



THE VOICE OF THE PROFESSION

Frequently Asked Questions about BUSINESS STRUCTURES FOR MEDICAL PRACTICES

There are no restrictions on which business structure a medical practice adopts provided the elected business structure is a lawful one. There are many different types of business structures and it is important to understand the distinctive features and characteristics of each. Different business structures have different tax implications which really ought to be discussed with a tax expert or accountant. The AMA (NSW) sells numerous business packages including Associateship, Partnership, Medical Practitioner in Private Practice Agreement, Independent Contractor, Locum and Assistant agreements. These include templates which have been carefully drafted by our external legal advisers TressCox Lawyers to meet legislative and taxation requirements.

It is advisable that each doctor, party to any of these agreements, obtains his/her own independent legal advice should he/she require more counsel on altering specific terms of his/her agreement with the practice particularly as there may be tax implications. Similarly for more detailed legal advice on structuring the business, setting up a service trust for practice expenses the doctors should consult our external legal advisors, their own solicitor or their accountant.

It is important to note that in the event of dispute, the courts and the Australian Taxation Commissioner will not necessarily accept the names the parties use to describe the type of commercial arrangement they have established, but indeed may look behind the written terms of the arrangement to ensure that the arrangement fits that description in both spirit and letter by looking at the circumstances and conduct of the parties. This information sheet attempts to provide a brief summary of each of the different types of contractual relationships.

Are these employment relationships?

Associateships, Partnerships, Medical Practitioner in Private Practice Agreement and Independent Contractor Arrangements are specifically designed so as not to create employment relationships between the contracting parties. The Locum and Assistant agreements are specifically created so as to create employment relationships between the contracting parties.

Medical Records – Who owns them under these arrangements?

The creation of an employment relationship or otherwise bears some significance on the ownership of medical records. Generally speaking, in an employment relationship, the employer retains ownership of the medical records. In an Associateship and Medical Practitioner in Private Practice Agreement arrangement the individual doctor is presumed to own the records he/she creates unless the agreement states otherwise. In a Partnership the Partnership or individual Partners may own their records. In an Independent Contractor arrangement the Practice rather than the consultant is presumed to own the medical records created by the consultant, however Independent Contractors are able to negotiate for ownership of these records and patients if they wish.

The issue of ownership of medical records is an important one to consider and negotiate in all arrangements. There should be an express provision in any agreement on this to resolve the question of ownership clearly and quickly upon the termination of the agreement.

ASSOCIATESHIP – Member Price of Package \$400.00 including GST

What is it?

An Associateship exists where there are two or more medical practitioners sharing practice expenses such as those associated with the premises, staff and equipment. The medical practice of each practitioner remains autonomous, in that practitioners keep their own patients and do not share their income with each other.

Difference between Associateships and Partnerships

Partnerships involve only one practice which all the partners own and each Partner shares in profits and losses. However in an Associateship, each practitioner maintains his/her own practice, albeit from shared premises, and practitioners do not share profits and losses but do share practice expenses with the other practitioners.

Why choose an Associateship over a Partnership?

- Sharing practice expenses can be more economical
- Partnership law imposes strict duties on partners owed to each other. Associateship allows practitioners to maintain a level of independence by conducting their own practice without being answerable to others and without having to share income.
- There is no personal liability for acts of other associate practitioners.
- Possibility of capital gains tax-free status

Some matters to consider when establishing an Associateship

The practitioners must appear to a reasonable observer from the outside world as operating separate businesses. This ideally means:

- Each practitioner's patient files should be kept separate from other practitioners;
- Each practitioner should keep his/her accounting records separate from those of other practitioners;
- A separate account should be kept for shared practice expenses;
- Invoices and stationery of the practitioners should contain either the name of the individual practitioner or his/her medical practice company and not the names of other practitioners or merely the name of the medical centre;
- Fees earned by the practitioners should be paid into separate bank accounts; and
- If possible, practitioners should have separate legal and financial advisors.

Doctors entering into an Associateship also need to consider:

Expenses

- which expenses are to be shared. Such expenses would normally include staff costs, electricity, rent, equipment costs, insurance, cleaning and maintenance, i.e. Those relating to benefits enjoyed by all practitioners;
- the proportion of the shared expenses each practitioner should bear; and
- how the expenses should be paid.

Employees

- Staff can be employed either jointly or by an individual practitioner and hired out to the others. The type of employment will affect the liability of the practitioners of the practice.

Separate Entity/Payroll Tax Implications

- If the number of practitioners involved in the Associateship is large it may be appropriate to establish a separate entity such as a company or service trust to employ the staff, enter into leases and generally incur the expenses which are to be shared. The grouping provisions in the Payroll Tax Act are relevant in these circumstances.
- Where a number of medical practitioners and/or service companies are shareholders and/or directors of the service entity established to incur shared expenses, the Office of State Revenue has expressed the view this can create a 'substantial connection' between the medical practitioners and the service entity which renders them liable to the grouping provisions of the Payroll Tax Act. Medical practitioners should therefore consider carefully the manner in which they establish the service entity and seek further advice from a tax expert or accountant.

Exit Clauses

- Medical practitioners need to consider in detail what provisions will apply and what obligations outgoing Associates will have in the event of sale of an Associate's practice, expulsion, death and incapacity. The method of terminating the Associateship should be set out in clear written terms.

Trade Practices Act

- Associates should not agree with each other about the fees that they charge their patients. By doing so they may breach the anti-competitive conduct and price-fixing provisions of the Trade Practices Act.

PARTNERSHIP – Member Price of Package \$400.00 including GST

Partnerships are becoming a less commonly adopted business structure for medical practices and the AMA (NSW) would generally recommend that an Associateship arrangement would be more beneficial to individual medical practitioners seeking to set up practice together.

What is it?

A Partnership is formed where two or more medical practitioners practice in common with a view to sharing profits. Profits, losses and expenses are shared between the partners. There is a presumption that partners share equally in the partnership assets and capital. Also the Partnership Act provides the death of a partner results in the Partnership being dissolved unless the partners agree otherwise. It is very important that any Partnership agreement be reduced to writing to overcome these statutory and common law presumptions.

Legal liability of partners

Each partner is personally liable for anything done (or not done) by their fellow partners in the ordinary course of business of the Partnership.

Some matters to be considered when establishing a partnership

The terms of the agreement for the conduct of the medical practice will vary according to the requirements of the partners, so it is important that the following matters are considered:

- The type of medical practice the partners wish to carry on. This is important as generally a partner is not held liable for those acts of another partner which are outside the scope of the Partnership business. This will also help partners to determine what income derived by a partner personally (eg from a Hospital appointment) will be considered as Partnership income;
- The name and place of the practice;
- The term/length of the Partnership – this will usually be for either the joint lives of the partners or a reasonably lengthy period such as 50 years;
- What percentage interest in the capital and any assets' moneys worth of the Partnership each partner holds;
 - Ownership of Partnership assets. Where any partner owns the premises at which the practice is carried on, a separate lease to the partnership is necessary. Where any equipment, instruments, plant, furniture is owned by a partner personally, partners need to consider whether this will become partnership property and what terms of payment for purchase or use will apply;
 - The share of each partner in the profits of the Partnership and whether any partner will receive a salary;
 - Mechanism for incoming partners at a later stage, as well as expulsion and retirement of existing ones;
 - Possibility of restrictive covenants. If a restrictive covenant is to be included, consideration should be given to whether the restriction will prohibit the doctor from practising in a geographical area and or in relation to patients of the practice and the duration of the restriction;
 - Partners are presumed to take an equal role in the management of the partnership business unless they contract otherwise. In a large partnership it may be appropriate to set up a management structure to conduct the day to day running of the practice including keeping financial records, banking, providing periodical accounts, dividing profits and drawings on accounts of profits and payment of expenses.

ASSISTANT – Member Price of Package \$250.00 including GST

What is it?

An Assistant is a doctor employed by the Principal of a medical practice to provide professional services to patients of the practice, sometimes with a view to eventually becoming an associate and/or partner. The relationship between a Principal of a Practice and an Assistant is generally considered to be that of employer and employee.

Some matters to consider when employing an Assistant

- The term/length of the Assistant Agreement;
- The general obligations of the Assistant;
- The provision of medical equipment and motor vehicle;
- Leave entitlements;
- Remuneration;
- Restrictive covenants;
- PAYE, payroll and fringe benefits tax;
- Superannuation;
- Insurance and Workers Compensation.

As an employer, you will be responsible for the Assistant's superannuation, insurance and workers' compensation. You will also need to consider whether the Workchoices or NSW Industrial Relations legislative provisions apply to the Assistant's termination. The AMA (NSW) industrial team can advise on these issues more comprehensively.

LOCUM – Member Price of Package \$250.00 including GST

What is it?

A Locum is a doctor employed to replace another doctor who is absent from his/her practice. The relationship between a Principal of a Practice and a Locum is generally considered to be that of employer and employee.

Some matters to consider when employing a Locum

- The term/length of agreement;
- The general duties of the Locum;
- Provision of medical equipment and motor vehicle;
- Leave entitlements;
- Remuneration;
- Termination;
- Any Restrictive Covenants;
- PAYE, Payroll and Fringe Benefits tax;
- Superannuation;
- Insurance.

As an employer, you will be responsible for the Locum's superannuation, insurance and workers' compensation. You will also need to consider whether the Workchoices or NSW Industrial Relations legislative provisions apply to the Locum's termination. The AMA (NSW) industrial team can advise on these issues more comprehensively.

MEDICAL PRACTITIONER IN PRIVATE PRACTICE AGREEMENT – Member Price of Package \$250.00 including GST

What is it?

A Medical Practitioner in Private Practice Agreement allows a medical practitioner consultant to rent rooms and infrastructure from a practice in return for payment of a fee for those services. It does not create an employee/employer relationship, an Associateship or a Partnership.

What does a Medical Practitioner in Private Practice Agreement entail?

The fee for services rendered by a practitioner under this Agreement can be fixed (eg hourly, sessional or weekly rates) or based on a percentage of the income generated by the consultant. In return for granting this fee, GST will be payable by the practitioner to the practice. The practitioner generally retains all patients and medical records seen/created by him/her, however, the agreement can be altered to allow the practice to retain such records. This could affect the flow of services and who is responsible for GST payments so it is recommended that legal advice be sought in this respect.

Other matters to consider and negotiate with a Medical Practitioner in Private Practice Agreement

Term of the Agreement

A Medical Practitioner in Private Practice arrangement can operate on a month to month basis or be for a fixed term. Should the period of renewal lapse without further discussion and the working relationship continue in accordance with the terms of that Agreement, then it will impliedly remain on foot until specifically varied or terminated.

Termination

Parties should consider how the arrangement can be ended – that is what notice is required for example.

Any restrictive covenants

The restricted geographical area and time period should be negotiated.

Superannuation

A practitioner under this Agreement is responsible for his/her own superannuation.

Public liability insurance

Medical practitioners should check whether the Public Liability Insurance Policy held for the Practice also covers practitioners engaged by the Practice under this Agreement. If not, it may be advisable obtaining additional cover for such persons.

Recent Developments

In Taxation Ruling TR 2005/16 and Superannuation Guarantee Ruling SGR 2005/1, the Australian Taxation Commissioner sets out what makes a person an employee for the purposes of PAYG withholding and the superannuation guarantee.

Broadly speaking the Australian Taxation Office uses the following main indicia when assessing whether a person is an employee:

- degree of control the person has over how, where, why and when work is done;
- whether the person carries on business on their own account
- whether the person is hired to achieve a specific result
- whether the person can subcontract the work
- whether the payer has the right to dismiss the worker

The mere fact that an agreement describes the relationship as one of Independent Contractor will not of itself mean the agreement is not in fact regarded as a contract of employment. The fact that a person has an ABN does not mean that he/she cannot be an employee in a particular context or under a particular arrangement. It is possible, in light of recent rulings, the ATO may view that some doctors who perform work under Independent Contractor arrangements are employees. The consequences of this could be that the practice would incur a liability to withhold tax from payments made to the doctor and to make superannuation contributions on the doctor's behalf. This may also have implications as to the person's statutory entitlements to leave. The AMA (NSW) advises that you seek appropriate legal and or accounting advice on the possible tax and superannuation issues if you are thinking of setting up an Independent Contractor arrangement.

INCORPORATION

What is it?

This is where a company is established with the objective of employing or otherwise engaging the services of registered medical practitioners and to make available the services of such medical practitioners to perform and render medical or surgical services.

Incorporation is a complex procedure and as such, legal advice should be sought if considering incorporation.



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For further information or to purchase a Package for any of the business structures discussed in this FAQ, please contact the AMA (NSW) Medico-Legal Division

Australian Medical Association (NSW) Limited

Telephone: 02 9439 8822 FREECALL: 1800 014 488 Fax: 02 9438 3670

Email: industrial@nswama.com.au Website: www.nswama.com.au

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