

PRACTICE SURVIVAL

**WHAT ARE THE RISKS?
CAN THEY BE MANAGED OR
MITIGATED?**

01

THIS SEMINAR WILL EXPLORE

- Liability and risk
- Exposure to claims – Practice and Personal
- Practitioner responsibilities
- Moral, Ethical and Legal Responsibilities
- Estate and Succession Planning
- Protection of wealth
- Practice Structures
- Employee risks and responsibilities

02

THE RISKS AND LIABILITIES/ OUR LEGAL SYSTEM

- Contractual Liability
- Tortious Liability –third party liabilities
- Joint and Several Liabilities
- Indemnities
- Warrantees
- Consumer Guarantees Act
- Fair trading Act
- Health and Safety in Employment Act
- Breaches of the Companies Act
- Breaches under the Architects Act
- Breaches of the Employment Relations Act

**FAILING TO MANAGE THESE RISKS CAN LEAD TO FINANCIAL
DISTRESS AND THE POSSIBLE DEMISE OF THE PRACTICE**

03

AN ARCHITECTS LIABILITY

- **Under Contract**
 - Breach of contract
 - Breach of duty of care owed under contract
- **Tort of Negligence**
 - Failure to exercise reasonable skill and care to a standard expected of a similarly qualified and experienced architect and
 - Owed to a class of people whom the Architect ought reasonably contemplate could be affected by the advice or actions

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LIMITATION OF LIABILITY IN TIME

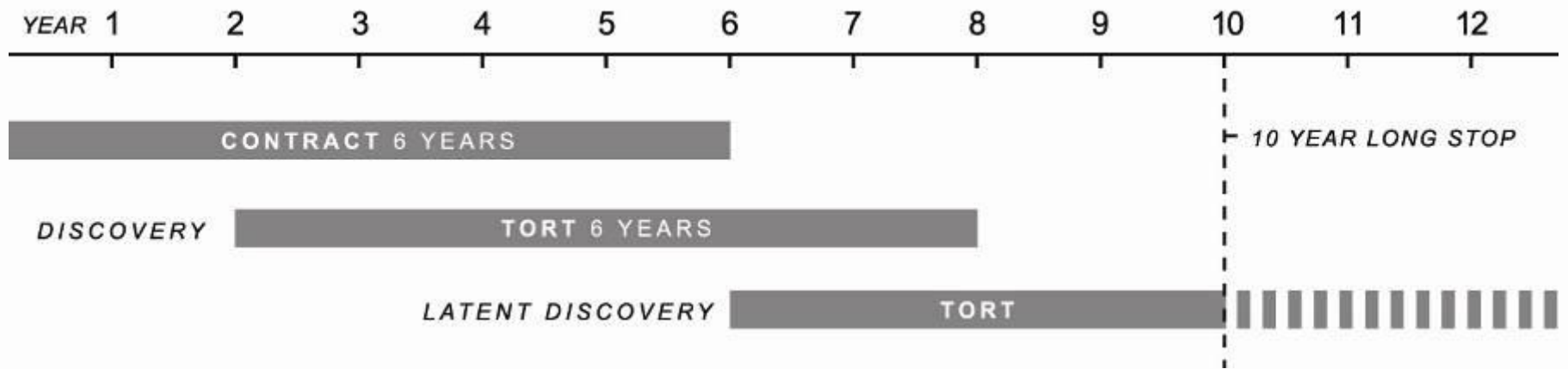
- **Under Contract** – an action must be brought within
 - 6 years from the date of the breach
 - 12 years from the date of the breach if signed under deed

- **Under Tort**
 - 6 years from the date on which the cause of action accrued
 - 6 years from when the negligent act / omission ought reasonably to have been discovered.

- **Under the Building Act 2004 (s. 393)**
 - Civil proceedings relating to building work may not be brought after 10 years or more from the date of the act or omission.
 - This is referred to as the **10 year long stop**

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LIMITATION OF LIABILITY IN TIME



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LIABILITIES IN QUANTUM

(Limited to a specified monetary value)

Can only be limited by agreement (i.e. Under Contract)

Except that under the Consumer Guarantees Act no limitation can be established

(Applies when one Party is a Consumer and the other is in Trade)

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THE IMPORTANCE OF AN AGREEMENT FOR ARCHITECTS SERVICES

NZIA Agreement for Architects Services 2008 (AAS 2008)

LIMITS THE ARCHITECTS LIABILITY IN BOTH QUANTUM AND TIME

- Breach, Reasonably foreseeable, Caused by
- Proportionate Liability
- 6 years from DATE OF AGREEMENT
- Core Services concept
- Responsibility for changes
- Limitation for Third Party Claims
- Limitation in Quantum (\$250,000)
- Professional Indemnity Insurance cover

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PRACTITIONER RESPONSIBILITIES

TO WHOM ARE YOU RESPONSIBLE AND OWE A DUTY?

- Your Clients – Under Contract
- Your Staff – Moral and Contract
- You and Your Family – Moral
- Your Community – Moral and Ethical
- Your Fellow Professionals - Ethical

09 YOUR CLIENTS

Contractual and moral obligation to deliver their projects and achieve their objectives

10 YOUR STAFF

- Moral obligation to maintain continuity of employment for staff and to safe guard their families from distress
- Statutory obligations under the Employment Relations Act 2000
- Good faith employment relations
- Penalties for breaches of duty or good faith

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YOU AND YOUR FAMILY

Moral obligation to yourself and your family to maintain continuity of income support and to safeguard their home and assets

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CODE OF MINIMUM STANDARDS OF ETHICAL CONDUCT FOR REGISTERED ARCHITECTS

STANDARDS RELATED TO THE PUBLIC

46. Not misrepresent himself or herself

47. Uphold the law

STANDARDS RELATED TO CLIENT

49. Care and Diligence

A registered architect must perform his or her professional work with due care and diligence

50. Terms of Appointment

A registered architect must not undertake professional work unless the registered architect and the client have agreed the terms of the appointment.

51. Remuneration and Inducements

52. Confidentiality of Client's Affairs

53. Conflict of Interest

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CODE OF MINIMUM STANDARDS OF ETHICAL CONDUCT FOR REGISTERED ARCHITECTS

STANDARDS RELATED TO PROFESSION

- 54. Act with honesty and fairness
- 55. Acknowledge colleagues' contributions
- 56. Not maliciously or unfairly criticise
- 57. Conflicts of professional appointment
- 58. Giving an opinion on the work of another registered architect.

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CAN WE CONTROL OUR EXPOSURE TO CLAIMS?

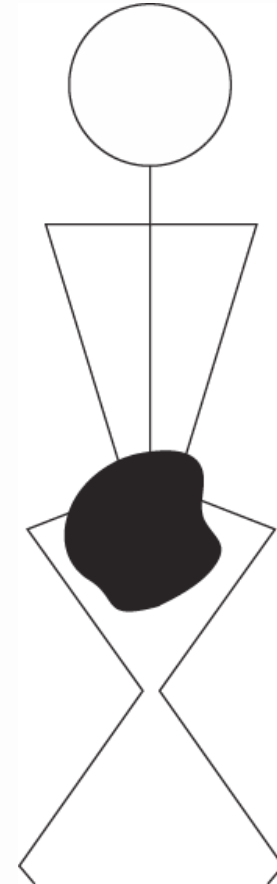
CURRENTLY NO!
BUT WE MIGHT BE ABLE TO
MANAGE IT!

- The law enables anyone to bring a legal action, but they firstly have to prove their case and prove they have suffered loss
- None the less, you are obliged to defend

15 TYPES OF CLAIMS EXPOSURE

- WHRS claims through limited involvement
- Commercial arrangements (developments)
- Policy exclusions affecting cover
- Certificates of Practical Completion
- NZRAB Disciplinary Offences
- de Geest v Cromwell Plumbing
- The cost of defence
- How good are your drawings?

HOWEVER, IF THE CLAIM IS NOT COVERED BY PI INSURANCE, THE FULL LOSSES PLUS DEFENSE COSTS ARE TO THE ARCHITECTS ACCOUNT

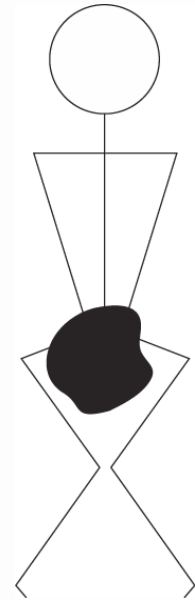


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STAFF ARCHITECT EXPOSURE

- Staff Architect joined in an action against a former employer (practice)
- Former employer no longer in practice and has no “run off” PI Insurance
- The current employers PI Insurance cannot respond

STAFF ARCHITECT HAS TO FUND OWN DEFENCE



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RISK MANAGEMENT

- Ensuring firms PI. Insurance Policy provides protection for staff

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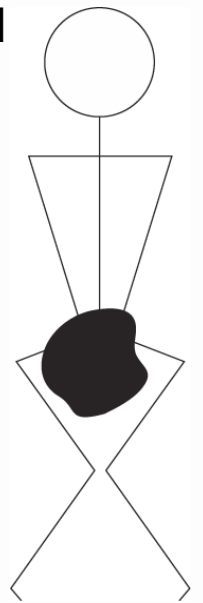
IMPORTANT CONSIDERATIONS

- Under NZACS/Acanthus PI Policy Employees are protected
- Some other PI Policies this is not the case
- NZACS/Acanthus has negotiated a portability of indemnity for employees transferring to other practices insured with NZACS/Acanthus
- Responsible employers obligations under the ERA could include appropriate protection for staff architects

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SOLE PRACTITIONER EXPOSURE

- Both the practice and the principal can be sued
- PI Insurance would cover both the defence costs and damages within the indemnity provided by the policy (Current NZACS policy)
- Defence costs could run to \$100,000 or more
- If total claim exceeds the policy indemnity the Practice and the Principal are liable to fund the remainder



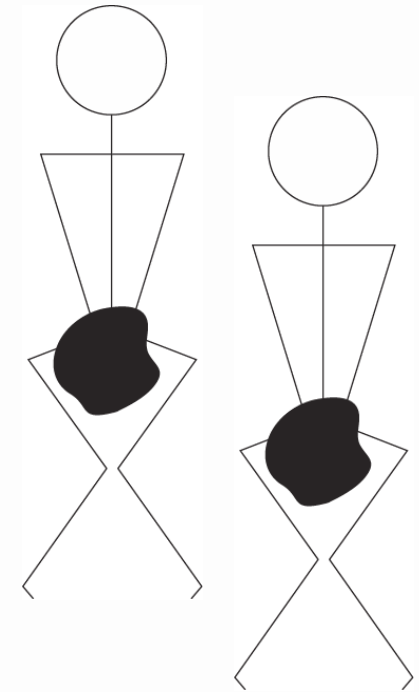
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RISK MANAGEMENT – SOLE PRACTITIONER

- Regularly update adequacy of PI Insurance
- Ensure PI Policy covers both Principal and Practice
- Incorporate Practice as Limited Liability Company
- Form a relationship with another practice to provide continuity to clients in the event of death or disability
- Estate Planning

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PARTNERSHIPS EXPOSURE



- Each Partner is jointly and severally liable for the actions (or in-actions) of each of the other Partners
- After the assets of the Partnership are exhausted by a claim the Partners become personally liable for the outstanding amount to the extent of their own Private Fortunes

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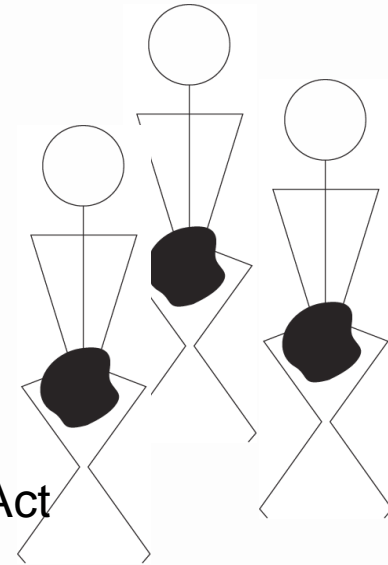
RISK MANAGEMENT - PARTNERSHIPS

- Adequate PI Insurance
- Incorporate Practice into a Limited Liability Company
- Succession Planning
- Estate Planning

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INCORPORATED PRACTICE EXPOSURE

- Exposure to claims limited to the assets of the Company
- Individual Directors not liable for actions of other Directors
- Directors can be liable for breaches of duty under the Companies Act
- (Fines and Infringements)
- Directors (and staff) can be found liable for negligent work they undertake working in the Company
- A Director can be joined in an action and found liable for losses of Company Assets



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DIRECTOR DUTIES COMPANIES ACT 1993

- S.131 Duty of Directors to Act in Good Faith and in the best interests of the Company
- S.137 Duty of Care, act using Diligence and Skill

PRIMARY RESPONSIBILITY OF DIRECTORS (THE BOARD)

- Preparation of Financial Statements
- Establishing Goals and Strategic Plans
- Annual Budgets and Monitoring
- Managing Risk
- Working with Management to create Shareholder Value

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RISK MANAGEMENT – INCORPORATED PRACTICE

- Adequate PI Insurance
- Robust in-house procedures and standards
- Succession Planning
- Estate Planning
- Disaster Protection for the Company and its Shareholders

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“ADEQUATE” PI INSURANCE

ADEQUATE

With respect to level of indemnity sought and

ADEQUATE

With respect to the Policy wording

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WHAT TO LOOK FOR IN A PI POLICY

- Main operative clauses – general terms of policy
- Joint insured parties
- Civil Liabilities wording
- Exclusions or Exceptions – what you are NOT covered for
- Extensions – that modify the basic indemnity available
- Definitions that establish the meaning of specific words in the policy
- Conditions pertaining to warrantees, cancellation, notification of claims, non-disclosure, double insurances
- The Schedule – period of insurance, insured parties
- Endorsements

IF IN DOUBT SEEK PROFESSIONAL ADVICE

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ROBUST IN-HOUSE PROCEDURES AND STANDARDS

- Use of NZIA suite of documents – AAS, SCC, PN's, Guide notes, etc
- NZIA “Practice Manager”
- Avoid/Negotiate non standard conditions of engagement
- MasterSpec
- Access to NZACS Communiqué

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SUCCESSION PLANNING

- Planning for the longevity of the Practice
- Planning to protect the worth of the Practice
- Planning for succession of valued people into responsible positions in the Practice
- Planning for affordable entry and exit of Principals
- Valuing the worth of your people
- Share holding trusts

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ESTATE PLANNING

- Protecting and sharing Personal Wealth
- Protection of Family Assets
- Family Trusts
- Taxation
- Gifting Programme takes time

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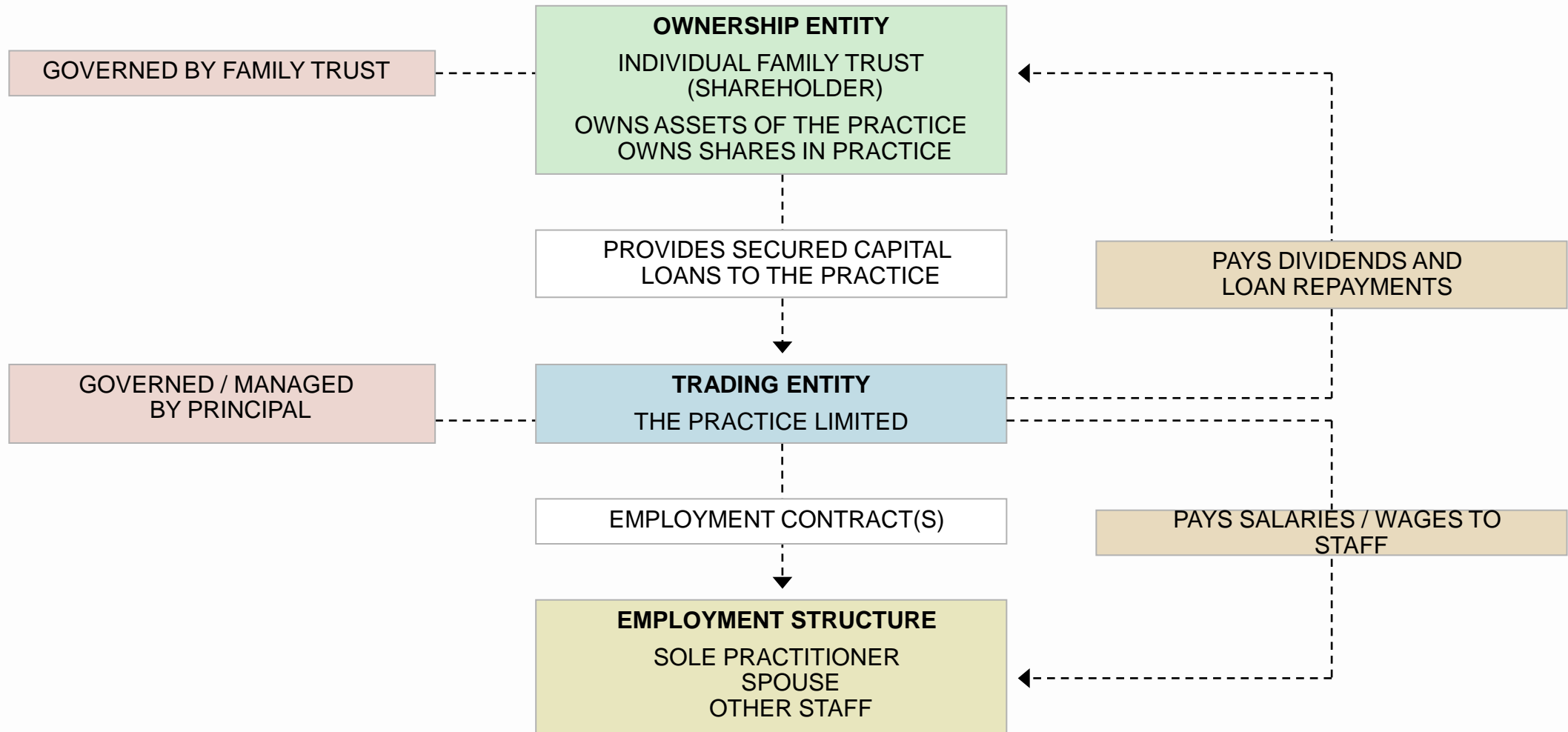
DISASTER PROTECTION

- **Strategies for meeting moral and ethical obligations to –**
- Your Clients
- Your Staff and their Families
- You and Your Family
- Your Community
- Strategies for safeguarding your Company (Practice) and its Shareholders

WHAT WOULD HAPPEN TO YOUR PRACTICE IF A \$2 MILLION CLAIM LANDED ON YOUR DESK TOMORROW?

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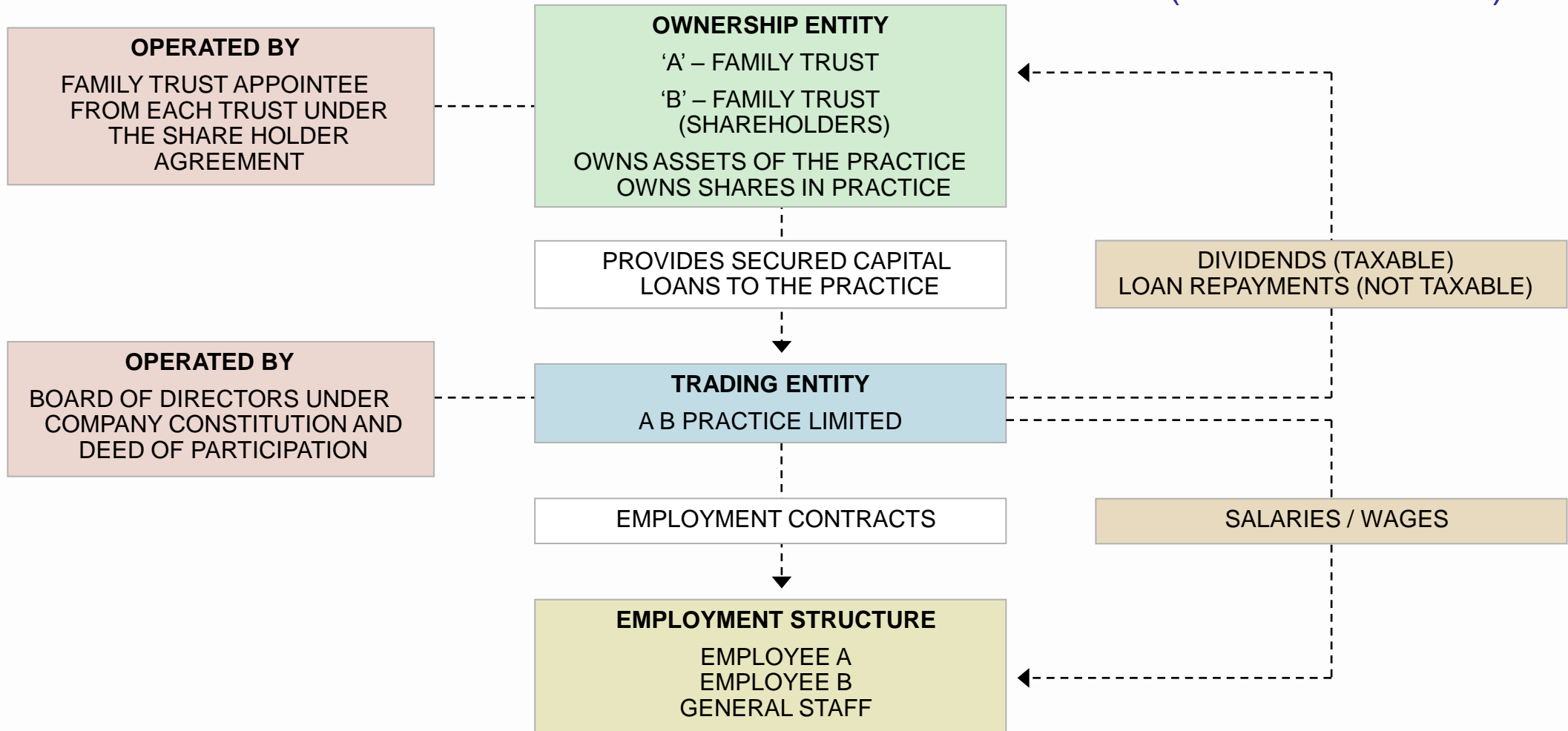
SOLE PRACTITIONER STRUCTURE (TYPICAL MODEL)



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LIMITED LIABILITY COMPANY STRUCTURE

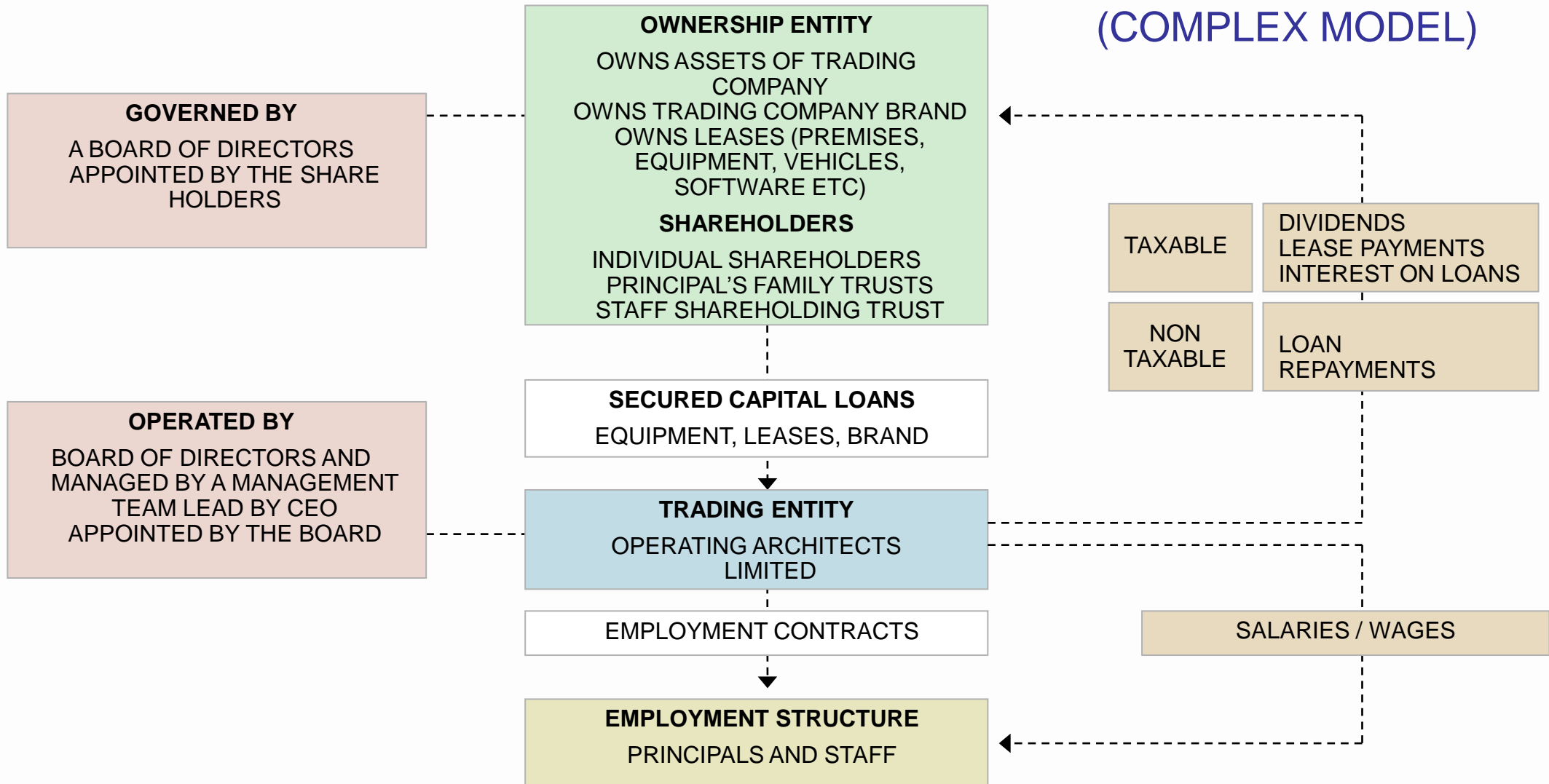
(SIMPLE MODEL)



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INCORPORATED PRACTICE STRUCTURE

(COMPLEX MODEL)



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PHOENIX LEGISLATION

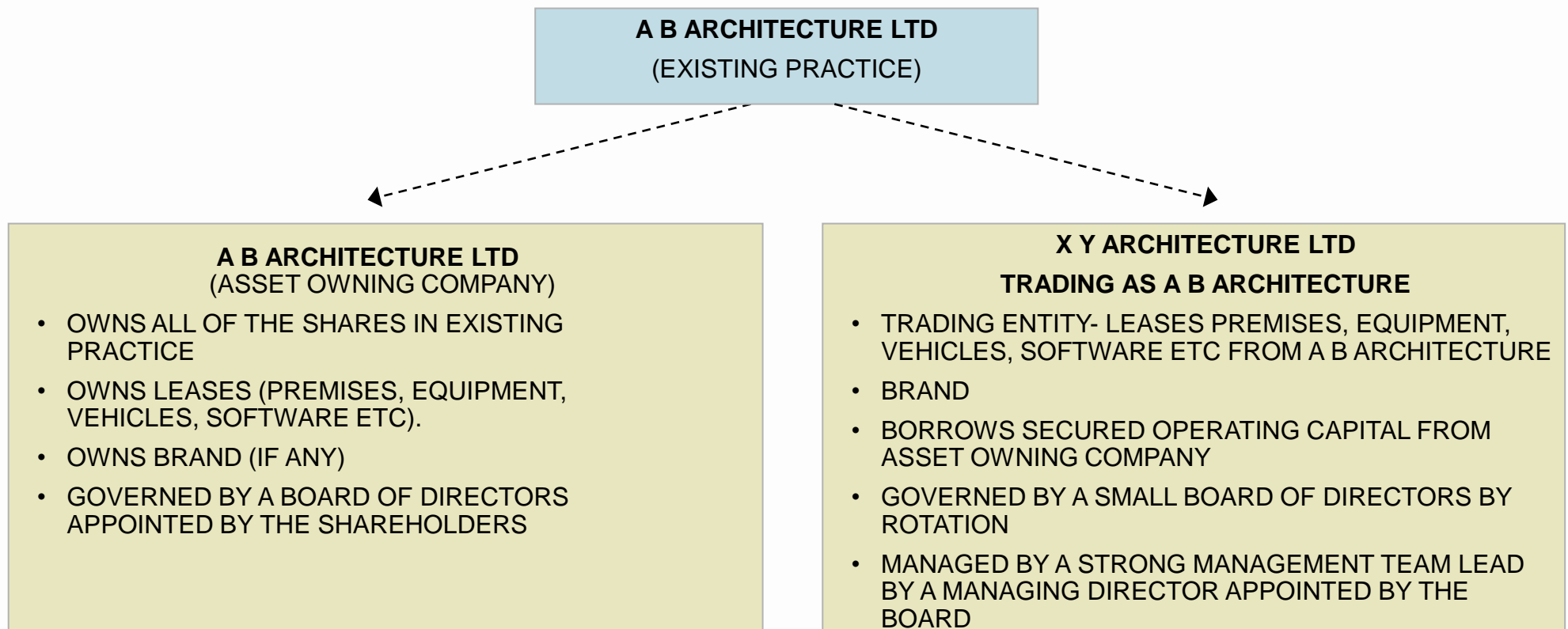
COMPANIES ACT 1993 WAS AMENDED IN NOVEMBER 2006 TO PREVENT:

1. Directors of a failed company to be director of any new company within 5 years of the commencement of liquidation of the failed company, and
2. Registering a new company of similar name to that of a failed company within 5 years of commencement of liquidation of the failed company.

Phoenix company provisions covered under section 386 A to 386 F of the Act.

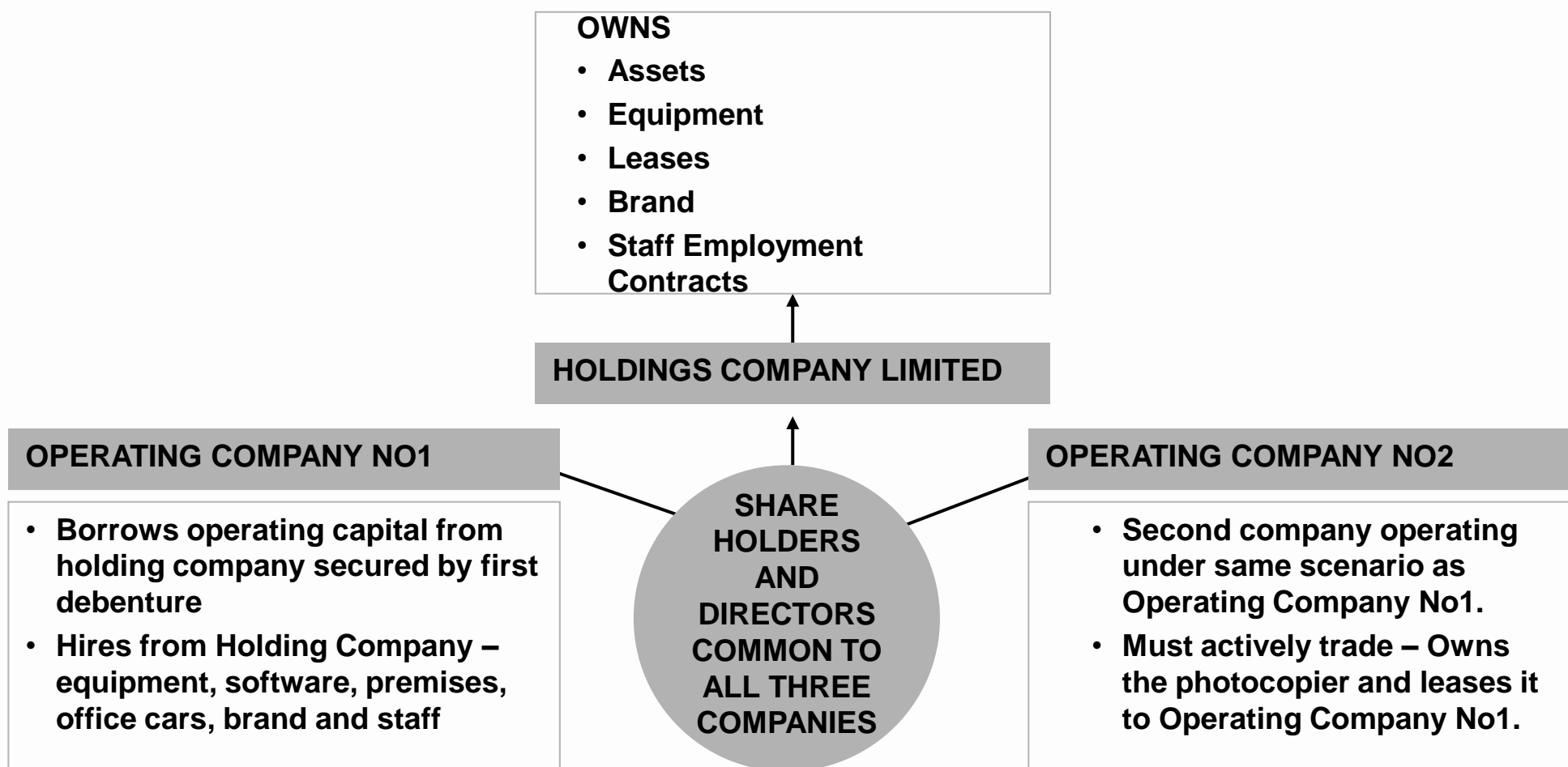
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RESTRUCTURING AN EXISTING INCORPORATED PRACTICE



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A POSSIBLE SOLUTION THREE COMPANY STRUCTURE



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ARCHITECT EMPLOYEES

PROFESSIONAL RESPONSIBILITIES

- PJ CLIENTS

 - Continuity of service

 - Completion of projects undertaken

- EMPLOYER

 - Meet employment obligations

 - Devote focussed working time

 - Devote ethical and moral energy

 - Contribute to wellbeing of the firm

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ARCHITECT EMPLOYEES

RISK MANAGEMENT

- PI Insurance for PJ's
- PI Insurance extension for past employment risks

NZACS Programme

Other insurers

- Open dialogue with employer

PI premium

PI Excess

Leave for defence of claim

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RISK MANAGEMENT CONTINUED

- **Protect family assets**

 - Family trusts

 - Settlers' objectives – refer slide 36

 - Gifting programme

- **Contract as individual contractor to employer**

 - Trade as Limited Liability Company

 - Recognises PJ's

 - Recognises employment responsibilities

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DISCLAIMER

- The various subjects and structures discussed in this seminar are both complex and will vary in their appropriateness for individuals and practices and are NOT a substitute for proper legal and financial advice
- Accordingly NZACS, Acanthus and their directors assume no liability for the use of the content of this seminar without further expert advice
- NZACS is not offering advice in any areas relating to good employee/employer relations and disclaims any assumptions that may be inferred from the content of this seminar about appropriate or inappropriate employee/employer relations.



BE CAREFUL OUT
THERE!