MULLINS business

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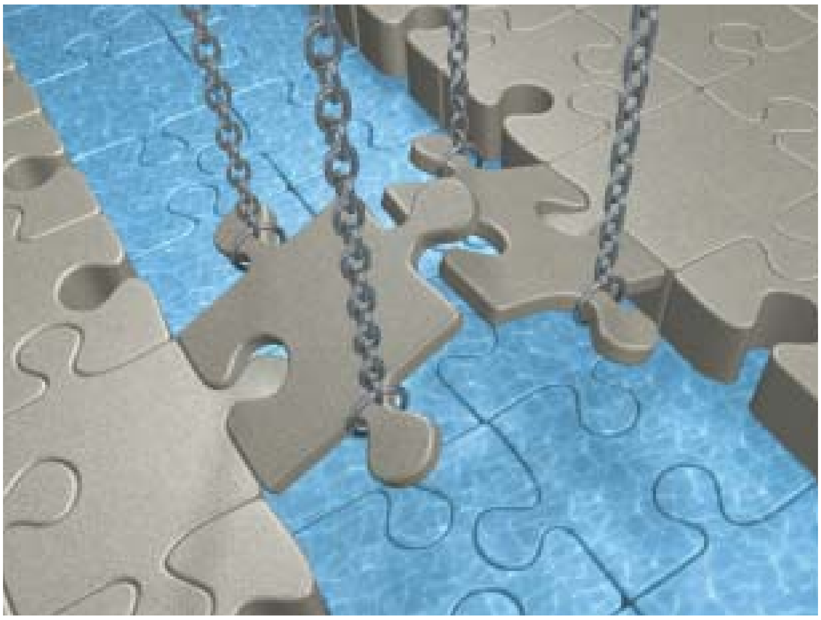
Capitalise ON Private Equity

DAVID WILLIAMS

Today the opportunities for successful small to medium businesses to advance the commercial objectives are quite extraordinary and all business owners should not rule out the option of Private Equity.



One exceptional example of this is the success achieved by NBC Capital, headed by Bruce Scott and Bernie Stapleton.

NBC Capital in May 2002 invested $890,000 for a 50% stake in Trinity.

NBC then worked with Trinity and its key executives to improve its business and grow funds under management.

This lead to an Initial Public Offering ("IPO") for Trinity being closed oversubscribed when it went to market in late 2004 realising to QDF $8 million for its investment, representing an Internal Rate of Return ("IRR") of 114.3% per annum and a cash back multiple of 8.9 times to QDF.

It is no wonder that in late 2005 NBC Capital was awarded "The Best Expansion Stage" award by Australian Venture Capital Association Limited ("AVCAL") for its investment and subsequent exit in Trinity.

Mullins Lawyers was proud to have been a part of this accomplishment with both the Business Services and Property practice areas playing a role. In particular, Business Services acted on behalf of NBC in the acquisition of its interest in Trinity, whilst the Property division provides legal services to Trinity in relation to the acquisitions of properties.

"Mullins provided invaluable commercial advice for the acquisition management and exit of our investment in Trinity" said NBC Capital's Managing Director, Bruce Scott.

It will be interesting to watch the chronicles of Private Equity particularly after the recent publicity as to the offer to Coles and the newly announced PBL Media Company and the future impact of Private Equity upon the business community.

Business Owners can now see that when they are planning strategies for exit from their existing business that Private Equity will be an alternative to consider.

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DAVID WILLIAMS

EDITORIAL

It was only yesterday that we started 2006 and now we are in the final stages of closing the year and looking forward to 2007. The 2006 year has been a challenging year for business owners with increases in interest rates and the introduction of WorkChoices legislation.

The High Court of Australia convincingly concluded that the WorkChoices legislation was valid under the "corporations power" of the Constitution. Justice Callinan's dissenting judgment in relation to this constitutional issue is interesting reading. In the sense that His Honour sees the use of that power could well be the tip of an iceberg that could have far reaching ramifications in the operation of key areas of law traditionally the domain of the States.

We have also seen recently, the passing of the amendments to the Trade Practices Act ("TPA") in relation to recommendations made by the Dawson Committee. This piece of legislation will be the first of a number of amendments being made to the TPA which will occur in early 2007. The most significant amendment to date is the increase in pecuniary penalties for breaches of Part IV of the TPA and the provision of powers to disqualified persons involved in managing corporations that breach the provisions of Part IV of the TPA.

The Cartel Bill which is likely to pass in early 2007 will also provide for the first time criminal sanctions in relation to breaches under Part IV of the TPA for actions where dishonesty is an element in the commission of the offences.

Effective from 1 January 2007, stamp duty payable on the transfer of shares in non-listed companies will be abolished in Queensland, except for land rich companies. This will bring Queensland in line with the stamp duty exemption already in place for shares in Victoria.

As this is the final newsletter for 2006, I wish you and your families a happy and holy Christmas from all involved in the Business Services group of Mullins Lawyers. We look forward to your continued support in 2007.

Review of Franchising Code

CARLA CRAWFORD

On 28 June 2006, the Federal Government announced it would conduct a review of Part 2 - Disclosure Requirements under the Franchising Code of Conduct. As concerns have been raised about the adequacy of these provisions and their success.

Under the Code, information such as the number of existing franchises, intellectual property information and financial information must be provided to prospective franchisees in a disclosure document prior to execution of the franchise agreement.

A small committee has been established to undertake the review.

Its objectives are to review the current operation of Part 2 and identify possible amendments which would improve these provisions. In doing so, the Committee is taking into account public submissions, consulting with key stakeholders and the State and Territory Governments and learning from international experiences.

Public submissions, closed on the 15 August, have been extended for another month. So far the Committee has received over 70 submissions.

The Committee is expected to deliver its report shortly.

Stay tuned for our next update on the Committee's findings and recommendations.

Work Choices Fine Tuning

ANDREW PERRY

After considerable lobbying by employer industry bodies the Federal Government has made some last minute amendments to delay the imposition of the onerous new record keeping requirements imposed by Work Choices

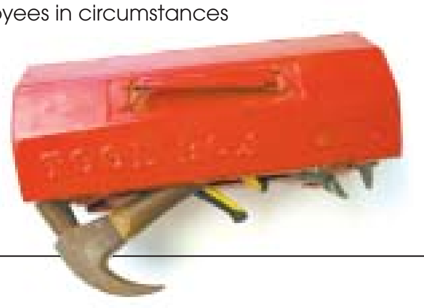
Under the Work Choices provisions, which were scheduled to commence on 26 September 2006, where an employee was not entitled to overtime and earns more than $55,000.00 annually (indexed), no hours records were required to be kept. However, where an employee was entitled to overtime under an industrial instrument or a common law contract, employers were required to keep records relating to daily start and finishing times. If the employee earns less than $55,000.00, only total weekly hours had to be kept. Under the regulations these requirements have been postponed to 27 March 2007.

For those of you hoping that the six-month delay would also apply to the new Work Choices requirements required to be included on payslips you can breath a sigh of relief as the delay will also apply to those provisions.

It is not clear at this stage what the final requirements for record keeping will eventually be. However the amendment is welcomed on the basis that it will allow further consultation for any anticipated problems to be resolved prior to the implementation of the requirements.

Other material changes made to Work Choices include:

- Clarification that a term of an agreement that provides for the cashing out of annual leave other than at the election of the employee is prohibited content;
- Restrictions on the operations of terms in workplace agreements and contracts of employment that penalise employees in circumstances of absence from work due to illness, injury or emergency;
- Clarification that the Australian Fair Pay and Conditions Standard does not apply (for a five year transitional period) in relation to personal or carer's leave entitlements that accrued before the Standard applied to an employee.



BARBARIANS AT THE REMOTE

OLIVIA VERSACE

You would have heard about the private equity firms that were circling Coles Myer and have now struck deals with PBL Media and Channel Seven. It seems the original "Barbarians at the Gate", private equity firm Kohlberg Kravis Roberts (KKR), are teaming up with other private equity firms to bid for Australian icons. Finally the private equity industry in Australia is getting some mainstream attention. Whilst not all of this attention is positive, shining a light on the industry is the best way for all of us to learn about how private equity works and weigh up what it can do for the Australian investment landscape.

The private equity modus operandi is quite straightforward. The private equity investor, using debt and money from superannuation funds, acquires the whole of, or takes a majority interest in, a business. The investor's aim is to strengthen what might be a profitable but flagging business with a combination of debt, cost cutting and the realignment of strategic focus. One of the key benefits of private equity is that a business can access new capital, restructure or refocus without the compliance constraints and short-term share price expectations placed on publicly listed companies.

The private equity investor usually aims to exit within a 3 to 5 year

So why would a business owner want to sell to a private equity investor?

timeframe by public float or selling to a trade player. Sometimes the investor will exit by selling to another private equity investor, this is called a secondary buy-out.

So why would a business owner want to sell to a private equity investor? Several reasons come to mind. These include:

- ability to offer key management an interest in the business using a management buy-out/private equity buy-in structure
- the high multiples currently offered by private equity investors
- ready access to expansion capital offered by private equity

A fantastic example of private equity providing expansion capital to a business is NBC Capital's investment in Trinity described in David Williams' article.

For business owners and managers the time is ripe to reassess your growth and exit strategies. As the private equity industry booms owners and managers should consider adding private equity to their list of alternatives when planning for the future.

Liability of Corporate Trustees

CARLA CRAWFORD

A decision in the Supreme Court of South Australia caused much uncertainty about the scope of the liability of directors of corporate trustees under section 197(1) of the Corporations Act. This section imposed personal liability on directors of corporate trustees.

The Court found in Hanel v O'Neill (2003) 48 ACSR 378 that directors of trustee companies would be personally liable if there are insufficient trust assets out of which the trustee corporation can be indemnified. As a result, directors of corporate trustees were exposed to a greater potential for personal liability than directors of other companies. The South Australian's court's interpretation had potential to significantly expand the personal liabilities of the directors of all corporate trustees, from large superannuation trusts through to trading trusts running a small business.

Prior to Hanel's case, it was generally the case that directors of a corporate trustee would not be held liable if the trustee was acting with the scope of the trust and the trust deed does not limit the trustee's right of indemnity.

Following the uncertainty created by Hanel's case, the Corporations Amendment Act (No 1) 2005 has since been enacted. The amendment to Section 197(1) addresses those concerns that have arisen, namely, that directors of corporate trustees could be personally liable in any case where there are insufficient assets to discharge the liabilities of the trust.

The amendment repeals the old section 197(1) and replaces it with a revised version.

The new subsection 197(1) only imposes a personal liability on a director of a corporate trustee where one or more of the following occurs:

- The trustee company breaches the trust;
- The trust limits or denies the trustee company's right to be indemnified; or
- The trustee company has acted outside the scope of the trust.

The section provides a note, that a director will not be liable under the section merely because there are insufficient assets to indemnify the trustee company.

The re-drafting and introduction of the new section 197(1) comes as a welcome relief to directors of corporate trustees and ensures they are not disadvantaged for personal liability than other directors. This does not mean that trustee companies can become complacent and should continue to act in accordance with the company's powers and fiduciary obligations and ensure that trust deeds include comprehensive indemnities and liability is limited to the assets of the trust.

WARNING FOR COMPANY OFFICERS

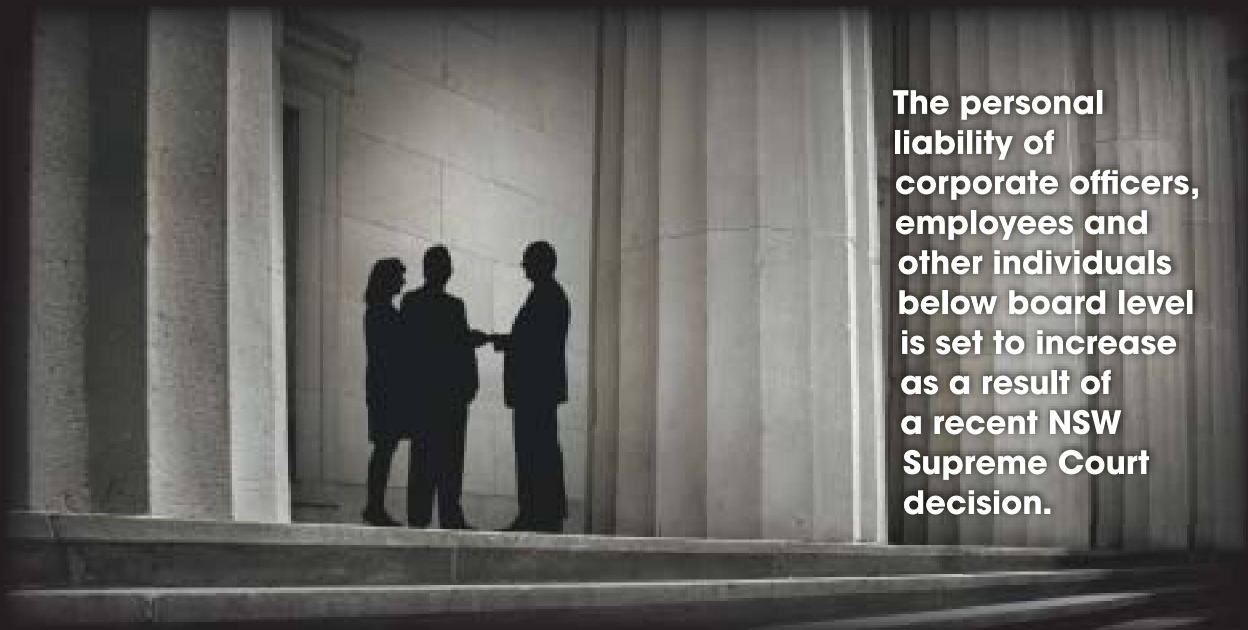
JONATHAN BROUGHTON

GIO Case

Facts

The NSW Supreme Court found three former officers of GIO Insurance Limited personally liable for breaching their duties during a takeover bid by AMP Insurance Holdings Pty Ltd.

The case focused on the conduct of the three "Executive Officers" in their formulation and methodology used to calculate a subsidiary's profit forecast and their preparation of a Part B Statement. A Part B Statement is prepared by the takeover target for shareholders explaining why they should or should not accept the bidder's bid. In this instance, the Part B Statement contained an inflated profit forecast.



The GIO Board recommended that shareholders reject the takeover offer of AMP claiming that the shares were worth more. However, the takeover went ahead and the GIO Shareholders who did not accept the original AMP offer were required to accept an arrangement for which they received a lesser amount.

Issues

The Court focused on the issues of what is an "Executive Officer" and what is the content of their statutory duty of care and diligence.

Executive Officer

The Court took a wide view of whether a person takes part in management of a Corporation. It was held that an "Executive Officer" should not be confined to people undertaking the central management of the affairs of a company, but rather it should encompass those with significant enough responsibility to justify the imposition of special statutory duties.

Duty of Care

In determining the statutory duty which should be exercised by an officer of a company, the Court adopted an objective standard of care which was measured by reference to what a reasonable person of ordinary prudence would do. Further, the Court found that the duty is enhanced where the person has some special skill which they bring to the position.

Government Report

The Corporations and Markets Advisory Committee issued a report ("the Report") considering the personal duties and liabilities of company officers under the Corporations Act 2001 ("the Act"). The Report recommended the sections of the Act relating to the duties of care and diligence, good faith and proper purpose (sections 180(1), 181 and 184(1)) be extended beyond directors and other officers to "any other person who takes part, or is concerned in, the management of that Corporation."

The Report also recommended the existing defences such as the Business Judgement Rule (section 180(2)) is extended in the same way.

It remains to be seen if the Federal Government implements the Report's recommendations. In any event, the Report conceded that it is almost impossible to formulate an exhaustive definition of "management" in the Act. The Report noted that it will be the Court's role to determine the ambit of these definitions based on the facts and circumstances of each case.

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