MULLINS business

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GOOD CONTRACTS BEAT BAD DEBTS

By: Mark Madsen

WHY IS IT THAT YOU HAVE PROVIDED TOP QUALITY GOODS OR SERVICES TO A CUSTOMER AND THEN THAT SAME CUSTOMER DISPUTES THAT IT OWES YOU YOUR HARD-EARNED DOLLARS?

Some customers will do so because they genuinely believe you have not provided to them the product which they say was agreed. Unfortunately, other customers may raise a dispute simply because they can. In either case, the result be having to settle for less than your due entitlement. Alternatively, if litigation results, you will be forced to prove to a third person that your version of events is correct.

The general principle to combat both situations is the same – ensure that a documented agreement is reached before delivering your goods or services.

...ENSURE THAT A DOCUMENTED AGREEMENT IS REACHED..

By incorporating into your internal procedures the following guidelines and ensuring that your staff comply with those guidelines, you should be able to minimise any disagreements with customers as to what the end product should have been. For those customers who simply want to try to take advantage of you after you have delivered your goods or services, the better documented your case, the stronger your position.

1. RECORD PRE-CONTRACT NEGOTIATIONS

Even contracts written by experienced lawyers cannot anticipate every conceivable situation. A clause read at the time of entering into the contract may be read in a different light once other circumstances arise. If the other party then attempts to take advantage of such a clause, you may be entitled to have the contract rectified if you can demonstrate that your intent and that of the customer when entering into the contract was not as is now proposed by the customer. Accordingly, you should ensure that you record, in writing, the principal terms of any proposed contract and the reason for their inclusion. Take detailed notes at the time of any conversation and confirm the content by letter to the customer.

2. DON'T UNDERESTIMATE THE COMPLEXITY OF THE TRANSACTION

Some contracts are quite obviously complex in their nature; for example, construction or sale contracts for large developments, agreements for mergers and acquisitions. However, the simple provision of goods by one person to another can also have its complexities. If at all possible, any agreement should be reduced to a written contract. The terms of that contract must be clear and agreed by your customer before any services are supplied or money changes hands. The actual documents recording the agreement between the parties should be comprehensive and encompass all terms agreed. Each party should have a complete copy of those documents before performing the contract. Businesses should be aware that it is generally insufficient to state in a document that standard terms and conditions apply, without actually providing in advance of the agreement, a copy of those standard terms and conditions and confirming that the other party accepts them.

3. MAINTAIN DETAILED RECORDS OF PERFORMANCE OF THE CONTRACT AND ANY VARIATIONS TO THE CONTRACT

Generally, your right to enforce any contract is reliant upon the performance of your obligations under that contract. The clearer your records in relation to the fulfilment of your tasks, the easier it will be for you to prove an entitlement to payment. Similarly, contracts attempt to anticipate and govern future events. Without the benefit of foresight, inevitably variations to that contract will arise. Whether the original contract requires the parties to do so or not, any change to the original agreement should be documented and signed off by each party as if it were a contract in itself, to ensure that there are no later misunderstandings.

Our Commercial Litigation and Insolvency Division has seen many instances where the incorporation of the above guidelines into internal procedures of businesses would, in many cases, prevent disputes with their customers or, at the very least, place the business in a strong position where it need not be so readily forced to a negotiating table or into litigation to receive its due entitlements.

Do your internal procedures meet these guidelines? Are your records and contractual documents sufficient to protect your business and lead to a fruitful outcome for both you and your customer?

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SETTING UP A BUSINESS – making informed choices

by Michael Klatt

A "HORSES FOR COURSES" APPROACH IS THE RIGHT ONE TO TAKE WHEN SETTING UP SHOP.

Setting up a business requires a careful consideration of the choice of structure to be used. There is no one perfect structure. The nature of the business and the needs of the owner will greatly influence the choice of structure. Income tax, capital gains tax, asset protection considerations and succession plans will all impact on the structure. The main types of business structures which can be used include a sole trader, partnership, joint venture, discretionary trusts, unit trusts and companies.

There are a number of small business concessions available in relation to capital gains tax. These include a general discount for individual, trusts and complying superannuation funds. Individuals and trusts are eligible for a 50% discount. Complying superannuation funds are eligible for a 33% discount.

THE NATURE OF THE BUSINESS AND THE NEEDS OF THE OWNER WILL GREATLY INFLUENCE THE CHOICE OF STRUCTURE.

Other concessions available to businesses with a net value not exceeding $5 million (provided that the assets are active assets) include the 15 year retirement exemption, the 50% active assets concession, the $500,000.00 retirement exemption and the small business active asset rollover.

Commonly, asset protection is extremely important to clients setting up a business. This involves the operators of the business separating out assets of the business from their personal assets and, indeed, also separating the assets of the business from the trading operations. Commonly, discretionary trusts with corporate trustees are used as a vehicle to operate the business. Where more than one family is involved in the business, each family may have a discretionary trust with a separate corporate trustee and those entities would form a partnership or joint venture to operate the business. Corporate trustees are, commonly used as trustees and will be personally liable for the liabilities of the trust. Accordingly, if the liabilities exceed the assets of the trust from which the trustee could be indemnified, the personal assets of individual trustees would be at risk. It should also be borne in mind that directors of companies can also be personally liable for the debts of the company whilst the company trades insolvently and also can be liable for the negligent actions of the company.

Business succession agreements are a useful way of dealing with succession issues in a business where there are a number of principals. These agreements cover what happens in circumstances where a principal dies, becomes disabled or retires (either voluntarily or involuntarily). The agreements normally set up options where the outgoing principal has the option to require the other principals to purchase their interest and the continuing principals have the option to require the outgoing principal to sell their interest. The sale price is either predetermined or able to be calculated with a set formula. The business succession agreement has to be carefully drafted to ensure that unnecessary capital gains tax implications are not triggered. If the acquisition of the outgoing principal's interest is mandatory, the disposal of the business interest may be deemed to have occurred at the date that the business succession agreement was entered into.

Life insurance and trauma insurance is generally also covered by the agreement. Policies may be self owned (ie where each principal owns their insurance policy), cross-owned (where principals own policies on each other) or ownership by a separate trust where the Trustee controls the release of the proceeds from the policy.

There are tax issues with cross-ownership. Life insurance does not attract capital gains tax whether the policies are self-owned or cross-owned, but total and permanent disability and trauma policy proceeds are not exempted from capital gains tax unless the proceeds are received by the injured party or a relative of the injured party. There will be significant tax problems for cross-owned policies.

The principals also need to decide whether the entity or individuals pay the premiums on the insurance. Obviously, where the principals are of different ages and health, the premiums may be different for each principal.

Proper planning when setting up business structures is essential to maximise the tax savings available and to provide for effective asset protection.

ASIC gives MORTGAGE BROKERS A BREAK

by Richard Stone/James Woodgate

The mortgage broking industry in Australia has experienced rapid growth in the last ten years. One of our clients Northern City Finance (NCF) is a classic example of such a business. This growth in the industry stems from consumer use of mortgage brokers to assist them in navigating their way through the vast number of products offered by lenders in the home mortgage industry. Mortgage brokers provide valuable assistance and advice to home mortgage product consumers so that they are able to decide upon a home mortgage product which suits their needs.

Important issues have arisen for the mortgage broking industry under the *Financial Services Reform Act 2001* ("the Act") which has now become fully operational following a two year transitional period. Under the Act financial service providers who deal in or advise on financial products must hold a financial services licence. Financial service providers typically include banks, credit unions, insurance companies, stock brokers and mortgage brokers.

However, ASIC recently issued a Class Order (CO 03/1048), to the effect that financial service providers who provide advice in relation to mortgage offset accounts or arrange for another person to apply for, acquire, vary or dispose of a mortgage offset account are not required to obtain a financial services licence. This exemption is of particular significance to mortgage brokers who often advise on mortgage offset accounts as part of a customer's loan package.

A mortgage offset account involves a borrower depositing money into an account as repayment of a loan from a lender such as a bank. According to Class Order 03/1048 a mortgage offset account operates in the following way:

- the amounts deposited are notionally offset from time to time, either fully or in part, against the balance of the borrower's loan account, so the borrower pays interest on the reduced balance only; or
- interest on the loan account is periodically reduced by an amount that would otherwise accrue as interest on the offset account.

When viewed independently, mortgage offset accounts would ordinarily be classified as a "financial product" under the Act because they are essentially a "financial investment". That is, the borrower is seen as an investor giving money to the lender so the lender can generate a financial return for the borrower.

However, Australian Securities & Investment Commission (ASIC) has determined that mortgage offset accounts are effectively a credit facility because they are such an integral part of loan packages. Credit facilities are specifically excluded from the definition of "financial products" under the Act, which means those who provide advice or deal in credit facilities are not required to hold a financial services licence. Therefore, mortgage brokers who provide advice or deal in mortgage offset accounts as part of a credit facility, such as a loan, are not required to obtain a financial services licence.

It is important to note that ASIC Class Order (CO 03/1048) only applies to mortgage offset accounts. Mortgage brokers who advise on, or deal in other financial products in the course of arranging or providing advice on loans will still need to obtain a licence, or be an authorised representative of a licensee.

What's in a **NAME?**

By Andrew Nicholson

Choosing the right name, brand identification or logo, can be a time consuming and critical task. After the creative juices have flowed, it is time to protect the good work.

In a recent due diligence exercise conducted by Mullins Lawyers, it became apparent that the brand name used by the business was not owned by the owner of the business. A Marketing Consultant used to create the brand name retained ownership of the name even though the business had used it for years.

> ... THE BRAND NAME USED BY THE BUSINESS WAS NOT OWNED BY THE OWNER OF THE BUSINESS

This is not an uncommon occurrence in the sale and purchasing of a business but it can be fatal to the value a purchaser could put on a business. If you think your business does not have any substantial intellectual property, stop for a minute to consider what value others place on your reputation, your market position and your business name, trade mark or logo.

In the course of acquiring a business, it is essential that the assets of the business are identified and that ownership of the assets is established and secured.

All purchasers should undertake due diligence enquiries to establish firstly what are the assets of the business and secondly, if they owned by the correct party.

Often, in completing a due diligence process, it becomes apparent that the business does not own a certain asset or that there is some form of claim or security which may prevent clear title from being passed. This occurs most frequently with the intangible assets of a business, such as the brand name under which the business operates.

We have seen examples of situations where it has been necessary to obtain not only one but two transfers of a trade mark and copyright from prior owners before the completion of a sale, because the transfer of those assets had simply been overlooked. In the worst cases, it has been necessary to sue to establish ownership.

It may also be that Intellectual Property is often not addressed (and often not properly valued) or transferred because it is perceived to be just too hard or that it is adequately addressed including it in an assessment of goodwill.

However, what is becoming increasingly clear is that purchasers of businesses are more savvy than in the past and it is increasingly necessary to maximise any advantage over competitors. The Intellectual Property of a business is just one of those advantages. You should protect it.

Redundancy Pay – Big Reprieve for Small Business?

By Sam Kane

The Commonwealth Government has introduced legislation aimed at exempting businesses with fewer than 15 employees from paying redundancy to workers. The Workplace Relations Amendment (Protecting Small Business Employees) Bill 2004 would overturn an Australian Industrial Relations Commission ruling in March.

On 26 March 2004 the Australian Industrial Relations Commission handed down its decision to increase the standard redundancy entitlements and termination provisions within the Federal Safety Net Awards.

Previous to this decision, redundancy provisions within awards were governed by the "TCR provisions" (ie the Termination, Change and Redundancy Provisions) handed down by the Commission in 1984. Those provisions provided for entitlements on redundancy for permanent employees only in relation to employers who employed more than 15 employees. The Commission's most recent decision has now made these minimum redundancy entitlements payable by employers who employ less than 15 employees, who were previously exempt from payment of redundancy entitlements. The landmark decision also extended redundancy entitlements to a maximum of 16 weeks' pay for employees with up to 10 years' service.

At this stage, the Bill looks unlikely to be passed in the Senate. Labor and the Greens have expressed opposition to it while the Australian Democrats are considering moving to send the Bill to a Senate inquiry.

FINANCIAL UPDATE: Duty Update

By Samantha Gulliver

QUEENSLAND

- A range of new concessions will apply to contracts entered into on or after 1 May 2004, instead of 1 July as originally planned. Most significantly, people buying a Queensland property as their Principal Place of Residence, worth up to $250,000 will pay no stamp duty and no mortgage duty – a saving of up to $3000.

VICTORIA

- All Victorian first home buyers who qualify for the Government's $7000 First Home Owner Grant (FHOG) will be eligible for an additional $5000 grant paid by the Victorian Government known as the First Home Bonus.
- The First Home Bonus will be available for Victorian properties where the contract is entered into on or after 1 May 2004 and before 1 July 2005, and where the consideration paid under the contract is no more than $500,000.
- No Stamp duty applies in regard to the Purchase of businesses within Victoria.

NEW SOUTH WALES

- Vendor Duty will now apply to liable contracts executed on or after 1 June 2004. The duty will be levied at 2.25% and will apply to consideration received on the sale or disposal of property, other than on the sale or disposal of a principal place of residence or farm. Liable properties will be exempt from the duty where the vendor's sale price or value on disposal does not exceed the purchase price or value on acquisition by more than 12%. This exemption phases out between 12% and 15%.
- There will also be an exemption for the first sale by builders or developers of new dwellings. This will include "off the plan" sales.
- New South Wales has also introduced a range of changes to its First Home Plus scheme. From 4 April 2004 homes valued at up to $500,000 are duty free for first home buyers (this includes contract duty and mortgage duty). First home buyers purchasing a vacant block of land will pay no duty on land valued up to $300,000.

LEAVE YOUR SPAM in the can

By: Kate Williams

If your business markets its products or services via email or SMS messages you need to comply with the *Spam Act 2003* ("the Act") which came into effect on 11 April 2004. Businesses that persist in sending spam messages can face penalties of up to $1.1 million per day for each offence.

...SENDING SPAM MESSAGES CAN FACE PENALTIES OF UP TO $1.1 MILLION PER DAY FOR EACH OFFENCE

WHAT IS SPAM?

The Act prohibits the sending of unsolicited commercial electronic messages (otherwise known as spam). Your emails or SMS messages will be spam if they have a commercial focus such as promoting or selling your products or services.

HOW DO I COMPLY WITH THE ACT?

1. Any spam you send must include your businesses details; including the name, logo and contact details of the individual/business authorising the sending of the message and the name and contact details of the author of the message.
2. Any spam you send must include an "unsubscribe" facility to enable the recipient to opt out from receiving future communications. This "unsubscribe" facility should include the following words, or similar *"If you no longer wish to receive these types of messages, please click here"*.

Ideally, the blue underlined word "here" should automatically un-subscribe the recipient from receiving the message once it is clicked on. Alternatively, it should lead the recipient to a pro-forma email already set-up and addressed to your business so that the recipient only needs to send the email for the un-subscription to be complete.

WHEN DOES THE ACT NOT APPLY?

1. When the message consists of no more than factual information.
2. When the sending of the message is authorised by any of the following; a government body, a registered political party, a charity or charitable institution, or a religious organisation.
3. Where the recipient of the message has consented to the sending of the message.

Consent can be either:

A. Express; or

B. Inferred from the conduct, business or other relationship with the business or individual concerned.

You may wish to consider adding a clause to your letters of engagement/ contracts or other such communications which provides that the person you are engaging with expressly consents to receiving any SMS, emails or other marketing material from your business. This will ensure there are no ambiguities as to whether the recipient has consented to receiving such messages and will effectively provide your business with the appropriate protection under the Act.

In order to ensure your business complies with the Act and to ensure good client relations we recommend you include an "unsubscribe" facility at the end of each message you send regardless of whether this is legally required or not.

Whilst the Act is relatively straightforward there are pitfalls for those who are unaware. The best course of action is to arm yourself with knowledge because unfortunately, ignorance is no excuse.

EDITORIAL

By: David Williams

This is the first of many newsletters to be produced by Mullins Lawyers on the issues affecting our Business clients. In last month's editorial of Mullins Report, John Mullins made it clear the reason why the firm established the Business Services Group.

In the very short time since the launch of the Business Services Group we have received extremely positive support from our clients.

Our Business Services group comprises experienced practitioners who have a wide range of legal skills and business experience. John Mullins and myself are the Partners that head up a team of six lawyers that cover a range of legal services in the areas of:

- business acquisitions
- restructures and sales
- trade practices
- governance
- intellectual property
- employment law

Depending upon the specific legal issues involved, the Business Services group can also involve specialist from other practice areas within the firm to assist in the delivery of our service to you, our client.

We can best assist clients by focussing on the commercial outcomes that business owners and managers seek to achieve in running their business.

It is important that we as lawyers understand and appreciate the complex issues that impact upon your business on a day to day basis. We believe we have a high degree of knowledge in regards to those issues, which would assist in the delivery of timely, affordable and accurate legal advice to our clients.

Mullins Lawyers as a business has also experienced significant growth over the last three years. We believe we are well placed to understand the difficult issues that face business in a highly regulatory and competitive environment.

I welcome any feedback you may have in relation to the subject matter of the articles in this newsletter and any future newsletters.

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