

Structuring for **IP Protection**

ANDREW NICHOLSON



Capturing the IP created by a business continues to be a focus for attention. Once captured the IP has to be owned by the current entity to protect not just ownership but its use.

A variety of structures may be used to suit your circumstances,

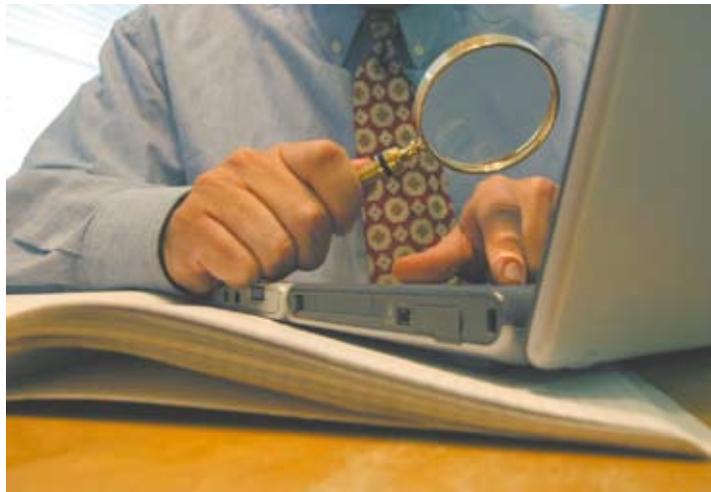
including group structures with a holding company, trusts, a joint venture or other special purpose vehicle. Often companies elect to establish a separate purpose vehicle (IP Holding Company) within a group of companies. However, that should not be seen as a one size fits all solution.

Whilst asset protection is an important consideration, the circumstances of the group may dictate that one structure should be favoured over the others. It is essential to obtain both legal and accounting advice at an early stage to ensure that an appropriate asset protection strategy is developed that

also recognises the commercial outcomes you wish to achieve. Matters for consideration include compliance with accounting standards, tax requirements, the potential to obtain R&D grants and the potential to raise capital

(particularly for risky new ventures) or other finance, or where a sale is contemplated in the short term.

A number of difficulties may be encountered if IP is not correctly addressed within the desired structure. Licences and/or assignments of IP rights must be properly documented. We have seen a number of recent instances where those agreements have been overlooked. The courts will not regard the rights as enforceable if they are held by an incorrect entity merely because another company within the group structure maintains them. An inability to recover damages



for infringement and difficulties in maintaining certain registered rights may occur where the owner does not have control. That is a particular concern with registered trademarks that are subject to the principle of 'use it or lose it'.

While circumstances may change throughout a company's lifecycle, it is essential that consideration be given to the appropriate structure

at the outset. Unravelling a structure may be a time consuming and costly exercise, particularly as some forms of IP cannot be transferred without stamp duty consequences.



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Sham contracting results in severe penalties

NIGEL INGLIS



The Gillard Government has announced that it is considering a crackdown on sham contracting arrangements.

Unions stepped up demands that the Government take action on sham contracting across numerous industries. Sham contracting occurs when an employer evades paying entitlements, such as superannuation, to workers by forcing them to become contractors when they should be classed as employees. Sham contracting arrangements are prohibited by the independent contractors legislation.

In the recent case of *The Fair Work Ombudsman v Land Choice Pty Ltd*, Land Choice, a company, which operated a real estate agent, was found to be engaging in sham contracting and was fined \$24,600. The sole director was fined a further \$4,840 for his involvement in the misrepresentation of a contractor relationship.

The Court found that Land Choice had treated a female sales person "recklessly" by appointing her as an independent contractor instead of as an employee. The worker did not receive the guaranteed basic periodic rate of pay, which was an employee entitlement, and received just one payment of \$1,414.20 for working an average of 40 hours a week from 23 March 2007 until her employment was terminated on 27 September 2007. She was underpaid more than \$20,000.



the underpayment of employee entitlements...Both small and large businesses have an obligation to meet these requirements. If not, it will normally be necessary to mark the failure by imposing an appropriate monetary sanction at a meaningful level...The penalties should reflect the need for some specific deterrence and more particularly for general deterrence, reinforcing the seriousness with which the Courts treat the non-payment of basic employee entitlements."

In addition to legislative provisions, the common law also provides relevant tests for determining whether a worker is an employee or a contractor. These include how much control is exercised over the person and whether the person supplies their own tools of trade.

You should review each contracting arrangement to determine whether, against the accepted legal tests, an arrangement would be regarded as employment rather than an independent contracting arrangement. In light of the Gillard Government's recent announcement to consider cracking down on sham contracting it is timely for you to review each contracting arrangement to determine whether or not it should be regarded as employment.

You should also consider whether you have engaged the person through a corporation, rather than as an individual. Liability under the independent contractor legislation is substantially lessened if the arrangement is between you and a corporation, rather than you and an individual worker.

There are various steps you can take to lessen the risk of liability for a breach of the sham arrangements provisions. If the Gillard Government's review goes ahead, being subject to severe penalties such as those handed out by the Court in the Land Choice decision is something we can help you to avoid.

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The Court received submissions that the real estate industry in New South Wales often paid individuals on a commission only basis. Despite this, Federal Magistrate Barns held that "*Nonetheless...a message should be sent to the community, and to the real estate industry in general, that employees should be correctly identified and appropriately remunerated and should not be paid on a commission only basis if not licensed...The imposition of penalties does act as a warning to other employers and reinforces the seriousness with which the Courts treat*

Are you ready to exit your business?

DAVID WILLIAMS



We have in past newsletters discussed important elements of reviewing your business to ensure that when you are ready to exit you can maximise your sale price. In simple terms, selling a business is not unlike selling your home. When you are selling your house a real estate agent

would advise you that you should de-clutter your home and make it presentable so that purchasers will fall in love with your home. In the sale of a business (whilst far more complex than selling a home) the theory of making your business attractive to a buyer is the same.

One of the critical aspects in selling a business is that you cannot always control the timing of your sale, as a buyer may knock on your door at any time. If you are well prepared, then this preparation will assist you in maximising the value for your business.

You will need to establish a Data Room which can be either electronic or hard copy and contain the life history of your business (including the financial information and key material agreements). The importance of the data room to you is that in the due diligence process the disclosure by you as a seller of what makes up your business (warts and all) provides protection to you in that the buyer will buy your business with eyes wide open. Disclosure is your friend and the disclosure can limit the buyer's options they may have against you post completion in the event of a problem.

You should never underestimate the interference the sale process will have on your ability to continue to operate your business during this process. If your staff and customers become aware of a sale this could be fatal to the continual operation of your business and a successful sale of your business, therefore it is important for you to maintain confidentiality.

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The important message for you is that you should get your business records in order, establish a quality data room and engage Mullins Lawyers who can take you through the journey of a sale. This can be demanding and emotional but at the end of the day if successfully handled you will maximise your exit price.

When is a charity **charitable**?

PAT MULLINS



A December High Court decision in *Aid/Watch v Commissioner of Taxation* establishes that an organisation remains charitable (in terms of its tax status) even though its relief of poverty activities include engendering public debate about the effectiveness of Government aid spending. Engagement in

public debate may put charities in opposition to the Government of the day. *Aid/Watch* was involved in publicly releasing research reports. It campaigned for changes to Government aid delivery. This was directed towards *Aid/Watch*'s goal to relieve poverty.

The term 'charitable institution' is not defined in the tax legislation. The Court decided that the word "charitable" was to be construed not according to some popular understanding of charity (as requiring the relief of poverty), but rather on the technical meaning given by the English Law of Trusts. The Commissioner's case was that *Aid/Watch*'s lobbying or political activities or purposes denied it the right to be considered "charitable".

Aid/Watch argued (first) that its activities were apt to contribute to public welfare and (second), that its purposes and activities did not fall within any area of disqualification. It argued that its purposes and activities were, therefore, charitable. The majority of Justices accepted these submissions. They found that by lawful means of public debate, *Aid/Watch* was performing

a purpose beneficial to the community. Further, they found that there was no general doctrine that excluded 'political objects' from charitable purposes. This is now the Australian position: 'charitable' may include 'political'.

The Court's decision is clearly a sensible one. It recognises that one of the most effective ways that modern charities can alleviate poverty (both here and overseas) is to question Government policy. The recent 'Make Poverty History' campaign has been supported by a variety of churches and other charities within Australia. This is an example of an effective world-wide program designed to put pressure on governments to improve their aid spending. The decision in this case demonstrates that the Courts are in touch with public sentiment about charity and the relief of poverty in a way that the Deputy Commissioner of Taxation may not be.



The Future of FINANCIAL ADVICE

MICHAEL KLATT



The federal government announced reforms earlier this year that will have significant impact on regulation of financial advice once legislation is passed. The Government hopes that the reform will encourage more people to seek financial advice. The reforms are the Government's response to an inquiry set up in the wake of collapses including Storm Financial and Opes Prime.

The three key reforms that will apply from 1 July 2012 are as follows:

- A ban on commissions paid to financial planners from product providers. Further, percentage-based fees (known as Assets Under Management Fees) can only be charged on un-g geared products or investment amounts. These changes are designed to ensure that consumers receive independent advice in relation to products.
- Financial planners must disclose charges for advice. Ongoing fees are permissible but an annual renewal notice that restates the fees and requires a consumer to renew by opting in rather than opting out will be required.
- Financial planners will be required to act in consumers' best interests. A statutory fiduciary duty for all licensees and authorised representatives will be introduced.

Other reforms include:

- The Australian Security and Investment Commission will have greater powers over licensing and banning of individual advisers.
- Low cost simple advice. Superannuation Funds will be able to provide simple advice on issues such as transition to retirement, retirement planning, nomination of beneficiaries, super payments, Centrelink payments and intra-pension advice.
- Accountants will require an Australian Financial Services license to provide advice on establishing or closing self-managed superannuation funds.
- Establishing an expert advisory panel to review professional standards for advisers.
- Simplifying the disclosure of advisory services provided to consumers.

The Government hopes that over time more investors will develop confidence and trust to seek financial advice as attitudes about perceived conflicts within the industry change.



DAVID WILLIAMS
EDITORIAL

Welcome to 2011 and lets hope that this year will be a vast improvement on 2010.

This year however has started off with natural disasters that will impact Queensland, particularly in the Brisbane and regional areas of Queensland.

At Mullins Lawyers we also were impacted in that our offices were closed from 12th January and reopened on 24th January, but we were spared the pain that was suffered by so many.

As you will see from this edition's articles of our Newsletter, the focus is about government regulation clamping down on certain types of activities and issues you should consider in regards to the structure or sale of your business.

Whilst economic issues will heavily influence the outcomes of 2011, it should also be remembered that the political balances of power, particularly at the Federal Government, will also undergo a significant amount of stress with the change in control of the Senate post 1 July 2011.

The Reserve Bank's decision to increase interest rates towards the latter part of 2010 has certainly curtailed consumer spending and a number of business activities.

The impact of the natural disaster upon the economy may deliver a more adverse impact than the GFC as it has severely damaged the Queensland and Victorian economies which will take years to recover.

We wish you all the best on your endeavours for your business in the current year and look forward to working with you in enhancing the value of your business.

Level 21, Riverside Centre
123 Eagle Street
Brisbane Qld 4000

GPO Box 2026
Brisbane Qld 4001

Telephone 07 3224 0222

Facsimile 07 3224 0333

email: jmullins@mullinslaw.com.au
www.mullinslaw.com.au

mullins
LAWYERS

Postscript: The information contained herein, whilst accurate, is of a general nature. If you have any queries in relation to the information contained herein, we ask that you consult the partners and solicitors of Mullins Lawyers with whom you usually deal. If you have any comments regarding our newsletter we would like to hear from you.

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