



BENNETT CARROLL SOLICITORS

---

# HOW TO BUY OR START A SMALL BUSINESS

**By Guy Gibbons, CEO of Bennett Carroll Solicitors**

We will teach you how to check a business is viable, check you are compatible with it, buy that business, set yourself up for retirement and much more.... FREE

[WWW.BCGLAW.COM.AU](http://WWW.BCGLAW.COM.AU)

**Bennett Carroll Solicitors**

Brisbane North - Stafford  
Brisbane South - Upper Mount Gravatt  
Sunshine Coast - Kawana  
Gold Coast - Robina  
Gold Coast - Mermaid Beach

Mail to: PO Box 6030 Upper Mount Gravatt Brisbane 4122

Phone: 1300 334 566

Fax: 07 3343 8664

Email: [info@bcglaw.com.au](mailto:info@bcglaw.com.au)

WWW: [www.bcglaw.com.au](http://www.bcglaw.com.au)

Facebook: "Bennett Carroll Solicitors"



**Guy Gibbons, CEO  
Bennett Carroll Solicitors**

Guy is a graduate of the Queensland Institute of Technology (QIT) and has had over 25 years experience in litigation, estates, commercial and conveyancing work. With a wealth of accounting and managerial experience, Guy is the head of the Commercial Department and the firm's Chief Executive Officer.

Guy also has an extensive history in finance investment, both as a member of the firm, and as a private investor.

His vast experience in property includes purchase, renovation and sale of houses, ownership, management, purchase and sale of motels, boarding houses, office complexes, flats and units, child care centres and shopping centres.

Guy has more than 20 years experience in Commercial work, particularly in the purchase and sale of businesses.

A Director of the Gibbons Child Care Group, which has owned and managed childcare centres in Brisbane and on the Gold Coast, and a Director of Pacific Accommodation, which has provided budget accommodation between Cairns and Sydney since the early 80's, Guy has experience well beyond the Law.

Guy has a very comprehensive knowledge of the Law and for some time has presented on radio for over ten years on both The ABC and 4BC.

Guy is a specialist lawyer in commercial property transactions, asset protection, contract disputes, planning and environment, building disputes, company structures, franchise agreements, joint venture agreements and leases.

On a personal level Guy contributes to many community organisations with free legal advice, hands on management assistance and financial support.

These include local youth charities, family help-lines, sporting groups and handicapped children.

Guy is the founder of the charity



One of Guy's great passions is surfing and he has helped raise a lot of money for our charities.

## TABLE OF CONTENTS

1. INTRODUCTION – WELCOME
2. THE DYNAMICS OF A SMALL BUSINESS
3. INTRODUCTION
4. INITIAL STRUCTURE
  - A. SOLE TRADER
  - B. PARTNERSHIP
  - C. COMPANY
  - D. TRUST
5. TECHNICAL SIMPATICO
6. GOALS
7. PURCHASING A BUSINESS OR A COMPETITOR AND BUSINESS PARTNERS
8. SIZE
9. MARKET DYNAMICS
10. WHAT BUSINESS TO BUY
11. VALUING THE BUSINESS
  - A. GOODWILL
  - B. FIXTURES, FITTINGS, PLANT AND EQUIPMENT
  - C. WORK IN PROGRESS AND DEBTORS
12. BUYING THE BUSINESS OR BUYING THE COMPANY
13. STARTING A BUSINESS FROM SCRATCH
14. GOING INTO COMPETITION WITH YOUR CURRENT EMPLOYER (COMPETITION CLAUSES AND RESTRAINT CLAUSES)
15. ASSESS YOUR STRENGTHS AND WEAKNESSES
16. MATCH THE SKILLS WITH YOUR GOALS
17. LOOK FOR AN EXISTING OR A NEW BUSINESS WHICH MATCHES YOUR SKILL SET AND YOUR GOALS
18. JOINT VENTURES AND EXPANSIONS
19. WHAT TO LOOK FOR IN A NEW OR EXISTING BUSINESS

20. **WHAT IF YOU DON'T HAVE THE SKILL SET TO INSTALL SYSTEMS AND PROCEDURES?**
21. **SYSTEMS, GROWTH AND FRANCHISES**
22. **SYSTEMS**
23. **GROWTH**
24. **PLANNING FOR THE FUTURE (MORE ON SYSTEMS)**
25. **LICENSING**
26. **BUDGETING, FINANCE**
  - A. **FINANCE/FACTORING**
  - B. **BUDGETING CASH FLOW**
  - C. **DAILY, WEEKLY AND MONTHLY BUDGETS**
  - D. **THE EMOTIONAL ROLLER-COASTER**
27. **RETAIL PRESENTATION ISSUES**
28. **NAMES, SIGNAGE, LOGOS**
29. **ADVERTISING, MARKETING**
30. **POSITIONING IN THE MARKET**
31. **THE PURCHASING PROCESS**
  - A. **INITIAL DISCUSSIONS**
  - B. **YOU SHOULD THEN RECEIVE SOME INITIAL INFORMATION WHICH SHOULD INCLUDE**
  - C. **ONCE YOU ARE HAPPY THAT THE BUSINESS**
32. **CONTRACT CONDITIONS**
  - A. **PRE-SETTLEMENT TRIAL PERIOD**
  - B. **POST-SETTLEMENT ASSISTANCE FROM THE VENDOR**
33. **DUE DILIGENCE AND FINANCE CLAUSES**
34. **STOCK**
35. **BUYING STOCK**
  - A. **MARGINS**
  - B. **PERISHABLE STOCK**
36. **THE CONTRACT PROCESS**

- A. THE SOURCE OF THE CONTRACT
  - B. MORE ON DUE DILIGENCE
  - C. CONFIDENTIALITY CLAUSES
  - D. CONTRACT VARIABLES
  - E. DEPOSIT
  - F. INCLUSIONS
  - G. DATE FOR COMPLETION (SETTLEMENT DATE)
  - H. STAGED OR DELAYED SETTLEMENT AND RETENTIONS
  - I. THE LEASE
  - J. STAFF
  - K. STAMP DUTY
  - L. RESTRAINT CLAUSES
  - M. ADVISORS AND SEARCHES
  - N. LEASE ASSIGNMENT
  - O. THE SETTLEMENT PROCESS AND ADJUSTMENTS TO THE PURCHASE PRICE
  - P. TYPES OF SETTLEMENT ADJUSTMENTS
  - Q. RELEASE OF ENCUMBRANCES
37. GST
38. PERSONAL SPENDING
39. EQUIPMENT FINANCE – STRUCTURES
- A. BUYING FROM CASH FLOW
  - B. REDRAW ON YOUR CAPITAL LOAN FACILITY
  - C. BILL OF SALE
  - D. CHATTEL LEASE
  - E. RENTAL
40. FACTORING
41. INSURANCE
42. RETIREMENT AND ESTATE PLANNING
- A. RETIREMENT PLANNING
  - B. ESTATE PLANNING
43. TAXATION
- A. THE PURCHASE PROCESS
  - B. ON-GOING TAXATION
  - C. TAX PLANNING
  - D. TAX AUDITS
  - E. INDUSTRY TARGETS AND QUESTIONNAIRES
  - F. TELEPHONE ENQUIRIES
  - G. DOCUMENT AUDITS
  - H. TAX SCHEMES AND “30<sup>TH</sup> JUNE SPENDING”

44. **DEBT COLLECTION, CLIENT INDUCTION, CREDIT ASSESSMENT, COSTING YOUR PRODUCTS AND MARGINS**
45. **PRIVACY**
  - A. **WHAT DO THE PRINCIPALS REQUIRE?**
  - B. **WHAT IS INFORMATION?**
  - C. **OTHER TYPES OF INFORMATION**
  - D. **OTHER RECORDS**
  - E. **COLLECTING INFORMATION**
  - F. **CHILDREN AND YOUNG PEOPLE**
  - G. **USE AND DISCLOSURE**
46. **HIRING AND FIRING**
  - A. **UNFAIR DISMISSAL**
  - B. **LEGISLATION DOES NOT COVER**
  - C. **RELEVANT COURT**
  - D. **POWERS OF THE COMMISSION**
  - E. **FEATURES OF THE LEGISLATION**
  - F. **MUST GIVE REASONS FOR DISMISSAL**
  - G. **TERMINATION CAN'T BE HARSH/UNJUST/UNREASONABLE**
  - H. **THE COMMISSION WILL CONSIDER**
  - I. **MINIMUM NOTICE PERIODS**
  - J. **OPPORTUNITY TO RESPOND**
  - K. **PROHIBITED GROUNDS FOR DISMISSAL**
  - L. **SUMMARY DISMISSAL**
  - M. **CONSEQUENCE OF UNFAIR DISMISSAL**
  - N. **ONUS OF PROOF**
  - O. **REDUNDANCY**
  - P. **PROCEDURE FOR A WRONGFUL DISMISSAL APPLICATION**
  - Q. **THE HEARING**
  - R. **AVENUE FOR APPEAL**
  - S. **HOW YOUR SOLICITOR CAN HELP**
47. **WHAT IS DISCRIMINATION?**
48. **WHAT IS SEXUAL HARASSMENT?**
49. **PART X, BANKRUPTCY AND EXTERNAL ADMINISTRATION**
  - UNINCORPORATED BUSINESSES**
  - INCORPORATED ENTITIES**
    - A. **ADMINISTRATION**
    - B. **RECEIVERSHIP**
    - C. **LIQUIDATION**
    - D. **EXTERNAL ADMINISTRATION**
50. **CONCLUSION**
51. **APPENDICES**

- A. LIST OF EXPENSES**
- B. HARASSMENT MODEL POLICY**
- C. ANTI-DISCRIMINATION ACT 1991**
- D. HARASSMENT COMPLAINT PROCEDURE**
- E. CHECK LIST FOR DISMISSAL PROCESS**
- F. SAMPLE INTERVIEW PROCESS**
- G. FEEDBACK RECORD BOOK**
- H. WRONGFUL DISMISSAL DIAGRAM**
- I. FIRST WARNING LETTER TO POOR PERFORMER**
- J. SECOND WARNING LETTER TO POOR PERFORMER**

## 1. INTRODUCTION – WELCOME

Owning or running a small business is particularly difficult, despite the current misconception by the general public.

The prevailing attitude is, “I’ll buy a business so that I can be my own boss and I won’t have to work any more”.

The reality could not be more different.

In buying a business you are probably exchanging the practical freedom of leaving your job behind you for the freedom to keep the profits of the business (if any), and “of never leaving the business (mentally at least)” and, most likely taking on a twenty-four (24) hour/seven (7) day task indefinitely.

Having said that, if you are successful in building a business which creates income for you without you working in it (which should be your aim), as opposed to “buying yourself a salary”, then you will receive automatic profits and virtually unlimited freedom, with the income to indulge that freedom.

This is the secret to owning a business.

In this course we will show you how to:-

- A. Select a business;
- B. Check that that business is viable;
- C. Check that you are compatible with it;
- D. Buy that business;
- E. Set yourself up to protect yourself as best you can from the dangers of owning a business;
- F. Protect the business;
- G. Set yourself up for retirement;
- H. Structure and grow the business to provide you with passive income.



## **2. THE DYNAMICS OF A SMALL BUSINESS**

Business management mentor Paul Gerber says that all businesses require three (3) skills, those of entrepreneur, manager and technician. In most small businesses the owner is all three, at least early in the life of the business and at least partly.

The entrepreneur is the person who drives the business; the person with the direction, enthusiasm and “push” to get the product or service made, sold, delivered and paid for.

The manager is the person who provides and maintains the system with regular quality, product or service on time and on budget.

The technician is the person who assembles that product or service.

The small business owner must have some skills in all three (3) of these areas.

Each of us has strengths, and over time the business should be geared to play to your strengths, that is, if you have a management bent, you may take on the systems and procedures role and hire a CEO to run if you prefer to gravitate towards the entrepreneur or technician end, you may hire people around you to take over primary responsibility for the other two (2) aspects.

These are issues of scale and size, and it must be remembered that the business owner can never fully abdicate any of the three (3) areas of skill. You must always keep control of the technical aspects of the business so as not to become hostage to your technicians; likewise with strategic direction.

## **3. INTRODUCTION**

The first decision to be made is what type of business to buy or start. This is bound up with what is driving you to take on a small business.

Many people go into business simply because of dissatisfaction with their present surroundings. This will always be a motivating factor, but must be one of several. If it is a sole motivator, then you are probably choosing a business as an escape, which may not be a sound approach. Many people have gone into business simply because of the myth that, "all of the cash in the register belongs to me". This "cash register fever", is often the downfall of small businesses.

It is important that you examine whether or not you want to go into business and why, and then look at your skill set and your budget to decide what type and size of business.

#### **4. INITIAL STRUCTURE**

There are several structures available to you use in running your business:-

- A.** Sole Trader;
- B.** Partnership;
- C.** Company;
- D.** Trust.

Different structures suit different businesses and different business owners. Which one you choose depends upon:-

- (a) The size of the business;
- (b) Your goals for the present and the future.

#### **A. SOLE TRADER**

##### **Benefits**

Cheap, simple, easy to understand.

##### **Dangers**

Unlimited personal liability, no ability to split income, Provisional Tax problems.

A Sole Trader business is simply you, yourself as the owner, one (1) individual owning the business. It is simple and easy to operate. You may not even need to

register a business name (a cost of approximately \$100.00). If you use your surname and initials in the name of the business, a business name is not required to be registered. Alternatively, you can register a business name and be, for example, John Smith Trading as Rapid Electrical.

The difficulty with being a Sole Trader is that any net profit generated by the business is tax to be paid by you personally. Likewise, any debts payable by the business are owed by you personally. There is no ability to separate your personal assets from debts and risks associated with the running of the business.

Further, you will be exposed to Provisional Tax (now called PAYG), which in the first two (2) years of trading, can place your business under severe strain.

## **B. PARTNERSHIP**

Running the business as a partnership between you and your business or life partner, at least allows you to split the income to keep the net profit in a lower tax bracket. For example, a net profit of \$52,000.00 would be split between the partners as \$26,000.00 each, thereby lowering the tax burden.

However the same problem exists with personal liability for creditors, and the income can only be split 50/50 rather than any other proportion.

## **C. COMPANY**

A Company is the most commonly recognized vehicle for running a business. They are now reasonably cheap to run, easy to set up and commonly understood by clients and debtors and creditors.

### **Benefits**

Limited liability, income splitting ability, lower tax bracket (Company rate);

### **Dangers**

Additional taxpayer (additional cost), increased complexity, personal guarantee problems and insolvent trading issues.

Running a business through a Company gives the business a “legal life of its own”. Your Company is an individual in its own right, a taxpayer, a legal entity; able to sue and be sued on its own. You as Directors and Shareholders make the decisions about what the Company does, but the Company operates in its own right.

This corporate veil protects your assets from debts owed by the Company unless you have provided a personal guarantee (such as to your financier or a trade creditor), or you allow the Company to incur debts when you knew or should have known that the Company could not pay those debts (insolvent trading).

The company structure also allows you to split income. Dividends can be paid to Shareholders based on their shareholding, and a little thought and assistance from your Accountant or Solicitor can give you some flexibility there. In addition, the Company can incur tax liabilities itself and pay them at a flat rate rather than the graduating scale that applies to individuals. The present Company tax rate is 30%. The top marginal rate for an individual is 45%.

There are some problems with Company structures however:-

- (a) An enormous volume of Company Law and Tax Law applies to the operation of the Company, and your accounting structures (and therefore accounting bills) will increase;
- (b) Additional corporate and taxation returns will be required for the Company, over and above individual returns for the Directors and Shareholders;
- (c) You are most likely to be required to provide a personal guarantee at least to your financier if not to your major trader creditors, thereby defeating the corporate protection of your own assets. A little bit of thought and planning by your Solicitor and Accountant may resolve this issue to some degree;
- (d) There are now some reasonably complex issues to do with loans between Companies and their Directors, and the transfer of monies which the Australian Taxation Office will call income and seek tax for, in circumstances where you might not think tax is payable. Advice from your Accountant should keep this issue in check;

- (e) There are fines and in some cases jail terms for Directors who allow companies to trade whilst insolvent, that is, to incur debts when the Directors knew or should have known that the Company could not pay them as they fell due.

#### **D. TRUST**

The Trust is still by far the most flexible (though the most complex), structure available for running a business. If you have plans to grow the business, and expect it to be quite a profitable long term venture, then the Trust structure will give you the most flexibility for splitting and moving income into the lowest tax bracket.

A Trust structure allows the net income for the business, at the end of the year, to be distributed among a number of beneficiaries thereby providing you with more people to split the income among, and lower the total tax payable.

The advantage of a Trust over a Company is that the proportion of income allocated to beneficiaries, can be altered from year to year, depending upon the income status of those beneficiaries. A beneficiary can be any person named in the Trust document or any category of beneficiary referred to in the Trust document (for example any Company of which you are a Director or Shareholder which may be incorporated in the future).

As the Australian Taxation Office continues to attack legitimate businesses in an effort to take more income, and continues to alter the rules from year to year declaring long standing business practices to suddenly be illegal, flexibility is paramount.

Detriments of the Trust structure are an additional complexity, the need, usually, for a Company to act as Trustee anyway, and additional accounting requirements.

**The most important thing is to ensure that any structure you adopt for your business, is understood by you well enough to be operated on a day to day basis.** You may well have to rely upon your Accountant to prepare returns and to deal with some of the more complex issues, but do not adopt the structure for the running of your business which you do not understand. Either take the time to

understand the structure by having it explained to you repeatedly until you do, or abandon the structure for something simpler.

## **5. TECHNICAL SIMPATICO**

You should at least have some passing acquaintance with the technical content of the business.

An interest in “assembling the **widgets**” or at least an ability to learn and not be bored by the mechanical aspects of the business, is important to maintaining your passion for this project.

## **6. GOALS**

You must look at (and we believe list), your goals for what you hope to get out of going into business, eg comfortable income, lifestyle, flexible hours, freedom, retirement income.

It is important to match these goals against any business you look at. Otherwise you will end up owning a business that will not get you where you want to go. Why exchange one unsatisfying existence for another which you can't quit and walk away from like your current job?

Your goals should never be far from your thoughts and should shape the tool which is your business. If the tool isn't getting you where you want to go, change and evolve it.

## **7. PURCHASING A BUSINESS OR A COMPETITOR AND BUSINESS PARTNERS**

You may have the opportunity to leave your current employer and purchase a competitor. This can have great benefits given that your experience in the industry will be somewhat transferrable and that you will have good knowledge of your major competitor. You should also have some idea of the details of the history of the business you are buying as you will have competed against it during your current employment.

There are additional issues to consider here however. Firstly you may be restrained by your current employer and you will need to check if the restraint is binding, and then if you are likely to breach it.

Secondly, you will need to ensure that you cannot be pursued for using your current employer's resources to prepare to compete with it in your final days of employment. This is a breach of your fiduciary duty as an employee and is a very serious matter. In a similar vein, you will need to be careful not to be able to be pursued for taking confidential information and documents with you.

Depending on the size of the business or your skill set you may think about taking in a partner.

Business partners can make a business fly. A well chosen partner can provide a skill set that you are lacking, finance, talent or simply a sounding board which is all important. Your business partnership can also ruin your business and your life.

There is one simple rule for business partnerships: never go into partnership with someone unless they bring something to the table which you don't have and which is useful to the business. All business partnerships fail when one partner fails to appreciate (rightly or wrongly and always utterly subjectively), the input or value of the other. The root of this is often a lack of valuable input. Sometimes partners are taken in because they "were there at the time", or were part of the initial planning. This is not a good reason to do so. Be clear about the skill sets required and who is in. Also be clear about what is required. Capital should be put in equally unless this is absolutely impossible, and if impossible this is an alarm bell.

Unraveling a business partnership is far more harrowing and expensive than a life partnership. The parties to a divorce can physically separate, business partners usually cannot. This means continuing to work together in very stressful times. This can often kill the business and lose key staff.

## **8. SIZE**

The size of the business does provide you with some security but provides other challenges and problems. A larger business should incorporate some infrastructure systems and procedures, and should have some embedded talent in its staff, which will provide you with some safety and security whilst you are learning the ropes. Apart from the obvious budgetary issue (having to find more money to purchase the business), there are issues relating to volatility. The larger the business, the greater the risk, and the more difficult to turn around long term trends and sliding income.

## **9. MARKET DYNAMICS**

The useful life of a good idea these days is very short. It is very important that you examine carefully, trends in the industry you intend to enter.

Competition is fierce, the development of new income producing fields is hotly contested, and traditional ways of doing business in particular areas go stale and become useless extremely quickly.

- A. If there is an industry association, speak to its President, attend its meetings, and find out the overall health of the industry, whether there is a market leader, and what your prospects of competing successfully in that industry really are.
- B. Look at overseas trends in your intended industry. Successful systems, procedures and products in your target industry, can often be developed overseas, and do not reach our shores as quickly as you might think.

It is important not to dive into a dying industry or a hyper-competitive market with small margins and cut-throat competitors; unless you either know that market intimately or you have an innovation that will give you an edge and you are very confident of it.

## **10. WHAT BUSINESS TO BUY**

Having decided on a target industry (or perhaps a group of two (2) or three (3)), where do you look?

Business classifieds, and business brokers, have always been the best source of potential leads for businesses. You can speak with the local trade association for the industry in



question, and many (news agencies, medical practices, child care centers for example), have their own listing processes.

It is important that you have a rudimentary understanding of how to value businesses in your target industry.

## **11. VALUING THE BUSINESS**

The value of business is broken up into several parts:-

- A. Goodwill;
- B. Fixtures, Fittings, Plant and Equipment;
- C. Work in Progress and Debtors.

### **A. GOODWILL**

This is the most difficult component of the business to value. It is the component the Vendor asks for which compensates him for the fact that you will receive on-going income from the machine that he has built.

It is usually calculated as a multiplier of the average net income of the business over the last three (3) years.

Every type of business has a different multiplier. It is important that you speak with your Accountant and the industry association (if there is one), to find out what the goodwill multiplier is.

This figure is usually the most hotly contested and intensively negotiated part of a business purchase.

Different industries have different multipliers (for example accountancy practices a multiplier of 1 between .8 and 1, legal practices a multiplier of .3 etc.)

Multipliers are often expressed as percentages based on the return you receive for the purchase price (eg caravan parks, 16%, that is you should receive 16% return on the purchase price, or put another way, the net income should be 16% of what you paid for the goodwill).

Percentages are multipliers that may be moved backwards and forwards depending upon the quality of the business, its years of trading, the volatility of the market, the desperate nature of the Vendor, or patchy trading history of the business.

## **B. FIXTURES, FITTINGS, PLANT AND EQUIPMENT**

Most often these items are bought at their “written down value”, that is, the value to which the Vendor has written them down in the depreciation schedule for those items of equipment. Sometimes however, there is contention between the Vendor and Purchaser over this value.

The Vendor may wish to keep the fixtures, fittings, plant and equipment figure low and the goodwill figure high in order to minimize Capital Gains Tax. The gains tax paid on the goodwill component of the business by a Vendor, is considerably lower than other items of the business.

Conversely, the Purchaser, if he can legitimately raise the value of the fixtures, fittings, plant and equipment, will gain additional depreciation benefits, and will lower the “indexed cost base” of the business, the starting figure for your Capital Gains Tax bill which you will eventually pay when you sell the business.

Any figures used in the purchase between the parties, must be able to be justified to the Australian Taxation Office. It is important that you consult both your Solicitor and Accountant in relation to ensuring that whatever action you take with the breakdown of the purchase price, is sustainable and can be justified to the Australian Taxation Office.

Many parties simply decide not to complete a breakdown of the purchase price, and “go their separate ways”, in relation to recording the breakdown of the components of the business.

### **C. WORK IN PROGRESS AND DEBTORS**

It is not normal to buy the debtors of a business (that is the outstanding debts which have already been invoiced by the Vendor but have not yet been paid). If you were to buy the shares in the Company which runs the business, rather than the business itself (*see below*), then all of the assets of the Company remain in tact. Otherwise, the debtors belong to the Vendor, and the Vendor may collect them (with or without your assistance).

Ordinarily, some assistance is provided by you, as you will be dealing with the customers and cheques will be coming in to the business premises. You are not responsible for any invoices which were issued before the settlement date, which are not collected.

With regard to work in progress (orders which have not yet been completed, delivered and invoiced) you may:-

- (a) Buy these at invoice price;
- (b) Not buy these but be faced with having to complete the work (not recommenced);
- (c) Split the proceeds;
- (d) Pick a particular part of the process (for example orders completed and ready for delivery), and use that point to divide jobs between Vendor and Purchaser.

## **12. BUYING THE BUSINESS OR BUYING THE COMPANY**

Occasionally, it is suggested (and there may be some benefit), in buying the shares in a Company which runs the business, rather than buying the business assets from the Company.

If the Vendor uses a corporate structure for example XYZ Pty Ltd trading as ABC Fencing, there are two (2) separate entities, the business ABC Fencing, and the Company which owns that business XYZ Pty Ltd.

You may buy the business from the Company which is not a legal entity. You set up your own structure and commence trading as a brand new entity, from day one.

Alternatively, you may buy the shares in XYZ Pty Ltd and have that Company continue to trade as ABC Fencing.

If you do so, the Company will be the owner of the business both before and after settlement, and you will simply own the shares in that Company and have the ability to direct it.

Most of the benefits flow to the Vendor by using this structure, and you will inherit any sins and skeletons in the closet committed by that Company prior to the date for completion. There may be Capital Gains and Stamp Duty benefits to be gained by you however, and certain non-transferable licenses (depending upon the industry), might be able to be preserved by using this structure. It is not normally recommended however.

### **13. STARTING A BUSINESS FROM SCRATCH**

An alternative and seemingly cheaper option to buying an existing business is to start your own.

#### **Benefits of starting your own business:-**

- A. Can be cheaper;
- B. Can be set up using your own systems and procedures in your own manner;
- C. Can be grown at your own pace;
- D. Requires less immediate capital input.

#### **Disadvantages:-**

- A. More likely to fail;
- B. May not be any cheaper in the long run;

- C. No track history of income which will affect both financing and prospects of success;
- D. No client base, no goodwill, no market presence.

#### **14. GOING INTO COMPETITION WITH YOUR CURRENT EMPLOYER (COMPETITION CLAUSES AND RESTRAINT CLAUSES)**

You may be considering setting up in competition to your present employer, and even, perhaps, taking some of your employer's clients with you.

Contrary to common belief, this is not automatically taboo.

Unless you have agreed to a restraint, there is nothing to prevent you from setting up in competition with your employer, and taking some clients with you.

There are some rules however:-

- A. You cannot, in preparation for your departure, use your employer's equipment, systems, procedures or records to lure clients away.
- B. Generally speaking, you cannot take client records with you, which have been copied before your departure. Photocopying and removing client lists, ledgers, data bases, or precedents is not permitted.
- C. You cannot use your employer's telephone and other systems to "set clients up to leave", prior to your departure.

In the absence of a Restraint Agreement however, there is nothing to stop you from speaking with customers once you are ready to leave, and soliciting them to come with you.

If you are subject to a Restraint Agreement, you should take that Agreement to your Solicitor and have it looked at to see if it is binding and reasonable, prior to deciding upon your course of action.

You are not permitted to run a "parallel business". That is, you are not permitted to stay employed with your present employer, and run a separate business in competition with your employer.

## **15. ASSESS YOUR STRENGTHS AND WEAKNESSES**

The first thing you should do is make an honest and realistic assessment (seeking input from people whose opinions you value and trust), as to which of these skills you have best.

You will probably know intuitively, which of these three (3) areas is your forte, but it is important to assess how far behind the other two skill sets are.

## **16. MATCH THE SKILLS WITH YOUR GOALS**

By now you should have assessed and written down what it is that you want from this business venture; money, lifestyle, growth, secure retirement, etc.

You will have asked yourself what do I want this business to look like in 5 years, 10 years and 15 years time. Most of us know instinctively whether we want to grow into a world-wide phenomenon, whether we are happy to become a medium sized business, or whether we are simply happy to have a business that is small enough to manage but large enough to provide financially for our families, and not impinge on our lifestyle and free time.

## **17. LOOK FOR AN EXISTING OR A NEW BUSINESS WHICH MATCHES YOUR SKILL SET AND YOUR GOALS**

This is not as easy as it sounds. Apart from all of the characteristics of the business (if it is existing, its trading history, finances, clients, strengths, weaknesses, opportunities and threats), or if it is a new venture (all of the set up issues, market assessment, building of a client base, growth, systems, planning and the myriad of issues that go with starting a business from scratch), you have to look at whether each business does or has the potential to match your skill set, but meet your goals.

You are unlikely to be successful, even if you buy a perfectly satisfactory and profitable business, if your skill set is not suited to maintaining that profitability, continuing growth, and meeting any new threats that come the way of that business. Similarly, you are unlikely to be happy or satisfied even having bought or started a profitable business, which

suits your skill set, if it has no prospect of meeting your goals and providing you with the things you are looking for in life.

These might seem like small or irrelevant things, particularly if you already know the type of business, or indeed the actual business that you want.

It is important however that you devote some time to looking at, and I believe writing down, these aspects, as you are about to put a great deal of time and effort, and a substantial portion of your life into this business, and you should at least pause and ask yourself:-

- A. Do I have the skills to do this particular job;
- B. Can I fill in any of the gaps that are missing and do I have the strengths to improve any weaknesses in the business;
- C. Will this business get me where I want to go.

There is nothing more certain to kill a business than lack of enthusiasm, care or interest from an owner, who has become “burned out”, because he found the business was not suited to him, or didn’t go where he wanted it to go.

Inevitably this feeling flows through to all aspects of the business, and the people who work in it, and this shows in the financial performance and viability of the business.

## **18. JOINT VENTURES AND EXPANSIONS**

If you have a business that is successful but is not covering all of its market, or needs to expand to ensure its survival, then you might want to look at a joint venture.

The trend these days is toward specific project joint ventures, that is, assembling together a group of people with specific skill sets designed for a single venture or project only.

You may have a manufacturing capability and another potential joint venturer may have a marketing ability or distribution lines together with a brand name. Several things about joint ventures are vital:-

- A. Don’t rush;

- B. Do not invite anyone into the venture who does not have something to bring to the table;
- C. Be very specific about the roles and the goals of the parties and the venture.

Use a project specific entity (separate Company).

Document the roles, expectations, capital requirements and profit distribution arrangements (including salaries for any parties who are going to be directly involved), in a Joint Venture document.

Treat the joint venture as a separate entity from your core business. Begin with the end in mind.

Ask yourself how much information can I release during the initial negotiation period without jeopardizing my core business.

Make sure, if it's a merger, the personalities and goals of the parties are aligned. Look at where the key people in each organization are prepared to "get on board".

Ensure that you won't lose any key parties in your own organization as a result of the venture.

Do a proper due diligence.

Ensure Confidentiality Agreements are signed.

## **19. WHAT TO LOOK FOR IN A NEW OR EXISTING BUSINESS**

Businesses grow because they turn out high quality goods and services, at prices perceived to be "good value", on a consistent basis.

There is no benefit to occasionally turning out an amazing patch of goods, service or quality.



In order to meet this consistency requirement (the most important requirement in service or product delivery), you must have systems.

Look for a business which either already has good systems, or where your skill set or knowledge can produce systems.

The ability to discover the fastest and best way to produce a product or service, create that as a system, and install it so that **EVERYBODY** uses that system consistently, is the key to a successful business.

It affects every key performance indicator for the business:-

Speed of service, how you are perceived by the public; profit margin; returns and complaint numbers; your ability to order supplies accurately thereby avoiding wastage; your reputation in the market place; your ability to differentiate yourself from competitors on something other than price; your profitability.

A great deal of money, growth and profitability can be made if you can take a business that is not systemized, and systemize it for growth.

Many people (mostly technicians); will tell you that their business, or particularly the part of it that they are in, cannot be systemized, because, "it relies too much on individual skill and flair".

Have you ever wondered why some sales people are more successful than others and why some businesses attract customers when others don't. This is often held up as an example of why a business or part of it cannot be systemized.

In my experience any series of acts done, no matter how intuitively, can always be reduced, in part at least, into a series of systems' scripts which can be followed by anybody.

In other words, if you observe your best performers in a particular area, you will notice a pattern of behaviour, speech or activity, which you can record into a system or script, and used to train your other less successful people in that field.

They may not turn into a clone of your top dog, but if they follow the words and actions of that person, performance will lift.

People say, “But that’s not my style”. This is not about style. This about taking the building blocks of the successful performance, recognizing them, recording and scripting them, and training your less successful people to adopt those building blocks. They can place their own style over the top of those building blocks. These issues are not incompatible, and you can add systems to even the most meandering and unstructured process, which appears to rely wholly upon intuition.

Sales departments for years have perpetuated the myth that sales people have their own particular style, which should not be interfered with.

Companies with successful sales teams have a core structure and a clear system for how their sales people perform.

## **20. WHAT IF YOU DON'T HAVE THE SKILL SET TO INSTALL SYSTEMS AND PROCEDURES?**

The answer is to think extremely carefully about starting a business from scratch, and if you buy a business, ensure that it already has systems and procedures in place.

How can you do that?

The way to maximize your chances, is to look at a franchise.

Franchises have been through several evolutions in the public’s mind.

Early on, on the back of the success of such franchises as McDonalds, they were seen as the great lifestyle decision of the 80’s. You could buy into a multinational, and everything was done for you. Essentially, it appeared to be semi-retirement, and the money simply went in the till.

Then franchising exploded. The resultant flood of franchise groups which had no systems and procedures, no proven market history, and no ability to provide that stable systemized process, earned franchising in general the reputation of either:-

- A. Buy yourself a job – franchises were essentially you were the cog in the wheel, and if you did not work, then the business was not profitable. Personal services franchises (mowing, car washing and others), were the biggest offenders; or
- B. Dodgy operators flogging you a great concept, but leaving you with no proven system for delivery of goods or services. (This is actually what you are supposed to get when buying a franchise).

Franchising has now moved beyond that with the compulsory code of conduct, and with the economy shaking out poor operators.

## **21. SYSTEMS GROWTH AND FRANCHISES**

These issues are perhaps the biggest secret to achieving your goals in business, and having a happy life.

It is important that your business does not take over your life.

The common misconception is that, in order to be successful, you must be so completely driven by the business, that it consumes you and you are wedded to it 24 hours a day 7 days a week.

This is a life out of balance, and is unlikely to be conducive to your long term goals, happiness, or a proper family life.

When starting or buying a business, you should look for a business that can be systemized to run **WITHOUT YOU**.

In order to have the business generating money without you having to touch every part of it all the time, systems and procedures need to be in place, so that whatever goods or services you are presenting, this happens to a high standard, consistently.

How central this is to the business you buy, and whether or not it is “the one for you”, will be affected by your goals.

If your goal is simply to “buy a job”, and you are going into business to get away from a difficult employment situation, then after some years, you may find that the only thing that has changed is that, if you do not work, you do not have any money.

You should think carefully about going into businesses where your own labour is the essential ingredient of the money-making machine.

These businesses are difficult to grow and difficult to get away from even for short breaks, and you will still have all of the difficulties attached to running a small business (marketing, logistics, paper work, taxation, planning, debt collection, equipment maintenance, presentation etc).

Each of us has a core skill. We are, first and foremost, generally technicians. We know how to “assemble the widgets”, to get the job done in our particular area of skill. Even if we don’t, in relation to a business we are intending to buy, this is a training issue, and we can learn it.

Many of us will have an ability to sell, and to drive a big picture (the entrepreneur’s skill). All small business owners should have some affinity with this skill.

Many of us will also have the ability to manage people and systems, and to create coherent and consistent ways of producing high quality goods and services in the same way all the time.

Small business owners should have at least a basic grasp of all of these issues.

## **22. SYSTEMS**

It is often said that if you don’t have a system you don’t have a business to sell. You should always be buying or starting a business with one eye on increasing its value for sale. You may not have the luxury of choosing the timing of the sale of your business, and

keeping the business in tip-top shape or keep your bank happy, keep you alert and able to take advantage of opportunities, and fuel growth.

The only way to keep value in your business, is to have it sufficiently systemized that a buyer (or manager, or staff member), can step into any part of it and run it with minimum knowledge and effort.

If all of the systems and procedures are “in your head”, then so is all of the value. You have nothing to sell.

Systemizing your business is a journey that must be constantly undertaken. The search for improvements and streamlining never stops, and must become part of the culture of running your business. If you adopt a mania for systemizing, recording and training in your business, your staff will adopt it too. It will take on a life of its own, and your people will start to volunteer suggestions and solutions along the way, thus making your job easier.

Systemizing is a consultative process. There is no point in you “issuing a memo” which changes or improves the system, only to find that those on the shop floor, come back to you and tell you that it won't work because it's impractical.

Likewise, no change in the system should be considered to be final. Changes should be suggested, discussed, scoped out, trialed, and if successful adopted. If the trial is not successful, the search continues.

It seems old and tired, but you must have a Procedures Manual, and it can't simply sit in a folder on a shelf. You need to allocate time each month to a structured staff meeting to talk about aspects of the business and to provide a forum for people to raise problems and make suggestions. A permanent part of that meeting agenda must be a review of a particular section of the Procedures Manual. This will keep it fresh, form part of your training, and help to install improvements in your system.

## **23. GROWTH**

All businesses need to grow. Growth helps balance the natural loss of profitability and business through competition, changes in Government regulation, maturity in the market,

price changes, and obsolescence of products and services. You need to plan for and monitor growth.

Static growth over a long period of time (or worse, decline), is not a healthy sign in your business.

Be aware of growth for its own sake though.

It is not automatically beneficial to you or your business to be madly growing at a rate so fast that it is unsustainable, that the quality of your service is affected, or that it doesn't meet your personal goals.

If your interest in buying or starting a business does not revolve around growing it into a nation-wide or multi-national organization, then sufficient growth to meet your goals will be all you need.

The "take home message", is that, whatever your growth goal, you measure and monitor so that you have some idea of whether you are ahead or behind in the schedule.

## **24. PLANNING FOR THE FUTURE (MORE ON SYSTEMS)**

It is important that, when you go into business, you have a clear goal in mind. You may wish to:-

- A. Grow the business into a multi-national;
- B. Grow the business to the point where it can be sold to a competitor or larger company;
- C. Grow the business to the point where it is manageable by you but does not get any bigger;
- D. Not grow the business at all and simply use it as a "cash cow", to build a passive income through investment.

It is important that you examine what you exactly want to achieve, rather than looking to escape from your present circumstances. It is highly likely that your present circumstances, though possibly occasionally unpleasant, may be more palatable than

running a small business 80 or 90 hours a week for roughly the same (or even less) money.

Regardless of your goals, one thing is the most important:-

**YOU MUST HAVE SUFFICIENT**  
**SYSTEMS AND PROCEDURES THAT**  
**THE BUSINESS CAN RUN**  
**PROFITABLY AT LEAST FOR A**  
**REASONABLE TIME, WITHOUT YOU!**

No matter what your business is, it is vital that you systemize it, and document that systemization. This, to me, seems like a distraction from the day to day business of getting money into the till.

It is not!

You must take the time (or hire someone to take the time), to systemize and document every aspect of your business.

A proper set of procedures, kept in a regularly up-dated manual, will:-

- A. Make your business run more smoothly;
- B. Take the pressure off you when taking on new staff, or if you lose a staff member;
- C. Assist with enquiries, demands and audits from regulatory bodies;
- D. Allow you to “take your eye off the ball” occasionally;
- E. Remove you as the “hub of the wheel”.

Without a proper manual, systems and procedures, you have to re-invent processes, every time you take on a new staff member. This is not only tiresome it's dangerous, and it will rob you of free time.

If there are systems and procedures written down in the business that you buy, write them down as you are doing your orientation.

Make sure that you allocate time to turn those notes into proper check lists for how to do all of the tasks required for running of the business. These check lists should be kept in a manual (a laminated loose-leaf system if they are to be kept in a wet or dirty area), and time should be allocated (even if it is only half an hour a month), to make sure that all of your people are up to date with how things are to be done.

An incentive scheme for the best idea and how to improve the system is a great idea.

You might think that in a business as small as yours, there is no need to document the systems and procedures, but there is one other very important reason to do so:-

## **YOUR BUSINESS HAS NO VALUE** **AND NO GOODWILL UNLESS IT CAN** **BE RUN WITHOUT OUT.**

The goodwill of a small business should not be locked in the head of the owner. How can you sell the business if you are the only one who knows how to run it.

If you are not the sort of person who knows how to create a procedures manual (we suggest you have a go anyway, you might be surprised at how good you are at it), allocate the resources to get somebody to do, or find a staff member who is a “completer/finisher”, and ask them to commence the process.

Remember, it is an ongoing process, and you are unlikely to get it right the first time.



The manual should be updated constantly so that it contains the latest processes for running your business.

If your goal is to continue to grow, then you may find capital is a problem, and, provided your systems and procedures are good enough, you may want to consider franchising.

Setting up a franchise is a completely separate course, at least double the size of this one, but it is a faster way to grow a business than conventional opening of stores.

## **25. LICENSING**

Virtually every business now requires some type of licence, and often multiple licences from different levels of Government and semi-government agencies.

Luckily, the Queensland Government has set up “Smart Licence”, which is an agency that will advise you of applicable State (and sometimes local), Government licences required for the running of your business. A call to your local authority should reveal the balance of licences required. You should double check this advice with your Solicitor to ensure that you understand all of the regulatory regimes applicable.

Some very few businesses will require Commonwealth Licensing (child care, funding arrangements for example).

## **26. BUDGETING, FINANCE**

### **A. FINANCE/FACTORING**

Most small businesses fail because of a lack of capital or cash flow. It is fair to say that most businesses start with a good idea that either doesn't sell, or the owners “can't hang on long enough”, to get the business to the point where it is profitable and has a future.

### **B. BUDGETING CASH FLOW**

There is no more important part of planning for buying or starting a business than to work out what it is going to cost each week and month for the first two years, and to ascertain whether or not you can afford to cover that cost either from existing earnings, or from your capital reserves.

Your venture is bound to fail, if the business is going to cost say, \$100,000.00 in its first year, and your projected cash flow and your capital reserves total \$80,000.00.

This might seem like a simple concept, but the vast majority of businesses simply “get in and get started”, without considering the short, medium, and the long term sustainability of a business.

### **C. DAILY, WEEKLY AND MONTHLY BUDGETS**

This process does not have to be complex, but you must know exactly what your target income is for each day, week and month, and what your expenses are likely to be.

You do not need the world’s largest accounting firm to prepare you a beautifully presented set of financials. You can list your income and expenses each day, week and month, on a sheet of paper kept in a folder. If you are, or know someone who is, familiar with Microsoft Excel, this is an ideal format for spreadsheets for income and expenditure.

Simply list your expenses (budgeted in the first column, and actual in the column beside it), and then above that your projected and actual income for the same day, week and month. See sample in Appendix.

It is important that you compare corresponding periods (the previous day, week or month, and that same period for the previous year if you have it), so that you can establish a trend in increasing or declining income, or a blow-out in particular expenses.

It is very easy on a day to day basis to lose control of your expenditure, as you do not realize what your purchases are hour by hour and day by day.

This single tool, though it seems boring, and may be the last thing you want to do at the end of the day, will tell you precisely whether the business is growing or shrinking, and help you determine your viability daily.

#### **D. THE EMOTIONAL ROLLER-COASTER**

It is important to keep daily figures in perspective. It is easy to fall into the trap of seeing a good day or a bad day in your figures, as ecstasy or agony. Becoming prey to this roller-coaster will take the fun out of your business (and you must have some fun). Keep these daily figures in perspective and look for trends rather than allowing yourself to become the pinball in the daily budgets machine.

Other important/useful statistics:-

(a) Cash book balance

This is your present bank account balance to which you add any cheques that you have written which have not been presented yet (unpresented cheques).

This tells you, precisely what your balance will be, in the event that all of the cheques you have posted, are presented immediately, with no further income. This gives you a “worst case scenario”, for your bank balance and tells you how much precisely you can spend as a maximum.

(b) A list of creditors unpaid

This tells you what your likely obligations are going to be over the immediate couple of weeks. They can simply be crossed off once they have been paid.

- (c) A list of debtors separated into current/30/60/90 days

Many Accountants will tell you to concentrate upon your current debtors and not worry about the older debtors.

I believe that all debtors are equally important, and debtors should not be allowed to get the impression that they can constantly lie in the 90 day column.

Many small business owners fear their debtors. They worry that contacting debtors directly and asking them to pay their bill will lead to a loss of that client and a drop in income.

This is not the case.

In the wake of the depression in Australia in the early 1990's, many companies, particularly the large ones, have a strategy of not paying you until you actually take some step to ask to be paid.

In many cases, statements of account sent through the post, are simply ignored and no longer have any value.

There is no substitute for ringing a debtor (preferably very close after the time for payment has passed), and undertaking the process of asking to be paid.

## **27. RETAIL PRESENTATION ISSUES**

Whatever business you are going into, it is absolutely vital that time and effort is spent looking at how your clients will perceive you from the first point of contact. Whether it's looking at your advertisement, making a phone call, or walking into your store, those clients are gathering information and using it to determine whether or not they will do business with you.

You cannot leave these impressions and decisions to chance.

Every message received by a client consciously or otherwise, helps them make the decision about doing business with you, and you should attempt to control as much of that process as possible. These issues run to:-

- A. Advertising layout;
- B. External signage;
- C. Floor stock layout;
- D. Perceived price and range;
- E. Counter presentation;
- F. Colours;
- G. Uniforms;
- H. Greetings used by staff;
- I. Management of contact with clients during the purchasing process;
- J. Clarity and usability of documentation handed to the client;
- K. How the price of the products is presented;
- L. How easily the client gets the product that they want (from their perspective), and many more.

Each of these issues, together with an assessment of where your business fits into the market place compared to other traders, and how you are perceived by the target market, must be considered, written down, systemized and monitored.

If you are going to run a successful small business, you cannot collect the goodwill of the business in your head. You cannot be the only person that “knows all about” the aspects of your business.

You will find that if you write down what you do simply and clearly, and provide that information to those that you work with, in a way that they can understand it, all of a sudden you have a “system”, which works uniformly and seamlessly and creates happy clients.

The trick then is to monitor and modify the system so that it continues to get better, from the client’s perspective.

Often clients' opinions are formed by the smallest things. Those opinions are based around how easy and pleasant their interaction is with you. Your system has to find the balance between safely and smoothly delivering profits, and creating happy clients who believe they have received value for money.

## **28. NAMES, SIGNAGE, LOGOS**

There are many hundreds of people who will tell you that they can assist you with this process.

Many will use jargon like, "branding", "badging", "positioning statements", and a great deal of other impressive sounding wording.

The fact is that you need something simple that says what you do, and how you do it.

It needs to be short and distinctive, and it needs to be uniformly used across everything that you do, from advertising, through store presentation, and on to documentation.

Advertising agencies, graphic art studios, and design houses, can all assist with this process, and unless you are particularly good at graphic design, this is money well spent.

Remember though to do what you always do when making an important purchase:-

- A. Ask around for referrals;
- B. Seek samples of previous work;
- C. Interview several possibilities;
- D. Scope out what you actually want and write it down as best you can;
- E. Do not rush to a decision;
- F. If in doubt – continue to look.

Many times people who start or buy small businesses place themselves under unreasonable pressure or accept the deadlines of Vendors or Real Estate Agents, seeking to run their own agendas.

It is important to remember to set your own deadlines, and to negotiate time frames that suit you. If an arrangement or a contract is not coming together, there is a reason for that.

There comes a time when no amount of additional effort (or ignoring of the warning signs), is going to save a negotiation, and you should accept that this business, or premises, or business relationship “is not going to work out”.

Our natural reaction is to redouble our efforts in an effort to reach the goal and not appear as a quitter. Recognize the warning signs that a deal is not going to come together and try to listen objectively to those warning signs.

## **29. ADVERTISING, MARKETING**

You can read expert opinions and study this issue for the rest of your business life and still not have mastered it.

The reality is that most small businesses do not have the budget to advertise as broadly as they would like.

As a rule of thumb, your advertising and marketing budget should be between 4% and 6% of your gross turnover. Some industries require more and some less, and, as always, the magic is in how it is spent and monitoring the value that comes from each dollar spent.

Just to make things that little bit more difficult, if you are entering into what is called a mature market place (lots of large operators selling products which the public is quite familiar with, and which the public consider commodities, where price is the major issue), many of the “innovative” ideas for selling the products, will have been tried and be in place.

Further, advertising ideas and systems will often grow stale over time, and need to be replaced or updated.

The good news is, old fashioned methods still work best.

- A. Value each new customer and do a good job;
- B. Keep a record of where these people come from and seek referrals;

- C. Say thank you to referrers;
- D. Run a marketing and advertising campaign that is appropriate to your business and budget, and spend time thinking about it, varying it, and updating it on a monthly basis;
- E. Set aside a specific part of your budget for “trying something new”;
- F. Seek advice;
- G. Watch your competitors;
- H. Pinch ideas that you see from the market place (not necessarily from your industry).

Every business needs to have a strategy for creating work, and that strategy needs to be reviewed and updated. It does not need to be complex or involved, necessarily nationwide or prime time television advertising. So long as you have a plan, you measure the results, and you review the plan, it will be successful for you.

### **30. POSITIONING IN THE MARKET**

There is no point in selling luxury cruise ships in the middle of the desert. It is important that whatever product you sell, you identify the target market, go after that market, and check that the market actually wants your product at the price and in the way you’re presenting it.

In many cases, with mature products, this is quite simple because the playing field is well defined, but joining a crowded market place with nothing new to offer is the other side of that coin.

Again, homework is the key:-

- A.** Research your product in the market place – who buys it, at what price, who from, how it is delivered, who are the market leaders for that product and what are they doing (and perhaps more importantly, where do their customers think they are failing);
- B.** Determine whether you can do the job faster, better, cheaper or more palatably for a significant part of the market than the market leaders;



- C. Determine the ingredients you need to differentiate your product and the strategies to get customers to buy your product instead of that of your competitors.

## **31. THE PURCHASING PROCESS**

### **A. INITIAL DISCUSSIONS**

The Vendor or the Business Broker (if there is one), will have some initial discussions with you and show you through and around the business. You may be required to sign a Confidentiality Agreement prior to doing so. Have this document checked by your Solicitor.

### **B. YOU SHOULD THEN RECEIVE SOME INITIAL INFORMATION WHICH SHOULD INCLUDE:-**

- (a) Financials for the business for the last three (3) years. Tax returns for the taxpayers related to the business for the last three (3) years. (NOTE: These may not match, and it is the tax figures which are the ones that should be used for calculation of any values for the business. It is not necessarily a danger sign that these figures vary).
- (b) A breakdown of wages and salaries.
- (c) A depreciation schedule of the equipment and details of any equipment leases or hiring arrangements for equipment.

You should look at these carefully and ensure that you understand them. They should be checked independently by your Accountant.

### **C. ONCE YOU ARE HAPPY THAT THE BUSINESS:-**

- (a) Suits you;
- (b) Can be afforded by you;
- (c) Is financially viable;
- (d) Has been accurately valued by you and your Accountant, then you may wish to make an offer.

That offer should be done by signed contract.

## **32. CONTRACT CONDITIONS**

The Real Estate Institute of Queensland (REIQ), produces a standard Business Purchase Contract with variables for most of the things that you will see on the assets lists, or which are likely to be issues in the purchase.

Some are more valuable and contentious than others.

### **A. PRE-SETTLEMENT TRIAL PERIOD**

You may be allowed to enter into the business before settlement, for some weeks, to have a look at it. This is not common, but is catered for in the Contract.

### **B. POST-SETTLEMENT ASSISTANCE FROM THE VENDOR**

It is essential that, after completion, the Vendor remains to show you the systems and procedures, and introduce you to clients and suppliers.

What period you receive is a matter for negotiation, and depends upon the type and size of the business you are buying.

## **33. DUE DILIGENCE AND FINANCE CLAUSES**

The Contract caters for the deal to be subject to finance. Obtaining finance for the purchase of a business is often more difficult than the purchase of a house or commercial property. You should expect approval to take several weeks, but you can start early by providing your financier with all of the due diligence material you receive, as you receive it.

If you wish to move quickly to secure the business and take it off the market, or if the issue is complex, you may want to use a due diligence clause. By doing this you will agree all of the terms and conditions and the purchase price, but it will be subject to the Vendor making all of the material available to you and answering any questions you may have,

prior to the Contract becoming unconditional. You may “bail out” of the Contract and recover your deposit if your due diligence is not satisfactory.

### **34. STOCK**

Stock is the great black hole of retail business. Control of your stock levels, pricing of old and slow moving stock, and the ability to identify fast moving stock with good margin, are the hallmarks of successful retail businesses. Again, you do not need a Rolls Royce stock control system (though it would be nice), to do this well. You do need to count your stock in and out. If you do not count your stock in, you have no idea what your inventory levels are, how old the stock is, or how much of your working capital is tied up on the floor or in the warehouse.

### **35. BUYING STOCK**

Buying stock is always a risk and any new line should be treated with caution.

Samples or small runs, on consignment can help you test new lines. Some manufacturers, (quite few these days), will allow you a return policy on a new line, because they see it as part of a long term relationship.

#### **A. MARGINS**

Most industries will have a “usual mark-up” on wholesale.

Research on a regular basis with your competitors, is vital. Your customers compare prices, why shouldn't you.

#### **B. PERISHABLE STOCK**

Watch for wastage and stock which becomes unsalable due to age.

Many food businesses will have a waste register, and examine stock thrown out due to age, and ingredients ruined by staff members, with particular care. This is essentially capital of yours, hard earned money, which has been flushed down

the toilet. You need a mechanism for recognizing this, dealing with serial offenders, and adjusting your purchases accordingly.

## **36. THE CONTRACT PROCESS**

How your Contract comes together and is settled may vary a little.

There are subtle differences from State to State and even from deal to deal.

### **A. THE SOURCE OF THE CONTRACT**

The business that you buy may come to you from a number of sources:-

- (a) Newspaper advertisement;
- (b) Broker;
- (c) Direct approach by you;
- (d) Approach from the Vendor;
- (e) Liquidator or Receiver's sale;
- (f) Management buy-out.

### **B. MORE ON DUE DILIGENCE**

Obviously, you will need to do some homework on the business to determine whether it is any good and whether it is the one for you.

There are two possible processes:-

- (a) Due Diligence then Contract;
- (b) Initial overview followed by Contract with a Due Diligence clause.

#### **(a) Due Diligence then Contract:-**

This is the way to go if you feel no pressure that someone else may buy the business. It allows you an open-ended period whereby you can call for documents and make enquiries, seek advice and make a decision without

any time constraints. The Vendor however is also not constrained, and may wind up selling the business to somebody else.

**(b) Initial overview followed by Contract with a Due Diligence clause:-**

This is the way to go if you fear that you have competitors for the purchase of the business. This ties up the Vendor to sell you the business on the terms specified on the Contract, but the Contract is specified to be, "Subject to Due Diligence". In this scenario the Vendor agrees to give you all of the material that you require to check the business out, and you then have a set time to make a decision as to whether or not to proceed. The downside of getting the business tied up, is that you will have a set deadline by which you must make up your mind. It can be extended by agreement of the Vendor, but if the Vendor will not extend, then you have to "bite the bullet". This can be stressful and lead to error.

**C. CONFIDENTIALITY CLAUSES**

For some particularly sensitive businesses, you may be required to sign an initial document, even to get material, with an obligation not to copy or disseminate it except to your advisors, and a requirement to return all of the material if the Contract does not proceed.

With respect to protecting their staff from the anxiety of worrying about the sale of the business, the seller may think it is important that you consider the confidentiality aspects of contact between the landlord and you. If the knowledge that you have signed a Contract to buy the business is sensitive and likely to cause destabilisation (and it would be in most cases), some confidentiality obligations for all of the parties, until particular milestones have been completed, would be very worthwhile. Again, this is mostly missing from standard Template Contracts.

**D. CONTRACT VARIABLES**

Contract terms vary from State to State. Many State Real Estate Institute organizations have a set of Standard Contracts (including one for the purchase of a business), with a standard set of Contract Terms and a Schedule where you fill in the variables.

Items to consider in your offer are:-

- (a) Purchase price;
- (b) Deposit;
- (c) Term of settlement;
- (d) Due diligence;
- (e) Finance;
- (f) Inclusions (telephone and facsimile numbers, logos, trade marks, web site, internet, email, Lease requirements (do you take out the existing terms or make the Vendor ensure that you have a new Lease. You may in fact want no Lease, and want to move the business)).
- (g) Staff requirements (either requiring new Contracts and security of tenure for key people, or requiring the Vendor to terminate the employment of unwanted staff).
- (h) Stock arrangements (either built into the purchase price “walk-in-walk-out”, or purchase price plus stock of your choice to an agreed value).

## **E. DEPOSIT**

A deposit of between five (5) and ten (10) percent is normally the appropriate yard stick. You may however be able to get away with paying a smaller deposit. The smaller your deposit is the smaller you are risking in the event that things go wrong early in the Contract. The deposit will be held in the agent’s Trust Account. If there is no agent, then it will be held in the Trust Account of one or other of the Solicitors involved in the transaction. The deposit should never be held by the Vendor. Some Vendors will attempt to negotiate for the release of the deposit before completion. You should resist this.

Payment of the deposit may be staged, with a certain amount paid when the Contract is signed, and the balance paid at another milestone (either when due

diligence is satisfied, or when finance is approved). This will save you tying up a significant amount of money, not earning interest, when a Contract is not certain to settle.

## **F. INCLUSIONS**

It is important to make sure that you have considered all of the assets of the business required to run it. These days assets like telephone and facsimile numbers, internet addresses, email systems and the mailing addresses included in them, customer data bases, trade marks and logos are increasingly important to the on-going viability of the business. Recent evolutions in structures used by people for asset protection may mean that some of these assets are actually not owned by the business, but are owned by an "I.P. company". This is a separate company with the same ownership structure, which holds certain key assets, but keeps them away from the trading of the business so that if the business hits trouble, those assets are not available to the creditors. Part of your due diligence must be to ask, "Are there any related companies which hold assets that the business uses?"

## **G. DATE FOR COMPLETION (SETTLEMENT DATE)**

This date should be, in my view, the soonest date available, by which you can do everything you need to do to be in a position to take control of the business.

Many people believe that the beginning of the month, the quarter, or the financial year are vital dates for completion. Whilst this is nice for the Vendor, there is no special magic in the actual date of the month or the time of the year. You should consider however, whether there are any special features of the business (delivery dates or cash flow cycle), which will make it easier for you to take over on a particular date. For example, years ago when the Child Care Government Subsidy System was in its infancy, the subsidy used to be paid quarterly in advance. Taking over a centre at the time this quarterly payment was due, was an enormous cash flow advantage.

## **H. STAGED OR DELAYED SETTLEMENT, AND RETENTIONS**

Some Contracts allow for payments over time. This is a form of Vendor finance, whereby the seller will give you control of the business, but take some security over it, and will allow you to make payments over a period of time, using the cash flow of the business. This is desirable, but involves you ensuring that you do not fall into breach, and losing control of the business, and the money you have put into it. The Vendor will usually take a Fixed and Floating Charge over the assets of the business, until these monies are paid, enabling the seizure of the business at very short notice. Interest may or may not be payable upon the balance of the purchase price.

Another feature of some Contracts is a retention. With this feature, you are effectively saying to the Vendor, “I’m paying you based upon the turnover that you have told me this business has. In order to be certain it continues with that turnover, we are going to hold a proportion of the purchase price, say, twenty (20) percent, until one (1) year after completion. If the turnover matches what you have told me, then you will get the balance of the purchase price, if not, then the purchase price will be reduced on a sliding scale.”

This is common in Contracts for the purchase of professional service businesses (accountancy firms and the like), where some of the client base may in fact leave after the business changes hands. The retention monies should be held by the agent or by one or other of the Lawyers, and invested in joint names of the Vendor and Purchaser, pending the end of the first year’s trading.

## **I. THE LEASE**

It is the Vendor’s responsibility to assist you with the assignment of the existing Lease term, or to introduce you to the Landlord, to negotiate a new Lease (whichever of these situations is specified on the Contract). The Contract should be subject to you achieving this goal. Looking at the terms of the Lease and determining whether the term and options to extend suit you, is something that should be done as early as possible in the process. It should not form part of the post-contract due diligence.



## **J. STAFF**

This is one of the most tricky and difficult aspects of the Contract process, for both parties. The Vendor does not want to speak to his staff until he knows that he has the business sold. You want to be certain that your key people will stay. Identifying those people that you want to stay and want to go, should be part of the early due diligence.

Once you have made these decisions, it is important that you have a mechanism in the Contract for the Vendor to be required to assist you to achieve these goals.

No one (not even the Vendor), can make key staff members stay after a sale. You can however seek to renew or extend the Contracts of key staff prior to releasing details to the staff of the existence of the Sale Contract for the business.

If you are in a dominant position in the negotiation, and if the key staff are sufficiently pivotal, you may seek to make the Contract subject to those staff members signing a new agreement with you. In this event, if staff members do not stay, and the value of the business walks with them, you have the option not to proceed.

## **K. STAMP DUTY**

This is a State Government Tax levied on any signed document relating to a transaction between parties.

Your Contract, and any associated transfer, attract stamp duty.

The Government no longer even pretends to provide a service in exchange for this tax, and has contracted out this process to law firms who are now unwilling participants in the process of assessing and collecting Government tax.

Stamp duty is levied on a sliding scale of the purchase price, and can be up to 3.75% of the price. This can be a significant amount, and you will have to find it in the purchase budget. It must be paid at or before settlement, and, if you intend to fund it from the bank, you should talk with your advisor about the logistics of doing so, as this is not always easy.

Stamp duty must be paid within twenty-eight days of the Contract becoming unconditional, whether the Contract is due to settle at that time or not. If you do not pay then interest and penalties apply. The Government does not wait for its money.

## **L. RESTRAINT CLAUSES**

These clauses are designed to prevent the Vendor (and if it is a Company, the Directors), from selling you the business and then setting up in competition with you.

This clause will usually specify a time period and geographic area, within which, the restrained parties, cannot conduct a business in competition with you, in any capacity whatsoever.

Obviously, this is a fairly serious restraint on the Vendor's ability to earn a living.

Naturally, Courts seek to limit this restraint, and if a restraint is expressed to be over too wide an area or too long a period, it will be held to be completely void, and the Vendor can compete with you immediately and right next door.

When determining a restraint clause, you should look at the client base spread geographically, and make a determination as to how long it will be before you control the client base and can go "head to head" with the Vendor for their loyalty. What is reasonable will be determined by the Court based upon an assessment of industry norms and of these criteria.

Be sure that you restrain all members of the family who have experience in running the business. It has happened before where restraints have been

effective against the Company Vendor, and the adult Directors, but suddenly the two sons who have worked in the business, turn up as the front men of a competing business.

## **M. ADVISORS AND SEARCHES**

It is possible for you to do your own conveyance of a business. It is possible, with enough time, homework and some luck, for you to successfully negotiate anything from building an aeroplane to doing it yourself brain surgery. The question is, "Is this smart, and are you receiving value for money?" All Lawyers in Australia are required to carry negligence insurance (professional indemnity), to cover any mistakes they have made. You get the benefit of this any time you engage a Solicitor.

Quite apart from this, you will have an enormous amount of work to do yourself in preparing to slide into the business, without having to deal with the mechanics of searches, documents and settlement.

You are unlikely to know whether you have made a mistake in the purchase, until you come to sell the business, by which time some records may have been lost, and it will be extremely difficult to go back and re-sign documents, or rectify defects in the transaction. Your Buyer, if properly advised, may well reject the transaction leaving you with a heavy price to pay.

Your Solicitor, when engaged, should check the following things:-

- (a) Does the Vendor own any business names, trade marks, web sites, motor vehicles, buildings and other items of value;
- (b) Are those items encumbered;
- (c) Is the Vendor bankrupt, in liquidation or under external administration (if so, the Vendor has no right to sell those assets);
- (d) Are all of the licences required to run the business current;
- (e) Are they transferable or do you have to apply afresh for new licences in your name;

- (f) Are the premises from which the business trades, properly zoned for the activity it carries on;
- (g) Is the Lease current, enforceable and registered;
- (h) Are there any breaches of the Lease or of any licences required to run the business;
- (i) Will the Lessor consent to assigning of the Lease, or providing a new one;
- (j) Is any of the equipment rented or subject to a Chattel Lease (in which case it is not owned by the Vendor and you may, depending upon what your Contract says, be able to force the Vendor to buy the equipment, or have the Lease or rental assigned to you).

Many Government agencies now have a licence enquiry bureau, whereby you can advise the type of business that you intend to carry on, and receive a complete list of the licences applicable to that business, and an explanation of how to go about having them assigned or new ones issued to you.

#### **N. LEASE ASSIGNMENT**

Most often the delay in these types of transactions (apart from your financier not being ready on the day), is in having the Lease assigned. The Vendor is required to approach the Lessor to seek consent to assignment. Your Solicitor however should be pushing this aspect, and ensuring that the consent is received, in writing, as soon as possible. Some Lessors have a formal approval process and may wish you to submit financial documentation, references, and sometimes attend an interview.

Once the written consent is received, the assignment documentation is drawn, (generally by your Solicitor), and a Deed of Covenant is drawn by the Lessor's Solicitor. This document is always slow to emerge, and your Solicitor should be alert to pressing for that document as soon as possible. The Vendor is required to pay the cost of the Lessor producing any assignment documentation.

#### **O. THE SETTLEMENT PROCESS AND ADJUSTMENTS TO THE PURCHASE PRICE**

In the lead up to settlement, if your Contract is a purchase price plus stock Contract rather than a walk-in-walk-out Contract (where stock is included), you will need to do a stock take.

This is normally done the day before settlement.

Most standard stock clauses allow the Purchaser to pick and choose stock, at cost value, up to a ceiling, after which the Purchaser may accept or reject stock. The total stock accepted, is paid at or before settlement, by separate bank cheque.

In some industries (notably the supermarket industry), specialist stock takers are available to do this quickly and simply.

A final check that all of the equipment listed in the Contract, is present, clean and in good order should also be done at this stage.

Electricity needs to be read and changed over, as will telephone, email, internet and any on-going advertising requirements. You are required to book the electricity and telephone changeover. Beware of time delays with this issue, and order your meter readings and changeover early.

Once this is done and satisfactory, you can liaise with your Solicitor regarding whether all of the documentation has been signed, and it will then be in order for settlement to take place. With many smaller businesses, this simply involves the Buyer handing the Seller a bank cheque for the purchase price as adjusted. With larger matters, or where they are more complex, a formal Settlement between the Lawyers will take place, where everything is checked, and the purchase price handed over at a formal gathering.

## **P. TYPES OF SETTLEMENT ADJUSTMENTS**

There are a number of possible adjustments which might move the purchase price up or down, they are:-

- (a) Pre-paid or unpaid advertising;
- (b) Pre-paid or unpaid rental on equipment;
- (c) Pre-paid or unpaid rent and outgoings;
- (d) Contributions to a merchant association in a shopping centre;
- (e) Franchise dues.

#### **Q. RELEASE OF ENCUMBRANCES**

One matter often overlooked in these matters when negotiating the Contract, or at settlement, is items of equipment subject to encumbrance.

Equipment may be the subject of a Bill of Sale or Chattel Lease, and if you are alert to this, your Contract may be written in such a way that the Vendor pays out these debts and assigns ownership under the Contract, free of encumbrance. If not, you will need to take an assignment of ownership, subject to the Lease arrangement.

Many owners of businesses do not realize that their bank has quietly taken a Fixed and Floating Charge over all of their assets.

Fixed and Floating Charges often appear with a stack of Mortgage documents, without any warning or explanation.

Many small business owners do not understand the significance of a Fixed and Floating Charge.

If you or your Solicitor do a search of the Company records for the Vendor, or a Bill of Sale search for individual Vendors, and find a Bill of Sale or a Charge, then, regardless of what the Contract says, you must obtain a release at settlement, otherwise you may not even become owner of that equipment, or may do so subject to the original debt. Many times financiers have turned up to seize equipment and found a startled Buyer who says that he gave the purchase money to the Vendor. The Vendor stopped making payments, ignored the default notices, and the Buyer was left with the wreckage.

Yet another reason to be professionally advised in relation to the transaction.

### **37. GST**

Businesses are now becoming attuned to the GST regime.

It is still quite common however for people to spend the GST component of their money that goes in the till, and “worry about the BAS later”.

This is the fastest way to lose control of your cash flow, and find yourself short of working capital, and unable to pay your bills.

### **GST IS NOT YOURS TO SPEND.**

You absolutely must have a GST suspense account, into which you put that proportion of each day’s or week’s takings, which relate to the GST. Even if you do not do this to the cent, you will find that BAS does not hold a quarterly terror, and that you have funds to pay your Tax obligations.

Many businesses, (mine included), have additional suspense accounts and put away money for keystone financial debts that occur on a regular basis (Group Tax, Personal Income Tax, wages). Your budget will tell you how much to put away on a daily basis, and your takings should be allocated in accordance with that budget – **NO MATTER**

### **WHAT!**

This financial discipline will ensure that you do not spend money which is technically “not yours”.

Suspense accounts for ongoing recurring liabilities, are hallmarks of successful small businesses.

### **38. PERSONAL SPENDING**

The next easiest way to lose control of your cash flow is to “live out of the till”. Your personal expenses must be separate from those of the business. Taking cash out of the takings for personal use is a bad habit. Set yourself a personal salary and make the business support it. Have your own personal spending account and put your drawings or salary into it. If you need further funds you can draw further if the business can stand it. Paying your personal accounts directly out of the business account or “dressing them up” as business expenses, messes up your budget and clouds your assessment of the viability of the business (not to mention setting up trouble with the ATO).

### **39. EQUIPMENT FINANCE – STRUCTURES**

Tailored finance is now available for virtually everything from your PC or fit out through to large specialized equipment.

The options range, broadly, is as follows:-

- A. Pay for the item from cash flow, own it, and depreciate it;
- B. Gear up on your normal capital loan using a redraw, and own the piece of equipment;
- C. Take out a separate business loan and provide a Bill of Sale over the piece of equipment itself;
- D. Undertake a Chattel Lease;
- E. Rent the item.

#### **A. BUYING FROM CASH FLOW**

This option, if you have the capital available, can be the fastest and simplest option. It does rob you of cash flow, and should only be undertaken if you are certain your budget allows for this. You should not automatically see it as a “no cost option” though. The process will in fact rob you of the use of that capital for other items, but this is not a problem if the cash flow can stand it. You should ensure that your Accountant has details of the purchase, as depreciation will usually be available as a Tax deduction on that item.

#### **B. REDRAW ON YOUR CAPITAL LOAN FACILITY**



This, though requiring contact with the bank, is a cheaper form of finance than those that follow. Your existing working capital requirements will be secured in some form, and therefore will attract a lower interest rate than Bill of Sale or Chattel Lease finance. You should compare rates for these three processes, when considering any equipment purchase. There is a school of thought which says that undertaking a Bill of Sale or Chattel Lease finance with a financier other than your main one, keeps these liabilities “off balance sheet”, and therefore does not affect your bank’s assessment of the viability of your business.

### **C. BILL OF SALE**

This process involves buying the piece of equipment, owning it, and giving security over that specific piece of equipment, in the form of a Bill of Sale. This will allow the financier to seize the asset, specifically, in the event that you default.

You pay the debt off on a principle and interest basis and receive a tax deduction for the interest component of your monthly repayment.

Because you own the equipment you also receive a depreciation allowance for it. You do not get a deduction for the capital repayment proportion of your monthly outlay. GST is not payable on your repayment.

### **D. CHATTEL LEASE**

This is an agreement whereby you still get the equipment, and you still make a monthly repayment.

The subtle difference is that the equipment is owned by the leasing company and not by you. The good news is that all of your repayment is tax deductible, not just the interest component. You get an option to buy the piece of equipment at an agreed residual value at the end of the term of the arrangement

(usually three (3) or four (4) years). The bad news is that GST is payable upon your monthly repayment. This, of course, is tax deductible.

## **E. RENTAL**

Rental is essentially what it says. The rental company will come and install the equipment, and if it breaks down will be required to repair or replace it. If the equipment has a serious depreciation over its life and becomes obsolete quickly, (say a computer), renting may well be sensible, as the computer will be worth nothing by the end of its lifespan, and you can simply rent a new one and start the process again.

Whichever option you choose, it is important that it suits your business, and that it makes economic sense.

Often, it is a matter of personal choice, business owners like to own their equipment, or are not interested in doing so and would prefer to lease or rent. It is important that you look at the length of time you are going to be using the equipment, and its likely value at the end of the arrangement. Also keep an eye upon the possibility that you may have to upgrade during the term of the agreement, or immediately after. If this is the case, then rental or Chattel Lease may be a better option.

## **40. FACTORING**

Factoring is an arrangement with a financier whereby they pay you immediately, in cash, the amount of any invoice which is owed to you, less a certain percentage (anywhere between 6% and 10%).

The theory is that this allows you to recover your debtors immediately, and accelerates your cash flow.

Essentially, as soon as you issue an invoice to one of your clients, the factoring company will pay you on that invoice.

There are some hidden difficulties however.

Firstly, the factoring margin which is kept by the company as a fee for providing of this service, can be significant, and may rob you of any profit margin you are seeking to gain on the invoice.

Secondly, if the invoice is not properly paid by the debtor to the factoring company, the factoring company can claim a refund and put you back where you started.

Of late, businesses which factor their debts, have been seen by traders in the market place as companies with “special problems”, and there has been a deal of “baggage”, that has come from using a factoring company.

#### **41. INSURANCE**

Every business person has uncomfortable feelings about insurance.

When things are going well, or times are tight, insurance is seen as an expense for which there is no benefit.

Unfortunately, you can't switch insurance on when you need it. Insurance is a constant part of the business landscape, and you **MUST** have it.

What type of insurance depends upon your business, your risk profile and your responsibilities both business and personal.

There is an ever-widening range of products available to you, and a good insurance broker is a must.

A core of essential insurance products are:-

- A. Contents and stock;
- B. Product liability, professional indemnity (negligence);
- C. Home insurance (protecting the asset which secures your working capital);
- D. Business interruption cover;

- E. Life cover;
- F. Income protection; and
- G. Trauma.

Business interruption, income protection and trauma are the three most often ignored types of cover.

Very few businesses can afford, without some outside help, simply to have the principal step out of the way for six months, and to cover that cost. Income protection/trauma insurance is designed to provide you with both a lump sum and/or on-going payments, to allow changes the business needs to make to cover the hole you will leave if you are “taken out of the picture”, for a period of time.

Not only is having these insurance covers important, but regularly reviewing the amount and type of cover is also important. Most brokers will do you a review checking on the suitability and level of your cover, without cost, and on a regular basis (yearly is best).

It is simply a matter of asking them to diarize the date each year (making a corresponding note in your diary), and having them do the exercise, then making the time to look at any recommendations they make.

Be aware that a second opinion and a check quote could be in order. Some brokers, unfortunately, still recommend the product which brings them the most commission, and any broker found doing this should be replaced.

## **42. RETIREMENT AND ESTATE PLANNING**

### **A. RETIREMENT PLANNING**

This is one of the most ignored parts of owning and running a business. Yet it is perhaps the most important.

What is the point of sloggng it out in your own business, if you are not working towards some kind of goal?

If that goal is not well defined and the pathway to it clear and monitored, you are not only kidding yourself about whether you will reach the goal, but you could be wasting your life. What could be more depressing than toiling away at your own business for decades, waking up on a milestone birthday (50 or 55), and realizing that you can't afford to get out because the sale price of your business will not fund your retirement, you have no other investments, and all that will happen is that you will lose your existing, inadequate, income stream?

You are then too old to do anything else, and you are chained to your business with no possibility of escape.

The solution is to work out what lifestyle you want, how long you have between now and retirement, and have a financial planner work out how much you need to earn and invest between now and then, in order to achieve that lifestyle. This seems simple but is not done by the vast majority of small business owners.

It is one of the many things that business owners "don't get around to", because they are too busy running the business.

I say this: "What is the point of all this effort if it is not leading to a secure and comfortable retirement?" This is not a question you can comfortably ask when you turn 50.

- (a) Make enquiries;
- (b) Select a financial planner;
- (c) Get him/her to do the math; and
- (d) Start the process.

There are as many ways to invest for your retirement, as there are investment products, and this is the subject of dozens of books.

The point I make is, get started; don't put it off.

## **B. ESTATE PLANNING**

Most people associate making a Will with dying. Most people would call thinking about dying (or actually dying), a fairly unpleasant experience.

The fact is making a Will is:-

- (a) Fast;
- (b) Simple;
- (c) Essential.

A Will is not about dying!!

A Will is about ensuring that the assets you have managed to gather together and keep during your working life, go to the people and in the directions that you want.

A Will is “traffic directions for your stuff”.

It is the fastest, simplest and cheapest legal service you are ever likely to undertake, and can take less than twenty (20) minutes. Once it’s signed, you can forget about it, except for a short review every few years.

This will give you peace of mind, and save your family cost, delay and anxiety if something happens to you. That alone should be reason enough for you to undertake this process.

## **43. TAXATION**

### **Introduction**

Failure to plan, budget for and pay taxation obligations is one of the major threats to small business.

Government taxes and charges now (ironically as a result of pressure from Governments on Lawyers), make up virtually all of the costs of buying a business.

Indeed, over 70% of the cost of even incorporating a new company, goes to the Government.

Failure to budget for local Government search costs and State Government stamp duty, can have your business under financial stress right from the start.

## **A. THE PURCHASE PROCESS**

When you sign a Contract to buy a business, you need to investigate aspects of its history, viability, and whether or not it has any “skeletons in the closet”.

This, in many respects involves checking the public records with Federal, State and Local Governments for things like:-

- (a) Is the Vendor bankrupt or in liquidation;
- (b) Is the Lease registered and are the tenancy rights protected;
- (c) Does the business have all of its licences required to operate;
- (d) Is it receiving Government funding and what is its status of entitlement (eg child care).

Each level of Government will charge a fee (sometimes a significant amount), to provide this information. These amounts, together with stamp duty, make up virtually the lion’s share of the cost of the purchase.

## **B. ON-GOING TAXATION**

Everybody knows that they have to pay tax.

Unfortunately, many small businesses do not plan for taxation, nor budget or put money aside for it.

There are too many other priorities, keeping the doors open for example.

Many small businesses wake up at tax time and find no preparations have been made, no money has been set aside, and that the bill is larger than expected.

This shock now arrives four times a year, because of the GST and Business Activity Statement (BAS) regime.

You now have to lodge a return and calculate and pay your obligations quarterly (and on large turnovers monthly).

Money to pay your taxation, like money to pay your GST, **IS NOT YOUR MONEY.**

A suspense account for your taxation obligations (or at the very least putting it in with your GST in that suspense account), is the safest and clearest way to avoid quarterly stress on your business.

Taxation for your employees (Group Tax), should be dealt with in the same way.

### **C. TAX PLANNING**

Of all of the advisors you need to help successfully run your business, an Accountant who understands and is interested in your business, and can speak a language you understand, is the most important.

If you are starting a business, or have bought a business with a small turnover, you do not need one of the global giants to advise you.

The key to choosing an Accountant is to choose someone who can explain concepts to you so simply that you understand them and have a working knowledge.

You do not need to read the Tax Act and understand every aspect of it. You do however need to understand what the tax cycles are for your business, what your business structure is, and how your particular income and taxation merry-go-round works.



Virtually every small business owner sees “tax time”, BAS and accounting as dead time, stolen from you and your family.

You may not have the turnover to run a full time internal Accountant, and an external advisor. You do however need to be able to produce simple and accurate projections for taxation, prepare and lodge your documentation on time, and have a system for keeping your records, so that when (**yes when**), someone from the ATO comes to look at it, it is all in order.

#### **D. TAX AUDITS**

The Tax Office still does have a large audit arm, which physically attends at your premises and crawls through all of your records.

These days however, they also have a range of simpler more efficient and more subtle processes for finding people who are “doing the wrong thing”.

#### **E. INDUSTRY TARGETS AND QUESTIONNAIRES**

The ATO periodically picks an industry and a particular form of non-compliance, and will issue a questionnaire to every member of that industry.

The answering of the questionnaire is not compulsory, but it is made clear that if you choose not to answer the questionnaire, you will “come to their attention”. The idea is, “if you co-operate with us we might shoot you, if you don’t co-operate, we will shoot you.”

Answering the questionnaire is designed to find out whether or not you are complying with your obligations in relation to that particular aspect of taxation. This saves audits, but can place you in an extremely difficult position. If you ever receive a questionnaire, seek advice on how to fill it in, but do so.

#### **F. TELEPHONE ENQUIRIES**

The ATO is now making unannounced telephone calls on taxpayers, particularly with regard to GST compliance, and the handling of stock. The idea is to ask you a series of questions, unannounced and unprepared, in an effort to find out what your practices are relating to a particular taxation issue.

People feel compelled to provide this information, and often, quite innocently, answer the questions inaccurately.

If you receive such a call, take the callers details (they are unlikely to give you any more than their first name), and tell them that you will field their questions now on the phone, check your position in relation to each of them, and provide them with an answer as quickly as possible.

You should then seek advice regarding the questions, and either provide a formal, limited, verbal response, or a written response.

You must do so quickly, in order to avoid a flag on your file.

## **G. DOCUMENT AUDITS**

These are a short and simple process for the ATO.

This is not a full audit, but simply a visit to your business to see what types of records you are holding, and “how good your systems are”. The logic behind this, is that if your records are in order, and proper time and effort is being put into their maintenance, your taxation position is likely to be similarly tidy and accurate.

You are entitled to have your advisor present during any of these visits, and document audits usually only take a couple of hours. This cost of having an advisor present is money well spent, as you can quickly find yourself out of your depth, even if you do keep your own books and records and are familiar with your processes.

A poor outcome from a document audit, can often lead to a graduated response from the ATO.

## **H. TAX SCHEMES AND “30<sup>TH</sup> JUNE SPENDING**

In the last decade there has been a lot of loose talk and foolish behaviour relating to the difference between tax avoidance and tax evasion.

Tax evasion is fraud and involves intentional and illegal concealment of taxable income. Tax avoidance is the legitimate structuring of your business to keep your taxation obligations to a minimum. There is nothing wrong with this process, despite the attempts of the ATO, and some sections of the media, to say otherwise.

It is your absolute right to put time and effort into using structures, and keeping records, which prove and reduce your taxation debt.

Also, in the last decade, there has been an explosion in schemes and products designed to reduce your taxation debt. Some of these are controversial, and some are artificial. Some are outright illegal.

I would say this,

- (a) Do not enter into any arrangement unless and until you fully understand it;
- (b) Do not feel pressured into any tax structure because of the date or time of year;
- (c) Consider how “visible” you become to the ATO by entering into a complex arrangement in the shadows of the 30<sup>th</sup> June;
- (d) Ask yourself (and your advisor) how likely you are to be able to afford to defend this position if an enquiry is made.

## **44. DEBT COLLECTION, CLIENT INDUCTION, CREDIT ASSESSMENT, COSTING YOUR PRODUCTS AND MARGINS**

One of the most important things, perhaps more important still than actually getting sales, is being paid for them.

Unless your business is “cash over the counter”, you will need good systems for the following:-

- A. Getting business in;
- B. Getting business done;
- C. Getting paid for it.

It is exceedingly, important that when someone commissions work from you, they understand exactly what the terms of the deal are, and what their financial obligations are.

It is vital that you have terms of trade, and a credit assessment procedure.

It is also vital that these documents are used and enforced!

Many times decisions are made to abandon proper procedures for credit terms and credit assessment.

The people who will put you in a position where you are asked to abandon these procedures, are the very people who will take advantage of it later, not to pay you.

Do not be frightened of being clear and robust with your terms of trade.

Do not be seduced or pressured by the size of the client or the job. If a client or a job is truly A Class, then compliance with your standard procedures should be no problem.

Ensure that no job is big enough to break you of itself.

If you are minded to take a commercial risk and “get in over your head” with a job, at least understand the size of the risk.

Credit monitoring and following up payments, is not a difficult job if you have the skill set, personality and procedures.

If you are not up to this work, then find someone in your organization that is.

This work is not difficult, and does not require “being nasty” to your clients.

Since the depression of the early 1990’s, most clients will withhold payment to you, until they are telephoned and asked for payment.

It is important that you have a system for following these items up, rather than simply waiting until your debtor “gets around to” forwarding a cheque to you.

If you are doing long term projects with open-end cost arrangements, security for the costs is also important to look at.

Most companies now have one Director, who is usually the Husband, with the Wife owning all of the assets.

Personal guarantees from the Directors, and these days, partners or spouses of the Directors (or alternatively the shareholders), are perfectly in order for long term credit arrangements or for large one-off projects. These items should form part of your terms of trade. These are not expensive items to have a Lawyer draw, and can be done from a fairly standard template.

Ensuring that your products are properly costed and that your margins exist and are maintained, is a mathematical exercise, which should involve your Accountant, and should be done at least annually.

It should also involve some market research to see what your competitors are charging for products, and should maintain your margin at all times.

There is no point in selling your products without a margin.

A product is a product, whether it is advice, a service, or a physical item.

You must know what it costs, and you must add a suitable margin. If the product will not sell at that price, then you should consider not selling it.

All products, as they go through to maturity, are pressured for margin. If you are going to sell low margin products, you must have a system set up for volume.

Alternatively, you must look for new products to add to your stock list.

The debt collection process should involve a daily assessment of your outstanding invoices and telephone calls. Statements and reminders are not recommended. Very few debtors will pay on a statement or reminder these days. The standard practice is not to pay until somebody calls.

The call does not need to be difficult or offensive. You need simply, on the first call to say, "Hello it's Paul here from Paul's Garage Doors, I am just calling about the job that we did for you. I am just wanting to check that you got our invoice. Is there any problem with it? We don't seem to have a cheque from you yet. Could you send one for me?"

The call should always end with a comment to the effect of, "That's great thank you, and I will give you a call next week if it hasn't come in just so that I can confirm to you whether or not it has been lost in the post".

Have a system of recording the telephone calls, who you spoke to, and what they undertook to do.

Diarize that particular debt for the following week for a follow up call where you can gently remind them that they undertook to pay you, and have not. This makes it extremely difficult for people to complain at a later stage that there was something wrong with the job, in order to stall payment. It also means that if there is something wrong with the job, you will find out immediately. This process does not need to be confrontational or offensive. In fact, in my experience, the more polite and light you keep the telephone call, the more difficult it is for the debtor to turn the telephone call into some kind of personal issue.

After two (2) telephone calls, a demand letter should be sent. Many small businesses balk at this, but if you allow your debtors not to pay you, they will not respect you, and you will wind up being a hostage to their cash flow. A debtor who will not pay you, is not worth

keeping. Demand letters are simple, and if you have never seen one and do not have one that you can copy from, your Solicitor can draw you one in less than five (5) minutes.

### **Who Makes The Call?**

No one has more impact in collecting your debts than you do. A well-made, well-timed phone call from the owner directly will yield results more quickly than almost anything else.

Having said that, not many of us are very good at that process, and my theory has always been, if your crap at something, don't do it; get someone who's good at it to do it.

Even in a small business, you will find people who are quiet happy to undertake this task, and have no problem with it.

Despite my comments about the value of having the owner call, there are some other benefits to "third partying the issue". If somebody other than you calls, it is less personal, and appears to be "just part of the business". This can save any potential anxiety, heat or anger to deal with the call. It also allows you "somewhere to go", if the debtor complains about the service or some other aspect of the job.

### **Script for the Call**

Rule number 1 – Never get angry, always be polite, and always allow the debtor a face-saving solution.

Steps for the call:-

- A. Ask to speak to whoever is responsible for paying the bills (accounts payable, or the financial controller);
- B. Introduce yourself and your company and say that you are, "Just calling to speak to somebody about the account that we have sent out which looks like it's outstanding".

- C. Ask, "Have you got this account?" If the answer is no, offer to fax it and then ask could it be looked at straight away.
- D. Ask, "Is there any problem with the account?" If the answer is yes, ask for the details of the problem, and indicate that you will research the matter and respond as soon as possible. In many cases, this is a delaying tactic, or the beginning of a process of seeking a discount. You should avoid trying to "haggle", at this first stage, and, rather, quickly research the matter and respond with a written response listing the complaints, and dealing with them one by one.
- E. If the answer is no, then ask, "Is it possible to get that particular one paid?"
- F. At this stage, experienced debtors will give you a vague response like:-
  - (a) Yes I will go and see the boss about that;
  - (b) The cheque has been drawn and it's sitting on his desk for signing;
  - (c) It will go out in our next cheque run;
  - (d) I'll put that in the post to you shortly.
- G. It is important to recognize these as vague proposals with no time frames.
- H. It is in order for you to, politely, ask, "When will that be?"
- I. Attempt to ascertain precisely when the "cheque will go in the mail". You may even offer to go and collect it.
- J. Finish the call with a comment along the lines of, "So if that's going in the post tonight, I'll give you a buzz, say, the day after tomorrow if it hasn't come in."
- K. This tells the debtor that you are serious about the time lines, and that you will call and bother them again if they do not follow through.
- L. This may seem like unnecessary antagonizing of your customers. In fact, it is doing two things:-
  - (a) Is getting your debts paid on your time table, in accordance with your terms, rather than on their time table, whenever they feel like it;
  - (b) It is conditioning the accounts manager inside that organization that your accounts are important, that they should be paid on time, and that if the accounts are not paid, they will receive "one of those phone calls".

The phone call script set out above allows several face-saving solutions, any one of which can be grabbed by the debtor. The fact is, it doesn't matter to you how the



debt is paid, so long as the debtor is not embarrassed, and the cheque arrives on time.

**If this process is handled sensitively, and is done with discipline, you will not lose clients.**

## **45. PRIVACY**

In December 2000 the Privacy Amendment (Private Sector) Act 2000 was passed by Federal Parliament. The Act commenced on 21st December, 2001 with the exception of small businesses wherein the new provisions apply from 2003.

Private sector organisations now have an obligation to protect the privacy of individual's personal information (regardless of company, trust or partnership structure) under the National Privacy Principles ("the principals"). The amendment applies to all businesses in the private sector, regardless of size from the 21st December 2001 (ie the under \$3 million exemption doesn't apply). The following definitions are important:-

### **A. WHAT DO THE PRINCIPALS REQUIRE?**

The legislation contains 10 National Privacy Principles (NPP). The legislation incorporates a vast array of information concerning handling practices including:-

- A. Needing to gain consent for the collection of information;
- B. What to tell individuals when information is collected;
- C. What to consider before passing information onto others;
- D. The details that should be included in a privacy policy;
- E. Securing and storing information;
- F. Providing individuals with a right to access their records.

Where you are receiving and storing personal information, the Act only applies to personal information about an individual who can be identified, or where identity could be reasonably ascertained from the information.

## **B. WHAT IS INFORMATION?**

Information includes any information collected by a business during the course of providing a service to an individual, including:

- (a) Medical information;
- (b) Personal details, such as a name, address, admission and discharge dates, billing information and Medicare number;
- (c) Notes and opinions about an individual and their health;
- (d) Generic information, when this is collected or used in connection with delivering a health service.

## **C. OTHER TYPES OF INFORMATION**

The Act states that other types of sensitive information include:-

- (a) An individual's racial or ethnic origin;
- (b) Political opinion;
- (c) Religious or philosophical beliefs;
- (d) Professional or trade association membership;
- (e) Union membership;
- (f) Sexual preferences or practices;
- (g) Criminal record.

The National Privacy Principles apply to information in any form including paper, electronic, visual (X-rays, CT scans, videos and photos) and audio records.

## **D. OTHER RECORDS**

The Privacy Act does not apply to information held by an employer about its current and former employees where that information is held in employee records and its use or disclosure relates to the employment relationships.

Only some of the National Privacy Principles apply to information collected before the 21st December, 2001. These include information on data security, openness, identifiers, and transporter data flows.

## **E. COLLECTING INFORMATION**

A service provider may only collect health information about an individual where they have individuals' express or implied consent to do so. There are a limited number of situations where a health service provider can collect information about an individual without consent. These include, but not limited to, emergencies, as required by law, or in circumstances relating to legal or equitable claims, when undertaking certain research or management activities.

Express consent is given explicitly either orally or in writing. Implied consent is agreement that can be inferred from an individual's conduct.

The elements to consent are:-

- (a) It must be provided voluntarily;
- (b) The individual must be adequately informed; and
- (c) The individual must have the capacity to understand, provide and communicate their consent.

## **F. CHILDREN AND YOUNG PEOPLE**

The Privacy Act does not specify an age after which individuals can make their own privacy decisions. Health service providers will need to address each case individually.

## **G. USE AND DISCLOSURE**

Only use and disclose personal information for the primary purpose for which it was collected. The primary purpose is the main or dominant reason a service provider collects information from an individual. The use or disclosure of

personal information can also be used for directly related secondary purposes if these fall within the reasonable expectations of the individual.

A reasonable expectation is what a reasonable individual with no special knowledge of the health sector would expect to happen to their health information.

## **46. HIRING AND FIRING**

### **Introduction**

The labour market in Australia and Queensland in particular, has undergone significant change in the last 10 years. Most notable among these changes has been the move by Governments to regulate the basis of employment. Bosses now no longer have the right to arbitrarily terminate employment. Even a casual employee has the power now to apply to be reinstated. This is one of the most significant and dangerous developments in the law which small businesses have faced for many years. The dismissal laws require you, as employers, to have and document reasons for terminating any employment agreement. You need to be aware of the danger of union intervention and/or the order for reinstatement of a disgruntled employee and/or compensation which may become payable for dismissal with every decision to employ or terminate. This work is a short introduction and overview of the Fair Work Act and how it works which is intended to assist you to become aware of the danger of an industrial relations dispute. This hopefully will assist you to avoid many of the situations which give rise to compensation and reinstatement applications and save your business money and you, as an employer, a lot of headaches.

### **A. UNFAIR DISMISSAL**

Federal Legislation – known as the Fair Work Act has set up a regime which covers:-

- (a) Non award employees;
- (b) Queensland award employees.

### **B. LEGISLATION DOES NOT COVER**

- (a) Salaried employees earning in excess of \$64,000.00 per annum (such assessment includes not just wages paid but also the value of fringe benefits such as a car; etc);
- (b) Federal award employees - covered by Federal Industrial Relations Act and Commission similar to State Legislation);
- (c) Apprentices/trainees under Vocational Education Training and Employment Act;
- (d) In the case of employers who employ fifteen (15) employees or less, those employees engaged AFTER 1 July, 1997.

### **C. RELEVANT COURT**

- (a) Queensland Industrial Relations Commission

### **D. POWERS OF THE COMMISSION**

- (a) Order reinstatement, with back pay. Back pay does not have a monetary limit;  
or
- (b) Order payment of compensation, if reinstatement is “not practicable”; or
- (c) Order payment of monetary compensation of up to six (6) months pay, ie. the value of wages is determined by reference to the net rate.

### **E. FEATURES OF THE LEGISLATION**

- (a) An employer should always give reasons for termination;
- (b) An employer can only terminate for proven serious misconduct; inability to perform a job or where there has been a change in the operational requirements of the employer (including casual wage earners);
- (c) Termination can't be harsh/unjust/unreasonable;
- (d) Minimum notice periods apply; ie 1 week if employed for less than 1 year; 2 weeks if employed for 3 years; 3 weeks if employed for 3-5 years; 4 weeks if employed for 5 years or more;
- (e) Employee should have the opportunity to respond ie to “defend” themselves against an allegation before the decision to terminate their employment is

made.

## F. MUST GIVE REASONS FOR DISMISSAL

Every dismissal, to be lawful, must be for a reason and the employer MUST inform the employee of the reason.

These reasons are:-

(a) Employees conduct:-

- i. Theft, assault, fraud or other serious misconduct of a similar type, eg drunkenness; etc.
- ii. Persistent lateness;
- iii. Persistent annoying or disruptive behaviour in the Workplace;
- iv. Persistent breach of dress or other codes.

(b) Employees' incapacity or inability to do job:-

- i. Persistent errors;
- ii. Slow pace/lack of productivity;
- iii. Generally poor performance;
- iv. A permanent injury which makes it impossible for an employee to perform the job. NOTE. In this case, it is not so much a dismissal as a forced redundancy on the grounds of inability and MUST be supported by medical evidence of permanent incapacity which renders the employee unable to perform his/her employment.

(c) Operational requirements:-

- (i) Redundancy;
- (ii) Restructure of business;
- (iv) Closure of business.

(d) A termination of employment would NOT be valid if:-

- (i) No valid reason was given by the Employer;
- (ii) The employee was not told the reason;
- (iii) No opportunity was given to the employee to respond;
- (iv) If termination was for unsatisfactory work performance, no warnings were given;
- (v) Whether any and, if so what, warnings were given.

#### **G. TERMINATION CAN'T BE HARSH/UNJUST/UNREASONABLE**

Even if you comply with the proper procedure for termination your actions can still be found to be "unfair" OVERALL and reinstatement or compensation ordered eg giving an employee "the sack" for not performing a task or for allegedly engaging in misconduct, but where later investigations show that there was a reasonable explanation for the conduct is "unfair".

#### **H. THE COMMISSION WILL CONSIDER**

- (a) Whether the employee was given a reason for the dismissal, which was a "valid" reason;
- (b) Did the dismissal relate to "operational" requirements in business restructuring;
- (c) Had the employee been warned about work performance in the past; how often; the type of warning given and whether any counselling or retraining was made available to the employee;
- (d) Had the employee had an opportunity to respond to allegations about conduct/capacity or performance;
- (e) If there was a "grievance procedure" in place, was it adhered to.

#### **I. MINIMUM NOTICE PERIODS**

[These do not apply to serious misconduct situations.]

If an employee is employed for:-

- A. Under 1 year      - 1 week      [1 week extra if over 45]

- |    |               |           |                                                                                     |
|----|---------------|-----------|-------------------------------------------------------------------------------------|
| B. | 1-3 years     | - 2 weeks | [1 week extra in all cases where over 2 year's continual service with the employer] |
| C. | 3-5 years     | - 3 weeks |                                                                                     |
| D. | Above 5 years | - 4 weeks |                                                                                     |

\*Longer periods may be set if provided for under a specific service contract or a Workplace Enterprise Agreement. In those cases, the specific notice period must be followed.

## **J. OPPORTUNITY TO RESPOND**

You should allow the employee a chance to explain his/her actions and respond to the allegation that forms the basis for dismissal. If you do not, the Commission may find the dismissal was harsh or unjust and, consequently, illegal. You do not have to accept the explanation, but may later be found to have acted unreasonably if you don't give him/her a proper hearing. A failure to do so may result in an order for re-instatement. A failure to re-instate can, in turn, leave you open to a fine.

## **K. PROHIBITED GROUNDS FOR DISMISSAL**

You cannot dismiss an employee for any of the following reasons:-

- (a) Temporary absence from work due to illness or injury;
- (b) Union activities or involvement as an officer or official of a union;
- (c) Membership or non-membership of a union;
- (d) Making a complaint to you, as an employer, or about you to a union or other proper body or government agency;
- (e) On grounds of race, colour, sex, sexual preference, age, physical or mental disability, religion, political persuasion or national origin;
- (f) Family responsibilities;
- (g) Parental leave;
- (h) Being a "whistle blower";
- (i) Refusing to negotiate a Work Place Agreement.



## **L. SUMMARY DISMISSAL**

- (a) Can only occur for serious misconduct;
- (b) Serious misconduct is misconduct of a type which makes it unreasonable to require the employer to continue employment during the notice period. The grounds for such are defined, by the law, to include theft, assault, fraud or other, similar, conduct.

Be VERY careful and ...ONLY use this procedure where there is a very clear situation - eg proven criminal conduct/wilful disobedience. If in doubt - comply with the notice provisions.

## **M. CONSEQUENCE OF UNFAIR DISMISSAL**

- (a) Reinstatement and back pay - Commission can order back pay to the date of termination. In practice, this may be as much as 1 year's pay; or
- (b) Compensation - up to 6 months entitlement to "lost wages" (in the future).

## **N. ONUS OF PROOF**

The onus is on YOU to show that you had valid reasons for dismissal and complied with prescribed procedure.

## **O. REDUNDANCY**

- (a) This is usually provided for in the relevant Industrial Award which covers your labour force;
- (b) If not, where there are fifteen (15) employees and all are dismissed together, you are obliged to notify the union (where employees are members), and give reasons for the redundancy. The logic behind this is to give the union a chance to consult with you, as the employer re minimising the effect of redundancy and the relevant Government Agency (Centerlink) a chance to arrange/find employment for the former employees. If this procedure is not complied with, the conduct will be deemed a wrongful dismissal.

## **P. PROCEDURE FOR A WRONGFUL DISMISSAL APPLICATION**

- (a) The applicant files a complaint; this must be filed within twenty-one (21) days of the dismissal;
- (b) The applicant can apply for an extension, if the application is made out of time;
- (c) A conference between the employer (and their representatives) and the employee before a Commissioner is held (usually 7-14 days later);
- (d) If the conference fails to reach a settlement of the claim then the Commissioner sets:-
  - (i) Directions (or dates by which things have to be done, eg affidavits/statements prepared, filed and served, documents shown to each side, examinations by doctors, etc and a date for hearing); and/or
  - (ii) A hearing date.
- (e) Legal representation can ONLY occur with the consent of ALL the parties AND the Order of the Commission.

## **Q. THE HEARING**

Statements from both sides are tendered before the hearing and the parties are cross-examined on their statements. The Commissioner who hears the matter may postpone handing down of decision to think about/write it.

## **R. AVENUE FOR APPEAL**

Appeals only lie to the Industrial Court. The grounds of appeal are limited. Parties can be legally represented. Costs of an Appeal are paid by the unsuccessful party.

## **S. HOW YOUR SOLICITOR CAN HELP**

- (a) To prevent unfair dismissal:-

- (i) You should consult your Solicitor BEFORE taking any action against an employee. If necessary, get your Solicitor to draw documents and even attend the investigating interview with the employee to ensure, as far as possible, that you do not breach the Act;
- (ii) To defend unfair dismissal applications, with the consent of the Commissioner (usually given) your Solicitor can attend at conferences and hearings to conduct examination of witnesses and make submissions on the Law;
- (iii) Your Solicitor can save you a lot of time, money and heartache by ensuring compliance by you with the Workplace Relations Act.

#### **47. WHAT IS DISCRIMINATION?**

Discrimination occurs when someone is treated unfavourably because of a personal characteristic. Discrimination may involve:-

- A. Making offensive “jokes” about another worker’s racial or ethnic background, sex, sexual preference, age or disability;
- B. Expressing negative stereotypes about particular groups eg “married women shouldn’t be working”;
- C. Judging someone on their political or religious beliefs rather than their work performance;
- D. Undermining a person’s authority or work performance because you dislike one of their personal characteristics;
- E. Using selection processes based on irrelevant personal characteristics such as age, race or disability rather than on skills and merit.

#### **48. WHAT IS SEXUAL HARASSMENT?**

Sexual harassment is any form of sexual attention that is unwelcome. It includes unwelcome touching or other physical contact, remarks with sexual connotations, smutty jokes, requests for sex, or the display of offensive materials such as pictures, posters or computer graphics.

Sexual harassment has nothing to do with mutual attraction. Such friendships are a private matter.

Sexual harassment can be a single incident – it depends on the circumstances. Obviously some actions or remarks are so offensive that they constitute sexual harassment in themselves, even if they are not repeated. Other single incidents, such as an unwanted invitation out, may not constitute harassment if they are not repeated.

There is no onus on the person being harassed to say he/she finds the conduct objectionable. Many people find it difficult to speak up. All employees are responsible for their own behaviour. If you think the behaviour may offend, then don't do it!

#### **49. PART X, BANKRUPTCY AND EXTERNAL ADMINISTRATION**

There may come a time when you have to concede that your business venture is not working.

If things go wrong financially for the business, you need to:-

- A. Have systems in place that will tell you early;
  - B. Put time and money into advice on the strategies and solutions before it's too late;
  - C. Take decisive action;
  - D. Don't give up.
- 
- A. Many small businesses get into trouble long before their owners are aware that it's happening. Inadequate systems, reports and understanding mean that by the time the owner discovers there's a problem, it's too late to do anything about it.
  - B. Assuming you have put the time and systems into at least being able to see the warning signs and tell when it is not working, the most difficult decision to make is, when to switch from the aggressive "save the business" strategy to the defensive "protect my assets" strategy.

- C. The natural tendency in all small business owner is to fight on until the bitter end, never conceding, and “pressing on”, until some external force shuts down the business.

Your Key Performance Indicators (KPI's) should tell you if the business is in trouble.

Long term trends of decreasing sales and inability to meet ongoing financial obligations, over a reasonable period of time, with none of your strategies making a difference, should bring you to consider all of your options.

Similarly, many small business owners take the attitude, “Things are tight, and I can't go spending money on an Accountant or business advisor now”.

- D. Further, when things get grim, many small business owners “drop their bundle”, right at the time when their business needs them most. They go into survival mode, and, particularly in retail, this becomes evident to customers very quickly.

When things get tough, your input levels need to go up, and your antenna needs to sharpen. You need to devote even more time to working at the business than ever before.

If things look irretrievable, and the sale of the business is not possible, an orderly shut down may well save you many years of cleaning up and paying for the wreckage.

If the business cannot be sold, then it may have to cease trading.

Your financials will tell you if ceasing trading will mean you will lose less money than if you continue to trade.

There are some other options though.

## **UNINCORPORATED BUSINESSES**

If the business is not owned by a Company, then arrangements under the Bankruptcy Act with the Creditors are the first things to be looked at.

These are voluntary, informal structures under the Bankruptcy Act. They are not the same as going bankrupt.

Once you sign the authorities required to start the process, no creditor can take action against you for a short period of time, and a Trustee is appointed to assist you to make decisions. The Trustee will make an assessment of the viability of the business.

Commonly called a Part X Arrangement, this involves senior specialist consultancy Accountants and signing an authority to the Accountant to negotiate with your Creditors. The Accountant will call a Creditors' Meeting, and produce a List of Creditors and a Statement of Position. The Accountant will put forward a proposal to your Creditors for them to accept. It may involve waiting for payment over time clearing existing debts, or accepting a part payment (x cents in the dollar), to clear all of the debts.

Your Creditors may:-

- A. Accept the proposal by Special Resolution (more than half of the numbers representing more than 75% of the debt must be in favour);
- B. Reject the proposal but substitute or accept some other proposal;
- C. Reject the proposal and end the process.

If a proposal is accepted, then a "Deed of Arrangement" is in place, and all Creditors, whether they voted for it or not, are bound by the arrangement.

Creditors can apply to the Court to end the arrangement if there is an irregularity, or under other very limited circumstances.

When the arrangement is complete, you emerge without having been bankrupt, and your debts are expunged. This process is for individuals only.

A Part IX Arrangement is a similar, even less formal arrangement where the debts fall below a certain threshold (presently a little over \$50,000.00).

If the proposal is rejected, then the circumstances are as though the process never took place, and all parties, including you, are free to continue as before.

## **INCORPORATED ENTITIES**

There are three (3) processes available which run along similar lines to a Part X Arrangement, (or generally called “External Administration”):-

- A. Administration;
- B. Receivership;
- C. Liquidation.

### **A. ADMINISTRATION**

Administration is a fairly recent phenomenon. It allows a process similar to a Part X Arrangement, whereby a specialist Accountant is appointed for a limited period of time to make an assessment of the best options for the future of the Company, and report to Creditors, seeking their approval for an arrangement. The options are broadly similar to Part X Arrangements.

The Directors pass a Resolution that the Company is not solvent and that it should go into Administration. They sign an authority with an Administrator who has five (5) days to call a First Meeting of Creditors to advise that the Company is in Administration.

This process is similar to a Part X Arrangement. An Administrator is appointed by the Directors of the Company, and has five (5) days to call an initial meeting of creditors, to advise of the administration. The Administrator then has a further thirty (30) days to make an assessment of the viability of the Company’s business, produce a report, and call a second meeting of Creditors.

At that second meeting, the Administrator will make a recommendation, that the Creditors accept the Scheme of Arrangement, that the Company go into Liquidation, or that the administration end, which puts you back in the position that you were in prior to the administration commencing.

The alternatives available are:-

- (a) Immediate Liquidation;
- (b) Payment over time;
- (c) Part payment;
- (d) Ending the Administration with no further action taken.

Voting at the Meeting, and the aftermath of the Meeting are similar to Part X Arrangements.

This process is designed to provide a circuit breaker for the Company, and to bring the creditors together in an attempt to keep the Company alive.

## **B. RECEIVERSHIP**

Certain Creditors of yours may have the ability to appoint a Receiver. Receivers can usually only be appointed with an Order of the Court.

Receivers are appointed by secured creditors (those holding a Company Charge, Bill of Sale or some type of security over an individual piece of property or equipment).

Usually this is a Fixed and Floating Company Charge, and the Receiver will take possession of the entire business. The Receiver may leave you running the business for a short period of time.

A Receiver's role is to take over the running of the business and run it for the benefit of the Creditor who had him/her appointed.



Receiverships are designed to allow the secured creditor to make an assessment of whether to run, sell or break up and shut down the business, in order to recover the debt owed.

Generally, Receivers will immediately seize control of the business and run it in “caretaker mode”, for a period of time until a decision can be made about its future (sale/break-up and sale/shutdown).

The Receiver has an obligation to account, but no obligation to the Company’s Directors and Shareholders. Often, a co-operative approach is taken, but this is not required of the Receiver.

Some Companies are run by Receivers for many years (Sanctuary Cove being one of the best known examples). However, ordinarily, the Receiver will run the business until it can be sold, to recoup the debt for the Creditor (usually the bank or a secured creditor), and will then account to other creditors, and finally to you. Receiverships are common only in larger Companies, and only Companies with reasonable cash flow that can be run under management.

## **C. LIQUIDATION**

This is the most common form of external Administration and is final.

This is the ultimate in external administration. A Liquidator is appointed who will quickly size up salability of the business, and if it cannot be sold, will make it cease trading, and sell off the assets, providing the proceeds to the secured creditors first, the unsecured creditors second, and if any is left over, to the Shareholders last.

It is final in the sense that, the Company ceases to be a legal entity, ceases to trade, and its assets are broken up and sold.

The proceeds are paid to Creditors, and, if there is any surplus back to the shareholders. Liquidation is done by Order of the Court on Application of the

Creditor, and the outcome is that you will lose control and ownership of the Company and the business which it runs.

The Liquidation process begins with a Statutory Demand.

The demand is a short document served upon the Company at its registered office.

The demand essentially says, if you do not either pay this debt, or apply to set aside the demand within twenty-one (21) days of service, the Company will be deemed unable to pay the debt, and therefore insolvent.

As a result of recent changes in the Law, this is now a particularly powerful weapon in the hands of Creditors.

The tables have been turned and it is now up to the Company to apply to set aside the debt within the twenty-one (21) days.

The Court Application must be filed and served within the twenty-one (21) days, and you must then convince the Court that the Company is solvent.

Up until the end of 2003, simply showing that the debt was disputed would be sufficient.

As a result of recent Court decisions, your Company can still be deemed insolvent, and therefore wound up, even if the debt is disputed, unless it can prove that it is solvent.

The rules for solvency are now particularly savage.

Simply producing your Profit and Loss Statement and Balance Sheet, even if prepared by your Accountant, may not be sufficient.

Freshly audited books and records, (you are unlikely to be able to get these within twenty-one (21) days), may be sought by the Court, and it has been indicated that these are the preferred primary documents for proving solvency.

The message with all of this is, take very seriously a Statutory Demand served upon you, and seek advice very quickly. Consideration should also be given to a structure that keeps the more important assets of the enterprise, away from the trading part of the Company.

Depending upon the size of the business, a trading company and an assets company might well be in order.

After the Statutory Demand expires, the Creditor is free to bring an Application to Wind Up the Company. The Application is filed in the Court and served upon the Company at its registered office specifying a Court date, at which, provided the documentation is in order, there is very little that you are allowed to argue about, to prevent the liquidation. At that point the Liquidator is appointed, and he will seize the Company assets and they will be sold individually or collectively to the highest bidder.

#### IMPORTANT THINGS TO REMEMBER:-

- (a) If your business is losing money, make a realistic assessment of how likely it is that you can turn it around;
- (b) If your business is losing money, it is using up your capital, and eventually you will run out of capital. You need to make a decision about when it is time to try and preserve what is left of your capital, and stop the hole getting any deeper;
- (c) The more mess and debt there is when you call a halt, the longer it will take for you to recover;
- (d) There are now severe penalties (including jail terms), for Directors of Companies who allow the Companies to trade whilst insolvent, and create Company debts which cannot be met.

The current horror story is that of the Director of a Company in Tasmania, who was found to have allowed the Company to trade whilst insolvent. The Company's debts were relatively small (under \$2m), and the lion's share of that debt was actually owed to the Director himself.

Regardless of this, and despite the fact that many of the creditors were paid back out of the Director's own pocket, and the fact that the Director co-operated in all respects with the Liquidator and the regulatory body (ASIC), the Court sent him to jail anyway! I am not sure what that says about the value of co-operating with the regulator.

The most important thing to remember is that your business is not your life, and if it fails, recognize the signs, act early, continue to seek advice, and keep it in perspective.

#### **D. EXTERNAL ADMINISTRATION**

Rules, Legislation and trends for External Administration tend to swing backwards and forwards depending upon the economy and political view points. At present the pendulum has swung towards Creditors, but it is likely to swing back again. Good reporting and advice will both reduce the possibility that you will need to consider these options, and smooth the way, if consideration is necessary.

### **50. CONCLUSION**

Owning a successful business and having a life in balance can be the most rewarding and satisfying key to a long and happy life.

Having a business that works for you (rather than the other way around), which provides you with a lifestyle, and creates time that you can use at your discretion, can be achieved but:-

- A. It is quite rare;

- B. It requires constant work and adjustment (it is not a set and forget phenomenon);
- C. Does not just happen and cannot be created from “any old business”.

For those of us however whose brain is wired up in such a way that we have no option but to work for ourselves, this special breed of masochism, if it is done well, is the most satisfying form of existence.

As you will have seen throughout this book, the keys are planning and analysis.

The days of businesses run solely by technicians who are good at producing their product, are largely gone. Businesses now need to have a whole range of other abilities, and business owners need to have those abilities, or have the ability to harness people who do. This should be looked on as a relief and a freedom. You now no longer need to hold all of these keys yourself, and the range of advices and tools available to you has never been better.

Any decision you make however, has to pass the “sleep test”; that is, will you be able to sleep, long term, with the consequences of the decision you have made. If you cannot, then delay the decision and “if in doubt miss out”.

You will read stories of great risks taken and fortunes made from snap decisions or chance happenings.

Australian society and the business community world wide, tend to lionize those who have “made it by the seat of their pants”, or who appear to “have been in the right place at the right time”. This is not a sound basis for a business venture which will underpin the rest of your life.

Take care, do your homework, do not regret opportunities foregone which weren't 100% right. If you are patient an opportunity will present itself which fits your circumstances, goals and personality. This will be the one for you.

This will set your life up and provide you with the rewards you were seeking.

Enjoy the journey.

## **51. APPENDICES**

# APPENDICES

## APPENDIX

### ITEM A

#### LIST OF EXPENSES

Projected income for the same day \$.....  
Actual income for the same day \$.....  
Projected income for the same week \$.....  
Actual income for the same week \$.....  
Projected income for the same month \$.....  
Actual income for the same month \$.....

DATE	BUDGETED EXPENSES	ACTUAL EXPENSES

## APPENDIX

### ITEM B

#### MODEL POLICY

#### ...(COMPANY)... ANTI-DISCRIMINATION AND SEXUAL HARASSMENT POLICY

...(Company name) ... is an equal opportunity employer. All employees are treated on their merits, without regard to race, age, sex, marital status or any other factor not applicable to the position. Employees are valued according to how well they perform their duties, their ability and their enthusiasm in maintaining Company standards of service.

The Company believes that all employees should be able to work in an environment free of discrimination and sexual harassment. We consider discrimination and sexual harassment to be an unacceptable form of behaviour, which will not be tolerated under any circumstances.

Under the Queensland Anti-Discrimination Act 1991, discrimination in employment on the following grounds is against the law:

Sex	Marital status	Race
Pregnancy	Parental status	Religion
Age	Trade union activity	Lawful sexual activity
Impairment	Political belief and activity	Association with someone with an attribute above



Sexual harassment is also prohibited, under both state legislation, and the Federal Sex Discrimination Act 1984. Federal anti-discrimination legislation also prohibits discrimination on the basis of criminal record or social origin.

Managers and supervisors must ensure that all employees are treated equitably and are not subject to discrimination or sexual harassment. They must also ensure that people who make complaints, or who are witnesses, are not victimised in any way.

Any reports of discrimination or sexual harassment will be treated seriously and investigated promptly, confidentially and impartially. A written complaint is not required.

Disciplinary action will be taken against anyone who discriminates against, or sexually harasses a co-worker. Discipline may involve a warning, transfer, counselling, demotion or dismissal, depending on the circumstances.

### **WHAT TO DO IF YOU ARE DISCRIMINATED AGAINST OR SEXUALLY HARASSED?**

There are several options. Choose the course of action you feel most comfortable with. Don't ignore discrimination or sexual harassment, thinking it will go away – often it just gets worse.

1. Contact one of the following people in the Company who have been nominated to give advice or to investigate complaints:

Name:

Name:

Position:

Position:

Location:

Location:

Telephone:

Telephone:

2. Contact your trade union for advice.
  
3. Make a complaint: call the Anti-Discrimination Commission Queensland on state-wide 1300 130 670. The Commission has offices in Brisbane, Rockhampton, Townsville, and Cairns or call the Human Rights and Equal Opportunity Commission in Sydney on free call 1300 369 711.

This Company is committed to providing an environment which is safe for all employees. You will not be disadvantaged in your employment conditions or opportunities as a result of lodging a complaint.

Signed.....

Position: (Chief Executive of Company)

(Compiled by the Anti-Discrimination Commission Queensland.)

## APPENDIX ITEM C

### DISCRIMINATION

#### ANTI-DISCRIMINATION ACT 1991

- 1.0 PURPOSE OF ACT
- 1.1 RELEVANT LEGISLATION
- 1.2 WHAT IS SEXUAL HARASSMENT
- 1.3 TIME LIMITATION
- 1.4 HOW ARE THE COMPLAINTS MADE
- 1.5 WHAT TO DO IF COMPLAINT MADE AGAINST YOU
- 1.6 WHAT ROLE DOES YOUR LAWYER PLAY
- 1.7 THE MEANING OF “DISCRIMINATION”
- 1.8 DIRECT DISCRIMINATION
- 1.9 INDIRECT DISCRIMINATION
- 1.10 PROCEDURE FOR COMMENCING AN ANTI-DISCRIMINATION APPLICATION
- 1.11 TIME NEEDED FOR LODGING A COMPLAINT
- 1.12 INVESTIGATION PROCEDURE
- 1.13 LEGAL REPRESENTATION
- 1.14 ORDERS THE TRIBUNAL MAY MAKE IF THE COMPLAINT IS PROVEN
- 1.15 APPEAL PROCEDURE
- 1.16 WHAT ARE THE PROCEDURES IN AN ANTI-DISCRIMINATION APPLICATION

# ANTI-DISCRIMINATION ACT 1991

## 1.0 PURPOSE OF ACT

The Act aims to protect persons from discrimination on the basis of sex; marital status; pregnancy; parental status, breastfeeding; age; race; impairment; religion; political belief or trade union activity and lawful sexual activity in the areas of work, education, goods and services, superannuation; insurance; disposition of land; accommodation; club membership and the administration of State and Local Government Law and Administration.

## RELEVANT LEGISLATION

### 1.1 **The Anti-Discrimination Act (1991)**

**Racial Discrimination Act (1975)**

**Sex Discrimination Act (1984)**

**Human Rights and Equal Opportunities Commission Act (1986)**

**Disability Discrimination Act (1992)**

The stated aim of all of the legislation is to promote equality of opportunity for everyone, by preventing unfair discrimination in certain areas of activity and discriminatory conduct against a person on the grounds of:

Sex

Marital status

Parental status

Pregnancy

Breast feeding

Race

Age impairment

Religion

Political belief or activity

Trade union activity

Lawful sexual activity

Association with a person who has any  
of the abovementioned attributes

The legislation applies in the areas of:

work and work related areas

education

goods and services

superannuation and insurance

disposal of land

accommodation

club membership and affairs

administration of state laws and programs

local government

It's most significant effect is to be used as a forum for policing what has now come to be known as "Sexual Harassment".

## 1.2 WHAT IS SEXUAL HARASSMENT

Sexual harassment happens if a person subjects another to:-

- a. unwanted acts of physical intimacy;
- b. makes unwanted demands or requests for sexual favours (whether directly or by implication);
- c. makes remarks with sexual connotations relating to the other person;
- d. engages in any other unwelcome conduct of a sexual nature

It is only harassment if it is done:-

- i. with the intention of offending, humiliating or intimidating; or
- ii. in the circumstances it is reasonable to believe that the person is being offended, humiliated or intimidated by the conduct.

If someone requests or encourages another to harass someone else then both the harasser and the person encouraging the behaviour are in breach of the Act.

### 1.3 TIME LIMITATION

A complaint to the Anti-Discrimination Commission should be made within one year of the alleged harassment. The Commission can accept a complaint made after one year has expired, if the complainant can show good cause for the delay. For example, a complainant who is too scared to speak up about it or threatened not to speak, would get a favourable hearing. So, too, a person with limited knowledge or ability in the English language.

### 1.4 HOW ARE THE COMPLAINTS MADE

There is no prescribed form for such, but it MUST BE WRITTEN. Initial complaint is usually in letter form addressed to the Anti-Discrimination Commission. There is no charge for lodging a complaint.

## 1.5 WHAT TO DO IF COMPLAINT MADE AGAINST YOU

- a. You will be notified by the Commission of the complaint;
- b. You will be required to respond in writing to the alleged complaint;
- c. The Commission will then investigate the matters and either recommends a Conciliation Conference or Tribunal Hearing;
- d. Conciliation Conferences are recommended first, before taking the matters to a hearing, and most people reach agreements of some sort at the Conciliation Conference and the matter is finalised. If the matter does not settle at Conciliation Conference the matter is sent to the Tribunal for a Hearing.

## 1.6 WHAT ROLE DOES YOUR LAWYER PLAY

The Conciliation Conference involves someone from the Commission and the parties. If you want your legal representative to be present during the conference, then a request needs to be forwarded to the Commission, by that legal representative, and permission granted for them to attend.

Your lawyer can assist you behind the scenes. He/she can advise you on what steps to take; take statements from witnesses; and prepare any relevant documentation that may be needed. Your lawyer can also negotiate for you, with the other side, to effect a rapid and complete compromise if appropriate of what can otherwise be a very expensive and embarrassing exercise.

## 1.7 THE MEANING OF "DISCRIMINATION".

The Anti-Discrimination Act defines "to discriminate" rather uselessly as follows:

"Discriminate" means to discriminate whether by direct discrimination or indirect discrimination.

## 1.8 DIRECT DISCRIMINATION

If a person treats, or proposes to treat, a person with an attribute less favourably than another person, without the attribute, would be treated in circumstances that are the same or not materially different.

For example:

Robert refuses to rent a flat to Clive because Clive is English and Robert doesn't like English people;

Clive's friend Barry is English and Robert doesn't like English people

Robert believes that English people are unreliable tenants.

In each case Robert discriminates against Clive directly whether or not Robert believes about Clive's or Barry's nationality or the characteristics of people of that nationality is correct.

## 1.9 INDIRECT DISCRIMINATION

Indirect discrimination on the basis of an attribute happens if a person imposes a term (a) with which a person with an attribute does not or is not able to comply and: (b) with which a



higher proportion of people without the attribute comply or are able to comply: and (c) that is not reasonable.

For example:

An employer decides to employ people who are over 190 centimetres tall, although height is not pertinent to effect performance of the work. This disadvantages women and people of Asian origin, as there are more men of non-Asian origin who can comply. The discrimination is unlawful because the height requirement is unreasonable, there being a genuine occupational reason to justify.

An employer requires employees to wear the uniform, including a cap, for appearance reasons not for hygiene or safety reasons. The requirement is not directly discriminatory but has a discriminatory effect against people who are required by religious or cultural beliefs to wear particular forms of headdress.

#### 1.10 PROCEDURE FOR COMMENCING AN ANTI-DISCRIMINATION APPLICATION

A complaint must be made in writing to the Queensland Anti-Discrimination Commission or other, relevant, body (as set-up under the Legislation).

In the complaint the complainant must set out the nature of the allegation and give a brief outline of the relief sought.

#### 1.11 TIME NEEDED FOR LODGING A COMPLAINT

The complaint must be made within 1 year of the alleged incident. The Commission has the discretion to accept the complaint out of time, if it considers that there is a good cause for the lateness of the complaint. For example, where an employee out of fear of losing his or her job did not bring a complaint within the stipulated one year period, that will probably be regarded as a “sufficient reason” for extending time.

#### 1.12 INVESTIGATION PROCEDURE

Once a complaint is lodged with the Commission, the complaint is then investigated by the Anti-Discrimination Commission, usually by a Public servant employed in the staff of the Commission.

The respondent will receive a written notification from the Anti-Discrimination Commission advising him or her that a complaint has been made and the nature of the complaint.

The respondent then must respond to the complaint.

The response must be in writing.

The applicant can then respond to the respondent's response.

If the Commission considers it appropriate, it has the discretion to interview witnesses whom it considers helpful or who may assist in its' enquiry. Witnesses cannot be compelled to assist in these enquiries.

If the Commission considers conciliation appropriate (this occurs in most cases) it will make an Order for conciliation. Conciliation is a confidential meeting arranged between the Commission, the parties and their legal representatives, if allowed.

If the matter does not settle at conciliation, it then proceeds to a hearing. Nothing said at the conference can be referred to at the hearing. The hearing proceeds before the Anti-Discrimination Tribunal. Usually a solicitor or barrister heads the Tribunal.

### 1.13 LEGAL REPRESENTATION

A party may be represented before the Tribunal by a Solicitor or by a Barrister, instructed by a Solicitor. The Tribunal may have a Solicitor or Barrister to appear to assist it if the Tribunal considers it necessary.

### 1.14 ORDERS THE TRIBUNAL MAY MAKE IF THE COMPLAINT IS PROVEN

1. The respondent is not to commit any further breach of the Act against the complainant.
2. The respondent is to pay to the complainant or another person, within the specified period, an amount which the Tribunal considers appropriate as compensation for loss or damage caused by the contravention;
3. The respondent is to do specified things to redress loss or damage suffered by the complainant because of the contravention;

4. All or part of any agreement made in connection with a breach of the Act is void;
5. A complaint is dismissed.

The specified things a respondent may be required to do, include, but are not limited to:

- a. Employing, reinstating or re-employing a person or;
- b. Promoting a person or;
- c. Moving a person to a specified position within a specified time.

The complainant or the respondent may ask the Tribunal for written reasons for an order and if requested, the Tribunal must provide the written reasons within 28 days of receiving a request.

#### 1.15 APPEAL PROCEDURE

After the hearing it is possible for a party to appeal on a question of law to the Queensland Supreme Court, provided such appeal is lodged within 28 days of the decision of the Tribunal being published.

#### 1.16 WHAT ARE THE PROCEDURES IN AN ANTI-DISCRIMINATION APPLICATION

Initial inquiry



Written complaint

Respondent is notified of the complaint  
in writing and is asked for a response

Response is forwarded to complainant

Conciliator interviews the complainant and  
respondent and discusses the matter in  
detail. Parties may be asked to  
produce documents

WITNESSES AND OTHER RELEVANT PEOPLE NOMINATED  
BY BOTH PARTIES MAY BE INTERVIEWED

If complaint clearly lacks  
substance may be declined

If parties have not come to an  
agreement the complaint may be  
taken on to conciliation

In some cases the complainant may  
require the complaint to be  
referred for public hearing

A conference between the parties  
is often conducted by the  
conciliator to help in reaching  
a settlement

<input type="checkbox"/>	<input type="checkbox"/>
No settlement agreed on. Complaint may be referred to Commission or Anti-Discrimination Conciliation Tribunal for public hearing	<input type="checkbox"/>
	Settlement agreed on by both parties and agreement signed

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Determination or decision made	<input type="checkbox"/>	<input type="checkbox"/>
	If Anti-Discrimination Act matter, conciliation agreement registered with	Complaint closed

Tribunal  
**APPENDIX  
ITEM D**

**HARASSMENT  
COMPLAINT PROCEDURE**

1. EMPLOYEE ALLEGES HARASSMENT
2. RECORD DETAILS OF ALLEGATION
3. ASSURE COMPLAINANT THE MATTER WILL BE INVESTIGATED
4. ISSUE GENERAL MEMO REFERRING TO POLICY OF NON-DISCRIMINATION/HARASSMENT
5. INTERVIEW OTHER PARTY/PARTIES
6. RECORD THEIR RESPONSE
7. SEEK ADVICE ON THE EVIDENCE AND LAW
8. DETERMINE ACTION
9. IMPLEMENT

10. MONITOR

**APPENDIX  
ITEM E**

**CHECK LIST FOR DISMISSAL PROCESS**

1. GATHER INFORMATION ON PERFORMANCE
2. INTERVIEW IMMEDIATE SUPERVISOR AND RECORD NOTES OF INTERVIEW
3. FIRST INTERVIEW WITH STAFF MEMBER
4. MAKE ENTRY IN FEEDBACK RECORD BOOK
5. HAVE FEEDBACK RECORD BOOK CO-SIGNED

6. MONITOR PERFORMANCE (SEEK CLOSE SCRUTINY PERFORMANCE FROM IMMEDIATE SUPERVISOR)
7. MAKE OR REQUEST FROM IMMEDIATE SUPERVISOR NOTES OF PERFORMANCE PROBLEMS
8. IF PERFORMANCE DOES NOT IMPROVE GATHER INFORMATION ON PERFORMANCE
9. INTERVIEW IMMEDIATE SUPERVISOR AND RECORD NOTES OF INTERVIEW
10. MAKE ENTRY IN FEEDBACK RECORD BOOK
11. HAVE FEEDBACK RECORD BOOK CO-SIGNED
12. TREE DIAGRAM
13. REPEAT 6 TO 11
14. IF APPROPRIATE ADVISE STAFF MEMBER THAT THE RESPONSE GIVEN AT THIS INTERVIEW IS NOT SUFFICIENT OR ACCEPTABLE AND THAT EMPLOYMENT IS TERMINATED
15. PREPARE LETTER CONFIRMING TERMINATION AND PAY ENTITLEMENTS



16. FIRST WARNING LETTER TO POOR PERFORMER

17. SECOND WARNING LETTER TO POOR PERFORMER

**NOTE:** BOSSES HAVE BEEN CRITICISED BY THE INDUSTRIAL COMMISSION IN CASES WHERE A PREPARATORY LETTER OF DISMISSAL OR CHEQUE FOR ENTITLEMENTS HAS BEEN PREPARED PRIOR TO THE FINAL INTERVIEW. THIS HAS BEEN FOUND TO BE EVIDENCE THAT THE FINAL INTERVIEW WAS A SHAM, AND THAT THE EMPLOYEE WAS NOT GIVEN AN OPPORTUNITY TO RESPOND TO THE ALLEGATIONS, AND THEREFORE THAT THE DISMISSAL WAS HARSH, UNJUST OR UNREASONABLE.

## APPENDIX ITEM F

### SAMPLE INTERVIEW PROCESS

#### First or Second Interview

1. ESTABLISH THE REASON FOR THE INTERVIEW (SAMPLE):
  - (A) TED, I HAVE CALLED YOU IN TO TALK TO YOU ABOUT SOME ISSUES I HAVE WITH YOUR WORK PERFORMANCE.
  
2. EXPLAIN THE PROCEDURE (SAMPLE):
  - (A) NOW WHAT I NEED TO DO WITH YOU IS TO PUT TO YOU CLEARLY THE PROBLEMS THERE ARE WITH YOUR WORK PERFORMANCE, SO THAT YOU UNDERSTAND THEM, AND THEN GIVE YOU AN OPPORTUNITY TO RESPOND. AFTER THAT PROCESS, I WILL WRITE A SUMMARY OF THIS DISCUSSION IN THE INTERVIEW BOOK AND GIVE YOU THE OPPORTUNITY TO SIGN IT. I WILL SIGN IT, AND IT WILL BE A PERMANENT RECORD OF THIS DISCUSSION. DO YOU UNDERSTAND THIS.
  
3. PUT THE ALLEGATIONS (SAMPLE):
  - (A) NOW TED, THE PROBLEMS THAT HAVE BEEN BROUGHT TO MY ATTENTION OR THAT I HAVE SEEN WITH YOUR WORK PERFORMANCE ARE AS FOLLOWS:-

- (I) YOU ARE CONSISTENTLY LATE FOR WORK;
- (II) YOUR PRODUCTIVITY IS POOR COMPARED WITH YOUR FELLOW WORKERS, YOUR ADHERENCE TO WORK BREAKS IS ALSO POOR, I NOTE YOU ARE RUNNING CONSTANTLY OVER TIME, AND HAVE DONE SO ON THE FOLLOWING DATES ...
- (III) IN THE LAST FEW WEEKS YOU HAVE BEEN MAKING LONG PRIVATE TELEPHONE CALLS IN THE RECEPTION AREA.
- (IV) THE FOLLOWING COMPLAINTS ARE FROM CLIENTS.
- (V) I HAVE REVIEWED THE STANDARD OF YOUR WORK, AND FOUND ERRORS ON THE FOLLOWING FILES/JOBS.

4. ENSURE THAT THE ALLEGATIONS ARE UNDERSTOOD (SAMPLE):

- (A) NOW TED DO YOU UNDERSTAND WHAT I HAVE JUST SAID TO YOU IN RELATION TO THESE PROBLEMS.

5. PROVIDE AN OPPORTUNITY TO RESPOND (SAMPLE):

- (A) TED YOU HAVE AN OPPORTUNITY TO HAVE SOMETHING TO SAY IN RESPONSE TO THESE ALLEGATIONS. YOU DO NOT HAVE TO SAY ANYTHING, BUT YOUR RESPONSE WILL BE RECORDED. IS THERE ANYTHING YOU WISH TO SAY.

**NOTE:** YOU ARE NOT REQUIRED TO JUSTIFY THESE ALLEGATIONS, NOR TO “RESPOND TO THE RESPONSE”.

6. CONFIRM THE RECORDING PROCESS (SAMPLE):

(A) WHAT I NEED TO DO NOW TED IS TO RECORD A SUMMARY OF THIS CONVERSATION IN THE FEEDBACK RECORD BOOK.

7. INVITE THE EMPLOYEE TO CO-SIGN THE FEEDBACK RECORD BOOK (SAMPLE):

(A) I'M GOING TO SIGN THIS DOCUMENT AS THE SUMMARY OF OUR DISCUSSION. YOU CAN CO-SIGN IT IF YOU WISH.

8. PROVIDE A FORMAL WARNING (SAMPLE):

(A) I HOPE YOU UNDERSTAND THE SERIOUSNESS OF THIS SITUATION. I REQUIRE THESE ISSUES TO BE RECTIFIED. BEYOND THIS POINT YOUR SUPERVISOR WILL OBSERVE YOUR PERFORMANCE AND IF IT DOES NOT IMPROVE THERE WILL BE A SECOND INTERVIEW PROCESS, AFTER WHICH YOUR EMPLOYMENT MAY BE TERMINATED. DO YOU UNDERSTAND THIS?

**APPENDIX  
ITEM G**

**FEEDBACK RECORD BOOK**

**STAFF MEMBER'S NAME:**

DATE	ALLEGATION	RESPONSE (IF ANY)	SIGNED (EMPLOYER AND EMPLOYEE)

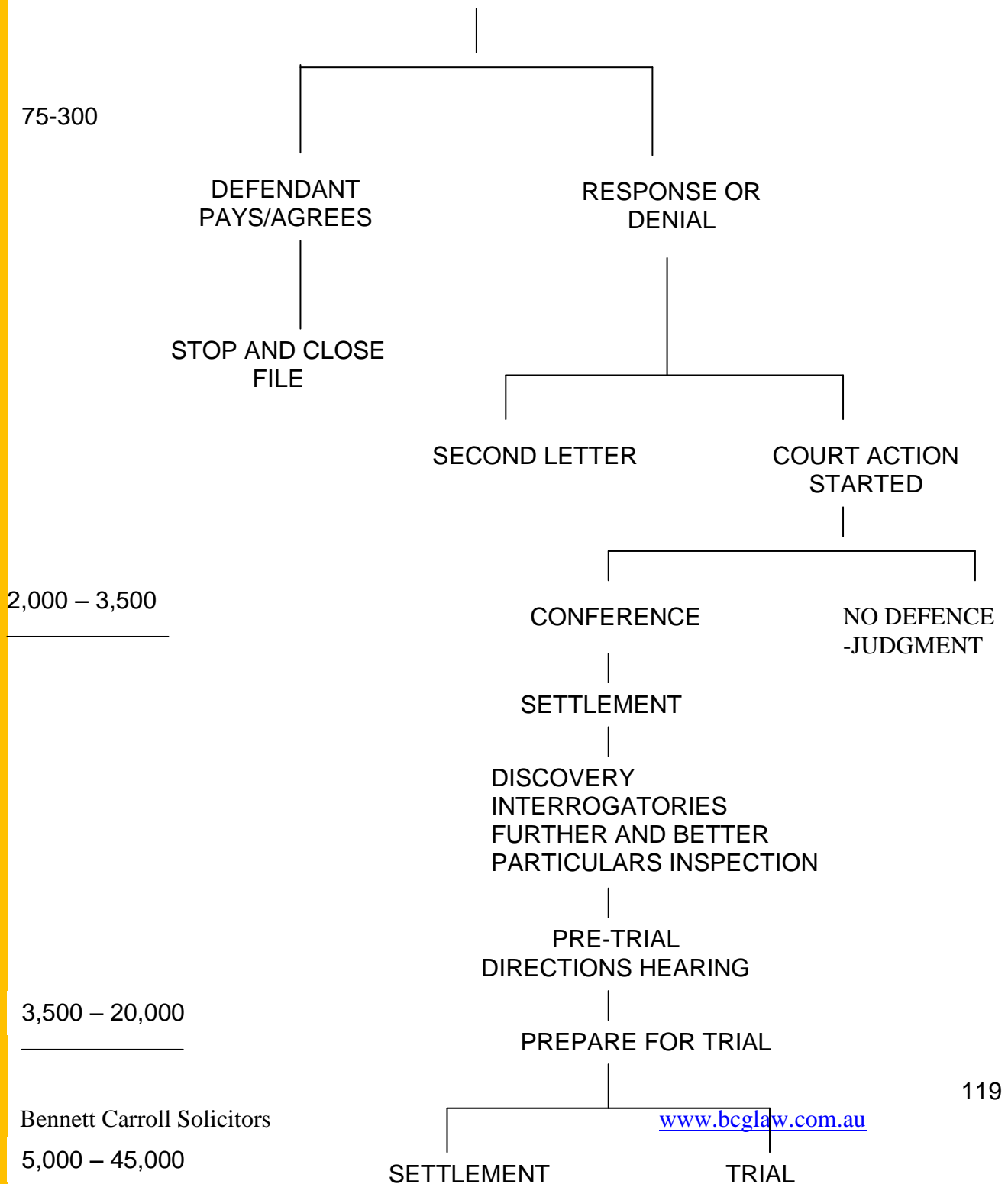
--	--	--	--

**APPENDIX  
ITEM H**

**WRONGFUL DISMISSAL**

**DIAGRAM**

**LETTER TO DEFENDANT**



## **APPENDIX ITEM I**

### **FIRST WARNING LETTER TO POOR PERFORMER**

To be given after warning Interview to a salesperson who is not performing the actions he or she agreed to perform and is therefore not producing the results expected.

[Date]

### **MEMO TO [Name of Salesperson]**

Dear [Name]

The purpose of this Memo confirming our recent discussion is to:

- Discuss your results.
- Explain why they are unacceptable.
- Instruct you on what is necessary to improve your performance.
- Reinforce what has been said to you about the actions you must perform as part of your duties.

### **YOUR RESULTS**

Your current level of results is not acceptable.



Prior to the commencement of your employ it was made clear to you what level of results are required of you. You know that you are not meeting those requirements.

During your employ, you undertook training. That training very clearly specified the actions you must perform to obtain acceptable results. From the outset of your involvement with this agency, you have been aware of the level of results required. Our meeting suggestions and directions have been given to you to help you reach your target results.

### **WHY YOUR RESULTS ARE UNACCEPTABLE**

At the end of the quarter there can only be results or reasons for lack of results. Results come from “actions” as you know. Therefore, a lack of results comes from a lack of doing these actions. **The sole reason your results are unacceptable is your failure to properly perform “action”.**

### **DETAILS OF YOUR FAILURE:-**

You have agreed that your results are obtainable and within your ability. A failure to do these actions is a failure to do what you are paid to do.

### **THE REMEDY**

- Massive Action. You will need to work more at doing the actions to restore your performance to acceptable levels.
- Focus on results and the actions necessary to obtain those results.

### **WHAT WILL HAPPEN IF YOU DON'T REACH YOUR TARGETS**

At the outset of your employment it was made clear to you that **reaching your targets is mandatory.**

Your failure to reach this standard comes as a result of your failing to do the right actions properly. You are not following the path for success. The purpose of this Memo is to urge you to return to the correct path. I regard it as my duty to you to provide counselling and advice to help you. If you need any help or further training please let me know and I will see to it.

If you feel you are unable to meet the specified requirements then you should tell me. If you can't or won't do the actions you are paid to perform then you should consider pursuing a career elsewhere.

## **WHAT HAPPENS NOW?**

As I mentioned to you during our talk, I would much rather you stayed with us and succeed rather than to leave us. I do not believe people should work under a threat of dismissal. I assure you that once you do the actions you will get the results and I want you to now focus entirely on the actions which you have been trained to perform. You will also be a lot happier with some results coming in.

I look forward to your renewed vigour.

I know you can do it! The question now is “will you do it?”

It's all up to you.

Regards

**[Your first Name only]**

## APPENDIX ITEM J

### SECOND WARNING LETTER TO POOR PERFORMER

To be given to a salesperson who is still not doing the actions he or she agreed to do after receiving a warning letter and is therefore still not producing the minimum results required.

[Date]

#### MEMO TO [Name of Salesperson]

Dear [Name]

Following my recent memo to you on [insert date] , I am completely unable to understand why you are still not following the actions. I am truly disappointed with your results and your inability to carry out the actions that bring results.

You seemed to pick up for a couple of days and then you dropped off again. Why?!

**[Name]** , I am really concerned about your performance – or to put it better – I am really concerned about your lack of effort. I have no doubt that if you were to make the effort, your performance would increase to a satisfactory level.

**I must now make 4 clear points to you:**

1. I want you to stay with us and succeed. I know you can do it. All it requires is a determined effort from you.
2. If you do not make the effort, you will not obtain results. You are paid to obtain results. Your employment here is dependent upon you obtaining satisfactory results.
3. You cannot remain employed here unless you consistently meet your agreed standard. I cannot justify your continued employment on your current level of results **but** I am giving you **one final chance to show you can do it.**
4. You have 2 weeks to recover your position and you must, in this time frame, obtain the following results:

**List all actions here**

If there is any matter that you wish to put to me arising out of this memo then I would be pleased to speak with you further.

Please **[Name of Salesperson]** , make the effort as you have agreed to on several occasions.

I am counting on you not to let me or yourself down.

Thanks.

Regards

**Signed in Blue Ink**

**[Your First Name and Surname]**