

Loaning Personal Money to the Business

When providing a loan to your own company, recognise the importance of treating it as a business transaction and establishing a formal Loan Agreement.

This should include a General Security Agreement (GSA) over all the personal property in the company and a mortgage as security over any property.

It should be registered on the Personal Properties Securities Register (PPSR).

Tom Meagher
Executive Director



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Estate Planning

Be aware that jointly-held assets that can become problematic on your death.

Company property, trust assets, insurances and superannuation are not necessarily dealt with by the terms of a personal will and testimony.

They are usually considered 'non-estate' assets.

Tom Meagher
Executive Director



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The Risk that Hides in Your Digital Copier

Most modern multifunctional printers have an internal hard disk drive that stores up to 2 years' worth of every single document that has ever been copied, scanned or printed.

This needs to be considered in managing the machine's access, information retrieval and disposal.

Tom Meagher
Executive Director



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Prepare for Physical or Mental Incapacitation

In the event that you become physically or mentally incapacitated without adequate notice or warning, a pre-planned **Enduring Power of Attorney (EPA)** or an **Enduring Power of Guardianship (EPG)** can be used to appoint a trusted person or persons to make important decisions concerning your medical treatment, hospitalisation or life-support, as well as your legal and financial affairs.

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Who Will Take Over Your Business?

Documenting what will happen and who will take over your business when you become incapacitated or leave, whether by choice or by circumstance, forms your **Business Succession Plan**.

The objective is to preserve value and provide the business with a smooth transition so that disruption and any loss in profit is minimised.

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Does Certifying Documents Need to be in Person?

When you know the person, and they send you documents to sign that has their signature on it and have come from them in the mail or digitally, you can still certify them.

You need to take into consideration that the documents sent are the original document however.

Digital authority is becoming more common, however it generally needs to be a Government Department's process to be allowed.

Tom Meagher
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Another Urgent Independent Legal Advice Certificate!

Despite the recent Banking Royal commission, complex financial and legal instruments, including those with guarantees, are being sent at the last minute where the client is often told to simply get them “witnessed” by a lawyer.

In reality, the client needs to have first read all the documents, then had all the risks and obligations explained to them by the other party. After that, the advising lawyer can be adequately satisfied that the client has fully understood the risks and obligations to effect the Independent Legal Advice Certificate. The **Solicitor’s Guarantor Advice Certificate** does require that all the relevant loans and security documentation need to be reviewed.

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Is this a Safe Work Environment?

All Australian organisations have a duty under their applicable health and safety laws to provide a safe working environment. This includes being safe not only from a human injury or death, but from psychological and verbal abuse and harassment.

If an employer becomes aware that an employee has been abused by a client, that employer has a legal obligation to manage the risk. If an employer does not take client bullying of their employees seriously and it does not have the right procedures in place, that employer may be opening itself up to litigation for stress leave and stress disorders, and even prosecution under the health and safety laws in the more serious cases for failing to provide a safe work environment.

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Using Super for Commercial Property Acquisition

When procuring commercial property to occupy yourself, the current and future rental/review amounts must be of a true market value, not providing any additional benefit to the owner by charging themselves a low rent.

If buying through a Self Managed Superannuation Fund (SMSF), the governing rules would need to allow for a Limited Recourse Borrowing Arrangement (LRBA) and that the trust's strategy enables for such type of geared property investments.

The other key note is that the sale of commercial property often attracts Goods and Services Tax (GST). This generally applies where the seller is registered or required to be registered for GST and is conducting an enterprise (particularly where an existing lease arrangement is already in place).

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Private Loans using a Caveat or Mortgage as Security

When making a private loan arrangement between a parent to a child, putting a (mere) caveat on the property does not give any substantive nor real enforceable protection for that loan, as it is basically just a notice to other parties rather than giving the relevant security interest in that real property.

Such loans needs to consider other mortgages in place.

If there already is a first-ranking mortgagee, you would want to upfront (i.e. before the funds are advanced otherwise and you are looking at an 'Acknowledgement of Debt Deed' rather than a 'Loan Agreement') negotiate and agree a Deed of Priority with that first mortgagee and then put in place a second mortgage (assuming there is sufficient equity in that property).

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Risks in Non-Disclosure Agreements

There are no legal or commercial risks in signing a Mutual Confidentiality Deed / Non-Disclosure Agreement (NDA), so the resistance of a party to signing one may be an indicator of negative things to come.

So that the Deed is legally valid and enforceable, it's critical that the signature parts are done correctly. Where any party is an individual, then their signature must be witnessed by an independent other adult. If it is a company, you must have both legal entity name and identifying ABN/ACN and names of the officers signing.

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Indigenous Ownership for Supply JVs

A party will ultimately need to hold a 51% share in the Joint Venture (JV) to comply with Supply Nation and the Aboriginal Business Directory of WA's minimum indigenous ownership requirements. That will enable the JV to be registered with those bodies and enable it to be eligible for the WA Department of Finance's Aboriginal business and employment tendering preference.

A Company structure is best for such arrangements, as WA partnerships are governed by the *Partnership Act of 1895* and partnerships formed under this Act have some limitations, such as not being a separate legal entity with each partner being fully responsible for business debts and liabilities incurred on behalf of the other (with or without their knowledge), whereas companies have limited liability.

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Are Your Valuable Documents Safe?

Leaving valuable documents with a third party for them to store and hold on your behalf is known as 'bailment'. If a third party is endeavouring to sell such personal property on your behalf, it is known as a 'consignment'. If they are using such for their exclusive use and benefit that is known as a 'lease'.

Materially, at law and in all those instances, you have not been deemed to sell or transfer ownership of such personal property to the third party. **However** pursuant to the PPSA and since 2012, as the concept of 'title' has been abolished, once an owner/bailor/consignor/lessor (collectively the "Secured Party") *parts with possession and direct control* of any such personal property to third party whether acting as a bailee law/consignor/lessor (collectively the "Grantor").

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Do Certified Copies Work?

When a lawyer safely stores original documents, such as a will and testimony, they can provide email-copies with the words “COPY” stamped in red across the front.

When requesting “certified copies” they are actually “certified copies” of copies, as without the clients’ express authorisation, any of those original instruments should not be outside of the safe custody to avoid any party, who may sight those certified copies (of copies) to inadvertently think they were authorised copies of originals.

Essentially the only time certify copies of original documents are provided is when the duly authorised person(s) need to ‘activate’ a copy, such as when a bank or other appropriate third-party requires a certified copy.

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Do You Really Have a Secure Contract?

A carefully crafted *'termination for convenience'* clause typically used in government contracts gives them the right to unilaterally terminate a contract at their discretion. This may be used when a change of government occurs and an existing project is not wanting to be continued.

Be careful when this clause is used in non-government contracts that can place the supplier in a vulnerable position for having the contract terminated.

Todd Hutchison



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But... I Earned that Money!

When a company goes into liquidation they are required to pay their debts.

There is a provision within the liquidation process to claw back any unfair preferential payments made or any transfer of assets to a debtor up to the six months prior to the relation-back day or winding up day.

This is used to enable a payment distribution between creditors on an equal basis.

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History of the Magna Carta

The Chart of Rights agreed by King John of England in 1215 was referred to as the *Magna Carta Libertatum* (medieval latin for ‘the Great Charter of the Liberties’, better known simply as the Magna Carta).

It basically recognised human rights and that everyone was subject to the law, including the King.

The first Magna Charter was annulled by Pope Innocent III.

Todd Hutchison



Todd with an original copy of the Magna Carta in London.



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No Contract? But I spend money in Goodfaith !

Where parties act as if there is a contract in place, such as when they are acting on promises made before a legal binding contract is rightfully executed, they cannot rely on the remedy provisions under contract law.

Instead, **Promissory Estoppel** may apply, which is a legal principle that a promise is enforceable by law where a promisor has made a promise to a promisee who then relies on that promise to their subsequent detriment.

A claim for any loss may be possible.

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Minimise Emotions in Contract Negotiations

Negotiations can be stressful events and cause emotionally-driven decisions. To help manage your emotional state during the negotiation, you should upfront determine before the event your:

- **Target** (ideal) position;
- **Acceptable** (compromise) position; and
- **Walk Away** (unacceptable) position.

You can then focus on your opponents position during the negotiation to find the win-win position for both parties.

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Whose Terms and Conditions Win?

Contracts require a 'offer' from a party and an 'acceptance' from the other.

When one party makes an offer, the other can accept or reject it or make a counter offer.

Be aware that a counter offer removes the previous offer and therefore restarts the offer process and puts it into the other party's hands.

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Who Has Legal Rights in a Contract?

As a general common law rule, only parties to the contract have the right and obligations under that contract.

This means any third parties can become beneficiaries to the contract, but will be unable to take legal action themselves.

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Unfair Contract Terms for Small Business

The Australian Federal Government introduced a new law that came into effect on the 12 November 2016 to protect small businesses (at least one of the parties must be a small business) from 'unfair contract terms' imposed on a small business by larger entity.

A small business in this context is an enterprise that employs less than 20 people, including casual employees employed on a regular and systematic basis).

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Mistakes are recognised by Law

Mistakes in contracts can be recognised and corrected by courts, such as:

1. **Common mistake** - when both parties are commonly mistaken (e.g., the authenticity of a piece of art);
2. **Mutual mistake** - when both parties are mistaken about different things (e.g., the agreement might be too vague or uncertain to be enforceable);
3. **Unilateral mistake** - when only one party is mistaken about some aspect of the contract (e.g., resulting in some improper conduct on the part of the unmistaken party whereby that party seeks to prevent the other becoming aware of the mistake);
4. **Non est factum** - where a party is mistaken about the nature of the document that they are signing through no fault or neglect of their own.

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A Person Walks Away from a Contract

If a disgruntled contractor walks off a site suggesting they are not coming back to finish their contract obligations its becomes an anticipatory breach, until their don't appear again as per the planned schedule or where the other party formally accepts their position.

This becomes a **repudiatory breach** that represents an unwillingness to perform in substance or at all. This may lead to a court remedy to the buyer for any loss in getting the remainder work completed by another party.

Repudiatory breach can also be enacted where a contractor is proven to be incapable to meet their obligations.

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A Walking Contractor is Still to be Paid

Where a contractor chooses to walk away from their contractual obligations under a repudiatory breach situation, they will still need to be paid fairly for “what one has earned” where a reasonable sum of money is paid for services rendered or work done.

It is a measure to determine a value of work performed and known as **Quantum Meruit**. The contractor may be liable for any costs to fulfil the work by another party however.

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Are they a Sham Contractor?

A sham contracting arrangement is when an employer attempts to disguise an employment relationship as an independent contracting arrangement.

Court tests may give consideration to factors such as the presence of a uniform, the ability of the party to delegate the work, the hours of work, the control of work, the ownership of any tools, how they represent themselves, the place of work, the number of clients, the remuneration and access to provisions such as leave entitlements.

Contractors are generally unable to access leave entitlements, superannuation and insurance claims.

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Survival Clauses

Legal binding clauses in a contract that continue after the discharge or termination of a contract are called 'survival clauses'.

These typically include clauses that cover: Confidentiality, Intellectual Property rights, Restraint of Trade, Non-compete, Warranties and Guarantees.

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Judicial Injunctions

An **Injunction** is an order by the court for a party to not to do something.

Prohibitory injunctions seek to prevent actions which will constitute a breach of contract. They basically forbid a party to do or continue to do something.

Mandatory injunctions seek to direct a party to act in a certain way, often preventing it to do something.

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Be Aware of Guarantee for Bank Loans

When preparing to sign guarantor instruments, don't forget to look at all the related documents, such as:

1. the bank finance or facility offer letter;
2. the relevant loan agreement/term sheet;
3. the relevant guarantee and indemnity provisions;
4. any related security documents such as a mortgage and/or general security agreement; and the
5. **Solicitor's Guarantor Advice Certificate** that ensures you have been provided with legal advice of your obligations.

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