BUSINESS BULLETIN

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OWEN HODGE LAWYERS

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Over the years at Owen Hodge Lawyers we have developed a reputation for professional service, realistic advice, and commitment to providing the best outcome for our clients. Our vision is to pursue profitable opportunities, with likeminded individuals and businesses, driven by success.

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The Importance of a Will - Succession Amendment (Intestacy) 2009

Whether the present is prosperous or not there doesn't seem to be reason to focus on the last stages, but as your business grows and becomes more successful, so does the importance of having a Will.

If you have not identified what you want done with your business and your personal affairs, you're not only risking business value but you're setting up potential problems for the remaining family and other business stakeholders. Without a current and valid will, people pass away intestate. There is currently a complex system of laws that apply to situations of intestacy. A system that is about to be made even more technical in the wake of new reforms with the introduction and passing of the Succession Amendment (Intestacy) Bill 2009.

The current law

The current scheme applies to persons who died on or after 1 January 1978 with no will. It works in a similar vein to a circular web. Assuming the deceased is the centrepiece, the closer the parties are to the deceased the higher their chance of benefiting from the estate. If the deceased is survived by a *legal spouse,* that spouse is entitled to the whole estate to the exclusion of all other relatives of the deceased.

This situation becomes more complex when the deceased is survived by both a *spouse and a de*

facto partner but no children. If this occurs the de facto partner will be entitled to the entire estate providing they were the de facto partner of the deceased, at the date of death, for a continuous period of at least two years.

The law spins a more complex web when the deceased leaves a *de facto partner, spouse and children*. In this case the spouse or partner is entitled to a statutory legacy, the deceased's personal effects and half of the residue of the estate. The maximum value of the entitlement is $200,000.00. The deceased's children are entitled to the remainder unless it is required to secure an interest in the shared home for the spouse or partner.

If the deceased leaves *no spouse,* the estate will be divided between their descendants in accordance with the concept of statutory trust, then to remoter blood relatives. If the deceased does not leave any persons that may benefit under the Wills, Probate and Administration Act 1898 (NSW) then the estate passes to the Crown as property with no entitlement, enabling it to make limited provisions for dependants of the deceased.

The changes
Just when it is thought this web of law cannot be weaved into anything more complex, the word 'reform' rears its head. Under the Amendment Bill when an intestate dies leaving *a spouse or partner and children* the entire estate goes to the spouse or partner. If the children of the intestate are not the children of the surviving spouse or partner, the amendments dictate that the estate is to be shared between the deceased's spouse or partner and surviving children. The spouse or partner will only be able to select a portion of the estate equivalent in worth to their entitlement.

The amendments further increase the statutory *entitlement* for a surviving spouse or partner where they are not entitled to the whole estate from $200,000.00 to $350,000.00 to reflect CPI increases.

The final amendment is an extension of the categories of persons that may benefit from the deceased's estate to include cousins. Special consideration is made in the case of Aboriginal persons who may have a broader concept of family relationships.

The best way to avoid tangling your descendants in this very technical web however is to quite simply make a Will. A signed, witnessed and documented script of your intentions.

If you would like further information about how Owen Hodge Lawyers can help, please contact James Kelly on 95707844.

Commercial Leasing Issues

Two cases decided this year have raised some interesting points in relation to commercial property leases.

Alterations to Commercial Premises without Lessor's Consent

In the case of Byron Bay Retirement Villages v Zandata, the tenant had a lease of a caravan park at Byron Bay, and over several years began to remove old and dilapidated cabins from the property and replaced them with new cabins, which benefited both parties as rent increased with the increased takings of the caravan business.

The lease contained a clause which is fairly usual in commercial leases, stipulating that the tenant must not make any additions or alterations to the premises without the prior consent of the landlord, which consent would not be unreasonably withheld.

By 2003 about fifteen dwellings had been removed without the landlord's consent. The landlord took action

against the tenant in respect of an alleged breach of the lease.

Even though the dwellings were purchased by the lessee and were the lessee's property, the Supreme Court decided that the terms of the lease in relation to improvements did apply to these dwellings. However the tenant was successful in the case on two main issues, with the Court deciding;

1. That the landlord had elected to affirm the lease and wave the breaches by the acceptance of rent for several years with knowledge of the lessee's conduct and breaches of the lease; and

2. That the judge would have granted "relief against forfeiture" to the lessee in respect of the breaches, that is, would have ruled that the breaches were not such as to entitle the Landlord to terminate the lease in the circumstances.

It is important that landlords and tenants are aware of the provisions of their leases and also that if a landlord believes that there has been a breach of the lease which it wishes to object to, that it is raised immediately and does not become prevented by lapsing of time from raising the issue.

The judge also came to the conclusion that the intention of the landlord was actually to try to terminate the lease to get back the land for development and accordingly the Court would have been willing to step in and make sure that fairness prevailed.

Liability of a Guarantor Under a Lease

In the case of Handcock V Salemon Enterprises, the tenant of a retail video store went into liquidation and the landlord decided to sue the tenant's director who had given a personal guarantee.

The guarantor raised various arguments including that, because the landlord could not succeed against the tenant which was in liquidation, the guarantor did not have to pay the outstanding rent.

The landlord was successful and an order was made that the guarantor had to pay the outstanding rent. A well worded guarantee in a commercial lease will not be reliant on the ability of the tenant to pay, and will be a primary obligation of the guarantor in favour of the landlord.

The Court ruled that the liability of a guarantor or an indemnifier will be construed simply using the actual words used in the lease contract. In this case the wording of the lease was clear and unambiguous and the guarantor was liable to pay the outstanding monies to the landlord.

Roger Harkin is an accredited specialist in Property Law and can be contacted about commercial leasing and other property matters on 9549 0770.

An Overview - BUY/SELL AGREEMENTS

Building a business is hard work. Where there is more than one owner it could all be lost if an owner becomes ill or dies and an effective business succession plan is not in place. This plan should include a buy/sell agreement and funding mechanism.

A buy/sell arrangement provides certainty upon death or disablement on who will purchase the business share, how the purchase will be funded and what price will be paid. It may also include provisions to extinguish personal guarantees. The arrangement has two components:

Legal agreement – this sets out the terms and conditions of the business transfer including business valuation method, trigger events and procedures to follow. Roger Harkin of Owen Hodge Lawyers can assist you with the legal agreement.

Funding mechanism – this provides the money to facilitate the sale. Funding could be provided by selling assets, taking out a loan, gradual buy-out, insurance or a combination of options. Insurance is a common method used in business succession plans to cover insurable trigger events (i.e. death, total and permanent disablement or critical illness). Ben Graham of Owen Hodge Financial Planning can assist you with the necessary insurance policy.

Ownership of policy
The suggested default option is to make the person who ultimately needs the money (i.e. the departing owner) the policy owner. However, you should consider other issues such as control over the policy, payment of premiums, the business structure and potential for ownership changes as well as taxation to determine if it is more effective for another person/entity to be the policy owner.

Paying premiums
Despite who owns the policy, a decision needs to be made on who pays the premium and how the cost is shared. Mechanisms should also be put in place to avoid policy lapses for non-payment. The owner of the policy is responsible for paying premiums. However in practice the business entity often pays the premium as a non-deductible or FBT expense.

Business valuation
An important part of the buy/sell agreement is deciding how to value the business. The business owners should work with their accountant to decide on the methodology to be used.

Trigger Events
Business owners will need to decide what trigger events they want to include in a buy/sell agreement. Life insurance can be used to fund the transfer upon death, total and permanent disability and critical illness (trauma) however, it cannot cover retirement or leaving the business for personal reasons. The remaining owners may need to fund the latter options using borrowings, personal assets, gradual buy-out or savings plans.

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