Burke & Associates Lawyers

A – Z Business Guide for Medical and Health Practices

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A Arbitration or Litigation

So you find yourself in dispute with another commercial party….

- What forum do you choose to try to resolve the dispute?
- Direct negotiation, mediation, arbitration, litigation?
- What are the pros and cons of each?

The tricky thing is that once you are in dispute, it is likely too late to ask these questions because that luxury has passed. You will usually already have agreed to a process for dispute resolution in your contract with the other party.

These questions are of great importance during any process of pre-contract negotiation and, later on, before the commencement of any proceedings relating to a dispute.

Let us compare the features of two of these modes of dispute resolution in more detail: (a) litigate the matter in Court vs. (b) arbitrate before a chosen Tribunal.

Finality and Enforcement

Finality of proceedings and enforcement are two critical issues in international commercial disputes.

Recognition and enforcement of awards granted arising out of arbitration across international jurisdictions are today much easier than with Court orders. The reason being the bilateral agreements, treaties and conventions in operation. Many countries are now parties to such agreements, making enforcement of arbitral awards a much smoother process than in the past.

Arbitration also has a very limited appeal process which provides finality for the parties early on and accelerates the enforcement process in comparison to litigation.

Confidentiality

A remarkable feature of arbitration is that the proceedings take place in private settings and, in many cases, there is an implied obligation of confidentiality. Litigation is different in that the proceedings are public unless an application is made (and granted by the Court) for the proceedings to be sealed (or "suppressed" as it is known in Australia). The Court will not always grant such applications and, in fact, it is usually quite difficult to obtain this type of confidentiality order from a Court.

Flexibility

Disputing parties have greater scope and flexibility to decide the forum for their proceedings in arbitration including the guiding language, rules and principles. As a result, there is greater transparency in arbitration about the procedural aspects when compared with Court proceedings.

Time and Cost

The time and cost involved in a particular case that utilises arbitration will depend on the statutes and procedure adopted by the parties but also the nature, scope of concern and territorial limits of the dispute.

These are the clear advantages for the use of arbitration as a chosen mode of dispute resolution. However, our discussion would be incomplete if we didn't also look at the potential negative aspects of arbitration, namely:

- Execution of interim measures (such as an injunction), if recommended by a tribunal in arbitration, is far more complex and difficult when compared to obtaining early or interim orders from a Court;

- In the case of multiparty disputes, if the parties involved fail to agree on the terms, the whole purpose of arbitration is lost because the tribunal cannot force the proceedings on other parties who are not a party to the arbitration;

- Setting a precedent for how future matters are decided by the legal system is very important for one or more parties and, in such cases, litigation is the preferred option; and

- In cases where the evidence is strongly in favour of one party, the proceedings may be shortened and summary judgment may be obtained by way of litigation. Such an option is not available in arbitration.

B Business Structures

So what is a business structure?

A business structure is the legal vehicle for operation of the business of your medical practice. The structure is established at the commencement of your business' trading activities or operation but it can change throughout the life of your business too especially when there exists growth and expansion of that business.

A business structure is different to a business model.

The buiness strcuture is the skeleton through which you operate your business, and the buiness model is the purpose of your business.

Choosing the right structure for your practice is important for the following reasons:

- Liability of owners;
- Asset protection (protection of assets of individual owners and the business). You should consider segregating risky areas of the business (i.e. employees) away from business assets;
- Tax benefits (be mindful of income tax rates and concessions);
- Future sale of the business (can you sell separate parts of the business to third party owners, for example, shares or units?);
- Licenses you may require for operation of your business which may have specific business structure requirements;
- Direct control over your business;
- Initial set-up and ongoing costs (including accounting) of the business structure;
- Simplicity vs. complexities;
- Your type of business may have special structure requirements – for example if your business is a franchise, online, a family business or you are an independent contractor.

In choosing a business structure for your practice, it is important to know what choices are available to you and the consequences so that you have all of the necessary tools to make the right choice for your business. We outline below the key features of the most common types of structures through which to operate a business.

Sole Trader

- Simple to set-up and to operate (i.e. less ongoing paperwork and accounting required). This is a simple business structure to set-up and so generally it has less paperwork, accounting and lower ongoing costs. You don't need to lodge a separate tax return for the business but keep tax records for at least 5 years as with your personal tax affairs.

- Set-up and ongoing costs are low. Ongoing costs are minimal – business name registration, bank and accounting fees. No need for a separate business bank account (although this is recommended)

- Sole traders are taxed as individuals and business income is reported in your individual tax return. Further tax features are:

    - 2016 – 2017 tax free threshold is $18,200;

    - The amount of tax you pay ultimately varies depending on your total income and the deductions you can claim; and

    - Income tax is here to stay! One of the major disadvantages of running a sole proprietorship is the personal tax liability you will incur. So if your business has more than $180,000 in taxable income per year, you are really paying the highest rate of income tax. Not a tax effective business structure but how a lot of businesses start out initially.

- Sole traders are personally liable for financial and tax debts. Another major disadvantage is there is no legal separation between business and personal liability. For example, if you took out a loan to help buy office supplies or a new computer, your creditors can sue you personally if you default on your obligations. Keep in mind though, many businesses begin as sole proprietorships and graduate to more complex business forms as the business develops.

  Sole proprietorships are the simplest of all legal structures but they also lack the legal and financial protections of other business forms. There is no division between business assets and personal assets including your share of joint assets e.g. house or car. Assets in your name can be used to pay business debts.

- As the sole proprietor of the business, you have full control and authority over the business. Sole proprietors experience the key advantage of being their own boss, but that needs to be balanced with shouldering the burden of being responsible for the business' success and failure.

- As with other structures, as a sole trader, you can employ people to help run your business.

- You will need workers' compensation insurance. You will also need to understand employer tax, superannuation obligations for employees and employee entitlements.

Partnership

- An association or group of people or entities running a business together, but not as a company. A general partnership is one where all partners have equal responsibility for the management of the business, and each partner has unlimited liability for the debts and obligations.

  For a partnership to exist there must be some element of repetition which indicates the conduct of a business. From this flows the aim of generating profits which are then divided between the partners.

- In most cases this is now a redundant structure in Australia.

- There are different types of partnerships (general and limited). A limited partnership is one where the liability of one or more partners for the debts and obligations of the business is limited. A limited partnership consists of one or more general partners (whose liability is unlimited) and one or more limited partners.

- Issues with buying, selling, retiring or death of a partner. Without an effective partnership agreement in place which appropriately deals with these circumstances, these events may involve the partnership dissolving. That is, substituting owners isn't as simple to do as with a company or trust.

An effective business partnership agreement should record the following:

- how the business' profits are to be shared;

- how much money or other capital each partner brings to the partnership business;

- how new partners can join the partnership;

- how partners are removed from the partnership;

- the roles and responsibilities of each partner including decision making powers and authorities; and

- how to resolve disputes.

A shareholder agreement for your company or unitholder agreement for your trust should cover similar issues.

Company

A Company is a legal entity separate from its owners (called shareholders) established under the Corporations Act. Such a structure is usually a company limited by shares which means the shareholder liability is limited to the amount paid to the company for their shares (could be as little as $1.00 for a company just starting out).

- It is a more complex business structure to establish and operate. It has higher set-up and ongoing costs than a sole trader or a partnership. Costs for set-up include the ASIC company registration fee (currently $466) and at least $200 if you use a service to assist you in the set-up. Also any associated accounting or legal professional fees for advice on the establishment. Ongoing costs – business name registration, ASIC annual review fee of $246 (and potential other late fees from ASIC) and bank and accounting fees which would be higher than for a sole trader. A company must have a separate business bank account.

  Further companies require more paperwork, accounting requirements and potentially higher ongoing costs. Other features are:

  - Company must lodge its own tax return in addition to your individual return, and the returns of any associated trusts;
  - Must keep financial records for seven years to comply;
  - Must keep tax records for at least five years, either electronically or on paper;
  - Is subject to annual review by the Australian Securities and Investments Commission (ASIC);
  - Obligations and legal requirements include: having a registered officer, principal place of business, regular company meetings – including a written record (minutes) of resolutions, notifying ASIC of key changes;
  - A company will continue to exist, even if it has ceased trading until deregistration under the Corporations Act.

- Companies are taxed as a separate entity and report income in the company's tax return:
  - There is no tax free threshold for companies, unlike with sole traders; and
  - The small business (turnover of less than $2 million) company tax rate for 2016-2017 is 28.5%.

- Accessing business income is more complex and difficult. Money earned by the company **belongs to the company**. A separate business bank account is mandatory and as a director, the company may pay you wages or directors' fees, but you cannot simply draw money from the company as 'personal drawings'. You may also receive money via shares, dividends or loans. These all have very different taxation consequences for the director so close ongoing advice of a good accountant is essential in operating a company.

- Liability for business debts. A company is liable for all business debts, however your personal assets can also be at risk if you're a director of a company and the company can't pay its debts. Read as a director, you are **personally liable for tax debts** including Super Guarantee contributions and Pay-As-You-Go (PAYG)

withholding. Even when you cease as a director, you are liable for the period you were a director.

- Control over business – one director compared to more than one director

Trusts

Different types of trusts include discretionary (family) trusts; units (fixed) trusts and hybrid trusts.

With discretionary trusts, there can be difficulties with selling parts of the business to other owners in the future, i.e. there no are no fixed "parts" (shares or units) in this type of trust to sell. In this way, it is easier for owners to enter and exit the business (units and shares to buy and sell) in hybrid and unit trusts. You should refer to Chapter H of this Guide for more on trusts, particularly fixed and hybrid unit trusts.

Not For Profit

- Company limited by guarantee; and
- Non-incorporated association.

These are generally the most common structures for non-profit entities. There is an incorporated and non-incorporated option. The company option again involves registering with ASIC similarly to the company with shareholders which we discussed earlier.

Making the right choice

The best choice of structure is one made for your business and it's owners AND which also considers the owners' goals and plans for the business (short, medium and long term – to the extent that these are known);

- AND which are made in consultation with professional advisers for the owners – accountant, financial planner and / or lawyer;
- AND the right choice of professional advisers. Small businesses often need help with negotiating contracts with customers and suppliers, assisting with real estate needs (leases or building purchase), taxes, zoning and licenses, protecting intellectual property, or settling disputes.

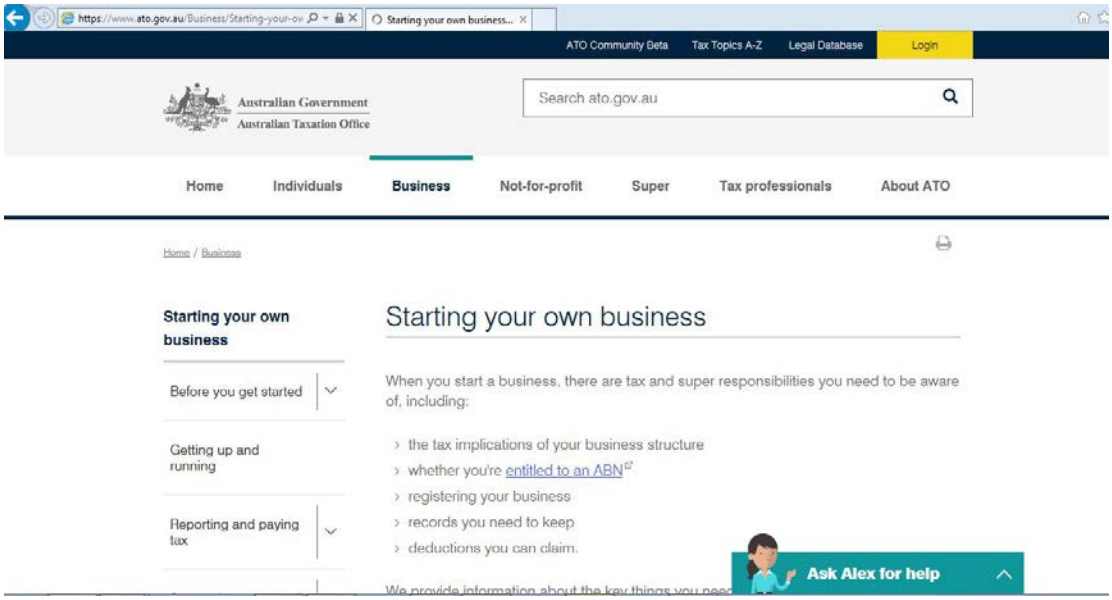
There is no right choice or one size fits all.

By all means, draw on this Guide to assist you in this decision but not in isolation. An accountant's advice with respect to tax applicable to the owners' and the business' circumstances will be critical.

If you don't have a good accountant and a good lawyer to advise you in your business decisions, source them! They will be essential resources as you set out in the commercial world, saving you and your business a huge amount of money, stress, time and (if they are good) adding to development and growth of your business

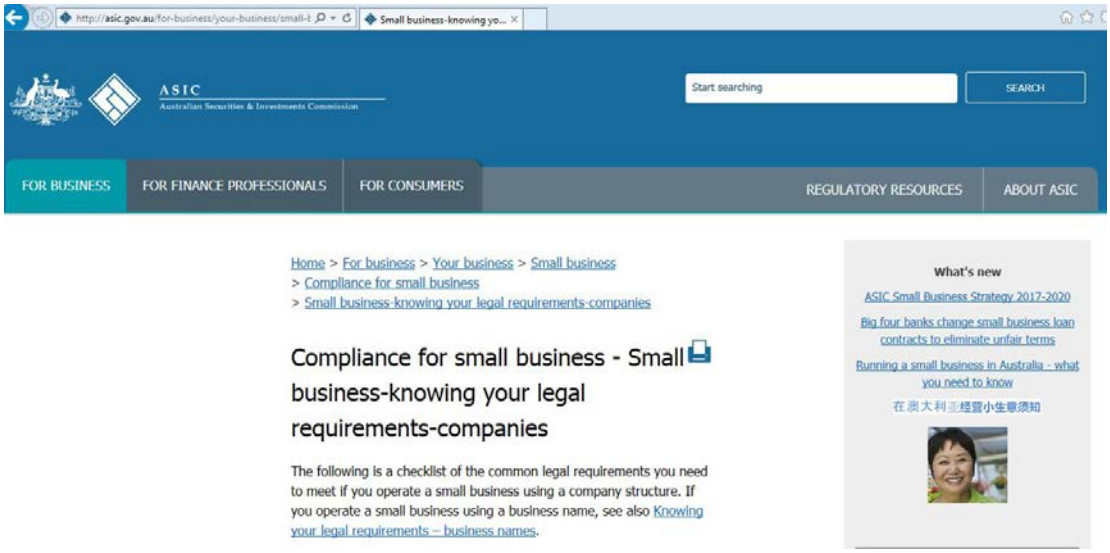
Where to go for more free information?

- *Australian Taxation Office (ATO) website*

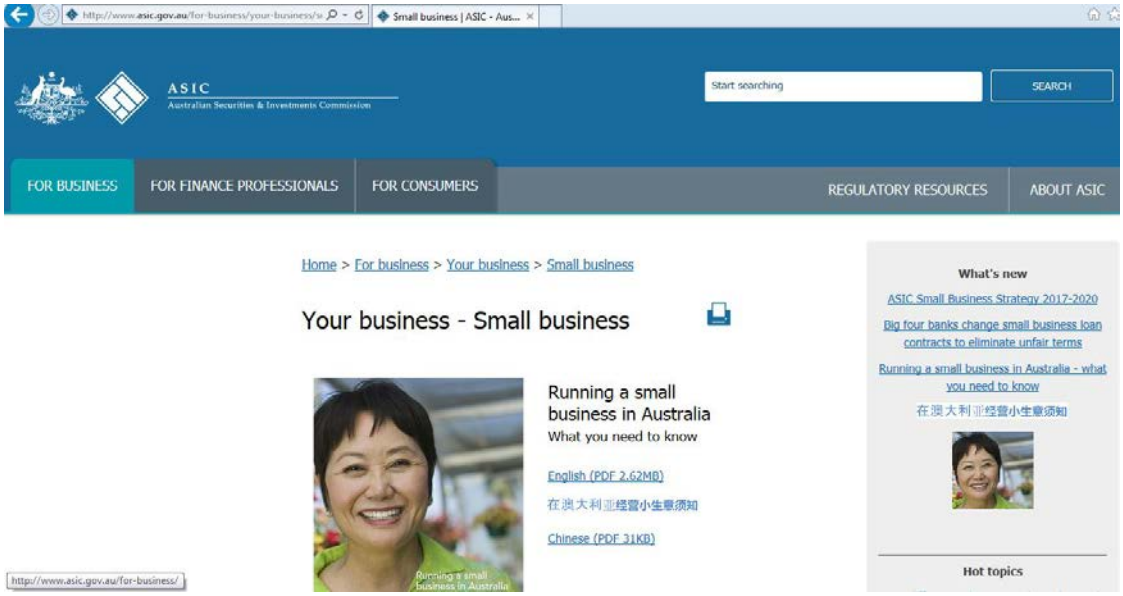


https://www.ato.gov.au/business/starting-your-own-business/before-you-get-started/choosing-your-business-structure/

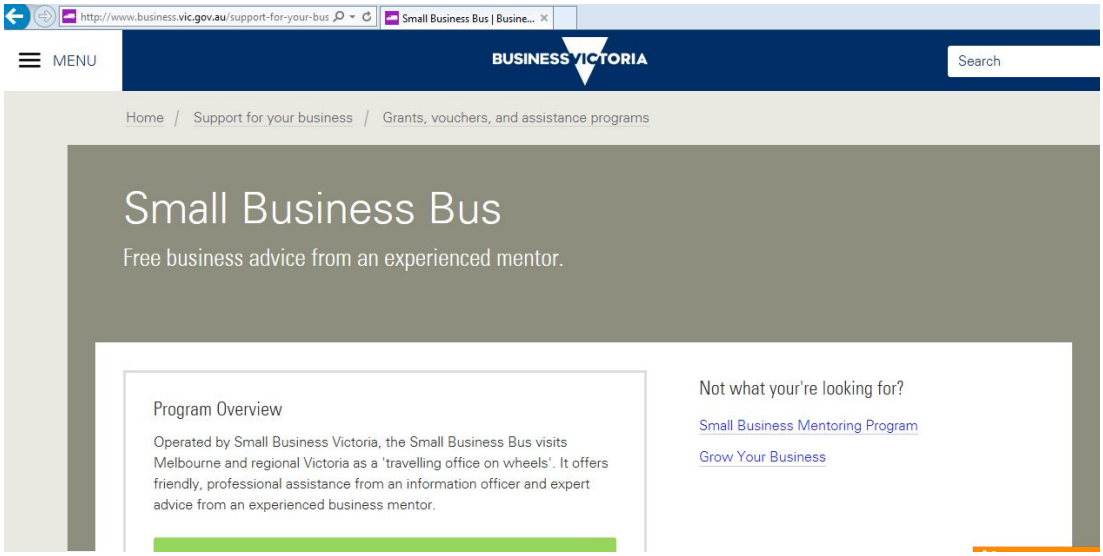
- *Australian Securities & Investments Commission (ASIC) website*



http://www.asic.gov.au/for-business/your-business/small-business/compliance-for-small-business/small-business-knowing-your-legal-requirements-companies/

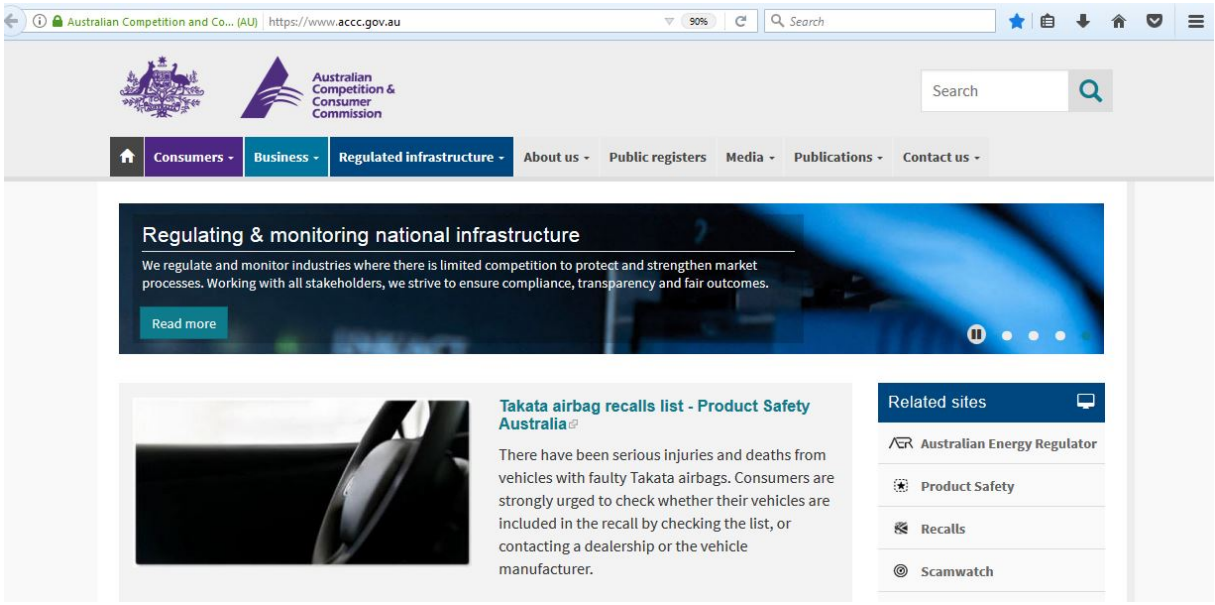


- *Small Business Victoria website*

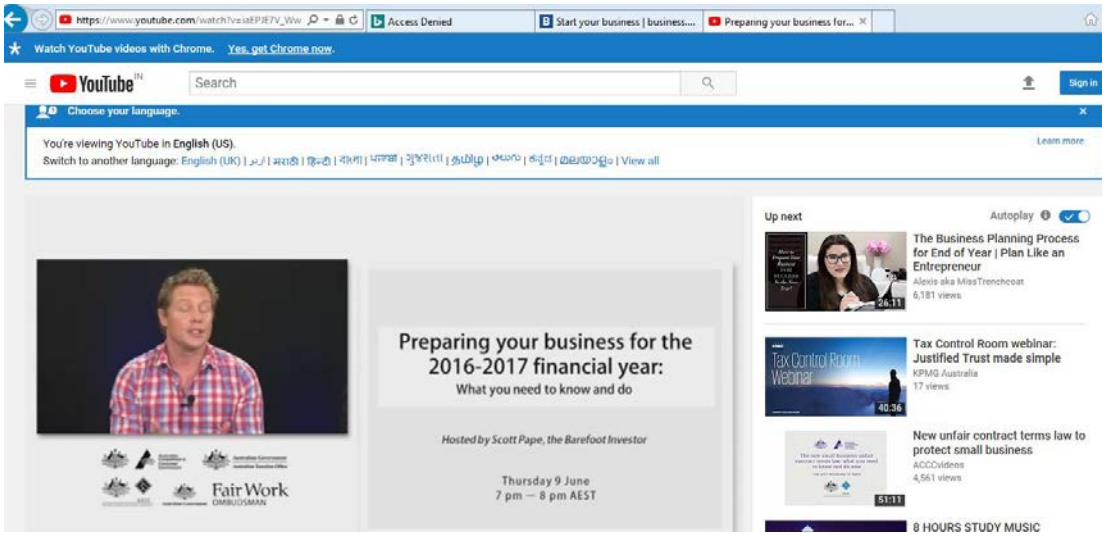


http://www.business.vic.gov.au/support-for-your-business

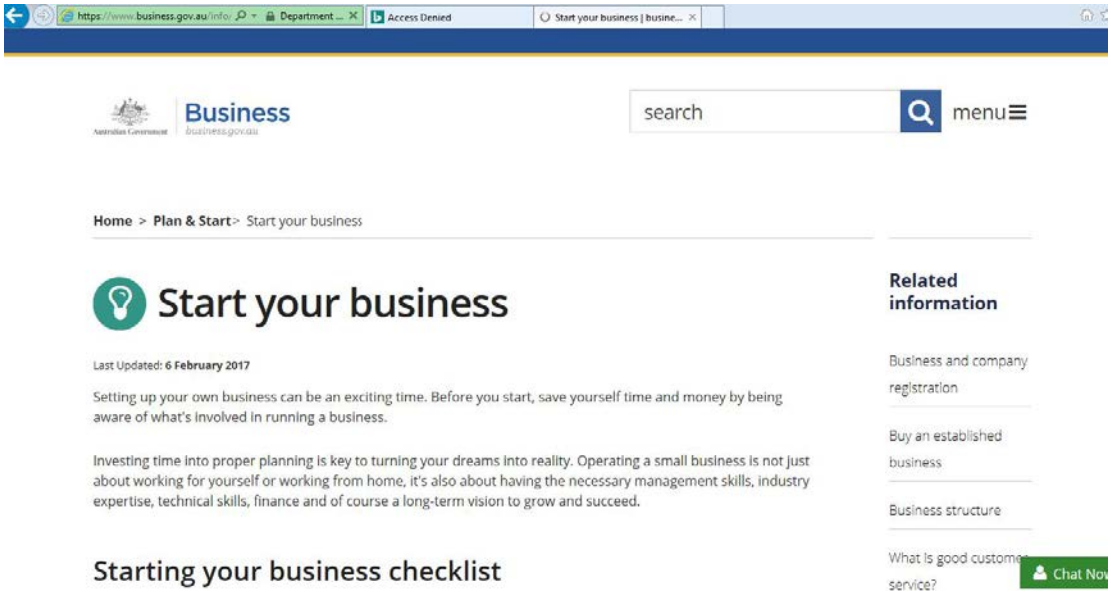
- *ACCC website and webinars*



https://www.accc.gov.au/



- *Australian Government Business website*



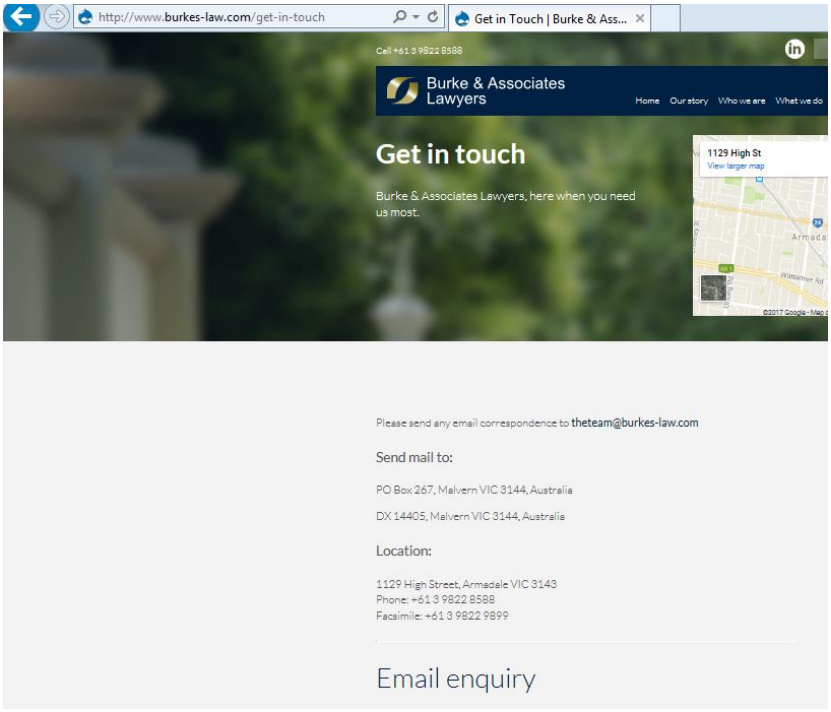
- For employers, this website also has helpful pages on:
  - Workers Compensation Insurance;
  - Superannuation & Tax; and
  - Employee Entitlements.

Those "good" lawyers we mentioned

- *Burke & Associates Lawyers website and resources*
  - A – Z Guide to Small Business

- Blogs

- Contact us and ask Meghan Warren at mwarren@burkes-law.com or (03) 9822 8588.



C Contractors

As a business owner particularly in the medical and health practice space, you may engage both employees and contractors at various stages in the conduct of the practice. Particularly concerning your doctors, you may treat some as employees, some as associates, some as contractors or, quite often, you may have a mixture of a number of different types of legal relationships.

As an alternative to leasing or subleasing, one of the other and most common ways that a general practitioner, medical specialist or other allied health specialist engages in private practice within a medical centre is by way of licensing a consulting room and being provided administrative and management services by the host entity running the centre. This suits the practitioner and the host practice for a number of reasons.

At a minimum with respect to these relationships and the potential issues which can arise, it is important to understand the fundamental differences between the relationships of employment, independent contractor and associate doctor engaged by way of a service agreement to avoid potential employee entitlement claims, government penalties, and other related liability.

If there is any confusion about the nature of a certain legal relationship (especially whether someone is an employee or not), there may be significant legal and financial implications for the employer (or legally deemed employer). Such implications include taxation (including payroll tax, penalties and interest), superannuation guarantee contributions and back payment of employee entitlements in circumstances where the appropriate legal relationship between the parties is not well understood and not implemented correctly in practice. These relationships are a particularly grey and tricky area of the law to navigate and you should seek expert professional advice.

There is a perception that an independent contractor is engaged on a short term basis only, has an individual Australian Business Number ("ABN") and issues invoices for their work done. However, the above are not a complete set of all of the determining legal factors when it comes to looking at the true nature of the relationship.

The law looks to a number of indicia and the substance of the relationship in practice, rather than what the parties label it to be or what the terms of any written agreement between them may say (even though these are relevant factors to consider).

The main indicia include:

Indicia	**Employee**	**Independent Contractor (and also "Associate" health professional / service agreement model)**
Control over work	The employer exerts a high level of control over the employee and how they conduct their work on an ongoing basis	The contractor determines their way of performing the work
Hours of work	Employees have standard, recurring or set hours (i.e. more hourly based)	Under agreement, the contractor decides what hours to work to complete specific task(s) (i.e. more task / job based)
Expectation of work	Employees usually work on a continuous and ongoing basis	Contractors are engaged for a specific task or specific period
Risk	The employee has no personal financial risk or liability (i.e. the employer wears this risk)	Contractor is responsible for their own risk and financial decisions of their own individual business
Superannuation	Entitled to have minimum superannuation guarantee contributions paid by the employer into a nominated superannuation fund under legislative requirements	Contractor contributes to their superannuation fund as they wish by way of their particular business structure
Tools and equipment	The employer generally provides tools and equipment for use by the employee in performing the work (or sometimes tool allowances are provided)	Contractors supply and use their tools and equipment in undertaking the work
Tax	Income tax is withheld / deducted from the employee's remuneration by the employer	Contractors are responsible for paying their income tax and GST directly to the Australian Taxation Office

Indicia	Employee	Independent Contractor (and also "Associate" health professional / service agreement model)
Delegation	Cannot delegate work to others or only with specific employer authorisation	Can delegate work to others as the contractor chooses (perhaps with notice to the principal)
Method of Payment	Paid regularly on a weekly / fortnightly / monthly basis by the employer	Contractor has an ABN and raises invoices regularly or is paid on a project-specific basis (plus GST)
Insurances	Employees are covered by the employer's public liability, professional indemnity, and worker's compensation insurance	Contractor is required to take out and maintain insurances, and it is generally expected that that contractor will not be covered or be able to claim under any insurance held by the principal
Leave	Entitled to receive paid leave for holidays and periods of illness from performing work, by the employer	Does not receive paid leave and must make arrangements in this way (i.e. delegating the work to be performed by others or engaging a locum to perform while the contractor is absent)

The following further tool can be used as guidance on this issue, however, this should be used with caution and is not determinative as to the law: Australian Taxation Office Decision ToolThe ATO Decision Tool may also assist in the determination of a business owner's tax and superannuation implications for workers.

D Dispute Resolution

No one wants to find themselves in dispute (well, almost no one!). But even more so you don't want to find yourself in a dispute with no roadmap for how to adequately deal with it or, even better, resolve it altogether. Tailored agreements between owners about how they agree to run a business together (such as shareholder or unitholder agreements) are critical in providing this roadmap.

Your stock standard constitution or trust deed documents usually created when you first set up your business structures will not be sufficiently tailored to assist you in this area helpfully. Nor will it be sufficiently tailored to suit many other aspects specific to your business' model and purposes.

A key term in any owner agreement is an effective dispute resolution clause setting out the rules and procedures to be followed where a dispute arises. We have seen terms similar to the following save owners significant cost, time, stress and disruption to the business in potentially protracted litigation where a dispute has come about:

- *If the Directors, shareholders or unitholders are unable to agree on a matter of importance with regard to the operation of the Trustee, the conduct of the Trustee's affairs and / or the Business including, but not limited to:*

    - *a matter which requires a unanimous resolution of unitholders, shareholders or Directors; or*
    - *a matter which the Directors cannot determine by a vote at a board meeting; or*
    - *a matter which has been referred by the Directors to the unitholders for resolution,*

    and are unable to resolve the dispute within 21 days of it first arising by way of consultation between the disputing parties, they must, in good faith, endeavour to resolve the dispute expeditiously using informal dispute resolution techniques in the following sequential order:

    - *firstly, any disputing party may give notice to the other disputing parties of their intention to refer the dispute to an independent expert or mediator as nominated by the Australian Medical Association for mediation and must so refer the dispute within two business days of that notice;*
    - *secondly, if the dispute is not resolved within 21 days of any disputing party referring the matter to the independent expert or mediator the subject of*

clause (a)(iv) of this Agreement, any disputing party may give notice to the other disputing parties of their intention to refer the dispute to the Office of the Victorian Small Business Commissioner ("OVSBC") for mediation and must so refer the dispute within 2 business days of that notice; and

- *thirdly, if the dispute is not resolved within 30 days of being referred to the OVSBC, any disputing party may commence court proceedings with respect to determination of the dispute.*

- *The disputing parties must bear their own costs of dealing with any dispute. The costs of any other expert or mediator the subject of this clause will be borne equally by the disputing parties.*

- *Nothing contained in this clause will deny any party the right to seek injunctive relief from an appropriate court where failure to obtain such relief would cause irreparable damage to the party concerned. Furthermore, the dispute resolution procedures in this clause do not apply to impair, delay or otherwise prejudice the exercise by a party of its rights provided in this Agreement (including without limitation any right of termination).*

We don't recommend that you simply use these sample terms in your owner agreements in isolation and you should contact us to discuss further how to integrate dispute resolution into your written agreements.

E Employees

In a health and medical industry environment of:

- ever-increasing competition;
- increase in overseas doctors migrating to Australia;
- increase in the growth, development and establishment of medical centres (including large mixed specialist and allied health centres);
- reduction in patient numbers;
- high business costs associated with employees;
- cuts in government funding including Medicare strain;

Many practices (and other types of businesses generally) are having to consider restructuring, changing the way staff are remunerated, redundancies and otherwise reducing employee hours to survive. How to achieve this legally and ethically in a way that does not cause disharmony the staff is a bit of a minefield. Terms of employment contracts (verbal and written), policies, Modern Awards, workplace agreements and workplace relations legislation must all be carefully considered together first before any action by the employer is taken in this area.

The first step is almost always consultation between the employer and employees to ensure ongoing viablity.

Below is a sample letter to an employee to consider commencement of a consultation process.

> *Dear [Employee Name],*
>
> ***Consultation Regarding Ongoing Business & Operation Requirements of the Practice***
>
> *It is unfortunate that we have to write to you in these terms, however, the current business requirements of the Practice are such that we have to make some very difficult decisions.*
>
> *For reasons of:*
>
> - *a slowing down in business due to factors such as not enough patient numbers and economic downturn;*

- *financial difficulty including a decrease in profitability of the Practice; and*
- *associated current and future organisational, operational and structural requirements for operating the business of the Practice profitably and successfully;*

we have to consider the potential of each of us as owners attending to more clinical hours, and the potential elimination and restructure of employment opportunities within the business.

As a result, we would like to make a time to consult with you in person as soon as possible as to how these issues are likely to affect your position of employment with the Practice. In this meeting, we would like to discuss further with you the proposed changes, discuss steps which we could look to take to avoid and minimise any negative effects of changes upon you, listen to your ideas and suggestions and address any queries or concerns which you may have about proposed changes.

We suggest ……. at ……. at …….for our meeting to discuss this further.

Please don't hesitate to let us know if you have any specific queries or concerns in the meantime.

Thank you for your understanding at this time.

Please note that this sample letter should be used by you for information purposes only and should not be used in practice without legal advice first as to your particular practice's business, requirements, circumstances, employees and goals. Unfortunately, it is not a "one size fits all" approach with respect to these issues.

F Fair Value

In the section of this Guide, D for Dispute Resolution, we discussed the importance of putting in place owner agreements at the outset (or very close to the outset) of running a business with your fellow partners. Whether these agreements be shareholder, unitholder, joint venture or partnership agreements, some of the key issues for the owners to agree upon are: What is to happen if an owner wants to exit? What if an owner retires from, say, treating patients? What if an owner dies or becomes permanently disabled?

Would each of these situations (and potentially others) trigger a sale of that owner's interest in the business? If so, what price would that owner receive for their interest? Most owners answer this question as: the exiting partner should receive fair market value for sale of their share upon exit.

A sample methodology often used by our clients for calculation of what is meant by "fair value" is included below:

- *"Fair Value" means the price which is the average of the valuations of the subject units as determined by an independent valuer of businesses [land, if applicable] experienced in medical and health industry practice valuations appointed by each of:*
    - *the Trustee (such appointment must be by unanimous resolution of the Directors, except that an offending Representative or Representative of an offending unitholder is not entitled to vote on such resolution where clause XX of this Agreement applies); and*
    - *the seller of the subject units, if any (save that the seller is not entitled to appoint and obtain such a valuation where clause XX of this Agreement applies);*

      save that the said price must be at least AUD$XX ***[price paid by the owner or a % reduction of same]*** *per unit.*

- *If the seller referred to in clause (a)(ii) of this Agreement waives their right to obtain the said valuation, the Trustee must obtain and the price shall be that determined by the Trustee's valuation in accordance with this clause.*
- *The costs of each valuer referred to in this clause will be paid by the party appointing that said valuer.*
- *If the seller referred to in clause (a)(ii) of this Agreement has a right to obtain a valuation under this clause, that right can only be exercised within 21 days of any "Sale Notice" pursuant to this Agreement.*

- *This clause specifically overrides clauses XX to XX of the Trust Deed and the parties agree that those clauses are void and of no effect as from the date of this Agreement.*

Please note that this sample wording should be used by you for information purposes only and should not be used by you in practice without legal advice first as to your particular practice's business, requirements, circumstances and goals.

Insurance for key people

Often called "key man insurance" this is a type of life and total permanent disability (TPD) insurance which insures the business against the death or incapacity of a key employee (usually a shareholder, executive or an effective salesperson). It provides financial protection if a key person suffers major illness, injury or death, for lost revenue and the value of the business.

The business or individual shareholders may take out key person insurance on employees whose knowledge, contribution or work is uniquely valuable to the business. Doing so can offset the costs and losses (such as a decreased ability to sell property until suitable persons are trained to the required level) which the business may suffer if they lose a key person.

With any key person insurance, it is critical that the business has in place an owner agreement (such as a shareholder or unitholder agreement) to record the responsibilities and obligations relevant to this type of insurance. Such as, the type of insurance and level required, the policyholder, the insured party, who pays for the insurance, when it is to be utilised and by whom. Critically, how the owners agree that key person insurance is to be tied to trigger events around the transfer of equity must also be carefully considered in any comprehensive written succession plan agreement.

Buy and Sell Agreements

As your business becomes a grouping of skills, expertise and capital, it is important to ensure that this is not buried with a deceased shareholder. Would your business survive if a shareholder or representative director passed away suddenly? One solution in these circumstances is a buy / sell agreement.

A buy / sell agreement is a structured legal contract which gives remaining shareholders either the right or the option to purchase another owner's equity, on the happening of trigger events such as death or permanent disability.

Any agreement like this (often incorporated into your shareholder agreement) must clearly record the business succession strategies to cover both planned circumstances (such as retirement) but also unplanned (death or loss of capacity). What is particularly important to consider is: if these events are to trigger equity buy-outs, how will this be funded?

In establishing clear exit strategies for shareholders before a trigger event occurs, effective buy / sell agreements predetermine funding or insurance so that a shareholder's estate receives "fair value" for their share of the business.

A well thought out exit strategy can potentially avoid lengthy estate proceedings such as probate or continuing business involvement by non-participating shareholders such as a shareholder's surviving spouse.

We recommend that the value set for each owner's equity in these agreements be regularly reviewed to reflect the changing and then present value of the business.

G Goodwill in Intellectual Property

So, you have new and innovative ideas that you want to bring to market. Naturally, you should be concerned about how to protect your invention or your concept. You cannot, however, protect an idea! The best that you can hope to do is to protect an idea when it is expressed as words, art or music (through copyright protection), in the form of a unique mark or logo (through trademark protection) or a unique invention (through patent registration).

Intellectual property rights form a vital and often large part of the goodwill and generation of revenue in any business. Often these form the most valuable assets of a business. A new invention can fetch big money when put to commercial use. However, with any commercial dealing, there are chances of these rights being violated and the business suffering loss as a result.

This often makes for a rather tricky conversation in the early stages of product development. As an inventor or designer, you want to protect your work but you usually don't have the skills to do the legal protection work for yourself, and you often need help from other people in business to take your idea to market.

Consider this: It is a little like walking up to a bunch of strangers and saying: *"Hey, I've got this secret invention and it is going to be worth a whole lot of money and I want you to tell me how to protect it. BUT it is a secret and I can't really tell you what it is all about."*

Not surprisingly, you will likely get a strange look and they will respond by saying: "How the hell can we advise you on the protection of your idea if we don't know what it is?" You can't begin the process of protecting your secret without first disclosing the secret. There is no way around it.

Fortunately, when you deal with lawyers, accountants, patent attorneys and others in the intellectual property space, you have some degree of protection because each of these professionals is subject to ethical and professional codes of conduct that require each to treat and keep confidential the confidential information of a client.

Of course, you need to think beyond this basic level of protection to something more robust.

It is commonplace for inventors and entrepreneurs to protect themselves before first dealing with prospective commercial partners. For this purpose, it is wise to get professional assistance in preparing a confidentiality / non-disclosure agreement, achieved through a lawyer. In the absence of a solid, enforceable and operative confidentiality agreement, a potential investor or business rival is more likely to exploit your intellectual property without proper authorisation from you.

While there are lots of template confidentiality agreements floating around on the internet, many are not fit for purpose and are little more than junk.

For a confidentiality agreement to be effective it must have at least these attributes:

- identify all of the parties to be bound;
- describe with some degree of precision the confidential information sought to be protected. There is no getting around this;
- forbid dissemination of the confidential information to any other parties without each of those other parties being required to enter into a similar written agreement;
- contain an acknowledgement by the person who receives the confidential information that it is confidential and that its release would cause damage, without there being a formal requirement in court to prove damage;
- be signed by the parties through their authorised representatives; and
- ideally, provide consent to the granting of an injunction upon mere proof of a breach and without the need to prove any loss.

BUT scratch any lawyer who has been involved in commercial law practice for any length of time and they will tell you that it is all very well to have a confidentiality agreement in place, however, proving a breach can be just about impossible without enormous expense being incurred.

When you think about it - that is fairly obvious. For example, if I give you my confidential information and stress to you the importance of it being kept confidential and you then steal that confidential information, the last person you are likely to tell is me. And if you then disclose it to some other third party, they will have the same perspective.

You see that there is an enormous difference in the real world between the theory of protecting intellectual property and the real world ability to protect it economically. So many larger corporations have given up on trying to protect their intellectual property for this very reason. Android software is basically Google's proprietary source code made public. Most of the internet depends upon open source software for its operation. Microsoft has opened up its software toolkit to the world and Apple operates in a sort of closed environment where thousands of developers can come in and play around in the Apple toolbox to create new and better applications.

The more contemporary approach in the digital world (where proprietary data can be stolen and transmitted around the world in a nanosecond) is to be different.

To be the best you have to not only beat your competitors but also be the first to market. You have to innovate without end. As you develop critical mass, you buy up your competitors. If there are legal protections available to you (and you can afford them), you use the lawyers to fight a rear-guard action against your chasing competitors. It is a dog-eat-dog world in this very primal world of intellectual property. Nothing pretty about it.

Well, that is the story at least insofar as broad ideas are concerned. You have a greater degree of protection if you can protect your ideas using copyright law, trademark or patent protection.

H

Hybrid & Other Trusts

In today's times of rising risk and claims of negligence, protection of assets is crucial. Other threats exist such as bankruptcy, lawsuits and accidents. Trusts play an important role in protecting assets in these situations. They are also an excellent tool in tax planning.

A trust is a legal entity that holds property and / or income for the benefit of others. It requires a trustee to act as the decision maker and effective operator for the trust who can be individual persons, however, is usually a company. Utilising a company acting as trustee instead of individual trustees is usually more beneficial because there is no need to change the name of ownership of business assets (owned by the trust) when controllers enter and exit the business (that is, you can simply change directors of the trustee company).

A trust can allow for the potential to distribute income to a wide class of beneficiaries of the owner's choice (i.e. family members) in, say, lower tax brackets. In this way, they can be very effective tax vehicles. But beware of potential income tax issues, that is, is the trust deriving business income or personal services income and what are the differences in streaming these types of income?

A further benefit is that trust structures provide the greatest level of asset protection for owners against business debts and other personal creditors.

Types of Trusts

- *Family (Discretionary) Trust*

  All family assets including shares are managed under these types of discretionary trusts with provisions to distribute the income and capital gains if the trusts to the next generation of family members. While making such provisions, the trustee applies her discretion based on tax rates applicable to the specific family members and troubled family members may be excluded. Family members could include the parties' spouse, parents, children, grandparents, siblings, nephews, nieces and their spouses.

- *Unit Trust*

  Under a unit trust, the beneficial ownership of the trust property is divided into units. The trustee does not have discretion concerning the distribution of the property because it is strictly allocated in accordance with the fixed units held in trust.

- *Hybrid Trust*

  A hybrid trust has features of both a discretionary trust and a unit trust. It is usually the most suitable method for structuring a business or investment activity which involves unrelated parties.

  Under such trusts, the specific rights and entitlements of unrelated third parties are taken into consideration while still allowing flexibility in the income and capital distributions among them. Subsequently, the distribution is carried out between those parties and all related persons.

- *Business Trust*

  Businesses can be faced with crisis due to lawsuits filed by aggrieved employees, customers or creditors. Business trusts are often established to manage and protect the businesses from such losses. Business trusts act to ensure that a person's family assets remain unaffected in the event of a business crisis and vice versa. Profits can be distributed in a way that is both tax effective and increases net profit from the business. They can also often obtain small business tax concessions like exemption of capital gains tax (CGT).

Summary of Trust Benefits

- One's wealth pool may be expanded through trusts with the transfer and sale of income-producing assets. With the tax efficient distribution of profits, the proceeds and the profit can be reinvested into further assets or in other investment options.

- Families can use trusts for financial planning purposes with the best of investment options and strategies. Beneficiaries for charitable donations and inheritable assets may be identified together with recipients for income distributions.

- Some trusts are created to hold assets on trust for minor children. With proper structuring, the assets of these trusts can potentially be kept beyond the reach of future creditors and unsuccessful relations and also distributed in a tax effective manner.

- Trusts are helpful in keep one's assets within the family. By inserting special provisions and conditions for distribution of assets after the death of a person, one can keep assets within family groups.

- Trust assets are excluded from Wills for the simple fact that they are not held in one's own name. Consequently, this can mitigate family disputes over such assets.

Insurances

In establishing a new medical practice or in operation of your current business, owners should undertake a regular assessment of what insurances are needed in consideration of the inherent risks in operation of medical practice (and in business generally).

Firstly, both the practice and each of the practice's medical and health practitioners engaged in delivery health services to patients must have public liability insurance to a minimum level of $10 million for anyone claim (or $20 million, subject to the owners' assessment of the risk for a particular speciality practice).

Secondly, both the practice and each of the medical and health practitioners must have professional indemnity insurance with an approved, reputable and appropriate medical defence fund insurer. A registered practitioner is required to have this in place for the purpose of registration, however, the practice should also consider this type of insurance (albeit perhaps to a more reduced level to the doctor) because if a patient claim is made against a doctor (for example, a negligence claim), the practice at which the doctor treated that patient, can be (and is often) added as a defendant to the patient claim.

Thirdly, concerning workers' compensation insurance, this must be put in place by the practice if required by law. Once the practice makes payments to directors and / or has any employees, it will be required by law to put in place this insurance. Even if not required by law (which is very rare), at a minimum each owner or the practice should have business accident insurance to cover the owners in the event they suffer an illness or injury related to their work.

The terms of the service agreements between the practice and the doctor must also include terms requiring the doctors maintain their own workers' compensation insurance or business accident insurance.

The above are the bare minimum level insurances which we recommend. The practice may also need to ensure that more general insurances such as building and contents insurance are considered. If leasing a building insurances required under the terms of a commercial lease (such as loss of rent and outgoings, plate glass, landlord's property and others that the parties have agreed to in the lease) will also need to be put in place. Paying careful attention to these insurances and negotiating them with the landlord before signing any commercial lease is strongly recommended (particularly to ensure that the practice isn't over-insured or under-insured).

These days, with many practices being cloud-based and not maintaining physical premises (for example, geriatrician specialist practices), having both public liability insurance and business accident insurance in place for the owners may not be necessary.

In these circumstances, the practice should conduct a risk assessment based on the particular specialty and requirements of their business.

Finally, we recommend that the terms of any owner agreement for the practice (shareholder / unitholder agreement or associate agreement) and service agreements between the practitioners and the practice include very clear terms setting out (at the very least) the levels and types of insurances required by each party, who is responsible for maintaining them, claiming on them and paying for them.

J

Jurisdiction

The jurisdiction clause in any contract is usually a small, boiler-plate, stuck right at the back of the contract and not often considered by the parties in any great detail before signing. We have recently come across some commercial contracts which fail to mention any jurisdiction to apply to the agreement entirely. Ignore this at your peril!

With business increasingly being negotiated and transacted across international borders (especially with such significant advances in technology in recent years and continuing), it is critical that interstate / territory and internationally trading parties give careful consideration to the jurisdiction for the agreement. The clause needs to clearly record their agreement as to which country and state / territory jurisdiction is intended to govern the contract and any disputes between the parties.

In a case in which we were involved, an Australian based client found itself in the unfortunate position of being the subject of urgent United States court proceedings brought by a company party located in the US. Facing the prospect of legal proceedings on the other side of the world can cause great hardship including inconvenience, cost, time, delay, stress and difficulty, not least due to competing time zones, jurisdictions and time away from family, friends and businesses as a result. This is of particular concern where there is no legal avenue in the contract for the party to commence proceedings in their home territory.

Before signing any contract (no matter how big or small it may seem):

- FIRST CONSIDER: Where would be most convenient for you to commence or defend legal proceedings if there was a dispute between the parties to the contract?
- TAKE ADVICE of your lawyer as to what jurisdiction's laws may be most beneficial to your specific interests in light of the specifics of the proposed agreement, your personal circumstances and the goals sought from the proposed commercial relationship or venture.

K Key Benefits of Accreditation for Healthcare

Accreditation is primarily a public recognition of the achievements of certain standards by a healthcare provider. Such recognition or more specifically, accreditation is issued by a health care accreditation body following a string of independent external peer assessment of the healthcare provider's level of performance concerning the standards.

Benefits of Accreditation

- **Improved patient safety** - Accreditation typically results in high quality care and patient satisfaction.
- **Effective risk management** – Healthcare accreditation reduces erroneous practices within healthcare considerably due to the consistent risk stratification approach undertaken to offer best practices and quality service to the patients.
- **Patient assurance that a high level of care is provided** – When a patient opts for an accredited healthcare provider, they can be more certain to receive healthcare services from highly qualified and trained medical staff.
- **Building a culture of quality in the environment** – Accreditation helps healthcare providers demonstrate to the community the facility's commitment and dedication to provide exceptional healthcare services and meet the highest standards.
- **Developing staff skills and engaging the practice team in continuous quality improvement** – Accreditation acts as a stimulus for continuous quality improvement and performance management in daily practice.

Benefits for Patients?

- **Patient privacy protection** – Accredited healthcare providers honour the dignity of the patients by respecting their individuality, faith and cultural background.
- **Health record maitainance** – Most accredited hospitals implement EHR (Electronic Health Record) which allows for better tracking, more standardised documentation of patient interactions, and has the potential to reduce error.
- **Practice team education** – The practice team typically adopts approved evidence-based practices which include educating and training frontline clinicians and healthcare workers, engaging patients, and collaborating with clinician leadership to drive best practices.

- **Safe environment for patients** - Facilities that are accredited undertake additional steps to foster a safe environment for the patient's health.

- **Responsive to patients' cultural needs** – Accredited medical facilities recognises the challenge presented by the healthcare needs of a growing number of diverse racial and ethnic communities and the need to apply research advances in such a way as to ensure improved health care services.

Self-Assessment – Why are the Standards Important?

The reputation of a healthcare organisation is critical in influencing where patients seek services. Quality improvement is linked with performance improvement because quality enhancement tends to reduce costs.

The Standards:

- provide a framework for safe, quality healthcare in a health setting;

- provide a structured way for health services to assess quality and safety systems;

- provide safe care;

- allow the use of quality improvement initiatives that create opportunities for teamwork and the achievement of outcomes;

- demonstrate to the general community that the health service is serious about providing safe high quality care.

Values to Achieve in Accreditation

Value 1: To promote capacity-building, professional development and organisational learning.

Value 2: To provide a team-building opportunity for staff and improve their understanding of their co-workers' functions.

Value 3: To improve communication and collaboration internally and with external stakeholders and strengthens interdisciplinary team effectiveness.

Value 4: To promote the sharing of policies, procedures and best practice amongst health care organisations.

Value 5: To develop a framework to help create and implement systems and processes that improve operational effectiveness and advance positive health outcomes.

Value 6: To demonstrate credibility and a commitment to quality and accountability and sustained improvements in quality and organisational performance.

Support

The process of acquiring accreditation can be a little tedious and involves a number steps and assessments where the healthcare facility and the accreditation organisation has to collaborate. Accreditation organisations offer dedicated client support with respect to assisting them to understand the standards and then to use them to assess their own services. We at Burke & Associates Lawyers can also assist your practice through this process.

L

Leases (Subleasing)

Whether you are leasing / subleasing premises in a medical practice or establishing your own practice and becoming a tenant and / or looking to sublease to pathology, here are three handy tips to keep in mind:

Exclusivity

Be aware of this both from a tenant and landlord perspective. Exclusivity terms generally entitle the tenant to be the only business of its kind (for example, a pharmacy) in the applicable building, centre or other surrounding premises. If you are the tenant, we recommend that you negotiate with the landlord to include a term in your lease to protect against direct competition in close proximity to your business.

For example:

Exclusivity of Permitted Use

For the term of this Lease, the Landlord agrees and undertakes not to lease any premises in the building to any tenant other than the Tenant for a permitted use the same or similar to the Permitted Use without the written consent of the Tenant.

No Landlord Sublease Consent

As the tenant, you should consider inserting an additional provision in your lease to allow you to sublease or licence part or all of the premises to other medical / health providers (perhaps for specific purposes) without needing to obtain the landlord's consent. This will make the ongoing administration and operation of your practice and its structure much easier. That is, you don't want to have to obtain the landlord's consent every time you change which medical professional uses consulting rooms in your practice.

Permitted Use

Make sure your "permitted use" is broad enough (from the tenant's perspective) to capture all of your intended uses of the premises and any intended future uses or subleases of part of the premises.

M Marketing Medical

The success of any business is dependant on effective marketing. Marketing campaigns in the healthcare industry must comprise the best practices and techniques for reaching out to patients, referrers and the community. The aim should be to communicate and deliver value and manage relationships.

Having an effective marketing strategy means a good mix of online and traditional marketing techniques which target potential patients.

Types of Marketing

- Digital Marketing: Digital marketing is an effective mechanism for healthcare practices at a comparatively lesser cost than traditional forms of marketing like billboard advertisements or TV commercials. Some forms of digital marketing are:
    - *Automated Marketing* - This is a way to reach both prospective and current patients with custom messages by incorporating technology that "automates" the tasks.
    - *Google Add Word and PPC Marketing* – The most effective way of reaching out to potential patients by utilising popular search engines. The most effective forms of Google and PPC marketing are directory submissions, search engine optimisation and remarketing advertisements.
    - *Social Marketing* – Marketing your brand on social media channels can help you to interact and engage with both prospective and existing users, which in turn helps build brand reputation and stronger relationships. Such platforms one can use are Facebook, Instagram, and Twitter.
    - *Reputation Marketing* - Producing and distributing quality content that educates the audience in the form of blog posts, social media posts or videos adds value and builds trust between patients and the healthcare provider.
- Word-of-mouth Marketing: Word-of-mouth (WOM) advertising addresses the right target with the aim of fostering loyalty towards the brand. WOM marketing typically involves providing reasons and services to people to make them happy and accordingly to encourage them to talk about the brand. The key element of harnessing the potential of a WOM strategy is to earn the

respect and trust of the customer, which in turn will help spread the conversation within the community.

Public Relations (PR) in the form of free press and events can go a long way in building a reputation for the brand within the community. An effective PR strategy works wonders for brands in building a strong connect with existing and prospective users.

- Referral Marketing: Referral marketing is one of the most important aspects of marketing for any healthcare practice. A number of business experts say that the major part of their business is derived from referrals. However, in the absence of any system or automated machinery, referrals cannot be effectively generated.

  An effective referral marketing strategy entails the identification of the referral goals, referral processes and practices, required communication, training, measurement and building of commitment.

  It is crucial that the priority patient referral list not be ignored. Lack of awareness, relationship, trust and failure to outline good referrals can have a negative impact on the success of this strategy and your business. Not providing an incentive for referrals and ignoring referrers and their patients may also damage the reputation of the practice.

- Promotional Marketing – One of the most popular practices of attracting the attention of potential customers is to reach out to them with a brand new promotional offer or discount deal.

Overall, for your practice's marketing strategy to be effective and successful, at a minimum, it should contain and implement regular communication with patients through newsletters circulation, professional alerts, personal letters, publishing of case studies and conducting online surveys.

N Negotiation & Contract Skills

Negotiation plays an essential role in healthcare practice, yet it is not formally taught during medical and health training. Many believe that good negotiators are born, not made. We can tell you, that is not true. Being a good negotiator requires preparation and practice.

This chapter considers the key theories and common negotiating techniques. You may already be applying these techniques during your everyday practice without even realising it. The aim of this chapter is to provide you with a few basic tools and to present several practical tips for improving the outcome of a negotiation.

Situations requiring negotiation permeate all aspects of medical and healthcare practice. Not only are medical and health care professionals required to negotiate with other staff members on a daily basis, but they also negotiate with government bodies, insurance companies, hospitals, referring physicians and patients. A specialist prosthodontist, for example, who has recently established her own practice is likely to undertake negotiations at one point or another for the purchase of new imaging equipment or for hiring a new partner.

Key Terms and Theories

Distributive versus Integrative

The two main approaches to any negotiation are the distributive strategy and the integrative strategy.

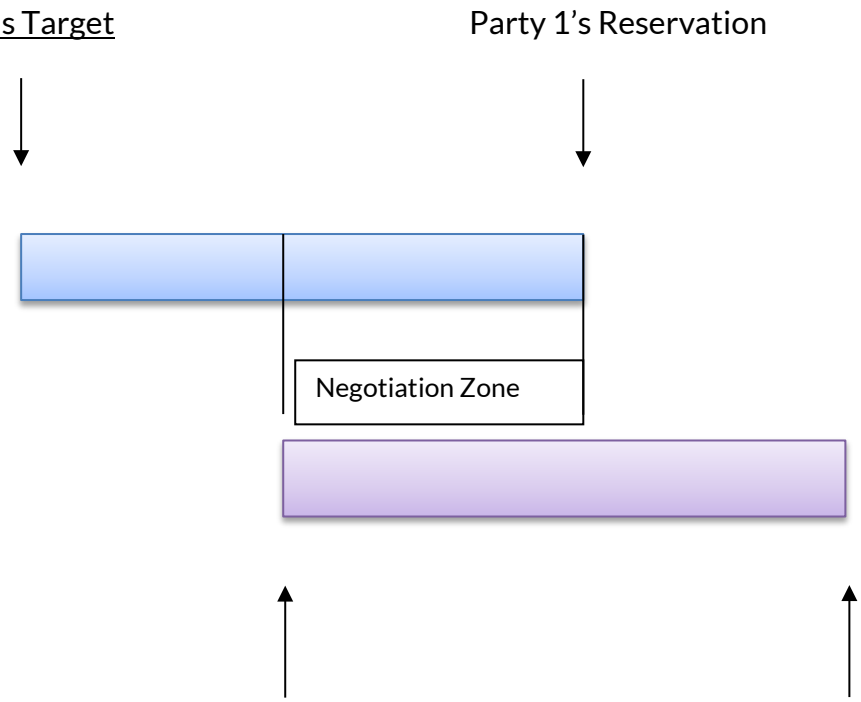
Distributive negotiation is akin to a 'divide the pie' scenario where there is a fixed amount of resources and whatever one party gains, the other party loses. We encounter distributive negotiation every time we make a purchase. Negotiators who adopt this strategy are reserved and keep information to themselves, while trying to retrieve as much information as possible from the other party. Some tactics include:

- Letting the other party make the first offer so you know what their position is;
- Tell the other party about any alternative or competing offers. For example, if you are negotiating to purchase a steriliser machine for your practice, you might want to mention that you received a previous offer for a much lower price.

Integrative negotiation is most suitably adapted in a situation where the parties wish to maintain a good relationship or establish a new one. It involves considering each parties' underlying interests, rather than their positions; not what they want, but why they want it. It aims to create an agreement which is beneficial to both parties.

Target, Reservation Points and Best Alternative to Negotiated Agreement (BATNA)

Before any negotiation, parties should estimate their target and reservation points, as well as their BATNA. The target refers to a party's best possible outcome for the negotiation. The reservation point refers to the least a party will accept before walking away from the negotiating table. The general rule is not to reveal your reservation point but try to uncover the other side's reservation point. The diagram below illustrates what is called the "Negotiation or Bargaining Zone".



As you can see, the Negotiation Zone is the zone of the possible agreement. Consider, for example, if Party 1 is the purchaser of goods who has a reservation price of $2 million. Party 2 is the seller who has a reservation price of $1.5 million. The zone of agreement is $500,000.00.

The BATNA is the most favourable option available to a party when a negotiated agreement is not reached. In other words, BATNA is the alternative to what a negotiated agreement would have been. Consider the following example.

A doctor is thinking of switching jobs. She is currently engaged in negotiations with a prospective new employer at Hospital A. At the same time, she has been offered a job at Hospital B. Her BATNA is either to stay at her current job, or accept the job at Hospital B. However, all terms and conditions of the employment at Hospital B must be certain and she must be willing to accept the position in order for this option to form part of her BATNA. In other words, the BATNA must be a realistic option for the negotiator.

Anchoring and the Final Outcome

Anchoring refers to the first offer that is put forth in any negotiation. The first offer is always the most important as it sets an agenda and shapes the outcome of the negotiation. It involves ‘naming your price'. The offer should be realistic and aggressive.

When determining an anchor, keep in mind that it may be prudent to thoroughly prepare before a negotiation and conduct the necessary research to put you in a more powerful position.

For example, a medical practice extending a job offer to another medical or health professional would likely require that the practice undertake research in order to obtain a solid grasp of the average salary for that particular position. If the potential employee sets an anchor first by asking for a higher salary than the practice is willing to give, then the practice should be prepared to justify their position regarding the salary. For example, the practice can mention that it has recently purchased some state of the art equipment that no other practice has which the employees can benefit from, justifying a lower salary for the new employee.

Practical Tips and Concluding Remarks

Negotiation is common and most of us practice it without even realising. When entering negotiations, remember:

- Preparation is key.
- Be yourself but adapt your style as you see fit.
- Keep in mind that cultural differences and personal biases can affect the style adopted by the parties.
- Listen to the other side. If you are unsure about anything then ask for further explanations.
- Don’t lie or mislead.
- Be reasonable, trustworthy and have integrity. People like dealing with people they trust.
- There is nothing wrong with pausing or taking a break from the negotiation to seek information or instructions.
- Attempt to uncover the other side’s BATNA early.

O

Oppression Amongst Owners

In any dispute between company owners, issues of whether the conduct of company affairs is done in such a way which is oppressive or unfair to one or more shareholders, are almost always raised at some juncture.

In this context, section 233 of the Corporations Act 2001 entitles a shareholder to seek a wide variety of orders. That is, if the alleged oppressed shareholder (or holders) can successfully prove:

- it suffered oppression as a result of the conduct of a company's affairs by others; and / or
- that the conduct in question was unfair, prejudicial to or discriminatory against a holder or holders (whether in the shareholder capacity or another capacity).

Regarding success by shareholders in these types of claims and what a Court is likely to order, we saw in a Federal Court case not long ago that the applicant sought annulment of an amendment to a company's constitution on the basis that the shareholder considered the amendment to be oppressive. Any amendment to a constitution which takes away from a shareholder the right to know how the affairs of a company are being conducted and / or rights of control, are likely to be considered by the Court to be oppressive.

In the Victorian Supreme Court case of *Vigliaroni v CPS Investment Holdings Pty Ltd & Anor* [2009] VSC 428 (in which Meghan Warren of our office had the opportunity to act for the successful party), Her Honour Justice Davies considered the question of whether the Court had the requisite jurisdiction.

The jurisdiction in question was that pursuant to section 233 of the Corporations Act to order, not just a buy-out of shares in the trustee companies, but also buy-out of units in the underlying trusts.

In declining to follow the previous conflicting decision of the New South Wales Supreme Court in *Kizquari Pty Ltd v Prestoo Pty Ltd* on this point, Her Honour found that the Court **did have such a power** and made orders in this case accordingly. On this particular question, there continues to remain a clear division in the view of different State based Australian courts.

In deciding an oppression claim, the emphasis is always on the rights of the particular shareholder. How the interests of the majority shareholders or the company itself are affected (while purportedly protecting these interests) are irrelevant considerations and not defences to the conduct in question.

Given the expense and time involved in litigation of this kind, this is an important reason to have appropriate Shareholder and Unitholder Agreements drawn up and signed between your practice partners at the outset and, if not, as soon as possible after reading this chapter!

P Pathology

The Australian Association of Practice Management (AAPM) released in 2016 its position statement on proposed changes in legislation for pathology collection centres.

Gillian Leach, the Chief Executive Officer (CEO) of AAPM issued a written statement on behalf of the organisation stating that the AAPM strongly opposes the Federal Government's proposal to change regulation of pathology collection centres rent. AAPM's response has been consistent with Pathology Australia's position on the Government's proposals.

In 2008, legislation came into force which bound pathology providers and requestors. Medical practitioners requesting pathology services, or people deemed to be pathology requesters must consider a number of issues relating to approved pathology collection centres within their premises.

The legislation is apparently in place to ensure unethical transactions are not entered into by pathology providers and requesters and was not designed with the intention of prohibiting legitimate commercial transactions relating to pathology.

As this law applies to both pathology providers and pathology requesters, penalties for non-compliance also apply to both parties. Penalties include fines up to $660,000.00 and up to five years imprisonment.

Currently, a pathology provider and a requester are allowed to enter into a lease to establish an approved collection centre. However, there are three essential criteria that must be met for the lease to comply:

- The rent paid for the pathology collection centre must not be substantially different to the market rent value. This is defined as not more than 20% greater or lesser than the market value (some value may be attributed to the convenience of the location for patients);
- The rent cannot include amounts referrable to any pathology works or value; and
- Within 60 days of entering the lease, the pathology provider must establish an approved collection centre with the premises must not be used for any other purpose.

Pathology collection centres were deregulated in some respects in 2010 and have grown significantly in number since that time. Rent for pathology collection centre has

historically been negotiated privately between the relevant parties (usually a medical practice and pathology provider).

Parties have generally come to mutually beneficial arrangements at a co-location with the general medical practice able to generate additional revenue. Larger pathology practices have also gained more from these arrangements that in the previous regulated environment.

It now appears that the Federal Government is persisting with planned changes to further regulate rent for approved collection centres. These changes look to be made around the definition of "market value" for rent in the prohibited practices provisions of the Health Insurance Act. That is, tightening that definition.

The proposed changes will affect small businesses as a majority which will likely see them suffer significantly from a financial perspective in that they already have in place negotiated lease arrangements with pathology providers. These businesses will also have conducted forecasts based on projected estimates and rental revenue streams taking into account their leasing arrangements.

Earlier in 2016, we also saw the Government backtrack on their plans to axe bulk billing incentives for pathology services and imposition of a freeze on the development of new collection centres. These changes came after protests by the pathology industry against the axing of a bulk billing incentive.

AAPM is of the view that in such a controlled rental market, many medical practices will likely close their adjoining pathology centres. As a result, the community will suffer the loss on these health services.

AAPM does not believe that it is the prerogative of the Federal Government to regulate the rental market. It should be rightfully guided by free market forces, commercial arrangements and competition. Regulation of this nature will inevitably lead to more Government interference, red tape and increased compliance costs in the health and medical sector.

Q Quality and Safety in Patient Privacy and Data Protection

Biometric Data within the Healthcare Industry

Biometric data has become one of the most effective methods for personal identification. Examples include fingerprints, voice patterns and retinal images. Both public and private sectors are increasingly adopting policies which involve the collection of biometrics for various reasons, security being the most obvious. For example, the Australian government announced early this year that it intends to introduce new technology which means that travellers will no longer be required to present their passports when entering or leaving Australia. This technology will instead use fingerprints, iris or facial structure recognition.

One of Australia's biggest English language test centres, IELT, has recently policies relating to biometric data collection in a bid to prevent identity fraud.

The healthcare industry, in particular, is undergoing rapid change with the use of new and innovative technological advancements. There has been a significant shift toward the use and development of digitised medical records with the aim of overcoming communication barriers between healthcare professionals and their patients. Proper and effective delivery of high quality medical and health services for patients is paramount. By implementing digitised medical records, health professionals will no longer need to track down a patient's history, patients will no longer undergo duplicated tests due to lost or forgotten records and both patients and health professionals can access medical records online. UnitingCare, for example, has successfully developed Australia's first fully-integrated digital regional hospital in Hervey Bay on Queensland's Fraser Coast.

Increasing digitisation of the healthcare industry does, however, increase the chances of identity theft. If identity thieves obtain access to patients' medical records, they will be able to modify. This can have negative and potentially life threatening consequences for some patients. In this regard, the use of biometric data is becoming an increasingly common practice to protect patients' confidential medical information from being misused and provides a higher level of security and control over who can access medical information by basing accessibility on inherently unique personal characteristics. Linking digital medical records with a patient's biometric data also reduce the likelihood of records being duplicated and patient identification errors.

New Mandatory Data Breach Notification Laws

The Australian Government has recently passed a bill expected to be enforceable in a year's time with respect to obligatory data infringement. These new laws come under the purview of the Privacy Act 1988, and will apply to organisations registered within Australia and those registered abroad with business connections in Australia and

What is an Eligible Data Breach?

As per the new laws, your practice will need to provide notifications of "eligible data breaches" likely to result in serious harm to any individuals. Such serious harm may be physical, psychological, emotional, economic and financial harm, as well as harm to reputation.

It is now crucial for practices to analyse the importance of individual information and the limits to accessibility. The test of seriousness of the harm caused by the breach should not be assessed by the number of individuals affected, but whether the breach of a particular individual's information has made him suffer harm or not.

Required Notification

In a case where you suspect that an eligible data breach has occurred, your practice must perform a speedy and sensible test to detect if there has been a proper data violation within 30 days of being aware of the suspected breach.

If a breach is detected, the affected person must be informed of the following information:

- the identity of the organisation;
- the details of the breach;
- the type of concerned information; and
- the recommended measures to take in response to the breach.

Organisations are required to investigate data breaches and if the breach meets the "likely to result in serious harm" requirement then the breach is an eligible data breach and must be reported to the Australian Privacy Commissioner. The effected individual must also be notified of the breach.

A failure in compliance with the requirements as to notification will lead to monetary penalties for serious data infringement, namely, $360,000 for individuals and up to $1.8 million for companies.

Recommended Steps

Your practice should be aware of its obligations under this new legislation and implement appropriate and adequate systems and processes including;

- Review existing business contracts to ensure they contain provisions relating to privacy and data breach reporting obligations;

- Prepare a data breach response plan for a quicker turnaround and also as a safeguard for your practice in case of a breach investigation;
- Prepare a draft notification to keep handy and amend it on a case by case basis; and
- Communicate about the breach to patients through regulars channels such as text messaging or emails.

R Restraints of Trade in Medical

To promote healthy competition and fair practices in trade, 'restraint of trade' terms often play a crucial role. Written practice agreements including sale of business agreements, health practitioner service agreements and employment contracts usually contain some type of restraint.

These terms are generally aimed at restricting an individual from practising in a defined geographical area and for a particular period of time both during and after the term of service. They also often contain provisions which seek to prevent an employee or a practitioner from soliciting patients or using confidential information for his / her own benefit.

Due to ambiguity around these types of provisions and their enforceability at law, these clauses have, historically, not been received well by healthcare professionals. With the growth in corporate healthcare, we have seen a significant rise in the number of cases for breach of restraints in this area both in and out of court.

Despite the questions around enforceability, it is crucial to carefully consider the implications of entering into contracts containing restraint terms before signing them.

Legitimacy and reasonable restraint of trade

In looking at the New South Wales position, the Restraints of Trade Act 1976 states that a restraint of trade is valid only if it is not against public policy.

To determine the validity of restraint terms, courts seek to determine the nature of the interest which is intended to be protected. If the interest is legitimate and reasonable, the applicable terms are likely to be upheld.

The following factors are usually considered by courts in any assessment as to legitimacy and reasonableness:

- The extent of geographical limitation imposed;
- The time-period of such limitation;
- Level of restriction on the practitioner's ongoing profession;
- Impact on any restrictions which be not be in the public interest.

Courts have drawn a distinction between a restraint following the sale of a business and a restraint following an employment relationship. Restraints imposed on employees are considered by Courts in much more strict manner than those imposed

on sellers of business. This distinction is based on the interests being protected by the respective parties.

We have acted in a number of matters where written contractual restraints between a seller and purchaser of a medical practice have been relied upon very heavily by large medical corporates in litigation. Such corporates are notoriously adversarial and litigious in their enforcement of such restraints against doctors.

Consequences of breach of a valid restraint

The party who intends to enforce the restraint has two options in the case of breach:

- Injunction — To immediately stop the defaulting party from carrying out the prohibited activity; and / or

- Monetary Compensation — Monetary compensation and liquidated damages are awarded after calculating the losses suffered due to the breach of restraint. This remedy is open only when the restraint period is over. The amount of any such damage is notoriously difficult to ascertain because of the difficulty in proving the damage suffered by the party seeking to enforce the restraint and that the breach caused such damage.

In such cases, it is easier to obtain an interlocutory injunction during the restraint period rather than monetary compensation after expiry of the restraint.

Are Restraint of Trade Clauses Enforceable in Employment Contracts?

The Supreme Court of Victoria again recently considered the issue of whether a post-employment contractual restraint of trade is enforceable. It was held that such restraint of trade provisions will only be justified if they are ***reasonably necessary*** to protect an employer's ***legitimate business interests***.

The base position is that a restraint of trade clause that extends beyond the termination of an employment contract is void and unenforceable. As discussed below, courts will step in to enforce restraint clauses only when they are carefully tailored to a particular situation between the respective parties and reasonable in the circumstances to protect a former employer's business interests.

Background of Just Group Case

Nicole Peck was employed by Just Group Limited ("**Just Group**") as a Chief Financial Officer in December 2015. Her contract of employment contained post-employment restraints of trade. The restraint clauses prevented Ms. Peck from working for a competitor for a specified period after her employment at Just Group ended. Ms. Peck resigned from her position not long after her commencement on 2 May 2016.

Prior to resigning, Ms. Peck was involved in pre-employment negotiations with Cotton On Group Services Pty Ltd ("**Cotton On**") regarding a position as their General Manager. Just Group became aware of Ms. Peck's intention to commence employment at Cotton On shortly before her employment ended.

On 2 June 2016, Just Group initiated proceedings in the Supreme Court of Victoria seeking to enforce the post-employment restraints in Ms. Peck's employment contract. The central issue in this dispute was whether Ms. Peck could be restrained from commencing employment at Cotton On for the specified period. The specified period was between 12 and 24 months after her employment contract ended.

The contract of employment referred to restrictive activities which provided the following:

Personal Engagement means directly or indirectly:

- *being engaged, concerned or interested in;*
- *assisting or advising in respect of; or*
- *carrying on **any activity**:*
    - *which is the **same as, or similar to**, any part of the specialty brand and fashion business of a Group Company in which you were involved, or in respect of which you received Confidential Information, in the Connection Period; (**the First Limb**) or*
    - *for or on behalf of any of the entities operating the brands listed in Annexure A, their assignees, successors or transmittees (from which, it is acknowledged, Just Group and the Group have a legitimate interest in withholding their confidential information and their connections with customers, employees and suppliers) (**the Second Limb**).*

The First Limb

The First Limb purported to restrain Ms. Peck from being involved in a business that competed with any part of Just Group with which she had been involved previously, regardless of whether the confidential information was relevant to that business. Justice McDonald considered this to be too broad. It essentially meant that Ms. Peck was not allowed to be employed by a competitor, even when the confidential information she may have acquired during her employment with Just Group was not relevant to her new employer. It was held that the First Limb restraint clause ***extended beyond what was reasonably required to protect Just Group's business interests***.

The Second Limb

The Second Limb purported to prevent Ms. Peck from being involved with some 50 entities or brands, listed in Annexure A of the employment contract. Cotton On was one of the listed entities.

In order to determine the reasonableness of the Second Limb, the Court considered whether each listed entity was actually in competition with Just Group. Just Group led evidence for only four of the 50 entities (including Cotton On) arguing that their commercial activities competed. Due to lack of contrary evidence, Just Group requested that the Court infer that the other 46 listed entities also undertook similar commercial activities which were also in alleged competition. The Court did not agree.

The Court held that it was not appropriate to make this inference in favour of Just Group. Woolworths Ltd, for example, was a listed entity which has numerous businesses that undergo commercial activities of many different kinds which do not compete with Just Group. In drawing this inference, Ms Peck would have been prohibited from working in any business under Woolworths Ltd, even though the subject confidential information would have been irrelevant to her new employer. It was on this basis, that the Court found the clause to be unreasonable and, therefore, unenforceable.

Soon after the Court's judgment, Just Group filed an appeal which was heard by the Victorian Court of Appeal in December 2016. The appeal was dismissed.

The bottom line: restraints of trade in employment contracts must be tailored to prevent an employee from working in a role for a competitor where the confidential information acquired by the employee during their term of employment will be relevant to the new employer.

There also needs to be a degree of probability that the confidential information will be misused by the employer. Where the restraints are too broad, the employer runs the risk they will be unreasonable and not aligned with the valid protection of its business and commercial interests.

S Shareholder Agreements

A shareholder agreement is a contract that binds all shareholders of a company.

These agreements are incredibly important and govern agreement about most aspects of a company, such as its management, dispute resolution, share transfer processes and fundraising from investors.

It can also be used as a mechanism to show other interested parties (including financiers and potential purchasers) that your company has a clear and stable management system.

DIRECTORS

Any agreement should set out some fundamental details of a shareholders rights in relation to directors, such as:

- If they have the right to appoint directors, and what percentage share in the company they need before obtaining this right;
- How a director who is appointed by shareholders is removed;
- How to prevent the removal of a shareholder appointed director.

EMPLOYEE EQUITY

One way of paying employee's salaries is to offer part (or the whole) of their salaries as a share in the company rather than a regular salary. This is particularly useful for start-ups who wish to employ talented professionals but may not be able to offer the attractive salaries of large companies. This system provides employees with great initiative to do their best to see the company grow. As the company grows, so does the value of their share.

With such a process, it is incredibly important to document it well through the shareholder agreement. A well drafted shareholders agreement offers clear and certain terms in this area, assisting in avoiding the potential for disputes.

PRE-EMPTIVE RIGHTS

In some instances, current shareholders can have the first preference to buy future shares that will be made available within a company. This allows a shareholder to maintain a certain percentage of ownership in the company, even when the number of the company's shares grows. For example, if you own a 10% share in a 100 share company, and that company grows to be a 1000 share company, you may be given the

opportunity to buy the extra 90 shares required to keep your position as 10% stakeholder before those shares are made available for public purchase.

The shareholder agreement should set out the process for the pre-emptive purchase of shares and include such details as, for how long the offer stands, how much each share will be and how quickly the shares are to be paid for.

ANTI-DILUTION

If a company sells shares at a later date at a lower price, this will disadvantage original shareholders who paid a higher price for the same stake in the company. To protect against this, you can insert an 'anti-dilution' clause into your shareholder agreement. Commonly, there are two types of anti-dilution clauses:

Full Ratchet: The price of an existing shareholder stake will be readjusted after any shares sold in a down round (a round of fundraising where shares are sold at a lower price). This readjustment will put the existing stakeholder on a level playing field with those who are buying shares in the down round. This may result in extra shares being issued to the original stakeholder at no extra cost to them.

Broad-based weighted average: Another possible anti-dilution formula is the broad-based weighted average adjustment. The purpose here is to diminish the old conversion price to a number between itself and the price per share in the proposed dilution. Broad-based weight average takes into account the number of new shares issued.

RESTRICTIONS

Shareholder agreements often contain a number of restrictions, including:

- Not allowing shareholders to borrow money against their shares (unless they have the consent of all shareholders);
- Restricting who shares can be transferred to, and in which circumstances.

DRAG ALONG

In some circumstances, a purchaser may only want to purchase shares in a company if they can acquire 100% of the shares. In these situations, by inserting drag-along terms, a majority shareholder can force minority shareholders to sell their shares on the same or similar terms.

TAG ALONG

Minority shareholders may be given the opportunity to join a transaction when a majority shareholder sells their share in a company, the *tag along*. Minority shareholders under these provisions usually also have a right to be included in negotiations around the sale of the shares.

VOTING

Shareholder agreements should set out the procedure by which shareholders vote. Votes are usually done in accordance with proportion of shares. For example, in a ten share company, someone with two shares would hold a 20% weighting on their votes.

Shareholder agreements should also set out what percentage of votes is needed to pass (50%, 75%, 100%).

Shareholders are usually given the right to vote on a number of areas of corporate policy.

DEADLOCK PROVISIONS

Conflicts can arise between shareholders, particularly if there is only a small number of them. Deadlocks are common where there are only two shareholders (holding 50% each in the company). In these circumstances it is important to have deadlock provisions agreed in the shareholder agreement to help resolve any disagreements.

There are different types of deadlock provisions, such as the following (and potential variations):

- Shotgun: A shareholder can serve a notice on another shareholder, requiring them to buy their shares at the nominated price. The shareholder receiving the notice may choose not to buy the shares, in which case they must sell their shares to the other shareholder at the same price;

- Chairman clause: If a dispute arises, one of the shareholders becomes the chairman, enabling them to cast a vote to resolve the dispute; and

- Liquidation clause: This is quite an extreme mode of dispute resolution. If the dispute cannot be resolved after a certain period, the company is wound up.

Deadlock provisions create a mechanism to assist in the resolution of decisions between shareholders (and directors) which cannot be agreed.

Again, it is important to seek professional advice with respect your start-up. It is even more important when considering the issues involved and preparing a shareholder agreement.

We recommend that you talk to your accounting and legal advisors for guidance and assistance about the best way to approach this for your practice.

T

Tenant, Resident or Licensee

While a lease and a licence may appear to be very similar, there are several key and critical differences from a legal perspective.

A lease allows for a proprietary interest in land and a tenant is accordingly entitled to exclusive use of the land. Alternatively, a licence is merely a personal right. That is, a contractual permission to allow someone to use another's land for a particular purpose. A lease is grounded in property law and is, therefore, a far stronger right in land. A licence is based in contract law only and, accordingly, provides a weaker right.

With a leasehold interest, a tenant is entitled to take action against third parties in order to defend / protect its interest, however, a licence holder cannot.

A lease allows more security because a tenant is entitled to exclusive possession of the property for the term of the lease. A licence can be revoked by the grantor of that licence at any point.

Revocation of a licence may amount to a breach of contract, entitling the licence holder to sue. However, in these circumstances, the licence holder would still not be able to enter the land because their authority from the owner of the land has been lost. Leasehold interests can also be bought to an end, however, the protections that this type of interest provides makes it far more difficult for a landlord to end a lease.

Are you a Tenant, Resident or Licensee?

Under property law, your rights and duties change depending on whether you occupy premises as a tenant, resident or as a commercial tenant. If you are not a resident or a tenant then residential tenancy laws will not apply at all.

It is important to note that under residential tenancylaw there is a presumption that it applies. If someone disputes whether it applies, it is up to the person alleging that it doesn't apply to then prove that it does not.

Tenants

In general terms, a tenant is someone who lets property under a tenancy agreement. Tenants are allowed to have exclusive possession of the property in exchange for rent paid. This means that tenants can refuse entry to anyone, including the landlord. In most cases this only applies to residential premises and there are several exclusions such as hotels, farms and educational institutions.

Rooming House Residents

A person who lives in a rooming house residence as their primary residence is a "resident" for the purpose of residential tenancy legislation. A rooming house is any building in which there are one or more rooms available for rent, as long as no more than four people occupy a room.

Despite living in a rooming house, a resident may opt to sign a tenancy agreement, in which case the relevant tenancy sections of residential tenancy legislation apply instead.

Licensee

Licensees are not given rights under residential tenancy legislation. It can be quite difficult to determine who is, in fact, a licensee because often they look very similar to tenants. It is, therefore, necessary to determine if exclusive possession exists. Factors which may indicate that exclusive possession exists are whether the licensor also lives in the building and / or whether the licensee can exclude others from the premises.

U Unfair Contract Terms

From 12 November 2016, new law came into force to protect small businesses from unfair terms in standard form contracts.

Contracts covered

Contracts that are produced by one party, without giving the other party the opportunity to negotiate or vary the terms, are known as standard form contracts.

You will encounter standard form contracts every day. Think of your telephone contract as an example. Your Provider most likely produced it and an identical contract would be provided to thousands of consumers without being varied in any way.

Due to their nature, standard form contracts can sometimes lead to an imbalance in the rights of the parties. For this reason, standard form contracts are now subject to additional regulation.

The new laws apply to contracts which are for the:

- Supply of goods and services or sale of land;
- Contracts where a party is a small business (employs less than 20 people); and
- Where the upfront price payable under the contract is under $300,000 or $1,000,000 if the contract exceeds 12 months.

It is important to note that terms varied within a contract after 12 November 2016 will be covered by the new law.

Contracts not covered

- Contracts dated before 12 November 2016;
- Shipping contracts;
- Constitutions of companies, managed investment schemes or other similar bodies;
- Specified insurance contracts.

The following contract terms are not covered by the unfair protection of the new law:

- Any term that defines the main subject of the contract;

- Terms which make the upfront price payable;
- Any term that is already required by law.

Terms that may be unfair

In the following circumstances, terms in a contract may be void for the reason that they are unfair:

- Where one party is able to limit their duties and obligations under the contract unilaterally;
- Where only one party can terminate the contract;
- Where only one party is penalised for a breach of the contract; or
- Where one party can unilaterally vary the terms of the contract.

This means that the specifically unfair term will no longer form part of the contract, however, the remaining terms will continue to bind the parties.

What does unfair mean?

A term will be considered unfair where it causes a significant imbalance in the rights of the parties to the contract. These terms often cause financial hardship to the weaker party to the contract. An important characteristic of unfair terms is that they are not reasonably necessary to protect the *legitimate* interests of the party.

For a contract term to be deemed 'unfair', it will need to be considered unfair within the context of the entire contract.

We can use a phone contract as an example. A phone contract gave your provider the ability to cancel your plan without notice to you. Unless the contract extended this cancellation option to you also, it would be considered unfair on that basis that your provider has the ability to unilaterally terminate the contract.

Avoiding unfair contract terms

Contract terms should be clear to ensure they are fair to all parties and easily understood. Terms that are overly convoluted, hidden in small print, difficult for a party to locate or not accessible to one of the parties will likely not be considered clear.

As a general rule, an average member of the public should be able to understand and consent to the terms of a standard form contract without the assistance of a lawyer. If legal assistance is required to understand a term, it is again unlikely that the term will be considered clear.

V Valuation

If you are considering purchasing a medical practice, or a percentage of one that is already up and running, it is important to know what it is worth. Consider the following methods:

Earnings Before Interest and Taxes (EBIT) Method

The EBIT method is one of the most commonly used methods for valuing a business. The EBIT formula measures the profitability of the business without taking into account its cost of capital and tax implications. It is calculated as follows:

EBIT = Revenue – Operating Expenses (excluding tax and interest)

Calculating EBIT is a useful tool to evaluate a business' performance and profitability. It eliminates interest and tax expenses as these factors can vary greatly from business to business. As such, using this valuation method can be particularly helpful when comparing similar practices across the medical industry that may have significantly different capital structures or tax implications.

Super Profit Method

This method is commonly used to value goodwill of a business. Super profit is the difference between the estimated future profits of a business and the normal profits. Therefore, the Super Profits are the extra profits obtained by the business as follows:

Super Profits = Actual Profits – Normal Profits

Goodwill is a business asset that does not carry a market price and is difficult to value.

Goodwill can include:

- Client lists
- Business reputation
- Business brand
- Operational procedures
- Workplace culture
- Succession opportunities

In calculating goodwill, Super Profits are multiplied by the number of years of purchase of the business as follows:

Goodwill = Super Profits x Number of Years of Purchase

Business Information

To value a business properly, you should consider a wide range of business information, such as:

- Financial statements for the last five years including cash flow statements, debts, annual turnover, and profit and loss statements.
- The details of tangible assets such as building, equipment and stock.
- The details of intangible assets such as goodwill and intellectual property.
- Documents relating to leases, insurance policies, licenses, permits, Australian Business or Company Number (ABN or ACN).
- Business history such as changes in ownership or location.
- Employee details such as job descriptions, work history and pay rates.
- Information regarding marketing activities.
- Forecasts for the next twelve months.
- Business procedure regarding staff roster and customer service.
- Information regarding the business plan including marketing and growth plans.

Key Drivers of Performance

When determining the value of the business, it is essential to identify the key drivers of the business. A key business driver is something that has a significant and substantial impact on the performance of the business. There can be a whole range of key drivers, but the idea is to focus on a few. When identifying key drivers, keep in mind that they:

- Reflect the performance and progress of the business;
- Are measurable;
- Can be compared to a set standard; and
- Can be actioned.

A Key Performance Indicator (KPI) is a type of performance measurement used to monitor the success of targets within the business. Being able to measure KPIs assists in calculating and quantifying the value of the business. KPIs can also assist in:

- Improving the business;

- Aligning the business' practice and procedure with the overall goals and objectives of the business;
- Planning for the future; and
- Identifying potential issues before they arise.

For medical practices, the main methods for measuring KPIs include:

- Costs; including staff wages, administrative expenses and general practice expenses;
- Financial; such as patient fee's per doctor, net profit, revenue per employee, cash/debt retirement; and
- Operational; such as average gross billing per hour, average patient fee, bulk billing rate, support staff and doctor ratio, average waiting time, number of new patients and the average duration of consultation.

Value Proposition

In assessing the value of your business, you should also turn your mind to designing and communicating its value proposition which is a business or marketing statement.

The statement is a summary explaining why a consumer should buy a product or use a service. The aim is to convince potential consumers that the product or service offered by your business (as opposed to the competition) will meet their needs, solve problems, deliver specific benefits or otherwise improve their circumstances.

You should consider the value proposition as a promise to your customer. When creating a value proposition, it is important to keep in mind the following:

- Think of why a customer should purchase a product from your business or engage your services and put that in an easy-to-understand statement;
- Make it clear and concise;
- Identify your target audience;
- Consider the overarching benefit of the provision of services to the customers;
- Communicate how your services solve certain problems faced by customers; and
- Explain how your business can deliver added benefit to potential customers.

W Wealth Protection: Litigation & Bankruptcy

It is common for individuals associated with any business to hold assets by way of family trusts or superannuation funds instead of in their own names. This can be an effective strategy for retaining and safeguarding assets when faced with family or business-related litigation although protection is not guaranteed by any means.

Irrespective of whether a doctor's practice is small (sole practitioner) or considerably large and operating in a corporate manner, asset protection is a key challenge given the increasing number of claims made on the ground of malpractice, especially where insurance companies exclude or otherwise fail to pay claims.

Over the years, there have been many cases where doctors have entered into dubious financial agreements in a bid to protect their assets.

We have considerable experience in assisting clients to avoid related insurance and bankruptcy litigation in this area. Doctors should never delay the payment of their professional indemnity insurance premiums and seek advice early about the best business structure.

As a precautionary step, doctors should avoid owning assets in their own name. Family trusts and superannuation funds are the best alternatives.

Future Assets

Transferring all assets acquired by a doctor into the name of his/her spouse, a family trust or a superannuation fund can be beneficial except in the case of an asset which is residential property and the spouse is also in a similar profession. The capital gains tax component can also be a challenge in such a situation.

In most cases it is best to burden the property in the spouse's name with a significant mortgage and ensure that the repayment does not lead to the creation of another asset. We work closely with accountants and financial planners for our clients in these situations in order to devise and implement the best strategy for our clients.

Existing Assets

During any sale of assets, one should meticulously consider the stamp duty and capital gains tax costs in addition to ensuring that a property that is intended to be sold in the near future is not transferred into the name of any trust or spouse. However, there are potential beneficial options for transferring proceeds of a property sale to a third party to a spouse or a trust as a gift.

We can assist in a comparative analysis of the costs involved as well as evaluating the chances and prospects of any litigation during the transfer of assets to trusts or superannuation funds. We advise on best practice in this area and save clients a considerable amount of money during such transactions.

It is important to note that tools and equipment deployed by a doctor during their day-to-day practice have little significance in any litigation. Their value as an asset diminishes considerably after purchase. However, state-of-the-art technology in a specialised area of practice may be treated differently and likely given more value.

Goodwill

Goodwill generated by a doctor through her skills and efforts during many years of practice do not qualify as an asset for the purpose of wealth protection. This type of goodwill cannot be transferred. However, for a large enough practice, goodwill can be measured as an asset and in these circumstances, it would be worth considering safeguarding it by way of a trust.

X

X-Rays and Radiology

Starting a new business can be a daunting and stressful process. To avoid some of this, it is important that you conduct thorough research before you launch. In the operation of a radiology practice, it is generally the hospital which invites an experienced radiologist to set up a new practice within or underneath the hospital's existing structures. This is usually very beneficial as it provides work from day one.

Establishing a radiology clinic often involves a four step process:

- Pre-assessment and business planning;
- Consideration of issues;
- Recruitment and
- Launch.

We will deal with each of these in turn.

Pre-Assessment and Business Planning

At the outset, conducting a feasibility study of your proposed business is crucial. You should consider whether the likely revenue stream will be profitable in light of your start-up costs.

You should also consider the potential risks the venture may be exposed to. A method of reducing risk is to develop business structures which protect your personal and business assets. We regularly review existing structures and advise in establishment of new structures in radiology practice to determine which business structure is best suited to your interests and goals.

Additionally, business owners should also develop a detailed business plan together with a budget. These not only provide direction but can also be useful when consulting when seeking business finance (if required).

Consideration of Legal and Financial Issues

The next stage will be to consider the legal and financial issues including finance and compliance with applicable rules, regulations and the law.

The Medical Radiation Practice Board of Australia's website is an invaluable resource as to the rules, regulations, standards, codes and guidelines for practice in the medical

radiation profession. A link to the website can be found here:
http://www.medicalradiationpracticeboard.gov.au/

The radiology industry is subject to the Health Practitioner Regulation National Law 2009 ("the National Law"). As an owner of a radiology practice, it is important that you have a basic understanding of the legislation that governs your industry.

Radiology equipment and machines are very costly, therefore, potential owners should be very cautious in determining whether the business is likely to be profitable.

The above considerations all have potential tax and legal implications for you and, therefore, it is often important to engage the services of a lawyer, accountant and financial advisor to advise you at the earliest opportunity. In our experience, this almost always saves you time, cost and stress in your business down the road.

Recruitment

Recruiting eligible physicians to your practice will be an intensive and time-consuming process. Physicians you employ should be assured that your organisation complies with the regulations of the industry. It is also important to monitor your employee's qualifications and check that they remain qualified under the National Law during all times in which they are in practice with you.

Many businesses establish strong compensation structures and procedures to attract and retain talented staff. You should turn your mind to establishing a strong work culture which will enable long term retention of key practitioners and other staff.

Launch Operation

Only when all elements described in this chapter are considered will you be ready to launch. Business contracts (particularly with a hospital in radiology practice) may be complicated and lengthy. We have decades of experience in assisting business owner and practitioners in the review, drafting and negotiation of such agreements.

Y

Young Doctors & Estate Planning

So you are a young doctor and thinking of buying into a practice or establishing your own. You think that estate planning isn't really that important as you don't have many assets yet BUT these issues are still critical for you…

Superannuation and Family Trust Assets

To complement the internal arrangements addressed by any shareholders or unitholders agreement it is also wise to have arrangements in place to cover death and disability.

Nowadays we have increasing wealth held through superannuation funds and family trusts which are not actually addressed by wills. So, if your business assets are held in part through such vehicles and structures you need to have a plan for what happens when you are not around.

On superannuation, in the event of your death, the trustee of your superannuation fund may have the discretion to decide where to pay your superannuation death benefits. This may result in your intended beneficiary receiving either a greater or smaller benefit than what you had intended. To avoid leaving this choice with the trustee, you should put in place what is called a "binding death benefit nomination" with your superannuation fund. With this, you can nominate any mix of your superannuation law dependants (i.e. spouse, a child of any age or in an interdependency relationship) or your legal personal representative (i.e. your estate) to receive your death benefits.

If you nominate your "legal personal representative" to receive 100%, this will ensure that your superannuation death benefits are paid to your estate to be dealt with as estate assets in accordance with the terms of your Will. It is also important to note that proceeds of life insurances are treated similarly.

You should also ensure that your binding death benefit nomination is made in accordance with the fund's deed (if you have a self-managed superannuation fund), accepted by your superannuation fund and kept up to date. It is common for binding death benefit nominations to lapse after three years. If your superannuation fund allows you the option of making these non-lapsing, you should consider doing so because these are often things which are made, forgotten about and otherwise lapse during that time.

Unlike superannuation funds, there is no simple nomination form by which family trust assets can be successfully dealt with. The only way in which those assets can be transferred to individual beneficiaries (such as adult children) is by way of a formal distribution to beneficiaries in accordance with the relevant provisions of the trust deed.

This not only requires consideration of the technical requirements of that trust deed, but can also have tax (particularly, capital gains tax) and stamp duty consequences.

In these circumstances, as part of your succession planning, it is important to consider who you would like to see in effective control of the family trust assets upon your death. That is, who would act in the roles of appointor / principal and trustee of the trust once you pass away? Often a trust deed will provide that on the death of the principal / appointor, their powers pass to the executors of their Will, however, it is important to check this specifically. Once considered by in your planning, appropriate trust documentation should be prepared and terms included in your will to ensure that control of these assets passes to the intended hands.

Business Structures

The ownership and control of your business operated through a business structure such as a company or a unit trust must also be considered. You do not own business assets held by a company or trust and, therefore, again these are not covered by your will.

If you hold shares in a company or you are owed money by a company or trust, those shares and that money are your assets. These assets form part of your estate and can be covered in your will. Even so, in preparing your estate plan, it is important to have your lawyer carefully check the provisions of your structure's governing and other relevant documents such as company constitutions, shareholders agreements, trust deeds and loan agreements, because these could contemplate an outcome that is different to what is in your will.

For example, it is common for a shareholders' agreement to give other shareholders the right to acquire the shares of a deceased shareholder. Those documents will also set out what rights the shareholders have, such as voting and rights to receive dividends and capital, particularly when there are different classes of shares. These documents should be reviewed and, if necessary, updated as part of your estate plan.

If you are owed money, you can, in your will, choose to forgive repayment upon your death. We note, however, that you should take the advice of your lawyer and accountant about such forgiveness before putting in place a will to do so.

Your position as a director of a company automatically ends when you die or become mentally incapacitated, but the company continues to exist. This can be particularly relevant for companies with only one director, and it is often for this reason that a company should itself make a Power of Attorney to ensure that the company (and its business) continues to operate if the director dies or loses capacity. This can be critical for a quick and smooth transition to maintain the value of the company, and to retain staff and clients.

The moment you pass away, all of your estate (including shares owned in a company) passes to the control of executors of your will. Your executor's role and powers also commence immediately at that time. Generally, this means that your executors take control of businesses owned by a company or trust after you die. It is then important that you record your wishes as to what you want to happen to those businesses if this occurs.

While your wishes are not binding, they do act as a useful guide as to how your executors should exercise their powers.

Powers of Attorney

While it is important to appoint those you trust to act as executors upon your death, it is just as important to appoint trusted persons to make decisions on your behalf when you are unable to do so during your lifetime.

In Victoria, we have three key attorney powers. These are:

- **Medical Enduring Power of Attorney**: This is a legal document where an individual appoints another person with the power to make decisions about medical treatment on their behalf. The law specifies a hierarchy of people who can consent to medical treatment on behalf of someone who is not able to do so. A person appointed under a medical enduring power of attorney is first in the hierarchy.

- **Enduring Power of Attorney**: Often referred to as the now combined guardianship and financial power of attorney (since the law changed in September 2015), this power is a legal document where an individual appoints another person or persons to make decisions for them about:

    - financial matters;

    - personal matters;

    - both financial and personal matters; or

    - specific financial and/or personal matters.

- **Supportive Attorney**: This power of attorney is a little different in that it applies in circumstances where you still have decision making capacity, however, you may lack the physical capacity to carry out or otherwise give effect to the decision. These appointments are a way that a person can be supported to make and act on their decisions.

Some helpful tips in selecting your attorney(s) are as follows:

- It is absolutely critical that those persons acting as executors of your will and your attorneys during your lifetime be able to work well together;

- Appoint more than one person and consider alternative appointments;

- Appoint people you know and trust who will do their absolute best to carry out your directions and wishes;

- It is not always appropriate to appoint only family members and sometimes a mix of friends, family and / or professional advisers works well; and

- Discuss the appointment and your wishes with all concerned so there will be no surprises when the time comes.

Z Zoning

It is of critical importance to properly consider the relevant council zoning and planning conditions with respect to your current medical practice, or if you wish to purchase land to develop a medical centre.

The requisites in obtaining a planning permit will depend on what local council your premises falls within and also what alterations you intend to make to the existing tenancy / building.

You might need to obtain common planning and building permit applications in some of the following situations:

- setting up your medical premises or business;
- changing the existing premises frontage;
- attaching signage to the building;
- updating the internal fit-out of the premises; and / or
- having outdoor seating or heaters on a footpath.

In Victoria, it should be part of any normal due diligence process to check and verify the following, before signing a lease, establishing a business or otherwise buying property or business. As part of this, your due diligence could include the following (this list is not by any means exhaustive):

- Ascertaining which planning zones and overlays apply to the properties by obtaining appropriate searches including a Basic Property Report in Victoria;
- Checking the Victorian Heritage Database to see if the premises are listed as heritage. If so, further Government body permissions and approvals for the premises are likely to be necessary for your intended use and development of the premises.

In the case of establishing a medical or dental practice, the first thing that you should check with the local council is whether the premises falls within an area that is zoned for medical purposes. In the case that it is already zoned and approved for medical purposes, you should check the number of practitioners that the permit allows for such practice at the premises. If you wish to have more practitioners in the practice than is authorised, you will need to submit a planning permit application for assessment and approval by Council before additional practitioners can practice.

We have assisted many clients in obtaining the required permits. You may have several questions about such practices in a particular building or area and it is a good idea to also talk to your neighbours on these points (to the extent this might be helpful on your particular situation).