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# IN TOUGH TIMES, ADAPT YOUR APPROACH TO LEGAL ISSUES

Many businesses are struggling to make ends meet.

There doesn't seem much hope for change any time soon.

This is reflected in the increased number of the following matters in which we are acting.

The outcomes we are achieving are the result of us not taking a purely "legal" approach, as well as our clients adapting their approach to such matters. We explain below.

***Contractual disputes***

We suspect that contractual disputes are increasing because margins are tight and parties are required to fight for every last dollar, rather than the heady days where compromises were common as the "next big deal" was around the corner.

A "commercially realistic" approach and doing the "maths", including the time, cost and risk of continuing with a dispute, often leads to sensible outcomes.

***Debt collection / payment disputes***

Debtors are slow to pay, presumably because they themselves are not being paid by their own debtors.

A "realistic" approach yields the best results. If a debtor doesn't have funds to pay the debt in full, and they prove it, then a payment arrangement with added security or avenues of attack (e.g. a director's guarantee) may be the best commercial outcome, rather than commencing Court action which may take many months and cost significant amounts in legal fees, and which also may not be recovered.

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***Partnership/Shareholder/Unitholder disputes***

When times are tough, it is common for one business owner to feel they are carrying the other(s), or for disagreements to ensue regarding strategies to increase revenue/profit.

We have found that a "creative" and "commercial" approach by both/all parties, rather than an emotional approach tied strictly to legal rights/obligations, achieves the best results.

And where the parties are to go their separate ways, a "co-operative" approach can result in win-win scenarios.

***ATO negotiations***

The ATO's powers are considerable, and continue to grow.

The ATO's past (and continuing) focus on ensuring lodgements are made has resulted in a greater awareness of what debts are now required to be paid.

We have found that a "pro-active, transparent and all-encompassing" approach to negotiations, for both lodgement and payment, often leads to excellent (and sometimes surprising) outcomes with the ATO.

We've also found that so long as such an approach is adopted, the ATO has been reciprocally co-operative in allowing time for such negotiations to occur.

***Liquidator claims***

Liquidators have power to bring certain claims not otherwise available to a company. Examples include unfair preference claims, uncommercial transaction claims, and insolvent trading claims. See for example s588FA, 588FB, and 588G *Corporations Act* 2001 (Cth).

Again, a "commercial" approach to negotiations with liquidators often leads to desirable outcomes, rather than a purely combative approach.

Remember, liquidators have duties to company creditors to consider and where reasonable bring valid claims. There is usually no emotion involved in a liquidator's decision. They have a job to do, which is to maximise the return to creditors in the circumstances.

In our experience clients who adopt an "ignore it" approach, or entirely combative approach, sometimes lose the opportunity to get a great commercial result very early, with minimal legal costs. Costs can escalate quickly if the liquidator commences Court action, not knowing that a defence exists. .

***Bankruptcy claims and asset transfers / asset protection***

Bankruptcy trustees have the power not only to bring claims, but also have the power to more easily (by a relatively simple *notice* procedure, rather than Court) undo undervalue transactions or transactions entered into to defeat the claims of creditors (for example).

Directors wishing to protect their assets should be pro-active and do so early, preferably when they are solvent. Further, such strategies should be properly implemented and regularly revised, lest the intended protection is later lost or undone. For example, acquiring

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a property in your spouse's name only may (if done properly) be a valid asset protection strategy, but the protection may be lost in the event of your bankruptcy if your spouse acquired the property as a direct or indirect result of financial contributions made by you. See s139DA *Bankruptcy Act* 1966 (Cth).

***Legitimisation of DIY transactions***

When times are tough, businesses try to "do it themselves" to save legal fees. Examples include preparing your own contracts (or having no written contract at all), transferring assets, and making loans to your company. Sometimes directors go so far as to try a *whole business sale* or "restructure" themselves, or do so upon the advice of non-lawyer "pre-insolvency" advisors.

A DIY approach can be a false economy. The costs of disputes regarding invalid transactions often outweigh the cost of doing it right the first time.

We have found that a pro-active approach to identify such DIY transactions (often with an accountant assisting), and then "re-doing" such DIY transactions properly, can result in their legitimisation at minimal legal cost, especially if the DIY-effort itself at least evidences the *intention* of the parties so that it does not seem to be a recently concocted transaction to avoid creditors' claims, for example.

This might involve not only drafting proper contractual documents, but also obtaining valuations, formalising vendor finance arrangements, dealing with PPSR creditors and securities, and assigning debts and providing proper notice.

The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

For further information or assistance contact Murfett Legal on +61 8 9388 3100.

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Murfett Legal is a leading law firm in WA, providing services in litigation, corporate and commercial, employment and workplace relations, insolvency, debt collection, business restructuring, Wills & estates, property, leasing, settlements, liquor licensing and intellectual property.