MULLINS business

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IT HAS LONG BEEN AN ASPIRATION OF PRIVATE COMPANIES TO BE LISTED ON THE AUSTRALIAN STOCK EXCHANGE. WITH THE CONTINUING FOCUS ON CORPORATE GOVERNANCE AND THE INCREASED REGULATION OF PUBLIC COMPANIES, MANY PRIVATE COMPANY DIRECTORS ARE TURNING OFF THE IDEA OF A PUBLIC LISTING.

GOING PUBLIC - or maybe not?

By: Olivia Versace

The escalation in public company compliance requirements has even led some public companies to consider going private.

Recent commentary suggests that the pool of talent for public company directors is dwindling. One reason suggested for this is the risk associated with being a director of a public company. Many directors wish to add value to the business they are involved in rather than having their time consumed by regulation and compliance issues.

A private company should consider the availability of experienced directors as a key matter when deciding whether to list or not. Before making a decision on expansion a private company should consider the pros and cons associated with going public and with raising funds through private equity.

A public listing offers access to capital that is not freely available in the private scene. Once listed, it is usually easier for a company to raise money going forward. With a public listing comes public scrutiny and a higher level of regulation. The company, and the directors that sit on the board, must be ready for the continuous disclosure regime of the Australian Stock Exchange and put in place appropriate compliance procedures to ensure the company operates according to the principles of good corporate governance.

So what else can a private company do if it wishes to expand? An injection of capital from a private equity fund is often an attractive alternative to a public listing. In our previous newsletter we described the nature of private equity and its growing significance in the capital raising market. The private equity investor commonly has several requirements before it will invest. These requirements will vary depending on the investment strategy of the individual private equity fund. For example, some private equity funds look for the following matters when short-listing potential investee companies:

1. A seat on the board
2. An equity position of between 5% and 49% (ie. they do not want control)
3. A detailed business plan and budget
4. Investment from the existing management team
5. A business at the expansion stage
6. A particular industry focus (eg. biotechnology or agribusiness)

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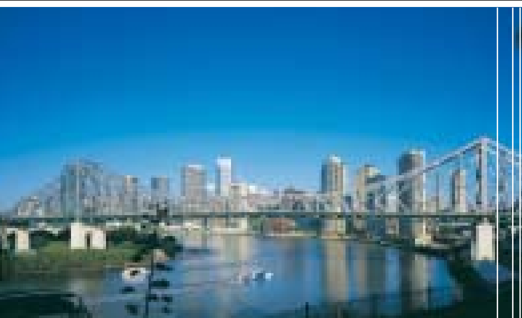

contents

DIY SUPER 2
PRIVACY REVISITED 3
FRANCHISING - THE FINE LINE BETWEEN COMMERCIAL AND OPPRESIVE CONDUCT 3
DIRECTORS AND THEIR MATERIAL PERSONAL INTERESTS 4
EDITORIAL - DAVID WILLIAMS 4

DIY SUPER

By: Michael Klatt

For a number of reasons many employees are now turning to self-managed superannuation funds rather than industry funds. These include dissatisfaction with the investment performance of their existing industry funds or perhaps they are on a high income with significant disposable income which can be tipped into superannuation which is a tax friendly environment.

The main benefits of self-managed superannuation funds are that the members have greater control and flexibility. In most cases, the costs can be minimised. Most self-managed superannuation funds would engage the services of professionals in the administration of the fund and also in making investment decisions.

THE MAIN BENEFITS OF SELF-MANAGED SUPERANNUATION FUNDS ARE THAT THE MEMBERS HAVE GREATER CONTROL AND FLEXIBILITY.

A self-managed superannuation fund must have at least one member, but no more than four. The trustees of the fund must be the individual members or a company with each of the members being directors. Where there is one member of the fund, the trustee must be a company of which the member is the sole director or one of two directors, the other director being a relative or where the trustees are individuals, the member is one of the trustees and the relative is the other. A member can only be in the same fund as their employer if they are related.

Tax deductions for the full amount of the first $5,000.00 of contributions plus 75% of additional payments up to the age based limits can be claimed. Importantly, contributions will be taxed upon the fund at a maximum rate of 15% during the accumulation phase. The tax paid will be much less than the top marginal rate paid by high income earners on the same money where it is not contributed to superannuation. Income earned by the fund will be taxed at maximum rate of 15%. The capital gains tax rates are much lower for the fund rather than for individuals attracting only 10% where the asset is held for a minimum 12 month period.

Upon retirement, death benefits can be paid out by way of lump sums and/or a choice of three different pensions (Complying Pension, Term Allocated Pension or Allocated Pension). Depending on the tax composition of the member's account, each method of withdrawal will have differing tax implications. For example, the most commonly used Allocated Pension can potentially pay a member an annual pension of $25,930.00 tax free. Income earned from investments in the fund post retirement and after the commencement of a pension (pension phase) is 100% tax free to the fund.

Death benefits payable on the death of a member can be regulated by binding death nominations or there can be flexibility given to the trustee to allow pensions to be paid to the surviving spouse and/or children. Child allocated pensions paid from the superannuation fund attract significant tax advantages for children under 18 so that children can obtain $25,930.00 per annum tax free with any higher sums being taxed upon the adult marginal rates. Superannuation benefits are also protected from creditors up to the reasonable benefit limit of $1,297,886.00 (2005 - 2006 tax year) for each member. The trustee in bankruptcy will be able to claw back excessive contributions over $5,000.00 under legislation anticipated to be passed shortly.

Because Superannuation Death Benefits are not necessarily paid to the member's estate, self-managed superannuation funds which will have "friendly" trustees can be a good way to prevent a member's estate from being subjected to family provision claims. In many cases, the trustees of an industry fund have a wide discretion as to which dependents death benefits are paid to and this may not accord with the wishes of the member.

GOING PUBLIC - OR MAYBE NOT?

(Continued from page 1)

Invariably private equity investors look for a company that has a strong management team and growth prospects. In addition, the company must be open to the active participation of the investor in relation to management mentoring and strategic planning.

If a company would rather obtain funds through private equity what are the pros and cons?

A perceived advantage in staying private is that the company has less of a corporate governance burden allowing more timeto be dedicated to growing the business. Private equity canoffer greater flexibility and lower regulatory costs.

A lack of public accountability can lead to a lowering of protection for investors. If a company is seeking private equity investment it will be more attractive if it can offer the private equity investor a level of comfort by already operating its business in accordance with good business practice.

PRIVACY REVISITED

By: Kylie Torlach

The Federal Privacy Commissioner has reviewed the private sector provisions of the Privacy Act 1988. Her report was released for public consideration on 18 May 2005.

The Commissioner has recommended a number of amendments to the Act. Many of those recommendations concern two particular issues: the need for consistency between the privacy regimes operating in the government and private sectors; and improving the area of privacy concerning health information.

The report relies, to a considerable extent, on anecdotal evidence as well as the Commission's own complaint statistics. The Commissioner has suggested that a wider review of privacy laws in Australia may be required.

Amongst other recommendations, the Commissioner has suggested that the Federal Government consider:

- Providing consumers with a general right to "opt out" of direct marketing approaches, at any time (perhaps establishing a national "do not contact" register);
- Giving complainants and respondents a right to have the Commissioner's decisions reviewed by another body or person;
- Giving the Commissioner discretion not to investigate complaints where the harm to individuals is minimal and there is no public interest in pursuing the matter;
- Modifying the small business exemption, so that the definition of "small business" is changed to businesses with 20 or less employees (rather than the current definition, which is a business which has an annual turnover of $3 million or less). Given the Federal Government's recent indication that it intends to redefine "small business" in the industrial relations context, to mean businesses with 100 or less employees it may well be that any change to the privacy legislation will be consistent with that;
- Imposing an obligation on an organisation to ensure personal information it discloses to a contractor is protected by the contractor;
- Permitting the disclosure of non-health information, where the disclosure is necessary for the management of the affairs of a person with a decision-making disability;
- Making it clear that an organisation collecting personal information from an individual must take reasonable steps to notify the individual of the likely disclosures of that information generally, including disclosures to government agencies.

The Commissioner has also suggested that further resources be provided to ensure consumers and businesses are better educated about their rights and obligations under the privacy laws.

FRANCHISING - the fine line between commercial and oppressive conduct

By: Richard Stone

The Australian Competition and Consumer Commission ("ACCC") has recently issued its publication "A Small Business Guide to Unconscionable Conduct" in May of this year. This guide sets out examples of the types of conduct the ACCC considers infringes on Section 51AC of the *Trade Practices Act* ("the Act"). This report highlights what is regarded as unconscionable, extends beyond hard or tough bargaining. Rather it is conduct where the stronger party seeks to capitalise upon its bargaining strengths by dealing unduly harshly with the weaker party.

IT IS NOT UNCONSCIONABLE FOR A FRANCHISOR TO ENFORCE ITS STANDARDS AND REQUIREMENTS SO LONG AS THEY ARE DIRECTED TOWARDS THE PROTECTION OF PROPRIETARY INTERESTS OF THE FRANCHISE SYSTEM AND THAT SUCH CONDUCT IS NOT IN ANY WAY UNREASONABLE.

Franchising has been at the forefront of a number of the cases that are highlighted in this publication as conduct that is unacceptable commercial conduct for franchisors or any other business operators to conduct their affairs.

What does in fact amount to unconscionable conduct is essentially an assessment of the course of conduct and whether in view of all the circumstances this conduct can be regarded as unconscionable. More recently the ACCC has highlighted the need for franchisors to exercise care in the way they operate their franchise systems. It is not unconscionable for a franchisor to enforce its standards and requirements so long as they are directed towards the protection of proprietary interests of the franchise system and that such conduct is not in any way unreasonable.

We would expect the Courts to provide further guidance in relation to that conduct which is unconscionable by virtue of a number of cases that are currently before the Courts.

PUTTING YOUR CARDS ON THE TABLE - Directors and their material personal interests

By: Olivia Versace

Subject to certain exceptions, a director of a company must give other directors notice if he or she has a material personal interest in a matter that relates to the affairs of the company. It is a criminal offence not to give such a notice when it is required.

For instance, a director does not need to give notice:

- if the company is a proprietary company and the other directors are aware of the nature and extent of the interest and its relation to the affairs of the company; or
- if the director has given a standing notice under the Corporations Act.

SUBJECT TO CERTAIN EXCEPTIONS, A DIRECTOR OF A COMPANY MUST GIVE OTHER DIRECTORS NOTICE IF HE OR SHE HAS A MATERIAL PERSONAL INTEREST IN A MATTER THAT RELATES TO THE AFFAIRS OF THE COMPANY.

A standing notice is a notice given by a director to the other directors that sets out details of the nature and extent of the interest. A standing notice may be given at a directors' meeting or to each other director individually.

The provisions in the Corporations Act are intended to be in addition to, rather than replacement of any rules on directors' interests contained in a company's constitution or under the general law.

SO WHAT IS A MATERIAL PERSONAL INTEREST?

"Material personal interest" is not a defined term under the legislation. In each case it will be a matter of considering the circumstances.

A director will not have a material personal interest if the interest does not give rise to a real sensible possibility of a conflict of interest for the director. It has been suggested that an interest will be "material" if it has the capacity to influence the vote of the particular director.

A director of a proprietary company may participate in voting and completion of a transaction if notice is given or notice is not required to be given. A director may only retain benefits under the transaction if the notice is given before the transaction is entered into. Also, the company may not avoid the transaction if the notice is given beforehand.

A director of a public company must not be present while the matter is being considered at a directors' meeting nor vote on the matter unless the other directors are satisfied that the interest should not disqualify the director from being present or voting. The other directors pass a resolution to such an effect. Alternatively, a public company director may participate if ASIC gives its approval.

EDITORIAL

By David Williams

The Federal Government will, by the time you receive this newsletter, be taking control of the Senate for the first time since the 1980s. This will immediately result in some dramatic changes in certain areas of the law that will impact upon business clients of our firm. The first target will be Industrial Relations Law.

On 26 May 2005 the Prime Minister released a Ministerial Statement outlining the Government's historic modernisation of Australia's workplace relations system and it is likely that draft legislation will be available soon.

In recent times we have all seen strong jobs growth, low inflation, low interest rates and high levels of general growth across the economy, particularly in the property market. It was always going to be difficult for any political party to maintain growth at comparable levels. The Government has put forward what they feel is a suitable vehicle for achieving these aims and in the process encouraging what could be an industrial revolution.

The Government has outlined its plans to use the Senate majority to provide a flexible, simple and fair system of workplace relations that is to enable Australia to sustain our "prosperity, remain competitive in the global economy and meet future challenges such as the ageing of our society".

Whilst the tenor of the changes can clearly be interpreted as increasing the ability of employers and employees to negotiate at the workplace level, to the exclusion of any third parties, whether this will result in increased productivity or a real reduction in the level of wages previously enjoyed only time will tell. One thing that is clear in all of the uncertainty currently surrounding the Australian workplace relations system is that employers will welcome any simplification in the overlapping maze of conflicting federal and state legislation in this area.

Upon the tabling of the new legislation our Workplace Lawyers will be available to provide detailed advice to clients of the firm about the legal ramifications of the new legislation. The Federal Government has already tabled amendments to other important legislation (i.e. Trade Practices Act) that will impact upon how business will operate. In particular, it is proposed that the test for Third Line Forcing becomes a competition test. We anticipate this amendment will be positively received by the franchising and distribution industries.

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