

Newsletter

Selling Your Business - Confidentiality Agreements

Thinking of selling your business? Beware. Selling a business can be fraught with danger. One potential danger area is providing information about your business to a prospective buyer so that they can fully investigate the way that the business operates, before deciding whether to buy it. This process is usually called "due diligence enquiry".

Generally, the type of information which the buyer wants is not publicly available. This means that the only way that the buyer can get the information is as a result of your disclosure. This will often require you to provide highly sensitive financial and operational information about your business to (usually) a complete stranger, or one of your competitors. This environment creates the potential for misuse of the information by the buyer or competitor. Obviously, this could have serious adverse consequences upon your business.

Consider the situation where you enter into a contract to sell your business to a buyer, and the contract is conditional upon the buyer being satisfied with due diligence enquiries. On the strength of the buyer entering into the contract, you disclose sensitive financial and operational information about your business. The buyer then terminates the contract on the basis of not being satisfied with his enquiries. After a period of time, you may find that your business is not as busy as it once was. You then discover the buyer, using the business information which you provided him, has opened a business similar to your own. The buyer is using the information which you freely provided him against you. Clearly, this is something you would not want to happen.

We recently acted for clients who operated a very specialised business from a customised factory. The clients wanted to sell the business and did not renew their factory lease, thinking that the successful buyer of their business would do so. A contract was entered into subject to satisfactory due diligence enquiries by the buyer.



The buyer discovered that our clients did not have a lease. Without our client's knowledge, the buyer then approached the Landlord, informed him that they had contracted to purchase our client's business and negotiated a new fixed term lease which was subsequently signed.

The buyer then terminated our client's contract, saying they were not happy with the outcome of their due diligence enquiries. Our clients then discovered that the Landlord had entered into a new lease of the factory with the buyer. Since the operation of our clients' business was dependent upon their using the customised factory, the buyer's action – if successful – would have effectively taken the business away from our clients without having to pay for it.

Fortunately for our clients, we had drafted a Confidentiality Agreement which the buyer had signed – before any confidential information about the business had been released to him. As a result, we were able to fully protect our clients' business. A Court Order was obtained which effectively prevented the buyer from using the financial and operational information.

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It is important to appreciate that information about the operation of your business is an asset which needs to be protected. Before disclosing any business information to a prospective buyer, you should oblige the buyer to sign a Confidentiality Agreement. You can then freely disclose information which would otherwise be confidential, as it is protected.

Be wary about using your business broker's standard Confidentiality Agreement. In our clients' case, their broker's agreement was invalid. If we had not replaced it with our own document – which the buyer subsequently signed – our clients would not have succeeded in protecting their business. If you are inclined to use the broker's Confidentiality Agreement, it would be in your best interests to have us vet the document before the buyer signs it.



New Code Of Practice For Pet Shops To Reduce Unwanted Pets

Queensland pet shops will be encouraged to source dogs and cats from breeders who care properly for their animals, and to discuss the home and care needs of pets with buyers, under a proposed new code of practice for pet shops.

The Minister for Primary Industries and Fisheries, Tim Mulherin, said the proposed code of practice, the first of its type in Queensland, was one of a number of initiatives aimed at reducing the number of unwanted pets.

The proposed code of practice for pet shops will complement proposed statewide legislation to require all cats and dogs to be registered and all cats and dogs to be microchipped for identification when sold or given away.

The Queensland Government will also run pilot studies to test innovative animal management initiatives by local governments.

This proposed code of practice for pet shops sets out important guidelines - minimum standards which will go a long way in reducing the number of pets that end up unwanted, abandoned and euthanised in Queensland.



Real Estate Contracts (Part 1)

All Real Estate Contracts contain the same basic provisions –

- the deposit,
- the price,
- details of the Buyer and Seller,
- details of the property being sold,
- the conditions of sale,
- completion date.

This article deals with the deposit and is written from the perspective of a Buyer.

Do you have to pay a Deposit for the Contract to be valid?

There is no legal requirement that a deposit must be paid to make a contract legally binding.

The main purpose for paying a deposit on signing a contract is to show the seller that you mean business – a sign of good faith that you will complete the contract. If you default in performing the terms of the contract, the deposit may be forfeited to the seller.

When can you lose your deposit?

If you are in default under the terms of the contract, it is likely that you will lose the deposit. Default happens when you fail to complete the purchase of the property.

This can occur even if you do not intentionally fail to complete the purchase. For example, if your financier is not ready to complete on the date set down for settlement, and the seller is not willing to grant an extension of time to do so, you are in default under the contract, and the seller may terminate the contract and take your deposit.

As well as taking your deposit, the seller is also able to make a claim on you for any loss incurred when the property is re-sold.

Can you withdraw from a contract without losing your deposit?

There can also be circumstances where, although you do not complete the purchase, you are not in default under the contract, for example –

1. Where your purchase is subject to satisfying a special condition, eg finance approval, satisfactory building inspection, or completion of the sale of another property.

2. Where the seller fails to satisfy a special condition of the contract, eg obtaining a final building clearance certificate for the property.

If a special condition cannot be satisfied through no fault of your own, then the contract is terminated and the full deposit paid by you must be refunded.

Consumer Protection – Cooling Off

Contracts also contain a provision for you to withdraw from the contract during the “cooling off period”. This option is open to you for five business days after the contract is signed. If you decide to withdraw during the cooling off period, you are not in default and will receive a refund of most of the deposit paid.

However, while this gives you an absolute right to terminate the contract during the cooling off period, it does have its drawbacks.

Under the cooling off provision, the seller is allowed to keep an amount up to 0.25% of the property’s purchase price if you withdraw from the contract during this period – on a \$400,000 transaction, this would be \$1,000 of your deposit.

In our next newsletter Part 2 will deal with the other basic provisions in a real estate contract.



Looking After The Grandchildren

When most of our clients make their Wills, they make provision in them for their children. But, what about the grandchildren?

The legislation which governs the making of Wills in Queensland (the Succession Act), contains a provision that if a legacy is made to a child of the Will maker and that child dies before the Will maker, the deceased child’s children take the legacy. The technical term for this is substitution. The statutory substitution will apply unless a contrary intention is expressed in the Will.

So, if you wish your estate to be divided only amongst your children who are alive at the time you pass away, your Will needs to clearly say that you leave your estate to those of your children who survive you. We can advise you of the proper wording to give effect to your wishes.

Even if you are happy for the children of a deceased child – your grandchildren- to take their parent’s legacy, we always recommend that you expressly say so in your Will. That way, there will be no room for misinterpretation of your intentions and if you have property in another State or country where there is no similar substitution provision, your grandchildren will get their legacy.

When providing for your grandchildren, or maybe even your children, you need to consider the age at which you would like them to take any legacy you make in their favour. The minimum age is 18 years – the age of majority. Some people would say they wouldn’t trust anyone to wisely look after a large sum of money at 18 and set the age at 21 or 25 years. In those cases the Will can provide for a legacy to be held in trust by the Trustee appointed in the Will until the qualifying age is reached, with the Trustee having an ability to advance all or part of the legacy to the beneficiary for things like their education.

Give that some thought when you give us instructions for your Will.

*“people you
can talk to”*

S M I T H & S T A N T O N
LAWYERS

Staff News



Juliet Hall

Juliet Hall has joined Smith & Stanton on a full time basis. Juliet has been working with Judy Smith in the Succession area of the practice on a part time basis while she finished her studies. Late last year Juliet was awarded degrees in Psychology and Law from Griffith University and will now spend the next six months completing her practical legal training. She will be admitted in July this year. Juliet brings a compassionate and informed approach to dealing with client's will and power of attorney issues and we know she will be a great asset to our firm.



Naomi Wright

If you have been to our office recently you would have been met with the smiling face of Naomi who joins us as receptionist and bookkeeper. Naomi has an engaging personality and has already taken our client service at the front office and on the telephone to a higher level.

Thank You To Our Clients

Over the last 16 months, access to our building and our business operations have been severely impacted by the development of the Aspley Village Shopping Centre. Fortunately, the major part of the construction and the fitouts of the key tenants are now completed and there is some respite. The fitout of the Medical Centre, which will be relocated into the first floor of the building is under way and it should be open for business by March/April this year.

We have used the opportunity to carry out some construction of our own. The car park and pavers at the front of our building have been resurfaced, and our signage has been relocated and will be upgraded. A new security fence has been installed and we will shortly be remodelling our reception and enhancing the look of the exterior of the building. We anticipate another 2 to 3 months of disruptions, after which we will have –

- a new reception area,
- a new entry to our premises, and most importantly
- three new meeting rooms so that we are better equipped to deal with our clients' concerns.

We would like to thank all of our clients who, like us, have had to put up with dust, noise and parking problems over the last 16 months. We expect that your patience will be rewarded with the improved facilities which we will shortly be able to offer.



S M I T H & S T A N T O N
LAWYERS

PO Box 41 Aspley QLD 4034
607 Robinson Road, Aspley QLD 4034
Telephone: (07) 3263 4244 Facsimile: (07) 3263 1138
e-mail: mail@smithstanton.com.au
www.smithstanton.com.au

