

Radio National Transcripts:



## Doing Business - Part 9

### Law For The Small Business

Joe Gelonesi: Hallo, I'm Joe Gelonesi. Today on Doing Business - Law for the new small operator. Last week we heard how franchising was a great way to learn the ropes of running a small business. Today we'll examine other options for structuring a business, and find out how to protect your ideas. With consumer specialists, we'll hear how to develop a good relationship with your customers and avoid costly disputes.

Sally Nash: Now people wouldn't dream of buying a house without first seeing a solicitor. For some reason people don't see businesses in the same light. They feel that they're more qualified to know what they're doing, and in fact in many instances, they're not. But my advice is to see a lawyer for a couple of hours is going to cost between \$500 and \$700 for some fairly basic advice, and the general rule of thumb is you go to court and it costs \$5,000 a day.

Clare Arthurs: So at what stage in the process of getting into a business should a person be talking to a lawyer?

Sally Nash: Right at the beginning. At the beginning either when they're entering into a business relationship, perhaps by entering into a partnership with somebody, or when they're going to buy the business. Most people will think about seeing a solicitor when they're going to buy a business or enter into a lease because the documents themselves are quite legal in the way in which they're drawn.

Clare Arthurs: They're so complex, they want clarification of what they're signing.

Sally Nash: Well, what they've already agreed to sign. Often what happens is, they may sign a contract for the purchase of a business with a business broker, find that they're bound by terms which they didn't even understand because they didn't see a solicitor before they even signed up with the business broker.

Joe Gelonesi: Sally Nash, from Sally Nash and Company, a litigation lawyer. Much of her work comes from business clients. Here she is with Clare Arthurs and an overview of legal structures for your business.

Clare Arthurs: What are the most common options for structuring a small business?

Sally Nash: Well there are really four. The first one is as a sole trader; the second one, partnership; the third is as a corporation; and the fourth is in some form of

trust.

Clare Arthurs: Let's work through those then. Firstly, the sole trader. What are the benefits of setting up that way?

Sally Nash: Well the real advantage is that you have control. You are the person who makes the decisions, and of course there's a considerable cost saving. The administration costs are considerably less, the accountant's fees, the tax returns, the lodgement of documents with government instrumentalities, they're all considerably reduced. But the risk is with that particular trader, and that means that their house, their car, their business is on the line when they make decisions.

Clare Arthurs: Is that the most common form of structure for small business?

Sally Nash: For a small business, either that or the - what we used to call - the \$2 company. The main benefit is what we call the veil of incorporation, the individual director or shareholder's assets are protected from the creditors. And this means that the company trades, carries on the business and if the business does not go as well as expected, and goes into liquidation, the personal assets of the directors may be protected from that liquidation. The perception is that if you're not prepared to back your own business acumen, then you put it into a company. The reality is that most people will not trade with a company structure without personal guarantees from the director and shareholders, well certainly from the directors. And anyone who's gone to a bank to apply for a loan in the name of a company will know that any bank or financial institution will require personal guarantees.

Clare Arthurs: What advice do you give people in terms of structuring their assets?

Sally Nash: Invariably I try to have the person who operates the business have all the debt through the business, and all the assets with the spouse.

Clare Arthurs: OK a simple solution. You mentioned there trusts. What is the structure of the trust which is a benefit to the small business?

Sally Nash: It's the most complicated of structures, and the most effective from the point of view of protecting your assets. The downside of course is it's the most costly to maintain.

Clare Arthurs: There's a lot of administration in running a trust.

Sally Nash: There is. There are the costs of incorporating the trustee, the stamp duty in the trust, the cost of preparing the trust documents and generally administering not only the corporate trustee, but also the trust assets and the beneficiaries in the distributions to beneficiaries. And really I couldn't recommend it in the normal small business structure, but it is something which is - if it is to be put in place - can give the best protection, because the family assets can be better protected through a trust.

Clare Arthurs: Let's move now then to the fourth popular legal structure for a business, and that's the partnership. What has to be in the partnership agreement?

Sally Nash: Well, my view is the partnership agreement in most States will be

covered by the Partnership Act. But that doesn't cover the way in which the business is to be structured. For example, a partnership need not be an equal partnership. One partner might bring in money by way of capital to the partnership, and the other partner might bring in expertise or a particular asset, or a patent or copyright or a lease. So those matters need to be properly represented in the agreement. Plus what is to happen if the partnership fails? What is to happen to key personnel in the partnership? Those matters are to be dealt with in the Partnership Agreement, and they're covered in general terms in the Partnership Acts in each State. But my view is that there's nothing like preparing a specific document for that partnership.

Clare Arthurs: What's the most common dispute among partners?

Sally Nash: It's almost like a family. Somebody does more than the other person, and one person perceives that they're either bringing in more work, or doing more work, and not being properly remunerated.

Clare Arthurs: How can that be addressed in the early stages of setting up the business?

Sally Nash: It's difficult, but a formula can be determined in the Partnership Agreement concerning hours worked, business brought in, because it doesn't have to be a 50-50 partnership, it can be 80-20.

Clare Arthurs: As long as the remuneration also reflects that.

Sally Nash: That's correct.

Clare Arthurs: How much do you need to know about the financial situation of the partner?

Sally Nash: My view is that it's absolutely crucial. If I'm entering into a partnership with somebody, I would like to know that their asset backing is at least equal to mine because if the business does fold, I don't want to be supporting their debt as well as my own debt.

Clare Arthurs: People do start out, don't they Sally, with rose-coloured glasses, and they believe that they're good mates, or they've got a good business partner and things won't go wrong.

Sally Nash: Oh, I'd just like to talk about one of my dear clients, who's been a client of mine for probably 20 years, and one day he walked into my office all starry-eyed with his wife, and said 'I've finally found the perfect partner'. I said, 'Oh great, that's wonderful' because I'd been involved in two partnership disputes for this client, so it was nice that he'd finally found his perfect partner. And he said, 'My accountant'. And five years later, he and his accountant are in the courts fighting about a \$1.5-million loss for a company structure.

Clare Arthurs: What's the lesson from that?

Sally Nash: The lesson from that is he thought he knew the person that he was going into business with, but of course the accountant was putting in the accounting expertise and not being paid for it, that was part of the deal, my client was putting in building expertise and not being paid for it. So neither one of them

really looked at the structure, at the partnership or the business they were carrying on, as a business. It was a friendly relationship which ultimately lost \$1.5-million between the two of them, because neither one of them took enough care of the business.

Joe Gelonesi: Sally Nash with a general guide to legal issues. Remember, you should get more detailed advice from your own lawyer.

Allan Lurie and his partner run two businesses from a New South Wales business enterprise centre, an incubator for small business, common to many States. Their enterprises take in recycling and an Australian Tourism Guide in Chinese. Clare asked why they set up in the incubator.

Allan Lurie: It was the easiest way to set up an office structure where we didn't need to go in to major leases and overheads. One can be in offices in the incubator centre for a week, two weeks, whatever period you want. You do have to supply a small deposit which is refundable at the end of the term, but if you want to be here for a week or two years, you can be in here and it's a small monthly payment on however often you use the office structure.

Clare Arthurs: And what services do you get from the incubator?

Allan Lurie: The incubator provides a full secretarial and reception service. The offices have their own desks, chairs and telephones, and a filing cabinet. And that's really what you get. There's certainly no glamour, but at least you get a fully functional office and you don't have to provide anything - you can walk in from day 1 with a pen and paper and get going. Obviously I've had to provide our own computers, but again, the incubator centre has photocopying facilities, faxing facilities and all the other facilities that one requires.

Clare Arthurs: Allan, do you and Jack have equal shares in the business?

Allan Lurie: Yes in Jack Jie we certainly do.

Clare Arthurs: And who does the most work?

Allan Lurie: We both do our own work. I do most of the administration and planning; Jack does more of the outside sales and integration with the world outside.

Clare Arthurs: And how do you value that in terms of the payment that you take from the business - how do you value his work against your work?

Allan Lurie: We don't value each other's work at this stage. We take it the same as a marriage, it's equal shares, you can't really relate what your wife puts into a marriage against what you put in, it's an equal business, and we both reap the same rewards.

Clare Arthurs: So do you currently have a partnership agreement in existence?

Allan Lurie: No, we're now in a company structure; the operations are both run as companies, but held by family trusts.

Clare Arthurs: Why did you choose a company structure?

Allan Lurie: Because we deemed with the rate that the businesses will grow at, it would be the best and most effective structure for us to have. Our aim is to build up some fairly substantial businesses in the short-term and have something where either we can get other partners coming into it, in other words investing capital, or possibly looking at taking over other companies, other companies taking over us, and the cleanest structure for that is to have a company structure.

Clare Arthurs: In choosing the company structure then, you were thinking ahead for where you wanted to grow your business and what vehicle would most suit that.

Allan Lurie: Yes. We targeted our markets, we've done full cashflow analysis plans for two-and-a-half-years ahead, and the potential of both of these businesses certainly warranted the expense of having that sort of structure.

Clare Arthurs: Who helped you set that up?

Allan Lurie: Both the solicitors and the accountants.

Clare Arthurs: Do you and your partner in the businesses have separate solicitors?

Allan Lurie: We had until we joined together. We now just use the same set of solicitors and accountant.

Clare Arthurs: So if you're seeking legal advice, do you and he both go to the same person for that advice?

Allan Lurie: If it's to do with the company and company matters, yes we do; if we're seeking our own personal legal advice and entities, he may go to a different solicitor. We haven't yet had to come across that stage, and we're not planning on getting to that sort of entity.

Clare Arthurs: How much do you know about each other?

Allan Lurie: Up until last November when we got together, we knew very little about each other, but we've had a very happy relationship and a very harmonious working relationship since then.

Clare Arthurs: How much did you need to know about his financial situation, his asset backing?

Allan Lurie: I certainly did inquiries and found out about his asset backing, as he did to mine, and we were both happy with what was required to run the business - that both of us had enough money to run the businesses.

Clare Arthurs: When you were looking at the company structure that you now use, did you look at the issue of protecting your personal assets?

Allan Lurie: Yes, we have looked at that issue, and that's why we really are structured through the family trusts, so each family individually will be protected.

Clare Arthurs: Did you find that an expensive way to set up?

Allan Lurie: Yes, it's an expensive way to set up in the initial stages, but if you're

looking further down the track, certainly past the first 18 months, the expense is well worth it.

Clare Arthurs: Again, it's that planning ahead.

Allan Lurie: Absolutely, one can't do it without planning ahead.

Clare Arthurs: What happens if circumstances change and you and Jack fall out over some issue, whether it's the amount of work that you're doing, the hours you're putting in, the money you're taking, or the way the business is run. How will you deal with any disputes?

Allan Lurie: We'd obviously have to go to arbitration on that, but I believe we're both level-headed enough to sort it out ourselves without getting into that mess.

Clare Arthurs: Have you built any promises of arbitration into the contracts you've drawn up between you?

Allan Lurie: Yes, there are degrees of arbitration in there. In any normal contract you will build a ???? on where you have to settle something. If it's not settled within a certain period of days, then one goes to arbitration.

Joe Gelonesi: The benefits of planning ahead. Allan Lurie, who used a company and a trust to set up in a government-sponsored enterprise centre.

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Coming up later in today's program, what you need to know about consumer law.

But before that, let's look briefly at protecting your ideas with Intellectual Property lawyer, Jennifer Douglas, from Mallesons Stephen Jacques.

Jennifer Douglas: Intellectual property describes different types of property rights you may have over elements of your business: your designs or inventions, for example. The major types of intellectual property you should protect include trademarks, copyright, and trade secrets.

A trademark is a mark or logo which indicates the origin of goods or services. It must be distinctive, not merely a description of what you are selling. Whilst not essential, it is highly preferable to register trademarks with the Australian Industrial Property Organisation, AIPO. The first step you should undertake is a business name and trademark search, to ensure you can use your proposed mark. Contact AIPO early, checking is not costly, although registration will be an expense.

Copyright protects the rights of authors of creative works, such as music, literature or art. In business, it may cover reports, software, designs and drawings and written advice. You don't have to formally register copyright, but there are three things you should do:

First, ensure all copyright materials created by you or for your business, such as by a consultant, is assigned to your business.

Stamp valuable documents with copyright, the year, and the name of the owner.

You might even consider posting documents to yourself to prove the date of creation.

And thirdly, keep the material as confidential as possible.

Another type of intellectual property is patent rights. These cover inventions which advance existing technology, for example a new drill, or medical drug. These must be registered with AIPO, like design rights over your original designs. Don't tell anybody about your invention until your application is lodged.

Finally, trade secrets, your recipe for success. It might be a great spaghetti sauce or a process. Keep the information locked up, stamp it confidential and restrict it to people who really need to know. Employees may even be asked to sign confidentiality agreements.

It's always wise to plan the protection of your business assets, and intellectual property is a key asset. Don't give it away. Also accurately record the date you started using or created intellectual property. This could be very helpful in a dispute.

Once you're established, monitor the market and be ready to act against anybody using your property.

You can get more information from your solicitor, AIPO, or look for a patent attorney in the phone book.

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Joe Gelonesi: Before we leave business law, we should touch on an important area of rights. Knowing your legal obligations to your customers, and what they can legitimately ask of you will help avoid bad relationships and costly disputes.

Here's Clare Arthurs with Bernadette Rogers, Director of Alternative Dispute Resolution with the Queensland Law Society, and consumer advocate, Kate Hammond, who begins by outlining consumer rights under the Federal Trade Practices Act.

Kate Hammond: They are entitled to ask for one of three things: an exchange, their money back, or a credit note may be offered, but the consumer doesn't have to take the credit note. And we need to be careful of that, because there's often cases where a consumer will buy something from a shop and there is nothing else that they want from that shop. The right belongs with the consumer, they have the choice.

Clare Arthurs: Bernadette Rogers, you have some dealings in your area of resolving disputes with small businesses. Do you find that an understanding of the basic rights is a common problem?

Bernadette Rogers: It certainly is Clare. A lot of people aren't prepared to acknowledge what the rights of the consumer are, and also a lot of consumers don't understand what their rights are. So small business people can actually get themselves a very good reputation in a good working relationship with their clients or their customers, if they're prepared to first of all find out what their rights are and then talk very frankly and openly with their customers.

Kate Hammond: There's also another concern with traders and dealing with their customers, and that is the signs that are used and policies that are made. A lot of traders say 'I can do this because it's my shop and this is my policy.'

Clare Arthurs: 'I want to search your handbag' is a very common one.

Kate Hammond: Yes, yes, and of course they may not touch your handbag, and of course the consumer can refuse to even show the contents of a bag. But there are some worrying signs around too. For instance, you have the sale items 'No exchange or refund' which is an illegal sign. Because regardless of sale or not, they are still covered by the Trade Practices Act. Otherwise, traders could just say everything was on sale all of the time and never give exchanges or refunds.

Clare Arthurs: You mentioned, Kate, before that one of the common problems that small business owners encounter is through not understanding the most basic contractual relationship they have with their clients. How do they learn about this relationship? Do they have to become quasi lawyers?

Kate Hammond: Yes. Unfortunately the Trade Practices Act should be understood by anyone trading with the public. There are small business organisations in every State, Fair Trading or Consumer Affairs officers who will help, they're not just there for consumers, they are there to educate traders as well. There are also some trade organisations like the Retail Traders' Association that do a lot of education in that regard. But it is basically up to the trader to educate themselves. But if you go down and buy two litres of milk from the milk bar, you are in fact making a contract with that owner, you are saying, 'I am giving you this perfectly good money' - we hope it's not counterfeit - and they are saying, 'I will give you this perfectly good milk in exchange' and the vast majority of the time, it's fine. But the Trade Practices Act applies to something as small as that. If the goods are not of merchantable quality, or they're not fit for the purpose (heaven knows what that means with milk!) or if you've handed over counterfeit money, you are also in breach of a contract. It's a verbal one, but it is a contract.

Clare Arthurs: Bernadette, at what point does a lawyer need to be involved in the dispute?

Bernadette Rogers: I think that for small business people Clare, the lawyers need to be involved when the small business person is establishing their business. So they need to be involved in the setting up process, so that information doesn't just come out of booklets and consumer bodies, it can also come out of their lawyers. But the reason that's important is when a dispute arises, the small business person has got that immediate relationship with their lawyer so that they can take very early advice on how to deal with it, and that might just be a phone call. But often that early advice is very useful. That's critical, because disputes cost money. I mean they take you away from other more creative and more profitable enterprises, and disputes are very time-consuming. But also if a dispute escalates and it becomes necessary to litigate, then you really are looking at a lot of money going down the track. If you're looking at how to deal with disputes at an early stage, the first way to deal with them has to be both a preventative and an early intervention measure, and that is communication. Communicate often, personally if possible, with your customers, your suppliers and your employees. It's a critical first step and an important strategy for any small business person to adopt.

Kate Hammond: I would agree with that, much as I don't like paperwork or the

escalation of it, certainly even having a basic complaint form is a very quick way of making sure you have a professional approach to a complaint.

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Clare Arthurs: What are the range of methods available to people to sort out their disputes.

Bernadette Rogers: Well the common and most useful way, and the way that probably resolves 95% of disputes, is just pure face-to-face negotiation with the other side. So the two parties themselves work it out. There reaches a point where, for a whole range of reasons - it may be the relationship between the parties, or that there's not sufficient data - you will need to bring in the assistance of someone else, and you can move from negotiation to assisted negotiation which is where either side might have a solicitor or a consumer advocate, or some other person working with them. You can then move through to where you bring in an independent third person to help you talk to each other and explore options and try to come up to some sort of an agreement, and that's mediation. The advantages of moving through mediation or negotiation, conciliation, where both sides keep control, is very much that that allows for an ongoing relationship. So you haven't got bitterness in that customer or you haven't got a bad name out in the workplace. You're able to deal with the dispute in a way that will satisfy both sides, and will protect your reputation and your relationship with that customer.

If you move further past that, we've got other processes. I'll call them early neutral evaluations, but they're a system where both sides can hear a probable court outcome if this matter had to go to court. So they're both getting the same advice. So that's a process that is gradually moving up the scale, and it's moving towards arbitration or litigation, where an outcome is imposed on the parties.

Clare Arthurs: Bernadette, for people who have a dispute, or want to build dispute resolution into their contracts or their methods of running a business, where can they go, what sort of names or numbers can they jot down to go for help with mediation?

Bernadette Rogers: There are a lot of community-based organisations that deal specifically with giving help to small businesses. They'll be in the phone books in each State. But they're a very good place to start. There's also a number of government-sponsored programs that are specifically designed to help small businesses establish themselves, and they will be able to offer advice in that area. And of course if you develop a relationship with your lawyer and you say to them up front, 'Well, how do I resolve disputes?' then they can give you advice about what sort of notices you can put out on your front counter. 'If you're not happy with your dealings with this shop, this is what we will offer to you.'

Kate Hammond: That's a very good point I think, that having the notices up there around the cash register area, are always well read. Unfortunately many of those notices are illegal, so people should make sure through their lawyer or the Offices of Fair Trading or Consumer Affairs to make sure that the signs are correct in law. But the mediation - what we call conciliation - is a very good step, because you get the neutral mediator to advise as to what probable outcomes there could be, and in most States that's a totally free service.

What traders need to understand is that a lot of consumers go automatically to the

Small Claims Tribunals, which costs very little - I think it's about \$10 in most States. I know that in Victoria we have consumer agencies, some other States have them as well. Otherwise there's the Office of Fair Trading or the Ministry of Consumer Affairs, depending on your State. They will give you advice, consumers also go to them, but they are obliged to help both parties. There are also the Trade Associations which in general I find very good and very responsible and balanced in their approach, who have helped traders with a very quick way out of a dispute.

Clare Arthurs: Kate Hammond in Melbourne and Bernadette Rogers in Brisbane, thank you both very much.

Kate Hammond: Thank you.

Bernadette Rogers: Thanks, Clare.

Joe Gelonesi: Now, let's review today's main points:

Man: Great, let's rewind it and hear it played back.

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Clare Arthurs: A good lease and contract are the basis of a successful enterprise. Check them thoroughly before you sign anything.

There are several ways to structure your business, including a partnership or trust. Find the legal structure that suits your needs, and consider how to protect your personal assets such as the family home. If you are in a partnership, ensure you know your partner and their financial situation.

Consider getting separate professional advice, and think about how you'll be paid for your share of the work.

Seeing a solicitor early in the life of your business could cost you several hundred dollars, but save you thousands by getting it right the first time.

Know your customers' rights. Understanding some basic consumer law and the contracts between you and your clients will help you conduct good ethical business.

Disputes with your business colleagues or your customers are often caused by poor communication. Dispute resolution procedures can be built into contracts, and if you can't sort out disputes on your own, an expert mediator could be the answer.

Joe Gelonesi: Next week, taking the headache out of growing your business.

Woman: There are laws, there are laws that cover you that you may not be aware of; there are laws covering employees that you may not think cover your particular employees. The best thing is to go to someone for advice, either an Industrial Relations Department, an employer organisation, or indeed a union. And unions can help because they want successful, viable businesses to employ employees who can become union members. But there are plenty of places in the community where you can get good advice. Start out with that advice and then

build on from there.

Joe Gelonesi: That's employment, next week on Doing Business.

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