

## **QUARTERLY NEWSLETTER**

**DECEMBER 2011**

### **Merry Christmas and Happy New Year**

Yet another year has passed and as we look back and self reflect on the year that was, MLB Lawyers & Associates (MLB) looks back at a year of growth and achievement.

MLB is a law firm that places an emphasis on providing outstanding client communication with trusted legal advice. The company has implemented many communication processes and procedures over this year to ensure that client satisfaction is achieved and maintained.

Over the past year MLB, launched their new website with improved content from the legal industry issued through newsletters and publications. Furthermore, this year MLB also implemented a range of free legal seminars for both business owners and individuals.

In April, MLB acquired their new offices in Bentleigh with a new consultation suite in Mount Waverley opened in the second half of this year to cater for the growing small to medium sized businesses in east Melbourne.

On behalf of all staff at MLB we would like to take this opportunity to thank you for your interest and custom throughout 2011 and wish you and your families all the best for 2012.

### **Directors' Liability for Company Warranties**

Any director or executive maybe held personally liable for any false or misleading warranty or assurance provided by their company.

In the case of *Metz Pty Ltd -v- Simmac Pty Ltd* (No 2) [2011] FCA 981, the Federal Court held that directors of a company were also liable for a warranty provided by their company even though they were not parties to the contract.

The company warranted to a purchaser that it had nothing to disclose that may be material to the purchaser. The representation was held to be untrue and the directors were liable for

misrepresentation under the *Competition and Consumer Act*.

An "innocent" director or executive can also be liable even if they have not been personally involved in concealing the truth or in the wrong doing. Misrepresentation liability therefore does not depend on any fault being proved against the director or executive. It is also not possible to exclude liability for misrepresentation by wording in a contract.

It is advisable that directors and executives avoid providing any warranty or assurance in the first instance and if they need to provide a warranty or assurance, they should be careful about the actual words used in the contract.

### **The Differences between Contractors and Employees**

In the case of *ACE Insurance Ltd v Trifunovski* [2011] FCA 1204, five insurance agents filed claims for annual leave and long service leave entitlements.

The Federal Court held that whether an individual is an "employee" is determined by reference to the "totality" of the relationship and outlined a number of indicia to determine this issue. These indicia include the terms of the contract, intention of the parties, degree of control or right to control, whether tax is deducted, whether subcontracting is permitted, whether uniforms are worn, whether tools are supplied, whether holidays are permitted, whether wages or commission are paid, what is disclosed in tax returns and what one party represents to the other party.

The court concluded that the agents were employees despite the fact that they drove their own vehicle, had to remit their own income tax and their contract with the company specifically stated that they were engaged as independent contractors.

An important factor for the court to determine whether or not the agents were employees was the fact that the sales agents were organised into teams under a territory representative. Secondly, the court also found that the company exerted control through developing and maintaining all training within the organisation and the incentive of advancement

through the organisation also demonstrated the company's control over the agents.

In conclusion, an agent maybe deemed an employee as opposed to a contractor if the company maintains organisational control and control over their agent. It is not enough to state in a services contract that an agent is a contractor as opposed to an employee. Business owners should seek legal advice if they are concerned about their liability to pay employee entitlements to any individual engaged as a contractor/agent in the business.

### **New Requirements for Goods and Services Warranties**

A 'warranty against defects' is a representation to a consumer in connection with the supply of goods or services or part of them and includes a warranty to:

1. Repair or replace the goods or part of them;
2. Provide again or rectify the services or part of them; or
3. Wholly or partly recompense the consumer.

From 1 January 2012 all warranties against defects in connection with the supply of goods or services to consumers must comply with regulation 90 of the *Competition and Consumer Regulations 2010* (Cth).

This means that all businesses issuing any documents that include warranties against defects must act now to ensure that they do not sell goods or supply services with non-complying warranties.

A person or a company will be considered a 'consumer' if they acquire:

1. Goods or services that cost more than \$40,000 but are ordinarily purchased for domestic, household or personal use or consumption; or
2. Goods or services that cost less than \$40,000 (regardless of their purpose); or
3. A vehicle or trailer predominately used to transport goods on public roads.

Suppliers and manufacturers providing warranties should review and update all warranty statements contained in their point of sale materials to ensure they comply with the new requirements.

Failure to comply with the requirements from 1 January 2012 may result in penalties up to \$50,000 per offence for corporations and \$10,000 per offence for individuals.

### **SEMINARS\***

#### **Venue for all Seminars**

MLB Lawyers & Associates,  
Level 1, 441 South Road,  
Bentleigh Victoria

#### **Preparing to sell your business**

ABSTRACT: This seminar provides invaluable legal and marketing advice on preparing your business for sale.

DATE: 21 March 2012

TIME: 6:30 – 7.30PM

*\*All dates and times of our seminars are subject to change depending on numbers of participants attending.*

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