LAW WAY: INDIGENOUS BUSINESS AND THE LAW

Written by Terri Janke and Company

CASE STUDIES AND SCENARIOS

The case studies are an important component to this publication. We thank the business owners for sharing their experiences. While some of the scenarios are hypothetical with fictitious names, all are based on real life events.

Page 3 Case Study: Aboriginal Steel Art, thank you Wayne McGinness, see his artwork at www.aboriginalsteelart.com.

Page 10 Case Study: Buri Building and Design Pty Ltd, thank you to Will and Sharna Morgan, see more about their projects at www.buri.com.au.

Page 10 Scenario: Richard and Lizzie's Cultural Tours, while the names are fictitious, the licence and permits mentioned are factual. Thanks to Wendy Hills, Manager, Cultural Tourism, NSW National Parks and Wildlife Service, for looking over the initial draft.

Page 11 Scenario: Bunge Finds A Solution For His Paperwork. The fictitious characters of Bunge and Sharlene are based on real people and real events.
Some of their experiences were also mentioned on page 23, Don't Pay Workers 'Cash'!

Page 20 Case Study: LBF Consulting Pty Ltd, for sharing this experience we thank Lani Blanco Francis, CEO and Rhonda Sampson, Indigenous Employment Manager, see them at www.lbfconsulting.com.au.

Page 31 Case Study: Saltwater Freshwater Arts Alliance – Protecting ICIP we thank Alison Page, CEO, the National Aboriginal Design Agency, see www.saltwaterfreshwater.com.au/national-aboriginal-design-agency/.

LIST OF IMAGES AND PHOTOGRAPHS

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Page 15 Interrentye Traditional Healing Products from Akeylerre Inc, Alice Springs NT. Photo by Gilimbaa.

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Page 21 Photo of Lani Blanco-Francis courtesy of LBF Consulting Pty Ltd.

Page 22 Photo of David Scholes, a Dunghutti man and qualified carpenter with Robert Longbottom from La Perouse, a final year apprentice carpenter, photo courtesy of Buri Building and Design Pty Ltd.

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Page 35 Photo of Terri Janke by Amanda James www.jamesphoto.com.au.

ACKNOWLEDGEMENTS FOR LAW WAY

For help and support during the production of this publication, Terri Janke and Company acknowledge assistance from the following people. Thank you to the supporters in IBA, especially Kirsti McQueen, General Manager and Samantha Black, Assistant Manager for reviewing the early drafts. Thanks also to Kirsty Gowans General Counsel IBA for guidance on what issues to include and Nathalie Harbottle, IBA Brisbane also gave some good suggestions. Bridie Henehan and Daniel Hughes did some fantastic work promoting the publication.

Thanks Jasmine Herro, CEO and founder of Outback Global for taking time to talk to Terri Janke about the types of issues a new business may want to know. Thank you to our proof readers who provided critical feedback on the early drafts, including Cheryl R Creed, Aboriginal Portrait Artist, Margaret Pitt and Murray Saylor. Thank you to Caroline Bakerman, Executive Assistant Terri Janke and Company, for editing work. Thank you to Nancia Guivarra for taking that excellent cover photo of Terri.

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INTRODUCTION

It's exciting to start your own business and to be your own boss. There are a lot of great opportunities that come along with having a business, but there are also responsibilities.

It is best to keep well-informed and know your legal responsibilities when you go into business. If you are aware of the legal risks of running a business and understand your responsibilities law way, this is likely to save you a lot of time, money and stress later on. It is better to prevent legal problems in the first place, than deal with them when they come up.

→ WHO IS THIS GUIDE FOR?

This guide is for Aboriginal and Torres Strait Islander people who have a business idea and are looking to start up in business, and those that are already in business.

Law Way aims to assist the Indigenous entrepreneur with a short introduction to navigating the legal obligations for conducting business in Australia. It's a guide only, so there will still be occasions when you need to do more research, or you need to get professional advice on your specific matter.

→ WHAT IS AN INDIGENOUS BUSINESS?

An Indigenous business can be any kind of business which has majority Indigenous ownership.

→ A NOTE ON THE AUTHORS

Terri Janke was born in Cairns with family connections to both the Torres Strait Islands (Meriam) and Cape York Peninsula (Wuthathi), she was recognised as NAIDOC Person of Year in 2011. Terri Janke became a business owner in April 2000 when she leased a small office and started her own law firm. After more than a decade, Terri has worked on close to 4000 unique legal matters, many of them involving Indigenous small business. Terri is familiar with the challenges Indigenous people face when starting up a business - as a business owner herself and through the experiences of her clients, colleagues, friends and family. Everybody has a story and a question on business law. In this booklet Terri provides the answers to the most common questions, gives tips to avoid typical mistakes and makes use of case studies to see how other Indigenous people did it.

Andrew Pitt has been a business owner since 1991 and is a director of several private companies, he acted as an editor. Daniel Herborn is a practising solicitor, provided legal research and acted as an editor.

1. WHAT LEGAL STRUCTURE IS YOUR BUSINESS?

SOLE TRADER, PARTNERSHIP AND PRIVATE COMPANY

Choosing the legal structure for your business is one of the biggest decisions you will make when you are starting a business. The three most common legal structures for individuals setting up a commercial business are: sole trader, partnership and company.

→ SOLE TRADER

A sole trader is the simplest legal entity. The business operates as a single person. There is no separation between business assets and personal assets. All that is required is registration of a business name.

A sole trader legal structure is generally a good option when it is a small one-person business, short on cash with no big plans for growth. Many businesses start as sole trader and then move into the company structure, but this can be costly and cumbersome.

PROS:

- There is only one boss.
- It is the cheap and simple option for going into business.
- The assets (money in the bank, property, cars, tools, plant, customer database, intellectual property and other) of the business are clearly owned by the sole trader.
- Cost savings (for example, if there are no other employees, there is no legal requirement to pay superannuation).
- Ideal structure for a micro part time business with modest ambitions.

CONS:

- The sole trader needs skills in all aspects of the business, or a willingness to bring in specialised employees or contractors to help (for example; sales, marketing, service, administration, bookkeeping, cleaning and other).
- If you choose to expand the business later on, it will be costly, cumbersome and time consuming to change over to a partnership or company structure.
- The liabilities (including guarantees to lenders and creditors) start and end with the assets of the sole trader, which means if a sole trader can't repay debts, the creditors (people the sole trader owes money) can take personal assets (such as home or car) to repay the debts.
- Getting jobs, acting as a sole trader may make it harder to get work or loans, for example some businesses and government agencies will not work with sole traders.
- Tax time confusion: some sole traders struggle to distinguish between genuine business expenses (which are treated as tax deductable expenses) and personal expenses (which are treated as drawing wages).
- Tax bracket: a sole trader with a larger income slips into a higher tax bracket, meaning a sole trader may be paying more tax when compared to the flat tax rate of a company.

■ CASE STUDY: ABORIGINAL STEEL ART

Wayne McGinness operates his business 'Aboriginal Steel Art' as a sole trader, and has done so for the four years of its operation. Wayne did IBA's 'Into Business' workshop in 2009. Although he had been doing his steel art for two years part time, the workshop helped him make the decision to go full time and concentrate on the business. To set up as a sole trader, he only needed to register his business name. Wayne says: 'The sole trader structure was simple for the start-up phase. Now with corporate clients obtained through the Supply Nation networks, the business has grown. It will move to the company structure at the end of the financial year. The company structure offers more flexibility for our future business plans.'

→ PARTNERSHIP

A partnership is a type of arrangement between two or more people and can involve up to 20 people. The partners jointly manage the business. A partnership is in many ways similar to a sole trader, because the partnership entity is not separate from the partners.

You can enter into a partnership in writing, verbally or it can be implied by your actions. The best way is in writing with a partnership agreement because then everyone is clear on their roles and responsibilities.

The big risk with partnerships is that if your relationship with another partner goes bad, it can be expensive and stressful to exit the partnership. You need to think very carefully about who you want to go into a partnership with. Depending on the partnership deed, one partner leaving may basically end the business.

PROS:

- Partnerships can be set up to suit the partners.
- Specialisation of skills (for example, one partner may be better at sales and marketing, while the other is skilled at administration and book keeping).
- Minimal reporting requirements.
- Partners are not employees, so like a sole trader, it is not a legal requirement to pay partners superannuation contributions.
- Partners can take advantage of tax planning opportunities such as income splitting between partners (popular with partners who are also married).
- A partner's share of the business tax losses may be offset against other personal income, subject to certain conditions.

CONS:

- Two bosses may not always agree on business decisions. There is potential for disputes over profit sharing, administrative control and business direction.
- Potential for disputes if there is a duplication of partner skills.
- Like a sole trader, partners have their personal assets at risk. However, in a partnership, each partner is jointly and severally liable for all the debts of the partnership. This means that each partner can be liable to pay back 100% debts of the partnership personally, not just their share of the debt.
- Transfer of partnership is subject to the other partners agreeing. Changes of ownership can be difficult and generally require the closure of the existing partnership and establishment of a new partnership.
- Cost (time and money) of preparing a written partnership agreement or deed: it is usually cheaper and more efficient to purchase a shelf company.

■ SCENARIO: KITCHEN WIZARDS PARTNERSHIP

Jamie and Wicko are old friends who are considering establishing a business together making kitchen cabinets. Ideally they wanted to incorporate as a company, but the costs of registering the company was not a priority. They thought that they could move over to a company structure at a later date.

They started trading as a partnership using the business name 'Kitchen Wizards'. Before registering the business name in their joint names, they visited their lawyer who advised them of their obligations and drafted a partnership deed. The partnership deed covered each partner's contributions, drawing arrangements, profit shares, expense arrangements and what to do if a partner exits the business.

They then got independent legal advice of their own. Jamie's lawyer suggested some changes, which Wicko's lawyer agreed to. The partnership deed was amended and they signed.

→ COMPANY

The most important thing to know about a company is that it is a separate legal entity from the person or people who run it and own it. This means that the profits or losses are made by the company and not by the individual.

There are three components to a company:

1. Shareholders: they own the company and choose the directors
2. Directors: they govern the company, answer to the shareholders and select the key people who will work in the company
3. Executive: they are employed by the company

You can have a company even if you are the only person involved in the business, you can be the sole shareholder, sole director and also the sole employee.

Companies have to abide by the Corporations Act. The government body responsible for making sure businesses follow this act is the Australian Securities and Investment Commission (ASIC). There are director's duties which a director must comply with. These include:

- The duty to be honest and careful in your dealings at all times.
- The duty to exercise your powers with care and diligence that a reasonable person would have, which includes steps to ensure you are properly informed about the financial position of the company and ensuring that the company can meet its debts as and when they fall due.
- The duty to exercise your powers and duties in good faith in the best interests of the company and for proper purpose.
- The duty not to improperly use your position to gain an advantage for yourself or someone else, or to cause detriment to the company.

It is important to understand the difference between the interests of the company and the interests of the director. For example, a director of a company must consider that the company can pay its bills before taking director's drawings or a director's loan. The law also makes directors personally responsible for keeping proper company records. See the ASIC website for more information. http://www.asic.gov.au/asic/asic.nsf/byheadline/Your+company+and+the+law

If you do not comply with your director's duties, penalties will apply depending on the duty breached. For instance, you will incur late fees for late filing of company records. If your company trades insolvent, you will be personally liable to repay debts. If you are dishonest, ASIC can may take you to court. In some instances, people have gone to prison for breach of this duty.

■ SCENARIO: DOOGIE DAZE PTY LTD

Cameron and Melissa are both directors of a company, Doogie Daze Pty Ltd. They both have equal shareholding in the Company. A dispute erupts between them. Cameron leaves in the middle of a large consultancy project and withdraws $10,000 from Doogie Daze Pty Ltd's bank account, which is being held to pay some bills. Cameron says that he has had enough and is going to set up his own consulting company. Melissa can do the rest of the project by herself. Cameron washes his hands of it. Cameron has put his own interests before the Company and is in breach of his director's duties.

→ HOW TO SET UP A COMPANY

Get advice from your accountant first and resolve who will be the shareholders, directors and executives. You can buy an existing 'shelf company' (under $1000), this is a basic company which is 'ready to go', registered with ASIC, has an Australian Company Number (ACN), but has never traded. You will be able to change the name of the company and modify the constitution. The company directors will need to lodge a simple Annual Return with ASIC to confirm details or shareholders, directors and address details and pay a small fee (about $230) each year.

PROS:

- Separate legal entity.
- Quick to set up, with a standard constitution.
- Transparency (for a small fee ASIC makes available details of company shareholders and directors, this is called a company extract).
- Any losses or profits the company makes stay in the company. This means that it is the company, and not the person who owns the company, who retains the loss/profit.
- Limited liability. Unpaid creditors (people the company owes money) can only make a claim on the assets owned by the company, rather than the personal property of the shareholders and directors (though most creditors, particularly banks, insist on directors providing personal guarantees).
- Flat tax rate, 30% of net profit.
- Exit strategies: changing shareholders is a simple transfer transaction (when compared to a messy partnership break up).

CONS:

- Initial setup cost (under $1000) plus annual ASIC fee (over $230).
- Running a company is more complex than operating as a sole trader.
- Directors' responsibilities, an expectation for more stringent record-keeping and reporting.
- All workers are considered employees, therefore the company must maintain work cover insurance and pay superannuation for every employee.
- There are serious penalties if you don't run your company legally. For example, if you continue to trade when the company is insolvent (unable to pay its debts), you may be held responsible for repaying this money.

→ PRIVATE COMPANY OR PUBLIC COMPANY

Companies may be either private (or proprietary) companies (these have the 'Pty Ltd' after their name) or public companies. Public companies are generally for bigger businesses which issue shares to the general public. A public company needs to have at least three directors, while a private company can have only one.

→ INDIGENOUS CORPORATIONS

For community owned businesses, there is the option of becoming an Indigenous Corporation. The members of the group must register with the Office of the Registrar of Indigenous Corporations (ORIC). Unlike other legal entities, there is no registration fee. Indigenous corporations can incorporate traditional law into their rule books. An Indigenous corporation can be structured so that the profits are put back into the corporation or distributed to members. However 95% of Indigenous Corporations are structured as not-for-profit Indigenous corporations. See the Office of the Register of Indigenous Corporation www.oric.gov.au.

→ TRUSTS

A trust is basically a legal arrangement where one person holds money or property on behalf of another person or group of people. Legally, it is considered a relationship instead of a legal entity like a company. A trust will be started by someone who is called the settlor. The person in charge of the property is called the trustee. The person who the property is being held for is called the beneficiary. There can be multiple trustees and beneficiaries. The document which sets out how the trust will operate is called the trust deed. The trust deed will say how the trustee can distribute money from the trust (this may be money that was initially in the trust or it can be income or interest).

PROS:

- Trusts can be a good way to flexibly distribute income and minimise tax. For example, many families have trusts and the trustee can make decisions on how much each family member (beneficiaries) should get each year.
- Like companies, trusts can be useful as they protect the assets of a trust from creditors.
- Trusts are popular with cashed up business entities or families, that hold and keep large investments like real estate.

CONS:

- Trusts can be very complex and confusing.
- A trust can only distribute profits, a trust can't distribute losses, like a partnership can.
- Getting a loan can be much more challenging with a trust.
- Tax: the trust itself doesn't pay tax, but the trustee or any beneficiaries who get money from the trust will have to pay tax on the relevant amounts they get from the trust.
- Trusts that own real estate (personal or investment) may pay a higher level of tax, for example land tax in NSW and Victoria.

→ CONSTITUTIONS AND RULE BOOKS, WHAT ARE THEY AND DO I NEED ONE?

For many businesses, you will need to have some kind of document that sets out how your business will run. The legal documentation you need will depend on what kind of business structure you have.

IF YOU ARE A:	YOU WILL NEED:
SOLE TRADER	No formal requirements
TRUST	Trust deed
PARTNERSHIP	Partnership Deed
COMPANY	Constitution or replaceable rules. What exactly you need will depend on what kind of company. See more information below.

→ CONSTITUTIONS

For companies, you will either have to draw up a constitution, or be governed by the 'replaceable rules' which are found in the Corporations Act. A constitution is a document that sets out how the company will operate. It is the founding document of the company.

If you want to have your own constitution, you need to put one in place formally. This is called adopting a constitution. You can either do this when the company is registered or if you want to do it later, you will need to pass a special resolution to adopt the constitution. While you can tailor the constitution to reflect the goals and needs of your own company, this does not mean you can put anything you like in your constitution – it still has to abide by the rules in the Corporations Act.

→ TIPS ON THE BUSINESS'S LEGAL STRUCTURE

It is important to consider the advantages and disadvantages of each legal structure in the context of your own personal circumstances and goals. Make sure you get professional advice from a lawyer or accountant. Choosing the right business structure will depend on a lot of different things like:

- How much money can you get to set up the business.
- How many people will be involved in the ownership.
- How big will the business income grow.
- How many people will work in the business.
- Is it a part time thing, with no plans for massive growth.
- Exit strategies.

2. GETTING STARTED AS A BUSINESS

NAMES, ABN, TAX, GST, LICENCES, ADMINISTRATION AND FILING

→ CHOOSING AND REGISTERING A BUSINESS NAME?

Selecting your business name is an important step in setting up a business. It's also an exciting step because you get to start to decide on the identity of your business. A good first step is to do a search for the name you would like to use to see if anybody else is using it. Also make sure you check the website name, to see if is already taken or not. It makes it much harder to promote your business if you can be confused with someone else's business. If you have a company and trade under a different name, you will need to register the business name as well.

Your online searches should cover:

- The ASIC register www.asic.gov.au to see if the business name is taken
- ATMOSS at IP Australia www.ipaustralia.gov.au to see if the name has been registered as a trade mark
- ABN Lookup http://abr.business.gov.au to see if the name is connected to an Australian business number
- A domain name search to see if the website domain is available: www.auregistry.com.au will show you who owns Australian sites
- Online phone books (yellow pages) and local directories (truelocal, hotfrog)
- Google search: make sure there is not an international competitor with the same name
- Social networking: is someone using the name as a handle on twitter, or has someone made a Facebook page with the name?

→ REGISTERING YOUR BUSINESS NAME

The business name will be the name your business trades under, so it will be the name people know your business by. Your company name and business name can be different. It is illegal to carry on a business under a name you haven't registered. You need to register your business name with the Australian Securities and Investments Commission www.asic.gov.au Registration of business names is now nationwide – once registered, your business can trade in any Australian state or territory. It is easy to register your business name online. It should take about 20 minutes and the cost is about $70 for 3 years.

TIP: *When you register a new business name or a new website, make sure the applicant is consistent with the intended owner (for example, if your company is to own the business name, don't register the website in your personal name).*

→ BUSINESS NAME, DOMAIN NAME – ARE THEY THE SAME?

While registering a business name is an important step, it's important to remember what the business name is not:

- A business name is not the same as a company. It's only a name, not a legal entity.
- Registering a business name does not mean you have any right to use or to reserve the website domain name of the business.
- Registering a business name will not stop somebody else registering a similar sounding business name, or a name with almost the same spelling.

Once your business name is registered, you will receive a certificate of registration. You will need to display this in a prominent place at the principal place of business. If one of the partners in the business changes their address, or a company change of address, you need to update these details within 14 days.

→ AUSTRALIAN BUSINESS NUMBER (ABN) – WHAT IS IT?

An ABN is a unique number that identifies your business and is used when dealing with other businesses or government departments. You can get an ABN online, at no cost, from the Australian Taxation Office (ATO) www.ato.gov.au. Your ABN should be on your letterhead, must be on your invoices and should be included on your contracts and agreements.

→ GOODS AND SERVICES TAX (GST)

Goods and services tax (GST) is a tax of 10% on most goods, services and other items sold or consumed in Australia. Some items are exempt from GST including; fresh food and education. Businesses registered for GST will include GST in their selling price. A business registered for GST will also claim tax credits for the GST included in their purchases.

→ DO I NEED TO GET AN ABN AND REGISTER FOR GST?

You will need an ABN if you are carrying on a business. If you are an employee, or you are just making a very small amount of money as a hobby you don't need to get an ABN. Any business which has an annual total income greater than $75,000 has to register for an ABN and also has to register for GST. If your turnover is less than $75,000 you can be in the situation where you have an ABN, but you are not registered for GST (you can't charge GST on your invoices, nor can you claim GST on your purchases). For instance, many sole traders have an ABN, but are not registered for GST.

If you do not have an ABN, businesses who are paying you can withhold 46.5% of the payment (for tax). However, for hobbyists (or micro businesses), there is a form you can obtain from the ATO website which you can provide to customers/clients with a statement as to why you do not hold an ABN, Statement by a supplier (reason for not quoting an ABN to an enterprise) or see http://www.ato.gov.au/content/downloads/BUS38509n3346_5_2012.pdf

→ BUSINESS ACTIVITY STATEMENT (BAS)

The ATO wants money paid to them monthly or quarterly. For most small business this means filling in a form called a Business Activity Statement (BAS) each 3 months and sending some money to the ATO. The ATO will send a personalised BAS to complete near the end of a reporting period, and your accountant will double check all figures at the end of the year. As a business owner, you may pay several taxes with your BAS, including; GST, PAYG (Pay as You Go) employee tax and PAYG company profit tax. It is very important you complete the BAS, even if your business hasn't done anything in the reporting period. If you can't make the payments you need to make, complete the forms anyway and get in touch with the ATO to work out a payment plan – the worst thing to do is just ignore it as there are penalties.

→ FRINGE BENEFITS TAX

Fringe benefits tax applies to benefits (other than money) which an employer gives to their employees as a reward. They can include; cars, interest-free loans, cheap accommodation, holidays and other benefits provided to the employee by an employer. This is a complex area, and you should seek advice from your accountant.

→ FIND OUT WHAT LICENCES YOU NEED TO RUN YOUR BUSINESS

Just as you need a licence to drive a car, in many industries, you will need a licence to sell your goods or services. Having the right licences in place will allow you to operate without the threat of being fined or even shut down because you don't have the right paperwork in place. For example, builders require building licences and lawyers require practising certificates. Bush remedies are 'complementary medicines' if they contain herbs, vitamins and minerals and are regulated under the Therapeutic Goods Act 1989.

The Australian Business Licence and Information Service website https://ablis.business.gov.au has a useful online tool where you can type in the details of your business to find out the licences you will need to operate.

■ CASE STUDY: BURI BUILDING AND DESIGN PTY LTD

Buri Building and Design Pty Ltd is an Aboriginal owned, developed and managed building company and the vision of founder Will Morgan, one of only a few qualified Aboriginal builders in NSW. Will has over 20 years' experience, in the building industry both in Australia and abroad, with Buri trading since January 2010. Will has held a building licence for 7 years. Will says, 'Getting a licence is required under the Building Code. I studied for three years to become a carpenter then I had to study a further 2 years to gain a Certificate in Building Studies. Only after I had the accreditation certificate was I able to apply to the NSW Department of Fair Trading for a builder's licence". As well as all the education, it was compulsory to have two years' experience in a supervisory role with another builder.

To hold a Company Licence, someone directly linked to the Company is required to hold a current builder's licence. The Company licence can be renewed annually or every three years. In this period it is up to the licence holder to maintain ongoing knowledge through Continuing Professional Development (CPD). CPD points are accumulated by completing building and business development courses.

■ SCENARIO: RICHARD AND LIZZIE'S CULTURAL TOURS

Richard and Lizzie are planning to offer 4 wheel drive tours in a National Park, which is their traditional country. The tours include a sunset dinner cooked with local ingredients. They went to the Australian Business Licence and Information Service website and entered the type of business they wanted to do, and the location. The website pointed them to 20 different licences and permits they may need to have in place before they start offering tours.

This search showed they would need licences for standard activities they would do as part of their business, like operating a tourist vehicle, serving food, playing hold music and operating in a national park. They also respected cultural protocols by contacting the local Indigenous community and the National Park to get permission to interpret their cultural heritage and take photographs to promote their tours on their website. Getting all these licences took a while, but in the end Richard and Lizzie had peace of mind knowing they were on top of all their legal and cultural obligations in running their tour business.

→ YOUR LEGAL RESPONSIBILITIES WHEN SETTING UP A BUSINESS: THE BASICS

Running a business, whether you are a sole trader, partner or company director, is a serious responsibility. There are several legal obligations that come along with these roles. You will be required to:

- Pay all taxes, insurances and superannuation as they become due.
- Lodge an Annual Return if you have a company.
- Maintain the company register.
- Ensure your business name (and company name if you have one) is registered.

Whether you are a director, partner or a sole trader, it is vital that your business keeps proper financial records and is able to pay its debts when they become due. If you are a director of a company, you must know what your company is doing. It is no excuse to say your company did something, but you didn't know what was going on. Directors also have a general obligation to be honest in their dealings.

As a director, you must act in the company's interest and not your own – for example if there are two directors of a company, one person cannot take-on one of the company's clients as a personal client outside of the company. When you are a director, you may get information because of your position. You have a legal duty to use this information properly and in the best interests of the company. It is against the law to use this information for your own gain, or to pass it onto someone else for them to gain from it.

Above all, you must be involved in the company and know what everyone in the company is up to. You need to take part in the directors meetings and keep up to date with what the other staff members are doing and how the business is going. Legally, you can't be a 'hands off' director. Directors who don't meet their legal obligations can be fined and even jailed.

TIP: *Don't ever sign on as a token director to a company, for example, as the silent director of a friends company. Take the role seriously, or don't touch it.*

→ RECORD KEEPING – ONGOING

One of the keys to running a successful business is keeping good records. There is a huge administrative burden to comply with all this record keeping. Do it yourself, get an employee to do it, or hire a contractor to do it. But get it done, do it accurately and do it regularly (daily or weekly). Use a filing cabinet, use folders, archive the old files, or better still try and get a complete digital set of files, with regular backups.

A business owner will need to keep files on: incorporation details, financials, insurance, suppliers, employees, clients and jobs. Government bodies like ATO or ASIC have a right to look at your financial records at any time. It also helps you know how your business is going, so keeping good records will help you as well.

Some of the records a business owner will need include:

- Financials, with all the transactions (incomes and expenses).
- Bank statements and petty cash records.
- Tax documents (tax returns, BAS statements).
- Records of the wages you pay employees and superannuation you pay.
- All contracts and deeds your business has entered into.
- Records of any investments you have made.
- A register or a list of all your property and equipment.
- A register of all your intellectual property

You need to keep records for 7 years. You can keep your records in electronic form if this is easier.

■ SCENARIO: BUNGE FINDS A SOLUTION FOR HIS PAPERWORK

Bunge is a handyman, good on the tools, popular with the clients. Bunge runs his own business (setup as a sole trader) called Bunge The Home Handy Fella. The problem was Bunge hated paperwork and had no patience for business administration. Bunge used to keep a box in the kitchen where he would dump all his invoices, quotes and contracts. Now and then he would take the box into his home office and sort it out. It came to crunch one week when Bunge missed out on a good paying job because his quote was delivered way too late, even though he had the best price and played touch footy with the client.

Bunge pulled in a local contractor to help with the admin, filing and book keeping. Sharlene was a friend of a friend and ran her own business called Sweet-As Book Keeping. Sharlene would pop in half a day per week (or more often if needed), work at Bunge's home office computer, sort out the filing, book keeping and help write the quotes. Bunge felt a huge burden off his back. He was happy working with a hammer, rather than a keyboard. At the end of the financial year, even after paying Sharlene, Bunge did his best year ever.

3. MAKING YOUR BUSINESS A SUCCESS

CONTRACTS, GETTING PAID, PPSR, NETWORKS, PROFESSIONAL ADVISERS

→ CONTRACTS – GET IT IN WRITING

A contract is a legally binding promise. As a business owner you will enter often into contracts with other businesses, such as your suppliers. Even a simple sale to a customer is a contract, a lease is a contract, so is a loan. Contracts are legally binding on both parties. If a party doesn't do what they say they will do in the contract, like supplying you with goods or paying you money, you can go after them for damages. 'Damages' means money to compensate the party that has suffered loss or damage because of a broken promise.

It is very important you only enter into contracts that you are sure you want to follow through with. If you break a contract, the other party can sue you for damages. Contracts don't always have to be written down, but it is much better when they are. You can enter into a contract verbally. If the other party relies on a promise you have made, they may be able to sue you.

The basic rule with contracts is if you are going to enter into a major contract, get a lawyer to draw up the contract or to review the contract if the other side gives you one. This is the best way to make sure you get a fair deal.

Getting paid on time

Many business contracts, including those with government departments, include a clause that says if payments are made late, the party paying late has to pay interest, so be sure to check for this kind of clause. For example, the NSW Government has a 30 day Payment Policy for Small Business, see http://www.smallbiz.nsw.gov.au/initiatives/pages/30daypaymentpolicy.aspx

→ WHAT IF THEY DON'T PAY?

Your business should be providing tax invoices for all transactions. If a client or customer is slow paying you money they owe you, provide them another copy of the invoice with a gentle reminder. Send a written statement at the end of every month; make a phone call to understand what the issue is. Are you sending invoices and statements to the right person? Have you completed the work to the client's satisfaction? Does the client agree they owe you money? Is the issue they won't pay, or they can't pay?

If the other party has still not paid, despite all your efforts, consider asking your lawyer to send a letter of demand saying they need to pay you the amount by a certain date. The letter should then say that you will take legal action if they do not pay by this date. A letter of demand will give the other party a final chance to pay. It is also important if you do have to go to court to get your money back, as it shows you have done the right thing by trying to recover the money yourself before getting the court involved.

→ PROTECT YOURSELF WITH THE PERSONAL PROPERTY SECURITIES REGISTER (PPSR)

Every business needs to know about the PPSR. This is an online register which lets you record when you have a security interest in an item, such as a product, car, boat, heavy equipment and even intellectual property assets like written reports, everything except real estate (land).

A security interest is any arrangement where you offer goods on credit, or give customers a loan/purchase agreement, or any type of deal where you give someone else something but you still own it until they've fully paid it off. You can record your interest in any property, other than real estate, on the PPSR.

The PPSR is also useful for businesses wanting to buy an item. Buyers can make use of the register by checking the PPSR to make sure the person selling the items fully own what they are selling and nobody else still has an interest in it. If you don't check the PPSR and someone has an interest in what you have bought, you might find they have a right to take it back even though you paid for it fair and square.

The PPSR is very important when dealing with goods sold on consignment. If you hand over your goods to someone who has responsibility for selling them, it is vital that you register your interest in these goods on the PPSR. If you don't and the seller goes broke, the seller's creditors can take your goods even though the seller never actually owned them. It is useful for both sellers and buyers. It is useful for sellers because they then have a record that the item is still theirs until the buyer has paid all of the sale price and interest.

■ SCENARIO: JONAH'S FLORISTS NEEDS A VAN

Jonah was looking to buy a van which he could use to make deliveries for his florist business. He saw a second-hand van in a classified advertisement and after inspecting the van, Jonah was very interested. Jonah didn't buy the van on the spot; he went and did an online search on the PPSR website www.ppsr.gov.au to see if anyone had registered an interest in the van. This only cost a few dollars.

It turned out a bank still had an interest in the van and could have repossessed it! The owner of the van still owed some money on a van loan and hadn't told Jonah about it. If Jonah had bought it, he may have lost his van even though he thought he was buying the van fair and square.

→ INSURANCE

Insurance is a how a business can manage risk. Many small businesses don't recover if something goes wrong and they don't have insurance. You will want insurance policies for; work cover, vehicles, public liability, office contents, plant and equipment. Depending on what type of business you have, you may also want professional indemnity and other types of insurance specific to you. This will mean you hold several different insurance policies. Most will require you to complete an application form (an insurance broker can assist). Request a Certificate of Currency for each policy.

→ WHO TO TURN TO FOR HELP?

Running a small business can be lonely. Especially when you need specialised help, advice or just somebody with business experience to talk things through. While family and friends can help with personal issues, they may not have the experience to help with a business issue. Perhaps one of your employees can assist, though not if the issue is confidential, nor if it concerns another employee. Your best options for help will be; colleagues from your professional networks, paid advisors, or Indigenous Business Australia.

Indigenous business networks

Supply Nation (previously known as AIMSC) has a vision for a prosperous, vibrant and sustainable Indigenous enterprise sector. Supply Nation helps Indigenous owned businesses get work with big private sector corporations and Government agencies. Attending Supply Nation events, like the annual Connect tradeshow is a fantastic way to network and meet up with other Indigenous business owners who share similar backgrounds, aspirations and challenges.
For more information, including how to become a Supply Nation certified Supplier see http://supplynation.org.au/

Regional Indigenous business networks include:

- The NSW Indigenous Chamber of Commerce www.nswicc.com.au
- South East Queensland Indigenous Chamber of Commerce www.seqicc.com.au/
- Digedi www.digedi.com.au/ for indigenous business in the mining and construction sectors, in Qld, SA & NT
- Northern Territory Indigenous Business Network www.ntibn.com.au
- Kinaway, for Victoria's Aboriginal business community, see www.facebook.com/kinaway
- The Aboriginal Business Directory WA, see www.abdwa.com.au
- The Pilbara Aboriginal Contractors Association, see www.pacainc.com.au/

→ INDIGENOUS BUSINESS AUSTRALIA, DEEWR AND BUSINESS NSW

Indigenous Business Australia (IBA) is the key government organisation for supporting Indigenous business owners. IBA has a commercial focus and encourages self-management, self-sufficiency and economic independence for Aboriginal and Torres Strait Islander peoples. A phone call to 1800 107 107 will put you into contact with one of the18 regional offices Australia-wide, or see www.iba.gov.au for links, newsletters, publications and resources. IBA can help you with;

- Home loans and business loans
- Business support (for example, professional assistance with a business plan)
- IBA's Into Business workshops (great for start-ups wanting to test their idea's)
- IBA's Indigenous Entrepreneur Microenterprise Program

Other government assisting Indigenous business owners include The Department of Education, Employment and Workplace Relations. Find regional offices and specific programs at www.deewr.gov.au. Another popular source of information for business start-ups are the short video series on http://toolkit.smallbiz.nsw.gov.au/

→ PAYING FOR HELP AND ADVICE

As a business owner there will be times you need to pay money to get specialised advice, particularly when it's required urgently and to a high standard. We recommend you gather a reliable and regular team you are comfortable with. Your team may include your insurance broker, finance broker, book keeper, accountant, solicitor, professional mentor and others. Pay them, either on a per hour basis, lump sum, or on a commission.

→ HOW TO ENGAGE A SOLICITOR

Australian laws are complex and extensive. Most solicitors specialise in a particular area of law, for example property, employment, family law etc. Solicitors usually charge by the hour and can be expensive. Big law firms specialise in many areas, though charge much higher for this convenience. Unless you have an existing relationship with a solicitor, it's unlikely a solicitor will accept a random phone call and provide you with 20 minutes of free advice.

Before you approach a solicitor you should resolve several issues:

- What is the core problem (or prioritise them if there are several)?
- What sort of outcome are you seeking (money, apology, access, repairs, action)?
- What is your budget to reach that outcome?
- What is the timeframe: urgent, by end of month or no hurry?

After you have contacted a solicitor, and provided a brief overview, the solicitor should provide you a costs agreement or a retainer, which sets out the fees they will charge. If the solicitor does not have the specialised expertise to help, ask for a referral. When you are finally working with a solicitor on your matter, consider:

- Emailing your solicitor, with concise information, as it may be cheaper than calling.
- Keep the matter within your initial brief, don't add extra work and expect not to pay for it.
- Read and/or listen to the legal advice, even if it's not what you want to hear.
- Don't presume your matter is a small thing.
- Most solicitors request payment in advance.

4. SELLING GOODS OR SERVICES

CONSUMER PROTECTION, MISLEADING CLAIMS, INVOICES AND REFUNDS

→ CONSUMER LAW BASICS YOU WILL NEED TO KNOW

If you're selling goods or services, an important set of laws you need to know about is within the Australian Competition and Consumer Act (which replaces the Trade Practices Act). The government body that looks after consumer protection law is the Australian Competition and Consumer Commission (ACCC), sometimes referred to as the 'consumer watchdog'. Essentially the ACCC try to protect customers from businesses that mislead and scam. The ACCC runs a small business helpline 1300 302 021 and online education programs to help small businesses. See www.accc.gov.au/business

The key issues for small business owners include:

- Advertising & promoting your business: keep it real, don't exaggerate.
- Anti-competitive behaviour: treat your competitors fairly.
- Business rights & protections.
- Franchising code of conduct: to resolve disputes between franchisee and franchisor.
- Industry codes: some industries have mandatory and voluntary codes of conduct.
- Pricing: keep it real, don't try and confuse customers (as they won't come back).
- Professional services: some industries have developed their own codes, lawyers for example.
- Treating customers fairly: repairs, refunds, warranties, safety issues.

→ SOME OF THE MAIN POINTS ON CONSUMER PROTECTION LAW

Making misleading claims about goods or services you are selling: Make sure you avoid this. An example of a business prosecuted for making misleading claims was a shop selling souvenirs that they claimed were made by Indigenous Australians. Actually they were made overseas. They got taken to court and had to pay a lot of money for doing this.

Even unintentional but false claims about products will break the law – if you're not sure about a claim you are making, don't make it! It is OK to make boastful statements about what you are selling. What is illegal is making factual statements that are inaccurate. For example, if you have a shop selling jam made from native fruits you can promote your jams as the best in the land, because this is your opinion. But if you promote your jam as made from organic fruit when it isn't, you will have broken the law.

Itemised tax invoices: Customers have a legal right to a tax invoice for services you provide which break down work into particular tasks.

Refunds: It's illegal to say you won't give refunds, or offer only exchange instead of a refund. If a product you sell doesn't work, you will need to give a refund. However, if the customer has just decided they don't want it any more, you are within your rights to not give them a refund.

Unfair contracts: It is not the case you can just impose unfair terms on a customer because they have signed up to it in a contract. Consumer protection law bans contracts which are "unconscionable", which means they are very unfair and couldn't have been made in good conscience.

5. BUSINESS LOANS

INTEREST RATES, LOAN AGREEMENTS, SECURITY, GUARANTEES, IBA LOANS

→ GETTING A LOAN

To grow quickly, sometimes a business needs to borrow money. Many Indigenous small businesses will take out loans from banks or other credit lending institutions in order to get established. Taking a loan is a big commitment so it is important to understand all the benefits and risks before agreeing to it. Good planning can prevent you entering into any agreement you don't really want and can't get out of. Not all 'loan products' are the same. For a business the issues to consider when looking for a loan should include; how many years does the loan go for, is the interest rate fixed or variable, what sort of security is acceptable, who will provide guarantees, does the loan allow redraw facilities, what are the fees and so on. Redraw facilities are important for a business, which is making larger payments if the business is going well and withdrawing money when cash is tight.

→ LOANS – FIXED INTEREST RATE AND VARIABLE INTEREST RATE

It is vital you understand exactly how much you will have to repay in a loan, frequency of loan repayments (for example, weekly or monthly), how interest is calculated and if the interest rate can change (variable rate) or if the interest rate is fixed.

Variable rate: This type of rate will change, depending on the 'cash rate', which is set by the Reserve Bank of Australia. If the cash rate goes down, you will pay less interest. If the cash rate goes up, you will pay more. If you do an early pay out of a variable rate loan (for example if you refinance elsewhere) there should be no penalty fees, though there will still be lender administration fees.

Fixed rate: Unlike the variable rate, the rate of interest stays the same, or is 'fixed' for a certain period (usually 1-5 years). You may end up paying more than with a variable rate, but at least you know what the rate will be which allows you to plan ahead. Fixed rate loans often include penalties for early pay outs of the loan (for example, refinancing).

→ THE LOAN PROCESS

Getting a business loan is more complex than getting a housing loan. When a business goes to a bank and applies for a loan, the bank will ask for detailed information about the financial situation of the business, the applicant and others. Items the bank may ask to see include copies of financial statements, copies of bank statements, copies of business and personal income tax returns, proof of ownership of assets, copies of leases, copies of credit cards and other copies of loan statements. Without the documentation, a business is unlikely to get a loan.

TIP: *Engage a loan/mortgage broker and figure out what loan product is best for your business, then have your broker get loan quotes from different lenders (rather than you only approaching one bank), then meet with your accountant and get a professional opinion on the loan quotes.*

→ LOAN AGREEMENTS

A loan agreement is a contract between the lender and the borrower of money. It sets out the terms and conditions of the loan and the rights and responsibilities of each party. As the purpose of the loan is business use, the bank may also ask to exclude the National Consumer Credit Protection Act and bits of the Personal Property Securities Act.
Each business loan will be different, so it is important for a business owner to understand the terms of the loan to avoid any misunderstanding and to minimise the possibility of a costly and time consuming legal dispute. Most banks have their own standard loan agreement; they can be quite lengthy and complicated documents. Many banks will also request the lender to go and see a solicitor for formal advice on the loan document.

→ WHAT IF I BORROW MONEY FROM A RELATIVE OR FRIEND?

We recommend a written loan agreement to cover these situations. Without a written agreement, disputes may start if there are different ideas about how and when the loan will be repaid. Two identical copies of the agreement should be dated, include the key information and be signed by both the lender and borrower. What happens if the loan is not repaid? Resolve this before the loan starts and include it in the agreement.

→ SECURITY FOR A LOAN

A business loan may be unsecured or secured. A secured loan is where the lender has taken a mortgage over any property given as security (banks prefer real estate though they may accept cars, stock and intellectual property).
If a borrower stops repaying the loan (defaults), be aware that the lender can, and most certainly will, take the security without hesitation.

The owner of the security and the borrower do not have to be the same. For example, many business owners use their personal homes, or their parent's homes as security for their company business borrowings. Take extreme caution in this situation if you are the person putting up the security.

It is rare for a business to get an unsecured loan, the exception being a company credit card.

→ WHAT IS A GUARANTEE?

With a loan, the bank will usually ask for guarantees, essentially an agreement to manage the loan responsibly and repay the loan in full. If you sign a loan guarantee, you are known as a guarantor. The banks will usually ask that every person linked to the loan be a guarantor (for example, all the directors of a company would be guarantors, perhaps shareholder too).

However, sometimes the banks will ask for more guarantors (for example, a young first time borrower may also need their parents to act as guarantors). A guarantor that is not enjoying the benefits of the loan is called a 3rd party guarantor. If you are a 3rd party guarantor for a family member, friend, husband, or business colleague, you are legally responsible for paying back the entire loan if the loan repayments are not made by the loan applicant, as well as bank fees, charges, or penalty interests. Take extreme caution in this situation and think very carefully before becoming a 3rd party guarantor, you can't change your mind afterwards.

→ WAIT FOR LOAN TO BE SETTLED BEFORE SPENDING ALL THE MONEY

It is important to understand that when dealing with banks and IBA for lending services, a letter of offer is not guaranteed funds and that clearances must be done before releasing the money. For instance, business should not commit to spend the loan funds on leases, property or purchase of equipment, until the loan is settled. Any negotiations should be 'subject to finance'.

→ HOW IS YOUR CREDIT HISTORY?

Credit providers, like banks and building societies, provide reports about people's outstanding debts and credit applications to central databases managed by credit reporting agencies (for example, Veda and Dun & Bradstreet). This information may be used by other credit providers in assessing your capacity to afford a new loan, lease, credit card, or mobile phone plan. The Office of the Australian Information Commissioner can guide you on getting a copy of your own credit history and methods to update the information, see www.oaic.gov.au/privacy/privacy-topics/credit-and-finance/how-do-i-get-a-copy-of-my-credit-report

■ SCENARIO: MR AND MRS PARKER

Retired elders, Mr and Mrs Parker mortgaged their home to secure a loan made to a business owned and run by their son Phil. The bank asked Mr and Mrs Parker to give a written guarantee on the loan. Similarly, both were asked to give security of their house. However Phil's business didn't do very well. Phil ran out of money and could not pay back the loan. The bank then asked Mr and Mrs Parker to repay the loan as guarantors. The Parkers were unable to, so the bank sold their house which they had taken as security.

→ BUSINESS FINANCE THROUGH INDIGENOUS BUSINESS AUSTRALIA (IBA)

Meeting all the conditions of mainstream lenders is a challenge, almost impossible for business borrowers with no assets, nor credit history. There is help. Commercial loans are available through IBA, who may provide a concessional interest rate for viable businesses. IBA also provides assistance to Indigenous business owners with a short business history and to Indigenous Australians who wish to start a business. See www.iba.gov.au

IBA also has a partnership with the NAB and Commonwealth Bank to refer small businesses to their microenterprise programs to assist Indigenous entrepreneurs who have a sound small business idea, but limited financial resources. With a loan up to $20,000 (NAB) and $50,000 (CBA) and ongoing business support, the program is ideal for a business just stepping out.

See more information at www.iba.gov.au/business-ownership/

6. BUSINESS LEASES

DUE DILIGENCE, DISCLOSURE STATEMENTS, TERMS, DISPUTES

→ FINDING BUSINESS PREMISES

The decision on where to locate your business involves two choices, purchase premises or lease premises. Signing a lease is a massive financial commitment so make sure you fully understood the risks involved and your responsibilities before you sign any documents. Do not sign a letter of offer, or a letter of intention, or a Disclosure Statement, or pay a deposit without getting legal advice and understanding the complete set of terms and conditions you are agreeing to. Once you have searched and found the right place for your business, make sure you do thorough due diligence of the premises. Double check all the information the real estate agent provides, as they are working in the interests of the landlord. Be careful with your presumptions about the property.

→ THE LEASE

A lease is a legally binding contract between you (the lessee, the tenant) and the landlord (the lessor, the owner). When you sign a lease you are committing to pay a certain amount of money over a certain period of time. Even if your business goes bad and you leave the premises, you may end up paying money for premises you no longer occupy. It is vital that you understand both the obligations that you have and the obligations your landlord has. The main areas that cause confusion relate to rental increases and options to renew.

→ RETAIL LEASES

Not every lease is the same and don't presume the lease process will be the same in different states and territories. For instance, in New South Wales the Retail Leases Act has additional requirements for retail premises, for example, a café or shop. Essentially there is more paperwork (disclosure statements are provided before the lease is written up) with retail, when compared to office or industrial property. The (retail) Lessee Disclosure Statement is where the tenant declares they are able to meet all financial obligations of the lease. While the (retail) Lessor Disclosure Statement is where the landlord declares information about the property, lease, rent, GST, annual increases (CPI increase or a fixed % increase?), outgoings, opening hours, options to renew the lease and more.

→ ZONING AND LOCAL GOVERNMENT

As part of your due diligence, check with local government to see if you can actually run your business from the premises – before you sign the lease. Is your business use consistent with the property zoning? Are existing business usage rights attached to the property (for example, opening a café on premises that previously held a café)? Or do you need to lodge a development application, how many weeks will that take? Most local Councils run a one-stop-desk to help you get the answers. Be careful with older style properties, they may not comply with current rules regarding parking, fire rating, disabled access, disabled toilets, size of grease traps and much more. What are the specialised requirements for your business?

→ TERMS OF THE LEASE

The terms of the lease are always negotiable. Points to consider include:

- Length of time for the lease: how many years?
- Is there an option to renew the lease?
- Annual rent increase? Fixed % or CPI?
- Payment of a rental bond and terms of personal guarantees?
- Restrictions on types of services and goods that can be traded in the premises?
- Rights to terminate the lease if premises are damaged or destroyed?
- Limitations on tenant's ability to transfer or assign the lease, very important if your exit strategy involves selling the business?
- What are the outgoings? Outgoings are expenses that a tenant agrees to pay under the lease which are directly and reasonable related to the premises or to do with the operation, maintenance or repair of the premises. This may, or may not, include property rates, water rates, land tax, building insurance, garbage, air-conditioning maintenance and other items specific to the site.
- Types of insurance required by your business (glass/window insurance?)
- Restrictions on removal of fixtures and fittings?
- What happens if you are late paying the rent, penalty fees?
- Terms of any guarantee or indemnity?
- Negotiating rent-free periods at the start of the lease.

TIP: *It is important you read the whole lease thoroughly (and the Disclosure Statement if a retail premise), particularly the lease Special Conditions. Don't assume that just because you have signed a lease before that it will be the same. Don't let the real estate agent rush your decision. Get a solicitor to look over the lease and disclosure statements before you sign anything. Once you have signed a lease, it is too late to negotiate.*

■ CASE STUDY: LBF CONSULTING PTY LTD

When Lani Blanco-Francis first started her business LBF Consulting, she found office space in the city that met her needs. The real estate agent gave her a lease to sign pressing the urgency of signing it as soon as possible, because other potential lessees were considering the premises. Instead of signing it then and there, Lani engaged a solicitor to advise her and to help her understand her obligations. She considered her responsibilities under the lease, checking how long it would run, what costs in addition to the monthly rent she was responsible for, whether there were car spaces, whether there was access during the weekends and whether or not there was an option to renew the lease.

With the help of the solicitor she found out that the monthly outgoings included vague charges which could have amounted to substantial outlay. She was able to negotiate with the real estate agent and agree to specific charges which were reasonable.

→ HOW TO SUCCESSFULLY MANAGE A DISPUTE WITH THE LANDLORD

If a problem arises in relation to your rented business premises, you should read the lease to see what it says, and then discuss the issue with your landlord or his agent. If the landlord/agent is not responding, for example the roof is constantly leaking and the landlord will not undertake repairs, put your complaint in writing (be polite, specific and include dates).

If you cannot solve the issue, then you may need to get legal advice or contact the Office of Fair Trading in your state or territory. There are also Small Business Commissioners in the states and territories that can assist you in dealing with disputes.

→ UNCONSCIONABLE CONDUCT

There are laws banning unconscionable conduct in leases which may assist you. The Australian Consumer and Competition Commission (ACCC) can take action against landlords who are abusing their power. Some examples of landlords that have been prosecuted by the ACCC for unfair conduct in retail leases include:

- Landlords terminating a lease for no good reason.
- Landlords giving a shop an exclusive lease to sell a particular type of good or service and then allowing a competitor to rent space in the centre.
- Not disclosing relevant information to the owners of the shop.
- Landlords refusing to transfer the lease on the sale of a business.

→ CAN I STOP PAYING THE RENT IF I AM UNHAPPY WITH THE PREMISES?

No. If you are unhappy with something your landlord is doing, for example if they are not completing repairs that you need done, it is important that you continue paying rent anyway. This will strengthen your position if the matter ends up in court. Contact a lawyer for advice on how to resolve the dispute.

7. EMPLOYING STAFF

EMPLOYMENT CONTRACTS, TERMINATING STAFF, SUPER, WORK COVER, OH&S

→ EMPLOYEE OR CONTRACTOR?

Your business is growing and you need extra help. There are only two options: you engage an employee, or you engage a contractor. It is important to understand the distinction. With an employee, you as the employer are responsible for their wages, forwarding their tax to the ATO, paying their superannuation and maintaining work cover insurance. A contractor must provide you with a tax invoice that includes his ABN and the contractor should be responsible for his own taxation, super and insurance. Employee or contractor? Determine this before people start work, not afterwards. The Australian Tax Office can help with how to determine if workers are employees or contractors, see www.ato.gov.au/content/00095062.htm?alias=employeecontractor

→ EMPLOYMENT LAW BASICS

Employment relationships are governed by a complex set of laws. As an employer, you need to make sure that you meet your obligations and that you provide your employees their legal entitlements. You must also make sure that you treat your employees in accordance with the law.

→ NATIONAL EMPLOYMENT STANDARDS (NES)

There have been many changes to the laws governing industrial relations, and we expect more changes. The following is current at June 2013. The main law you need to comply with when employing people is the National Employment Standards (NES), which is governed by the Fair Work Ombudsman, see www.fairwork.gov.au. As an employer you are free to write up your own employment contract, but by law you have to offer what is set out in the NES. You can offer more than what the NES provides, but not less.

The 10 National Employment Standards are:

1. Maximum weekly hours of work, 38 hours a week.
2. Parents or carers can request a change in working arrangements to care for their child or the person they care for.
3. Unpaid parental leave and the right to request return to work.
4. 4 weeks paid annual leave per year.
5. 10 days paid personal or carer's leave per year, 2 days unpaid carer's leave if needed and 2 days compassionate leave (unpaid if the employee is casual).
6. Community service leave: unpaid leave for employees who are doing volunteer emergency work or jury duty.
7. Long service leave.
8. Public holidays, employees receive a paid day off.
9. Length of notice employees have to be given before they are terminated and what redundancy pay they are entitled to.
10. Employers must provide a Fair Work Information Statement to their employees, see www.fairwork.gov.au/employment/fair-work-information-statement/

The Fair Work Australia government website also has templates you can use for pay slips, weekly time and wage sheets, leave records, employment records, a roster for the employees and a general timesheet.

→ EMPLOYMENT CONTRACTS AND LETTERS OF ENGAGEMENT

The best approach to employing staff is to utilise a written Employment Contract or a Letter of Engagement. This is a proactive approach to a more productive and harmonious working environment, which should provide for a more profitable and enjoyable business. In our experience, small business that don't use written contracts (rely on verbal contracts) devote a higher portion of their time to managing workplace misunderstandings, when compared to workplaces that do use written contracts.

The employment contract or letter of engagement could be as small as one page or larger than a 20 page document. The aim of the contract is to reflect the agreement between employer and employee and to avoid misunderstandings or disputes. An employment contract is a clearly written record of what work the employee will be doing, how much they will be paid and what work conditions they can expect. We recommend an Employment Contract include the following:

- Detailed description of the position and date of commencement.
- A duty statement that outlines tasks and standards of work.
- Performance indicators (easier to manage an employee's performance, or lack of).
- The days and hours of work, start, finish, lunch, breaks.
- Gross pay, tax withheld, net pay, pay method (EFT/cheque), pay frequency.
- Probationary period (for example, 3 or 6 months).
- Holidays, notice required.
- Sick days, funerals, compassion leave.
- Public holidays (are you including NAIDOC day?)
- Termination, grounds for termination, notices, how, when.
- Confidentiality clauses and restraint of trade.
- Social media (for instance, what is your policy on lunchtime Facebook?)
- Intellectual property.
- Occupational health and safety (OH&S) and work health and safety (WHS).
- Dress standards, shoes, hats, protective gear.
- Your values statement: as an employer what's important to you?

There will always be clauses specific to your industry, so take care when using template employment contracts you find on the internet, particularly templates from outside Australia. We recommend you obtain legal assistance with your employment contracts.

→ HOW MUCH DO YOU HAVE TO PAY EMPLOYEES?

Different industries have different minimum wages. These are called award rates. Each award shows you the minimum amounts you legally have to pay employees. There are different classifications based on how much experience and skill the employee has. Age is also a factor.

→ DON'T PAY WORKERS 'CASH'!

Some employers pay their workers 'cash', with no written records. This is illegal and a very risky approach to business. Some of the myths around 'paying cash' include; 'avoiding the hassle of paperwork', 'saving money', 'the workers like it' and 'they were only here for a couple of days'. But consider this: what happens if the worker has an accident at work? Legally, the work cover insurance policy does not include them, but the employer is still held legally responsible, which means paying all costs. Plus, the accountant of the business will probably not assist with claiming a business deduction because there is no proper record of the expense. Further, with a cash-and-no-records-worker there is no employment contract, no written record of rights, responsibilities and duties, which means it's more likely there will be disputes and misunderstandings between business owner and worker.

→ TERMINATING STAFF

No employer likes the emotional roller coaster of sacking staff. As an employer you invest time and money to advertise, interview, select and train your staff, so it's just not cost effective to sack staff for minor reasons. However, if you are in the situation where you need to dismiss staff, consider your approach very carefully before proceeding. Hopefully you will have set out the ground rules in the employment contract.

The Small Business Fair Dismissal Code applies to any business with fewer than 15 employees and boldly claims to make the obligations of small business employers clearer in case of dismissal. The code is available from the Fair Work Ombudsman's website: www.fairwork.gov.au/Templatesformschecklists/Small-Business-Fair-Dismissal-Code-2011.pdf

The main points of the Small Business Fair Dismissal Code are:

- The business needs to be under 15 people, including the dismissed employee and casual employees employed on a regular basis.
- The employee needs to have been employed more than 12 months in order to make a claim for unfair dismissal.
- Does the dismissal follow a reorganisation where you no longer need that person's job to be done? If yes, you need to consult about the redundancy in the modern award, enterprise agreement, or other industrial agreement applied to the employment of that person. You also need to consider whether the employee can be redeployed in the new organisation.
- Consider the reasons for dismissing the employee: do you have reasonable grounds to believe he/she was stealing from the business, defrauded the business, threatened you or other employees, committed a serious breach of OH&S procedures, or any other form of misconduct?

There are several categories of dismissal, including:

- Summary dismissal: is where the employer dismisses an employee without notice or warning, if the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Such misconduct includes theft, fraud, violence, and serious breaches of occupational health and safety procedures.
- Other dismissal: in other cases, the employer must give a valid reason why the employee may be dismissed, and the employee must be warned preferably in writing. The employer must then give a chance to the employee to respond, and to rectify the problem.

Employees who have been dismissed because of a business downturn or because their position is no longer needed cannot bring a claim for unfair dismissal. Likewise, the redundancy needs to be genuine. Refilling the position with a new employee is not a genuine redundancy.

In conclusion, terminating a staff member is an emotional and complicated process for a business owner. If your goal is to sack somebody quickly, quietly and with respect, we recommend you get professional guidance as soon as possible and proceed with caution.

→ SUPERANNUATION

There have been a lot changes to the rules around superannuation, and we expect there will be more. Basically when you employ staff and agree on a pay rate, you also need to pay an extra amount of money directly into your employee's superannuation fund. As of July 2013 the amount is calculated at 9.25% of your employee's gross income (before tax income). This amount will increase by yearly increments to 12% of gross income in 2019.

This is called the Compulsory Superannuation Guarantee (CSG) as employers are legally required to pay it. CSG needs to be paid if your employees are permanent, part time or casuals. There are some exceptions, for example if your employee earns less than $450 per month, you don't have to pay super. As of July 2013, there is no upper age limit on the CSG. Also, your employee can elect to 'sacrifice' a portion of their income directly into super, this is popular with high income earners that are close to retirement.

The choice of super fund is your employee's responsibility, and you must pay (contribute) into their nominated fund. No, you can't pay the super money into your employee's everyday bank account, even if your employee begs you because times are tough and they urgently need the money. An employer can't choose their employee's fund, unless the employee takes no action in finding and nominating a fund of their own. Employers will be requested to forward the employees tax file number to their nominated complying super fund. Super contributions are tax deductable business expenses, so keep good records. A reliable source of information is the ATO, see www.ato.gov.au/businesses/pathway.aspx?pc=001/003/090

→ HOW TO MAKE SUPER PAYMENTS

As a small business you need to make super payments at least four times a year. Each complying super fund has a different system for accepting contributions, some require forms be completed and acknowledge payments, while others provide no receipts. Most funds accept payments via EFT and BPAY.

The government has recognised that making superannuation contributions to numerous superannuation funds is time consuming and increases administrative costs. If you are a small business with less than 19 employees you should consider using the governments Small Business Superannuation Clearing House, which lets you pay superannuation contributions in one transaction to a single location. There is some initial setup time to register employee superannuation fund details. Once completed, the clearing house will distribute the contributions to their various superannuation funds. More information at www.humanservices.gov.au/business/

→ WORK COVER INSURANCE

Despite the best precautions, there is always a risk of death or injury at the workplace. For that reason, by law every business must maintain work cover insurance, also known as workers compensation insurance. There are exemptions, including sole traders that do not employ other people and employers who pay $7,500 or less in annual wages, are not required to hold a policy of insurance unless they employ an apprentice or trainee, or are part of a group for premium purposes. However, we recommend sole traders hold work cover insurance (and pay superannuation too).

TIP: *If you engage a contractor that is a sole trader to work on your premises, or a site under your control, if they DON'T have their own workers compensation insurance policy, you will need to include them on your policy, even though they are not actually your employee. Take care on this issue.*

→ HOW TO SETUP WORK COVER INSURANCE?

Contact an insurance company. Usually they will provide you a question form, asking for a declaration of total actual wages including super. You will also be asked to describe your business activities. Be precise and concise with descriptions, in the case of an incident your insurance policy may be void if you are found loose with the truth. From your business activities, your insurance company will determine your business classification (your risk profile) and determine the cost of your insurance policy. As with any insurance policy you obtain, we urge you to also ask for a Certificate of Currency. Generally, if one of your workers is injured, you will not have to make payments to them directly, the body in your state or territory will take care of that.

8. INTELLECTUAL PROPERTY

COPYRIGHT, TRADE MARKS, PATENTS, DESIGNS, CONFIDENTIALITY, LICENSING

→ WHAT IS INTELLECTUAL PROPERTY?

Intellectual property is property of the mind. There are a number of different types of intellectual property (IP). It is important to know about these if you are going into business. Some types you can register but some you can't. All types of IP may be very valuable to your business.

Copyright protects artistic, literary, dramatic and musical works. The most relevant one for most businesses will be literary works. This isn't just for books, it includes any type of written work. So copyright protection covers many texts that businesses will produce such as:

- Training manuals and marketing strategies.
- Software (patent protection may also be available).
- Reports, newsletters and minutes of meetings.
- Databases and lists, such as client contact lists.

Copyright owners have the exclusive right to use and reproduce their copyright-protected work. Using somebody else's copyright-protected work without their permission is illegal. In Australia, copyright protection is free and automatic. You don't need to register your work as copyright-protected to receive this protection. Copyright protection of works lasts for 70 years after the death of the creator.

TIP: *It is a good idea to put a copyright notice on your work. This reminds people that you are the copyright owner and they need to get your permission to use the work. This can be done simply like the following example: © Nikki Taylor, 2013*

→ WHO OWNS THE COPYRIGHT? EMPLOYER, EMPLOYEE, CONTRACTORS AND CLIENTS RELATIONSHIPS

When an employee creates intellectual property for an employer as part of their daily duties (for example, writing a report or developing training materials) the intellectual property is automatically owned by the employer, not the employee who was the creator. If the employee leaves the place of employment, the IP ownership still belongs to the employer. We recommend every employment contract include a clause that clarifies this issue.

If a business owner engages a contractor (see previous distinction between employee and contractor) to create intellectual property, for example to write a training manual, the contractor automatically owns the intellectual property. If ownership of the intellectual property in the training manual is important to the business owner, there needs to be a written agreement between the business owner and the contractor that clearly assigns (transfers) the ownership. An Intellectual Property solicitor can help draft the agreement. Take care, as a business owner you may find you cannot freely use work you paid for, as someone else is the owner of the IP.

Government departments may insist on owning or licensing all the intellectual property on work that is done for them by consultants and contractors. If you do this kind of work for government, make sure you know what IP you are keeping and what you are giving away.

If your business often creates intellectual property (for example you prepare art design for reconciliation action plans for clients) and you are constantly frustrated by assigning your IP to clients, consider negotiating. Does the client really need to own the IP or do they just need a licence for limited purposes? Try and negotiate that you retain copyright ownership and your client gets a license to use the material. Establish value in your negotiation, include an extra charge item in your quotes for assigning intellectual property to clients.

→ TRADE MARKS-PROTECT YOUR BRAND

A trade mark is a word, phrase, logo, colour, scent, shape or style which is capable of distinguishing your goods and services from others on the market. You need to apply to IP Australia to have your trade mark registered, see www.ipaustralia.gov.au They will consider if your mark is distinctive, so it will be harder to register if it is similar to marks used by other businesses. IP Australia is a big government bureaucracy, so an intellectual property lawyer can help save you time and money with this process.

Once a trade mark is registered you have the exclusive right to use this mark in connection with your business. Protection lasts for 10 years and then you pay to renew your mark. Trade marks are registered in different classes, there is an extra charge for each class. The more classes you get, the more protection you will have for your mark. Each class relates to a different category of goods and services.

TIP: *There are also unregistered trade marks which are marked with a 'TM'. These offer some protection, but not as much. You can use the 'TM' with phrases or logos which you would like to have as trade marks but haven't registered yet, for example the IBA workshops Into Business™. Only use the ® with registered trade marks.*

→ PATENTS - PROTECT YOUR INVENTION

A patent can be granted to anyone who invents something that is new, useful and inventive. Once you have a patent, only you get to make the patented invention for the next 20 years. The patent system is a way of rewarding people who come up with useful inventions by ensuring that they get a good chance to make money from their invention. The patent protects them from the competition of other people using their idea. Indigenous inventor David Unaipon took out 10 different patents in his life (that's him on the $50 note!)

There are different types of patents, and different types of patent suit different kinds of inventions. The best thing is to see a patent attorney or IP lawyer to find out which kind of patent to apply for. They can also help you through the process and make sure your patent application is done properly – a common mistake inventors make is to make the formal application themselves and not do it properly. A patent that doesn't protect what you need protected is costly and useless.

YOU CAN GET A PATENT FOR THESE:	YOU CAN'T GET A PATENT FOR THESE:
Industrial processes	Good ideas
Pharmaceuticals	Theories or concepts
Computer hardware and some software	Artistic works
Business methods (in some cases – the method must have an industrial application)	

■ CASE STUDY: NIKKI'S NAILS

After a feature article in the Aboriginal Business Magazine (see www.abmpublication.com.au), Nikki Taylor's Aboriginal styled nails become popular and more clients want Aboriginal styled nails. This makes Nikki happy until she found out that another salon has opened up doing the same thing. Nikki was annoyed. She wanted to stop them using her good idea, but she wasn't able to. Intellectual property law doesn't protect ideas, no matter how valuable or unique they might be.

Nikki kept working hard though and as well as doing her nail art, she developed a new type of resin. She didn't tell anyone about her invention, because she knew if it became public she would not be able to patent it. She worked with a lawyer to eventually get a patent, which took a few years but was worth it in the end. She also applied for international patent rights, so she would have protection outside of Australia. An important lesson from Nikki's case study is that an invention has to be new to be protected. This means if you make your idea public before applying for a patent you may lose your protection. Don't make this mistake and be sure to keep your valuable ideas confidential.

→ DESIGNS-PROTECT THE UNIQUE LOOK OF YOUR PRODUCTS

If you draw something, like a diagram, artwork or a map, it will be automatically protected by copyright. But if you do an artwork that will be industrially applied, or come up with a product that has a distinctive look that sets it apart from your competitor's products, you can register it as a design. IP Australia is in charge of examining applications for registered designs. Once your design is registered, you have the exclusive right to use this design. This protection lasts 10 years and can then be renewed.

→ SHOOSHHHHH! KEEPING YOUR VALUABLE IDEAS SECRET

Often in business you will want to keep an idea or way of doing business secret so that you can make the most money out of it. Ideas may lose their value if everyone starts using them. This is particularly important if you need to make a model of your business idea for investors to look at or you need to share your idea with another business so that they can decide whether they want to work with you or invest in your idea. But you don't want them copying your idea or using it for other purposes without your permission.

An important step to prevent this is to have the other person sign a confidentiality or non-disclosure agreement. (We also recommend every employment contract include a clause that clarifies this issue and every written agreement you have with your suppliers, or contractors, include a clause on this issue). If you are sending documents which contain information that you don't want shared with competitors, these should be clearly marked 'COMMERCIAL IN CONFIDENCE'.

→ MAKING MONEY FROM YOUR INTELLECTUAL PROPERTY (IP)

Licensing is a way to exploit your IP, to get the most value out of it. Licensing is an arrangement where someone lets another person use their intellectual property for a fee. This may include for example someone using a manual you have written, performing a work you have done, or putting your trade mark on their product. A licence is a contract that can be enforced through the courts. As with all commercial arrangements, it is wise to have a written agreement so you know exactly what the other person can and can't do with your IP, what restrictions will be in place on the other person using your property in ways you don't want it to be used, or ways which aren't culturally appropriate.

Assignments are different to licensing and not as good for the owner of the intellectual property. An assignment is where you completely sell your IP to another party. It is much better for you to retain ownership of your IP and licence it to others for specific purposes, so think very carefully before signing an assignment.

■ CASE STUDY: A LICENSING AGREEMENT

Mary is an Aboriginal woman who lives in Sydney and runs a training company. One service she offers is an educational workshop which she delivers to large corporates who want training on Indigenous cultural sensitivity. Her training activities and resources are popular and companies around Australia start contacting her to deliver sessions at their business.

Another Indigenous training company in Melbourne wants to offer cultural sensitivity training and decides it will be quicker and easier to pay Mary to use her content rather than develop their own.

Mary has a lawyer draw up a licensing agreement for her. This agreement states that Mary keeps copyright in her materials but gives the Melbourne company an exclusive licence to deliver her seminars in Victoria. She gets paid a base fee and a percentage of profits every time they deliver a show. There are a number of conditions in the agreement. Mary makes it a condition that only Indigenous people can deliver the workshop and the Melbourne company can't change any of the workshop materials. The agreement allows Mary to continue teaching the workshop herself, retain control of how it is taught, expand her business into new areas and make extra money from her good work.

→ MAKING SURE YOU DON'T INFRINGE SOMEONE ELSE'S IP RIGHTS

It is also important to remember you will need permission to use and reproduce the intellectual property that belongs to other people. Just because you can download an image off the internet, doesn't mean you have permission to use the image in your marketing campaigns. Find the source of the image, and ask for permission, you will be surprised how easy and effective this is.

TIP: *It is a good idea to draw up an IP management plan to ensure you are both protecting your own IP and have gained the necessary permission to use IP that others have developed. An intellectual property lawyer can help you with this.*

→ DREAM SHIELD

Useful Resources: IP Australia's Dream Shield project features intellectual property success stories and tips for Aboriginal inventors, designers and business owners. Watch the short videos at www.ipaustralia.gov.au/understanding-intellectual-property/ip-for-business/indigenous-business/dream-shield/

9. INDIGENOUS CULTURAL & INTELLECTUAL PROPERTY

ICIP, PERMISSION, CASE STUDY

Many Indigenous people in business want to make commercial use of their cultural heritage. Indigenous language words, traditional knowledge of bush tucker and medicines or information about cultural sites and traditional cultural expression such as songs and dances and art are some examples of Indigenous cultural and intellectual property that may be used in business. Indigenous business owners want to identify their products and services as being 'Indigenous' and also may have knowledge and skills handed down to them which they wish to promote in return for economic benefits. Indigenous cultural and intellectual property belongs to the group of Aboriginal and Torres Strait Islander people that have culturally inherited.

Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples recognises that Indigenous people have the collective right to protect their traditional cultural expression and traditional knowledge as intellectual property. Whilst not legally implemented in Australian law, the Declaration sets out a framework to follow.

Even though the current law may allow an individual to use and commercially exploit Indigenous cultural heritage, there is a cultural obligation to consider the impact on the group and to seek consent from people who can speak for the collective.

→ INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY (ICIP)

Indigenous cultural and intellectual property refers to the rights Indigenous Australians want to their cultural heritage and traditional knowledge. These rights are fundamental for the continuing survival of Indigenous Australians. ICIP can include language, artistic work, music, writing, performance, dance, ceremonies and documentation of Indigenous heritage like films, sound recordings and writing. It includes both tangible cultural property (like sacred sites) and intangible cultural property (stories and knowledge passed on orally). ICIP also covers traditional knowledge, traditional cultural expressions and also knowledge about plants and genetic material.

→ DEALING WITH ICIP IN THE COMMERCIAL CONTEXT

A common question is whether permission is needed to commercially use these cultural assets. The current Australian intellectual property laws do not legally require consent be obtained from the group however there is a growing practice of doing so, and there are also developing international laws that may require consent. ICIP is a continuing cultural asset belonging to an Indigenous clan or community or family. You should carefully consider the implications of commercialising traditional knowledge such as bush medicine and language words. Some points to consider are:

- Are you a member of the cultural group? If you are not – consider whether you should use it at all. If you still want to go ahead, get the consent from relevant Indigenous people and/or organisations. Even if you are culturally linked to the ICIP, you should get consent from your family, clan or community. It is best practice to get this in writing.
- Is the proposed commercial use derogatory, and will it affect cultural integrity of the ICIP or the group? For example, in the US the Navajo people objected to the use of their cultural designs on underwear and on alcohol flasks.
- Do you need to get the consent of the group – check if your business idea is acceptable to elders, traditional knowledge holders or relevant community organisations?
- Have you addressed benefit sharing with the community? If you are making money from the group cultural assets, you should consider ways of sharing this with the group.
- Attribution or crediting the group is important. How will you acknowledge them as the source of the ICIP?
- Cultural conditions on use – are there any conditions on the use or exploitation of the ICIP. If so, consider whether you can abide by these cultural conditions and whether the people you do business with will agree.

If you want to protect your ICIP, you may need to get the other person to agree to your terms by putting them in a contract. Written contracts are binding promises. If someone breaks their contract with you, you can take legal action against them.

→ GETTING AND GIVING PERMISSION TO USE ICIP

If you are using Indigenous communal knowledge, traditional knowledge, traditional cultural expressions, or any knowledge which should only be shared with certain people or in a certain way, you should gain the permission from the owners of the knowledge and make sure they consent to the particular use you have in mind. Make sure they consent to you using the ICIP commercially. The same applies if you are sharing your ICIP. Make sure you know what is being used, how, where and when it can be used.

■ CASE STUDY: SALTWATER FRESHWATER ARTS ALLIANCE – PROTECTING ICIP

Saltwater Freshwater Arts Alliance is an Aboriginal organisation that aims to position Aboriginal Art and Culture as the foundation for the long-term social, economic and environmental development of the Mid North Coast NSW Aboriginal communities. Culture is a key component of their work in creating culturally based training and employment opportunities. Saltwater Freshwater Arts Alliance registered the words 'Saltwater Freshwater' as a trade mark.

Saltwater Freshwater Arts Alliance operates the National Aboriginal Design Agency (NADA). The aim of the NADA is to work with Aboriginal artists to create high-end industrial appliances, furnishings and carpets. NADA is committed to best practice in terms of respecting the ICIP of the Indigenous people and communities it works with.

NADA has agreements that allow the artists to disclose any ICIP that they are sharing in their work and to set out instructions about how their artwork can be used commercially. For example, some artists may like to acknowledge the communal ownership of what is depicted in their art, so every item produced under the agreement will come with this community acknowledgment. The agreements also set out the commercial deal terms.

→ SECRET TRADITIONAL KNOWLEDGE

Some Indigenous knowledge is sacred and is for use only in ceremony or within communities. Secret traditional knowledge is not suitable to be commercialised. For instance, if you commercialise a healing practice that can only be used within a cultural group, by initiated men or women, then you have made it public to the world and the group can no longer keep it secret.

Commercialising the healing properties of plants and animals also requires careful consideration. Whilst you can apply for a patent to protect the intellectual property rights to exploit a new medicine, the patent registration process requires you to disclose detailed information of the intervention which would be searchable on a public database, and after the life of the patent (20 years) freely available for anyone to exploit commercially.

→ CAN I REGISTER INDIGENOUS WORDS AS TRADE MARKS?

If an Indigenous language word is used in a commercial way such as for a trade mark, brand, business name or domain name for goods or services, you will need to obtain free, prior and informed written consent from the relevant owners of the traditional knowledge or Indigenous knowledge. You must also enter into a benefit sharing agreement. Whilst this is not a requirement under the Trade Marks Act, it is our recommended practice for the recognition of Indigenous Cultural and Intellectual Property rights.

You should consider the following cultural protocols surrounding use of the Indigenous language word as a trade mark, brand or domain name in relation to your goods and/or services:

- Is it appropriate for the word to be used in the proposed context?
- Will it be misleading or deceptive and will people think it is associated with an Indigenous clan or community?
- Has the proposed use been discussed with relevant traditional owners?
- Has consent been obtained to use the Indigenous language word?
- What recognition and attribution will be given to the traditional owners?

- If the context is extremely wide and commercial use, consider ways the benefits can be shared with the traditional owner language groups. Eg: the word 'Navajo' is licensed to a jean company who pays royalties to the Navajo nation.

→ COMMERCIALISING INDIGENOUS ART

If you are dealing in Indigenous art, promote fair trade and recognise Indigenous artists ICIP. Always use written contracts including for commissioning, selling and reproducing Indigenous art. Subscribe to the Indigenous art code. Make sure your labels and descriptions are accurate, and develop protocols for use of ICIP. For information on rights of artists see:

- Indigenous art code www.indigenousartcode.org/
- Arts Law Centre of Australia's Solid Arts website www.solidarts.com.au/

→ ICIP, MORE INFORMATION AND RESOURCES

- Pathways & Protocols: a filmmaker's guide to working with Indigenous people,
- culture and concepts, www.screenaustralia.gov.au/documents/SA_publications/Indig_Protocols.pdf
- Our Culture, Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights, Michael Frankel and Company, written for AIATSIS and ATSIC, Sydney, 1999 http://frankellawyers.com.au/media/report/culture.pdf
- Australia Council for the Arts Indigenous protocols: www.australiacouncil.gov.au/grants-2012/information-for-applicants/indigenous-protocols

10. THE END OF A BUSINESS
SUCCESSION, SELLING A BUSINESS, WINDING UP, INSOLVENCY

→ EXITS

A business may end for a number of reasons including; retirement, family succession, selling the business for a profit, changes in life choice, sickness, death or because the business is not going well. Ending a business can be a complicated process. It is a very different process depending on whether you have control of the closure (for example, selling the business) or if another person has control of the business (for example, a receiver has been appointed). It is important to know that if a business isn't able to pay its debts when they become due, a business owner can lose control of the company and have people appointed to come in and sell the company's assets.

→ SALE OF A BUSINESS

The key to successfully selling a business is preparation, presentation and patience. Get your business in order, have your business financial statements available, be clear on what is for sale and what isn't (prepare a list of the assets, including; products, vehicles, plant & equipment, client lists, intellectual property and other), are the employees staying on, are you helping with the transition, what warranties are you providing, put a realistic price on your business, be transparent, consider getting an agent involved to handle the sale of your business.

If your business is owned by your company, a purchaser will wisely only want to buy the business assets, not the actual company itself. You will want a solicitor to prepare a contract for the sale and include clauses specific to your needs.

→ FAMILY SUCCESSION

Often with a family business, the parents will want to hand over the business to their children who work in the business. This is a highly emotional process and many families struggle with it. Too much is unspoken, too much is presumed. We recommend you get professional guidance, as many sensitive issues need to be addressed.

→ WINDING UP

Say you have sold your business (the assets), but you still have the company (the holding vehicle). A company will still be registered even if it is not making or losing any money. So if you have a company which is inactive it will still be costing you money to pay the ASIC annual review fee and bank fees perhaps. If you do not want to run your company any longer but it is not in financial trouble, you can end the company by going to ASIC and applying for it to be deregistered. After it is deregistered, it won't legally exist – it can't make a profit or loss and it can't sue anyone or be sued.

→ INSOLVENCY

When a business can't pay its debts as they become due, it is said to be insolvent. Any business that continues to operate while insolvent is breaking the law and the directors can face heavy penalties. There are a number of options for businesses that have become insolvent. A business may be forced into administration or it may choose to go into administration, which is called voluntary administration.

→ WHAT IS ADMINISTRATION?

Administration is where an outside person (the administrator) comes in and basically runs the company. They get control of the company's property and have power to investigate what the company has been doing. If they find company directors have broken the law, they will report the company to ASIC. While the administrator will work WITH the original business owners, they are actually working FOR the creditors of the company. Control of the company is essentially taken out of the business owners' hands if administrators are called in, so it is important to avoid going into administration in the first place.

→ WHAT IS RECEIVERSHIP?

This is where a court or a creditor (someone who is owed money) appoints a receiver. The directors stay in place but what they can do is limited by the receiver. The receiver has the power to sell off assets of the company so that the company can repay its debts.

→ WHAT IS LIQUIDATION?

This involves an outside person (the liquidator) coming in, but with liquidation they are not trying to revive the company, they are just helping the creditors get back as much of their money as possible. They will sell the company's assets and deregister the company.

→ BANKRUPTCY

Bankruptcy is a legal statement that a person can't repay their debts. This is a very serious step with major consequences, so get professional advice if you are thinking of applying for bankruptcy. If you owe someone money, they can also file an application for you to become bankrupt. Things to know about bankruptcy:

- A trustee can take things and sell them to pay off the debts.
- A bankrupt may only keep basic property, like a bed and refrigerator.
- Bankruptcy is on the public record, so people will be able to see who is a bankrupt.
- Bankruptcy puts closure on the matter. But it is not an easy way out. It is only for people who can't repay their debts, not for those who are just unwilling to pay.

→ AN ENDING WITH A WILL

On the subject of exits and endings, we have noticed very few Indigenous people have a will. We have seen this lead to disputes and family break ups. If a person dies without a will, they are 'intestate' and a complete stranger from the government may step in and take control of distributing the assets. We recommend every business owner have a written will, prepared and witnesses by a professional, who will keep the information confidential.

TEN TIPS FOR INDIGENOUS BUSINESSES

1. **File it so you can find it.** Make a good filing system, or employ somebody to do the paperwork and administration for you. Keeping complete records is both a legal requirement and makes good business sense. It allows you to see how your business is doing, understand your strengths and see areas for improvement.
2. **Read it before you sign it.** Read the terms of contracts and agreements before you sign them. If you don't understand the contract, or you don't agree with the terms, don't sign it.
3. **Think before you act.** If you take out a loan or sign a lease, understand the consequences if you can't make payments. If you put up your house as security for a loan, the bank can (and definitely will) take it if you default on the payments.
4. **Put a fence around your intellectual property.** Proactively protect your intellectual property. Consider ways to add value to your IP. Your brand may be more valuable than your physical property.
5. **Reduce risk.** Get insurance, particularly work cover and public liability. Ask your sub-contractors for copies of their licences/permits/accreditation and their insurance certificate of currency.
6. **Respect.** Give it, to get it. Be careful sharing your Indigenous Cultural Intellectual Property (ICIP), know how, when and where it will be used. Respect the use of ICIP from another individual or community - get proper permission. Use contracts to ensure your ICIP, and the ICIP of others, is used appropriately.
7. **People matter.** Be careful hiring and firing people, go through the proper processes, to protect your business from disputes and unfair dismissal claims. Keep it respectful.
8. **Pay your bills.** On time, every time. Keep up to date with tax and super payments. A good credit rating is a key part of your reputation as a business owner.
9. **Write it down.** When you make a deal, put it in writing. A written contract, or agreement means both parties know what has to be done, and gives you proof of the deal you made if the other party doesn't fulfil their promise.
10. **Be true to your word.** Be honest in all your business dealings. This will keep you on the right side of the law and it will help you develop a good reputation. If you rip someone off once, they may never come back and your reputation may be trashed forever.

Small business has been called the beating heart of Australia. Running your own business can be a lot of work, but if you know your responsibilities, it can be exciting and very rewarding. Good luck!

LINKS AND FURTHER INFORMATION

Useful links for business owners include:

Aboriginal Business Magazine www.abmpublication.com.au to help stay connected with other Indigenous business owners and issues

The Aboriginal Business Directory Western Australia www.abdwa.com.au

The Australian Business Licence and Information Service https://ablis.business.gov.au has an online tool to find the licences required to operate a business

ABN Lookup http://abr.business.gov.au to check if a business name is connected to an Australian business number (ABN)

Australian Competition and Consumer Commission (ACCC) www.accc.gov.au is the government body that looks after consumer protection law

AusRegistry is the official wholesale provider of .au domain names and provides information on available web sites, www.ausregistry.com.au

Australian Securities and Investment Commission www.asic.gov.au is the government body regulating business

Australian Taxation Office (ATO) www.ato.gov.au for information on taxation, PAYG, GST, ABN's, tax file numbers and more

Digedi www.digedi.com.au for indigenous business in the mining and construction sectors, in Qld, SA & NT

Fair Work Ombudsman www.fairwork.gov.au for a copy of the National Employment Standards (NES), the Small Business Fair Dismissal Code and more

www.humanservices.gov.au/business/ provides a superannuation clearing house for small business

Indigenous Business Australia (IBA) www.iba.gov.au is the key government body for supporting Indigenous business owners, phone 1800 107 107

IP Australia www.ipaustralia.gov.au is the government body regulating intellectual property, including trademarks and patents, see Dream Shield also

Kinaway, for Victoria's Aboriginal business community, see www.facebook.com/kinaway

The NSW Indigenous Chamber of Commerce www.nswicc.com.au

Northern Territory Indigenous Business Network www.ntibn.com.au

Office of the Australian Information Commissioner www.oaic.gov.au to get a copy of your credit history

Office of the Register of Indigenous Corporation www.oric.gov.au (95% of Indigenous Corporations are structured as not-for-profit)

The Pilbara Aboriginal Contractors Association www.pacainc.com.au

Personal Property Securities Register www.ppsr.gov.au an online register for recording a security interest in an item (goods, products, cars, boats, heavy equipment etc)

Advice for small business in NSW, see www.smallbiz.nsw.gov.au

South East Queensland Indigenous Chamber of Commerce www.seqicc.com.au

Supply Nation (previously known as AIMSC) http://supplynation.org.au/ helps Indigenous owned businesses get work with big private sector corporations and Government agencies

SPECIAL THANK YOU

Terri Janke and Company Pty Ltd extend a special thank you to Indigenous Business Australia (IBA) for funding this publication. The contents within represent the opinion of the authors, they are not the opinions of IBA.

DISCLAIMER

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LAW WAY: INDIGENOUS BUSINESS AND THE LAW

ISBN: 978-0-9757044-5-5

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Design and layout: Gilimbaa Indigenous Creative Agency.

Printing: Print Junction

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