



Business Legal Risk Checklist

Risk management and compliance is a critical ingredient in a successful business. Recent economic conditions have posed new challenges, as well as opportunities, and act as a timely reminder to businesses to assess their compliance and risk management processes.

Following is a list of potential legal and related risks that, based on our experience, businesses need to consider when reviewing their operations.

Risks to consider

Action required (✓)

Customers and suppliers	
1. When did you last review standard customer/client contracts? Are key terms appropriate and enforceable, eg warranties, limitations, etc?	
2. Do you know what to do if a customer/client does not or cannot pay your invoices? Are your customers complying with your terms of trade? If not, what steps have been taken?	
3. For corporate customers/clients (including corporate trustees), are appropriate securities in place and enforceable?	
4. When did you last review your contracts with suppliers? Are you aware of what to do if suppliers default on their contractual obligations? Do you have certainty of supply? What if you default on an obligation - what is the impact?	
5. Do you know what to do if a supplier sues you for an unpaid debt? Are you able to seek an extension of terms?	
6. Do you know what to do if a supplier serves you with a statutory demand under the <i>Corporations Act</i> ?	
7. Do your standard terms and conditions of supply include an appropriate and enforceable retention of title clause?	
Human resources	
8. Have all employment contracts in your business been recently reviewed for compliance with: <ul style="list-style-type: none">• Modern Awards; and• National Employment Standards.	
9. Do your contracts contain appropriate restraints preventing ex-employees from competing with the business or soliciting clients, suppliers and other employees?	
10. Are you remunerating employees in accordance with their minimum entitlements under Modern Awards and applicable Enterprise Agreements? Do your contracts contain appropriate 'set off' wording to wrap up any applicable entitlements?	

11. Do you know the process and termination entitlements required for redundancies, restructures and terminations?	
12. Have you updated policies in light of changes introduced by the <i>Fair Work Act 2009</i> (Cth) on 1 July 2009? Are you conducting training, eg as part of your induction processes on important policies such as equal opportunity and email/technology?	
13. Are OH&S obligations being complied with and your OH&S policies up to date? Are you aware of your obligations under imminent new harmonised OH&S laws? Have you conducted relevant risk assessments, including in relation to employees working from home?	
14. If the business engages contractors, have you conducted risk assessments in relation to whether they are genuine independent contractors or should more properly be regarded as employees? Are you aware of your obligations to pay superannuation and deduct PAYG for 'deemed employees'?	
15. Has the business got adequate insurance in respect of workers compensation, in particular following recent changes to worker compensation legislation as regards contractors?	

Assets and operations

16. Is there a current lease and if so, what are its key commercial terms? Is there the possibility of renegotiating lease terms, and how might you go about this? How quickly can the lease be exited if required and what are the obligations upon termination? Are there personal guarantees supporting the lease?	
17. Are all of the core and non-core assets owned by the company? How quickly can non-core assets be sold-off if required? How would you go about this?	
18. Have you reviewed your market or industry for any opportunities that may be arising? Can you move quickly to take advantage of opportunities?	
19. Is your intellectual property adequately protected (ie trade marks registered, patents filed, confidentiality agreements in place)? Is there a regular review of your IP portfolio?	
20. Are you aware of potential intellectual property infringements by competitors? Are any infringements being acted on?	

Corporate governance

21. Are the directors and officers of the company aware of their obligations under the <i>Corporations Act</i> with regard to insolvent trading, including the risk of personal liability? Is the business able to pay its debts as and when they fall due? Is there a risk that a transaction being considered may make the business insolvent? Are insurances and indemnities (including D&O cover) appropriate and up to date?	
22. Are the directors satisfied that the company is able to continue as a going concern?	
23. Has the company reviewed its compliance with accounting standards, including in relation to asset impairments?	
24. Are the owners of the business finding that their relationships with each other have become strained? What happens if a dispute arises between the owners? Do you know how to protect the business and yourself? Is there an appropriate shareholders agreement with dispute resolution provisions in place?	
25. Are you engaged in litigation that is draining valuable company resources but don't know how to get out of it? Have you reviewed your current litigation matters and made an assessment of whether they ought be pursued or resolved? Have alternative dispute resolution mechanisms been entirely explored?	
26. Have there been any transactions involving the company and related entities that have not been on arm's length terms or are otherwise unusual?	
27. Are you able to demonstrate that all transactions that have and are being entered into have a proper purpose and have been entered into in the best interests of the company? Have all potential conflicts of interest been avoided or otherwise appropriately dealt with?	

Financing

28. When is the next testing date for the financial covenants in your loan? Will you comply with them on this date? What are the consequences if you do not: will it be an event of default, a potential event of default or a review event? Do you need to consider asking the bank in advance for a waiver if it is likely that you will breach the financial covenants?
29. Is the bank generally able to review the loan documents and change the terms? If yes, is it likely to do this? How are you managing this exposure? Are you prepared for an increase in margin and fees? Can you still comply with your interest cover ratio covenant if the margin is increased by 200 basis points?
30. Will you need to refinance in the near future? Have you spoken with your current lender? Is there the possibility that your current lender will not refinance the facility or only refinance on substantially less favourable terms? Have you approached other alternative lenders?
31. Are the company's bankers talking about referring the company's account to 'asset management'? If so, do you know how to manage this?
32. What personal assets are supporting the business? Are they at risk from secured or unsecured creditors?
33. Are there any loans between the company and its directors or shareholders? Are appropriate securities in place?

Tax issues

34. Will debts be written off as bad? What needs to be done to ensure a deduction is available?
35. Are tax losses being realised from trading or asset sales? Will they be available for offset in the future?
36. Are tax losses on revenue or capital account? (capital losses can only be offset against capital gains whereas revenue losses can be offset against both revenue and capital gains)
37. Are you restructuring debts including being released from debts? What is the tax impact?
38. Are business assets and retained earnings exposed to operating/trading risks? Could a restructure be used to reduce this risk?
39. If liquidating a company, can steps be taken to reduce the amount of a distribution that is assessable as a dividend?
40. Are there any outstanding obligations to the ATO regarding tax on PAYG instalments on wages? Are you aware of directors' and officers' personal liability for unpaid PAYG? How is personal exposure being managed?
41. Are Superannuation Guarantee (SG) contributions for employees being paid on time and calculated in accordance with the ATO's current ruling in relation to 'ordinary time earnings'? (directors and officers can be personally liable for unpaid SG contributions)
42. Do the superannuation contributions you are making meet the requirements for you to claim a tax deduction?
43. Are loans between the company and directors/shareholders tax compliant?
44. Have you reviewed the status of option plans and other employee incentive arrangements?

Superannuation

45. Have you reviewed your arrangements for meeting your Superannuation Guarantee (SG) obligations in light of the following legislative proposals:
- the imposition of personal liability on directors for unpaid SG contributions;
 - (from 1 July 2012) the requirement to disclose on payroll slips when an employee's superannuation contributions are due to be paid;
 - (from 1 July 2013) the increase in the maximum age for payment of SG contributions to age 75; and
 - (from 1 July 2013) the increase in the SG rate from 9% to 9.25% of an employee's ordinary time earnings.

If you require no obligation assistance or advice in respect of any of the legal risks identified in this checklist or for further information on how Hall & Wilcox can assist your business, please contact your Hall & Wilcox relationship partner/lawyer or:

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