



**BUCHANAN LAW**  
Intellectual Property and Technology

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[www.buchananlaw.com.au](http://www.buchananlaw.com.au)

## **CLIENT BULLETIN**

*As more businesses fall victim to the current economic downturn, we see that their creditors are increasingly finding themselves unable to recover debts owed.*

*This bulletin provides some points for consideration in relation to appropriate contract drafting and methods for reducing the risk of finding yourself incapable of recovering monies owed to your business by a customer, business alliance partner or similar.*

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## **Managing business exposure to commercial contract debts**

It is daily news fodder that the current state of the economy is far from ideal. Australian businesses are feeling the pinch of higher interest rates and increased borrowing. As a result, we are seeing an increasing number of businesses incapable of recovering debts owed to them by impecunious customers and alliance partners.

What can be done? Obviously, commercial risk cannot be eliminated (contracting with even the most financially robust customer poses a risk – such is the nature of business!) but there are always prudent measures that can be taken to reduce it. Here, we offer up some suggestions.

First, before entering a commercial contract of any size, it is always prudent to undertake some background research into your prospective opposite number: for a publicly listed company, a review of the company's public reports should reveal any glaring financial risks and, in relation to other companies or individuals, use of credit reporting services may also be an appropriate option (many such services are now available on the Internet, a change which has both increased speed and reduced prices).

Next, we remind all our clients to take particular care when at the negotiation and entry stages. Ideally, any contract you enter into (other than a strictly standard-form one) should be drafted or re-drafted by your legal advisor to make sure that it is tightly worded in your favour; as part of this process, your business can then insert or reword provisions to minimise the risk of being left out of pocket as a result of a customer who cannot satisfy its debts.

When contracting with a corporate entity, it is wise to seek to obtain a director's guarantee. As a corporation has a separate legal identity to its members, any debts owed by the corporation are generally not recoverable from its members. However, a director's guarantee can circumvent this issue by requiring one or more directors to agree to personally pay any debts that the company cannot satisfy. Further, or as an alternative, if your corporate customer has a parent company, a guarantee might be obtained from the parent company.

Finally, in a contract with any external supplier, ensure that your payment is dependent upon the supplier's performance. Be wary of agreements under which you may be required to make payment to a supplier regardless of the timeliness, quality or quantity of goods or services provided.

If sums payable do fall overdue, there are a range of actions that can be taken (and we would be happy to advise on these) but, as with many things, we would always say 'prevention is better than cure'. So, by planning for the worst case scenario when contracting, you can help protect your business against unnecessary exposures.

If you want any further information or you would like to learn more about how to protect your business against the risk of unrecoverable debts, please contact the Buchanan Law Team.

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### Buchanan Law – who we are

Buchanan Law is a legal practice with a difference. Our primary focus is on the commercial aspects of intellectual property, telecommunications, technology and innovation law. We are leaders in our chosen practice areas, providing specialist and commercially oriented legal advice and creative solutions.

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