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INSIDE

Et tu, Brute? When technology procurement ends in tragedy

Transitioning to a new or upgraded IT system is a major undertaking for most businesses. The challenges are compounded for large national and multinational organisations that need to integrate their systems across multiple offices or change the manner in which customers interface with those systems.

Taking inspiration from Shakespeare's plays, Julia Murray's article gives the top five tips for avoiding technology procurement traps.

It's no surprise that the epilogue of so many technology procurements is one of hardship and misfortune. Transitioning to a new or upgraded IT system is a major undertaking for most businesses. The challenges are compounded for large national and multinational organisations that need to integrate their systems across multiple offices or change the manner in which customers interface with those systems. This article takes inspiration from Shakespeare to impart five top tips for avoiding a tragic technology procurement.

Knowledge (transfer) is power: '*Our remedies oft in ourselves do lie*' (All's Well That Ends Well, Act I, Scene I)

Without appropriate skill and knowledge transfer, businesses risk becoming dependent on their technology suppliers to manage and operate their systems and processes. This is particularly problematic where suppliers support business critical operations (and more so where those operations have been moved into the cloud). While businesses are entitled to rely on the expertise of their technology suppliers, it is prudent to maintain sufficient internal capability to monitor and manage supplier performance. Moreover, outsourced arrangements should:

- ensure that suppliers train in-house personnel in the operation of new and updated systems, and
- require the regular review and central storage of project documentation (including training materials, contract manuals and technical specifications).

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Cooperation is key: *'Help me, Cassius, or I sink!'* (Julius Caesar, Act I, Scene II)

Successful procurements hinge on good customer/supplier relationships, which are in turn fostered by good governance and fair business terms. Project agreements that are more akin to master-and-slave arrangements with high risk and low reward for the supplier are unlikely to encourage good supplier performance. For this reason, there is a growing trend towards negotiating project agreements that are relationship and outcome focused, rather than driven by risk. These agreements employ mechanisms such as:

- sophisticated governance regimes that bring the right people together at the right times and facilitate open communication
- 'bonus' arrangements that reward good supplier performance, and
- dispute escalation and decision-making forums that afford meaningful supplier representation.

What's your Plan B? *'Modest doubt is call'd the beacon of the wise'* (Trolius and Cressida, Act II, Scene II)

Contingency planning is particularly important in the technology industry. The time and effort required to develop and implement new systems is frequently underestimated, leading to project delays. And even if those systems are subject to extensive testing, it is often difficult to predict how they will perform in a production environment. It therefore makes sense to have a viable 'Plan B' (and even a 'Plan C' and 'Plan D') in place ***before*** embarking on any major upgrade or replacement of core IT infrastructure. Different contingency plans may also be required during different phases of the project. For example, Plan B during the design and build phase may involve exercising an option to extend the contract with the incumbent or rolling out a less functional off-the-shelf product as an interim solution. During the support phase, Plan B may entail maintaining hot sites or engaging an alternative provider to step-in at the supplier's cost during prolonged system failures.

Ensure strong leadership and executive level buy-in: *'The king's name is a tower of strength'* (King Richard III, Act V, Scene III)

It is an unhappy reality that many boards do not oversee technology projects with the same level of scrutiny as other projects that directly affect their core operations. Technology procurements that run over budget and over time, disrupt business continuity and ultimately add little value to the business are often linked to a lack of executive level oversight. To some extent this has improved in recent years with greater regulatory focus on corporate governance. However, there are a number of initiatives that can be taken to ensure that the board is kept informed and able to ask the 'tough' questions when needed. These include:

- establishing appropriate contractual processes for measuring and reporting project performance to the board for critical review
- scheduling periodic presentations to the board to ensure that the project continues to align with the business' strategic objectives, and
- ensuring the board has sufficient expertise (for example, by appointing the CIO or an appropriate non-executive director to the board).

And don't *'let Rome in Tiber melt'* while you focus on Egypt! (Antony And Cleopatra, Act I, Scene I)

Although major technology procurements can be all-consuming, it's important not to neglect other technology projects that are underway. Top CIOs differentiate themselves by their ability to manage major technology projects having regard to their organisation's existing systems and strategic initiatives. For example, they may provide a greater financial incentive to suppliers who implement critical infrastructure swiftly and with minimal impact to the business' other suppliers. Or they may delay the commencement of a new project to avoid distracting the in-house technology team from an existing project that has entered a critical stage. And when major technology procurements start to divert key resources from existing projects, CIOs are adept at persuading their fellow executives to engage more resources to support the day-to-day operation of core systems and infrastructure.

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Tips and traps in contracting: novation versus assignment

Contracting parties must be aware of the important differences between novating and assigning their contracts, in particular, when transferring contractual rights, obligations and liabilities.

The concepts of assignment and novation are distinct – but are commonly confused. In particular, the rights, obligations and liabilities that can be transferred differ depending on whether the transfer is by means of an assignment or a novation. There are also divergences in the means by which contracts can be validly assigned or novated.

It is important that all contracting parties – be they lenders, borrowers, suppliers, customers, purchasers or sellers – are aware of the important differences between novating and assigning their contracts.

What is an assignment?

An assignment occurs when a party to a contract (the ***assignor***) transfers all, or part, of their contractual *rights* to a third party (the ***assignee***).

The assignor must notify the other party (the ***counterparty***) in order to effect a legal assignment but, in the absence of a contractual provision to the contrary, does not need the counterparty's consent to assign its rights. (An equitable assignment may be effective without notice having been given to the counterparty, but if the assignee seeks to enforce the assigned rights against the counterparty, then they would also have to join the assignor as a party to the claim.)

Importantly, at common law, a contracting party cannot assign its *obligations* or *liabilities* (only its *rights*). This means that the assignee will be entitled to the assignor's *benefits* under the contract, but the assignor will still remain liable to discharge its contractual obligations and liabilities.

In practice, most contracts include a provision expressly dealing with each party's rights of assignment, and often include a prohibition on a party assigning its rights without the other party's consent or, if assignment is permitted, a requirement that notice of any proposed assignment be given to the ongoing party.

What is a novation?

The effect of a novation is to discharge an existing contract between two parties (the ***ongoing party*** and the ***retiring party***), and enter into a new contract – usually on the same terms – between the ongoing party and a new party (the ***incoming party***).

Once the novation occurs, the incoming party must perform the contractual obligations (under the new contract) that were formerly owed by the retiring party. However, for the novation to be validly effected, the ongoing party and the incoming party must both give their consent to the retiring party novating its obligations – which is why a novation is usually effected via a *tripartite agreement or deed*.

The issue of whether the retiring party is released from all claims arising in respect of the original (discharged) contract will usually depend on whether the warranties and indemnities under the original contract are intended to survive termination. It is common practice for the issue of accrued obligations and liabilities to be expressly addressed in the tripartite instrument that effects the novation.

Key differences

Differing commercial and risk implications arise depending on whether a transfer is effected by way of novation or assignment, and contracting parties need to understand these differences when preparing novation and assignment provisions.

The key difference between the two concepts is that novation destroys the privity of contract between the original contracting parties, and replaces it with a new contract between the ongoing party and the incoming party. Accordingly, if a party wishes to shift its obligations under a contract to another party and be absolved from its liability to fulfil those obligations, it will generally need to effect a novation.

By contrast, no new contract is formed by an assignment, and so the assignor will remain bound by any prospective obligations and accrued liabilities arising under the original contract.

A party effecting a novation will also need to carefully consider the drafting of a novation deed, and in particular, whether it will be released from liability in respect of liabilities that may have accrued prior to the date of the novation.

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Consenting to a future novation

For a contract to be validly novated, the retiring party must ensure that the ongoing party has knowledge of the agreement to novate the contract and agrees to the terms of that novation: *Rohrlach v Christianos* (1980) 26 SASR 161.

The recent decision in *Goodridge v Macquarie Bank Limited* [2010] FCA 67 considered the issue of whether a party to a contract can *prospectively* consent to a future novation. Rares J held that an ongoing party cannot give effective consent to a future novation where the terms of the new contract are 'unspecified' or unclear (at 102). On the basis of this case, it is more likely that a prospective consent will be effective if the clause providing for it is clear and precise as to the parties' intentions, and if the terms of the novation agreement (or deed) are annexed to the original contract.

Alternatively, consent to a future novation can be obtained by including a power of attorney clause within the original contract. By doing so, the ongoing party agrees to appoint the retiring party as their attorney in order to execute the novation deed.

The outlook

It is important that contracting parties are aware of the implications associated with transferring contractual rights, obligations and liabilities. Different requirements must be met in order to effect a valid novation or assignment, and different rights and obligations attach to each party depending on whether the contract is assigned or novated and the specific terms of the assignment or novation.

Contracting parties should ensure that all necessary consent and notice requirements are met, and that clear and unequivocal language is used in the contract and in any deeds of assignment or novation in order to give effect to their intended commercial outcome.

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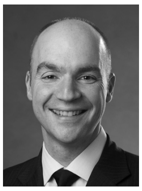

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To bet or not to bet – the question is whether to do it online

Does online gambling have a future in Australia? You can bet on it. The more interesting wager however will be on how that future is regulated.

With the recent proliferation of online sports betting facilities in Australia, it is timely to consider the personal and legal risks faced by the online gambling operators and their clients.

In this article we argue that the restrictions currently imposed on online gambling in Australia have gone too far.

While online gambling should be tightly regulated, and separate regulation of offline and online gambling may be technically necessary, the underlying policy objective should be to ensure regulation is effective but not excessive.

The *Interactive Gambling Act* (Act) regulates interactive gambling services by placing restrictions on certain services provided to customers in Australia. The Act targets the providers of interactive gambling services, even for overseas based or foreign-owned providers, by imposing fines of up to $1.1 million per day.

The main focus of the Act is to prevent 'online casinos' and protect the Australian community from the harmful effects of gambling in the comfort of your own home.

In a report released in June, the Productivity Commission revealed that:

- 2-3% of Australian adults are either 'problem gamblers' or are experiencing 'moderate risks', and account for 40-75% of gambling expenditure
- even a 10% reduction in the costs of problem gambling could save society nearly half a billion dollars annually, and
- international industry estimates show that, in 2008, about 700,000 Australians played online casino games.

Dipping its hat to established industries that have long been involved betting, online wagering (which includes betting on horse racing and 'sporting events' like football) is not restricted by the Act. Counter-balancing this freedom is a restriction on bets placed on a sporting event after the event has started (also known as 'in-the-run' betting), which was seen to be the most harmful form of online wagering.

It is worth considering further the policy basis for the Act, which was to protect the Australian community from the harmful effects of gambling in the comfort of the family home. The Act does not generally restrict online gambling on horseracing and sporting events. Some submissions to the Productivity Commission argued that dangers for problem gamblers exist with online gambling, with bets placed with a few clicks of the mouse and fast turnover, all without ever having to leave the comfort of your own home. However, the Productivity Commission report ultimately concludes that, even as far as 'online casinos' are concerned, it may be better to have Australian-based games available but subject to particular harm minimisation strategies, rather than leave Australians who are looking for an online betting fix to resort to 'risky overseas sites'. In addition, profits made by overseas operators go untaxed by Australian governments. The future should see fewer restrictions on online gambling, with policies targeted more at prevention through education and control mechanisms. Clearly, heavy regulation continues to be required to reduce problem gambling. In our view, online gambling is not so different from traditional, offline forms of gambling as to justify the extra restrictions currently imposed on online betting sites.

While online gambling may require different regulatory mechanisms from those applied to traditional betting methods, due to technical differences, government policy should consistently achieve the same harm minimisation outcomes, regardless of the form of gambling.

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New legal landscape for mobile advertising

Mobile advertising is an increasingly important medium for advertisers, mobile service providers and the telecommunications industry. However, organisations who wish to offer mobile advertising services, or to advertise products using mobile advertising platforms, must carefully consider both the legal and reputational implications of these evolving platforms.

The Australian Interactive Media Industry Association defines mobile advertising as 'all expressions offered on the mobile phone and paid for by advertisers, for which the purpose is to influence the attitude, intention and behaviour of the receiver'. Mobile advertising platforms include mobile applications ('apps'), mobile websites, messaging and video.

Tole Hart, research director at Gartner, thinks that 'five years from now, everyone will have a smartphone or a really good feature phone', which means 'there will be a lot of eyeballs and a lot of revenue'. His contention is supported by research conducted by the Mobile Marketing Association in New York, who predict that worldwide mobile advertising revenues will be worth US$13.5 billion in 2013.

Prohibitions on mobile phone spam

The *Spam Act 2003* (Cth) (**Spam Act**) regulates commercial electronic messages originating in or sent to Australia, including messages sent by email, short message service (SMS), multimedia message service (MMS) and instant messaging (iM). Penalties under the Act are enforceable against individuals or companies who have committed, or who were 'knowingly concerned in', any breaches. The costs of non-compliance may be significant. Currently, the maximum penalty for companies that breach the Spam Act is $1.1 million per day, while individual liability can reach $220,000 per day.

Subject to certain limited exceptions, the Spam Act prohibits the sending of commercial electronic messages unless *express* consent has been given by the recipient, or their consent can reasonably be *inferred*. Depending on the circumstances, express consent may arise from a recipient subscribing to an electronic mailing list, or ticking a box to agree to receive advertisements or promotions.

The Spam Act provides that consent may reasonably be *inferred* from the *conduct* of the recipient, or the business and other *relationships* between the sender and recipient. There may be significant uncertainty as to whether consent has been inferred, given that this will depend on the facts and circumstances of the case. Senders should, therefore, exercise caution if they are unsure – particularly since the onus of demonstrating inferred consent lies with the sender.

A sender of a commercial electronic message is also required to include accurate identifying information in its messages, as well as a functional 'unsubscribe' facility to enable recipients to opt out of future messages. In instances where a business has engaged a third party to send commercial electronic messages on its behalf, the message must still include accurate identifying details of the business who authorised the content.

Misleading or deceptive conduct

Companies engaging in mobile advertising also need to consider the statutory prohibitions against misleading or deceptive conduct and representations under the *Trade Practices Act 1974* (Cth) (**TPA**) and equivalent State and Territory legislation.

Section 52 of the TPA prohibits corporations from engaging in conduct in trade or commerce that is misleading or deceptive. Statements and conduct will be considered misleading if there is a real possibility that a reasonable person in the audience to whom the statements or conduct are directed would be led into error by the overall impression that is conveyed. The deception may result from a positive statement, but may equally arise from silence or omission (for example, where the information that is provided is incomplete or amounts to a half-truth).

In advertising, companies may be able to engage in some degree of 'puffery' or exaggeration, but if the advertising would nevertheless mislead the intended audience (for example, statements intended as puffery but which are in fact capable of objective assessment and that would be understood by the audience as statements of fact) they may nevertheless have engaged in conduct prohibited by the TPA.

Consequently, companies need to avoid using false or unclear images, claims and offers to promote products.

Advertising agencies, as well as the companies whose products are advertised, may be liable under the TPA (as either a principal or accessory) for misleading or deceptive conduct, depending on whether the agency merely relays the information provided by the client or adopts it itself. If an advertising agency knows of the facts which allow the advertisement to be characterised as misleading or does more than merely prepare the advertisement, it may also be found liable for breach of section 52 of the TPA.

Australian privacy and telecommunications laws

Organisations must also consider their obligations under Australian privacy legislation when using their customers' personal information. The *Privacy Act 1988* (Cth) (**Privacy Act**) applies to private sector organisations with an annual turnover of more than $3 million, and to certain smaller businesses (if they trade in personal information or are related to larger companies). If companies fall within the ambit of the Privacy Act, they must ensure that the methods by which they handle, store and use personal information comply with its requirements.

These requirements include that a company take reasonable steps to ensure that individuals from whom personal information is collected are made aware at the time of collection the purposes for which the information is being collected; that the company only uses personal information for the primary purpose for which it was collected or any related purposes that the individual would reasonably expect; and that the company provides a privacy policy. Companies may also use personal information for the purpose of direct marketing, but only if certain conditions are met, including that it is impractical to seek the consent of the recipient of the marketing and that they are given the opportunity to opt-out with each communication.

All telecommunications carriers and carriage service providers in Australia are regulated by the *Telecommunications Act 1997* (Cth). Under this Act, carriers and carriage service providers (and their employees) are prohibited from using or disclosing any information or document which comes into their possession through the course of their business. Finally, organisations must always consider the reputational issues that may arise from misuse or inadvertent disclosure of personal information. For instance, applications that employ GPS or other location-aware technologies in order to target consumers with location-specific advertisements may elicit concern and criticism from the targeted recipients.

The outlook

Mobile advertising is an increasingly important medium for advertisers, mobile service providers and the telecommunications industry. However, organisations who wish to offer mobile advertising services, or to advertise products using mobile advertising platforms, must carefully consider both the legal and reputational implications of employing these evolving platforms.

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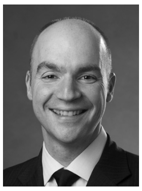

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