

SPECTRUM SPEAKS

THE COMPANY NEWSLETTER OF
SPECTRUM COACH & SPECTRUM LAWYERS



We can't believe it's already the end of January 2022! We also cannot believe that we are fortunate to be into our third year of association between Spectrum Lawyers and Spectrum Coach. Some might say we are crazy to be married and work together, whereas others who know us will say that is why we work so well for our clients. We love what we do because we see the effects for our clients, whether it be generating that next sale, securing the next site start, negotiating favourable terms in these difficult market conditions or resolving a dispute.

Offering a *spectrum* of services in both business sales, operations and legal services provides our clients with a wholistic approach they cannot get from any other business. But more importantly, we like to learn from our clients too. We like to understand their business as no one client is the same and we like to tailor our services accordingly.

Fred and Donna combined have over forty years experience in the housing industry and are passionate about the industry and their clients. We hope you enjoy this edition of Spectrum Speaks which offers an insight into our businesses and also some articles to provide you with information on areas which are hot topics for some of our clients.

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New year, new services

BY DONNA ABU-ELIAS

2022 has not started off the way most of us expected or hoped it would. With surging COVID cases and pressure continually placed on the construction industry, it's easy to feel overwhelmed.

But rather than focus on the negativity of the current situation, we have decided to stay positive, focus on the things we can control and channel our energy into some exciting projects for 2022!

This year is already shaping up to be a busy one, with a lot of work being carried on from last year. Below is a snapshot into some of the areas we are working on:

- Unfortunately, 2021 saw many builders go into administration (whether voluntary or involuntary) which left some owners without a builder. We are assisting clients with their Domestic Building Insurance claims with VMIA and assisting clients negotiate new building contracts with new builders.
- Representing clients in both the Supreme Court, County Court, VCAT and DBDRV in relation to:
 - * Building disputes relating to defective building works, slab movement, adequate site drainage. These cases are complex and involve large volumes of documents, expert evidence, witness statements by clients and/or their representatives/contractors. They are also very lengthy given the delays in the Courts and Tribunal at the moment, so during the process we assist clients consider reasonable settlement options.
 - * 2021 was a difficult year for cashflow for many builders and this saw a rise in payment claim disputes, whether it is representing an owner against a builder who has wrongfully claimed a progress stage (as the staged works are not complete) or whether it's representing a builder where the owner has not paid the progress claim. This may include where the owners have wrongfully taken possession of the property prior to payment and/or repudiated the contract by not complying with their contractual obligations.
- As many know, litigation is lengthy and expensive, therefore we facilitate negotiations and settlements between the parties where litigations is not a viable option. Each negotiated outcome depends on the facts and the parties' appetite to settle.
- Pursuing claims by builders against contractors for recharges arising from the contractor's defective workmanship or joining contractors to claims issued by owners. As builders may be liable to owners for generally up to a 10-year limitation period in Victoria, there needs to be accountability between the builders and their contractors and/or suppliers to ensure the risk allocation is fair and reasonable. Where a claim is brought against a builder, there may be some instances where such claims arise due to the workmanship of another party (eg, a plumber, registered building surveyor, concreter, carpenter etc). Whilst the builder is still liable for their own obligations under the contract and legislative requirements, we advise and assist builders (or other parties) consider what avenues are available to apportion to the liability in appropriate cases.
- 2022 is also a year where businesses are venturing into new areas or extending current services, which requires us to assist our clients by helping them obtain trademarks on new logos, names or slogans. It is exciting to assist clients with their growth and advise them along the way about procurement contracts, terms and conditions, websites, and advertising.



- Sometimes builders (or third parties) may choose to buy-back the property to avoid litigation, and where this is in the interest of all parties, we will negotiate such settlements, and now that we offer conveyancing services, we act as conveyancers to prepare the necessary contracts and documentation and finalise the settlement.
- Some clients are seeing 2022 as an opportunity to grow their business, and they are purchasing land to build a display home. We assist our clients by reviewing their display village contract of real estate and again as we now provide conveyancing services, we act as our client's conveyancers to finalise the settlement of the property.
- Building projects are complex and during the project a client may wrongfully terminate the contract (amounting to a repudiation of the contract) or may issue an invalid notice. We provide timely advice to our clients to guide them throughout the duration of their project. Likewise, we advise our clients and prepare the required notices for clients who wish to end contracts during a project (or before the works have commenced) to ensure the proper process is followed to avoid a breach of the contractual requirements. Our aim is to assist our clients manage their projects to avoid unnecessary litigation where possible.

- Assisting clients respond to VBA investigations for breaches of registration obligations or breaches of legislation.

As we indicated at the end of last year, we have introduced two new areas – Conveyancing and Probate. This is largely due to Hannah Smith joining our firm. With the combination of Donna's 10+ years' experience in conveyancing added with Hannah's extensive experience, this is an area we can offer our clients. Likewise with probate, Hannah has practiced in probate law for many years so this will see a fuller service offered to clients who engage Spectrum Lawyers & Consultants for their Wills.

So, although 2022 may not look exactly how we expected it to, we are entering the new year with a positive mindset, and we are excited to be able to assist our clients in a broader spectrum of areas.

**"We are excited to broaden
our spectrum of services in
2022."**



Case Study: Triple R Builders

BY FRED ABU-ELIAS

Here at Spectrum Coach, we're proud of our fast-growing list of clients, but we do believe it's important to acknowledge those who have worked with us for quite some time.

In this article, we'll be taking a look at three of our longest-standing clients, who we've nicknamed our "Triple R Builders". Rosin Bros, RODA Developments and Ramsay Builders have been working closely with our team for some time now with a focus on increasing leads and sales. Although these businesses are quite similar in nature, the support they've needed, and therefore our approach, has been quite different. These builders have taught our team a lot about the diversity of businesses within in the new homes industry, and at times, challenged us to come up with new and improved strategies to close sales.

RODA Developments

RODA has been working with Spectrum Coach since August 2020, with the aim of improving communication to increase sales. Along the way, we taught the RODA team that some things are better said face to face, while other information should be transmitted via email. RODA has also learned about the power of selling in stages and the importance of understanding what the next stage is for each client. RODA often turn to our team to help hold them accountable in order to avoid complacency. Each time we regroup, we brainstorm new sales strategies to increase sales and improve functionality. If we identify a weak area of the business, we focus on identifying solutions to improve this.



Pictured: David Maiolo

Ramsay Builders

Before working with Spectrum Coach, Ramsay Builders would assess clients based off a questionnaire they would send, asking clients to fill it in and send it back. Once we started working with them, we slightly adapted this clever process and suggested that they start to have a conversation with the clients based off their responses to the questionnaire, to build stronger relationships with potential clients.

Ramsay Builders have changed their sales process dramatically, by implementing new processes and steps, and analysing each individual client to understand their needs and motivations better. We're very pleased to say that this has increased sales as well.



Pictured: Brett and Anthea Ramsay

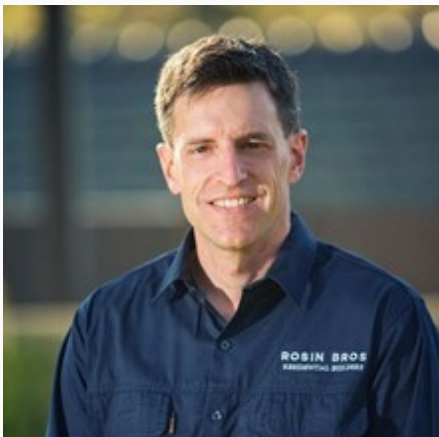
"We believe it's important to acknowledge those who have worked with us for quite some time."

Rosin Bros

Rosin Bros have only been working with Spectrum Coach since March 2021, but in that short time we have seen a significant improvement in their sales, their conversion of leads to appointments and ultimately, conversion from appointments to contracts.

Rosin Bros were facing the common issue of putting too much time and work into a potential sale, for little return. This meant that they were not progressing to the next stage of the sales process, which caused delays and wasted time.

Since identifying this issue, Rosin Bros have been able to focus on growing their business and improving their processes, and to do so they have started to make changes to their business internally.



Pictured: Robert Rosin

What's so special about our Triple R Builders? Each of these three builders have developed a successful and trusting reputation in their respective communities, in what they do and what they deliver. This is because they take the time to build relationships with their clients, allowing them to understand their client's lifestyle and enabling them to deliver a product that works for their client's unique needs.

The biggest change for these industry leaders is that they now identify themselves as salespeople, not just business owners and builders. Becoming a salesperson is in fact a skill, and there needs to be a process to follow to become successful in this field.

Spectrum Coach want to extend a big thank you to the *Triple R Builders* for their continued support and their trust in us to guide and mentor them. These clients are on track to keep smashing sales targets and will continue to manage their businesses efficiently.

The next step involves challenging the norm and seeing how they can improve as salespeople and business owners, with the guidance of Spectrum Coach.

"Spectrum Coach want to extend a big thank you to the Triple R Builders for their continued support and their trust in us to guide and mentor them."

Cost escalation – a builder's right to charge for increased labour and material costs

BY DONNA ABU-ELIAS

COVID has affected construction projects in more ways than one – whether it be time delays due to lockdowns, shortage of trades or materials, workers in isolation or price increases. All of which have had a huge impact on a company's cashflow. It is common for our firm to be asked by builders how they can protect their profit margins when entering into building contracts for projects which may not start for some time.

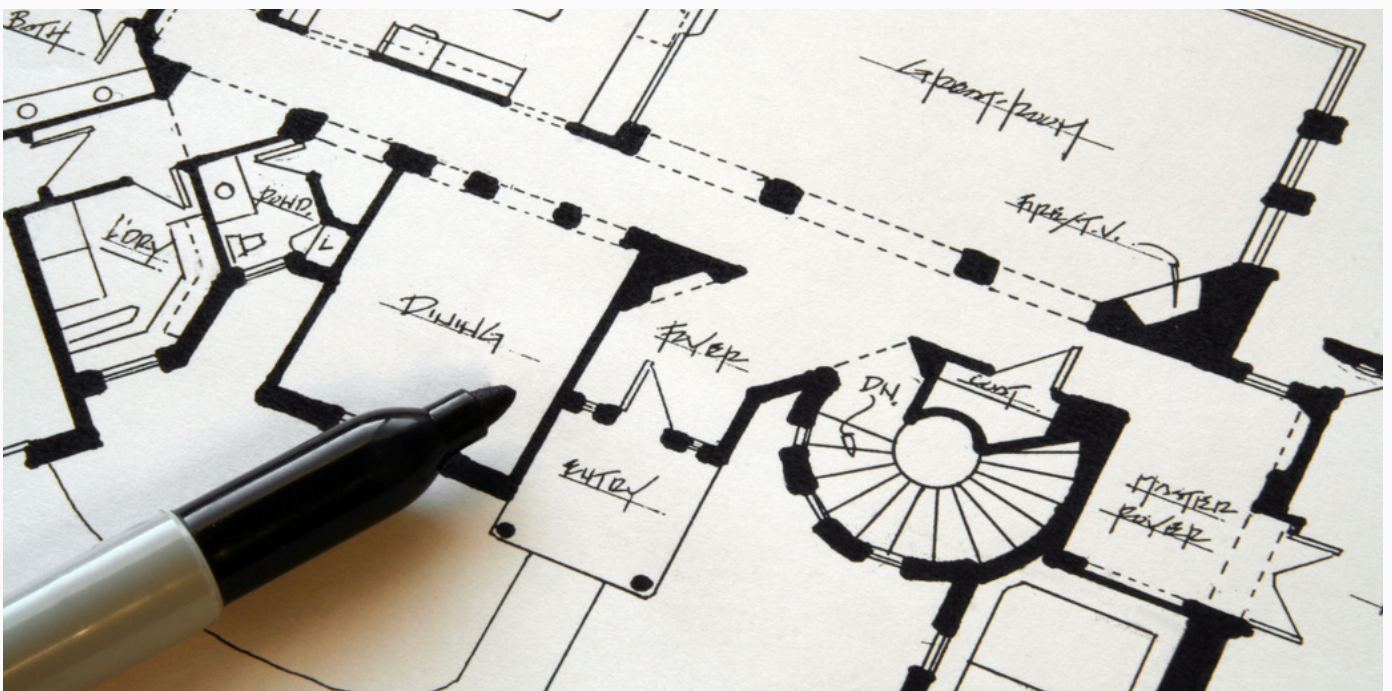
Section 15 of the Domestic Building Contracts Act (DBC Act) prohibits a builder from having a cost escalation clause in a domestic building contract where the value is less than \$500,000. A 'cost escalation clause' as defined by section 15 of the DBC Act is "a provision in a contract under which the contract price may be increased to reflect increased costs of labour or materials or increased costs caused by delays in carrying out the work to be carried out under the contract". It is noted that this section does not apply to government taxes or charges or prime costs / provisional sums.

So, what can a builder do if they are faced with large increases as we've seen arising from COVID? How can a builder protect their profit margin?

Can a builder issue a variation?

A true variation is a change to the plans or specifications in the building contract. Therefore, if the only change is a change to the price, this is not a true variation and an owner is now bound to accept the builder's variation for increased costs. There are two exceptions to this:

- The parties can agree to sign a variation, but the variation should clearly acknowledge the agreement between the parties (and acknowledge that there is no change to the plans and specifications)
- Where a product is not available or the parties have agreed to alter the plans and specifications, then the associated price increase can be changed by way of a variation. It is important to ensure that a variation notice is issued and signed in accordance with the building contract



Are the items prime costs / provisional sum items?

Where the building contract properly allocates costs as prime cost and provisional sum items, the builder may be entitled to charge the owners for increases in the actual costs. However, caution should be given as there are strict requirements under both the DBC Act and the building contract when costing prime costs / provisional sums and also when adjusting these amounts, so it is important the builder strictly adheres to these requirements to be able to enforce any price adjustments.

It is important to issue extensions of time

COVID has seen many delays due to lockdowns, difficulties in obtaining materials from overseas and a shortage of labour. It is therefore important that proper notices be issued for any delays. Whether a builder wishes to impose liquidated damages for the extension of time or not (as the builder wants to stay friendly at the beginning of the project), it is still important to extend the building period with a proper notice of extension of time as soon as possible, to avoid having to pay the owner liquidated damages at the end of the project if the building period blows out. Also remember that some contracts permit extensions at the commencement of works, so if the works are delayed in commencing, remember to get your EOT in.

Builders should also be mindful of section 41 of the DBC Act 1995 (Vic). This section permits an owner to end a building contract if the contract price increases by 15% or more where “the reason for the increased time or cost was something that could not have been reasonably foreseen by the builder on the date the contract was made” (s41(1)(b)). It is noted that, any increase does not include any amounts which “arise as a result of a prime cost item or a provisional sum or that is caused by a variation made under s38.”

If the owner seeks to end the contract under s41 of the DBC Act, the “owner must give the builder a signed notice stating that the building owner is ending the contract under this section and giving details of why the contract is being ended.”

Sometimes a builder does want to bring the contract to an end, so this may be a good option (depending on the circumstances).

Especially as s41(5) provides that if the contract is ended under this provision, the builder is entitled to a reasonable price for the works carried out under the contract to date (but pursuant to subsection 6, no more than you would have been entitled to recover under the contract). The only question therefore is what is a ‘reasonable price’, this may not be agreeable between the parties and you are limited to the amounts as per the contract and no more.

Can a builder just end the contract because it is not financially viable for to continue?

Not necessarily - at least not without mutual consent. The building contract will set out the rights to terminate a contract. Usually, termination can only arise for breach of contract. Therefore, escalated costs would not be a right to end a contract, unless the parties both agree to bring the contract to an end. It is important to document any mutual ending of a contract by way of a terms of settlement, deed or agreement.

There are also some important considerations before entering into a building contract:

- Some builders are considering moving away from the standard fixed price building contracts and entering into Cost Plus Contracts. However, builders should note that a Cost Plus Contract may only be entered into where the value of the building works is for \$1 million or more.
- Look closely at your procurement contracts with your suppliers. Try to lock in prices to avoid price rises during a building contract (or find an alternative supplier where possible).



How do you budget sales and forecast?

BY FRED ABU-ELIAS

At the beginning of this year, I started reflecting on what I wanted to achieve in 2022. Last year I worked on my budget and forecasted what I wanted to achieve for my own business. I have done the same with my builders, I always ask the crystal ball question, how many sales do you want?

Each builder should know what their breakeven point is and how many sales they need to cover costs. We then work out what they want to achieve above and beyond this and divide this number into months. From here we can work out how many leads and appointments we need to convert to achieve these goals. There is a science to it.

Once the budget is set, I recommend having a weekly sales meeting, covering the following items:

- Number of leads
- Number of future appointments
- What is your follow-up date for the client?

When coaching I always ask the question, when are you predicting to close the client? In most cases, we can forecast three months out. The way we do this is by understanding where the client sits within our sales journey and by setting expectations with the client. You should break down your yearly sales budget by quarters and also by months, as well as budgeting for a number, we should also add a name to that number on a monthly basis.

As a business owner when managing a sales consultant, you should refer to your budget and your monthly sales forecast to make sure you are on target to achieve your monthly sales budget / forecast. I am often asked; how can you predict how many sales you are going to get? The answer to that is, if you have leads coming in and you have followed a sales process, you should be able to predict sales three months into the future.



What is a reasonable scope of remediation for defective works?

BY DONNA ABU-ELIAS

It is common for Spectrum Lawyers to be engaged by either the builder or the owners where the parties acknowledge that the building works may be defective (that is, there is an argument that the building works were not carried out in a proper and workmanlike manner (clause 8(a)), and/or that the building works were not carried out with reasonable care and skill (clause 8(d)). However, the dispute really arises because the scope of remediation cannot be agreed between the parties.

This very issue was considered by the Victorian Civil and Administrative Tribunal at the end of 2021, in the case of *Lu and Tang v Metricon Homes Pty Ltd* (Building and Property) [2021] VCAT 1359. This case related to the supply and installation of engineered timber flooring to the ground floor (of a two-storey residential dwelling). In this case the owners had engaged Metricon Homes (the builder) to design and construct the two-storey dwelling and included in the contract was the supply and installation of the timber flooring. The owners claimed that the flooring to the ground floor was defective and pursued the builder for damages totalling \$155,413.20 on the basis that the owners wanted all of the floorboards on the ground floor to be removed and replaced.

Whilst the Tribunal found that the builder had breached its statutory warranties (as contained in section 8 of the DBC Act 1995 (DBC Act) and those replicated in the building contract), the Tribunal was required to consider whether the replacement of all of the floorboards on the ground floor was necessary and reasonable to rectify the defective work. It is noted that Metricon contended that peaking at the end of the floorboards is a known risk where the home is left unheated over the winter months. However, the Tribunal did not accept this as no warnings had been provided to the owners by the builder at the time of handover. Further, Metricon also asserted that the owners had failed to mitigate their loss by refusing to accept Metricon's offer to re-sand and re-stain the flooring (and if they had accepted the offer the owners would not have incurred the cost of alternative accommodation and removal of furniture). The Tribunal did not accept this argument as the Tribunal believed that at the time the offer was made by Metricon (in mid-2019) the owners did not have any independent opinions about the merits of Metricon's proposal.



The Tribunal found that replacing the entire ground floor flooring was not necessary and reasonable but rather, the builder could in fact re-sand and re-stain as an appropriate remedy. Therefore the owners are not entitled to the cost of the full removal and replacement of the timber flooring on the ground floor as it is disproportionate to the nature and extent of the defective work. This decision, namely to consider the 'reasonable and necessary' test can be found in many cases, to support the test of whether the rectification works (as defined in *Bellgrove v Eldridge* [1954] HCA 36) are:

- Necessary to produce conformity with the terms of the contract
- The reasonable course to adopt in all the circumstances

In the decision of Senior Member Walker in *Claredon Homes Vic Pty Ltd v Zalega* [2010] VCAT 1202, Senior Member Walker summarised the decision in *Ruxley*, that suggests that account can be taken of the following matters at least:

- Whether and to what extent the work, although not in conformity with the contract, is nonetheless serviceable
- Whether and to what extent the defect has affected the value of the work or the building as a whole
- The cost of rectification, the proportion that the breach bears to the cost of rectification and whether the cost of rectification would be wholly disproportionate to the real damage suffered by reason of it

"When discussing remediation scopes it is important to consider what is necessary and reasonable."

- The likelihood that, if rectification cost is awarded, the sum so ordered will actually be spent on rectification. Obviously, a successful plaintiff can spend his damages as he sees fit but this may be a useful indicator of whether the amount sought is greater than the real loss suffered

Considering the above, VCAT ordered the builder to pay the amount of \$28,913.81 to the owners as this was the appropriate remedy (which was reasonable and proportionate to the nature and extent of the defective work) - the cost to re-sand and re-stain (\$13,428.80), diminution in the life of the flooring (\$13,841.61), accommodation for 6 days (\$818.40) and furniture removal (\$825.00).

Accordingly, it is important for parties to remember when discussing remediation scopes with owners that they are only required to consider what is necessary and reasonable and all communications should be framed in this manner. Whilst it may not always be possible to convince an owner on what is necessary and reasonable, it will assist in mitigating your loss should you find yourself in a dispute.



Are sales about closing the client?

BY FRED ABU-ELIAS

Are sales always about closing? You can answer this in so many ways, however, the way I like to answer this is to start with - what does it take to close a sale? If you remove the pressure of closing and hitting monthly targets and instead focus on building relationships, then for me sales is more about how many relationships I can create and build on.

When I started Spectrum Coach, I had to go out and sell my business. I didn't have a tangible product that a client could see, so I had to sell myself and my years of experience. I had to build new relationships and maintain those relationships. When I would walk into a meeting, instead of starting off by doing an entire spiel about what I could offer them, I would start by showing them what I could do for them, advising them how they should sell, and I was always willing to give them free training.

A while ago I wrote an article called "the importance of relationship building when starting a new business". Relationships are one of the most, if not the most important aspects of sales. If you do not have a relationship with your clients, they will not buy from you. For me, when selling I genuinely wanted to get to know my clients, what their motivators were and why they did what they did. It's always great to listen to someone's story, not because it will lead to a sale but because it helps you understand how important you are to them and why they are sitting in front of you.

The close will always come in the end, people buy from people they trust, and you gain trust by building a relationship. I'm glad to say that I have strong relationships with all my clients and that to me is my number one priority.



SPECTRUM LAWYERS & CONSULTANTS

Spectrum Lawyers provide legal services with legal expertise across all areas of building & construction law.

Building and construction law

- To assist builders and/or owners efficiently resolve building disputes
- Developing streamline procedures and training to manage the spectrum of challenges in today's market
- Advising consultants and contractors on their legal obligations under the Building Act and Building Regulations
- Advising building surveyors on compliance issues
- Debt recovery
- Dispute resolution at private mediations, DBDRV, Tribunal and Courts
- Reviewing building contracts and advising on rights and obligations

Conveyancing

- Assisting clients with the purchase or sale of residential or commercial property

General Counsel Services

- Reviewing and advising on procurement contracts and licenses
- Advising on general business law and day-to-day business operation issues
- Drafting policies
- Reviewing and drafting policies and terms and conditions
- Negotiating contractual documents
- Providing training (contract law, Australian Consumer Law, advertising, warranty, etc.)

Probate, Wills and Powers of Attorney

- Administering estates
- Drafting Wills and Powers of Attorney to protect your family and assets

CONTACT DONNA

E: donna@spectrumlaw.net.au

M: 0428 545 688



@spectrum_law



@spectrumlawyers



@spectrum-lawyers



SPECTRUM
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SPECTRUM COACH

Spectrum Coach provides 5 core areas of service, Sales, Marketing, Operations, Home Designs and Business Coaching. They are designed to understand your business intimately, this allows us to provide the focused, dedicated support that we hold to high standards to all our clients. We understand that every business is different, and will have different needs. Choose one of our services or choose them all – whatever works for you and your business.

Sales

Without sales, you don't have a business. Our training gives you guidance at a micro level, arming you with specific strategies that are proven to close sales.

Operations

Your front end and back end operations are key to turning a profit. From taking the initial sale to getting to a site start, we have designed processes that improve efficiencies, increase profits, and that are easily adopted, helping you to manage your jobs more effectively.

Design & Drafting

Our extensive design library has a range of plans you can use to sell your new homes, and are fully customisable. Our training will equip you with the tools you need to sell these plans based on their respective features and benefits. Need a custom design? We can do that too.

Marketing

You're busy doing what you do best – building homes. Let our in-house team help you market your business so you can do more of what you love. We can guide you through marketing your brand, generating leads, and can even help you build a website. We can also manage your social media, including writing content and posting on your social media pages.

Business Coaching

We get it - running a new homes business is complicated. As the business owner, you have to be across every aspect, and not all of them are going to be your specialty. Our general business coaching gives you a team that are skilled in all areas of business, from construction to finance.

CONTACT FRED

E: fred@spectrum.coach.com.au

M: 0447 062 996



@spectrum.coach



@spectrumcoach1



@spectrum-coach



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