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LAWYERS

The Guide

Buying a Business

The practical legal guide on buying a business for buyers and their advisors

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Who Should Use This Guide?

This Guide is designed for use by buyers of businesses, business brokers and professional advisers when buying a business. The purpose of the Guide is to explain some of the key issues, specific risks and the potential for getting things wrong and some opportunities where professional advisers can assist in securing better decisions.

How Should the Guide be Used?

For a buyer (purchaser), the Guide provides an important overview of issues to consider when buying a business. It should be helpful in understanding how the law will work, what's included and excluded from the business, timing, notices and so on.

Helpful Features

In the Guide, we use the following special types of annotations:

- Buyer Opportunity – opportunities that can improve the business.
- Buyer Beware - dangers and pitfalls.
- Notes – general notes and examples.

Please pay particular attention to these notes as they relate to you. Unfortunately, these are where buyers often miss something or get it wrong.

Warning

You **should not** use this Guide as a do-it-yourself tool, because the risks in doing so are extremely high. Every business sale transaction is different and requires the input of professional advisers – typically your lawyer, accountant, finance broker and financial advisor.

Get Very Involved

Many business people become impatient with details and there is a temptation to just say to an adviser: "you sort out the paperwork". Unfortunately, only the buyer truly knows their desired outcomes and what they hope to achieve. There is no substitute for working through every single detail until you are satisfied that you are getting what you are paying for.

If in Doubt, You Must Ask

When a draft Contract is finally submitted to you, it is important that you read the whole document and understand what every item means for you. For this, use our Guide – REIQ Business Sale Contract if you are in Queensland. There is a simple rule: if you don't understand something, it may cause a problem later on. So if in doubt, ask your lawyer.

Let's Get Started….

How Should You Structure the Business?

Structuring has two important benefits:

- tax management – not paying more tax than you have to; and
- asset protection – protecting your assets from being seized or sold if you are sued.

When it comes to buying a business, good structuring is about determining which of the following structures is going to give you the best tax minimisation and asset protection:

- buying the business personally or in partnership; or
- buying the business in a company established and controlled by you; or
- buying the business in a trust established and controlled by you or a corporate trustee.

Each type of structure has varying legal requirements, liability limitations and tax consequences. In choosing the most suitable form of business structure it is important to have an understanding of the characteristics of each type and to consider its advantages and disadvantages.

Tax management is often the function of your accountant or financial advisor. They will advise on the impact of a given structure on (i) income tax, on the profit of the business and (ii) capital gains tax (CGT) when the business is sold. The income tax rate will be different for each of these structures. For example, a company's tax rate (at the time of writing) is a flat 30%, whereas for an individual it is only 30% up to $80,000 (where it then changes to 37% after $80,000 and 45% after $180,000). So the higher the profit, the more tax an individual will pay as opposed to a company. However, a company will not (for example) be entitled to the 50% CGT discount when selling a business owned for more than 12 months. This example illustrates the complexity of the tax side of structuring and the importance of getting the right advice.

As to asset protection, one of the risks in business is that the business owner does something wrong, the business owner is sued and the business owner loses everything. Therefore, the goal with asset protection is to separate the business owner (person) from the asset owner.

- Simple example: if someone buying a business owns their house personally, they may set up a company to buy the business. Therefore, if the business owner (the company) is sued as a result of something the business does, the house is not owned by the company and therefore cannot be targeted to satisfy any award of damages by a court if the company loses. This can be slightly complicated by the existence of personal guarantees and / or a director of the company being sued as well – but in general terms, the goal is to achieve effective separation between all aspects of the business and the individual / family.

- When buying a business, it is important to consider structuring before entering into a contract. If left until after an opportunity is found, it could be too late because the legal *Buyer* as per the contract may not be the structure which is in the best interests of the buyer, and changing this after-the-fact may be both costly and impractical. Choosing which structure is right for you is not a split-second decision. It requires consultation with your lawyer and accountant. Then depending on the structure chosen, additional time will be required to set up the company or trust.

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Therefore, once you determine the type of business you are looking for, you should speak with your lawyer and accountant about "structuring". This will ensure sufficient time is available to establish the structure before entering into the contract.

What Assets Are You Buying?

When buying a business, the buyer must ensure that all the assets used (to make the business what it is) are included in the sale. Typically, most businesses comprise the following:

1. goodwill;
2. fixtures;
3. furniture;
4. plant and equipment;
5. industrial and intellectual property;
6. stock;
7. work in progress; and
8. permits and licences.

Whilst some standard business sale contracts provide that all assets of the business (whether itemised in the contract or not) are included in the sale all assets of importance to the buyer (including intellectual property) should be itemised and included in the contract. Also, if the seller wishes to retain any assets of the business, such assets should be specifically excluded in a special condition or schedule to the contract. This is to ensure that there is no doubt and potential for unhelpful disputes.

A buyer must also ensure that the seller does in fact own all the key assets and not some other person or company. If this occurs, there may be a problem using that asset in the business. This could cause a significant disruption or loss to the buyer.

- Please take caution when a seller seeks to exclude assets of a business. You should recommend that they obtain advice from their accountant first. An important consideration in a business being sold as a "going concern" and consequently GST free is that all of the things necessary for the continued operation of the business are included. A failure to do so will make the sale subject to GST, again capable of causing a problem.

How to Protect the Goodwill?

One of the most important features of a prospective business is its goodwill, which has sometimes been described as the very 'sap of life' of a business.

As a potential buyer, what would you do if you bought a business with significant goodwill, only to have the seller open up a competing business nearby and trade off the goodwill of the business that was sold to you? How would you react if the seller used confidential customer lists of the business to poach your customers for their newly-created business?

This is where 'restraint of trade' clauses in contracts can help protect you as a buyer. Unless you have a reasonably effective restraint of trade clause in the business sale contract (or as a separate agreement) you may not be able to do anything. Consequently, you would not be getting what you bargained for.

- As a buyer you may be presented with a standard contract, such as the REIQ contract, that provides a standard restraint of trade by geographic area and time only. This may not be enough, for

example, such restraints may provide that the seller cannot start a competing business to the one sold within a defined radius of say, five kilometres, for a defined period of say two years.

While this may be useful when a majority of the business' customers are within a certain distance from the business premises (e.g. takeaway shops, grocery stores and news agencies), it will not be satisfactory when the customers are spread far and wide, as in the case of professional service firms, manufacturing businesses and specialised retail shops. Therefore, a buyer also needs to consider restraining other conduct by the seller after settlement, for example:

1. restraining competition - the seller providing competing goods and services;
2. assisting competitors - the seller promoting or assisting another competitor;
3. soliciting customers - the seller taking the customers of your new business;
4. interfering with employees - the seller trying to poach the employees of the business; and
5. the seller using or disclosing confidential business and financial information of the business.

- It may also be the case that restraining the seller alone is not enough. For example, if the seller is a company, then a director or shareholder who is not personally restrained may start a competing business in their own right or in another company they control. Therefore, restraints of shareholders, managers and key employees of the seller might also be required in order to protect the goodwill of the business.

- Unless the contract provides all relevant restraints against the seller, the buyer's interests might not be protected. However, not all restraints are valid at law. The challenge therefore is to include restraint clauses that cover your practical needs, but without being so wide and unreasonable that they may be invalid and unenforceable. The three main limitations that are imposed in most types of restraints to ensure reasonableness relate to:

  1. the scope of the activity prohibited;
  2. the duration of the restraint, e.g. time; and
  3. the area within which the restraint operates, e.g. geography.

  The total restraint should be reasonable in the interests of both the buyer and the seller.

Unless you have a reasonably effective restraint of trade clause in the business sale contract, the goodwill of your new business might be seriously undermined and you will not be getting what you bargained for.

Intellectual Property

A business's intellectual property (IP) can also be one of its most valuable assets. It may be essential to the continued operation of the business. For this reason, a buyer of a business must ensure that the IP is properly identified and dealt with in the business sale contract.

What is IP?

- The key components of IP are:
  - patents - protect inventions;
  - industrial design - protects aesthetic creations determining the appearance of industrial products;
  - trademarks - protect distinctive marks (name, motto or symbol) that identify a business or its products or services;

- copyright - protects literary, artistic, musical or other creative work (the expressions of an idea).

- In essence, the business sale contract must make provision for:
    - the business being sold including all the IP;
    - the seller promising it owns (and is the sole owner) all the IP;
    - the seller promising that all the IP is unencumbered;
    - the seller providing the buyer with all documents and other assistance necessary to transfer the IP to the buyer on completion;
    - any trademark specifically noted in the contract being registered on completion;
    - whether the IP is all that is required to run the business;
    - whether any fees are payable in relation to the IP;
    - whether the seller has granted any licences or rights to other parties to use or otherwise deal with the IP;
    - whether anyone is claiming, or may claim, a right to the IP; and
    - whether anyone claims that the IP infringes a third party's IP.
- It is important that the business sale agreement also includes warranties (promises) by the seller that the IP:
    - is valid;
    - does not infringe another's IP;
    - there are no rights granted to others with respect to the IP; and
    - there are no claims, or potential claims, against the IP.

These warranties, at the very least, are required. If any IP is significant to the buyer, there are likely to be other warranties required or issues that must be addressed.

- For example, with patents, warranties are required from the seller that the seller is the true and first inventor of the invention and the invention has not been used or published in Australia before the patent application was filed.

How Should Stock be Dealt With?

Every business is different in regard to its stock, so every sale contract must be suited to reflect the best way to deal with the business stock at settlement.

In some business sales the stock is included in the purchase price. This is commonly referred to as 'walk-in walk-out'. In many other business sales the price of stock must be ascertained just before settlement (usually at the close of trade the day before).

- Where the price of stock is to be added to the purchase price, it is important that the following queries be considered before entering into the contract:
    - Is there to be a minimum and maximum amount of stock at settlement?
    - What is the effect of existing retention of title clauses in supplier agreements over the stock (i.e. ownership of stock does not pass to the business owner until the supplier is paid in full)?

- How is the stock to be valued; will it be valued at wholesale cost, retail price, any discounts due to the age of the stock or for stock partially completed?
- Is a professional stock-taker needed to undertake the stock-take or will the agree between themselves; If so, who will the stock-taker be?

What is a Fair Lease?

Whether buying a business with a lease in place or subject to a new lease being issued, there are some key terms and issues that should be considered before proceeding with the purchase. Every buyer's requirements for a lease will be different, so what is a good lease for you may not be a good lease for the next person.

- There are four key issues to consider with a lease:

1. Are payments required under the lease sustainable?

   Whilst the rent that the buyer is required to pay immediately upon becoming the owner of the business might be reasonable, it is important for a buyer to be satisfied with the manner in which the rent will be reviewed under the lease (usually every year) and what other payments are required under the lease. Rent is often reviewed on each anniversary of the lease start date. The rent is often increased by a fixed percentage, CPI or a "market" review. Other payments required under a lease also include a contribution to outgoings and promotion levies which all need to be considered. Also, the buyer will normally be required to pay a security bond or bank guarantee before taking possession of the business (usually three months rent). If unexpected, this can put a serious dent into capital.

2. Can the premises be used for the business?

   All leases have a defined use. Depending on where the business is situated and the number of shops in the centre, this can be defined as wide as "retail" or as narrow as "sale of food as per the attached menu". What is important is that the definition of the use allows the buyer to undertake all their desired activity. Also, a lessor and seller will not usually guarantee that the particular business can be operate from the premises. Whilst the business may have traded from the particular premises previously, the buyer should check with a town planner that the use is lawful. Otherwise, the buyer could find themselves bound to a lease in which they cannot operate their business.

3. Is the length of the lease sufficient?

   Leases contain a fixed term. This is the period in which the lessee can operate the business. Some leases also contain option periods. These are further periods available to the lessee if they wish to exercise the option. If the particular location of the business is important to its success, the longer the lease term and any options the better. If the length is insufficient, the buyer could try to negotiate a new lease or an extension of the lease term as a condition of buying the business.

4. Are fit-out/refurbishment requirements in line with your business plan?

   When the premises were leased to the founder of the business, it was probably an empty shell. The founder would have been required to fit-out the premises. Most leases require the premises to be "refurbished" at some point during the term. What is required varies from lease to lease, but it often requires (at least) the re-treating and painting of all surfaces and

replacing the floor coverings. Some leases also require a new fit-out. If this is the case, it needs to be factored into the projections of the business sale as it could be an expensive exercise.

Given the significant impact of the lease on the success of the business, it is important that these items are addressed before proceeding with the purchase of a business.

It is also important to start on the right foot with the lessor. A business operated from leased premises cannot be transferred to a buyer without the lessor's consent. Negotiations with a prospective lessor will also be much smoother if you start off on the right foot. A lessor will normally want to ensure that the buyer is of good character, has sufficient experience to run the business well and has the financial standing to support the lease obligations. (Especially if the business hits hard times).

Therefore, it is important for the buyer to impress a lessor in the short time required to complete the business sale contract. This is often achieved by providing the lessor with the following documents in advance of a meeting with the lessor:

- two business references;
- statement of assets and liabilities;
- summary of business experience/CV; and
- business plan.

It is common for the lessor to want to meet the buyer of a business before giving consent for them to take over the lease. First impressions are important so prepare and dress well for the part. Demonstrate to the lessor that you are capable of taking the business to a better level than the current owner!

Why is Due Diligence Important?

Often the basic information provided by a seller or its agent at the time you show an interest in buying a business does not give a complete picture of a business and its true value.

- Due diligence is a buyer's opportunity to evaluate a business and confirm that what has been represented about the business and its value is true and complete. Unfortunately, some standard contracts only provide a buyer a limited number of business days from the date of contract to only verify whether the financial accounts of the business are true and correct. These standard contracts do not provide the buyer and its financial advisors/accountants with time to undertake investigations of the goodwill, the licences and accreditations held or required by the business and its employees, whether the company's intellectual property is appropriate to the business and any included plant and equipment is in good working order.

Some of the things a buyer will seek from a seller in due diligence are:

1. a complete asset list with all relevant details of the assets (such as age/condition/market value);
2. details of and copies of agreements for any hire, lease or licence of assets;
3. copies of all contracts relevant to the business, including those which may require the consent of the other party to assign;
4. details of all statutory and other licences required to operate the business;
5. details of all financial liabilities and commitments of the business;
6. copies of all leases, sub-leases, licences or other agreements relating to the property;

7. copies of all written contracts or if none, details of contractual terms for all employees and their roles;
8. details and copies of any arrangements, contract or understandings (written or verbal) with suppliers;
9. details of any past or current (likely, pending or threatened) disputes or litigation against the seller; and
10. copies of recent years' tax returns and details of any current tax liabilities owed.

If a due diligence is required by a buyer, then a special condition will need to be carefully drafted to address:

1. who the parties are that will be involved in the due diligence investigations;
2. the extent of the investigations;
3. the time limit or period to undertake the investigations; and
4. the confidentiality requirements of all parties involved in the investigations.

How to Deal With Employee Entitlements of Transferring Employees?

When a business is sold, the issue of paying out or transferring accrued employee entitlements of transferring employees can be problematic.

Problems arise from the myriad of laws that must be considered. For example:

- there are so many leave entitlements to consider (including sick leave, annual leave and long service leave);
- each of these leave entitlements may be governed by a variety of sources including state and federal legislation, awards, industrial instruments and where the employee has an individual contract, by the terms of that contract; and
- sometimes, an employee's continuity of service upon the sale of a business is preserved by legislation and sometimes it is not (when preserved, the buyer must honour accrued leave and the employee cannot be paid out by the seller).

Most standard business sale contracts provide for a "continuity of service" for all accrued entitlements, thus simplifying the process and reducing the cost for the parties. This basically means that all accrued employee entitlements will become the liability of the buyer. In return, the purchase price will be reduced by an equivalent or slightly lesser amount (usually 70%).

- The most important thing is that the seller and buyer consider the issue before any contract is signed, so that proper provisions may be included by the lawyers in drafting the contract.

What Business Licenses Are Required?

Does the business sale contract obligate the seller to have all licences required to operate the business prior to settlement? Are all existing licences transferable? In short, the answer is often *no*.

Licenses such as local government food licences or professional licenses such as those for real estate agents and motor dealers are not transferable. The buyer will need to apply for these licences and the licences issued by settlement in order for a buyer to operate their new business. There can also be delays in

transferring those licences that are transferable, resulting in the transfer not being completed prior to the date of settlement.

- The buyer must determine:
  - what licences, permits, consents and approvals are required for the business;
  - whether each of the licences are transferable or whether the buyer must make a new application;
  - what assistance they are prepared to provide the buyer with each licence.
- The contract must then be drafted:
  - reflecting the necessary licence details;
  - only agreeing to transfer what is capable of being transferred;
  - addressing the consequences of transferable license not being transferred at the time of Settlement due to delay; and
  - addressing the consequences of the buyer not being able to obtain any licences.

This will at least clarify the ambiguous manner in which it is dealt with under most standard contracts and allow certainty for the parties as to their expectations.

Is the Buyer Responsible for Debts & Liabilities of the Business?

Every business incurs debts and liabilities and these must be dealt with in the sale contract on a business by business basis.

Some of the issues that need to be addressed in a contract in regarding to the business' liabilities are:

- what will be the likely debts of the seller at the time of completing the sale;
- what debts does the seller have to suppliers, and do these need to be paid out on or before completion;
- are there any employees not continuing with the business and, if so, should the seller be required to pay out these employee's entitlements at settlement;
- is it likely that the seller will have any current or potential warranty claims for products or services, if so, how are these to be dealt with, will the buyer take on these liabilities, will the parties share the costs;
- is the seller involved in any current or threatened court action with suppliers, customers or other parties, if so, how do the seller and buyer intend to deal with these issues; and
- does the seller have any other liabilities to third parties that should be taken into consideration.

The last thing you need is to buy a business and to find you are unexpectedly responsible for a debt.

How Much Deposit Should I pay for a Business?

The short answer is that it depends. The amount of deposit ultimately paid will be a factor of the competing interests and negotiation between the parties.

Given the seller may take the deposit if the buyer breaches the contract and does not settle, the buyer will want to pay the least amount of money possible, especially if the cash available to them when signing the contract is limited.

On the other hand, given the seller will tie up their business for a period of time upon signing the contract and will incur costs and spend time on the sale, the seller will require the buyer to demonstrate its genuineness and ability to complete its purchase of the business by paying a larger deposit.

So what's usual? Generally a deposit of approximately 5% to 10% of the business sale price.

However, it should be more if the seller is concerned as to the genuineness of the buyer or the buyer's ability to settle. If not, the deposit has less significance.

- For example, we have recently seen a 30% deposit paid on a $70,000 business and a 0.33% deposit paid on a $15 million sale. In this large sale, the sellers were very confident that the buyers were genuine and capable of completing, the $50,000 non-refundable deposit was paid simply to cover most of the seller's legal costs in case they were wrong.

What is Vendor Finance?

Vendor finance occurs when the seller is prepared to fund part of the purchase price payable by a buyer. Typically, the seller will agree to allow the buyer to pay part of the purchase price on settlement with the balance payable afterwards. The business is transferred to the buyer on settlement.

This is different to an instalment sale where the seller retains ownership of the business until such time as the whole of the purchase price is paid. An instalment sale has many difficulties for a buyer. Whilst the buyer is in control of the business, the buyer is not the owner of the business and may experience difficulties dealing with the lessor under the lease and other suppliers and creditors of the business.

Sellers are often prepared to provide vendor finance when the money market is tight. When buyers are having difficulty borrowing money from banks, vendor finance is an option that facilitates the sale and allows the seller to achieve its desired price, even though a part will be paid after settlement.

The terms upon which finance is provided by the seller are normally contained in the business sale contract or a separate vendor finance agreement. The recording of the arrangement will mean that the seller can sue the buyer for breach of contract if the buyer fails to make payment of the balance monies owing.

As the seller will transfer the business to the buyer before receiving the full purchase price, the seller will also normally take "security" over the business or some other asset of the buyer. This could be in the form of a security over the business assets, or over a company or a mortgage over the lease or other freehold property. That way, if the buyer does not meet its obligations the seller should be able to take possession of the business personally or through a receiver and manager and re-sell it.

Also, if the buyer is a company, the seller will usually also require the directors of the buyer to guarantee the debt of the company.

Normally, the costs of completing the documents relating to the vendor finance is charged to the buyer.

What Are the Usual Legal Costs?

It is important when considering buying a business to keep in mind that there are costs and outlays that you will need to cover on top of the purchase price and lease rent. These can include:

- Your Lawyer's Costs – for negotiating and advising the buyer on the contract, negotiating the contract with the seller, conducting searches of the business, transferring the business assets to the buyer, dealing with any problems that arise, liaising with other stakeholders in the purchase (such as the buyer's financier) and attending to settlement;

- Lessor's Lawyer's Costs - for drawing up a new lease or the documents to transfer an existing lease from the seller to the buyer;
- Lease Registration Costs – for registering a new lease or the transfer of an existing lease on the title at the Land Titles Office;
- Transfer Duty - paid on the assets of the business – this is usually worked out on the full purchase price plus stock and GST;
- Search fees – there are certain investigations that a buyer's lawyer should undertake on the buyer's behalf. These can include searches such as bankruptcy/insolvency search on the seller, registered charges searches, intellectual property registration searches and title searches on the property to ensure the lessor is the registered owner.

Trial Periods

A trial of a business involves the buyer being permitted to attend at the business for a period (usually between 7 and 14 days) to observe the performance of the business and its financial takings. The seller will normally guarantee an amount of gross takings and if those takings are not achieved, the buyer will be entitled to terminate the contract. Trial periods are often only used in retail businesses where a significant number of small cash transactions occur.

- In trialling a business, the buyer needs to be aware that whilst most sellers may be honest, there are some who are dishonest. The buyer should position themselves, without interfering with operations, where they can view all the transactions being made at the point of sale. This is to ensure that no false transactions are made to inflate the takings.
- Also, buyers need to be aware of sellers who will do anything and everything to maximise the gross takings during the trial period. Such sellers may undertake certain marketing to maximise business during the trial period or engage the assistance of family and friends to make purchases for the same reason.

Whilst a trial period may reveal a "dead" business, it is unlikely to accurately reveal the average takings of a business over a financial year. In addition to the potential dishonesty described above, seasonal fluctuations may cause the takings to exceed or fall short of the average.

Therefore, a buyer is taking a substantial risk if buying a business based on the performance during a trial period alone.

The Contract

When buying a business, the business sale contract is a critical part of the transaction. This is because it is the document that sets out what each party is going to do and what each party is going to get. Therefore, if something is missing, a party may not get what they expected.

Each State has its own differing standard business sale contract. In Queensland, the form of contract commonly used by business brokers and lawyers for the sale of small businesses is the REIQ Business Sale Contract (2nd Edition). Often, the REIQ Contract will be initially completed by the business broker and then submitted to the seller's lawyers to finalise. It is then submitted to the buyer's lawyers. Whether using the REIQ Business Sale Contract or another contract prepared by the lawyers, all business sale contracts must address the following issues:

- Assets: what assets am I buying for my money? The buyer must ensure that the seller does in fact own all the key assets and that they will be successfully transferred to the buyer. All assets of

importance to the buyer (including intellectual property) should be itemised and included in the contract.

- Stock: whether the stock is included in the purchase price or is extra? If extra, how will it be calculated? Can the buyer reject stock? What happens if there is a dispute?
- Goodwill: how is goodwill protected? Is the contract subject to the seller providing a period of tuition/assistance to the buyer to learn the ropes; is the seller prohibited from competing with the buyer for a period of time after completion; are key contracts with suppliers being transferred to the buyer?
- Employees: what is the process for the buyer employing the employees of the business? Is the contract subject to any employees staying on after completion? How are accrued leave entitlements dealt with on transferring employees?
- Premises/Lease: can the business operate lawfully from the premises? Does the lease allow the buyer to do what it needs to do from the premises for a satisfactory period? Is there anything in the lease that may make it difficult to sell the business?
- Licences and Permits: does the seller have all the licences and permits required to run the business? Are there any outstanding requisitions by any local authorities? Can the buyer successfully apply for or receive a transfer of such licences?
- Liabilities: are there any product or service warranties that the buyer will need to honour; are there any debts payable by the business?
- Money: what is the purchase price; what is the deposit; is the contract subject to finance?

The REIQ Business Sale Contract, whilst used for most small businesses sales in Queensland, will most often require some modification to suit the particular business. This is why the contract allows for "special conditions". This is the section of the contract that modifies and adds to the standard conditions.

Why Use A Lawyer?

Lawyers are experts at identifying the risks that can derail or destroy a business sale. They can also identify opportunities for business improvement. This is the case whether you are buying a business for $100,000 or $10,000,000.

Often it is the business person buying a small business who will question the need for a lawyer. This is usually because (i) the cost of engaging a lawyer may seem high relative to the purchase price of the business and (ii) the business person may simply not appreciate the considerable risks involved in settling any major transaction in the absence of professional advice.

- However, it is often these same buyer's that get the most value from engaging a lawyer when buying a business. This is because they often have the most to lose. They are often putting everything on the line for the business to succeed.

It must be remembered that a business person's liability with respect to the business is not limited to their initial investment in the business represented by the purchase price. Often, they are borrowing money from the bank to buy the business. The bank will take a mortgage over their house and possibly other properties. So, if the business fails, they could lose their home.

They will often take over or enter into a lease for the business premises. Even for a small business, rentals can exceed $100,000 per year. If a business fails, this can leave a buyer with an exposure of $500,000 on a 5 year lease – which is legally payable whether the business succeeds or fails.

Then there is the possibility of falling short of the law. This could be as simple as selling a defective product or forgetting to lodge a government form on time. These could lead a business owner liable for significant losses and in extreme cases, imprisonment.

So how can a lawyer help?

- A lawyer can help by identifying the risks that may impact on the success of the business. For example, by ensuring:
    - the assets being purchased are in fact the property of the owner and will be properly transferred to the buyer;
    - contracts with key suppliers can be transferred to the buyer and without significant adverse changes;
    - that key employees will be re-employed by the buyer;
    - the lease for the premises allows the buyer to use the premises in the manner and for as long as is necessary for the buyer to obtain a return on the investment;
    - the buyer will have all the licences and permits required to run the business;
    - the seller is restrained from competing with the buyer after completion.
- A lawyer can also help capitalise on opportunities for the business owner. For example, by negotiating more favourable terms with a supplier as a term of purchasing the business; by pursuing additional licences or permits that add value to a business (like a liquor licence or a footpath dining licence); by pursuing trade marks or other intellectual property that set the business apart and give it a competitive advantage over copycats.

  A lawyer can also assist with structuring the ownership of the business to obtain better tax outcomes and assisting with formalising employee incentive packages or profit-sharing structures that can increase the productivity of workers.

By identifying and addressing risks and assisting the business owner to capitalise on opportunities, a specialist business lawyer can have a significant impact on the potential success of most business purchases.

This Guide is brought to you by:

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LAWYERS

Kafrouni Lawyers, founded in 1999, is a specialist small business law firm in Brisbane. Helping small business owners, Kafrouni Lawyers helps their clients to start, buy, grow, sell businesses and deal with business disputes.

The authors of this guide, Joe Kafrouni and Rob Montes, have a special interest in the sale and purchase of businesses.

For further information on buying or selling businesses and other legal issues involved in owning a business, please visit www.klaw.com.au or phone (07) 3354 8888.

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