



# Guide

## Working with lawyers in business sales



## Introduction

Many business brokers believe that a lawyer can make or break a deal. Often, business brokers feel they are faced with lawyers representing the buyer or seller of a business who don't seem to care, especially about deadlines, or make mountains out of mole-hills.

A business broker can influence the co-operation and productivity of lawyers to achieve a smoother and timelier settlement. This is predominantly achieved through:

1. Building relationships with lawyers where business brokers are viewed as key stakeholders in moving the sale from contract to completion;
2. Understanding what legal issues should be anticipated in a business sale and how to effectively deal with them prior to the lawyers making them into an issue.

## What is the problem with lawyers?

What do business brokers really think about lawyers? Amongst other things, not to be repeated here, business brokers often feel that lawyers don't seem to care about deadlines or can "make or break a deal" or are "deal killers".

Lawyers undoubtedly have significant influence over their clients and therefore if advice or direction given by the lawyer to their client is "under-par", this will cause complications. However, it must be appreciated that not all problems raised by a lawyer are inappropriate. Later in this paper, the key responsibilities of lawyers in a business sale are explained and they are numerous. Many of them can legitimately "kill" a deal perhaps which should not have been done in the first place. Often it is better an issue is raised and dealt with (even to the demise of the sale) than for the matter to drag on and on and waste all parties' time, money and opportunities.

Problems with lawyers often arise not because they don't care. Most lawyers care about their clients and/or the outcome of the matter. Therefore, lawyers would not deliberately "break" a deal if they thought it was not in the best interests of their clients. However, problems do arise with lawyers. This is not only a problem for business brokers but also for the other lawyers in the transaction. These problems often arise when the lawyer lacks:

1. necessary business/industry **knowledge**;
2. business sales **experience**;
3. **time** necessary to handle the matter properly.

In such circumstances, the lack of experience and attention could lead to significant delays and frustration, causing a party to terminate the deal.

This is not good for the client and certainly not good for the business broker's bottom line. Presuming a business broker completes 10 business sales every year, every sale that falls through as a result of an inexperienced lawyer could represent 10% or more of a business broker's annual income. Therefore, it pays for the business broker to care about the solicitor who is involved in the transaction.

## What can a business broker do?

Given the problem is often a lack of knowledge, experience or time; a business broker should:

1. Help the buyer or seller engage a **specialist lawyer** with a proven track record in business sales transactions;
2. In effect "**project manage**" the sale process to maximise a timely completion;
3. **Anticipate problems** that are likely to cause delay with the lawyers to reduce the chance that they will.



Let's look at each one of these in more detail.

## **Referral to specialist business lawyer**

A business broker needs to know the right business lawyers and be able to convince the parties to the business sale to use them.

*How to convince the buyer or seller to use them?*

Business brokers, and anyone regularly involved in business sales, appreciates that it is a specialised area of law. Unlike selling a physical asset, such as a house, a business not only has its physical or tangible assets (such as the equipment) but also numerous other assets that are not tangible. These include:

1. goodwill;
2. intellectual property;
3. rights under contracts;
4. employees;
5. licences and permits; and
6. leases.

Ensuring that the business sale contract adequately addresses these issues and that there is no impediment to transferring these assets to the buyer and attending to the required process in a timely manner can be quite a task.

Further, and what often makes a business sale interesting, is dealing with all the other parties involved in the transaction including the:

1. accountants and financial advisors who ensure that the financials of the business stack up and tax issues are considered;
2. financiers who fund the project;
3. landlords who need to be convinced the buyer is worthy to be their tenant;
4. lawyer representing the other party, who can be challenging; and
5. business brokers (or course) who have put the deal together and want to see it complete.

Knowing how and when to deal and co-ordinate all these parties can be a challenge.

Lawyers who don't regularly work in the area of business sales may overlook something that could derail or destroy the business. Also, they won't appreciate the manner in which these issues can be best addressed.

Whilst specialists may be more expensive, they will make the process easier for a buyer and seller allowing them to get on with their business. Also, if things do go wrong, they could avoid a very stressful and expensive dispute.

### *Knowing the right lawyers*

A business broker needs to get the parties to a lawyer with a track record in this area of law. To do this, the business broker needs to know who these lawyers are.

How? Firstly, ask colleagues for a referral. If that colleague has had good experiences with a particular lawyer, chances are good they will do well for the buyer or seller.



Secondly, the business broker should always ask the lawyer being considered about their relevant experience in business sales and request testimonials from their clients. If they have good experience in business sales and have happy clients, chances are they will do well for the buyer or seller.

Referring a party to a business broker's recommended solicitor can be difficult when they have a long standing relationship with a family solicitor. It may well be the case that their family solicitor is experienced in business sales and will do the job well. If not, it is appropriate to give the party a recommendation to two other specialist solicitors (not one). Explain the reason why it is important to use a specialist and recommend that they contact both of them and see who they feel most comfortable with. Also, recommend that they discuss legal costs up-front.

If they continue to engage a non-specialist, then the next suggestions become even more important.

## Project Manage the Sale

Given the business broker has co-ordinated the sale up to the point of contract negotiations, why would they believe it should stop there? If the business broker wants to see the deal complete, there is no good reason why they should not continue to be involved after the solicitors commence. Business brokers are key stakeholders in the sale, no less than the solicitor or the accountant.

Business brokers have a key advantage over a solicitor in a transaction because of their personal knowledge of the buyer, the seller and the business. Those lawyers who consider business brokers' opinions on problems or ask them to help push another party along have an invaluable advantage in getting the job done. Sometimes, this could also mean a significant saving in legal costs to a client.

Lawyers representing a party to a business sale normally bear the responsibility to see things through to completion. This is certainly not assisted by business brokers, who often withdraw from the sale process once the lawyers get involved.

If business brokers want to be involved, which they should, then they must get involved. But not unlike co-operating with any other professional, the business broker must engage with the lawyer.

To get the lawyer to engage with the business broker, the business broker must:

1. Convince the lawyer they are a **professional** with a desire to continue to help their client (most often the seller) achieve their goal of selling the business;
2. Help the lawyer to **understand** how they can help and what they will do.

### *How to demonstrate professionalism*

The following are suggestions on how to demonstrate professionalism:

1. Complete the item schedule of the draft contract thoroughly and **accurately**. Don't use special conditions if in any doubt as to their appropriateness. Refer to the lawyers. Sloppy contracts create the wrong first impressions.
2. **Contact** the lawyer by phone to discuss any potential sticking points/peculiarities concerning the business or the parties and confirm the suggested solutions made to the buyers. This will give the lawyer the heads up, ideas and understanding of the possible expectations of the parties.
3. Send the lawyer a "**package**" including the following:
  1. copy of any information memorandum or brochure prepared on the business. This will assist the lawyer to better understand the business and the representations that were made.
  2. copy of the confidentiality agreement signed by the buyer. This will save the lawyer chasing it up, especially in due diligence.



3. copy of leases or key contracts (if any) concerning the business. This allows the lawyer to hit the ground running, even if they may later seek validation of the documents.
4. copy of company searches undertaken on a corporate buyer or seller. The lawyer will eventually need one. Having it readily available allows for an immediate check of the parties details and whether there are any charges (encumbrances) registered against the selling company which will need to be removed prior to completion.
5. copy of all relevant licences and permits obtained by the seller relating to the business. This will allow the solicitors to immediately start considering their transfer or any other application required. Given some transfers/applications may take significant time, this may save time at the other end;
6. background about the business broker. The background should be succinct and relevant;
7. details on how the business broker can help and what they will do (discussed in detail below).

With these simple steps, a business broker will absolutely set themselves apart from the majority and will have taken one big step to demonstrating their professionalism and interest in the matter.

### *How to help & what to do?*

Whilst this is obviously something for each business broker to determine, some areas of assistance received from business brokers are:

1. provision of a succinct summary of the business and its key components;
2. insight into the other parties personal circumstances and personalities (where appropriate) that may be relevant in addressing them;
3. raising any “problem areas” concerning the business and options to address them;
4. keeping all the parties and their advisors moving in the same direction and in a timely manner;
5. assisting negotiations between the buyer and the seller when problems arise.

Our suggestion is to include these points in the “package” or raise them directly with the solicitor when speaking to them.

By demonstrating professionalism and being clear on what type of assistance can be given, the business broker can also play a role in seeing the business sale through to completion.

## **Anticipate and address issues**

The final factor that will assist a business broker in their dealings with solicitors is to anticipate and address issues that are likely to be raised by the solicitors.

To do this, it is firstly important to get a better idea of what it is that a lawyer is required to do in a transaction.

### *What is a lawyer required to do?*

A lawyer is legally responsible to “*protect their client against reasonably foreseeable adverse contingencies*”. This responsibility exists “*whether or not such advice was sought or information suggesting the need for it was furnished to the solicitor*” by their client. Essentially, a lawyer is a risk manager. They assist their clients to manage the risks that can derail or destroy their business or other objective.

As a direct consequence of this, lawyers must raise problems to deal with them. Business brokers and others often view this as the lawyer “creating” problems. Not so. However, the clever lawyers are the ones who know:



1. which problems need to be pushed and which ones do not;
2. how to focus on the detail without losing sight of the big picture; and
3. how to capitalise on opportunities for their client in the process.

The legal duty of a transactional lawyer, emphasised is demonstrated in the leading Queensland Court of Appeal decision on the subject, *Littler v Price* [2005] 1 Qd R 275. In that case:

- The solicitor was engaged by the buyer of a residential unit in a resort complex in Coolumb.
- The lawyer was engaged to handle the property conveyance.
- The unit was leased to the resort manager, a \$2 company and the property was marketed on the basis of an 8.5% return.
- The lawyer was aware of this but was not requested to advise on the lease.
- After completion, the lessee (the resort manager) went into receivership and the client (the buyer) lost the promised return and income.
- The property was sold at a substantial loss and the client sued their solicitor for the loss claiming negligence.
- The solicitor argued that he was not liable because:
  - he was not asked to give the advice nor was information furnished to him which would have suggested the need for such advice;
  - advice of this kind was of a financial or commercial nature and was outside the duty of a solicitor.

The court did not agree with the solicitor. They found that the solicitor breached his duty to his client in failing to advise them that performance of the obligations of the corporate lessee under the lease was not secured by guarantees or otherwise.

### *How to anticipate the issues?*

Personal guarantees of a company's obligation, such as in the case above, is only one aspect of hundreds that a lawyer must consider in a business sale. The Queensland REIQ Contract (Second Edition), which is standard contract used for small businesses in Queensland, alone has 39 separate clauses. These clauses deal with 75 separate legal issues (from stock take and GST to confidentiality and restraints of trade). A more complex transaction will have many more. To put it simply, to a lawyer, a business sale can be a mine-field.

Also, expectations are very important. A buyer's or seller's expectations on timing can greatly influence the outcome of a matter. If either party is mistakenly led to believe by a business broker that a part of a transaction will take a limited time or occur in a particular way, and it does not, this can create problems. A business broker should be sure and realistic about time frames and processes so that lawyers do not have to overcome unrealistic expectations. If in doubt about it, ask the relevant parties lawyers about what to expect.

The key legal aspects of a business sale and how a business broker can anticipate and deal with them follow.

### **Structuring**

*Solicitor:* what are the tax consequences of the transaction and should the party be referred to a tax expert? Is it a sale of a going concern for GST purposes? What structure is appropriate taking into account the trading risks and asset protection issues.

*Business Broker:* encourage the seller to speak to their accountant regarding the tax implications of their sale immediately upon appointment. Encourage a qualified buyer to speak to their accountant and





solicitor immediately the business broker feels a deal is likely to occur about structuring and asset protection. If this issue needs to be addressed when the draft contracts are forwarded to the solicitors, there will be delay.

### **Assets**

*Solicitor:* what assets are being purchased? Are any assets excluded? Does the seller in fact own all the assets? Are the assets encumbered? Can they be successfully transferred to the buyer?

*Business Broker:* all assets included in the sale (particularly the important ones) should be itemised in a schedule to the contract. Similarly, all assets excluded from the sale should also be itemised in a schedule to the contract. If something of importance to the buyer is not included or something important to the seller is not excluded delays will occur. Also, ask the seller if they have given any security over the business assets such as a bill of sale or company charge (and check your company search for company charges registered against a corporate seller). If security has been given, ask them to contact their bank or relevant third party to determine what will be required to get the security discharged in time for completion.

### **Purchase price**

*Solicitor:* Is the purchase price 100% cash or does it include shares? Is sufficient deposit being paid? If payment is being deferred, is adequate security provided? Are there any earn-out risks? Are debtors included? Are creditors included? Are there any product or service warranties that the buyer will need to honour?

*Business Broker:* if the sale price includes any deferred payment, indicate to the buyer the likelihood that the seller will require security (mortgages and charges) from the buyer and personal guarantees from directors of companies. If you don't raise it, the lawyer will. This could become a sticking point at the time of contract and derail the deal.

### **Goodwill**

*Solicitor:* how is goodwill to be 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?

*Business Broker:* if the business is anything other than a retail shop where almost all its customers are locals, the buyer is likely to require the seller be restrained from dealing with all existing customers, staff and possibly suppliers after completion. Ensure the seller has a reasonable expectation as to what is likely to be required. Otherwise, a negotiation regarding a restraint clause will cause delay.

### **Key contracts**

*Solicitor:* are key contracts with suppliers and customers capable of assignment/novation?

*Business Broker:* determine the key contracts in advance. Obtain complete copies of all of them. Determine a strategy with the seller to maximise the likelihood of transfer of these contract and retention by the buyer. Have copies of all documents ready (along with relevant strategies) for due diligence and provide copies to the solicitors. Otherwise, there will be delay in sourcing this information and determining risk.

### **Employees**

*Solicitor:* what is the process for the buyer employing the workers of the business? Is it important that any particular workers stay on after completion? How are accrued leave entitlements dealt with on transferring employees?

*Business Broker:* have the buyer prepare a list of all employees along with their:



1. position;
2. capacity (i.e. full time, part time or casual);
3. original commencement date (if they started with a previous owner of the business, need to go back);
4. current salary.

If the contract requires it, attach this to the contract. If not, provide this information to the solicitors. If there is a significant amount of accrued entitlements, this will assist in determining whether any special conditions are required dealing with, for example, a joint bank account for long service leave.

### **Premises/Lease**

*Solicitor:* can the business lawfully run from the premises? Does the lease allow the buyer to implement its business plan? Is there anything in the lease that may make it difficult to sell the business?

*Business Broker:* If there is not much term left on the lease, have the seller anticipate a request from the buyer that the lessor grant a further term or new lease to the buyer. Where possible, discuss this opportunity with the lessor. Find out from the lessor what their usual requirement for considering a new lessee is (usually a statement of assets and liabilities, 2 references, past experience (CV) and business plan). Get a serious buyer to arrange this information ASAP. Give this information to the solicitors. Also, determine from the lessor how long it is likely to take for them to process an application for assignment of lease and for their solicitors to do the paperwork. Unless it is unreasonable, ensure the date for completion allows for this. Otherwise, there will be delay or the lack of time could cause the deal to terminate.

### **Licences and Permits**

*Solicitor:* does the seller have all the licences and permits required to run the businesses? Are there any outstanding requisitions? Can the buyer successfully apply for or receive a transfer of such licences?

*Business Broker:* identify all licences required for the business and those obtained by the owner. Get copies. Determine what can be transferred and what needs a fresh application and how long will each of these take? If lengthy, ensure the completion date allows for this. Otherwise, there will be delay or the lack of time could cause the deal to terminate.

There are many legal issues to address. The business broker does not have the time or the expertise to address all of them. However, if the business broker understands what the lawyer is looking for and attends to the items suggested above, they will make a difference.

### **Conclusion**

Lawyers are integral to the successful sale of a business. Given their impact on the success of a business broker, and their income, it is important that a business broker make the effort to get the best lawyers involved in the deal. Staying involved in the process through to completion will also help. Along with understanding what lawyers do and how they do it so that the business broker can anticipate and address problems before they become an issue. The more proactive the business broker is with respect to these suggestions, the greater the chance of completion and success.





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Kafrouni Lawyers, founded in 1999, is a specialist business law firm in Brisbane. Joe Kafrouni, the author of this guide, specialise in the sale and purchase of SME businesses, especially those where there is some complexity or seriousness.

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