



Buying or selling a business in Queensland
Client Guide

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As time goes by our busy society is evolving and transactions are becoming more complicated.

The amount of 'red tape' on the sale of businesses has substantially increased over the last five or so years. For example, employment laws, that change on a regular basis depending on what political party is in power, have a big impact on how to deal with employee entitlements in the sale of a business.

Another area of change is environment issues, such as trade waste emissions that are now becoming paramount to local regional councils.

We have prepared this guide to help you, given there are now so many issues to consider before buying or selling a business.

I am ready to sign a contract for the business – who prepares the contract?

Because there are such a variety of important issues involved with business sales, contracts for the sales of businesses are usually prepared by a solicitor experienced with the legal complexities of business conveyancing. Traditionally, the seller's solicitor would prepare a contract but in practice, it often depends on which party's solicitor can prepare the contract most expediently. We can generally provide a first draft of a business contract to our clients within 24 hours.

Is there a standard contract that can be used?

The Real Estate Institute of Queensland (REIQ) (in consultation with the Queensland Law Society) has prepared an REIQ Business Contract. This is comprised of:

- items schedule – the main body of the contract where information specific to the business is inserted;
- standard conditions – 38 standard conditions that apply to the contract (unless excluded by way of a special condition);
- special conditions negotiated between the seller and buyer; and
- schedules and annexures such as lists of unencumbered plant and equipment, plant and equipment under hire purchase and leased plant and equipment.

You need to read and understand the standard conditions as you may want to change some clauses. Also, unless a special condition is inserted confirming particular standard conditions do not apply to your contract, then you will be bound by all the standard conditions.

You also need to consider that the sale of each business is a unique transaction and it is not practical that one business contract can be applied to each and every business sale. It is not as simple as completing the basic information in the item schedule to complete the contract.

You can approach it this way, but expect to get

burnt in the process. We will illustrate in this guide that you may want to handle part of the transaction in one way, but the standard conditions may have the opposite effect. Remember – if there is a dispute between you and the other party, you revert back to what is in the written contract.

➤ John agrees to purchase a takeaway store from the owner, Kylie. John completes his due diligence inquiries relating to the business before signing the contract. The contract is not subject to finance approval or any other special conditions that enable John to terminate the contract. Kylie and her husband commit to buying their dream boat to reward themselves for their years of hard work, on their understanding that John has no right to terminate the contract.

A standard condition in the REIQ business contract obligates the seller to disclose all financial records to the buyer and the buyer has 10 business days to terminate the contract. John gets cold feet and terminates the contract on the basis he was not satisfied with the financial records.

Kylie had not taken the time to read the standard conditions and did not intend to create an opportunity for John to terminate. She now has to work out how she and her husband will fund the new boat they can no longer afford. Kylie could have avoided this situation by inserting a special condition that excluded the particular standard condition relating to financial records from applying to the contract.

Is there a cooling off period for a business contract?

Although a five-day cooling off period applies to some Queensland contracts such as residential land and houses and unit sales, no statutory cooling off period applies to business contracts.

I am the buyer – should I purchase the business in my own name?

The basic choices include buying the business:

- in your own name as a sole trader;
- in joint names as a partnership (if there are more than one of you);
- in the name of a company;
- in your name as trustee of a discretionary family trust or a unit trust;
- in the name of a company as trustee of a discretionary family trust or a unit trust; or
- a combination of the above.

It is vital that you take advice on how to buy the business prior to signing the contract. Do not sign a contract first and then take advice. If the buying entity is amended after a contract is signed and before settlement occurs, then you will need the seller's co-operation to make the change and extra legal costs are likely to be incurred.

There is also no guarantee that the seller will co-operate. If the sale is completed and you decide that someone other than the buyer (such as a company or trustee of a trust) should own and operate the business, then this could involve a transfer of the business assets and extra stamp duty may be payable.

Why would I choose one business structure rather than another?

Often the choice of what buyer entity you use is driven by the taxation implications. For example, a company is taxed differently to an individual and some capital gains tax concessions are not available to companies that are available to individuals.

You should discuss these issues with your accountant or financial advisor, who will consider the taxation implications and guide you on the most suitable structure and whom will already know your personal circumstances.



They will want to know what sort of business assets you are buying, the purchase price, how you are funding the purchase, the level of income you expect to generate from running the business and whether you expect to make long term capital gain from an eventual sale of the business.

Are the tax implications the only things to consider when choosing what structure to use for the buyer?

No – It is vital that you also consider asset protection issues. The choice of business structure can help enormously in protecting your wealth, if the business venture fails or some unexpected claim is made against the operator of the business which is not covered by insurance (or the insurer fails).

Whoever buys and operates the business will be exposed to potential liability – there is just no avoiding it. A lot of people think that choosing a company to operate the business avoids that risk, but the reality is that a company needs at least one director and directors can find themselves personally exposed to certain liabilities of the company. There can also be adverse capital gains tax implications from using a company to own the business.

If you wish to protect your wealth and not expose everything you own to the risks associated with operating a business, then it is important that you separate your wealth from the risks. We can help you do this by guiding you on the choice of business structure – often in consultation with your financial advisor, accountant and insurance broker.

Please ask us for our “Client Guide to Asset

Protection” which explains these issues more fully.

Any other matters I need to consider?

In choosing the structure you may also need to take into consideration:

- any professional or trade requirements (such as the Building Services Authority or the rules relating to certain professions);
- the requirements of your customers or franchisors noting that some of them may wish to only deal with companies, particularly when personal services are being provided by your business;
- whether you are looking long term to float the business on a stock exchange or sell it off;
- what impact the choice of structure may have on your professional indemnity or other insurance premiums;
- whether you are considering bringing in “partners” at a later date;
- whether you wish to offer shares in the business as an employee incentive; and
- any other special factors peculiar to your individual circumstances.

Are guarantors required in a contract?

Consider this scenario – You sign a contract to sell your restaurant and the day before the settlement date of the contract, the buyer wrongfully terminates the binding contract. The buyer is a company with assets of only \$1. Yes, the buyer is in breach but in reality, it may not be in your best interests to take the buyer to court, because even if you obtain a judgment against the buyer, as the saying goes ‘you can’t get blood out of a stone’ and the buyer has no assets to take in order to satisfy the judgment.

What can be done to avoid this occurring? If the buyer is a company or trust, have the individual trustees or the directors of the company liable

in their own personal capacity, to perform the obligations of the buyer contained in the contract. The seller will then be entitled to sue the guarantors personally (usually the directors of the company) and any assets such as the family home in the guarantors' names may be available to seize and sell to pay any judgment.

A buyer should also consider a guarantee from the seller, if the seller is a company or trust, for the seller's warranties contained in the standard conditions of the contract (e.g. that financial figures attached to the contract are true and correct).

➤ Tom owns a caravan park. Tom's wife is sick and he needs to sell the business quickly so he substantially reduces the listed sale price. Tom signs a contract to sell the business to Susan. The contract is only subject to Susan obtaining finance approval. As Tom has effectively discounted the sale price, he is only prepared to spend up to \$1,000 to comply with any rectification work needed on the business. The parties mutually agree to insert the amount of \$1,000 as the requisition amount in the contract.

Susan obtains finance approval and arranges the local council to inspect the business. The council issues a notice requiring substantial rectification work to the septic system of the business. As Tom has already discounted the purchase price, he decides that the most he is prepared to contribute to the septic system repair is \$1,000. Susan is not prepared to pay any more than the purchase price on the business and so she validly terminates the contract.

What about licences, permits and consents needed to operate the business?

Usually a contract is subject to the buyer obtaining all the licences and consents referred to in the contract of sale. We recommend that a buyer obtains a copy of all licences, permits and consents from the seller, before a contract is signed so the buyer will be aware of any conditions attached to any licenses.

If licences exist for the business, you need to consider a maximum amount of money inserted in the contract that the seller is required to spend to satisfy any requirements (also known as "requisitions") outstanding applicable to any consents or approvals or licences. The amount to be placed in the contract of sale for requisitions requires careful consideration.

For example, a health licence exists for a restaurant. The buyer arranges for the local council to attend the business premises to conduct a health inspection. The council advises work needs to be performed, namely replacing bench tops with laminate missing and replacing the floor coverings. This demand for rectification work is considered to be a requisition.

If the cost of complying with the requisitions exceeds the nominated dollar value contained in the contract of sale, then the seller can perform all works at their cost to satisfy the requisitions or decide to only pay up to the dollar value contained in the contract of sale. If the seller chooses to do the latter the buyer may terminate the contract or elect to proceed with the contract and pay to rectify any requisitions that exceed the amount contained in the contract for sale.

How is stock dealt with between a buyer and seller?

You need to negotiate on whether the purchase price includes or excludes the stock of the business. If it includes the stock this is considered a 'walk in, walk out' contract.



If not, a stock-take will be needed on or before the date of settlement. You should be at the stock-take to ensure it is done correctly and the stock is of good and merchantable quality.

The contract may include a maximum value of stock. This normally means that if the value of the stock exceeds the maximum value contained in the contract, the buyer is not required to buy all the stock, but rather the buyer can choose the stock that they will be keeping after settlement.

➤ James signs a contract to buy a hotel from Ben. The contract contains a list of all plant and equipment included in the sale. It includes a ride on mower. Before James signed a contract, he saw two ride on mowers at the business. One was new and worth around \$10,000. Then there was an old machine stored in a shed full of old equipment and worth less than \$500. James knows Ben uses the new machine and assumes this is the machine included in the business sale.

After settlement, James notices that the old machine is still in the shed and the new machine is gone. Ben denies that the new machine was part of the sale. James wants to commence court proceedings against Ben for the difference in value between the two machines. It would be difficult for James to prove to a court that the new machine was part of the sale.

This situation could be easily avoided if the parties provide a detailed list of plant and equipment included in the sale.

If the sale is a going concern, and no GST is payable, the buyer only pays the seller the GST exclusive value of the stock. The value of the stock is normally calculated on the price the seller has paid for the stock, not the retail price.

If a buyer does not want to buy particular stock when buying a business, they can either insert in the contract a maximum amount so that they will not be required to buy all the stock, or include a special condition stating they will not buy particular stock.

For example, a buyer of a florist may not want to buy any artificial flowers. This would be considered part of the stock of the business. The buyer could insert a clause in the contract stating they will not be required to purchase any artificial flowers.

If you are a buyer, you need to be wary that if a contract is on a walk in walk out basis, the seller may run down the stock values between the date the contract is signed and the date of settlement.

To avoid this, as the buyer, you can either require a special condition be inserted in the contract requiring the seller provides stock to a minimum value or change the contract from a walk in walk out basis and reduce the purchase price by the maximum amount of stock that the buyer will be required to buy. Therefore the seller would still receive the same price, but only if the stock is there, at the date of settlement.

What plant and equipment is included in the sale?

The contract should attach three separate lists, namely:

- (i) the unencumbered plant and equipment owned by the seller and included in the sale;
- (ii) the plant and equipment that is under hire purchase to the seller; and
- (iii) the plant and equipment that is leased by the seller.

If any plant or equipment is under hire purchase or leased, the parties often want the buyer to take

over the seller's obligations contained in the hire purchase agreement or lease. It is rare that a financier will allow this to occur and if it did, there is a real risk that the seller will remain liable under the hire purchase agreement or finance lease until it is paid out. More commonly the financier will require the hire purchase or the finance lease to be paid out, so that the seller can give clear title to the buyer.

Does a buyer have to accept responsibility for hire agreements or leased equipment?

Only if it is disclosed as hired or leased equipment in a schedule in the contract. If a buyer is to take on the obligations of the seller under one of these agreements, they should always review the agreements before signing a contract so they are aware of what their obligations will be.

A standard condition in an REIQ contract provides for the seller to give clear unencumbered title to all business assets to the buyer. If this is not to occur, a special condition may be required. Sellers please be aware – if you have taken out a loan to fit-out the business premises, then review your loan documents. Usually the financier requires the loan to be paid out before you can part with ownership or possession of the shop fit-out.

Does all equipment included in the sale need to be listed in the contract?

It is crucial that all plant and equipment included in the sale is mentioned in the contract. If you are a buyer, do not be fooled by a seller saying that particular plant is included in the sale, but is not mentioned in the contract.

Many buyers have been burned where they have been told by the seller that particular items of plant were included in the sale, but if the items are not mentioned in the contract and the seller takes the items, it is very difficult for the buyer to prove that the items should have been included as part of the sale.

It is also important that the items are described in enough detail so they can be clearly identifiable.

A standard condition exists in the REIQ contract stating that the seller is obliged to provide the plant and equipment in good working order and condition up to the date of settlement. The buyer should conduct a final inspection of the business assets, prior to settlement. It can be difficult to arrange a seller to make repairs after the sale is complete.

If a seller wants to sell the equipment in an 'as is' condition, this can be achieved by inserting a special condition to this effect in the contract overriding the standard condition.

Transfer of motor vehicles registered with Queensland Transport

Before particular types of vehicles can be transferred, a safety or roadworthy certificate is usually required. The obligation to obtain the safety certificate is commonly with the seller and if repair work is required to the vehicle before the safety certificate can be issued, then the seller should be required to pay for any necessary repairs.

If you are a seller and have negotiated the sale price on the basis that the buyer is to accept the vehicles in an 'as is' condition, then a special condition will need to be inserted or you will be obligated to provide a safety certificate as per the standard conditions.

The seller and buyer will also be required to sign an application to transfer vehicle registration form and the seller will be required to provide the buyer with the original current roadworthy certificate.



Are computer software, websites and the like usually part of the sale?

A standard condition in the REIQ contract, states that any registered trade mark, email addresses, website address or domain names disclosed in the contract form part of the sale and the seller is to give to the buyer, at completion of the contract, all forms necessary to transfer the trademark, website etc. If the business has a website but the details are not inserted in the contract, then the seller is not obliged to transfer the website to the buyer.

Computer hardware is considered plant and equipment so details should be inserted in the relevant plant and equipment list, if it is to form part of the sale. But what about computer software? When you purchase software, the creator grants you a licence to use a copy of the software. It is not technically plant and equipment.

The REIQ business contract does not refer to computer software. If software is to form part of the sale, a special condition should be inserted outlining the details of the software and assigning the seller's interest in the software licence to the buyer.

➤ Kate buys a bakery from Emma. The sale includes two computers and they are listed in the plant and equipment list. Emma uses QuickBooks as her business accounting software.

After settlement, Kate finally finds the time to sit down and start the book keeping. Kate then discovers that QuickBooks has been removed

from the computer and the disks are not with all the other computer equipment. Kate is forced to spend \$600 to buy a new QuickBooks software package that she did not budget for.

It is important that software is referred to in the contract so it is clear if it forms part of the sale.

There is usually an obligation for the seller to provide to the buyer, at settlement, all business documents and records such as business data, customer lists, supplier details, pricing information, marketing data and the like.

If the sale is to include information technology licences then a special clause would need to be inserted in the contract that confirms the finer details of the actual licence and the terms and conditions relating to the transfer to the buyer. For example, on the sale of an accounting business, you would need to determine if the buyer is to receive the benefit of the annual research website subscriptions that the seller is a party to and if so, if this will be at an additional cost to the buyer.

How is the lease of business premises transferred from a seller to a buyer?

The contract will normally provide for either the assignment of an existing lease from the seller to the buyer or be subject to the buyer entering into a new lease with the owner of the premises.

If a contract of sale is subject to an assignment of lease, the obligation to obtain the landlord's consent is normally with the seller. The seller should notify the landlord that the business is being sold and the buyer is obliged to provide the landlord with any reasonable information it requires to consider whether or not to consent to the assignment of lease.

Such information required may include business or personal referees, statement of assets and liabilities of the buyer and written references. If

the landlord consents, then a document is usually required to be signed by the seller and buyer and the landlord confirming that that lease will be assigned as of the date of settlement.

Who pays the landlord's costs? The standard conditions state a seller is to pay the costs of the landlord to make a decision on whether or not to consent to the assignment of the lease. If you are a seller and want the buyer to pay, a special condition needs to be included in the contract to override the standard condition.

What is a retail shop lease?

The Retail Shop Leases Act 1994 (Qld) (the "Act") contains a schedule of the various business types that are considered retail businesses. This Act will apply if the tenant operates a business type contained in the Act or if five or more of the tenants in a building wholly or predominately carry on a retail business. The lease is then considered a retail shop lease.

This Act has been designed to protect tenants and restricts what can be obtained in the lease. If there is an inconsistency between what is contained in the lease compared to the Act, then the Act will prevail.

In retail shop leases, the costs and outgoings that the landlord can claim from the tenant are restricted. For example, if a new retail shop lease is to be prepared, this must be at the expense of the landlord.

If there is a dispute with the tenant and it is a retail shop lease, a specific tribunal is available to hear the matter.

There are disclosure requirements applicable to a retail shop lease. For example, at least seven days before a lease commences, the landlord is to give to the tenant a disclosure statement that is approximately seven pages long outlining general information relating to the lease, such as what the rent and outgoings will be etc. If no disclosure

statement is given, the tenant has the right to terminate the lease within six months of entering the lease.

> If IT software is to form part of the sale, a special condition should be inserted which outlines the details of the software and assigning the seller's interest in the software licence to the buyer.

What happens if there is no existing lease for the business premises?

If you are a buyer, insert a special condition to make it subject to you negotiating a new lease with the owner of the premises. You would need to consider how long you want to lease the premises for, how much rent you are prepared to pay, if you are prepared to pay a rental bond and how many option terms you want to extend the lease. If you cannot reach an agreement with the landlord on the terms of a new lease within a defined period of time, then either party commonly has the option to terminate the contract and the sale would be at an end.

What if there is a lease but it expires soon and has no option terms?

If you are a buyer, to protect the goodwill of the business, you will want to ensure the term of the lease is sufficient. For example, you may not want to pay \$200,000 for a business that has six months left before the lease expires and the landlord will not agree to a new lease. You are not likely to make enough profit to justify the purchase price during the term of six months. Rather, include a special condition making it subject to you negotiating with the landlord to amend the existing lease to include more option terms.



If the lease is considered a retail shop lease, within six months before the expiry of the term, the landlord must give written notice to the tenant to advise whether the landlord is prepared to continue leasing the premises to the tenant.

If so, the notice is to contain the terms and conditions of the renewal of lease.

If the landlord does not give this notice to the tenant, the tenant has the right to remain in the premises for up to six months and the rent is to remain the same as it was at the expiry of the term.

What is an option term in a lease?

An option period gives the tenant the right to stay in the premises for a further term but only if the tenant wants to. The landlord cannot force the tenant to renew the lease for the option term and cannot lease the premises to anyone else if the option is exercised. The option can usually only be exercised if the tenant is not in breach of the lease and complies with the obligation to give notice within the required period of time, as contained in the lease.

If the lease is considered a retail shop lease, a landlord is to remind the tenant that the period of time in which to exercise the option is due to expire soon. If the landlord gives the notice and the tenant does not exercise the option in writing within the required period of time, then the landlord can refuse to grant the option. If the landlord does not give the relevant notice to the tenant before the relevant notice period to exercise the option expires, the tenant still has the right to exercise the option in writing any time before the expiry of the term.

Once a lease is assigned, is the seller liable if the buyer breaches the lease?

This will depend on the terms and conditions of the lease and whether the lease is considered a retail shop lease. If the lease is not considered a retail shop lease, then subject to the specific terms of the lease, commonly a seller is still liable to the landlord for the performance of the lease, despite selling the business to the buyer.

If that buyer stops paying rent, the landlord can pursue the seller or the buyer for payment. Things become even riskier if the buyer on-sells the business to a third party. Then the original seller, buyer (whom is subsequently selling) and third party (the new buyer) will all be liable to the landlord to comply with the terms and conditions of the lease. We can take steps to try to reduce the seller's liability under the lease for the current term of the lease only and not for the duration of the option terms (if they are exercised by the buyer).

If the lease is considered a retail shop lease, then provided the seller and buyer exchange disclosure statements as per the Act, then the seller is no longer liable to the landlord if the buyer breaches the lease. What if a buyer refuses to provide to the seller a disclosure statement? Within two months of the assignment date of the lease, a seller or landlord can apply to the Tribunal for an order requiring the buyer to give the disclosure statement.

If you are a seller, to avoid the problem of the buyer not providing a disclosure statement, you may consider inserting a special condition into the contract, which allows the seller to terminate the contract if the buyer does not provide a disclosure statement.

What amount of training does the seller have to provide?

This is purely a matter of negotiation by you. Some businesses will require more training than others. Sometimes sellers prefer to give training

after settlement so that the buyer will not become familiar with the business and potentially change their mind about buying the business! A buyer may prefer training to occur prior to settlement. We have seen examples where sellers have failed to provide training after settlement, once they have received the sale monies.

Can a seller open a similar business in competition to the buyer?

A business sale usually includes the goodwill of the business, the business name, the business phone, facsimile and mobile numbers, email addresses and website, the transfer of any existing licenses, permits or consents needed to operate the business, the lease of the business premises, the plant and equipment of the business and the stock in trade and work in progress.

To protect the goodwill of the business, a contract commonly contains a restraint on the seller where the seller agrees not to be an owner, manager or an employee of a business of a similar nature to what is being sold within a prescribed area for a set period of time. The area and period of time depends on the type of business being sold and what you negotiate.

➤ Tyler signs a contract to sell her commercial printing store to Candice. Tyler leases the business premises from Rainbow Pty Ltd. The parties sign documentation with Rainbow Pty Ltd to assign the lease from Tyler to Candice and the business is sold.

Four months later Candice decides that commercial printing is not for her and signs a contract to sell the business to Paul. The parties sign documentation with Rainbow Pty Ltd to assign the lease from Candice to Paul and the business is sold. Nine months later, both Tyler and Candice receive a letter from Rainbow Pty Ltd claiming four months unpaid rent due to Paul not paying the rent.

Both Tyler and Candice would be liable to pay the rent to Rainbow Pty Ltd as the documentation to assign the lease did not release the seller from their obligations contained in the lease. Rainbow Pty Ltd would be able to choose whether it seeks payment from Tyler or Candice or both.

If the seller is a company then buyers should also require the directors of the company (and any other key stakeholder in the company) to sign a deed of personal restraint, so that not only is the company restrained from operating another similar business, but the directors as well. A buyer may also consider obtaining a deed of restraint from any key personnel employed by the business.

What about the current employees?

You need to consider who is going to be responsible for existing long service leave, annual leave and sick leave of employees that the buyer will be employing. A buyer of the business is not required to re-employ any existing employees.

If you are a seller, you need to consider whether an employee will be retrenched, if the buyer chooses not to re-employ the employee. Under some awards, or employment agreements, this may be considered a retrenchment. A seller should also obtain advice on whether there is a valid unfair dismissal claim for any employees that the buyer does not re-employ. There may be obligations under the relevant award or employment agreement to give the employee notice of termination.

A standard condition in an REIQ contract applies unless you insert a special clause to a different effect. The standard condition states that in relation to employees that are re-employed by the buyer, the selling price be reduced by 70% of existing employee entitlements consisting of annual leave, sick leave or long service leave (only for employees that are employed for at least five years). Thereafter, the buyer will be solely liable to pay the employee the entitlements.



This is regarded as a continuing employment. Be aware – the requirements contained in legislation may override what you insert in the contract.

This is a very complex area of law that depends on whether federal or state legislation applies. Companies fall under federal jurisdiction. Individuals and partnerships (not involving companies) fall under state jurisdiction. Trusts will usually be determined on the category of the trustee – a company as trustee is considered federal jurisdiction and an individual as trustee is considered state jurisdiction.

If state legislation applies then the sale of a business is considered a continuation of employment. Regardless of what you write in a contract, annual leave, sick leave and long service leave transfer to the new buyer of the business. If you are a buyer and do not adjust employee entitlements with the seller, you will be left ultimately responsible.

If federal legislation applies, it is not automatically a continuation of employment unless the seller and buyer of a business agree to this in writing. The only entitlement that automatically transfers over is the period of service to enable an employee to qualify for unpaid maternity leave.

You should obtain legal advice, regardless of whether you are a seller or buyer, to determine what legislation will apply and understand that legislation may override what you negotiate with the other party on this issue.

➤ Tammy signs a contract to sell her jewellery business to Amy. Kay has been managing the store for Tammy for the last eight years. She has sick leave worth approximately \$12,000. Amy advises Tammy that she will continue to employ Kay in the business.

As per the standard conditions, the sale price is reduced at settlement by an amount equivalent to 70% of \$12,000, namely \$8,400. Three days after settlement of the business, Kay does not like working for Amy and resigns. Kay is not entitled to be paid out for any unused sick leave. Therefore Amy has received the benefit of \$8,400 for potential sick leave but due to Kay resigning, Amy will not be required to pay any of this money to Kay.

Tammy could have inserted a special condition in the contract to restrict the amount of monies adjusted from the sale price for sick leave, to create a fairer outcome.

What about insurance?

Usually (but not always) the business assets are at the risk of the seller until the date of settlement. By the date of settlement the buyer should arrange insurance for the business assets including the fixtures and fittings of the business premises and public liability insurance.

The buyer should also consider the insurance obligations as contained in the lease of the business premises (if applicable). If you are a buyer, we recommend you contact your insurance broker to discuss policy options. To be prudent, the seller should retain their insurance until after the sale is complete.

You should also consider other insurance that may be relevant to you. This may include life insurance, income protection or specific property insurance. If you are obtaining a business loan to buy a

property, you need to consider how you would continue to make payments if you were unable to operate the business for at least six weeks. Your insurance broker would be able to provide you with detailed advice on what policy may best suit your circumstances.

Does the Goods and Services Tax (GST) apply to the sale of a business?

The obligation to pay GST depends on whether the seller is registered (or required to be registered) for GST purposes. If the seller is not registered and not required to be registered, then generally no GST will be payable on the contract. If the seller is registered they are obliged to pay the GST to the Australian Tax Office, unless some special exemptions apply.

If the buyer is registered for GST, they can claim the GST component in their next business activity statement. This can cause a cash flow problem for the buyer in having to fund the GST even if only for a short period. Stamp duty is also increased because it is payable on the purchase price inclusive of the GST.

➤ In relation to employees that are re-employed by the buyer, an adjustment may be required to be made at settlement for the existing employee entitlements for employees the buyer intends to employ.

In accordance with the standard conditions of the REIQ business contract, 70% of existing employee entitlements consisting of annual leave or other entitlements (excluding long service leave), are to be reduced from the purchase price payable by the buyer.

A “GST-free” concession may apply to the business contract. If the seller supplies to the buyer all the things that are necessary for the continued operation of an enterprise and the seller carries on the enterprise until the date of completion, and

the parties agree in the contract to claim the “going concern concession”, then this concession may apply.

This means that no GST is payable and the seller is obliged to provide all things to enable the buyer to continue the business. In most businesses, this will include supplying a fixed term lease of the premises, although in certain businesses such as a pie van, a lease of the business premises need not necessarily be required to enable the business to continue to trade.

It is vital that you take advice from your accountant over the GST implications before signing the contract.

Who pays Stamp Duty?

Under the Duties Act (Qld) both parties are liable to pay the stamp duty, but the usual commercial convention is to include a clause in the contract stating that the stamp duty is payable by the buyer on the purchase price (inclusive of any GST) contained in the contract.

It is important to note that if the buyer does not pay the stamp duty in accordance with the contract conditions, the Office of State Revenue can require the seller to pay the duty.

There may be a stamp duty concession available if the business is being transferred to a husband, wife or defacto spouse. Please ask us about this if it is relevant.

The rate of transfer duty is calculated on a sliding scale of \$1.50 to \$5.25 per \$100 (subject to change – please contact us to confirm the current rate) or part thereof, depending on the purchase price. The duty is calculated on the amount the buyer paid or the unencumbered value of the assets acquired, whichever is the higher amount.



What if there is a liquor licence?

As the REIQ contract does not contain a clause relating to a business being sold with an existing liquor licence, we recommend a special condition be inserted into the contract stating that the liquor licence be transferred to the buyer before the date of settlement.

The Liquor Licensing Division of the Office of Fair Trading is required to approve the buyer before the licence is transferred. Police searches are conducted and the buyer will be required to take part in a two-day training course, if the buyer has never held a liquor licence before. The whole process takes on average two months.

Therefore settlement will not be able to occur for at least two months when a liquor licence applies to a business.

The special condition will also need to outline such things as what happens if the licence is not transferred within the allowed period of time and obligating the buyer to act quickly and reasonably in applying for the transfer of licence.

If the buyer is a company, a person will need to be the nominee of the liquor licence. They would be personally responsible to comply with the obligations applicable to the licence.

A buyer should obtain a copy of a liquor licence, before signing a contract, to ensure they are aware of the conditions that may be attached to the licence such as approved trading hours etc.

> Zach signs a contract to buy a well-known pizza franchise. The contract does not include a clause referring to the franchise agreement. Zach obtains legal advice from his solicitor about the franchise agreement, after the contract is signed.

The franchise agreement requires the owner of the business to pay quarter of the gross sales of the business to the franchisor as a fee on a monthly basis. This means that the business is nowhere near as commercially viable as Zach first thought.

Zach would not be entitled to terminate the contract on the basis that he was not satisfied with the franchise agreement unless a special condition had been inserted in the contract to this effect.

What if the business is a Franchise?

The REIQ business contract contains no standard conditions relating to franchises. A special condition will need to be inserted making the contract subject to the franchisor consenting to the sale before settlement can proceed.

The buyer of the business is most likely required to provide the franchisor with references and details of referees (both personal and trade referees) as well as an asset and liability statement, bank statements and other documentation to provide proof of ownership of assets. It is important to understand the relevance of the Franchising Code of Conduct.

If there is a fee payable to the franchisor for obtaining their consent, then it is up to you to negotiate whether the seller or buyer pays this cost.

Most franchises provide that the operator of the business has to regularly pay a sum of money to the franchisor based on their gross sales. If you are a buyer obtain legal advice on the franchise agreement and thoroughly read the document, so you are aware of all future obligations with the franchisor.

What if the seller has prepaid advertising (such as Yellow Pages)?

If the seller has paid for advertising in the future such as Yellow Pages and PDC ads, then a clause can be inserted in the contract making this amount adjustable at settlement. The buyer can then be required to contribute towards the amount of advertising paid for a period after the date of completion.

What if the buyer is paying the seller the purchase price over time rather than in a lump sum?

If the buyer is not paying the full purchase price at settlement, then this is considered vendor financing. You need to agree on whether the buyer will be required to pay interest on the outstanding balance and consider whether the seller requires security for the loan. The security may include a bill of sale over the business assets, registration with REVS over any motor vehicle or boat, or a registered mortgage over real property owned by the buyer or a fixed and floating charge registered with the ASIC, if the buyer is a company.

Important information regarding asbestos in the business premises

Legislation relating to asbestos was amended on 1 January 2012 relating to any workplace built prior to 31 December 2003. A person in control of the workplace is to:

- develop and implement an Asbestos Management Plan;

- investigate the premises for the presence or possible presence of asbestos and develop and maintain a register of the identified or presumed asbestos;
- develop measures to remove the asbestos or otherwise to minimise the risks and prevent exposure to asbestos and assess the condition of any "asbestos" that is found and the associated asbestos risks; and
- ensure that control measures are implemented as soon as possible and are maintained as long as the asbestos remains in the workplace.

If the business operates from premises built before 31 December 2003, then asbestos issues must be considered by sellers and buyers. Substantial fines may be imposed if you do not comply with the above. You should turn your mind to this new issue applicable to business premises and determine who will be responsible for completing an Asbestos Management Plan, if one does not already exist and if one does, ensuring it is current and up to date.

Help and advice from your accountant

Your accountant can help and advise you on determining a buyer entity, apportionment of price between goodwill and plant and equipment, GST issues, review of seller's financial records and due diligence, cash flow and other financial management issues.

Checklist to prepare a business contract

We have prepared a business contract checklist that outlines the information required by a solicitor to prepare a contract. This reduces the time it takes to prepare a contract and this saves you money. Please contact us to receive a free copy of the checklist.

What now?

The best advice we can give is to get legal advice before any contract is signed. Care must be taken at the contract preparation stage to get it right, rather than exposing yourself to the contract not reflecting the deal you struck with the other party. You could end up severely out of pocket if the contract is not prepared correctly.

From our experience, clients need a trusted group of professionals to consult with on matters including a solicitor, accountant/financial advisor, banker and insurance broker. These parties will cover different issues relating to the sale or purchase of a business relevant to each person's expertise such as tax savings, asset protection strategies and essential terms of the business contract. It is important that these professionals cooperate and work together for the benefit of their mutual client. This creates efficiency and savings in time and money for you and much less stress for you.

With offices in Brisbane, Mackay, Gold Coast and Surat Basin and due to the large size of our practice, our solicitors are able to specialise in the areas of the law in which they work.

Please call us to provide you with assistance in buying or selling a business or any other legal work on 1300 MCKAYS (1300 625 297).

PLEASE NOTE that this guide does not apply to the sale and purchase of businesses situated outside of Queensland.



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