# BUSINESS GUIDE

Resource Booklet

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# ABOUT THIS GUIDE

This guide has been designed for those contemplating buying or selling a business in Queensland. It is a starting point for the issues you will need to consider before, during and after the contractual stages of the purchase or sale process.

This guide is not a substitute for legal advice. Every business has different circumstances as do their owners. For this reason, we encourage you to treat this guide as general information only and to contact us to tailor legal advice for your particular business.

# WHERE TO START?

If you are looking to buy a business, then the first thing you need to do is find a suitable business to buy. If you are looking to sell, then it is a good idea to make sure your business is organised and up to date to make it as attractive as possible for the Buyer.

Whether you are buying or selling a business, the starting point for the transaction is entering into the business sale contract.

# WHO PREPARES THE CONTRACT?

The Business Broker will prepare the contract and suggest that both the Buyer and Seller obtain their own legal advice.

Where there is no broker, usually the Seller's solicitor will prepare the contract.



# THE STANDARD CONTRACT

A standard business contract is available from the Real Estate Institute of Queensland (REIQ) which contains a standard set of terms and conditions that are general to most businesses.

For most small to medium sized businesses, the standard contract is a good starting point to then add special conditions to provide for your specific needs. As every business is different, the special conditions required for each contract vary.

However, the standard conditions will apply to your contract unless your special conditions confirm otherwise.

# NO COOLING OFF PERIOD

Unlike some real estate transactions, there is no "cooling off period" for business sale contracts. So, unless there are conditions allowing for termination in certain circumstances (e.g. finance approval) the contract is binding on both parties once fully signed.

# BUSINESS STRUCTURE OPTIONS FOR BUYING A BUSINESS

Legal and financial advice is crucial when deciding how to buy the business to protect your assets and to be tax effective. The right structure depends on the type of business you are buying, how much it costs, the funding you are using and the level of income expected.

Some of the options are:

1. Sole Trader
2. Partnership
3. Company
4. Trust

You should obtain legal and financial advice on an appropriate structure before you sign the contract.

If you sign a contract and before settlement receive advice to change the Buyer entity, the original contract should be rescinded and replaced with a new contract showing the correct new entity.



# ASSET PROTECTION & TAX EFFECTIVENESS

We work together with your Accountant or Financial Planner to advise you on a structure to best protect your assets and provide you with the best tax benefits. In some instances, it is possible to separate the assets you own personally or with other entities from the risks you take by purchasing a business.

Separate company and trust entities can be created, provided they also meet your taxation needs depending on your circumstances, which assist to protect your assets. Having said that, some aspects of the business such as loans from the Bank or the lease can require the directors of your company to provide personal guarantees which can re-create that personal liability in some situations.

However, getting the right advice can help minimise your exposure to these risks and from paying more tax than required.

# OTHER STRUCTURE REQUIREMENTS

Your considerations for the right structure should also include whether your professional or trade requirements need a certain structure (for example, pharmacy companies require qualified pharmacy directors to be appointed to their companies).

You might also choose a structure that will allow you to bring other parties or investors in at a later date. Professional indemnity insurance premiums can also depend on the type of structure you adopt which might also be a consideration.

Other things you might consider are how your customers or suppliers perceive particular structures which could influence your ability to trade or earn income.

# GUARANTORS TO THE CONTRACT

We recommend you consider obtaining personal guarantees from the other party if that other party is a company. Usually you would request the guarantee be provided by the directors of that company.

This will enable you to sue that director personally for a breach of the contract (if one occurs). The reason this is important is that often companies are designed to own very few assets (sometimes only $2), so having personal guarantees from its directors provides you with greater security for that party to hold up its end of the bargain.

If you are a seller, the standard REIQ contract enables you to insert a guarantor for the Buyer for the Buyer's performance of the contract.



# PURCHASE PRICE & THE DEPOSIT

The purchase price should be clearly recorded on the Contract. Generally, it will be comprised of:

**The Deposit** – This can be broken into an initial holding deposit (e.g. $1,000) and a balance deposit within an agreed timeframe after that, or just one initial amount to secure the contract.

**Balance Purchase Price** – The balance purchase price is paid on settlement. The REIQ contract has provision for the price to be broken down further into good will and asset components however advice should be sought from an accountant prior to agreeing to any breakdown. Otherwise, we recommend not completing the breakdown in the Contract so taxation outcomes are not compromised unnecessarily for either party.

**Stock** – The contract needs to clearly indicate if the purchase price includes or excludes stock. More on this below.

# FINANCE

If you intend on borrowing funds to purchase the business, then the finance clause should be completed to give you a reasonable period of time (e.g. 21 days) to obtain the loan approval for an amount "sufficient to complete" from a lender "of the Buyer's choice". The REIQ standard finance provisions allow a buyer to terminate the contract if finance cannot be secured in this time and the Deposit must be refunded in full.

# DUE DILIGENCE & VERIFICATION OF BOOKS AND RECORDS

The REIQ contract has standard provisions requiring a seller to provide a buyer access to the books and financial records for the business so the buyer can verify them to be true and correct. However, since there are often more comprehensive investigations required into the business aside from just the financials (e.g. key supply agreements, employment contracts etc), we recommend buyer's request the inclusion of a broader "Due Diligence" clause to allow the Buyer a reasonable time (e.g. 21 days) to carry out their investigations into the business with the assistance of their legal or financial advisers. This clause would also allow the Buyer to terminate the contract if there were not satisfied with these investigations and be refunded their deposit.

A comprehensive due diligence would include carefully reviewing:

- income statements
- records of accounts receivable and payable
- balance sheets and tax returns including business activity statements (last 3-5 years)
- profit and loss records (last 2-3 years)
- cash deposit and payment records, as reconciled with the accounts
- utility accounts
- bank loans and lines or letters of credit
- minutes of directors' meetings/management meetings
- audit work paper files (if available)
- the seller's claims about their business (e.g. their reasons for selling the business's reputation)
- privacy details (e.g. of employees, trading partners, customers)
- stock
- details about plant, equipment, fixtures, vehicles (are they in good working order and licensed?)
- intellectual assets of the business (e.g. intellectual property, trademarks, patents)
- existing contracts with clients/staff
- partnership agreements
- lease arrangements
- franchise arrangements (if any)
- details of the business's automated financial systems
- details of credit and historical searches related to the business.



# BUSINESS LICENCES, PERMITS, AND CONSENTS

The contract will usually be subject to the buyer obtaining all the licences and consents referred to in the contract of sale. It is best to see a copy of all licences and consents from the seller prior to signing the contract.

The standard REIQ contract provides for a maximum amount to be nominated for "requisitions". This means that if an authority requires rectification works to be conducted to the business (i.e. a requisition), the seller can choose whether to do all of the works required, or works only to the value of the nominated requisition amount. In the latter case, the Buyer can elect to proceed with the contract and rectify the remainder of the works itself, or elect to terminate the contract. For example, in Queensland your local council authority will usually inspect a restaurant before it is sold to ensure it complies with food preparation safety standards. If they find any defects, they can issue rectification notices to the owner which creates this situation.

# STOCK

Contracts can include stock on a "walk in walk out" basis meaning that the purchase price includes stock. If this is the case for your contract, you may wish to insert a special condition to provide that the Seller must maintain a minimum level of stock for the continued operation of the business on the date of settlement.

This helps protect against Sellers depleting stock values from the date you sign the contract to the date of settlement. Alternatively, stock can be calculated separately by conducting a stock take on or close to the date of settlement. If this is the case, the standard contract allows for a maximum figure for stock to be included so that the buyer is not required to pay for stock exceeding that amount. If the value of the stock exceeds the maximum amount, the Buyer can choose what to keep up to the value of that maximum amount.

# PLANT & EQUIPMENT

The contract should attach three separate lists disclosing all of:

(i) the unencumbered plant or equipment owned by the seller included in the sale

(ii) the plant or equipment under hire purchase

(iii) the plant and equipment that is leased

Most commonly, financiers of equipment require hire agreements to be paid out so clear title can be given to the Buyer. However, in some instances they will agree to transfer them to the Buyer if they meet specific requirements.

It is crucial for Buyers that all plant and equipment is listed in the contract to avoid assuming certain items are included only to find them missing on the date of settlement. It is very difficult to prove items should have been included if they were not listed in the contract.

# CONDITION OF PLANT AND EQUIPMENT

The Seller needs to ensure plant and equipment is in good working order under the standard REIQ contract. However, as this is not always practical for businesses with aging equipment, the Seller could include a special condition to provide that plant and equipment is provided on an “as is” basis.

# BUYER’S RESPONSIBILITY FOR HIRE AGREEMENTS OR LEASED EQUIPMENT

If equipment is disclosed as hired or leased in the schedule, then the Buyer must take on these obligations. If you are a Buyer, you may wish to request that a due diligence special condition be included to the contract to allow you to consider the hire or lease agreements for the equipment and to terminate the contract if they are unacceptable. The standard REIQ contract requires the Seller to give clear unencumbered title to all business assets being transferred to the Buyer.

# MOTOR VEHICLES

The Seller must obtain a Safety Inspection Certificate to transfer a motor vehicle to the Buyer and pay for any works required to the vehicle to comply with safety standards. However, if Seller’s negotiate the transfer of motor vehicles on an “as is” basis, then a special condition needs to be included to remove the Seller’s obligations to obtain a safety certificate. Transfer of vehicle forms will then need to be signed by the Seller and Buyer before settlement.

# WEBSITES, EMAIL ADDRESSES AND COMPUTER HARDWARE

The REIQ contract covers trademarks, websites, email addresses and domain names that are disclosed in the contract to be transferred to the Buyer. If the details are not inserted into the contract then the Seller is not forced to give them to the Buyer.

Computer hardware is considered plant and equipment and needs to be listed in the relevant equipment list. However a special condition can be inserted to cover computer software to ensure that the Seller's licence to use that software is assigned to the Buyer.

# THE LEASE

The lease for the business premises can either be assigned to the Buyer or a new lease will be entered into with the owner.

For an assignment of the Lease, the Seller is required to obtain the Landlord's consent. The Landlord will usually require information about the Buyer such as details of their assets and liabilities, a resume and some trade and personal references.

The standard REIQ conditions provide that the Seller must for the Landlord's legal costs for consenting to the assignment of the Lease. Usually, Landlord's will require the parties to sign a Deed of consent which is prepared by the Landlord's solicitor.

If there is no Lease for the premises, a Buyer should request a special condition to the contract making it conditional on the Buyer negotiating a new Lease with the Landlord prior to settlement on terms satisfactory to the Buyer. This condition should allow the Buyer to terminate the contract if the Lease cannot be obtained and have the deposit refunded.



# RETAIL SHOP LEASES

The Retail Shop Leases Act 1994 applies to leases of retail premises (the Act has a list of all the different types of businesses included in it) and to premises in buildings which contain five (or more) tenants which predominantly carry on retail businesses.

This Act places strict disclosure requirements on Landlords and Tenants. For example, the Landlord must provide a prospective tenant with a disclosure statement at least 7 days before the Lease commences which sets out all the various costs and obligations that will be imposed on the Tenant in the Lease. Failing to do this can give the tenant the right to terminate the Lease within the first 6 months in the case of brand new Leases.

These timeframes need to be accommodated in your contract and you need to be mindful that Landlords may not always be as efficient as you in dealing with an assignment of the Lease.

Tenants also have disclosure obligations under the Lease which your solicitor should address before and during the assignment process.

Presently, The Act requires Sellers to provide a Lease and an Assignor Disclosure Statement to the Buyer 7 Days before the Business Sale Contract. This 7 day period can be shortened where the Buyer receives the Lease and Assignor disclosure statement and gives the correct waiver notice (this requires advice from a solicitor).

Disclosures can be waived in certain circumstances with tailored advice.

# TERM OF THE LEASE

Buyers should pay particular attention to length of the term left on the Lease and if there are any options remaining to renew it. If the Lease is about to expire, then you should request a special condition to make the contract conditional on the Landlord granting you further options. An option in a lease is simply the tenant's right to renew the Lease if the tenant elects to exercise the option.

# SELLER'S LIABILITY AFTER ASSIGNMENT OF LEASE

If the Lease is a retail shop lease, then the Seller and the Buyer can comply with certain disclosure obligations under the Retail Shop Leases Act which then provides the Seller with a statutory release of any further ongoing liability to the Landlord for the remainder of the Lease. If not a retail shop lease, then usually leases will provide that Sellers remain liable to the Landlord for any loss under the Lease, even after it is assigned the Buyer.

Sellers may be able to negotiate this release direct with the Landlord.

# RESTRAINT OF TRADE

A Buyer will usually negotiate a prescribed area and set period of time where the seller cannot be an owner, manager or employee in a competing business in order to protect the goodwill of the business. If the seller is a company then the Buyer will also need the directors of the company to sign a personal restraint. The size of the geographical area and timeframe for the restraint are open to negotiation but should be reasonable in the circumstances to remain enforceable.



# TRAINING

The level of training Buyers need depends on the business type and should be negotiated between the parties to accommodate what is reasonably required in the circumstances. Buyers might prefer to have training prior to settlement once the contract is unconditional in other regards to ensure they feel comfortable with the business before the official take over. Alternatively, Buyers and Sellers might agree to some training before settlement and some after, or in other cases, only after settlement.

# EMPLOYEES

A Buyer is not required to re-employ any existing employees, however may choose to do so. The standard REIQ contract provides that for 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 (long service leave is for those employees that have been employed for at least five years). The Buyer will then be required to pay the ongoing employee entitlements from after the date of settlement and this is considered “ongoing employment”.

Regardless of whether or not the leave is adjusted, the entitlements become the responsibility of the Buyer from the date of settlement for ongoing employees.

We recommend both parties give careful consideration to the amount of leave entitlements involved in the business since this liability is easily overlooked in a sales transaction.

# PREPAID ADVERTISING

Advertising such as Yellow Pages may be already paid for by the Seller therefore a clause can be used to adjust for this and the Buyer would then be required to contribute to the advertising for a period after the date of completion.



# INSURANCE

The assets of the business are usually the risk of the Seller until settlement. Buyers should obtain insurance for the business assets effective from that date (but even from the date the Contract is unconditional to be safe). Buyer’s also usually have insurance requirements under the Lease and should ensure these are also met prior to settlement. You should also consider other insurances such as income protection and life insurances to ensure you are covered for situations where you are sick, injured or disabled and unable to work.

# GST

If the Seller supplies the Buyer with all the things that are necessary for the continued operation of the business and the Seller carries on the business until the date of completion, then the business may be sold “as a going concern” meaning the transaction is “GST free”. Otherwise, the general rules are if the Seller is not registered for GST (and not required to be), no GST is payable on the contract. If the Seller is registered for GST and the business is not being sold “as a going concern”, then GST is applicable on the contract. If the Buyer is registered for GST, they can claim this GST amount in their next business activity statement, but this means that the Buyer has to resource additional funds to cover the GST (10% of the purchase price), plus an additional amount for stamp duty calculated on the GST inclusive amount. Your Accountant can assist with GST implications under the contract.

# FRANCHISES

The REIQ contract does not cover franchises. Therefore a special condition should be included to ensure the consent of the Franchisor is obtained for the Buyer entering into the system. Franchisors will usually require details of the Buyer's assets and liabilities, resume and references.

There is also usually a fee involved for an assignment of a Franchise Agreement along with training for the Buyer.

A special condition should be included making it clear who pays for which fee to avoid confusion.

Franchise Agreements are often onerous on Buyers and it is therefore critical that Buyers obtain legal advice to fully understand the terms.  A special condition giving Buyers an opportunity to be satisfied with any proposed Franchise Agreement they are expected to enter into is ideal.

# VENDOR FINANCE

If the purchase price is being paid over time and not at settlement, then this is vendor financing.

Negotiations and written agreements will need to be in place regarding interest on the outstanding amount and whether security will need to be given to the Seller in the form of general security registered over the business, mortgage over the Buyer's property or other personal guarantees.

# STAMP DUTY

In most cases a clause is used in the contract stating the Buyer is liable to pay the stamp duty.

However if the Buyer doesn't pay according to the contract the Office of State Revenue will require the Seller to pay the duty.

Duty is paid on the higher of the purchase price or the unencumbered value of the assets.

Some concessions are available for transfers to husband, wife or defacto spouse.

# LIQUOR LICENCE

There is no standard condition in the REIQ contract pertaining to liquor licensing. A special condition should be included stating the licence is to be transferred to the Buyer prior to settlement and outlining what is to happen if it is not transferred in the given time as the process can take up to 2 months. The special condition should also place obligations on the Buyer to act quickly to ensure this process moves as efficiently as possible.



# CONCLUSION

Our most successful clients engage us to work with a team of professionals including their accountant, banker and insurance broker.

We co-operate with these professionals to ensure your total needs are met in relation to the transaction.

You should seek advice as early as possible from all these professionals to arm yourself with the knowledge you need to reach a deal that protects your interests.

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# CONTACT US TODAY

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(07) 5413 9206

# SELLER'S CHECKLIST FOR SALE

1. Decide to sell and plan in advance.
2. Get your house in order (ie. ensure financials are up to date, tax returns completed, BAS & GST, lease and other agreements are current).
3. Speak to a Business Broker, value the business and list it.
4. Find a Buyer.
5. Engage a solicitor and inform your accountant.
6. Negotiate the Sale terms and sign a Contract (your Business Broker and solicitor will assist).
7. Take care of your employees and assist them with the change.
8. Transfer the business to the Buyer. Your solicitor and accountant will assist with this including transferring leases, paying out loans, releasing securities, transferring business names, vehicles and any licences.
9. Settle and receive the purchase price.
10. Notify your accountant of completion and deal with any capital gains tax that could be required after.



# BUYER'S CHECKLIST FOR PURCHASE

1. Decide the buy a business.
2. Engage a solicitor and accountant.
3. Consider the best legal structure to own the business.
4. Check your finances and speak to your finance broker or bank.
5. Negotiate the sale terms and sign a Contract (your solicitor will assist with this).
6. Undertake Due Diligence Enquiries (engage your accountant and solicitor to assist with this)
7. Secure finance
8. Proceed to settlement and ensure the business assets are transferred to you.
9. Settle and take over the business.

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