



Richmond and Bennison

LEGAL ISSUES FOR SMALL BUSINESSES

These notes cover basic legal matters relating to small businesses including:

- choice of business structure
- laws and legal areas that affect small businesses
- buying and selling a small business

WHAT IS A SMALL BUSINESS?

The term 'small business' is used to describe many types of business activities – retailers, professional service providers, suppliers and the like. The *Estate Agents Act 1980* defines a small business as one where the goodwill, plant, equipment and fittings are sold for a total price of not more than \$200,000 (this figure does not include the stock). The information presented here is relevant to most small to medium sized businesses.

ARE ALL SMALL BUSINESSES SET UP IN THE SAME WAY?

The simple answer to this question is no. There are four main structures used for small business:

- a one-man business;
- a partnership or joint venture, where two or more people have decided to start a business;
- a private company
- a business operating pursuant to a trust.

When you decide to buy a small business, speak with a solicitor and accountant about which structure is best for your business. The decision will depend on a large number of issues such as convenience, flexibility, taxation issues, and costs to set up and run the business. Most of these issues are complex and need to be fully explained.

THE LAWS AND LEGAL AREAS THAT APPLY TO SMALL BUSINESSES

There are many laws that govern the various elements of buying, selling or running a small business. A Lawyer can give you a more precise idea of the laws you should be concerned about, but some of the areas include:

- your rights in relation to representations made by the seller of the business during the negotiation process.
- local government and town planning restrictions.
- essential clauses that should exist in a sale of business contract eg. restricting the seller from competing with you.
- occupiers' Liability – as an occupier of business premises, you are responsible for the safety of visitors entering and remaining on your business premises. Maintaining safe business premises and taking out insurance cover for any accidents are the first steps in your obligations in this area.
- registration of a business name or incorporation of a company.
- retail leases legislation.
- the law of contracts.
- franchise agreements.
- consumer protection legislation such as the *Commonwealth Trade Practices Act* and *Victorian Fair Trading Act*.
- protecting original ideas by use of the *Patents Act*, *Copyright Act*, *Design Act* and trademarks.
- employment laws including Work Cover, wages, employee benefits, enterprise bargaining, discrimination, superannuation, training and unfair dismissal.
- income tax, including capital gains tax, sales tax and payroll tax.
- leasing arrangements for plant & equipment.
- licensing requirements.

DAY-TO-DAY BUSINESS DECISIONS THAT NEED TO BE MADE

Once a business is operating, there are a number of day-to-day decisions that will need to be made. These include:

- marketing decisions (promotion and advertising);
- commercial decisions such as whether to bring out a new line, offer a new service, expand the business or take on additional staff or equipment;
- how to prevent debts from accruing and how to collect them when they do (credit control);
- how to properly pay and manage all staff;
- how to manage your financial affairs - usually these decisions are made in consultation with your accountant.

WHAT TO CONSIDER BEFORE DECIDING TO BUY A SMALL BUSINESS

- i) The type of business structure best suited to your needs.
- ii) What do you know about running a business? For example, relevant management experience.
- iii) Can you afford the initial outlay and the continuing costs? (Remember, about 90% of failed businesses did so because of a lack of adequate capital.)
- iv) Where will your finance come from?
- v) What sorts of insurance do you need to protect yourself, your employees and your clients?

- vi) What do you know about the industry your business is involved with? For example, trade or product knowledge.
- vii) Is the business in the right location? Will you have sufficient customers?
- viii) Do you have all the equipment you need? If not, can you finance necessary additions?
- ix) How will you protect your investment? For example, security of tenure of premises, registration of ownership etc.
- xii) Are you familiar with all the laws relating to business, particularly income tax, sales tax, payroll tax, local government, health, industrial awards, and trade practices?
- x) Are you eligible for government assistance?
- xi) Have you received professional advice about the terms of the contract and the terms of the lease?

This list of "check points" is certainly not exhaustive. This is another good reason why you should have a careful discussion with legal and business advisers before you decide to buy a small business.

I HAVE FOUND A SMALL BUSINESS I WANT TO BUY: WHAT HAPPENS NOW?

Everyday many small businesses change hands. The decision to buy or sell a small business is very important. The decision affects the lives of both buyers and vendors. Despite the significance of the decision, many solicitors are surprised by the number of people who rush into small business transactions without seeking any professional advice or undertaking any research or preparation. Buying or selling a small business is a complicated matter requiring careful consideration. If you establish a working relationship with a solicitor and an accountant from the outset your investment will be one that will repay itself time and time again.

The person selling the business should supply a prospective purchaser with several documents:

- a statement called a "section 52" Statement that outlines details of the financial position of the business;
- a copy of the sale of business contract;
- if an agent is being used for the sale, a statement called a "section 51" which states whether or not the agent will help you find finance;
- a copy of any lease and assignment or, if real estate property is being sold with the business, a copy of the contract of sale and "section 32" statement.

Discuss each of these documents thoroughly with a Lawyer. In most cases, the contract and lease will require negotiation and drafting.

A Lawyer will carry out a number of inquiries, including:

- permits and licences required; and
- rates and other outgoings payable

It is a good idea to arrange for the vendor of the business to work in the business with you for a reasonable period of transition, enabling you to become familiar with business procedure and systems, meet customers, suppliers or sales representatives. A transition period to be worked by the vendor can be specified in the sale of business contract. It is also a good way for a purchaser to verify cash-flow representations made by the vendor.

SELLING A SMALL BUSINESS?

If you have decided to sell your business, the first step is to obtain a section 52 statement. This statement must include details of the income and expenses of the business, details of the lease, and hire purchase agreements, equipment, loans or bills of sale. A practising public accountant must certify the income and expenses details.

Once the section 52 statement has been prepared, you can consult a business or real estate agent to sell the business, or you can advertise the business for sale privately. A contract of sale of business is required and a solicitor can prepare this document for you.

Once you have a buyer for your business, you will have to transfer any registered business name to them, assign the existing lease of the premises to them, or arrange for a new lease. The sale of a business usually includes an agreement that the buyer will buy all the stock or some of the stock. It is usual to employ a professional stock-taker to decide the value of the stock to be sold.

ONGOING PROFESSIONAL ADVICE

When you consult your solicitor or accountant about buying a business, it should be the start of a very fruitful and beneficial relationship. Ongoing professional advice for the small business owner is invaluable in helping a business stay profitable and comply with legal and regulatory requirements. Small business owners should regularly seek sound legal and business advice – it is vital for ensuring the ongoing success of a business.

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