



The Essential **business** **eguide**



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This guide is designed to provide general information only and does not replace legal advice. Please contact us when you are ready to discuss your needs.

Understanding the legal obligations and issues that may arise when setting up a small business will ensure you get it right from the very start.

STARTING A BUSINESS

The type of business structure that best suits your needs will depend upon a number of factors which may include:

- The type and size of the business;
- Establishment fees and maintenance costs;
- Tax obligations; and
- The level of asset protection.

TYPES OF BUSINESS STRUCTURES:



SOLE TRADER

- A sole trader is the most simple and inexpensive form of business structure to set up.
- The structure consists of an individual trading on their own and operating under their own name or with a registered business name.
- Registration of a business name does not make the sole trader a separate legal entity. The sole trader controls and manages the business and is personally responsible for all debts and liabilities.
- It is relatively simple to change this type of business structure if the business grows and it is also simple to close down this type of business.



PARTNERSHIP

- A partnership is formed when 2 or more people (up to 20) carry on business together with a view to making a profit. They may operate under their own names or with a registered business name.
- A partnership is not a separate legal entity.
- Liability is unlimited (unless you are in a Limited Partnership) and extends to debts incurred by a partner without the knowledge or consent of the other partners.
- Partnerships don't pay tax on the income earned by the partnership. Instead, each partner pays tax on their share of the net partnership profits at their individual tax rate.



TYPES OF BUSINESS STRUCTURES (cont.)



COMPANY

- A proprietary limited company is a more complex business structure formed by at least one, but not more than fifty, shareholders who wish to operate a business as a separate legal entity to themselves.
- Under the law, a company is considered a "person", and can therefore incur debt, sue in its own name, or be sued.
- The shareholders own the company and the directors run the company.
- The liability of the shareholders is limited to the value of the shares.
- A company often offers a greater level of asset protection as opposed to some of the other business structures, as a shareholder's personal assets are separate from the business.
- Companies are regulated by the Corporations Act 2001 (Cth).
- There are costs associated with registering a company and the company is taxed on all profits.
- Establishment and ongoing administrative costs associated with the company's compliance with the Corporations Act are usually higher than costs associated with running a business as a sole trader or through a partnership.
- Companies must register with the Australian Securities and Investments Commission (ASIC).
- All companies are allocated an Australian Company Number (ACN). This is different to an Australian Business Number (ABN).
- Companies must be registered for GST if the annual GST turnover is \$75,000 or more.
- Companies must lodge annual company tax returns with the ATO.



TRUST

- A trust is a business structure whereby the trustee holds property and earns and distributes income on behalf of the beneficiaries. One of the most common types of trusts is a discretionary or family trust.
- For discretionary trusts, profits are distributed to the beneficiaries at the discretion of the trustees and can, therefore, be distributed in such a way to minimise tax, such as by distributions to beneficiaries in lower tax brackets.
- A trust often offers a greater level of asset protection as opposed to some of the other business structures if the trustee is a company that owns no assets.

CHANGING YOUR BUSINESS STRUCTURE

If you choose to start your business as a sole trader or partnership, you may later decide to change your business structure to a company.

OTHER MATTERS TO CONSIDER WHEN ESTABLISHING YOUR BUSINESS

When establishing a business there are a number of formalities that need to be completed before operations can commence.

APPLYING FOR AN AUSTRALIAN BUSINESS NUMBER (ABN)

- An ABN is a unique 11 digit number that identifies a business or organisation to the government and the public.
- It is free to apply for an ABN.
- An ABN can be applied for online on the Business Registration Services (Australian Government) website.



REGISTERING A BUSINESS NAME AND TRADE MARK

- A business name is a name or title under which a person or entity conducts a business.
- Unless you are trading under your own name, a business name will need to be registered if you carry on business within Australia.
- Exceptions to this rule include:
 - If you are operating as an individual and your operating name is the same as your first name and surname,
 - If you are in a partnership and your operating name is the same as all the partners' names, or
 - If you are an already registered Australian company and your operating name is the same as your company's name.
- A business name can be registered online on the Business Registration Services (Australian Government) website.
- Registering a business name does not provide exclusive ownership of your business name. It also doesn't prevent other people from being able to register and use similar names.
- A Trade Mark can be a letter, number, word, phrase, sound, smell, shape, logo, picture, movement, aspect of packaging, or a combination of these. A registered trade mark under the Trade Marks Act 1995 gives you the exclusive legal right to use, license and sell your trade mark in Australia. The owner of a trade mark can apply for its registration. This could protect your business name from being used by anyone else.
- Once you have registered your business name, a trade mark can be applied for through IP Australia.

OTHER MATTERS TO CONSIDER WHEN ESTABLISHING YOUR BUSINESS (cont.)

REGISTER A WEBSITE NAME

Your domain name is your website address or URL on the internet and gives you an online identity or brand. It's a valuable part of your business identity and is an important marketing tool that can help customers find your business and identify with it.

You will need to check that your domain name is available before you register it.

In order to purchase a .com.au or .net.au web address you will need to have either an Australian Business Number (ABN) or Australian Company Number (ACN).

BUY OR LEASE PREMISES

When establishing a business with a shopfront or physical presence, it is necessary to consider whether to buy commercial property or enter into a commercial lease.

ARRANGE INSURANCE

- Workers compensation insurance is required by employers to cover work-related accidents or illnesses for employees.
- Public liability, product liability and professional indemnity insurance may also be required for some businesses, depending on the industry and type of business.
- It is worthwhile to discuss the insurance needs for your business with an insurance broker or advisor to ensure you obtain the right policy for your business.



WHEN STARTING UP A NEW BUSINESS IT IS IMPORTANT TO FIND OUT WHAT REGISTRATION AND LICENCES APPLY TO YOU.

KEY DOCUMENTS FOR BUSINESSES

Partnership Agreement

A Partnership Agreement is a written agreement between the business owners who operate as a partnership.

Although it is not essential for a written agreement to be in place for a partnership to exist, we strongly recommend that a written agreement is prepared to outline matters affecting the business operation.

Your partnership agreement should include terms to deal with:

- How the profits and losses from the business are shared;
- The roles and responsibilities of each partner;
- Daily management issues for the business, such as payments for expenses, accounting records, insurance and employment matters.
- Admitting new partners into the partnership;
- Removing partners from the partnership;
- Whether assets brought in by each person are individual assets or assets of the partnership;
- How a partner may exit the partnership;
- How disputes will be resolved;



Company Constitution

The Corporations Act (2001) includes internal governance rules that companies must follow. Some of the rules in the Corporations Act are mandatory. Other rules may be replaced or supplemented by a "Constitution."

A company constitution is a document concerning three categories of people:

1. The company itself, and each shareholder;
2. The company and each director and company secretary; and
3. A shareholder and each other shareholder.

Whether your company needs a constitution will depend on a number of factors, including whether you want to make provisions for something not covered in the replaceable rules (e.g. different classes of shares, with different rights attached to those classes), if the company wishes to amend some parts of the replaceable rules, or even if the company just wishes to have a tangible document to refer to, that is not subject to legislative amendment.

A company's constitution governs the management of the company, and may include provisions for:

- Powers of directors, appointing directors and removing directors;
- The calling of director's meetings, and passing of director's resolutions;
- The calling of shareholder's meetings, and voting at shareholder's meetings;
- Remuneration of directors;
- Paying dividends;
- Transfer of shares.

SHAREHOLDER AGREEMENT

A shareholder is an owner of a company. Every company with two or more shareholders should have a written shareholder's agreement that establishes shareholders' rights and obligations, and deals with the management and operation of the company.

Shareholders usually invest in a company, and in return they receive a bundle of rights in the company. Each company and business is different, so the shareholder rights in each company will be unique. Generally, shareholders enjoy the following rights:

1. Attendance at shareholder meetings and voting rights on key issues;
2. Entitlement to receive dividends and other company distributions;
3. Entitlement to a final distribution on the winding up of the company;
4. Rights to sue to make a company act lawfully;
5. Rights to transfer ownership (this is often restricted).

Shareholder's rights can be found in the company's constitution and the Corporations Act 2001. Even though it is not legally required, shareholders should also enter into a Shareholder's Agreement. A Shareholder's Agreement will assist to protect the investment of the Shareholders by regulating certain aspects of the company and the shareholders behaviour.

A Shareholder's Agreement should contain terms relating to:

- The rights of shareholders to appoint directors of the company;
- The authority of the directors and shareholders to make certain decisions in relation to operating and management matters;
- Paying capital into the company or providing a shareholder loan;
- The sale and purchase of shares in the company, including how the shares may be valued;
- Restrictions on transferring shares to third parties;
- The transfer of shares on the death of a shareholder or key person of a corporate shareholder;
- Non-compete and non-solicitation restraints applicable to the company directors and/or shareholders;
- Confidentiality obligations; and
- Dispute resolution procedures.

COMMERCIAL AGREEMENTS

A commercial contract is a contract that defines the terms of a commercial transaction. The terms of the contract will depend upon the type of services or products that are being supplied.

A contract has 5 broad elements:



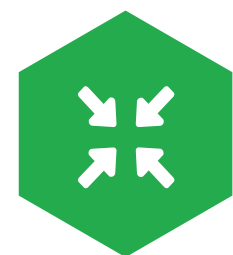
1. An offer;
-



2. Acceptance of the offer;
-



3. The agreement must be intended to create legal obligations (e.g. not a family arrangement, although these can also create legal obligations);
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4. Consideration (paying a price or promising to do or not to do something); and
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5. Privity - you can only sue the person with whom you made the contract, though you may be able to sue other people associated with the contract under other laws.

COMMERCIAL AGREEMENTS (cont.)

Some tips for drafting terms and conditions for business:

- Create a preamble in which you identify the parties to the contract by legal names and addresses. A common mistake is to identify an individual as a party to the contract when the company that the individual represents is the real party. If this happens, the person who signed the contract may become legally liable to perform the contract, while the company will not be bound. You should also briefly state the broad purpose of the contract. Courts can use the purpose clause as a guide when interpreting the rest of the contract.
- Identify the goods and/or services that are the subject of the agreement. In the case of goods, you should be as specific as possible - for example include catalogue or model numbers. If many types of goods are being purchased, you could list them in an appendix.
- State the price for each item, the currency of payment, payment due dates and the means of payment. You should be specific about the means of payment - in the case of a bank transfer, for example, list the account details.
- Insert a section detailing the seller's representations and warranties.
- Include terms about refunds and exchanges.
- A seller may wish to limit its liability in certain circumstances to the extent that it can do so by law.
- Always ensure that the contract is suited to your business circumstances and the transaction that is proposed to be entered into.

DOES A CONTRACT HAVE TO BE IN WRITING TO BE BINDING?

Although contracts can be verbal and do not have to be in writing, there are risks with enforcing a verbal contract. For example, the parties may think they are agreeing to different things, the terms may be unclear, and with a lack of tangible evidence it can be difficult to prove that the contract even exists.

We recommend that all commercial agreements are written. If this is not possible, make sure you have some written documentation that will assist with identifying the agreed terms. This could be emails, quotations or purchase orders, and even handwritten contemporaneous notes of discussions.

NON-DISCLOSURE AGREEMENTS

A non-disclosure agreement (NDA) is a contract between two or more parties that outlines confidential information that the parties wish to share with one another for certain purposes, but wish to restrict from being disclosed to third parties.

Under an NDA, the parties agree to not disclose certain confidential information. This will ensure that, if there is a breach of confidentiality, the person who disclosed the information can be held accountable and may be restrained from making further disclosure of the confidential information.

You can define in an NDA what proprietary information is "confidential information". NDA's are therefore very adaptable to the needs of your business, and may be used in many situations.

In the initial planning stages when starting your business, it is common to discuss ideas and

business propositions with potential employees, business partners, and suppliers. In this instance, it may be useful to have an NDA to protect your business ideas before you get your business off the ground.

If your business has valuable inventions, or information that qualify as "trade secrets", an NDA can protect those assets especially during discussions with a potential purchaser or potential business partner.

PRIVACY POLICY

The Privacy Act governs how agencies, organisations and some businesses must handle, use and manage personal information. "Personal information" is any information that identifies or could reasonably identify an individual, e.g. name, address, telephone number, date of birth, bank account details, and medical records.

Your business may be required to comply with the Privacy Act and the Australian Privacy Principles (APP).

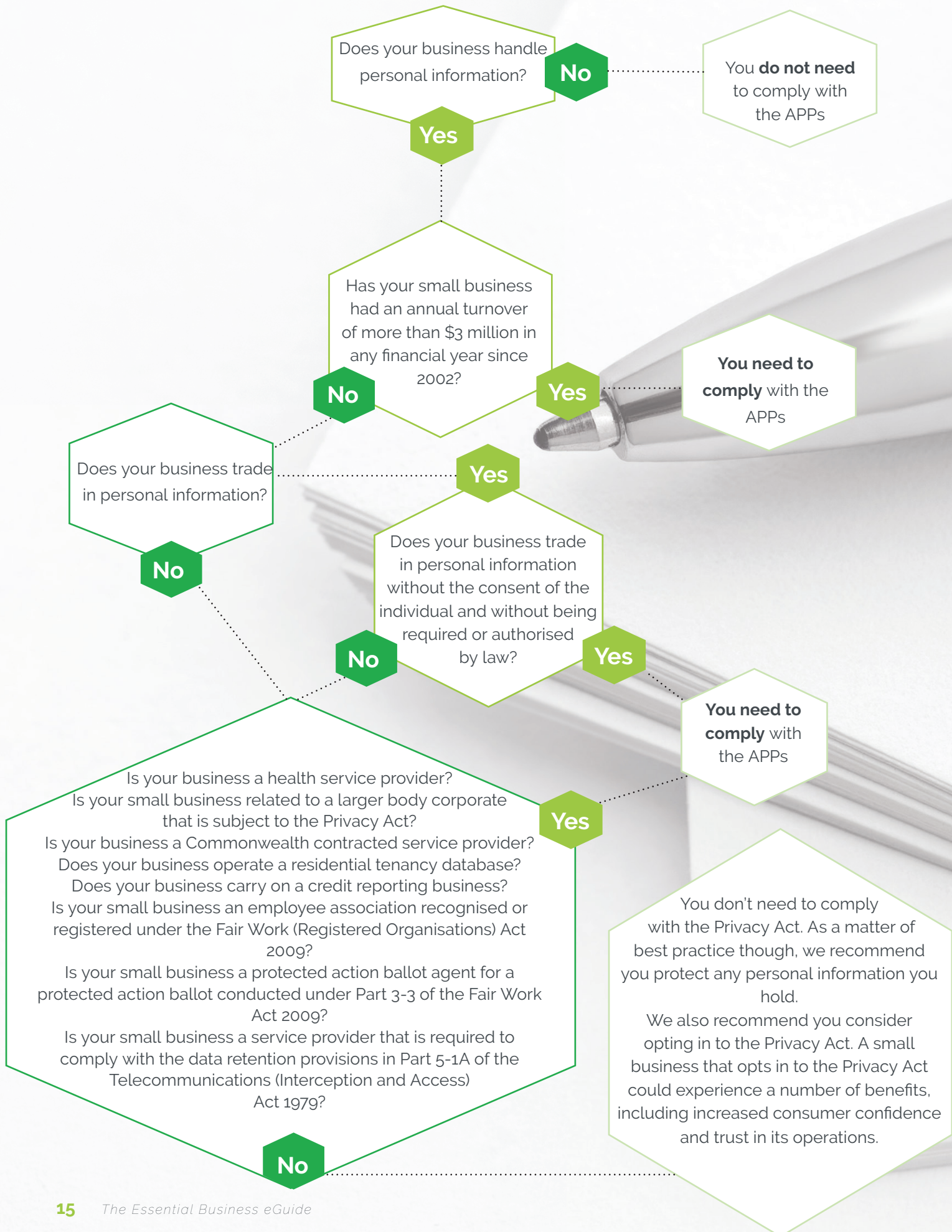
Even if the Privacy Act does not apply to your business, your business may still benefit from having a well-drafted, up-to-date privacy policy that is accessible to your customers. Good privacy practice in your business is critical to consumer trust and confidence in your brand.

Your privacy policy should include the types of personal information you collect, how you collect and hold that personal information, the reasons for collecting the information, and how, when and to whom you will disclose personal information.

Different types of personal information may be collected and handled differently, e.g. your business may collect customer information for the purpose of sending out regular newsletters, but will not share that information with any third parties. Your business may collect a customer's bank information (including credit card details) but not store that information and only use it to process transactions.

Australian businesses may also need to comply with the General Data Protection Regulation (GDPR) that was enacted by the European Union (EU) in 2018 if they have an establishment in a country that is a member of the EU, if they offer goods and services in the EU, or if they monitor the behaviour of individuals in the EU. Many Australian business that operate online will need to comply with the GDPR.

DOES THE PRIVACY ACT APPLY TO MY BUSINESS?



EMPLOYING PEOPLE IN YOUR BUSINESS

The National Employment Standards (NES) are 10 minimum terms of employment that apply to all employees in accordance with the Fair Work Act 2009 (Cth).

The 10 minimum workplace entitlements in the NES are:

- A maximum standard working week of 38 hours for full-time employees, plus 'reasonable' additional hours.
- A right to request flexible working arrangements to care for a child under school age, or a child (under 18) with a disability.
- Parental and adoption leave of 12 months (unpaid), with a right to request an additional 12 months.
- Four weeks paid annual leave each year for a full-time employee (pro-rata for a part-time employee).
- Ten days paid personal/carer's leave each year, two days paid compassionate leave for each permissible occasion, and two days unpaid carer's leave for each permissible occasion for a full-time employee (pro-rata for a part-time employee).
- Community service leave for jury service or activities dealing with certain emergencies or natural disasters.
- Long service leave entitlements.
- Public holidays and the entitlement to be paid for ordinary hours on those days.
- Notice of termination and redundancy pay.
- The right for new employees to receive the Fair Work Information Statement.



There are a number of options that an employer has when employing or contracting an individual to perform work for their business. Employment can occur pursuant to an award, enterprise agreement or individual employment contract. Alternatively, a business may engage the services of a contractor pursuant to an independent contractor agreement or services agreement.



AWARDS

Modern awards outline the minimum pay rates and conditions of employment for specific industries and job classifications. There are over 120 awards that cover most industries in Australia. There is also a Miscellaneous Award that may cover employees not covered by any other modern award.

An award will cover:

- Minimum wages;
- Types of employment;
- Termination of employment;
- Superannuation entitlements;
- Award flexibility;
- Dispute resolution;

It is important to note that when a workplace already has a registered agreement in place, the award does not apply to that business. However, the base pay rate in the registered agreement cannot be less than the award and the minimum NES still apply. Furthermore modern awards may not apply to high income earners, but the NES will.

EMPLOYMENT AGREEMENTS

An employment contract is an agreement between an employer and employee that sets out terms and conditions of employment. When an employee accepts a specific offer of employment (oral or written), a contract of employment has been established. Under this contract, both the employer and employee have certain rights and obligations.

In NSW, the parties to an individual employment agreement cannot agree on terms and conditions of employment that are less favourable to those set out in the applicable award or enterprise agreement.

An employment agreement should include the following terms:

- Title of the position and statement of the duties;
 - Wages or salary or remuneration benefits for the position;
 - Hours and days of work;
 - Leave entitlements;
 - To whom the employee reports;
 - Where the employee is to work;
 - How the contract may be terminated and the required amount of notice that should be given;
 - Redundancy provisions;
 - Confidentiality duties and any post-employment restraints.
-

A contract of employment is legally enforceable through the courts in the same way as any other contract. However, the courts will not usually order specific performance of the employee's contract and will not usually force an employee to work for a particular employer.

UNFAIR DISMISSAL

Unfair dismissal occurs where an employee is dismissed from their job in a harsh, unreasonable manner or where an employee was forced to resign from their position as a result of an employer's actions.

In order to apply for unfair dismissal, an employee must make an application to the Fair Work Commission within 21 days of the dismissal taking effect.

Employees working for a small business (fewer than 15 employees) need to be employed for at least 12 months before they can make a claim. Employees working in a larger businesses must have been employed for at least 6 months prior to the dismissal.

Employees also need to be earning less than the high income threshold in order to be eligible to make a claim for unfair dismissal.

Where Fair Work Australia upholds a claim, it may order an employer to:

- Reinstatement the employee to their former position;
- Re-employ the employee in another position that the employer has available;
- Provide back-pay and other entitlements owing from the time of the dismissal, where reinstatement or re-employment is ordered;
- Compensate the employee by ordering payment of an amount not exceeding the remuneration of the employee during the 6 months before the dismissal, where reinstatement or re-employment is considered impracticable; or
- Not dismiss the employee, where dismissal has been threatened.

Employers can minimize the risk that a former employee brings an unfair dismissal claim by providing the employee with written warnings relating to their performance prior to the dismissal, allowing the employee to respond to allegations or improve their performance, and clearly communicating the reasons for the dismissal with the employee.



Independent Contractor Agreements

The Independent Contractors Act 2006 (Cth) and the Fair Work Act 2009 (Cth) protect the rights and entitlements of independent contractors. Independent contractors are hired to do a set task or tasks. They are not employees.

Under an Independent Contractor arrangement the contractor:

- Has a high level of control in how the work is done;
- Decides what hours to work to complete the specific task;
- The contractor bears the risk of making a profit or a loss on each task;
- Bears liability for poor work or injury sustained while performing the task;
- Is responsible for paying their own superannuation;
- Uses their own tools and equipment;
- Pays their own tax and GST to the Australian Taxation office;
- Has an ABN and submits an invoice for work completed or is paid at the end of the contract or project;
- Does not receive paid leave.

'Sham contracting arrangements'

The Fair Work Act 2009 provides serious penalties to businesses who disguise an employment relationship as an independent contracting arrangement in an attempt to avoid responsibility for employee entitlements.

Penalties

Penalties for engaging in sham contracting arrangements can include an injunction if an employer attempts or seeks to dismiss an employee for the purpose of engaging them as an independent contractor. The courts can also make an order requiring the employer to reinstate the employee or compensate the employee for losses.

Intellectual Property

The intellectual property of a business can be a valuable asset. It can be protected by taking steps to register a trademark or patent through IP Australia, and including appropriate terms in commercial agreements and employment agreements to ensure that a clear message is given to others about the existence and use of the businesses intellectual property.

Intellectual property infringement is the infringement or violation of an intellectual property right. There are many types of intellectual property rights, such as copyrights, patents, trademarks, and designs. There are also actions available for "passing off" whereby an entity passes itself off as having some association with an entity that has a similar name, brand or other intellectual property rights.



Intellectual property infringement can occur in the following ways:

Copyright infringement– this is the unauthorised or prohibited use of works under copyright which infringes the copyright holder's exclusive rights, such as the right to reproduce or perform the copyrighted work, or to make derivative works (it can extend to music, movies, books etc).

Patent infringement - is the commission of a prohibited act with respect to a patented invention without permission from the patent holder. Permission may be granted by agreement, often in the form of a licence (paying a license fee or royalty). The definition of patent infringement may vary by jurisdiction, but it typically includes using or selling the patented invention. In many countries, a use is required to be commercial (or to have a commercial purpose) to constitute patent infringement.

Trademark infringement - is a violation of the exclusive rights attaching to a registered trademark without the authorization of the trademark owner or any licensees. Infringement may occur when one party uses a trademark which is identical or confusingly similar to a trademark registered to another party, in relation to products or services which are identical or similar to the products or services which the registration covers.

Passing Off – is an action that can be taken to enforce unregistered trademark rights. Passing Off occurs where a trader makes a misrepresentation (written or verbally) that their goods or services are those of, or associated with, another trader, who as a result suffers damage to its goodwill. An action may also be commenced where a product looks similar to that of a well-known brand so as to cause confusion for consumers.



Director's **Obligations**

Obligations and responsibilities

A director has an array of obligations or duties towards the company and its shareholders that must be adhered to pursuant to common law and statute. There are circumstances such as when the company is insolvent or is at risk of insolvency where duties are also owed to creditors and other members of the public.

Obligations imposed by the Corporations Act 2001 (Cth) include:

- The duty to exercise the degree of care and diligence that a reasonable person would exercise if they were a director of a company in the company's circumstances and had the same responsibilities as the director;
- The duty to act in good faith and in the best interests of the company and for a proper purpose;
- The duty not to improperly use their position to gain an advantage for themselves or someone else or cause detriment to the company;
- The duty not to improperly use information obtained through their position to gain an advantage for themselves or someone else or cause detriment to the company;
- The duty to disclose a material personal interest to other directors in a matter that related to the affairs of the company; and
- The duty to prevent insolvent trading.

Director's **Obligations** (cont)

A director will not face liability for business judgments made in good faith, with no material personal interest, on the basis of appropriate information, and with a rational belief the decision is in the company's best interests.

Obligations imposed by common law include:

- The duty to avoid conflicts of interest and not to compete with the company;
- The duty to use powers for a proper purpose;
- A duty to employees which may arise out of an independent fiduciary relationship, such as agency;
- A duty to act in the interests of creditors when a company is facing financial instability.

Consequences for breach of duties

There are a number of possible consequences that a director could face if they breach their duties, including:

- Being guilty of a criminal offence where recklessness or intentional dishonesty is apparent including a fine of up to \$200,000 and/or imprisonment for up to five years;
- ASIC commencing civil penalty proceedings or alternatively, criminal proceedings ; or
- Account of profits where the director has profited from their breach;
- Rescission of contract;
- Personal liability to compensate the company or others for loss that they have suffered as a result of the breach;
- Disqualification as a director of a company.

Personal Liability of a director

In certain circumstances, a director may be personally liable for the company's debts and losses incurred. These circumstances include:

- Debts incurred if the company continues trading whilst insolvent;
- Losses caused by breach of duties;
- Debts incurred by the company acting as trustee;
- Where the director provides a personal guarantee;
- Illegal activity including the intentional transfer of assets from an indebted company to a new company to avoid paying creditors, tax or employee entitlements;
- Where a company does not meet its Pay As You Go (PAYG) and superannuation guarantee charge (SCG) obligations.



Personal Property Securities Register (PPSR)

The Personal Property Securities Register (PPSR) is a national online register where you can register your interests in personal property (such as cars, boats, artworks, chattels), or check if personal property you're interested in buying has a security interest registered against it.

Does your business:

- Sell goods on retention of title terms?
- Hire, rent or lease out goods?
- Buy or sell valuable second-hand goods or assets?
- Want to raise finance using stock or other assets as collateral?
- Work as an adviser to clients who conduct these activities?

If you answered "yes" to any of these questions, then the PPSR may offer your business risk protection in one of two ways:

1. When buying goods: by searching the PPSR you can see whether the goods you are purchasing are free from existing financed debt, and therefore safe from possible repossession; and
2. When selling or leasing out goods: if any of your customers don't pay you for the goods, you will have priority over other creditors to repossess the goods if you have a registered security interest.

There are different types of "interests" that can be registered on the PPSR:



PPS leases

A lease or bailment where the agreement to lease or bailment is for either a set term of more than two years (including options to renew) or an indefinite period, but not until the lessee's or bailee's possession extends more than two years.



Interest of a factor in an account

A factor is a commercial agent that purchases accounts receivable from businesses at a discounted price for the benefit of future payments the account receivable will generate.



Consignment arrangements

Where the title holder delivers possession of personal property to the consignee.

The consignee is in the business of selling personal property of that type and attempts to sell the consignor's property.



Security interest

An interest in personal property that secures payment of a debt or other obligation. E.g. retention of title clauses in sale agreements (where the purchaser has possession of the property but doesn't acquire the legal title from the vendor until the full purchase price is paid), or financing leases.

Personal Property Securities Register (cont)

What types of goods are registered on the PPSR?

Almost anything of value can be listed on the PPSR, except for land, building and fixtures. Examples of goods that can be listed are motor vehicles, boats, aircraft, crops and livestock, stock in trade, artworks and equipment, intangible property (such as patents, copyright, commercial licences, debts and bank accounts), and financial property (such as shares, cash or cheques).



Retention of title clauses

A retention of title clause states that the title remains with you until the goods are paid for in full. However, this is no longer enough to protect your interests on its own.

If you don't register your interest and someone else registers theirs, their interest will be ahead of yours in the queue if the customer defaults or becomes insolvent.



Timing of registration

You should register your interest as soon as you know you're dealing with a new customer or dealing with an existing customer on new terms. You don't have to wait until the goods are delivered. Your rights are protected from the time of registration, so it's important to register as soon as possible.

Checking the register

Anyone wanting to know about security interests can search the register for a small fee.

The most common reasons for searching are:

1. A buyer searching to make sure the goods they want to buy do not have finance owing against them;
2. A liquidator or bankruptcy trustee searching for existing security interests because they affect other creditors in a liquidation/bankruptcy;
3. Business or financier searching a potential customer as part of the due diligence process.

PPS Leases

Leases entered into pre 20 May 2017

A 'PPS lease' is a lease or bailment where the agreement to lease or bailment is for:

- a set term(s) of more than one year (including options to renew);
- an indefinite term
- a term of up to one year or an indefinite term where, with the consent of the lessor or bailor, the lessee or bailee continues to retain substantially uninterrupted possession of the property.

Leases entered into post 20 May 2017:

A 'PPS lease' is a lease or bailment where the agreement to lease or bailment is for:

- a set term(s) of more than two years (including options to renew)
- an indefinite period but not until the lessee's or bailee's possession extends for more than two years.

Registering a PPS lease:

- In order to preserve a lessor's interest in the leased goods, a PPS Lease must be registered on the PPSR.
- Agreements entered into for more than 2 years should be registered on the PPSR.
- If the agreement is for two years or less, but exceeds the agreed term, it will become a PPS Lease when it extends beyond two years and should be registered at that time.
- An agreement that is less than two years is not considered a PPS lease.
- Leases of an indefinite term may be registered at a time when a lessor has reasonable grounds to believe that an indefinite term lease will exceed a two year period.



SELLING YOUR BUSINESS

Sales, Mergers and Acquisitions

There are 3 common ways to dispose of an interest in a business. You can either sell the assets of the business or the business itself, or, if the business is a corporation, you can sell the shares. There are important differences between these types of sales.

Preparing your business for sale - Business Valuation

A business valuation is the process of determining the economic value of a business or company. This will assist in determining the selling price for your business. It is important to prepare the correct business information in order to get the most accurate valuation possible.

Some documents you will need to prepare:

- Financial statements such as cash flow statements, annual turnover and profit and loss statements;
- Detail of physical assets such as buildings, equipment and stock;
- Detail of intangible assets such as goodwill and intellectual property;
- Legal documents such as leases;
- Any charges on the Personal Properties and Securities Register (PPSR) over any of the business' assets;
- Registration papers such as Australian Business Number (ABN), relevant licenses and permits;
- Business history such as commencement date and business plan;
- Employee, supplier and customer details.

Finding a purchaser for the business

There are a number of avenues that can be pursued in order to find a buyer for your business. These include:

- Offering the business to an existing staff member, family or friends;
- Advertise through a business broker;
- Advertising online, in newspapers or in trade publications.

Negotiating the sale

It is essential that when negotiating the sale of the business with a prospective buyer that any information that is given about your business is correct and true. Anything that is said during negotiations that is found to be incorrect could be classified as misleading behaviour, which may result in damages, injunction or compensatory orders being brought against the offender.

There are a number of factors that must be decided when negotiating the sale of a business:

- Sale price;
- Deposit amount;
- Settlement period;
- Arrangements for existing staff;
- Whether stock is included;
- Whether the lease will be transferred to the new buyer including who will pay for the landlord's costs for this transfer.

Preparing the Contract

After the terms of the sale have been negotiated, the contract for the sale of the business can be drafted. The contract should incorporate all the agreed terms.

Some of the matters that should be included in the contract are:

- A list of all of the assets that are being transferred such as property, stock and intellectual property;
- How the transfer of existing liabilities and obligations of the business will be dealt with, such as creditors and the lease on the premises;
- Existing employee entitlements and whether employees are to be transferred to the new business owner;
- Restraint of Trade Clauses - These prevent the seller from setting up a similar business within a certain radius and for a certain amount of time from the settlement date of the transaction;
- Training Clauses - These clauses allow the purchaser to work in or observe the business prior to settlement, so that the purchaser can gain a greater understanding of the operation of the business;
- Performance Clauses - These may state the minimum takings of the business over a certain period of time;
- Staged Payment Clauses - stating that payment of the agreed price will be made in stages. This may give the purchaser greater bargaining power if a dispute arises after the transfer of ownership or if the business does not perform as promised; and
- Guarantee Clauses - providing a guarantee from the vendor that all representations made regarding sales, costs and profits figures are correct.



Signing the Contract

Once the contract has been approved by both parties, the seller's lawyer will usually prepare the final contract along with any other documents referred to in the contract and both parties will sign and date the contract.

Settlement

Once the contract has been signed and exchanged, it is appropriate for the seller to transfer the business to the new owner. The settlement date is the day that the purchaser receives ownership of the business.

In order to prepare for the settlement date:

- If there is a lease on the premises, it needs to be transferred to the new owner or alternatively the landlord can issue a new lease;
- If relevant, any licenses, permits, contracts with third parties and intellectual property must be transferred to the purchaser;
- Tax returns, activity statements and instalment notices need to be finalised;
- It may be necessary to cancel your ABN and transfer or cancel your business name.

At settlement, the purchaser will give the seller payment for the balance remaining on the purchase price and any other relevant documentation.

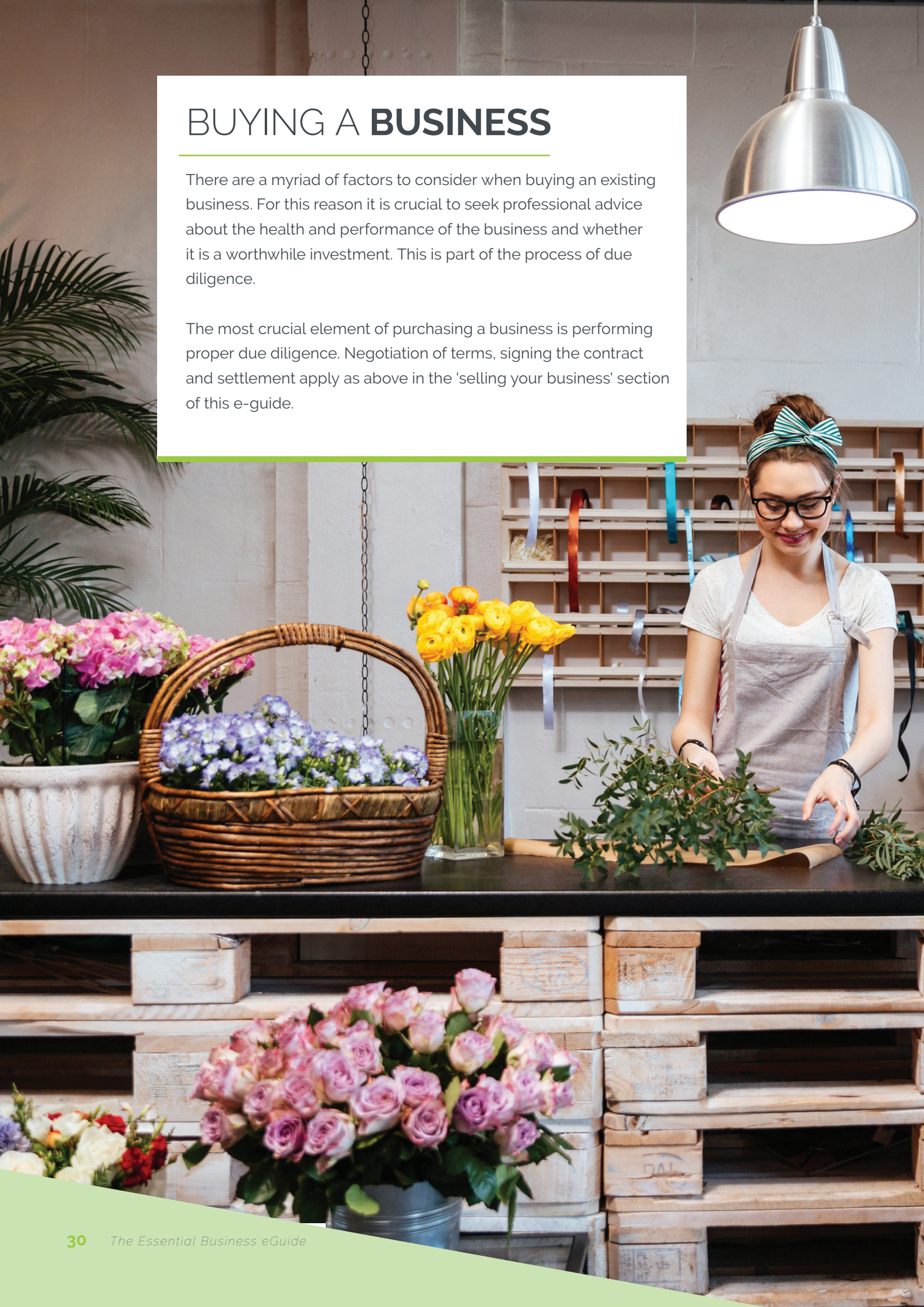
Selling your business can be a long and complex process. To ensure that you are receiving the best possible outcome from the sale of your business it is essential to consult legal and financial professionals.



BUYING A **BUSINESS**

There are a myriad of factors to consider when buying an existing business. For this reason it is crucial to seek professional advice about the health and performance of the business and whether it is a worthwhile investment. This is part of the process of due diligence.

The most crucial element of purchasing a business is performing proper due diligence. Negotiation of terms, signing the contract and settlement apply as above in the 'selling your business' section of this e-guide.



Due Diligence

Due diligence is the process undertaken by a prospective buyer to assess and evaluate a business' commercial potential. In order to perform this evaluation, it is necessary to gain copies of all relevant business, financial and legal documents before entering negotiations.

Relevant legal and financial documents that should be requested during the due diligence process:

- List of assets including a proof of ownership;
- Insurance policies;
- Lease agreements including; building, equipment and machinery;
- Employment contracts;
- Existing customer contracts;
- Existing supplier contracts;
- Balance sheet;
- Profit and loss statement;
- Sales records.

Important considerations during due diligence:

- Ensure that the business you are interested in purchasing is compliant with relevant laws;
- Whether any existing contracts that the business is a party to contain any hidden terms that could be detrimental to the business;
- Whether there are any existing mortgages over the property if it is part of the sale;
- If there are any charges on the Personal Properties and Securities Register (PPSR) over any of the assets;
- If the existing lease of the premises will be transferred to you or whether you will need to negotiate a new lease agreement;
- It is also necessary to consider any relevant licences and certificates (e.g. liquor licence or food handling certificate) that you must obtain in order to run the business after settlement.

You should consider and discuss with your accountant whether stamp duty, or any other taxes (Capital Gains Tax; GST), will be payable on the transfer of shares or assets. You should review with your accountant the company's financial statements, including the balance sheet and profit and loss statement. Your accountant should review the taxation warranties and indemnities to ensure they provide adequate protection.

To ensure that you are receiving the best possible outcome when purchasing a business it is essential to consult legal and financial professionals. If you are contemplating purchasing a business, please contact us and a member of our commercial team will guide you through the process.



MEET THE COMMERCIAL TEAM



Dean Groundwater is an Accredited Specialist in Commercial Litigation and heads our commercial group. He joined WMD Law in 1995 after 7 years in the business services taxation and insolvency division of a major accounting firm. Dean's practice includes drafting all types of commercial agreements, disputes resolution and litigation. Dean acts for a range of clients from SMEs to public companies, professional practices, registered clubs, charities and sporting associations.



Anika Fleet is a Principal of our Commercial Group. Anika's practice includes commercial, litigation and advice, estate litigation and employment law. Anika regularly appears in the Local, District, Supreme and Federal Courts on commercial disputes, equity claims, and insolvency matters. She advises clients about their legal rights and court processes. She prepares court documentation, briefs counsel and conducts proceedings generally.



Julie Duce works predominately in our south coast offices and practices in commercial leasing and litigation. She also works in the areas of conveyancing, probate, estate administration and contested estates matters under the Family Provision and Succession Acts, both in ACT and NSW jurisdictions. Julie has extensive experience as a mediator and proudly provides her clients a range of alternative dispute resolution options. She is a member of the NSW and ACT Law Societies.



Denis Bowles has specialised in Commercial Law for over 20 years. Denis has advised on ASIC investigations, major corporate reconstructions, public floats, complex bankruptcy law and insolvency matters. Denis also has wide and valuable experience in business sales and acquisitions, contractual negotiations and disputes, commercial litigation and Trade Practices Act litigation.



Matthew Coulter is a Senior Associate in our Commercial Group. Matthew's practice includes debt recovery, insolvency, contract disputes and commercial litigation. He drafts and reviews commercial contracts, including services agreements, agency and distribution agreements and terms & conditions of trade. He acts for a wide variety of clients including private companies, primary health networks, charities and not-for-profit organisations to provide employment and general corporate advice. Matthew regularly appears in Court as an advocate for his clients or when briefing Counsel.



Kate Brunton has experience in debt recovery, commercial litigation and employment law and assists the Commercial Law division to prepare documents and administrate Commercial Law matters. Kate joined WMD in 2015 and was admitted as lawyer to the Supreme Court of New South Wales in 2017.

About WMD Law

Why choose one lawyer when you can access an elite pool of specialists.

WMD Law is an elite legal firm. We provide the services you'd expect from a city team, in the heart of the Sutherland Shire and along the South Coast. We've handpicked our team of lawyers to best cover every aspect of law, so our clients can access the best advice for any matter. That's why we can provide advice and representation for family law, commercial law, property law, criminal law and estate law.

It's the diverse expertise of our team that allows our clients to achieve the best possible outcomes. Many businesses and individuals face legal issues that don't neatly fall under one category. At WMD Law, our legal teams work together to ensure our clients have all bases covered.

WMD Law has the big picture in mind when handling your matter. Our lawyers have the foresight needed to help you sidestep risk and unlock opportunities well into the future.

Our Services

At WMD Law, we provide our clients with effective, practical legal advice in all areas of law, including:

- Corporate and Commercial Advice, Commercial Litigation, Business Sale and Acquisitions and Insolvency and Bankruptcy.
- Family Law
- Property issues, including Leasing, Development and Conveyancing
- Probate and Estate Litigation
- Criminal Law and Traffic Offences
- Wills and Testamentary Trusts
- Powers of Attorney and Appointment of Enduring Guardians

Our team has the capacity to understand all aspects of your business and personal needs and can work with you to design and implement strategies to manage any of your legal issues within whatever time and budgetary constraints you need to impose.

As a client of WMD Law, you can expect:

- Excellence in the level of service, advice and representation you receive.
- To gain an advantage in your business and personal dealings.
- Support in the critical stages of your personal and professional life.
- Your needs met in a timely fashion.
- Value for your legal spending.

If you would like further information on how our team can assist you, your business, company or operations, please visit our website at www.wmdl原因.com.au or call us on (02) 9525 8688 to receive FREE preliminary phone advice and discuss your circumstances.



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