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SELLING YOUR BUSINESS

You've no doubt worked hard to build a business that you're proud of. Now that you're thinking about selling it, we've got to admit that there's just a *little* bit more hard work involved to get the deal signed and sealed. However, locking in a good deal, providing all the key information and seeing the transaction right through to the end are a few of the steps that are worth doing well to protect the return on all the hard yards you've put in. Although the sale process may involve a bit of thought and concentration, we're here to guide you through the process. We've put together this overview to give you a heads up on what's involved in the sale process. But, just like our other guides, this isn't a substitute for the real deal: Personalised legal advice and support as you work through one of the bigger transactions of your career.

Lawyering Up

So, if you're thinking about selling your business, talking to your lawyer is one of your very first steps. And we're not just saying that! There's a bunch of important decisions to be made and they all count, right from the beginning. Your lawyer is able to help you out from square one and make sure you're in the best possible position going forward.

Assets or shares?

Your lawyer will come in particularly handy when you come to consider one of the first questions in the sale process, being, just *how* do you want to sell your business? Depending on the nature of your business, you have the option of selling the assets of the business *or* selling the shares of the business. What's the difference between an asset and share sale? Which one should you choose?

The difference

- **Share Sale:** In the case of a business being run as a company, you may transfer the ownership of the shares in the company to the buyer using a share transfer form, which is generally considered to be a simpler option than an asset sale. The entire business, including all of the assets, contracts and employees stay within the company which will then be owned by the new buyer once the share transfer goes through. It's important to note that all liabilities are usually transferred too as part of this deal (unless otherwise agreed). Sellers usually want a share sale because of the ease of transferring the business over to a new owner, everything just stays within the company.

- **Asset Sale**: An asset sale is more complicated than a share sale because it involves individually transferring all the assets and important contracts of the business separately to the buyer, as well as rearranging employment arrangements and other key components of the business. Because liabilities don't automatically transfer, the parties usually agree which liabilities will transfer to the buyer and which ones the buyer won't assume. Because of this, buyers usually want an asset sale so they can buy a business without unwanted liabilities.

Choosing

- If you're a **sole trader** that runs a business personally (as opposed to the business being run through a company), you'll sell the **assets** of the business.

- If your business is a **company registered with the Companies Office**, you can do either a share sale or an asset sale. In reality, you'll probably negotiate with the buyer about which way to go. It all depends on the circumstances, the business, and the negotiations between the buyer and seller. If one party has a stronger position in the negotiations, they might be able to negotiate their way into a sale that suits their preferences better.

Coming to an Agreement

If you have a buyer interested in your business, you'll need to come to an agreement about the terms of the sale. This is usually done through a formal document called a sale and purchase agreement, which should cover the key parts of the deal. There are a few crucial places where a share sale agreement will be different to an asset sale agreement. However, based on our experience, we notice that most of the business sales we advise on are asset sales. For that reason, from now on in this guide we'll be talking specifically about asset sales. We'll also refer to the sale and purchase agreement simply as the **agreement**.

Below is a brief guide to some of the key issues that should be addressed in any agreement, together with a brief description of why each point matters to you as a seller.

Buyer and Seller Details	For both parties, it is important that the other is accurately described in the agreement and easily identifiable. This helps if any issues arise under the agreement and one party needs to take some kind of legal action against the other. As the seller, it might be worth doing your research on who the buyer is and getting an idea of their background and reputation. If they are a company, you or your lawyer can do a search of the Companies Office to check that they are registered as a New Zealand company.
Settlement Date	The agreement will nominate the date that the transaction will take place on, which is usually referred to as the settlement date. This is the date that money changes hands and the entire business transfers over to the new owner.
Purchase Price	It's a good idea to get the business valued so you can set an appropriate purchase price. There are different methods of valuation that are available, depending on the type of business, the industry it's in and various other factors. However, most methods will include a consideration of one or many of these factors:

	• Value of the assets of the business, which usually takes into account three types of assets:
	    ◦ **Tangible assets,** like any machinery, vehicles or premises that the business owns
	    ◦ **Stock** such as materials and supplies
	    ◦ **Intangible assets** such as contracts, intellectual property and goodwill, which refers to the value of the business' reputation, brand, customer base, location or many other factors that contribute to the success of the business.
	• Company liabilities and debt
	• Recent profit history of the business
	• Market demand and economic conditions
	• Future potential profit
	
	Valuing each component of your business will help provide a reference point for setting the purchase price. There are many ways to go about this exercise so we recommend getting your accountant and a professional valuer on board to advise you on your options.

GST	Another important consideration in finalising an agreement is whether the purchase price includes GST or not. This depends on the business and the tax status of the parties involved. Check with your lawyer or accountant how this applies to you.
Conditions	It's common for the agreement to have conditions that must be satisfied before the deal goes through. Some common conditions include:
	Due Diligence Due diligence is an inevitable part of any business sale and it's basically a fancy term for the research that the buyer will do on the business to check that it will be a good investment. The buyer may do due diligence before an agreement is signed, or after, depending on the circumstances. *Due diligence prior to an agreement:* Due diligence may occur *before* the parties have signed up to an agreement. In this scenario, due diligence isn't a condition of an agreement but a preliminary investigation that will inform whether an agreement is entered into. *Due diligence as a condition of the agreement**:*** It is more common for due diligence to be a condition of the agreement, which means that the agreement is conditional on the buyer being totally satisfied with their research into the business. If they aren't, the agreement can usually be cancelled, or the buyer may like to use their findings to negotiate on the price or other terms of the deal.

*How it works***:** Regardless of when due diligence occurs, you'll need to cooperate with the buyer and offer up a range of different information about the business as part of the process. Just how that plays out in practice, however, depends entirely on the business and the industry it operates in, its size and its level of complexity.

Some examples of the information that a buyer would be interested in reviewing include:

- Documents confirming the legal structure of the business (including, for example, the certificate of incorporation for the company)
- Customer lists or databases
- Your business agreements, for example, contracts with suppliers and customers
- Any leases or other agreements or licences relating to the business premises
- Any licences or authorisations you need to run your business
- Information about your employees and contractors, including all employment agreements
- Financial information and statements
- Balance sheets and accounting practices
- Evidence that you own all of the business' important assets
- Records relating to any intellectual property

As a seller, make sure that before you embark on a due diligence process your business affairs are organised, in order and easy to provide to any interested parties. Whether due diligence is a condition of, or a precursor to, a sale and purchase agreement, you'll want to make sure that this process is covered by a confidentiality agreement. You can use a robust confidentiality agreement as protection that your business affairs won't be leaked or used by that person if the sale doesn't go ahead.

If the buyer uncovers things that they aren't happy with, that information may be used to negotiate down the price of the business or other terms of an agreement. Alternatively, the buyer may simply walk away from the deal.

Finance

The buyer can make the deal conditional on approval from a bank or lender that it will lend sufficient money to finance the purchase.

	Other conditions *Obtaining the relevant consents, transfers, authorisations:* In an asset sale, there can be significant work involved in transferring all relevant contracts, licences, registrations, authorisations and other documents. For every one of these arrangements, the other party must agree to the contract being transferred from you as the existing business owner to the buyer as the new business owner. For example, say your business has a contract with Coca Cola for the supply of soft drinks to your cafe. You must contact Coca Cola, explain that the business is being sold and get their approval to transfer the contract for soft drinks to the new owner of the business. If some crucial contracts can't be transferred in this way, this could be a deal breaker for the buyer. *Assignment of Lease:* If the company leases business premises, the agreement will usually be conditional on the landlord consenting to lease being transferred from your name to the new owner's name. A lease is a crucial component of a business sale and if you can't get consent from your landlord, this is certainly a situation that could be a deal breaker for the buyer. *Employees staying with the business: I*n the case of important or crucial staff, the buyer may insert a condition to the agreement saying that the transaction is conditional on these staff accepting offers of employment with the buyer and, therefore, staying on with the business. *Overseas Investment Office approval:* If the buyer is a foreign entity, the deal may be conditional on them gaining approval from the Overseas Investment Office that they can go through with the transaction.
Warranties	Warranties are essentially promises that you make about your business to the buyer. These are a crucial part of the agreement as effectively you are promising that the business looks a certain way and that the buyer can buy the business on this basis. If any of your warranties are incorrect, the buyer can sue you later on. Working with your lawyer to negotiate the warranties you make is a big part of the agreement and one that should be taken seriously.
Restraint of Trade	In many cases the buyer will attempt to include a clause in the agreement that will "restrain" or stop you from competing with the business once you sell it. This is called a restraint of trade and it should be very well defined in terms of restrictions on behaviour, location and duration. For example, you won't be able to set up a new cafe (behaviour) within 100km of the one that you're selling (location) for 2 years (duration).

	A restraint can be valuable for the buyer, so any restraint may help you maximise the price you get for the business. However, it also restricts your behaviour and possible earning potential in the future, so you should try to keep the restraint as limited as possible if you want to keep your options open. The law helps you out on this one - an unreasonable restraint of trade can be overturned by the Court if it is over the top.
Ongoing Assistance	The buyer may request or require you to help out with the business for a period after the sale has gone through in order to ease the difficulties of the transition process. It is also common that any agreement will require you to act appropriately and in the best interests of the business during the time between the agreement being signed and the settlement date.
Employees	In an asset sale, the employees of a business aren't simply transferred over to the new owner. For each employee, their employment contract with you will be cancelled and the buyer will have the option to hire the employees or not when they take over the business. From your perspective, you will have certain obligations to your employees before the business is sold and it's important that you meet these. Depending on the employment agreements in place, these obligations may include notifying the employees of the sale, discussing with the buyer whether the employees will be offered employment, and taking care of all outstanding payments for wages and other entitlements before the settlement date. These matters are usually included in the sale and purchase agreement so that there is no doubt between you and the buyer about the position of the employees.
Property	As we mentioned above, if your business runs from premises that are leased, the lease agreement will need to be transferred from you to the buyer, which will require the consent of the landlord. If you own the property that your business operates out of, then the agreement will need to address the fact that the title to the property must be transferred as part of the sale.

Making It Happen - Settlement Date

After both parties sign the agreement, you will now be turning your attention to the not insignificant task of preparing the business for sale and satisfying all the conditions. Depending on your agreement this can include due diligence, transferring key contracts, managing employees and arranging the transfer of any employees to the new business, advising clients and customers of the sale and tidying up affairs in preparation for the sale.

Once the agreement is unconditional, you must sell the business according the terms that you agreed with the buyer. In return, the buyer must also buy the business in accordance with these terms. The settlement date is when everything happens - the buyer will transfer the funds and ownership of the business (and each of its components) will move to the buyer. In real life, your lawyer and the buyer's lawyer will likely be dealing with the transfer of funds and making sure all the boxes are ticked to ensure the sale is valid and that there are no loose ends. You'll be working closely with your lawyer at each of these stages and, in particular, on the settlement date they will help you work through the various documents you'll need to sign, confirm and finalise.

And, just like that, after all your hard work, the deal will be done!

Congratulations!

A Few Notes to End With

We put together this guide as a very general overview to the process of selling a business. However, there are innumerable factors that may become relevant or crop up in any given transaction that weren't covered here. We can't talk about them all in one guide, so, for the very best guidance and support, we recommend you give us a call so we can work together to make sure you're looked after, taking into account all of the specific circumstances of your business selling journey.

Have a question about buying or selling a business? Or perhaps you just fancy a chat about how this information applies to your situation? If so, we would love to help. You can give us a call or send us an email for more information.

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