

# **The top 7 legal considerations**

## **PREPARING FOR THE SALE OF YOUR BUSINESS**

A publication of aspect legal





*When you decide to sell your business, you may be walking into a minefield of issues that you have not encountered before.*

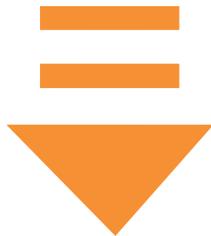
In this e-book we provide a summary of some of the most important legal considerations to be aware of, as you prepare yourself for a sale.

Some of these areas may seem pretty obvious, but our experience has been that even the most obvious areas are often forgotten or considered too late – which can have important ramifications on the sale and the sale price.

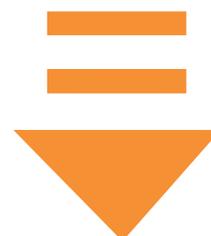
It is never too early to start planning for your eventual sale!

# aspect legal's specialist business sale and acquisition services

## OUR KEY DIFFERENCES TO OTHER LAWYERS



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Free Sale Preparation Review



Information pack



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*Preparing for the sale  
of your business*

## **THE TOP 7 LEGAL CONSIDERATIONS**

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# BUSINESS STRUCTURE

Get familiar with the differences between a share sale, a business sale, and an asset sale

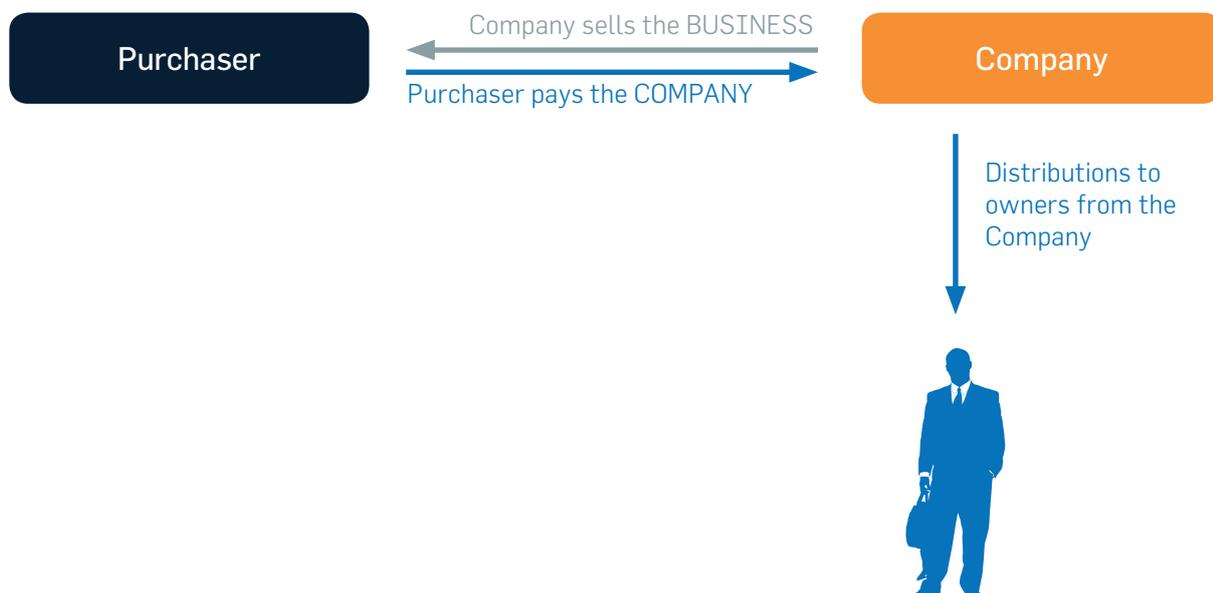
If your business is operated through a company structure, then the first question you should be considering is whether to sell your interests in your business by way of a business sale or by way of a share sale, or simply by selling some of the assets.

**Your decision can have serious tax and legal implications** - so it is extremely important to consider this issue from the outset.

## HOW THE OPTIONS WORK FOR A COMPANY STRUCTURE

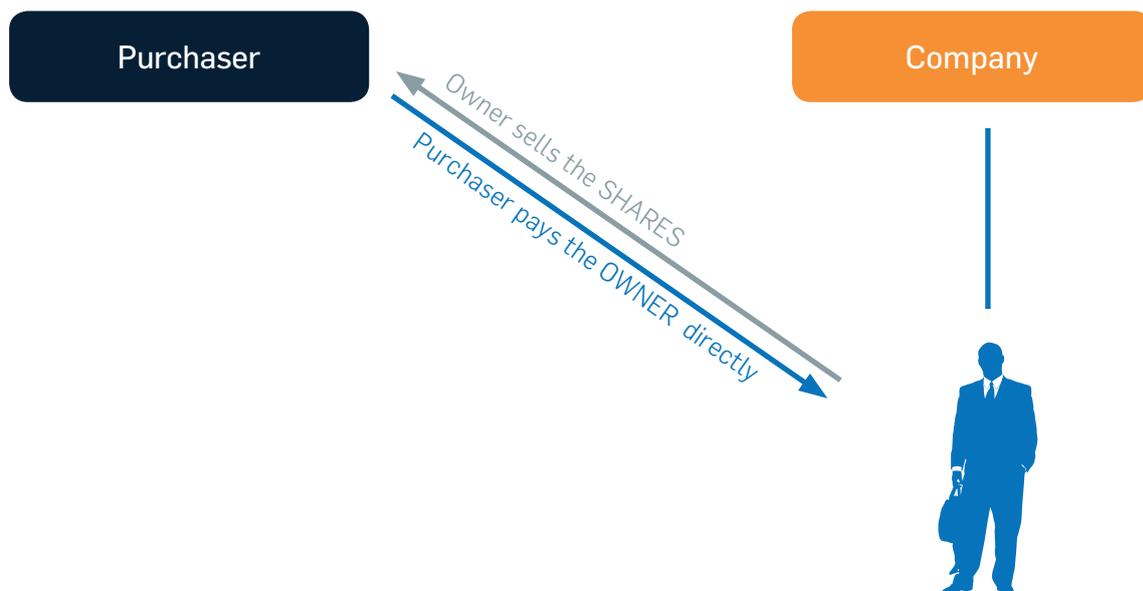
If you choose a “business sale” or to sell some of its assets – then your company will sell the business or assets (so the “seller” will be your company). The company will receive the funds from the sale, and the company may then distribute the funds to the owner at a later point, after paying tax on the capital gain.

### BUSINESS SALE



If you choose a “share sale” – then the owners of the shares will sell those shares. The owners of the shares will receive the funds from the sale. And if the owner of the shares are individuals or trustees (on behalf of a trust) then the owners may be able to utilise a variety of capital gains tax discounts.

### SHARE SALE



## PREFERENCES

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Buyers will often prefer a business sale or an asset sale over a share sale. This is because there is often more risk involved in purchasing a company (ie purchasing its shares) than in just purchasing the assets.

You may find however that if you have a company structure, a share sale may provide a better financial outcome for you.

However there are more than just financial considerations. The kinds of warranties (or promises) that you may have to provide are another area where business and asset sales can be quite different to a share sale.

## THE ULTIMATE DIFFERENCES FOR YOU

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### Business sale

- You may be required to provide less warranties and indemnities in relation to the business than a share sale
- The process of transferring contracts and the rest of the business may be more involved (and time consuming)
- Your sale may incur more tax
- A buyer is likely to prefer this option, so you may be able to use this as leverage in your negotiations

### Share sale

- You may be required to provide more extensive warranties and indemnities in relation to the company
- The process of transferring contracts etc may be easier
- This may result in providing you with a better overall return from the sale (given you may be better able to access various tax concessions on the sale that may not be able to be accessed in a business sale)

The only way to know what option is best for you is to get comprehensive legal and accounting/financial advice well in advance of starting the search for a buyer.

## THE IMPORTANCE OF EARLY PLANNING

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You should bear in mind that you may be able to restructure your business to optimise it for a future sale – but considerations of restructuring for a sale **MUST** be done well before the point of sale.

The earlier you look at the most optimal structure for a sale, the easier, cheaper and more effective a restructure will be.

# BUSINESS STRUCTURE

## Getting ready for due diligence

As part of the sale process, a buyer will want to conduct due diligence of your business. This is when they will review the accounts, and investigate other areas of your business, so that they are more aware of the business that they are hoping to buy (and to gauge the level of risk tied with the business).

Being prepared for due diligence will make the process quicker and easier. And result in a higher likelihood of a smooth transaction.

I have known of many transactions that have fallen apart at this due diligence phase because the seller had not been prepared before hand – make sure that's not you. Preparing for due diligence requires that you first understand what is likely to be involved in the due diligence process, so make sure you understand the financial and legal items that a prospective buyer will be looking for, so that you can show your business in the best sale-ready condition.

Preparations for due diligence from a legal perspective should include at a minimum unearthing the following **documents**:

- Corporate structure and organisation chart
- Copies of key insurance policies relating to the business and its officers (if relevant) and an outline of dates of cover
- Copies of all contracts containing retention of title clauses or PPS clauses
- Copies of any other financing documents, security agreements and any other finance/credit related documents
- Description of any intercompany arrangements
- Copies (or at least a listing of) all non-compete restrictions (eg of employees, contractors etc)
- Copies of all contracts that the business is a party to (this might include contracts with employees, contractors, customers, suppliers, business partners, leases, contracts relating to IP, licensing or royalties etc)
- Intellectual property documentation (for example details of business name registrations, trademarks, patents, copyrights, domain registrations etc)
- Copies of permits, licences and other registrations required to operate the business
- Any other legal document that is relevant to the business.

This is only a short summary of the legal items you should be preparing for due diligence. If we are acting for you, we will provide you with a more detailed overview of the legal preparations you should be considering for due diligence.

And of course don't forget that this is just the legal side – there are many other due diligence considerations outside of the legal context.

Obviously gathering all of this information can take some time and effort, but it is well worth doing in advance, to give you the opportunity to spot and fix holes rather than leaving them for a potential buyer to discover.

## CONTRACTS

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### Get your contracts in order, and key clients and suppliers locked in

In the previous chapter we touched on the need to collate and organise your current contracts in your preparations for due diligence. However collating your written contracts is not the only consideration you should be giving to the area of contracts. Prior to the sale you should give serious consideration to whether or not you have the right written contracts in place. Usually a business will have some deficiencies in this area, but serious deficiencies can start to have an impact on the value of your business.

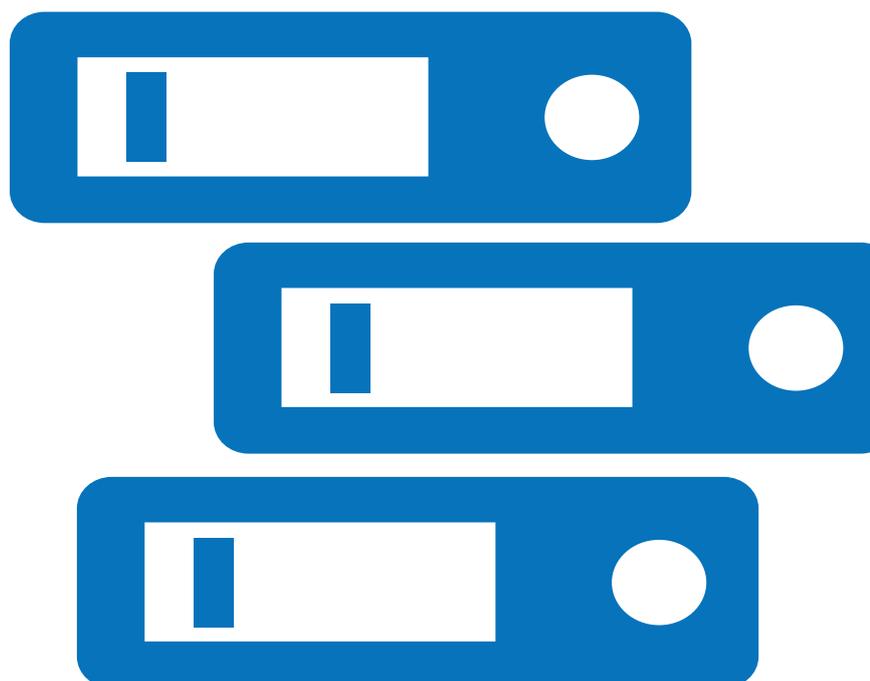
As a minimum, make sure that all of the key relationships in your business are supported by solid written agreements that are up to date. This includes relationships with any key clients, key suppliers, your contractors etc.

Also make sure that these agreements are up to date. Many times I have seen these contracts pulled out, only to find that they had expired a long time ago – and it can create quite a pain if you need to start the process of getting contracts renewed when the focus is on the sale.

Your contracts should also be specifically geared up for a sale, and contain clauses that assist you in an easy transition to a new owner.

I highly recommend that you make sure all of these contracts are reviewed and updated regularly to ensure that when the time comes for a sale, your sale price is not diluted as a consequence of a buyer taking a dim view of the protections you have in your contracts.

Bear in mind that these contracts can often be pivotal in helping you to prove that your business has locked-in and transferable value.



## PREMISES

### Get your premises secure

Review your business leases and ensure that the lease does not expire during the time you are looking to sell the business if the premises or location is an important component of the business.

Be prepared to deal with an assignment of the lease to the buyers.

Sometimes when sellers are in a hurry to sell, they forget that issues like the assignment of leases can take time.

If the premises are freehold, it may be worth considering if a sale and leaseback would be beneficial



# CONFIDENTIALITY AGREEMENT

Get a good confidentiality agreement ready to go

You should have a good quality confidentiality agreement ready to hand out to potential buyers before discussing any specifics about your business, and definitely before releasing any financials, client details or company documents.

This document should be on hand and ready to go well before the search for potential buyers begins.



# SALE STRUCTURE

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Once you find a buyer - consider carefully how you might want the sale to be structured

Some examples of considerations you might give to the structure of the sale:

- Will the sale be structured as cash, shares, or cash and shares?
- If cash, will this be a one off cash payment? Or upfront plus a deferred payment?
- If you are taking part of the sale as a deferred payment, what are the conditions to the deferral – will this be an agreed amount, or will it be calculated by reference to the performance of the business after sale?

There are many important legal implications tied to each of these decisions. An upfront payment may be the most appealing option, but a buyer may often require that the deal is comprised of some deferred payment.

If part of your payment will be deferred (as is often the case) then it is very important to consider what steps you should be taking to secure those payments. Will the deferred payment be guaranteed? Will you be able to take some security over the purchaser, over the shares, or over the assets of the company?

If your payment is tied in part to an earn-out, you must ensure that you have worked through the details of the calculation of the earn-out payment very closely. This can often be an area of dispute – so it is very important that you work through these calculations carefully. And while earn-outs may increase the final amount you receive, you have to bear in mind that you may not receive as much as you expect (or at worst, you may not receive anything under the earn-out at all).

Take time to sit down with your advisers and go through the options in detail. Often times the options can contain considerations you may not have originally thought of, so the more time you have to get across these issues, the better.



## TIMEFRAME

And finally - know your proposed timeframe – and get realistic about it

If you want to move quickly on a sale you need to make sure you have “all of your ducks in line”, so to speak.

A sale can take a long time to negotiate, get the contract agreed, and do all of the steps required in transacting the sale – and sellers often badly misjudge how long the process will take.

Make sure you get good solid advice from the start to help you build realistic timeframes around all of the key steps that are involved once you find a buyer.



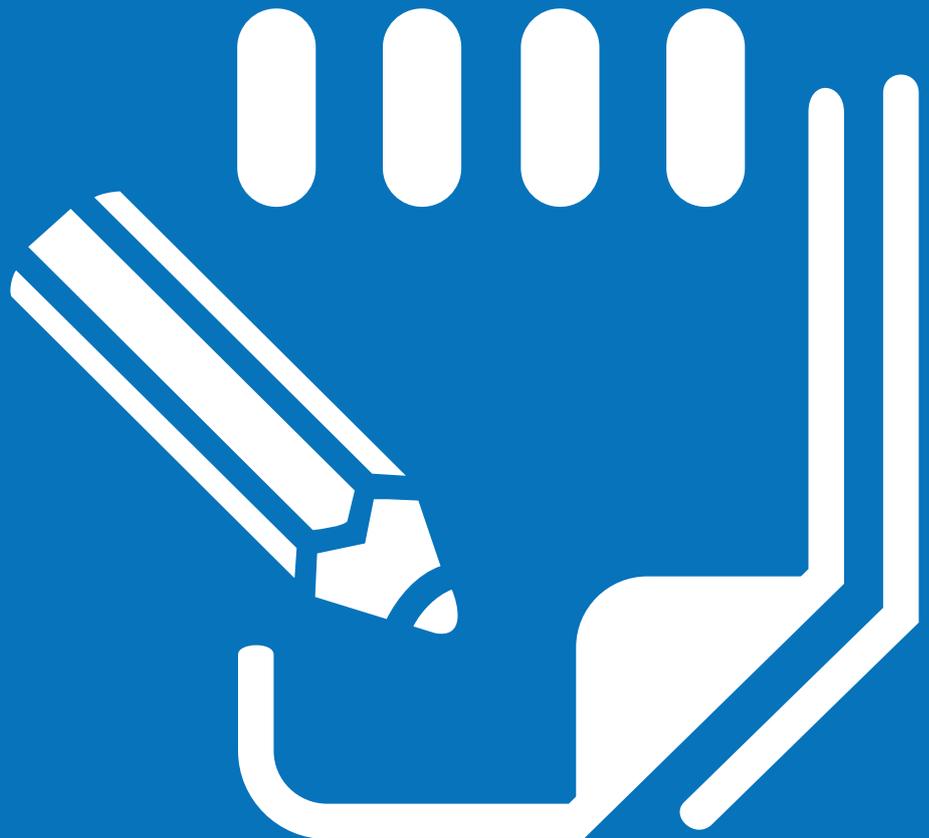
## A FINAL NOTE

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Many of these items will need to be addressed a long time before you start down the path of gearing up for a sale. For example you may need to restructure the business to optimise it for sale – and if that is the case, this may need to be done years before a sale.

A large proportion of sellers that I meet have just not thought about these issues in the detail that they should have, and sometimes by the time I come along, its too late.

*The message is that there is a lot to do to prepare yourself for a sale, and it is never too early to start planning towards achieving a great outcome.*



# Summary checklist of the legal considerations to review when preparing for a sale

- Sale structure**
  - Investigate the different ways you could structure your sale
  - Get an estimate on the tax implications of the alternative approaches
  - Consider the other implications of the alternative approaches (eg warranties, indemnities, ease of sale etc)
  - Consider whether there are any preparatory steps you could take to get a more optimal sale outcome
  
- Due Diligence**
  - Understand what you will need to provide during the due diligence process
  - Prepare all relevant documents
  - Have the legal elements reviewed to tie up loose ends and weaknesses before due diligence begins
  
- Contracts**
  - Have your key contracts reviewed
  - Consider contracts you should put in place before the sale process
  
- Premises**
  - Have your premises lease reviewed
  - Understand the process and timing of assignment
  
- Confidentiality Agreement**
  - Have a quality confidentiality agreement prepared
  
- Deal structure**
  - Review the options available in structuring the deal
  - Review the legal implications of each option
  - Calculate the best and worst case scenarios
  - List controls that could be instituted to protect your position
  - Consider security that could be taken
  
- Timeframe**
  - Review the timeframe needed to complete the above items and the sale items, to build a realistic timeline

Don't be concerned if this list looks long - we can help you start on all of these areas with our free [Sale Preparation Review](#)

## WHERE DO I BEGIN?

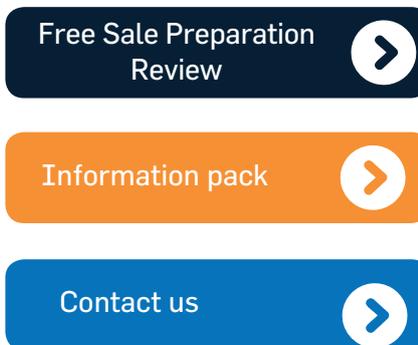
aspect legal offers a number of services to help business owners in the lead up to a sale.

We start with a free initial consultation that provides an in-depth discussion of your business, the legal steps involved in a sale, the timeline for each step, and the other items you should be considering.

We also provide a number of business audits and contract review services for businesses that are looking to gear themselves up for a future sale.

And once you have started down the sale path, we provide checklists and regular updates throughout the sale process, to keep you fully informed about timelines, what we are doing, and what you need to be doing.

If you would like to get started with a free initial consultation or a discussion with us about your matter, click on one of the buttons below



More information about [aspect legal](http://www.aspectlegal.com.au)  
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