



BUSINESS SALE AND PURCHASE



**TVP** || || **LAW**

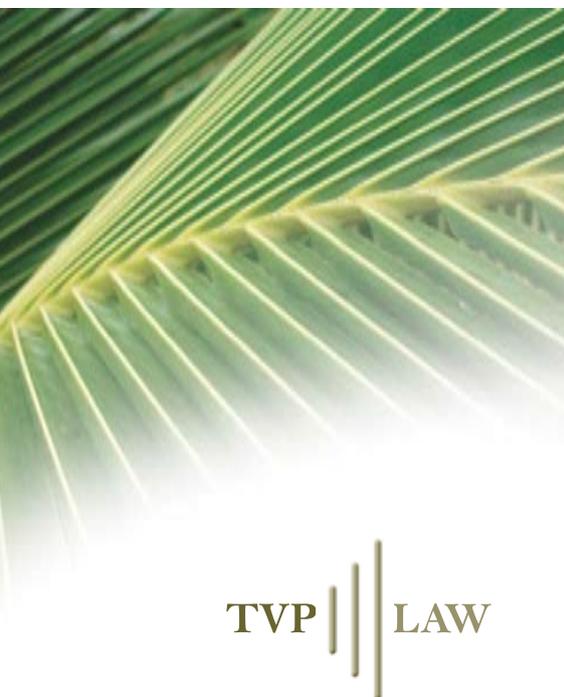


***Welcome to TVP Law where the service is personal and professional.***

TVP Law is premised on the old school values of personal, professional service and having a team with considerable and complimentary skills.

We seek to develop strong personal relationships with our clients so that we know each individual and their business well enough to render truly collaborative and progressive advice.

We would appreciate the opportunity to discuss our services with you and how we may work together to achieve results for you.



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A photograph of an outdoor bar area. In the foreground, several high, dark-colored bar stools with curved backs are lined up along a dark wooden bar. The bar has a metal railing with horizontal cables. In the background, there are lush green plants and trees, and a building is visible in the distance. The lighting is bright, suggesting daytime.

# *Business Sale and Purchase*

*The purchase or sale of a business is a complex transaction which if mismanaged will cause financial loss and delays.*

*The secret to ensuring a smooth and successful sale or purchase is to have a co-ordinated and systematic approach to the transaction.*

*This serves to highlight the more fundamental aspects of such an approach.*



### *It's a Team Effort*

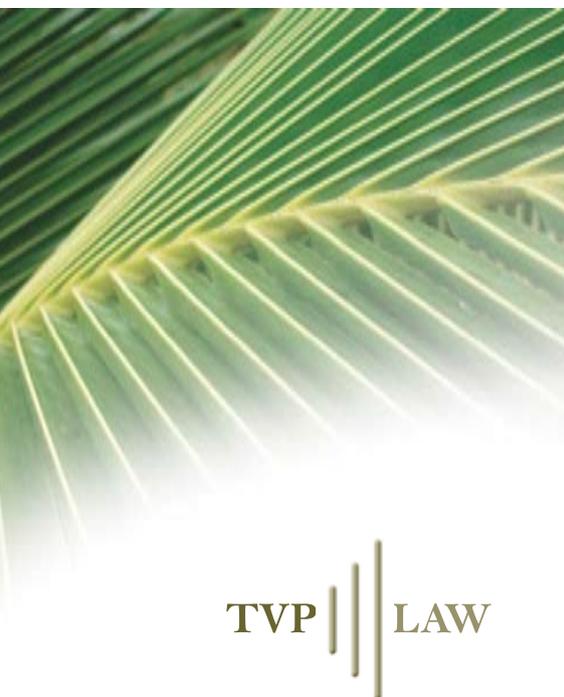
A business sale or purchase requires collaboration between the business owner/purchaser, business broker, accountant, finance broker and solicitor. Each of these players serve an indispensable purpose when selling or buying a business.

A professional business broker will be able to provide initial industry specific information relating to the business, which will include its relative performance, vulnerability to competition and barriers to entry. A reputable business broker will also grant immediate access to pre-qualified buyers and sellers and thereby significantly reduce marketing costs.

The accounting expertise required to accurately evaluate the profitability and value of a business is highly specialised and the advising accountant must have expertise in this field. An accountant will be able to determine whether the adopted accounting standards and policies are the same as those adopted by other businesses in the specific industry and ensure that the accounting records are properly kept and verified.

As a purchaser, having a good relationship with a financial broker will assist you to achieve maximum borrowing capacity. It is advisable to provide the financier with sufficient information to facilitate a quick assessment of any loan application. As purchaser such information will include, details of assets (real property and chattels) superannuation, share portfolio and other investments.

A solicitor with experience in business purchases and sales will pre-emptively identify issues and ensure appropriate special conditions properly reflects the negotiated commercial terms.



## *Preparing the Business for Sale*

As a vendor, work can be done in preparation for a sale that will significantly improve the value of the business and the prospect of a successful transaction. To ensure that an analysis of trading figures indicates a steady upward trend, the sale process may in some circumstances commence several years prior to the actual sale of the business.

A business that has been properly groomed for sale will have internal policies and procedures well documented and up to date accounts and records relating to contracts, intellectual property, leases, sub-contractors, asset ownership, suppliers and customers. Personal perks and unreported cash sales, if any, must be eliminated or minimised to increase trading profits. Accounting policies and procedures should be in accordance with industry standards and earnings driven to maximise profits.

It is very useful to perform a "reverse due diligence" on the business by having your own solicitor and accountant conduct a due diligence on the business as if they were acting for a prospective purchaser. A reverse due diligence often identifies issues that can be corrected before the business is actually placed on the market. If those same issues were discovered by a prospective purchaser it would taint the purchaser's general perception of the business and may serve as a negotiating point to reduce the purchase price.

## *Establishing the Purchasing Entity*

It is very important to ensure that the purchasing entity is correctly established prior to entering into a contract to purchase a business. Ensure that (in collaboration with your accountant) the purchasing entity will be tax effective and (in collaboration with your solicitor) provide adequate asset protection.

If the purchasing entity is changed after the contract is entered into there is the possibility of paying double stamp duty.

If there is more than one purchaser, it is advisable to determine whether the relationship between the purchasers will be one of partnership or joint venture. Discuss and agree the commercial terms that will regulate the partnership or the joint venture prior to entering into any contract.

It is necessary to have a Partnership Agreement or Joint Venture Agreement which will deal with each purchaser's funding obligations, day to day management obligations, rights of first refusal and buy/sell arrangements.

## *Determining the Value of the Business*

Businesses may be valued in a variety of methods which include the use of industry ratios, earnings based methods, asset based methods and market based methods.

The advice from an industry specific expert business broker and accountant in this regard is invaluable.

Valuing a business is not an exact science and there are many factors such as prevailing economic conditions, interest rates, labour availability and whether or not the business is in a high growth industry or sunset industry will impact on the value of a business.



## Negotiation of Commercial Terms

As a general rule, if initial negotiations are comprehensive and detailed the transaction is more likely to complete successfully. Comprehensive negotiations will flush out at an early stage any significant issues that might later have emerged as deal breakers.

As an absolute minimum, the following issues should be discussed:

### Share Sale or Business Sale

In Queensland, stamp duty is not payable on the transfer of shares in a private company. Transaction costs may therefore be reduced if the shares in the company that owns and operates a business are transferred rather than the business assets themselves. Most purchasers are however reluctant to purchase the shares in a trading company for fear of assuming a tax liability, trade creditors or contingent liabilities. If the shares in a business owning company are purchased, it is imperative to conduct a thorough due diligence and obtain comprehensive warranties from people or entities that have assets to support those warranties.

### Conditions

If the transaction is conditional upon certain events occurring, those events need to be specified and agreed. It is common to have a successful due diligence and finance approval as conditions.

### Deposit and Apportionment of Purchase Price

The amount of the deposit, when it is payable and to whom it will be paid should be agreed in advance. Specify whether or not the deposit is refundable.

Most trust accounts do not pay interest and it is advisable to instruct the deposit holder to invest the deposit in an interest bearing account and to specify for whose benefit the interest will accrue.

The manner in which the purchase price will be apportioned should be discussed and if no agreement can be reached in this regard then it should be agreed that the purchase price will remain unapportioned.

### Business Name and Intellectual Property

The value of intangible assets such as a business name, trade marks and goodwill is often overlooked. Intellectual property is not always owned by the vendor and it is important to identify all the intellectual property that the purchaser wishes to acquire and ensure that all the intellectual property is transferred with the business. It is important to note that the registration of a business or company name does not secure ownership over all the intellectual property rights associated with the business name or company name. As a general rule, a trade mark or word mark is the best form of securing ownership of a business name or logo.

### Licences, Permits, Certificates and Consents

Identify which licences, permits, certificates and consents are required to operate the business and ensure that the purchaser is eligible to hold such licences, permits, certificates and consents.



### Lease of Business Premises

If the business premises is leased, it may be necessary to negotiate with the landlord to ensure continued occupation of the premises on terms and for a period acceptable to the purchaser. The landlord's consent will be required to transfer or renew the lease and the lease terms (including rental, rent reviews, rent escalations, contributions to outgoings, option periods and personal guarantees) should be specified.

### Supply and Service Agreement

If there are existing supply and service agreements then the parties should determine which of those agreements will be retained and it may be necessary to negotiate with the supplier or service provider to ensure that the supply of goods and services will be provided to the purchaser. The terms on which the supply of goods and services will be rendered should be specified and agreed in advance. If existing supply and service agreements will not form part of the business sale then those agreements need to be terminated.

### Equipment Lease and Rental Agreements

If equipment is leased or rented then the parties must identify whether those lease or rental agreements will be continued after the sale of the business. It may be necessary to enter into negotiations directly with the lessor or hirer to obtain their consent to the

transfer of the lease or rental agreement and to determine the terms on which the equipment will be leased or rented.

If any of the lease or rental agreements will be terminated then it is necessary to determine the pay out figure (or other termination conditions) that will be required to transfer the equipment free of any encumbrance to the purchaser at settlement.

### Stock

It is important to determine whether the purchase price is inclusive of stock-in-trade as at the settlement date or whether the value of the stock will be paid in addition to the purchase price.

If the purchase price is inclusive of stock then it may be useful to specify a minimum value of stock that must be on hand as at the settlement date.

If the purchase price is exclusive of the value of the stock then it is important to determine the manner in which the stock will be valued and whether or not the purchaser will have the right to reject any stock at the settlement date.

### Employees

If any of the current employees will be employed by the purchaser, determine whether the vendor will terminate and pay out all statutory entitlements owing to the employees in full or whether the obligation for those entitlements will pass to the

purchaser with an appropriate adjustment being made to the purchase price.

It is useful to have moneys held in trust on a "wait and see" basis to cater for long service leave entitlements as and when they fall due to employees that will continue their employment with the purchaser.

### Training

The extent of any continued involvement by the vendor should be determined and the level of involvement, period of involvement and remuneration, if any, of the vendor should be agreed. It may be useful to have specific conditions relating to the introduction of the purchaser to existing clients and suppliers.

### Restraint of Trade

If the vendor will be restrained from competing with the business then the geographical area within which the restraint applies and the time for which the restraint applies must be agreed and specified. The contract should provide a mechanism whereby the geographical area and duration of the restraint can be "wound back" if a court finds them to be unreasonably excessive.

### Risk

Determine when risk in the business will pass to the purchaser. In certain circumstances, risk will pass to the purchaser upon the signing of the business purchase contract and in those instances it is important to ensure that the purchaser has sufficient insurance cover against all necessary risks.



## *Confidentiality and Qualifying Buyers*

In order to protect commercially sensitive information it is advisable to have a confidentiality and non-disclosure agreement signed prior to any prospective purchaser conducting a due diligence or having access to any confidential information or trade secrets.

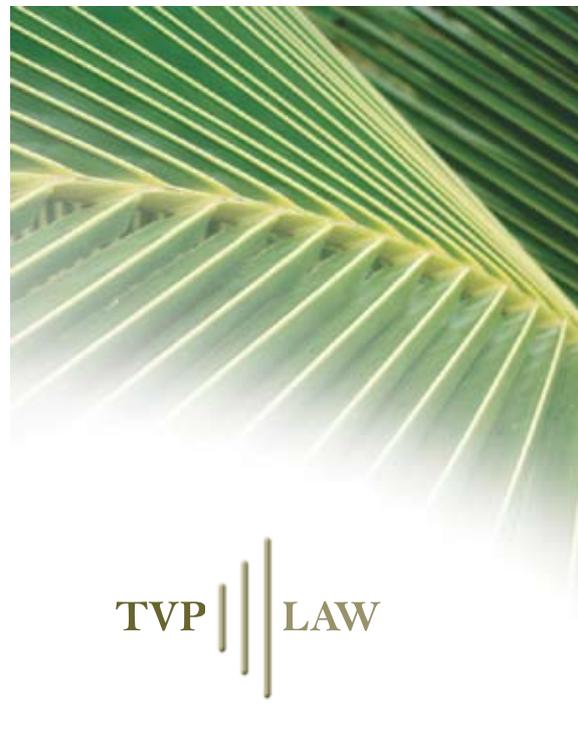
Competitors may seize upon the opportunity to gain access to a vendor's trade secrets and confidential information and as such it is advisable to have a business broker qualify all prospective buyers prior to them gaining access to confidential information.

## *Settlement and Hand Over*

A competent solicitor will be prepared for settlement with all issues identified and dealt with prior to the date of settlement. It is important to conduct the necessary searches on the settlement date to ensure that the business assets are unencumbered and all the requisite documentation is exchanged at settlement to effect a complete transfer of the business assets.

On a practical level, it is useful to arrange for a stock take, either by the parties or an independent stock taker, the night before the settlement date and to have the condition of the business premises and plant and equipment checked immediately prior to settlement.

Following settlement, the transfer of keys and security codes, power, phones and EFTPOS must immediately be arranged.





### *Our Role*

As stated, the solicitor plays a vital part of the business sale and purchase transaction and we will assist you from pre-contract structuring of the purchasing entity to formation of the contract, completion of a comprehensive legal due diligence and ensuring the satisfaction of various conditions of the contract up until settlement.

It is important to utilise solicitors with experience in dealing with business sales and purchases to ensure the correct advice and a smooth transaction. At TVP Law we have such experience.

We will work closely with your broker, accountant and financier to ensure that the conditions of the contract relating to verification of figures and finance are satisfied in a timely manner.

It is important that you seek professional advice on all of the issues raised in this brochure, particularly in regards to structuring of a purchasing entity and the drafting of the contract terms and conditions.

We will work with you every step of the way and keep you informed throughout the process.

### *Further Information*

We would be pleased to further advise you and assist you with your entire business sale or purchase needs. Please contact our commercial law team on (07) 5539 9090 or [www.tvplaw.com](http://www.tvplaw.com) should you require any further information in relation to any legal aspect of selling or buying a business in Queensland.

*We look forward to hearing from you.*

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10 "The Precinct" 45 Bundall Road Bundall Qld 4217  
PO Box 9059 GCMC Bundall Qld 9726  
t. (07) 5539 9090 f. (07) 5538 0799

[www.tvplaw.com](http://www.tvplaw.com)