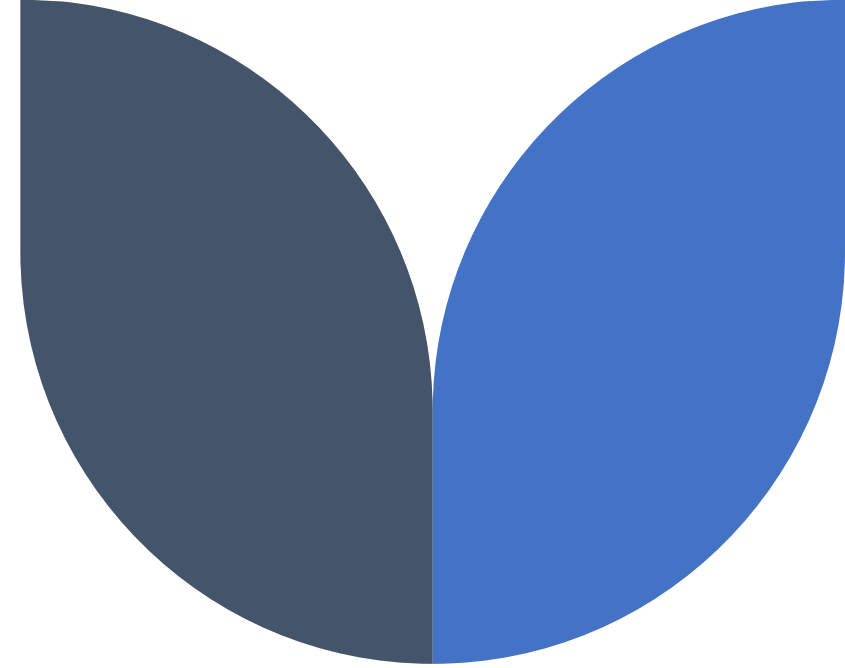
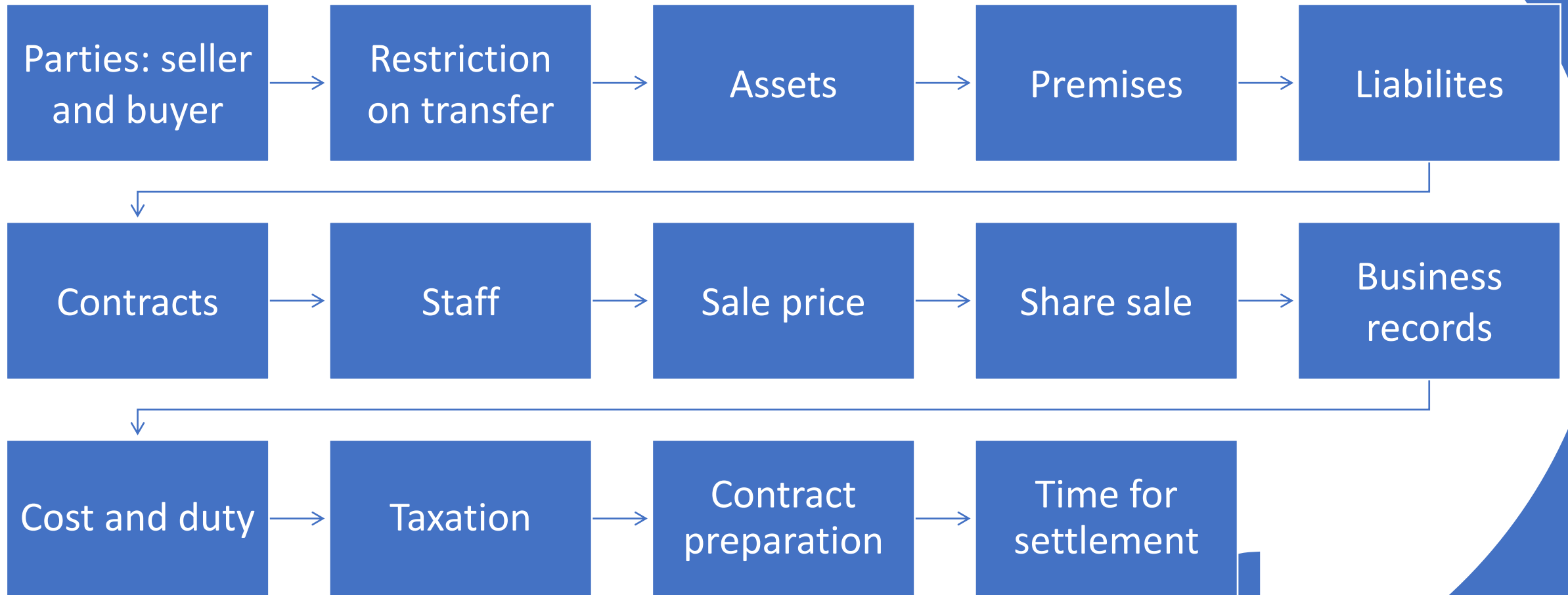


Sale & Purchase of Business

The basics you need to know



Topics



Parties: seller & buyer

Seller:

- ❖ List identification details of the sellers
 - ❖ Company type (e.g. Sole trader, partnership, limited company etc)
 - ❖ Company name & CAN
 - ❖ Address
 - ❖ Contact Details
 - ❖ ABN
 - ❖ Registered for GST?
- ❖ Is there more than one seller? If yes,
 - ❖ Who owns what? (e.g. Business Names, Trademarks, Leases, Licenses etc)
 - ❖ How will the purchase price be split?
 - ❖ Will there be joint or separate liability?
- ❖ Locate original Certificates of Registration.

Buyer:

- ❖ List identification details of the buyers
 - ❖ Company type (e.g. Sole trader, partnership, limited company etc.)
 - ❖ Company name & CAN
 - ❖ Address
 - ❖ Contact Details
 - ❖ ABN
 - ❖ Registered for GST?

DON'T SIGN ANYTHING until you've obtained legal and accounting advice



Restrictions on transfer

- ❖ Does anyone need to consent to the sale? (e.g. Franchisor)
- ❖ What will your financier require? (Speak to you financier as early as possible)
- ❖ Locate stamped original copies of franchises/licenses
- ❖ Will there be sufficient proceeds from the sale to pay out their loan?
 - ❖ If not, what arrangements can be made for continuation of part of the facility?
- ❖ Have you granted an option to another?

Assets

Plant & Equipment

- ❖ Obtain a list of the following (make sure you validate the accuracy of this list)
 - ❖ Which equipment is owned, leased or hired? (including vehicles)
 - ❖ Agreed values of seller-owned equipment
 - ❖ Finance details of leased or hired equipment– are these to be paid out or transferred?
 - ❖ Do you have the necessary contents?
 - ❖ If vehicles are owned,
 - ❖ Are they roadworthy?
 - ❖ Gather certificates of registration

Assets

Stock

- ❖ Obtain a list of the following (make sure you validate the accuracy of this list)
 - ❖ Quantity (stock levels)
 - ❖ When is the stocktake to occur?
 - ❖ Who will conduct the stocktake?
 - ❖ How will the stock be valued?
 - ❖ What will be done with obsolete stock?
 - ❖ Will there be a retention of title clause?
 - ❖ These may impact on the ability to give clear title to stock.

Assets

Work in progress

- ❖ Identify work in progress
- ❖ How will work in progress be valued?

Assets

Debtors

- ❖ Will debtors be purchased?
 - ❖ Yes
 - ❖ Method of Valuation
 - ❖ What about bad & doubtful debts?
 - ❖ Will there be any exclusions?
 - ❖ No
 - ❖ Method of collection
 - ❖ Will the seller enforce them?

Assets

Trailing commissions

- ❖ If these remain property of the seller, how are these going to be collected and monitored?

Goodwill

- ❖ What's the goodwill value?

Assets

Name

- ❖ Obtain a list of the following names
 - ❖ Business name (registered number)
 - ❖ Seller's name
 - ❖ Product name - list
- ❖ Seller must apply to ASIC to get a business name transfer number

Assets

Restraint on seller

- ❖ Are there any restraints on the following?
 - ❖ Geographical Area
 - ❖ Time limit of restraint
 - ❖ Business or Products
 - ❖ Persons Restrained

Assets

Tuition by seller

- ❖ How long will the seller's tuition be for?
- ❖ Will the seller's tuition be before or after settlement (or both)?

Seller's pre-completion conduct

- ❖ Will the seller be carrying on the business as a "going concern"?
 - ❖ Please ask us if you would like further explanation.

Assets

Intellectual property

- ❖ Identify the following:
 - ❖ Business names
 - ❖ Copyrights
 - ❖ Patents
 - ❖ Trade Marks
 - ❖ Trade Names
 - ❖ Other defined industrial, commercial an intellectual property
 - ❖ Software & Databases
- ❖ Obtain all User Agreements & Licenses
 - ❖ Any agreements you have with third parties – **gather these together for your lawyer to look at.**

Premises

- ❖ List your Premises (Address and real property description)
- ❖ Do you need consents from third parties or statutory bodies
 - ❖ If yes, do you have the necessary consents?
- ❖ Keep any property searches held on file in one accessible place
- ❖ Does the proposed use comply with statutory requirements?
- ❖ Are the premises affected by any statutory proposals?
- ❖ Will the buyer be acquiring ownership of the property, or the lease?
 - ❖ Acquiring property
 - ❖ Acquiring lease (More concerns)

Premises

Acquiring lease

- ❖ If the buyer is acquiring the lease, will you be...
 - ❖ Sub-leasing or assigning existing lease? Inspect the existing lease.
 - ❖ An original lease is required
 - ❖ Check rent (& GST), other outgoings (& GST), term, option and permitted use
 - ❖ Creating a new lease? Set the terms for your new lease.
 - ❖ You may need to inspect the existing lease first
 - ❖ Check Rent (& GST), other outgoings (& GST), term, option and permitted use

Liabilities

Current liabilities

- ❖ Are you up to date on current terms?
- ❖ Is there an agreed method of repayment?
- ❖ Are terms available to the buyer after completion?

Contingent liabilities (e.g. warranty or court proceedings)

- ❖ List out details of any potential current liabilities
- ❖ Agree a method of fulfilling
- ❖ Agree any compensation for buyer

Contracts

- ❖ Identify and obtain copies of all material contracts
- ❖ Are there conditions attaching to consents?
- ❖ What consents are necessary for assignment?
- ❖ Deposits and payments on account – how will these be treated?

Staff

- ❖ List out names of Staff
- ❖ List out start dates & annual salaries
- ❖ Terms of employment
- ❖ Cessation of employment on settlement
 - ❖ Which employees does the buyer wish to take?
 - ❖ How are potential long service leave entitlements to be adjusted?
 - ❖ Seller has to pay buyer 70% of long service leave

Sale price (asset sale only)

- ❖ Will the sale price be in cash or under a different arrangement?
- ❖ What will the deposit be?
- ❖ Apportionment of price between Assets being sold
- ❖ Speak to your taxation advisor
- ❖ Are these going to be guarantees from the director(s) of the purchasing company?
 - ❖ If so, who from?
- ❖ Will there be security for a deferred price
 - ❖ If so, what kind of security?

Share sale (share sale only)

- ❖ Obtain a copy of the current constitution of the company
- ❖ Are there any 'seller' restrictions on share transfer?
- ❖ Are there any shareholder agreement?
 - ❖ **If there are, give these to your lawyer**
- ❖ Are there any tax losses?

Business records

- ❖ What will be delivered/retained? Speak to your accountant about:
 - ❖ Takings
 - ❖ Wages
 - ❖ Bank Accounts
 - ❖ Age of Debtors
 - ❖ Credit Terms
 - ❖ Insurance
 - ❖ Litigation
 - ❖ Service Agreements
 - ❖ Employment Contracts
- ❖ Ensure that there is an ongoing right of access for delivered records that may be required in future (e.g. by ATO)

Costs and duty

- ❖ Who pays legal fees?
 - ❖ Usually, each party bears their own legal fees and the buyer pays the stamp duty.
- ❖ Who pays duty on Securities?
 - ❖ The buyer usually bears this fee
- ❖ Landlord – find out an approximate fee for assignment of lease (if any).
 - ❖ The buyer usually bears this fee

Taxation

Run this section past your tax advisor and lawyer

- ❖ Make sure your accounts in the loop
 - ❖ The sooner you can get them involved , the better
- ❖ What will be the income tax implication?
- ❖ What will the capital gains tax implications?
- ❖ Are there any Small Business Concessions or roll-over relief available?
- ❖ How is GST to be treated on the sale?
- ❖ Is sale as a “going concern” planned?
 - ❖ If so, you will need to take specific advice about the preconditions and what needs to be stated in the Sale Contract.

Contract preparation

- ❖ Who will prepare the sale contracts?
- ❖ What conditions will a buyer want?
 - ❖ Finance
 - ❖ Due diligence on books
 - ❖ Due diligence on lease/other contracts
 - ❖ Interview and securing assurances of continuation from key staff
- ❖ Consider encouraging the buyer to perform due diligence before they spend money on contract preparation.
 - ❖ If you do, consider a Non-Disclosure Agreement to get assurances of confidence from the potential buyer
- ❖ Email this document to your lawyer
 - ❖ As a basis for contract preparation/review

Contract preparation

- ❖ Will the purchaser retain any employees?
- ❖ Is the purchaser a constitutional corporation
 - ❖ i.e. a company, incorporated association or letters patent
- ❖ If you answered yes to both questions,
 - ❖ The purchaser should not express or imply that they do not want to preserve the “qualify period” under the Workplace Relations Act 1996, as during the initial 6-month period following settlement, the purchaser can terminate an employee’s employment and the employee cannot bring an application for harsh, unjust or unreasonable termination of employment.
 - ❖ Note that this is separate to a ‘probationary’ period

Time for settlement

- ❖ Date or days after contract signed
 - ❖ E.g. 30 days after contract date
- ❖ Consider everything that needs to be done before settlement and ensure you have allowed enough time.
 - ❖ The minimum is usually 30 days from the date of Contract and is commonly 60 or 90 days.

Final words of advice

- ❖ This above content is legal information only and not legal advice
- ❖ There needs to be a direct clear agreement between us about what we are advising you on before you can assume that we are providing you with legal advice.
- ❖ This is usually set out in a “Confirmation of Instructions” letter from us and you signing and returning our Cost Agreement.
- ❖ And finally...
- ❖ **Don't sign anything until you have had it checked and you are sure.**
- ❖ Good luck and enjoy the journey!

Thank you

