

Key Legal Issues in the Sale & Purchase of a Business

Part 1

A thick vertical black bar is positioned to the left of the main title text.

Managing the Client & Practical Risk Management

Managing the Anxious Client

- These transactions take time – managing expectations is critical
- Measure twice, cut once! Rushing only increases your risk, and your client's risk
- If the risk is too high, be confident to say '*no*'

Managing the Anxious Client

- Limited retainers or pressure to cut corners
 - Set out the risk and consequences in writing
 - Explain it to the client and seek confirmation
- The written confirmation of client instructions is your protection when the client's version of events changes later

Managing the Anxious Client

Early possession is a real risk (vendor and purchaser):

- Vendor - handover before full payment
- Purchaser - landlord consent - encumbered assets - staff adjustments - finance
- Extinguishes the right to rescind under section 52 of the *Estate Agents Act 1980* (Vic), **even** if the section 52 statement is defective

Practical Risk Management

- Checklists: Vendor and purchaser checklists for business sales available free on LPLC's website
- File notes: Dated, timed, author identified, substance of advice recorded, client's response noted

Every significant piece of advice should be confirmed in writing:

- Retainer scope
- Risk advice that sets out consequences
- Confirmation when client elects to proceed despite risk advice

Practical Risk Management

WIP List:

- A WIP list sets out all obligations across the parties, lists every document to be exchanged, and tracks what is done and what is outstanding
- Circulate it to all parties regularly so everyone is on the same page, and nothing falls through the cracks
- Ensure this includes practical items that the clients will be working out between themselves – ie: sharing passwords to subscriptions/social media

Project Superstar – Completion WIP List – 21 March 2026 version				
Clause Number	Item	Comments	Status	Responsibility
Deposit				
3	Deposit (payment)	Paid in full – 19.3.26	Paid in full – 19.3.26	Yellow Sunshine Lawyers holding as stakeholder.
3	Deposit (release)		To be released to Seller on settlement.	Yellow Sunshine Lawyers
Conditions Precedent				
5.1(a)	Finance Approval	Must be obtained by 9 April 2026		Buyer
5.1(b)	Authorisations	All held	All held	Seller
5.1(c)	Client Contracts	To be assigned	To be assigned – commencement of that process pending while we await confirmation of finance etc.	Seller
5.1(d)	Lease	To be signed	All agreed, commencement date to be added, then to be circulated and signed by all parties.	Buyer and Landlord.
5.1(f)	Encumbrances	PPSR registrations are the only encumbrances.		Seller
5.1(i)	Motor Vehicles	Roadworthy certificates required	Process will be commenced when finance confirmed.	Seller
Completion Items				
6.2(a)	Board Meeting – Seller	Seller board meeting to approve sale before or at Completion. Seller to deliver copy of minutes to Buyer on Completion.	To be drafted.	Seller.
6.2(b)	Transfer of control and possession of Business, Assets and Records	To be transferred on Completion.		Seller.
6.2(c)	Transfer of keys and passwords	To be transferred on Completion.		Seller.
6.2(d)	Procure copy of New Lease	Seller to procure copy of New Lease executed by landlord of the Property on Completion.		Buyer and Landlord.

Project Superstar – Completion WIP List – 21 March 2026 version

Clause Number	Item	Comments	Status	Responsibility
6.2(e)	Transfer of Asset Leases	Seller to give Buyer executed assignments or novation of Asset Leases on Completion.	N/A – no asset leases.	Seller.
6.2(f)	Transfer of Motor Vehicles	Seller to give Buyer transfer documents and other relevant vehicle documentation on Completion.		Seller.
6.2(g)	Transfer of Domain Names	To be transferred on Completion.		Seller.
6.2(h)	Provide access to Email Addresses	To be provided on Completion.		Seller.
6.2(i)	Transfer of Software	To be transferred on Completion.		Seller.
6.2(j)	Provide copy of Seller's Receivables	To be provided on Completion.		Seller.
6.2(k)	Transfer of Business Authorisation	To be given on Completion.		Seller.
6.2(l)	Exchange counterparts of Transaction Documents	To be exchanged on Completion.		All parties.
	Flynn's Employment Agreement			
	Contractor Agreement			
	Deed			
	GSA (if there is a loan)			
	Mortgage documents (if there is a loan)			
6.2(m)	Provide evidence that Unregistered Security Interests are/will be Released	To be provided on Completion.	N/A – no unregistered security interests.	Seller.
6.2(n)	Payment of Employee Entitlements	To be paid on or prior to Completion.		Seller.
6.7	PPSR Registrations	To be removed or released with effect from Completion within seven days of Completion.		Seller.

Project Superstar – Completion WIP List – 21 March 2026 version

Clause Number	Item	Comments	Status	Responsibility
6.3(a)	Board Meeting – Buyer	Buyer board meeting to approve the purchase at or before Completion. Buyer to deliver copy of minutes to Seller at or before Completion.		Seller.
6.3(b)/7.1	Purchase Price	To be paid on Completion.		Buyer.
8.1	Adjustment Amount	Adjusted purchase price to be paid on Completion.		Buyer.
	Statement of Adjustments to be prepared			All parties.
8.2	Valuation of Stock	Stocktake to be completed five Business Days prior to Completion.		All parties.
10.1 10.3 10.4	Transfer of Contracts	To be assigned/novated with effect from Completion. If not transferred by Completion, Seller has 3 months to do so, subject to clause 10.3 conditions, after which Buyer can elect to terminate/exclude the Contract or enter into a sub-contract (clause 10.4).		Seller.
11.1	Work In Progress	Parties to agree on calculation for adjustment.		All parties.
Post Completion Obligations				
6.8	Change of Name	2 years post-Completion, if Buyer requests that Seller stops all use of Business Name, Seller to do so with effect from Completion.		Seller.
12	Receivables	Buyer to collect for Seller.		Buyer
13	Employees	Pay out employees.		Seller
	Employees	Offer employees		Buyer

Part 2



Core Transaction Issues

Structure of the Deal: Shares, Units or Assets?

Selling Party

- Get accounting advice early on which structure is most advantageous from a tax perspective *before* the deal is documented, not after.
- Asset sale: the entity sells the business assets and retains its own liabilities. Generally simpler but the tax treatment of proceeds varies.
- Share or unit sale: the seller disposes of their ownership interest in the entity. Can attract significant small business CGT concessions. The accountant must assess eligibility before the structure is agreed.
- The structure affects GST, CGT and the treatment of retained liabilities.
- Do not let the client commit to a structure without accounting input.

Buying Party

- Asset purchase: the buyer acquires identified assets and does not inherit the entity's history. Cleaner from a risk perspective.
- Share or unit purchase: the buyer acquires the entity itself, including known and unknown liabilities, litigation history, tax obligations and contractual commitments.
- This is a materially different risk profile, and due diligence obligations are significantly greater.
- Advise the client on this clearly and in writing.
- Representations and warranties, indemnities and tax deed protections become critical.
- Beware – land transfer duty on share and unit transfers.

Section 52 Statements: Estate Agents Act 1980 (Vic)

Acting for the Vendor

- Must be provided before the purchaser signs or pays a deposit.
- Have the accountant prepare the business operating report and the section 52 statement.
- Review the whole statement before it goes out, not just the financials.
- Failure to provide = purchaser's right to rescind within 3 months or before possession.
- Does not apply where the business has a liquor licence (s.52(8)).

Acting for the Purchaser

- Check your client has received a section 52 statement.
- Have the accountant review the financials in the statement and give financial advice. This is not the lawyer's job.
- Advise on the right to avoid: 3 months from signing, or before taking possession.
- Early possession extinguishes rescission rights. Advise strongly against it.
- Applies to businesses up to \$450,000 in value.

Planning Permits, Searches & Due Diligence

Planning permits are critical, particularly for food businesses, licensed venues and home-based operations

- Identify the permits and licenses required
- If the client does not want searches done, confirm that instruction and the potential consequences in writing
- Clarify in the retainer exactly who is responsible for each category of search and enquiry

Planning Permits, Searches & Due Diligence

- Assumptions about what the client is handling are dangerous and frequently wrong!
- Make sure the client is 100% on top of liaising with Council, VCGLR etc – liquor licence, food trading permits, footpath permits – the works
- Beware: Section 173 agreements under the *Planning and Environment Act 1987* (Vic) restricting the use of land or premises
- **Always** do a title search

GST & the Going Concern Exemption

Section 38-325 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth): a going concern supply is GST-free if **all conditions** are satisfied

- Base requirements:
 - consideration paid;
 - purchaser registered for GST; ****Amendment** – both parties registered; (see ATO Ruling [GSTR 2002/5](#))
 - parties agree IN WRITING the supply is a going concern;
 - vendor supplies all things necessary for continued operation;
 - vendor carries on the enterprise until the day of supply.
- Be alert to nuances - get expert advice when required
- Get the accountant involved at the start-not at settlement

GST & the Going Concern Exemption

GST Considerations:

- If the exemption fails, the vendor bears the GST (1/11th of the purchase price)
- The purchaser may be required to pay an extra amount for GST
- Ensure the vendor's ABN is in the agreement
- When in doubt, treat the supply as taxable from the outset
- Consider a private ATO ruling

GST & the Going Concern Exemption

GST Considerations:

- Include fallback clauses in the contract;
 - is the purchase price 'PLUS GST (if any)'
 - a claw-back clause if GST is paid

Getting the Contract Right

- Don't exchange until details are checked and the contract is correct
- Get accounting and expert advice before exchange
- Changes after exchange can be costly, difficult or denied
- Schedules - have the client confirm accuracy;
 - Plant and equipment, IP, financial data

Getting the Contract Right

- Definitions and general conditions - read them carefully and check consistency with special conditions, particularly employee entitlements and valuation of stock
- Manage subject to finance and other due diligence clauses carefully:
 - Diarise the date
 - Set out in writing to the client with consequences if missed
 - A termination notice must be clear and unambiguous (Umbers v Kelson [2010] VSCA 227)
- Formula adjustments must be road tested

Getting Third Parties Sorted Early

Landlords:

- Lease assignment requires landlord consent
- It is the vendor's obligation to satisfy the landlord, not the purchaser's

Lenders:

- Written mortgagee consent is required if the property is mortgaged
Verbal assurances have been relied on and later denied
- Complete a title search on every file

Getting Third Parties Sorted Early

Secured parties:

- Run PPSR searches before exchange
- Start the ball rolling on releases ASAP
- Lenders are **SLOW** and they don't care about your settlement dates!

Part 3



Common Problem Areas

Vendor Finance Traps

- The starting point – no vendor finance!
- Vendor finance is difficult to secure and enforce, often sitting behind a primary lender who takes all available security
- The value of the business can decline substantially with a new owner, resulting in loss even where security is in place
- Vendor finance might make the deal happen but may never be recoverable
- Risk advice must be recorded in writing

Vendor Finance Traps

Personal Property Security Register

- Any retention of title security **must be registered** on the PPSR or it will be unenforceable against a liquidator or third-party secured creditor
- Register all security interests promptly

Restraint of Trade Provisions

- Restraints need to be reasonable in scope, area and duration, and the drafting must be precise
- Inaccurate drafting of carve-outs or partial exemptions from the restraint is a common source of disputes after settlement - get the carve-out language right
- Purchasers need to understand that enforcement of a restraint may require costly legal proceedings

Restraint of Trade Provisions

- Work through the restraint carefully with your client regardless of which side you are on
- For vendors, the client should understand exactly what they can and cannot do after settlement
- Where the vendor is a company, the restraint will likely bind the key individuals behind it as well

Restraint of Trade Provisions

- For purchaser practitioners: make sure the restraint actually covers what the purchaser needs it to cover
- Include non-solicitation clauses for employees and customers as a matter of course

Lease Assignments: Retail Leases Act 2003 (Vic)

Many business sales include a leased premises and understanding the Retail Leases Act 2003(Vic) (RLA) is critical to this work.

- Vendor (assignor) - If the required disclosure statement under schedule 4 of the Retail Leases Regulations 2023 (Vic) is provided before requesting landlord consent, the assignor is released from ongoing lease liability under s.62 of the RLA
- Failure to give that disclosure leaves the vendor exposed to ongoing lease liability after the sale completes
- Mortgagee consents - written mortgagee consent to the assignment is required

Lease Assignments: Retail Leases Act 2003 (Vic)

- Purchaser - walk the client through the key lease obligations they are taking on:
 - Remaining term
 - Options
 - Rent review mechanism
 - Make-good obligations
 - Any termination rights including redevelopment clauses

Lease Assignments: Retail Leases Act 2003 (Vic)

Make good obligations at the end of a lease often cause problems so:

- Identifying the tenant/landlord installations is imperative
- All parties (including the landlord) need to be clear about what reinstatement looks like, which installations are the landlords, and which are the tenant
- Post-settlement – this information is incredibly hard to establish

Employee Entitlements

- Insist on entitlement adjustment at settlement
- If not adjusted, advise in writing about the risk of the vendor failing to pay out long service leave and annual leave

Franchise Advice: Clarity in the Retainer

Franchises are specialist work

- Where a business sale involves a franchise, make it clear in the retainer that you are not advising on the franchise agreement itself
- If required engage a lawyer with specific franchise experience to review and advise on the franchise agreement
- This is a specialist area, and the client deserves specialist advice on it
- Define your role and confirm it in writing

Part 4



Other Considerations

Working Collaboratively & Other Tips

- Work collaboratively with the counterparty's solicitor
- Never act for vendor and purchaser - It is simply not worth the risk.
- Build networks and call a buddy - When something on a file does not feel right, call a trusted colleague or the LPLC before the problem compounds

Working Collaboratively & Other Tips

- Not financial advice - confirm at the outset and in writing that you are not advising on the financial viability of the business
- Keep that boundary clear throughout the matter
- Back to the WIP list – get it right at the start, keep it up to date and circulate it often

Key Takeaways

Manage the client Early possession, limited retainers and rushing all create claims exposure.

Document everything

File notes, written advice, client elections, the WIP list.

Know the problem areas

Vendor finance, restraints, leases and GST are where problems arise.

Never act for both parties

Simply not worth the additional fees

Call a buddy

Use your network, use the LPLC, use the checklists