

Small business - when acting for the purchaser

When acting for the purchaser

- When asked to advise just on the contract documentation before the purchaser signs the contract, recommend that all relevant searches be done before the contract is signed.
- Check that your client has a Section 52 Statement and has had the figures reviewed by an accountant.
- Advise your client that the absence of a Section 52 Statement or a defect in the Statement may give your client the right to rescind the contract.
- When instructed to act on a limited retainer, confirm the limits of the retainer in writing.
- When you receive a contract immediately check for any conditional clauses. If there is a 'subject to finance' clause, follow the recommendations set out in chapter 7 above.
- Clearly explain the issues associated with early possession (see the suggested form of letter in [LPLC's Practice risk guide - Small Business Big Risks - Appendix: Early possession - acting for the purchaser](#)).
- Advise your client of the need for comprehensive searches and the risks if particular searches are not obtained.
- Obtain details of the client's superannuation fund and policy.
- Consider whether the following searches are necessary:
 - company name search
 - business name search
 - ABN search
 - search of the Personal Property Securities Register
 - trade marks
 - motor vehicle registration
 - local council health department - health orders
 - certificate of title
 - liquor licensing
 - planning certificates
 - usual conveyancing searches
 - usual lease searches if leasing land.

- Do not rely on secondary sources instead of the standard searches and enquiries.
- Advise your client to check with the relevant planning authority as to whether there are restrictions in the planning permit or scheme that will inhibit the operation of the intended business. Confirm this advice in writing ([see the suggested form of letter in LPLC's Practice Risk Guide - Small Business Big Risks - Appendix: Possession at settlement](#)).
- Confirm in writing with your client who is to apply for the liquor licence (if applicable) and what type of licence is required.
- Consider the need for a restraint of trade clause and check that it adequately protects your client's position.
- Where your client wants a wide restraint of trade clause, use a 'stepping down' clause.
- Check whether the property is mortgaged. If so, ensure that the mortgagee has consented to the assignment of the lease in writing (see the [LPLC's Practice Risk Guide - Looking After Leases](#)).
- Advise your client of the need to obtain independent financial advice on the viability of the business. Do not give that advice yourself ([see the suggested form of letter in LPLC's Practice Risk Guide - Small Business Big Risks - Appendix: Possession at settlement](#)).
- If you are instructed before the contract is signed, ensure that there is a clause requiring the employee entitlements are adjusted at settlement
- If you are instructed after the contract is signed, check the contract accurately reflects who is responsible for all employee entitlements and any necessary adjustment is made to the purchase price.
- Insist that full details be provided of the employee entitlements.
- Advise your client in writing that they need to have their accountant verify the employee entitlement figures and what adjustment should be made at settlement.
- If you are not experienced in advising on employment law, advise your client that this is not part of your retainer and they should obtain separate advice on how to manage the transferring employees.
- If the client insists on dealing with the vendor personally in relation to employee entitlements, set out in writing what should be done and the consequences of not doing so.
- Make sure that the vendor quotes their ABN or tax file number. The simplest way this can be satisfied is by quoting the vendor's ABN on the Business Sale Agreement. Note: this is essential for a purchaser to comply with its withholding tax requirements and the requirement applies regardless of whether the transaction is subject to GST.

- Pay careful attention to:
 - Schedules: have your client confirm they are accurate, particularly in relation to plant and equipment, intellectual property and financial data.
 - Definitions: particularly 'employee entitlements'. Give careful consideration to who is responsible for long service leave, annual leave, sick leave and termination payments.
 - Advising on the default mechanism and the consequences if default occurs.
 - Formula: particularly 'retention amount'. The formula should be tested to ensure it works mathematically.

Generally

- Make a comprehensive file note of the initial conference with your client.
- Document all attendances and meetings with your client and others.
- Check that your file notes:
 - are dated;
 - record the duration of the attendance;
 - record who was present or on the telephone;
 - record the name of the author;
 - are legible to you and someone else;
 - record the substance of the advice given and the client's response/instructions; and
 - are a note to the file rather than a note to yourself.
- Provide clear advice on how the transaction should be handled to ensure your client's interests are protected.
- Obtain clear instructions as to the basis on which you are to proceed particularly where the client seeks to limit your retainer.
- Warn your client of the risks he or she is taking by reason of their decision about the way the transaction will be handled ([for example, early possession, limited retainer or limited searches; see suggested letters in Appendix of LPLC's Practice Risk Guide - Small Business Big Risks](#)).
- Confirm your retainer and your advice in writing, particularly where the retainer is limited, setting out any areas where your client has chosen not to take your advice and has elected to accept the resultant risks.
- Be aware of conflicting and divergent interests and do not act for both parties or for a party and the landlord.