CHECKLIST

May 2024

LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Sale of Business

This is not a comprehensive checklist but it will help you avoid most of the mistakes made by practitioners in business transactions.

Acting for the Vendor

- [ ] Advise your client that the failure to give the purchaser a section 52 statement may allow the purchaser to avoid the contract. Confirm this advice in writing.

- [ ] Explain that the business operating report in the section 52 statement must be prepared by an accountant and must be accurate.

- [ ] Confirm that your client's accountant is preparing the business operating report for the section 52 statement and request that the accountant or the client send the business operating report to you for inclusion in the section 52 statement.

- [ ] Have the client confirm all schedules are accurate.

- [ ] Explain the issues associated with early possession.

- [ ] Advise your client not to provide vendor finance.

- [ ] If your client still wants to proceed on vendor terms:

  - advise your client on the various forms of security and the attendant risks, confirming your advice and the client's decision in writing
  - ensure the title to chattels does not pass in a terms contract until final payment is made and register the vendor's security interest in the Personal Property Securities Register
  - consider the need to include a power of attorney in a vendor terms contract in the event that the purchaser defaults and the vendor needs to take possession and obtain a liquor licence.

- [ ] Where your vendor client is assigning a retail lease, ensure you use the disclosure statement in schedule 4 of the Retail Leases Regulations 2023. It should be provided before requesting a landlord's consent. Practitioners should review the legislation and regulations each time to ensure they are using the current form in the appropriate way in order to give their client the protection available.

- [ ] Seek written instructions from your client about any guarantees given in connection with the business.

- [ ] Seek specific instructions about guarantees given to suppliers and advise clients to check with suppliers to confirm the position.

- [ ] Confirm in writing your client's instructions to proceed by way of an indemnity and the possible consequences of taking this course.

- [ ] Ensure guarantees are obtained from directors where the purchaser is a company.

- [ ] If the vendors are so desperate to sell that they are willing to settle without executed releases from guarantees, or will accept indemnities or even provide additional guarantees to third parties, make sure you advise the vendors of the risks and confirm that advice in writing.

- [ ] Advise your client that it is the party who must satisfy the landlord about any assignment of lease requirements and obtain the landlord's consent.

- [ ] If there is doubt that the sale will qualify as the supply of a going concern, treat the sale as taxable.

- [ ] Always use a GST exclusive 'claw back' clause in the contract as a safety net.

- [ ] Be aware of the timing issues when acting for separate vendors selling both freehold and business to a single purchaser or for a single vendor selling both freehold and business to separate purchasers.

- [ ] Ensure the parties have agreed in writing that the supply is of a going concern.

- [ ] Conduct an ABN search to ensure that the purchaser is registered for GST prior to settlement.

- [ ] Advise your client of the need to give to the purchaser details of employee entitlements together with employment records.

- [ ] Pay careful attention to:

  - **schedules** — have your client confirm they are accurate, particularly for plant and equipment, intellectual property and financial data
  - **definitions** — particularly employee entitlements and 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 and test the formula 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 (online or in person) 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
  - 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 they are taking by reason of their decision about the way the transaction will be handled, for example early possession, limited retainer or limited searches.

- [ ] 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.