



Preparing your business for sale

Whether you're retiring, pursuing new ventures or looking to cash in on your hard work, selling a business is a significant milestone and one that needs careful planning and preparation.

To ensure the greatest return on your investment, your business should be at its best when it goes on sale. Building value in your business is important in attaining an optimum result.

Strengthening operations

As a starting point, you should ensure the business can operate successfully without you. All its operations and processes should be well-implemented and running smoothly.

It's important to delegate responsibilities to capable managers early on. Work to reduce the business's reliance on you and have a management succession plan in place detailing who will support the incoming owner and what pre-settlement training will be provided.

Sales are critical to the success of any business. It's therefore important that before you put your business up for sale, you focus on increasing the volume of sales. Tighten up on all expenses and eliminate any shrinkage.

Give your premises a thorough clean. Ensure all physical and digital assets are in good condition, and that sensitive data is secure. Tidy your database and ensure you have favourable terms in place with suppliers, or consider the need to transfer distributor or dealership rights if that's applicable. Damaged and obsolete stock should be disposed of and not included in the sale.

Collate the information concerning the business's website, phone numbers, social media information, passwords and an up-to-date client database. Consider compiling this into a 'starter' document (operations manual) that will make it easy for the buyer to be up and running early on.

In this issue +

- 1 Preparing your business for sale
- 3 Providing for your family in your will – You have some legal obligations
- 4 Employee burnout – Acknowledge and address this
- 5 Avoiding scams – Tips to protect yourself
- 6 Postscript – Holidays Act 2003 to be overhauled – Roadside drug testing to be rolled out – Visual artists will receive royalties when work on-sold



A potential buyer will want to see that the business has an existing marketing strategy for the next year and beyond. This will add value and may lead to a quicker sale.

Although this is a matter for the buyer of your business to consider, you should think about your current employees. Are they likely to be transitioned across to the new owner or will there be redundancies? Good communication with the buyer is important in respect of all employment issues. Existing employees are not likely to be notified of the sale until after the sale and purchase agreement is signed and/or it becomes unconditional.

Discuss with the buyer how customers will be notified of the business sale. The retention of customers is a major part of the goodwill of a business; to ensure a smooth transition, thought needs to be put into this process. Both parties should work together and plan on how your customers will be notified of the change of ownership. In the case of significant customers or clients or referrers of work, it may be necessary to arrange for personal introductions.

Marketing your business

When marketing your business to prospective buyers, you want to showcase its unique selling points. Engaging the services of independent professional advisors who specialise in business sales will be very helpful and provide invaluable assistance.

Considering who your potential purchasers are and negotiating with them can be very time-consuming. Professional advisers understand the market, can identify prospective purchasers, will assist with marketing your business and advise you on the sale process.

It is important to establish the right sale price. Advisers will look at the nature of the business including the value of its assets and its profitability to ensure an appropriate price is set. If an inflated price is set at the outset, this will deter potential buyers.

Finance

Buyers will want to review the historical performance of your business to ensure they are buying a sound and profitable operation. The sale price should reflect the financial position of the business.

Financial statements and tax returns of the business should be formally reviewed by your accountant rather than being generated in-house to ensure their accuracy and to address any red flags. This will make the due diligence process easier for buyers, who will be assured that records are accurate.

Buyers' lenders will be interested in cash flow and the ability to service any loans a buyer may have or need.

In preparation, formalise deals with customers and suppliers, and update your business forecasts.

Search the Personal Property Securities Register to identify security interests registered over your business assets. Seek the removal of any that are no longer required and others that can be removed as part of the sale process.

Give some thought to work in progress/partially completed projects; we will include provisions in the sale contract to cover this situation. It may be that payments made by customers and clients following settlement could be apportioned between the parties. If you have issued gift vouchers and they are redeemed after the sale, a mechanism should be included in the sale agreement to cover this.

Sometimes when selling, a proportion of the sale price is contingent on the performance of the business following its sale. This is often referred to as an 'earn-out.' If this is the case, there should be a carefully worded formula included in the sale agreement. This will often include the involvement of an independent assessor. We will help draft any necessary clauses.

Check with your accountant about any taxes, GST and other obligations that may affect the sale. Your options when selling can differ depending on the business structure you have. Getting this wrong can lead to an unexpected tax bill; advice from your accountant is essential.

Legal

When selling your business, there are many legal considerations. You should talk with us early to ensure there are no complications down the line. You do not want any issues to arise with the buyer that have the potential to lead to a dispute.

Review your existing contracts, leases and any business compliance obligations. Make sure any trademarks and copyrights are updated, and that patents and licenses are secured and transferrable. You may want to renew these as their expiry could devalue your business. Completing an audit of your intellectual property and legal obligations reduces any risks for buyers, and for you.

The information provided to prospective buyers that relates to your business's processes, finances and intellectual property is important and should be protected. Entering into a non-disclosure agreement with them will ensure that any confidential information about your business remains secure even if a sale falls through.

It is likely that the buyer will insist on a restraint of trade clause in the agreement. You should consult with us to ensure it is worded correctly and will not significantly impact your future plans.

Finally, it is important to keep your business running well when it is on the market as it may take time to sell. Be honest and realistic in your dealings, and keep up the marketing. Investing effort into thorough planning will increase the likelihood of achieving a successful outcome. +





Providing for your family in your will

You have some legal obligations

We all want to look after our families – both during our lives and after we die. One way you can make sure that your family is looked after when you die is by leaving behind a clear, well-drafted will.

In New Zealand, we have considerable ‘testamentary freedom,’ meaning we can generally choose how we want to distribute our personal assets after our deaths. Testamentary freedom has been a fundamental feature of New Zealand law for many years. There are, however, limits to testamentary freedom. We see these limits in action when claims are made against a family member’s estate.

Claims against an estate

Claims against estates can be made under the Family Protection Act 1955 which provides that you have a moral duty to provide adequate maintenance and support for certain family members after your death. They include your spouse, children and sometimes grandchildren. Even if you have family members with whom you have had a poor relationship during your lifetime, if you do not adequately provide for their maintenance and support in your will, there is a risk they could make a claim against your estate.

If you want to leave unequal shares of your estate to your family members, or leave a close family member out of your will entirely, it is important to state this expressly in your will and to provide your reasons for doing so. This can reduce the likelihood of a successful claim being made against your estate.

Protecting beneficiaries from their own folly

If you are concerned about how a particular family member (a beneficiary) may use (or misuse) their share of your estate, you should discuss this with us before your will is drafted. Leaving your family members with a significant lump-sum of cash is not the only way to provide them with their share of your estate. There are options such as establishing a protective trust for their share or appointing trustees to manage money on their behalf. These options may ease your concerns.

Family members having different needs

If your family members have different needs, you may want to consider adjusting their share of your estate. With family members who have significant health issues or support needs, your obligation to provide for them may be greater.

Earlier this year, the High Court made a decision in a case,¹ upholding an earlier decision of the Family Court. That decision increased the proportion of a father’s estate that was awarded to his unwell son by a small amount. His son had been unable to work for several years due to his illness, and incurred costs associated with managing his illness. When his father awarded him a smaller share of his estate than his sister, the court decided this had breached his father’s duty to him. The duty to provide adequately for maintenance and support applied, even though the relationship with his father had been strained and dysfunctional over several years before his father’s death.

Repercussions of not providing for your family

If any of your family members have been left out of your will or have not been adequately provided for, they could make a claim against your estate.

When such a claim is made, the court can review the circumstances and make an award from the estate to remedy failure to provide adequate maintenance and support. This is why it’s important to talk with us about the drafting of your will. We can help you adjust your will to minimise the possibility of a successful claim against your estate.

Estate claims can cause increased distress, conflict and delays during an already challenging time for your family. The legal costs associated with defending such a claim can also significantly reduce the value of your estate.

Important to think this through

If you’re tempted to write your wayward son, estranged daughter or irresponsible spouse out of your will, it’s well worth getting advice first. This may spare your family a claim against your estate, and the stress and expense that goes along with such claims. +

1 *Emeny v Mattsen* [2024] NZHC 291.



Employee burnout

Acknowledge and address this

The effects of burnout and work-related stress are an issue that both employers and employees should acknowledge and address.

Under the Health and Safety at Work Act 2015, organisations have a clear obligation to prevent harm not only to their employees' physical health, but also their mental health.

What is burnout?

'Burnout' is the result of chronic workplace stress that is not successfully managed. The World Health Organization has stated burnout is an occupational phenomenon and it is not classified as a medical condition. Although burnout is not depression, it is recognised as a major risk factor for depression and anxiety.

Burnout affects people differently and the symptoms of burnout are varied. Some common symptoms include:

- + Exhaustion: Feeling drained and emotionally exhausted
- + Low productivity: Negativity about work or being unable to concentrate. This can affect the ability to carry out normal, everyday tasks at work
- + Increased mental distance from one's job: Becoming cynical about work and distancing from one's colleagues, and
- + Physical issues such as insomnia, headaches or stomach aches.

Employers' obligations

You must be aware of your obligations to manage health and safety risks, including supporting any of your employees who are struggling mentally, and take steps to address the issues.

Prevention, as they say, is always better than cure, and in terms of preventing burnout you have a great deal of influence in setting the culture of your workplace. Burnout is often the result of an unhealthy workplace culture. Workplaces that have unmanageable workloads, unreasonable deadlines and lack of support can all contribute towards burnout. You should therefore proactively consider the following:

- + Are your employees given achievable goals?
- + Are there established processes to enable your employees to raise any issues and concerns they might have?
- + Is training provided to both your managers and employees on how to deal with mental health issues?

If a staff member discloses that they are struggling with burnout, you should take proactive steps to understand what is causing the issue and what is required to address it. It may be necessary to get advice from a medical professional (it is important to maintain confidentiality in line with your employee's wishes and any privacy requirements).

In addressing your employee's burnout, you should look for a solution that works for you both. It is prudent that all decisions and any agreements between you both are recorded in writing as evidence of the steps that have been taken.

Aside from the legal considerations of your health and safety duties, from a business perspective there is strong evidence that investing in the health and wellbeing of your staff provides a substantial return on investment. This is not surprising, given that burnout reduces productivity and is associated with high staff turnover. Taking steps to avoid employee burnout is good for business.

Feel burnt-out as an employee?

It is important you talk to someone at work as soon as possible. Although it may be difficult to talk about stress and burnout, it is vital that your workplace becomes aware of it and is given an opportunity to stop the situation from getting worse. By asking for help and support, it enables your employer to make necessary adjustments. This may include rebalancing the demands and responsibilities of your role, cutting back on unnecessary tasks or establishing a set of objectives to work towards.

A recent court case

Burnout was the issue in an Employment Relations Authority (ERA) case² in which an employee successfully argued that he was constructively dismissed because his employer had failed to provide him with a safe working environment.

The employee had raised concerns about his work-life balance and even informed his manager that he was 'burnt out' and could not continue due to being 'broken by the workload.' When his employer did not take prompt action to address these issues, the employee resigned.

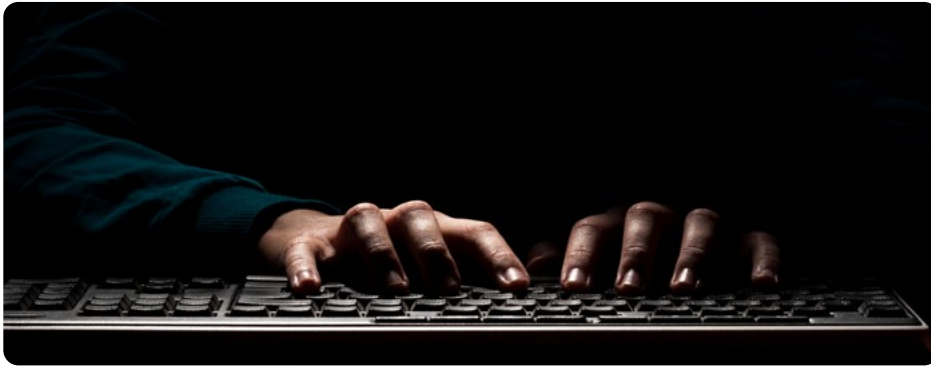
The ERA held that it was reasonably foreseeable that the employee would resign unless his burnout concerns were addressed, and ruled that his employer should have taken more formal and proactive steps to understand their employee's mental health situation. As a result, significant financial remedies were awarded to the employee, including \$25,000 as compensation for hurt and humiliation.

Employers take note

Employers have a duty to protect their employees in health and safety issues, and this includes their mental health. A person's work environment can have a significant impact on their mental wellbeing and, as a result, employers must take prompt, meaningful action should staff burnout arise.

If someone on your staff is struggling with burnout, it is important that they communicate this to you or their manager. For some guidance on steps to help avoid employee burnout, please contact us. We are here to help. +

2 *Perry v The Warehouse Group Limited* [2023] NZERA 773.



Avoiding scams

Tips to protect yourself

Every year thousands of people fall victim to scams through emails, phone calls and text messages. Scams are fraudulent schemes designed to deceive you and steal your money or personal information.

The danger of scams lies in their ability to look and sound genuine – at least until it's too late. Scammers are becoming more cunning, often using technology and psychological manipulation to trick you. Fortunately, there are a few easy steps that can help you.

Phone scams

Scammers often try calling and pretending to be from your bank. They usually create a sense of urgency, claiming there are issues with your bank account such as unusual account activity or overdue fees; scammers will make you think that the matter needs immediate attention.

To spot a phone scam, be wary of unexpected calls that ask for personal information such as your account details or your passwords. Most organisations do not request sensitive information over the phone. An easy way to verify if the call is genuine is to hang up and call back using the official number.

Text message scams

Text scams are when you receive messages designed to trick you into providing personal information or clicking on malicious links. These messages might say they're from your bank, a courier company or even your insurer. They often contain urgent requests to verify your account, claim a prize or resolve a problem.

To protect yourself from text scams, never click links or respond to messages from unknown numbers. If you receive a message claiming to be from an organisation, call them directly and check.

Email scams

Email scams, or 'phishing' emails, are a common way scammers try to steal personal information. These emails, similar to texts, appear to be from your bank, a courier or even a shop. Like many scams, they are often 'urgent' and ask you to update your account information, reset your password or review suspicious activity.

Don't click on links or download attachments from unknown or suspicious emails, especially if you've never heard from them before. Organisations will never ask (or should not ask) for sensitive information by email.

Key points

We are exposed to scams more and more in today's world. To keep yourself safe:

- + Be suspicious – who is contacting you and why?
- + Don't trust any unexpected contact
- + Resist the urge to act immediately, despite what the message says
- + Never open attachments or links if you're not sure where they've come from, and
- + Trust your instinct! If something doesn't feel right, it probably isn't.

Staying vigilant and informed is crucial in protecting yourself from scams.

If you think you've received a text or email that you think is a scam, you can report it to the Department of Internal Affairs, following the instructions on its website (www.dia.govt.nz). +

NZ LAW is a national network of quality, successful and innovative law firms. It has 63 member firms in more than 100 locations. Membership of NZ LAW enables member firms to access one another's skills, information and ideas whilst maintaining client confidentiality.

Members of NZ LAW Limited

Allen Needham & Co Ltd Morrinsville
Apogee Legal Whakatane
Argyle Welsh Finnigan Limited Ashburton & Rolleston
Aspiring Law Wānaka, Arrowtown, Christchurch & Dunedin
Atkinson Crehan Law Richmond, Nelson & Motueka
Barden & Co Waihi
Berry & Co Oamaru, Queenstown & Invercargill
BMC Lawyers Paraparaumu, Porirua & Levin
Boyle Mathieson Henderson, Auckland
Connect Legal Taranaki New Plymouth
Corcoran French Christchurch, Kaiapoi & Greymouth
Client Legal Solutions Nelson
Cruickshank Pryde Invercargill, Queenstown & Gore
CS Law Levin
Daniel Overton & Goulding Onehunga, Auckland & Pukekohe
DG Law Limited Mt Wellington, Auckland
DK Law Kingsland, Auckland
Darrington Poole Dannevirke
Downie Stewart Dunedin
Edmonds Judd Te Awamutu & Ōtorohanga
Edmonds Marshall Matamata
Freebairn & Hehir Lawyers Palmerston North
Gawith Burridge Masterton & Martinborough
Gifford Devine Hastings, Havelock North & Waipawa
Gillespie Young Watson Lower Hutt, Upper Hutt & Wellington
Greg Kelly Law Ltd Wellington
Horsley Christie Whanganui
Paul Hunter, Barrister Auckland
Innes Dean Lawyers Palmerston North & Pahiatua
JR Legal Tauranga
James & Wells Intellectual Property Hamilton, Auckland, Tauranga, Christchurch, Brisbane & Melbourne
Kaimai Law Bethlehem Tauranga & Omokoroa
Lamb Bain Laubscher Limited Te Kūiti
Law North Limited Kerikeri
Le Pine & Co Taupō, Tūrangi & Putāruru
Lowndes Jordan Auckland
Mactodd Queenstown, Wānaka & Cromwell
McCaw Lewis Hamilton & Te Kūiti
McIntosh & Signal Lawyers Feilding
Malley & Co Christchurch
Mike Lucas Law Manurewa, Auckland
Norris Ward McKinnon Hamilton
David O'Neill, Barrister Hamilton
Parry Field Lawyers Riccarton, Christchurch, Rolleston & Hokitika
PJ Magee Lawyer Whangārei
Price Baker Berridge Henderson, Auckland
Purnell Lawyers Thames, Coromandel & Whitianga
Brian Stewart, Barrister Auckland
Rainey Collins Lawyers Wellington
Rejthar Stuart Law Tauranga
Rennie Cox Auckland & Whitianga
RSM Law Limited Timaru & Waimate
Sainsbury Logan & Williams Napier
Sandford Wall Rotorua
Sheddan Pritchard Law Gore
Simpson Western Takapuna, Auckland
Simpson Western North Silverdale
Sumpster Moore Balclutha & Milton
Thomson Wilson Whangārei
Wain & Naysmith Limited Blenheim
Welsh McCarthy Parker Hāwera & Stratford
Wilkinson Rodgers Dunedin
Woodward Chrisp Limited Gisborne & Wairoa

Postscript

Holidays Act 2003 to be overhauled

Both employers and employees will be relieved that the government is prioritising overhauling this legislation.

"Change has been a long time coming, and I know there are many who are frustrated with the Holidays Act. We need an Act that businesses can implement, and that makes it easy for workers to understand their entitlements," said the Minister for Workplace Relations and Safety, Brooke van Velden.

The government will develop an exposure draft of the new legislation for consultation. It has indicated that the previous government's decision to double sick leave entitlements for all eligible workers has caused difficulties to some businesses and increased the disparity between part-time and full-time workers. As well, employers have long struggled with apportioning annual leave; an accrual system is mooted, rather than the current entitlements system.

It is expected that the exposure draft of the Holidays Bill will be released for targeted consultation in September. "I believe it is important to hear from small businesses in particular, given small businesses will adopt a range of working arrangements and often do not have the same payroll infrastructure as larger organisations," the Minister added.

Although registration for targeted consultation closed on 8 July, we will keep you up-to-date with how this new legislation progresses. +

Roadside drug testing to be rolled out

In May, the Minister of Transport, Simeon Brown, indicated the government will introduce legislation that will enable roadside drug testing to improve road safety.

"Alcohol and drugs are the number one contributing factor in fatal road crashes in New Zealand.

In 2022, alcohol and drugs contributed to 200 fatal crashes on our roads. Despite this, only 26% of drivers think they are likely to be caught drug driving," said the Minister.

The legislation is likely to be introduced mid-2024 and passed towards the end of the year. +



Visual artists will receive royalties when work on-sold

Long-awaited legislation that comes into force on 1 December 2024 will allow New Zealand's visual artists to receive royalties when their work is sold on the secondary market.

Passed in August last year, the Resale Right for Visual Artists Act 2023 will enable the collection of a 5% royalty each time an eligible artist's work is sold on the secondary art market. The scheme is for artworks that sell for \$1,000 or more. The collection agency, Copyright Licensing New Zealand, will deduct a percentage of the royalty as an administrative fee. +



BMC
LAWYERS

LAWYERS

Nikki Coulston
Nicola Tutt
Greg McCardle
Alice Back
Alyssa Le Lievre
Finn Seelen-Smith
Jack Philip
Alana Harris

LEGAL EXECUTIVES

Kristin Iacoppi
Heather Baker
Rachel Rogers
Lisa Mabey

PROPERTY SALES MANAGER

Brent Longstaff

CHIEF EXECUTIVE OFFICER

Mark Kennedy

BMC Lawyers

5 Kodex Place, Paraparaumu
Shop L05, 2 Lydney Place, Porirua
Level 1, 5 Stanley Street, Levin
PO Box 140, Paraparaumu 5254
T 0800 440 999
E info@bmc-law.co.nz

www.bmc-law.co.nz