

The A to Z of Small Business

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Introduction

One of the good things that happens during a lifetime spent running a small business and advising small business owners as a lawyer is that useful stuff sticks to you. You learn stuff. CEOs and business owners unburden themselves and vicariously you wander through the innards of many businesses. As a business lawyer in Melbourne, Australia, that has been my experience. Gradually that knowledge compounds and ferments and fertilizes itself.

Eventually, after several decades of practicing law and working with small business owners, what once seemed new and revelatory and transformative becomes so self-evident as to barely warrant comment.

The net consequence is that we business lawyers forget to have proper regard for what we know and the transformative effect it can have of those who seek our advice.

Those in the legal profession who promote value based costing models (as opposed to time based charging models) suggests that those with such extensive expertise should always resist the temptation to go into solution mode when first encountering a business client with what seems to be an intractable problem. Instead, they urge us to tease out the consequences of things going wrong and to invite a suggestion from the suggestible client as to what price the client might be willing to pay to avoid the perceived worst case scenario. Having created some fear and a heightened sense of potential loss, the theory is that the client will suggest a much higher fee than would otherwise be the case. To me, that approach is altogether too slick, too manipulative and thoroughly exploitative.

My late father was also a lawyer. Some years after he retired I encountered one of his clients who came to see me about a new issue. In conversation the client related to me how a conversation with my late father some decades earlier had transformed his life. In the course of a conversation my late father had routinely moved beyond a discussion of the problem to identify options and to suggest a solution. The client related how relieved he had felt to have the great weight of indecision removed and to have a path forward revealed. The paralysis of indecision was removed. I later related that conversation to my father, at that stage retired. Significantly, he could not remember the client, the matter, let alone the conversation. He had simply been stating what to him was self-evident and of no great significance.

That got me thinking!

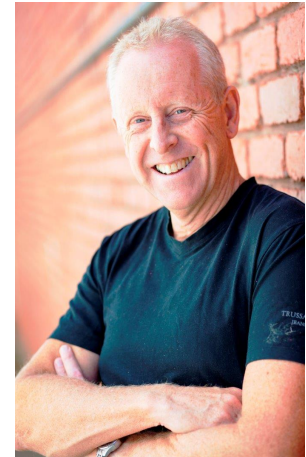
So then, the purpose of this handbook is to gather together a series of rants and raves, reflections and ruminations on matters Small Business. This is the stuff I wish I had known on Day One. And no, this is not an academic treatise. There are no footnotes. There is no bibliography. The ideas are not original. This is not much more than the baggage I have collected and the lint I have gathered. Therefore: treat with caution!

Just to be clear, whilst I use the expression Small Business throughout, there is no fixed definition in Australia as to what constitutes a Small Business. There are different tests in the taxation law realm, the employment law realm and in common parlance. So in the comments that follow I treat a Small Business as including micro businesses all the way up to larger, unlisted private companies. Perhaps the defining factor is the lack of ready market for trading equity in such businesses, with the consequential challenges for management, particularly with respect to succession.

Anthony Burke

I have been a lawyer in private practice in Melbourne, Victoria, Australia for over thirty years. For over twenty years I was the sole proprietor of my own Small Business (a small or medium enterprise), a suburban legal practice in Armadale, Victoria. So when not grappling with the challenges of my Small Business clients I have faced exactly the same challenges as owners of Small Businesses, including:

- How do I manage the cash flow and make sure I get paid?
- Who do I employ, who do I fire and when do I fire?
- Should I stay small or pursue a growth strategy?
- What is my succession strategy?
- Is my business really saleable?
- How do I sleep at night when my mind is racing with all the conflicting priorities of tomorrow?
- How do I keep motivated and healthy?
- Why can't I have a decent holiday?
- Why should I have to be the one to clean up and put out the rubbish?
- Beyond the mundane grind of running a business day to day, I have also been involved in Small Business activities in a range of ways:
 - early on I was accredited by Victoria's law society as a specialist in business law, following intense post-admission study of the legal issues affecting Small Businesses;
 - I have been actively involved in and at times chaired the Small Business Committee of Victoria's law society;
 - I was called upon by Australia's peak body for the legal profession, the Law Council of Australia, to establish and chair its inaugural SME Business Law Committee and in that capacity I represented Australian lawyers in dealing with the Australian Government on a range of Small Business issues;
 - I have given evidence to the Australian Senate Economics Committee on Small Business specific legislative proposals;
 - I have been involved in presentations at various industry forums on Small Business issues;
 - I have dealt with hundreds of Small Business owners in a multitude of business transactions, disputes and break ups.



So, in short, over several decades, I have been living and breathing the ups and downs, the highs and the lows, the excitements and the disappointments of running my own successful Small Business and as a lawyer focusing on the needs of many hundreds of Small Business proprietors.

As a business lawyer, I have spent decades giving business legal advice, immersing myself in commercial legal issues, writing commercial litigation and grappling with Small Business laws and regulations.

A

Accountant

In the 1970s I remember reading a collection of essays entitled “Disabling Professions” by various writers including the liberation philosopher Ivan Illich. The writers identified the hallmarks of a profession as including the adoption of a secret language. Each profession has its own secret language that is to some degree impenetrable to the rest of the world. By that mechanism there is created an inner circle of knowledge and jargon and an outer circle of relative ignorance and thus dependence.

In the legal sphere, tax law performs a similar role. Tax law invokes a whole new fog of legal jargon and complexity. Those who approach tax law enter a time and space warp and achieve infinite mass, or at least gravitas. Our tax law and revenue law is just so mind-bendingly complex. This is just a fact and is not about to change any time soon.

So given that and drawing upon decades of dealings with scores, if not hundreds, of accountants, these are Burke’s Laws to Small Business owners regarding accountants:

- Do not try to fully understand the tax law. You will never succeed. Invest your time in running the business.
- Beware the urgings of your accountant to adopt a tax minimisation focus, you will likely pay a price later on. See Chapter V - Valuation.
- When you are young and fresh in business choose an accountant who has at least a decade or more of experience in business. Piggy back on and benefit from his or her street smarts.
- When you are getting on in years, get rid of the older accountant and choose a younger one who can go the distance in your succession planning. You will need someone else’s energy to get you through.
- Set very clear KPI’s for your accountant and measure your accountant by reference to those KPIs. See Chapter P – Planning.
- A key KPI for an effective accountant is to bitch and nag you. Recognise that you will get caught up and distracted by your business with the consequence that you will neglect your own best interests in terms of financial planning. Demand of your accountant that he or she demands your time and attention.
- When you find that you have to start chasing your accountant it is time to sack the accountant and get a new one who meet the KPIs.
- When your accountant shows signs of becoming very entrepreneurial and “creative” run, run, run!
- Given the choice, accountants will always prefer the interest of the client who promises the longest term relationship and the most enduring revenue stream, all other things being equal. For the accountant your business is a tradeable income stream. That is just the way the world goes. Be aware of that.

- Accountants treat clients as property and will never refer a client to another professional if there is the slightest risk of their influence over the client being diminished.
- There is a self-levelling rule when it comes to professional referrals. Mediocre accountants refer their clients to mediocre professionals who achieve mediocre outcomes and everyone is happy in that mediocrity, including the client who chose mediocrity in the first place. Demanding clients, on the other hand, set the bar high for their higher performing accountants who refer to the best because they are less anxious about losing face or control.
- The more complex your structure the more dependent you become on your accountant and the harder it is to extricate yourself and manage succession.

My accountant friends won't like me for this. In parts Burkes Laws are a gross generalisation, but they approximate pretty close to the truth.

And as for me and my accountant? I am on my fourth accountant in my life in business.

The first was an older man who stupidly preferred the interest of the vendor to my interests as the purchaser when I bought the business for which he was the accountant. Doh!

The second talked me into a dubious "tax minimisation" product, failed to disclose his handsome commission and ran for cover when the ATO disallowed the "product", stating "You are a lawyer. You understand these things."

The third became reactive and I had to chase him. He was too busy building his empire.

My current accountant ticks the boxes. He is almost 20 years younger, speaks plain English, demands my time and attention and holds me to my promises and deadlines. My only concern is that if I keep praising him and referring clients to him he will cease to be as effective.

B

Buddy up

Being the proprietor of a Small Business can be a very isolating experience. You are responsible for all of the decisions ranging from marketing, dealing with staff, managing cash flow, attending to compliance obligations, generating new work, getting the work done and on and on and on it goes.

Because it can be such an isolating experience you often look for a relationship with many of your key suppliers. You have for some degree of empathy and understanding from those with whom you do business. Sadly, you generally do not get it from very large institutions like banks, telecommunication companies and so on, even though that is what they may promise. But you do expect it from some of your other suppliers.

In the sporting realm, it is often recognised that to achieve exceptional performance an athlete needs to buddy up with a coach or a mentor or someone who has already achieved success. If you want to achieve exceptional things in sport you seek out company of the best there are in that sport. You watch and learn from the best. You emulate the best. Eventually, the benchmark of performance rises and you become one of the best.

In the Small Business world the buddy principle applies just the same. If you want to achieve excellence in your business you need to seek out the company of those who are doing better than you. More often than not, those who are successful are proud of their success and happy to share the learning that they have developed.

Here are some ways of doing that:

- Participate in an industry benchmarking exercise. Nowadays, there are lots of organisations that aggregate data from businesses on an anonymous basis and provide feedback so that you can see how your business performs against others in the industry. More often than not, the participants in such benchmarking exercise are in any event market leaders, because they are hungry for improvement, so you end up benchmarking against the best in the industry.
- Join an industry group. In most industries there are worthwhile associations where you can participate in frank and helpful discussions and learn from industry leaders.
- Engage a business coach. That person may well be your accountant, but the role is different. If your accountant is not well suited to a coaching role, make enquiry and find a business coach or management consultant with specialist expertise in your sector. If you pay someone to provide advice and hold you accountable, you are much more likely to pay attention. Think of the business coach as a personal trainer for your business and make sure you turn up and do the hard yards.
- If there is no industry association or like body, create one. Identify several other participants in your business sector and ask yourself whether you are really in competition with one another. If the market is big enough for all of you to be effective and successful players, come together with those other participants for regular, structured and confidential discussions.
- Learn from successful people in completely different industries. A number of government and industry associations establish CEO Roundtables where CEOs from different industries come together and share their experiences. These can be extremely helpful.
- Commit yourself to doing something for a group or writing something for an industry publication. There is nothing more calculated to force you to get across your subject and learn at a deeper level than standing before others and holding forth. The fear of failure can achieve wondrous outcomes. Use that fear.

Essentially, the buddy up principle is a principle of accountability. It is a process of committing yourself and holding yourself to be accountable to some other person, to some other group or to some date certain. It is way of the addressing the inclination we all have to postpone, to delay, to avoid commitment and to find excuses.

C

Cash flow

For all the jargon and management speak about running a business, the fundamentals are really very simple.

In the services sector, it is all about:

- Doing the work;
- Billing the work;
- Converting bills into cash;
- Doing it all again.

In the manufacturing and retailing sectors, it is all about:

- Manufacturing or ranging the right goods;
- Selling the goods;
- Turning debtors into cash;
- Doing it all again.

The research abounds that cash flow problems and insufficient working capital are the primary causes of business failure.

So it follows that the key metric for any business, regardless of sector, is cash flow. If the cash stops flowing, the business stops. End of story.

So your accounting system must be capable of generating minute by minute, day by day reports about cash flow. Everything else can wait.

D

Deals

I have always found it curious that in the study of law there is never a focus on the structure of a deal. Even in post-graduate business study and legal study, very little attention is paid to the structure of deals and how to avoid getting the deal wrong.

After years of helping people do deals, it eventually occurred to me that the safest methodology for avoiding a stuff up was to mentally walk around a deal and look at it from the vantage point of each participant in the deal. Only by doing that and seeking to address the agenda of each participant in the deal is it possible to consider and bring to the table for debate all of the relevant issues.

Let us consider a simple transaction. Fred is selling a factory to Bill. The title to the factory is unencumbered and the factory is empty. Bill has cash to pay the purchase price and does not need assistance from a bank.

In that very simple transaction, Fred's agenda is to receive on the agreed settlement date the purchase price. Bill's agenda is to receive on the agreed settlement date a clear title to the factory and possession of the factory.

Let us now take that deal and embellish it somewhat.

Let's proceed on the basis that Fred has a tenant and Fred's title is encumbered by a mortgage to a bank. On the other side, Bill is a property developer who plans to redevelop the property when eventually the lease ends. Bill is being financed by a different bank.

To understand the deal and to ensure that it is managed effectively, you need to put yourself in the position of the now extended cast of players.

The agenda of Fred's bank is to be notified of the sale and the settlement date and to receive on the settlement date the amount owing under the mortgage. Only when that happens will it hand over the title and a discharge of the mortgage.

From the perspective of the Tenant, the agenda is to be notified of the change of ownership when settlement occurs. There may need to be separate and side negotiations between the Tenant and Bill in case Bill wants the lease to come to an earlier end.

Fred's perspective is to ensure that on the settlement date he receives payment of the purchase price and that his bank and tenant cooperate in the arrangements.

From the perspective of Bill's bank the agenda is to know that Bill has a capacity to service the debt, that it will receive clear title to the factory property and that it has appropriate security in place either over the title of the factory and perhaps other assets.

From Bill's perspective, the agenda is to complete the purchase, have certainty as to the dealings with the tenant, the opportunity to pursue planning permits and the ability to serve as the debt to the bank over the years to follow, even after the lease ends.

Conceptually, it helps to draw a matrix of the players in the deal and to address the agenda and connections of each. The by-product of this process will be one or more contracts.

Bringing such deal together in a contract results in a document that might be structured like this:

- An introduction of the parties;
- A short description of the context;
- Fred's obligations;
- Bill's obligations;
- Tenant's obligations;
- Fred's bank's obligations;
- Bill's bank's obligations;
- Who pays what to whom and when;
- Consequences of default;
- Dispute resolution process;
- General interpretation provisions;
- Signing clauses.
- Perhaps personal guarantees to support company commitments.

More complex commercial agreements run to that sort of structure.

Of course, the bigger the transaction and the greater the number of parties the greater the complexity. But structurally, that is the process.



Many Small Business advisors talk about Small Business issues in a cold and dispassionate way. But that's not the way that the Small Business world operates.

For many small business proprietors running a business is a very emotional undertaking. It is very difficult to keep the energy levels up, to daily step up to the plate and deal with the ups and downs and challenges of the business. That is why running a small business is a highly personal, emotive and at times uncomfortable process. Advisors who fail to have regard to that fact are doomed to fail.

Let's recognise and acknowledge the common experience of proprietors of Small Businesses.

Isolation

Being the owner of a small business can be a very isolating experience. See Chapter B – Buddy Up.

Independence

When you own your own business you can't be fired. However, equally you can't quit because disentangling yourself from the business can be a painstakingly slow and uncomfortable experience. So there are lots of times when you feel trapped.

Staff Hassles

We often hear Small Business owners say that their employees just don't get it. Working in a Small Business is fundamentally different to working in a large business because of the expectation that you will be part of a team and willing to take on a broad range of tasks. There is not the depth of staffing available. So, when your employees take a holiday, or take a sickie or get the wobbles the pressure on you as the owner just increases exponentially. The staff don't see that. They also commonly have a completely naïve appreciation of the costs of running the Small Business and a totally distorted idea of your income from it.

Juggling

We often hear Small Business owners complain about the difficulty of juggling multiple responsibilities and having to multi-skill. One minute you're putting out the garbage and the next minute you're working on the marketing plan, and so it goes.

Managing Cash Flow

This is obvious. See Chapter C – Cash Flow. It is what keeps you awake at night. It is what you worry about when taking on a new employee. It causes you to be apprehensive about investing in strategies that might grow the business.

Funding

At the moment, getting funding for a Small Business is particularly difficult. In fact, it always has been and that is just not likely to change. Banks and financial institutions are skittish about their lending requirements and so increasingly owners of Small Businesses have to fund their business growth from their own resources. This generally means living lean and hocking your other assets.

Holidays

Small Business owners complain of the difficulty of getting a decent holiday. There is just not the opportunity to have a long break. Over time this can result in a state of fatigue.

Start up excitement

But it's not all negative! There is no denying that there is a significant buzz of excitement when your business starts to gain some momentum and achieve some success. There is real pride in the establishment of a business all by yourself. See Chapter Z – Zone.

F

Family

Let's not kid ourselves, family businesses are different. They present a whole series of unique challenges.

More often than not the family business is set up by one key person, the founder. Invariably, the founder has worked extremely hard and sacrificed a great deal to achieve success. His or her single minded and dogged determination has established a foundation. But those founder characteristics make for difficulty in delegation and succession.

All of us who practice as business lawyers can immediately bring to mind numerous founders of family businesses who simply will not let go, do not know when it is time to step aside and seem to consider themselves both indispensable and immortal. Pity help the offspring of those persons who find themselves caught up in the business.

Lawyers, accountants and management consultants who sit in the wings and observe this phenomenon routinely encourage the founder to address his or her mortality. We make pious implications to concepts such as legacy, concern for the broader family, respect for staff and supplier. But it rarely registers.

The employment of other family members in a growing family business can be particularly problematic. Unless those family members come to the business with credibility borne out of success elsewhere and unless those family members are subject to the same KPIs as everybody else, the workplace culture will slowly fester and lead to the belief that family members are to be preferred over non-family members. This can be toxic as it discourages potentially good long-term managerial candidates to seek their fortunes elsewhere. Who needs nepotism to contend with alongside all the other challenges in Small Business life?

Those families who manage the transition from the founder to the next generation and beyond have a number of things in common. The founder and entrepreneur have some degree of humility and insight into his or her strengths and weaknesses, and the good sense to recruit others around him or her who are strong where he or she is weak. Equally, they recognise their own propensity for autocratic behaviour and establish governance structures that bring some degree of transparency and discipline to the process. This is a particularly uncomfortable adjustment for the hitherto free agent, but without it there can be no hope of moving from the kitchen sink brand of governance to a more contemporary corporate governance model that is a sine qua non for an eventual trade sale. See Chapter V – Valuation.

Whilst the data is compelling that family businesses face greater succession challenges than most other businesses, and thus are in greater need of support from professional advisors, those lawyers, accountants and management consultants who work in that space routinely throw their hands up in utter exasperation and walk away. It is often just too hard!!

And there is a corollary to the broader family business problem. It arises when the principal employs his or her spouse in the business. Tales abound of spouses of professionals and

business owners who run amok in the workplace as they bask in the reflected glory of the founder and assume for themselves like qualities and notions of indispensability.

If there is one simple piece of advice I could give: do not involve your spouse in the business unless he or she brings to the business separate and indispensable skills and then only if he or she works in an entirely separate area of the business and has the capacity to leave work at the workplace. Relationships depend for their vitality on sharing fresh experiences and separate challenges, not living in each other's pocket.



It is a fundamental misconception that the majority of Small Businesses and family businesses are actually for growth.

About 70% of Small Businesses fall into the category of either passionate professionals or those pursuing a lifestyle and for them growth is simply not an issue. Your typical passionate professional is a sole practitioner lawyer or doctor or physiotherapist who is passionate about the law or medicine or health and the affairs of clients and patients, but not that interested in the business aspects. Many such people have established a business to effectively buy a job because they like the autonomy and independence.

In this handbook we are looking at Small Businesses that have some aspiration for growth and transition, rather than hobby or lifestyle businesses where the proprietors are really only interested in buying themselves a job.

A successful Small Business applies business principles and aims to generate returns beyond a mere salary for the proprietor. Accountants and business brokers will tell you that a business has no real goodwill unless it is generating at least:

- a market based salary for the proprietor, that reflects the real responsibility of the role;
- a market based return on the risk capital that is tied up in the business, and generally at least 30%;
- profits over and above those two items, commonly referred to as super profits.

See Chapter V – Valuation.

So a threshold issue is to decide whether you are:

- a passionate professional;
- pursuing a business for lifestyle reasons; or
- serious about building and developing a business that may have a life beyond your departure from it.

If you are not in the latter category then succession planning is pretty much irrelevant for you. When you depart from your business you won't have much to sell beyond some plant and equipment and perhaps the rights to a franchise or business premises or something similar. But that is not a criticism as we all make our choices in business.

And a business that experiences growth has a particular cash flow challenge. Given timing issues, rapidly increasing sales do not translate into immediately enhanced cash flow. Funding growth saps working capital with the consequence that many otherwise very successful businesses collapse when they experience rapid growth.

So, be careful what you wish for in growth and keep your finger on the pulse of the cash flow.



On this subject I am quite passionate, if not obsessed!

Running a Small Business is stressful, draining and unrelenting in its demands. To be effective in a business, day after day, month after month, year after year, requires resilience and energy. You have to stay healthy.

From my part, I have always been involved in sport of one kind or another whilst the owner of a business. My particular interests are cycling, open water swimming and, until my knees gave out, running. Invariably, I find that subconsciously business problems sort themselves out to some degree whilst I am off doing other things. Breaking the business routine, provoking the flow of endorphins, releasing the synapses in my brain, deconstructing myself and oxygenating myself invariably resulted in a fresh perspective and a clear line of action.

And because I am so passionate on the need to achieve such a balance, I have actively sought to surround myself in my own business with people who are to some degree likeminded. However, with one employee, I certainly miscalculated. This particular young lawyer was living out of my dreams and achieving sporting excellence in fields that I could only dream of. But it came at a cost. He was constantly coming to work in a state of near exhaustion. He would walk around the office in barefoot, because his feet were bleeding from the marathon he had completed in previous days. His work performance tanked as his sporting prowess improved. He is no longer with me!

The celebrated American business guru Warren Buffett addresses his concept of business health quite frequently in his speeches and writings. He advises people to invest as much as possible in themselves. He makes the point that you will never get a better return on life than when you truly invest in yourself. So his mantra, which I echo, is that beyond physical health we should be constantly investing in our own intellectual health and mental wellbeing. That means we should never stop learning and should be constantly looking for

excellence. We should be constantly seeking out the company of people who are passionate and motivated and hungry for excellence.

And clients and customers much prefer to deal with a Small Business owner who is alive, energetic and engaged with the broader world.

Healthy body, healthy mind, healthy business.



Whether we like it or not, we all judge people on first impressions. Evolution has programmed us to make assessments in a nanosecond. Anyone who contends otherwise is having you on. So the way we project ourselves, the image we create, is pivotal to how we engage with our clients and customers in business.

Here are some of the attributes that go to making a professional impression and cultivating a successful image:

Project confidence

Of course, confidence without competence is useless. But if you know your stuff, own it and project confidence that you can deliver. As the saying goes, do not hide your light behind a bushel.

Integrity

People who know their stuff speak plainly. They assess the situation, carefully weigh up the options and offer a measured opinion without equivocation. The more the advice is couched in weasel words and equivocation, the less confidence you can have in it. Sure, you need to qualify your advice by a careful acknowledgement of risks, but ultimately an opinion is required and you must express it clearly.

Simplicity

People who know their stuff become impatient with obfuscation, jargon and obtuse language. I remember many years ago briefing an eminent tax QC to provide advice on a complex capital gains tax question which had significant financial consequences for my client's Small Business. When eventually we received the Memorandum of Advice from the tax silk, it ran to one paragraph for which advice he charged a fee of \$5,000.00, in those days a huge sum. The advice? "The answer to the question is: Yes." No equivocation there. A bankable and certain opinion! We were all impressed.

Self-awareness

By this I mean the ability to know your strengths and limitations, to be comfortable with them and to know how best to use your strengths while still being aware of your weaknesses. This goes to reinforce integrity and build confidence;

Strategic thinking

Stephen Covey, the author of the famous “The 7 Habits of Highly Effective People” elevated strategic thinking to a key habit. He expressed it as starting any endeavour with the end in mind. Successful professional people help their clients by identifying real goals, rather than perceived goals, and then work backward to achieve them.

Anticipation

Clients respect those in business who are mindful of their needs and anticipatory of them. It shows empathy and respect and concern.

Caring

Another word that comes to mind is empathy. See my comments in Chapter N – Networking. It is a simple statement of fact that you cannot be effective in providing advice to others until you learn to find out their needs, goals and fears;

Realism

One of the major drivers of complaints about professional advisers, particularly lawyers, is failure to realistically manage expectations. A successful business person will be realistic in promises, realistic in setting deadlines and realistic in fee estimates or quotations. It is always better to under promise and over deliver than to do the reverse. Of course, being realistic and delivering against realistic promises builds trust and reliability and becomes the genesis for repeat work.

Follow up

Quite simply, deliver on your promises. We all want to be loved. We all want to win the trust and confidence of a new client. But making unrealistic promises and setting unrealistic fee estimates is a certain recipe for a toxic relationship.

Enthusiasm

We have all heard that saying, attributed to both George Burns and Groucho Marx, “The most important thing is honesty. Once you can fake that, you have got it made.”

Enthusiasm is equally essential and you cannot fake it. If you are not enthusiastic about achieving good outcomes for your clients or your customers, you are in the wrong business. People respond to enthusiasm and see it as a very positive quality. Colin Powell said it this way: “Perpetual optimism is a force multiplier.”

Diligence

This is related to following up, but slightly different. If you exemplify qualities of persistence, doggedness and a work ethic you will inspire confidence.

Success

Nothing quite enhances your image like success, particularly repeated successes over a lengthy time. Celebrate success and do not be shy about it.

Discretion

Of course, in a professional realm integrity is essential.

Tenacity

Everyone wants to be considered special. We all feel that our problems are unique because they involve us. My late father, also a lawyer, had a great line when a client would present a challenging problem for which he had no ready answer. Drawing up all his gravitas, he would say “In all my many years in practice, I have never encountered quite this particular problem and it will be my great privilege to investigate it and report back to you in the next few days.” Invariably, the client felt important and respected, notwithstanding that my father had no idea how to deal with the problem, at least on that first encounter. But he was curious and engaged and respectful and he found the answer.

Risk taking

We would not be in business if we were not willing to take some degree of risk. But risk taking does not mean recklessness. It is about a measured assessment of options, a careful calculation of the cost benefit and an intelligent decision based on rational analysis of the available data.

Humour

A sense of humour is essential. It helps to demonstrate perspective. Self-deprecating humour can be an endearing trait. Further, humour helps put people at ease and allay apprehensions when dealing with strangers.

Authenticity

We have all heard that saying “Fake it till you make it”. However, the chutzpah has to be grounded in reality. In a business environment, the impostor will always be caught out sooner or later.

J

Justice

Inevitably in the conduct of a small business there will be disputes. Disputes just happen from time to time. The fact of a dispute is not necessarily a reflection on the competence of the Small Business proprietor. Random bad stuff just happens!!

A measure of a business proprietor is how the proprietor manages a dispute.

When disputes happen it is always best to deal with them as soon as possible. Otherwise, they fester and get worse. That is particularly so if there is some prospect of a continuing business relationship between the parties involved in the dispute.

There are many business owners who make the mistake of thinking that Courts involved in the management of the business disputes are concerned to administer justice. Nothing could be further from the truth. Business litigation operates in narrow range and with judges pretty much limited to attaching financial consequences to conduct. The process is slow, bureaucratic, intensely distracting and highly disruptive to the business. That disruption and distraction comes at a significant cost. You cannot be creative in the business when you are not sleeping. You cannot make plans in your business when the future is uncertain. You cannot effectively deal with banks and financial institutions when there is an uncertain liability.

I have seen a number of instances where the ill conceived advice to seek “justice” in the Court has caused the death of a business.

When speaking frankly, we business lawyers will acknowledge that there are multiple strategies to delay and frustrate the progress of a business dispute to trial. Yes, there is legislation that imposes standards of behaviour in commercial litigation. However, it is not the least bit difficult to find a plausible rationale to take a little longer, to introduce other tangential issues and to cause your opponent to spend ever more money.

Having practised commercial litigation for over 20 years, my advice to my clients when confronting a commercial dispute is generally as follows:

- Get early and competent advice about the likely course of litigation if it is to be pursued in the Court, together with the cost both in money, time and energy.
- If, relative to the benefit of a win, the cost is too high, move on. Do nothing.
- If there is an otherwise worthwhile commercial relationship involved, make early overtures for confidential discussions and involve an independent facilitator or mediator as soon as possible. Be willing to negotiate and be creative in that negotiation.
- Explore available alternate dispute resolution processes. In most states of Australia we now have Small Business Commissioners who provide government subsidised and relatively informal small business mediation. The success rate is high. The process is streamlined. It works very well. Even if the dispute is not solved this process almost

always serves to narrow the range of issues and to allow much more informed decision making about whether litigation might be warranted.

- Treat every dispute as an opportunity to reflect on and learn how to do things better in the future.
- Don't assume that judges are commercially literate. Most judges are former barristers, most have no business management qualifications and most have never run a business at even a micro level. And invariably the Courts operate in a technological environment that is often decades behind that in which Small Businesses operate. So taking a chance with a judge on a complex Small Business dispute and having your story mediated by a similarly challenged barrister simply compounds the risk. You will spend a great deal of time and money struggling to educate those who then sit in judgment on you. Scary, hey?

I often find myself saying to business clients who have suffered some loss in a business transaction, "Consider this your honorary MBA in business". That may sound gratuitous, but what I mean is that until you have been kicked in the guts at least once in your life in business, you do not really know which side is up. In the USA, it is almost a badge of honour and a rite of passage to have had at least one business failure before eventually achieving success.

So justice is not a concept that has much relevance for the Small Business owner. The commercial litigation processes are just one of a number of tools to be used in resolving business disputes and then only to be used sparingly and when the costs are proportionate. It is only ever about of the money. It is never about matters of principle. It has nothing to do with justice.



As an avowed rationalist and advocate of evidence based thinking, the very notion of my prattling on about karma will strike some as sheer hypocrisy. I can just see my friends exploding with laughter.

But properly understood karma is simply the notion of cause and effect where the intent and actions of an individual (cause) influence the future of that individual (effect).

So why not apply the notion to a business?

Yes, you can build a business empire by being an absolute tyrant, a modern-day robber baron, a Montgomery Burns type. You might dominate your market or even become a billionaire.

But in a Small Business we do not operate in a vacuum. We will never achieve monopolistic market control. Rather, we each operate within the relatively closed system of a market, a workplace, a community, an industry, a profession. And bad conduct in business reverberates, echoes, bounces around within our much smaller sphere of endeavour and is ultimately not sustainable because the market of suckers is not infinite. One day the second law of thermodynamics might well be applied equally to businesses I suspect.

So, if we abuse our customers they will only remain with us until a less unlovely alternative comes along. And then they are gone. When that happens the difficulty of catching another sucker becomes ever harder and more expensive. We have to slash prices (and so profits) or spend heaps on slick advertising.

Everyone who has ever attended a sales training course is well aware of Ansoff's Matrix which basically holds that your best source of repeat work is from existing customers and the hardest task in any business is selling new goods or services to new customers. Karma embedded perhaps?

In times of high unemployment you may be able to abuse your employees. But as soon as there is competition in the market the most talented people will up and leave. Those few people of superior talent who you may inveigle into working for you will watch and learn and eventually leave, leaving you with the duds who have no better prospects. Who wants to compete in the market with a team of also rans? Not sustainable.

Abuse your community, and you'll provoke a reaction and invite hostility. That can be very costly.

Disregard the law in business and sooner or later you're bound to come a cropper. Even if you emerge from the legal process seemingly unscathed those fines, those media mentions and your legal defense are costly – stuff lingers on and on in the ether of the internet.

Just this week a business client received what appeared to be an attractive offer for the sale of a warehouse property that might soon be suitable for redevelopment. My simple Google searches of the prospective purchaser and its directors threw up a media note of a serious corruption finding against the director in another State. And this purchaser wants a very long settlement? And this purchaser requires bank finance? And what bank wants to be associated? Hmm. So we are treading very cautiously. If the deal proceeds there will be protections abounding and a price will be paid for the past indiscretion.

Karma? In the Australian idiom: What goes around comes around. So, in Small Business life, keep yourself nice!



Lawyers

Yes, lawyers are expensive. Yes, lawyers speak a different language. Yes, lawyers see complexity and risk where others see opportunity and hazard.

However, an effective business lawyer can be a valuable aid in the conduct of a business. Our antennae are sensitised to the risks, based on our experience of handling multiple other business disputes and transactions. We understand the structure of deals. See Chapter D – Deals. We know how to put commercial arrangements in place, so as to cover all of the issues or to at least put in place a protocol to address and manage issues that may arise in a business relationship.

A good business lawyer should not act as a brake on entrepreneurship, but rather an active, informed and constructive listener for the entrepreneur. The business lawyer should be asking the tough questions and challenging assumptions. Active listening!

Early on in my legal career I had the notion that good lawyers did the Court stuff. I spent years running litigation in all the superior Courts. But eventually I realized that it was often little more than a highly ritualized cage fight. There was no subtlety or nuance in the outcome and the process was needlessly destructive. Destructive of real resolution options, real money, real fairness, real time.

Nowadays I subscribe to the view that the mark of an effective Small Business lawyer is to keep his or her client as far away from a Court as possible, whilst always having the capacity and skills for the fight, if required. And of equal importance is an informed understanding of the legal labyrinths of litigation, the cost benefits of litigation and the levers to pull to accelerate or slow down the process as the occasion requires.

More often than not, those embarking on the establishment of a new business speak first to an accountant, but often fail to discuss matters with a Small Business lawyer for fear that it will cost too much. That decision can result in significant expense later on.

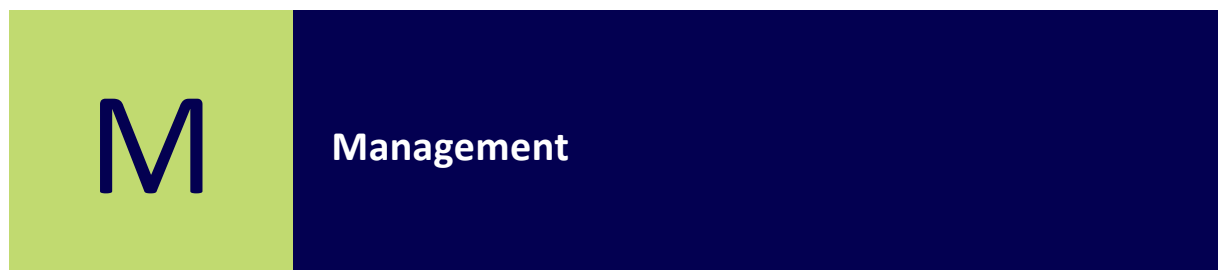
The minimum issues that a business proprietor should address with the lawyer when establishing a new business are as follows:

- Have I got the right business structure having regard to taxation, succession and asset protection considerations? Invariably this is a discussion that should be had jointly with the accountant.
- Have I put in place the basic contractual arrangements with suppliers, landlords, bankers and employees?
- Do I have the necessary permits, licences, business registrations to lawfully do what I want to do?
- If I have partners, fellow shareholders or other co-owners in the business, have we put in place at least a minimal agreement to cover such things as:

- Capital funding requirements;
- Remuneration strategies;
- Business valuation formula;
- Dispute resolution protocols;

That agreement can be as simple as a resolution, exchange of correspondence or memorandum of understanding. It does not have to be 50 pages of dense legal documentation.

- If I build up wealth or intellectual property in the business, how can I protect it?
- If I die or become incapacitated, what will happen with the business? Are there insurance arrangements that I could put in place?



There are literally thousands of books published about management. I am not about to pontificate on management theory. So let me keep this brief.

Some years ago, a friend sent me an email summarising what he thought were the key attributes of a good Small Business manager. I have kept it to this day as I still think it holds true.

Here they are:

- Listen first;
- Acknowledge result and effort;
- Continuously encourage;
- Empower people to take the next step;
- Celebrate even small achievements;
- Model appropriate behaviours;
- Continuously look to challenge the current practices and theory;
- Share the vision;
- Spend real time in planning for required outcomes;
- Learn from everything;
- Enjoy the work.

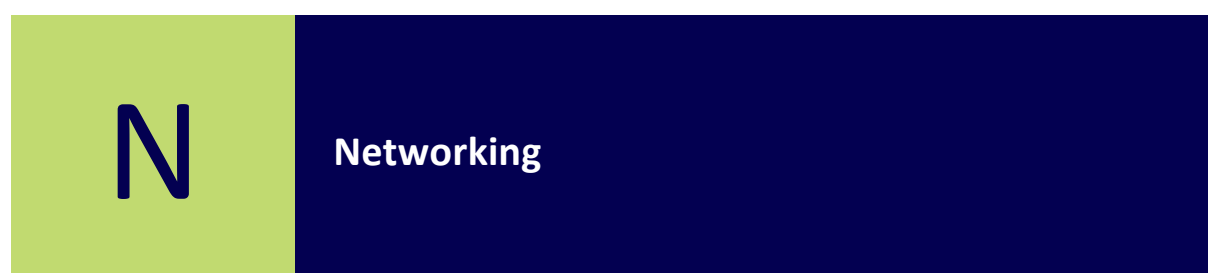
To which I add:

- If you cannot measure it or monitor it, it does not count.

Thank you Mick Paskos, former editor of the Law Institute Journal, for that.

Further, it is always constructive to stop and reflect on discrete episodes in the life of the Small Business. It helps to look at a transaction or an account and ask what did we do well and why? Or if it was not such a successful outcome, what did we do wrong and why?

Distilling learning from an episode, capturing it and keeping it as a resource gradually builds up quite valuable systems and processes that eventually may become valuable assets. After all, what is a franchise other than a highly evolved system distilled for a single first Small Business?



Over recent years I have developed a passion for open water swimming. Several days a week I swim with a mate from a yacht club base in suburban Melbourne. Every Wednesday morning a business networking group has a networking breakfast at this yacht club that runs between 7.00 am and 9.00 am. Each week the same 40 or 50 business proprietors meet up and network over breakfast. Often they hang around in small groups after the close of their formal meeting. Week after week, month after month, year after year it seems to be the same people, coming time and time again.

My swimming mate and I scratch our heads and laugh at the absurdity of it all. We wonder at the opportunity cost of this “investment” of time and networking. If the networking process was as good as it should be, it should have ceased years ago when everybody became so busy with new work as to make continued participation irrational.

Early on in my career as a lawyer, I confess to being stricken by shyness and introversion. The very idea of networking used to fill me with dread. I rationalised my disinclination for networking by cultivating a theory that if I was sufficiently good at my job eventually the quality of my work would speak for itself and clients would beat a path to my door. Wrong!!

One day whilst sitting across my desk from a non-English speaking client and conversing with the assistance of an interpreter, the interpreter vented his frustration at my approach. When we finished the client meeting, the interpreter kindly took me aside and gave me some advice that has stood me in good stead ever since. He said to me, “Stop talking like a lawyer. People come to you because they know that you know the law. When people go to a doctor they do not interrogate the doctor about his knowledge of medicine. They want empathy, understanding and concern. So look the client in the eye, tell him or her that you care and that you will fight for them and do not be afraid to be emotional. Do not be afraid

to touch and shake hands and be effusive. When someone is struggling to understand the language it is your body language that counts.”

That encounter transformed me. I then went out of my way to be much less a lawyer and much more passionate and concerned. Given the choice, I would visit clients in their homes and engage with their broader family. The effect of this change in my persona and approach was dramatic. All of a sudden I had clients coming to me from all over Melbourne and I was taking over files from other law firms. It was not that I was a better lawyer. Rather, I just went out of my way to develop empathy and engagement and to show that I cared.

I continue to be repulsed by the idea of structured networking events. From my perspective, they are unnatural environments based on forced intimacy and some weird calculus of mutual obligation that just does not work in the real world.

From my perspective, the far better approach is simply to be engaged in a wide variety of activities and with a diverse group of people. If you are active, energetic and engaged, people will respond to that and the opportunity for working together professionally will just happen. There is a degree of serendipity about all of this. However, one thing is certain, the more you engage and the wider the circle of your engagement, the greater the mathematical probability of good things happening.

Like a marriage, business relationships do not just happen. They require work. Just as in a marriage you have to schedule quality time and celebrate events, so also in a business relationship you must schedule quality time. You must create the opportunities to share stories and reengage. This can be as simple as a phone call, catch up over coffee, a lunch or some shared sporting or recreational activity. I cannot speak for women, but it seems to me that men develop better empathy by doing something physical together rather than sitting around just talking.



The smaller the enterprise the less of a gap between thought and action.

You go to a seminar and hear a good suggestion, you have an insight in the shower one morning, a new technology becomes available to make your business run smoother.

No, you don't have to write a submission. No, you don't have to prepare a cost benefit analysis and run the process through the budget review committee, the risk management committee and then win over a champion or two on the board. And, yes, you can be an early adapter.

Recently my law firm was approached by a much larger law firm about a possible "alignment". As we got down to a discussion the managing partner of this larger firm began talking about his firm's structure. But it got a bit complicated so he went for the whiteboard and sketched out the structure. It took the best part of 15 minutes.

When he drew breath we then talked about some new technology and procedures we had implemented in the last 12 months or so that had given us the jump on our competitors. Our visitor sighed and remarked that to implement such changes in his firm would take the best part of three years.

Small Businesses have a unique opportunity in the marketplace: as a consequence of being small we are able to stay nimble and adaptable. We can dance ahead of the slow moving herd of larger businesses and test new ways, new technologies, new markets, new products. We can duck and weave and make good profits from the scraps of business falling from the table of bigger businesses.

In a digital age where it is possible to access an enormous array of business technology on a pay as you go basis (software as a service) Small Businesses can nowadays get pretty well immediate access to the best business tools, the best business intelligence and the best marketing advice for far less money than at any time in history. So the balance of opportunity is in my view tilted well in favour of Small Businesses.

And in the personal services space, where personal relationships remain so critical, Small Businesses have that sweet spot covered. The larger the business the less possible it is to allow preservation of close personal relationships because specialisation and associated turf wars mitigates against it. When banks began discouraging their managers from having close relationships with customers, for fear they may become too close, banking changed to a commodity.

In my firm we do well by servicing the refugees from larger law firms.

So, in Small Business land, the opportunities abound so long as you are alive to them, keep a light management touch, stay nimble and keep hunting.



Being the owner of a Small Business involves risk. It is not for all.

Of course there are some Small Businesses that are essentially glorified jobs. I refer in particular to lower cost franchise operations where every aspect of operations is codified and regulated. I don't disparage those businesses but I don't think they involve the same assumption of entrepreneurial risk as establishing and running your own Small Business. In many franchises you are paying a royalty on turnover to compensate someone else, namely the franchisor, for having earlier on taken the entrepreneurial risk off the table to a large degree.

"Having a crack" on your own in a Small Business is different. It means chancing it all. It means a high wire act.

So, what are the key personality attributes required to be effective and successful as a Small Business owner:

- You must be comfortable with being uncomfortable, because nothing is ever static and certain. At any minute some random strange and weird karma can emerge from left field and trip you up.
- You must be able to effortlessly switch from challenge to challenge, neatly compartmentalising issues, warehousing them and being able to address them when required.
- You must be resilient and able to pick yourself up off the floor after adversity, dust yourself off and step back up to the plate for more;
- You must have confidence in your own ability and almost an angry determination to keep going;
- You must be hungry for news on the market, the opportunities, the gossip on the competitors, the next new thing;
- You must be able to turn off, zone out and recharge and regather your momentum. If you cannot do that you will burn out;
- You must have some degree of arrogance or bloody-mindedness to drive you beyond the waves of obstacles and annoyances; and
- Most important of all:
- You must be able to take a cold, hard, dispassionate look at yourself in the mirror, recognize your propensity to be abrasive and harmful to those less thick skinned than yourself and intermediate your dealings with the world by recruiting to your Small Business cause those who are strong where you are weak.

If you don't have such a personality then owning and running a Small Business is not for you.



What I have to say on the question of quality may well be misconstrued.

When I began writing this handbook some while back, a long while back, I had in mind a more rigorous and “professional” piece on business succession. In my endeavour to achieve “quality” I compiled endless resources, lots of references and I read widely. And then it languished. For a long time. You see, if I couldn't do something of quality it was best not to do anything at all! What arrant nonsense! What vanity! How holier than thou! How ineffectual!

In Small Business land we often trip ourselves up by delaying a decision until we have perfect data, we delay a product launch until all the bugs are ironed out and the launch is risk free,

we resist the call for an answer to the problem until we have conducted yet more tests. So, nothing happens but time is spent and costs are still incurred.

Life in business does not always allow for or indeed require quality. More often, something is better than nothing.

Those football fans who know their history will know of the famous coach John Kennedy who made that inspirational speech at the 1975 Grand Final half time to his Hawthorn players:

"At least do something! Do! Don't think. Don't hope, do! At least you can come off and say 'I did this, I shepherded, I played on. At least I did something.'"

Oftentimes the very nature of a transaction creates its own commercial momentum that overcomes initially indifferent quality. In most commercial transactions the parties want the closing of the deal rather than a fight. So imperfection along the way is rarely a deal breaker and more often a wrinkle to be ironed out, often with the active assistance of the party who might otherwise have taken advantage.

As I write this I am weeks short of settlement on the purchase by a developer client of a large tract of development land in Melbourne's sprawling western suburbs. The long story cut short is that the vendor, a large institutional investor whose holdings include the adjacent shopping centre, conducted a less than "quality" disclosure of certain infrastructure on the land. My client could take advantage and walk away but what's the point? It wants to settle, has already spent a fortune on planning applications and has already on sold a small portion of the land at a significant profit. Had this purchaser itself been more careful the "hidden" infrastructure would certainly have been detected earlier.

But, ultimately, it doesn't matter. There is a convergence of commercial interests that demands these mutual shortcomings of quality not unsettle the deal. Sure, there is a haggle and some concessions are made (that's where I come in) but we all know that no one has the slightest interest in going to Court.

Quality is a noble aspiration, but Small Businesses operate in the real world where quality comes at a price.

And much of the Small Business world is content with relative mediocrity: mediocre clients seek out mediocre advisors who dispense mediocre advice which achieves mediocre outcomes and everyone is moderately happy in that mediocrity! Just look around at your competitors!

To put the proposition another way: in business when it comes to products or services customers always want good, cheap and fast. But of those three you can only ever have two. Thus:

- Good and cheap? Yes, but never fast!
- Cheap and fast? Yes, but never good!
- Good and fast? Yes, but never cheap!

So, having compromised on quality, I may yet finish this handbook.

R

Recruitment

Some years ago my management consultant friend, David “Big Dave” Staughton, gave me some good advice. Drawing upon his own experience in having to come quickly to terms with the management of a labour intensive business Big Dave advocated a three-point plan:

- If all other things being equal, prefer the first generation offspring of a migrant family. He or she will be burdened by the parental expectations and the hunger for success that brought the parents to Australia in the first place. Generally, those people will be more determined, less coddled and more adaptable.
- All other things being equal, prefer a candidate from a regional or rural background. That is because in smaller communities there is a greater sense of community and the need to get on with the people from a wide variety of backgrounds. Further, more often than not young people from a rural or regional background have to travel to a larger city to pursue tertiary study and whilst studying are more than likely to be involved in part-time work which may lead to the development of a service culture.
- If you are particularly lucky, go for what he called a “Triple M”. A Triple M is someone who is married with a midget and a mortgage. So generally, those people are hogged tied by responsibilities on multiple fronts and less inclined to be impetuous.

Drawing on Big Dave’s advice I have tried to apply his Recruitment plan and when consistently applied it usually works well. The only danger is that those who are driven and ambitious are equally likely to seek success in their own right and may eventually leave and sit up in competition, taking your customers or clients with them. But that is an inescapable consequence of seeking out and recruiting the right people.

Long ago, I realised that academic qualifications whilst a good indicator of intellectual capacity in no measure a reliable indicator of capacity to work effectively and collegially in a modern workplace.

In more recent times, in my firm we have applied an extended the Big Dave theory of recruitment. We are now much more rigorous about trial arrangements, probation periods and similar arrangements. If the right culture is not there, if the fit is not good, it is best to sever the relationship as early as possible. Making mistakes in recruitment can be extraordinarily expensive. I remember when I was heavily involved in the Law Society in Victoria, there was endless debate about the loss to the legal profession of talented young lawyers leaving large firms after three or four years of employment and purportedly on account of the oppressive culture in some of their places of employment.

The research doing the rounds at the time suggested that when you took into account the costs of training a law graduate in the workplace, the cost of inculcating a replacement law graduate, the disruption to client relationships and workflow, the distraction of supervising partner time and fees paid to placement agencies and internal human resources staff, the cost of replacing a third or fourth year lawyer was equivalent to about one year's salary package for such a lawyer. That is a dramatically high cost of not getting it right.

S

Succession

Small Businesses represent about 97% of businesses in Australia. They employ the majority of the Australian workforce.

For several years now RMIT University has been conducting research on this critical sector of the Australian economy. A recent research report confirms earlier findings and reveals some interesting trends, including the following:

- the transmission from first to later generation family businesses is becoming less likely;
- for around 50% of Small Business owners continued family ownership is either not desirable or not feasible;
- there has been a significant decrease in multi-generational family businesses between 2003 and 2006;
- 81% of survey respondents intend to retire in the next ten years resulting in a transfer of wealth estimated by the RMIT researchers at \$3.5 trillion;
- over 50% of Small Business owners state that they are not exit or succession ready;
- there is a lot of talk in Small Businesses about succession planning but a conspicuous lack of exit readiness.

If this research is correct then it is clear that there will be a huge number of Small Businesses on the market in Australia in the next five or so years. If you are the owner of one such business then you cannot afford to delay because otherwise you will find yourself in a very crowded market place and the value of your business will be reduced. It is imperative that you start now.

Let's not kid ourselves. Succession planning for a Small Business is hard work. It is hard enough dealing with the day to day management of a Small Business without taking on the additional burden of planning for its succession.

It is also time consuming. For most of us, getting an effective succession plan in place will involve a significant commitment of our time and that's time we can't otherwise spend on operating the business, growing the business and so on. Some of that time will be wasted on false prospects and missed opportunities.

And succession planning can be expensive. Usually it involves engagement of external advisors, typically legal and accounting advisors and sometimes business brokers. It may take years before the return on that investment in external advice bears fruit and in the meantime you have to manage the business and fund its operations. The return on investment is often far from immediately apparent.

However, as is often remarked, failing to plan is tantamount to planning to fail. Failure to plan for succession often means that considerable value is lost because the business is not readily transmissible or the wrong structure has been utilised and avoidable taxation costs are incurred.

A starting point is to regularly schedule a business health check to highlight the gaps and insufficiencies in the status quo, to spark conversation with a trusted business advisor and to step aside from the daily grind of distraction.

The Business Health Checklist at the end of this handbook is a start. It pretty much reflects the checklist any acquirer will apply when conducting a due diligence investigation of your Small Business.

Effective business succession is in my view the hardest challenge of all in business. It should never be postponed or ignored. It takes three times as long as anyone's initial estimate and involves at least several false starts and disheartening setback. But it beats the hell out of an unplanned Exit. See Chapter X – Exit.



Business owners are chronically time poor.

But it is useful to realise just how little time there is available.

Let's run the numbers:

Total days per year	365
Less: Weekends	(104)
Less: Public holidays	(10)
Less: Annual leave	(20)
Less: Sick leave	(5)
Available workdays	226
Total available hours (based on 7.5 hours per day)	1,695 hours
Less: Training of say 10 days per year	(75)
Available time per annum	1,620 hours

But, of course, when you own a business you generally have to run the business and so your available time to be productive in the business is further reduced. There is endless compliance paperwork to be addressed. No matter the industry or sector, there is endless bureaucracy that sucks away your time.

So, within an available budget of say 1,620 hours of productive time per annum, the business owner has to:

- Provide the service or manufacture the goods that are integral to the sustainability of the business;
- Manage the business;
- Attend to the compliance obligations of the business;
- Market the business;
- Prepare the business for succession;
- Supervise employees in the business and recruit new employees;
- Put out the garbage!!

Little wonder then that planning is left to after hours or the weekend, and then only if the energy levels are possible.

So we business owners spend more of our working hours in and on the business than they do on any other single activity. We spend more time in the company of our business colleagues than we do with our life partners or sleeping. In fact, more often than not, much of the social time of the business owner is caught up in business related activities. We find ourselves socialising with work colleagues, clients and so on.

So anyone who thinks that you can own a business and then compartmentalise your work by separating business activity from family and social activity is dreaming in my view. In fact, business issues encroach upon our dreams and many times keeps us awake in the small hours of the night.

If that sounds altogether too confronting, do not go into business on your own account!!

U

Upside

There is nothing quite as exhilarating as seeing the fruits of your own hard work appear. It is yours!! You have achieved it by yourself. And no one can take it away.

Like all of life's great achievements, nothing of value is achieved without great effort, commitment and fortitude. The achievements of our sporting heroes often pale into insignificance against the success that comes from many years of hard work in business.

The upside of being successful in business goes well beyond the financial. It includes:

- The deep pleasure that comes from seeing employees in the business rise to the challenge and themselves succeed;
- Being effective in the lives and businesses of others;
- Developing expertise or reputation in a profession or an industry that is respected by your peers;
- Having the autonomy and the responsibility to steer your own course;
- Knowing where you have come from!
- Moving beyond your own self doubt!
- Perhaps creating something of enduring value that will continue long after you have ceased involvement;
- Being part of a broader community and having a role of significance in that community;
- Building something of intrinsic value from nothing.

V

Valuation

In my several decades in business and involved in many business disputes I have had multiple occasions to read, critique and commission business valuations. They are routinely commissioned from expert forensic accountants for the “assistance of the court” in a wide range of disputes ranging from vicious family law property disputes to shareholder disputes to estate disputes.

To this day I am still waiting in breathless anticipation for any two forensic accountants to independently run the tape over a business and come up with the same valuation. Just never seems to happen. Why is it so?

Well, valuation is an art, not a science. It is riddled with assumptions, some overtly stated, others covert.

In the legal sphere current market value is usually defined as “The price at which a willing but not anxious vendor would sell, and at which a willing but not anxious purchaser would buy.”

Frankly, I have never met a vendor who isn’t anxious and a purchaser who isn’t to some degree nervous. That’s why the good business brokers come into their own – they know that in the sale and purchase of most businesses there may well be an emotional roller coaster between in principle sale and settlement as the due diligence unfolds, as stock is counted, as assumptions are tested. The multiple orifices of the business body are coldly poked and prodded with scant regard for reputation, privacy, comfort.

So then, here’s my dumbed down business valuation formula. Let’s look at a typical Small Business Profit and Loss Statement:

Gross Sales / Gross Fees	\$X
Less cost of sales	\$Y
Gross Profit	\$Z

Then:

- Deduct all market based operating expenses paid to third parties such as rent, wages, utility expenses and so on.
- Impute and deduct a market based salary for the owners that accurately reflects value and responsibility.
- Impute and deduct interest cost on owners’ capital tied up in business (at a much higher rate than bank interest to reflect the risk of unsecured capital).
- Reverse out personal expenses of owners run through the business

If, after those adjustments, there is no profit, then it’s all but certain there is no goodwill.

If there is it is more likely to be attributable to location goodwill or the relative economy of being established so as to represent a saving against a complete new start up.

If, on the other hand, there remains a profit, then saleable goodwill is probably on hand. That goodwill may be reflective of transmissible intellectual property of intangible property. But if it won't endure after the owners depart then it's lost.

Succession planning is all about anticipating the tape measure of the dispassionate purchaser and developing systems and procedures to capture and protect and make transmissible that elusive goodwill. See Chapter S – Succession.



It seems that every second day we see some hero on the TV who, having had a near death experience of some kind or another (cancer, trauma, substance abuse, sex change, divorce, whatever) wakes up one day with an all consuming passion to save the world by doing something manifestly crazy.

Without wanting to draw attention to particular sufferers of this “Save the World Disease” we have seen someone ride a unicycle around Australia, someone else run daily marathons for months, and so it goes. I guess it serves some cathartic purpose.

In business, a near death experience can be profoundly transformative, so long as you don't actually tip over the brink in the process.

I often find myself saying to Small Business clients that until you have had that episode of the wobbles and come close to losing it all, until you have had weeks of sleepless nights worrying and come close to business failure, until then you don't know which side is up.

It's almost as if we each need at least one sucker punch when starting off in business to shake us from our complacency, to sharpen our reflexes and to heighten our sensitivity to the ever present danger of not paying proper attention.

And lest you might think me immune, no way. A misjudgement in taking on a large Court case on a no win no fee basis nearly cost me my business. I let sentimentality and misplaced trust get in the way of sound business judgment and I (and my family) paid the price. Even now a cold chill comes over me as I think back on that episode almost twenty years back. I got the business wobbles and came close to the brink. But the experience was so visceral and so powerful that I have never made the same mistake since. That painful lesson has stayed with me.

It's an inherent risk of being in business that you will get the wobbles. It is an uncomfortable fact of business life that four out of five start-ups end in failure.

Wobbles should be embraced for the intense learning they make possible.



Let's be frank. Most of us do not live healthy, fulfilling lives and then suddenly and painlessly drop dead. More often than not there is deterioration as a precursor to death, typically involving infirmity, illness and incapacity.

Believe it or not, business owners are not immune to these immutable laws of nature. That said, I have met many business owners who seem convinced that they will be the exception to the rule.

Whilst we might entertain some hope that our demise will be short, sudden and whilst we are snoring, the statistics tell us otherwise. So we need to arrange our affairs in the expectation that there is a fair probability that we might be ill and incapacitated before we die and before we exit our businesses.

None of us know when and how we will die but we have all heard of people in business who suffer premature illness or incapacity and cannot continue on in the business. Heart disease is still the number one killer, by a significant margin. After heart disease there are a number of diseases that are much slower of progression and likely to cause incapacity before death.

We need to arrange our business affairs in the expectation that we may be ill or incapacitated before we die and that this may occur during our ownership of a business. To ignore that possibility is simply foolish.

We lawyers who deal with Small Businesses are forever exchanging tales of the unstoppable business founders who continue on well past normal retirement age and refuse to consider the possibility of relinquishing control or planning for an exit. It is weird that astute and highly successful business people can so often ignore what is plain to all around them. Perhaps it is the nature of the entrepreneurial beast. To me it bespeaks a troubling degree of managerial blindness and lack of consideration for employees, clients and customers and family members. When a business is so dependent on its founder and the founder suddenly dies the value of the business plummets, if not fail altogether.

So then, out of consideration for our families, our employees, our suppliers, our bankers and our lawyers, how about we business owners put in place the basics to address incapacity to run the business:

- A complete and up to date Business Owners Critical Information List – see the attachment at the end of this book;
- A financial power of attorney for personal financial affairs. You cannot delegate your role as a company director under a power of attorney;
- The appointment of an alternate director if the business is run through a company;
- Key man insurance, so the business has a fund to draw upon to hire a hotshot to replace you;
- Disability income insurance protection;
- Documented operations and procedures manuals;
- Organisational chart.

Now that's being businesslike!



Yes, I struggled with Y.

But owning your own Small Business is different. You will spend more of your waking hours in the company of your business than you ever will in the company of your life partner or your children or indeed sleeping.

Writing about this intimacy in “In and Out of Business Happily” the American writer Thomas P. Burbank had this to say:

“A business is to its owner as a child is to its parents. Your business is an extension and a reflection of you. It's your baby and you do not have to sell. You have sacrificed yourself, your family life. There have been times when you didn't take anything out, rather you put everything back into the business. All those long hours, your hopes, your dreams. Now you are thinking of selling? Put the business up for adoption?”

It's intensely personal. But it's yours. It reflects you and your character, whether you like it or not. You are free to create your own culture, your own strategy, your own success.

Oh, and by the way, just as the success is largely yours, the flip side is that where the buck stops is also with you. Yes?

Z

Zone

It is hard trying to find a business topic that begins with Z!

Let me draw upon analogies from the sporting domain. When a sportsperson is at the peak of his or her game it is often remarked that he or she is “in the zone”. By that we mean the sublime experience of being totally immersed in the moment that time almost stands still and there is an intense sensation of total engagement.

We all remember that classic advertisement for Victoria Bitter beer: “You can get it riding, you can get it diving, you can get it knocking a car, matter of fact I’ve got one now”.

There are multiple versions. But the point is clear. It is possible when running your own business to have episodes of being “in the zone”. Sure, they are fleeting. Sure, there is lots of dross in between, but nothing quite matches that experience when there is harmony in the workplace and things are just ticking along fine.

But that sense of being in the zone, the sense flow is rarely experienced by employees, and certainly not at the visceral level of the business owner. At such moments it all seems worthwhile.

About Burke & Associates Lawyers

Our philosophy

Here at Burke & Associates Lawyers, we see ourselves as “big picture” lawyers.

We believe it’s our job to provide you with peace of mind in difficult or complex circumstances.

We understand the cost of legal disputes and complex transactions can be counted in more than dollars.

That means we carefully consider your legal needs in relation to how they might impact other aspects of your life or business.

And we’re committed to achieving positive legal solutions for you, your business and your family in a sensible, creative, cost effective and straightforward manner.

How we work

We understand you’re focussed on outcomes rather than lawyer-speak. That’s why we meet with you as an equal, taking the time to listen carefully to your exact requirements.

Once we understand your situation, we work quickly to explore the most timely, cost-effective and appropriate solutions for your situation.

We’ll start by offering practical and commercial advice in clear, plain language. Then we’ll lay out your options so you can make informed decisions about your future.

Litigation

At Burke & Associates Lawyers, our emphasis is always on solving your problem, not on legal action for its own sake. We’ll never recommend action unless there is a clear cost benefit to you.

If litigation does become necessary, we’ll let you know the process from start to finish to minimise any unpleasant surprises. And we’ll remain vigilant in monitoring the potential risks to you throughout the entire course of action.

Our history

As one of the longest established law firms in Melbourne’s South East, we’ve been providing transparent, effective legal solutions since 1953.

Over nearly 60 years we’ve helped literally thousands of our clients achieve outcomes that have effected positive and lasting change in their lives.

That’s why our clients keep returning, and recommending us to their friends and families.

Services

The law is a complex and ever-changing field of knowledge. Providing up-to-the-minute advice across the entire spectrum of legal issues would be an unfeasible task.

At Burke & Associates Lawyers, we believe in giving you the best, most creative advice in a timely manner.

That's why we limit our expertise to focus on the following areas of Commercial and Property Law:

- Private client advisory work
- Substantial commercial and residential property transactions
- Large commercial and residential developments
- Business establishment, sale, and purchases
- Strategic and succession advice for Small Businesses and family businesses
- Estate planning and administration
- Commercial dispute resolution (including mediation and litigation)
- Negotiating and drafting commercial ingredients
- Complex family business law matters
- General commercial advice.

Burke & Associates Lawyers does not practice:

- Criminal Law
- Personal Injury Law
- Migration Law.

Should you need this kind of advice, we can, however, refer you to an appropriately qualified legal practitioner who meets your requirements.

Alliances

We work closely with your advisors – accountants, financial planners, and management consultants – to ensure we take a holistic approach to resolving your legal matters.

We've also developed an extensive network of professional contacts over our many years of experience. We work alongside these allied professionals every day on a range of client projects. And we have no hesitation recommending them to you should you need their help.

Just some of our contacts include:

- Accountants
- Architects
- Barristers with a specialist focus on court advocacy
- Business Brokers
- Land Surveyors
- Management Consultants
- Property Valuers
- Owners Corporation Managers
- Real Estate Agents
- Website Developers
- Building Consultants
- Financial Planners
- Mediators

Business Health Checklist

1. BUSINESS OVERVIEW

1.1. Principals

- 1.1.1. full names, addresses and dates of birth
- 1.1.2. any public company directorships
- 1.1.3. any relevant professional/ occupational qualifications
- 1.1.4. any insolvency issues
- 1.1.5. personal assets that might be at risk

1.2. Structure of business

- 1.2.1. organisational chart
- 1.2.2. history
- 1.2.3. jurisdictions of operation
- 1.2.4. names of operation
- 1.2.5. past professional advisors
- 1.2.6. location of financial and legal records.
- 1.2.7. recent structural changes?
- 1.2.8. objectives/strategies?

1.3. Business plan

- 1.3.1. in existence
- 1.3.2. last prepared
- 1.3.3. goals/strategic plans?

1.4. Capital structure

- 1.4.1. establish type, number and date of issue of shares
- 1.4.2. any shareholders agreement?
- 1.4.3. any Buy and Sell Agreement?
- 1.4.4. any related party loan agreements and, if so, any security arrangements?
- 1.4.5. any restriction on transfer of shares/units
- 1.4.6. internal restrictions – constitution
- 1.4.7. external restrictions – statutory bodies – may be relevant in relation to licenses/permits/professional qualifications

1.5. Management structure

- 1.5.1. directors details
- 1.5.2. executive personnel
- 1.5.3. structure

- 1.5.4. relationships
- 1.5.5. corporate governance issues?

1.6. Professional or industry association

- 1.6.1. membership
- 1.6.2. qualifications for membership
- 1.6.3. industry benchmarking

2. ASSETS

2.1. Real property

- 2.1.1. owned or mortgaged
- 2.1.2. title

2.2. Leasehold property

- 2.2.1. retail premises? Compliance with legislation.
- 2.2.2. security of tenure?
- 2.2.3. options?
- 2.2.4. statutory notices?

2.3. Inventory

- 2.3.1. stock
- 2.3.2. work in progress
- 2.3.3. where located

2.4. Plant and equipment

- 2.4.1. leased
- 2.4.2. owned
- 2.4.3. insured

2.5. Intellectual property

- 2.5.1. trade marks/logos
- 2.5.2. business names
- 2.5.3. domain names
- 2.5.4. circuit designs
- 2.5.5. plant variety rights
- 2.5.6. copyright
- 2.5.7. design

2.6. Debtors

- 2.6.1. secured
- 2.6.2. supported by guarantees

- 2.6.3. factoring arrangements?
- 2.6.4. recoverable/bad debts

3. CONTRACTS

3.1. Contracts as between business and other parties

- 3.1.1. any agreement to become a party to any partnership, joint venture or arrangement?
- 3.1.2. any agreement to acquire or dispose of material assets?
- 3.1.3. any material long-term or abnormal or unusual agreements?
- 3.1.4. any material lease of real property, plant and equipment, motor vehicles, other property?
- 3.1.5. any agreement to purchase or dispose of any significant asset?
- 3.1.6. any agreement with consultants or agent to provide key services to the business?
- 3.1.7. any agreement with parties who provide key services, including:
 - 3.1.7.1. sub-contactor agreements;
 - 3.1.7.2. customer and/or supplier agreements;
 - 3.1.7.3. agency/distribution agreement;
 - 3.1.7.4. licence agreement (including software).
 - 3.1.7.5. maintenance agreement (including equipment and software)

3.2. Any default by the business pursuant to any relevant agreement and, if so:

- 3.2.1. any notice received that may affect rights under the agreement
- 3.2.2. any litigation

3.3. Powers of attorney/guarantee

- 3.3.1. any subsisting power of attorney that has not been revoked/
- 3.3.2. any redundant power of attorney that should be revoked?
- 3.3.3. any guarantee that can be set aside/terminated/renegeotiated?

3.4. Agreements between business and key people regarding:

- 3.4.1. shareholder agreements
- 3.4.2. bonus/incentive arrangements
- 3.4.3. management agreements
- 3.4.4. employment agreements – EBA/AWA
- 3.4.5. confidentiality or non-disclosure
- 3.4.6. any franchise agreement and, if so, the key terms/disclosure statement?

4. FINANCING AND SECURITIES

- 4.1. List and review all financing arrangements entered into and any securities granted, including:
 - 4.1.1. cash advances,
 - 4.1.2. bill facilities,
 - 4.1.3. letters of credit and guarantee facilities,
 - 4.1.4. trade credit arrangements,
 - 4.1.5. finance and operating leases,
 - 4.1.6. deferred payment arrangements
 - 4.1.7. sale and leasebacks
 - 4.1.8. swaps, hedges and similar risk management arrangements; and
 - 4.1.9. any foreign currency transaction;
 - 4.1.10. guarantees – bank/personal
- 4.2. Has business has provided any guarantee, letter of comfort or indemnity with respect to any material transaction and, if so, determine the extent of the obligation;
- 4.3. Review the register for any debentures, bonds, notes or similar debt instruments;
- 4.4. Confirm that documents requiring stamping and registration have been correctly stamped and registered and that all relevant taxes have been paid.
- 4.5. Review compliance by the business with financing agreements and confirm that:
 - 4.5.1. all reporting requirements have been complied with;
 - 4.5.2. all material covenants have been complied with;
 - 4.5.3. no event of default has occurred
 - 4.5.4. no notice or demand has been served in relation to any default or non-compliance
- 4.6. Establish details of any cheque, promissory note or bill of exchange drawn, accepted or endorsed that is still outstanding.

5. ACCOUNTING/AUDITING

- 5.1. Identify accountants and auditors and establish contact with a view to achieving open communication;
- 5.2. Obtain client approval for access to audit work papers if required;
- 5.3. Identify issues arising from the statutory audit or internal audit which warrant attention/auditor's qualifications to reports?
- 5.4. Obtain and review audit financial statements for the past several financial years;
- 5.5. Obtain and review management accounts for the last four years;

6. TAXATION

6.1. Business tax profile

- 6.1.1. identify and analyse tax structure and consider its appropriateness having regard to business plan and succession planning issues.
- 6.1.2. establish that adequate provision has been made for accrued but not yet discharged taxation and other liabilities or contingencies.

6.2. Compliance issues

- 6.2.1. ascertain whether relevant filings are up to date;
- 6.2.2. discuss with accountant whether appropriate elections for tax concessions are in force and highlight concessions which are capable of being withdrawn by authorities;
- 6.2.3. discuss with accountant any overseas tax arrangements considering compliance with relevant Australian and overseas tax legislation.

6.3. Documentation

- 6.3.1. Obtain and review:
 - 6.3.1.1. recent taxation returns.
 - 6.3.1.2. recent Fringe Benefits Tax returns;
 - 6.3.1.3. recent Business Activity Statements;
 - 6.3.1.4. any private ruling request made to the ATO or any other revenue authority and the response thereto;
 - 6.3.1.5. any requisitions from the ATO in relation to any contentious tax issues and response to the requisitions;
 - 6.3.1.6. payroll tax summaries;
 - 6.3.1.7. WorkCover remittances;
 - 6.3.1.8. Superannuation Guarantee remittances.

7. INSOLVENCY

- 7.1. any resolution by the Business or its creditors to wind up the Business;
- 7.2. any notice served on the Business under relevant sections of the Corporations Law;
- 7.3. any petition or other process for winding up presented or threatened against the Business or of any circumstance justifying such a petition or other process;
- 7.4. any writ or execution which has issued against the Business or its property or of any circumstances justifying such a writ;
- 7.5. confirm that no administrator, receiver or receiver and manager of any part of the undertaking or assets of the Business has been or is threatened or expected to be appointed and that there are no circumstances justifying such an appointment;
- 7.6. obtain details of any other insolvency event in which the Business is or has been involved (including any appointment of a receiver, manager, administrator etc.).

8. ENVIRONMENTAL COMPLIANCE AND PREMISES

- 8.1. Obtain/identify and review:
 - 8.1.1. documents relating to all necessary environmental licenses, agreements, registrations and approvals.
 - 8.1.2. any orders, notices or directions that have been served on the Business;
 - 8.1.3. any factors affecting any of the properties used or owned by the Business which are likely to give rise to any environmental liability;
 - 8.1.4. details of any prosecution that has been brought against the Business for breaches of environmental laws;
 - 8.1.5. any subsisting breach by the Business of its obligations under environmental law regulations and standards;
 - 8.1.6. any significant pollution, any inspections by authorities and any environmental reports (including environmental audits) undertaken;
 - 8.1.7. likely impact and costs of non-compliance with environmental regulations.
- 8.2. Confirm that the Business has complied with occupational health and safety legislation and provide details of any current, potential or threatened actions.
- 8.3. Establish regulations/laws that apply to the Business and check compliance with same.
- 8.4. Establish whether land owned or leased or otherwise occupied by the Business for use in connection with the Business is contaminated suspected of being contaminated or is in such condition that may justify any regulatory body requiring it to be cleaned up.
- 8.5. Investigate any Land owned, leased or otherwise occupied by the Business for use in connection with the Business which:
 - 8.5.1. was previously used to store hazardous materials or other substances likely to cause site contamination;
 - 8.5.2. in respect of contamination, any problems that have arisen relating to pollution, environmental health or safety matters.
- 8.6. Are the premises used by the Business well presented and in good repair generally?
- 8.7. Do Business premises provide for sufficient expansion?
- 8.8. Is the lay-out of the factory/warehouse/shop/office suitable?
- 8.9. **LICENCES AND PERMITS**
- 8.10. Obtain/list/review/identify:
 - 8.10.1. documents relating to all governmental, statutory or other consents, authorities, licenses, permits or rights which the Business holds or is required to hold for any of its operations (other than those in "**environmental**") including all planning approvals and permits.
 - 8.10.2. effect of change in control and any requirements for assignment.
 - 8.10.3. terms of each of these authorities etc. Include in this review a description of the parties, the term and any unusual conditions.

- 8.10.4. whether all fees due have been paid, all conditions complied with and whether there has been any breach of any authority, licence or permit.
- 8.10.5. details of any breach including whether such breach or default could cause revocation or non-renewal and whether there are any other factors of which the Business is aware which might prejudice the continuance or renewal.
- 8.10.6. whether there has been a breach of any relevant planning scheme, interim development order or other planning controls.
- 8.11. Obtain and review:
 - 8.11.1. Permits, licences, approvals, certifications and other authorisation (“**permits**”) material to the conduct of Business operations, including any permits or certificates or compliance with industry codes standards and permits required in connection with Occupational Health and Safety;
 - 8.11.2. Permits required with respect of the current or prospective use of real property or operation of the assets of the Business.

9. LITIGATION

- 9.1. Establish that there are no claims, actions, proceedings, orders or investigations pending or threatened against or relating to the Business, whether civil or criminal by any person or by any court or Governmental or regulatory authority which if adversely determined could:
 - 9.1.1. result in the Business incurring a significant liability; or
 - 9.1.2. prohibit or frustrate the continued operations of the Business;
- 9.2. Obtain details of any past litigation, arbitration or Government proceedings involving the Business that might be relevant.
- 9.3. Obtain details of disputes with:
 - 9.3.1. past, current or prospective supplier or customers of the Business.
 - 9.3.2. parties to contracts entered into by the Business
 - 9.3.3. employees or unions
 - 9.3.4. governmental authorities (including the Australian Taxation Office).
- 9.4. Obtain copies of any documents detailing complaints that could give rise to litigation.
- 9.5. Obtain details of any decisions or settlement terms resulting from any industrial or other dispute and establish that any settlement obligations have been discharged;
- 9.6. Review insurance arrangements in relation to litigation risks identified.

10. INSURANCE

- 10.1. What type of insurance is in place.
- 10.2. When was a risk analysis and insurance review last conducted and, if so, by whom? Consider further review.
- 10.3. Was the valuation used for establishing insurance cover appropriate and, if not, conduct review.

- 10.4. Establish that all insurance premiums are up-to-date and systems in place to ensure timely payment.
- 10.5. List all insurance claims in the past five years.
- 10.6. Obtain and review current and proposed insurance policies of the Business. Include policies regarding all operations and assets of the Business.
- 10.7. Obtain and review insurance claims made by the Business in the last 5 years.
- 10.8. Determine whether the Business has adequate insurance coverage and whether there are any proposed changes to this coverage.

11. RESTRICTIVE TRADE PRACTICES & COMPETITION

- 11.1. Obtain details of and review documents relating to:
 - 11.1.1. any application for authorization from ACCC;
 - 11.1.2. any notifications for ACCC;
 - 11.1.3. any consents granted by ACCC ;
 - 11.1.4. any undertakings given to the ACCC.
- 11.2. Determine the existence of and, if applicable, obtain copies of:
 - 11.2.1. any contracts, arrangements or understandings with any company with which the Business competes or potentially might compete in any market;
 - 11.2.2. any contracts, arrangements or understandings the Business has with any person as to the pricing of:
 - 11.2.3. goods or services provided by the Business to third persons;
 - 11.2.4. goods or services provided to the Business by third person.
 - 11.2.5. any reports, investigations, opinions or other details which discuss whether the Business attempts to restrict (by contract, inducement or threat) the ability of persons to whom it supplies selling at less than a specified minimum price (minimum resale price maintenance);
 - 11.2.6. any contracts, arrangements or understandings which the Business has with any person
 - 11.2.7. the purpose of which is to prevent, restrict or limit the supply to or acquisition of goods or services from particular persons or classes of persons;
 - 11.2.8. which otherwise involves a boycott of any other person;
 - 11.2.9. any contract, arrangement or understanding which:
 - 11.2.9.1. requires the customer to deal (either exclusively or to a specified extent) only with the Business as a condition of either the Business selling goods or services to or acquiring goods or services from the customer (excluding dealing);
 - 11.2.9.2. requires the customer to acquire other goods of a particular kind from the Business as a condition of selling to the customer (tying);

- 11.2.9.3. prohibits the customer reselling the goods supplied by the Business other than in particular places or to a particular person (exclusive territories)
- 11.2.9.4. requires the customer to acquire goods or services from a third party (even a related corporation of the Business) as a condition of the Business selling goods or services to the customer (third line forcing).
- 11.2.10. any agreement, contract, arrangement or understanding, whether legally enforceable or not, to which the Business is party, which is in breach of any trade practices legislation and details of any conduct by the Business in breach of that legislation;
- 11.2.11. documents which confirm whether the Business has engaged in pricing below cost for an extended period of time.
- 11.3. Determine the existence and, if applicable, provide copies any:
 - 11.3.1. documents which confirm whether the Business gives less advantageous terms in the provision of any goods and services to any person who may be a competitor or potential competitor of it in any market;
 - 11.3.2. details of any action taken by the Business for the purpose of damaging a competitor or preventing another person from competing with it;
 - 11.3.3. documents which confirm whether the Business has refused to supply any person for the purpose of hindering that person's ability to compete.
- 11.4. Determine the existence of and, if applicable, provide documents which confirm whether the Business has discriminated between purchasers of goods in relation to price, discounts or other terms of supply of goods.
- 11.5. Determine the existence of and, if applicable provide copies of documents which confirm whether the Business has acquired shares in or assets of any other person where the acquisition placed the Business in a position to dominate a market for goods or services.
- 11.6. Determine the existence of and, if applicable, provide copies of documents which confirm whether the Business has obtained any legal advice in relation to any of the above.

12. EMPLOYEES

- 12.1. Establish number of employees, their position descriptions, places of work and terms of employment.
- 12.2. Obtain copies of any Enterprise Bargaining Agreements or Australian Workplace Agreements and review same.
- 12.3. Establish any persons with re-employment rights such as employees on maternity leave, workers compensation, sick leave etc.
- 12.4. For each employee establish terms of employment and:
 - 12.4.1. obtain copies and review any employment agreement and letters of appointment (including standard form contracts or letters) and provide details of any unwritten understandings with staff.

- 12.4.2. obtain copies of any and review standard employment application forms.
 - 12.4.3. identify wages and systems of payment including incentives offered to employees (e.g. fixed wages, commissions, contract fees, fringe benefits, bonuses, etc
 - 12.4.4. provide details of all employment policies.
 - 12.4.5. examine the procedures for employment promotion and the dismissal of employees.
- 12.5. Obtain copy of Human Resources manual for the Business and review same as to:
- 12.5.1. recruitment;
 - 12.5.2. selection and termination of employees;
 - 12.5.3. confidentiality and restraint provisions;
 - 12.5.4. sexual discrimination;
 - 12.5.5. performance appraisal;
 - 12.5.6. disciplinary procedures;
 - 12.5.7. employee entitlements and benefits;
 - 12.5.8. OH&S policy;
- 12.6. Establish whether the Business is a member of any industry body and, if so, any relevant employment policy that may apply;
- 12.7. Obtain copies of any agreements, arrangement or understanding with unions.
- 12.8. Establish position of the Business with respect to employee superannuation entitlements.
- 12.9. Obtain details of any loans or financial assistance provided to or are available to employees and details of outstanding amounts;
- 12.10. Obtain details of position taken and with which companies by staff or consultants that have left or have had their employment terminated in the last twelve months;
- 12.11. Obtain details of liability for annual leave, long service leave, sick leave, workers compensation, accident make-up pay or other benefits or liabilities being paid or due to employees, and of all such amounts due but unpaid.
- 12.12. Obtain details of any other schemes or arrangements operated within the Business or any other benefits provided to employees. For example, health insurance, other medical benefits, allowances, annuities, benefits, lump sums, pensions, premiums or other payments in respect of death, disability, retirement, resignation or dismissal of any employee, travel allowances and provision of vehicles. Review same.
- 12.13. Obtain copies of and review insurance policies relating to employment issues, including:
- 12.13.1. certificates of currency
 - 12.13.2. claims made on those policies
 - 12.13.3. determine whether cover is adequate.
- 12.14. Establish the applicability of any common rule award and address its implementation.

13. EMPLOYEE SUPERANNUATION

- 13.1. Obtain a list of the superannuation fund(s) of which employees of the Business are members.
- 13.2. Obtain a complete and up to date set of the constituent documents of each fund (i.e. trust deed and rules) and any amendments. Also provide a copy of all material relating to superannuation which has been issued to employees (e.g. employee plan booklets).
- 13.3. Identify the trustee of each fund.
- 13.4. Review the trust deed of each superannuation fund and ascertain whether the terms of the trust deed have been complied with.
- 13.5. Ascertain whether all contributions to the fund are paid up to date and, if not, establish why not.
- 13.6. Establish details of the manner in which any contributions by members are paid into the fund.
- 13.7. Identify whether Superannuation Guarantee Level legislation and any other relevant legislation is complied with.
- 13.8. List any indemnity insurance taken out by the trustees or the Business in relation to the superannuation funds. If there is any such insurance provide a copy of each policy and a certificate of currency.
- 13.9. Provide details of the extent to which industrial awards or agreements pertain to superannuation.
- 13.10. Provide details of any outstanding and unpaid benefits due to any employee of the Business, their dependants or beneficiaries.
- 13.11. Obtain and review material correspondence to and received from the Insurance and Superannuation Commission and the Australian Taxation Office in relation to each scheme, including rulings and exemptions.
- 13.12. Obtain details of any approvals obtained from taxation authorities in relation to the schemes.
- 13.13. Obtain details of any breach of legislation.
- 13.14. Confirm that the terms of the fund comply with the applicable legislative requirements.
- 13.15. Confirm that the fund has been administered in accordance with the relevant legislation, including that all documents, notices, returns etc required to be prepared or filed have been prepared or filed, that the Trustee and Employer have properly considered any matter they are required to under the terms of the fund and have otherwise satisfied their obligations under the terms of the fund.
- 13.16. Confirm that no litigation has been commenced or threatened in relation to the fund.

14. INDUSTRIAL RELATIONS

- 14.1. Identify which unions are represented and negotiated with, the area with which each union deals, the number of employees which each union represents and whether the union is active in that area.

- 14.2. Obtain copies of and review applicable industrial awards, common rule award, confirm compliance and determine the number of employees covered by that award.
- 14.3. Obtain details of recent negotiations and each union. Provide copies of and review any existing agreements with unions (including details of existing industrial relations, employment arrangements or enterprise agreements outside of awards such as unregistered agreements and over award payments).
- 14.4. Identify and address any significant changes anticipated in industrial relations in the next 12 months.
- 14.5. Identify and provide details of all existing and any anticipated industrial disputes (ie. actions initiated by employees, executives, directors etc against the Business or vice versa).
- 14.6. Obtain details of any worker's compensation claims made in the last 4 years.
- 14.7. Report on industrial relations and industrial action in the past 4 years including any strikes involving lost time of one day or more.
- 14.8. Obtain details of any prosecutions, prohibitions or improvement notices issued by the relevant Govt department.
- 14.9. Obtain and review details of the policies regarding Occupational Health & Safety, Equal Opportunity and Discrimination, AIDS in the workplace etc.

15. TRANSACTION DOCUMENTS

- 15.1. Obtain and review:
 - 15.1.1. standard letters of engagement/order forms;
 - 15.1.2. delivery documents (retention of title, etc.);
 - 15.1.3. standard contract documents – compliance with the relevant law;
 - 15.1.4. standard term and conditions documents;
- 15.2. Establish system for regular review of training procedures as to use and implementation of standard transaction documents in dealing with clients/customers.

16. EXIT PLANNING

- 16.1. is the business ultimately for sale? if so, what is its value? how is this determined?
- 16.2. what is the market for the business? have any potential purchasers been identified?
- 16.3. what is for sale – business assets/ equity/ real property?
- 16.4. is the intellectual property in a form that can be readily transmitted to a purchaser? if not, address;
- 16.5. would a future sale impact upon future activities of the principals? if so, how might that be addressed. anticipate and address restrictive covenants;
- 16.6. have the wills and testamentary arrangement of the principals been addressed to reflect exit panning?

17. SUSTAINABLE COMPETITIVE ADVANTAGE

17.1. Intellectual Property

- 17.1.1. identify and obtain copies of relevant documentation for registered patents, registered designs, software, trademarks, trade names, copyrights and other intellectual property rights used in the conduct of the business (“**intellectual property**”);
- 17.1.2. confirm that the business has all right, title and interest in the intellectual property and provides documents in relation thereto;
- 17.1.3. obtain details of any previous developments in relation to any intellectual property or any development that is in progress including any software upgrades or enhancements.
- 17.1.4. confirm that there is no encumbrance or notice of any adverse claim relating to intellectual property.
- 17.1.5. obtains details of any purchased goodwill recorded in the balance sheet of the Company.
- 17.1.6. obtain all agreements and documents concerning assignment, purchase, sale or license of proprietary rights (other than distribution by Business of products in ordinary course of business), including patents, copyrights, trade secrets and trademark.
- 17.1.7. obtain copies of R&D agreements, including agreements with independent contractors who participate in development of any material product.
- 17.1.8. obtain copies of all documents concerning registration of trademarks and service marks, including application, correspondence and searches.
- 17.1.9. obtain documents relating to claims or disputes concerning products or proprietary rights owned or used by the Business.
- 17.1.10. obtain a schedule of any exclusive rights (product or geographical) granted by the Business with respect to its products.
- 17.1.11. obtain details of any security interest granted over the Business IP.
- 17.1.12. obtain details of any licence granted to the Business to use a trade mark owned by or which is the subject of any trademark registration or application owned by a third party.
- 17.1.13. confirm if any applications for registration of any trade marks have been made, please provide the following details for each trade mark:
 - 17.1.13.1. countries or regions where applications were made;
 - 17.1.13.2. names of the applicants for registration;
 - 17.1.13.3. approximate dates on which applications were made;
 - 17.1.13.4. copies of applications;
 - 17.1.13.5. official application numbers allotted to such application;
 - 17.1.13.6. details of the current status of those application;
 - 17.1.13.7. if any of those applications have proceeded to registration, date when that occurred;

- 17.1.13.8. the names of all solicitors who handled the applications on behalf of the Business;
- 17.1.13.9. if any, trade marks searches made before the relevant trade mark applications were filed or the names of the solicitors who conducted such searches;
- 17.1.13.10. confirm that there is no internally generated goodwill recorded on the balance sheet of the Business.

17.2. Business names

- 17.2.1. obtain details of all business names used within the business;
- 17.2.2. confirm the states and / or territories of Australia, or any other country in which the business names are used.
- 17.2.3. confirm any business names which to date have been used, but which may not have been registered.
- 17.2.4. obtain a description of the business activities conducted under each business name, in each state and territory and country where business is conducted under that name.
- 17.2.5. confirm if the Business conducts business under a registered business name outside its home state of incorporation, and if resident agents have been appointed for the purpose of conducting business under the name in the non-home states and territories or countries, please provide details of the identity of those agents, and their relationship with the Business – obtain details of any agreements setting out the terms of that relationship.
- 17.2.6. confirm whether at any time, any third party has sought to cancel any business name registrations, on the grounds of non-use, or for failure to comply with any other aspects of any business names legislation

18. CORPORATE GOVERNANCE

18.1. Company Secretarial Matters

- 18.1.1. are the Corporate Registers for the Business available and current? The Corporate Registers should include all minutes of directors and shareholders meeting, annual returns share certificates, memorandum and articles of association.
- 18.1.2. are the current shareholders the same as those set out in the last annual return lodged with ASIC?
- 18.1.3. obtain and review copies of Copies of Memorandum and Articles of Association (or Constitutions);
- 18.1.4. obtain details of any involvement as trustee of any trust.

18.2. Board of Management

- 18.2.1. is there a board of directors/management?
- 18.2.2. are regular meetings held?
- 18.2.3. how often are the meetings held?
- 18.2.4. are minutes taken?
- 18.2.5. obtain and review copies of minutes of meetings including action plan for recent period.

18.3. Other Matters

- 18.3.1. does the Business regularly review its compliance with bank covenants given that failure to review conditions set by lenders, including stated liquidity levels can jeopardise the status of a current facility?
- 18.3.2. is there a shareholders agreement or family constitution document? If so review. If not prepare.

19. MARKET/INDUSTRY POTENTIAL

19.1. The Competition

Are there any limitations on the markets that can be reached e.g. non-competition agreements, restrictive covenants, territorial restrictions in marketing or distribution agreements, areas of primary responsibility under sales, marketing or distribution agreements, governmental restrictions, or under other agreements that apply to the Business or any employees? If so, investigate.

19.2. Pricing

- 19.2.1. does the Business issue price recommendations for any goods or services supplied by the Business and on-sold by another person?
- 19.2.2. is the Business involved in any joint ventures with someone else which fix the price for goods or services purchased or sold by the joint venture?
- 19.2.3. does the Business supply any goods on condition that the customer may not resell below any minimum price specified by the Business?

19.3. Conditions of supply

- 19.3.1. in supplying goods or services does the Business impose any conditions, limitations or restrictions on purchasers which might substantially lessen competition in any market in which a purchaser operates?

20. QUALITY CONTROL/BENCHMARKING

20.1. Review of Operations

- 20.1.1. does the Business have any formal quality accreditation, for example ISO 9002?
- 20.1.2. Are there QA procedures and policies in place?

20.2. Investigate systems and procedures

- 20.2.1. obtain copies of any reports provided by external consultants in relation to the adequacy of internal controls and systems;

- 20.2.2. review strategies in place to minimise waste, rework, fraud or theft?
- 20.2.3. does the Business have an internal audit committee or like procedure?
Is it independent of management?

21. TRANSFER OF BUSINESS RELATIONSHIPS

- 21.1. Are there any “gaps” (roles or skills) in the current management team?
- 21.2. Are there strategies to ensure that relationships with key suppliers and customers are transferable?

22. RISK MITIGATION/RISK ANALYSIS

22.1. Identification of key areas of risk

- 22.1.1. has the Business conducted a strategic S.W.O.T. analysis?
- 22.1.2. has the Business reviewed the key threats/risk exposures and identified relevant mitigation strategies?
- 22.1.3. has the company established key man and equity transfer policies? If so obtain copies and review requirements for Buy and Sell Agreement

22.2. Other Strategies

- 22.2.1. is the trading entity separated from the property owning entity?
- 22.2.2. does the Business have a business-wide Disaster Recovery Plan (“DRP”) in place?
- 22.2.3. is the Intellectual Property owned in a separate entity from the trading entity?

Business Owners Critical Information List

Use this template to create a detailed file which can be used by someone else (e.g. your power of attorney) who needs to make decisions on your behalf.

BUSINESS DETAILS	
Business name & address	
Australian Business Number (ABN)	
Australia Company Number (ACN)	
Tax File Number (TFN) for your business	
Business banker (Bank, name & contact details)	

BUSINESS PERSONNEL DETAILS		
	Name	Contact Details
Partner(s) / Director(s)	(1)	
	(2)	
	(3)	
Accountant / Accounting firm		
Lawyer / Legal firm		
Power of attorney (business purposes)		

INSURANCE				
	Company	Policy No.	Renewal Date	Location of policy
Building				
Contents				
Other Insurance (e.g. disability, trauma etc.)				
(Note: if any insurance policy is paid by direct debit rather than by invoice, be sure to make a note of that.)				

BUSINESS BANK DETAILS			
I have _____ business accounts			
(Security alert: make arrangements for PINs and passwords to be accessed only by the trusted person of your choice. Do not record them here unless you are absolutely confident they will be the only person seeing this document.)			
My business banker is _____		Contact details _____	
Bank			
	Name of Account	Account Number	BSB Number
	Direct debits associated with this account (if any)		
	Company (& contact details)	Amount of debit	Date of debit
Bank			
	Name of Account	Account Number	BSB Number
	Direct debits associated with this account (if any)		
	Company (& contact details)	Amount of debit	Date of debit
	My tax file number		
	My Australian Business Number (ABN)		
	Company (& contact details) for EFTPOS transactions & machine maintenance		

BUSINESS LOAN DETAILS	
I have _____ business loans	
Who is the loan from?	
What is the account number (if loan is from a financial institution)?	
What is the loan amount?	
When are payments due?	
How much is the minimum payment?	
How are payments made?	
Where is the loan agreement kept?	

BUSINESS CREDIT CARDS		
(Security alert: make arrangements for PINs and passwords to be accessed only by the trusted person of your choice. Do not record them here unless you are absolutely confident they will be the only person seeing this document.)		
Company		
	Card name	Card Number
	Direct debits associated with this card (if any)	
	Amount of debit	Date of debit
Company		
	Card name	Card Number
	Direct debits associated with this card (if any)	
	Amount of debit	Date of debit

BUSINESS LEASES				
Building (address of the building)				
Equipment (describe the leased equipment)				
Cars (Registration number(s) of vehicle(s))				
Mobile Phones (describe the vendor or the service provider)				
	Building	Equipment	Cars	Mobile Phones
Who are the payments made to?				
When are payments due?				
How much is the minimum payment?				
How are payments made?				
When does the lease end?				

STAFF DETAILS		
Name	Position	Contact Details
(1)		
(2)		
(3)		
(4)		
(5)		
Staff Salary details		
When do you keep details of payments you make to staff and on behalf of staff? E.g. Payslips, superannuation payments, union dues etc.		
Staff Salary details		
When do you keep details of payments you make to staff and on behalf of staff? E.g. Payslips, superannuation payments, union dues etc.		

KEY CLIENTS / CUSTOMERS	
Customer Name	Customer Details
(1)	
(2)	
(3)	
(4)	
(5)	

SUPPLIER DETAILS		
Name	Nature of goods and/or services supplied	Contact details
(1)		
(2)		
(3)		
(4)		
(5)		

IMPORTANT DOCUMENTS	
(1) Financial Statements	
Within your business who prepares your financial statement?	
Where are copies of the statements kept?	
(2) Debtor & Creditors list	
Where is the debtors & creditors list kept?	
(3) Business Plan	
Where is the current copy of the business plan kept?	
(4) Governance	
Where are minutes of meetings kept? E.g. - Meetings of the board, or the directors, or other governance requirements?	
(5) Trust	
Is your business run through a trust?	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, where is the Trust deed kept?	
(6) Compliance obligations	
Does your business have any compliance obligations?	
Are they all lodged?	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, where and when were they last lodged?	Where: When:
Account management / book keeping	
Who has the responsibility of preparing returns?	
Where are the copies of the returns kept?	

PERSONAL DETAILS	
There is a copy of my will in this file.	<input type="checkbox"/> Yes <input type="checkbox"/> No
The executor(s) of my will.	Name: Address: Phone:
	Name: Address: Phone:
	Name: Address: Phone:
Funeral Arrangements	
I have prepaid my funeral (Details attached)	<input type="checkbox"/> Yes <input type="checkbox"/> No
I have planned my funeral (Details attached)	<input type="checkbox"/> Yes <input type="checkbox"/> No

POWERS OF ATTORNEY		
I have given my power of attorney to the following persons:		
	Name	Original document is held at
General power of attorney		
Enduring power of attorney (financial)		
Enduring power of attorney (medical)		
Enduring power of guardianship		
The document is held at:		

ORGAN DONATION	
I wish to donate any of my organs that may be useful	<input type="checkbox"/> Yes <input type="checkbox"/> No
My name is on the Australian Organ Donor Register	<input type="checkbox"/> Yes <input type="checkbox"/> No Registration number:
I have donated my brain for science (Details attached)	<input type="checkbox"/> Yes <input type="checkbox"/> No
I have donated my body to science (Details attached)	<input type="checkbox"/> Yes <input type="checkbox"/> No

PROPERTY			
I own the following property			
	Address	Name of owner / joint owners	If rented - Managing Agent
Without mortgage	(1)		
	(2)		
With mortgage	(1)		
	Amount due: Minimum payment:		
	When: How is it paid?		
	(2)		
Amount due: Minimum payment:			
When: How is it paid?			
Where is the original titles deeds of your property			
(1)			
(2)			
(3)			
(4)			

BANK DETAILS

I have _____ personal accounts

(Security alert: make arrangement for PINs and passwords to be accessed only by the trusted person of your choice. Do not record them here unless you are absolutely confident they will be the only person seeing this document.)**Bank**

	Name of account	Account Number	BSB Number
	Direct debits associated with this account (if any)		
	Company (& contact details)	Amount of debit	Date of debit

Bank

	Name of account	Account Number	BSB Number
	Direct debits associated with this account (if any)		
	Company (& contact details)	Amount of debit	Date of debit

My tax file number**SUPERANNUATION**

Institution name

Policy number

The policy is held at

INSURANCE				
	Company	Policy No.	Renewal Date	Policy is held at
Life Insurance				
Private health				
House & contents				
Income protection				
Mortgage protection or loan protection				
Car(s)	(1)			
	(2)			
	(3)			
	When is registration due on the car(s):			
	(1)			
	(2)			
	(3)			
	Where are the vehicle registration papers:			
	(1)			
	(2)			
	(3)			
(Note: If any insurance I paid by direct debit rather than by invoice, be sure to make a note of that.)				

CREDIT CARDS		
(Security alert: make arrangement for PINs and passwords to be accessed only by the trusted person of your choice. Do not record them here unless you are absolutely confident they will be the only person seeing this document.)		
Company	Contact Details	
	Card Name	Card Number
	Direct debits associated with this card (if any)	
	Amount of debit	Date of debit
Company	Contact Details	
	Card Name	Card Number
	Direct debits associated with this card (if any)	
	Amount of debit	Date of debit

VALUABLES	
Where do you keep your passport?	
DO you have a bank security box?	<input type="checkbox"/> YES <input type="checkbox"/> NO
	Which bank is it at?
	Where is your key?
Do you have valuables anywhere else? (Give details)	

Note: When you have completed the form, consider where you will lodge copies e.g. with your solicitor, your accountant, in a safe deposit box etc. Remember that the document will need to be reviewed / updated regularly. **DO NOT LEAVE THE DOCUMENT IN ANY PLACE THAT IS NOT COMPLETELY SECURE.**