

# THE BUSINESS LEGAL LIFECYCLE

How to Successfully Navigate  
Your Way from Start Up to Success



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For Abigail and Benjamin

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# Foreword

I believe entrepreneurs are extraordinary. Starting, scaling, and selling a business is one of the greatest endeavours a person can embark on. This endeavour has the potential for great financial rewards as well as personal growth but it also comes with enormous risks and many pitfalls.

Being an entrepreneur can be a lonely journey with no one to turn to for guidance, support or advice. For many entrepreneurs, they can't talk about their challenges with their employees, their family or their friends because they "just won't understand" or they fear being perceived as arrogant when talking about their business. This leaves many entrepreneurs feeling isolated when trying to figure it out on their own or, worse still, being guided by what they read on the internet or social media. From what I have learnt by helping over 1160 entrepreneurs grow sustainable businesses, this is never more true than when looking at the legal side of growing a business.

One of the blessings of growing a business is that you get multiple opportunities to test and measure, tweak and improve in all areas of business. If you make a mistake, you learn from it and do it better next time. Unfortunately, this does not apply to the laws around growing a business; for the most part, you only get one shot to get it right, so it has to be done right the first time.

Unfortunately, entrepreneurs often seek professional legal advice way too late, often to their personal peril or sometimes to the demise of their business. That's where the Business Legal Lifecycle steps in. It will give you early and accurate knowledge before it's too late.

This practical and easy-to-read book will become your companion guide as you discover the legal obligations and options that await you at each phase. Written with insightful intelligence and full of practical examples and anecdotes, this is a legal and business book that is easy to read and simple to follow. It is a book every entrepreneur should have within arm's reach because it will help you safely navigate the often nerve wracking and treacherous waters of the laws associated with running a business.

Although there are many books on how to grow a successful business (of which I have written one), there are few, if any, that focus on the legal steps associated with starting, scaling and selling a business. This book is the missing and critical piece of the puzzle that aims to support entrepreneurs in any phase of their business development. It is a long overdue and much needed resource to be added to the bookshelves of small to medium business owners everywhere. It gives the reader insight with the ability to predict and prepare for the future. Properly applied, it will allow entrepreneurs to not only grow a sustainable business but to make sure their treasured asset is also well protected.

The Business Legal Lifecycle is laid out like an old 'choose your own adventure'

novel, allowing you to enter at the place that is right for you. It then gives you the options you can take with the pros and cons of each, so you can be well-informed and grow your business with confidence and certainty.

This is a refreshing book not written by some lawyer sitting in their ivory tower pointing their judgmental finger at you like your school teacher did when you didn't do your homework. It's written by someone who not only cares about entrepreneurs but who has walked the path himself. Jeremy started his business from scratch and has grown it into an iconic boutique legal practice. He is also an entrepreneur who has experienced the highs and lows of growing a sustainable enterprise. Unlike many legal texts which are long, boring and full of legalese, this book is written in plain English, making it simple to understand and easy to apply. It is also written with compassion, care and clarity.

In my experience, people want more direction, not more information. While this is an informative book, you will also come away with very clear direction as to what your next business legal steps should be. I expect it will help you navigate safely through your entrepreneurial pathway as you set out to achieve your dreams and desires in business.

Enjoy.

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# Preface

As a lawyer and a business owner I am often frustrated with the legal industry as a whole. All too often, advice from lawyers is boring and repetitive with no thought for the client's actual situation. What happens more often than not is that clients are scared of going to their lawyer, scared of being told that they need to spend tens of thousands of dollars to do everything that they need to do. There is no commercial advice given and legal advice becomes unworkable in the real world. This frustration led to the creation of the Business Legal Lifecycle, a concept to shift legal advice away from the simple 'do everything at once' approach to a more commercial set of instructions for every business owner to use.

This book is all about demystifying the legal processes and unlocking the often confusing world of legal advice for business owners. My aim is to give business owners a reference guide to be able to use in business, to give guidance on legal terms, and to give a clear direction of where a business is and should be going. The 13 phases of the Business Legal Lifecycle have been developed to solve these issues and give business owners a clear path for their business.

As with anything in life, business owners are on a journey of discovery. In writing this book, I have developed a deeper understanding of the Business Legal Lifecycle in general and discovered new and interesting ways to look at businesses. The examples I have given are designed to give that clarity to business owners to be able to identify whether they have encountered a similar problem in the past or as a beacon saying to a business owner that they are not alone and that issues that they face in business are normal. Moreover I want to give you the knowledge and confidence to tackle problems head on and know that other business owners have been there before and there is always light at the end of the tunnel.

In writing this book I have researched other business books and legal processes and have also undertaken an extensive review of the business owners that I have dealt with over the years. I have examined where businesses did things correctly and where they did not, and I have developed the phases of the Business Legal Lifecycle as a guide to where the most successful businesses did things correctly.

Your journey as a business owner will be fraught with danger but it should be a journey that is interesting and allows you to develop many different skills. Whether you are a small, medium or large business owner, you will at some stage of your business life have many different roles, embrace them and learn from your mistakes and also from your successes. This book has been designed for you to establish and build a successful business.

# Introduction

## Business owners are in business to take control

When you first start out in business, you need to do everything yourself to keep your business going. You need to be the marketer, strategist, salesperson, manager and even the cleaner. Staying in control of all aspects of your business is vitally important to its ongoing success. As your business grows and develops, it is critical that you are aware of the changes and cycles that it will go through. All businesses go through very predictable and repetitive cycles that are both positive and negative. They are all very important and you need to be proactive and ready to take action when the time comes. I have examined not only what successful business owners have done well, but also where business owners have failed, in order to work out what went wrong. This led me to develop the 'Business Legal Lifecycle' based on my experiences as a lawyer working with over 5200 business owners and their businesses.

The main problem that I observe is that many business owners do not know what they need to do with regards to the legal side of their business. They often do not establish the appropriate structure for their business and do not know when certain legal processes of the business should be undertaken. I developed the Business Legal Lifecycle to guide businesses through what legal steps they need to take and when they need to take them.

## Experiences

As a young corporate solicitor during the 2000s it was drilled into me that a business should have every single legal document in place before it starts to trade. Part of this is due to the increasingly litigious nature of our society, and part is due to the commercialisation of legal businesses.

Crossing the t's and dotting the i's before you start trading is critical in order to make sure that you are ready for the challenges that you will face as a business owner.

## What we see from many business owners

All too often, a business owner, struggling to get their product off the ground, engages with clients and starts employing staff without having the resources or the time to implement all the necessary steps at the beginning of their journey. Setting up your business properly from day one is crucial as the decisions you make at the start will have huge impacts down the track, and could be the difference between success, failure and even bankruptcy.

The Business Legal Lifecycle was developed to help business owners overcome the challenges and protect yourself from the risks that you will face at different stages of your business' development. When your business is about to transition to the next

phase, it is critical for you to understand what your legal options and obligations are so as to ensure that the transition from one stage to the next is successful.

## The aim of the Business Legal Lifecycle

The aim of this book is to demystify the legal processes, explain the different legal practices, and demonstrate why they are necessary through the use of real-life examples. I will also attempt to fight my inner lawyer by doing all of this in plain English! The focus of this book is not specific to any particular type of business and can be used by all types of businesses and business owners.

It should be used by entrepreneurs, existing business owners, accountants, lawyers, financial planners, business mentors, business coaches, mortgage brokers, business brokers, real estate agents and other professionals as a guide to the legal aspects of a business.

It may be that some steps occur in a different order or certain events trigger the phases slightly differently, but from my experience, both as a business owner and as a lawyer, successful businesses generally follow a predictable pattern as presented in the Business Legal Lifecycle.

## How to use this book

Before we begin, a word of warning: specific businesses and business owners have requirements that are unique to their particular circumstances. This book is a general discussion on the phases of the Business Legal Lifecycle but it should not replace the advice that you, as a business or business owner, receive from your professional team of advisors which is specific to your own particular circumstances.

I have included many different case studies and examples to show how following the phases in the Business Legal Lifecycle can help your business grow into an asset that can either be sold or be used as a lifestyle business (a business set up to fund your ideal lifestyle as opposed to a larger type business). I have not included any names and some of the details have been changed for privacy. The effect of what happened in each case study or example, whether it is positive or negative, is very real. Ideally, you should read this book from cover to cover at least once and I encourage you to flag chapters that are especially relevant to you and scribble notes as you go. You may discover things that you have done correctly (or incorrectly) and, as you reach each transition to a new phase in your business, I encourage you to continually revisit the book to ensure that you follow the correct processes and seek the appropriate advice from your consultants.

## What is the Business Legal Lifecycle?

Starting a new business is an exciting venture for any entrepreneur. I know from my personal experience of starting three businesses that sometimes you get swept up in the excitement and resist getting bogged down in important, but let's face it, often boring, legal matters. There is a long list of considerations that a business owner needs to think about when starting a business, with initial start-up costs typically

being the driving factor behind making decisions.

This is one of the reasons that the Business Legal Lifecycle was developed: to ensure that you are aware that you need to start thinking about implementing the different legal processes from the very beginning.

The different phases of the Business Legal Lifecycle are:

- (a) Phase 1 - Conception
- (b) Phase 2 - Start-Up
- (c) Phase 3 - Initial Clients
- (d) Phase 4 - Bringing on Employees
- (e) Phase 5 - Protecting Intellectual Property
- (f) Phase 6 - Maximising your Business/Bringing in Investors
- (g) Phase 7 - Expansion/Franchising/Licensing or  
Buying an Existing Business
- (h) Phase 8 - Estate Planning
- (i) Phase 9 - Investing in Property
- (j) Phase 10 - Litigation and Dispute Resolution
- (k) Phase 11 - Sale of Whole or Part of your Business or the  
Listing on a Stock Exchange
- (l) Phase 12 - Retirement
- (m) Phase 13 - Insolvency/Winding up

Each phase of the Business Legal Lifecycle will have a different impact on your efficiency and profitability. Consequently, you may decide not to go through a particular phase, or another phase may present itself earlier for you. Your company may enter into litigation much earlier in its lifecycle, or you may decide to invest in property sooner than others typically do. Some business owners decide never to franchise their business.

The phases of the Business Legal Lifecycle were created as a general guide based on our experience in dealing with business owners and the stages we see them experience during the life of their business. Whether you follow the cycle exactly or not, the book is designed to give you an idea of where your business is currently situated and where it is headed.

## A word on contracts

Throughout the book I use various terms that refer to a contract, such as: a company constitution, a lease, agreements with your staff and so forth. These are all forms of contracts which are very important legal documents. There is an old saying in the

legal profession, “in any dispute there is your belief as to the truth, there is the other side’s view on the truth and then the actual truth is somewhere in the middle.” This is especially true if you do not have a contract in writing as each party to the contract will have a different interpretation of the agreement. In the ever-increasingly litigious nature of our society, putting a contract in writing is imperative for any agreement so that all parties can agree upon the terms and conditions.

## **CHAPTER 2**

# **Phase 2 – Start-Up**

The Start-Up phase commences the moment you take the plunge and start your business. This may include setting up the entity to operate your business, signing a lease for your premises or borrowing money to invest in your business. If you have not successfully completed the Conception phase of the Business Legal Lifecycle, the Start-Up phase will be the scariest phase as you are not in control of all aspects of your business. Problems and pitfalls will pursue you on a daily basis and prevent you from getting to the next phase (Initial Clients).

Generally, a business in the Start-Up phase will be opportunity-driven and action-orientated as the business owner will react strongly to different ideas and pressures and try to be all things to all people at all times. You need to accept that, as a business owner, you will be constantly stressed during this phase. This is completely natural as you take your first steps into the business world without the 'safety net' of paid employment.

If you follow the Business Legal Lifecycle then you can start up your business correctly which will save you a lot of money. After successfully navigating your way through the Conception phase, there are a number of matters you need to consider as the Start-Up phase has the most variables and options of all of the phases of the Business Legal Lifecycle.

### **Important considerations during this phase are:**

- Setting up the correct structure for your business
- Entering into a lease that is on commercial terms
- Creating your brand
- Funding your business until your first client is obtained and pays you for your services
- Defining your responsibilities
- Managing crises
- Dealing with management issues without having management experience

### **Dangerous ways of thinking during this phase are:**

- Rushing your new business, product or service to the market too quickly
- Trying to be all things to all people
- Not recognising and accepting errors or mistakes

- Pushing on despite insufficient funds to cover the initial cash flow for the new business, product or service

During this phase I will discuss concepts such as structuring the ownership of your business, entering into a lease for the premises from which the business will operate, the director's responsibilities, considerations if you want to be a franchise, taking out loans, and insurance. While this seems like a lot to consider early on in the process, these steps are crucial in order to establish a business properly and to complete the Start-Up phase.

I have left out a number of aspects that are ordinarily recommended by lawyers as I want to focus on only the most essential elements needed to get your business off the ground at this cost-prohibitive stage. I can't emphasise strongly enough how critical it is to obtain advice from your key advisors (accountant, financial planner and lawyer) on these issues.

Your goals and circumstances are unique to you, and there is no 'one size fits all' model. Anyone who tells you otherwise does not understand what is required to establish a successful business.

## 2.1 Structures

A structure is a separate legal entity to operate your business. It can be seen as the vehicle or entity that you are using to purchase or establish the new business, product or service. A structure may also refer to multiple vehicles or entities; for instance, a builder may set up one entity to run their construction company, another to own the assets of the business, another to own the real property assets that are being constructed, and one to operate a different business associated to the other vehicles or entities in the one structure.

Setting up the right structure for your business at the outset is crucial to its future. Often when clients first come to see me, they have been speaking to other people about setting up their business.

Unsurprisingly, they have decided that they want to 'set up shop' exactly the same way as their friend set up their business. While the advice may be accurate and sound – for the other business — it may not be right for you.

It is crucially important that you obtain independent advice from your advisors about the best structure that needs to be set up based on your unique circumstances. Key questions include:

- What is your current financial and personal situation?
- What structures, if any, do you have in place now?
- What liabilities do your current structures have and can this be used to your advantage in the new business?
- What assets do you own and in what structures?

- What are your long-term strategy and goals; that is, do you want to set up the business to earn an income and be a long-term lifestyle business, or do you want to build a business that you can sell once it is properly set up?
- What is your personal/family situation?
- Are there other unrelated investors from whom you need protection?

The biggest pushback that I see in this phase is when a business owner does a cost vs benefit analysis when setting up the correct structure. Whilst the initial start-up costs may seem high, they are essential to ensure that you:

- Protect any other assets that you own
- Consider your succession planning
- Effectively plan the best tax position for your business

From a legal perspective, each business, and where possible each different aspect of the business, should be a separate vehicle or entity under one overarching structure. This means that should one vehicle or entity fail, then your other vehicles or entities will be protected.

A lawyer will only advise you as to the appropriate structure you need for your business from a legal perspective. You also need to obtain accounting and financial advice before setting up the structure to ensure that you have carefully considered all aspects of your business before moving forward.

There are six different structures that may be suitable for a new business. Which one you choose depends on your situation, your goals, and the model you have chosen. They are:

- (a) sole trader
- (b) company
- (c) discretionary trust
- (d) unit trust
- (e) partnership

Don't forget, when setting up a new business you must always evaluate the risks and consider future problems that may arise that are beyond your control. Setting up the right business structure during the Start-Up phase will save you a lot of money and grief down the track.

## Sole trader

The term 'sole trader' refers to a business being operated by a person in their own name, for example Bob Smith trading as Smith's Auto Repair. Operating as a sole trader is the most common structure for small businesses in Australia. It often comes as a surprise to many business owners that by operating a business in their own



name, they take primary responsibility for all debts and liabilities of the business. As the operator of the business, they are personally liable for any defective work, any injury caused through their business, and for all debts that the business incurs. From a legal perspective, starting a business as a sole trader carries the greatest risk.

You must always consider both the short-term and long-term problems associated with operating a business. Events and risks beyond your control may mean that you lose a lot of money in the future that could have been prevented if you set up the right structure in the first place.

From a legal standpoint, being a sole trader is an extremely risky way to operate a business. There are other structures that can better protect you and your assets, and minimise the tax payable for the profits from your business.

## **Company**

Operating a business through a company is also very common. A company is a separate legal entity from the people behind the business thus it 'shifts' the risk of liability in many circumstances away from the owners of the business to the company itself.

The two main roles in a company are directors and shareholders. Directors are responsible for the day-to-day operation of the business; they make decisions on procedural matters such as entering into contracts, paying wages, and a variety of other aspects of the business operated by the company. They are there to ensure that the business is operating profitably and they also hold responsibility for a number of other aspects of the business: see the overview in section 2.3.

As part of their role, directors may be held liable for debts incurred by the company. This generally only occurs if they sign a personal guarantee, or if they incur debts on behalf of the company when they know that the company is insolvent: more on this in section 13. Shareholders, on the other hand, own the business according to the number of shares that they have in the company. Shareholders are said to have the real control of the business as a majority of shareholders (shareholders who own over 50% of the shares in the company) can appoint and remove directors from the company.

You may have heard the phrase, 'a \$2 company'. This refers to the share capital of the company. The number of shares each shareholder buys, which can be paid up, or the money 'owed' to the company, generates the share capital. A shareholder's liability is limited to the amount they still owe for their shares. This means that if you start a company and buy 10 x \$1 shares in that company, you are liable to pay the company \$10, if you have not already paid. The only other situation where a shareholder will be liable is if a lender or supplier requires a personal guarantee from the shareholders of the company. This limited liability protects the shareholders from the debts of the company and means that creditors cannot pursue the shareholders for the debts of the company.

### Company constitution

Each company in Australia should have a constitution, which essentially states the rules and regulations by which the company will operate. It governs the company's relationship with its shareholders and directors in a general sense and provides a framework for the management of the company. If a company does not have a constitution, then it will be governed by 'replaceable rules' and you need to consult with your lawyer to ensure that you understand your responsibilities under this arrangement.

### Shareholders' agreement

A 'shareholders' agreement' is another type of contract between the shareholders that sets out rules in relation to the company's management. This agreement is generally more comprehensive than a constitution, and must be drafted with the terms of the constitution in mind to ensure that there is no conflict between the two documents. Where you have multiple shareholders it is important to consider the different roles that each shareholder performs, and to what extent they can make decisions and agreements that affect the other directors and shareholders. I will discuss the options of shareholders' agreements, and buy/sell option agreements, in sections 6.3 and 8.4.

### Discretionary trust

A trust, like a company, is a very common vehicle or entity with which to operate a business as it separates liability from the business owner to the trust entity. Generally, a trustee holds properties and assets for the benefit of either a beneficiary or a group of beneficiaries. In a discretionary or family trust, the trustee holds the income and assets for the beneficiaries 'on trust', and uses their discretion to decide who receives income and capital from the trust. This is distinct from a fixed trust where the beneficiaries' entitlement to the income and assets of the trust are fixed to a certain percentage. A trust is set up by way of a trust deed where the settlor provides the rules which the trustee will use to govern the operation of the trust for the benefit of the beneficiaries. If you are thinking of setting up a trust, you need to give careful consideration to all of the terms of the trust deed to ensure that the document meets the needs and requirements of you and your business. Trusts are complicated legal structures, so it is critical that you obtain competent and thorough legal and accounting advice before setting one up.

### The benefits of a discretionary trust

There are a number of benefits that come with using a discretionary or family trust. These include:

- Distribution of profits and capital can be made to family members of the main person, usually the person behind the business, in the trust rather than just the person operating the business
- Children are entitled under the trust to the family's money without the parents losing control over the assets because the trustee controls how much money they get

- Property can be retained within a family
- Protection is provided against creditors
- The trust is an effective structure to help minimise tax

### The roles in a discretionary trust/family trust

There are generally four distinct roles within a discretionary or family trust. When establishing this type of structure, it is critical that you understand the different roles so that the correct person or entity is assigned to each role; this is to ensure that the trust complies with the legal requirements.

The roles are:

- (a) the trustee
- (b) the settlor
- (c) the beneficiaries
- (d) the appointor or principal

### The trustee

The trustee is the legal owner of the trust property, which is different to the beneficial owner of the property. The trustee has day-to-day control over the trust and is under an obligation to ensure that they do not place themselves in a position of conflict between the interests of the trust and their personal interests.

It is important that a trust deed is properly drafted to ensure that the trustee has all of the powers that they will need under the trust without compromising the security of the business. A trustee is primarily liable for the debts and operations of the business and has the right to be indemnified from the trust assets. This means that if you set up a trust with Joe Bloggs, named as trustee for the Bloggs Business Trust, then Joe Bloggs is personally liable for all of the debts incurred by the trust, unless he can pay the debts out of the assets of the trust. If the trust has insufficient assets to meet its obligations, Joe is thus personally liable for the debts of the trust. For this reason, and to separate liability, I always recommend that a company should be established to act as the trustee. If a trust is established and will not be trading with the outside world, such protection is usually not required. Where a trust will be trading, incurring debts or essentially dealing with third parties, it is important that a company is established as the trustee.

### The settlor

To establish the trust, a sum of money must be paid by a settlor. As the settlor cannot derive any benefit from the trust, they cannot be a beneficiary. The only obligation the settlor has under the trust is to pay a sum of money to create the trust, and to execute the trust deed or declare the trust in writing. I have heard of legal and accounting firms who did not pay the settlement sum when establishing these types

of trust despite being the settlor of the trust. This is a dangerous path to take because, if the trust is ever investigated, it may be found to be a 'sham' because it was not established properly. This could cause great financial losses as the business owner will be forced to pay tax on the money personally (as no trust was established properly) and will have to set up a brand new structure all over again.

## The beneficiaries

The beneficiaries are the people, vehicles or entities who can expect to receive a benefit from the income earned by the trust, and who are entitled to the capital generated by the trust. However, beneficiaries do not have a direct interest in the assets of the trust itself. The decision lies with the trustee in their discretion to decide which beneficiary receives what income or capital from the trust. In a family trust, the beneficiaries are ordinarily all members of a family, as well as any company or trust with which a beneficiary is involved. This gives the trustee broad discretionary powers to distribute trust property to a variety of entities which assists in effective tax planning.

## The appointor or principal

The appointor (or principal as they are sometimes referred to in a trust deed) is the person with the real control of the trust. The appointor has the power to remove and appoint a new trustee at their discretion. The appointer will generally also have the power to add new beneficiaries to the trust; however, this power should be used with great caution as it can have consequences for taxation. If you want to add or remove a beneficiary of a trust after it is established, then you will need to obtain advice from your accountant and lawyer in relation to the consequences that the change will have on your specific situation.

## Unit trust

Similar to a company and a discretionary or family trust, a unit trust is a separate legal entity that can operate a business or own an asset. A unit trust is distinct from a discretionary or family trust in that the beneficial interest in the assets of the trust are owned by the beneficiaries in proportion to the number of units that they hold in the trust. Generally, this structure is used where there are a number of unrelated business owners who want to own a share in the business through the trust.

In Australia, it is important to note that there are special rules that apply to a unit trust where the number of members is 20 or more. There will be similar rules when setting up a unit trust in other countries. Should you intend to put together a structure where this will occur, you will need to obtain specialist accounting and legal advice in relation to these matters.

### The roles in a unit trust

Similar to a discretionary or family trust, there are a number of different roles within a unit trust. It is critical that any person considering setting up this type of vehicle or entity understands the different roles so that the business owners can make an informed decision about the right person for each role. There are generally two distinct roles within a unit trust. These are:

- (a) the trustee
- (b) the unit holders

## The trustee

As with the trustee in a discretionary or family trust, the trustee in a unit trust is the legal owner of the trust property (distinct from the beneficial owner of the property). The trustee has the management of the trust and also must ensure that they are not in a position of conflict between the interests of the trust and their own personal interest. The trust deed also operates in the same way as the trust deed in a discretionary or family trust. It will set out a number of powers that the trustee is entitled to exercise, usually all of the powers that an individual can exercise. It is essential that your trust deed is drafted properly to ensure that the trustee has the proper powers under the trust.

Again, the trustee is primarily liable for the debts and operations of the business but has a right to be indemnified out of the assets of the trust. As a unit trust will almost certainly be a trading trust, the trustee should be a company to shift liability to the company rather than to the people behind the vehicle or entity.

## The unit holders

Unlike a discretionary or family trust, there is generally no settlor in a unit trust. Instead, the initial contribution to the trust comes from the unit holders. The contribution will be the price paid by the initial unit holders for their units in the trust. The unit holders are the people and entities that have an entitlement to the income of the trust and are entitled to the capital of the trust. The unit holders do not have a direct interest in the assets of the trust other than those benefits provided to them upon the trustee exercising his or her powers under the trust deed. When the trustee distributes income to the unit holders, this is always in proportion to the units held by the unit holder in the trust.

There is a general principle that unit holders are liable for the debts of the trust; however, this can be avoided with a properly drafted unit trust deed whereby their potential liability is avoided and the unit holders, like shareholders in a company, will also have protection from the debts of the business. This is critical protection that you must consider before setting up a unit trust.

Generally, it is the unit holders that have the power to appoint and remove trustees of the trust as there is no appointor. This is distinct from a discretionary or family trust where the power to appoint and remove trustees vests in the role of the appointor.

## **Un-incorporated partnership**

An un-incorporated partnership is a structure whereby a number of vehicles or entities partner together to operate a new business, sell a product or service or own an asset. A company and a unit trust are both forms of incorporated partnerships as they are structures that are established to deal with the different vehicles or entities by their owners.

An un-incorporated partnership is used much less frequently these days due to the fact that the individual partners, as in a sole trader structure, remain primarily liable for the debts of the business. There is no separation between the business owner/s and the outside world contracting with the business.

To help shift liability to the entity, you can set up a partnership of trusts, companies or individuals. A partnership of trusts is a popular structure for accountants where their clients are investing in real property, as it has many advantages from a land tax perspective in Australia.

### The partnership agreement

Where entering into a partnership, it is critical that you have a properly constituted and drafted partnership agreement. Like the constitution of a company, a partnership agreement sets out the rules governing the relationship between the partners, including defining responsibilities for the day-to-day operation of the business. It is also critically important to plan for the end of the partnership to give partners an appropriate 'exit strategy'.

## **A combination of vehicles or entities**

As I have previously discussed, it is quite normal for a structure to be established using multiple vehicles or entities. For example, the shareholders in a company or the unit holders in a unit trust will often be a discretionary or family trust to allow for the benefits of income distribution amongst the business owner's family, without risking the discretionary or family trust being the entity that trades the business. It is also common for an un-incorporated partnership to use a partnership of companies or trusts to provide similar protection to the parties to that of a company or unit trust structure.

### Trading/business name

It is important that you register any trading or business name as required by your local laws. This will ensure that nobody else can use that name in competition with you. Also, some laws provide that you cannot trade a business without having it registered with the appropriate government body.

## **Conclusion**

It is common to have a variety of different entities or vehicles within your structure, allowing for the most tax-effective distribution of your income and capital of the

business. There is no 'one size fits all' structure for a business.

When setting up a structure, it is essential that you seek complete advice from qualified professionals that caters to your unique situation. Therefore, stay away from 'barbecue advice' when it comes to making important and complex decisions about running your business.

## 2.2 Leasing Premises

A large number of businesses operate from commercial, industrial, or retail premises, often owned by a third party landlord. The relationship between the business owner (the lessee/tenant) and the owner of the premises (the lessor/landlord) is important for the successful running of the business. Being able to effectively operate your business without interference from third parties such as landlords is important for the early success of a business.

As a business owner, you need to ensure that any lease you enter into is on fair commercial terms and is affordable. The exact commercial terms will depend on the premises being let and your particular circumstances. It is essential that you have advice from all of your consultants during the lease negotiations to ensure that you enter into a lease that is advantageous for you and your business.

Far too often I have had to help clients that didn't get timely advice and tried to do it all themselves. The first mistake they made was not realising they were negotiating with a landlord and/or agent who dealt with these type of matters every day and were expert negotiators. Unless you get the right advice you may very well find yourself agreeing to terms that will hurt your business down the track.

Important considerations when leasing premises include:

- The amount of rent and when it is payable
- The length of the lease and any options to renew at the end of the initial term. This is essential as you plan for the future
- Whether the rent includes outgoings and/or operating expenses. Outgoings are the expenses generally incurred by the landlord such as rates, cleaning costs, rubbish removal, maintenance of air conditioning, lifts, escalators, security, repairs and maintenance, insurance premiums and management costs. Operating expenses are consumables generally incurred by the tenant such as electricity, water, gas and are dependent upon the tenant's consumption at the premises
- The type of security you need to provide to the landlord. This may include a bank guarantee, bond or a personal guarantee and will depend on the type of entity entering into the lease
- Whether there are any incentives, such as rent-free periods or fitout contributions paid by the landlord, to induce you to enter into the lease

### Commercial leases

It is important to ensure that a commercial lease properly reflects the agreement between the parties as there is no such thing as a standard commercial lease; each lease reflects the different terms and conditions negotiated between the parties.

The process for entering into a commercial lease is a complicated one and it is important that you understand all of the required steps prior to going through the process to ensure that nothing is overlooked.

The process is:

- (a) Finding the property
- (b) Initial negotiations
- (c) Drawing up the lease, including:
  - (i) whether the premises will be used as a retail shop
  - (ii) other general provisions that need to be considered
- (d) Your obligations as an ongoing tenant

## Finding the property

The first step in entering into a commercial lease is locating the property that you want to lease. The crucial element here is to find a property that meets your space and location requirements; these initial aspects of the search will help you to determine what commercial property is right for your business. The appropriate property for any business will vary greatly depending on the type of business, its target audience, the requirements of local authorities and the business owner. You need to speak to an appropriate commercial agent to determine all of these factors and find the right property for your business.

## Initial negotiations

After you find the right premises you would ordinarily contact the listing agent or the owner if no agent is appointed. They will have a letter of offer or agreement to lease for you to complete and sign. This document usually contains the salient features required for the lease, including the name of the landlord and tenant, the rent and outgoings payable, the commencement date, the area of the premises, the length of the lease (with any options to renew), and any incentives that the landlord is offering you to enter into the lease.

It is essential at this point that you seek advice from your consultants, such as lawyers, accountants, financial planners and business mentors, to ensure that the terms are commercially suited for your business and there is nothing untoward in the letter of offer or agreement to lease such as a change that you did not agree to, or where it places an obligation on you to perform a task during the lease that is unusual or unreasonable.



Once you sign this offer or agreement to lease you are bound by the terms of the document. The documentation will usually require that you pay a deposit, which you will need to pay upon signing. If you are unable to obtain professional advice before signing, you should ensure that you read through the document carefully and ask that:

- (a) It be subject to your lawyer's approval; and
- (b) That you be entitled to a full refund of any monies paid if you do not proceed with the lease

## The lease

Once you have agreed to the terms of the lease, the landlord will instruct their lawyer to prepare the formal lease agreement. This document will set out the terms and conditions upon which you will lease the property.

At this point, if you have not previously engaged a lawyer, it is essential that you do so now in order to ensure that all of your requirements are covered in the lease and that you are not left with any onerous requirements or terms to which you have previously agreed in the initial negotiations.

## Are the premises being leased actually a retail shop?

Broadly speaking, a lease of a retail shop is a lease of premises within a retail shopping centre. Countries have different legislation to protect different types of tenants.

In Australia, all states have legislation that regulates retail shops and protects tenants. The legislation is there to protect business owners against landlords who, often being larger and more experienced in business, try to manipulate the smaller businesses that are their tenants.

## General provisions to be considered

Given that there is no standard commercial lease document, it is important to remember that the terms of a lease will be negotiated by the parties to ensure that they properly reflect the rights and obligations of each party and that the terms are not too onerous on either party, especially the business owner tenant.

There are various matters that you should consider in entering a lease. These include:

- The initial rent and the method for calculating the rental increases over the term of the lease
- The initial term and how the lease is to be renewed or extended
- Whether local town planning laws allow your business to operate from the particular premises and under what conditions

- Your right to transfer or assign the lease if you decide to sell the business, and the expense of doing so
- Whether you can sublet the premises
- Who pays for:
  - o keeping the premises in good repair including structural improvements
  - o rates and taxes
  - o outgoings and other charges
  - o all the additions, improvements, and fixtures made during the lease
- The types of insurance required and who obtains each type of insurance
- Restrictions on the removal of fixtures and fittings
- Your obligation to remove partitions and reinstate the premises after expiry to its original condition
- The consequences of failing to pay rent
- Your right to end the lease before it expires
- The process of resolving any disputes with the landlord
- Whether any specific legislation applies to your lease and the obligations it places on each party
- Special obligations if you are in a shopping centre
- Payment of a security deposit, bank guarantee and/or the terms of any personal guarantee

## Obligations as an ongoing tenant

Too often, business owners do not maintain their obligations during the term of the lease which may have serious consequences for both the owner and the business. Some of the major areas in which I have seen business owners fail in maintaining their obligations as an ongoing tenant include failing to:

- Comply with the conditions of the lease and any rules set out by the landlord
- Give notice in time to renew the lease
- Understand their rights if they stay on as a tenant without renewing the lease
- Obtain the landlord's consent if they wish to change the type of business they run
- Understand the landlord's right to end the lease early

Before you take possession and undertake any works on leased premises you

should take photos or a video of the premises as a record of the condition that the premises were in at the time you took possession. This is critical, because by the end of the lease, which may be three, five or 10 years after you take possession, a dispute may arise with the landlord as to the original state of the premises which is usually the level to which you have to reinstate the premises at the end of the lease. Photographic evidence from the start of the lease is the best evidence to ensure that you can comply with this requirement.

## Owning your own property

It is becoming increasingly popular for business owners to buy the property from which they operate their business, a move which has significant benefits and risks. These are discussed further in section 9.

## 2.3 Directors' Responsibilities

If you are a director of a company, you need to be aware of the rules, regulations and responsibilities regarding that role in the company. This section is focused on the Australian legislation relating to directors' responsibilities. These general principals also apply in most of the countries that allow business owners to set up companies to operate their business.

Company directors are subject to a number of common law and statutory directors' duties in Australia. These duties are designed to promote good governance of companies and ensure that directors act in the interests of the company – including putting the company's interests ahead of their own.

As mentioned earlier in section 2.1, one of the advantages, from a legal perspective, of a company structure is that a separate legal entity operates the business and, in most circumstances, protects the individuals behind the company from any personal liability.

However, an abuse of this protection has seen unscrupulous directors hide behind the company to incur debts that they know cannot be paid. The law has developed over time to protect third parties dealing with these unscrupulous directors.

Some of the key director obligations include (this list is not exhaustive):

- (a) The duty to act in good faith in the interests of the company as a whole

A director will breach this obligation if they are found to have subjectively failed to give proper consideration to the company's interests as opposed to their own interests.

- (b) The duty not to act for an improper purpose

A breach of this duty generally occurs when a director uses their position and knowledge to obtain a personal advantage or defeat the voting power of the existing shareholders of the company.

(c) The duties of care and diligence

A director is obliged to keep themselves properly and completely informed as to the company's affairs and cannot claim ignorance of their own making (e.g. failure to undertake proper enquiries).

(d) The duty to avoid conflicts of interest

A director is obliged to make informed and independent judgments on decisions and cannot put themselves in a position where their own personal interests may conflict with the best interests of the company, either directly or indirectly.

(e) The duty not to make improper use of position

A director must not use their position to gain an advantage for themselves or any other person.

(f) The duty not to disclose confidential information

A director is often party to confidential information. This duty is to prevent a director from disclosing such information to third parties. This protects the interests of the company and prevents a director from abusing their position.

(g) The duty not to make improper use of information

Similar to confidential information, a director must not use any other information improperly for their own or someone else's gain, or to the detriment of the company.

(h) The duty not to trade whilst insolvent

This duty is to prevent a company from trading whilst insolvent and continuing to incur debts with third parties that the director knows the company cannot pay. Essentially, if it can be proved that a director has continued to trade whilst insolvent, that director can be personally liable for the debts incurred by the company during that time.

Clearly the circumstances that give rise to a breach of one duty may overlap with a breach of another duty. However, Australian law recognises each as a separate breach of duty, and may often result in the breach of a number of other duties as well. A number of defences may be raised by directors to allegations of breaches of duties. For further advice on breaches of duties, I strongly recommend speaking to your lawyer to discuss what actions should be taken to protect yourself.

## 2.4 Becoming a Franchisee

One option when starting a business is to purchase an existing business in the form of a franchise. This is distinct from the 'Expanding Your Business, Franchising and Licensing phase' (discussed in section 7) because, rather than starting up your own business and brand, you are purchasing an existing franchise. Usually, the franchise

will have all of the aspects of the business already established, so when you buy a franchise you are also buying that system to operate your business.

## What happens when you want to invest in a franchise?

To invest in a franchise, the franchisee (you) must first pay an initial fee for the rights to the business, training in the business model, and the equipment required to operate the franchise to the franchisor (owner). After the business is set up, the franchisee will generally pay the franchisor a regular royalty payment (such as a percentage of gross sales or fees) for the continued use of the franchise model. These payments are generally on a monthly or quarterly basis. When you buy a franchise you are effectively buying a brand that should be protected by a registered trademark and gives you the right to trade using that trademark.

After the franchise agreement has been signed, the franchisee will open a franchise business which replicates the business model of the franchisor. Generally, as a franchisee you will not have as much control over your business as you would over your own business so you need to be prepared to do things the franchisor's way, not yours. Usually, the franchisor will assist the franchisee where necessary to ensure that the reputation of the business trademark and model are maintained.

## Control of the franchise

Generally, the franchisor will require that the same business model is used by all the franchised businesses. This may include using the same uniforms, business processes, and signs or logos particular to the business itself. These help to identify the business and keep the brand consistent to the outside world. The franchisee should remember that they are not just buying the right to sell the franchisor's product, but the right to use the successful business process of the franchise.

Often the franchisee will pay an advertisement fee to the franchisor so that consistent advertising can be utilised to a larger audience rather than each franchisee attempting to advertise their business on their own. For example, a franchisee may only be able to afford to advertise in a limited area around their business due to the cost. Where multiple franchisees pool their money together, they can often afford advertising that reaches a much larger market and is therefore more beneficial to all of the franchisees as a whole.

While there are many benefits to investing in an already successful franchise business, there can also be drawbacks. As with any investment, you should do your research thoroughly before you make any purchasing decisions. Often, the franchisor will place a number of restrictions on how you operate the business and, as such, you should ensure that any franchise agreement is fully reviewed by a competent lawyer who can advise you in relation to your rights and obligations under it. It is also critical that you obtain advice from your accountant and financial planner to ensure that you are able to properly operate the business from a financial standpoint.

## Conclusion

Purchasing a franchise business is an important business decision. You need to give serious consideration to what you are signing up for and whether you are getting the most out of your investment. Importantly, you need to take advice from financial and business advisors on whether the franchise is viable, and from lawyers on the legal side of the franchise business.

## 2.5 Borrowing Money

Funding the initial start-up of your business can be difficult. You have just started your business and you immediately begin incurring debts with cash that you do not have. I remember when we started our law firm all we had was an overdraft and a credit card. We decided that we did not want to borrow a lot of money to start the business (otherwise we would just be paying a lot of our future profits to the bank), so we never touched the overdraft and established an internal line of credit with our own money.

However, depending on the type of business that you are starting, obtaining finance may sometimes be a necessary step to ensure that you can operate your business through the phases of the Business Legal Lifecycle. If you are starting a business that has large upfront capital costs such as a food supply business, a stationery business or a glass supplier, for example, you will need to spend money to buy your products before you start to sell them to your customers.

There are a number of options available to business owners to access funding to pay for the upfront start-up costs of their business, including:

- (a) Lending your own funds to the business
- (b) Borrowing money from a bank
- (c) Borrowing money from friends or family
- (d) Debtor finance
- (e) Equipment finance

### Lending your own funds to the business

Using your own funds to start your business is obviously a risky proposition; however, if you have the cash, it may be your best option. In choosing this option you don't need to worry about how you are going to pay yourself or your debts, and you will be able to generate a realistic projection of those costs against your income. Ideally, you should prepare a cash flow projection, a full year budget and business plan before you start. Again, at this stage, it is imperative that you obtain advice from key consultants such as accountants and financial planners. You may not be aware of all of the costs that are involved in setting up a business so it is vital that you properly plan your funding arrangements (if you haven't already done so in the Conception phase).

### Borrowing from a bank

If you don't have the cash to fund your own start-up costs, then you need to consider other funding alternatives. Borrowing from a bank is one of the most common methods to fund a start-up business. I am certainly not against banks and, indeed, believe that they are an essential player in setting up and funding your business. However, I have seen business owners work hard to build strong relationships with particular bank managers, only for those bank managers to move on and leave the business owners to deal with a new bank manager and rebuild the relationship from scratch. Or, worse still, because the bank has all of their assets tied up, they use this transition to become stricter in their lending conditions as the personal relationship no longer exists.

### *From the Case Files*

This is exactly the situation that confronted one of our clients with large property holdings. The client had a business in investing and developing large commercial and industrial properties. He owned properties that were valued at over \$60 million and was in debt to one bank that had funded him for over 20 years for approximately one third of the value of his properties. When he became embroiled in a dispute with his business partner, and despite the fact that the properties had significant equity, the bank stepped in and prevented my client from exercising his control over his assets without any reason other than the fact that there was a dispute and the bank did not want it to affect the value of the properties it held as security. This caused my client to enter into a protracted legal battle that cost both sides close to a million dollars in legal fees.

Another one of our clients is also a property developer with significant equity in a number of properties. The properties range from residential to commercial and industrial and the client had, over a 10-year period, built a strong portfolio of property assets with significant equity and a very good rental return. The client also had a long-standing relationship with his bank and one bank manager in particular. Just before the beginning of the 2008 global financial crisis (GFC), the client entered into a contract to sell one of his properties. Before entering into the contract, the bank manager told him that he could take 50% out of the sale proceeds to fund another project because the bank had sufficient equity in the other properties. At this time the bank manager suddenly left to pursue a different career. The new bank manager told the client that, as a result of the GFC, the bank tightened their lending criteria and changed their mind, taking all of the funds from the sale. The consequence of this was that the client was forced to secure additional funding through the bank at a higher rate and at a significantly higher cost in fees and lost opportunities. In a situation where the client was hoping to free himself from the constraints of the bank, a change of relationship manager and policy meant that he was even more closely controlled

by the bank. Had he been able to secure funding from a different bank, the client would have been able to negotiate a much better deal.

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Banks love to take security over a number of assets (cross-collateralisation) especially when you're first starting your business. For example, if you own a house, the bank will most likely require security over the house so that if you default in the repayments, it can sell your home to repay the debt, as really there is no value in selling the struggling business. This represents a considerable risk, especially if you own the house with a spouse or partner because the bank may require a personal guarantee from that person as well.

This should be avoided if possible as, more often than not, your spouse or partner will not be involved in the business and they risk losing their home as a result of the business going bad. If your bank says 'no', keep looking because you will probably be able to find another five banks that will say 'yes'.

In my experience there are two main strategies when borrowing from banks:

- (a) Build relationships with a number of banks and play them off against each other to obtain the most favourable terms, although this can still have negative consequences if one of the bank managers leaves.
- (b) Engage an experienced and competent mortgage broker who can liaise with different banks and get the best deal on your behalf. Additionally, it is important to also liaise with an accountant and financial planner so that your consultants know what is going on and can give you the best advice.

## Borrowing money from friends or family

Borrowing money from family and friends must be seen as the last resort. When borrowing money from a bank, there is always the risk of the bank stepping in and taking control of the business if things turn sour. If you borrow money from someone you know, be prepared that they are likely to want some involvement in your business. You might be shocked to find that you gained a 'de-facto partner' instead of a lender. Of course people never enter into the transaction with any malice, but unfortunately things can and do go wrong, not only damaging the business but also the relationship with the family member or friend. If you decide to borrow money from someone you know, it's imperative that the agreement is properly documented and clear ground rules are established to regulate the lender's role (if any) in the business so that the relationship is well-managed. Both parties need to understand that they are entering into a serious business transaction; to run the business properly rules are necessary and will be strictly enforced.

### *From the Case Files*

I saw this type of relationship turn sour a few years ago when a



business owner came to see me as he had lent money to his son-in-law to start a business. The father-in-law was an elderly gentleman who had worked for a salary all his life and he had built up a strong savings portfolio. He wasn't, however, aware of what was required to run a business so when his son-in-law approached him to help with a new business venture, he happily agreed. However, there was no agreement or understanding between them as to what the terms of the lending arrangement were or the level of involvement that the father-in-law had in the business. The father-in-law was concerned that his son-in-law was 'out socialising' instead of working to build the business. He felt that his son-in-law was simply wasting his money and wanted to get his money back. After many discussions he approached his son-in-law accusing him of taking his money and not taking the business seriously. On a positive note, it turned out that the son-in-law had simply been networking and was genuinely trying to build up his business, and that the father-in-law had misunderstood what was going on. Unfortunately, the mistrust caused massive divisions within the family that took years to resolve. Admittedly, this was an extreme case, but it is a real life illustration of how mixing business with family can lead to severe consequences.

On the other hand, I have also seen success stories where this kind of relationship has worked. A client of ours, who had recently retired after 40 years of operating his own business, sought our advice when the person he sold the business to wanted to borrow money from him. The business was a road transport one that had significant overheads in the trucks and machinery used in the business. The new owner had attempted to expand the business into other areas and they had not been successful so he was struggling from an operating cash flow perspective. The new business owner had a house that was virtually unencumbered that they could provide as security for the loan. After many discussions, the client took a commercial stance, engaging independent valuers to value the house and allowing us to properly document the loan.

The documentation clearly set out the rights and obligations of the parties and there was a clear understanding between the old business owner and the new one that the relationship was limited to that of a lender/borrower relationship and the old business owner was to have no involvement in the business.

By dealing with each other professionally and at an arm's length, the transaction proceeded without a hitch and the relationship remains strong.

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Borrowing money from family and friends can be risky but with the right advice and

proper establishment, it can work.

## Debtor finance

Debtor finance, also called 'debt factoring' or 'invoice lending', is where you accept a percentage payment from a debt factoring company on the value of the invoices you have issued to your customers or clients. The debt factoring company then assumes the responsibility to chase payment of the full amount of the invoice and they pocket the difference.

For certain types of businesses that require immediate cash flow to buy stock (e.g. a printing business) this type of finance can be of great assistance, especially in the short-term start-up phase before cash flow is enough to maintain liquidity.

There are a number of issues that can arise with debtor finance:

- You 'lose' a significant amount of your profit
- Usually if the debt is not paid within a set timeframe, for example 60 days, you are required to pay the money back to the debt factoring company that has provided it to you. You do not get any of your interest or other cash back and you lose that money
- Your ability to borrow from other lenders may be affected as your book debts will not be available as security for other borrowing options
- Customers may not like dealing with a third party on the payment of their debts

If you opt to use this type of finance, you should ensure that it is a short-term fix to your operating cash flow problems as it will seriously impact upon your profits. Again, it is imperative that you obtain the right advice from your lawyer, accountant, financial planner and/or mortgage broker to ensure that all of your circumstances are considered and that it is the right funding option for you.

## Equipment finance

Another common funding avenue for business owners is equipment finance, which is commonly used when a business needs a piece of equipment or a vehicle. There are many different options and you need to ensure that you get the best deal for your business in terms of start-up cash flow and value for money.

Your accountant, financial planner and mortgage broker will assist here in getting you the best deal. Beware of the latest deal from a financier or a vehicle dealer, which will usually result in you paying the full price for the vehicle (or piece of equipment) as well as paying interest on the loan.

*From the Case Files*

A client of ours had a business that had two different premises. It was an accounting firm that had two owners who visited both offices on a regular basis as they had significant clients at both office locations. The different premises were more than 50 kilometres apart.

This meant that the business owners needed a number of vehicles to travel between the two business premises. The client used the services of a broker on the basis that the purchase price was being paid upfront. This meant that the client, when negotiating the purchase price of the vehicles, was able to receive the lowest available market price and interest rate for the vehicle. This differs to the situation where you might take finance directly from the vehicle company, who will usually have a competitive interest rate but you will end up paying a higher price for the vehicle.

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## 2.6 Insurance

As a business owner, you or your business may be liable for a variety of damages or injuries that occur on your business premises or through the work that you perform. Insurance is an agreement where an insurer undertakes to provide a guarantee for compensation to an injured or wronged person for certain types of damage suffered by that person. It was introduced to help spread the risk for business owners amongst the community and to ensure that injured persons are paid compensation to help them with their injuries.

There are different types of insurance that you will need for your business. If you have leased premises or a franchise agreement, the formal documents will set out the types of insurance that are required. The most common types of insurance that you need to consider are:

- (a) Public liability
- (b) Professional indemnity
- (c) Product liability
- (d) Plate glass
- (e) Business interruption
- (f) Stock insurance

There are other types of personal insurance that will be discussed in section 8 on Estate Planning.

### **Public liability insurance**

Public liability insurance allows business owners to protect themselves from general claims for injury caused by negligence. For example, if someone injures themselves

on your business premises because they slip on water that is on the ground without a warning sign and that should have been cleaned up, the injured person can make a claim for compensation through this type of insurance for any injury or loss (for instance medical costs) that they suffer.

## Professional indemnity insurance

This type of insurance is necessary for businesses providing advice or services within specific industries. These can include where a professional has breached their obligation to provide advice for such things as:

- Providing negligent advice
- Not achieving the result required by a contract
- Giving bad financial advice
- Providing incorrect nutritional advice
- Professional indemnity insurance can also cover a business owner against claims involving the provision of services, including:
  - Incorrectly auditing a company's accounts
  - Inappropriate surgical procedures

While some industries have their own specific insurance that covers professional indemnity (e.g. lawyers in Queensland, Australia have one particular insurer that they must use for this type of insurance), this type of insurance is absolutely necessary for the majority of businesses to ensure that they are protected should their advice be deemed a breach of the law or negligent.

## Product liability insurance

If your business sells or produces a product, then you will need to consider product liability insurance. This insurance protects a business owner against a claim if your product causes:

- Injury or death
- Property damage
- Emotional distress or psychiatric illness

The point of this insurance is to protect you if there is a fault or failure in your product so that if you are deemed negligent and liable to pay compensation to someone who purchased your product, then you can continue to operate your business as the insurance pays the compensation.

## Plate glass insurance

Where a premises has a glass shopfront or uses a lot of glass, a landlord will invariably require the tenant to insure the glass against damage, whether intentional or accidental. For instance, where the business is part of a shopping centre or a strip of shops, damage may be caused by someone throwing a rock or deliberately damaging the glass in your shop or business premises. This type of insurance ensures that the damage is quickly and easily fixed without a dispute between the landlord and business owner over responsibility for the damage.

### Business interruption insurance

Where a business is affected by or is unable to trade due to circumstances outside its control (for example a natural disaster), business interruption insurance covers the loss of income for the period throughout which the business is affected, including the repair times. The actual amount that can be claimed will depend on the type of business and the type of loss suffered. An example of a natural disaster that affects a business is flooding; such an event is not the fault of any party but it can affect the ability of a business to trade from its premises by restricting staff and customer access. Policies vary widely between insurers and most have extensive exclusions so business owners need to compare policies carefully to understand how a policy's restrictions may affect a claim and to find the one that offers the best coverage for their particular business.

### Stock insurance

Any business that relies on its stock, inventory and/or products for its income should have stock insurance to cover it for the replacement of stock and products in the event of a disaster. The purpose of this insurance is to ensure that where the stock or products are damaged through no fault of the business, its employees or the business owner, they can be replaced and the business can continue to trade.

### An insurance policy is a contract

When you obtain an insurance policy you are entering into a contract with the insurance company. Before you enter into such a contract you need to obtain competent advice from an insurance broker, a solicitor, or both. Any insurance contract will very carefully set out the conditions of insurance and, more importantly, the limitations of that cover, called exclusions. Consult with your lawyer in relation to these conditions and exclusions to ensure that you are aware of what exactly your insurance covers and what it does not.

## 2.7 Conclusion

As we have seen, the considerations that go into the Start-up phase are extensive and require a great deal of advice from a range of different consultants. If all of the matters covered in this section are not considered at this stage, you may find that once you do eventually get around to considering them, you will have incurred

additional significant costs because of the delay. A very common example is where a business begins as a sole trader, and later it is transitioned into a company, whereby it incurs tax and duty costs for the transfer along with the legal and accountancy costs in doing so.

Similarly, without early advice as to the terms of the lease, you may be two or three years into a five or 10-year lease, and realise that you have agreed to an uncommercial term that will cost you a significant amount of money down the track. As the lease is a binding contract between the business owner and the landlord, it cannot be changed and, if you want to stay in the premises long term, you may have significant issues trying to renegotiate the terms of the lease, even with legal advice.

Evaluating the different aspects of this phase slowly and carefully will ensure that you successfully set up your business on sound financial footing. I have seen many business owners rush their way through this phase and not consider the implications of their actions, incurring them thousands of dollars in unnecessary costs. Once you have successfully navigated your way through Phase 2 – Start-Up, you are ready to proceed into Phase 3 – Initial Clients.

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## QUESTIONS TO ASK BEFORE YOU PROGRESS TO THE NEXT PHASE:

1. Have you set up the correct structure for your business?
2. If you are entering into a lease, is it on commercial terms that you are happy with?
3. Have you created your brand?
4. Do you have a clear path for funding your business so that you can operate successfully?
5. Do you understand your responsibilities as a business owner?
6. Do you have management experience? If not, where can you turn to get the right advice?

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# Conclusion

In business you are always learning new systems, procedures and methodologies. This book is all about educating you on the different aspects of your business and when legal processes and considerations should be implemented. The main reason that I wrote this book and developed the Business Legal Lifecycle was to share my experience as a business owner and a lawyer. We built our law firm on the principle of 'Solutions for a Better Life' and all of the work we do is geared towards that goal.

Understanding the Business Legal Lifecycle is not the end point for any business owner; it is the beginning of how to operate your business, how to grow your business, and how to prepare for your future. It is critical that you understand the different phases and times when different legal processes should be followed. It is also critical that you have a basic understanding of a number of legal concepts when in business. I hope that you have appreciated the explanations that I have given in this book and that it gives you, as a business owner, a greater understanding of the legal processes involved in operating a business.

I have used many examples and case studies in this book to illustrate how legal processes work and why they are important. You may find these examples similar to your own experiences or you may find that when you are faced with a similar situation, you can identify a potential problem and fix it before it becomes an issue. No two situations are ever exactly the same but you need to know when to take action at the appropriate time. This will prevent you from continually treading water or, worse yet, being swept away when problems occur.

It is important to remember that in business you will face tough times; that is the nature of business and it is entirely normal. It is *how* you deal with those problems that will determine how successful you are in the future. I also encourage you to read all you can and take in as much advice (but not 'barbecue advice'!) as you can in relation to operating your business. Do not implement everything you read and hear; consider your options and, if you are not sure of which way to go, it is probably best to take the course of a trusted advisor. Running a business is a rewarding endeavour and is something that I am very glad I have been able to participate in.

As you will have gathered from this book it is important that throughout the Business Legal Lifecycle you obtain advice from the right consultants at the right time.

Often lawyers or accountants will try to do too much, or they will not allow the other consultants to do their job. I have tried to also point out the various types of consultants that I recommend that business owners engage with at different times in their business.

I wish you the best of luck in your journey in business and through the Business Legal Lifecycle. If you have any questions, then please feel free to email me at [lifecycle@jeremystreten.com](mailto:lifecycle@jeremystreten.com).

*“The Business Legal Lifecycle is one of those books every business owner should own. Written in plain English with practical advice, no matter where you are in your business journey there are gems of wisdom on every page.”*

**Adam Houlahan, Author & International Keynote Speaker**

Whether you want to have a large company or a small, lifestyle business; you have to pay attention to the legal aspects – right from the start. If you don't take care of your legal obligations and plan for the inevitable problems that will surface, you will be exposing yourself to strain, stress, loss of business and potentially even bankruptcy.

*The Business Legal Lifecycle* is designed to guide and empower you with the knowledge you need to successfully navigate your business journey.

**In this book you will learn:**

- Why and when you need to pay attention to the legal aspects of your business;
- How to successfully start up your business;
- What you need to put in place to sell the business in the future;
- Whom you should consult with along your business journey; and
- What you should look at when your business is coming to an end.

**Act now and get ready to build a successful business – today!**



Jeremy Streten is a successful entrepreneur and lawyer. His passion is to help entrepreneurs and small to medium-sized business owners to succeed in their business so that they can live the life that they want to live. He has challenged and changed the way that many people look at lawyers. With a personal perspective from acting for thousands of businesses and their owners Jeremy often contradicts conventional wisdom.

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