

# Buying and selling a closely-held business

<b>1. INTRODUCTION</b>	1
<b>2. WHAT IS A CLOSELY-HELD BUSINESS?</b>	2
The times are a changing	2
<b>3. STATISTICAL INFORMATION</b>	3
<b>4. REASONS FOR PURCHASING A BUSINESS</b>	5
What should a purchaser be concerned with?	5
What are purchasers usually concerned with?	5
<i>Income stream</i>	5
<i>Lifestyle choice</i>	6
<i>Warnings to the purchaser</i>	6
<b>5. DUE DILLIGENCE</b>	8
Introduction	8
Why is due diligence important?	8
Due diligence process	9
Objective of due diligence	9
<i>Further considerations</i>	10
The cost of due diligence	10
Conclusion	11
Checklist: due diligence	12
Common due diligence matters	13
<i>Searches</i>	13
<i>Unit Titles</i>	13
<i>Inspection of the premises</i>	14
<i>Management</i>	14
<i>Plant</i>	14
Employment issues	15
<i>Key employees</i>	15
<i>Employment contracts</i>	16
<i>ACC and insurance in the work place</i>	16
Do the vendors operate another business? Do they own the business sold?	17
Is the business involved in litigation?	17
Year 2000 compliance	17
Leases	17
<i>Terms of leases</i>	17
<i>Non-competition clauses</i>	18
<i>Demolition clauses</i>	18
<i>Body corporate expenses</i>	18

<i>Rent reviews</i>	19
<i>Is the business paying market rental?</i>	19
Franchises	20
<b>6. WHO SHOULD CONTRACT AND HOW?</b>	21
Vendors	21
Purchasers	21
<b>7. STRUCTURE</b>	24
Sole trader	24
Company	24
Partnership	25
<b>8. REPRESENTATIONS</b>	27
<i>Standard 174 Limited v R Sherwood Limited</i> (High Court, Napier) 29 June 1998	27
Representations not included in the contract	29
<i>Gloken Holdings Limited v The CDE Company Limited</i> (1997) 6 NZBLC 102272	29
<i>Bartrum v The Sweet Factory Limited</i> (1997) NZBLC 102047	31
<i>Des Forges v Wright</i> (1996) 5 NZBLC 104030	32
<b>9. VALUATION AND THE PRICE</b>	35
Valuation	35
Goodwill	36
The name and any trade names	36
Internet domain names	37
Trademarks and patents	37
Conclusion	37
<b>10. FINANCING THE PURCHASE</b>	38
<b>11. RECEIVERSHIPS</b>	39
<b>12. PURCHASING A BANKRUPT'S BUSINESS</b>	40
<b>13. PURCHASES OF SPECIFIC BUSINESSES</b>	41
Motel business	41
Café / lunch bar / takeaway bars / fish and chip shops etc	42
Licensed premises	43
Wine shops and liquor outlets	43
Service stations	44
Drycleaners	45
Professional practices	45
Bread and milk runs	46
Florist shops	47
Lotto outlets	47
Mechanics/panelbeaters workshop	47
Small manufacturers	48
<b>14. SELLING A BUSINESS</b>	49

The decision to sell	49
Succession planning	49
Understanding the buyer's perspective	50
Selecting potential buyers to negotiate with	51
Keeping quiet	51
What your client wants from the deal	52
<i>Consideration</i>	52
<i>Form of payment</i>	52
<i>Plan B</i>	53
The best time to sell	53
<i>The business's stage of development</i>	53
<i>Market timing</i>	53
<i>Time of year</i>	53
Preparing your client's business for the sale	54
Finding potential buyers	56
Negotiating a successful outcome	56
Settlement	59
<i>Forms of consideration</i>	59
<i>Cash</i>	59
<i>Equity</i>	59
<i>Loans and convertibles</i>	59
<i>Deferred consideration or "earn-out"</i>	60
Completing the sale	61
Settlement	61
<b>15. THE STANDARD CONTRACT</b>	62
The parties	62
The address and description of the business	62
Consideration	64
Deposit	64
<i>Clause 1 - Definitions and notices</i>	64
<i>Clause 3 - Payment of the balance of the purchase price and the possession date</i>	65
<i>Clause 4 - Risk and insurance</i>	66
<i>Clause 5 - Stock</i>	67
<i>Clause 6 - Vendor's warranties and undertakings</i>	68
<i>Clause 7 - Restraint of trade</i>	73
Restraint of key staff	75
<i>Clause 8 - Financial conditions</i>	76
<i>Clause 9 - Approval of lease and its assignment</i>	76
<i>Clause 10 - Notice to complete and remedies on default</i>	76
Non-merger	77
GST	77

<i>Schedule</i>	77
Examples of extra clauses	77
<b>APPENDIX 1 – Agreement for Sale and Purchase of a Business</b>	81
<b>APPENDIX 2 – Business Purchase Checklist</b>	87
<b>APPENDIX 3 – Scenarios</b>	93