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# Getting Down to Business

A practical guide for people starting a business

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## Acknowledgements

We would like to thank Innes Dean Lawyers and Norris Ward McKinnon that have contributed and reviewed material; Crombie Lockwood – insurance brokers for its advice on the insurance section; and Adroite Communications in Wellington for its editorial and project management expertise.

© NZ LAW Limited, 2021  
Publisher: NZ LAW Limited, PO Box 132, Napier

Project management: Adroite Communications, Wellington.  
Design/production: Mission Hall Creative, Wellington.

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**ISBN: 978-0-473-61205-4 (soft cover)**

# Table of contents

<b>Introduction</b>	<b>3</b>
<b>Buying an existing business</b>	<b>7</b>
Agreement for sale and purchase	7
Key terms and conditions	8
Buying into a franchise	12
Confidentiality and non-disclosure agreements	13
<b>Establishing a new business</b>	<b>15</b>
Do your research	15
Personal attributes	16
Naming your business	17
Brand values – the way you do business	18
Make a plan	18
Confidentiality and non-disclosure agreements	18
<b>Choosing a business structure</b>	<b>21</b>
Sole trader	21
Company	22
Partnership	24
Joint ventures	25
<b>Setting up your business</b>	<b>27</b>
ONECheck – choosing a name for your business	27
Getting the paperwork completed	28
Establishing your brand	29
Protecting your intellectual property	29
Terms of trade	30
Creditworthiness	32
Your obligations under consumer legislation	34
<b>Establishing your workplace</b>	<b>37</b>
Working from home	37
Shared work spaces	38
Leasing premises	38
Purchasing commercial property	43

<b>Employing people</b>	<b>45</b>
Attracting good staff	45
Employment agreements	47
Casual employees and fixed-term contractors	47
Personal grievances	48
Disciplinary action	48
Dismissal/termination procedures	50
Health and safety	51
Employment legislation	52
<b>Managing risk</b>	<b>55</b>
Personal guarantees	55
Business creditors	55
Insurance	56
Other licenses or approvals	57
<b>Succession</b>	<b>59</b>
Selling your business	59
Employees buying all or part of your business	60
<b>Asset planning</b>	<b>63</b>
Keeping your business affairs separate	63
Family trust	63
Holding company	64
Enduring Powers of Attorney	64
Your will	65
<b>Checklist: Buying or establishing a new business</b>	<b>66</b>
<b>Glossary</b>	<b>71</b>
<b>Useful websites</b>	<b>75</b>
<b>Index</b>	<b>76</b>



# Introduction

## Tēnā koutou katoa

**Buying an existing enterprise, or starting your own business from scratch, is an exciting time. It's an opportunity to fulfil your hopes and dreams, being your own boss and working in the way that you want to.**

We have published this guide, *Getting Down to Business*, to help make your dream a reality. Its purpose is to provide you with some practical information to help set up and get your business off the ground.

This guide is designed for you to dip into, although you may want to read it cover-to-cover! As a result, there is some repetition in the chapters.

## Starting off

Whether you're buying an existing business or starting from scratch, you will need to assess whether your business idea is viable – is it going to make an acceptable return on your investment?

Once you have decided that your proposed business is viable you can decide on the best structure for it. Do you want to be a sole trader, establish a limited liability company or use some other form of ownership such as a partnership structure?

## Setting up

You will need to get the paperwork in order so you can run a legally-compliant business. Depending on which business structure you choose, you will need to register your company, liaise with Inland Revenue and your accountant on your tax situation, and so on. Drafting terms of trade is also important; these will help ensure you get paid on time.

Your business will need to operate from a physical place. We discuss options of securing premises – whether leasing or making a property purchase, or you may want to work from home in the early stages.

If you're buying into an existing business, there will be particular considerations for the staff you may or may not be taking on. In a start-up situation, you may need to have people working with you. We explain the necessity of having employment agreements and your obligations to your staff as an employer.

Managing risk is something even the smallest business must be aware of. This section covers personal guarantees, business creditors, insurance and so on.

## Looking ahead

Although probably a long way off, we have a chapter called 'Succession' where we discuss how you may want to sell your business to new owners.

Asset planning is extremely important when you're running your own business. You should keep your business dealings separate from your personal affairs; and you should ensure you that you have Enduring Powers of Attorney and an up-to-date will.

## Checklist

Everyone likes to have a list where they can tick off each step as it is achieved. We include a checklist that lists tasks to be completed when setting up a business or taking over an existing enterprise.

Finally, we have included a glossary of terms used in business and a list of useful websites.

We hope you find *Getting Down to Business* useful as you establish and build your new venture.

We are happy to help guide and advise you during what is an exciting, but also probably an anxious, time. Please don't hesitate to contact us – we are here to help and we want to see your business prosper.

Good luck!

**Ngā mihi**



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# Buying an existing business

Purchasing an established business rather than starting from scratch has its advantages and potentially less risk than creating your own start-up. An existing business will often have an established customer base, contacts, suppliers, staff, equipment, goodwill and reputation; the 'difficult' start-up work has already been done for you.

However, buying an existing business is not without disadvantages and is typically more expensive than starting from scratch. You will need to give careful thought as to the reasons why the business is being sold, and whether you have the right expertise and knowledge to be able to continue running the business successfully.

This chapter discusses the main legal considerations you should consider when thinking about buying an existing business, including completing adequate due diligence on the business to ensure the purchase is the right decision for you.

## Agreement for sale and purchase

When you are looking to buy an existing business one of many considerations will be whether the business is to be purchased by way of buying the assets or, where the seller is a company, by buying the shares in that company.

**Share purchase:** In a share purchase situation the existing shareholders of a company sell their shares to you as the purchaser. The company continues to exist and you acquire the shares and therefore (indirectly) all assets and liabilities of the company. On settlement of the purchase, you would generally receive the full benefit of the business and its liabilities – both current and historic.

In a share purchase situation, you will need to give careful consideration to what you are paying for so you understand exactly what business assets you are buying.

**Asset purchase:** In an asset purchase you are directly buying the agreed assets from the seller. You may also take over some liabilities, but only if you agree to this.

The assets of the business (whether share purchase or asset purchase) can include tangible and intangible assets. Tangible assets are, for example, stock, machinery, plant or property that may be owned by the business. Intangible assets include intellectual property, contracts, telephone numbers, domain name, email addresses, the name of the business and goodwill.

There are likely to be advantages and disadvantages for a share or asset purchase, and the structure of any sale will be dependent on the particular circumstances of the business being sold. It is advisable to carefully consider the best option including the GST and tax implications, because each business sale will be unique.

In some circumstances, it may be tempting for you to sign an agreement with the understanding that the particulars are to be worked out at a later date in the process. However, it should be clear at the outset what each of the parties' expectations are to ensure you do not end up paying for something you were not expecting or paying more than you expected to. It is advisable to consider these with us, and your accountant, before signing any agreement to purchase a business.

From here on, this chapter discusses the aspects relevant to an asset purchase of a business.

## Key terms and conditions

Any agreement to purchase a business is likely to be subject to finance, due diligence, landlord approval and, possibly, employees to be transferred. Any terms and conditions of the purchase will depend on the particular transaction. Some of the key terms are discussed briefly below.

**Finance condition and GST:** This will involve discussions and approval from your lender (if you need to borrow funds for the purchase). You must ensure that you obtain enough funds to cover not only the deposit, but also what needs to be paid on settlement.

Before obtaining finance from your lender, we recommend you speak with your accountant to establish the GST position. In most cases, the purchase price is likely to be zero-rated for GST purposes, but this is not always the case. You do not want a situation where you come to settlement day and find that you need to fund a further 15% of the purchase price (for the GST component) on top of the amount you have arranged with your lender.

**Due diligence condition:** Due diligence is the process by which you as purchaser (and sometimes your advisers) are given the opportunity to review and evaluate information relating to the business and its assets before the sale.

Completing due diligence will help you to make an informed decision about whether to purchase the business and/or its assets, and the terms on which you may be willing to do so. Aspects of the due diligence process may also affect the price that you are willing to pay. We can help you in the process, as will your accountant. If you are asking professional advisers to assist you during this process, then it should be clear what areas of the due diligence checking will be covered by each adviser.

It is important to note that being unhappy with an aspect of due diligence does not automatically give you the right to renegotiate the terms or the price you have offered to buy the business. Generally, the only right you have is to cancel the agreement. Renegotiation will be at the option of the seller.

What specific due diligence is undertaken will differ depending on the nature of the business and the information available. Some important due diligence considerations may include:

- 
- ✦ **Financial statements:** The last three years of financial statements will help you assess the financial performance of the business, and identify its assets and liabilities. Your accountant will be able to assist you with this assessment.
  - ✦ **Aged debtors reports:** This will help you assess how quickly customers pay their accounts. Again, your accountant will be able to assist.
  - ✦ **Material contracts:** A review of contracts with suppliers, customers and franchisors will be important for a number of reasons, including ensuring there is provision for the contracts to be assigned to you as the new owner of the business, and whether consent will be required to do that. It is also worth considering who the contracts are with to ensure there is the ability to maintain a good working relationship with them after the business purchase is settled. Further consideration may need to be given to terms which might be inconsistent with your future plans, for example, non-competition clauses or restrictions on geographic locations within the contracts.
  - ✦ **Tangible and intangible assets:** Due diligence will include a review of the tangible and intangible assets, including which ones are important to the operation of the business, whether they are owned by the business being sold and whether there are security interests registered against them, what condition the assets are in and whether the intangible assets are owned by the business such as trademarks.
  - ✦ **Customer databases:** Depending on the type of business being sold, a review of the customer database will be an important part of the due
-

diligence process. Review of the database will enable you to establish who the customers are and assess whether they are likely to carry on using the business after settlement. If access to the database is available then it will be important to ensure that this is part of the business purchase.

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- ✦ **Past warranty claims:** These will be business-dependent, however, they may be important to establish the current reputation of the business. The vendor should be able to provide these to you.
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**Premises location and lease:** If there is a lease in place it is important to review the lease documentation, including all renewals, rent reviews and variations that may have occurred. The lease will need to be assigned to you; landlord approval is typically needed before the assignment of the lease can take place.

If there is no lease in place then consideration should be given to whether a lease should be entered into.

You can read more about leases further on in this handbook on page 38.

**Employees:** Where a business is purchased in an asset sale situation, employees in the business are made redundant by the seller when the sale is completed. You may want, however, to offer employment to these staff members and they agree to be employed by you as the new business owner.

During this process, it's important that you follow the restructuring process within any employment agreement and all relevant employment legislation to ensure that you comply with all your employment law obligations.

It is also important to note that there are further rules in place which protect people who are known as 'vulnerable workers'. These are workers who are considered to be at higher risk of losing their employment as they generally have little bargaining power. Vulnerable workers tend to be those in the cleaning and catering industry, and some employees in the aged or residential care sector. Rules provide these employees with rights to transfer over to the new business on their existing terms of employment.

If workers are to be employed by you after settlement, you will need to take into account annual leave and sick leave entitlements – whether these entitlements are to be paid out by the vendor or whether the entitlements will continue with you as the new employer. If you are continuing the entitlements, these will need to be apportioned between you and the vendor on settlement.

There are further tax considerations with these entitlements; it is advisable to discuss these with your accountant.



**Key employees:** Often there may be key employees who are valuable to the business and their continued employment in your newly-purchased business may have an effect on the value. You may wish to make it a condition of a sale that certain key employees sign employment agreements with you as the new business owner.

**Restraint of trade:** It will be important to consider whether there are any restraint of trade provisions in place for the vendor and the key people behind the business, particularly if these key people have not agreed to transfer their employment to you as the new owner.

Any restraint should focus on non-competition that restrains a vendor or employee from working in a similar business area, and non-solicitation of employees and customers of the business being purchased.

Any restraint must be fair and reasonable in relation to the geographical location and the length of time of the restraint. There must also be a balance between protecting your business and preventing a person from earning a living in their chosen field.

**Inventory/stock:** In an asset sale, there may be existing stock in trade that will be sold by the vendor. The actual value of this stock may not be known until a stocktake is completed – either on settlement or soon after. Generally, an estimated stock value will be given to the existing stock by the vendor with that stock being subject to a negotiated stock variation figure of around 5%-15%.

A stocktake is undertaken by the vendor and purchaser prior to, on or after settlement; this determines exactly what stock is being purchased and its value. When determining stock value, allowance should be made for obsolete and/or damaged stock.

If agreement cannot be reached on the value of the stock, an independent valuer will generally be brought in to do this.

Where a stock variation percentage is used, if the stock estimate was, for example, \$100,000 and the stock variation percentage was 15%, you would be required to pay the full \$100,000 on settlement. The vendor's lawyer would retain \$15,000 on trust until the final stocktake is completed. If the result of the stocktake is that there is more stock than estimated, then you will have to pay up to another \$15,000; if there is less stock, then you will be reimbursed the extra amount from the \$15,000 held by the vendor's lawyer.

As a purchaser, it is helpful for the percentage variation to reflect the reality of the business.

## Buying into a franchise

A franchise may be an option if you are considering buying an established business. A franchise involves a franchisor granting you, as a franchisee, with the right to operate a business in return for paying a franchise fee. Examples in New Zealand of franchise businesses are Jim's Mowing, McDonald's and Subway.

In a nutshell, you agree to operate the business in accordance with the franchisor's business model. The intent is that all franchises, wherever they are located, operate in the same way.

Buying a franchise can be an attractive option for many as the business model is created for you, and the franchise may have considerable goodwill.

You do, however, need to be aware of the details and full implications of the franchise agreement. Franchise agreements are often long and complex, and drafted heavily in the franchisor's favour. As you must follow the franchise model and the operating manual, there is little flexibility when it comes to making entrepreneurial decisions about the business.

Further to the due diligence process outlined on page 9, as the purchaser of a franchise you should understand that a franchise is not forever but for a finite term (with potential rights of renewal). When that term comes to an end or there is a default under the franchise agreement, you will no longer have a business, nor, in many cases, will you receive back any investment you have put into the business.

Due to the complexity of a franchise agreement, do talk with us to ensure you fully understand all the implications of this business model and that this is the right decision for you.

### To summarise

The above is a brief summary of what you need to consider when buying an existing business.

It is important to understand that every business purchase is unique with different pros and cons, and issues to be taken into account not only between the parties but also the business itself.

We strongly advise that before you make an offer to purchase a business you discuss the potential deal with us and your accountant.

*The following chapter, **Establishing a new business**, outlines a number of steps that a person considering a start-up should take. It is, however, just as relevant to the buyer of an existing business as there are a number of steps you will need to take that are outlined in the chapter. Please read it!*

## Confidentiality and non-disclosure agreements

Non-disclosure agreements (NDAs) are an important tool in situations when you are disclosing ideas or information to people who are not involved with your business. An NDA outlines the obligations and expectations in relation to information that will be shared between the parties, and what could happen if confidential information is disclosed to a third party.

### What is confidential information?

Generally speaking, an NDA states that the person receiving information from another party will agree not to use or disclose that confidential information – other than for specific purposes provided for in the NDA. The agreement will provide for a definition of what is to be considered 'confidential information'. That definition is critical to the NDA and what the parties understand should be protected.

It is also important to have a limit on the length of time that the information should stay confidential. Often, it will remain confidential until the information is in the public domain or the information is no longer considered a trade secret.

### Why are NDAs important for your business?

Having appropriate people sign an NDA is critical as you establish your business as it helps protect your new business idea when you are in discussions with other parties and investors.

NDAs are also important for vendors when they are in discussions with potential purchasers of their business; they will help protect important information about the business and ensure that the information is only used for the purposes of investigations into the purchase of the business, and not for any use outside of that permitted by the NDA.

We can provide an NDA that is specially tailored to the business you are proposing to buy, or sell. Please be in touch with us early on during the process.







# Establishing a new business

Having an idea to establish your own business is a good beginning. Before you invest any money or get too far down the track, however, you should do some research that will help you decide whether you can operate a viable and sustainable business.

Once you've decided that your business idea is a goer, the next step is to do some planning that will confirm (or not) that your proposed business will work. Although a feeling that your business idea will fly is good, some solid research will give you peace of mind that it is an idea worth pursuing.

We outline some steps below that you can take before you commit any of your hard-earned cash.

## Do your research

It's not a good idea to launch a business on a hunch. Some cool-headed thinking and research will help confirm you are on the right track for your new product or service.

We list some points you should consider:

1. Is there a gap in the market?
2. Can you do something better than what is currently offered?
3. Is your proposed product/service a 'need' or a 'want'?
4. Does it address a latent need? Remember, no one knew they needed or wanted a microwave in the late 1970s, but now a microwave is very much part of people's kitchens.
5. Is it a product that is sustainable long-term, or is it something that addresses a short-term issue? (Remember the products/services that appeared during the COVID lockdowns?)

- 
6. What is your target market?
  7. What would be the price of your product/service that your customers would be prepared to pay?
  8. What is its unique selling point (USP); what makes it stand out from its competitors?
  9. Ask potential customers about your proposal? Would they buy your product or take up your service? And why would they do so? What makes it attractive to them?
  10. Come up with a possible name for your business.
- 

**Research help:** If you need to do some deep research about the viability of your potential business, there are a number of potential funders/advisers who can guide you. Some of these funders may be helpful:

- + **New Zealand Government:** [www.business.govt.nz/how-to-grow/getting-government-grants/grants-and-help-for-your-new-business](http://www.business.govt.nz/how-to-grow/getting-government-grants/grants-and-help-for-your-new-business)
- + **Callaghan Innovation** for incubators and accelerators: [www.callaghaninnovation.govt.nz](http://www.callaghaninnovation.govt.nz)
- + **Te Puni Kōkiri** for Māori business owners: [www.tpk.govt.nz/en/whakamahia/maori-enterprise](http://www.tpk.govt.nz/en/whakamahia/maori-enterprise)
- + **The Icehouse** for support and mentoring: [www.theicehouse.co.nz](http://www.theicehouse.co.nz), and
- + **Stats NZ** has a huge amount of data available for business: [www.stats.govt.nz](http://www.stats.govt.nz).

## Personal attributes

Establishing a new business can be exhilarating, energising and a great deal of fun – when the going is good.

It is important, however, to make sure you have the personal attributes that are well-suited to the ups-and-downs of a new business.

**Be organised:** You should be able to follow your business plan and to work towards your milestones in an orderly way. Good time management skills are essential. As well, you need to have the discipline to ensure you pay your bills and taxes on time.

**Cope with risk:** You should be comfortable with the risks associated with a start-up and be able to hold your nerve. It can be challenging launching a new business. You will have to market and sell your product or service, cope with knockbacks, deal with lumpy cash flows and all the other activities that go with running a business.

**Financially secure:** Make sure you have a financial nest egg that will see you through the first few months of your new business venture. This will ensure you can pay all your business establishment and operating expenses, and can also pay your personal outgoings such as mortgage, utilities, food and so on.

**Mentally tough:** It can be hard work establishing a business and there are often many set-backs and disappointments along the way. You need to be mentally tough to cope when things don't go your way, and then to have the resilience to pick yourself up and carry on.

**Open to new ideas:** Your customers, colleagues and friends may have good ideas on how to not only enhance your new product or service, but they may also come up with ideas for innovative new offerings. Be prepared to listen to what they say and thank them for their input.

**Celebrate the wins:** It's good to take time out and celebrate a business win, or positive news. And try to be a cup half-full person!

Having completed your research and believing you could have a viable business, you should now get down to the hard stuff and do some planning that will back up your research.

## Naming your business

It goes without saying that the name of your proposed business is vitally important.

- ✦ It needs to tell your audience what your business is about
- ✦ Be short and snappy
- ✦ Unique (obviously), and
- ✦ Easily remembered and pronounced.

Sometimes business owners want to add some humour to their business name such as 'Green Wellies', a small plant eco-business in Wellington, where all the puns are intended. Others prefer something like 'Al Chainsaws' or 'Smith Jones Chartered Accountants'.

If you are looking at using a business name in a language other than English, do robust due diligence to ensure it is not offensive or culturally inappropriate, that it is spelled correctly and that you are permitted to use it.

Once you've chosen your name, you should check that no other business has that (or a similar) name. Go to OneCheck ([www.business.govt.nz/onecheck](http://www.business.govt.nz/onecheck)) where, in one easy step, you can verify that name is available as a business name, trade mark, web domain and on social media. We write more on this in the Setting up your business chapter on page 27.

## Brand values – the way you do business

Your brand isn't just about your business name and your product or service. It also needs to incorporate some values about the way you do business.

Your brand values are also reflected in the style and tone of your communications. If you're a business operating in the corporate sector, the way you communicate with your customers and prospects may have a different style and tone from that of a neighbourhood café or bakery.

We have more on developing your brand on page 29. In addition, there is a great deal of information online that will guide you in developing your brand values.

## Make a plan

Although it may sound tedious, to make a success of your business idea you should do some more formal planning. This can include:

- ✦ A business plan, go here for a sample template: [www.business.govt.nz/getting-started/business-planning-tools-and-tips/how-to-write-a-business-plan](http://www.business.govt.nz/getting-started/business-planning-tools-and-tips/how-to-write-a-business-plan)
- ✦ SWOT analysis – a matrix of the strengths and weaknesses, and the opportunities and threats, for your proposed business
- ✦ Calculating your business set-up costs such as design costs for brand design, website, company registration fee and so on
- ✦ A budget that includes the start-up phase and your first 12 months of business. This will have your estimated income and expenditure, and
- ✦ Cash flow for the first 12 months you'll be in business.

## Confidentiality and non-disclosure agreements

Non-disclosure agreements (NDAs) are an important tool in situations when you are disclosing ideas or information to people who are not involved with your business. An NDA outlines the obligations and expectations in relation to information that will be shared between the parties, and what could happen if confidential information is disclosed to a third party.

For a fuller explanation about NDAs, go to page 13 as we have covered it in the section Buying an existing business.

We can provide an NDA that is specially tailored to the business you are proposing to buy, or sell. Please be in touch with us early on during the process.









# Choosing a business structure

Every business needs a framework in which to operate. Your business structure should be flexible enough to deal with your first few years of business, and also have the adaptability to change as your business grows. It's wise to think not only about what your needs are now in starting up, but also to be mindful of how your business may change in the medium-to-longer term.

In New Zealand, the most popular ways of doing business are to operate as a sole trader, establish a company or form a partnership.

In this section, we outline the pros and cons of these three business structures. We also discuss briefly some alternative business structures such as a joint venture and a limited partnership.

## Sole trader

Setting up a business as a sole trader is very straightforward.

As a sole trader you operate under your own name, and personally own all the assets of the business and you are entitled to all the profit. Start-up costs, generally speaking, are low as you don't have to register the business, and there's a possibility that at least in the early days of the business you may be operating from home. Setting up as a sole trader does not require registration with the Companies Office.

On the downside, a sole trader can have difficulty in seeking investment or finance when looking to expand the business; so growth of the business can be restrained. It can also be more difficult to sell your business as so much of the goodwill is tied up with your personal reputation.



In addition, as a sole trader you are personally responsible for all the business debts, taxes, other obligations of the business and any claims made against the business.

To help reduce your personal risk, we recommend you consider separating your business assets and debt from your personal assets by, for example, establishing a company that would own the business assets and reduce your personal risk. Otherwise, your personal assets (such as your house) could be sold to pay any business debts. We can guide you on the best way to do this that suit your particular circumstances.

## Company

A limited liability company is one of the most popular structures used to run a business. Your liability as a shareholder is limited (more on this further down this section), it gives your business more credibility than being a sole trader, it is usually more straightforward to sell and, if you're looking at significant expansion, it can be easier to obtain funding and new investment.

A company is a separate legal entity in its own right. It can own assets, enter into agreements to buy goods or services and incur debt. In essence, it formally separates your business transactions from your personal affairs which means that you are not personally liable for the company's debts unless you have been careless or you have given a personal guarantee. A company has its own IRD number, pays its own taxes and so on.

Running a company, however, may require more paperwork than operating as a sole trader as the business, and its activities, must comply with the Companies Act 1993 and other legislation.

Good record keeping is crucial to not only protect you as a director or shareholder, but also to give comfort to any employees. Designing and maintaining good systems and processes from the outset will help keep your company on the right track.

**Directors and shareholders:** The directors of the company have significant obligations and responsibilities that come under the umbrella of the Companies Act. In a small company, the directors are usually also the company's shareholders.

The Companies Act sets out the duties of directors including (amongst other things) that of acting in good faith and in the best interests of the company, and to use their powers only for the purpose for which they have been given. Particular processes must be followed, disclosures must be made, regular reports produced, and appropriate records (such as annual financial statements) must be kept.

If you own shares in the company with another person (or a group of people), you should have a constitution and a shareholders' agreement.

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## "A limited liability company is one of the most popular structures used to run a business."

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**Constitution:** A company's constitution sets out the rights, powers and duties of your company, its board, each director and shareholder.

Companies may be established without a constitution but this is not recommended. The advantages of a constitution are that it clearly sets out many necessary rules, powers and duties of the company, directors and each shareholder; it can also provide powers that would not otherwise be provided under the Companies Act. If your company has no constitution, it is automatically governed by the default provisions of the Companies Act.

You should consider and take advice on the need for a constitution early on in the establishment of your business, if not before it is set up. A constitution can be adopted after your company is registered, however, it would be best to consider the need and content of your constitution at the outset.

Your company's constitution then becomes a public document which can be viewed on the Companies Office website. As it is in the public domain, the constitution should be kept to the basics and only contain information that you are happy to share publicly and/or is of a generic nature. A shareholders' agreement is a better place to include anything that is likely to change or that you would like to keep confidential.

There are two options for drafting a company's constitution:

1. Buy an off-the-shelf product from a third party supplier, or
2. Have a tailor-made constitution drafted that suits your company's particular circumstances. We can help you with this.

A well-drafted constitution can save you significant hassle and expense by establishing early on the clear mechanisms and processes for your company. This will provide clarity to all involved.

**Shareholders' agreement:** A shareholders' agreement sets out arrangements between your company's shareholders, the way in which the business should be run and how the shareholders should exercise their rights. It is a private document and is not required to be registered on the Companies Office website.

The agreement can include provisions about how profits (or losses) are allocated to each shareholder, steps to take on how a dispute should be handled, whether a shareholder has the right to appoint a director and whether unanimous consent of directors is required for some company activity. It should also contain what can (or cannot) be done in a time of crisis such as the death of a shareholder, and if a shareholder wants to sell their shares in the company.

## Partnership

**Traditional partnerships:** This business structure is an agreement between two or more people to share the operation of a business together. Set out in a partnership agreement is how the partners will share the work, the expenditure, the profits (and losses) and how the partnership will operate. Traditionally, law and chartered accounting firms and other professions have run their businesses in a partnership structure.

Unlike a company, a traditional partnership is not a separate legal entity. Partners, in contrast with company shareholders, do not have limited liability but are jointly liable for each partner's debts and obligations. Being in a traditional partnership is a bit like operating as a sole trader, but with more than one person.

One of the challenges in a partnership is that the arrangement is specific to those partners named in the partnership agreement. When a partner enters or exits, a new partnership is formed; this requires a new partnership agreement to be signed.

If your partnership owns assets such as property, as partners enter and exit the partnership, the property title will have to be changed to reflect the new partnership arrangements. This is a cumbersome situation. To alleviate this, it is usually better that these assets are owned by a company or trust that exists alongside the partnership. Separating ownership in this way also separates assets from any risks associated with business activities.

A partnership does not pay tax per se, although it must file a tax return. Each partner is required to make a separate tax return taking into account the earnings of the partnership. Any tax position will need to be carefully considered and advice obtained from an accountant.

A partnership can be a straightforward way to do business in a way that reflects each partner's strengths, particularly where a very stable group of people want to work together.

**Limited partnerships:** Slightly different from the traditional partnership model above, limited partnerships are a fairly recent addition to business structure options. A limited partnership has the features of a traditional partnership, but is a limited liability entity, the partners' rights and obligations are recorded in a private partnership agreement which establishes the partnership.

A limited partnership is governed by the Limited Partnerships Act 2008 and must be registered with the Companies Office.

This type of partnership can involve some very complex documentation and agreements. To know more about how this business structure works and what it entails, please contact us.

## Joint venture

A joint venture is an agreement between two or more parties to carry out a project for a particular purpose such as operating a factory or developing a property.

A joint venture is not itself a separate legal entity, however the parties may choose to incorporate a separate joint venture entity such as a company.

Its purpose is to use the other party's expertise, their facilities or access to markets to achieve an agreed milestone or result without the need to restructure their own business model. A joint venture is usually limited in scope, but can run for many years.

When considering a joint venture, it is important that the parties are clear about their roles and accountability. A joint venture agreement clarifies who is to own what assets, how income is to be divided, and what the processes and procedures of doing day-to-day business will be. It is also vital that there are clear dispute resolution procedures.

Joint ventures usually mean that there are high stakes involved. If you are considering a joint venture, do talk with us very early on so we can discuss your options.

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We have covered the most popular structures for doing business in New Zealand in this chapter. There are, however, other options that may better suit your particular situation such as a holding company or a trust. We discuss these briefly on pages 63–65.

If you think your proposed business may not necessarily fit into any of the structures we have discussed or you have a particular outcome in mind, please do not hesitate to talk with us.





# Setting up your business

Having decided on the best structure for your new business (which may be either a start-up or the purchase of an existing business) you should finalise the name for your business (we have more on naming your business on page 17) get the paperwork in order and establish your workplace.

## Registration

There are a myriad of tasks to undertake when setting up your business to ensure that you fulfil your legal obligations and responsibilities. These include:

**ONECheck – choosing a name for your business:** Before you start the paperwork, you will need a name for your business. Go to ONECheck ([www.business.govt.nz/onecheck/](http://www.business.govt.nz/onecheck/)) to ensure search to ensure that your chosen name hasn't already been used for a business, and also that you can use it for a domain name, a trade mark (if needed) or for social media.

You want a name that is original, explains what your business is about, is easily spelled and pronounced, does not mean anything impolite in another language, is not culturally insensitive and is not too similar to another business in your sector.

There are many tips online to help you find a suitable business name.

If applicable, you should also use the Intellectual Property Office of New Zealand to check your proposed trade mark on the Trade Mark Check.

We have more information about intellectual property property on page 29. We can provide specialised advice on intellectual property matters and/or recommend specialists within the NZ LAW group who can assist.



## Getting the paperwork completed

**RealMe®:** Your RealMe® login allows you to access many online services using one username and password. It provides security to prove who you are online.

Your RealMe® login can be used, for example; to open a bank account, give access to the Companies Register, apply for licenses and permits and so on.

For more information on RealMe® and to get your RealMe® login, go to [www.realme.govt.nz](http://www.realme.govt.nz).

**New Zealand Business Number (NZBN):** Your NZBN is a globally-unique identifier that can be used by every business in New Zealand. A benefit to you of having this number is that each time you update your business information with one government agency, it will automatically update it with other agencies.

To get more information on NZBN, go to: [www.nzbn.govt.nz/whats-an-nzbn/about/](http://www.nzbn.govt.nz/whats-an-nzbn/about/)

**IRD number:** An IRD number is issued by Inland Revenue to keep track of taxes you pay (and that of your business) and entitlements you receive.

**Sole trader:** If you're setting up as a sole trader, you do not need a separate IRD number as all your tax affairs will be incorporated under your personal IRD number.

**Other business structure:** You will need a separate IRD number if you're establishing a company, a partnership or other business entity; this number identifies your business for all its tax-related matters. For more information, go to: [www.govt.nz](http://www.govt.nz) and search 'IRD number'. This is the same number your business will use to pay GST, if it is GST-registered.

You will also need a MyIR identification which means you can communicate securely with the IRD online. To find out more, go to: [www.ird.govt.nz/contactus/myir](http://www.ird.govt.nz/contactus/myir)

**Companies Office:** If you've decided that a company structure is best for your proposed business, you will need to register your business with the Companies Office. There is very good step-by-step information at [www.companies-register.companiesoffice.govt.nz/help-centre/starting-a-company](http://www.companies-register.companiesoffice.govt.nz/help-centre/starting-a-company).

**Accounting systems:** Any business needs a system to issue invoices, record payments, pay any staff and so on. The most popular and well-known systems are Xero and MYOB, but there are also others. It is a good idea to ask your accountant which system they prefer, and to get a steer on the pros and cons of each.

**Domain name:** There are a number of organisations with which you can register your domain name. You may wish to register several domains (different/similar versions of your business name and/or .com, .nz and so on) to prevent a competitor taking them.

## Establishing your brand

Your brand is more than just your logo, you need to think about the way you want your business to be perceived by your customers and people who will refer prospects to you.

Look online for businesses that have a brand presence that you admire and are appealing, and also look at those you don't like – for whatever reason.

The purpose of a brand is to differentiate your business from another – both in its look and feel, and the style and tone in the way you communicate with your target audiences.

If you are launching a start-up that develops apps, for example, the look and feel of your logo and the style and tone of your communications are likely to be different from that of a new plumbing business, or for a company selling fragrances for women. And you need to think of your prospective customers (and referrers) who will need to be inspired by your website to buy your goods or engage your services.

It's important to get your brand right from the very beginning. Talking with a branding specialist and/or a graphic design studio will help you pull together a brief so your business collateral and website can help achieve your business objectives.

## Protecting your intellectual property

You will have already checked that the name of your new venture is not the same as an existing business (see page 27 under ONECheck) so you can ensure your business is not confused with another with a similar name. It is hugely important that your business doesn't infringe on the intellectual property of another business as you can run the risk of having to re-brand, or potentially having to appear in court and pay damages to the other party for the infringement.

As well as this basic check, you should look at future-proofing your business so its intellectual property is safe.

**Trade mark:** A trade mark distinguishes the brand of the goods or services that you supply to the marketplace. It can include a logo, the name of the business, shapes, colours, sounds, smells or any combination of these. Look at how Cadbury chocolate branding is quite different from Whittaker's products; and the ANZ Bank and Westpac have quite different identities.

To find out more about trade marks and how they can give value to your business, go to the Intellectual Property Office of New Zealand's website: [www.iponz.govt.nz/about-ip/trade-marks/](http://www.iponz.govt.nz/about-ip/trade-marks/)



**Patents:** A patent is a right that is granted for an invention. A new product or process can be patented, as can the method of manufacture and the material from which it is made.

If your business is based on an invention, you should seriously consider registering a patent for it. This will prevent anyone else making, using or selling your invention in New Zealand. A patent can only be obtained where an invention is novel, involves an inventive step and is useful.

It is VITAL that you don't tell anyone of your invention before a patent is granted without a confidentiality agreement being signed. Even after a patent is granted, you should take care not to disclose to anyone any confidential know-how relating to your invention without a signed non-disclosure agreement (NDA).

There's more useful information about patents at the Intellectual Property Office of New Zealand of New Zealand at [www.iponz.govt.nz](http://www.iponz.govt.nz).

Intellectual property is a highly specialised area of the law; we strongly recommend that you seek advice from us when dealing with trade marks, patents and so on.

## Terms of trade

Acquiring customers, retaining their business and being paid should be the core goal of your business.

In doing business you have agreed to provide your customer with a service or goods in return for money. In essence, this is a contract or 'terms of trade' or, if you're selling services, it's sometimes called the 'terms of engagement'.

**What are terms of trade?** Terms of trade govern the relationship between your business and your customer. They set out each party's responsibilities and expectations, how you will be paid and in what timeframe, and how, in some cases, problems will be resolved. Once the terms are signed and dated by you and your customer, they cannot be varied without the other party's agreement.

The terms can be very brief and can often fit onto one page; they are often on the reverse of an order form or credit application.

**Why do you need terms of trade?** Well-drafted, easy-to-understand terms of trade make it much easier to do business. Your terms of trade help ensure there is a clear understanding about how you charge and how you're paid, and your rights if you don't get paid on time. They can also include a right for you to stop supplying goods or for you to have the ability to sell your customer's assets to recoup the debt.

They are also valuable in preserving the reputation of your business. The clarity they provide to your customers goes a long way in preventing misunderstandings which can lead to disputes.

If you don't have written/signed terms of trade, you may only have a verbal contract with your customer to rely on. Although a verbal contract is enforceable under the law, the terms would need to be clear and unambiguous. The recollections of each party on what was agreed are likely to differ, and the enforceability and dispute resolution process could become a painful undertaking.

We strongly recommend that your business has well-drafted fair terms of trade, and that you do not rely on verbal agreements.

Terms of trade should be written specifically for the needs of your particular business. There are, however, some general principles that are fairly standard.

**Parties:** Your business is one of the parties to the terms of trade; the other is your customer – whether it's a person or a company.

**Description of goods and services:** There must be a clear description of the goods and/or services to be provided so that your customer has an accurate understanding of what they are purchasing, and it is absolutely clear what your business is providing.

**Price:** The price of the goods and/or services should be clearly recorded. If, however, there is no fixed price you will need to calculate a cost estimate/quote and the terms for that – for example, the estimate/quote may only be valid for 30 days.

You should also make clear whether you need to be paid in stages (progress payments), require a deposit or get paid in advance if there's a substantial outlay for materials and/or costs such as lodgement fees.

**Installation and delivery:** When selling goods that need to be installed, your terms of trade should specify whether the installation is included in your quote or cost estimate. As well, your terms of trade should clearly state who will bear the risk of damage while the goods are being installed and, if insurance is required, who will pay for it.

If part of your service includes delivery of the ordered goods, your terms of trade should state where and when the goods will be delivered, how delivery is to be made, who pays for the delivery and the additional cost (if applicable).

**Ownership:** Ownership of the goods doesn't automatically pass to your customer when they are delivered. Your terms of trade should specify when ownership of the goods is transferred to your customer – usually this is when payment is made in full (which may or may not be before or after delivery). Having a 'reservation of title' clause in your terms of trade will clarify this point. It should be noted that if your business is selling to consumers, the Consumer Guarantees Act 1993 requires that, for a reservation of title clause to be enforceable it must be fully explained to your customer, they must acknowledge your explanation in writing and you must give them a copy of the agreement.

**Responsibility for loss or damage:** Your terms of trade should also address when responsibility for loss or damage to the goods passes to your customer. The default rule under the Contract and Commercial Law Act 2017 is that risk passes to the customer when they become owner of the goods (that is when they pay for them), unless the terms of trade say otherwise. To mitigate against the risk of goods being damaged whilst being delivered and your business having liability, you may want to include a clause in your terms of trade stating that risk passes to your customer when, say, the goods leave your premises.

**Getting paid:** The important bit! Your terms of trade must set out when and how you are to be paid. Most businesses expect to be paid on the 20th of the month following the date of the invoice, that is, if your invoice is dated 30 June, you should expect to be paid by 20 July.

Most businesses use internet banking so you should provide your business bank account number, with instructions to place the invoice number in the reference panel and so on. You may also want to offer a cash payment option if the amounts you deal with are relatively small.

**Penalty for late payers?** Most businesses have a section in their terms of trade setting out the penalties for late payers. Usually this involves adding interest, perhaps at your bank's commercial lending rate, as well as the ability for you to add any legal and administrative costs incurred by your business in chasing the debt.

In reality, most businesses give some leeway for late payers as a sign of goodwill. However, your business is not your customer's bank and you need to be firm about being paid in good time.

If you have real doubt about your customer's ability to pay, you may want a deposit or to secure your payment against something of equal or greater value. An example of this would be taking a security interest in some or all of your customer's assets. This will give you the ability to take possession of an asset or appoint a receiver, and sell the secured asset/s to recover the debt owed to you.

## Creditworthiness

If you are selling goods and/or services on credit, you must disclose all the information to your customer as required by the Credit Contracts and Consumer Finance Act 2003. An example of this is a hire purchase situation or where your terms of trade provide that payment is deferred to a date after the goods/services have been provided.

In addition, you must provide the credit (along with other services) with reasonable skill and care as required under the Consumer Guarantees Act 1993.

**Personal guarantees:** When dealing with a company, you may want to ask for a personal guarantee from either the director/s and/or the company shareholders. This means you can pursue the guarantor if the company goes into liquidation or your invoice has not been paid.

There is more on personal guarantees on page 55.

**Personal Property Securities Register (PPSR):** The **PPSR** gives the highest level of protection to businesses offering credit, albeit for high-end goods. The PPSR is a public register that allows businesses and individuals to register interests in personal property – in a similar way to a mortgage on a land title. If your customer has bought or leased goods from you on terms, you can register a charge (known as a 'financing statement') on the PPSR over the goods provided or over your purchaser's personal property. PPSR registration gives you a priority claim over other creditors who have not registered their interest or those who register after you.

A PPSR security interest will apply to personal property. Once property becomes affixed to a building or land, however, it may then be considered real property at which stage a mortgage over the property would need to be considered. Mortgages can often be difficult to obtain and the rules around security interests can be complex. Please contact us to discuss how the PPSR and/or mortgages may be able to help protect your interests.

If you want to have the ability to take a security over the goods you supply or over your customer's personal property, you must specify your right to do this in your terms of trade, otherwise you are not entitled to use the PPSR.

**Credit application:** Where you are providing credit accounts to customers you should ensure that they complete an application for a credit account (often this includes trade references) in order to reduce your risk of incurring a bad debt. Many businesses have this protocol in place before a customer's first order is processed and fulfilled. This step should be included in your terms of trade.

**Privacy:** It is essential that every business complies with the provisions of privacy legislation when it holds customer names, addresses, and other personal and private details. Your terms of trade should set out how you intend to keep their information safe. Alternatively, your business should have a privacy policy in place that sets out how the business will collect, use and share personal information.

The Privacy Act 2020 sets out the rules for collecting, using, disclosing and storing personal information in all forms, including online. There are hefty penalties if you get it wrong. For guidance, we recommend you go to the Privacy Commissioner's website, [www.privacy.org.nz/](http://www.privacy.org.nz/) and read more and read more information about New Zealand's privacy laws.

Your terms of trade document is one of the most important documents for your business. Even though there are off-the-shelf terms of trade available online, we strongly recommend that your terms of trade are tailor-made to reflect the exact nature of your business. This will help ensure that you are not only paid on time and in full by your customers, but also that you are well-positioned in case there is a dispute over being paid at all.

## **Your obligations under consumer legislation**

Every business has an obligation to protect consumers when buying goods and/or services. We list below the consumer laws that you must comply with when you're in business.

- + Commerce Act 1986
- + Companies Act 1993
- + Consumer Guarantees Act 1993 (CGA)
- + Contract and Commercial Law Act 2017 (CCLA)
- + Credit Contracts and Consumer Finance Act 2003 (CCCFA)
- + Fair Trading Act 1986
- + Privacy Act 2020

There is a brief rundown on each of these statutes in the Glossary on page 71.





# Establishing your workplace

Finding the right place to establish your business is important. You want premises that reflect the needs of your business – whether you need a place to store stock or plant, or whether you simply need a desk, chair and a fast internet connection.

You should start first by identifying the best location to work, then decide what you *need* and what you *want* for the least possible outlay. Inevitably, some degree of compromise will take place.

It's also worth considering how your business needs may change as it becomes more successful. The workplace you need now may not work as your business grows. Taking a medium-term view of your business goals when searching for an operating base will help ensure you start on the right foot.

## Working from home

Working from home is becoming an increasingly common and cost-efficient option – particularly for start-ups.

If you are self-employed and operate your business from home you may be able to claim the space you use as a business expense in your tax return. You may also be able to claim a proportion of other expenses such as rates, insurance, internet connection and so on. Inland Revenue has some very useful information to help guide you on what is deductible and fair. Go to [www.ird.govt.nz](http://www.ird.govt.nz) and search using your home for business.

Depending on the type of work being undertaken from home, you may also need to consider obligations under the Resource Management Act 1991 and your local



authority's district plan. These may place restrictions on certain types of activity or may require you to obtain a resource consent to operate from residential premises.

## Shared work spaces

Rather than work from home, you may want to think about working from a shared space in a serviced office so you do not have the overheads or obligations that you would in leased premises.

Shared work space or serviced offices are popular because they give physical separation from your home space; there is access to printers, meeting rooms and so on; they tend to be shared by 'like' people; and it provides some social interaction, which is particularly important if you're working alone. Shared work spaces tend to be collaborative environments with many businesses helping each other or providing sounding boards for new ideas.

Arrangements vary in terms of a lease or tenure. Some shared spaces have separate and lockable offices, or offer pods, desk spaces or hot desks where you can rent a space on an informal basis for only a few hours, days or weeks. To set up an office somewhere more permanent for, say, a year, you are likely to be required to sign a lease. For more information on leases, the following section will be helpful.

## Leasing premises

Leasing is the most common way to secure premises for small-to-medium sized enterprises (SMEs). The leasing market provides sufficient flexibility and range to suit almost any operation.

Finding the premises that are right for your business, however, involves more than locating space. The terms of your lease control your use of the property and your relationship with the landlord. Ensuring that your lease terms are reasonable and align with your business needs is crucial.

**Lease form options:** There are two standard forms that are used for most commercial leases in New Zealand:

1. The Auckland District Law Society (ADLS) Deed of Lease is the most common form of lease used by businesses. Unlike some other forms of lease, the ADLS document takes a balanced approach to the rights and obligations of both the landlord and tenant. It is, however, a standard document and many landlords and tenants will vary clauses so that the provisions specifically apply to their particular circumstances.
2. The Property Council Retail Lease is a more specialised lease form than the more general ADLS lease. Originally designed as a standard lease for shopping centres, the Property Council Retail Lease is now used for a wide range of multi-tenanted retail properties.

**The devil is in the detail:** Tedious as it may sound, getting the detail right in a lease is incredibly important. If you have a dispute with a landlord, it's the details that will see you through.

Understanding exactly what you are agreeing to at the outset is essential in understanding your rights and responsibilities as a tenant.

Regardless of the form that your lease takes, there are a number of important clauses that you will need to think about.

**Rent:** Your rental payments are likely to be a significant expense for your business and must be included in your budget. Obviously, the rent should reflect the size and quality of the space you want to rent, its location and current market conditions.

You will also need to check what the rent includes, for example, are any car parks included? How often is the rent to be paid – monthly or quarterly? How is the GST component of the rental payment to be managed? Is the rent quoted exclusive or inclusive of GST? If you're sharing space with other tenants, you should consider aspects such as how is the rent divided and the date the rent falls due each month, as this may impact your cash flow considerations.

**Outgoings:** How are the landlord's operating expenses (known as outgoings or sometimes 'opex') calculated and to be paid? (Some leases include outgoings as a component of the rent.) Outgoings can include rates, electricity charges, rubbish collection, fire service charges, cleaning, building maintenance and repair, yard and parking area maintenance and repair, management expenses and the costs incurred for your landlord to obtain a building warrant of fitness from the local authority.

**Personal guarantees:** Landlords often require someone to personally guarantee the obligations of the tenant contained in the lease. This provides security to the landlord that all payments due under the lease by the tenant are met. This is a usual commercial arrangement.

The director(s) of your tenant company will usually be asked to provide a personal guarantee(s). Alternatively, it could be a third party who has sufficient personal assets to secure payment of the obligations, if required. We recommend that any such third party seeks independent legal advice before agreeing to this.

You do not have to agree to a landlord's request for a personal guarantee, however it is unlikely that a landlord will agree to no personal guarantees if the tenant is a company. If your company is well-established and you can prove that the risk or default is low, the landlord may agree to exclude the guarantee.

An alternative to a personal guarantee is a 'rent bond' or 'bank guarantee', where your bank agrees to hold an agreed amount of money, usually six to 12 months' rent, on trust for the benefit of the landlord. If you are in arrears on rent or breach the terms of the lease resulting in a loss to the landlord, the landlord can access the rent bond/bank guarantee as reimbursement.

If, however, your landlord insists on a personal guarantee, it is important that you limit the extent of your liability as best you can. Even though your landlord isn't obliged to agree to any of the options below, you can ask that:

- ✦ The guarantee is limited to a specific sum or timeframe
- ✦ The landlord agrees to notify you (as guarantor) of any notice of breach they have served on a tenant
- ✦ Your landlord seeks remedies against the tenant before exercising their right against you, or
- ✦ The guarantee be released on assignment of the lease. 'Assignment' is where a tenant transfers its rights in the lease to a new tenant.

Do note that a personal guarantee continues until all of the tenant's obligations under the lease have been discharged notwithstanding the fact that the lease may be assigned. If you assign the lease to a new tenant, the obligations under the guarantee will continue even after the assignment takes place, until the lease is varied or renewed or unless agreed otherwise with the landlord.

There is more about personal guarantees on page 55.

**Term and lease renewal:** Negotiating the right term for your lease and the number of renewals will, among other things, depend on your business needs. A renewal gives a tenant the right to remain in a premises for a further term once the initial term of the lease comes to an end. A tenant can choose to renew the lease at that point or decide not to take up the renewal and end the lease. It is important to read the tenant's obligation around renewals to avoid any issues in extending the term.

Renewals give flexibility to tenants. If your business is new you may not want to agree to a long-term initial lease as you will probably want to keep your options open while your business gets established.

You may also want to align your lease renewal date(s) with the rent review date(s).

If the actual premises form an important part of your business and your business is relatively established, you may need to negotiate a longer term (including renewal periods) to provide long-term security for your business.

**Rent reviews:** Landlords may review your rent by several methods, two of the most common are:

- ✦ Market rent review, or
- ✦ A Consumer Price Index (CPI) rent review.

'Market rent review' is subject to market pressures so, in theory, the rent could go up or down in line with the market. Most leases however, have what is called a 'ratchet clause' that means your rent will not go below what it was at the start of the lease. (It's also important to consider whether your fit out cost is included in the market rent review assessment.)

'CPI rent review' ensures regular rent increases are linked to the quarterly Consumer Price Index. Sometimes a lease will contain both market and CPI rent reviews which ensure that the rent keeps up with changes (usually increases) in market rents.

If you receive a notice from your landlord about raising the rent in accordance with market rent review and are concerned about the level of the increase, you should immediately dispute the increase otherwise you may be deemed to have accepted it.

**Lease and renewal costs:** Leases have a provision for each party to pay for their own costs for the negotiation and preparation of the lease, and any renewal after that. Those costs include your lawyer's fees and the landlord's lawyer's fees for preparing and negotiating the lease or renewal document. Despite this, a landlord will often seek to vary this clause so that you, as the tenant, pay the landlord's lawyer's fees associated with any renewal.

It's good to make sure that you know what costs under the lease you are responsible for, so there are no surprises and you can include them in your budget.

**Insurance:** Floods, earthquakes, landslides and many other natural disasters have hit New Zealand businesses over the past few years. It pays to be insured. But it's not only natural disasters against which you should insure your business. You should insure against any risks that are outside your control.

Insuring your business (and yourself) against risk is a business necessity, it should not be considered an optional item.

There is a full section on insurance and risk in the section Managing Risk on page 55.

**Permitted use of the premises and the property:** It is important that you check that the description of the permitted use of the premises in the lease is broad enough to cover your business operations – now and in the foreseeable future. Do this check before you enter into the lease or take over an existing lease. If you forget to do this, and you want to change the way in which you use the property, you will need to obtain your landlord's consent (which cannot be unreasonably withheld) for a change of use.

The Resource Management Act 1991 regulates all uses of land, water and air. District and regional plans control the activities on the land, the use of water, the discharge of contaminants and coastal matters. Whether you lease or buy, it is important to check these plans to see whether you will be permitted to carry out your business activity from where your business premises is located or whether you

need to obtain resource consent. You will also need to ensure your premises meets the requirements of all building laws, regulations and codes for your particular business activity.

**Repairs and maintenance:** Your lease should list which parts of the property you are responsible to maintain – usually the interior of the premises. The list could include breakages and minor replacements, interior painting, worn floor coverings, grounds maintenance, and water and drainage systems. It's good to keep funds aside to pay for such maintenance, as unanticipated costs can wreak havoc with your budget.

If there are maintenance or repair issues with the building itself, it is important to know who is responsible – it could be the landlord or you as the tenant.

**Fit outs:** Getting your new premises working and looking 'just right' for your business is likely to involve a fit out so the interiors are designed for the way your business operates and to align with your brand. A fit out can vary from ensuring you have a bare-bones functional space in which to operate or it could be a high-end, more expensive exercise.

Ideally, the right to make physical changes to the building and install your fit out should be negotiated by way of an agreement to lease before the lease commences. If you want to have a new fit out mid-lease, it may be possible to negotiate this during the lease term, if your landlord agrees.

But what happens to the fit out when your lease term is up? Under most standard leases, if required by the landlord, you must reinstate the property to its original state by the end of the lease term. Remember to budget for this as the cost of reinstatement could be significant. If you fail to reinstate the premises, your landlord can recover from you any costs associated with completing the reinstatement.

As well, your landlord may decide that ownership of the fit out passes to them when your lease expires. If the fit out is retained, you may not receive any compensation for your fit out investment.

**Section 27.5/COVID-Red Zone:** The ADLS lease (section 27.5) includes what used to be known as the 'red zone clause' or, more correctly, the 'no access in an emergency' clause. It came about after the Christchurch earthquakes when tenants were legally unable to enter the 'red zone' and operate their businesses even though their particular building was perfectly habitable. (Rent relief was available but only if your building was damaged.)

Since the Christchurch earthquakes, section 27.5 has been reworked and expanded. It states that 'a fair proportion of the rent and outgoings shall cease to be payable for the period commencing on the date when the tenant became unable to gain access to the premises to fully conduct the tenant's business from the premises until the inability ceases.'

What is 'fair' has yet to be interpreted by the courts but, as a guide, during COVID Level 4 many tenants were paying around 50% of their rent, but this fluctuated significantly depending on the circumstances of the tenant.

## **Purchasing commercial property**

For the purposes of this publication, we have focussed on leasing as it is the most common way businesses occupy their premises, particularly new businesses.

If, however, you are considering purchasing commercial property to accommodate your business, you should get specialist accounting advice and talk with us early on about the legal aspects. You also want to ensure that the purchase of a property will be a valuable investment in its own right.

We can advise on certain aspects of due diligence, and to help you consider whether it is appropriate to separate the ownership of your business from the ownership of the property.





# Employing people

When establishing your business, you may need to employ some staff to help you achieve your strategic and financial goals. Alternatively, you may wish to wait until a regular pattern of revenue is established before you decide to have people working with you, or you may prefer to hire a contractor in busy times.

It is fair to say that employment law (and employing people) is an ever-changing scenario. Every employer must grapple with many tasks including employment agreements, annual leave entitlements, holiday pay, overtime, health and safety legislation and, of course, paying their employees correctly and on time.

In this section we outline the fundamentals you should know when employing people. We recommend that you talk with us before you employ anyone. It is vital that you have a well thought-out employment agreement and have discussed with us any issues you need to consider before employing or terminating staff.

## Attracting good staff

The first step in attracting good staff is to have good pre-employment practices so your business is viewed as an exciting and attractive place to work. In all interactions with not only potential customers, but also prospective employees, you should ensure that every step you take upholds the brand and values of your business. Some of these steps are below.

**Job description:** Each role in your business must have a job description, which is a description of the tasks and/or duties to be performed.

**Advertising:** Draft the job advertisement making sure the wording reflects the requirements of the job, and also that the style and tone of the advertisement reflects your brand.

Take care with the position title – you'll want a bartender rather than a barman, a camera operator rather than a cameraman, a supervisor rather than a foreman, and a waitperson rather than a waitress.

Make sure you advertise in places that your potential employees are likely to see the job advertisement. This is likely to be online (Seek, etc), on your website and/or on social media. You may also want to place an advertisement in print media – one of the metropolitan dailies or in your neighbourhood newspaper – depending on the nature of the job you are advertising.

**Receiving applications:** Once you receive applications, it is important (for your brand and good manners) to immediately acknowledge you have received the application. If an applicant is unsuitable, respond with a carefully drafted reply and wish them well for their job hunt. For people you would like to interview, acknowledge their application and say you will be in touch about the next steps in the process.

For applicants to go onto your short list, you will want to verify their qualifications and get a good feel for the sort of person they are.

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## Ensure that you have a set of standard questions to ask each applicant so the process is transparent and fair.

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**Interviews:** Contact your applicant about the time, date and place of the interview. Remember to confirm a couple of days beforehand by text, email or phone call and give an indication of how long you expect the interview to be.

Ensure that you have a set of standard questions to ask each applicant so the process is transparent and fair.

It's also important to remember that you cannot ask questions which may potentially discriminate on grounds including gender, race, age, marital status, sexual orientation, family status, religion and disability. You cannot, for example, ask a young woman if she is planning to have a baby, or when an older person is considering retirement.

When you have a short list, remember to check an applicant's references by talking with their referees. This way, you will not only get a good feel for the way the applicant works, but you will also find out more about how they will fit in to your workplace.

**Offering the applicant the role:** Once you have chosen a successful applicant and wish to offer them the role, you have the option of providing them with a conditional offer of employment. This offer could be conditional on the applicant returning a negative drug and alcohol test, or a satisfactory criminal conviction check. Once these conditions have been met, the applicant will become an 'intending employee'.

## **Employment agreements**

Every one of your employees must have a written employment agreement: this is the law.

Legally speaking, only a few key items are necessary to include in an employment agreement. A short, bare-bones agreement will comply with your legal obligations as an employer. However, an agreement that is tailored to your specific business and its needs will be a much more useful document – for both you and your prospective employee.

The Employment Relations Act 2000 makes it clear that every employment relationship is based on good faith; both parties in an employment relationship must be upfront and honest with each other. It also means that whatever your employment agreement says, you must act reasonably when dealing with your employees.

You should give your new employee a copy of their employment agreement to read and consider several days before they start work and to take independent advice if they wish.

Employers with 19 or fewer employees have the option of including a 90-day trial period in their employment agreements. If a 90-day trial period is included, your employee must sign the agreement before their first day of work. If employers have more than 19 employees, including a probationary period in their employment agreements is an option.

We strongly recommend that you talk with us early on so we can both work on an employment agreement that suits your own business situation. This is not the time to go it alone and think ‘this will do’. The employment law landscape is littered with employment agreement issues and it is a worthy investment getting professional advice at the outset so you (and your prospective employee/s) have the peace of mind of a legally-correct and specially-tailored employment agreement.

## **Casual employees and fixed-term contractors**

Some employers prefer to employ staff on either a casual or fixed-term basis; these sorts of arrangements can be very beneficial for both parties.

Casual employees have no guaranteed hours of work, no regular pattern of work and no ongoing expectation of employment. Casual employees are engaged on an ‘as and when required’ basis and are typically used as relief workers or to cover unexpectedly busy periods. There is no obligation on casual employees to accept future offers of work, and no obligation on employers to provide further work after each engagement.

Fixed-term contractors work for a specific period of time or for the length of a specific project. If you’re employing people on a fixed-term basis, you must have

a genuine reason based on reasonable grounds for making the employment fixed-term. This reason must be set out in the employment agreement, with an explanation of when and how the fixed-term will end.

Employees have limited rights under casual and fixed-term agreements. These types of agreements are only suitable in a limited range of scenarios and you should seek advice from us before using them. Getting it wrong can be very expensive.

To get more background information on the different types of employment agreements, go to Employment New Zealand's website, [www.employment.govt.nz](http://www.employment.govt.nz), and then make that call to us so we can fine-tune your employment agreements to suit your specific requirements.

## **Personal grievances**

A personal grievance (known colloquially as a 'PG') is a complaint an employee can bring against their current, or former, employer if they believe they have been treated unfairly or unreasonably.

Employees who believe they have been treated unfairly or unreasonably must generally raise the PG within 90 days of the date on which the action alleged to amount to a PG occurred or came to the notice of their employee (whichever is the later). There are specific criteria an employee must meet in order to raise a PG, so you should get advice from us as to whether it amounts to one.

It is vital that all your interactions with your employees are done in good faith, with good reason and following a fair process. This is not only because this is a thoroughly decent way to behave and treat your staff, but also because PGs are expensive and time-consuming to deal with. It is better to do things right the first time by identifying an issue early on and resolving it.

Sometimes, however, things can deteriorate and you are faced with a PG. If you are served with a PG, do get in touch with us so we can help you resolve this early on.

There is more information on PGs at [www.employment.govt.nz](http://www.employment.govt.nz) and search for personal grievances.

## **Disciplinary action**

You can begin a formal investigation process to determine the facts if you believe there has been misconduct or serious misconduct by your employee.

The definition of misconduct, or serious misconduct, will vary depending on your type of workplace and the sector in which you operate. What comprises misconduct or serious misconduct in your business should be listed in your employment agreements and also in your policies.

Examples of misconduct are:

- + Poor time keeping, including being late to work or returning from lunch or tea breaks late
- + Failure to report any accident or client/employee incident which occurs at work
- + Failure to work co-operatively with others, and
- + Misuse of equipment and/or property.

Examples of serious misconduct are:

- + Falsification of, or knowing about the falsification of, records or documents
- + Attending work in an intoxicated or drugged state
- + Refusal to obey lawful and reasonable instructions
- + Failure to observe health and safety procedures
- + Unauthorised disclosure of information which is confidential to you, and
- + Dishonesty.

In discussions with your employee, it could be that the misconduct is actually shielding a *performance* issue. For more information on what you can do in this situation, go to [www.employment.govt.nz](http://www.employment.govt.nz) and search for misconduct.

Employers must have good grounds for initiating a disciplinary action. It is vital that a fair process is followed and that you keep your employee informed throughout each step. If you don't follow a fair process, your employee may raise a PG. There is more on page 48 on PGs. To make sure you follow a fair procedure, do talk with us about the process.

Employment New Zealand provides some excellent resources for employers dealing with a disciplinary situation; these can be found at [www.employment.govt.nz](http://www.employment.govt.nz) and search for disciplinary process. It recommends the following steps:

1. Consider whether there is a good reason to initiate a disciplinary process
2. Let your employee know of the situation – by talking with them and writing to your employee outlining the allegations
3. Investigate the allegations – meet with your employee in order to get their response



4. Do any further investigations into the allegations resulting from the formal meeting
5. Follow-up with a formal meeting, if required
6. Consider your employee's responses and what action to take, if any
7. Preliminary decision and consultation, and
8. Final decision and actions.

If you are uncertain about any of the steps involved, or simply need to discuss the process for your business, please contact us straight away.

## Dismissal/termination procedures

Dismissing an employee may result from a disciplinary situation relating to misconduct or serious misconduct, as discussed above.

Dismissal may also occur because of poor performance, redundancy, during a 90-day trial period (if your business has 19 or fewer employees), at the end of a probationary period, incompatibility (a breakdown in a working relationship), becoming medically incapacitated or for other reasons.

In a dismissal/termination situation, you *must* follow a fair process, act in good faith and have sound reasons for initiating a dismissal process, otherwise you may face a PG claim from your employee.

### 90-day trial period

The 90-day trial period can only be used for organisations that have 19 or fewer employees, and where the clause is included in the employee's employment agreement permitting dismissal without cause during the 90-day trial period.

If you are dismissing someone who is still in their 90-day trial period, there are specific procedures for that situation. Go to [www.employment.govt.nz](http://www.employment.govt.nz) and search for trial process.

If you want to dismiss your employee on grounds of misconduct or poor performance, we have covered these on pages 48–49.

As each dismissal/termination situation is different and we strongly recommend you talk with us before embarking on this process for any of your staff. Getting it wrong can have serious consequences, so it is wise to consult with us when contemplating a dismissal or termination of employment.

### **Summary dismissal**

Summary dismissal occurs when the employment situation is so serious (such as stealing, violence or a serious breach of privacy) that instant dismissal is required. You need not give notice, nor pay out your employee in this situation. You are still required to pay accrued annual leave.

You do, however, still need to have a good reason and ensure you follow a fair process for a summary dismissal situation (as set out above). This includes putting the allegations to your employee in writing, getting their responses to the allegations and then considering their responses before making a decision.

There are serious consequences if you get a summary dismissal process wrong. If you are contemplating this action, it would be wise to talk with us beforehand.

### **Health and safety**

The Health and Safety at Work Act 2015, and its related regulations, is the over-arching legislation to which every business or undertaking must comply. Its objective is to ensure workers and others are given the highest level of protection from workplace health and safety risks, as far as reasonably practicable. This includes both physical and mental health.

As a business owner and/or employer, or what the legislation terms a 'PCBU' (person conducting a business or undertaking), you have a legal obligation to provide and maintain a safe workplace for not only your employees, but also clients and customers, any contractors at your workplace, visitors and even any volunteers you may have on your premises.

Health and safety compliance also includes workplace bullying and sexual harassment. A PCBU's duty extends personally to 'officers' as defined in the Health and Safety at Work Act 2015 and includes company directors and certain senior management. These people must carry out due diligence to ensure that the PCBU complies with its health and safety obligations and responsibilities as far as is reasonably practicable.

When you are establishing a new business or undertaking, a PCBU must establish robust processes and procedures to ensure employees and others are, as far as is reasonably practicable, protected from workplace health and safety risks.

If you are purchasing an existing business, you should prioritise your due diligence to ensure the business has appropriate health and safety processes and procedures in place.

There is a great deal of online help available on workplace health and safety, identifying workplace risks and hazards, establishing a health and safety committee or representative, and tips on engaging all of your employees in ensuring health and safety is a top priority in your business.

The Health and Safety at Work Act 2015 imposes a severe penalty regime if you get health and safety wrong. The current potential maximum penalties are \$300,000 for individuals, \$600,000 for company officers or \$3,000,000 for corporate PCBUs such as companies. Imprisonment is also possible in severe cases involving exposure or risk of serious harm or death.

To get you started, we recommend these two very helpful sites:

- ✦ **Worksafe:** [www.worksafe.govt.nz](http://www.worksafe.govt.nz), and
- ✦ **Employment New Zealand:** [www.employment.govt.nz](http://www.employment.govt.nz) and its health and safety at work section.

## Employment legislation

- ✦ Employment Relations Act 2000
- ✦ Equal Pay Act 1972
- ✦ Health and Safety at Work Act 2015
- ✦ Holidays Act 2003
- ✦ Human Rights Act 1993
- ✦ Parental Leave and Employment Protection Act 1987
- ✦ Privacy Act 2020







# Managing risk

Life is full of risks, and running a business is just an extension of that. In this section on business risk, we cover personal guarantees, business creditors and insurance.

## Personal guarantees

If your business is borrowing money, most lenders will require you to give them a personal guarantee. If you lease premises, your landlord is also likely to ask for a personal guarantee. There is more on personal guarantees on page 39.

Your personal obligations under a guarantee can be onerous and long-lasting, although it can be difficult to avoid giving a personal guarantee as they are a commonplace part of doing business. You do not, however, need to be completely exposed.

You may be able to limit exposing your family's assets, such as your house, by establishing a family trust or using other asset management options, depending on the state of your business when the family trust is established; however, this is not always the case. Please contact us for advice in relation to using a family trust to protect your personal assets.

If you are concerned about giving a personal guarantee and are worried about exposure of your family's assets, please be in touch.

## Business creditors

If you have personal creditors, either within the business or in your personal affairs, their claims can have a negative effect on the running of your business.

If, for example, you have borrowed money to buy a car for your personal use and fail to make a payment, that creditor (the lender) may be able to access your business assets in order to redress the situation. The power to do this will come from a General Security Agreement (GSA), which is a security interest

registered over a company or an individual and registered on the Personal Property Security Register (PPSR) at [www.ppsr.companiesoffice.govt.nz](http://www.ppsr.companiesoffice.govt.nz). It allows a lender to take control of any asset over which the GSA is registered.

If you get into this situation, please contact us early on so we can assist you to minimise business risks.

## Insurance

Insuring your business (and yourself) against risk is a business necessity, it should not be an optional item. It pays to be insured so that you have peace of mind if the worst happens.

**Working from home:** If you run your business from home make sure you review your house and contents policy to ensure that you are covered for business activities. In addition, you should think about adding some additional specific business cover, see the list below.

**Working in business premises:** There are many business insurance policies available; we list a number of policies that you should consider. The list is long, but many insurers 'bundle' business insurance products to cover a myriad of insurance requirements.

Do read the fine print to ensure that any situation specific to your business (storing chemicals, for example) is covered in your policies.

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- ✦ **Building insurance:** check with your landlord that building insurance is in place. Also check that there is insurance for your landlord's fixtures and fittings.  
If your business owns the premises out of which it operates, you must have insurance to cover fire and other risks.
  - ✦ **Business assets:** you will need this policy to insure any plant, machinery, stock, tools, office furniture, computers, printers and scanners, and so on.
  - ✦ **Business interruption:** this policy includes loss of profits, wages and other costs that can occur if your business has not been able to operate due to events outside your control.
  - ✦ **Business liability:** provides cover if your product and/or service causes accidental damage or injury to third parties.
  - ✦ **Cyber-insurance:** covers losses and liability relating to technology breaches and errors.
  - ✦ **Director and officer liability insurance:** this policy protects the personal assets of company directors and officers (and perhaps their spouses/partners) if they are personally sued for actual or alleged wrong doing.
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✦ **Employment disputes and statutory liability policies:**

- **Employment dispute:** funds the cost of an employee complaining about any form of harassment and unjustified dismissal, etc.
- **Statutory liability:** covers legal defence costs if you are prosecuted for an unintentional breach of most statutes. This can also be extended to cover fines (with the exception fines under the Health & Safety at Work Act 2015).
- **Employers' liability:** defends you against civil actions brought by employees who sustain an injury in the course of their employment with you that falls outside the scope of ACC.

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✦ **Key person insurance:** Covers the cost of either replacing key people in the business or the reduction in turnover if something happens to those key people preventing them from fulfilling their role.

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**Personal insurance:** As well as insuring your home, contents and car, now that you're running a business you should also think about taking out policies to cover life, medical, trauma and income protection insurance.

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There are many insurance products in the market all with different offerings and premiums. It can be daunting for business owners.

We recommend that you either talk with your current insurer or you may prefer to use a broker to get the best value insurance products to suit your particular business needs.

## **Other licenses or approvals**

Your business may require a licence, such as a liquor licence or food registration, resource consents or other approvals, accreditations, certifications and/or qualifications in order to operate.

Check what is required well in advance of establishing your business. The authorities can be quick to close down a business that is operating without the required paperwork in place.



# Succession

Although you're at the point of establishing your business, it will do no harm to take a medium-to-long-term view and think about some succession planning and selling the business – what to do and how you may do it, and the right timing for your particular business.

Whatever your timeframe to exit the business, having a good succession plan is important. People sometimes think that succession is the point in time that you retire and leave the business for good. That is very often not the case and, in fact, with proper planning, succession is all about business continuity and lifestyle. The incentive to create a succession plan should not be your impending withdrawal from working life, but rather part of your business and investment growth strategy.

We have made some points below about matters you may wish to consider in your specialists plan.

## Selling your business

If, or when you want to sell your business, you should obtain a valuation. This is usually done by a chartered accountant or valuer who specialises in businesses.

Before getting a valuation, take some time to do due diligence on the business yourself. Put yourself in the shoes of a potential purchaser and ask yourself the following questions:

- ✦ What are the business assets?
- ✦ Who are the key people?
- ✦ Who are the suppliers or clients?
- ✦ How is their relationship with the business managed? Is it documented?
- ✦ Do you have up-to-date financial statements, an asset register, a risk register and so on?

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- ✦ Make sure that employment agreements with your staff are current. You should check that the health and safety policies and procedures of your business are up to date.
  - ✦ Are there appropriate structures in place to transfer the relationship to a new party?
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You may want to contact a qualified business broker who can help market your business for sale and find an appropriate buyer.

At the same time, we can draw up an appropriate Sale and Purchase Agreement that can be discussed with a potential purchaser.

## **Employees buying all or part of your business**

Allowing your employees to obtain equity in your business can be a natural progression of passing on the reins. This means you can still control the business, but your employees also have a stake in how it is run and its success.

There are several different share schemes that you can create for your employees. These include:

- ✦ Employee share loans
- ✦ Partly-paid shares, and
- ✦ Creating different share classes to allow your employees to take ownership without increasing their management duties.

It may be appropriate to consider a different approach for different areas of your business. In doing so, you must comply with the disclosure requirements under the Financial Markets Conduct Act 2013. These include preparing and providing a product disclosure statement to your employees unless your employee share scheme falls within the exclusion contained in that legislation.

When setting up share options for investment in your business, it is crucial to obtain specialist tax, accounting and financial advice from your accountant.

**Talk with us early on:** When you want to consider your gradual withdrawal from the business, we can discuss the steps to take for a staged ownership withdrawal.









# Asset planning

When you are running your own business – whether you're a sole trader, working in a partnership, own the company or have some other business structure – you should also ensure your personal affairs are in order. This will give you some peace of mind that, even if the worst happens, your business and family affairs will be as safe as they can be.

## Keeping your business affairs separate

It's important when owning a business that you are scrupulous in keeping your personal affairs separate from the business.

Your accountant will be helpful in advising you how to do this cost-effectively. Ensuring that there is complete separation not only means that the annual financial statements for your business will be straightforward, but it will also provide clarity in case you are involved in a business or personal dispute.

**Relationship property:** You may also want to consider ringfencing your business assets so they are not at risk if you have a relationship break-up. The law around this, contained in the Property (Relationships) Act 1976, is complex and you will need expert advice.

Please get in touch with us if you are considering contracting out of this Act.

## Family trust

Establishing a family trust may provide some protection for you (if it is administered correctly and established at the right time) as a tool to ringfence assets. This is particularly important as your business grows and other investment opportunities arise.



The Trusts Act 2019 came into force on 30 January 2021. Much of this legislation updates or restates existing law found either in statute or case law. There are, however, a number of changes for both trustees and settlors of trusts. There are now increased obligations for trustees, and beneficiaries may be more aware of their right to access trust information.

Do talk with us about what is involved in setting up a family trust, the pros and cons (and there are some) and, most importantly, the benefits of a trust for a business owner.

We have a very helpful small book, *To Trust or Not to Trust: A practical guide to family trusts*, which will give you some background on what is involved in establishing a family trust. Please be in touch for us to send you a copy – our contact details are on the outside back cover.

## **Holding company**

An alternative to establishing a trust is to consider setting up a holding company.

A holding company separates chosen assets from the risks associated with running your business. If you purchase premises for your business, for example, having a holding company to own that property may protect that asset from your business risk.

As with trusts, holding companies come with their own requirements including complying with the obligations and responsibilities of the Companies Act 1993.

If establishing a holding company sounds the right asset protection move for you, please be in touch so we can explain more fully how this works.

## **Enduring Powers of Attorney**

When you are establishing a business, it is important to consider other issues such as who would act for you if you lose the ability to act for yourself.

If you are running a business and you become unwell or you are leaving the country for a period, having Enduring Powers of Attorney (EPAs) will help ensure that your business can continue running without you physically at the helm. EPAs set out who (an attorney) can take care of your personal or financial matters if you cannot.

There are two types of EPA:

1. Personal care and welfare, and
2. Property

Please talk with us so we can give you more detail about EPAs in relation to your personal assets.

While an EPA does continue if you lose capacity, it will only delegate powers in relation to your personal assets not the assets of your company. The Companies Act, the company's constitution and the company's shareholder agreement (where relevant) will provide for the process in the event you become incapacitated and cannot continue your duties as a director.

Please talk to us to ensure that your constitution and shareholders agreement cover these aspects.

## **Your will**

A will is a legal document that sets out your wishes about the distribution of your assets (including your business interests) after your death. This is one of the most important documents that you will ever sign.

Having a will ensures that your family is provided for in the way that you wish. Your will can also specify who you would like to look after your children if you die when they are young. It also allows you to specify gifts to friends and/or organisations that are close to your heart. You may also want to give directions for your funeral, whether you want to be cremated or buried, and so on.

Not having a will, particularly if you own substantial assets, is unwise. Dying without a will (known as 'intestacy') means the Administration Act 1969 sets out how your assets are divided up, which may not be the way you would wish. Intestacy is not only a hassle for your family to deal with, but is also more expensive than the process followed if you have a will.

If you have a current will you may want to review it, bearing in mind the establishment of your new business.

# Checklist:

## Buying or establishing a new business

Well done, you want to buy or establish a new business. As you set up, there are many things to do. Use this handy checklist as you tick off each relevant task.

### Buying an existing business

- ☐ Make sure you are happy with the reasons why the vendor is selling
- ☐ Obtain finance
- ☐ Seek accounting advice
- ☐ Agreement for sale and purchase
  - ☐ Share purchase, or
  - ☐ Asset purchase:
- ☐ Key terms and conditions:
  - ☐ Finance condition and GST
  - ☐ Due diligence
  - ☐ Premises location and lease
  - ☐ Employees (current staff, vulnerable workers and key employees)
  - ☐ Restraint of trade
  - ☐ Inventory/stock
  - ☐ Customer list/database
  - ☐ Suppliers
  - ☐ Material contracts
- ☐ Franchise agreement and consent from franchisor
- ☐ Confidentiality and non-disclosure agreements

NB: This list is not definitive; we strongly recommend you seek both legal and accountancy advice before signing any agreement to purchase a business. If you are buying an established business, there will be many additional actions that will also be relevant to you in the next section below.

## Starting a new business from scratch

- ☐ Do your research to assess whether your business idea is viable

If you think you can establish a successful business, continue down the list!

- ☐ Choose a business structure
  - ☐ Sole trader
  - ☐ Company: you may need a shareholders' agreement and you should have a constitution
    - ☐ Shareholders' agreement
    - ☐ Constitution
  - ☐ Partnership
  - ☐ Other business structure, eg: joint venture, limited partnership, etc

## Setting up your business

- ☐ Registration:
  - ☐ ONECheck
  - ☐ RealMe®
  - ☐ New Zealand Business Number (NZBN)
  - ☐ IRD number
  - ☐ Companies Office
  - ☐ Accounting system set-up
  - ☐ Domain name
- ☐ Establish your brand, talk with a branding specialist and/or design studio
- ☐ Protect your intellectual property (if required):
  - ☐ Trade mark
  - ☐ Patent
- ☐ Terms of trade: get these drafted and ask us to review them

- ☐ Check your creditworthiness
- ☐ Acquaint yourself with relevant business legislation
- ☐ If establishing a company, have you finalised your shareholders' agreement if required?

## **Establishing your workplace**

- ☐ Choose the best location to operate your business:
  - ☐ Working from home
  - ☐ Shared work space
  - ☐ Leasing premises
- ☐ Get the lease in place with your landlord if you're in a shared work space or in business premises
- ☐ Buying commercial property – call us!

## **Employing people**

- ☐ Job description drafted
- ☐ Advertise the position in the most appropriate outlets
- ☐ Process applications, remember to acknowledge receipt of applications
- ☐ Ask us to provide a draft employment agreement or ask us to review your current one
- ☐ Set up Interviews:
  - ☐ Plan interviews, draft questions, etc
  - ☐ Check references
  - ☐ Check employment agreement is specific to the successful applicant
  - ☐ Make job offer
  - ☐ Ensure agreement is signed before their first day
- ☐ Notify unsuccessful applicants the job has been filled, thank them for their time and wish them well
- ☐ Check health and safety compliance
- ☐ Ensure you have appropriate employment policies in place, eg: health and safety, privacy, etc. If not, you will need to develop these – we can help

## Managing risk

- ☐ Personal guarantees: check the level of exposure of your personal assets
- ☐ Personal Property Securities Register (PPSR): ensure that you manage personal debt so your business is not exposed to unnecessary pressure from a lender
- ☐ Business insurance, check off the insurance cover you may need:
  - ☐ Building insurance
  - ☐ Business assets, eg: plant, machinery, computers, etc
  - ☐ Business interruption
  - ☐ Business liability
  - ☐ Cyber insurance
  - ☐ Director and officer liability
  - ☐ Employer's insurance
    - ☐ Employment dispute
    - ☐ Statutory liability
    - ☐ Employer's liability
  - ☐ Key person insurance
- ☐ Personal insurance
  - ☐ Medical
  - ☐ Life
  - ☐ Trauma
  - ☐ Income protection
  - ☐ Home, contents and car
- ☐ Other licences, certificates or approvals, if required
  - ☐ \_\_\_\_\_
  - ☐ \_\_\_\_\_

Asset planning

When you own a business, it's essential that your personal affairs are in good order.

- ☐ Arrange to keep your business affairs separate from your personal life
  - ☐ Family trust
  - ☐ Holding company
  - ☐ Another entity? \_\_\_\_\_
- ☐ Enduring Powers of Attorney
- ☐ Will, ensure you have a current will

Other

There may be other things to check off that are unique to your particular business. Use this section to tick them off.

- ☐ \_\_\_\_\_
- ☐ \_\_\_\_\_
- ☐ \_\_\_\_\_
- ☐ \_\_\_\_\_
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# Glossary

**Asset purchase:** Directly buying the assets of the business you have agreed to purchase. (The sale may also include some liabilities, but only if you agree.)

**Assignment:** Used in a leasing situation where a tenant transfers its rights in the lease to another tenant.

**Bank guarantee:** Where a bank agrees to hold an agreed amount of money on trust. It can be used instead of a personal guarantee; and also be used as a rent bond.

**Casual employees:** Usually engaged on an 'as and when' basis; generally used as relief workers or in unexpectedly busy periods. These people have no guaranteed hours of work, no regular pattern of work and no ongoing expectation of employment. There is also no obligation from either party to offer or accept work.

**Collateral:** A term used for the material used to market a business such as sales brochures, presentation materials, etc. The term can also be used for all stationery, website, etc.

**Commerce Act 1986:** Legislation that prohibits anti-competitive behaviour including agreements, arrangements or understandings between competitors that, amongst other things, fix, maintain or control prices.

**Companies Act 1993:** Every company in New Zealand must comply with the Companies Act 1993. It sets out the rules for the way companies must do business and also the requirements when it ceases to operate. The Companies Office has extensive powers which range from striking off a company which has not completed its annual return to prohibiting a person from being a company director.

**Companies Office:** The government agency responsible for the administration of New Zealand's business registers. These include the Companies Register, the New Zealand Business Number (NZBN) and the Personal Property Securities Register (PPSR). There's more on the Companies Office role at [www.companiesoffice.govt.nz/about-us](http://www.companiesoffice.govt.nz/about-us).

**Company:** It is also known as 'limited liability company.' A popular business structure where the company is a separate legal entity in its own right. Company directors are not responsible, in most cases, for the company's debts – hence 'limited liability'.

**Constitution:** A company's constitution sets out the rights, powers and duties of that company, its board and each director and shareholder. This is a public document as it sits alongside your company's registration details at the Companies Office.

**Consumer Guarantees Act 1993 (CGA):** The CGA protects consumers by allowing customers to seek repairs, replacements or refunds when goods are faulty or when they are not of a reasonable standard for their intended purpose.

It also sets minimum guarantees for all products and services. No business can contract out of the CGA, so you must ensure you comply with this legislation.

**Contract & Commercial Law Act 2017 (CCLA):** The CCLA relates to rights and obligations of transport carriers and their customers, deals with contractual mistakes, contractual remedies and many other issues relating to contracts.

**CPI rent review:** Rent increases linked to the quarterly Consumer Price Index (CPI).

**Credit Contracts and Consumer Finance Act 2003 (CCCFA):** The CCCFA ensures that when you borrow money you can make informed choices, know what you're agreeing to, and can keep track of your debts.

The legislation requires lenders to act responsibly at all times. It provides protection when people take out a personal loan or mortgage, use a credit card, borrow money on an agreed overdraft, and buy products and services on credit, eg: by hire purchase.

**Domain name:** Your website name, eg: 'greenwellies' together with the domain name extension, eg: '.com' or '.co.nz'

**Due diligence:** The process by which you as a purchaser (and sometimes your advisers) have the opportunity to review and evaluate information relating to the proposed business purchase and its assets.

**Employment agreement:** Also known as an 'employment contract', an employment agreement states the terms and conditions of employment.

**Employment New Zealand:** A government agency that is part of the Ministry of Business, Innovation and Employment (MBIE). It has a comprehensive and useful website ([www.employment.govt.nz](http://www.employment.govt.nz)) with information for both employers and employees. You can sign up for its free employment newsletter.

**Employment Relations Act 2000:** Provides the legal structure around relationships between employers, employees and unions.

**Enduring Powers of Attorney (EPAs):** Enduring Powers of Attorney set out who (your attorney) can take care of your personal and/or financial matters if you cannot. There are two types of EPA – for property, and for health and welfare.

**Equal Pay Act 1972:** Ensures all employees are paid equally based on the value of their work and skill, without regard to their gender.

**Fair Trading Act 1986 (FTA):** The FTA prohibits businesses from misleading or deceiving customers when trading. Information provided to customers must be accurate and important information must not be withheld. The legislation also requires businesses to promote product safety. The FTA has a broader scope than the Consumer Guarantees Act 1993.

**Franchise:** A form of licence or contract that grants a franchisee access to a franchisor's proprietary business knowledge, brand, processes, etc. Examples in New Zealand are Jim's Mowing, McDonald's and so on.

**General security agreement (GSA):**

A security interest registered over a company or individual that is registered on the Personal Property Securities Register (PPSR).

**Goodwill:** An intangible asset that is purchased when a business is acquired. It relates to, amongst other things, reputation in the marketplace, the 'value' of its brand and so on.

**Health and Safety at Work Act 2015:**

Requires that workers and others are given the highest level of protection from workplace health and safety risks, so far as it is practicable. WorkSafe, part of the Ministry of Business, Innovation and Employment, is the government agency responsible for workplace health and safety.

**Holidays Act 2003:** Outlines leave entitlements for employees around annual holidays. It also covers entitlements for domestic violence leave, bereavement leave, alternative holidays, public holidays and sick leave.

**Holding company:** An alternative to establishing a trust, a holding company separates chosen assets from the risks associated with running your business.

**Human Rights Act 1993:** Aims to give all people equal opportunities and prevent unfair treatment based on irrelevant personal characteristics. The legislation covers discrimination on many grounds including sex, marital status, religious and ethical beliefs, colour, disability, sexual orientation and much more. The Human Rights Commission oversees this legislation.

**Intangible assets:** Assets such as intellectual property, business contracts and goodwill.

**Intellectual property (IP):** Intangible creations that include copyright, patents, trade marks and trade secrets.

**IRD:** Commonly-used acronym for what was the Inland Revenue Department, now simply Inland Revenue.

**Joint venture:** An agreement between two or more parties to carry out a project for a particular purpose, such as operating a factory or developing a property.

**Limited partnership:** Similar to a traditional partnership, but is a limited liability entity; it can involve complex documentation. It is governed by the Limited Partnerships Act 2008.

**Market rent review:** Regular review of rental that is pegged to wider market rentals.

**Ministry of Business, Innovation and Employment (MBIE):** MBIE is a very large government ministry. Its scope covers building and energy, business and employment, immigration and tourism, science and technology, and cross-government functions.

**NDA:** Non-disclosure agreement or confidentiality agreement.

**NZBN:** New Zealand Business Number. A globally unique identifier that can be used by every business in New Zealand.

**ONECheck:** A one-stop check to ensure the name you have chosen for a business has not already been allocated to a business, for a domain name, trade mark or for social media.

**Opex:** A contraction of two words – operating expenses.

**Parental Leave and Employment**

**Protection Act 1987:** Covers parental leave entitlements and protection of employment whilst on parental leave.

**Partnership:** An agreement between two or more people to share the operation of a business together. It is not a separate legal entity and partners do not have limited liability.

**Patent:** A right that is granted for an invention. A new product or process can be patented, as can the method of manufacture and the material from which it is made. Patents are administered by the Intellectual Property Office of New Zealand (IPONZ).

**PCBU:** A term used in health and safety law for a ‘person conducting a business or undertaking.’ A PCBU has a legal obligation to provide and maintain a safe workplace for employees, clients, customers, etc.

**Personal grievance (PG):** A complaint an employee can bring against their current, or former, employer if they believe they have been treated unfairly or unreasonably.

**Personal Property Securities Register (PPSR):** An online [register](#) where security interests in personal property can be recorded.

**Privacy Act 2020:** Governs how individuals, organisations and businesses collect, use, disclose, store and give access to personal information. There is more [here](#) at the Privacy Commissioner’s website.

**Purchaser:** Buyer.

**Ratchet clause:** Most leases have ratchet clauses that means that at your rent review, the rental amount will not go below what it was at the start of the lease.

**RealMe®:** A RealMe® login allows you to access many online services using one user name and password. It gives access to the Companies Register, applications for licenses and permits, etc.

**Renewal:** Where a tenant can elect to remain in a premises following the end of the initial lease term.

**Rent bond:** See under ‘bank guarantee’.

**Resource Management Act 1991:**

Promotes the sustainable management of natural and physical resources such as land, air and water. Often shortened to ‘RMA’.

**Shareholders’ agreement:** Sets out arrangements between a company’s shareholders, the way in which the business should be run and how the shareholders can exercise their rights.

**Share purchase:** Where existing shareholders of a company sell their shares to you a purchaser. The company continues to exist and you acquire the shares and therefore (indirectly) all the assets and liabilities of the company.

**SMEs:** An acronym for small-to-medium-sized enterprises. Generally speaking, SMEs have fewer than 20 employees.

**Sole trader:** A business operating under the name of an individual who owns all the assets of the business.

**Tangible assets:** Physical items such as stock, machinery, plant and property that are owned by a business.

**Term:** The period under which a lease is held.

**Terms of trade:** The agreement by which you agree to supply goods and/or services to your customer and how those goods/services will be paid for.

**Trade mark:** A brand that distinguishes your goods or services from the goods or services of other traders in the market place. Usually noted by a TM in superscript when unregistered – <sup>TM</sup> – and an R in superscript when registered – <sup>®</sup>.

**Vendor:** Seller

**Will:** Sets out your wishes about the distribution of your assets after your death.

**Zero-rated:** Goods and services that are not subject to GST (with a rate of 0%) in certain situations.

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## Useful websites

**Companies Office:** [www.companiesoffice.govt.nz](http://www.companiesoffice.govt.nz)

**Employment New Zealand:** [www.employment.govt.nz](http://www.employment.govt.nz)

**Ministry of Business, Innovation and Employment:**  
[www.mbie.govt.nz](http://www.mbie.govt.nz) and [www.business.govt.nz](http://www.business.govt.nz)

**Privacy Commissioner:** [www.privacy.org.nz](http://www.privacy.org.nz)

**Personal Property Securities Register:** [www.ppsr.companiesoffice.govt.nz](http://www.ppsr.companiesoffice.govt.nz)

**WorkSafe:** [www.worksafe.govt.nz](http://www.worksafe.govt.nz)

# Index

## A

accounting systems 28  
Administration Act 1969 65  
aged debtors reports 9  
approvals to operate the business 57, 69  
asset planning 63–65, 70  
asset purchase 8, 71  
    key terms and conditions 8–11, 66  
assets  
    business assets 22, 59  
    business assets insurance 56  
    joint ventures 25  
    personal assets 22, 55  
    traditional partnerships 24  
assignment 40, 71  
Auckland District Law Society (ADLS) Deed of Lease 38  
    section 27.5, COVID-  
    ‘red zone’ clause 42–43

## B

bank guarantee 39, 71  
brand  
    brand values 18  
    establishing a brand 29

budget 18  
building insurance 56  
business affairs,  
separation from personal  
affairs 22, 63, 70  
business interruption  
insurance 56  
Business NZ 75  
business plan 16, 18  
buying an existing  
business 7–13  
    checklist 66–67

## C

cash flow 16, 18  
casual employees 47–48, 71  
collateral 29, 71  
Commerce Act 1986 34, 71  
communication style and tone 18, 29  
Companies Act 1993 22, 23, 34, 64, 65, 71  
Companies Office 21, 23, 24, 28, 71, 75  
Companies Register 71  
company 22–23, 71  
    director and officer liability insurance 56  
    holding company 64  
    tax 28  
confidential information 13, 18, 23, 49  
confidentiality (non-disclosure) agreements 13, 18, 30, 73  
constitution of a company 23, 71  
Consumer Guarantees Act 1993 (CGA) 31, 32, 34, 71–72  
consumer legislation obligations 34  
Consumer Price Index (CPI) rent review 40–41, 72  
Contract and Commercial Law Act 2017 (CCLA) 32, 34, 72  
contractors 45  
contracts  
    *see also* terms of trade  
    employment contracts (see employment agreements)  
    material contracts 9  
    verbal contracts 31  
cost estimates 31  
COVID pandemic, rent relief 42–43  
credit  
    applications 33  
    personal creditors 55–56  
    selling goods and services on credit 32–33  
Credit Contracts and Consumer Finance Act 2003 (CCCFA) 32, 34, 72  
customer databases 9–10  
cyber-insurance 56

## D

delivery of goods 31  
directors of a company 22, 23, 32  
discipline 16  
dismissal/termination procedures 50–51  
dispute resolution  
    joint ventures 25  
    verbal contracts 31  
domain name 27, 28, 72  
due diligence  
    health and safety processes and procedures 51  
    naming a business 17  
    purchasing a business 9, 72  
    purchasing commercial property 43  
    selling a business 59–60

## E

employees 45–52  
    90-day trial or probationary period 47, 50  
    attracting good staff 45–46  
    business asset sale situation 10–11  
    casual employees or fixed-term contractors 47–48, 71  
    checklist 68  
    disciplinary action 48–50

dismissal/termination procedures 50  
    key employees 11, 57  
    share schemes 60  
    summary dismissal 51  
employer's insurance 57–58, 69  
employment  
    agreements 11, 46, 47, 48, 50, 60, 72  
    employment disputes and statutory liability insurance 57  
    employment legislation 52  
    Employment New Zealand 48, 49, 52, 72, 75  
    Employment Relations Act 2000 47, 52, 72  
    Enduring Powers of Attorney (EPAs) 64–65, 72  
    Equal Pay Act 1972 52, 72  
    establishing a new business 15–18

## F

Fair Trading Act 1986 (FTA) 34, 72  
family trust 55, 63–64  
finance  
    borrowing to purchase a business 8  
    first months of a new business venture 17  
    sole traders 21  
Financial Markets Conduct Act 2013 60

financial statement 9, 59, 63  
fit out 41, 42  
fixed-term contractors 47–48  
franchise 12, 66, 72

## G

General Security Agreement (GSA) 55–56, 73  
good faith 22, 47, 48, 50  
goods and services  
    description in the terms of trade 31  
    installation and delivery 31  
    ownership 31  
    price 31  
    responsibility for loss or damage 32  
    selling on credit 32–33  
goodwill 8, 21, 73  
late payment 32  
GST 28  
    purchase price for a business 8  
    rental payments 39

## H

health and safety 51–52, 60  
Health and Safety at Work Act 2015 51, 52, 57, 73  
holding company 64, 73  
Holidays Act 2003 52, 73



home, working from 21,  
37–38, 56  
Human Rights Act  
1993 52, 73

## I

---

ideas 17  
Inland Revenue (IRD) 28,  
37, 73  
installation of goods 31  
insurance 41, 56–57, 69  
intangible assets 8, 73  
    due diligence 9  
intellectual property  
(IP) 27, 29–30, 73  
Intellectual Property  
Office of New Zealand  
(IPONZ) 27, 29, 30, 74  
interviewing job  
applicants 46, 68  
IRD number 28

## J

---

job applications 46  
job description 45  
joint venture 25, 73

## K

---

key person insurance 57

## L

---

latent need 15  
leasing premises 10,  
38–43  
    assignment 40, 71  
    fit outs 42

lease and renewal  
costs 41  
lease form options 38  
outgoings 39  
permitted use  
of premises and  
property 41–42  
personal  
guarantees 39–40, 55  
rent bond or bank  
guarantee 39  
rent reviews 40  
rental payments 39  
repairs and  
maintenance 42  
term and lease  
renewal 40, 74

leave entitlements of  
employees 10

liability

    business liability  
    insurance 56  
    company director  
    and officer liability  
    insurance 56  
    employers' liability  
    insurance 57  
    limited liability  
    company 23

    limited partnership 24

    personal  
    guarantees 40  
    sole trader 22  
    statutory liability  
    insurance 57

    traditional  
    partnership 24

licenses 57, 69

limited partnership 24, 73  
logos 29

## M

---

market rent review 40–  
41, 73  
material contracts 9  
mental resilience 17  
Ministry of Business,  
Innovation and  
Employment (MBIE) 72,  
73, 75  
misconduct by  
employees 48–50  
mortgages 33, 72  
MyIR identification 28

## N

---

naming a business 17,  
27, 29  
new business,  
establishing 15–18, 67  
New Zealand Business  
Number (NZBN) 28, 73  
non-disclosure  
agreement (NDA) 13, 18,  
30, 73

## O

---

OneCheck 17, 27, 73  
operating expenses  
(opex) 17, 39, 74  
organisational skills 16

## P

---

Parental Leave and  
Employment Protection  
Act 1987 52, 74

partnership 74  
     limited partnership 24, 73  
     tax 24, 28  
     traditional partnership 24  
 patent 30, 74  
 payment  
     in advance 31  
     deposits 31, 32  
     ownership of goods 31  
     penalty for late payers 32  
     progress payments 31  
     security interest 32–33  
     terms of trade specifications 30–33  
 PCBU (person conducting a business or undertaking) 51, 52, 74  
 personal affairs, separation from business affairs 22, 63, 70  
 personal attributes of a new business owner 16–17  
 personal care and welfare EPA 64  
 personal grievance (PG) 48, 49, 74  
 personal guarantees 55  
     companies 22, 32–33, 39  
     leases 39–40, 55  
 personal insurance 57, 69  
 Personal Property Securities Register (PPSR) 33, 56, 69, 73, 74, 75

premises  
     see *also* leasing  
     premises; workplace  
     buying commercial property 43  
     location 10, 37  
     repairs and maintenance 42  
 price of goods and services 31  
 privacy 33  
 Privacy Act 2020 33, 34, 52, 74  
 Privacy Commissioner 74, 75  
 Property Council Retail Lease 38  
 property EPA 64  
 Property (Relationships) Act 1976 63  
 purchaser 7, 9, 11, 12, 13, 59, 60, 72, 74

## Q

quotes 31

## R

ratchet clause 41, 74  
 RealMe® 28, 74  
 record keeping 22  
 ‘red zone,’ rent relief 42–43  
 registration of a business 18, 27, 67  
 relationship property 63  
 renewal of term and lease 40, 74

rent of business premises 39  
     bank guarantee and rent bond 39, 71  
     rent reviews 40  
 research for establishing a new business 15–16  
 Resource Management Act 1991 37–38, 41–42, 74  
 restraint of trade 11  
 risks  
     managing risk 55–57, 69  
     new business 16  
     sole traders 22  
     traditional partnerships 24

## S

safety see health and safety  
 sale and purchase agreement 7–8, 66  
     key terms and conditions 8–11, 66  
 selling a business 59–60  
 serviced offices 38  
 setting up a business 3, 18, 21, 27–34  
     checklist 67–68  
     set-up costs 18, 21  
 share purchase 7–8, 74  
 shareholders 22, 23, 32  
 shareholders’ agreement 23, 74  
 sick leave entitlements of employees 10

SMEs (small-to-medium-sized enterprises) 38, 74  
social media 27  
sole trader 21–22, 28, 74  
stock, valuation for asset sale 11  
stock variation percentage 11  
stocktaking 11  
structure of businesses 21–25, 67  
succession 59–60  
summary dismissal 51  
sustainability of a new business 15  
SWOT analysis 18

## T

---

tangible assets 8, 75  
    due diligence 9  
tax 60  
    *see also* GST  
    asset purchase 8, 10  
    company 22, 28  
    IRD number 28  
    partnership 24, 28  
    sole trader 22, 28  
    working from home 37  
terms of trade 30–33, 75  
    parties 31  
    reasons for needing 30–31  
    reservation of title clause 31  
time management 16  
trade mark 27, 29, 75

Trade Mark Check 27  
Trusts Act 2019 64

## U

---

unique selling point (USP) 16

## V

---

vendor 10, 11, 13, 75  
verbal contracts 31  
vulnerable workers 10

## W

---

warranty claims, due diligence 10  
websites 29  
will 65, 75  
workplace 37–43  
    *see also* premises  
    checklist 68  
    shared work spaces 38  
    working from home 21, 37–38, 56  
WorkSafe 52, 73, 75

## Z

---

zero-rated goods and services 8, 75