

How to Sell your Business

We are often asked the best way to sell a business. There are two key components at play in the sale of a business: structuring the transaction; and positioning the business to the market. Both elements are important and can significantly impact your result.

Structuring the transaction covers things such as pricing the business, the terms and conditions attaching to the sale, key terms in the contract, and ensuring the transaction structure is as tax effective as possible. Much of the structuring is about ensuring the vendors secure the most efficient and effective outcome from the sale. It is about maximising vendor position.

Positioning the business for sale is all about ensuring that you achieve a sale and that maximises your price. It covers areas such as ensuring there are no hurdles within the business that will limit its saleability, identifying the competitive position of the business within its market segment, ensuring that operating performance is as good as it can be, and that the business benchmarks well in its market. Positioning also includes identifying the best time to take the business to the market, how to take it to the market, and who the most likely buyers will be.

Positioning is about doing everything needed to maximise the probability of a sale occurring whereas structuring is about getting the best outcome from a transaction once it has occurred. A lot of people make the mistake of spending most of their energy on the structuring of the transaction. It is important, but it only becomes important if the sale is achieved.

To do this, you need to get an objective assessment of how the business compares in its market, its competitive position and what, if any, impediments to sale exist – all the things a buyer will look at and look for when they assess your business. Most buyers believe that we are currently in a buyer's market and will try to drive down price expectations. Whether or not you are in a buyer's market depends on your industry segment but, regardless of this, you are in a competitive market. Buyers may be comparing your business with similar businesses, but also

opportunities in other industry segments. Securing a sale at the best possible price is about having your business positioned for sale. Preparation time is needed to achieve this so talk to us well in advance of putting your business on the market.

The Final Stage of JobKeeper and How to Access it

The impact of Covid-19 has been felt very differently from region to region. Fortunes vary wildly between business operators subject to ongoing lockdowns and trading impediments to those benefiting from the “new normal”.

For those severely impacted by Covid-19, JobKeeper might be available. The third and final phase of JobKeeper started on 4 January 2021 and runs through until 28 March 2021. To receive JobKeeper, employers need to have experienced a sufficient downturn (a 30% threshold applies to most entities) in their actual GST turnover in the December 2020 quarter compared to the same period in 2019 – although alternative tests exist.

The payment rate for employers is \$1,000 per fortnight per employee or business participant who worked 80 hours or more over a specific 28 day period, or \$650 per fortnight per employee or business participant for those who worked less than 80 hours in the relevant period – a reduction from previous JobKeeper payment periods.

Assessing eligibility, managing the decline in turnover test, calculating GST turnover for the decline in turnover test, and managing the 80 working hours requirement for the differential payment rates can all be complex. We have outlined a few of the key issues for employers in need of relief:

My business did not previously qualify for JobKeeper: can I access it now?

Your business can potentially access JobKeeper for the period between 4 January 2021 and 28 March 2021 even if it did not qualify for JobKeeper for the period between 28 September 2020 and 3 January 2021 or for the original JobKeeper scheme period that ended on 27 September 2020.

The fact that you have not previously enrolled in JobKeeper or met the eligibility conditions prior to the start of the latest phase of the JobKeeper scheme should not prevent you from accessing JobKeeper from 4 January 2021. For example, if you could not pass the decline in turnover test for the September 2020 quarter this does not automatically prevent you from being able to access JobKeeper for the period between 4 January 2021 and 28 March 2021 as long as your business can pass the decline in turnover test for the December 2020 quarter.

We have been in JobKeeper previously. Do my employees need to complete a new nomination form for JobKeeper from 4 January 2021?

Employees should not need to provide you with a new enrolment form if they have previously provided a valid nomination to you. You should ensure that you have a copy of the original form on file and a copy of the notification that you sent to the employee confirming that their details were provided to the ATO and advising them of the payment rate that applies to them.

What is included in GST turnover for the decline in turnover test?

To access JobKeeper, employers need to satisfy a decline in turnover test. The decline in turnover test for JobKeeper from 4 January 2021 compares actual GST turnover in the December 2020 quarter (October 2020, November 2020 and December 2020) to the same period in 2019 (alternative tests are available in some instances where this comparison is not appropriate).

Understandably, we are receiving lots of questions about what is included in GST turnover and how it is calculated.

In general, if your business is registered for GST you must use the same method that is used for GST reporting purposes. For example, if your business is registered for GST on a cash basis then a cash basis needs to be used to calculate current GST turnover for the purpose of the JobKeeper decline in turnover test for the December 2020 quarter.

Your GST turnover includes proceeds from the sale of capital assets, such as property, equipment or licenses, unless the sale is input taxed. Current GST turnover includes taxable and GST-free supplies, but should exclude input taxed supplies such as residential rental income and financial supplies like

dividends, interest, etc. JobKeeper and ATO cash flow boost payments should be excluded from the calculation along with other payments that do not represent consideration for a supply made by the business such as certain State-based grants.

If your business has received payments in advance, then you will normally need to recognise these payments as part of the GST turnover calculation, even if the goods or services have not been provided to the customer yet. For example, if your business accounts for GST on a cash basis then you need to recognise the payment for GST purposes as it is received and include it in your GST turnover calculation, even if the services have not been provided. There are some special rules where security deposits apply to defer the GST liability, but these rules are reasonably limited in their application.

And if your business is part of a GST group each entity needs to calculate its GST turnover as if it were not part of the group. That is, supplies made by another group member should not be included in GST turnover for the purposes of the decline in turnover test.

When I stood down my employees they started working for someone else to get by. Can they still receive JobKeeper?

To access JobKeeper, employees need to have been either full-time, part-time or long terms casuals of your business on either 1 March 2020 or 1 July 2020. If the employment relationship remains intact (their employment has not been terminated and they have not accessed JobKeeper from another business) then the fact that the employee is performing some work for another entity does not necessarily prevent ongoing access to JobKeeper with you, their original employer.

Of course, the employee can only receive JobKeeper from one employer and there are a number of eligibility conditions that need to be satisfied.

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Sole Trader Granted Access to JobKeeper with Backdated ABN

A sole trader who was able to backdate his ABN has won access to JobKeeper payments in a recent case before the Administrative Appeals Tribunal (AAT).

To be eligible to access JobKeeper as a business participant (e.g. as a sole trader) the rules require a business to have an active ABN on 12 March 2020. The rules also provide the Tax Commissioner with the discretion to allow further time for an entity to register for an ABN.

In this case, a sole trader, Mr Apted was an expert property valuer who had been in business for himself in various structures since 2012. In 2014 he set up as a sole trader and registered for an ABN and GST. In 2018 he decided to retire, cancelling his GST registration and later relinquishing his ABN with effect from 4 June 2018 - although he was aware that he had the flexibility to start up again if the need arose or his expertise was required.

In June 2019 former colleagues encouraged him to accept new work, and he was contacted soon after by a potential client who engaged him to provide his valuation services in September 2019. Mr Apted made it known that he was available for referral work.

Mr Apted stated that he was unaware that he needed to reactivate his ABN as he believed that an ABN was only required if he intended to register for GST. Given he did not expect to earn over the GST threshold of \$75,000, he did not see this as necessary. His clients also did not withhold tax from payments to him as required when payments are made to a supplier without a valid ABN.

On 31 March 2020 Mr Apted applied and had his ABN reinstated. Then on 20 April 2020 he applied for JobKeeper, but this was denied as he did not have a valid ABN on 12 March 2020. In June, Mr Apted phoned the Registrar of the Australian Business Register seeking to have the date of effect of his ABN corrected to align with his resumption of trade. The Registrar subsequently adjusted the date of effect of the ABN to 1 July 2019. With this adjustment Mr Apted believed he had an active ABN at 12 March 2020 required by the JobKeeper integrity rules.

The Tax Commissioner, however, did not accept the backdated ABN as an “active” ABN and declined to use his discretion to allow Mr Apted access to JobKeeper. However, the Administrative Appeals Tribunal (AAT) found:

“We are satisfied the applicant is the kind of person who was intended to benefit from the JobKeeper scheme. While his business was small and his income irregular, he still satisfies all of the eligibility criteria ... There is nothing to be achieved by denying him access to the payments in order to make a point about the desirability of obtaining an ABN.”

The AAT set aside the Commissioner’s decision in favour of Mr Apted directing the ATO to enrol Mr Apted in JobKeeper for the relevant period.

A statement from [Holding Redlich](#), the legal firm representing Mr Apted says *“Small businesses that have been refused JobKeeper might now qualify for JobKeeper – and be entitled to make claims back until the beginning of the scheme in April 2020.”*

The ATO has lodged an appeal with the Federal Court of Australia in the Apted case and has stated that it will not preemptively review decisions of eligibility until the outcome of the appeal has been handed down.

Giving further hope to those who had previously been denied access to JobKeeper under a strict interpretation of the rules is the recent report from the Inspector General of Taxation (IGT). JobKeeper and the cash flow boost require that a business had some business income in the 2018/19 income year and notified the ATO of this by 12 March 2020 or made some supplies connected with Australia in a tax period that started on or after 1 July 2018 and ended before 12 March 2020 and notified the ATO of the supplies (e.g. on an activity statement) by 12 March 2020.

In [her report](#), the IGT has made it clear that *“... for the purposes of the [JobKeeper] and [Boosting Cash Flow] support measures, a taxable supply can be made where an entity makes or acquires a financial interest, for example, by opening a bank account, as this constitutes the making of a financial supply. Such a supply might have been made during the commencement of the business, well before the business had made its first sale.”*

For any business seeking redress on a JobKeeper or cash flow boost eligibility decision, strict timeframes apply. Despite the ATO’s reticence to engage on these issues until the outcome of the Federal Court is known, it is important to lodge the necessary applications or objections to ensure the window of opportunity is not missed.

Refer to the “take-outs” table on the next page:

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Take-Outs

- An ABN backdated by the Business Registrar may meet the JobKeeper eligibility criteria.
- Simply opening a bank account and advising the ATO of the account (e.g. when registering for GST) in the relevant period (by 31 December 2019 for quarterly or by 29 February 2020 for monthly taxpayers) might meet the eligibility test to make a supply in Australia – even if the business had not made any sales.

Winding Up: Simplifying Small Business Insolvency

On 1 January 2021 new laws came into effect that introduce a new, simplified debt restructuring and liquidation framework for small business.

Drawing on key features of the Chapter 11 bankruptcy model in the United States, the new system aims to speed up the insolvency process, reduce costs and, where possible, restructure to help the business survive. Where survival is not possible, it is hoped that the quicker insolvency process will deliver greater returns for creditors and employees.

Under previous insolvency laws, the insolvency process treated all businesses the same regardless of size. The new laws step away from the “one size fits all” model. The simplified debt restructuring and liquidation framework is available to incorporated entities with liabilities of less than \$1 million (around 76% of insolvencies are businesses with less than 20 employees) with non-complex debt. The liquidation framework also requires that a company is up-to-date with its entitlements and tax obligations.

The new laws are intended to help manage the tide of insolvencies expected now that the temporary insolvency related relief for financially distressed businesses has ended (the Covid-19 relief measures which protected directors from insolvent trading and raised the threshold for action by creditors ended on 31 December 2020.) There is no question that the temporary measures in tandem with the stimulus measures such as JobKeeper have kept some “zombie” businesses afloat. In November 2020, 306 businesses entered

external administration compared to 748 in November 2019. In general, the number of insolvencies has dropped by around 200-300 each month since March 2020 compared to 2019 figures.

Debt Restructuring

For financially distressed, but viable companies simplified debt restructuring is available. Under this process the directors resolve that the company is insolvent, or is likely to become insolvent at some future time, and that a small business restructuring practitioner should be appointed. Once a practitioner has been appointed the directors generally have 20 days to develop a plan that sets out an approach to repay the company’s existing debts. Only the company directors can propose a debt restructuring plan to the company’s creditors and the creditors have the opportunity to vote on the plan electronically or virtually (previously creditors had to be physically present or appoint a proxy).

During this time the company directors retain control of the business - which is very different to the previous laws where the administrator took control of the company during voluntary administration.

To prevent the new laws being abused by phoenixing, a company is not eligible to use the debt restructuring process if a director of the company or the company itself has previously been through this process or the simplified liquidation process. The new laws are also not available where the company has already entered into an external administration process.

Streamlined Insolvency

If a company is not viable (the company will not be able to pay its debts in full within 12 months) the directors can resolve to voluntarily wind up the company and access the streamlined insolvency process. Once the resolution has been passed the directors have five business days to provide the appointed liquidator with a report on the company’s business affairs and a declaration that the company meets the eligibility criteria to access the simplified liquidation process.

If the liquidator agrees that the company qualifies for the simplified liquidation process, the creditors are advised of the process that will be adopted. The creditors can reject the approach if 25% or more by value oppose the process.

Streamlined insolvency is designed for companies with relatively simple affairs and is limited to those that have liabilities under \$1 million and are up-to-date with their taxation obligations. It uses the existing insolvency framework, but simplifies the interaction with creditors and ASIC. For example, outside of the simplified system the liquidator may convene a creditor’s meeting at any time to keep creditors up-to-date, to find out the creditor’s wishes or to approve the liquidator’s fees. The simplified system removes the obligation

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for a liquidator to convene these meetings with communication managed electronically. And under the simplified systems the oversight of creditors is limited; creditors, for example, cannot appoint a committee of inspection to monitor the conduct of the liquidation.

There are strict timings that apply to the insolvency process. If you are concerned that your business will not be able to meet its obligations, please contact us as soon as possible and we will review the situation for you. Where assistance is required, we can refer you to a qualified insolvency or small business restructuring practitioner.

Covid-Safe Business

In accordance with NSW government recommendations, our Mona Vale office is registered as a Covid-safe business. As such, staff and visitors are required to check in on entry to our office and to observe appropriate social distancing and hygiene measures. If you have any concerns, please contact us prior to visiting our office.

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