Commercial Law

Buying and Selling a Business
Basic Information Sheet

DELANEY & DELANEY
Celebrating 100 years

Buying and Selling a Business

There are a lot of things to consider when buying or selling a business.

At Delaney & Delaney we can make sure you address all those considerations. We can prepare, or review, the Business Sale Contract, help you to understand exactly what you are selling, or buying, and ensure you have obtained the relevant expert advice.

For Sellers:

What exactly are you selling?

Does it include:

- Property
- Shares
- Intellectual Property (are the rights to be assigned to the Buyer or retained by the Seller?)
- Furniture
- Plant and Equipment
- Capital
- Employees (are employees' contracts to be transferred with the sale? What are the employees' entitlements, such as sickness and long service leave entitlements?)
- Data
- Stock

What is the value of the business?

- The Goodwill of the business
- Customer lists
- Estimated future profits
- Intellectual Property Rights
- Work in Progress (WIP)
- Assets such as property, fixtures, furniture, fittings, chattels, plant and equipment, permits, licences, stock-in-trade.

How is the business to be sold?

Is the Contract of Sale to be a "walk-in, walk-out" or should there be a stocktake?

- A "walk-in, walk-out" contract means that the price of the Business includes the goodwill, fixtures, fittings, furniture, chattels and the plant and equipment, industrial and intellectual property, work-in-progress (if any), permits, licences, stock-in-trade and any additional assets listed in the schedule of the Contract of Sale.
- Alternatively, parties may choose that the sale is subject to a stocktake. In this scenario, the buyer must pay for the stock-in-trade to the maximum nominated figure as set out in the contract schedule. If the value of the stock in trade exceeds the maximum amount previously agreed or set out in the contract the buyer may reject items of stock beyond the nominated amount.

Tax liabilities

It is important to obtain tax advice on the sale, as taxes can significantly reduce the amount of money you receive from the sale of your business at the end of the day. You should consider both Capital Gains Tax (CGT) and Goods and Services Tax (GST).

The sale of a business as a going concern may be GST-free if certain conditions are met. Tax advice should therefore be sought or, alternatively, an application can be made to the Australian Taxation Office for a private ruling about whether the sale of business is, or is not a going concern and the relevant GST consequences.

The Australian Tax Office also offers a number of CGT exemptions in relation to small businesses and a tax adviser will be able to advise you on eligibility.

What other consents, transfers, authorities or licences might need to be obtained?

- Is there to be a transfer/assignment of Lease in relation to the business?
- Does the existing Lease contain provision for assignment and has the Lessor's consent been obtained? If it is the parties' intention to assign the Lease, then a Deed of Assignment will need to be prepared.
- Is the Seller intending to surrender the existing Lease and the Buyer to enter a separate Lease with the Landlord? If so, a Deed of Surrender of Lease will need to be prepared. If the Lease is surrendered then the Seller may be required to pay any costs relating to terminating the lease, including any outstanding rent, unless an agreement is reached with the Lessor.
- If the Business name is part of the sale of the business, have all the necessary ASIC name change documents been completed?
- Are there food and liquor licences or Council permits to be transferred or obtained? What happens if they cannot be transferred or obtained?
- Is there Plant and Equipment that has been leased or is the subject of a rental agreement? Can those agreements be transferred to the Buyer, or will the equipment have to paid out or returned?

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Employees, handover and training

- Does your business have employees? Will the sale of your business include the employees? If so, what are the terms of their contracts and what are their current leave entitlements? If not, will you be terminating their employment contracts and what entitlements are owing to them?
- Will you be required to stay on for a period to train the Buyer's employees in a handover period? What will be your remuneration and entitlements? What period will you be engaged for and what are your duties? Is there a contract setting out these details?

In small businesses, it is a common requirement that a deceased shareholder's shares must be offered for sale back to the Company or to the remaining shareholders before they are offered for sale to third parties. A Shareholders' Agreement can set out a mechanism for valuing the shares and setting the price for which the shares must be offered for purchase. If the shares can only be transferred to existing shareholders or to the Company, care must be taken to ensure that the terms of shareholders' Wills are consistent with the requirements of the Shareholders' Agreement.

Shareholders in Companies operating small to medium sized businesses commonly possess different levels of experience in diverse fields of expemg shareholders to control the decisions of the Company and to receive the profits from their future endeavours. A Shareholders' Agreement which specifies the rights and obligations of a shareholder who retires or ceases active involvement with the Company can be critically important to enable such issues to be dealt with fairly and transparently, in a way which has the prior written agreement of all shareholders.

A Shareholders' Agreement should state that in order to be eligible to receive shares in the Company all future prospective shareholders must sign a Deed of Accession, binding them to the terms of the Shareholders' Agreement.

For buyers:

Consider what kind of entity you are buying:

- Is it a franchise? Have you read the Franchise Agreement, are you happy to be bound by the terms of the Agreement?
- What are your legal obligations under the business's legal structure?

Due diligence

It is very important when you are buying a business that, prior to signing the Contract Business Sale, you undertake "Due Diligence". Due diligence refers to the conduct of various searches and requests for records from the Seller in order for you to satisfy yourself that the business you are purchasing is commercially viable. It also helps to talk to the Seller to understand why the business is being sold. These conversations and a thorough checking of searches and records will assist you to assess the value of the business and the risks associated with its purchase. Some of the documents you would request in order to satisfy yourself of a business's commercial viability would include:

- Profit and loss statements
- income statements
- balance sheets and tax returns including business activity statements
- gas, water, electricity and other utility accounts
- minutes of directors' meetings/management meetings
- evidence and outcomes of any audits
- inventory of stock. It is important to understand if warranties and indemnities apply to stock that has been previously sold and will need to be honoured by the Buyer
- inventory of plant, equipment, fixtures, vehicles.
- documents identifying ownership of intellectual property, trademarks, patents.
- partnership agreements
- lease, licences, hire purchase agreements, permits
- details of the business's automated financial systems
- details of credit and historical searches related to the business.
- current contracts with suppliers
- current employment contracts

Given that much of the information above will not be in the public domain and may be confidential, the Seller may request that the Buyer sign a Non-Disclosure Agreement prior to providing the Buyer with the requested information.

Restraint of Trade Agreement

It is very important that, when you are purchasing a business, you do not give the Seller the opportunity to then set up business close by and go into direct competition with you. It may be appropriate to enter into a Restraint of Trade Agreement with the Seller to protect the value of your business.

With all these considerations, and many more, involved in selling or purchasing a business, it is important to obtain clear and effective legal advice.

At Delaney & Delaney we will lead you through the process to give you the best possible start to your new business or the best return for the sale of a business which you have put heart and soul into growing.

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