

# Buying & Selling a Business

Owning and operating your own business can be an extremely rewarding experience – you are in control of the business and have ownership of where it is going and how it performs. Buying or selling a business is therefore a major decision, and in many cases, an emotional one. A myriad of legal and commercial issues come into play when a business is sold which are often complicated by time constraints and the need to ‘close the deal’. However, as it is such a major transaction and one which is likely to have a direct impact on you for a substantial period of time – whether you are the vendor or purchaser – it is important to make sure that the deal is properly evaluated and all risks assessed and minimised.

## ISSUES TO CONSIDER

### Purchaser

- Why is the business being sold?
- What is for sale – i.e. goodwill, plant and equipment, intellectual property?
- Has the business been independently valued?
- What liabilities come with the business – i.e. how will the employees be dealt with? Are there any leases or service arrangements that will come with the business? Are there any encumbrances over any property?
- What is the best business structure – sole trader, partnership, proprietary company?
- Have the accuracy of representations made by the vendor been checked?
- Does the vendor own everything it is purporting to sell? Has this been adequately checked?
- Are there any claims or disputes in relation to the business, such as taxation, trade mark or copyright infringement?
- Should there be a restraint of trade for the vendor?
- Has a thorough due diligence been conducted?

### Vendor

- How will employees be dealt with – what will the obligation be to employees not taken over by the purchaser?
- Have all representations made to the vendor been accurate?
- What are the taxation implications?
- Are there any consents and approvals need for the sale to proceed – i.e. are there any change of control provisions in any agreements, licences or leases?
- Should the purchaser sign a confidentiality agreement?

## KEY ISSUES

### Employees

When an entire business is sold as a ‘going concern’ it usually means there is a transmission of the whole of the business to the purchaser. In this case, the purchaser must take on any entitlements of any employees that are transferring with the business. Where employees are transferring with the business, it is also a good idea to have them sign new employment

agreements. If employees are not transferring with the business, then care must be taken to ensure that the employees are given the required notice and any termination payment (if necessary).

### **Tax**

Taxation considerations will be relevant for both the purchaser and vendor.

For the purchaser, consideration should be given to what type of entity will buy the business - individual (sole trader), company, partnership or trust, and the tax implications of each.

For the vendor, there may be capital gains tax considerations.

Stamp duty may also payable on the sale agreement, which is usually payable by the purchaser, but other payment may be negotiated into the purchase agreement.

If the business is sold as a 'going concern', GST will not be payable. However, care must be taken to ensure that the business meets specific criteria to be classified as a 'going concern'.

### **The purchase agreement**

It is vital that the purchase agreement between the vendor and the purchaser transfers all the relevant assets and liabilities of the business. This document should be drafted by a solicitor and checked by the other party's solicitor.

The purchaser is likely to want the vendor to provide warranties in the purchase agreement as to any representations that have been made regarding the business, such as the vendor warranting that it owes all the intellectual property purported to be assigned with the sale, or that it holds all relevant licences and approvals necessary to operate the business. The vendor should ensure that it does not make any representations to the purchaser that are not accurate (which could lead to a misleading and deceptive conduct claim) or that it is not prepared to warrant.

### **CONCLUSION**

As you can see, buying and selling a business can be a complicated process but owning and operating a business a very rewarding experience. Above are just a few of the considerations that will arise when buying or selling a business. If you are contemplating buying or selling a business, it is important that you speak to an experienced business lawyer, who can help you understand some of the complex issues that will arise and advise you on the best way to proceed.