

Selling a Business

If you are getting to the stage where you are looking to sell your business then it is important that you properly prepare for the sale and seek proper advice to negotiate a favourable contract.

Package

A lot of time and trouble can be saved if you put in the time and effort to properly package your business as a clean asset. You must keep proper accounts and work with your accountant so that the profit and loss, balance sheet and projections are all up to date. You should ensure that the lease of the premises is in order, all options have been properly exercised and the Lease is registered where required. You should create a detailed inventory of all plant and equipment and summarise details of any chattel leasing or hire agreements. All licences, business names, trademarks and all other intellectual property should all be current and the details presented clearly. A purchaser needs to be confident that they can step in on settlement and continue to run the business smoothly and efficiently.

Sale of business or shares

The sale of the business usually involves the sale of its assets, fixtures and fittings, business name, intellectually property, plant and equipment, vehicles, lease of business premises, stock in trade and goodwill to the purchaser. Usually you will remain responsible for debts and liabilities arising prior to the settlement date.

On the other hand, if the business is owned by a company, you may sell the shares in the company instead. If there are tax losses you may seek some payment for the tax losses being transferred. You should also be careful to ensure that you are released from any personal guarantees you have given concerning company debts and liabilities. When purchasing shares in a company the purchaser will usually want many onerous

insurances and warranties regarding the administration of and contingent liabilities of the company and it is therefore usually much more involved and costly.

Apportionment of the Sale price

The apportionment of the sale price can be a tug of war. From the seller's point of view the most tax effective apportionment of the sale price in order of priority is usually goodwill, freehold premises, furniture and fixtures, plant and vehicles and then stock. This apportionment of the sale price is usually the reverse of how a purchaser would prefer the apportionment to be made. For this reason the apportionment of the purchase price in a contract is often left blank.

Restraint of Trade

Usually a purchaser will wish to restrain you from setting up, operating or being involved with any other business in competition with the business being sold within a certain area for a certain period of time. If you are getting out of the industry or the locality then this is not an issue. If you do wish to return to the industry or have some role in the industry, you should ensure that the restraint of trade does not restrain you from what you intend to do. This will be a matter for negotiation as obviously a purchaser is paying money for the business and will therefore require some protection that you will not compete with him or her.

Representations

You should be careful as to what you represent about the business to the purchaser. It is in your interest to allow the purchaser make up his own mind objectively about the purchase and carry out his own investigations. A purchaser may have a right of redress against you if he is able to subsequently establish that he relied on certain representations made by you which turn out to be untrue.

Assistance to Purchaser

While you will need to give the purchaser an opportunity to inspect the business and its systems, it is often not desirable to give the purchaser access or training in the business prior to settlement.

After settlement, you can offer to give the purchaser training and assistance by attending the business to demonstrate workings and systems of the business and to introduce the purchaser to suppliers, customers and other contacts.

Lease of Premises

It is important that you maintain a good relationship with your landlord prior to the sale of the business as your landlord will need to consent to the transfer of the lease to the purchaser. If your lease has no further options it may be desirable to negotiate a further option with the landlord so that any purchaser is comfortable they will have security of tenure long into the future. Note that although the lease is assigned, you will not necessarily be released from the lease for the remainder of any current term, meaning you may be called on to honour the lease if the purchaser defaults. One way to avoid this is to make the contract subject to the purchaser negotiating a brand new lease with the landlord so your lease is surrendered on settlement.

Plant and Equipment

The standard contract contains a warranty that any plant and equipment sold is in good working order and condition. If this is not the case the contract will need amending. Often the business will have plant and equipment which is not owned but subject to a chattel lease or hire agreement. Usually the financier will either agree to a new agreement with the purchaser or consent to an assignment to the existing agreement. Note if the agreement is assigned, then you will not necessarily be released from the agreement meaning you may be called on to honour the finance agreement if the purchaser defaults. You should check with any chattel financiers to ensure that you will be released on settlement.

Vendor Finance

As a seller you may be asked to offer vendor finance to a purchaser to affect a sale. The reason a purchaser asks for vendor finance terms is usually because they cannot get sufficient finance from their bank and for this reason we normally advise vendor's against it. If it is the only way you will affect a sale, particular care has to be taken to ensure that you have sufficient security not only over the business assets but also personal guarantees from any directors and security over other assets of the purchaser such as real estate. Remember, you are being asked to be a bank and should act like one.

Employees

You must pay all entitlements owing to employees up to the date of settlement. Usually an adjustment will be made on settlement in favour of the purchaser for 70% of any accrued but unpaid holiday pay for all employees and long service leave for employees with 5 or more years of service.

Franchise

If you are selling a franchised business, then the franchisor will need to consent to the sale. Often the franchisor has particular procedures that need to be followed and you should contact the franchisor before putting the business on the market to discuss their procedures and the costs involved.

GST

If you are selling everything necessary to conduct the business then normally the sale of a business will be a sale of a going concern and therefore exempt from GST. If you are not selling all the assets of the business then you need to obtain advice as to whether the going concern GST exemption will be available to you.

There are many legal matters to consider when selling a business and the above notes are not exhaustive. It is therefore important that you get proper advice before you sign a contract.

This information sheet is provided for general information only and does not constitute legal advice. For advice on your circumstances please contact us on 5443 1566