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LAWYERS

Important things to consider when buying a business

If you are considering buying a business there are many things you need to do from a legal, financial and general business perspective. Getting the right advice from the start is important. The structure of, and issues involved in, the sale are quite different if you are buying the business assets only, compared with the shares in the company that owns the business.

Making sure you follow the right process before signing any documents is a key component of a successful business purchase.

The main things to do before signing a contract are:

- Due Diligence enquiries
- Get professional advice
- Review & understand all documentation

Due Diligence

Proper due diligence involves checking the records of the business and other information to ensure:

- Sales are as good as the owner says they are
- The business systems are sound and documented
- The business does not have any problematic legal obligations or liabilities
- All necessary information, rights and assets will be included in the sale
- Cash flow is sustainable
- Employees will be happy with a new owner
- Customers will remain loyal once you take over
- You understand the operation of and opportunities in the market/industry

Due diligence should, where possible, be carried out before you sign any contracts.

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Professional advice

You should always consider briefing and engaging legal and accounting advisers to assist you in conducting due diligence and documenting the transaction, to avoid legal and financial (including tax-related) “surprises” and arguments down the track.

You might also consider whether there are any industry specific experts that may be useful.

Review and understand the documentation

When purchasing a business there is a lot of documentation to be gathered, read and understood.

The seller may require you to sign a confidentiality agreement to stop you from using confidential information for any purpose other than buying the business. You should make sure you fully understand the agreement before you sign it.

Some of the information you should gather and review is outlined below.

Financial statements

It is sensible to obtain current and historical financial records for the business, including:

- Profit & loss statements
- Balance sheets to identify assets and liabilities
- Lists of debtors and creditors
- Copies of any BAS’s lodged by the business

List of plant, equipment, assets and stock

You should obtain a list of all plant, equipment, assets (including fixtures and fittings) being sold along with current valuations, proof of ownership and information on applicable warranties and guarantees.

Details of any stock sold with the business and how it will be counted and valued at settlement should be discussed and agreed with the seller.

You should also undertake thorough searches of the Personal Property Securities Register to, for example, ensure that security interests necessary for the business have been registered (such as over sale equipment leased to third parties) and to check whether any relevant security interests are held by third parties.

Lists of customers and suppliers

Customer and supplier relationships form part of the goodwill of the business and a list of all available contact details should be supplied so that you can make contact and ensure an ongoing relationship.

Employees

If the business is being purchased as a going concern and the buyer is assuming liabilities for employees then a list should be provided – setting out the employees, their job descriptions, salaries, years of service, any disciplinary issues and accrued entitlements like holidays and long service leave.

Important Contracts

Any major contracts necessary for the operation of the business should be provided and reviewed, including copies of the lease of the premises and any plant & equipment leases. Term, assignment, change of control and termination provisions, in particular, should be checked.

If any sale assets are financed, the financier's consent will be necessary.

If the business is a franchise, the seller is required to provide a franchisor's disclosure statement.

Documenting the transaction

After completing your due diligence you will need to have the transaction documented with a legally binding contract. There are many issues to consider.

Structure

You will need to decide on the structure of the transaction and it is crucial to get advice on the legal, financial and taxation consequences of the structure you adopt.

The types of things that need to be considered include:

- Whether you are buying the assets of the business or the shares in the company that owns the assets.
- The price to be paid and when it is to be paid.
- Who will the buyer be - an individual, company, trust or partnership?

Deciding on whether to buy the assets or the company is a critical issue when buying a business. There is no simple or right or wrong answer to this question as it will usually depend on the business being purchased and the individual circumstances of both the buyer and the seller.

Things to consider when making a decision include:

- The amount of flexibility and control you want over what you are buying.
- Do you require all of the assets of the business, or all of the employees?
- Do you want to be responsible for past liabilities (known and unknown) of the business which might relate to employees, suppliers or customers?

Price and Terms of Payment

Once the price is agreed you will need to determine how and when the price will be paid.

For additional protection you may want a portion of the price to be held back for a certain period to ensure that information given by the seller is accurate or that profit projections are achieved.

You may not want to pay the price in a lump sum and may be able to negotiate to pay in monthly or annual instalments.

You will need to take into account that the business will probably be continuing right up to the sale date, which means stock, accounts receivable and other items will need to be finalised at a certain time and in an agreed manner.

Legal Contract

The main legal document is a contract for sale of business. The sale contract sets out the various terms agreed to by the parties, including for example:

- the rights of the parties if things go wrong;
- the seller's representations and warranties, which are designed to ensure that:
  - the seller remains responsible for the information given to you about the business; and
  - you get what you pay for;
- a non-competition provision which prevents the seller from creating a competing business after the sale; and
- (if a lease or franchise is involved) the consent of the landlord or franchisor.

Conclusion

Buying a business can be a complex transaction. You need to make sure you have done adequate research, understand the risks and have received the right advice.

Resources to assist you

We have prepared the following Guides to assist you when buying a business:

- Due Diligence: Purchasing a Business Action Checklist
- Buying and Selling Businesses – Frequently Asked Questions

If you would like a copy of any of our guides, go to the Business Law Section of FAQ's and Guides on the 'Publications' tab on the home page of our website www.batemanbattersby.com.au

If you are considering buying a business and would like some help please contact Michael Battersby or John Bateman on 02 4731 5899 or email commercial@batemanbattersby.com.au.