



Buying and Selling Businesses

Some of the most commonly asked questions about Buying and Selling Businesses are discussed on this page.

1. What is a “due diligence” inquiry regarding a business?

A purchaser of a business must be conscious of the principal causes of business failures. These include inexperienced or incompetent management, location, excessive overheads, lack of capital, problems relating to stock. A viable business can be ruined with poor management, but it is very difficult to resuscitate a potentially non-viable business even with superior management skills. Hence, the necessity to thoroughly evaluate the cost and the financial viability of a business, before entering into a binding contractual commitment to purchase it. The business should not only be viable financially, but it should be suitable to the abilities, interests and financial capacity and need of the intending purchaser. These investigations are called “due diligence” inquiries.

Due diligence enquiries include:

- verifying the financial information furnished by the seller of the business; obtaining a valuation of the business;
- speaking with staff and suppliers of the business;
- reviewing the contracts held by the business;
- ascertaining who are the customers of the business.

The seller of the business may require the intending purchaser to sign a confidentiality agreement prior to disclosing information about the business to the intending purchaser.

2. What is Goodwill?

Goodwill of a business is a special asset of the business and is the right to have the continuing benefit of existing and prospective customers of the business and the maintenance of turnover and profits.

Goodwill arises in respect to a business for a variety of reasons, for example, the location of the business premises, the quality of the products sold by the business, the performance of the staff, the absence of competition etc. It is generally reflected in earning power of the business but can be destroyed quickly by changes over which the owner of the business has no control, for example, zoning, widening of roads or cancellation of a supply agreement.

The elements which comprise goodwill are not identical for all businesses. The following are things that should be considered when buying goodwill so as to assist in protecting the goodwill:

- obtaining a transfer of the name of the business;
- obtaining a transfer of the trade marks, designs, patents and logos associated with the products of a business;



- training of the purchaser by the seller of the business;
- introduction to, lists and records of customers;
- securing the continued employment of key employees;
- restraints of trade by the seller, directors or shareholders of the business.

3. Are Licences needed to run a Business?

Licences and permits may be essential for the continuing operation of a business. Many licences are principally concerned with the use of premises for particular activities and their suitability for such use (e.g. theatres, restaurants) but some licences are concerned with the licensee's suitability and fitness to conduct the activity (e.g. travel agent, security company). Some licences have no special value and may be obtainable from some public authority as a matter of routine at a moderate annual fee. Other licences have a substantial monetary value and may form a substantial portion of the value of a business (e.g. taxi licences, liquor licences).

Some professional or occupational licences need to be held by the business owner as a pre-condition of conducting the intended business and cannot be transferred to another person. Other licences require the holder to provide evidence of substantial assets (e.g. motor dealer, travel agent, builder).

In New South Wales there is a Business Licence Information Service providing information and forms for over 380 licences and permits.

4. What is a Restraint of Trade in respect to a Business?

A restraint of trade is a restriction placed on the seller of a business, or a director, shareholder or key employee of a business to prevent that person from undertaking certain activities for an agreed period of time after the sale of business has been completed. The reason the purchaser of a business requires the restraint is to protect the goodwill of the business that has been purchased.

There are a range of possible restraints. For example:

- a restraint on business ownership i.e. not to be involved in a similar business which is located within a specified area for an agreed period of time;
- restraint of certain activities i.e. not to sell any products competitive with products sold by the business;
- a restraint not to solicit, entice or endeavour to obtain the business of past or existing customers of the business;
- a restraint to keep secret and confidential business and financial information;
- a restraint not to interfere with or entice the employees of the business to leave and to work for someone else.

A breach of a restraint can be corrected by a Court order enforcing the restraint and/or by an award of damages for the breach.

5. How does the Sale or Purchase of a Business Affect Staff Entitlements?

When a business is sold, the purchaser usually has a right to select which of the existing employees of the business the purchaser wishes to retain.



Any employee that is not re-employed by the purchaser must be paid out his or her entitlements by the Seller. Sellers should be aware that they may become liable to make redundancy or severance payments to employees not re-employed by the purchaser.

For most employees who are re-employed by the purchaser, the employee's entitlements to holiday leave and long service leave carry over and are maintained. This means that the purchaser can be liable to pay employees for untaken holiday and long service leave accrued before the purchaser became the owner of the business. Provision for these obligations should be clearly settled with the seller in negotiations before the sale.

Under most awards or industrial agreements, the purchaser of a business does not acquire any retrospective liability in respect of employees' untaken sick leave for the period which the seller owned the business.

Purchasers should also be aware that they may be required to make redundancy or severance payments if they re-employ the seller's employees and subsequently discharge all or some of them.

The purchaser should be aware too, of the effect of fringe benefits tax on any benefits given to valuable employees to induce them to stay on.

6. Is Stamp Duty payable in respect to the Sale and Purchase of a Business?

Stamp duty on the transfer of 'business assets' was abolished from 1 July 2016. A 'business asset' includes goodwill, intellectual property, stock in trade, registered motor vehicles and a statutory licence such as a taxi licence or a gaming machine entitlement.

However, stamp duty remains payable on any land, or an interest in land (such as a transfer of lease) that is included in the sale of business and on 'dutiabale goods' such as plant and equipment also involved in that same transaction.

7. Does GST apply to the Sale and Purchase of a Business?

The sale of a business may be a taxable supply for the purpose of the GST legislation and if so GST may be payable.

The Contract for Sale of the Business will usually contain provisions relating to whether the price is inclusive of GST and whether the vendor or the purchaser bears the liability for payment of the GST.

In some circumstances the sale of a business may be GST free if the sale constituted the supply of a "going concern" i.e. a supply where the seller supplies to the purchaser all of the things necessary for the continued operation of the enterprise and where the seller carried on or will carry on the enterprise until the day of supply (usually the day of completion).

If a purchaser of a business is to obtain an input tax credit (i.e. claim back GST) or if a sale of a business is to be GST free under the sale of a going concern concessions, the purchaser (must be GST registered or be required to be GST registered at the time of the supply and acquisition.

The supply of a business as a going concern is GST-free if the following requirements are met:

- The purchaser must be registered or required to be registered for GST.
- The supply is for consideration.
- The supplier must carry on the business until it is sold.



- All things required for continued operation of the business must be supplied.
- Both parties must agree in writing that the supply is of a going concern.

If you would like further information, or require assistance, please contact us on (02) 4731 5899 or send us an email by clicking on the 'Contact Us' page on our website.