

Businesses of various sizes in different industries are bought and sold every day. As prospective purchasers, what can we do to ensure a smooth transition with no surprises, both before and after settlement?

## **SOME PRELIMINARY ENQUIRIES**

Obtain as much information as you can about the business':

- Financials (debtors, creditors, cash flow, revenue forecast, salaries and wages, accrued employee entitlements, pre-payments, guarantees, bonds, business maintainable earnings, premises and equipment rentals);
- competitors in the market, market trends and issues;
- marketing campaigns both current and in the pipeline and how effective past campaigns have been;
- customers and suppliers databases;
- customer survey reports and reviews;
- spend per customer and whether there is sufficient data to enable you to work out spending patterns;
- alliances with other business and its relationship with these businesses;
- warranties and claims and whether it is subject to any legal proceedings, unrealised legal claims and any contingent and other potential liabilities.

In order to obtain the above information from the business owners, you will usually be required to sign a NDA (Non Disclosure Agreement) which will restrain you from using or disclosing the information other than for the express purpose of evaluating the business for a purchase consideration. *(Note: this is not an exhaustive list and needs to be customised for each purchase)*



## **MAKING AN OFFER**

Having reasonably satisfied yourself that you have identified the business to purchase, the next step is to negotiate the price with the vendor. Ideally, you should not sign any document at this point before obtaining legal advice. If you are dealing with a business broker, you will be asked to sign a Heads of Agreement setting out the commercial terms of the proposed purchase. If you do not have time to engage a solicitor to provide advice to you before signing, ensure that you make the offer "subject to the approval of the purchaser's solicitor and the execution of a formal contract to be approved by the purchaser's solicitor."

## **NEGOTIATION OF THE CONTRACT**

The vendor usually provides the draft contract for your consideration. This contract sets out the terms and conditions of the business purchase.

Some points to consider:

- the purchase price;
- proposed settlement date;
- how stock is to be valued and whether you have the right to reject or set a upper limit to the value of stock you must purchase;

- premises lease terms and conditions and in particular the make good provisions in the lease;
- Usually there is no room to negotiate variations to the lease but if the vendor is prepared to accept a sale subject to variations to be granted by the landlord, these must be included in the contract. The contract should be drafted to ensure that you will get all your monies refunded unless the variations are granted by the landlord;
- if you are taking over any employee of the business (within 3 months of the settlement date), you will need to verify all accrued employment benefits and understand whether they are governed by Modern Awards, under an enterprise agreement or otherwise. The manner in which the vendor manages the cessation of the employees' terms will have an impact on the calculation of the various types of employment benefits after they become your employees.
- If you decide to recognise the employees' accrued annual leave and long service leave with the vendor, specific adjustment clauses must be included in the Contract to ensure that you are not out of pocket when you are called upon to make payments to the employees under your employ;
- All necessary permits and licences for the business must be included in the sale and such transfer must be a condition precedent to settlement so that you will have the right to terminate the contract if you do not obtain a transfer of the permits, licences and a transfer of the premises lease;
- Ensure that all assets, plant and equipment, together with all distinctive indicia of the products and service offerings of the business are included in the sale and will be unencumbered at settlement. Proper release will need to be obtained from all security interest holders over the assets of the business;
- There have been due compliance with industry and trade regulations and any contraventions must be rectified by the settlement date. Various due diligence investigations will need to be undertaken to ensure that the business is compliant by the settlement date.

*(Note: each business is different and different industries have their peculiar compliance requirements. The above is just a sample list of issues to be considered)*

## **PROCEEDING TO SETTLEMENT**

- If taking over employees from the vendor, ensure that all employees are terminated by the vendor with proper termination notices and redundancy pay so that their period of service with the vendor will not be recognised for redundancy purposes;
- attend to the transfer of phone and fax numbers, domain names, website, social media accounts and utility connections;
- inspect the business premises and all assets to be transferred to ensure that they are in the same condition they were in when the contract was signed.

*(The transfer of leases and assets with documents of title will be effected by your solicitor)*

**FOR A SMOOTH BUSINESS PURCHASE WITH NO SURPRISES**

**CONTACT US FOR A CONSULTATION TODAY.**