SELLING YOUR BUSINESS FACT SHEET

Selling your business involves a number of moving parts. This fact sheet will provide an overview of the sale of business process and the documents you need to make an effective sale.

1. PREPARING FOR DUE DILIGENCE

Due diligence refers to the process of investigating the critical facts relating to a business, including its legal and financial position. The buyer undertakes due diligence to ensure claims about your business are true. Business sales that undergo a thorough due diligence process have a higher potential for success.

Corporate Matters - This reveals what approvals are required for the sale. Start by reviewing your company constitution and shareholders agreement, as it might detail a specific sale process.

Financial Matters - Provide profit and loss statements, balance sheets, cash flow statements and information about any security interests registered over the business on the Personal Property Securities Register.

Employment Matters - If your employees are to be transferred to the buyer in the sale, the buyer will want to check your:

- employment contracts;
- compliance with wage and superannuation requirements;
- leave accruals; and
- immigration and visa compliance.

Intellectual Property - Ensure you have correctly registered any trade marks, designs or patents with IP Australia. You may need to supply a list of login details for website and social media accounts.

Leases - Check you can assign your lease and the steps to take to obtain the landlord's consent. The buyer may want to negotiate whether:

- they will take on your existing lease; or
- require a new lease.

Litigation - You should disclose any litigation the business is subject to, as you will likely have to provide a warranty to the buyer that makes you liable for failing to disclose any current or impending litigation within your knowledge.

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2. FINDING A BUYER

There are different streams to use to find the right buyer:

- utilising existing networks (e.g. employees, suppliers);
- engaging a business broker; and
- advertising and listing your business for sale online.

Some key questions you should ask when considering a prospective buyer include:

- Are they experienced in running a business?
- What industries do they have experience in?
- How much are they realistically willing to offer for the business?

3. PREPARING THE BUSINESS SALE AGREEMENT

The business sale agreement is the main transaction document required to sell your business. It should include the following clauses.

Parties - Confirm who are the parties to the sale. For a business run by a company, the company is selling the business assets to a third party rather than the company's shareholders selling their shares. Therefore, parties to the transaction will be the company (as the owner of the business) and the purchasing entity.

Assets Being Sold - List all essential assets in the business sale agreement, e.g intellectual property, plant and equipment.

Key Contracts - Confirm if your agreements require the other party's consent to transfer that agreement to an incoming buyer (either by assignment or novation), e.g. leases and supplier agreements.

Purchase Price and Adjustments - The purchase price can be broken into three categories:

- Goodwill: includes intangible assets such as your business' reputation, brand identity, customer base, location, and the skills required to run it.
- Stock: if stock is included in the transaction, it forms part of the final price.
- Plant and equipment: the equipment, tools, machinery and any other physical assets necessary to run the business.

If you have paid in advance for any business expenses that relate to the period after completion of the sale, adjust the purchase price at completion so the buyer is required to reimburse you.

You should engage a financial expert, such as an accountant, business valuer or broker, to assist you with valuing the business.

Warranties and Indemnities - A warranty is a contractual promise you are providing to the buyer about the business, e.g. that the plant and equipment is in good working order.

An indemnity is an obligation to compensate the buyer for loss or damage they suffer as a result of a specific matter.

Restraints - These restrict the seller from establishing a similar business within a reasonable distance and for a reasonable period. Courts will only enforce a restraint if it is reasonable.

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4. COMPLETING THE SALE

The completion process broadly involves the buyer and seller's lawyers working together (with their respective clients) to fulfil pre-completion and completion obligations.

Pre-completion steps:

- corporate governance approvals;
- release of encumbrances;
- training;
- stocktake;
- offers to employees; and
- any conditions precedent.

Conditions precedent are conditions that must be satisfied or waived in order for completion to take place. For example, assigning a lease, or novating material contracts.

Key completion day steps:

- deliver title documents;
- deliver business records;
- physically deliver assets being sold (if capable);
- transfer business name; and
- buyer to pay the balance of the purchase price.

Once both parties fulfil their completion obligations, the sale is complete. The buyer is now the legal owner of the business.

Possible post-completion obligations:

- training the buyer on the business processes for a period of time;
- being on call for a period for technical questions and assistance; and
- complying with restraint obligations.

5. AFTER THE SALE

Wind Up the Company - As you no longer have business assets, consider deregistering your company or voluntarily winding it up if your company is solvent.

Deregistering: To be eligible to deregister, ensure that the company:

- shareholders agree to deregister;
- no longer conducts business;
- assets are worth less than $1,000;
- stocktake;
- has no outstanding liabilities (e.g. unpaid employee entitlements or tax owing to the ATO);
- ASIC fees have been paid; and

Winding up: An option if your company cannot voluntarily deregister. It includes four phases:

1. A Declaration of Solvency Special Resolution

2. Notifying ASIC - You have seven days to lodge:
   - Form 205 - notification of resolution; and
   - Form 505 - appointment of a liquidator;

3. You have one business day to publish a notice of your winding up on ASIC's Published Notices;

4. Liquidator Wind Up - Where the liquidator forms the view that the company is solvent, ASIC will deregister the company three months after receiving the final forms required of the liquidator.