



Buying a Business – What to consider and what to expect

*Buying a business is both an exciting yet often confusing time for purchasers. **Aitran Nguyen** considers what is involved and what a purchaser should expect when purchasing a business.*

Congratulations - so you want to buy a business and be your own boss! It is exciting and daunting.

One of the most common questions we receive at Bowden McCormack is, "I want to buy a business - what should I consider and what is involved in the transaction?"

We provide a summary of points to consider and the steps involved in the transaction so that you know how to prepare, what questions to ask of the Seller and what to expect.

1. What to consider when buying a business:

When buying a business you should consider the following:

- **Why are they selling** – Ask the Vendor (Seller), what are the reasons the business is being sold? Provided the Vendor gives you a truthful answer, which can be tricky to achieve with this question, the Vendor's reasons for selling will give you an idea as to whether the issues the Vendor has faced is a challenge you are comfortable with overcoming.
- **Income/Sales** - Can you see any patterns or trends? What is the business' customer base? Who are the current suppliers?
- **What are the Costs** - What are the fixed and variable costs? One of the largest costs in a business will be the rent! Make sure you obtain a copy of the lease to identify what the rental payments are.
- **Lease** – is the term of the lease sufficient? The last thing you want to happen is to expend a considerable amount in purchasing the business, only to find that you only have a short time left on the lease. If there is only a short period left on the lease, you could sign the purchase agreement with a special condition that the purchase agreement is subject to the Landlord agreeing to a variation of the lease to allow for an extended lease term and/or further options to renew the lease.
- **Is it profitable? Previous Financial Records** - It is important to obtain a copy of at least 3 years' financial records to allow you to review the financial records and identify any patterns and trends over this period. We recommend obtaining three years' worth of financial records to safeguard against a potential buyer obtaining for example 1 year's financial records only to find that there was an unforeseen/unsustainable increase in sales/income in that year alone.

Look at the net income, is the business profitable? You should consult your accountant if you require assistance with reviewing the financial records.

- **Assets** – You should fully understand what assets will be yours if you purchase the business. Many businesses have leasing arrangements over their equipment and so what may be present in the business, will not necessarily become yours upon purchase of the business.

The list of plant and equipment contained in the business sale agreement will identify the assets that will be sold to you.

- **Stock** - You should be mindful as to whether the stock is included in the purchase price, or whether the stock value is additional to the purchase price. Where there is extensive stock, it is common for the stock to be additional to the purchase price and valued on the day the sale/purchase of business is completed.
- **Business structure / Purchasing entity** - What is the business structure? Do you need or want to change the business structure to suit your business needs? Do you know the different legal, tax and record keeping requirements of your current business structure, or the one you want to change to?
- **Planning** - Have you written your business plan and marketing plan to help you document your business objectives and identify how this business will meet your goals?
- **Business sale agreement** – Before you sign the sale agreement, we strongly recommend that you engage solicitors to review the terms for you to ensure that it protects your interests.

This will assist in ensuring that you have:

- the most suitable structure.
- tax considerations are dealt with particularly concerning GST, as a business purchased as a going concern allows the business to be purchased free of GST.
- appropriate and enforceable restraints of trade clauses are included to ensure that the Vendor does not establish a similar business near your newly acquired business, taking away your customers and good will that you purchased.

2. What are the steps involved in buying a business?

a) Reaching Agreement

The first stage is the offer and acceptance of the terms of the business purchase. This can be in written form or a simple verbal offer.

It is recommended that an offer is made in writing to avoid any misunderstanding/dispute as to the terms.

The principal terms that should be agreed upon at this stage are:

- price and deposit amount
- assets included in purchase
- any conditions to include, such as subject to finance and subject to due diligence clauses;
- whether there is a handover period to allow training of the new owner of the business' operations;
- any restraint of trade conditions, preventing the seller from competing against your business;
- settlement date (date final payment made)

b) Review of Contract

Our clients generally approach our team at this stage, and we always hope that they haven't signed the contract yet!

The Seller's lawyer generally prepares the sale agreement and provides it to you to review. This is the point where we recommend that you seek our assistance prior to signing to ensure that your interests are fully protected.

In addition to ensuring tax components are correctly dealt with, liabilities, indemnities and restraints of trade clauses; warranties are a clause that requires attention to ensure that the Seller does not misrepresent the viability of the business and its assets/equipment to you. Many representations are made verbally, and a warranties clause in the contract will ensure that this is captured in the sale agreement in case a dispute arises later on.

c) Exchange of Contract

Once the negotiations between yourself and the Seller have concluded, the contract will be executed and exchanged.

d) Settlement Process

Once the contract has been signed and exchanged between the parties, you should immediately make application to your financier (if seeking finance) and conduct due diligence enquiries (or otherwise seek our assistance in doing so).

From the date of exchange of contracts to the settlement date, which is the date the final payment for the business is made and business ownership legally transfers to you, the following would need to occur in readiness for the settlement date:

- Finance: finance should be approved for the purchase of business by the finance date (if finance sought)
- Consent from Landlord: The Landlord's consent must be obtained and documented in a Deed of Consent and Assignment of Lease for the assignment of lease to you as the new tenant
- Any securities held by banks/creditors must all be released over the business' assets, now in the form of PPSR securities
- Business name is to be ready for transfer
- Website/Telephone Numbers/Logos and any other Intellectual Property to be ready for transfer
- Supplier contracts (if any) are to be ready for transfer – consents to assignments of leases must be obtained

Adjustments as at the settlement date will be made for:

- Rent/Outgoings paid already by the seller that relate to the period after the settlement date;
- Stock value;
- Lease security deposit paid by the Seller to the Landlord; and

Once all of the above are ready, then the solicitors for each respective party settle the transaction on the settlement date, where the final payment is made to the Seller by bank cheque/s, final documentation checked over by the solicitors and keys are handed over to you as a new business owner.

For advice on purchasing or selling a business please contact Bowden McCormack on 08 8941 6355 or email the writer at aitran@bowden-mccormack.com.au