

Buying a Business in Australia – Some Traps to Watch Out for!

Steven Goodman, Truman Hoyle Lawyers

Because of the availability of capital gains tax concessions for sale of shares held by individuals or trusts in a company, most sellers of businesses in Australia prefer to structure a sale of their business as a share sale transaction.

For a purchaser this means that you are likely to be offered shares in a company. As a result, in addition to the assets of the business (being what you want) you will also be buying all the liabilities of the company. To understand these liabilities as well as check on what is being represented to the buyer it is essential that the buyer:

1. Conducts a due diligence process in order to identify the potential liabilities; and
2. Negotiates a share purchase agreement that protects the buyer.

The due diligence process should:

- Involve commercial, accounting, tax and legal due diligence. Be careful to ensure that tax due diligence does not slip between the cracks of your advisors scopes. It is in our experience a key risk as very often companies have not paid the correct tax or withheld the correct PAYG amounts (short for “pay as you go” deductions employers are required to withhold from employees pay and pay to the tax office) or paid the required 9% superannuation contributions for employees.
- Be commensurate with the degree of risk as well as likelihood of the risk occurring. This simply means that the process needs to fit the amount of money at stake.
- Be carefully controlled and co-ordinated. This includes co-ordination between the advisors as well as co-ordination of the timing.

The share purchase agreement should:

- Include extensive warranties including a warranty that the accounts are correct and that there have been no material changes since the date of the accounts and a warranty that all material information has been disclosed.
- Include a carefully drafted tax indemnity to indemnify the company and buyer against tax liabilities of the company.
- Include appropriate guarantees.

Of course these suggestions are simply brief high level thoughts regarding some of the traps to watch out for. In every transaction it will be essential to consider the particular circumstances and to obtain appropriate professional advice.

Steven Goodman
Partner
Truman Hoyle Lawyers
sgoodman@trumanhoyle.com.au

Tel: (02) 9226 9888

Fax: (02) 9226 9899

Truman Hoyle is a Sydney based law firm serving the new economy industries across the Asia Pacific region. Australasian Legal Business has recently ranked the firm's Telecommunications, Media & Technology and Intellectual Property practices as top-tier in Sydney. The firm was named Australian Law Firm of the Year in 2005 and again in 2006, for firms with 50 lawyers or less. In 2009 our firm was awarded the prestigious ACOMM Award for Professional Services Excellence at the annual Australian telecommunications industry awards.

December 2009

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