

# Issues Arising after a Sale of Business

## What could Possibly go Wrong?

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### Introduction

In this paper we will briefly canvass some of the issues that may arise after completion of a contract for the sale of a business and in so doing examine five key areas:

- (1) the structure of the transaction and advantages and disadvantages of buying or selling a business;
- (2) pre-contractual negotiations;
- (3) the structure of the contract;
- (4) what can go wrong after the sale has been completed; and
- (5) managing the risks associated with buying or selling a business.

An understanding of these issues may assist a practitioner in understanding the motivation of the vendor and purchaser when entering into a business sale transaction and the practical steps that may be taken when acting for the vendor or purchaser of a business.

Before considering these issues (really in the context that we are about to examine “disputes”) which can arise after completion of a contract for the sale of a business, it is first important to consider the context and that means first examining at a high level the various steps from deciding upon the appropriate structure of the transaction to the pre-contractual negotiations down to completion of the contract and thereafter issues which might arise.

### 1. The Structure of the Transaction

When instructed to act on the sale or purchase of a business, it is important to consider whether the intended purchaser should buy the business (which will comprise a collection of specific assets and specified associated liabilities), and the entity which owns the business (namely the company or trust). Relevant considerations include, without limitation:

- (a) if the vendor is a company or trust whether it has assets other than the business to be sold;
- (b) whether the purchaser is prepared to accept all the liabilities of the company, and rely on its due diligence enquiries and the vendor's warranties (sale of shares) or would prefer the comparative certainty of assuming only specific liabilities (sale of business);
- (c) taxation consequences for the vendor and the purchaser (note: the vendor will generally wish to stipulate the nature of the transaction having regard to CGT and GST consequences);
- (d) stamp duty consequences given that duty on business sales is generally higher than on share sales; and
- (e) employee entitlements which may be crystallised, for example redundancy and long service leave obligations.

While this paper focuses on the issues relating to the sale of the business assets and not a sale of shares of a company, it is well to recall the respective, advantages and disadvantages which include:

### ***Advantages***

When buying the business, a purchaser will acquire:

- (a) an existing customer base and existing contracts;
- (b) existing suppliers;
- (c) existing plant, equipment, stock and material;
- (d) knowledge of the business from the current owner (particularly if the owner will be engaged as an employee or consultant for a period following completion);
- (e) established premises (to the extent that such premises exist and are necessary for the conduct of the business);
- (f) goodwill associated with the name and location of the business; and
- (g) financiers may be more willing to lend money to assist in the acquisition of an existing business with a trading record.

### **Disadvantages**

When buying a business, a purchaser must assess:

- (a) preservation of the goodwill or reputation of the business;
- (b) employment issues including the departure of key individuals from the business;
- (c) inheriting plant and equipment that is obsolete or faulty;
- (d) the business may have no real intellectual property that is transferable or the business may have failed to adequately protect its intellectual property; and
- (e) the cost of acquiring goodwill may be too high.

## **2. Pre-Contractual Negotiations**

Self evidently pre-contractual negotiations between the parties are of the essence of any agreement leading to the negotiation of commercial terms whereby the vendor agrees to sell and the purchaser agrees to purchase the assets of a business. What those assets comprise will of course vary from business to business but usually are divided into:

- plant and equipment;
- stock in trade;
- intellectual property and associated licences;
- equipment leases and service agreements;
- the rights of the vendor under material contracts; and
- goodwill.

Each party will have his own views on the value of each of these components and of course the economic and business circumstances in which the sale negotiations are both conducted and concluded will ultimately be decisive in not only determining the total price payable, but also how that price is apportioned between these various assets.

When the vendor or purchaser client instructs the practitioner to act and once detailed instructions have been received, it is important that the practitioner:

- (a) ensures that the client's financial advisor (traditionally his accountant, but sometimes his taxation accountant) is involved considering the structure of the sale to ensure that revenue issues are squarely dealt with and understood - those revenue issues include GST, CGT and stamp duty;
- (b) undertake due diligence to ascertain the nature of the business and consider items such as:
  - (i) the identity of the parties – check that the vendor is the owner of all assets purporting to be sold and is capable of selling the assets; whether any other persons should be joined as a party to the agreement as co-warrantors (such as directors and senior executives to ensure that those who know the business consider the truth of the matters represented to the purchaser), covenantors (particularly under the restrictive covenants against competition, such as directors and senior executives and substantial shareholders) or guarantors (consider whether any person or company should guarantee either the vendor's obligations, particularly under the warranties, or the purchaser's obligations to pay);
  - (ii) sales – this will include identifying patterns and trends;
  - (iii) profits – analysing financial records, future cash flow and profitability to determine whether the business generates sufficient profit for a reasonable income;
  - (iv) costs – including fixed and variable costs and staff costs;
  - (v) contracts – identify the business customer base and percentage of sales from different customers and check whether customers will stay with the business if it is sold;
  - (vi) assets – identify and check all assets, including intellectual property and leasing arrangements, depreciation schedules and determine book value, market value and replacement value of fixed assets; and
  - (vii) employees – identify key staff that are important to the ongoing conduct of the business and review salaries, employment packages and FBT implications;
  - (viii) liabilities - outstanding debts, refunds and warranties.
- (c) so far as possible the practitioner considers advisedly the pre-contract negotiations and whether during those negotiations any representations were made which might materially affect the contract and which should be recorded, but also those which may impact adversely after completion.

### 3. The Structure of a Contract for Sale of Business

This paper does not deal with the detailed drafting of contractual terms for the contract for sale, but rather highlights the typical structure of the contract with a focus on those areas which may cause difficulties after the contract has been completed.

#### (a) Identification of Sale Assets

The assets which typically form part of a business sale agreement have been identified earlier in this paper. Having identified those assets each must be clearly identified and defined. Typically the assets are defined in the interpretation section of the agreement and identified in schedules. For example:

- The plant may be defined by reference to depreciation schedules attached to the contract.
- The stock has to be calculated on or before completion and typically a valuation clause or schedule is inserted, ideally including a process which in the event of a dispute leads to an expert determination.
- The intellectual property comprises registered and unregistered business names, trademarks, trade names, service marks, registered designs, patents, copyrights, domain names etc.
- Material contracts of either supply or delivery of product must be identified as in some cases it is these material contracts which are essential to the ongoing development and success of the business.
- Increasingly, goodwill is a more variable component of the assets.
- Employees can also be a critical element in the sale as the retention of some key employees may be essential to a purchaser retaining, maintaining and enhancing the goodwill purchased.

#### (b) Conditions Precedent to Agreement and to Completion

In some instances conditions must be satisfied before a binding agreement is formed, for example, board approval being obtained.

More often however it is the conditions precedent to completion which can cause the most difficulties and these might include:

- FIRB approval.
- The acceptance by key employees of employment offers.
- Detailed due diligence in relation to some aspects of the assets, including, for example, the financial records or the consequence of a pending Court case.
- Assignment/transfer of property leases.
- Assignment of material contracts.

#### (c) Payment of the Purchase Price

Usually the purchase price is paid on completion, but there may be delays because:

- part of the purchase price is based on an earn out by the vendor;
- whether linked with an earn out or not, part of the price maybe deferred and in that event consideration will have to be given to securing that deferred price.

(d) **Employees**

Employees are either terminated on completion with accrued entitlements paid by the vendor or offers of employment are given by the purchaser to each employee which if accepted may mean an adjustment to the purchase price.

(e) **Material Contracts**

The assignment of material contracts as mentioned may be a key element in any transaction. Assuming the contracts are assignable then usually indemnities are given and received in relation to the contracts up to completion and if any security deposits have been paid under those contracts adjustments may have to be made.

(f) **Warranties**

The vendor will be expected to give and the purchaser will demand warranties in relation to the business assets the subject of the sale. Those warranties typically cover:

- The capacity of the vendor to enter into the agreement.
- That all of the information provided in the contract is true, complete and accurate.
- The vendor has the legal capacity to transfer unencumbered all of his right, title and interest in the business and the assets.
- If premises are to be occupied by the purchaser (whether as a tenant or owner) environmental warranties.
- Intellectual property.
- Financial position.
- Employees.
- Litigation.
- Insurances.
- Finders fees, commissions etc.

If in any way the warranties have to be qualified then the vendor must disclose the qualifications to avoid liability. However, when the contract terms have been finally negotiated it is usual that the warranties remain in full force for a defined period of time 6, 12 or 18 months as the case may be; that warranty claims are limited to

substantial claims and not “rats and mice claims”; and finally a figure for maximum liability must be agreed. The purchaser will seek to have the maximum liability for claims to be unlimited or at least the full amount of the purchase price whereas the vendor will seek to limit the amount to a much lesser figure.

(g) **Restraints**

A purchaser of a business and its assets is also purchasing the opportunity to conduct the business profitably into the future and often an integral part of the purchase will be:

- a training period on the part of the vendor or an officer of the vendor; or
- the vendor or an officer of the vendor being employed as a consultant or employee for a period of time.

In any event at some point in time the relationship between the vendor and its owners and officers and the purchaser will be severed and the purchaser will require the vendor and its affiliates to be restrained from conducting a competing business, within an area and for a period, to ensure that the purchaser is given the maximum opportunity to realise the goodwill and the purchase price he has paid for the business.

#### 4. What can go wrong after the sale has been completed

Ideally once the contract has been completed and the purchase price paid and the various post completion items dealt with, the contract is filed away never to see the light of day again. However, difficulties can arise some of which are set out below.

##### 4.1 Revenue Issues

The importance of involving at an early stage a competent financial adviser has already been touched upon. That is because in many cases each sale will have revenue consequences for either the vendor, the purchaser or both which have to be managed and so far as possible competing interests accommodated. Revenue issues which can arise and which can adversely affect, the vendor, the purchaser and the parties’ legal advisers are set out below.

(a) **Valuation of the Business**

Methods for calculating the value of a business are varied and can be complicated.

One method that is commonly used is an EBIT (Earnings Before Interest and Tax) and multiple method to obtain a general view of the valuation of the business eg EBIT x 4.

(b) **The Purchase Price**

*Adjustments*

Certain events or occurrences, whether arising in the ordinary course of business or not, may impact on the value of the business. To protect a purchaser from a possible decrease in the value of the business prior to completion, the sale of business agreement should ensure that an adjustment will be made for certain occurrences or liabilities.

An example may be where a former employee has commenced proceedings against the business which could cause damage to the reputation of the business and result in a payment to be made to the claimant.

### ***Deferred Payments***

As mentioned, it is not uncommon for the payment of the purchase price to be deferred as it may be based on an earn out or certain performance indicators to be achieved by the business. The deferred payment may then depend on the financial capacity or business skills of the purchaser. As there is a risk that the purchaser may not be able to make the future payments, it is prudent to consider requiring security or a guarantee of the continuing obligations of the purchaser. Note however Section 267 of the Corporations Act where charges in favour of certain persons are void in certain cases.

### (c) **Stamp Duty**

#### ***Apportionment – dutiable property***

As part of its mini budget announcement on 11 November 2008 the New South Wales Government announced the abolition of duty on the transfer of business assets (other than land), statutory leases and unlisted marketable securities from 1 July 2012. Until then stamp duty is assessed on the combined dutiable value of all items of dutiable property agreed to be sold or transferred. The liability to duty will only extend to those assets identified as dutiable property<sup>1</sup>. In the context of a sale business dutiable property includes:

- Land.
- Leasehold interest in land.
- Intellectual property: Intellectual property is only considered to be dutiable property when sold or transferred in conjunction with the goodwill of the business.
- Goodwill.
- Statutory licences.
- Various items of goods including fixed and moveable plant and equipment.

Non dutiable property which may be included in a sale of business are:

- Stock-in-trade.
- Materials used in manufacture or goods under manufacture.
- Registered motor vehicles.

However, in the case of a substantial sale or transfer of business (for example a merger) items which may appear to be exempt may in fact be dutiable.

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<sup>1</sup> Section 11(1) of the Duties Act

From the point of view of the purchaser, it is important that the highest possible figure be apportioned to depreciable assets and stock to reduce tax liability. Of course, the figure must be supported by adequate valuation documentation.

### *Apportionment – location of assets*

Situations may arise where certain assets the subject of a business sale agreement cannot be isolated within State boundaries. Such assets will likely include goodwill, intellectual property and statutory licences or permissions under a Commonwealth law. Section 21(3) of the Duties Act provides that the dutiable value of a business asset referred to s11(g), that also has a relevant connection with the Commonwealth or another Australian jurisdiction, is to be apportioned in accordance with s28.

Section 28 provides a statutory apportionment formula for the purposes of assessing NSW duty if the asset has territorial connections beyond NSW in respect of:

- Goodwill - if sales of goods and/or services have been made to a non-NSW customer of the business during the previous 12 months.
- Intellectual property - if it has been exploited in one or more other Australian jurisdictions during the previous 12 months.
- A statutory licence or permission under a Commonwealth law - if the rights under the licence or permission have been exercised during the previous 12 months in respect of one or more other Australian jurisdictions.

### *Timing*

The time for stamping a document or a written statement in each jurisdiction varies from as little as 1 month in Queensland, 60 days in Tasmania and the ACT, 30 or 60 days in the Northern Territory, 2 or 6 months in South Australia, and 3 months in NSW. If the one original document must be sent to each jurisdiction, the timing requirements for certain States or Territories may not be met.

#### (d) **Goods and Services Tax**

GST liability is a real concern in relation to any contract for sale of business. At a high level, if the business is sold as a going concern with commercial leases being assigned then GST is normally not payable. But where the business is not sold as a going concern or the premises are mixed between residential and commercial or otherwise, GST may be payable.

As set out in the Australian Taxation Office's Goods and Services Tax Ruling 2002/5 "*Goods and services tax: when is a 'supply of a going concern' GST-free?*", the supply of a business as a going concern may be GST-free if the following requirements are met:

- The purchaser must be registered for GST on or before the date of the supply.
- The supply must be for consideration.
- The vendor must carry on the business until it is sold.

- The vendor must supply to the purchaser all of the assets and other elements required for the continued operation of the business.
- Both parties must agree in writing that the supply is of a going concern.

If the business is not sold as a going concern and GST is payable then a tax invoice should be issued on completion so that input credits can be claimed and GST paid, all of which is part of the process if the GST issue was considered advisedly before contracts were exchanged and addressed in pre-contract negotiations and the outcome accurately recorded. But if these events have not occurred then on completion a purchaser may be rendered an invoice for the purchase price plus GST or if on completion the parties do not address the issue then at a later time when a BAS statement is lodged a purchaser or vendor may unexpectedly become liable.

In addition, the Office of State Revenue considers that, where GST applies to the sale of assets, and is passed on to the purchaser, the GST forms part of the consideration for the sale and duty will be calculated on the purchase price **inclusive** of GST.

(e) **Capital Gains Tax**

The completion of the sale of a business amounts to a capital gains tax event. If the business was formed before 1985, CGT is not payable by the vendor, but for businesses formed subsequently capital gains tax is payable subject to small business concessions including roll over relief. The issue can become particularly complicated though where the small business roll over provisions are not available and there is some doubt that the business has been conducted without interruption since before 1985. A failure to evidence continuous conduct of the business over a long period of time could mean that a substantial amount of the purchase price is eventually liable to be paid in capital gains tax<sup>2</sup>.

## 4.2 Valuation of the Goodwill

When valuing goodwill, it is important to bear in mind that:

- goodwill will have no value unless it is capable of being transferred from one person to another – so, if it rests exclusively with a person that will not be joining the business, the purchaser will prima facie not be acquiring the good will; and
- the goodwill of a business is dutiable property if during the previous 12 months a sale of goods and/or services has been made in NSW.

In light of this, in circumstances where the value of the goodwill has been incorrectly (or over-) valued the valuation will not accurately reflect the commercial or financial worth which it represents. This may be of detriment to a purchaser when paying stamp duty. A contract dutiable in other states and territories may in effect be “audited” by OSR’s in those states.

Methods of valuing goodwill include:

- number of year's purchase of past net profits;
- number of year's purchase of future super profits; and

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<sup>2</sup> *Briar Holdings Pty Limited & Ors v Capolingua* (1997) 37 ATR 135

- capitalisation of maintainable profits.

#### **4.3 Waiver of Conditions Precedent**

Conditions precedent provide basic preliminary safeguards for a purchaser and typically cover the elements of the transaction that are critical for the purchaser to obtain a full benefit of the business or bargain.

A purchaser may waive the conditions precedent contained in a contract for the sale of a business or, in the cases of simultaneous exchange and completion, the contract may not contain any conditions precedent. Where this has occurred, the purchaser may be effectively waiving the right to void an agreement where certain key requirements have not been achieved.

In circumstances where a purchaser has waived, or has not had the benefit of, certain conditions precedent, a purchaser may be obliged to proceed with a transaction which is of detriment to the purchaser and which may mean that the purchaser is not purchasing all of the assets of the business as it had initially intended.

#### **4.4 Employees**

If there are certain employees that are crucial to the business and need to be retained, it is important that there be a condition precedent to the contract that this person be retained for the benefit of the purchaser. If the key employees do not join the business after the sale, existing relationships of the business with customers and suppliers may be lost.

In addition, if the key employees are not subject to a suitable restraint of trade, such key employees may establish a business that is in competition with the business acquired by the purchaser.

#### **4.5 Intellectual Property**

It is not uncommon, particularly with small businesses, for the vendor to have failed to:

- (a) appropriately protect the intellectual property;
- (b) ensure that any intellectual property created by contractors is assigned to the business; or
- (c) properly document intellectual property licences.

Where this has happened, the vendor may not own all right and title to the intellectual property and may not have the right to transfer or assign such intellectual property. In this situation, purchasers may discover after completion that the vendor does not own the intellectual property its has purported to transfer or that a third party has an interest in the asset.

#### **4.6 Leases**

Often, when negotiating a sale of business agreement, the lease of the premises at which the business is conducted will form part of the transaction.

In circumstances where the vendor has failed to secure the assignment of the lease prior to completion, the lessor may not grant to the purchaser the benefit of the lease. When this occurs;

- (a) the purchaser may be required to re-negotiate a new lease on terms that are substantially less favourable than those previously provided to the vendor;
- (b) the purchaser may have to leave the location which could result in the loss of a significant proportion of the customer bases and, consequently, the good will of the business; or
- (c) the purchaser may incur significant costs in moving to another location and negotiating a lease with a new landlord.

As a matter of law the vendor/lessee remains liable to the lessor in the event of a default of the purchaser unless released by the lessor on assignment. If the purchaser lacks the financial capacity to maintain the lease, or if the purchaser causes damage to the premises, the vendor could be liable for significant amounts of money. The vendor must seek an indemnity from the purchaser in the sale of business agreement.

#### **4.7 Inadequate Due Diligence**

Due diligence in relation to the business may be inadequate for a number of reasons including if:

- (a) the vendor does not fully co-operate with the due diligence requests and endeavours of the purchaser;
- (b) the vendor and purchaser agree to a short timeframe for the conduct of due diligence;
- (c) the due diligence is limited in its scope, for example, if it is only limited to the financial affairs of the business; or
- (d) the purchaser waives the opportunity to conduct a due diligence.

If the due diligence relating to a business is inadequate, the purchaser may not be made aware of something that could materially affect the business and assets it is purchasing prior to completion. In those cases, the purchaser may only be able to rely on the warranties provided in the contract and the pre-contractual representations and warranties of the vendor.

#### **4.8 Breaches of Warranty**

Where there has been a breach of warranty, then in a properly drafted agreement, proceedings are to be commenced within a defined period of time. However, as was noted earlier a fundamental warranty is that the vendor can convey unencumbered title to assets to a purchaser. Where in the ordinary course searches and enquiries reveal that, for example, a corporate vendor has given fixed and floating charges over assets to a bank, then on or before completion those charges must be released and discharged. In one case where the completion date was an essential term and the vendor was unable to obtain a release or discharge of the charges leading to a delay in completion and the purchaser securing his purchase moneys, the contract was terminated<sup>3</sup>.

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<sup>3</sup> *Net Parts International Pty Ltd & Ors v Kenoss Pty Ltd & Ors* [2008] NSWSC 241

In another case there was a contract for the sale of a business involving advertising signage in shopping centres it was a term of the contract that the consent of each relevant shopping centre to the activity was required. Only 10 of 25 shopping centres gave prompt consent to assignment and when the vendor was unable to comply with a notice to complete, the purchaser validly rescinded the contract.

In addition to imposing a defined period of time in which to bring warranty claims, a vendor may also seek to limit its exposure to a certain monetary amount. Any such ceiling on claims for breach of warranties would not restrict damages that the purchaser could claim under the Trade Practices Act or Fair Trading Act. As a practical matter and to stop vexatious warranty claims, it is not unusual to include a minimum claim amount. Unless there is a minimum claim amount on a “per claim” basis, the purchaser may be burdened by multiple possible claims.

#### **4.9 Disclosure Letters**

Disclosure letters may present problems for both vendors and purchasers.

In relation to vendors, the vendor may fail to include certain items in the disclosure letter or may fail to adequately disclose sufficient details in the disclosure letter. If this is the case, the vendor may still be liable under the relevant warranty to which the disclosure was intended to related.

In relation to purchasers, a disclosure letter may materially detract from the veracity of the warranties provide in the sale of business agreement. In addition, where the disclosure letter is drafted to include everything in the materials that the vendor had already supplied to the purchaser, the purchaser must be satisfied that its examination and assessment of the materials supplied by the vendor has been comprehensive and that the material does not contain any questionable elements.

#### **4.10 Enforceability of Restraints of Trade**

This is a recurring area of post sale of business litigation. The decided cases are frequent and inevitably focus upon the drafting of the agreement and the reasonableness of the restraints. Two cases serve to illustrate the problems faced.

The International Linen Service case<sup>4</sup> involved the sale of a linen hire service which represented about 95% of the vendor’s revenue and a dry cleaning business which represented about 5% of the company’s revenue. In 2005 the vendor sold the business to a competitor and the sale agreement contained a restraint clause that the vendors were not to:

*“operate or be involved in any way directly or indirectly with the operation of any linen supply or laundry hire service business of any kind or provide or offer to provide or be involved in any way directly or indirectly with the provision or offer of provision of dry cleaning services in competition..”*

The purchasers commenced proceedings seeking declaratory relief challenging the restraint of trade to which they had agreed. The Court held that the restraints were unenforceable under the general law because they were:

- too wide in area (the whole of South Australia); and

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<sup>4</sup> *Fadu Pty Ltd v ACN 008 112 196 Pty Ltd* [2007] FCA 1965

- too long in duration (5 years).

The proceedings were argued by reference to general law and competition law principles (sections 45 and 87(3) of the Trade Practices Act) and in the result the Court varied the contract to limit the geographical area and reduce the duration of the restraint from 5 to 3 years in relation to the laundry hire business, but refused to vary the restraint relating to the dry cleaning business which remained unenforceable.

The vendor sold a restaurant business and agreed not to carry on business within a 5 kilometre radius for 2 years. However within 6 months he purchased another restaurant (through a company controlled by him) which was situated just over 1 kilometre from the restaurant he had sold. On an interlocutory injunction hearing, the Court refused to grant the interlocutory injunction although it thought an injunction may well be granted on a final hearing. The Court found that in all probability the 2 year restraint would be effective and that if it were proved that the 5 kilometre radius was too wide that could be and would be only rectified by application under the Restraints of Trade Act 1976<sup>5</sup>.

#### 4.11 Section 52 Proceedings for Pre-Contract Representations and Warranties

A number of judicial decisions demonstrate that purchasers are entitled to rely on pre-contractual representations and warranties made by the vendor and it is no longer sufficient just to look to the contract as the source of a party's rights and obligations.

The pre-contract period, being the period that precedes formation of the contract for sale of a business, is of particular legal significance as it is during this period that the vendor may make certain representations to the purchaser which could amount to misleading and/or deceptive conduct.

While an actionable misrepresentation may provide substantial common law and equitable remedies including rescission and/or damages, misrepresentations made in the pre-contract period may also attract liability under section 52 of the *Trade Practices Act* (Cth) ("TPA") or the mirror provisions of the Fair Trading Act.

Of particular significance when considering pre-contractual representations and the application of section 52 of the TPA is that:

- it has been held that section 52 is not restricted to consumer transactions<sup>6</sup>;
- silence may be relied on to show a breach of section 52 when the circumstances give rise to an obligation to disclose relevant facts<sup>7</sup>;
- the duty to disclose relevant facts is not confined to cases where there are particular relationships<sup>8</sup>;
- the concept of contributory fault does not exist in relation to section 52 cases and the existence of a duty to disclose relevant facts is not negated because inquiries could be made which would disclose the true position<sup>9</sup>;

<sup>5</sup> *Hermessec v Carcagni* [2008] NSW SC 183

<sup>6</sup> *Hornsby Building Information Centre Pty Limited v Sydney Building Information Centre Pty Limited* (1978) 140 CLR 216

<sup>7</sup> *Henjo Investments Pty Limited & Ors v Collins Marrickville Pty Limited* (1988) 79 ALR 83

<sup>8</sup> *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 320

<sup>9</sup> *Obacelo Pty Ltd v Taveraft Pty Ltd* (1986) ATPR 40-703

- (e) recovery under section 52 is founded by actual reliance upon the misleading or deceptive conduct although that conduct was not the only factor in the decision to enter a particular agreement and although verification of representations was not sought or was inadequate<sup>10</sup>; and
- (f) exclusion clauses cannot operate to defeat claims under section 52<sup>11</sup>.

Each of the above elements demonstrates that vendors must be aware that:

- risk allocation in contract terms, for example, “Entire Agreement” clauses will not overcome the effect of any conduct which contravenes the TPA; and
- vendors should ensure that they diligently search for and disclose all information that they hold that may be material to a contracting party.

## 5. Conclusion - Managing the Risks Associated with Buying or Selling a Business

When acting for the vendor:

- (a) ensure that the method used the valuing the business is accurate and that there is a mechanism for valuing any trading stock at completion;
- (b) if the vendor agrees to a deferred purchase price payment regime, consider requiring security or a guarantee in respect of the outstanding amounts;
- (c) identify the intellectual property owned or licensed by the vendor and determine whether such intellectual property can be assigned;
- (d) ensure that the vendor has received an assignment of any intellectual property created by third parties;
- (e) if the vendor is to remain liable under a lease or other contract, obtain indemnities from the purchaser;
- (f) advise the vendor to co-operate with the due diligence enquiries of the purchaser ;
- (g) advise the vendor in relation to the possible consequences of any pre-contractual representations made;
- (h) ensure that the vendor only gives warranties that it is able to give and that any further details are fully disclosed in a disclosure letter.

When acting for the purchaser:

- (a) ensure that the method used the valuing the business is accurate and that there is a mechanism for valuing any trading stock at completion;
- (b) allow for adjustments to the purchase price in the event that anything occurs or arises that may affect the profits or value of the business;

<sup>10</sup> *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 320

<sup>11</sup> *Henjo Investments Pty Limited & Ors v Collins Marrickville Pty Limited* op cit.

- (c) carefully consider apportionment of the purchase price for stamp duty purposes in terms of both the dutiable property the subject of the transaction, and its location;
- (d) review the deadlines for payment of stamp duty in each relevant location to avoid incurring late fees;
- (e) determine whether the business will be sold as a going concern and whether the purchaser will be liable for GST on the purchase price;
- (f) consider whether conditions precedent should be included in the contract;
- (g) identify any key personnel and whether such personnel are to be offered new positions of employment or whether they are the subject of an adequate restraint of trade;
- (h) identify the intellectual property to be purchased and the relevant owner. Obtain warranties and indemnities in relation to the vendor's right, title and interest to such intellectual property;
- (i) ensure that any premises necessary for the conduct of the business will be assigned or transferred to the purchaser at completion;
- (j) conduct a thorough due diligence;
- (k) obtain comprehensive representations and warranties by the vendor as to the state of the business;
- (l) ensure the agreement contains clear terms and arrangements for the payment and delivery of possession, unencumbered title and security of tenure to what the purchaser buys;
- (m) obtain an indemnity from the vendor as to debts or liabilities of the business; and
- (n) include appropriate restraints of trade in relation to the vendor.

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