

LAWS5108

PROFESSIONAL PRACTICE

Exam Notes

- I. Plain English Drafting
- II. Drafting Commercial Contracts
- III. Mergers & Acquisitions

3. Mergers & Acquisitions

TRANSACTION TYPES AND STRUCTURE

- Asset Sale
 - An asset sale is the sale of receivables and other loans to a third party (e.g. client lists, trademarks, equipment).
 - If the sale of the assets does not give the buyer complete control after payment, the transaction is not considered a true asset sale.
 - A business is a “a commercial enterprise in the nature of a going concern; activities engaged in for the purpose of profit on a continuous and repetitive basis (*Hope v Bathurst City Council*).
 - Need to identify and separately transfer all relevant assets
 - Need to assign or novate key contracts
 - Can't assign liability without consent
- Share Sale
 - A share sale where the shareholders sell their shares, giving majority control to the new owner.
 - i.e. the transfer of assets and liabilities
 - The company continues in the same form as it was prior to the share sale, unless the purchaser makes changes to its operation – it is only the identity of the shareholders that change.
 - Existing licenses and authorities remain in place and do not need to be transferred.
 - EXCEPTION: where the license or authority contains a change of control clause.
 - **Main advantage** → simplicity
 - All transferred with one purchase agreement
 - **Main disadvantage** → inheritance of liabilities
 - Could be ‘skeletons’ in the target company which are inherited

STEPS IN SALE OF BUSINESS

- (1) SIGN CONFIDENTIALITY AGREEMENT
- (2) AGREE LETTER OF INTENT / TERM SHEET
- (3) DRAFT TRANSACTION DOCUMENTS
 - e.g. Share Purchase Agreement
- (4) DUE DILIGENCE INVESTIGATION BY THE BUYER AND ITS ADVISORS.
- (5) VARIOUS NEGOTIATION MEETINGS TO DISCUSS TRANSACTION DOCUMENTS
- (6) SIGN TRANSACTION DOCUMENTS
- (7) SATISFY THE CONDITIONS PRECEDENT IN THE TRANSACTION DOCUMENTS
- (8) PREPARE COMPLETION STEPS

- e.g. corporate resolutions, powers of attorney, deeds of transfer
- **(9) COMPLETE THE TRANSACTION**
 - **(A) TRANSFERRING THE SHARES OR ASSETS; AND**
 - **(B) FUND THE PURCHASE PRICE**
- **(1) POST-COMPLETION STEPS**
 - e.g. amend board compositions, change signatories to bank accounts, update share register

PRELIMINARY MATTERS

- Identifying the Assets
 - Make sure to precisely identify the accessed that
 - Asset types to consider include:
 - Real property (owned/leased/licensed)
 - Plant and equipment (owned/leased/service agreements)
 - Stock in trade
 - IP (and associated licences)
 - Vendor's rights under material contracts
 - Goodwill
- Due Diligence **see below **
- Preliminary Agreements
 - **(1) HEADS OF AGREEMENT** *(Letter of Intent, MoU, Terms Sheet)*
 - **(A) RECITALS**
 - **(B) AGREEMENT TO SELL/PURCHASE**
 - Examples:
 - **Recital C** → *The Vendor and [potential purchaser short name] have agreed to negotiate a business sale agreement pursuant to which [potential purchaser short name] will purchase the Business including all of the Business Assets (Business Sale Agreement).*
 - **Clause 1(a)** → *The Vendor [potential purchaser short name] will negotiate in good faith with a view to both parties entering into the Business Sale Agreement, under which the Vendor will sell the Business and all of the Business Assets to [potential purchaser short name]*
 - **Separate Clause** → *The Vendor agrees to sell the Assets to the Purchaser, and the Purchaser agrees to buy the Assets from the Vendor free from all encumbrances.*
 - **(C) CONDITIONS PRECEDENT**
 - e.g. *[potential purchaser short name] has satisfactorily completed its due diligence process;*
 - **(D) NEGOTIATION PERIOD**

- e.g. *The negotiations in relation to the Sale Agreement must be completed and the Sale Agreement must be entered into by both parties within 90 days from the date of this agreement.*
- **(E) AGREEMENT TO NEGOTIATE IN GOOD FAITH**
 - e.g. *For so long as this agreement remains in force the parties will negotiate in good faith on an [exclusive/non-exclusive basis] the terms of the Sale Agreement.*
- **(F) ACCESS**
 - Agreement to provide access for due diligence.
 - e.g. *For so long as this agreement remains in force the Vendor will continue to respond to any due diligence questions and provide [potential purchaser short name] with due diligence materials.*
- **(G) CONFIDENTIALITY**
 - For example:
 - (1) *The parties acknowledge that, by virtue of this agreement, each may be afforded access to, and acquire knowledge of the other party's proprietary and business information of a confidential nature, including notes and discussions relating to the proposed transaction and due diligence materials (**Confidential Information**).*
 - (2) *A party receiving any Confidential Information agrees that, unless permitted under [below], Confidential Information will not be:*
 - (a) *disclosed to any third party;*
 - (b) *used by the recipient for its own purposes; or*
 - (c) *disclosed to employees, contractors or agents who do not have a need to receive the Confidential Information in connection with this agreement and the Business Sale Agreement.*
 - (3) *Confidential Information may be disclosed:*
 - (a) *if it is no longer confidential;*
 - (b) *to a party's solicitors or accountants for the purpose of assessing the commercial transaction contemplated in the Sale Agreement;*
 - (c) *where disclosure is permitted or required by law; or*
 - (d) *where the disclosure is permitted in writing by the disclosing party.*
- **(H) TERMINATION**
 - For example:
 - (1) *When termination will occur*
 - (a) *If the Sale Agreement has not been entered into within the 90-day period from the date of this agreement, then this agreement will terminate,*

unless otherwise extended by mutual written agreement.

(b) If there is a breach or non-observance of any of the covenants, obligations and conditions contained in this agreement then the Vendor may, at its option, by notice in writing terminate this agreement which will have immediate effect.

(2) Effect of termination

(a) Upon termination of this agreement:

(i) [potential purchaser short name]'s right to access any of the due diligence materials will terminate; and

(ii) [optional: any exclusivity in relation to the negotiations for the Sale Agreement will terminate].

(b) Termination of this agreement under any circumstances will not abrogate, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this agreement including, without limitation, obligations of confidentiality.

(3) Action upon termination

(a) Upon the termination of this agreement, for whatever reason:

(i) [potential purchaser short name] will return all Confidential Information to the Vendor;

(ii) the parties will cease negotiations in relation to the Sale Agreement; and

i. the Vendor may pursue negotiations for the sale of the [Shares/Units] with any third party.

▪ **(I) CONTINUITY OF BUSINESS**

○ **(2) CONFIDENTIALITY AGREEMENT**

▪ Purpose

▪ Key terms

- Copying of information
- Return of confidential information
- Unauthorised use
- Breach – relief
- No warranties
- Exclusivity

• Types of Mergers

- **(1) HORIZONTAL**
- **(2) VERTICAL**

- (3) CONGLOMERATE
- Regulatory Prohibitions and Approvals
 - Competition Law Issues
 - The Prohibition
 - **s.50 Competition and Consumer Act (2010)**

s 50(1): A corporation must not directly or indirectly:

 - (a) *acquire shares in the capital of a body corporate; or*
 - (b) *acquire any assets of a person;*

if the acquisition would have the effect, or be likely to have the effect, of lessening competition in any market.

50(2): A person must not directly or indirectly

 - (a) *acquire shares in the capital of a corporation; or*
 - (b) *acquire any assets of a corporation;*

if the acquisition would have the effect, or be likely to have the effect, of lessening competition in any market.

s50(3) Factors to take into account:

 - (a) *the actual and potential level of import competition in the market;*
 - (b) *the height of barriers to entry to the market;*
 - (c) *the level of concentration in the market;*
 - (d) *the degree of countervailing power in the market;*
 - (e) *the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;*
 - (f) *the extent to which substitutes are available in the market or are likely to be available in the market;*
 - (g) *the dynamic characteristics of the market, including growth, innovation and product differentiation;*
 - (h) *the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;*
 - (i) *the nature and extent of vertical integration in the market.*
 - Terms
 - **'Acquisition'** → *'an acquisition, whether alone or jointly with another person, or any legal or equitable interest' in such shares/assets (TPC v Arnotts Ltd)*
 - **'Likely'** → *'a significant finite probability' or 'a real chance', rather than 'more probably than not' (Australian Gas Light Company v ACCC (No 3))*
 - Merger Clearance and Authorisation Process
 - Three applications for avenues:
 - **(1) TO THE ACCC FOR INFORMAL MERGER CLEARANCE**