

BUSINESS GUIDE SERIES:

STRUCTURING A TRANSACTION. SHARE SALE OR ASSET SALE?

SHARE SALE

The subject matter of the transaction are the sale shares forming part or all of the target company's share capital. It is the target company that conducts the business.

Identifying the target shares

The parties will need to verify the members of the company and the number of and type of shares comprising the entire share capital of the company.

The parties will also need to identify any options or any other securities or rights which are convertible into shares and any restrictions on the ability of the seller/s to sell their shares (including any pre-emptive rights in the company's constitution or in a shareholders deed).

By acquiring all the securities in the share capital of the company, the buyer will indirectly acquire all of the assets and liabilities of the company. For this reason it is not necessary to specify all of the assets and liabilities of the company in order to effect their transfer.

What is transferred in the transaction?

All contracts (including supply agreements, customer agreements, property leases and finance agreements) remain contracts to which the company is a party. However, often the contracts will contain change in control provisions requiring the consent of the other contracting party without which that party may terminate the contract.

Licences held by the company necessary for the operation of the business remain with the company, subject to the terms and conditions of such licences or applicable statutory provisions.

More often than not, consent from the relevant authorities or governing bodies will be required to be obtained in the event of a change in control of ownership of the licence holder.

Share sale or asset sale?

A crucial issue to be determined early in the sale process is whether or not it is the assets of the business that are being sold or the shares in the company that owns the assets that are being sold.

Each transaction is different - seek appropriate legal and financial advice

Each transaction must be considered on a case by case basis. The parties commercial, legal and tax considerations will influence the way in which the transaction is ultimately structured.

Both seller and buyer should always seek specific legal and tax advice in relation to structuring the sale as there will almost always be a number of alternative structuring options giving rise to different consequences.

Consideration of Employees in a share sale

As only the ownership of the employing entity changes all employees remain employed by the company in accordance with any and all existing and applicable terms and conditions of employment (statutory, contractual or otherwise).

It is recommended that employees are notified of any change of ownership and regard should be had to any 'change of control/ownership' provisions that may be contained in any contracts of employment or industrial instruments.

ASSET SALE

The subject matter of the transaction are only this assets specified in the sale agreement and the liabilities assumed by the buyer. The buyer may cherry-pick the assets its wishes to acquire.

Unknown Assets

The seller will often not want to give warranties in respect of unknown assets. The seller may wish to confine the assets being sold to an exhaustive specified list, or specify any assets excluded from the sale (commonly cash and receivables). It is important that the buyer conducts its own due diligence on the assets being acquired are which are required to conduct the business.

Assignment of Contracts and Licences

Any contracts or licences (including supply agreements, customer agreements, property leases and finance agreements) which the buyer wishes to acquire the benefit will need to be assigned or novated (if possible) to the buyer - this will require the consent or agreement of the other parties to the contracts.

Employees

The employees of the target company do not automatically become employees of the buyer. If the buyer wishes any or all of the seller's employees to become employees of the buyer, the relevant employees' employment with the seller will need to be terminated and the employees will need to accept new employment with the buyer.

If the buyer chooses to offer employment to an employee that is not substantially similar, and where the employee will still be performing substantially similar work to that which they performed for the seller, an employee may choose to reject the offer and may be entitled to redundancy pay.

Whilst the seller may be legally liable for any redundancy payment arising from the termination of employment, the commercial terms of a transaction may require a buyer to meet all or part of any redundancy pay liabilities as an adjustment to the sale price.

Part 2J.3 of the Corporations Act (Cth) 2001

If the purchaser wishes to use the assets of the company as security for the purchase price finance, it may need to obtain shareholder approval under Part 2J.3 of the Corporations Act (Cth) 2001 (provisions regulating financial assistance), this requires 14 days notice to ASIC after the approval is granted but before the transactions takes place.

What happens to the assets in a share sale?

The buyer will want to ensure that the assets are not transferred by the company or otherwise diminished prior to completion of the transaction, other than in the ordinary course of business.

Defining 'Assets'

A buyer will want to ensure that the definition of Assets is wide enough to capture all the assets of the seller used in, or which are necessary, to conduct the business.

Statutory Implications

If a statutory transfer of business has occurred for the purpose of various employment legislation, this will trigger obligations for both the seller and the buyer in relation to the treatment of employees and employee entitlements and will depend on the nature of the transfer.

For example, a non associated entity as defined by the Fair Work Act (Cth) 2009, does not need to recognise an employees service with the seller of the purpose of accrued and untaken annual leave. Different provisions apply to long service depending on State legislation.

Both sellers and buyers should seek legal advice about their obligations and options prior to negotiating any employee issues.

Consider including a Schedule of Assets

A buyer may seek to include detailed schedules of fixed assets, IP and other assets capable of specification and to use generic wording to capture any assets not specified in the sale agreement but which are owned by the seller and used in the business.

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Gateway Tower, Level 19
1 Macquarie Place
Sydney, NSW 2000



Phone: +61 2 8075 4699
Direct: + 61 9195 1310



Email: info@silberstein.net.au
Website: www.silberstein.net.au