

THE BUSINESS ACQUISITIONS MASTERCLASS

Share or Asset Sale? Is the Choice Still Yours?

Employment Law Issues When Buying a Business

Evaluating IP Assets When Buying a Business

Navigating Asset Depreciation Risks from Contract Signing to Completion

The Role of Earnouts in Mergers and Acquisitions

Revising Business Structures When Sale is on the Horizon

Maximising the Small business CGT concessions

Wednesday 25 October 2023

Online



Leaders in online CPD for Lawyers & Accountants

WEDNESDAY 25 OCTOBER 2023

9.00 - 9.15am Introduction and welcome

MORNING CHAIR: *Tony Symons, Partner, Mills Oakley, Melbourne, Vic*

9.15 - 10.00am

Session 1: Getting Ready to Rumble: Share or Asset Sale? Is the Choice Still Yours?

When buying a business that is operated by a company an important consideration is whether the buyer should purchase the shares of the company comprising the business or the assets out of the company itself. A key driver of this decision is often taxation implications. This session provides an overview of the taxation implications of share versus asset sales, with a focus on how these decisions have become increasingly vulnerable to attack on the basis of anti avoidance rules. It covers:

- The options for implementation of sale structures having regard to anti-avoidance measures in a share sale vs asset sale (including dealing with assessments and justifying share over an asset sale)
- The recent shift in focus of revenue offices at state level and the growing rise of anti-avoidance activity
- The tax avoidance characteristics of the sale structure drawing the current attention of the ATO, when to expect a structure to be attacked and how to best respond if it does

Speaker: Andrew Rider, Barrister, Level 22 Chambers, Sydney, NSW

10.00 - 10.10am Panel Comments and Questions

10.10 - 10.55am

Session 2: Human Capital: Employment Law Issues When Buying a Business

The continued cooperation and goodwill of employees is often an understated but critical aspect to a business's operation and success. It is therefore important not to overlook employees (particularly key personnel) and plan for all employment law considerations when buying a business. This session will guide lawyers through what to look out for with respect to employees and employment law considerations when purchasing a business. In particular, this session will look at:

- Due diligence issues:
 - Ascertaining accrued entitlements
 - Ensuring compliance with the transfer of business rules under the Fair Work Act
- How to correctly identify employee relationships and issues which can arise from the mis-categorisation of employees
- The types of leave entitlements to be considered, how to check compliance with awards including capitalisation of overtime payments to avoid future claims for purchaser
- Restraint of trade and exclusivity issues
- When can an employee argue that their employment has been terminated as part of a business acquisition?

Speaker: Jess Hill, Director, Velocity Legal, Melbourne, Vic

10.55 - 11.05am Panel Comments and Questions

11.05 - 11.30am Networking Break and Morning Tea

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11.30am - 12.15pm

Session 3: Hidden Treasures or Ticking Time Bombs? Evaluating IP Assets When Buying a Business

When buying a business, the maximisation of business assets, including intellectual property (IP) assets, is obviously central to the transaction. However, there is more to the IP considerations of the business sale than just registered designs, trademarks or patents. This session will focus on the purchase of businesses from an IP perspective and discuss:

- Identifying the IP assets and ensuring / proving ownership
- Managing the impact of non/misidentification on sale of businesses
- Valuing the IP and goodwill of an acquisition target
- How to best manage the assignment and change of control of IP ownership
- Dealing with representations and warranties related to ownership of IP
- Identifying key red flags in IP related agreements
- Understanding the scope of indemnification and disclaimers by seller on IP issues

Speaker: Peter English, Principal, Coleman Greig Lawyers, Sydney, NSW

12.15 - 12.25pm Panel Comments and Questions

12.25 - 1.10pm

Session 4: Navigating Asset Depreciation Risks from Contract Signing to Completion

The value of assets can fluctuate over time due to various factors, potentially posing risks to both buyers and sellers. With the High Court's recent decision in *Laundy Hotels*, it has never been more important for commercial lawyers to understand how to navigate these challenges and fortify their clients' positions when asset values diminish during the critical stages of a transaction. It covers:

- Advising clients on potential risks that may occur prior to completion – knowing where the asset depreciation risks are
- Contractual safeguards to consider, including force majeure clauses, change of law clauses, or material adverse change clauses
- Can the doctrines of frustration and implied terms assist a party with buyer's remorse?
- The role of warranties in managing the risk of the value of the assets reducing between signing and completion
- Spotlight on the High Court's decision in *Laundy Hotels* – what should the purchaser have done to protect its position?

Speaker: James Halliday, Consulting Principal, Keypoint Law, Sydney, NSW

1.10 - 1.20pm Panel Comments and Questions

1.20 - 2.15pm Luncheon

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AFTERNOON CHAIR:

Michael Sonogo, Executive Director, Pitcher Partners, Melbourne, Vic

2.15 - 3.00pm

Session 5: Money, Money, Money: The Role of Earnouts in Mergers and Acquisitions

When used effectively, earn-outs can be a great tool in helping parties in a sale of business to resolve disputes in relation to purchase-price deadlocks and reallocation of risk. This session will provide an overview of earn-outs and help lawyers to understand:

- Earnouts from the perspective of both the buyer and seller, the potential benefits they can provide as well as the risks
- What to consider when structuring an earnout to maximise effectiveness, including tips for calculation
- The range of covenants and protective provisions that can be negotiated and the key elements to consider when drafting such provisions
- The pros and cons of various dispute resolution mechanisms and tips for drafting

Speaker: Lynda Reid, Partner, Mills Oakley, Sydney, NSW

3.00 - 3.10pm Panel Comments and Questions

3.10 - 3.55pm

Session 6: Geared for Exit: Revising Business Structures When Sale is on the Horizon

What may be an optimal business structure from a tax or operational perspective may not be the best option when it comes to the eventual sale of the business. As part of gearing a business for exit, it is essential that the business structures be reviewed and revised to ensure the value of the business at sale can be maximised (and not inadvertently reduced by unexpected tax consequences). This session will examine:

- The importance of pre-sale reviews:
 - how a well structured business can enhance its value during the sale process
 - reviewing the sale through the eyes of the potential purchaser – what might they want and how can it be achieved?
- The different options for structuring businesses with a view to sale and the advantages, disadvantages and obstacles of each
- The potential tax consequences arising from various business structures and tips for minimising this through choice of structure
- The often-overlooked small business restructure rollover and when this can assist small business owners looking to sell
- Tips for tax effective extraction of funds after business sale (getting money out to shareholders tax free)
- Case study involving a change from a trust to a company

Speaker: Andy Milidoni, Partner, Johnson Winter Slattery, Sydney, NSW

3.55 - 4.05pm Panel Comments and Questions

4.05 - 4.25pm Networking Break and Afternoon Tea

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4.25 - 5.10pm

Session 7: Cashing in when Cashing Out: Maximising the Small Business CGT Concessions

When used properly, the small business capital gains tax (CGT) concessions allows for the capital gain from an active asset used in a small business to be reduced, disregarded or deferred. However, when misunderstood or not applied in the appropriate circumstances the consequences can be significant and possibly disastrous. This session examines the key issues, including:

- Eligibility for the concession (what does small business entity, definition of passively held assets and how to satisfy the maximum net asset value test and active asset test)
- The types of small business CGT concessions including the 15-year exemption, 50% active asset reduction, retirement exemption and small business rollover]
- Tips for applying the concessions including within a multi-tiered business structure and other tax considerations arising from internal restructuring, including the GST rollovers
- Case study

Speaker: Neil Brydges, Principal, Sladen Legal, Melbourne Vic

5.10 - 5.20pm Panel Comments and Questions

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Registration Fee

The registration fee includes attendance at the masterclass and technical materials.

Masterclass Materials

TEN will not provide printed copies of the masterclass materials. Access to the papers and/or Powerpoints will be available online to all delegates in the lead-up to the masterclass (as they become available).

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Lawyers (except WA): 6.5 CPD units (substantive law).

WA Lawyers: 6 CPD points (substantive law) - being the maximum claimable per event by the LPBWA. TEN is an accredited QA provider.

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