

BUYING A BUSINESS

A GUIDE TO CLOSING THE DEAL

A publication of aspect legal





This guide gives an overview of the main steps involved in a business purchase transaction, the important issues you should consider and hints and tips to help you along the way.

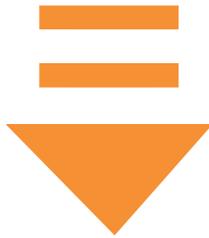
We have often seen deals unnecessarily fall down after months, sometimes years, of time and effort simply because the parties were unprepared or unfamiliar with the process.

Nothing can replace the advice and assistance of a professional adviser, but being prepared will reduce your stress levels, reduce your costs and even make the process enjoyable – as it should be!

Be prepared and get the best deal possible!

aspect legal's specialist business sale and acquisition services

OUR KEY DIFFERENCES TO OTHER LAWYERS



OUR SERVICES FOR SELLERS



Free sale preparation review



Information pack



Contact us



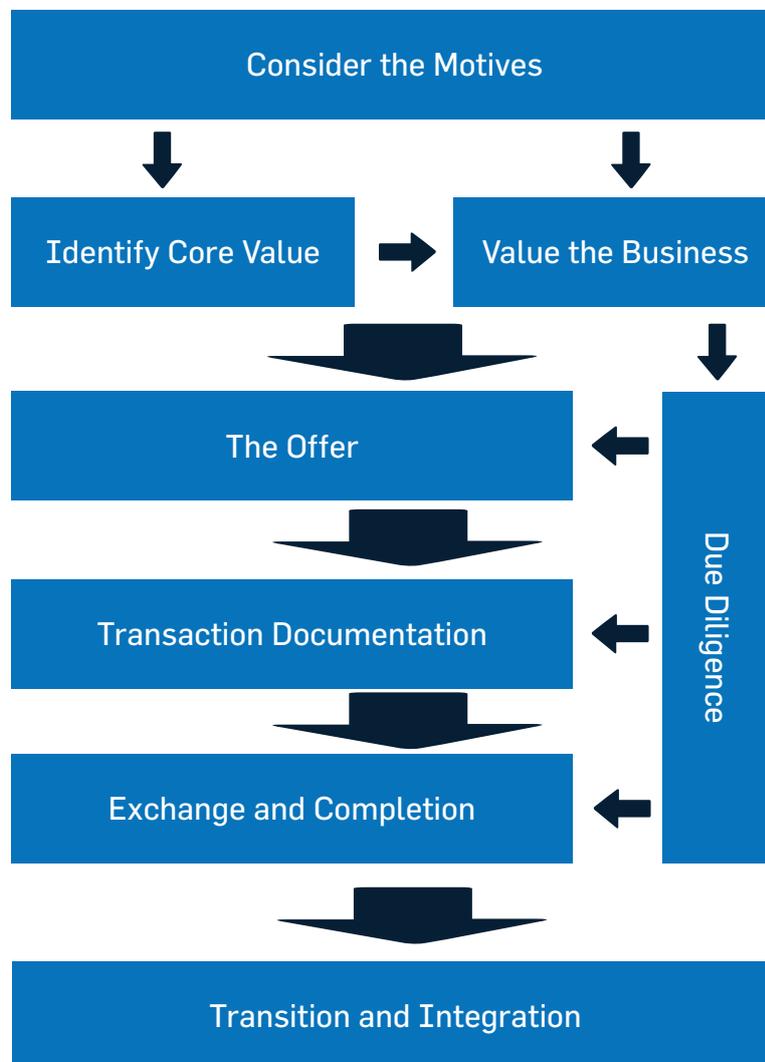
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SUMMARY OF THE TRANSACTION FLOW

This is an overview of the steps involved in a business purchase transaction. Every deal is different and may not proceed in the order set out below or some steps may occur simultaneously and repeatedly (e.g. the due diligence often continues up until the legal documents are signed). We can assist in guiding you through the necessary steps and help you determine a transaction timeline from the outset.



STEP 1.

THE MOTIVES

1. Why do you want to buy the business?

Common reasons for business acquisitions are:

- Acquire new capability or technical expertise
- Expand existing business
- Acquire intellectual property
- Acquire client base

Understanding what it is you are expecting to receive out the business will also help focus your advisers when they assist you with structuring the deal and undertaking due diligence.

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Speak to someone who has worked in a similar business – has their experience reflected what you think it will be like?

2. What will your exit strategy be?

It may seem like a strange question to ask when you haven't even purchased the business yet, but having a vision for the end goal will help you establish an appropriate deal structure and determine which of the business's assets are of value to you. Some exit options may be:

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Speak to an experienced adviser as early as possible. A good adviser will ask questions you may not have considered and refer you to other professionals to assist

- Sell some of its assets and build up the remaining part of the business
- Building up the business to sell it at a profit to a venture capitalist
- Building up the business to sell it to a competitor
- Build up the business and list it on the stock exchange
- Create a franchise
- No planned exit

3. Why does the Seller want to sell the business?

Understanding the reasons why the Seller is selling the business can give you an insight into the position of the business and help you to value the business. Reasons a Seller is selling may include:

- Retiring, moving, looking for a change
- The business might be more successful in the hands of a buyer
- They foresee challenges which they are not able or willing to face
- Changes to regulatory or industry landscape

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Understanding the Seller's motives will help you leverage your negotiations

STEP 2.

THE CORE BUSINESS AND ITS VALUE

4. Is the value in the core business?

Value will have a different meaning to each different buyer. It is important you know and understand what you value in the business. The obvious starting point is in the core business. Most advisers will assume the value is in the core business and will undertake activities such as due diligence and transaction documentation that focusses on the core business as they understand it. If what you value is not in the core business, then work with our advisers so they know what to focus on when undertaking transaction activities.

Things to consider:

- What are the key success factors for the business?
- What will happen to the business if certain key success factors are no longer present?
- What will / can you do to make the business successful under your ownership? Are there any synergies between your existing business and the target that will spark growth beyond their individual capabilities?

Depending on your budget and the size of the purchase, it could be worthwhile engaging a professional advisers to help value the business. The valuation may also give you some leverage in negotiating the price.

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Consider what your strengths and weaknesses are and what value you can add to the business



STEP 3.

THE STRUCTURE

5. How will the purchase transaction be structured?

Designing the right structure for the transaction will ensure that you get the most value out of the purchase. Tax consequences and financing issues will often shape the structure of the transaction. The important considerations here include:

- Will this be a share or asset sale?
- Where you are acquiring valuable assets, will these be held in a separate entity?
- Does the target business have the same risk profile to your existing business?
- Does the target business need to be held in a different entity for risk management purposes?
- What are the tax issues? Which assets can be depreciated?
- How will you finance the purchase? Cash? Loan?
- If borrowing funds, what security will be required?
- Will you pay the sale price in a lump sum up front or is there an earnout?
- Which legal entity will purchase the business?
- Does the structure suit your eventual exit strategy?

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We can work together with your financial advisers to help determine the most appropriate structure for you



STEP 4.

MAKE AN OFFER

6. Make an offer to the Seller

Based on the valuation of the business and the structure that best suits you, make an offer to the Seller. This may take the form of an official written offer at one end of the scale to preliminary verbal discussions at the other end of the scale. In making the offer, some issues that you should consider are:

- Do you want exclusivity to close the deal within a period of time? A carefully worded exclusivity provision can give you the necessary protection from competing bidders.
- Is your offer binding?
- What are the conditions your offer is subject to?
- Do you or the Seller have specific timing for completion of the transaction?
- The costs you have incurred to date in relation to the transaction (in our experience, the longer the transaction is drawn out, the greater the chances the costs will be higher), in terms of financial as well as non-financial considerations.

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Speak to us about securing exclusivity arrangements with the Seller before you start delving into the buy process



STEP 5.

DUE DILIGENCE

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We can review the confidentiality agreement to ensure you are not inappropriately restrained

This step involves thorough fact finding, verification and validation of your assumptions of the business. This will help you determine whether you want to buy the business and whether you will get what you think you are buying.

At this stage, the Seller may ask you to sign a confidentiality agreement before handing over any information about the business.

7. Focus

It is important you undertake a general due diligence about the business but it is even more crucial to know what your focus is. Relevant considerations are:

- Validate and identify the risks around the key assumptions you have made in relation to the business
- Is there any non-core asset or aspect of the business which you value that you would want to have a thorough understanding of
- Are there any impediments that may inhibit your proposed exit strategy?

8. If you are buying the core business, what is the core business?

Understand what it is exactly that the business does and how it makes money. Things to consider:

- What goods or services does it provide?
- Who are its customers?
- Who are its suppliers?
- Who are its employees? Will they stay on if you take over the business?
- Where are its customers/suppliers based?
- What are its distribution channels?
- What geographical or physical limits are there on the business?
- Is the business scalable?
- How will it fit in with your business?

9. What are the risks of the business?

All businesses have some risks. Understanding what these are will help you determine where to focus your due diligence on. Areas to explore:

- How can the risks be mitigated either in the transaction documentation or by you through other risk mitigation strategies after you have acquired the business?
- Are the assets worth more or less than your proposed asking price having regard to the risks?
- What impact does each risk identified have on the overall business should it eventuate?

As part of the general due diligence process, it will be important that various documents of the target business are properly reviewed. As a guide, below is an example of the types of documentation that should be reviewed in this phase:

- Incorporation documents and shareholder agreements
- Business accounts and tax returns
- Financing documents, security agreements and any other finance/credit related documents
- Copies of all contracts that the target business is a party to (this might include: contracts with employees, contractors, customers, suppliers and business partners; property and equipment leases; contracts relating to IP, licensing or royalties etc)
- Intellectual property documentation
- Copies of permits, licences and other registrations required to operate the business
- Any other legal document that is relevant to the target business

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A thorough legal review of the business contracts will help you identify risks and validate value

STEP 6.

TRANSACTION DOCUMENTS

10. What legal documents will be required to effect the purchase?

This varies depending on the nature of the business, the industry it operates in and the structure of the transaction. The usual documents may include:

- Sale and purchase agreement
- Confidentiality agreement (if not already in place)
- Financing documents
- Corporate and regulatory approvals and registrations
- Stakeholder (e.g. banks, landlord, key suppliers, key customers) notifications and approvals
- Option agreements
- Contract novations
- Employment agreements

 **Aspect TIP**

We can help negotiate appropriate warranties and indemnities to ensure you are appropriately protected

The type and number of documents required will impact on the timing (and hence cost) of the overall transaction, so this should be factored into the price.

STEP 7.

NEGOTIATION

11. Negotiate with the Seller

You can usually expect the Seller to reject your initial offer, so be prepared with good reasons to justify your offer price. Consider the issues or conditions that you are willing to “trade” with in order to justify the offer price. Issues to consider to assist you to negotiate your position:

- The relative bargaining strength of the parties
- What are market or industry conditions like or what will they be like in future?
- Are the financial and legal records in a good state? What are the costs involved to rectify those records?
- Are there any outstanding disputes?
- Are there any questionable or bad management practices that have impacted the risk of the business or added costs to the operation of the business?

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We can assist you with strategic negotiations to get you the best possible outcome

Issues that are typically heavily negotiated include:

- Earn out mechanisms
- Non-compete clauses
- Warranties and indemnities (which will vary depending the structure of the transaction)
- Limits of liabilities
- Post-purchase assistance from the Seller
- Payment timelines and conditions.

STEP 8.

EXCHANGE AND COMPLETION

12. Exchange

Once the negotiations have been completed, it is time for exchange of contracts. However, it is important to ensure that the right people sign the appropriate documents. In some cases, you or the Seller may need corporate approvals before relevant people can sign the documents.

13. Pre-Completion Actions

Understand what it is exactly that the business does and how it makes money. Things to Ensure that any ancillary documents (such as regulatory notifications, licenses and permits) are completed and lodged within appropriate timeframes. The parties must be thoroughly prepared for the eventual completion deadline. There is often a lot more coordination of events and paperwork than buyers and sellers expect. There is sometimes a short time period between exchange and completion. Ensure you are aware of all the things that have to take place by completion so that you are not caught out for failing to complete on time. You could be liable to pay interest for any delay!

 **Aspect TIP**

Some notifications are subject to time limitations - speak to us

14. Completion

This is one of the most important steps for the Seller, so make sure you pay on time and correctly! If payment is via bank transfer, ensure you have those details (it should have been included in the Sale and Purchase Agreement!). If payment is via cheque, ensure you have the names of the right entities to make the cheque out to.

The most important step from your perspective is to make sure you receive all confirmations and signed documentation necessary to enable you to assert ownership to the business. Where title to assets are subject to a registration regime, ensure they are attended to expeditiously to ensure there are no adverse claims against your title to the assets.

STEP 9.

TRANSITION AND INTEGRATION

15. Are there any post-completion obligations that need to be met by either party?

The substantive part of the transaction is completed, but there may be certain notifications and obligations that may need to be satisfied before the purchase is complete. Sometimes, the transaction may be subject to certain conditions precedent to finalising the transaction – in other words the transaction is not completed until these steps are completed. Failure to satisfy these conditions may result in an adjustment to the purchase price or, in the worst case, the deal falling through. The Sale and Purchase Agreement should have set out some of these. Some common post-completion obligations include:

- Notifications to suppliers, landlord and banks and execution of relevant transfer documentation
- Regulatory notifications, approvals, registrations and stamping (e.g. to ASIC, PPSR, OSR)



BUSINESS BUYER'S CHECKLIST

- Pre-purchase**
 - Consider motives
 - Speak to us about whether you should request exclusivity for a period during the due diligence
 - We can review any confidentiality agreement the Seller asks you to sign
 - Appoint other appropriate experienced advisers to assist you through the process (accountant/financial adviser, industry specialist)

- Due diligence**
 - Consider any focus areas
 - Understand what is being sold (which assets and liabilities, shares)
 - Understand the financial position of the business
 - Understand the legal position of the business
 - Understand the risks in the business

- Purchase structure**
 - Investigate the different ways to structure the purchase
 - Get an estimate of the tax implications of the different structures
 - Consider the different options available for financing the transaction
 - Consider the alternative payment structures (e.g. cash, deferred payment, earnout etc)
 - Understand your financial budgetary constraints and limits

- Timeline**
 - Determine the timeline for completing the transaction – build in a buffer!
 - Understand the implications of a failure to meet certain milestones in the timeline

WHERE DO I BEGIN?

Aspect Legal offers a number of services to help prospective business buyers.

We start with a free initial consultation that provides an in-depth discussion of your plans, the legal steps involved in a purchase, the timeline for each step, and the other items you should be considering.

We are experienced in undertaking sale and purchase transactions from end to end. We can be involved from early discussions on structuring and planning through to the transition and integration of the acquired business.

Once you have started down the purchase path, we will work closely with you and your appointed advisers to ensure an integrated approach to the transaction. We can provide checklists and regular updates throughout the process and keep you fully informed about timelines, what we are doing, and what you need to be doing.

If you would like to get started with a free consultation, [click here](#).

Free Consultation



Information pack



Contact us



More information about [aspect legal](https://www.aspectlegal.com.au)
www.aspectlegal.com.au



aspect legal's specialist business sale and acquisition services



Joanna Oakey



Elizabeth Lee

Aspect Legal is a boutique commercial legal firm servicing businesses ranging from small to medium enterprises all the way through to national and multi-national corporates. Our specialty is business sales and acquisitions.

Joanna and Elizabeth lead the sales and acquisitions team, and have almost 4 decades of combined specialist experience advising on an extensive range of sales and acquisitions transactions representing multi national corporations as well as small to medium sized businesses. Their first-hand experience of the “inside” of businesses also gives them a unique and commercial perspective of the challenges and opportunities of business owners.

As a boutique practice, you can be assured that throughout your transaction, you will always deal directly with Joanna or Elizabeth.

Our key strengths and attributes:

- Experience and Quality
- Highly responsive services
- Extremely quick turn around times
- Commercial focus
- Team players
- We truly care

Our services for Buyers:

- Pre-purchase advice (Confidentiality Agreements, Heads of Agreement, Reviewing your Structure, etc)
- Due diligence
- Drafting and negotiating transaction documentation
- Undertaking transactional requirements of the purchase
- Finalising the deal with a successful commercial outcome
- Follow up work with transitioning and integration

Free Initial Consultation



Information pack



Contact us

