



***“Buying a Business/Company:  
which is best –  
Asset or Share sale?”***

Presented by  
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# Tom Meagher | Director



Tom has over 30 years' legal and business experience including:

- Previously working for local law and major national firms;
- Being majority-owner and executive director of his former mid-tier firm;
- Being the national operations manager for a financial advisory IT platform provider;
- Previously being the WA Legal Technology Group Manager for a National Law Firm
- Owning and managing an IT consultancy business; and
- Being a director and in-house counsel for a public company.



**Tom is also a regular publisher of articles and is one of Australia’s leading presenters of legal seminars to and for various professional bodies, associations and government authorities on a wide range of business law and professional development-training topics including:**

<b>WA Department of Commerce</b>	<b>Institute of Public Accountants</b>	<b>CPA Australia</b>
<b>Chartered Accountants Australia &amp; NZ (CAANZ)</b>	<b>Governance Institute of Australia</b>	<b>Mortgage &amp; Finance Association of Australia (MFAA)</b>
<b>Law Society of WA</b>	<b>National Electrical &amp; Communications Assoc (WA)</b>	<b>City Insolvency Discussion Group</b>
<b>Innovation Centre of WA</b>	<b>Australian Hotels Association (WA)</b>	<b>Forum for Directors of Indigenous Organisations (FDIO)</b>
<b>LegalWise CLE</b>	<b>Small Business Development Corporation</b>	<b>Stirling Business Centre</b>
<b>The Tax Institute</b>	<b>Australian Institute of Conveyancers (WA)</b>	<b>Institute of Certified Bookkeepers</b>
<b>Western Suburbs Business Association</b>	<b>Business Foundations Inc</b>	<b>WA Business Assist</b>
<b>Strata Community Association of Australia</b>	<b>Real Estate Institute Western Australia (REIWA)</b>	<b>Australian Institute of Business Brokers (AIBB)</b>

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*If you have a matter that relates to this presentation topic or you require legal advice, careful review and analysis of your matter's particular facts, information and documents are required before proper legal advice can be given or applied to your matter.*

# Introduction

In the sale or purchase of a 'business', a very important consideration is whether the buyer should actually, ultimately purchase the:

- *shares of the company comprising the business; or*
- *certain assets and/or the entire business itself directly from the company.*

This seminar is focused on the example sale and purchase of a business, which is operated by a company (which similarly could be for a business sale from a unit trust. However, for simplicity's sake, we will continue to just refer to a share sale).

For other business structures such as a sole trader, family trust or partnership, *those buyers are usually only able to purchase the assets of that business.*



# What are some of the possible tax outcomes?

- Tax and net financial(\$\$) outcomes from a sale can be *vastly* different depending on the business structure and the method of disposal (i.e. *Share sale* vs *Business/Asset sale*)
- E.g. are the shares or business assets *pre-CGT* (i.e prior to 20/9/1985)? More importantly... if they were... are they still?
- What options do you have to reduce the tax on the sale (e.g. 50% discount, ‘Small Business concessions’)
- Get the right advice *before* you sign...  
*note: date of contract vs date of actual settlement/ completion for CGT event ‘triggers’!*



# The Differences between an: **Asset Sale** and a **Share Sale**.



1. An asset sale involves the purchase of some, or all of the assets owned by a company.
  - a) Examples of common assets which are sold may include: plant and equipment, land, buildings, machinery, stock, goodwill, contracts, records and intellectual property (including domain names and trademarks).
  - b) The transaction is between the company and the buyer of the business assets. The seller retains ownership of the company structure.
2. In a share sale, the buyer purchases shares in the company, rather than just the business assets.
  - a) The buyer acquires the equity in the company – a separate legal entity.
  - b) Typically, the company continues to retain its assets and liabilities.
  - c) The transaction is between the company's shareholders and the buyer of the shares.
  - d) All business assets remain with the company. It is the composition of the ownership of the company which changes.

# Advantages & disadvantages of an **Business/Asset Sale**.

## Seller Advantages

- ✓ Apportionment of total consideration across assets.
- ✓ Typically, a seller provides fewer warranties and indemnities in an asset sale.
- ✓ The seller can exclude any assets that are not intended to be transferred.



## Seller Disadvantages

- Transferring individual contracts and assets from the seller to the buyer may require the consent of third parties and/or additional registration which can be a time consuming and onerous process.
  - For example, suppliers of the business may have to consent to the buyer taking over supply agreements and the landlord under a lease would have to consent to the lease being assigned to the buyer.
- The seller must procure releases of any security interests affecting the assets of the business from their financiers prior to the completion date.
- The liabilities of the business generally remain with the seller.
- Access to sale proceeds — seller structure.

# Advantages and disadvantages of a **Business/Asset**

## **sale** Buyer's Advantages

- ✓ Usually, the liabilities remain with the seller company and do not transfer to the buyer.
- ✓ The buyer can 'cherry pick' certain assets (and employees!) and leave any unwanted assets with the seller.
- ✓ The buyer may agree to take on certain contractual rights and/or liabilities of the business.
  - ✓ For example, if employees are transferred across from the seller company to the buyer's business as part of the transaction, then a buyer may agree to take on the accrued employee entitlements subject to a reduction in the purchase price for the assets.
- ✓ Subject to certain criteria (usually the sale of a business and its assets rather than just a mere asset sale.
  - ✓ For more guidance see Goods and Services Tax Ruling [GSTR 2002/5](#)), the sale may be classified as a 'mere asset sale' which may result in no GST being payable on the transaction.



# Advantages and disadvantages of a **Asset sale**

## Buyer's Disadvantages

- Transfer duty will usually be payable on the transfer of a business or its assets (and for certain assets, such as motor vehicles, at different rates of duty).
- Third parties may refuse to consent to assign or novate contracts which the buyer considers to be vital to their decision to purchase the business.
- The seller will often require the buyer to offer employment contracts to all current employees which are substantially similar to their current terms.
- Some assets, such as government licences and permits, may not be assignable.



# Advantages and disadvantages of a **Share sale**

## Seller Advantages

- ✓ There may be a better overall return for the shareholder in a share sale transaction which includes access to tax concessions.
- ✓ Client/Customer, supplier and employment contracts usually\* remain within the company.
  - ✓ There is less effort and risk associated with ensuring clients/customers, suppliers and employees will stay with the company than in an asset sale.

\* However if there is a changing control provision in any agreements, commonly in key customer and lease agreements then that may require the consent of those third parties



# Advantages and disadvantages of a Share sale

## Seller Disadvantages

- ❖ Because the company retains all historical, actual and contingent liabilities of the business, to protect against these liabilities, the seller may be required to provide extensive warranties and indemnities. These warranties (unless limited) could be required for a significant period of time (note: vendor warranty *insurances* exist!)
- ❖ The directors of the selling company may be required to provide personal guarantees which may expose them to unlimited personal liability.
- ❖ Part of the purchase price may need to be held on trust or the seller may need to provide a bank guarantee as security if there is a breach of a warranty.
- ❖ The seller may need to comply with any restrictions on share transfers to third parties, such as pre-emptive rights provisions in the company's constitution or the Shareholders Agreement.



# Advantages and disadvantages of a **Share sale**

## Buyer's Advantages

- ✓ Where the company has recognised brand, goodwill and reputation, it may be preferable to buy the business by way of a share sale in order to capitalise on the company's brand, goodwill and reputation.
- ✓ Purchase of retained profits and debts.
- ✓ As contracts, business names, leases and intellectual property are already in the name of the company, there is no need to formally assign contracts and other property and therefore third party consents are not required.
- ✓ Transfer duty is not payable in a share sale (unless the selling company is 'land rich').



# Advantages and disadvantages of a Share sale

## Buyers Disadvantages

- ‘Undesirable’ assets may be acquired.
- The buyer becomes the sole shareholder in the company. The company retains all past, current, future and contingent liabilities of the business on completion (including any legal and tax liabilities of the company).
- Even if the seller provides an indemnity for the liabilities incurred by the company up until the date of completion, unless an amount representing the value of the indemnities/ warranties is held on trust as security or a bank guarantee is procured, there is the risk that the seller may not have the funds (or possibly still exist!) to indemnify the buyer when called upon to do so.
- To mitigate the additional risks associated with a share purchase the buyer usually must engage in extensive and detailed due diligence to detect liabilities and risks associated with the selling company.
- Some agreements require third party consent where there is a ‘change in control’ of the company.



# Deciding how to sell a **business** or **company**.

- Although there are advantages and disadvantages for buyers and sellers associated with asset sale and share sale transactions, there are numerous effective ways to mitigate risks that are associated with each type of transaction.
- It is therefore vital to explore & understand the various commercial, taxation and legal risks associated with both types of transactions to determine the most optimal type of transaction for the particular sale – *appreciating that largely this will be determined by the relevant tensions of respective buyer and seller's preferences.*



# Concessional rate of transfer duty on Sale of **Business:**

Sections 79 – 86 of the *Duties Act 2008*

A dutiable value of the ‘dutiable property’ which does not exceed \$200,000 may be assessed at the concessional rate of duty.

The concessional rate of transfer duty is as follows:

\$ 0 - \$100,000	\$1.50 Per \$100 or part thereof
\$100,001 - \$200,000	\$1,500 + \$4.39 Per \$100 or part thereof above \$100,000

An application for an assessment at the concessional rate of transfer duty should accompany the relevant transaction record when it is lodged.

The appropriate application form is available from the Office of State Revenue website at

[www.osr.wa.gov.au](http://www.osr.wa.gov.au)

## Requirements to lodge **Business Sale Agreement** with Revenue WA

### - Section 280(2)(b) of the *Duties Act*

- Under section 280 (2)(b) of the *Duties Act 2008*, after the expiry of the time provided under section 23 within which an instrument is to be lodged for duty endorsement:
  - a person who is not a party to the dutiable transaction effected by the instrument, acts under the instrument,
  - that person must, as soon as practicable, lodge the instrument or give notice of the instrument to the Commissioner.
    - Penalty is a fine of \$20,000.
- Section 23 - “*within 2 months after the day on which liability for duty on the transaction arises*”.





# Can a Business Broker sell shares?

**No.** Not unless they also hold the requisite AFSL license or are an authorised representative of an AFSL licensee.

➤ What is an AFS licence?

An Australian financial services (AFS) licence authorises licensees to:

- ✓ provide financial product advice to clients;
- ✓ deal in a financial product\*;
- ✓ make a market for a financial product;
- ✓ operate a registered scheme;
- ✓ provide a custodial or depository service;
- ✓ provide traditional trustee company services.



An AFS licence is required to conduct a financial services business.

*\* particularly the sale of shares constitutes a “financial product” and therefore would require the relevant licensing pursuant to [ASIC Regulatory Guide 36](#)*

## REAL ESTATE AND BUSINESS AGENTS ACT 1978 - SECT 4

### 4. Terms used

#### (1) In this Act unless the context otherwise requires —

**“business agent”** means a person whose business either alone or as part of or in connection with any other business, is to act as agent for consideration in money or money’s worth, as commission, reward, or remuneration, in respect of a [business transaction](#) as defined by this section, but does not include a person whose business is to so act by reason that —

- (a) he is appointed by a court as a receiver or receiver and manager of the business of another; or
- (b) he is an official receiver or trustee within the meaning of the Bankruptcy Act 1966 of the Commonwealth or any Act in amendment or substitution of that Act;

**“business sales representative”** means a person who on behalf of an agent negotiates a [business transaction](#) irrespective of whether or not the agent is the owner of the business involved, and includes —

- (a) a person who does so as a member of a firm that is a licensee and the holder of a current triennial certificate unless he is also a licensee and the holder of a current triennial certificate;
- (b) a person who does so as a director of a body corporate that is a licensee and the holder of a current triennial certificate, unless he is also a licensee and the holder of a current triennial certificate;

....**“business transaction”** —

- (a) means a sale, exchange or other disposal and a purchase, exchange or other acquisition of a business and any share or interest in a business or the goodwill thereof; and
- (b) includes any sale, exchange, or other disposal and any purchase, exchange, and other acquisition of goods, chattels or other property relating to a business transaction of the kind specified in paragraph (a); and
- (c) also includes an option to enter into a business transaction; but
- (d) **does not include the sale, exchange, or other disposal or a purchase, exchange, or other acquisition of a share in the capital of a body corporate carrying on a business or an option in respect thereof;**



## REAL ESTATE AND BUSINESS AGENTS ACT 1978 - SECT 60

### 60. **Agent not entitled to commission etc. unless licensed and validly appointed**

- (1) **An agent is not entitled to receive any commission, reward, or other valuable consideration in respect of his services in that capacity unless —**
- (a) **he is licensed in that capacity** and he holds a current triennial certificate in respect of his licence when he renders the services; and
  - (b) he has a valid appointment to act in that capacity which is in writing signed by the person for whom the services are or are to be rendered or by some other person lawfully authorised to sign on behalf of the person for whom the services are or are to be rendered.
- (2) **An appointment to act as an agent is not valid unless —**
- (a) it is contained in a document which —
    - (i) clearly sets out the services that are or are to be rendered; and
    - (ii) where specific property is to be the subject of those services, clearly identifies the property; and
    - (iia) clearly sets out the method by which the amount of any commission, reward or other valuable consideration to be received for those services is to be calculated; and
    - (iii) contains such other information, if any, as is prescribed;
  - and
  - (b) the document is not an offer or acceptance or a contract, or a document purporting to be an offer or acceptance or a contract, binding or purporting to bind a party thereto to a transaction; and
  - (c) the person obtaining the signature to the document gives a true copy thereof to the signatory immediately after the signing thereof (the onus of proof of which is upon the person obtaining the signature).
- (3) **A person shall not demand or receive any commission, reward, or other valuable consideration in contravention of subsection (1) or (2), or both.**  
**Penalty: \$5 000.**
- (4) **Any commission, reward, or other valuable consideration received in contravention of subsection (1) or (2), or both, may be recovered as a civil debt recoverable summarily in any court of competent jurisdiction.**



# Thank You

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