

Acquisition of Strata Management Agency Business

A number of legal and practical issues arise when one proposes to acquire a strata management agency business and wishes to obtain the full benefit of the business acquired.

Normally, a prospective purchaser will be concerned about the following issues:

1. The appropriate structure for the business.
2. The appropriate “due diligence” to undertake in relation to the acquisition, which will depend on what is being acquired.
3. Legislative requirements, such as licensing and insurance requirements under the legislation regulating agency businesses and potentially Foreign Investment Review Board approval where the purchaser is a foreign interest as defined in the Foreign Acquisitions and Takeovers Act 1975.

As to the structuring issue, there are also a number of ways in which the business can be structured in the hands of the purchaser, although this will generally involve trading through one or more corporate entities, depending on the size and diversity of the business, often also involving trust structures. This involves tax as well as legal issues and accounting and legal advice, before settling on a structure or acquiring the business, is invaluable. Normally, we proceed on the basis that your accountant has recommended a structure, which we review from a legal perspective, generally involving consideration of limitation of liability and asset protection issues.

As to the “due diligence” issue, there are a number of ways in which such an acquisition may proceed, including:

1. Acquiring the company operating the business, i.e. acquiring the shares in that company. However, for a number of reasons, that is not the preferred or usual way of proceeding.
2. Acquiring the assets comprising the business, potentially including the vendor’s interest in the business premises, which might be owned or leased, the vendor’s interest in the equipment of the business and most importantly the vendor’s interest in its agency agreements with its clients. Generally, it will also be necessary to make arrangements to re-employ some or all of the vendor’s staff and this often extends to employment or consultancy arrangements with the vendor’s principals, to ensure an orderly transition of the business.
3. Acquiring the vendor’s interest in its agency agreements with its clients, rather than the business as a whole.

Regardless of which of these applies, the purchaser's primary concern will be in relation to the vendor's agency agreement and proper "due diligence" would include at least the following:

1. Sighting copies of the agreements and owners corporation resolutions approving owners corporations' entry into them, in order to confirm valid execution of the agreements, in light of the requirements of the strata management legislation applicable at the time of the agreement.
2. Confirming the remaining term of each agreement.
3. Confirming the services to be provided under the agreement, particularly those services which are covered by a fixed fee and not costed on a time costing basis.
4. Confirming that the agreement permits assignment or novation or if owners corporation consent is required, that it has been or can be obtained. A business sale contract may make the sale conditional on such consents being obtained or it may make payment of part of the price conditional on such consents being obtained and this will determine whether the sale falls over or proceeds at a reduced price if some required consents are not obtained.
5. Where an agreement is to be assigned, confirming that there are no grounds for termination of the agreement, i.e. that the vendor has complied with its obligations under the agreement.
6. Investigating the quality of the accounts and other records maintained by the vendor for its clients and the cost of bringing up to an appropriate standard where they currently fall below that standard. In our experience, very substantial costs can be incurred bringing records up to an appropriate standard, which can be very difficult to recover from the client owners corporation.
7. For agreements entered into, renewed or varied on or after 12 November 2016, if one of the parties is a "small business" as defined in the Australian Consumer Law, confirming that the terms of the agreement do not infringe the "unfair contract terms" provisions of the Australian Consumer Law.
8. Confirming that the agreement contains all necessary provisions from the purchaser's point of view. By way of example, many agency agreements do not adequately address work health and safety issues, in that work health and safety legislation potentially requires agents to take action, the cost of which may or may not be recoverable from the client owners corporation, depending on the terms of the agreement.

If the purchaser acquires the whole of the vendor's business and not just its interest in its agency agreements with its clients, it would also need to consider the following as part of the due diligence process:

1. What is required in order to obtain the benefit of the vendor's business premises? If they are owned by the vendor or an associated entity, it may be necessary to enter into a leasing arrangement with the vendor. If they are leased by the vendor, it may be necessary to review the vendor's lease, confirm that it has been complied with and confirm that it can be assigned or novated.
2. What is required in order to acquire the equipment of the business, which will involve confirmation that it is owned by the vendor and not subject to encumbrances?
3. What is required in order to re-employ the vendor's staff, which will involve investigation of employee entitlements, including superannuation and entry into appropriate employment contracts?

If the purchaser acquires the shareholding in the company operating the business, it would also be necessary to investigate and verify the financial position of the company, including its tax and other liabilities.

Key takeaways

- Understanding the appropriate business structure is crucial for liability and asset protection.
- Due diligence is essential and includes reviewing agency agreements and ensuring compliance with strata management legislation.
- Acquisition can involve purchasing shares, assets, or specific agency agreements.
- Confirming the terms of agency agreements and the ability to assign them is vital for a successful acquisition.
- Investigating the quality of vendor records can prevent substantial future costs.

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