Going into business?

How important is my lease?

The location of your business is often vital to its success and you must ensure that your lease is properly drawn up so that you do not have to move or change some important aspect of your operations. Before moving into leased premises obtain a copy of any proposed or existing lease and discuss with your Solicitor each clause in it and its implications.

Remember that your occupancy may be subject to the NSW Retail Leases Act 1994 and the conditions under which you occupy the premises must be contained in the lease you sign. It ought to allow you to make any alterations necessary to your business and, if the business is in a shopping center, you would be wise to have a restriction on other businesses, which may compete with yours.

Be careful of any restrictions or requirements relating to hours of access or carrying on business.

Most leases make the lessee responsible for keeping the premises and fittings in good repair and many require you to pay all or a proportion of costs of rates, maintenance and so on. Make sure all these are clearly stated. In some cases the rent may vary according to a fixed percentage or some formula such as the consumer price index or the turnover. The lease will normally describe the only business permitted on the property and is usually interpreted strictly; this could restrict you from diversifying and make it difficult for you to sell the business. It must be clearly worded with the future development of your business in mind.

What business structure should I choose?

There are several forms of business structures, each having its own legal, accounting and tax requirements. The form of organisation of a business determines many things, including how tax is paid and how profits are disbursed, and it should be geared to help you achieve maximum benefits.

The types of structure you may ask your Solicitor to discuss with you include:

- Sole trader: With this structure you intend to conduct your business on your own or with employees but no joint owner. As a sole trader you are responsible for all debts and may have to mortgage your personal assets when borrowing for your business.

- Partnership: Up to 20 people may form a business partnership. A larger number is possible for some professions, such as accountants. If no formal partnership agreement exists, partners are deemed by law to be equal owners. Liability for all debts may fall on any of the partners jointly and severally – if one absconds or dies the others are left with the liabilities.
- Limited liability company: If you form a company, you will as a shareholder have limited liability; you may become an employee and also a director but with certain duties and liabilities and strict responsibilities set out in the Corporations Law, and subject to tax, record-keeping and reporting obligations.
- Trusts: These may be more appropriate for holding business assets, rather than trading. They will necessitate seeing your Solicitor.

How is a franchise set up?

Franchising is a type of business ownership which allows an individual, partnership or company to operate an independent business under the banner of an already established business. Before entering into a franchise you should check the reputation, track record, and financial stability of the franchiser very carefully. Also find out what advertising budget and back up services the franchiser offers.

The fees payable to the franchiser must be clearly stated, along with the terms of sale for goods supplied by the franchiser – you will need to know if you can purchase stock from outside the franchise network.

A franchise agreement is a written document outlining the rights and obligations of both the franchiser and the franchisee. It is a legal contract and much attention should be given to its contents – ultimately it contains the rules and regulations upon which your future income and security will depend. Also the franchiser must give you a 'Disclosure Document' and allow you at least 14 days to consider it before signing.

What do I get when I pay for goodwill?

Goodwill is a way of describing a special asset of a business and for which a purchaser can be called upon to pay. It arises for a variety of reasons, for example, the location of the premises, the quality of the products sold, the performance of the staff, the absence of competition, etc. It is generally reflected in earning power but can be destroyed quickly by changes over which the owner has no control, for example, zoning, widening of roads or cancellation of a supply agreement.

The real value of goodwill should be thoroughly assessed by your legal adviser and your accountant as capital gains tax issues may arise.

Are there any Government fees I must pay?

Often there are certain permits, multi-purpose licences and certificates you are required to have in order to carry on business legally, for example, a council licence which takes account of Department of Health regulations, a factory registration certificate, tobacco retailer's licence, trade waste agreement or liquor licence. In many cases these are not transferable by the seller and a new permit or licence must be obtained by you and a new fee paid. In most cases NSW Government stamp duty will be payable by the purchaser.

What sort of insurance will I need?

Landlords and franchisers may require you to have certain insurances. The only business insurance you are required by law to carry is workers compensation. The rest is up to you, but you would be foolish to neglect to cover such obvious risks as fire, burglary, public liability, personal disability and loss of profits. If you rely heavily on a particular person, you would be well advised to have key-person insurance against the event of their injury or death.

There are many other insurances which might be appropriate for your business and these should be discussed with your legal adviser to get an impartial assessment.

How does my sale or purchase affect staff entitlements?

It is important that the purchaser of a business does not take on the entitlements of staff for which the vendor is responsible, for example, long service leave, sick pay or holidays. Provision for these obligations should be clearly settled with the previous owner in negotiations before the sale.

The owner should be aware, too, of the effect of fringe benefits tax on any benefits given to valuable staff to induce them to stay on.

In many instances, the staff are the most vital single asset when you buy a business, but no one can be prevented from leaving. It can be important to many businesses to ensure that any staff who leave, or even the previous owner, do not set up in opposition using special knowledge or confidential information which has been gained from the business you bought.

Will the Government help me?

Some businesses are eligible for assistance from the Government of New South Wales. The Government also funds a comprehensive range of publications, audio-visual material and computer assistance available through Business Enterprise Centers in regional enters around the State.

These brief notes are for your general information. They are not a definitive analysis of the subject and professional legal advice should be taken before any course of action is pursued. ***Your Solicitors at Barry F. Cosier & Associates can advise you further regarding any matters of this nature.***

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