



## Corporate Alert 2007

### Sale of Business - Potential Liability of Sellers

“ Sellers must be aware of their potential liability and ensure that any risks are minimised. ”

When selling a business, a seller faces possible post-sale liability. If things don't go well for the purchaser once the business is sold, the purchaser may attempt to blame that failure on a disclosure made by the seller prior to the sale.

Sellers must be aware of their potential liability and ensure that any risks are minimised.

#### Potential Liability

##### Contractual Liability

This area of liability usually arises under the terms of the sale agreement. Potential liability may be limited by a cap on any claims that may be made by the buyer. A seller can also limit exposure by disclosing information relating to the business to the buyer. It is particularly beneficial if a seller can negotiate the disclosures to limit the extent of warranties provided by the seller, although this is not always easy to achieve.

##### Misleading or Deceptive Conduct

This other key area of potential liability relates to both misleading and deceptive conduct and conduct that is likely to mislead or deceive. Such conduct is prohibited by both the Corporations Act 2001 (in respect of shares) and the Trade Practices Act or State based fair trading legislation (other business dealings).

All disclosures, whether written or oral, can be classified as statements made in the course of trade or commerce and are thus subject to the misleading and deceptive conduct provisions. Conduct can be misleading or deceptive irrespective of the intention of the person engaging in the conduct. If the conduct is found to be misleading or deceptive then the person who engaged in that conduct will be liable to compensate any person who suffered loss or damage as a result of that conduct.

Liability for misleading or deceptive conduct cannot be excluded. Neither a disclaimer nor a clause in a binding agreement will exclude liability. However, in drafting a sale agreement it is usual to attempt to limit exposure as much as possible.

#### Forecasts

The greatest area of risk for potential liability for misleading and deceptive conduct is in respect of forecasts. Any statement as to a future matter will be deemed to be misleading unless the person making the statement can prove that, at the time they made the statement, they had reasonable grounds for doing so. The most certain way to establish reasonable grounds for making a statement as to future matters is to have a report prepared by an independent expert who considers the statement and confirms that there are reasonable grounds for making the statement.



## All Relevant Information Must be Disclosed

A statement or even silence can amount to misleading or deceptive conduct. This can be interpreted as tantamount to an obligation on sellers to include everything material to a potential buyer in the information provided to buyers. This is the case whether given to the buyer in an information memorandum or in connection with due diligence investigations. It is therefore important to consider whether everything materially relevant is included.

It is recommended that the seller conduct internal due diligence to ensure that all relevant information is included.

Sellers must have a complete and intimate knowledge and understanding of all aspects of the business in order to make all relevant disclosures, and some form of due diligence can achieve this. It is no defence to an allegation of misleading or deceptive conduct that the seller was not aware of relevant information. The seller needs to take reasonable steps to become aware of such information.

### Practical Implications

It is important to carefully consider the information provided to a prospective buyer, especially in relation to forecasts. It is recommended that the following practical steps be taken to minimise possible liability:

- > Responsibility for liaison with potential buyers should be limited to one or two persons only.
- > Detailed file notes of telephone conversations and other discussions with any prospective buyer should be maintained.
- > Copies of all information provided to a prospective buyer should be retained.
- > Employees should be informed of the potential exposure for misleading or deceptive conduct.

### Contact Details

For further information in relation to this subject please contact:



**Loretta Reynolds - Partner**

T: +61 8 8236 1406

E: lreynolds@thomsonplayford.com.au



**David Zwi - Partner**

T: +61 8 8248 3414

E: dzwi@thomsonplayford.com.au



#### Adelaide

101 Pirie Street . Adelaide . SA 5000

T: +61 8 8236 1300 . F: +61 8 8232 1961

#### Melbourne

Level 40 . 140 William Street

Melbourne . VIC 3000

T: +61 3 8608 7000 . F: +61 3 8608 7199

#### Sydney

Australia Square Tower

264 George Street . Sydney . NSW 2000

T: +61 2 8248 5800 . F: +61 2 8248 5899

info@thomsonplayford.com.au

www.thomsonplayford.com.au



This Alert is produced by Thomson Playford. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters.

Liability limited by a scheme approved under Professional Standards Legislation.