



CONSIDERING PURCHASING A BUSINESS OR CLIENT BOOK?

GIVE YOURSELF THE BEST CHANCE WITH AN EXCLUSIVE NEGOTIATION AGREEMENT

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A properly drafted representative agreement has the potential to save your business hundreds of thousands of dollars. However, a large number of financial services businesses are making do with basic, outdated and even poorly drafted agreements.

If you have found a business or client book which looks appealing, consider whether you want to ask the seller to enter into an exclusive negotiation agreement with you, so that you have the exclusive right to negotiate with the seller for a limited period of time. If the seller's business is appealing, this may give you the opportunity to come to terms with the seller before anyone else.

Typically, during the term of the exclusive negotiation agreement (sometimes referred to as the "lock-out period" or the "exclusivity period"):

- the seller is restricted from entering into negotiations with anyone other than the prospective buyer concerning the sale of the seller's business;
- the seller cannot agree to sell the seller's business to anyone other than the prospective buyer or the prospective buyer's nominee; and
- the seller is prohibited from allowing any person other than the prospective buyer or the prospective buyer's nominee to conduct due diligence in respect of the seller's business.

A prospective buyer cannot force a seller to enter into an exclusive negotiation agreement. In most cases, the prospective buyer will have to entice the seller with some sort of monetary payment or other consideration. If there is no consideration at all, the agreement may need to be structured as a deed in order to be enforceable.

Care must be taken not to draft the exclusive negotiation agreement as an "agreement to agree" or an "agreement to negotiate" concerning the sale of the seller's business. In broad terms, an agreement to agree, or an agreement to negotiate, may not be upheld by a Court as a legally binding agreement, e.g. see *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1*.

For an exclusive negotiation agreement to make commercial sense, there must be a time limit on the exclusivity period. Once that time limit expires, the seller is once again free to negotiate with anyone.

We have seen exclusive negotiation agreements drafted by the parties themselves which fail to meet the general requirements for a valid contract, including certainty and completeness. Agreements which are insufficiently certain or complete are unlikely to be upheld by a court.

Halseys has for many years been involved in mergers and acquisitions, including the sale and purchase of businesses and client books, across Australia. Our management team collectively represents more than 50 years of experience in the accounting, financial services and credit industries as advisers, researchers and senior managers.

FURTHER INFORMATION

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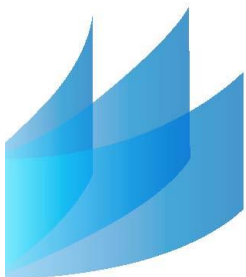
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