mergers + acquisitions
the ultimate guide to m+a law

ebook

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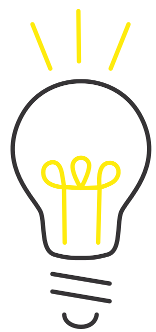
Mergers and acquisitions [M+As] are terms often used interchangeably but differ substantially in meaning.

It is the process of a company consolidating or transferring ownership through various legal and financial arrangements.

In a merger, two or more entities come together to form one new business.

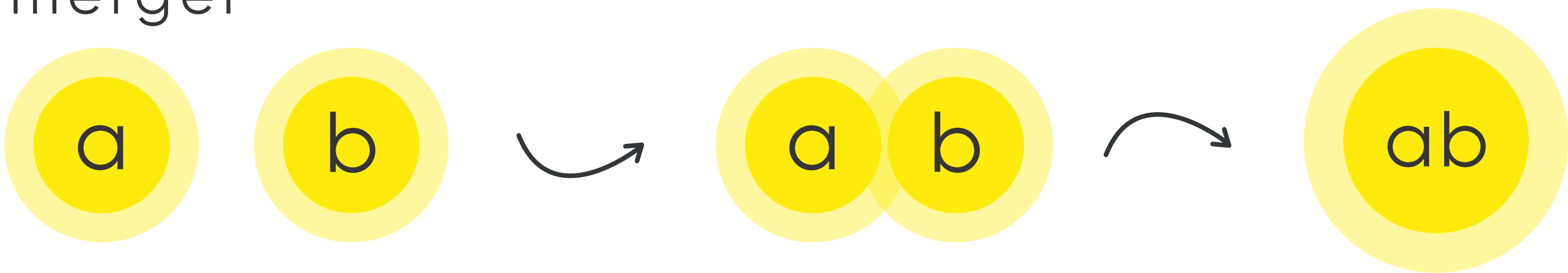
An acquisition, on the other hand, relates to an entity acquiring another entity. This is commonly completed by either purchasing ownership of the target share capital or by taking over the assets of the company.

In this ebook, we will unpack the main steps in completing a successful M+A, from structuring the deal, pre-contractual considerations, and getting the contract right [including key terms] all the way down to completion.

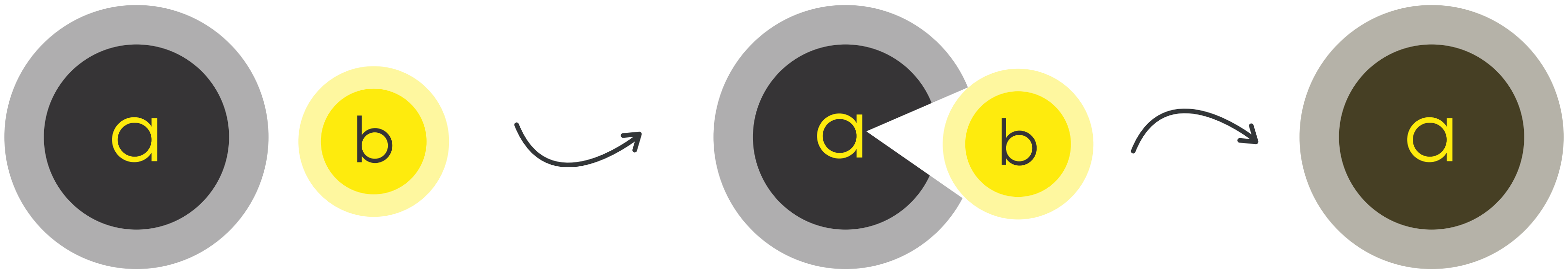


some of the most common types of M+A are shown in the diagrams below

merger



acquistion



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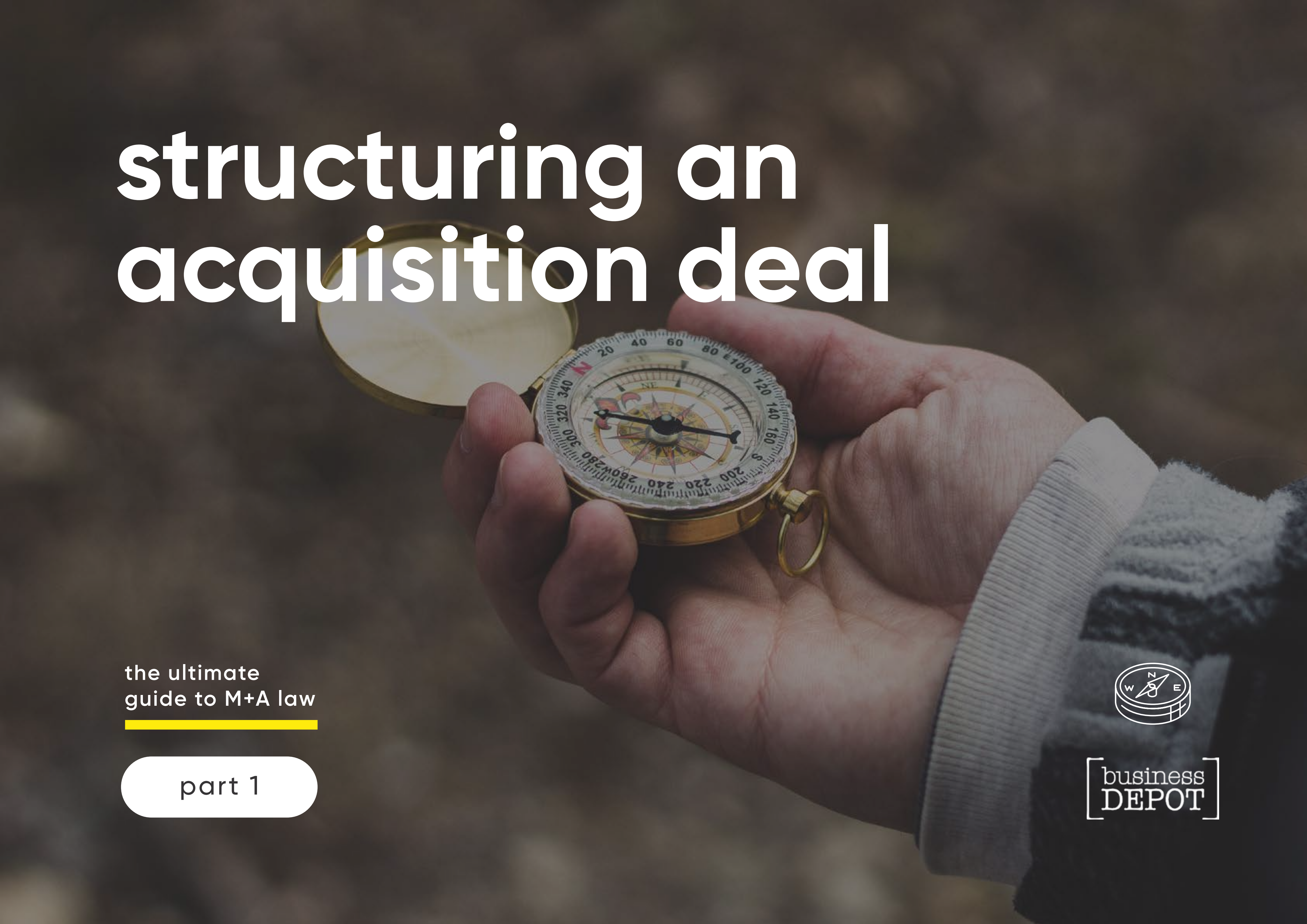

structuring an acquisition deal

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part 1

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share purchase or asset purchase?

The following **Part 1** will focus on how to structure the deal in acquisitions, unpacking the difference between a share purchase and an asset purchase and discussing the advantages and disadvantages of each.

share purchase	asset purchase
Purchasing the shares in the company comprising the business.	Purchasing assets of the business from the company itself.

One of the key considerations when looking to acquire a business is how the deal should be structured.

what's the difference?

An asset purchase, as the name suggests, involves the purchase of some or all of the assets owned by a company, while leaving ownership of the company itself with the seller.

Typically, these will include assets such as goodwill, current supply contracts, plant and equipment, interests in land [e.g. leases], stock-in-trade and intellectual property.

Conversely, in a share purchase, the purchaser buys some or all of the shares in the company, taking over the company itself [and therefore ownership of all of its assets and liabilities].

what are the advantages and disadvantages of each?

Each option brings with it certain advantages and disadvantages for each party, so it's always important to consider the circumstances of each case to determine which option is most appropriate.

The next two pages contains a summary of some of the pros and cons of each option.

advantages + disadvantages

asset sale

	seller	purchaser
advantages	Typically, a seller provides fewer warranties and indemnities in an asset sale as liability for any future acts of the business lies with the purchaser.	Usually, the liabilities remain with the seller company and do not transfer to the purchaser. So you're not inheriting any of the sellers liabilities other than the specific liabilities of any asset you acquire.
advantages	Certain assets may be able to be excluded from the sale where the seller wishes to retain them for other purposes. For example a seller may wish to retain a particular item, such as a vehicle or domain name.	Greater flexibility in the purchaser often being able to reject certain contracts, items of stock or equipment, or may be able to terminate the employment of any unwanted employees as a condition of settlement.
advantages		The sale may qualify as the sale of a 'going concern' which may result in no GST being payable on the transaction.
disadvantages	Many assets of the business such as contracts, property and equipment leases will need to be assigned to the purchaser which can be a time consuming process. Further, the consent of third parties may be required to complete any assignment.	Stamp duty may be payable on the transfer of the business assets, as well as any land and other property interests, such as leases.
disadvantages	The liabilities of the business generally remain with the seller.	Third parties may refuse to consent to assign contracts and landlords can impose conditions on assignments which may jeopardise the settlement of the sale or devalue the business.

advantages + disadvantages

share sale

	seller	purchaser
advantages	Many tax concessions may apply to the transaction which are beneficial to the seller. For example, GST is generally not payable on the sale of shares. There may also be personal tax benefits available.	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; so that on the face of it, there's no change in operations from a consumer perspective.
advantages	As the ownership of the company [rather than of the assets] is changing, there is no need to separately assign contracts or leases as is the case with an asset purchase [although consent may still be required from some third parties].	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. Whilst consent to a change of ownership may still be required under some agreements this is less complex than an assignment.
advantages		Stamp duty is generally not payable in a share sale, unless the company is land rich in which case, landholder duty may apply.
disadvantages	Since 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 post completion.	The company retains all past, current, future and contingent liabilities of the business on completion [including any tax liabilities of the company].
disadvantages	The seller may be required to provide a non-compete for a significant period of time post completion.	Even if the seller provides an indemnity and financial security for the liabilities incurred by the company up until the date of completion, there is the risk that the seller may not have the funds to indemnify the purchaser when called upon to do so.
disadvantages	Part of the purchase price may need to be held back as a surety for a period to compensate the buyer for any warranty breaches. There may also be complex purchase price adjustment mechanisms.	To minimise the additional risks associated with a share purchase the purchaser usually must engage in detailed due diligence to ascertain any liabilities and risks associated with the selling company which can often be costly and may result in significant delays.

deciding how to sell your business

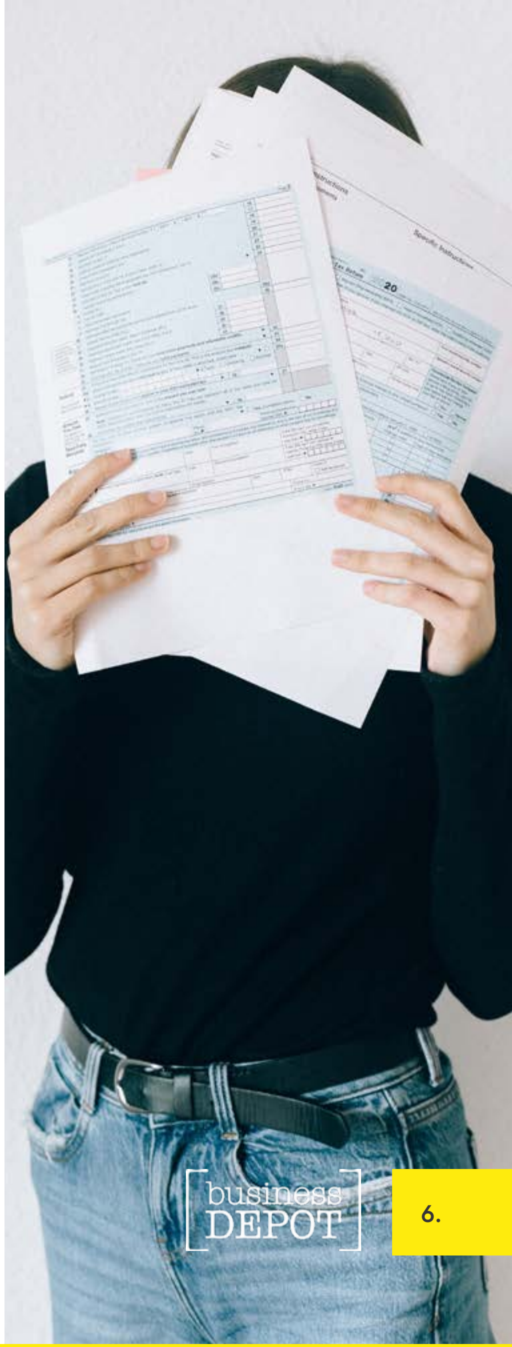
Although there are advantages and disadvantages for purchasers and sellers associated with a share sale and asset sale transaction, there are ways to mitigate risks that are associated with each type of transaction.

The best thing that you can do is to get the right advice regarding the commercial, tax, and legal risks associated with both types of transactions, so that you are best placed to choose the most suitable type of transaction for your purchase.

tax, duties and other implications

Stamp duty and Capital Gains Tax [CGT] have different implications for both the purchasers and sellers depending on whether a transaction progresses as an asset sale or a share sale. We highly recommend you seek specialised tax advice in this regard to determine the tax implications applicable to your circumstances.

We make the following general statement as guidance on the next page.



tax

stamp duty

Stamp duty is a state and territory based tax that is imposed on the transfer of assets, payable by the purchaser. Noting each state is different, subject to specific legislated concessions and exemptions, in Queensland and New south wales stamp duty is payable on the sale of business assets. Stamp duty is generally not payable on the transfer of shares in a Pty Ltd company unless that company holds more than $2 million of land in QLD and NSW particularly.

income tax

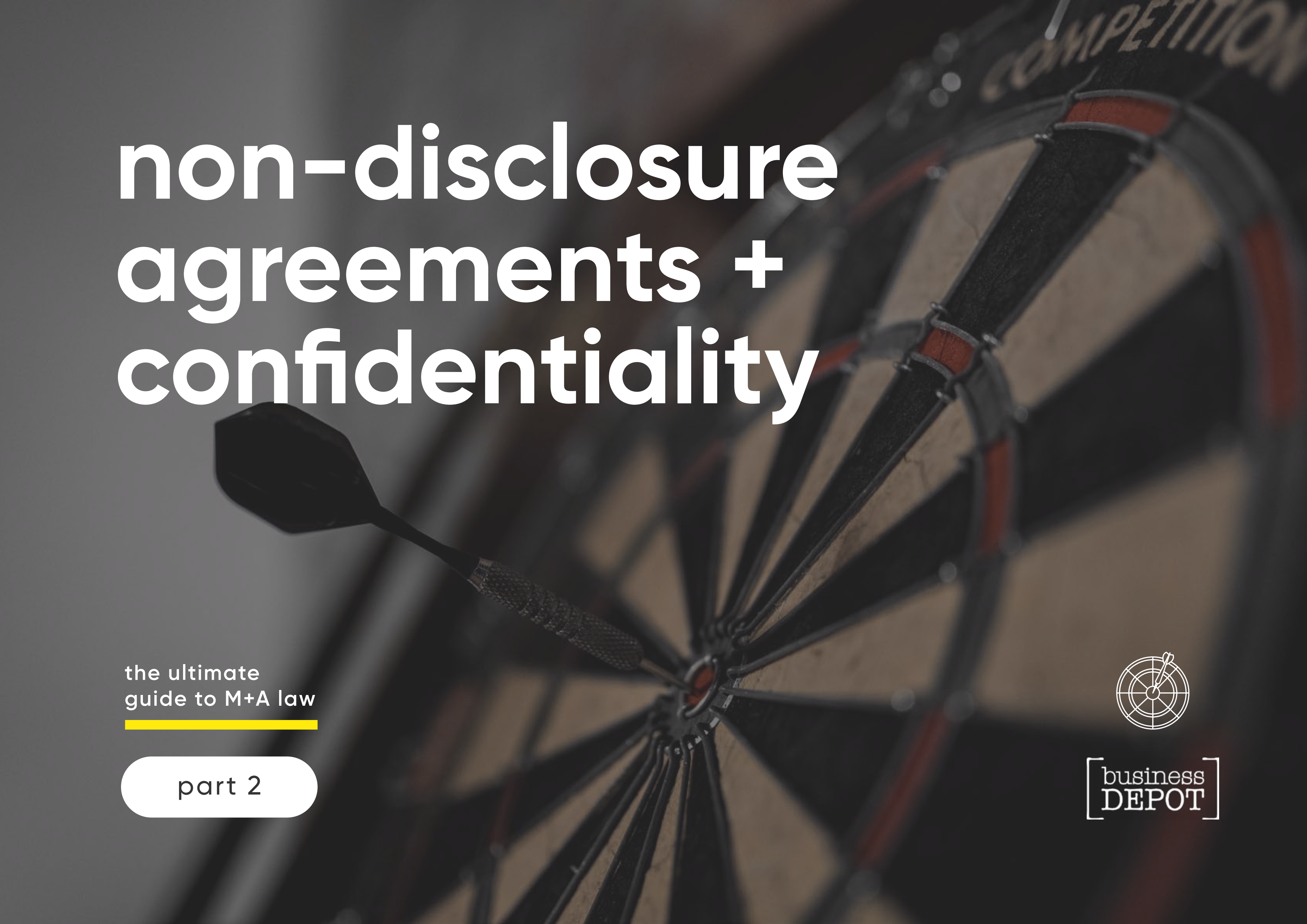
Depending on the structure of the transaction, you may also have income tax implications. For example, if you need to pay out a dividend before transferring shares in the company, this may have income tax implications relevant to your considerations.

capital gains tax

A share sale and an asset sale can each result in a different CGT impact for a seller. The nature of the transaction will impact the cost base and depending on the selling entity certain CGT discounts may or may not be available.

goods + services tax

Although the sale of a going concern and the sale of proprietary company shares are not subject to GST, the sale of a business that does not meet the requirements of the going concern exemption will attract GST.



non-disclosure agreements + confidentiality

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part 2

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what is a non-disclosure agreement?

One important aspect of M+A is ensuring all parties to a potential transaction enter a non-disclosure agreement.

A non-disclosure agreement [or commonly referred to as a confidentiality agreement] is an agreement parties enter to ensure confidential information is protected during negotiations of a transaction.

This part contains a summary of non-disclosure agreements, why and when they are entered into and what they should include.

why a non-disclosure agreement?

It is crucial for parties to enter a non-disclosure agreement during negotiations of M+A.

This is because the seller will provide confidential information to the buyer so the buyer can determine whether they wish to acquire the seller's business or assets.

There can be significant consequences for the seller if the prospective buyer decides to no longer proceed with the transaction, which is why it is imperative parties enter into a non-disclosure agreement at the outset.

when is the correct time to enter a non-disclosure agreement?

We highly recommend parties to a potential M+A enter a non-disclosure agreement before the execution of any term sheet or transaction document [whether this is binding or non-binding], or before due diligence processes has begun.

what to include in the non-disclosure agreement?

It is important to ensure your non-disclosure agreement is specifically tailored to the potential M+A transaction. The next page has some key terms to incorporate.

what to include in non-disclosure agreements

party details

This will be the purchaser and the seller. If the seller is a holding company, it may be important to include a guarantor to the agreement.

disclosure of information

This is usually captured by defining the purpose of the agreement. For example, for the buyer and specific permitted persons to evaluate and assess the transaction.

confidential information

It is important to correctly define what is confidential information in the first place. This can include things like employees, suppliers, profit and loss statements and the company's internal systems.

permitted disclosure

Parties can only disclose confidential information if the agreement expressly allows, or to a permitted person. It is therefore important to define permitted person correctly. This usually includes a party's directors, specific employees and professional advisors. If the information is highly sensitive, these permitted persons may also be made a party to the agreement.

public knowledge

Both parties will be prohibited from notifying the public about the negotiations of the potential M+A until the transaction is complete as this could impose negative ramifications for customers, employees or suppliers.

restraints

It may be important to include a restraint against some confidential information. For example, parties may not approach or deal with the other party's major customers, or solicit employees that they have been made aware of due to the information exchanged.

destruction of information

parties must destroy confidential information [and copies of such] after the transaction is complete, or immediately if the transaction does not go through.

terms of agreements

It is important to ensure that the period for the agreement applies for 1-2 years from the date of the agreement. Alternatively, this may terminate once the transaction is complete.

remedy

If a party breaches the agreement, then the disclosing party has a right to apply for an injunction, damages or specific performance.

what due diligence is all about

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part 3

business
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are you thinking about buying your business and ready to start your journey

Looking at acquiring another business to expand your existing one?

Or wanting to add another product to your product line?

If you answered 'yes' to any of these questions, you need to know about the due diligence process and how it can better inform your purchasing decision.

In part 2 we discussed the importance of all parties to a potential M+A transaction entering into a non-disclosure agreement and what those agreements should include.

Usually, once the parties have entered into the non-disclosure agreement and/ or a heads of agreement, the next most important aspect involved in any M+A transaction is conducting the due diligence investigations on the company or business being purchased.

what is 'due diligence'?

Put simply, due diligence is an investigation into the business or product you are interested in purchasing.

The purchaser may conduct their due diligence investigation to verify if the acquisition is worthwhile. If this is the case, before committing to the transaction, the purchaser will want to ensure they know what they're buying and what obligations

they are assuming, the nature and extent of the target business or company's contingent liabilities, problematic contracts, litigation risks, intellectual property issues and much more.

If the purchaser elects to conduct their due diligence prior to a formal agreement being entered into, it is highly recommended the vendor provide to the purchaser an exclusivity period wherein they can go ahead with the purchase after they have finalised their due diligence investigations.

Otherwise, when entering into a formal agreement for the purchase of the company and business, the purchaser will want to make sure there is a comprehensive due diligence clause included in the agreement, to allow them to conduct their due diligence investigations for a period of time after entering into that formal agreement, but which also affords to them a termination right if their due diligence investigations are unsatisfactory.

due diligence from a purchaser's perspective

Due diligence allows the purchaser to feel more comfortable that their expectations regarding the transaction are correct. In any transaction, purchasing a business without doing due diligence substantially increases the risk to the purchaser.

due diligence from a vendor's perspective

Due diligence is most often conducted to give the purchaser confidence. However, sometimes vendors carry out a 'vendor due diligence' prior to sale. This is common in competitive bid processes, where the

vendor undertakes this exercise to encourage purchasers to make bids [by lessening the need for purchasers to conduct their own due diligence]. This exercise may also benefit the vendor, as a closer financial examination of the business or product may reveal that the fair market value of the vendor is more than what was initially thought.

so, what is involved?

When conducting the due diligence, key areas of the business or product are investigated including profits, financial risks, legal issues and potential deal breakers.

types of due diligence

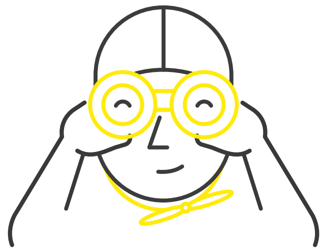
legal due diligence

The purpose of a legal due diligence is to enable a purchaser to assess the legal risks associated either with a business or a product in order to make an informed decision as to whether they will proceed with the transaction and, if so, on what terms.

What are the main items and issues that might be covered in a legal due diligence?

This will all depend on the nature of the transaction i.e. whether the purchaser is purchasing a business, purchasing the assets of the business, or whether they are purchasing the shares in a company that owns the business and assets. For the full details on how these transactions play out, check out section one on structuring an acquisition deal.

If purchasing the business, the due diligence questions will usually be focused on the assets being transferred, rather than the liabilities. Other than employee liabilities, the business liabilities usually will not be transferred across to the purchaser as part of the sale.



On the other hand, if purchasing all the shares in a company, you will be acquiring all the assets together with all the liabilities as they exist. In that case, the legal due diligence will be more comprehensive as it will need to consider the liability side as well.

financial due diligence

Further to the legal due diligence process, it is paramount a purchaser also has their accountant undertake a financial due diligence on the company and business to provide the purchaser comfort and understanding on the financial drivers of the company and provide a historical glimpse into the cashflow and potential tax liabilities of the company. This area of due diligence may be very extensive or less so depending on the purchaser's risk appetite. Typically, the things to be looking out for are listed on the next page.

Due diligence helps investors and companies understand the nature of a deal, the risks involved and whether the deal fits with their overall strategy. Essentially, undergoing due diligence is like doing 'homework' on a potential deal and is essential to making informed investment decisions.

Download our checklist to see the other areas to consider when conducting a legal due diligence investigation on a company sale transaction!

look out for these things when doing financial due diligence

reconciling accounts

reconcile the management accounts of the business against the accountant's financials to see if there are any variances and to ensure those variations can be explained.

debtors + creditors

review the aging profile of debtors and creditors, because this has a large impact on the working capital. You want to know how much money is outstanding, on what terms the money is paid, and get a sense of any risks around that customer portfolio from a financial perspective.

cash flow profile

usually start by looking at the bank statements of the business' trading account on a monthly basis and go back one to two years to see the flow of funds in and out of the business to determine how it has tracked from a cash flow perspective.

identity trends and anomalies

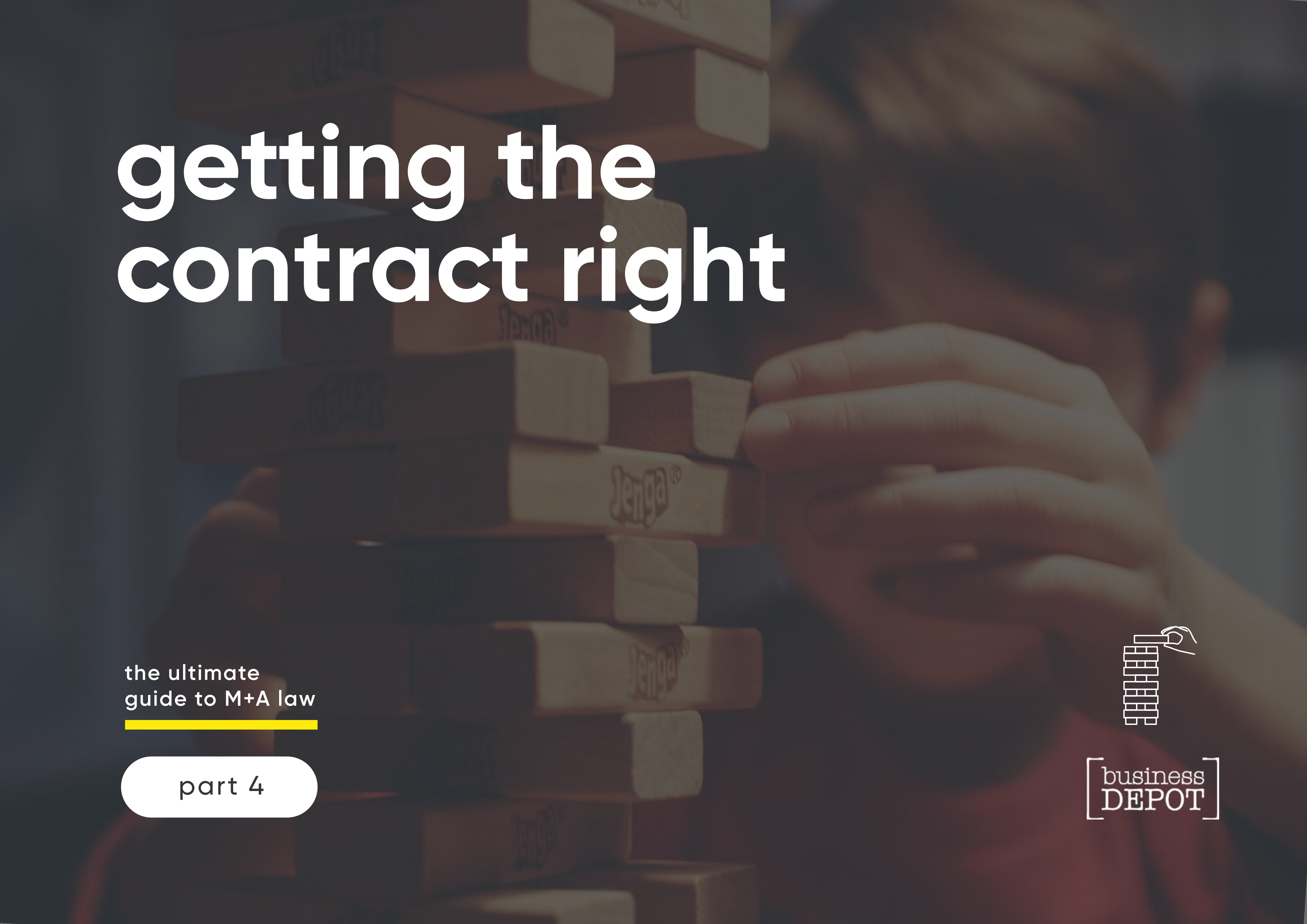
review business/trading trends and importantly, identify any non-reoccurring revenue. A purchaser will need to understand if the performance of the business is subject to any once-off non-recurring revenue lines. This investigation will also assist a potential buyer to identify high-value customers which may lead to a detailed review of their engagement agreements.

superannuation and employee entitlements

An area of a lot of attention through a due diligence is any potentially unknown and undisclosed employee liabilities like super and leave entitlements. Also, watch out for any potential payroll tax risk!

taxation

finally, look at a range of tax due diligence aspects. These relate to making sure the business has met its taxation liabilities correctly over the years and looking at the Business Activity Statement [BAS] to match them up against reported sales and expenses.



getting the contract right

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guide to M+A law

part 4

business
DEPOT

In part 3 we covered what due diligence is all about, and how the process can help business owners make an informed purchasing decision in a merger and acquisition [M+A] transaction.

Typically, the next step has the parties enter a formal contract documenting the transaction. It is crucial to ensure the contract is well drafted to protect your interests and covers all important aspects of the transaction – whether that be a share purchase or an asset purchase agreement.

This part will discuss the importance of ensuring all the key terms in the agreement are correct and where things can go wrong.

what should be covered in the sale agreement?

1. the purchase price and related terms

There is a common misconception that the purchase price is 'just a number'. However, some of the most important aspects of the agreement to get right are the mechanics of:

- how the purchase price is paid
- what adjustments need to be made [to the number]
- any working capital contributions
- It is important to also consider what your position is regarding matters such as adjustments for employee leave entitlements and stock.

2. retention

One of the most important areas of the agreement, and often the most negotiated, is the retention clause [if applicable]. Retentions are used to 'hold back' a portion of the purchase price pending certain events happening or pending a warranty period expiring, whereby the buyer has a form of guarantee for potential claims.

It is important both parties consider the amount of any retention held and what the terms of retention are. Whilst an attractive scenario for a seller is to have a smaller retention, the buyer will push for a higher retention for as long as possible. It may also be the case that the parties are able to negotiate that there is no retention and that additional warranties are instead provided by the seller.

3. milestones and earn-out provisions

It is important that any milestone to the transaction is documented, particularly if you have agreed on an earn-out provision. Earn-outs typically consist of contingent, additional payments that can be made after the satisfaction of certain milestones relating to future performance. These earn-outs

what should be covered in the sale agreement? (cont).

expire at a specified date in the future.

The purpose of these earn-outs is to mitigate risk for the buyer, particularly where the future of a business is uncertain. There is however, a risk that there is a misrepresentation of the buyer's goals with respect to an earn-out provision, and they should be carefully drafted to ensure the milestones are very specific with a clear formula or method for determining an earn-out..

4. special conditions

You may have agreed on special terms, perhaps you have a condition precedent to completion happening. It is important those terms are incorporated into the written agreement, with the details of when that condition must be satisfied by, and what happens if a party doesn't comply with that condition.

5. the nature and extent of representations and warranties

Warranties and representations made either prior to agreement or formalised within your agreement are incredibly important to both the seller and buyer and should be carefully drafted.

From a seller's perspective, it is important these are qualified to the greatest extent possible and are only given with respect to matters within the party's actual knowledge.

As a buyer, consider the important aspects of what it is that you are requiring and what warranties you require. Matters such as intellectual property, financial and liability representations and employees often take a particular focus.

6. restraints + non-competes

If you are acquiring all the shares in a company or acquiring

what should be covered in the sale agreement? (cont).

the whole of the business, it is important to consider the terms of any restraint that is to be placed on the seller. Restraints and non-competes should be carefully drafted to ensure that they prevent the seller from competing with the buyer, or from contacting clients and employees for a specified period following completion. As a starting point, there needs to be consideration as to what is necessary to protect the goodwill that the buyer is paying for.

7. disputes

Have you considered what happens if there is a dispute under the agreement? Often, parties don't consider what happens if there is a disagreement on the application or effect of the terms of the agreement (whether before or after completion). For example, the parties disagree about the purchase price calculation. It is important a carefully drafted dispute resolution clause is included in your agreement. This ensures that the deal can keep moving forward, even in the event of a dispute.

8. termination

So, you think you have everything covered and the parties are happy working towards completion… but have you considered what happens if a party cannot comply with their obligations under the agreement? Perhaps they fail to comply with a condition precedent, or they default at completion. In such circumstances, the agreement should carefully step out what happens, who is entitled to what, and what claims the parties may have against each other.

when things can go wrong

Often where things can go wrong, is where the parties have not considered what happens in specific scenarios, or in areas of the agreement that have not been carefully drafted to truly reflect the intentions of the parties. Please note the above is not an exhaustive list of matters that should be considered, and each agreement should be highly tailored to suit your needs.

earnouts + working capital adjustments

the ultimate
guide to M+A law

part 5

business DEPOT

The next key aspect in a merger and acquisition transaction is earnouts and working capital adjustments, and why they must be considered in every merger and acquisition transaction.

what is an earnout?

An earnout is a payment that the seller 'earns' from the buyer when specific performance targets are met following the transaction.

If an earnout strategy is adopted, the milestones that trigger an earnout payment must be clearly negotiated and specified in the contract. It is crucial to clarify the mechanics of this strategy so it is clear whether the performance criteria has been met or not.

As an example, an M+A contract may place an obligation on the buyer to pay the seller an earnout payment if the company achieves a profit number, past completion, above a certain target. Here, the parties would need to consider the following when drafting an earnout clause in the contract.

accounting standard

It is necessary to ensure that the accounting standards that were used by the company in the lead-up to settlement are the same standards applied post-completion in calculating profits for the earnout.

impact of head office

On acquisition, some companies may incur additional costs that impact profit. Such buyer-driven introduced charges should be excluded from any calculation with respect to the earnout.

The buyer's decision to vary the material nature of the company.

prorata payment

What happens if the target is not met? Is a portion of the earnout payable?

Valid earnout payments are not considered 'deferred consideration' and to determine when capital gains tax [CGT] will apply to the earnout payments, careful consideration of the earnout terms is required.

Where the earnout payments meet the look-through earnout rules, the CGT provisions have a mechanism that allows you to amend your original capital by including the amount of the earnout received when the earnout is achieved [i.e. you will only pay CGT where the earnout components are met and financial benefits received].

However, in the event the earnout does not meet the look-through earnout right rules, the market value of the earnout is included in the initial capital gain and you pay CGT upfront. Inability to meet the look-through earnout rules can have adverse tax implications, as the market value of the earnout is taxed upfront.

In the event you do not reach the specific targets of the earnout, and the earnout right expires, you have a capital loss in the year the earnout expires. Obviously, this is not a desired outcome as you have paid CGT upfront on the market value of an earnout that you may never achieve.

If an earnout strategy is proposed for your transaction, it is strongly recommended that your accountant provides advice about the tax impact of the earnout payments.

complications with earnout clauses

The drafting of earnout clauses can be quite a contentious process.

Common problems with the adoption of an earnout [in addition to the previous example] are listed to the right.

Earnout clauses need to be specifically tailored to the transaction, and whilst they can help negotiations, it is essential that all concerns be addressed so that there is no confusion as to the calculation of the metrics going forward.

disputes over metrics

Disputes over metrics, the period of time or methodology used for the earnout formula.

unforseen events

Disputes as to whether or not the buyer [who is now the owner of the company] caused unforeseen events which negatively impacts the ability to achieve earnout targets.

disclosure

The seller being denied financial access so they can ascertain the position.

what is a working **capital adjustment?**

A working capital adjustment is when the purchase price of a M+A transaction is adjusted based on an agreed working capital target of the company to be acquired.

It is therefore vital to consider in any M+A share sale transaction what financial position will the company be in at the closing of a transaction.

As part of the purchase price negotiations, the buyer and seller should discuss the working capital position of the company when the transaction is finalised.

During negotiations, buyers should negotiate a target net working capital of the company. It is expected that the target net working capital should be equal to a sum of money that is sufficient to cover the company's short-term obligations.

common considerations

cash free/ debt free

When the M+A transaction is finalised, the contracted position is that the seller will pay off all debts and extract all excess cash.

cash target

When the M+A transaction is finalised, the contracted position is that the seller will pay off all debts and would contain a minimum cash at bank value.

net working capital target

Net working capital is simply the difference between the company's current assets [such as cash, unpaid invoices and inventory] and its current liability [such as accounts payable and debts].

settlement

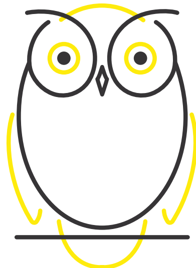
If at settlement a seller delivers more working capital than a pre-agreed target working capital value, the seller will receive a positive adjustment to the purchase price. Conversely, if the seller delivers the company at closing with less working capital than the target working capital, the seller will owe money to the buyer, which will be a deduction of the purchase price.

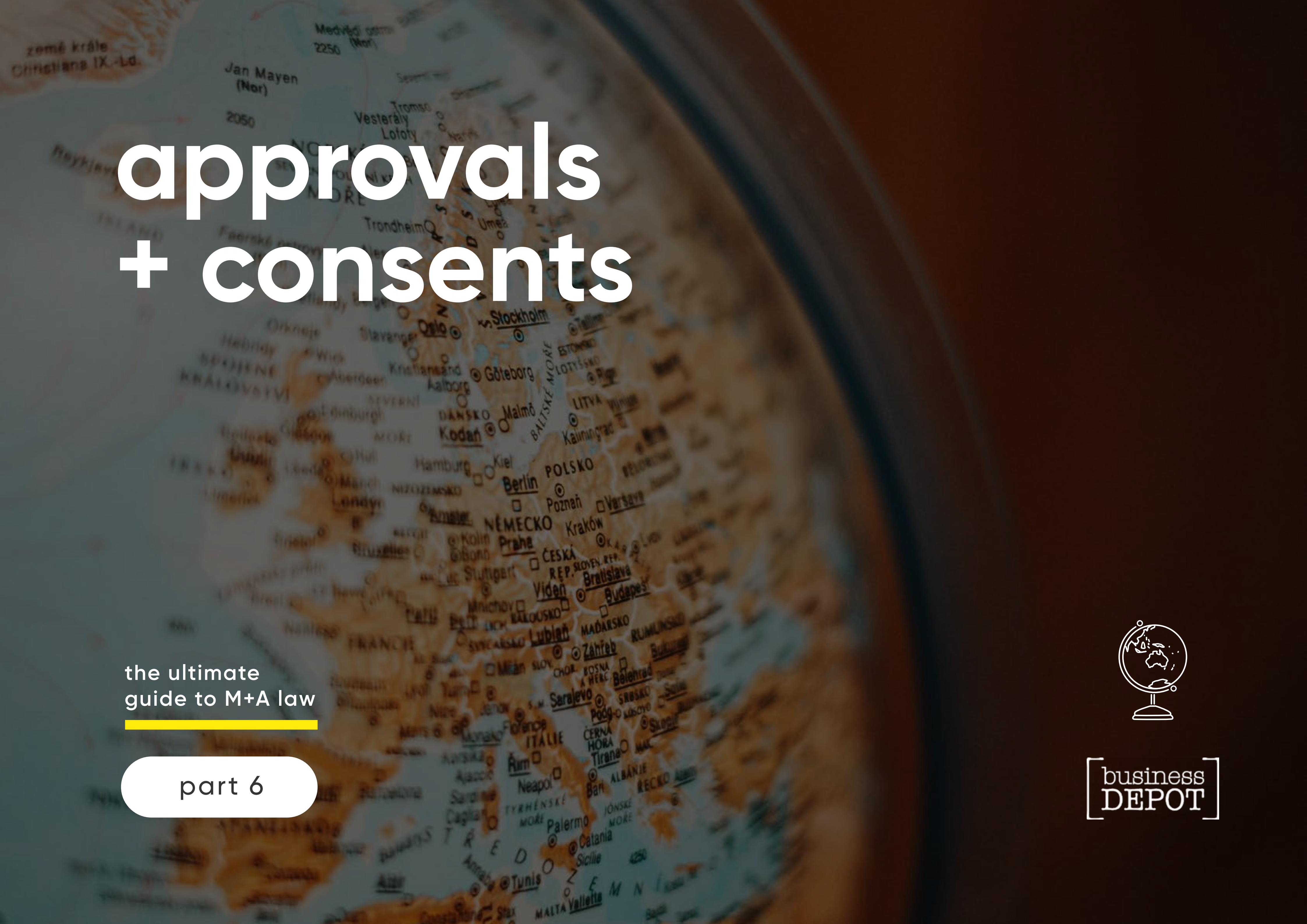
overall considerations

Unfortunately, net working capital targets are commonly misunderstood. In negotiating a net working capital target, the buyer must convince the seller that the buyer requires the company to leave behind a defined minimum amount of working capital. From a buyer's perspective, current assets such as accounts receivable, inventory and prepaid expenses are necessary to maintain the ongoing operation of the company.

Net working capital can be a strongly negotiated aspect of the transaction. Please also be aware that the target net working capital is substantially dependent upon the nature of the specific business and its historical operating cash flows.

It is vital that you seek legal [and accounting] advice while negotiating the terms of your M+A transaction to determine whether earnouts and working capital adjustments apply to your transaction.





approvals + consents

the ultimate guide to M+A law

part 6

business DEPOT

So, you've decided upon the deal structure, signed the contract and undertaken your due diligence; the transaction is progressing towards completion, and you are beginning to imagine yourself in charge of what you hope will be a successful and profitable business.

You then hit a snag – the transfer of the business, and many of its main income-generating assets, are subject to third-party approvals. If this is you, don't panic, help is at hand.

In part 6, we address the most common forms of third-party approvals required to seal the deal.

corporate approvals

The board of directors for each party [or a duly appointed committee of the board] will often need to evaluate and approve the following:

- The deal itself, including that it is in the company's and its shareholders' best interests.
- Execution of the key transaction documents, as well as any additional ancillary documents necessary for completion.

Typically, a buyer will require a copy of the board minutes, or the board resolution, to be signed by all directors of the target company as part of the documents delivered at completion.

shareholder approval

Shares in private companies are not subject to transfer restrictions under the Corporations Act 2001 (Cth), assuming that the company is not in administration or has not commenced winding up.

However, private companies typically have share transfer restrictions in their constitution and in shareholders' agreements. These can include:

- The board of directors having the discretion to refuse to register a transfer of shares.
- Rights of first offer or first refusal for shareholders to acquire the shares being sold at an agreed price, and in proportion to their percentage holdings, before they can be transferred to a third-party [pre-emption rights].

If the share purchase transaction is particularly significant, a corporate seller, buyer's constitution, or shareholders' agreement may require shareholder approval. A share purchase transaction is considered particularly significant if it fundamentally alters the buyer's or seller's business, or if it results in a holding company effectively disposing of all or substantially all of, its assets and business.

To incorporate these shareholder approval requirements and relevant voting thresholds, and to schedule them appropriately, a thorough and comprehensive review of the following documents should be conducted:

- The relevant entities' constitutions and shareholders' agreements.
- The relevant provisions of the Corporations Act

change of control

A change of control is typically a transfer that moves more than 50% of voting rights in a company, but can sometimes include a change in practical influence that can be exerted on company issues.

A transfer that results in a change of control often undergoes additional scrutinisation and as a result, additional steps are required to complete the transaction process.

regulatory approval

Depending on the industry in which the target company operates, share transactions that result in a change of control may require:

- Regulatory approval from the regulatory authorities in those industries prior to the change of control [such as for food safety, educational requirements, or environmental approvals].
- Notification after the change of control [such as for Australian financial services licensees].

contractual consents

In a share sale, where a transfer results in a change of control, the target company's material contracts may require the counterparty's consent.

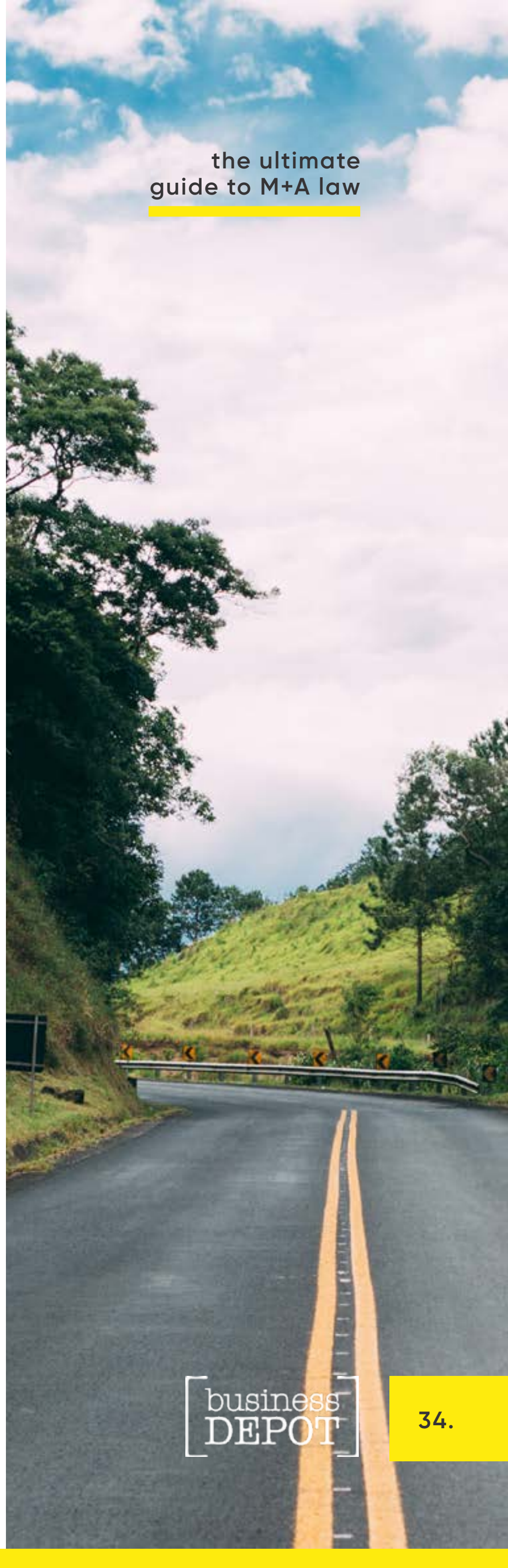
In an asset sale, creditors do not have to be notified or have their consent obtained for the asset sale if the seller is solvent. However, the seller may have a contractual obligation to notify a creditor of a transfer of an asset in which the creditor has an interest.

If a creditor has registered a mortgage, caveat, or security interest over an asset, it is common practice to require the creditor's security to be released before the asset sale. A transfer of a liability by novation to the buyer also requires the creditor's consent.

seeking consent

When proceeding with either an asset or share purchase, where the consent of third parties is required, the timing of obtaining such consents must be considered. The contracts themselves may dictate when consent must be obtained and may require all costs be covered with respect to such consent.

Obtaining the consent of third parties also raises issues with respect to the confidentiality of a transaction, where one or both parties wish to keep the proposed transaction confidential. The impact of not obtaining required consents should be considered, especially if such contracts are material to the business.



Due to these issues, it is important that early in the process, any contracts that will be transferred or will remain with the target company are carefully reviewed, and the matter of how any required consents are obtained is discussed.

assigning contracts

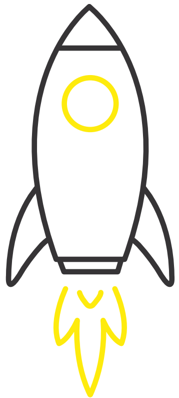
To affect an assignment in the context of an asset purchase, the parties should enter into an assignment agreement. This means the vendor assigns, and the purchaser assumes, the contract and all rights, obligations, and benefits thereunder.

Often a contract will specify that the vendor will not be released of its obligations on an assignment. In such instances, the vendor and purchaser should address each of their obligations going forward.

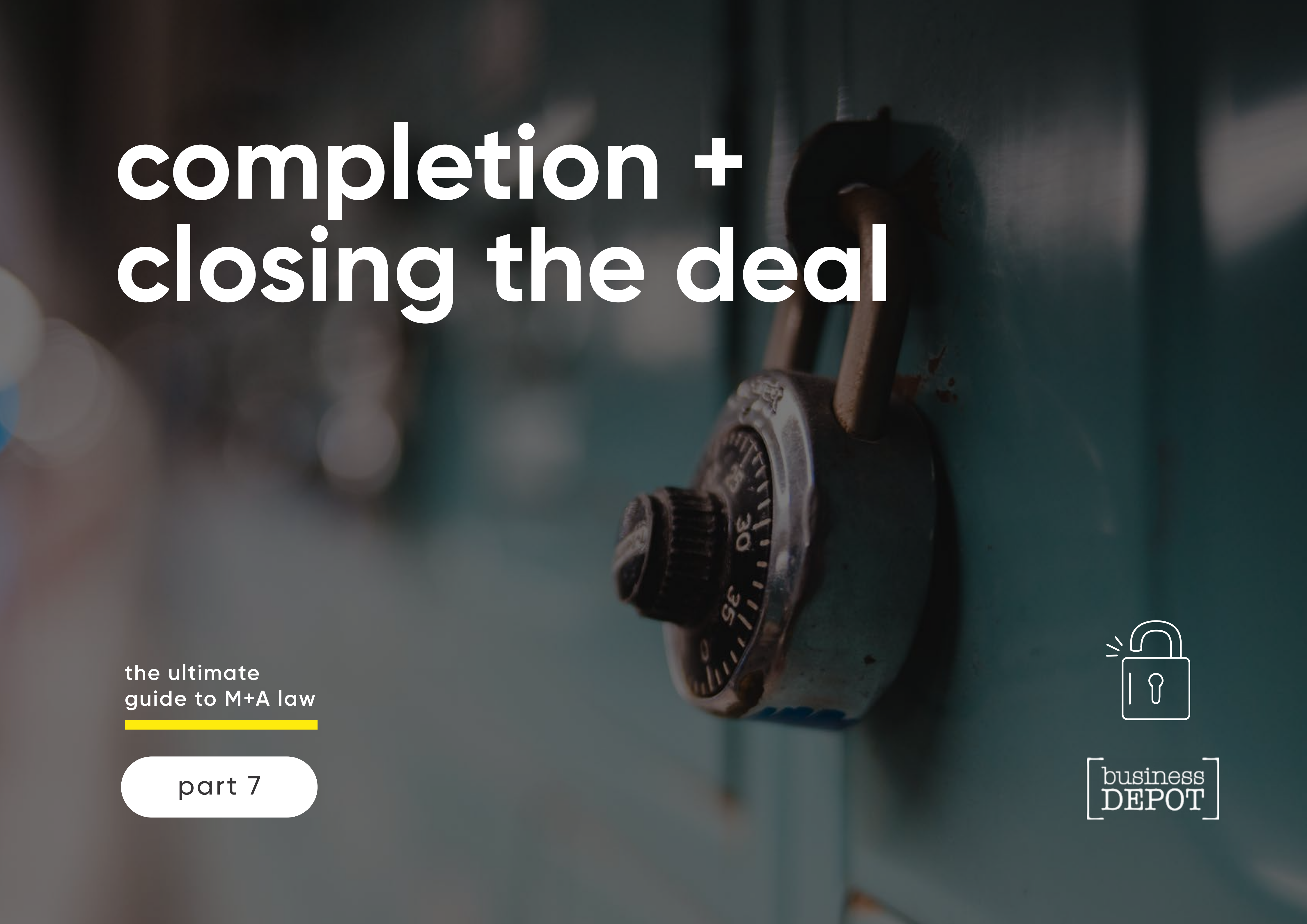
Typically, the purchaser will be solely responsible, and will indemnify the vendor for any non-performance or breach by the purchaser under the contract from, and after, the date of assignment.

If consent for the assignment is required from a third party, such party can either be made a party to the assignment agreement, or a separately written consent can be obtained. If consent is not required, notice should be given to the third party that the assignment has or will occur.

To affect an assignment in the context of a share purchase, only the documents affecting the sale and transfer of shares are needed, as between the vendor and purchaser.



Notice to, or consent of the third party to each of the contracts may be necessary – depending on the presence and content of any change of control provisions in each contract that the target company is a party to.



completion + closing the deal

the ultimate guide to M+A law

part 7

business DEPOT

The next and one of the final steps is preparing for completion and closing the deal of an M+A transaction. Whilst this step is commonly known as completion, it is often also referred to as the 'integration phase of the transaction', 'closing the deal' and the 'acquirer bringing the target company under its control'.

getting ready for completion

The next page contains a general summary, outlining the key factors to consider when completion is fast approaching for an acquisition. It should be noted there are many completion steps that are specific to each industry and the licences that are required to operate in that industry are not included in this summary.

key factors to consider when completing a M+A transaction

release of encumbrances

It must be made sure that no securities are registered against equipment or assets of the business [in an asset sale structure] or shares [in a share sale structure]. If securities are registered, they must be released before completion and releases handed over at completion.

employees

Employees must be notified of the upcoming M+A and whether the buyer will be taking over their employment. The seller must notify the buyer of what staff entitlements each employee is owed which may be adjusted at settlement [depending on the drafting of the transaction documentation].

leases

If a lease is required to be transferred [which will require the landlord's consent], then documentation must be prepared and handed over at settlement.

intellectual property

The seller's intellectual property will need to be transferred [such as trademarks, patents, plant breeder rights, designs, social media accounts, email addresses, domain names, websites and business names].

contracts

The seller must arrange for the transfer [or termination] of any business contracts they have afoot with third parties as per the terms of the transaction documentation.

equipment

Depending on the terms of the transaction documentation, the seller must contact any owners of hired equipment for the business and have the hire agreements transferred to the buyer.

stock

For some businesses that carry stock, a stocktake calculation and adjustment is an essential completion requirement. When a stocktake is required the stock should be calculated in accordance with the stocktake guideline negotiated in the transaction documentation.

funding

The buyer must also ensure all funding is organised and prepared to cover the costs of the M+A. This includes liaising with banks and relevant third parties.

share purchase docs

Evidence of title: If the M+A was structured through a share sale, then relevant share transfer documents, original share certificates, new share certificates and resolutions [including any change of office holders, revocation of powers of attorney and variation of bank authorities] will need to be prepared and handed over at settlement for lodgement with ASIC.

asset purchase docs

Evidence of title: If the M+A was structured through an asset share sale, then relevant title paperwork for the assets and possession of the assets. For items that are registered [such as motor vehicles] the necessary approval paperwork is needed to allow a change of title.

predominant focus

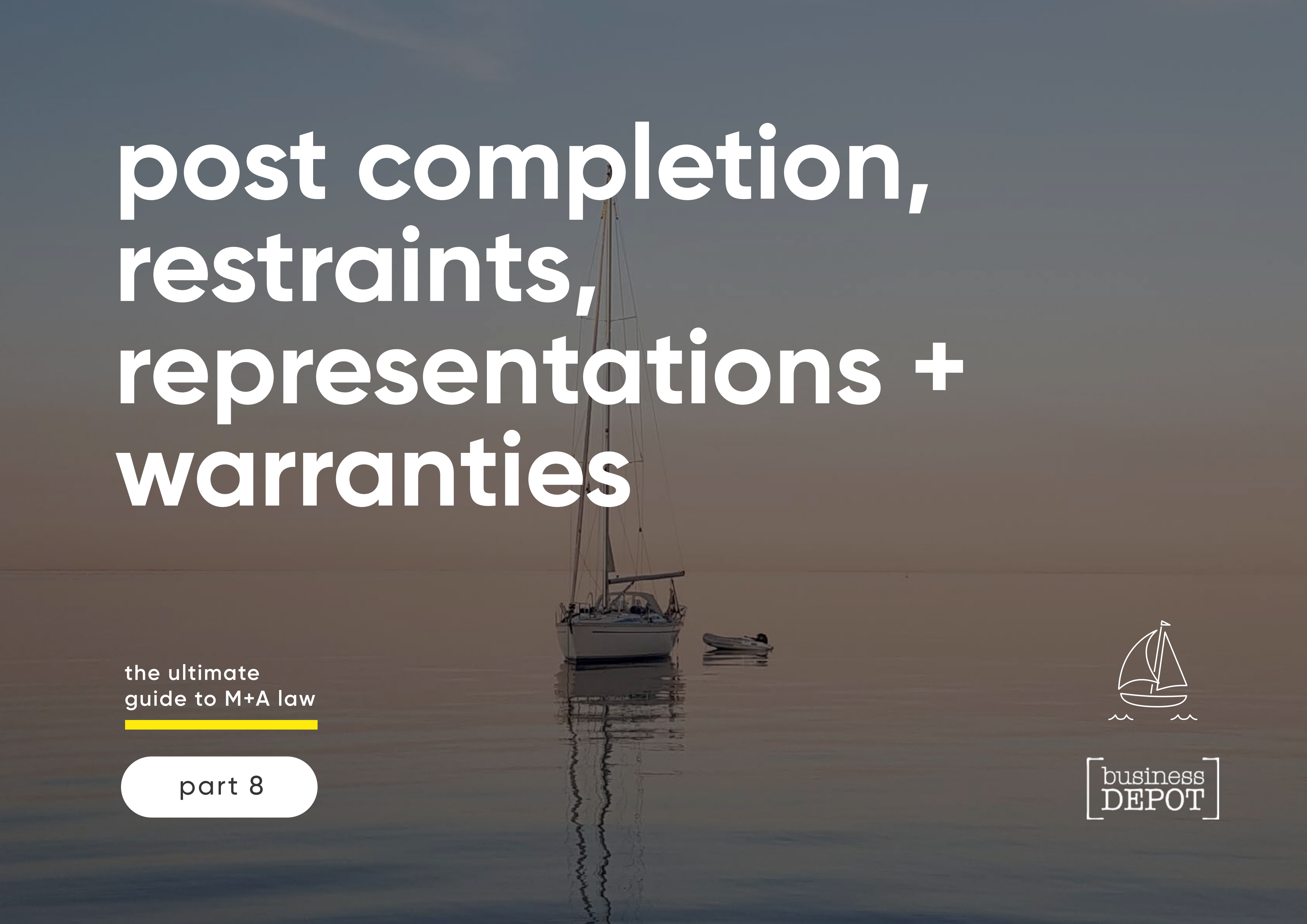
With respect to a merger, while the majority of the information on page 38 applies, the main and predominant focus is on the merge and integration of the two companies becoming one new company. This may include:

- Rebranding,
- Preparing strategies for management,
- Teams of the merging companies,
- Entity planning and compliance work such as entity set-up and shareholder agreements,
- Consolidations + annual filings,
- Office restructuring,
- Other activities to ensure it is business as usual, and
- shareholder agreements.

completion date

It is crucial that a settlement statement and completion checklist is prepared and lists everything that must be provided by each party at completion, including payment directions for where all funds are to be paid.

At settlement, the parties will provide all documents required for each party. This also includes ensuring the necessary payments are made.



post completion, restraints, representations + warranties

the ultimate
guide to M+A law

part 8

business DEPOT

Our final section in our eight-part merger and acquisition [M+A] series is finally here. If you haven't already been following along, we've unpacked each step of the M+A process on the previous pages in our ultimate guide to mergers and acquisitions for your reading pleasure!

Our final part details considerations to bear in mind after completion of the deal.

restraints

As a buyer, it is important post-completion to be aware of the behaviour of the seller and to ensure those behaviours are not in breach of the restraints.

When buying a business or shares in a company, setting up restraints helps protect the viability and value of the business moving forward. The buyer should be looking to limit the seller from starting or working for a competing business and also restrict the seller from soliciting clients, suppliers or key workers of the business.

There are generally two types of restraints: non-competition and non-solicitation.

non-competition clause

Prohibits the seller from being engaged as or acting as an employee, contractor, consultant, director, or agent of a competing business or from starting a competing business [broadly speaking, a business that provides services that are the same or similar to the restrained business].

In the sale agreement, restraints will usually be defined by reference to a restraint area and a restraint period. For example, the seller is restrained from competing with the business for a period of 3 years from completion within an area of 50km from the premises of the business.

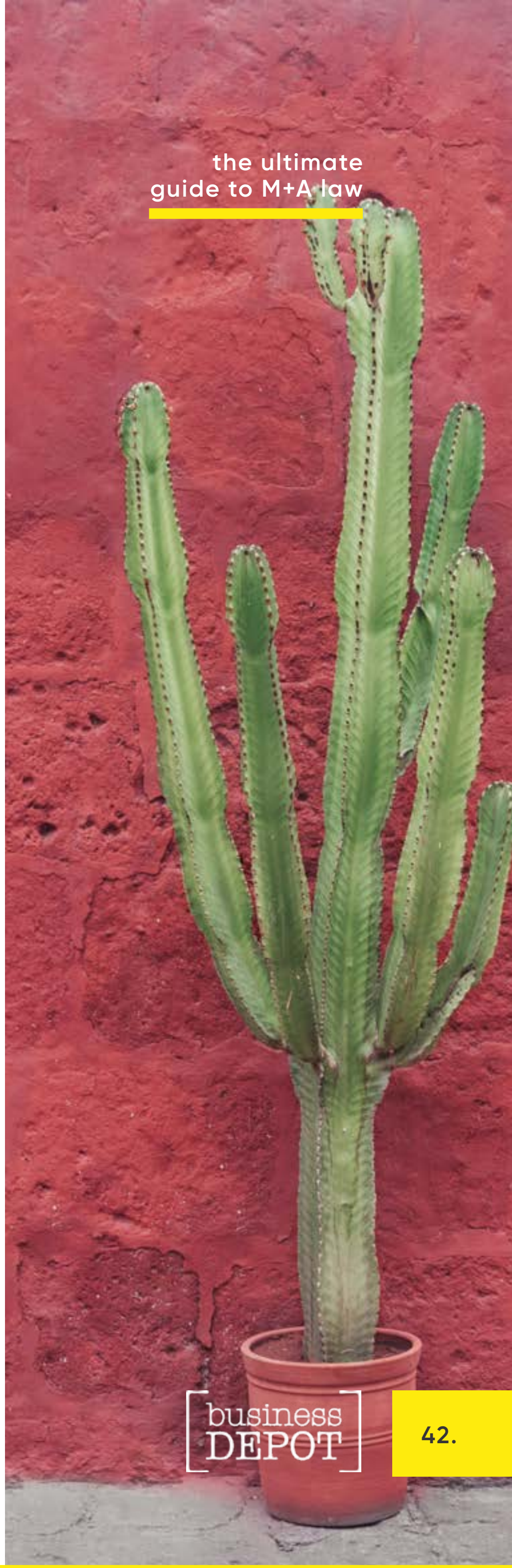
Restrains cannot go beyond what is considered reasonable to protect legitimate business intrests of the buyer. It is recomended that you seek legal advice to review your sole contract to ensure credibility is considered.

non-solicitation clause

Prohibits the seller from soliciting, approaching, contacting, or poaching current key clients, suppliers, and employees from the business that they are selling.

When drafting any restraint provisions into the sale agreement the parties must consider what is reasonable depending upon the individual facts which are relevant to the business being sold, and the transaction as a whole.

As a buyer, purchasing a new business can be an exciting venture, however, the last thing you will want is for the seller to turn around and start competing with you directly.



what are representations and warranties?

When a seller is selling shares or assets in their business they will provide certain warranties to the buyer to guarantee the value of the sale of either the shares or assets.

how does this apply after completion?

If the seller has breached any of the warranties provided after completion of the sale has occurred, it may allow the buyer to claim damages [or if discovered prior to completion, to terminate the agreement].

It is standard procedure for the buyer to also provide certain representations and warranties within the sale agreement, such as their ability to purchase the company's shares or assets and fulfil any of their obligations under the agreement.

Representations and warranties are a critical part of a share or asset sale agreement. Unfortunately, there are situations where a buyer may later discover that some of the seller's representations and warranties are untrue.

representations and warranties usually cover:

- Any ongoing disputes or litigation,
- The company's tax status [if a share sale],
- Statements regarding employee contributions and benefits,
- Statement of fact regarding all financial statements of the business, or
- Any specific representations or warranty that the purchaser would need to know.

limitations

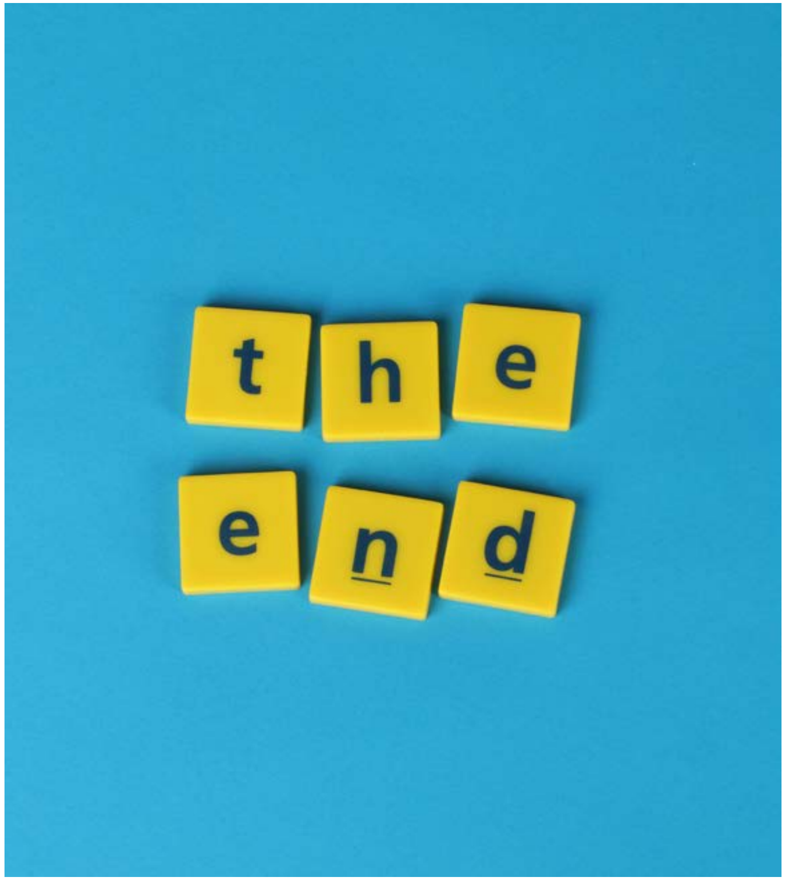
Usually, the agreement for sale will include a cap on damages that the buyer can claim for a breach of a seller warranty. These caps may vary for the different matters the warranties deal with [i.e. a breach of a tax warranty may allow the buyer to be entitled to damages equal to 100% of the purchase price, while for general business warranties the damages may be capped at 50% of the purchase price].

The caps are usually open for negotiation between the parties prior to the parties signing the sale agreement.

It is also standard practice to specify a time limit on when the buyer can claim for a breach of warranty, as a seller does not want to give the buyer the power to be able to bring a claim decades after the sale has occurred.

This marks the end of our series breaking down the process of an M+A transaction.

Stay tuned for future content as we're sure to tackle the topic from other angles, such as when it might be the right time to make an acquisition. You can check out the rest of our content on our blog page where we cover all things business, whether it be covering new regulations, breaking down other areas of law, or providing business insights to help you through your business journey.



we're here to help!

If you are considering purchasing a business or shares in a company, give the team a buzz or get in contact via email.

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