



Be Due Diligence Ready

A Guide for Business Owners to Minimise Risk, Maximise Value

What is Due Diligence?

Due diligence is a critical part of the business sale process. It is the period during which the Buyer and their advisers will investigate, review, and assess the financial, legal, operational, and regulatory aspects of the target business. This process aims to verify the accuracy of the Seller's statements about the target business, evaluate potential risks and liabilities, and determine the true value of the business.

The Buyer's findings from the due diligence process will inform the negotiation of the transaction agreement, including warranties, indemnities, and purchase price adjustments, to mitigate risks and protect the Buyer's interests.

Why is Due Diligence important to a Seller?

A positive due diligence will not likely increase the purchase price a Buyer is willing to pay for a target business, but a negative due diligence will likely:

- reduce the purchase price the Buyer is willing to pay;
- increase the amount held back from the purchase price as security for the Buyer;
- increase the duration of any holdback period; reduce the Seller's liability threshold and increase (or eliminate) the Seller's limitation of liability; and
- cause the Buyer to require specific indemnities for risks identified.

As a result, it may take significantly longer for the Seller to receive the full amount of the purchase price.

Sellers can take active steps to avoid a Buyer identifying negative findings.

HenryMae regularly works with Sellers to get their business ready for sale.

8 Key Steps to get your business ready for sale

Not all businesses are the same, and so the scope of due diligence for each business sale will depend on a number of factors.

There are however 8 key steps that a business owner can take to minimise risk, maximise value in any sale transaction.

Step 1 – Identify the correct Sellers

In any transaction it is critical that a Buyer has absolute confidence that they will acquire good and absolute ownership of the target business.

For any business that has operated for a number of years with a number of shareholders, it may be that shareholders and their shareholdings have changed from time to time.

So that a Buyer can have confidence in acquiring good and absolute title, Sellers should:

- ensure their share register is complete, current, and corresponds with ASIC records
- ensure that no encumbrances are registered over any of the Seller's shares
- confirm that the transaction would not breach the terms of any shareholders' agreement (if any)

Step 2 – Ensure the target business owns or has the right to use all critical assets

A Buyer will want confidence that a target business owns or has the right to use all assets necessary to operate the business as a going concern from completion.

To give this confidence Sellers should:

- have a current and complete:
 - asset register
 - intellectual property register
- ensure all assets are owned by the target business
- ensure any critical licence agreements are valid

- identify any supply agreements that have retention of title clauses, and any security interests registered against the target business on the personal property securities register (**PPSR**)

Step 3 – Identify key stakeholders

Identify key business stakeholders (e.g. suppliers, customers, contractors, and key employees) and review existing contracts with each of those stakeholders to determine whether any terms need to be renegotiated in advance of any business sale.

If the term of any contract has expired, or will expire in the near future, negotiate a new contract in advance of any business sale.

Where possible, avoid any termination for convenience clause or change of control clause that benefits the stakeholder.

Step 4 – Transfer non-business assets

It is not unusual for private companies to hold non-core business assets. It is recommended that any such assets be transferred out of the target business in advance with advice from your tax advisor.

Step 5 – Satisfy all compliance obligations

Ensure that all compliance obligations for the target business have been satisfied and are current, including but not limited to:

- lodgment of all tax returns and annual statements
- payment of all taxes, duties, and annual fees
- correct classification of employees v contractors
- ensuring no underpayment of employees
- calculation and payment of superannuation obligations

Step 6 – Settle any disputes

If the target business has any existing and open disputes, ensure that they are settled on terms that properly shield the target business and any new owner from any future liability.

Step 7 – Collate all business records in a digital format

Prospective Buyers and their advisors will require full access to records of the target business.

We recommend the use of an electronic data room to manage access and review of records, and to conduct any Q&A. This will ensure a complete and proper record of matters that have been disclosed during due diligence, and will also assist to protect confidential information of the target business if a transaction does not complete.

Step 8 – Identify transaction objectives

Sellers should identify their objectives for a successful transaction ahead of the commencing the transaction process. This will help to identify the right Buyer and avoid the disclosure of confidential information to the wrong Buyer.

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About

HenryMae is an Australian commercial law firm focused on assisting clients to complete private M&A and strategic transactions. We work with a select number of clients to ensure quality and timeliness of our services. Most importantly we want to make sure that our clients have a positive experience when dealing with us.

We work with our clients on a capped fee basis payable at completion so that our clients have certainty of their spend and can manage their cash flow during the transaction period.

Paul Napier is the founding Partner of HenryMae and leads the firm's M&A transaction practice. Paul has over 19 years private M&A experience having worked for one of the Big 4 Professional Services firms, one of Asia Pacific's top legal firms, and was Group General Counsel for an ASX100 listed company for almost a decade. He has also acted as consulting counsel to one of the world's largest protein processors, a global life sciences business, an international leading product automation company, and a water infrastructure and delivery business.

Paul has advised on strategic partnerships, acquisitions and divestments, in a variety of different sectors (including services, agriculture, FMCG, energy and resources,

consumer products, transport, and intellectual property) in Australia, USA, UAE, China, Hong Kong, Europe, and South America. He is a trusted advisor to a wide range of national and international clients, and has advised on acquisition and divestment projects ranging in value from AUD 1 million to AUD 550 million.

DISCLAIMER

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