**Business Purchase Tax Checklist**

There are two common ways for buying a business:

1. the purchase of the business assets, which can be tangible or intangible; or
2. the purchase of the business entity itself, such as acquiring the shares of a company.

***Choice of method***

In most cases, a purchaser acquires the assets of the business unless there are significant commercial reasons for buying the company (e.g. contractual obligations that cannot be assigned). Purchasing the assets of the business nullifies the risk of assuming the company’s commercial, tax or legal liabilities, some of which may not be known or readily identifiable. A sale of shares would also not be appropriate if the purchaser is not acquiring the entirety of the business.

On the other hand, buying the company may be favoured where the company has accumulated tax losses and where the company has a franking account surplus that can be utilised by the purchaser, subject to specific integrity provisions that must be carefully reviewed and satisfied before utilising the relevant tax attributes. This may require ongoing analysis and planning, such as an annual review of the company loss tests to ensure that prior year tax losses remain available to the new owners.

Acquiring the shares may also convert pre-Capital Gains Tax (CGT) assets to post-CGT assets with attendant consequences for CGT liability on subsequent disposal.

Often, the optimum method may not be the same for the vendor and purchaser. In particular, the vendor may prefer to sell the shares rather than the business assets to access the 50% CGT discount and possibly also the small business CGT concessions. A sale of shares may also be favoured where the shares are pre-CGT while business assets are post-CGT and thus a sale of the assets may give rise to assessable income. However, if the value of the company’s post-CGT assets is 75% or more of its total net value, there may be a deemed capital gain.

The structure of the sale will often become a major point of negotiation, balancing commercial factors such as risk against the tax implications for each party.

***Due diligence***

In the process of buying a business, or the company that conducts a business, the purchaser should conduct a due diligence review to establish that they are buying what they believe they are buying. The review should identify the current tax position of the company as well as areas of risk and contingent liabilities that the business may have, and allow these considerations to be factored into the purchase price. Such due diligence may also be a requirement to obtain financing. Where the vendor gives warranties relating to the company’s tax and business situation and provide indemnities against losses, the purchaser should ensure that this fully covers the potential tax liabilities. The directors of the new company can potentially be *personally* liable for the tax debts of the company.

There are also many tax issues that the purchaser needs to consider prior to the contract being signed. The taxation implications of buying either the assets of the business or the shares in the company are very complex and professional advice should be obtained. The following guideline highlights some of the tax considerations that may arise with each method of purchasing a business.

**SUMMARY CHECKLIST- Asset and Share Purchases**

**Buying assets of the business**

**1.                Income**

1.1       Sale of goods

1.2       Services income

1.3       Royalties

1.4       Rent, e.g. sub-leases

1.5       Other

1.6       Unearned income

Review whether the accruals or cash basis should be used for each type of income. Ensure allowance is made for unearned income received.

**2.                Tax deductions**

2.1       Review seller’s tax position to ensure that business expenses will be tax-deductible

2.2       Review the tax implications of unusual expense items

2.3 Consider bonus deductions for business expenses

**3.                Trading stock**

3.1       Purchase price and book values allocations

            Ensure correct tax basis is used, full cost, market value or replacement value

3.2       Purchaser and seller tax treatment

            Ensure the seller will use the same tax basis as the purchaser

            Review company tax exposure for a share purchase

**4.                Trade debtors**

4.1 Appropriate treatment of trade debtors

**5.                Accrued employee leave**

5.1             Are employee leave adjustments provided for?

5.2             Vendor to pay accrued leave?

5.3             Purchase price to be adjusted for leave payments?

**6.                Depreciable assets - plant and equipment**

6.1             Tax depreciable asset schedule reviewed for qualifying plant and equipment items

6.2             Review depreciation rates for tax compliance

6.3 Consider effect of small business instant asset write-off

**7.                Business premises**

7.1             Obtain building expenditure tax notice

7.2             Review details, including depreciable items

7.3 Leases, consider the lease assignment

**8.                Work-in-progress**

8.1             Review the sale basis adopted

8.2             Review the deductibility to the purchaser

**9.                Goodwill and statutory licences**

9.1             Review tax treatment of goodwill and licences

9.2             Review possible future application of the CGT small business entity tax concessions

**10.             Other intangible assets**

10.1          Review other intangible assets for depreciable items

10.2          Review other intangible assets for capital tax treatment

**11.             Goods and services tax**

11.1          Review GST treatment of the sale for GST-free status

11.2          Review the application of the GST margin scheme

11.3          Review GST cash or accruals basis, including the implications of other relevant entities

11.4          Review correct GST accounting for input tax credits, GST-free sales and input taxed sales

**12.             Business tax structure**

12.1          Review tax structure required for business asset purchase

12.2          Review income allocations and CGT implications

12.3          Review holding entities for shareholding and unit holding purchases

**13.             Other taxes**

**Buying shares in the company**

**1.             Tax status**

**2.             Trading stock**

**3.             Debtors**

**4.             Depreciable assets**

**5.             Capital Gains Tax (CGT)**

**6.             Tax losses**

6.1          Review tax loss continuity of ownership test

6.2          Review tax loss same business test

6.3 Consider potential application of loss carry-back rules

**7.             Other taxes**

7.1           Review other tax obligations, e.g. GST, PAYG withholding & PAYG instalment obligations

7.2          Review payroll tax implications

7.3          Review WorkCover obligations

7.4          Review superannuation guarantee (SG) implications

7.5 Review division 7a benchmark

7.6 Retained earnings & franking credits

7.7 Transfer duty in different states and territories

**8. Transaction-related costs**

**9. Timing and method of payment**

# BUYING ASSETS OF THE BUSINESS

The purchaser should consider the CGT and income tax consequences of each tangible and intangible asset being transferred. The type of assets usually purchased include trading stock, goodwill, plant and equipment, business premises, trademarks and other intangible assets. Depending on the circumstances, other assets may be acquired and liabilities may also be assumed.

The price paid for the business should be allocated between all the business assets being acquired and the values separately allocated in the contract. The ATO will generally accept the allocation of sale proceeds between the various classes of assets as agreed in the contract provided the vendor and the purchaser are dealing at arm’s length.

## 1.                Income

For both the purchase of a business and the purchase of shares in a business, the purchaser should review the tax treatment of the income of the business to ensure that the correct basis is adopted so that annual tax liabilities are properly calculated so as not to leave open a question of an unfavourable review by the taxation office.

In addition, the tax treatment of the business income should be reviewed to ensure that business income has been correctly returned by the seller and will be correctly returned by the purchaser to avoid any misunderstanding by the vendor.

In the review of income, consideration should be made as to whether the basis on which income is returned is correctly accruals or cash basis.

An allowance should also be made for any unearned income received by the business and consider future tax adjustments on the unearned income.

## 2.                Tax deductions

Review those expenses to be claimed in respect of the business will be tax-deductible and that the various domestic and foreign tax rules have been complied with.

Identify items that are not tax deductible, and any items eligible for other write-offs, e.g. under the blackhole provisions in section 40-880.

Interest and borrowing expenses, such as application fees, legal costs, valuation, broker’s commission and stamp duty, related to financing the purchase and other costs incurred as part of the transaction may be deductible over the lesser of the term of the loan or 5 years. Non-deductible expenses may nonetheless be taken into account as an incidental cost of purchase in determining the cost base for CGT purposes (especially for business real property).

In relation to tax deductions, it is worthwhile to note bonus deductions available for businesses in the 2024 financial year:

* Under the Small Business Energy Incentive, small businesses will have access to a temporary additional 20% deduction on eligible expenditure, to promote electrification and energy efficiency.
* The Small Business Skills and Training Boost is available for small businesses to deduct an additional 20% of expenditure that is incurred for the provision of eligible external registered training courses provided to employees.

Changes to deductible gift recipient categories were effective from 1 January 2024, with the ATO administering environmental organisations, harm prevention charities, cultural organisations and developing country relief funds. Further, businesses can now claim deductions for donations made to community charity trusts and corporations that are endorsed as deductible gift recipients.

## 3.         Trading stock

The valuation of trading stock can have a material effect on the sale negotiations. The purchaser prefers a higher value allocated to stock as this results in a higher cost of goods sold and therefore a lower profit, whereas the vendor prefers a lower value to reduce their assessable income.

For tax purposes the vendor is treated as selling the stock for its market value and the purchaser is treated as having bought the stock for this value.

## 4.         Trade debtors

The purchaser does not normally acquire the trade debtors of the business since a tax deduction will not be allowed for any debts that subsequently go bad. However, a capital loss may be incurred in some cases. Instead, the purchaser should collect the debts as agent for the vendor in return for a commission. This may also have stamp duty benefits.

## 5.         Accrued employee leave entitlements

Where the purchaser will retain some of the employees, it is important that accrued employee entitlements (e.g. annual leave and long service leave) are determined and factored in the purchase price.

There are three alternative ways of dealing with accrued employee entitlements upon the purchase of a business:

1.      If the relevant employee's Award or Workplace Agreement does not provide for the employee’s leave entitlements to be transferred to the purchaser, the **vendor can pay out these liabilities** and obtain a tax deduction.

2.      The **vendor makes a payment to the purchaser** who in turn takes over the employee’s accrued leave entitlements. The purchaser either assumes these liabilities because it is a legal requirement, or because the purchaser has agreed to do so. The vendor may be entitled to a deduction for the accrued leave transfer payment and the purchaser is assessable on the amount received.

3.      The **purchase price is reduced** in recognition of the purchaser accepting responsibility for the accrued leave entitlements. The reduction in the sale price is generally not deductible to the vendor nor is it assessable to the purchaser.

## 6.         Depreciable assets-plant and equipment

To maximise the tax benefits, consideration should be specifically allocated to all assets that are subject to depreciation (for example, plant and equipment, building, vehicles). The purchaser would prefer to allocate a greater amount to plant and equipment as either depreciation or an outright deduction can be claimed for each individual item. The purchaser should also request details of the original construction cost where the building is eligible for capital works deductions.

Where the property being transferred requires repairs, this should be undertaken before the transfer so that it can form part of the depreciable cost or cost base of the asset.

A building or other capital improvement to land may be treated as a separate asset for CGT purchases and on disposal of the property there may be a separate capital gain or loss for each asset.

If the prior business owner had fully written off some assets for tax purposes, then the purchaser will be unable to claim any tax deduction for these. Further, for assets that are written down and subsequently sold at a price above the written down tax value, there could be tax payable on an upward balancing adjustment.

In relation to tax depreciable assets, it is worthwhile to consider various changes during the financial year. For the 2024 financial year, the temporary instant asset write-off no longer applies. For assets first used or installed ready for use during 1 July 2023 to 30 June 2024, eligible businesses can claim an immediate deduction for the business portion of the cost of an asset, with a $20,000 threshold applied on a per asset basis.

## 7.         Business premises

Where the purchaser is also acquiring the business premises, a tax deduction for the capital costs of building works, including any structural improvements carried out, usually passes to the purchaser.

The purchaser should ensure that that a notice is provided by the vendor outlining the construction cost details for the purposes of claiming the building write-off. The substantiation of the claim could also include a report by a Quantity Surveyor, which may have previously been obtained by the vendor but if insufficient substantiation exists then the purchaser might subsequently commission their own report once the sale has been completed.

Where the business premises are leased, it is important that you understand your legal rights and obligations as lessee, assignee or lessor when it comes to commercial leases. Depending on the lease agreement, there could be some additional disclosure requirements or restrictions on assigning a lease.

## 8.         Work in progress

An amount paid by the purchaser to the vendor for work in progress (WIP) is generally assessable to the vendor and tax deductible to the purchaser. When the WIP has been completed it will be assessable to the purchaser either:

* When the amount becomes a recoverable debt, if the purchaser is operating on an accruals basis: or
* When the amount is collected by the purchaser, if operating on a cash basis.

## 9.         Goodwill & statutory licences

The purchase of business goodwill and statutory licences (e.g. liquor licence, taxi licence, fishing licence) is a capital asset and is subject to CGT upon ultimate disposal. Therefore, no tax deduction is available to the purchaser.

The purchaser may in turn be entitled to claim the small business CGT concessions upon a future disposal of goodwill and statutory licences.

## 10.         Other intangible assets

A licence relating to the use of a copyright, patent or registered design is an intangible depreciating asset and the purchaser is entitled to a deduction over its effective life. The Tax Act[[1]](#footnote-1) prescribes an effective life for certain intangible depreciating assets as follows:

         Standard patent 20 years

         Innovation patent 8 years

         Petty patent 6 years

         Registered design 15 years

         Copyright The shorter of

(Except copyright in a film) - 25 years, or

- The period until the copyright ends

In-house software 5 years

## 11.         Goods and services tax

GST will normally apply when purchasing a business unless the supply is GST-free. This commonly occurs when the going concern exemption is applied and reflected in the contract of sale. However, the purchaser can generally claim back the GST component of any sale-related expenses (e.g. legal fees, broker’s commission, accounting and tax advice and other advisory fees) as an input tax credit.

The GST going concern exemption may also apply where the purchaser is acquiring all the items necessary for operation of the business, including the business premises.

## 12.        Business tax structure

The purchaser will need to consult their accountant to determine the most appropriate structure for operating the business. This could either be a company, unit trust, family trust, partnership or as a sole trader.

Where the purchaser is also acquiring the business premises, it is preferable for asset protection purposes to purchase the premises in a separate entity.

The future application of the small business CGT concessions needs to be considered before deciding on the appropriate structure.

What should also be considered is the application of the small business restructure rollover which will allow taxpayers to roll over active assets into another entity without triggering any income tax liabilities. Please note this is only available in circumstances where the ultimate economic ownership of the assets does not change hands.

## 13.     Stamp duty in different states and territories

Where a company transfers business assets, consider the application of transfer duty. Depending on the size of the business, the amount may be significant. If assessments are not lodged, the state or territory Government may issue penalties on the unpaid duty.

***Jurisdiction:*** Determine whether the Australian state or territory of the premise of the business imposes transfer duty. Some States and Territories still impose transfer duty on the sale of business assets, in particular Queensland, Western Australia, Northern Territory, and other locations in special circumstances. In other States such as Victoria and New South Wales duty generally applies only on transfers involving real property and certain interests in landholding entities.

There is potential for double stamp duty if the consideration is not properly allocated between jurisdictions and the jurisdictions disagree on the value of assets within their control.

***Land:*** Where the sale involves land, the timing of the settlement may be important because, depending on the jurisdiction, the owner at 30 June, 1 July or 31 December will generally be responsible for a full year’s land tax.

# BUYING SHARES IN THE COMPANY

It is assumed that the purchaser is buying shares in a single wholly owned Australian Pty Ltd company that operates a business in Australia.

Several additional taxation issues need to be considered when buying shares in a company because the purchaser is automatically assuming any current outstanding and contingent liabilities of the company. Where issues are identified, the risks can be mitigated by using the income tax consolidation provisions, with appropriate post-sale restructuring, although this would involve some additional costs that should be factored into the negotiations with the vendor. There are usually no GST implications to the purchaser in relation to the transfer of shares because this constitutes an input-taxed financial supply.

Consideration should also be given to the effect of the transaction on the business’ contractual relationships, such as with customers, suppliers and tenants. These parties should be advised otherwise difficulties might arise under contract law, the incorrect party may be identified on the invoice when claiming GST input credits, or the transaction may be treated as a sham and nullified by general anti-avoidance provisions.

Some tax issues to consider include:

## 1.         Tax status

Under the system of self-assessment, the company’s income tax returns will not have been reviewed in any detail by the Australian Taxation Office (ATO) unless the company has been the subject of a tax audit or review.

***Compliance:***

Some of the items that require detailed examination include:

* Review tax returns for the past four years and supporting work papers, including detailed reconciliations of profit/loss as per the financial statements and taxable income/loss. Confirm that the tax returns have been lodged.
* Review certain potentially contentious expenses claimed for the past four years to confirm deductibility (e.g. repairs & maintenance, legal fees, interest paid, domestic and overseas travelling and entertainment).
* Request a copy of the ATO Integrated Tax Account from the company’s tax agent to confirm that all tax obligations are up to date.
* Review copies of any correspondence with the Tax Office for the past four years to identify if there are any disputes including:
* all private ruling requests, requests for the Commissioner’s opinion or objections lodged, and all responses received;
* requests for an amended assessment; and
* requests for information from the Tax Office, whether as part of a formal audit or otherwise and all responses provided. Otherwise confirm that the company has no knowledge of any intended audit activity.
* Review copies of internal and external advice to identify any aggressive tax positions taken in tax returns for the past four years and determine potential tax shortfall penalties.
* Obtain records relating to the business for the past five years, in accordance with the usual rule for record retention.

***Consolidated group:*** Enquire as to whether the company is currently, or has ever been, a subsidiary member or head company of a tax consolidated group. If so, this may raise several other tax and commercial questions to be addressed. Generally, the tax history relating to assets and liabilities taken out of the group leave with the company while franking credits, foreign tax credits and losses remain within the group.

Where the company was part of a GST group, ensure there is adequate indemnity in respect of any residual liability for GST liabilities.

There may be scope to modify the split of pre-CGT and post-CGT assets through rollovers.

The purchaser should ensure that it secures the records necessary to enable it to comply with its tax obligations, such as the tax costs of capital assets.

## 2.         Trading stock and prepayments

Confirm that trading stock has not been overvalued by the company in its tax returns for the past four years. If so, there may be a substantial hidden tax liability going back for many years and this will also impact on the value of the company.

The consideration for stocks of consumables and spare parts are generally regarded as capital.

The business may have prepaid rent, insurance premiums, rates or other expenses. Where these are reimbursed by the purchaser, they are generally deductible unless they are capital in nature. Generally, the prepayments are only deductible if the services are to be performed within the income year of the payment. Otherwise, it is spread over the lesser of the period of the services or 10 years. The restrictions on deductions do not apply to payment of wages or payments of less than $1,000.

## 3. Debtors

***Trade debtors:*** Review any bad debt deductions claimed for tax purposes over the last four years to ensure that the debts were genuinely bad and written off prior to the end of the relevant income year.

***Loans to associates:*** Determine whether any debts owed by or to the company have been forgiven in the past four years, and if so, what tax adjustments or capital loss claims resulted.

Where there are loans to shareholders or their associates, check that interest and principal repayments have been correctly calculated and that a properly executed loan agreement is in place.

***Related parties:*** Assess whether any transactions may not have been undertaken on arm’s length (market value) basis between related parties.

## 4. Depreciable assets

Review copies of both accounting and tax fixed asset registers and related fixed asset reconciliation schedules for those years. This may include confirmation that purchase price, cost of improvements, existence, and written down value of the assets can be verified.

The purchaser may have an interest in keeping the consideration allocated to depreciating assets high to maximise depreciation claims. Meanwhile, the vendor may have an interest in keeping it low to minimise assessable balancing adjustments.

## 5.         CGT

***Prior 1985:*** If acquiring a controlling interest in the company, no adjustment should be made to the purchase price for any assets acquired prior to the introduction of CGT on 20 September 1985. This is because the Tax Act deems all the pre-CGT assets to have been acquired at their market value on the date the shares in the company are purchased. Consider obtaining a formal valuation of the relevant assets to substantiate the commencing cost base for CGT purposes.

***Post 1985:***

* The current market value of any substantial assets acquired post 19 September 1985 needs to be determined so that the purchaser can consider and adjust the purchase price for the future CGT liability that will arise when the assets are eventually sold.
* Determine whether there have been any capital gains tax rollovers to the company since 20 September 1985. Obtain details of the assets involved, their cost base and potential market value at the time of transfer.
* Obtain documentation of CGT cost base calculations, service agreements, and ownership changes.
* If acquiring a minority interest in the company, the purchaser needs to consider the possible application of the small business CGT concessions upon future sale of the shares. One of the conditions for claiming the small business CGT concessions is that the individual must hold at least a 20% shareholding (directly or via interposed entities such as trusts) to be a CGT concession stakeholder.
* When testing this, ensure that a review has been conducted of the different classes of shares on issue (if more than one) and their respective rights to dividends, voting and capital returns. Of particular concern is the existence of any “discretionary dividend shares” that can have the effect of treating no shareholder as having a fixed entitlement to 20% of the dividends that may be paid, and that in turn may rule them out of claiming any of the small business CGT concessions on a subsequent share sale.
* Another important condition is that the shares qualify as an “active asset”, meaning that at least 80% of the total value of the company’s assets are represented by active business assets (including goodwill and other intangibles). Often the active asset test will apply going forward, i.e. for years where the purchaser owned shares, but there are some instances where the “active asset percentage’ during the vendor’s ownership period can become relevant, and this should be raised.
* If the shares quality as an “active asset” then consideration should be given to the possibility of utilising the small business restructure rollover.
* When considering small business CGT concessions, the additional eligibility conditions including some modified tests since February 2018 need to be satisfied. These amendments to legislation make it harder for businesses with investments in larger entities to access the concessions. These changes also impact businesses with multiple owners due to a broadening of the grouping rules.

## 6.       Tax losses

Where the company is carrying forward revenue or tax losses from prior years, assess the continued availability of the various parcels of losses. The ability to claim company bad debts are subject to broadly similar limitations.

Where tax losses have been incurred by the company in the years from 2020 up until 2023, and tax has been paid in the 2019 or later years, ensure that the potential application of the loss carry back rules announced in the October 2020 Budget has been properly considered.

**6.1**      **Business continuity test:** Assuming there is a majority (i.e. more than 50%) change in ownership as a result of the sale, the company can take advantage of accumulated losses only if it satisfies the “business continuity” test. Broadly, this means that the purchaser must be carrying on the same or similar business and derive the same kind of income as it did prior to the change in ownership. To assist in this review, obtain details of any changes in ownership since incorporation and a schedule of income tax or capital losses over the past five years to ensure the company has satisfied this test from the start of the loss year through to the end of the income year in which the deduction is claimed.

Changing the nature of the business or entering into a new kind of transaction before the sale to ensure the same business is carried on after the sale may not satisfy the business continuity test and may fall foul of the general anti-avoidance provisions. Nor would the business continuity test be satisfied the business ceased to carry on the business during the claim year.

**6.2**      **Non-commercial business activities:** If the business activity fails the “non-commercial business activities” tests, there are limits on the deductibility of losses from that activity. However, these limits may be waived, such as where there is an expectation that the activity will produce a taxation profit.

**6.3**      These restrictions have the effect that accumulated losses have no value where the purchaser is intending to make significant changes to business activities, yet when a loss-making business changes ownership the new owners are likely to instigate changes. Thus, when negotiating the purchase price for the company, do not allow for the future benefit of the tax losses unless it is certain that the company will obtain these benefits.

## 7.       Other taxes

## 7.1      GST, PAYG withholding & PAYG instalments obligations

Some issues to consider include:

* Review GST returns for all periods from 1 July 2000, including summary sheets, schedules and other documents used in the preparation of the BAS returns.
* Enquire as to whether the company is currently, or has ever been, a member of a GST Group. If so, this may raise several other tax and commercial questions to be addressed.
* Check that all GST obligations have been complied with, including record keeping, accounting and correctly categorising its supplies.
* Obtain and review copies of all accounts from the Tax Office (e.g. income tax and integrated client account).
* Review copies of any Recipient Created Tax Invoice agreements, sample copies of invoices and adjustment notes issued by the company.
* Confirm that all BAS’s have been lodged for the period since 1 July 2000 and payments have been correctly made for GST and PAYG.
* Review the details of employee share schemes (ESS) and ensure you meet specific obligations ESS interests were provided at a discount.
* Review the status of independent contractors to ensure they are properly classified. There could be hidden liabilities for PAYG withholding, superannuation guarantee contributions, WorkCover and payroll tax where the contactors are working under normal employee conditions.
* If PAYG withholding amounts are unpaid before the due date, the Commissioner of Taxation may issue a director penalty notice which will be equal to the unpaid liabilities.
* In relation to PAYG instalments, the GDP adjustment factor for the 2024 and 2025 financial years is 6%.

## 7.2      Payroll tax

Some issues to consider include:

* Determine whether payroll tax returns have been lodged and payroll tax paid in each jurisdiction.
* As remote working became much more widespread during the Covid lockdowns, a trend that is seemingly here to stay, be aware that where an employee of a business is physically based in a different State or Territory while they carry out their employment duties on more than a short-term basis, it will be necessary to consider whether a payroll tax liability will arise in the other jurisdiction.
* Determine whether the payroll tax threshold in each relevant jurisdiction has been met and thus whether payroll tax still applies.
* Consider whether the entity is appropriately grouped or not grouped with other entities for payroll tax purposes (including entities based in other States/Territories).
* Check payroll tax records and assess whether the amount of salary and wages shown in the accounts approximates the amount declared for payroll tax.
* Review the status of independent contractors to ensure they are properly classified, including whether they meet the definition of a deemed employee or any required exemption applications have been lodged with and approved by the relevant State/Territory revenue offices.
* Determine whether single touch payroll (STP) applies and ensure the necessary reporting requirements have been met.
* Determine whether there are any outstanding assessments or refund claims.

## 7.3      WorkCover

Some issues to consider include:

* Review copies of WorkCover premiums for the past three years.
* Review WorkCover correspondence to determine whether there are any documents advising of WorkCover premium rates or industry classifications, outstanding claims or claims history.
* Determine whether WorkCover premiums and payments are up to date.
* As discussed above for payroll tax, consider whether there are any interstate employees (including those working remotely) for whom a WorkCover obligation may arise.
* Review the status of independent contractors to ensure they are properly classified.
* Assess whether there are any outstanding obligations, assessments or challenges currently undertaken in relation to WorkCover.

## 7.4     Superannuation guarantee

Some issues to consider include:

* Review the status of independent contractors to ensure they are properly classified.
* Review copies of all superannuation guarantee payments for the most recent financial years.
* Determine whether all superannuation guarantee payments have been made and whether they have been made on time.
* Determine whether there have been any shortfall penalties in the past four years.
* If superannuation guarantees charges are unpaid before the due date, the Commissioner of Taxation may issue a director penalty notice which will be equal the unpaid liabilities.
* Ensure that the increase in the superannuation guarantee rate from 11% (1 July 2023-30 June 2024) to 11.5% from 1 July 2024 has been properly implemented and has not resulted in any shortfalls.

## 7.5 Division 7A

Note there have been changes to the Div 7A benchmark interest rate for private companies with a regular 30 June balance date. For the 2023-2024 financial year, the benchmark interest rate is at 8.27%. This rate increased to 8.77% for the 2024-2025 financial year.

## 7.6 Fringe benefits tax (FBT)

Review copies of FBT returns and supporting work papers for the past four years. Confirm that all FBT returns have been lodged and that fringe benefits have been correctly classified and calculated.

There are new options to keeping fringe benefit tax records from 1 April 2024. Employers will now have a choice to use existing corporate records for certain fringe benefits provided to employees, rather than prescribed records to comply with their FBT obligations.

## 7.7     Franking Credits

Ordinarily when buying a company, it is likely that the retained earnings balance may be reduced to nil by the vendor before sale. This could also reduce the company’s franking credit balance before the sale.

***Franking surplus:*** The franking credits that remain in the company at the time of the sale can be utilised by the new owners. Review copies of company franking accounts for the past four years, including details of dividends paid and the extent of franking. Check whether there is any liability for franking additional tax, franking deficit tax, or deficit deferral tax.

***Company tax rate:*** Note there have been changes in legislation to company tax rates, and the purchaser should ensure the correct franking rate is being used on dividends paid. The full company tax rate is 30%. From the 2021–22 income year onwards, companies that are base rate entities must apply the 25% company tax rate.

## 8. Transaction costs

***Financing:*** Interest and borrowing expenses related to financing the purchase and other costs incurred as part of the transaction may be deductible may be deductible over the lesser of the term of the loan or 5 years. Even if non-deductible, expenses may nonetheless be considered as an incidental cost of purchase in determining the cost base for CGT purposes.

***Fees:*** Fees incurred in order to obtain tax, accounting, legal or financial advice in relation to the transaction, to sales agents or for advertising the sale of the business may be deductible provided it is provided by a registered provider. Even if non-deductible, they may nonetheless be considered as incidental costs of the acquisition in determining the cost base for CGT purposes. The costs of conducting due diligence and certain capital accounting costs may qualify for a 5 year write off if they are not otherwise included in the cost base of a CGT asset (e.g. costs associated with a proposed business acquisition that did not ultimately proceed).

However, capital legal fees relating to the acquisition of the depreciating assets would form part of the depreciable cost of those assets

***GST:*** Fees are generally subject to GST but can be claimed back as an input tax credit.

## 9. Timing and method of payment

***Instalments:*** If the purchase is to be paid by instalments, the CGT cost base consists of the amount which the purchaser is required to pay and is not discounted because some instalments will be paid in future years. Indexation applies on the full amount at the time of acquisition.

***Variable consideration:*** The sale of a business for variable consideration, or consideration that is linked to the performance of the business after the sale, is a particularly complex area and appropriate advice should be sought.

* If the contract provides for earnouts, whereby the purchaser agrees to make further payments depending on the future performance of the business, this is treated as part of the consideration. Payments provided by the purchaser will be added to the cost base of the business and payments received will reduce the cost base.

If the rights are treated as look-through earnout rights then any capital gains or losses are initially disregarded, instead the capital gains and losses for the seller, and the associated application of CGT concessions, are considered at the time when payment is made.

* Payments made for breaches of performance warranties would generally be treated as partial recoupments of the purchase price and reduce the purchaser’s cost base.
* The contract may provide for clawbacks in which the purchase price may be partially or fully refunded if certain performance criteria are not met. These would be treated as recoupments of the purchase price and reduce the purchaser’s cost base. If the payment cannot be regarded as a recoupment, the right may be treated as a separate asset which is disposed of when payment is received, whereupon it gives rise to a capital gain since the cost base is nil.

***Restrictive covenants:*** Restrictive covenants granted to the purchaser is an asset for CGT purchases, being the right to enforce the covenant. Any compensation received is normally treated as being received for the disposal of the asset, or otherwise as partial recoupment which reduces the cost base. Expiry of the covenant is a disposal of the asset and the purchaser can claim a capital loss if an amount was allocated to the covenant (rather than simply forming part of the goodwill), since no consideration is received for the expiry and the market value is nil.

1. Income Tax Assessment Act 1997 s.40-95(7) [↑](#footnote-ref-1)