Global Private M&A Guide - Limited External Content - Australia

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*This content was last reviewed around October 2023.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

In Australia, it is customary to finalize the due diligence review of a target before executing the acquisition agreement. The key areas of review in the due diligence process will depend on the deal, but generally include corporate, financial, assets, real estate, intellectual property, IT systems, litigation, employment, liabilities, insurance, compliance and tax matters.

In a share sale transaction, reviewing material contracts (shareholder agreements, customer contracts, leases, banking contracts) for change of control provisions is key.

In asset sales, clauses relating to restrictions on the seller to assign or otherwise transfer their rights or interests in the assets to the buyer are the most relevant.

Based on the due diligence findings, the parties may negotiate special completion conditions and specific indemnities and tailor specific warranties.

**Pricing and payment**

The payment of deposits is not common practice in Australia, except in the real estate sector.

There are no requirements to carry out a valuation or follow a particular valuation model for determining the purchase price for companies or assets (although a valuation may be required for stamp duty purposes).

In practice, the most commonly used valuation method is completion accounts, with the most prevalent being cash-free and debt-free adjustments. The parties may also agree on an adjustment to the purchase price based on any shortfall or excess of the target's actual working capital against a target working capital. Fixed price agreements are also fairly common, as are net asset valuations.

"Locked-box" mechanisms are not common, other than in seller-friendly private equity deals (typically auctions) to reduce or eliminate the complexity of adjustments.  Earn-outs are becoming more common as a means of bridging the gap between the seller's and buyer's views on valuation, allowing the buyer to defer the payment of some of the consideration, conditional on agreed milestones or thresholds being achieved.

The parties will need to agree upon the form of payment, that is, whether it should be a cash payment, a share exchange, a combination of both cash and share exchange, or other valuable consideration.

Electronic transfers of funds (including through the SWIFT Code international system) are the most common way of making cash price payments.

**Signing/closing**

The shares or assets being sold are formally transferred to the buyer upon closing of the transaction. Usually, the purchase price is paid on closing.

Simultaneous signing and closing is more commonly seen in straightforward deals with minimal conditions involving third parties. However, where it is necessary to obtain regulatory approvals or third-party approvals before closing (e.g., customer consents for change of control), it is common for completion to occur shortly after the satisfaction or waiver of the last condition precedent.

The acquisition agreement will typically provide that on closing, the seller will deliver to the buyer the relevant documents relating to officer appointments and revocation of authorities (for share sales) as well as title documents, and other documents necessary for the buyer to obtain legal title to the shares or assets acquired.

**Warranty and indemnity insurance**

In recent years, there has been an increase in the uptake of warranty and indemnity (W&I) insurance by corporate and private equity parties in M&A transactions. There are two main types of W&I insurance: a buyer-side policy and a seller-side policy.

The most popular type of W&I insurance is the buyer-side policy, where the buyer is insured for any losses as a result of a breach of warranty (subject to the agreed limitations) given in the sale agreement.

The seller-side policy insures the seller for claims by the buyer with respect to financial loss arising from a breach of warranties given by the seller (subject to the agreed limitations). In the event of a breach of insured warranty, the buyer brings the claim under the sale agreement and the seller makes a claim against the insurance policy.

A W&I policy will usually cover warranties (e.g., title and capacity warranties, general business or operation warranties, and tax warranties) and general indemnities (e.g., tax indemnity covering unknown tax risks) provided under the sale agreement.

In the Australian market, the average premium rates offered by insurers are currently approximately 1.0% to 1.5% of the insured limit.

## Approvals/registrations

**Foreign investment restrictions**

Australia has a mandatory and suspensory foreign investment screening procedure, which means that transactions that meet the relevant criteria need to be notified to the relevant authority and cleared before they can be completed.

The foreign investment review regime is not limited to certain sectors. However, there are additional rules for certain sectors that are considered national security sectors or sensitive sectors. For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Notification of a merger in Australia is not mandatory but recommended by the Australian Competition and Consumer Commission (ACCC) when the merging parties' products are substitutes or complements, and the merged firm will have a post-merger market share of more than 20% in relevant markets.

Informal merger clearance can be sought from the ACCC, which provides significant comfort but does not offer protection from legal action. A formal authorization process can grant immunity from legal action, and allows for review of the ACCC's decision. The Foreign Investment Review Board (FIRB) usually requires ACCC merger clearance before granting their own approval.

Parties may be asked to provide an undertaking not to complete the transaction until after the ACCC’s review.  For further information, see the more detailed section on "Antitrust/merger control".

**Corporate regulator**

The Australian Securities and Investments Commission (ASIC) is the Australian corporate regulator. ASIC does not directly regulate private asset or share transactions, but filings need to be lodged with ASIC within 28 days of a change in share capital, ownership or ultimate ownership, address details or director and company secretary details of an Australian company. ASIC becomes more involved in takeover transactions involving Australian publicly listed entities.

**Other regulatory or government approvals**

Transactions involving certain sectors, such as healthcare, banking, renewables, insurance, financial services and broadcasting, may also involve regulators specific to the industry.

## Employment

**Share sale**

In a share sale transaction, the legal entity being acquired continues to employ its staff after completion of the sale. The employment of the employees does not normally end and the terms and conditions of employment do not change, subject to applicable change of control provisions (which are unusual in employment agreements).

**Asset sale**

In an asset sale, the employees will need to cease employment with the seller and commence employment with the buyer. The buyer will need to make an offer of employment to each employee. Generally, the terms and conditions of employment offered by the buyer need to be comparable or superior to the employees' existing terms and conditions to reduce the risk of the seller being liable for redundancy/termination costs. The offer should be conditional on completion occurring.

Employees cannot be forced to accept the buyer's offer. The seller will need to consider how to deal with employees who do not accept the offer and which party will bear any resulting costs.

Commercial issues to consider include redundancies, retention arrangements and indemnities for any claims made against the target company by employees.

Specialist employment law input is often engaged to review the terms of employment contracts, industrial awards and any rules of any employee share or option schemes or other employee benefit plans and determine the consequences of the sale for participants in those plans.

## Tax

**Income tax**

A nonresident is generally assessable to tax on income derived by it from Australian sources and on capital gains made on assets that are "taxable Australian property" (TAP). TAP may include Australian real property, business assets of Australian permanent establishments and non-portfolio interests in entities that hold a majority of assets that, by market value, comprise Australian real property. This position may be modified by the tax treaty in force between the relevant countries.

*Foreign resident capital gains withholding tax*

The buyer may be required to withhold 12.5% from the purchase price of certain classes of TAP and remit that amount to the Australian Taxation Office (ATO) where the seller is a foreign resident. The asset sale or share sale agreement should be appropriately drafted to deal with this withholding tax.

*Transfer pricing issues*

Where related parties are counterparties to the transaction and one of the entities is a nonresident, the transfer pricing rules should be considered. Generally, the conditions existing between the parties should be at arm's length.

*Thin capitalization*

Australia is currently tightening its approach to investment entities funded by high levels of debt (when compared to equity). Some changes are proposed to apply retrospectively from 1 July 2023. The proposed changes would deny debt deductions for entities with debt deductions above AUD2 million based on stricter tests, the default being an "earnings-based" test rather than the current "assets-based" test. The proposals include broad anti-avoidance rules that may deny deductions where related party debt is used to acquire a target and certain other debt deduction creation strategies.

*Acquisition structure*

The acquisition structure the buyer uses to acquire the shares will influence the tax treatment of the share acquisition for the buyer, and the go forward tax profile of the company acquired. What acquisitions structure is appropriate for the buyer will depend on the profile of the company being acquired, the existing corporate structure of the buyer and the post-acquisition integration plan.

A discussion of the tax treatment of asset acquisitions and share acquisitions is included in the Tax section of this guide.

**Stamp duty**

The rate of stamp duty and the categories of dutiable property vary between each Australian jurisdiction. The highest effective rates of duty range between 4.5% and 6.5%. Relevant to foreign buyers, surcharge duty rates may also apply in respect of transactions concerning interests in residential land in certain states. Surcharge rates range between approximately 1.5% and 8%, and surcharge duty is payable in addition to the primary duty.

The buyer is generally liable to pay stamp duty (under statute and contractually).

A discussion of the duty treatment of asset acquisitions and share acquisitions is included in the Tax section below.

**Goods and Services Tax**

Australia has a Goods and Services Tax (GST) which, where applicable, is levied at a rate of 10%. A discussion of the GST treatment of asset acquisitions and share acquisitions is included in the Tax section of this guide.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

The sale and purchase of private companies usually takes the form of either an asset acquisition, where the assets of a business are purchased and certain liabilities assumed, or a share acquisition.

A share acquisition may proceed by way of either of the following:

A direct share acquisition, which is the purchase of shares in an Australian company

An indirect share acquisition, which is the purchase of shares in a non-Australian corporation that holds shares in the Australian company.

The legal consequences may differ depending upon whether the share acquisition is direct or indirect.

An acquisition of shares is often simpler than an acquisition of assets, as it is generally only necessary to transfer the shares in the target company, which is a straightforward process in Australia. The main disadvantage of a share sale compared to an asset sale is that the acquisition of shares of the target company involves the purchase of the target company together with all liabilities (including contingent or undisclosed liabilities such as undisclosed tax liabilities, breaches of legislation affecting the business or claims by customers or employees), which may have an impact on the value of the shares being acquired.

In an asset acquisition, it is necessary to separately deal with and transfer or assign each asset and assumed liability. The seller may select which assets it wishes to divest more easily under an asset sale than under a share sale. The seller may also wish to retain the corporate entity in order to use tax losses, which it cannot do under a share sale. An asset acquisition is therefore often more logistically complex and time-consuming than a share acquisition. In contrast to a share acquisition, under an asset acquisition, the seller retains all liabilities not specifically assumed by the buyer.

Bilateral negotiations are the traditional structure used to acquire an Australian company, however auction bid processes are an alternative to negotiating bilateral contracts. Competitive auctions are more commonly used in private equity deals.

There is no concept of merger in Australia, however a procedure known as a "scheme of arrangement" is similar. It involves two companies "merging," subject to the approval of the target's shareholders in a general meeting and the relevant court. Schemes of arrangement are rarely used in a typical private M&A transaction and are more common in a public M&A or public-to-private transaction.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

A private company limited by shares. (Private companies must be either limited by shares or established as unlimited companies with share capital. Unlimited companies are not common in Australia.)

## What are the different types of limited liability companies?

There are limited and unlimited companies. In the case of limited companies, the liability of shareholders is usually limited to the amount of their capital contribution in the company; in the case of an unlimited company, the personal liability of the members for the debts and obligations of the company is unlimited.

## Is there a restriction on shareholder numbers?

A proprietary company cannot have more than 50 non-employee shareholders and must have at least one director who is ordinarily resident in Australia. Shares in a private company may not be offered to the public.

## What are the key features of a share sale and purchase?

The acquisition of shares of the target company involves the purchase of the target company together with all liabilities (including contingent or undisclosed liabilities, such as undisclosed tax liabilities, breaches of legislation affecting the business or claims by customers or employees), which may have an impact on the value of the shares being acquired.

All that is generally required to transfer legal title to the shares in an Australian private company is for a share transfer form to be executed by the seller and buyer and then registered in the register of members of the target. The seller's original share certificate(s) in relation to the transferred shares will be delivered to the buyer at completion (or, if the share certificate(s) are lost or destroyed, an appropriate indemnity) and a new share certificate will be issued in the name of the buyer.

## What are the key features of an asset sale and purchase?

In an asset acquisition, it is necessary to separately deal with and transfer or assign each asset and assumed liability in accordance with the contractual, legislative or other requirements governing that particular asset or liability. The seller may select which assets it wishes to divest more easily under an asset sale than under a share sale. The seller may also wish to retain the corporate entity in order to use tax losses, which it cannot do under a share sale. In contrast to a share acquisition, under an asset purchase, the seller retains all liabilities not specifically assumed by the buyer.

When a business is being transferred by way of an asset purchase, each individual asset must be transferred in accordance with the formalities for a transfer of an asset of that nature. In respect of some assets, this will simply be a case of physically delivering the asset to the buyer but, in other cases, the formalities are more prescriptive, such as in the case of real property (where a separate instrument of transfer must be delivered and later registered).

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

It is not unusual for negotiated acquisitions to begin with (or include) the negotiation of a letter of intent, which can also be known as a memorandum of understanding or heads/terms of agreement. The letter of intent is a useful outline of the transaction and may also serve to accomplish the following (among other things):

Quickly agree key terms of any potential transaction

Prevent a seller from negotiating with other parties

Allow relevant governmental approval processes to begin within an agreed framework

Facilitate fundraising for the transaction

Define a buyer's inspection and due diligence rights

Provide for the treatment of confidential and proprietary information

Establish a schedule for completing all matters necessary to close the transaction.

The letter of intent may be expressed to be binding or nonbinding, either wholly or in part. Unless drafted carefully, a court may decide that the document is not binding, even if it states that it is intended to be binding.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity**: It is common to include binding exclusivity provisions in the letter of intent or term sheet, even if the entire letter itself is not binding.

**Break fee**: Break fees are not particularly common in private M&A transactions. However, if they are seen, it would be for larger or competitive bid transactions. Break fees are more commonly used for public M&A transactions.

**Confidentiality**: It is common to include binding confidentiality provisions in the letter of intent or term sheet, even if the entire letter itself is not binding.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Confidentiality agreements and exclusivity agreements are often negotiated as separate agreements in private M&A transactions.

Separate confidentiality agreements are commonly entered into, particularly where the seller is providing the buyer with due diligence information.

Separate exclusivity agreements are not as common as confidentiality agreements, as exclusivity provisions are often included in confidentiality agreements as well as letters of intent.

## Is there a duty or obligation to negotiate in good faith?

In Australia, there is no general obligation to act in good faith. There is some uncertainty under Australian contract law about the circumstances in which an obligation to use good faith when entering and performing a contract will be implied. For example, several cases have held there to be an implied obligation to use good faith when exercising a right to terminate for breach. However, it is not settled under Australian law that an obligation to use good faith when entering and performing a contract will always be implied. The most common remedy is financial damages to compensate a party for its loss and put it in a position as if the contract had been performed. Damages are the most commonly pursued remedy and may be awarded by a court or any other adjudicator.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Purchase price adjustments are very common; they are much more common than fixed price, locked box or other mechanisms.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Cash-free, debt-free and working capital adjustments are the most typical adjustment mechanisms. Net asset value adjustments are also seen in the market, although have recently been reducing in frequency. Locked-box mechanisms are not very common (although not unusual) but have been used to reduce or eliminate the complexity of the adjustments process (typically in private equity and auction deals).

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely; collars are not common. Sometimes, a de minimis is agreed.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: This is usually prepared by the target company (i.e., buyer-controlled). This is a matter for negotiation. It is considered an advantage to prepare the first draft.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Rarely.

## Is an earn-out common?

Frequency/market practice: Becoming more common; we are seeing more earn-outs as a means of bridging the gap between forecast earnings views/valuations of seller and buyer, particularly in small and mid-cap transactions. If used, earn-outs are typically for a period of between of 12 and 36 months and commonly capped at an amount that is less than 25% of the purchase price.

## Is a deposit common?

Frequency/market practice: Rarely. Deposits are more common in the real estate sector.

## Is a break fee common?

Frequency/market practice: Rarely (more common for public M&A deals).

Frequency/market practice: Not common.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Becoming increasingly common, particularly where there is a long period between execution and completion. It is also more common where a foreign seller or buyer is involved.

## Is the MAE general or specific?

Frequency/market practice: Both are seen; often combined.

## Is the MAE quantified?

Frequency/market practice: Increasingly includes specific triggers (which are typically business related (e.g. EBITDA) and not market related (e.g. index fall)). Business triggers generally include carve-outs for specific events or circumstances. It is often combined with a general MAE.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Fairly common, depending on the nature of the buyer and seller.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Waterfall/blue pencil provisions are very common for noncompete provisions, as courts will sometimes read down the period/geographical reach.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Very common; it is customary to include restrictions on the seller in relation to the conduct of the target's business in the period between signing of the acquisition agreement and completion to limit actions or omissions that may adversely affect the value of the target. For example, the acquisition agreement will often provide that there are to be no amendments to the constitution, no issue of securities and no entry into contracts/transactions with a value above a specified amount without the consent of the buyer.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common; broad access for the buyer and its representatives is generally provided in private deals.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Updating disclosure is rarely permitted after execution. Notification of possible breach is fairly common. In the case of a material breach, there is sometimes a right to terminate but more commonly there is only an indemnification/damages claim.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common; materiality qualifiers are commonly seen but are often not quantified, so, for example, knowledge qualifiers are common (other than specific warranties, e.g., contract value).

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge qualifiers are common, but only appropriate for certain warranties. Depending on the outcome of negotiations, they are often limited to the actual knowledge and reasonable due enquiry of a specified list of senior management.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Very common; this is almost always requested by buyers, but typically one of the most contested warranties in negotiations.

## Is disclosure of the data room common?

Frequency/market practice: Very common; it is standard practice in Australia. It is fairly common for the buyer to seek to limit disclosure to matters fairly disclosed with sufficient particularity to enable the buyer to assess the impact of the disclosed matter on the target company/business.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Very common; repetition of warranties at completion is market standard in Australia.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: Not very common, but may be negotiated in buyer-friendly agreements.

## Is a bring-down certificate at closing common?

Frequency/market practice: Rarely.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True and accurate and (if acting for buyer) not materially misleading (including by omission).

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely; double materiality is usually avoided.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: The cap is often split between title, tax and other material warranties (which almost always have a 100% cap) and other more general warranties (which typically have a lower percentage cap, usually between 10% for an auction deal and 50%). Larger deals will tend to have a lower aggregate cap.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: Both are seen regularly; will be subject to deal negotiation (seller will seek to expand the scope of the cap to all claims under the agreement, whereas buyer will seek to limit it to warranty claims only).

## What are the common exceptions to the cap?

Frequency/market practice: Key warranties are often exempted from the lower cap, but still subject to a 100% cap (e.g., title, capitalization, authority, tax and sometimes some specific areas of concern).

There is usually a carve-out from all limitations (including cap) for fraud, tax evasion and deliberate nondisclosure.

## Is a deductible or basket common?

Frequency/market practice: Basket is very common, but both are seen.

## Is a de minimis common?

Frequency/market practice: Very common.

## How long does seller liability survive?

Frequency/market practice: It is common to have:

18-24 months for general warranties;

Anywhere from 18-24 months to 6-12 years for title, capitalization and authority warranties (the seller will typically start with the same time period as general warranties but buyer will often seek the relevant statutory limitation period (i.e. 6-12 years)

Five years (or seven years, where there is good justification for doing so) for tax warranties and tax indemnities.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: Key warranties are often exempted from the lower cap, but still subject to a 100% cap (e.g., title, capitalization, authority, tax and sometimes some specific areas of concern).

There is usually a carve-out from all limitations (including cap) for fraud, tax evasion and deliberate nondisclosure.

## Is warranty insurance common?

Frequency/market practice: Fairly common; W&I insurance is becomingly increasingly common, particularly in private equity deals.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Fairly common.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Fairly common for actually received insurance proceeds.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Fairly common for actually received amounts.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Very common; this is required by law for a contractual claim for damages, but failure to mitigate is still usually an express limitation on liability to the extent that loss increased as a result of failure to mitigate.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common. The definition of consequential loss is a matter for negotiation (as the meaning of consequential loss is currently uncertain under Australian law).

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Very common; sellers and buyers will negotiate for these respective positions.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes

## What is the common governing law?

Frequency/market practice: An Australian state or territory law is usually chosen.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Litigation is more common, but arbitration is becoming more common where parties are from different jurisdictions.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: Stamp duty is not payable on share transfers (provided that the target company does not directly or indirectly hold significant interests in land, i.e., is not a "landholder"). Where landholder duty applies to a share transfer, the liability at law is usually borne by the buyer, although some Australian jurisdictions (at law) impose joint and several liability on the buyer and the target company itself.

Stamp duty on asset transfers is usually borne by the buyer (at law in most Australian states/territories) and it is highly unusual for parties to agree otherwise. The rate varies between asset types and between states.

Broadly, parties are free to contractually allocate the economic burden of any duty that applies to a particular transaction as they wish, but this does not abrogate or modify the liability that is imposed under legislation.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: It is very common to have a specific tax indemnity, usually included in the acquisition agreement.

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