FREE CHAPTER

Chapter 1. What you are actually buying: the business or the company

Buying a Small Business in Australia

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On the Central Coast of New South Wales, a couple bought a real estate agency, Ray White Bateau Bay. Strictly, they did not buy the agency. A company called Tin-Tagel, the trustee of the couple's family trust, bought the shares in Danc Pty Ltd, the company that ran it, and the couple, Mr and Mrs Folley, guaranteed Tin-Tagel's obligations ([2025] NSWSC 578 at [1], [5]). A family trust is an arrangement in which a trustee — here a company — holds a business or other assets for the benefit of members of a family.

The price was A$2.3 million. A deposit of $230,000 was paid on exchange, the day both sides signed and the contract bound them. And $690,000 of the price was lent to the buyers by the sellers themselves: vendor finance, to be paid back two years after settlement (at [8]).

At the first meetings, the sellers explained why they were selling. The court later recorded it:

> The parties agree that during one or both of those initial meetings, the Hockeys said to the Folleys that they were intending to retire from real estate.

([2025] NSWSC 578 at [45])

Settlement was on 1 June 2018 (at [7]). From 19 December 2018, Mrs Hockey was the licensee in charge of Boyle Partners, a competing agency (at [79]). The buyers sued. On 10 June 2025 the Supreme Court of New South Wales found that she had broken the promise not to compete (at [345]), and that her words about retiring were misleading; Mr Hockey, it found, had reasonable grounds for his (at [631], [667]). It also found that the buyers had suffered no loss from the broken promise (at [343]; Chapter 11 tells that part). This chapter is about the price, because that part of the case turns on what the buyers had bought.

The clause that was there, and nobody used

The contract had a clause that took the company's debts off the price. It worked only if someone on the buyer's side counted the debts from the seller's papers and held the money back on the day. Nobody did.

Clause 6.6(b) set the adjustments to the balance of the price at settlement:

> i. Minus Company Liabilities as at the date of Completion (including present and future Liabilities for Taxes in respect of the period up to the date of Completion;
>
> ii. Minus Employee Entitlements accrued as at the date of Completion in accordance with Schedule 2;

(at [19])

The court read the clause as the buyer's own step in paying:

> Clause 6.6(b)(i) provides for an adjustment to the "balance" paid by the deduction of "Company Liabilities" but it is at least implicit in that provision that the adjustment is one made by the purchaser in the course of making the payment provided for under cl 6.6(b).

(at [159])

The day before settlement, the sellers had sent the figures needed to work out the deduction. The buyers' own solicitor wrote back:

> In any event, please note that as I am not a qualified accountant I am not in a position to interpret the attached financial documents provided by the vendor to ascertain the

> final amount that needs to be deducted or added to the purchase price for the liabilities and assets of the company.

(at 155; see [160], [166])

So the company owed tax at settlement, and nothing came off the price (at [156]). The buyers later sued for the tax and the staff's leave, $164,435.48 in all (at [12]), and lost on the tax: the court found no breach by the sellers (at [173]), one month's GST had been paid by the sellers themselves (at [182]), and a separate tax indemnity, which needed notice within 30 days of the buyers finding the debt, was never used (at [185]). The staff's leave did come off, but later: a second clause, 6.8(f), set it against the vendor finance two years after settlement, and the court held that this clause, not (iii), applied (at [195]).

Part of the price, $320,000, had also been held back for six months, a retention against agency contracts lost in that time, with a list due within 21 business days after the six months (at [8], [34]–[36]). In April 2019 the buyers agreed to release $265,084.64 of it to the sellers, and the court held them to that choice (at [9], [245]).

The result, on the sellers' claim: Tin-Tagel was found liable to pay the sellers the vendor finance less the staff's leave, $690,000 – $58,342.71 = $631,657.29 (at [697]), with interest at 5 per cent a year from 1 June 2018, and the Folleys were to pay them the $54,915.36 left of the retention (at [720]). The formal orders were to follow (at [722]).

Our arithmetic: $631,657.29 + $54,915.36 = $686,572.65, before interest.

In April 2024 Macquarie Bank put Danc into receivership (at [2], [99]): a bank appointed receivers to the company it had lent to.

The part to take away is in our words, not the court's. When you buy the shares, the company's debts stay the company's debts. A clause can take them off the price, but only on the day, and only if your side does the count.

Two ways to buy the same café

Australian law has no chapter called *sale of a business*. The difference between the two ways of buying shows up in who stays the employer, the debtor and the tenant after settlement.

You buy the business (an asset sale). The seller hands you the things, the stock, the contracts, the lease and the name. The seller, whether a person, a partnership, a trust or a company, stays where it was, with its own past. You start a new employer relationship with the staff, you take the lease over with the landlord's consent, and you apply for your own licences.

You buy the company (a share sale). Nothing is handed over. The company (a proprietary company, with *Pty Ltd* after its name) keeps its staff, its lease, its licences, its contracts and every debt it has ever run up. What changes is who owns the shares. And if you make yourself a director, a thirty-day clock starts. That clock is further down.

The listing will not tell you which of the two is on offer. A café advertised as *business for sale* can be either. Ask before you talk about price, because the same price buys two different things.

The company is a separate person

Under the Corporations Act 2001, a company comes into existence on the day it is registered, and it has the legal capacity and powers of an individual (ss 119 and 124(1)).

So a company is a person in the eyes of the law, with its own contracts, its own staff and its own debts. It does not stop being that person when its shares change hands. When you buy the shares, you buy that person whole, with its history, including the parts nobody has told you about.

That is why a share purchase is written with three kinds of protection: promises from the seller about the company (warranties), an adjustment to the price for the company's debts, and part of the price held back (a retention) until the promises have been tested. Each one works only if someone on your side uses it on time. At Bateau Bay the price clause went unused on settlement day, the indemnity claim missed its 30-day notice, and the larger part of the retention went to the sellers because the buyers agreed to release it.

What comes with the company

Go through this list with the seller's papers in front of you. Each line has its own chapter.

- **The staff.** The employer does not change, so every employee stays with the company on the same terms and with all their years of service. The transfer-of-business rules in Chapter 7 apply when the employer changes; in a share sale it does not change, and every obligation to the staff stays inside the company you now own. That is our reading of the Fair Work Act and the Corporations Act together; no section says it in one sentence.
- **Security interests.** A loan secured on the coffee machine or the van stays on it. Chapter 8 shows how to search the register.

- **Tax.** The company’s unpaid tax stays the company’s. If you become a director, part of it can become yours. See the next section.

- **The lease.** The tenant is still the same company. A shop lease can say what must happen when the tenant company changes hands; read yours for it, with Chapter 6 beside you, and ask your solicitor.

- **Licences.** The holder is still the company. Whether a change of owner must be reported to the licensing body depends on the licence and the state; ask the regulator (Chapter 9) before settlement. And licences lean on named people. In New South Wales, a licensed building company must have a nominated qualified supervisor, and a real estate corporation must employ a class 1 licence holder as the licensee in charge. In Queensland, a building company must keep a nominee overseeing the technical work, and the Queensland Building and Construction Commission (QBCC) must be told within 14 days when the nominee stops acting (Chapter 9).

  So the company holds the licence, but the licence stands on a qualified person. If that person is the seller and the seller walks out on settlement day, you have bought a company that may not be able to trade the following week. That was the job title in the Bateau Bay case: *licensee in charge*.

- **Stamp duty on shares.** This book does not cover duty on the purchase of a company’s shares. Ask your solicitor or your conveyancer — a licensed specialist in the paperwork of a transfer and settlement; in Western Australia, a settlement agent — before you sign.

Whichever way you buy, a company does not keep your own name off the papers. At Rose Bay the buying company's sole director became the guarantor of its lease ([2019] NSWCATCD 80 at [6]; Chapter 6), and banks ask company directors for guarantees too (Chapter 13).

The thirty days that make the company's tax yours

This is the rule that turns a share purchase into a personal risk. It sits in the Taxation Administration Act 1953, Schedule 1, Division 269, as compiled from 27 August 2026.

First, every director carries the duty, in s 269-15(1):

> 1. The directors (within the meaning of the Corporations Act 2001) of the company (from time to time) on or after the initial day must cause the company to comply with its obligation.

Then the rule for someone who arrives late, in s 269-20:

> Penalty for new director (3) You are also liable to pay to the Commissioner a penalty if: (a) after the due day, you became a director of the company and began to be under an obligation under section 269-15; and (b) 30 days later, you are still under that obligation. (4) The penalty is due and payable at the end of that 30th day. [...] Amount of penalty (5) The amount of a penalty under this section is equal to the unpaid amount of the company's liability under its obligation.

The Australian Taxation Office (the ATO) says the same thing for a reader who is not a lawyer, on a page last updated on 16 April 2026:

> Before you become a director of an existing company, check if the company has any unpaid or unreported PAYG withholding, GST or SGC liabilities. You may be personally liable for unpaid amounts that were due prior to your appointment. As a new director, you will not be liable for a director penalty that was due before your appointment if, within 30 days of your appointment, you ensure the company does one of the following: • pays the amount outstanding in full • appoints an administrator to the company • appoints a small business restructuring practitioner to the company • winds up the company (within the meaning of the Corporations Act 2001). If you resign as a company director within the 30-day period, you may still be liable for the company's unpaid PAYG withholding, GST or SGC liabilities that were due before your appointment.

In plain words: if the company has not paid the tax it withheld from wages (PAYG withholding), its GST or its staff's super guarantee charge (SGC), then thirty days after you become a director you can owe the whole unpaid amount yourself, including the part from before you arrived. Inside the thirty days only four things stop it: paying it; appointing an administrator, an outside insolvency professional who takes control of the company; appointing a small business restructuring practitioner, who helps a small company agree a plan with its creditors; or winding the company up, which ends it. The last three take the company you have just bought out of your hands. Resigning inside the thirty days does not stop it.

Five more things follow, and each changes what you do.

Tax that falls due after you are appointed gets no thirty days. The thirty days are for tax that was already due when you arrived. For the rest, s 269-20(1) makes whoever is a director at the end of the due day liable from that day. The GST, the tax withheld from wages and the super that build up in the weeks before settlement fall due after it. So the contract should hold back part of the price, or adjust it, for the GST, PAYG withholding and super building up for the period up to settlement (Chapter 12).

After the thirty days, what was not reported in time only paying clears. Once the thirty days have passed, the penalty is yours. Before the ATO can recover it, it must send you a director penalty notice, and you then have 21 days to have the penalty remitted, that is, cancelled. Which ways out still work then depends on what the company reported, and when. The same ATO page:

> The director penalty can only be remitted by paying the corresponding company liability in full, for the unpaid amount of PAYG withholding or GST, if: • it is reported more than 3 months after the due date (or, in the case of new directors, 3 months or more after the date of their appointment), or • it remains unreported after 3 months. Estimated amounts of PAYG withholding and GST are treated as amounts that were never reported.

In plain words: inside your first thirty days, the four steps work whatever the company has reported. After day thirty, an administrator, a small business restructuring practitioner or a winding-up still clears GST and wages tax that was reported in time: for a new director, within three months of the appointment. What was reported later, never reported, or estimated by the ATO, only paying clears. For the super guarantee charge there are no three months at all: the page says that an amount reported after its due date, or never, can be cleared only by paying it in full. So take any super guarantee charge not reported by its due date off the price in full, or have it paid before you are appointed. And if you do become a director, lodge every overdue business activity statement (BAS) in your first week (Chapter 14).

A payment plan does not stop the clock. Under s 269-15(3), while an instalment arrangement with the ATO is in force, the ATO may not go to court against a director over the debt. The directors' obligation itself ends only when the company pays, or on one of the other three steps (s 269-15(2)). A company on a payment plan still owes the balance, and so, after thirty days, can you.

It is the directorship, not the shares. The penalty lands on a director. Owning the shares without sitting on the board is a different position — but not always. The Corporations Act counts as a director, in s 9AC(1):

> b. unless the contrary intention appears, a person who is not validly appointed as a director if:
> c. they act in the position of a director; or
>
> ii. the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes [...]

In plain words: if you own the shares, run the café yourself and put a relative on the board who does what you say, the law can treat you as the director. Decide the two questions separately, and decide the second one only after you have seen the company's tax position.

Thirty days is less time than it sounds. The clock runs from your appointment, not from the day you find the debt. Find it before you are appointed. Ask for the company's ATO account statements, printed by its tax agent in the days before settlement; the list of every BAS and super guarantee statement lodged, with the dates; and the payroll records set against what was reported. Then put a warranty, an indemnity with its notice period, and a retention in the contract for what the papers cannot show.

And one step you cannot leave to the day. The Australian Business Registry Services:

> If you plan to become a director, you must apply for a director ID before you're appointed.

In plain words: a director ID is the number every company director must have. Apply for it before settlement, not on the day.

A debt the company takes on while it cannot pay

The Corporations Act has a second rule a new director needs to know, in s 588G:

> 1. This section applies if:
>
> a. a person is a director of a company at the time when the company incurs a debt; and
> b. the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
> c. at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and

In plain words: if you, as director of the company you bought, keep ordering stock and signing up debts when the company already cannot pay its way, you can be held to answer for them yourself. So before you buy the shares, find out whether the company can pay its bills today, not only whether it made a profit last year.

What comes with the business instead

An asset purchase leaves the old company's past with the old company. It does not leave everything behind, and it gives you work to do that a share purchase does not.

- **The staff** move to a new employer, you. The rules on their years of service, their leave and the seller's enterprise agreement are in Chapter 7.
- **Security interests** on the equipment stay on the equipment unless the lender releases them. Chapter 8.
- **The seller's tax debt** does not pass to you by any section we found. But the ATO can tell you, in writing, to pay it the part of the price you still owe the seller. Chapter 8.
- **The lease** passes only with the landlord's consent, under your state's retail lease law. Chapter 6.
- **Licences and food registrations** do not move by themselves. Chapter 9, and Chapter 3 for your industry.
- **GST and stamp duty** depend on how the sale is written. In New South Wales there is no duty on a business's goodwill; in Queensland and Western Australia there is. Chapter 10.

Our numbers: who you are buying from

The ABS survival figures differ by the seller's legal form: of those trading in June 2022, 48.4 per cent of sole proprietors and 66.9 per cent of companies were still trading four years later. That is a population, not the seller in front of you (Chapter 0); what it tells you is that the legal form of the seller is worth asking about on the first visit.

And one caution from the same statistics. The ABS counts ABNs that trade, not shops. One owner can hold more than one: a family trust that owns the business and a company that runs it, for example. The ABS names the difference in its method and cannot measure it. So a café can sit on two or three legal persons, and the one that holds the lease may not be the one that employs the staff. Find out which is which before anyone tells you the price. ABN Lookup and ASIC's company register show you, free, what each of them is (Chapter 0).

What to say to the seller

The first visit. Five questions. The seller is showing you something they built. Being interested in how it is put together does not get in the way of the check.

> "Am I buying the business from you, or the shares in the company that runs it?"

> "Whose ABN is the business under, and whose name is each licence in?"

> "Is the price with the stock, or plus stock at value?"

> "How many years are left on the lease, and who decides whether it is renewed?"

> "Who is the qualified person the licence stands on, and will they stay after settlement?"

After you agree a price in principle. If the answer is shares:

> "Before anyone appoints me a director, can the company show me its ATO account statements for PAYG withholding, GST and super guarantee, and a list of every statement it has lodged, with the dates?"

> "Is the company on a payment plan with the ATO, and for how much?"

> "If the company owes tax or staff leave on settlement day, which clause takes it off the price, and who does the count?"

What you may hear back:

- **"It's all up to date, the accountant looks after it."** Good. Ask the accountant for the statements, not for the reassurance. If the seller will not ask their own accountant for them, treat the tax position as unknown and keep the deal an asset purchase.
- **"Shares or assets, it's the same thing."** It is not, and the thirty-day rule is the proof. Ask the question again in writing.
- **"The price already allows for all that."** Then it can be written down. Ask for the figure and the clause.
- **"We're on a payment plan with the ATO, it's handled."** A plan stops the ATO suing directors while it is kept; it does not end what the company owes (s 269-15(3)). Take the balance of the plan off the price, or have it paid before you are appointed.

If the answer is bad

No tax position before you become a director. Do not accept the appointment yet. If the contract needs you on the board on settlement day, that condition is the thing to negotiate. Or ask for the deal to be rewritten as an asset purchase.

The contract has a clause for the company's debts, but nobody has counted them. This is the Bateau Bay lesson. Have your accountant work out the adjustment from the seller's papers before settlement, and sign it, and hold that amount back on the day. Put every notice deadline in the contract — there, 30 days for the tax indemnity — into your calendar (Chapter 14). Do not sign a release of retained money on the seller's figures until you have checked your own. And if two clauses of the draft deal with the same money in different ways, as clauses 6.6(b)(iii) and 6.8(f) did with the staff's leave, have your solicitor take one of them out before you sign.

The seller is the licence. If the business runs on the seller's own licence and they will not stay or cannot be replaced by a qualified person you have found, the business you would own on Monday is not the business you inspected on Saturday. That is a reason to walk away, or to pay only for what survives without them.

If the answers are good

You know whether you are buying the business or the company, which legal person holds each part of it, and — if shares — what the company owes the ATO, counted before your appointment and written into the price. Next: the price itself. Chapter 2 shows what an asking price can and cannot tell you.

Before you move on

- ☐ I know whether I am buying the business or the shares, and I have it in writing.
- ☐ I know which legal person holds the ABN, the lease, the staff and each licence, and I have checked them in ABN Lookup and on ASIC's register.
- ☐ If shares: I have the company's ATO position for PAYG withholding, GST and super guarantee, including anything unreported or on a payment plan, before anyone appoints me a director.

- ☐ If shares: my accountant has counted what comes off the price for tax and staff leave, and the contract says who holds it back, what any retention is for, and every notice deadline.
- ☐ If shares: I have applied for a director ID.
- ☐ I know who the licence stands on, and whether that person stays.

Sources. Corporations Act 2001, ss 9AC, 119, 124(1), 588G(1), compilation No. 148, in force from 27 August 2026. Taxation Administration Act 1953, Schedule 1, ss 269-15, 269-20, compilation No. 226, in force from 27 August 2026. ATO, Director penalties, last updated 16 April 2026. Australian Business Registry Services, director ID: who needs to apply and when. NSW Government, building licences for companies and real estate corporation licences; QBCC. Supreme Court of New South Wales, [2025] NSWSC 578, 10 June 2025. NSW Civil and Administrative Tribunal, [2019] NSWCATCD 80. ABS survival by legal form: Counts of Australian Businesses, released 18 August 2026. Australian Business Register, ABN Lookup; ASIC, company and organisation registers. Opened 28 September 2026; s 9AC, the director ID page, ABN Lookup and the ASIC registers page on 29 September 2026.

The whole book — every chapter, every source with its address — is sold as an e-book, EPUB and PDF.