

INDEX

SR NO	TOPIC	PAGE NO
1.	Tips	2-3
2.	Task 1.1-Drafting the contract	3-23
3.	Task 1.2-Preparing for settlement (vendor)	23-29
4.	Task 2.1-Advising a purchaser on the purchase of a business	29-64
5.	Task 2.2-Preparing for settlement (purchaser)	65
6.	Task 3.1-Setting up business structures	65-89
7.	Special Conditions Steps	90-91

Here are some tips to assist with your upcoming CCP oral assessment
The OA will be conducted according to the assessment rubric.

REFLECTION ON LEARNING

Reflect on your progress through the subject, how you learn and what resources you engaged with as you go through this subject, when you consider your strengths are and areas where you believe you need to improve or focus upon, how you intend to use the skills learnt in your practice.

TASK 3

Bear these in mind when presenting:

- Who is the audience for your presentation?
- What are client objectives?
- What are your assumptions about client's context?
- Provide recommended structure, substantiated by the law and most importantly suited to client's circumstances.

While it is beneficial to list the pros and cons of the business structures, it is how they relate to the client's circumstances which is of importance. The assessor will be looking for application of law to the facts/circumstances of the client, in particular

- How does your recommendation meet the objectives?
- What are the costs implications? Both setup and maintenance. Can you justify this?
- PPSA and their implications to sale of business?
- What is the difference between debt and equity financing?
- Have a good understanding of revenue issues such as tax (income, GST, CGT)/stamp duty, pay particular attention to GST and CGT.
- In the case of trust, why individual or corporate trustee? What's the difference?
- How are trust taxed?

KNOWLEDGE OF PRACTICE AREA

Some knowledge of practice areas issues include:

- What is the difference between purchase of shares of a company, or purchase of assets of the company? What are the implications to purchaser?
- What is the "personal property" under the PPSA?
- What's perfecting a security interest under the PPSA?

There are quite a few acronyms in the PPSA – know and understand them.

TASKS 1 & 2

Understanding the rights and obligations of the parties – the provisions of the standard Contract, noting that unlike the Sale of Land, there is no vendor disclosure legislation. As such, purchaser solicitors need to be alert to the business and its needs and requirements. Caveat emptor applies.

Know the steps each party – vendor and purchaser – needs to take along the process including the pre-settlement steps including who does what, rights and contractual obligations of vendor, purchaser, lessee

Understand the usual elements involved in a business

- its employees
- its key personnel
- its assets – tangible and intangible

- its marketing such as social media, and of course its IP
 - its technology and information systems
 - its premises
 - its financial accounts
 - its legal and corporate compliance
- and what needs to be done with each of them in order to transfer (ie sell) the business as a going concern so purchaser can continue trading.

Between exchange and settlement, what are the parties (and their solicitors’) obligations? Think about when risk passes, noting who has control of the business at the time in question.

Know the whys to your answers in A2.1. Understand the items in A2.2.

ETHICS AND PROFESSIONAL RESPONSIBILITY

What are the likely ethical or professional responsibility issues to arise when practicing in this area?

TOPIC	NOTES
TASK 1.1	DRAFTING THE CONTRACT
RESOURCES	Advising on commercial transactions [PDF] Drafting special conditions [PDF] CC202 Sale and Purchase of Business Assets [PDF]
LEGISLATION-	<i>Business Names Registration Act 2011 (Cth)</i>
SEE TASK 1.1 FEEDBACK	See Printout
REFLECTION OF SUBJECT THROUGHOUT	Strengths and weaknesses – -Had some exposure while working. -However, the resources and the assignments only made the concepts clearer as they progressed. -Making the PPT succinct to put in all the required information, and yet having an impact on the audience.
ADVISING ON COMMERCIAL TRANSACTIONS [PDF]	<ul style="list-style-type: none"> • Commercial lawyers advise on a broad range of transactions. The extent of their practice can be considered from a number of different perspectives : <ul style="list-style-type: none"> ○ the nature of the transaction, including <ul style="list-style-type: none"> ▪ establishing and advising on various commercial entities and structures, including corporations, partnerships, trusts, joint ventures and sole proprietorship ▪ acting on sales and acquisitions, ranging from those involving small businesses, to mergers and acquisitions involving multinational corporations ▪ advising on and structuring finance and securities transactions involving the various sources of finance, the different financial products and types of security, and

TOPIC	NOTES
	<ul style="list-style-type: none"> ▪ advising on and structuring revenue and financial transactions involving taxation and duties (including their effect on other commercial transactions), superannuation and funds management. ○ the areas of law involved i.e statutory, common law or equity including: <ul style="list-style-type: none"> ▪ transferring of real and personal property ▪ contract and commercial law ▪ corporations law ▪ equity and trusts ▪ intellectual property ▪ banking and finance laws, and ▪ taxation, duties and superannuation • All lawyers practising in commercial areas require, <u>not only extensive technical legal expertise</u> to meet the client’s requirements, <u>but a sound understanding of the client’s business</u> and the <u>commercial nature of the transaction</u> they are acting in. • The nature of commercial practice frequently involves: <ul style="list-style-type: none"> • complex legal and practical issues • significant financial considerations, and • tight time frames and deadlines. <p>MATTER MANAGEMENT</p> <p><u>Determining costs</u></p> <ul style="list-style-type: none"> • Commercial matters are often costed on a time or fixed basis. • The basis for costs must <u>comply with costs disclosure requirements</u>. • Costs in commercial matters are often considerable and need to be kept under review. • The client should be kept informed at all times. <p><u>Running commercial matters</u></p> <ul style="list-style-type: none"> • Commercial matters often proceed quickly and require lawyers to work intensively, under great pressure, to meet deadlines. • Despite this, lawyers must ensure that their files are maintained so that the full history of the matter is recorded, regardless of whether the file is maintained in hardcopy or electronic form. • This includes ensuring that: <ul style="list-style-type: none"> • file notes, emails and correspondence are complete and record any changes to instructions and advice, and • successive drafts of documents are kept, including comments provided on them and any marked-up changes recommended. • As with all legal work, a commercial lawyer must effectively manage the relationship with the client. • From the beginning of the matter, the lawyer must understand the client’s requirements and expectations and regularly keep the client informed of progress and developments. <p><u>Distinguishing between legal and financial advice</u></p> <ul style="list-style-type: none"> • As a commercial lawyer, it is important to understand the commercial context in which your clients operate.

TOPIC	NOTES
	<ul style="list-style-type: none"> • Further, a distinction must be drawn in the commercial context between the legal advice and services a lawyer can provide and financial advice that a lawyer is not qualified to give. This distinction must be clearly explained to the client. • Under the <i>Corporations Act 2001</i> (Cth) (Corporations Act), advice given to a client that is classified as “financial product advice” requires the advisor to hold an Australian financial services licence: see s 766B. <p><u>What is “financial product advice”?</u></p> <ul style="list-style-type: none"> • Under s 766B of the Corporations Act, financial product advice is defined to be a recommendation, a statement of opinion or a report of any of those things, that: <ul style="list-style-type: none"> • is intended to influence a person in making a decision in relation to a particular financial product, class of products or an interest in them, or • could reasonably be regarded as being intended to have such an influence. • There are two kinds of financial product advice: <ul style="list-style-type: none"> • personal advice: s 766B(3), and • general advice: s 766B(4). <p><u>When does a person provide a financial service?</u></p> <ul style="list-style-type: none"> • Under s 911A of the Corporations Act, a person who carries on a financial services business – must hold an Australian financial services licence covering the provision of those financial services. • Section 766A of the Corporations Act states that a person provides a financial service when they: <ul style="list-style-type: none"> • provide financial product advice: s 766B • deal in a financial product: s 766C • make a market for a financial product: s 766D • operate a registered scheme • provide a custodial or depository service: s 766E, or • engage in conduct of a kind as prescribed by the regulations . <p><u>Application to lawyers’ advice</u></p> <ul style="list-style-type: none"> • A lawyer advising a vendor or purchaser of a business or giving legal advice on any business/commercial matter must be familiar with the provisions of the <i>Financial Services Reform Act 2001</i> (Cth) (FSRA). • The FSRA covers a broad range of financial products (including securities, derivatives, superannuation, general and life insurance, and deposit accounts and non-cash payments), as well as the regulation of financial intermediaries (which includes securities dealers, investment advisers and brokers, general and life insurance brokers and future exchange dealers). • The three schedules of the FSRA extensively amended the Corporations Act, including to exempt lawyers from licensing requirements. • Generally speaking, advice provided as a lawyer to your client, and any incidental advice, is not financial product advice, provided you do not give advice outside the definitions in s 766B(5) of the Corporations Act. • Section 766B(5) provides that the following advice is <i>not</i> financial product advice: <ul style="list-style-type: none"> ○ advice given by a lawyer in a professional capacity about matters of law, legal interpretation or the application of the law to any facts, and ○ subject to regulations, any other advice given by a lawyer or a tax agent in the ordinary course of their respective activities as a lawyer or tax agent that is reasonably regarded as a necessary part of these activities. • As such a lawyer is not usually required to hold an Australian financial services licence.

TOPIC	NOTES
	<p><u>What additional protection is given to retail clients?</u></p> <ul style="list-style-type: none"> Parts 7.7 and 7.9 of the Corporations Act set out protections given to retail clients in the form of the: <ul style="list-style-type: none"> Financial Services Guide – Document containing basic information that any retail client is entitled to receive before obtaining any financial advice or service. Statement of Advice -document containing the advice that must be given to a retail client under certain circumstances as soon as reasonably practicable after the advice is given. Product Disclosure Statement -must generally be given to retail clients and contain information that might influence a person’s decision to acquire a financial product. Note also the arrangements for complaint resolution.
<p>DRAFTING SPECIAL CONDITIONS [PDF]</p>	<p>General principles</p> <ul style="list-style-type: none"> Drafting special conditions for inclusion in a contract should follow best practice drafting skills and use: • plain language and no jargon • short sentences • logical structure • headings and numbering • logical layout • definitions if appropriate • present tense • active voice • appropriate punctuation, and • non-discriminatory language. The purpose of any special conditions is to protect the vendor without imposing onerous obligations on your client. A special condition will be necessary where the agreement between the parties includes matters that are not covered or inadequately covered in the standard Contract for Sale of Business. You must be familiar with all terms of the standard contract. Should ensure that such a special condition refers to the standard clause it is seeking to amend. There is no point inserting a special condition if the matter is already wholly covered by an existing standard contract clause. This will lead to confusion as, at general law, a special condition will usually prevail over a standard condition, as the parties are more likely to have turned their minds to its contents. Inconsistencies may result in severance of parts of clauses. Special condition numbering should continue consecutively from the numbering of clauses in the standard contract. For example, if using the 2021 standard contract, then the first special condition will be numbered 37. Special conditions should also be identified by a heading as a part of the contract between the named parties in respect of the named business with provision to date on exchange. Be mindful of the precedents of the contracts that may be used-ensure that it fits the particular facts and circumstances. If you are disclosing an issue of non-compliance with a law or regulation that is evidenced in writing by an authority, you should attach the written notification, and the special condition should refer to the annexed notification and let it speak for itself, rather than paraphrasing it. You should also include a sub-paragraph that the purchaser has read the attached notification. A common format of a special condition to make disclosure of a matter would generally follow several steps: <ol style="list-style-type: none"> The vendor discloses that ... The purchaser acknowledges that... And the purchaser will not be entitled to raise any objection, requisition or claim for compensation in respect of ...

TOPIC	NOTES
	<ul style="list-style-type: none"> • If a special condition is inserted to make the contract conditional on some event, it is important to ensure that the condition includes mechanics as to what will happen if the event does not occur. • Mechanics of a conditional contract might be that the contract is conditional on the occurrence of some event, the time by which that event must occur, times that each party must do something and preclusion of purchaser rights and consider frustration. • The most common reason a special condition will be necessary is to avoid disputes, so it is particularly important that any special condition is clearly and concisely drafted. <p>Particular special conditions</p> <ul style="list-style-type: none"> • The 2021 standard contract may need some special conditions for certainty; for example: <ul style="list-style-type: none"> • an agreement as to what constitutes a reasonable time for a notice period • amending the interaction between the completion date and cl 19.1 • an agreed rate of interest as a genuine pre-estimate of liquidated damages • amendment to printed conditions that are not commonly enforced (for example, cl 20.6 regarding an allowance of \$10 for every settlement cheque required by the vendor above five cheques) • procedures if one of the parties loses mental capacity • release of deposit (although not recommended from the purchaser's perspective) • payment of deposit if some unusual arrangement other than 10% has been agreed, and • guarantee for a corporate purchaser. • Other special conditions will depend on the particular facts. • These circumstances are many and varied but might include that the contract is subject to a trial period, valuation of stock-in-trade, a handover period with obligations on the vendor to introduce the purchaser to key customers and suppliers of the business, and interdependence with any other agreement such as the sale of freehold.
<p>CC202 SALE AND PURCHASE OF BUSINESS ASSETS [PDF] 4 (Introduction to the Standard Contract)</p>	<p>4.1 Use of standard contract</p> <ul style="list-style-type: none"> • The standard contract can be used in the sale and purchase of most small businesses, with amendments and additions by special condition made to suit the circumstances in a matter. • Despite the publication of the standard contract, the vendor's lawyer may still prepare specially drafted business sale and purchase contracts to suit the needs of a transaction. Often, law practices have different precedent contracts that either favour a vendor or a purchaser. <p>4.2 Drafting the agreement</p> <ul style="list-style-type: none"> • Contract is not prepared until the buyer has been found. • Vendor's lawyer prepare the draft agreement on receiving instructions from the vendor or its agent. • Agreement is sent to the purchaser's lawyer and amendments are made to the agreement after negotiation between the parties. • <i>Good practice for the vendor's lawyer, when sending the draft contract to the purchaser, to state that no legal obligations will arise until formal exchange of contracts has taken place.</i> • The purchaser will have usually already signed a confidentiality agreement to protect the vendor if the sale does not proceed. <p>4.3 Agent</p> <ul style="list-style-type: none"> • Generally direct negotiations between the vendor and the purchaser, where purchaser responds to an advertisement.

TOPIC	NOTES
	<ul style="list-style-type: none"> • However, if an agent has introduced the purchaser, standard agency procedures will apply. <p>4.4 Role of the vendor's lawyer Some of the vendor's lawyer's responsibilities when drafting a contract for sale of a business are:</p> <ul style="list-style-type: none"> • receive clear instructions from the vendor; • advise the vendor on the legal procedures involved in the sale; • prepare due diligence and disclosure materials, and gather and organise all necessary documents and information related to the assets being sold. This ensures that all required disclosures are made to the purchaser and that the vendor can meet its obligations under the contract; • advise the vendor on any liabilities associated with the assets being sold and how to best mitigate these risks or disclose them appropriately in the contract; • advise the vendor on the need for any special conditions and pre-conditions to be fulfilled before the sale is completed or variations to the contract are made; • assess the vendor's level of financial understanding and, if necessary, advise the client to seek financial advice from an accountant or financial adviser, particularly in relation to the purchase price and how to apportion it to minimise the effect of income and capital gains tax (CGT); and • understand the need to secure the continuing obligations of the purchaser under guarantees, particularly if the purchaser is a company. <p>4.5 Role of the purchaser's lawyer</p> <ul style="list-style-type: none"> • Upon receipt of the draft agreement, the purchaser's lawyer should check it, noting: <ul style="list-style-type: none"> • the legal entity of the vendor (a company, sole trader, partnership, trustee for a trust); • any special conditions imposed by the vendor; • any amendments; • all the annexures attached to the contract; and • all other details relevant to the purchaser's interest. • The purchaser's lawyer should also: <ul style="list-style-type: none"> • conduct due diligence on the business and/or the assets; • verify the accuracy of the information provided by the vendor, including as to the takings and profitability of the business; • assess any potential risks associated with the assets; and • fully inform the client as to the agreement and the effect of any special conditions. • Important to ask the purchaser why they wish to purchase the business and if the purchaser has had any discussions with the vendor that may have influenced the purchaser to buy this particular business. • The purchaser's lawyer should also enquire how the purchaser will pay for the business and advise on the implications of obtaining any finance. At this point, the lawyer should suggest to the purchaser the option of independent financial advice. • An important issue to consider at the outset is the duty payable on the business purchase. Although there is no longer any business asset duty in New South Wales, ad valorem duty is payable on certain goods when purchased with land. <p>4.6 Choice of entity for purchase</p> <ul style="list-style-type: none"> • The purchaser's lawyer should advise on the nature of the legal entity most appropriate for the purchase of the business. • The major considerations are income tax, CGT, duty, limiting liability, requirements of any financier and the nature of the business. • Usually, the choice of entity is between: • sole trader; • partnership; • private or public company; and • trust. <p>4.7 Separate representation</p>

TOPIC	NOTES
5 (Purchase Price and its Apportionment)	<ul style="list-style-type: none"> It is important that both the vendor and purchaser are separately represented (unless they choose to represent themselves). Lawyers run a great risk of being negligent and/or guilty of professional misconduct when acting for both parties due to the definite possibility of an actual conflict of duty to act in the best interest of each client. <p>4.8 Caveat emptor</p> <ul style="list-style-type: none"> The purchaser's lawyer must warn the purchaser that despite the legal protection given by legislation such as the Australian Consumer Law (set out in <i>Competition and Consumer Act 2010</i> (Cth) Sch 2), the maxim of caveat emptor (let the buyer beware) still applies in the purchase of a business. The purchaser's lawyer must use their best efforts to protect the purchaser at every stage of the purchase of a business. <p>4.9 Description of business</p> <ul style="list-style-type: none"> It is essential that the agreement accurately describes the business being sold. The agreement must specify precisely what assets are being sold to the purchaser in exchange for the consideration. The assets of a business may comprise: <ul style="list-style-type: none"> goodwill; plant and equipment (whether leased or owned); premises leased or freehold land owned; employee details and contracts; intellectual property (such as patents and trade marks); licences affecting the business; business name; phone numbers, including landline, fax and mobiles; email addresses, domain name, webpages and social media accounts; know-how and customer lists; stock-in-trade (SIT); work-in-progress; debtors; and current (and significant) contracts with key customers. Plant and equipment are usually fully detailed in an inventory attached to the contract. The vendor's lawyer will also attach the relevant tax depreciation as a schedule. Additional conditions may be required to accommodate other assets of the business being sold. If the purchaser is to take over any liabilities of the business, these must be clearly set out and any conditions for taking over the liabilities clearly drafted. <p>5 Purchase Price and its Apportionment</p> <ul style="list-style-type: none"> It is important to consider how the purchase price is to be apportioned between the various assets being sold, as this will have tax implications for both parties. The price to be apportioned for the plant and equipment on which the vendor has claimed depreciation is most important: <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 1997) Subdiv 40-D. Careful consideration is required of the possible application of ITAA 1997 s 40-285 in relation to the sale of equipment for which the vendor has been claiming depreciation. Careful consideration is also required by the vendor of the possible application to the sale transaction of the CGT business concessions and the CGT 50% discount.

TOPIC	NOTES
6 (Goodwill)	<ul style="list-style-type: none"> Both the vendor and the purchaser will need to consider carefully cl 13 of the standard contract and how the goods and services tax (GST) legislation may affect the sale transaction. Generally, parties acting at arm's length are entitled to minimise the revenue impact on the transaction and it is vital to confer with a vendor's accountants before apportioning the price. <p>6.1 Legal position</p> <ul style="list-style-type: none"> No definitive description of goodwill. For the purposes of the PPS Act, goodwill is "personal property". In legal terms, goodwill is a type of intangible personal property similar to intellectual property. Goodwill is the "drawcard" that attracts customers to the business – it is the lifeblood without which there is no business. It is the reputation of the business and, accordingly, can be difficult to quantify. In fact, the "value" of goodwill can only be determined when a business is sold; it is the cost to purchase the business minus the value of the net tangible assets, intellectual property and identifiable intangible assets. Usually, goodwill is sold with the business it is connected to. However, it is not legally impossible to sell goodwill or a portion of the goodwill independently from the business it is attached to. <p>6.2 Economic view of goodwill</p> <ul style="list-style-type: none"> In economic terms, an accountant will view the goodwill as the "premium" value attributed to the business after deducting the value of its tangible assets, the intellectual property, the intangible assets that can be identified and the liabilities obtained in the purchase. goodwill can be represented (in accounting terms) as follows: <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p>Goodwill = Value of Business – Value of Net Tangible Assets (Net tangible assets is calculated by deducting the total liabilities of the business from its gross tangible assets), intellectual property and identifiable intangible assets.</p> </div> <ul style="list-style-type: none"> When apportioning the price, the amount applied to goodwill is often, but not always, the surplus of the price after allocating appropriate amounts to the tangible and identifiable intangible assets of the business. <p>6.3 Goodwill from the perspective of a purchaser</p> <ul style="list-style-type: none"> Obtaining and protecting goodwill both important from purchaser's perspective. The purchaser's lawyer must ensure that the sale contract places proper restrictions against the vendor's ability to "interfere" with goodwill sold to the purchaser: see standard contract cl 17. The position under general law on a sale of goodwill is as follows: <ul style="list-style-type: none"> Unless the vendor has entered into a restraint of trade covenant, it is not precluded from carrying on a similar business to the one sold, even in close proximity. The vendor is allowed to advertise having set up or continued in business but should not represent they are continuing with or relocating a business that has been sold. The vendor should not canvass the customers of the business and may be restrained by injunction from approaching those customers. The purchaser is entitled to use the vendor's name in conducting the business but must not hold out the vendor as the present owner of the business or expose the vendor to any personal liability. The two ways of vesting the goodwill in the purchaser are by: <ul style="list-style-type: none"> transferring to the purchaser all the assets and rights that constitute the goodwill, including the business name and trade marks in particular; and

TOPIC	NOTES
TASK 2.2	PREPARING FOR SETTLEMENT (PURCHASER)
RESOURCES	CC202 Sale and Purchase of Business Assets [PDF]
See Task 2.2 Reflection	See Printout
CC202 SALE AND PURCHASE OF BUSINESS ASSETS [PDF] 13.8 (Clear and unencumbered title) 17 (Pre-Settlement) 18 (Settlement) 19 (Post-Settlement)	See the discussions above
TASK 3.1	SETTING UP BUSINESS STRUCTURES
RESOURCES	Advising on commercial structures [PDF] Advising on tax [PDF] Advising on financing and securities [PDF] CC201 Business Structures [PDF] CC205 Finance and Securities [PDF]
ADDITIONAL RESOURCES	CC205 Finance and Securities [PDF] CC206 Management of Trusts [PDF] T101 Income Tax [PDF] T102 Capital Gains Tax [PDF]
LEGISLATION	<u>National Consumer Credit Protection Act 2009 (Cth)</u>
Reflection See Task 3.1	See Printout
ADVISING ON COMMERCIAL STRUCTURES [PDF]	Types of commercial entities <ul style="list-style-type: none"> One of the most important functions of a commercial lawyer is to advise the client on the most appropriate and effective structure for undertaking the client's commercial operations. Possible types:- sole proprietor, partnership, company and unit/discretionary trust. No formal documentation is necessary to run a business as a sole proprietor. However, need to have ABN for tax purposes and if any name other than individual name is used in business then it needs to be registered under <i>Business Names Registration Act 2011</i> (Cth): s 18.

TOPIC	NOTES
	<ul style="list-style-type: none"> The selection of an appropriate commercial entity is a matter of identifying and balancing the client’s objectives for the commercial enterprise. The tax consequences of each type of entity will also need to be considered and may require specialist advice . <p>Referral to experts</p> <ul style="list-style-type: none"> A purchaser involved in a large and sophisticated asset acquisition may require advice from a wider range of experts than a purchaser involved in a purchase of a small family business. Every purchaser has a different level of experience in asset purchase transactions and a different level of risk tolerance. These factors will determine: <ul style="list-style-type: none"> the level of explanation the purchaser's lawyer will provide in relation to the transaction, and the additional advisors that the purchaser’s lawyer recommends the purchaser consult . The purchaser may need advice from expert advisors, such as: <ul style="list-style-type: none"> ➤ an accountant and/or tax advisor or financial planner: <ul style="list-style-type: none"> to analyse the financial viability of the business, including the cash flow, balance sheet, profit and loss statements and tax assessments. This is critical if the purchaser intends to rely upon the vendors’ warranties and indemnities to advise on the optimal way of structuring the purchase for tax purposes, for example, through a company or a trust, including considering the purchaser’s personal circumstances, and in the event that the purchaser is borrowing funds to purchase the business, to advise on the purchaser’s ability to meet the loan repayments from the cash flows of the business being purchased, as well as alternative ways to structure the loan ➤ a valuer, to provide a valuation of the business assets and cash flows and the price to be paid, and/or ➤ an independent industry consultant familiar with the industry in which the business operates. This could be important if a purchaser has no prior experience in the particular industry. The consultant can advise as to the standing of the target business in the marketplace and current industry issues and trends. See printout of table for Summary of commercial structures.
ADVISING ON TAX [PDF]	<p>Introduction</p> <ul style="list-style-type: none"> When advising on the revenue implications of commercial transactions, you should carefully consider these areas of taxation: • income tax • capital gains tax (CGT) • goods and services tax (GST), and • fringe benefits tax (FBT). Duties and land tax are also relevant to commercial transactions and can strongly influence the way a transaction is structured. <p>Income tax</p> <p>What income is taxable?</p> <ul style="list-style-type: none"> To be taxable under the <i>Income Tax Assessment Act 1936</i> (Cth) (ITAA 1936) and <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 1997), income must be “assessable income”, includes- <ul style="list-style-type: none"> ordinary income (see ITAA 1997 s 6-5(1)), such as salaries and wages, interest and the earnings of a business, and statutory income, such as royalties. Some income exempt so first to determine if income is assessable income and second to establish how much of the income will be taxable income of taxpayer. Taxable income is the amount left after subtracting the taxpayer’s allowable deductions from their assessable income. Taxable income is the amount upon which tax is calculated and paid (less any rebates). <p>What deductions are available under the income tax legislation?</p>

TOPIC	NOTES
	<ul style="list-style-type: none"> Two basic types of allowable deductions <ul style="list-style-type: none"> General-expense or loss incurred in the ordinary course of producing assessable income or carrying on a business Specific-a specific deduction under a provision of ITAA 1997 or ITAA 1936, such as depreciation of certain items of plant and equipment . Two main exceptions to allowable deductions are expenditure of a personal nature (for example, child care, food) and capital expenditure (for example, purchase of premises). <p>What are capital allowance provisions?</p> <ul style="list-style-type: none"> Capital allowance provisions are important in commercial transactions because the value at which depreciated items are sold can have tax consequences for both the seller and the buyer. If the value of capital items sold as part of the sale of the business is less than their depreciated value, the seller can claim a deduction for the difference. If the value of capital items sold as part of the sale of the business is greater than their depreciated value, the seller must include the excess amount in their assessable income. <p>Specific commercial structures</p> <p>Partnerships</p> <ul style="list-style-type: none"> Is a partnership taxed separately from its partners? – Partnership not separate entity but still needs to file P’ship tax return with ATO at end of year indicating the assessable income earned or losses attributed to particular partner: ITAA 1936 s 91. How is each partner taxed? -Each partner is taxed on their “individual interest” of the “net income” of the partnership or is entitled to a deduction for their share of a “partnership loss”: ITAA 1936 s 92. Calculation of the “net income” or “partnership loss” -based on the activities of partnership rather than the partner. Weekly earnings irrelevant, as net income of P’ship calculated and allotted to partners as per their share. Interest of individual partners are determined according to partnership agreement. <p>Companies</p> <ul style="list-style-type: none"> What dividends paid to a shareholder are usually assessable income? – Dividends paid, credited or distributed to the shareholder by the company out of profits derived from any source. What is a corporate tax entity under the ITAA 1997 and how is it taxed?-A corporate tax entity (CTE) is a company, corporate limited partnership, corporate unit trust or a public trading trust. A separate tax payer. Required to pay tax on it’s taxable income or net income. Rate of tax 30% or 25% for base rate entities. What is an imputation system? How does that apply to shareholders? Members of a CTE (such as shareholders, partners and unitholders in a trust) are assessed on distributions of profits from a CTE. Imputation system avoids double taxation. It applies to dividends paid by Australian resident companies to resident individual shareholders. Effect of system-tax paid by the company will be imputed, or allocated, to such shareholders by means of imputation credits attached to the dividends they receive(these dividends known as ‘franked dividends’). <p>Trusts</p> <ul style="list-style-type: none"> How is a trust such as a discretionary or unit trust usually taxed? -trust, such as a discretionary or unit trust, is not a separate taxable entity for tax purposes and treated on a flow-through basis i.e trust income retains its source and character in hands of beneficiaries. How is a beneficiary of a trust usually taxed? A resident beneficiary who is not under a legal disability and who is “presently entitled” to a share of the income of the trust estate must include that share of the net income of the trust estate in their assessable income: ITAA 1936 s 97.

TOPIC	NOTES
	<ul style="list-style-type: none"> • When is a beneficiary said to be “presently entitled” to a share of the trust income? A beneficiary will be “presently entitled” if: • the beneficiary has an interest in the trust income that is both vested in interest and in possession, or • the beneficiary has a present legal right to demand and receive payment of the trust income, whether or not the precise entitlement can be ascertained before the end of the tax year and whether or not the trustee has funds for immediate payment. • Where no beneficiaries are “presently entitled”, the trustee will be assessed under ITAA 1936 s 99A at penalty rates of tax or under s 99 for deceased or bankrupt estates at normal rates of tax if the Commissioner exercises a discretion that it would be unreasonable to apply s 99A. <p>Capital gains tax</p> <p>What is CGT?</p> <ul style="list-style-type: none"> • CGT affects the income tax liability of a taxpayer because the taxpayer’s assessable income includes any net capital gain it has made during the relevant income year: ITAA 1997 s 102-5. • Taxpayer’s net capital gain is the total of its capital gains for the year reduced by its capital losses and any relevant concessions. <p>What are CGT events and CGT assets?</p> <ul style="list-style-type: none"> • A capital gain or loss is made if certain events or transactions (CGT events) occur: ITAA 1997 s 102-20. Most CGT events involve a CGT asset. Some CGT events are concerned directly with capital receipts and do not involve a CGT asset. See s 104-5 for a summary of CGT events and s 108-5 for the definition of a CGT asset. A CGT asset may be land, buildings, shares in a company, units in a unit trust, contractual rights, options, licences or goodwill. <p>What are capital gains and losses?</p> <ul style="list-style-type: none"> • Generally, a taxpayer makes a capital gain if it receives an amount (capital proceeds) from a CGT event (for example, disposal of a CGT asset) that exceeds its total costs associated with that event. • A capital loss is made when the taxpayer receives an amount from a CGT event that is less than its total costs associated with that event. <p>What is a CGT discount?</p> <ul style="list-style-type: none"> • CGT discount is a reduction of the capital gain by a certain percentage. • For individuals (including partners in partnerships) and trusts, the discount percentage is 50%. • Companies are ineligible for the CGT discount. <p>What are the small business CGT relief concessions?</p> <ul style="list-style-type: none"> • There are four available CGT small business concessions introduced to reduce capital gains on disposal of certain assets owned by a small business: • 15-year exemption • 50% active asset reduction • retirement concession, and • roll-over relief: see ITAA 1997 Div 152. <p>What are the “basic conditions” that apply to a CGT small business concession?</p> <ul style="list-style-type: none"> • The basic conditions are (see ITAA 1997 s 152-10): • maximum net asset value test: s 152-15 • active asset test: s 152-35, and • taxpayer is an SME: ss 328-110 and 960-100. <p>Goods and services tax</p> <ul style="list-style-type: none"> • GST may be described as a tax on the supply of goods and services in Australia. • It requires one to pay the GST payable on any taxable supply that they make.

TOPIC	NOTES
	<p>What is a taxable supply?</p> <ul style="list-style-type: none"> GST is payable if a supply is a taxable supply: s 9-10. Taxable supply must be: • for consideration • made in the course or furtherance of an enterprise that the supplier carries on • connected with Australia, and • made by a supplier who is registered or required to be registered under the GST Act. <p>Difference between a GST-free supply and an input-taxed supply?</p> <ul style="list-style-type: none"> A supply is not a taxable supply to the extent that it is GST-free or input-taxed . Some examples of GST-free supply include: • supply of a “going concern” as defined in s 38-325(2) (such as sale of a business) • education • water and sewerage, and • childcare. Some examples of input-taxed supply include: • renting by a landlord of residential premises to a tenant • sale of “second hand” residential premises, and • financial supplies. <p>What are the GST registration requirements?</p> <ul style="list-style-type: none"> An entity is required to be registered if: • it is carrying on an enterprise as defined in s 9-20, and • its current annual turnover meets the registration turnover threshold: see s 23-5. Registration turnover threshold for profit-making enterprises is \$50,000 (or such higher amount as the regulations supply): s 23-15 <p>Is sale of property GST-free?</p> <ul style="list-style-type: none"> sale of property is GST-free in some circumstances Section 38-325 deals with “sales and purchases as a going concern”. Sale of farm and sales and purchases as a going concern only two categories. <p>Fringe benefits tax</p> <ul style="list-style-type: none"> FBT is a tax payable by an employer based on the value of taxable fringe benefits provided to an employee by an employer or an associate. <p>How does FBT impact on the sale or purchase of a business?</p> <ul style="list-style-type: none"> FBT impacts on the calculation of adjustments at settlement. Where an existing employee of the business who is to continue to be employed by the purchaser of the business after settlement receives any fringe benefits that may have been prepaid by the current owner/existing employer or will be post-paid by the new owner/new employer, those benefits and any FBT payable need to be taken into account in the calculation of adjustments at settlement. FBT should also be considered as part of the due diligence process and whether the benefit is an appropriate expense for the business

<p>ADVISING ON FINANCING AND SECURITIES [PDF]</p>	<p>Debt financing</p> <p>Common questions</p> <p><u>Issues need to be considered by a borrower and its legal advisors?</u></p> <ul style="list-style-type: none"> • rate of interest. • extent to which income tax will impact on the finance arrangement. • fees charged by the lender. • type of security required by the lender. • specific provisions of the loan and/or security documentation and of any relevant legislation. <p><u>Issues need to be considered by the lender and its legal advisors consider?</u></p> <ul style="list-style-type: none"> • Whether the borrower has authority to borrow. • purpose of the loan/financing arrangement. • borrower’s exposure to other lenders. • term of the loan/financing arrangement. • specific provisions of the loan and/or security documentation and of any relevant legislation. <p><u>What type of loans are available for individuals?</u></p> <ul style="list-style-type: none"> • For individuals, the most common financing package is the housing loan. This loan is secured over the individual’s place of residence and its terms are quite standard. Typically, the borrower’s primary concerns are the rate of interest and period of the loan, and lengthy negotiations with the lender are not usually necessary. • In Australia, the National Credit Code (NCC) (in <i>National Consumer Credit Protection Act 2009</i> (Cth) Sch 1) regulates loans to a “natural person” where the credit is provided “wholly or predominantly for personal, domestic or household purposes”. <p><u>What types of loans are available for business borrowers?</u></p> <ul style="list-style-type: none"> • For business borrowers -market open and regulated. • Common form of small business finance is an overdraft or line of credit. • Commercial bills, leasing, bank guarantees and letters of credit are also popular with business borrowers. • For larger business entities, lenders may offer trade finance facilities or foreign exchange and interest rate risk management financial products. • Under Part 2J.3 of the <i>Corporations Act 2001</i> (Cth), a company may provide financial assistance to a person to acquire shares in the company or holding company if : <ul style="list-style-type: none"> • the assistance does not materially prejudice the company, its shareholders or its ability to pay its creditors • shareholder approval is obtained, or • the assistance is exempted. See ss 260A-C. <p>What forms of security may be required by the lender?</p> <ul style="list-style-type: none"> • common types of security include: <ul style="list-style-type: none"> • mortgage over land (legal, equitable or leasehold) • a security interest (which includes a mortgage, charge, pledge, certain finance leases and commercial consignments) over personal property, and • a guarantee. <p>Mortgage over land</p> <p>Priority rules-</p> <ul style="list-style-type: none"> • Competition between registered mortgages. The date and time of registration will dictate the order of priority.
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- Competition between unregistered mortgages -mortgagee first in time has a stronger claim at law, but an earlier in time (and unregistered) mortgage may lose its priority to a later one if the earlier mortgagee was careless in protecting its interest under the mortgage. (For protection better to lodge caveat on title)
- Competition between registered and unregistered (or equitable) mortgages -registered takes priority over unregistered.
- Priority rules in respect of securities over land are not affected by the basis for determining priorities between competing “security interests” over “personal property” under the *Personal Property Securities Act 2009* (Cth) (PPS Act) which only affects priorities between security interests over personal property.
- Personal property defined in PPS excludes land and fixtures attached to land.

When should a caveat be lodged?

- A caveat is a notice to the registrar of the existence of the mortgagee's equitable mortgage and it prevents the registrar from registering any dealings with the land which are inconsistent with those of the party who lodged the caveat (called the caveator).

Security over personal property

Common questions

What is “personal property” under the PPS Act?

- Personal property is any property excluding land and fixtures attached to land and some statutory licences (for example, water rights and mining tenements).
- Excluding real estate (and some statutory licences), all tangible and intangible property of a company, including goodwill and any intellectual property, is the personal property of a company under the PPS Act.

What is a “security interest” under the PPS Act?

- A security interest to include any consensual arrangement which confers an interest in personal property that “in substance” secures payment or performance of an obligation.
- This includes traditional securities over personal property, such as a mortgage, charge or pledge, as well as a conditional sale agreement with retention of title by the seller.
- PPS also deems some other arrangements to be security interest – finance leases and commercial consignments.
- A security interest may be given over (specified or general) personal property owned by an individual or a company and is usually linked to a loan agreement or facility document which creates the relevant debt or obligation.
- Under PPS- property subject to security interest- collateral, person having rights in collateral is borrower (grantor) and financier or party having benefit in security interest is secured party.

What is perfection by registration on the Personal Property Security Register?

- The PPS Act has a concept of “perfection” of a security interest after it is validly created and evidenced in writing that describes the collateral and is signed or adopted by the grantor.
- The most common perfecting step is registering a financing statement for a security interest on the Personal Property Securities Register (PPSR).
- PPSR is a single national online register of security interests over personal property created by the PPS Act. It is accessible online and is managed by the Australian Financial Security Authority.
- Under the PPS Act, the perfection of a security interest over personal property is optional, not mandatory. The benefit of perfection is priority and protection of secured creditor status in the event of the insolvency or bankruptcy of the grantor of the security interest.

How is a financing statement for a security interest registered on the PPSR?

- A security interest in personal property may be notified online by accessing the PPSR and completing a Financing Statement.

	<ul style="list-style-type: none"> • Not possible for the document which creates the security interest to be lodged with the Financing Statement, as the PPSR is a notification register, not a document register. <p>How is priority of interests determined under the PPS Act?</p> <ul style="list-style-type: none"> • A perfected security interest in personal property has priority over an unperfected security interest over the same collateral. • If both security interests are perfected by registration, then the security interest with the earliest registration time will prevail (subject to some qualifications, notably purchase money security interests which have a “super priority). • Most common perfecting step is registration of a financing statement for a security interest on the PPSR. <p>When can a financing statement for security interest be registered?</p> <ul style="list-style-type: none"> • A financing statement for a security interest may be registered when the secured party reasonably believes that the security interest will arise. • Secured party need not wait for security interest to be put in writing and signed. • AFSA encourages business secured parties to register early by promoting on its website “First in time: First in line”. • There are some types of security interests in personal property that must not only be registered but must be registered within a defined time to get the benefits of priority (such as a purchase money security interests “super priority”). • This depends on the nature of the security interest and the nature of the personal property which is the subject of the interest. • Once a security interest is registered, there may be a need to renew the registration in the future to continue to benefit from the priority conferred under the PPS Act. • Whether a particular registration may require renewal depends on which class of personal property the security interest is over.
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