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KALUS KENNY INTELEX
BUYING AND SELLING REAL ESTATE IN AUSTRALIA

ILN REAL ESTATE GROUP



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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER AUSTRALIAN LAW



“Buying and Selling Real Estate in Australia”

Lawyers at

Kalus Kenny InteleX – Melbourne

INTRODUCTION

The majority of land in Australia consists of freehold title. Registration of ownership of freehold title is recorded using the Torrens system. The Torrens system is a system of title by registration. This means that an interest will only be a legal interest if it is registered on title. Once the interest is registered, that interest is indefeasible and takes priority over all other interests. Both the vendor selling the land and the purchaser purchasing the land execute a legal document transferring ownership. Once settlement of the property has occurred, the transfer document is registered. Each State and Territory in Australia has its own register. The purchaser becomes the registered proprietor of the land, which is recorded on the Torrens title register. The registered proprietor is issued with a specific certificate of title for the property which typically contains a volume and folio number and a plan identifying the land, details of any restrictions (e.g. a covenant) affecting the land and details of any encumbrances (e.g. mortgage). Titles may comprise of land or spaces defined by a plan.

In recent years, property settlements and registration of interests on the Torrens system have been effected electronically through the Property Exchange Australia platform (“PEXA”). One of the key benefits of using PEXA is that registration of interests is effected immediately. Certificates of title were previously issued only in paper, but now titles can be issued electronically.

COMMON TYPES OF PROPERTY TRANSACTIONS

Land

In Australia you can acquire or sell a vacant block of land. Subject to zoning, the land maybe used to construct a residential and/or commercial building on the land. Developers commonly subdivide large blocks of vacant land into smaller blocks, (subject to local zoning and planning restrictions) which are then on-sold to purchasers. It is often a condition of the land contract that purchasers must commence and complete the construction of a dwelling on the land within a certain timeframe. The type of dwelling may be controlled by restrictions imposed by the vendor, or the planning authority (e.g. local council) such as a covenant, building envelope and/or design guidelines.

Residential Dwellings (Existing and Proposed)

Existing Dwellings

The purchase or sale of an existing residential dwelling is a common transaction. This involves the transfer of ownership of the land, including any fixed dwelling, improvements, and other permanent fixtures on the property. The property is usually sold to a purchaser in its current condition and subject to all defects. It is important for purchasers to undertake their own due diligence enquiries concerning the property and to be satisfied with its state and condition. These enquiries should be conducted before a contract is signed. As contracts are prepared by the vendor, they tend to be one-sided (except for certain statutory protections). Alternatively, the contract could be conditional on the purchaser being satisfied with certain enquiries and if not, then have a right to terminate the contract. Purchasers are entitled to attempt to negotiate



contracts in order to make them more even handed.

Proposed Dwellings

Purchasing “off-the-plan” involves purchasing a dwelling that is yet to be built on a lot which is yet to be created. Settlement occurs once the subdivision has been registered (which creates a title for the lot), and construction of the dwelling has been completed. Off-the-plan contracts are complex, but commonplace. Both the land and what is being constructed on the land may be subject to changes by the vendor. It is important for purchasers to obtain legal advice before entering into such a contract. Depending on the State and Territory, there can be stamp duty savings when purchasing off-the-plan. It is important for vendors who are selling “off-the-plan” to obtain legal advice before the contract is prepared. Settlement under an off-the-plan contract may take several years to settle, as the vendor has a specified timeframe in which to register the plan and construct the dwelling. These types of contracts are typically drafted on a vendor favourable basis, with the vendor having flexibility regarding construction and broad termination rights, especially if the development does not proceed. A purchaser’s right to terminate the contract is usually limited. Residential, commercial, and vacant land can be purchased and sold “off-the-plan”. Selling “off the plan”, is possible because of a legislative regime which allows this, so long as the parties may terminate the contract if the title is not created by an agreed date.

Commercial Properties

Commercial properties include retail, industrial and office spaces. The acquisition or sale of a commercial property may be with vacant possession or subject to a lease (i.e. tenanted). A property may comprise both commercial and residential spaces (e.g. commercial space at ground level, with adjoining residential space

upstairs). If the property is leased and is sold to a purchaser subject to the terms of the lease, it is important for the purchaser to review the terms of the lease, especially if the purchaser is relying on the rent for income. The sale of commercial properties is usually a taxable supply and subject to the payment of a Federal Goods and Services Tax (“GST”). However, the sale of leased property can be GST free if the parties agree that it is the supply of a “going concern”. To satisfy the going concern exemption, certain requirements must be met. It is important that purchasers and vendors obtain legal advice in relation to the sale and purchase of commercial property and any GST consequences.

Retail Properties

When buying or selling a retail property in Australia, each state and territory has its own specific retail legislation, which governs retail premises, the lease provisions and disclosure documentation. If purchasing a leased property, it is important for a purchaser to review the lease documentation. A failure to do so could adversely affect the purchaser’s rights as the future landlord to enforce the terms of the lease. Some leases have termination rights, or rights under the retail lease legislation for longer terms, and certain rent review methodology. The applicable retail lease legislation has a big impact on leases, so leases are not always what they seem to be.

DIFFERENT METHODS OF SALE

Private Sale vs Auction

Private Sale

A property can be sold privately through a sales agent or by private sale directly between a vendor and a purchaser. In most cases, a vendor will engage a real estate agent to sell the property, as this can be more efficient, and the vendor has the benefit of the real estate



agent's brand, reputation, and database of potential purchasers. In these situations, contracts may be negotiated and re-drafted to suit both parties and may include agreed conditions.

Auction

A property can also be sold at a public auction. This involves the engagement of a real estate agent, who is also an auctioneer. An auction date is set by the vendor and interested buyers can attend the property and submit their offers by placing a public bid. Each State and Territory has its own legislation which governs auctions. Sales of property by auction are unconditional. The contract is signed, and the deposit is paid after the auction has concluded. Generally, the vendor controls the bidding by setting a reserve price, which is the minimum price a vendor will accept for the property. Sometimes, the bidding at a public auction does not reach the vendor's reserve price. When this occurs, the property is "passed in" and the highest bidder has first right to negotiate with the vendor at the reserve price. Generally, at auctions it is more difficult for a purchaser to renegotiate the contract.

Expression of Interest vs Tender

There are methods of gauging interest in a property without a public auction or directly negotiating with a purchaser straight away. Such methods may involve an expression of interest or a tender.

Expression of Interest

The vendor of the property invites potential purchasers to submit an expression of interest ("EOI"). The EOI form may be prepared by the real estate agent or by the vendor's solicitor. It contains details of the purchaser, price, and terms such as the deposit, settlement period and special conditions. The terms of the EOI make it clear that the submission of an EOI

does not create a contract for the sale of the property. It is not binding. Therefore, no legal rights or obligations except those contained in the EOI document are deemed to arise until a contract of sale is executed and exchanged and the full deposit is paid. The vendor may accept or reject any EOI in its absolute discretion without giving reasons and the vendor is not bound to accept the EOI with the highest price or any EOI received. EOIs can be complying or non-complying and a vendor is free to accept either. Once parties are close to agreement on commercial terms, a contract of sale must be entered into to effect a binding transaction. With an EOI, purchasers can be more casual with their proposal.

Tender

The vendor invites offers from tenderers for the purchase of the property. The tender document, which is usually prepared by the vendor's solicitor, sets out the terms of the tender and attaches a copy of the contract of sale. The tenderer must deliver the tender to the tender box in a sealed envelope. The tender documents include the signed tender form, signed contract documentation, including guarantee and a cheque for the deposit. The key difference between a tender and an EOI is that each tenderer who lodges a tender is deemed to have made an irrevocable offer to purchase the property for the tender price and on the terms and conditions of the tender and the contract of sale. The offer made by the tenderer remains open for acceptance by the vendor for a certain period and it cannot be revoked before that time by the tenderer. Tenders can be complying, or non-complying and a vendor is free to accept either. The vendor is under no obligation to accept any tender, which is not lodged in accordance with the terms of the tender and is not bound to accept the highest tender. This method of selling is usually undertaken for large



residential and commercial properties, like shopping centres, where the vendor prefers to keep the sale as private as possible. If a tender is accepted, there will be a binding contract between the parties.

DOCUMENTATION

Sale Documents to be in Writing

Each State and Territory has its own specific legislation, which requires that a contract for the sale or disposition of an interest in land must be in writing and signed by the person to be charged.

Contract of Sale

Each State and Territory has available its own standard contract of sale which is in a form approved by the relevant peak body for lawyers (e.g. applicable Law Society or Law Institute) or real estate agents (i.e. the Real Estate Institute for the State or Territory) or both. The contract of sale includes among other things the parties' details, the property (and any inclusions) to be purchased, the price and the settlement date. It is important for purchasers to obtain legal advice before entering into a contract of sale and for vendors when having a contract prepared. It is becoming common for contracts to be signed electronically. However, whether or not banks and other financial institutions are prepared to accept electronically signed contracts is an evolving matter.

Prescribed Conditions

Generally, a contract of sale will contain standard or general conditions of sale, with the ability for the parties to include additional conditions as "special conditions" or to amend the standard or prescribed conditions. In terms of priority, the special conditions of a contract will usually prevail over any standard or general conditions. When preparing a contract of sale for an off-the-plan purchase, conditions

imposed by statute must be included. The requirements for each State and Territory vary.

Disclosure Requirements

The vendor disclosure requirements vary for each State and Territory. In some States, a vendor is required to disclose certain information about the property in the form of a vendor's statement or disclosure statement or by providing copies of certain prescribed documents (e.g. title search, plan, drainage diagrams, registered dealings on title and council certificates). In other parts of Australia, the disclosure regime does not exist or is very limited, with a requirement for the vendor to provide some statutory warranties about the property. It is important that a purchaser obtains legal advice and conducts its own due diligence enquiries and is satisfied in relation to all aspects of the property.

Statutory disclosure obligations provide some protection to purchasers. Non-compliance by a vendor with statutory disclosure obligations may give a purchaser the right to terminate a contract.

Negotiated Amendments

If a purchaser or vendor has concerns or issues regarding the property, then the parties can negotiate any required amendments to the proposed contract before it is signed and exchanged. For example, does the contract need to be conditional on the purchaser undertaking due diligence enquiries or certain works or obtaining reports which must be satisfactory to the purchaser? Is there a particular issue concerning the property (e.g. contamination) which needs to be in a special condition? Is the vendor obliged to carry out works before settlement?

Conditional Contracts

It is not uncommon for the contract of sale to be subject to certain conditions. An off-the-



plan contract is one example of a conditional contract, as it is subject to the registration of a plan of subdivision. A contract could also be conditional on finance, the purchaser's due diligence enquiries (e.g. title and property searches, building and pest reports), either the purchaser or the vendor procuring a permit for the property or the vendor agreeing to complete certain works before settlement. It is important that the condition is included in the contract and drafted carefully to ensure that the party relying on the condition can terminate the contract without penalty if the condition is not satisfied and is refunded any deposit monies paid.

Heads of Agreement

Before a contract of sale is entered into, the parties may execute a preliminary agreement. A heads of agreement ("HOA") is one example. A HOA is commonly used when the parties to a large transaction are seeking to secure an early commitment from the other party and wish to impose obligations of exclusivity and confidentiality. One of the advantages of having a HOA is that it sets the contractual framework for the parties at an early stage and helps identify the key terms. The HOA can create a timetable for certain events to happen. The parties can specify in the HOA if they intend to be immediately bound by its terms or if they are only bound upon the signing and exchanging of a formal contract of sale. If the HOA is meant to be binding, this needs to be expressed clearly in the HOA. Careful drafting is required. The disadvantages of using a HOA are that it can be time consuming to prepare and it could potentially restrict a party's negotiating position in the future.

Terms Sheet

A terms sheet is another example of a preliminary agreement. A terms sheet can be binding or non-binding between the parties.

Just like a heads of agreement, a terms sheet creates the framework for the sale or acquisition of the property between the parties. The same considerations which apply to a heads of agreement also apply to a terms sheet.

Options

Before a contract of sale is entered into, the parties could enter into an option agreement. Option agreements are commonly used by developers who wish to secure a right to purchase a future development site. Generally, the option agreement will require the payment of an option fee which may or may not form part of the deposit which is payable under the contract of sale. The option to acquire the property is exercisable within a specified time frame, which could be several months or years. The contract of sale for the purchase of the property should be attached to the option agreement. If the option is not exercised within the specified timeframe, it lapses. Any option fee paid is usually forfeited to the vendor. It is common for the grantee under an option to have the right to assign the benefit of the option to a third party.

There are several types of option agreements. A call option is where the purchaser has the right to purchase the land, but no obligation to do so. A put option is where the vendor has the right to sell the land to the purchaser, but no obligation to do so. A put and call option is where the purchaser has the right to call for the option to be entered into by the purchaser (i.e. require the vendor to sell) or the vendor can put the contract to the purchaser (i.e. require the purchaser to buy). A put and call option agreement is normally used where the purchaser intends to proceed with the acquisition. Each State and Territory has its own stamp duty regime when dealing with options.



Terms Contracts

A terms contract is a special type of contract. Except for Victoria and Western Australia, these types of contracts are referred to as instalment contracts. What constitutes a terms contract or an instalment contract will vary depending on the applicable legislation of the State or Territory. Terms contracts can be created inadvertently. Care must be taken. Generally, a terms contract can arise when a purchaser is obliged to make multiple instalments of the price under a contract or the purchaser is entitled to possession or occupation of the property before settlement. In some States, the title to the property may be transferred before the purchaser has paid the full price. While in other States the use of these types of contracts is either prohibited or their use is severely restricted. Where terms contracts or instalment contracts are permitted, the relevant statutory requirements must be strictly complied with to avoid creating a contract which is voidable by the purchaser. Terms contracts can impose restrictions on the vendor's ability to mortgage the property once sold. Depending on the State or Territory, the consent of the purchaser is required to any mortgage of the property. Terms contracts are not common but were used for the sale and acquisition of rural properties (e.g. farms). Legal advice should be obtained when you are dealing with a terms contract or instalment contract.

DIFFERENT TYPES OF OWNERSHIP

In Australia there are several distinct ways that property can be owned.

Sole Proprietor

If a property is acquired by an individual or by a single corporate entity, that individual or single corporate entity will be recorded on the certificate of title as the sole registered proprietor.

Co-ownership

If two or more parties purchase property together in Australia, those owners are co-owners. The two types of co-ownership are joint tenancy and tenancy in common. Careful consideration as to how property is owned is important as this can have implications for stamp duty, estate planning, finance, and tax implications. The co-ownership of a property can be registered as joint tenants or as tenants in common or a combination of both.

Joint Tenancy

A joint tenancy means that all co-owners own the property jointly and equally and each co-owner is entitled to the whole of the property. This means that upon the death of any of the joint tenants, the ownership share of the deceased person automatically passes to the surviving joint tenant/s equally. It is the right of survivorship, which is the principal difference between a joint tenancy and a tenancy in common. It is important that legal advice be obtained when determining whether a property should be owned as a joint tenancy or as tenants in common. A joint tenancy form of ownership is commonly used by spouses/domestic partners. In certain circumstances, a joint tenancy can be severed and converted into a tenancy in common.

Tenants in Common

A tenancy in common allows two or more parties to record and specify the percentage in which they will own a share in the property. This form of ownership is used when the contribution to acquire the property is unequal or where the 'partners' are not spouses. For example, the transfer of land would refer to shares as proportions. This type of ownership allows each owner to separately deal with their respective share of the property as they require. This also includes transferring their share to a third party or bequeathing their share in the



property under their will. This form of ownership is commonly used in business acquisitions.

DUE DILIGENCE CONSIDERATIONS

Vendor disclosure requirements

A purchaser should be satisfied in relation to all aspects of the property being purchased as most contracts will be vendor-biased and once signed a purchaser will have little in the way of rights unless those rights are specifically negotiated. It is important that purchasers conduct their own due diligence as the disclosure requirements imposed on vendors in Australia varies from each State and Territory. It is important that legal advice is obtained as early as possible in the process. It is important that a vendor obtains legal advice to ensure they comply with any disclosure requirements which are imposed by the applicable State or Territory legislation. Otherwise, a failure to comply may give a purchaser rights to terminate a contract before settlement.

Caveat Emptor

The doctrine of caveat emptor or “let the buyer beware” means that purchasers looking to buy property in Australia should undertake their own due diligence enquiries. Due diligence enquiries can be conducted before a contract is signed or the contract can be signed subject to the purchaser undertaking its due diligence enquiries and being satisfied with them within a specified timeframe. The extent of those enquiries will depend on the value of the property.

Title Search

Conducting a title search of the property is the first step. It is important to check that the vendor who is selling the property is actually the registered owner on title and to see a plan of the land being purchased. In Victoria, a person can sell land before that person has

become the registered proprietor of the property. This can be achieved by providing a purchaser with evidence of the right to sell, such as the lodgement of a purchaser’s caveat.

Restrictions /Encumbrances

A search of the title and plan will reveal information which is relevant for a purchaser. Such information will show if a property is mortgaged or if there are restrictions, easements or encumbrances (any registered interests or third party agreements which affect or limit ownership or use of the land), which burden the property and potentially limit what a purchaser can do with the property. A title search will also reveal if any third parties have registered their interests, by a caveat or a mortgage. When a vendor sells and settles the property, the vendor must provide clear title at settlement to the purchaser. All mortgages and caveats must be removed by settlement. A vendor warranty to provide clear title is common in a contract.

Planning Checks

Purchasers should check the local planning scheme or planning restrictions for the property being purchased. This is important if a purchaser has a particular use for the property. In Australia, such controls are achieved through legislation and planning policies and instruments. Each State and Territory has its own regulatory framework. Responsibility for implementing those requirements is usually with the State Government and the local councils. Contracts of sale often contain conditions, which provide that a purchaser buys the property subject to all restrictions, including those under the relevant planning scheme. It is important that a purchaser is satisfied that they can use the property for the desired purpose. For example, is a permit required for the proposed use? In certain States, disclosure obligations will reveal the



relevant zoning of a property, but full enquiries may be warranted.

Property Inspections

A physical inspection of the property by the purchaser is important. They may include expert building inspections and pest and termite inspections. A purchaser should check that the improvements on the property are sound and compliant with the applicable building legislation. A contract of sale will often include an acknowledgement that the purchaser accepts the condition of the property as at the day of sale. It is equally common that the vendor need only deliver the property at settlement in the condition it was in on the day of sale. A contract can be conditional on the purchaser obtaining a satisfactory pest/termite inspection and if not satisfactory, then the purchaser can terminate the contract.

Survey

Purchasers should check the title boundaries of the property. Are all fences and improvements erected within the title boundaries of the property? If not, there could be issues in the future if the owner of a neighbouring property seeks to enforce its rights. The principle of adverse possession means that a person may claim land by long usage. The requirements for adverse possession claims vary from State to State. However, adverse possession claims are not part of the land law in the Northern Territory or the Australian Capital Territory.

Services

As the vendor disclosure regimes vary from each State and Territory, it is important that a purchaser is satisfied with the level and quality of the services (i.e. water, sewerage, electricity, and gas) at the property. Do they exist? What is the state and condition of the services at the property? A failure to check for services could result in a purchaser incurring substantial cost if

they need to be installed to the property and connected.

Environmental Checks

Each State and Territory has its own regime for dealing with contaminated land. Generally, the person who causes the contamination is responsible. However, if that person no longer owns the land, or cannot be found, then the relevant authorities may require the owner of the land to deal with any contamination issues. It is important for purchasers to check the environmental condition of the property, especially if they have a particular use in mind or the property may be contaminated. Although this is less of an issue for existing residential land, it is a relevant consideration for industrial or commercial sites. If the land is contaminated, certain uses may be prohibited by the relevant planning regime, unless certain requirements are met (e.g. remediation of the land). If a purchaser is looking to use the property sensitively (e.g. residential or childcare), it is essential that the purchaser is satisfied with the environmental condition of the property. It is common in contracts of sale for a vendor to sell a property in its current condition and subject to any contamination. A vendor will seek a release and indemnity from a purchaser in respect of any claims, which may arise from contamination. If a vendor has a contamination report, the report will often be disclosed to the purchaser and the purchaser will be expected to purchase the property subject to that report.

Finance

If a purchaser requires finance to purchase the property, then the contract can be made conditional on finance being obtained.

Land Tax

When purchasing a property, it is important to understand what annual outgoings are payable



such as council rates, water rates and land tax. Land tax is calculated as a percentage based on the value of land and is an annual charge. The purpose of land tax is to assess an owner of land on the aggregate value of all taxable land they hold in a particular State or Territory. Land tax is payable in each State and Territory in Australia except for the Northern Territory. The thresholds for when land tax is payable vary for each State and Territory.

If the property being purchased is held on trust, a trustee surcharge may apply. New South Wales, Queensland, Victoria, and South Australia have a trustee surcharge regime. Depending on the State, different tax-free thresholds apply for property held on trust. Land tax is not payable by an owner who uses the property as their principal place of residence. Foreign owners are obliged to pay additional absentee duty.

Leases

If the property is leased, then the sale of the property will be subject to the lease, unless the lease expires before settlement occurs. In some States and Territories, leases of a certain duration must be registered on title. If a property is leased, this means that vacant possession of the property will not be provided to the purchaser at settlement. The type of property (e.g. residential, commercial, or retail) will determine the type of lease. For example, if the property is used for retail purposes (e.g. a shop), then the lease will likely be a retail lease and will be subject to the relevant retail tenancy legislation. Each State and Territory has its own retail tenancy legislation, which is very prescriptive. It is important for a purchaser to review the terms of the lease to ensure it is enforceable, the vendor has been complying with the retail tenancy legislative requirements and there are no tenant rights in addition to those contained in the lease.

Personal Property Securities Act 2009

Purchasers should check whether the vendor has granted any security interests under the *Personal Property Securities Act 2009* (Cth) (“Act”). This Act came into operation on 30 January 2012 and it relates to personal property. A security interest in personal property includes most forms of tangible and intangible property (e.g. motor vehicles, goods, long term leases). However, the Act excludes dealings in land. If there are security interests registered against the vendor, then a purchaser should check if the security interest affects any goods, plant, or equipment, being purchased by the purchaser. If a security interest exists, the purchaser must ensure that the contract requires the security interest to be released at settlement. The release of registered security interests is usually dealt with in the conditions of the contract.

GOODS AND SERVICES TAX

GST is a Federal tax of 10% introduced in Australia on 1 July 2000 under *A New Tax System (Goods and Services Tax) Act 1999* (Cth). It is similar to a value added tax, whilst the primary liability for GST is on the vendor, or supplier, a contract may transfer responsibility to the purchaser. GST is imposed on the supplier in respect of taxable supplies. Whether GST applies to a particular property transaction will depend on whether the supply is taxable.

Threshold Requirements

Whether a supply is taxable will depend on four threshold requirements:

- Consideration (monetary or otherwise, but not a gift);
- Australia (transaction must occur in Australia);



- Registered entity (supply must be made by an entity registered for GST); and
- Enterprise (supply must be made in the course of an enterprise).

Just because a vendor is not registered for GST, does not mean that GST is not payable on the transaction. GST can still be payable if the supplier is not registered for GST but is required to be registered for GST. To avoid unexpected GST liability, it is important that the right questions are asked at the outset and legal and accounting advice is obtained.

Whether Price Inclusive or Exclusive of GST

In property transactions, it is the vendor as the supplier of the property who is primarily liable to remit the GST to the Australian Taxation Office (“ATO”). If GST is payable, then purchasers should pay attention as to whether the price for the property is inclusive or exclusive of GST or GST free. If the purchase price is exclusive of GST, the additional cost of GST can be significant, depending on the price for the property.

The imposition of GST is an important consideration for a vendor when preparing the contract of sale. If a vendor expects to receive a certain price for the property, then GST needs to be factored into the price. Otherwise, the vendor could receive 10% less at settlement. How GST is dealt with under the contract is important. For example, if a vendor expects to receive a particular price for a property, then the price should be stated in the contract as GST exclusive. There should be a provision which requires the purchaser to pay or reimburse the vendor for GST in addition to the price. Similarly, for a purchaser, GST is an important consideration when purchasing a property. The imposition of GST needs to be factored in when considering the purchase price.

If GST is payable on a property transaction (i.e. the four threshold requirements have been satisfied), then the supplier (i.e. vendor) must provide the purchaser with a tax invoice for the GST. A contract of sale is not usually a valid tax invoice. Stamp Duty is payable on the higher of market value and the purchase price for the property plus GST.

GST Free Supplies

Not all supplies of property will attract GST. Some supplies are treated as being GST free (i.e. no GST is payable). The following are examples of GST free supplies:

Sale of a farm

In order for the sale of a farm to be GST free, the property must have been used as a farm for 5 years before the sale.

Going Concern

The sale of leased commercial/retail or industrial property can be GST free. This is referred to as the “going concern” exemption. In order for the exemption to apply, certain criteria must be satisfied:

- The purchaser is registered for GST;
- The vendor and purchaser agree in writing that the supply of the property is that of a going concern;
- The vendor must supply everything necessary for the continued operation of the enterprise (i.e. the enterprise of leasing); and
- The vendor must carry on the business until settlement.

If the going concern exemption is not satisfied, it is critical that the contract contains a claw back provision for GST. The claw back provision will enable the vendor to recover the amount of GST from the purchaser. It is important for the claw back provision to remain enforceable



after settlement has occurred for a certain period of time in case there is an issue. It is not uncommon for a claw back provision to remain enforceable for a number of years after settlement.

Input Taxed Supplies

The sale of existing residential property (i.e. not new residential property) is input taxed. This means that no GST is payable. Even if the property is owned by a company, provided the property has been used as residential premises, it will be input taxed. New residential premises, the sale of new residential or commercial residential property will attract GST if sold in the course of an enterprise.

Mixed Supplies

Certain supplies of property are considered to be a “mixed supply”. That is, both taxable and nontaxable (i.e. input taxed) for GST purposes. An example of a mixed supply is the sale of commercial or retail property, which also has existing residential premises. It is important that the contract deals with the mixed supply issue. It will be necessary to apportion the price and determine what portion of the property constitutes the taxable supply and the non-taxable supply.

Margin Scheme

If GST is payable on a property transaction, the amount of GST payable can be reduced if the vendor can adopt the margin scheme. Developers prefer to apply the margin scheme (if it is available) to the calculation of GST. It is important to understand that the margin scheme is not automatically available. Certain criteria have to be satisfied before it can be applied. Generally, a vendor can only sell property using the margin scheme if they purchased the property using the margin scheme, or no GST was payable.

The application of the margin scheme will differ depending on when the property was acquired:

- If the property was owned by the vendor as of 1 July 2000 (i.e. was acquired before 1 July 2000 when GST was introduced); or
- If the property was acquired by the vendor after 1 July 2000 (i.e. after GST was introduced).

If the property was owned by the vendor as of 1 July 2000, then GST is calculated on the margin or difference between the valuation of the property as of 1 July 2000 and the sale price. If the property was acquired by the vendor after 1 July 2000, then GST is calculated on the margin or the difference between the acquisition cost (i.e. what the vendor paid for the property) and the sale price (i.e. what the vendor is now selling the property for).

Assuming the margin scheme is available, the parties must agree in writing that it applies. Such agreement is usually contained in the contract, but it can sit outside of the contract.

GST Withholding Regime

Since 1 July 2018, purchasers of certain types of residential premises and potential residential land are required to withhold GST and pay it to the ATO.

The withholding regime applies to supplies by way of sale or a long-term lease where the contract is entered into:

- On or after 1 July 2018; or
- Before 1 July 2018 where the first consideration (excluding the deposit) is received on or after 1 July 2020.

The GST withholding regime applies to supplies for:

- New residential premises (that are not created through substantial renovations or commercial residential premises); and



- Potential residential land that is included in a property subdivision plan at the time of supply (i.e. settlement of the transaction), where:
 - The land does not contain buildings used for commercial purposes;
 - The recipient is not registered for GST and does not require the land for a creditable purpose.

A vendor of residential premises or potential residential land must give the purchaser written notice before making a supply. The notice must contain details as to whether the purchaser will be required to make a withholding payment. The notification requirements also extend to existing residential premises even if the supplier is not registered or required to be registered for GST. Failure to comply with the scheme is a strict liability offence.

OTHER IMPORTANT CONSIDERATIONS

Cooling off

Generally, once a contract of sale for property has been properly entered into, it is binding on the parties. However, in Australia, certain States and Territories have legislation which provides a purchaser of residential property with a statutory right to “cool off” under a contract. The cooling off right means that subject to certain conditions being met, a purchaser may bring the contract to an end by notice in writing to the vendor. The cooling off right has to be exercised within a specified period of time from when the contract of sale was signed (usually 3-5 business days).

Each State and Territory has their own statutory requirements, including the timeframe, the percentage of money to be forfeited and the notice requirements, except for Tasmania and Western Australia. Depending on the State or Territory, there may be some exceptions to the cooling off rights.

Exceptions may include if the property is purchased at a public auction or within three days of auction or is over a specified size. It is important that legal advice is obtained if there is a statutory right to cool off and a purchaser wishes to exercise that right. If the cooling off right is not exercised in strict compliance with the relevant legislation, then a purchaser will be legally bound under the contract.

Registration fees

Each State and Territory has its own land titles registry office which charges a registration fee for transferring the ownership of the property. This transfer fee is charged in addition to any stamp duty which may be payable on the property transfer. The transfer of land registration fees varies depending on the State or Territory and are often calculated on a sliding scale according to the purchase price. Registration fees are also charged to register any other dealing against the property title (such as a mortgage or caveat).

PEXA fees

PEXA is an electronic lodgement platform, which enables property settlements to occur electronically online and in real time. PEXA is currently operating in Victoria, Queensland, New South Wales, South Australia, Western Australia, and the Australian Capital Territory. This electronic process has replaced the former paper settlement method. PEXA allows the parties to a property transaction to settle, stamp and register the transfer of the property online. All parties to the conveyancing transaction are charged a PEXA fee. This fee covers services provided by PEXA, which include pre-population of land registry data, lodgement verification checks and the use of the PEXA platform. The PEXA fee varies depending on the transaction.



Stamp duty payable on acquisition of land (or an interest in land)

If you acquire property in Australia, each State and Territory requires 'stamp duty' to be paid on the acquisition. Stamp duty is charged at a flat rate or an ad valorem rate (based on the value of the transaction). The rate of duty payable on a property acquisition varies between each State and Territory. It can also depend on whether or not you are an 'owner-occupier' or an investor. In some cases, the location and nature of the property (whether rural or suburban) can affect the rate of duty payable. The timeframe for paying stamp duty varies for each State and Territory and there are various stamp duty concessions and exemptions available. Generally, stamp duty is payable by the purchaser. It is important to understand how much stamp duty is payable in any property transaction and to obtain legal advice.

Depending on the State or Territory, you may be able to apply for a stamp duty exemption or reduction. This is generally where there is no change in the underlying ownership. In Australia, first home buyers can apply for a stamp duty concession and in some States, pensioners can also apply for a concession.

Higher rates of duty are payable on property acquisitions if you are a foreign purchaser. A higher rate of duty will be imposed on trusts with foreign beneficiaries who purchase property.

In the wake of COVID-19, some states are removing or reducing stamp duty payable to stimulate activity.

Landholder duty

Each State and Territory has its own landholder duty regime, which imposes duty on certain acquisitions of interests in companies and unit trusts that own land. A landholder is generally

a company (private or public) or a unit trust scheme which has land holdings of a minimum threshold value, which varies amongst each State or Territory. What constitutes landholdings is broadly defined and depending on the State or Territory includes interests in land (including leases), fixtures on the land or fixtures held separately on the land and may include certain rights in relation to the land such as mining tenements and derivative mining rights. In Victoria, economic entitlements in relation to the land can constitute a landholding. A landholder may be entitled to land in different ways by direct ownership (e.g. registered proprietor), indirect ownership (e.g. constructive ownership) or deemed ownership (e.g. uncompleted agreements). The acquisition of an interest in a landholder which is subject to the regime has to satisfy a threshold requirement before duty is payable (e.g. constitute a significant interest). Exemptions or concessions may apply for landholder duty if the acquisition is due to a corporate reconstruction or consolidation. Duty is charged at the same general rate as if it were an acquisition of the real estate held by the landholder. Liability for payment of landholder duty varies. In some States, liability for landholder duty is joint and several between the acquirer and landholder. In other States, landholder duty is payable by the person who makes the acquisition. It is important to seek legal advice.

Economic entitlements

Landholder duty in Victoria on economic entitlements has impacted developers and affected how development agreements are drafted. When the economic entitlement provisions were introduced, they were limited in their application and only applied where the landholder was a private company or a unit trust and there was a 50% threshold. The provisions did not apply to landholdings of



individuals or discretionary trusts. However, since 19 June 2019, the 50% threshold has been removed and the provisions apply to any type of landholder. A person who acquires an economic entitlement in relation to land is taken to have acquired a beneficial ownership of the land. If the arrangement does not specify the percentage of economic entitlement, it is deemed that the person has acquired a 100% interest in the relevant land. Economic entitlements include an arrangement under which a person is entitled to participate in the income, rents or profits of the land, proceeds of sale or capital growth. It is important that legal advice is obtained when drafting agreements for these types of arrangements.

Verification of identity

It is a requirement of the land titles office in each State and Territory that the identification of the parties in a property transaction be verified (“**VOI**”). VOI checks are intended to protect against identity theft and fraudulent land title transactions. This VOI requirement applies to individuals as well as corporate entities. The existence of the company must be confirmed and the identity of the persons signing on behalf of the company must be verified. If an attorney has been appointed under a power of attorney, the attorney’s identity must also be verified.

Solicitors are required to certify to the relevant land titles office that the VOI checks have been completed. This verification process is particularly important due to property transactions in Australia now being settled online using PEXA. Verification checks are usually completed by a solicitor for the party or Australia Post. “Reasonable steps” are required to verify the identity of a party. The Australian Registrars National Electronic Conveyancing Council has issued a “verification of identity standard” (“**Standard**”). If the Standard is followed, then that person is deemed to have

taken reasonable steps. If a person resides overseas, the VOI check can be undertaken by a notary public who certifies that they have verified the identity of the party and provide certified copies of the identity documentation (e.g. passport and driver’s licence). The VOI documentation is considered valid for 24 months and can be relied upon across multiple conveyancing transactions.

Adjustments at settlement

In addition to the payment of the price and GST (if applicable) by the purchaser to the vendor at settlement, there is an adjustment of certain annually payable outgoings. Subject to the terms of the contract, certain outgoings are apportioned between the vendor and purchaser. The vendor is usually responsible for all outgoings up to and including the day of settlement and the purchaser is responsible for all outgoings from settlement. The outgoings which are commonly adjusted are council rates, water rates, land tax, owners’ corporation fees/levies and rental income (as applicable).

Before settlement, a statement of adjustments is prepared for the parties. This is usually prepared by the purchaser’s solicitor. The adjustment amount for the outgoings is paid or offset against the balance of the purchase price to be paid by the purchaser at settlement. Unless the contract provides otherwise, there is no adjustment for utilities such as electricity, gas, or telephone services. It is the vendor’s responsibility to ensure that all utilities are cancelled from settlement and it is up to the purchaser to make their own arrangements regarding the utilities from the date of settlement.

Settlement – using PEXA

As previously discussed, PEXA is an electronic lodgement platform that enables legal practitioners, conveyancers, and financial institutions to prepare, lodge and register land



registry documents and effect property settlements online in real time. Using PEXA has led to a significant reduction in the manual processing of paperwork by allowing land registry documents to be lodged electronically. PEXA also facilitates the transfer of funds in real time. PEXA as a platform has its limitations, but it is still evolving and will continue to develop. This means that in some cases the parties are required to complete their standard conveyancing process outside of PEXA (i.e. contract reviews, ordering of property certificates, preparing the statement of adjustments).

Agents

It is common to engage a real estate agent when selling property in Australia. Real estate agents must be licensed and will require the vendor to execute a sales authority or agreement. Each State and Territory has its own legislation which governs the real estate industry. If a real estate agent is engaged, the vendor will be required to pay the agent a commission as agreed in the sales authority or agreement. A common structure can be negotiated. The trigger for payment of the commission is usually when the contract becomes unconditional. The vendor will also be required to pay advertising and marketing costs associated with the sale of the property.

Some real estate agents offer a 'flat fee' or 'fixed fee' service. It is becoming common for buyers to engage agents as buyers' advocates.

Consultants frequently engaged

The types of consultants commonly engaged in property transactions from time to time include builders, building surveyors, land surveyors, environmental and geotechnical consultants, town planners, valuers, feasibility analysts, architects, and engineers. In addition to these consultants, it is also important to obtain legal and accounting advice.

Capital Gains Tax

Generally, tax is payable on the capital gains made from selling property. Discounts are available in certain circumstances. However, this does not apply to gains made from the sale of a principal place of residence.

Death duties

Australia does not have a death duties regime.

IMPORTANT FOREIGN INVESTMENT CONSIDERATIONS

Foreign resident capital gains withholding

Foreign resident capital gains withholding applies to vendors who sell certain taxable property under contracts entered into from 1 July 2016. It applies to sales of property where the contract price is \$750,000 or more. The tax rate is 12.5%. It imposes an obligation on purchasers to withhold 12.5% of the price at settlement and to remit it to the ATO if the vendor is a foreign resident. A foreign resident vendor can claim a credit for the foreign resident capital gains withholding payment by lodging a tax return with the ATO. Australian resident vendors can avoid this requirement by providing the purchaser with a clearance certificate. The withholding obligation applies to both Australian resident and foreign resident purchasers.

Foreign Investment Review Board – foreign purchasers

The *Foreign Acquisitions and Takeovers Act 1975* (Cth) ("FATA"), *Foreign Acquisitions and Takeovers Regulations 2015* (Cth) and the Australian Federal Government's specified Foreign Investment Policy provide the framework for dealing with a "foreign person" or a "foreign government investor" who propose to purchase property in Australia. Depending on the type of property being purchased, if you are a "foreign person" for the



purposes of FATA, you must apply for foreign investment review board (“FIRB”) approval prior to the property being transferred. This means that contracts of sale for property by a “foreign person” are typically conditional on the purchaser obtaining FIRB approval within a specified time. If FIRB approval is not obtained, then the contract can be terminated.

A “foreign person” not only includes an individual who is not ordinarily resident in Australia, but it also includes:

- a corporation or the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; and
- a corporation or the trustee of a trust in which 2 or more persons, who together hold an aggregate *substantial interest*, are:
 - (a) not ordinarily resident in Australia;
 - (b) a foreign corporation; or
 - (c) a foreign government entity.

A “substantial interest” for the purposes of the above means an interest of 20% or more in the relevant company or trust.

There are certain restrictions imposed when dealing with the purchase of residential and commercial property by “foreign persons”. Generally, foreign persons are unable to purchase existing residential dwellings unless they are a temporary resident (at a minimum). By way of contrast, foreign non-residents have the ability to purchase ‘new dwellings’ within Australia. A new dwelling is defined as being a dwelling that has not been previously occupied or a dwelling within a development that has not been occupied for more than a total of 12 months. These parameters aim to encourage the creation of jobs within Australia and also

increase the number of new residences being developed.

There is no threshold for the purchase of residential property, but there is a threshold for the purchase of developed commercial property. If you are a foreign non-resident investing in commercial land, there are specific thresholds that determine whether you are required to notify the FIRB prior to acquiring an interest in property. However, if you are purchasing commercial vacant land, there is no threshold, and you must notify the FIRB. The same situation applies if you are a foreign government investor.

Contracts of sale are generally conditional upon a purchaser obtaining FIRB approval within 30-45 days of the day of sale.

If you are a permanent resident in Australia or if you are from New Zealand, exemptions apply and FIRB approval is not required prior to acquiring an interest in Australian property. If you are a temporary resident, it is likely that you will be granted FIRB approval to purchase vacant land or a residential dwelling off-the-plan, however, the approval is likely to be subject to conditions.

Recent changes due to the Coronavirus

From 29 March 2020 onwards, the Treasurer announced that due to the impacts of the coronavirus all monetary screening thresholds will be temporarily reduced to \$0. The *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* have effected this change. This means that a greater number of investments made by foreign persons in Australia will need approval.

OWNERSHIP STRUCTURE

When looking to acquire property in Australia, it is important to consider the most appropriate legal structure in which to own the property. The key issues will be asset protection, taxation



issues, stamp duty, land tax, estate planning, complexity, and cost. It is important that specific legal and accounting advice is obtained before deciding upon what is the most appropriate structure for ownership of the property. The most common structures are individual, company, trust, partnership, and joint venture. It is also possible to buy an interest in a property by buying shares or units in the ownership structure.

Individual

Ownership by an individual is the simplest option. It means that all debts and liabilities attached to the property will be the responsibility of the individual. The individual will have sole control of the property. An advantage of an individual is that if the property is held as an investment and it is subsequently sold and a capital gain is made, the individual will be able to take advantage of the 50% capital gains discount. The capital gains tax is a Federal tax imposed on the capital gains realised from the sale of assets. To take advantage of the capital gains discount, the property must be held by the individual for 12 months or more. If the property is held by a foreign resident individual, the 50% discount is removed or reduced on capital gains made after May 2012. The main disadvantage with individual ownership is that it does not offer any asset protection. The individual's creditors will have the right to claim against the personal assets of the owner, including the property.

Company

A company is a legal entity and has the same rights and obligations as an individual person but is subject to regulation by the *Corporations Act 2001* (Cth). This means that a company can incur debt, can sue, and be sued and it is taxed as a separate legal entity. One of the advantages of using a company to own the property is that the liability of the owners of

the company (i.e. shareholders) to third parties is generally limited to the amount (if any) which is unpaid on their shares. There are public companies and proprietary companies (i.e. private). A proprietary company is simpler and less expensive to administer than a public company. The process for incorporating a proprietary company in Australia is a relatively straightforward process and inexpensive. A company can be registered within a couple of days. One disadvantage with using a company structure is that if the property is sold and a capital gain is made, the company cannot claim the 50% capital gains discount on any resulting capital gain.

Trust

Under a trust structure, the trustee (who may be an individual or company) holds all income and capital (e.g. the property) on trust for the beneficiaries. The beneficiaries can be individuals, trusts or companies. The trust is created by a document called a trust deed. The trust is governed by the terms of the trust deed, State or Territory legislation and the common law.

Whilst the trustee must be a legal entity, the trust is not a legal entity. It is merely a body of rules around ownership, management, and control. The Torrens system of recording ownership of land in Australia struggles to recognize the existence of a trust as only the trustee is registered on title. No particulars of any trust are recorded in the register which provides anonymity, and also some flexibility.

There are three main types of trusts.

Discretionary Trust

A discretionary trust means that the trustee has the discretion to distribute the income and capital of the trust to a range of beneficiaries. Discretionary trusts (also known as a family trust) commonly have specified beneficiaries,



as well as classes of general beneficiaries (which may include the family members of a named beneficiary and associated companies and trusts). Under a discretionary trust, the trustee can but is not obliged to make distributions, which consider the beneficiaries individual tax circumstances. A discretionary trust may also provide a reasonable level of asset protection as the beneficiaries of the trust are generally not entitled to income or capital until the trustee decides to make the distribution. Another benefit with using a trust is that a trust can take advantage of the 50% capital gains tax discount if the trust held the property for at least 12 months before it is sold and the capital gain is distributed to an individual or another trust.

Unit Trust

Under a unit trust, the beneficiaries (which are referred to as unit holders) subscribe for units in the trust. Each unitholder has a fixed interest in the capital and income of the trust that corresponds with the proportion of units they hold. Units can be bought and sold. Unit trusts have the benefit of conferring a clearly defined entitlement and are considered to be more appropriate than a discretionary trust for non-family ventures.

Fixed Trust

Unlike a discretionary trust, a fixed trust is a trust where beneficiaries have a fixed entitlement. The trust deed fixes the proportion of income and capital that each beneficiary is entitled to throughout the income year. With a fixed trust, the trust can take advantage of the 50% capital gains discount if there is a sale of the property where a capital gain has been derived and the property has been held for 12 months or more.

Joint Venture (with or without nominee)

A joint venture is another example of a structure, which may be considered when dealing with property. A joint venture is when two or more parties come together in order to undertake a specific project. For example, the acquisition and development of a property.

The parties usually enter into a joint venture agreement which contains the rights and obligations of each joint venture party. Each party is treated individually or separately for tax purposes, so each party can use their own preferred tax structure. In this type of joint venture, a nominee is often used to hold the joint venture property as bare trustee. The nominee can provide a corporate identity for the joint venture and also act as the operator of the joint venture.

Partnership (with or without nominee)

Another alternative structure to consider when dealing with property is a partnership. Unlike a joint venture, a partnership is an arrangement between two or more entities to carry on a business together with a view to a profit. Except for certain professional partnerships, business partnerships cannot have more than 20 partners. A partnership is created by an agreement among the partners, which is usually documented in writing. The partnership is regulated by the terms of the partnership agreement (if there is one), the common law and the relevant partnership legislation, which applies to the applicable State and Territory.

A partnership is not a separate legal entity and each partner is jointly and severally liable for the debts of the partnership. Partners also share in the profits of the partnership. Limited partnerships can also be established in some states under specific state legislation. Limited partnerships allow some partners to limit their liability for debts. Limited partnerships are generally taxed as companies.



It is common for a partnership to operate through a nominee company. The nominee's role is usually very limited with no control or decision-making powers in relation to how the partnership should be conducted. It is the partnership rather than the nominee which actually carries on the business. The nominee provides a corporate identity for the partnership.