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A GUIDE TO BUYING AND SELLING COMMERCIAL PROPERTY IN QUEENSLAND

If you are buying or selling a commercial or industrial property in Queensland, you should obtain advice from professionals such as a solicitor, accountant, financial planner and a finance broker before signing a legally binding contract.

This is particularly important as a buyer to ensure the right ownership structure is used to purchase the property, the price is apportioned between goodwill and plant and equipment, GST issues are addressed, the seller's financial/business records are reviewed and to ensure all conditions are included in the contract to protect your interests.

WHAT IS COMMERCIAL PROPERTY?

A commercial property can include an industrial property, vacant land, a single stand-alone building, a lot in a commercial community titles scheme or more complex transactions such as the purchase and sale of a retail shop, hotel, motel or rural or farming property.

WHAT TYPE OF CONTRACT SHOULD BE USED?

It is not practical to apply the same commercial contract to each and every sale, so we have prepared an overview of matters that need to be considered whether you are either buying or selling commercial property.

A commercial sale contract is usually prepared by the selling agent. There are, however, 2 forms of standard commercial sale contracts developed by the Real Estate Institute of Queensland and The Queensland Law Society:

1. Commercial land and buildings; and
2. Commercial lot in a community titles scheme.

When buying in a community titles scheme the seller is also required to provide the buyer with a signed and completed disclosure statement setting out certain information about the body corporate prior to the buyer entering into the contract.

For more complex transactions, it may not be appropriate for a standard form commercial sale contract to be used and a solicitor may need to draft an appropriate contract for you.

WHEN IS THE DEPOSIT REQUIRED TO BE PAID?

A contract will state the total amount of the deposit required to be paid by the buyer and the date for payment will also be stated. The deposit should not exceed 10% of the purchase price.

A buyer must pay the deposit strictly in accordance with the terms of the contract. If a buyer proposes to pay the deposit by direct debit or bank transfer, then they should endeavour to ensure it is received by the deposit holder by the date stated in the contract. If not, the seller may argue the buyer has breached their obligations under the contract.

If the deposit is not paid by the buyer on the due date, then the seller may have a right to terminate the contract and claim compensation from the buyer, even after the deposit is paid.

To reduce risk, a buyer should consider paying the deposit by cheque and deliver it to the deposit holder on or before the due date. A buyer should always have sufficient evidence of when they paid the deposit to the deposit holder.

CAN THE BUYER ENTITY BE CHANGED ONCE A CONTRACT IS SIGNED?

In Queensland, once a contract has been signed by the buyer and the seller the buyer's name cannot be changed.

If another party needs to be added to the contract, or the buyer entity needs to be changed to a corporate entity, then the buyer and the seller would need to agree to rescind the contract and enter into a new contract on the same terms as the previous contract but noting the correct buyer details.

Most sellers will agree provided the buyer pays their legal costs associated with this process and a transfer duty (stamp duty) indemnity is also provided in the event the Office of State Revenue assesses double stamp duty (stamp duty on the original contract and stamp duty on the new contract).

A buyer should always bear in mind that a seller is under no obligation to agree to a rescission of a contract due to an incorrect buyer entity being noted on a contract.

If only a minor change needs to be made to a buyer's name such as correcting a misspelt name, or adding or deleting a

middle name, then this can usually be corrected by formal agreement of both the buyer and the seller through exchange of solicitors' letters. These types of amendments are usually required because the buyer's name on the contract does not correlate with the buyer's formal identification such as a birth certificate, passport or driver's licence which prevents a bank from being able to formally identify that person and provide finance for the purchase of the property.

CAN THE WORDS 'OR NOMINEE' BE NOTED AFTER THE BUYER'S NAME ON A CONTRACT?

The short answer is 'no'.

The most common reason for a buyer wanting to include the words 'or nominee' on a contract is that they have not had time to speak to their accountant as to the entity they should be using to buy the property and they want to be able to change that entity at a later stage.

The use of the word 'or nominee', or substituting a buyer entity, could result in the buyer having to pay transfer duty (stamp duty) twice. The buyer and the seller would need to agree to rescind the contract and enter into a new contract on the same terms as the previous contract but noting the correct buyer details. A seller may agree to this provided the buyer pays their legal costs associated with this process and a transfer duty (stamp duty) indemnity is also provided in the event the Office of State Revenue assesses double stamp duty the buyer will attend to payment.

A buyer should be aware that a seller is under no obligation to agree to a rescission of a contract due to an incorrect buyer entity being noted on the contract.

The only time 'or nominee' should be used is where:

- the buyer knows who the nominee is when the contract is signed;
- the buyer was appointed in writing as agent for the nominee buyer prior to the contract being entered into; and
- the nominee buyer pays the deposit.

Another alternative, if the buyer does not know the correct buyer entity, is a put and call option agreement with a right for the buyer to nominate another buyer entity. This operates like a normal sale contract in that the buyer has an option to buy, and the seller has an option to sell, so neither party can walk away from the sale. The buyer can nominate another entity to exercise the option and complete the purchase without incurring double stamp duty. However, a seller would need to agree to this type of transaction and extra legal fees would be incurred to draft the put and call option agreement.

ARE GUARANTORS REQUIRED IN A CONTRACT?

The standard form commercial sale contracts do not contain a provision for a buyer's guarantee. As a seller, and in order to protect your interests, you should include a special condition in the contract for a buyer's guarantee to be provided if the buyer is a company or trust entity.

IS THERE A COOLING OFF PERIOD WITH A COMMERCIAL PURCHASE?

No. A cooling off period does not apply to the purchase of commercial property.

WHAT SPECIAL CONDITIONS SHOULD BE INCLUDED IN A COMMERCIAL CONTRACT?

As the standard form commercial sale contracts do not contain all conditions which may be necessary to protect a buyer's interests, then it may be necessary for special conditions to be included.

A special condition needs to be included in the contract at the time of negotiations and before the contract is signed by the buyer and the seller. Two useful special conditions are:

1. Due diligence; and
2. If buying a commercial lot in a community titles scheme, a body corporate inspection of records search.

If the buyer is unable to satisfy a special condition, then the buyer can terminate the contract whereupon the deposit is required to be refunded in full.

WHAT IS A DUE DILIGENCE SPECIAL CONDITION?

A buyer should consider including a due diligence special condition. This enables the buyer to conduct searches, enquiries, investigations and tests in relation to the property (such as soil test, town planning and development searches, whether there are any restrictions on the use of the property, present use is lawful, etc) within a specified period of time. If the buyer is not satisfied with those enquiries, then the contract can be terminated and the deposit refunded.

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IS THE BUYER REQUIRED TO ARRANGE FOR BUILDING AND PEST INSPECTION REPORTS?

If the contract is subject to a building and pest inspection reports condition, then the buyer should arrange for a licensed building and pest inspector to attend at the property and provide these written reports.

The buyer must then decide whether they are satisfied with the reports and provide written notice to the seller by 5pm on the building and pest inspection date noted in the contract. A buyer must act honestly when deciding if the reports are satisfactory.

If the buyer is not satisfied with the building and pest inspection reports, then they may be able to terminate the contract provided they have acted reasonably (there must be some real defect with the property).

The seller will also have a right to terminate the contract if the buyer does not notify the seller of the outcome of the building and pest inspection condition by 5pm on the due date.

Buyers should be aware that sellers are not obliged to fix any issue raised in a building and pest inspection report nor is the seller required to make allowance for a reduction in the purchase price for those issues.

IS A BUYER REQUIRED TO MAKE A FINANCE APPLICATION?

If the contract is subject to the buyer obtaining finance approval, then the buyer is required to take all reasonable steps to obtain finance which would include making a finance application.

All decisions relating to the acceptability of any finance approval condition rests with the buyer.

The buyer must give written notice to the seller by 5pm on the finance date whether or not they have obtained satisfactory finance approval.

The seller will also have a right to terminate the contract if the buyer does not notify the seller of the outcome of the finance condition by 5pm on the due date.

If the buyer wants to terminate the contract on the basis that finance has not been approved, then the seller may refuse to authorise the deposit to be released until the buyer obtains a letter from the proposed financier (not a finance broker) stating that a finance application was made but it was not successful or the finance terms offered were not acceptable to the buyer.

SHOULD SEARCHES BE CARRIED OUT WHEN BUYING A COMMERCIAL PROPERTY?

There is no obligation on the seller to tell a buyer about the property, any of its defects or any other issues (except for limited contractual warranties and statutory disclosure).

Therefore, a buyer should undertake searches to identify:

- the property under contract is in fact the property which was inspected and for which an offer was made;
- the legal ownership of the property (the seller is in fact able to sell the property);
- whether there are any encumbrances on title to the property (such as mortgages, easements, covenants, caveats or any other administrative advices);
- whether the property is contaminated;
- whether there are any adverse property issues (which may give rise to termination of the contract or a claim for compensation from the seller);
- whether there are any restrictions on the use of the property;
- so that the required adjustments can be calculated;
- the seller has met their disclosure obligations; and
- the warranties in the contract are correct (the seller warrants various things that could affect the property such as correctness of title, capacity to complete, no judgments, orders or writs affecting the property, no unregistered dealings, no notices of body corporate meetings and no obligation to give notice of contamination).

It is common practice for a contract to be signed first and searches conducted afterwards. A buyer can protect themselves from unsatisfactory search results by including a special condition in the contract such as a due diligence special condition.

DOES GST APPLY TO THE SALE OF A COMMERCIAL PROPERTY?

The obligation to pay GST will depend on whether the seller is registered (or required to be registered) for GST purposes.

If the seller is not registered, and is not required to be registered, then generally no GST will be payable on the supply of the property.

If the seller is registered for GST purposes, then the seller will be required to pay GST unless some exemption applies. The most common exemptions are the 'margin scheme' and 'going concern'. If the 'margin scheme' is to be applied, then the seller is still required to pay GST but at a reduced rate. The 'going concern' exemption may apply if the seller supplies to the buyer all of the things that are necessary for the continued operation of an enterprise such as the existing lease of the property on terms that continue after settlement. The seller must also continue to carry on the enterprise right up until settlement. Both the buyer and the seller must agree that the 'going concern' exemption is to apply to the transaction. The buyer must be registered for GST as at settlement otherwise the 'going concern' exemption cannot be claimed.

As a buyer, where GST is payable in addition to the purchase price, then transfer duty (stamp duty) will also be increased because it is payable on the purchase price plus GST.

WHAT HAPPENS IF THE SALE PRICE (OR MARKET VALUE) OF A COMMERCIAL PROPERTY IS $750,000.00 OR MORE?

The Foreign Resident Capital Gains Withholding Tax Regime will affect real property if the sale price (or market value) is $750,000.00 or more.

Despite the Regime referring to 'foreign residents', it is important to note that it will apply to all sellers (whether a foreign resident or an Australian tax resident). It is important to understand that this regime is different to the requirements of the Foreign Investment Review Board where foreign persons generally need to apply for approval, or obtain a no objection notice, before purchasing property in Australia.

An Australian tax resident selling real property with a market value of $750,000.00 or more will need to obtain a clearance certificate from the ATO prior to settlement to ensure they do not incur the 12.5% withholding tax.

A foreign resident seller can apply for a variation of the withholding tax rate, or make a declaration that a membership interest is not an indirect Australian real property interest and therefore, not subject to withholding tax.

If a clearance certificate, or a variation notice, is not provided by the seller at settlement, then the buyer must retain 12.5% of the purchase price and pay this amount to the ATO as a withholding tax following settlement. Penalties may apply if a buyer does not comply.

A clearance certificate is valid for 12 months and is specific to a particular entity (i.e. the registered owner recorded on title) and not linked to a particular property.

DOES THE GST WITHHOLDING REGIME APPLY TO A COMMERCIAL SALE?

Even though commercial property is being sold, the GST Withholding Regime may apply if the ATO considers the property to be 'new residential premises' or 'potential residential land' for the purposes of the relevant GST Withholding laws. The GST Withholding regime will not apply to the sale of commercial residential properties such as a hotel, boarding house or caravan park.

If the GST Withholding Regime does apply, then the seller is required to give the appropriate withholding notice to the buyer prior to settlement. The buyer is then required to complete certain forms online with the ATO and provide copies of those forms to the seller at, or prior to, settlement. Payment of any required GST Withholding amount is the buyer's responsibility and a failure to pay may render a buyer liable for the withholding amount as well as penalties.

WHO IS RESPONSIBLE FOR PAYMENT OF TRANSFER DUTY?

Transfer duty (also referred to as stamp duty) is a tax charged by the State Government on a purchase contract. Transfer duty is calculated on the purchase price and different rates apply depending on the purchase price.

It is usual for all sale contracts, including the standard form commercial sale contracts, to include a provision that the buyer is to pay transfer duty. It is important to note that if the buyer does not pay the transfer duty, then the Office of State Revenue can require the seller to pay the duty. The

seller would then need to recover this amount from the buyer as a liquidated debt.

The buyer will need to have documents stamped and pay transfer duty either 30 days from when the contract becomes unconditional or on settlement (whichever occurs first). If the contract is not stamped and duty paid when due, then penalty interest can be imposed by the Office of State Revenue.

WHO IS RESPONSIBLE FOR INSURING A COMMERCIAL PROPERTY?

The standard form commercial sale contracts provide that the property is at the risk of the buyer from 5pm on the next business day after the contract date.

As a buyer, you will need to arrange for all required insurances to be taken out. You should consult with an insurance broker to make sure adequate insurance is taken out. If the property is damaged between the contract date and settlement, the buyer is still required to settle unless the property is destroyed or damaged as to be unfit for occupation. If damage occurs, the buyer may, in some circumstances, gain the benefit of the seller's insurance.

If you are the seller, it would be prudent for you to also maintain existing insurances over the property until settlement occurs. This will protect you in the event the buyer does not take out insurance and something happens to the property such as the property burning down.

DOES A SELLER HAVE TO PROVIDE THE BUYER WITH A CERTIFICATE OF CLASSIFICATION WHEN SELLING A COMMERCIAL PROPERTY?

If the sale comprises commercial land and buildings (a stand-alone building), and that building was constructed on or after 1975, or an approval has been given by council to alter the building after this time, then the *Building Act 1975* (Qld) will apply to the sale. This means that the seller is required to provide to the buyer at settlement a certificate of classification for each building permit issued. A building is not able to be lawfully occupied unless a certificate of classification has been issued. The building may also not be covered by the owner's insurance if a certificate of classification does not exist.

A buyer should conduct a search of council's records to obtain a list of all building approvals, the final inspection certificates for each permit as well as a copy of all issued certificates of classification.

If a certificate of classification does not exist, then the seller will be required to arrange for council to inspect the property to ascertain whether the building work complies in order for a certificate of classification to be issued. If the building does not comply, then the seller will be obligated to perform any necessary building works so that a certificate of classification can be issued and provided to the buyer on settlement. A seller is also able to insert a special condition into the contract to provide that the buyer is purchasing the property 'as is' and a certificate of classification is not required to be provided by the seller on settlement.

WHAT HAPPENS IF ASBESTOS IS PRESENT IN THE PROPERTY?

The rules for dealing with asbestos apply to buildings used as a 'workplace', which is likely to be most commercial property. The standard conditions of the standard form commercial sale contracts do not allow a buyer to terminate the contract if asbestos is found in the building.

If you are selling a commercial building which was built before 31 December 2003, then you will have an obligation to comply with the Asbestos Management Code. As an owner of commercial property, you will be obliged to keep an Asbestos Materials Report and Register at the property. You will also be obliged to develop and implement an Asbestos Management Plan. Copies of both of these documents are required to be provided to the buyer both prior to the buyer entering into a contract and at settlement.

A commercial building should not contain asbestos products or materials if built in or after 2004.

WHAT ARE THE REQUIREMENTS FOR THE SELLER TO PROVIDE A BUILDING ENERGY EFFICIENCY CERTIFICATE?

This commercial building disclosure regime will apply when commercial office space with a net lettable area of 1000sq.m. or more is offered for sale (unless an exemption applies).

Prior to advertising the property for sale, the seller needs to obtain (and display) a building energy efficiency certificate and register the property on the Building Energy Efficiency Register and the Register of Recognised Ratings.

The seller will also be required to provide a copy of the building energy efficiency certificate to a buyer if requested.

WHAT IS THE EFFECT OF THE COMBUSTIBLE CLADDING REGULATION?

An owner of a private building is required to undertake a process to identify whether the building is affected by combustible cladding. The Cladding Regulations will apply to certain buildings. If a building has non-conforming cladding, then a notice to that effect must be displayed in a conspicuous part of the building for so long as the cladding remains in place. Every lot owner and tenant must be given a copy of that notice (including new tenants and new owners).

Sellers of buildings subject to the Cladding Regulations are now required to disclose whether the seller has complied with the relevant provisions of the Regulations and copies of those documents are to be provided to the buyer prior to settlement.

If you are selling a commercial lot in a community titles scheme where cladding is present, you are not required to give disclosure to the buyer ,but, you should carefully consider whether you should disclose the existence of combustible cladding in the sale contract, as the non-conforming cladding may be considered by the buyer as a defect in common property which you were aware of (or ought to have been aware of) which may then give rise to the buyer terminating the contract.

If you are a buyer of a commercial lot in a community titles scheme, then you may wish to include a special condition in the contract for a comprehensive search of the body corporate records to be conducted to ascertain whether combustible cladding is present. If it is present, then the contract can be terminated and the deposit refunded.

IS A BUYER BOUND BY ANY EXISTING LEASE AND SERVICE CONTRACT?

Where a commercial property is being sold which has an existing lease and/or an existing service contract, then the details of those agreements are required to be disclosed to the buyer as those agreements will continue after settlement.

The standard form commercial sale contracts include both a lease and service contract schedule which the seller is required to complete at the time of providing the contract to the buyer.

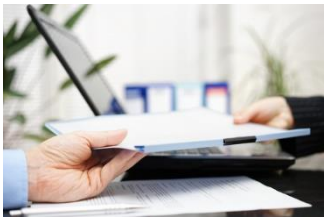
The seller is required to provide true copies of all leases and service contracts (and a written statement to that effect) to the buyer after the contract is signed. The buyer should then undertake a complete legal and financial review of those documents. The buyer can then terminate the contract if not satisfied with the terms and conditions of any lease or service contract. If the buyer does not terminate the contract, then the buyer will be bound by the disclosed leases and service contracts after settlement.

WHAT DOES 'TIME IS OF THE ESSENCE' MEAN?

This is a legal term that means both the seller and the buyer must perform their obligations strictly by the due date. For example, both parties must settle by 4pm on the settlement date.

If either the seller or the buyer, after making all reasonable efforts, is not able to meet their settlement obligations because of a natural disaster then, in certain limited circumstances, time will no longer be of the essence. When the natural disaster no longer prevents performance of the parties' settlement obligations, then a notice must be served to make time once again of the essence. Both parties will then be obliged to settle on the date stated in the notice.

WHAT HAPPENS ON SETTLEMENT?



Settlement is the day noted in the contract when all of the parties' legal and financial representatives meet at a pre-arranged place and time. Settlement must take place between the hours noted in the contract which is usually between 9am and 4pm. If the settlement date falls on a public holiday, or a weekend, then settlement must occur on the next business day. At settlement, all of the required legal documents are exchanged for payment of the purchase price and possession of the property is then given to the buyer.

WHAT HAPPENS IF EITHER THE BUYER OR THE SELLER CANNOT SETTLE ON THE SETTLEMENT DATE?

The party who is unable to settle usually requests an extension of time from the other party.

If the buyer requests an extension, then the seller is able to impose a monetary penalty which is determined by the terms of the contract. This usually involves default interest being charged on the balance purchase monies calculated daily from the original settlement date through to when settlement actually occurs. If the contract does not stipulate the default interest rate, then that rate is usually the rate determined by The Queensland Law Society at that particular time. The seller may also require settlement adjustments to be calculated as at the original settlement date and may also require the buyer to pay their additional legal fees.

If the seller requests an extension, then the buyer may impose similar conditions to those a seller can impose on a buyer.

If an extension of time is granted by either the seller or the buyer, then it should be granted on the basis that time will remain the essence of the contract. This will then enable a party to force the performance of the contract should they be required to do so at a later date. If time is not of the essence, then a party cannot force settlement to occur on a specific date which can have significant implications for the party who wants to settle at a later time.

If an extension is not granted then:

If the buyer defaults:

The seller can either *affirm* or *terminate* the contract.

If the seller *affirms* the contract, they may sue the buyer for:

- damages; or
- specific performance (where the seller will require the buyer to comply with their contractual obligations and settle); or
- damages and specific performance.

If the seller *terminates* the contract, they may do all or any of the following:

- take back possession of the property;
- claim the deposit the buyer has paid and any interest earned (if the deposit was invested);
- sue the buyer for damages;
- resell the property. If the property is resold at a lesser value, then the seller may sue the buyer for the difference in the resale price. The seller may also sue the buyer for any expenses relating to any repossession, any failed attempt to resell, and the resale of the property. However, this is on the basis that the resale of the property settles within 2 years of the contract being terminated by the seller.

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- damages; or
- specific performance (where the buyer will require the seller to comply with their contractual obligations and settle); or
- damages and specific performance.

If the buyer *terminates* the contract, they may do all or any of the following:

- recover the deposit they paid and any interest earned (if the deposit was invested); and/or
- sue the seller for damages.

Whether you are a buyer or a seller, the best way to make sure that you are protected is to make sure that you do everything that you can to prepare for settlement on the due date.

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