



# Residential Conveyancing Booklet

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## Acting for Buyer Off the Plan of Residential Vacant Land (Non-CTS)

This document is only for use:

- (a) for proposed residential lots sold with disclosure statement and disclosure plan under *Land Sales Act 1984* (Qld);
- (b) for contracts formed from 1 July 2019; and
- (c) by law practices insured by Lexon Insurance Pte Ltd ('Lexon') and not for public circulation or for use by any other third party or practice without Lexon's prior written approval.

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# 1. WHY READ THIS BOOKLET?

Please read this Residential Conveyancing Booklet ("the **Booklet**") together with our letter ("the **First Letter**") and the First Letter's enclosures. **It is important that you read this Booklet as soon as possible because it contains essential information about your rights and obligations when buying property.**

If you have any questions about the information, please contact us.

We may give you advice during your transaction on your rights in relation to the Contract. This could include rights to terminate the Contract or to claim compensation from the Seller. This advice may be general (e.g. advice contained in this Booklet) or specific to your circumstances (e.g. advice contained in the Contract and Property Report). Alternatively, you may decide you no longer wish to buy the Property and need advice about any possible termination options that might exist.

**These rights can be subject to strict time limits or lost as a result of your actions or steps in the transaction.** For example, if you take steps or actions after you become aware of some rights (e.g. receiving some types of notices or search results) it may impact that right and a Court may even consider you have lost that particular right. It is critical that, if we have advised you about any rights and you may want to rely on them or if you otherwise are considering not proceeding with the purchase, you contact us as soon as possible to discuss. Otherwise, any rights or options may be lost.

## 2. OUR RETAINER

In working towards the best outcome possible in your purchase, it is important that we clearly set out what is and is not part of our retainer. Please read this section so that you can identify as early as possible any additional legal or non-legal advice you may require or steps that you need to take personally for a successful purchase.

### 2.1. What Is Included In Our Retainer? (What We Will Do)

Our retainer includes things that are usual and necessary for a residential purchase in Queensland.

If you instruct us to not take any of these usual or necessary steps, we are required by law to provide you with a detailed explanation of the risks associated with these exclusions.

**Advice of this nature is not part of the usual conveyancing process and will be an extra cost to you.**

### 2.2. What Is Excluded From Our Retainer? (What We Are Not Doing)

Our retainer does not extend beyond what is usual and necessary in the residential conveyancing process. The following is therefore excluded:

#### a. Physical inspection

We do not conduct a physical inspection of the Property. It is up to you and also better if you do this. Each transaction is unique and each Buyer has different requirements for a property that may only be identified by physical inspection. Issues about the Property's location, impact of nearby infrastructure, noise or properties or proposed developments or road

works are not likely to be discovered by us in our searches. Therefore you must advise us as soon as possible of any concerns following your physical inspection.

#### b. Commissioning a survey

Please note that we do not conduct a survey following registration of the plan - this is your responsibility (if you decide to do so). Issues such as errors in the boundaries or area of the land, encroachments by structures onto or from the land or (where the land is waterfront land) whether its boundaries are affected by erosion will generally not be identified, unless a survey is conducted.

As you are purchasing a lot "off the plan", the Seller is required to provide you with a disclosure plan in relation to the proposed lot prior to your entry into the Contract. That disclosure plan must comply with the requirements set out in paragraph 6.4.

If land is beachfront land, in some cases the State government has the power to declare a right of public access over the beach area of your land despite private ownership. If declared, the public will be entitled to use the affected land and the State or local government may create conditions for how it may be used (including by you).

The Seller should disclose any existing declarations to you. However, if a declaration is made after settlement, there is no compensation available to you. While any declaration that is made must be registered, it may be important to establish whether erosion has resulted in the seashore affecting the boundaries of the land and whether circumstances exist which might lead to a declaration being made or which may have already given rise to a declaration that has not yet been registered. If you are aware of any of these circumstances, please inform us as soon as possible.

If you wish to satisfy yourself about these potential issues then you should engage a surveyor to survey the land or contact the relevant government agency to make further enquiries as soon as possible. If the surveyor makes any observations you should contact us urgently.

#### c. Obtaining insurance

It is also your responsibility to attend to any necessary insurance for the Property. Please see our comments in Part 4 below about insurance requirements.

Generally, it is recommended you make enquiries about insurance availability and cost before entering into a contract. Insurance can be expensive and, for some properties, may only be available in relation to certain risks.

#### d. Document storage

We may not retain documents from your purchase indefinitely. The timing of destruction will depend on authorities given.

It is your responsibility to retain copies, and originals (where appropriate), of all correspondence and purchase documentation. This may be required for taxation, duties or other evidentiary purposes at a later date. For example, if the Property is held as an investment at any time, then your documentation may be required for capital gains tax ("**CGT**") purposes.

e. **Obtaining finance and loan advice**

In off the plan sales, it is rare for a Seller to agree to a long term finance condition. The benefit to a Buyer of a finance condition may be limited because the period of the finance approval may lapse before settlement.

If needed, you must apply for any finance required and tell us before the date specified whether your finance approval is satisfactory to you. Finance approval is often subject to conditions including satisfactory valuation.

In the case of property being acquired "off the plan", finance approval is often subject to the financier obtaining a satisfactory valuation following construction.

It is possible that, between the time you enter the Contract and the due date for settlement, market conditions may change and an unsatisfactory valuation may be received or your own financial position may change. In either case, this may cause your financier to decline to provide finance to complete the purchase. In that case, if the Contract is no longer conditional on finance then, despite the financier's failure to provide finance, you would still be obliged to complete the Contract.

It is up to you to decide whether you are prepared to accept these risks before notifying us that you have finance approval. Our retainer (unless otherwise agreed for additional cost) does not extend to giving advice on the finance or security documents or any valuation you obtain.

We will however need to liaise with your financier to arrange settlement. Any instructions you give us concerning your loan, the security documents or any certificates required by your financier are beyond the scope of our retainer and may be an extra cost.

f. **Eligibility for grants and other schemes advice**

We will not be providing advice or reminders on the Queensland First Home Owners' Grant or any other government grants as part of our retainer (unless agreed otherwise for additional cost).

To find out if you are eligible for any grants you should contact your financier (if applicable) or visit the Queensland Treasury website ([www.treasury.qld.gov.au](http://www.treasury.qld.gov.au)).

It is up to you to apply for the grants if you think they apply to you.

If you are purchasing the Property to develop it, we do not give any advice on your future buyers' eligibility for any grants or concessions, unless that advice has been specifically requested and is included in our retainer.

g. **Financial and tax advice**

We do not give advice on the commercial viability, tax and other financial implications of the purchase (including CGT, goods and services tax ("GST") and land tax). If you require this advice, you should seek the specialist advice, such as your accountant. This includes advice on whether or not the standard contract provisions relating to GST are appropriate for your circumstances.

Such advice could be particularly relevant for circumstances which may include buying the Property:

- i. as an investment;

- ii. with or as part of a business;
- iii. to substantially renovate or develop the Property;
- iv. as the executor or beneficiary of an estate;
- v. as a foreign owner; or
- vi. where you are not intending to use the Property solely as your main residence.

You need to ensure that (where required) you or your accountant have registered the purchasing entity for GST and maintain that registration after settlement. Failure to do so could have significant GST, financial and other consequences.

h. **Self managed superannuation fund ("SMSF") advice**

If the purchasing entity is an SMSF entity, please seek your accountant's advice about compliance with your SMSF's investment strategy and any other requirements. There are restrictions on how your SMSF may borrow and invest funds. Our retainer does not include advice about those issues unless we accept specific instructions (which will be an extra cost to you).

i. **Succession and matrimonial advice**

This transaction may affect or be inconsistent with your succession planning or any arrangements with your current or former spouse (whether a marriage, de facto relationship or civil partnership). This advice is beyond the scope of our retainer. We recommend that you obtain legal advice about wills and other succession planning and any family law agreements or other spousal arrangements you have.

j. **Town planning information and advice**

The information available from town planning searches is set out in section 8.3 of this Booklet and the Buyer Searches List. The information received depends on the search you select. The following types of advice are excluded (unless agreed otherwise for additional cost):

Site Issues and Planning Laws

- the development potential of the site;
- whether nearby land is subject to development applications or development approvals which could affect the value or potential development of the site;
- whether any applications or approvals over the site are current or have lapsed;
- whether the site and its structures have all necessary approvals;
- whether any old or historic approvals are still current and binding on the site (e.g. whether a Bushfire Management Plan affects the Property);
- the laws about compensation for changes in a Town Planning Scheme;
- deadlines to apply under superseded versions of a Town Planning Scheme;

- other deadlines to make and pursue applications for approvals;
- whether the Seller should assign certain rights to make applications to the Buyer;
- any existing use rights;
- infrastructure charges which apply on development;
- whether the site is subject to call in powers by the government;
- any existing or proposed Town Planning Scheme amendments;
- the effect of the South East Queensland Regional Plan (if relevant); and
- the effect of current and future government planning policies.

If you are concerned about the impact of any of these things on your use of the Property then you should engage a town planner, a lawyer with town planning experience or make your own enquiries with the relevant local council.

#### Other Laws

Local laws concerning:

- vegetation protection or controls;
- noise including industrial noise, road noise, rail noise, aircraft noise and future planned increases in noise levels from these and other sources;
- current and future transport routes; and
- whether the site was illegally cleared in the past.

#### k. **Consumer guarantees advice**

In some circumstances where goods are being supplied as part of the sale, implied consumer guarantees may apply to those goods. They cannot be contracted out of. Our retainer does not extend to providing advice on the applicability or effect of any consumer guarantees to your purchase.

#### l. **National Rental Affordability Scheme (“NRAS”) lease or arrangement advice**

We will not be providing advice on any NRAS lease related to your purchase as part of our retainer. NRAS arrangements are very complex in nature and require specialist legal advice. It is your responsibility to obtain NRAS advice and if you choose not to:

- you may not be eligible for any benefits from the NRAS scheme;
- the NRAS lease or arrangement may not be enforceable; or
- you may suffer loss.

### 3. IMPORTANT CONTRACT ISSUES

The Contract includes a number of technical and legal terms that have been considered by the Courts and may be specific to Queensland conveyancing. **Contracts can change the meaning of words and phrases from what they may ordinarily mean which can lead to misunderstanding, miscommunication and loss.** We therefore provide the below explanation. Please contact us if you are unsure of any of the Contract’s terms.

#### 3.1. Method Of Sale

In Queensland, property is sold by the following methods:

- private treaty - where you usually negotiate the Contract price and terms through a real estate agent, who acts for the Seller;
- auction - where terms are set by the Seller and the price determined by competitive bid, usually subject to a reserve; or
- tender - this is another form of competitive bidding.

#### 3.2. Nature Of Contract

The lot you intend to buy will not exist at the time that you enter into the Contract which makes this transaction different from the conveyance of an existing lot. You should be aware of the following:

- The standard REIQ contract is generally unsuitable for the sale of Lots “off the plan” unless it is supplemented with special conditions. Advice regarding the specific form of contract that has been used appears in our Contract and Property Report.
- As the Lot has not yet been created, it is difficult at the point of entry into the Contract to confirm any representations made to you about the Lot such as, for example, its area, location or view but if you are materially prejudiced by a change you may elect under the *Land Sales Act 1984* (Qld) to terminate the Contract.
- During the development of the project, circumstances may arise which require the Seller to make changes to the lot.
- Under the Contract, the Seller usually gives limited warranties and reserves the right to make changes to deal with various issues that might arise and you agree to accept and not object to certain changes (e.g. minor changes or changes that may not be minor but are authorised under the Contract).
- You do have certain statutory rights but your rights are limited.
- Whether you have a right to terminate the Contract if changes occur to the lot will generally depend on whether you have been materially prejudiced and we would need to have regard to the provisions of the Contract and the disclosure material that was given to you.
- You are unlikely to be able to terminate the Contract unless it can be shown that the lot (as established) is substantially different from that described in the Contract.

### 3.3. Form Of Contract

There are no standard terms and conditions for an “off the plan” contract, although the Contract will generally be prepared for and will be particular to the development. The main terms and conditions of the contract are summarised in our Contract and Property Report.

#### **Please read all of your Contract.**

While it may be possible to seek to limit the risks associated with buying a lot "off the plan" by requesting amendments to the Contract (assuming you have not yet entered into it), the Seller may be reluctant to make changes in the interests of maintaining a consistent approach with all buyers and to preserve flexibility to deal with issues arising during the development and construction of the project.

#### **Please also read our review of your Contract in the Report we provide.**

### 3.4. Signing Contract Electronically

For a contract for the sale of land to be enforceable, the law requires that it must be in writing and must be signed by both parties.

Traditionally, land sale contracts will be printed on paper and the parties will sign the printed document. The law does, however, recognise that the requirement for a written contract may be satisfied by the creation of an electronic document and that the parties may sign that document electronically as long as certain conditions are met in relation to the identification of the parties and their consent to the electronic signing process. DocuSign is an example of a digital signing tool which is sometimes used for the purpose of electronic signing of land sale contracts.

A party contemplating using DocuSign or a similar tool should be aware that there are risks in doing so including:

- a. the Seller may later deny signing the Contract and allege that a third party without authority signed the Contract;
- b. the Seller is a corporation and later alleges the signing party did not have authority; and
- c. the Seller later alleges the signature used is not the Seller's signature.

If you are considering the use of an electronic signing tool in relation to the Contract, please contact us to discuss this issue urgently. It is important to ensure that the process proposed to be used satisfies the relevant requirements necessary to create an enforceable contract and to deal with the delivery of any required disclosure in relation to the Contract and that appropriate steps are taken to establish the authority of signatories to the Contract. If the Contract has already been signed using an electronic tool, we will need to discuss the signing process with you to check if there are any issues.

### 3.5. Time Is Essential

Unless we tell you otherwise in our Contract and Property Report, time is of the essence of the Contract. **This is a legal term that means you must perform your obligations strictly by 5.00pm (or other time specified) on the due date.** For example, you must be able to settle on the settlement date; otherwise the Seller may either terminate or seek to enforce the Contract. In both cases, the Seller may claim compensation from you.

### 3.6. Deposit

Payment of the deposit is a sign of your intention to proceed with the Contract. If the Contract becomes unconditional and you later default then the Seller may be entitled to forfeit the deposit and sue you for damages.

An “off-the-plan” contract may provide for a deposit of up to 20% of the purchase price to be paid without offending the law against penalties. This is different to the position that generally applies to the sale of existing lots where a deposit of more than 10% of the purchase price is likely to be considered a penalty and the Seller may be prevented from forfeiting the deposit. In addition, a deposit of 20% under an off-the-plan contract will not have the effect of making the Contract an instalment contract. Please see paragraph 9.11 for more information.

If the deposit is not paid on time or you are otherwise in fundamental breach of the Contract the Seller may be entitled to terminate, forfeit the deposit and either sue you for damages or seek an order from the Court that you specifically perform the Contract, or both. If the Seller is obliged to pay GST then GST will be payable on the forfeited deposit.

The stakeholder (who must be a solicitor or real estate agent) holds the deposit in trust until completion, upon which it will be paid to the Seller (usually less the agent's commission). If you were to terminate for valid reasons in accordance with the Contract, then the deposit would be repayable to you.

We strongly recommend that you do not agree to a contractual provision or other arrangement under which the deposit is released to the Seller prior to settlement. If the deposit is not held in trust until settlement, there is a risk that the Seller or deposit holder may become insolvent and that you will lose the deposit or be unable to recover it even if settlement doesn't proceed and you don't receive title to the Property.

### 3.7. Finance (if applicable)

If the Contract is subject to finance, you must take all reasonable steps to obtain finance approval by the approval date. Please provide us with a copy of your letter from your financier confirming your finance approval or otherwise before we are expected to notify the Seller as to whether you have obtained finance or not.

If you fail to take reasonable steps to obtain finance approval, you may be prevented from relying on the finance condition to terminate the Contract. The Seller may request evidence of your reasonable steps.

Once notice of finance approval is given to the Seller under the Contract, it cannot be withdrawn. However, most financial institutions will reserve the right to withdraw finance approval at any time prior to settlement for any number of reasons. It is important that you consider very carefully any conditions attaching to a finance approval and your ability to satisfy all requirements (now and up to settlement) relevant to the advance of funds before instructing us to give any notice about finance under the Contract.

We will need to notify the Seller as to whether you have an approval on or before 5:00pm on the finance date. If you do not obtain satisfactory finance approval from the financier specified in the Contract, you can instruct us to terminate the Contract or seek an extension of time for finance. Agreement from the Seller is required for any extension and your request may be declined.

Alternatively, you may instruct us to give notice to the Seller waiving the benefit of the finance condition. This means you are bound to complete the Contract regardless of whether your financier approves finance or the finance terms are

satisfactory. (This will not affect any other rights you may have to terminate the Contract.)

**If we do not notify the Seller in writing that finance is approved, waived or not approved by the finance date then, the Contract continues and both you and the Seller have a right to terminate the Contract.**

When advising us of the satisfaction or otherwise of this condition you should notify us in enough time so that we are able to prepare and give the requisite notice under the Contract in time to protect your interests.

If you do not have sufficient funds to pay the balance purchase price (including any adjustments) at settlement the Seller may terminate the Contract or seek to have you specifically perform the Contract and in both instances can claim compensation from you.

### 3.8. Settlement Funds

If you are not borrowing all of the funds required for settlement, you are responsible for providing the balance amount as cleared funds. You may be able to make arrangements to either:

- a. transfer the funds to your financier (if your financier agrees), and instruct your financier to attend at settlement with all the settlement money;
- b. provide us with bank cheques as instructed by the Seller. You will need to ask us about the exact cheque details; or
- c. deposit the funds to our trust account as cleared funds at least one day before the day of settlement. Note that an ordinary bank transfer is not cleared funds and we cannot draw on those funds. The amount needs to be deposited in cleared funds by:
  - i. telegraphic transfer; or
  - ii. real time gross settlement (RTGS).

If you need to do this, please contact us as soon as possible as we will need to discuss timing issues and provide our trust account details to you.

You will need to liaise with your financier and with us to ensure that logistically all settlement funds and any other payments are available when required. This includes ensuring that any deposits to our trust account are cleared with sufficient time for us to draw cheques and are made available at the place nominated for settlement. If your financier is applying for a government grant on your behalf, you must find out whether the grant will be available for settlement.

**Please note that, if all the required cheques are not available at settlement in the correct amounts, payee names and form of cheque then we may not be able to settle which may place you in breach of the Contract entitling the Seller to terminate, keep the deposit and sue you for compensation.**

## 4. INSURANCE

### 4.1. Risk

In our Contract and Property Report, we will outline how the Contract deals with risk between the parties.

Subject to the provisions of the Contract, the Property will usually be at your risk from the settlement date.

### 4.2. Your Insurance

When acquiring vacant land, it is prudent to take out public liability insurance.

If you are obtaining finance, your financier will need to be noted on the policy as first mortgagee.

## 5. HOW DOES *THE PROPERTY OCCUPATIONS ACT 2014 (QLD)* (“POA”) AFFECT THE CONTRACT?

### 5.1. Application Of POA

POA contains provisions relating to the sale of residential property. Those provisions apply to contracts for the sale of property that is used, or is intended to be used, for residential purposes but will not apply to a contract:

- a. for the sale of property where it is used primarily for industry, commerce or primary production;
- b. formed on a sale by auction (directly on the fall of the hammer by outcry or directly at the end of another similar type of competition for purchase);
- c. entered into, no later than 5.00pm on the second clear business day after the Property was passed in at auction with a registered bidder for the auction;
- d. formed because of the exercise of an option granted under an earlier agreement if the parties to the Contract are the same parties as in the earlier agreement;
- e. where the Buyer is:
  - i. a publicly listed corporation; or
  - ii. a subsidiary of a publicly listed corporation; or
  - iii. the State or a statutory body; or
  - iv. purchasing at least three lots at the same time (even if under separate contracts).

### 5.2. Cooling Off Period

If POA applies, you may be entitled to a five business day cooling off period.

The cooling off period starts on the day you receive from the Seller or their agent a copy of the Contract signed by both parties or, if that day is not a business day, on the next business day. If the Seller signed the Contract before you did, the cooling off period starts on the day you signed the Contract and communicated your acceptance to the Seller.

**The cooling off period ends at 5:00pm on the 5th business day.**

You are entitled to terminate the Contract during the cooling off period. If you do, the Seller may retain a penalty of 0.25% of the purchase price from the deposit paid under the Contract. The balance of the deposit (if any) must be refunded to you within 14 days after termination.

If you terminate the Contract and later decide you would like to purchase the Property, there is a risk that the Seller will not enter into another contract with you.



If you decide to terminate the Contract during the cooling off period you should tell us as soon as possible so we can give notice before the period ends.

You may shorten the cooling off period or waive the benefit of it entirely by giving written notice to the Seller of the shortening or the waiver. It is up to you whether you wish to do this.

### 5.3. Particular Words Must Be In The Contract

If POA applies, the Seller is required to ensure that, when they first give you the proposed Contract for signing, it contains a conspicuously written note (immediately above and on the same page where you sign to indicate your intention to be bound by the Contract) which draws your attention to the cooling off period and the termination penalty. It must also include a recommendation that you obtain an independent property valuation and independent legal advice before signing the Contract.

If the required statement is not included in the Contract, the Seller or the Seller's agent may have committed an offence under POA and be liable to a fine. Please note that, any non-compliance will not affect the validity of the Contract or give you a right of termination.

### 5.4. Valuation

The note recommends that you obtain an independent valuation of the Property. We endorse this recommendation but do not provide valuation advice. The price is something you need to satisfy yourself about. The Contract is not conditional on a valuation. If you do not want to proceed without a valuation, you will have to obtain it before entering the Contract or expiry of the cooling off period.

## 6. HOW DOES THE *LAND SALES ACT 1984 (QLD)* ("LSA") AFFECT THE CONTRACT?

### 6.1. Sunset Date

An off-the-plan contract will usually contain a sunset date which is the date by which settlement must have occurred. The Contract will generally stipulate that if settlement has not occurred by the sunset date, either party may terminate.

Under the LSA, if settlement has not occurred within 18 months after the date you enter into the Contract, you will be able to terminate.

Our Contract and Property Report will set out details of how the Contract deals with the sunset date.

### 6.2. Settlement Date

Our Contract and Property Report will set out details of how the Contract deals with the settlement date.

### 6.3. Seller Disclosure Obligations

Before a Buyer enters into a contract for the sale of an "off the plan" lot, the Seller must give the Buyer:

- a. a disclosure plan and disclosure statement for the lot; or
- b. a copy of the lot's survey plan approved by the relevant local government.

### 6.4. Disclosure Plan

A disclosure plan must be prepared by a cadastral surveyor and be substantially complete. The plan must contain the following particulars:

- a. for a proposed lot to be created by a standard format plan:
  - i. the proposed lot number;
  - ii. the lot's total area;
  - iii. a description of the lot's dimensions and bearings and distances;
  - iv. identification of the proposed orientation of the lot by reference to north;
  - v. if there is operational work for the lot:
    - contour maps of the lot showing the surface contours, with appropriate contour intervals, as at the work's completion;
    - the location and height of any retaining walls that are part of the work (and if it varies, the lowest and highest points and an average height);
    - information about any fill that is part of the work, including the fill depth, whether compaction will be in accordance with the relevant Australian Standard (and if not, the nature of departure from the Standard) and the level of inspection and testing services carried out and compaction rates; and
  - vi. if there is no operational work for the lot, contour maps of the lot showing the existing surface contours, with appropriate contour intervals.
- b. for a proposed lot to be created by a volumetric format plan:
  - i. the proposed lot number;
  - ii. an isometric representation of the lot;
  - iii. the area of the lot's projected footprint;
  - iv. the level of the ground surface in approximate values for illustrating the lot's location in relation to that level;
  - v. identification of the proposed orientation of the lot by reference to north; and
  - vi. if the lot is proposed to contain a building or to be located in a building, the lot's proposed floor level.

### 6.5. Content Of Disclosure Statement

The disclosure statement must be signed by the Seller and state the following:

- a. that the Seller has given the Buyer a disclosure plan for the lot;
- b. whether a development approval has been granted for reconfiguring (i.e., subdividing) an existing lot to create the proposed lot or any operational work for the proposed lot;

- c. that the Seller must settle the Contract no later than 18 months after the Buyer enters into it; and
- d. that the Seller must give the Buyer a copy of the registered survey plan and a statement by a cadastral surveyor to the effect that there are no differences between the registered survey plan and the disclosure plan for the lot given to the Buyer.

## 6.6. Termination Rights

You may be entitled to terminate the Contract in the following situations:

- a. Seller's failure to deliver disclosure plan or statement - LSA s.10(3)

If, before you enter into the Contract, the Seller does not deliver a disclosure plan and disclosure statement or a copy of the survey plan approved by the relevant local government, you may terminate the Contract before settlement.

- b. Further statement - LSA s.13(4)

If the Seller becomes aware of any information contained in the disclosure plan that is inaccurate, the Seller must give to the Buyer a further statement rectifying the inaccuracies in the disclosure plan at least 21 days before settlement.

The statement must explain, in plain English, the differences between the information in the disclosure plan and the further statement. The statement must be signed by the Seller and prepared by a cadastral surveyor.

You may terminate the Contract before it settles by giving notice to the Seller within 21 days after the Seller provides the further disclosure statement if you would be materially prejudiced, if compelled to complete the Contract, given the extent to which the disclosure plan was or has become inaccurate.

If the Seller does not comply with its obligation to deliver a further statement, you may terminate the Contract before it settles by giving notice to the Seller if you would be materially prejudiced, if compelled to complete the Contract, given the extent to which the disclosure plan was or has become inaccurate.

- c. Settlement does not occur within particular period - LSA s14

As noted above, under the LSA, settlement must occur by the date that is 18 months after you enter into the Contract or you will be able to terminate.

If you think you have a right to terminate under any of the above sections and wish to exercise that right please contact us immediately.

## 7. IMPORTANT INFORMATION - GENERAL

### 7.1. Particular Issues Of Concern

If there are matters regarding the Property of particular concern or importance to you or your financier then you should contact us so that we can determine whether a special condition is required and appropriate investigations can be made. For example:

- a. Is the purchase subject to sale of the Buyer's existing property?
- b. Is payment of deposit by insurance bond or bank guarantee?
- c. Rights of termination if particular searches are adverse for example, if an existing or proposed tunnel or abandoned mines are discovered beneath the Property.

### 7.2. Fraud, Identity Theft And Hacking

There has been a recent increase in the number of attempted frauds relating to real estate.

It is essential to the conveyancing process that you provide us with a range of private information. Much of that information can be obtained by fraudsters and identity thieves from publicly available records or by hacking, phishing or trolling through unsecure email transmissions.

Parties to a conveyance are targeted as the conveyancing process often requires the transfer of large quantities of money.

We will take steps, such as obtaining personal identification from you, to assist to minimise the risk of fraud.

We recommend that you also take steps to minimise the risk that your personal information is fraudulently obtained by being cautious about all communication. This could include the following steps:

- a. Double check that all money transfer requests are legitimately requested by our law practice or your financier – despite how legitimate the request may appear;
- b. Do not transfer any money to any account other than our trust account (at our request – details of which are in the To-Do List) or to your existing financier or mortgage accounts (at your financier's request) – without first checking with us that the transfer is necessary for your transaction;
- c. If you are contacted by someone you don't immediately personally recognise representing themselves to be from our law practice, your financier or somehow linked to the transaction, ask the representative some historical questions about the transaction that you can be certain will verify that they are who they say they are;
- d. Avoid sending personal and sensitive information such as bank account numbers via email;
- e. Where instructions are requested or advice is provided via email, check with another form of communication.

### 7.3. Promises Made By The Seller Or The Agent

Please tell us of any promises or warranties made to you by the Seller or the agent which are not contained in the Contract as soon as possible, as we may not be aware of them. There may be no protection for you in the Contract in relation to such issues. Your options may be limited to:

- a. terminating under any applicable cooling off period or some other contractual term (where applicable); or
- b. a claim for compensation.

Court action is expensive and if you are aggrieved by the misrepresentation it may be more cost effective to terminate,

if possible using any contractual rights if you have the opportunity.

## 7.4. Other Professionals

We suggest you seek advice about the purchase from other professionals, including:

- a. an accountant – about the commercial viability, appropriate purchasing entity, tax considerations of the purchase and (if applicable) compliance with your SMSF's investment strategy;
- b. a surveyor – to survey the Property to check for boundary, area and encroachment issues;
- c. a valuer – to assure yourself that the price represents the market value of the Property;
- d. a soil tester – if you are planning on building (particularly in a new estate) to assure yourself that the soil condition does not require any special construction requirements; and
- e. a town planner – to assess planning compliance issues or give advice regarding proposed future development.

## 8. IMPORTANT INFORMATION – SEARCHES AND USE

### 8.1. Searches And Seller's Disclosure

Generally, the Property is sold free from encumbrances except those disclosed in the Contract. In addition, there are certain statutory warranties which apply and the Seller may make certain warranties in the Contract regarding the Property's condition.

We will need to undertake various searches immediately following registration of the plan creating the lot to establish whether the Seller has complied with its disclosure obligations and that the warranties are correct. In the event of any adverse results, we will advise what rights you have in relation to those matters. Unless you instruct us otherwise, we will undertake all necessary searches immediately following receipt of notice of registration, so that we can protect your interests.

Despite undertaking certain inquiries which may reveal adverse impacts on the Property, you will not always be able to terminate. If searches do reveal unsatisfactory results we suggest you instruct us to give you specific advice about your contractual rights and any remedies you may have. The advice will depend on the nature of the unsatisfactory search result and your particular contract. For example, the discovery of unapproved structures, non-compliant swimming pool fencing and flooding do not give you a right of termination or a right of compensation from the Seller. Despite this, searches are still undertaken so that you are well informed of the Property's condition.

### 8.2. Present Use

For a residential subdivision, the development will usually require an approval for a reconfiguration.

Following registration of the plan, it is prudent to obtain a standard town planning certificate to confirm whether a relevant approval was obtained and the terms of that approval. Our recommendation regarding a town planning certificate appears below.

### 8.3. Planning and Development Certificates

There are three types of planning and development certificates which can be obtained from the local authority. The information these searches disclose and their relative cost are set out in the Buyer's Searches List:

a. Limited Certificate - (takes approximately 5 business days)

Provides:

- i. information as to the town plan area or zone in which the Property is located;
- ii. by reference to the plan, a description of the planning scheme provisions applying to the Property; and
- iii. a copy of any information recorded for the Property in the infrastructure charges register kept by the local authority (including the amount of any unpaid charge applying to the Property).

Limited certificates do not tell you whether the existing use is lawful or whether any conditions for the use of the Property have been complied with. This certificate reveals the designated zone of the land and any other restrictions on the use of land in the zone (e.g. if the Property is in a Demolition Control Precinct or subject to character housing or other development codes of general application to the area).

b. Standard Certificate - (takes approximately 12 business days)

Provides:

- i. the same information as in a limited certificate; and
- ii. a copy of every decision notice or negotiated decision notice for a development approval that has not lapsed, which has been issued by the local authority for the Property.

By looking at the existing use of the Property, the local authority area or zone and the approvals obtained, it is possible to ascertain if the Property is capable of being lawfully used for its existing use or for other uses.

The certificate does not identify compliance with any approval conditions.

c. Full Certificate - (takes approximately 30 business days)

Provides:

- i. the same information in a limited certificate and standard certificate; and
- ii. if there is currently in force for the Property a development approval containing conditions (including conditions about the carrying out of works or the payment of money), a statement about each condition's fulfilment or non-fulfilment.

The full certificate is more expensive because a town planning officer from the local authority needs to inspect the Property and go through approval conditions to identify compliance and non-compliance.

d. **Recommendation on Planning and Development Certificates**

A development approval that is in effect for a Property attaches to the Property and will bind all owners (and occupiers) even if the Property is later sold, the Property is reconfigured under the approval or later development (including reconfiguration) is approved for the Property.

If you purchase the Property and there are outstanding obligations under a development approval which attaches to the Property, you may become liable to perform those obligations and for any consequences of non-compliance (including prosecution for an offence). An outstanding development condition may require the expenditure of money or the grant of an interest in the Property such as an easement or covenant which may affect the future use of the Property. For this reason, it is important that you are satisfied that conditions of a development approval attaching to the Property (including a larger parcel of land from which the Property was created) have been satisfied and are not outstanding even if the object of the development approval appears to have been carried out.

The only sure way of knowing whether approval conditions have been complied with is to obtain a full planning and development certificate. Information about compliance with conditions of an approval (including conditions about the carrying out of work or the payment of money, other than under an infrastructure agreement) is only available by obtaining a full certificate.

Obtaining a full certificate is costly and takes considerable time (you may not necessarily receive the certificate by settlement even if ordered immediately). The certificate is legally binding on council and the search may discover non-compliance issues that the other town planning certificates will not. If you intend to develop the Property or are particularly concerned with compliance with all approvals (and your settlement date is sufficiently far enough away to allow the results to be obtained in time) it can be beneficial.

If the Seller does not pay any relevant charges attaching to the Property, you may become responsible for their payment. If you think this might affect the Property you are purchasing please contact us urgently.

In some circumstances, it may be sufficient to obtain a limited or standard certificate or to make alternative investigations such as obtaining a copy of the Development Approval if available online, then consulting with town planners and checking title and other searches, however this may not identify all the conditions that might not be fulfilled.

For vacant land a limited certificate may be adequate unless the Property is recently subdivided land or you intend to develop the Property (in which case you may require a standard or full certificate).

If you require a full certificate please contact us as soon as possible.

## 8.4. Future Use

If you have any plans to change the present use of the Property or any building structures on it in the future, it is your responsibility to investigate what approvals you require from the local or other authorities. This is not part of our retainer.

## 8.5. Environmental Protection

The *Environmental Protection Act 1994* (Qld) ("EPA") requires that the Seller makes specific disclosure, before entering into

the Contract, if any of the following are applicable to the land (including the common property if in a Community Titles Scheme):

- a. the land is listed on the Contaminated Land Register or Environmental Management Register;
- b. the land is the subject of an EPA notice or evaluation (generally about possible contamination or notifiable activities such as underground fuel storage); or
- c. a magistrate has issued an EPA order for an authorised person to enter the land to conduct an investigation or carry out work.

If any of these apply and the Seller does not give disclosure before you enter the Contract then, you may terminate before the earlier of settlement or possession. If the Seller has not complied with these disclosure obligations, the Seller may still give disclosure after the Contract has been entered into, but you will be given a period of 21 business days after disclosure to terminate the Contract. If you do not terminate in that time you will lose the right. **Given the limited time period available for termination, it is important that you contact us promptly if you receive a notice from the Seller to remedy a failure to comply with its disclosure obligations.**

If you terminate the Contract because of the Seller's failure to make relevant disclosure, all money paid by you under the Contract must be refunded.

The searches we undertake only identify land on the Contaminated Land Register or the Environmental Management Register but not notices and orders. If you think the land may be contaminated, consider the prior or current use of the land might contribute to any contamination issues or any notices or orders may affect the land, please contact us as soon as possible so that we can take necessary steps.

## 8.6. Administrative Advices

Administrative advices may reveal interests on title impacting on the land that require disclosure by the Seller such as heritage listing or agreements, coastal protection notices, nature conservation orders, vegetation clearing offences or Milton Brewery notices (for a lot in a Community Titles Scheme).

An administrative advice on title may note that the land is declared acquisition land under the *Queensland Reconstruction Authority Act 2011* (Qld) and the following would apply:

- a. the owner is not able to sell the land other than to the authority; and
- b. if the owner does want to sell the land the authority must acquire it.

If a coastal protection or tidal works notice is given under the *Coastal Protection and Management Act 1995* (Qld), this should appear as an administrative advice. If you buy land with this on title, then the Contract may be of no effect unless the Seller has given you written advice of the undischarged notice not less than 14 days before settlement, or if settlement is less than 14 days after the Contract Date, at or before entering the Contract.

Your rights for any administrative advice, including termination rights, may depend on the administrative advice and the extent of disclosure.

## 8.7. Physical Limitations, Government Intervention And Operational Issues Affecting The Land

Unless you specifically instruct us to do so or unless the information is provided in the results from our standard searches, our retainer does not include advice about any of the following issues:

- a. whether the land is subject to laws about acid sulphate soils;
- b. whether there are agricultural land protection laws affecting the site or nearby land, air pollution;
- c. animal conservation laws over the site including current or proposed future wildlife corridors;
- d. bushfire control laws;
- e. whether the site is subject to commonwealth government environmental laws;
- f. laws about potential acquisition of part or all of the site by government or quasi government entities;
- g. whether the site or nearby land is contaminated or potentially contaminated;
- h. ability for the site to treat effluent;
- i. impacts on the site from current or future extractive resource developments including existing or possible future road haul routes;
- j. flooding from storm surge, overland flow or other sources;
- k. foul water drainage, storm water drainage pipes, sewerage pipes whether existing or proposed;
- l. whether you have any rights in negligence or contract or any other basis against an approving or acquiring authority;
- m. service connections to the site by services such as sewerage, water, power, telephone, internet or gas;
- n. whether the site is subject to land slip on or steep slopes;
- o. any laws relating to waste management and the use of the site for waste management activities;
- p. the availability of waste collection services for the site; or
- q. water courses and underground water sources on the site and their effect on the usability of the site.

If you have any particular concerns relating to any of these matters then you should contact us.

## 8.8. Unregistered Encumbrances

Unregistered encumbrances and other government rights or interests may affect the Property or the title such as:

- a. unregistered water, sewerage or combine drains; or
- b. access or extraction rights under the *Greenhouse Gas Storage Act 2009* (Qld); *Geothermal Energy Act 2010* (Qld) or the *Petroleum and Gas (Production and Safety) Act 2004* (Qld).

The standard searches may not reveal all unregistered encumbrances or other rights or interests. Council rates searches often show sewerage or drainage lines through the Property.

If you have any concerns about unregistered encumbrances, please contact us as soon as possible.

## 8.9. State Government – Prescribed Projects

It is possible that infrastructure projects undertaken by the State Government under the *State Development and Public Works Organisation Act 1971* (Qld) may affect the land or nearby properties (e.g. water infrastructure pipeline works).

Your use and enjoyment of the land may be affected by a project even though the land is not directly affected. Our searches only reveal issues affecting your land.

We suggest you check to see if projects have been declared or proposed in the area.

## 8.10. Urban Encroachment

The *Planning Act 2016* (Qld) enables registration of a premises' existing use with the Registrar of Titles to provide protection from legal proceedings for nuisance in relation to the emission of aerosols, fumes, light, noise, odour, particles or smoke. This is particularly relevant for areas where residential use is increasing into existing industrial areas.

If the Property is in an affected area, then you are restricted from taking proceedings against the industry making the emissions, with few exceptions.

There is generally no termination right if it is discovered that the Property is in an affected area.

## 8.11. Neighbourhood Disputes

Please tell us if you hear about or receive any copies of documents relating to disputes between the Seller and neighbouring property owners about dividing fences or trees. In particular, please tell us if you are aware of any:

- a. notices to fence from a neighbour;
- b. applications to QCAT for fencing or trees; or
- c. QCAT orders for fencing or trees affecting the Property.

If there are tree applications or orders affecting the Property and you receive them from the Seller before you enter into the Contract, then you can be obliged to respond to the QCAT application or complete work specified in an order which has not been completed.

If copies of tree applications or orders are not given to you prior to your entry in the Contract then you may have the ability to terminate at any time prior to settlement. The Seller may also be liable for your reasonable legal and other expenses incurred in relation to the Contract after you signed it.

If you complete the purchase and the Seller has not completed all work required in a QCAT tree order not disclosed to you before Contract, the Seller will remain liable to carry out the work after settlement.

Although views from a property are not generally protected by the law, the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (**ND Act**) will, in limited circumstances, provide a property owner with the ability to seek an order from QCAT regarding trees on adjoining land (or on land that would be adjoining but for a road). Where a person's property is affected by substantial, ongoing and unreasonable interference from a tree on adjoining land, that person may

seek orders under the ND Act in relation to the tree (including for compensation or for work to be done to the tree). If the interference is the obstruction of a view, QCAT may only make orders if the tree rises at least 2.5 metres above the ground and the obstruction is a severe obstruction of a view, from a dwelling on the Property, that existed when the Property owner took possession of the Property.

The ND Act will not provide you with greater views than what exist when you take possession of the Property and QCAT decisions suggest that the ND Act will only create rights in relation to a view from a dwelling that exists when you take possession. If the views are important to you, we recommend that, on taking possession, you make a record (including photographs) of the existing views from the dwelling on the Property. Without a relevant record, it would be difficult to provide evidence to QCAT about the views that existed at the time you took possession of the Property.

## 8.12. Building Covenants

Are you aware of any building covenants affecting the Property or have you signed any document relating to any covenants? If so, please provide us with details and a copy of any documents signed, as these may impact on your proposed use of the Property or bind you to additional contractual obligations or liabilities.

## 9. IMPORTANT INFORMATION – OWNERSHIP AND PAYMENTS

### 9.1. Purchasing Entity/Tenancy

If any of the following apply:

- a. There is more than one Buyer:

Please advise in the Questionnaire whether you intend to purchase the Property as joint tenants or tenants in common (and, if so, in what proportions) as we will need to specify this on the transfer documents.

The effect of **joint tenancy** ownership is that on the death of one owner their share in the Property passes to the surviving joint tenants despite any provision in a will.

If you purchase as **tenants in common** then on the death of a co-owner the share in the Property of that co-owner will pass in accordance with their will or in accordance with the laws of intestacy if they do not have a valid will.

Joint tenants can, at any time, give a notice to their co-owners which severs their interest from the joint tenancy. A joint tenant who gives such a notice will then hold their share as a tenant in common with any other co-owners remaining as joint tenants between them (if more than one).

A joint tenancy is not appropriate where parties wish to hold interests in the Property in unequal shares. If you wish to hold the Property other than equally (for example, a 99% and 1% split or some other unequal percentage ownership) for taxation, duty (e.g. Foreign Acquirers Duty) or asset protection reasons then you must hold the Property as tenants in common. You will need to advise us of the percentage of ownership each owner is to have as this needs to be set out on the Property transfer. Any later change to ownership proportions will result in transfer duty being imposed.

- b. You are purchasing the Property for investment purposes and the Contract has not yet been entered into:

We recommend you seek advice from an accountant or financial advisor on the best purchasing and borrowing entity for you taking into account your financial circumstances and financial planning requirements (for example:

- i. whether to purchase (and borrow) as an individual, company, trustee or other entity such as a SMSF;
- ii. tax implications and structuring; and
- iii. land tax and other holding costs.)

If you enter into the Contract as trustee of a trust, you are still personally liable under the Contract for the performance of all the Buyer's obligations unless provision is included in the Contract to limit that liability. If you have any concerns about this issue, please contact us.

### 9.2. Foreign Ownership (if applicable)

If you are a foreign person or are a trustee of a foreign trust, you may need to:

- a. obtain a notification from the Foreign Investment Review Board under the *Foreign Acquisition and Takeovers Act 1975* (Cth) ('**FAATA**') that it has no objection to your acquisition of the Property; and
- b. notify the Department of Natural Resources, Mines and Energy under the *Foreign Ownership of Land Register Act 1988* (Qld).

For the purposes of applying FAATA:

- a. a corporation is considered to be a foreign person if an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest in the corporation (at least 20% voting entitlements or shares) or two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest;
- b. a trustee of a trust is considered to be a foreign person if an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest in the trust (at least 20% of the income or property of the trust) or two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest in the trust; and
- c. the trustee of a discretionary trust where a foreign person holds any beneficial interest in the trust is generally considered to be a foreign person in their capacity as trustee of the trust.

Please call us if you think this applies to you.

**Failure to obtain a required no objection notification under FAATA may result in a forced sale and substantial penalties being imposed.**

Further, if the Property is not occupied or genuinely available for rent for at least half of the year, the Australian Taxation Office may charge you an annual fee equal to the relevant foreign investment application fee imposed on the Property. If this applies, this is your responsibility to comply with the

relevant foreign ownership occupancy requirements and is outside the scope of our retainer.

### 9.3. Capital Gains Tax Withholding Payments (if applicable)

Under laws designed to ensure that foreign residents meet their liability for CGT when selling land in Australia, a Buyer may be required to pay 12.5% of the purchase price to the Australian Taxation Office ("ATO").

**The CGT withholding laws apply to contracts entered into on or after 1 July 2017 where the Property sold has a market value of \$750,000 or more.**

If the CGT withholding laws apply, the Buyer must pay the required amount to the ATO promptly after settlement unless the Seller produces a valid clearance certificate issued by the ATO or a notice from the ATO varying the CGT withholding amount to nil.

The issuing of a clearance certificate by the ATO to the Seller is confirmation that the Buyer is not required to pay any part of the purchase price to the ATO at settlement.

**It is important to note that, payment of any required CGT withholding amount is the Buyer's responsibility.** A failure to pay the CGT withholding amount to the ATO may have serious consequences. In addition to liability for the CGT withholding amount, a penalty (equal to the amount required to be withheld) may apply where a Buyer fails to comply with the CGT withholding laws.

The CGT withholding laws effectively allow the Seller to avoid a withholding by producing a clearance certificate at any time until settlement. Unfortunately, if the Seller provides a clearance certificate at a late stage, your ability to prepare for settlement may be prejudiced as details of cheques required for settlement may change. There is a risk that a late change in payment details may mean that you are unable to provide the required bank cheques at settlement and may be in breach of the Contract as a result. While we will endeavour to mitigate this risk by putting the Seller on notice of requirements in relation to the clearance certificate and the time frame for the drawing of bank cheques for settlement, if the Contract has not yet been signed, we recommend that you instruct us to request the inclusion of a special condition in the Contract to the effect that you will be entitled to extend the settlement date unilaterally for a further business day if the Seller provides a clearance certificate after cheques have been drawn for settlement.

In most cases, market value will be determined by the purchase price payable under the Contract. If the transaction involves a purchase price of \$750,000 or more but includes personal property (such as moveable equipment or furniture) with a material value and the market value of the land and improvements may be less than \$750,000, it may be appropriate to obtain an independent valuation of the Property for the purpose of specifying an apportionment of the purchase price.

Similarly, an independent valuation of the Property should be considered if the transaction is between related parties and the Property may have a market value of \$750,000 or more.

If the market value of the Property is \$750,000 or more but the purchase price is less than the amount to be paid to the ATO, you should consider options for the payment of this amount or amendment of the Contract to require payment by the Seller of an amount to cover this payment.

### 9.4. GST Withholding Payments (if applicable)

For contracts selling **new residential premises** or **potential residential land** entered into after 1 July 2018 or entered into

before 1 July 2018 but settling after 1 July 2020, GST withholding laws apply requiring the Buyer to withhold at settlement any GST payable in relation to that contract. Generally speaking, the provisions will apply to any off-the-plan sales in a residential development.

A property will be treated as affected **new residential premises** if it has not previously been sold as residential premises or is residential premises built to replace demolished premises on the same land. The GST withholding requirements will not apply to the sale of commercial residential premises (such as a hotel).

Land will be affected **potential residential land** when all of the following apply:

- a. the land is permissible to use for residential purposes, but does not contain any buildings that are residential premises;
- b. the land is included on a property subdivision plan;
- c. the land does not contain any building that is in use for a commercial purpose;
- d. the following exclusion does not apply:
  - i. the recipient is registered for GST; and
  - ii. the recipient acquires the land for a creditable purpose.

The amount to be withheld will be 1/11th of the purchase price although if the margin scheme applies the amount of the GST withholding will be reduced (and in the absence of any other determination by the relevant Minister, will be 7% of the purchase price).

**It is important to note that, payment of any required GST withholding amount is the Buyer's responsibility.** A failure to pay the GST withholding amount to the ATO may have serious consequences. In addition to liability for the GST withholding amount, a penalty (equal to the amount required to be withheld) may apply where a Buyer fails to comply with the GST withholding laws.

### 9.5. Land Tax

Land tax is potentially payable if the unimproved value of all land owned by you as at midnight on 30 June in each year meets the statutory threshold amount. Generally there are exemptions for your private residence. If the Seller has any outstanding land tax liability in respect of the Property then this will need to be taken into account in determining the settlement figures. There may need to be a settlement retention for unpaid land tax although in off the plan contracts, this right is not often given and instead you must rely on the Seller's undertaking to pay land tax for the current land tax year.

After settlement, you will be responsible for dealing with any rates and land tax assessments, checking their accuracy (including whether the correct category has been applied for any assessments and your entitlement to any deduction or concession) and attending to payment.

Land tax is calculated by reference to the taxable value of a property (i.e., the value of the land). The taxable value of all property of an owner in Queensland is aggregated to determine the rate of land tax payable. A landowner who is an individual will pay a lower rate of land tax than that payable by a company or trustee. Absentee landowners (i.e., landowners who do not usually live in Australia) pay a higher rate of land tax. Absentee landowners, foreign corporations and trustees of foreign trusts also pay an additional land tax surcharge of 2%.

## 9.6. Transfer Duty

Transfer duty is a state tax which is payable on dutiable transactions in Queensland. It is calculated on the Property's dutiable value which is generally the higher of the consideration payable under the Contract and the Property's unencumbered market value.

**As transfer duty is applicable to each transaction, you must ensure that the Buyer named in the Contract is the person or entity that you intend to own the Property.**

Otherwise you risk two or more assessments of transfer duty, which can increase the amount payable.

If you are seeking to purchase property for your SMSF and are planning to buy the Property using a bare trustee as purchaser with a loan then you risk paying transfer duty again when the Property is transferred to your SMSF on repayment of the loan. It is outside our normal retainer to advise you on strategy to avoid that additional duty.

You also need to carefully consider your current and ongoing eligibility for any concession or exemption that you obtain.

If you do not pay duty or advise the Office of State Revenue of changes to your eligibility for concessions or exemptions then they may identify this (as they actively cross-check data held by other government agencies) and can seek to recover any shortfall directly from you including penalties and interest. Recovery of incorrect or unpaid duty may occur years after settlement and could compound into substantial amounts.

From 1 October 2016, transactions under which foreign persons acquire land for residential use or development will attract additional duty. See item 9.8 for further details.

## 9.7. Home Concessions To Transfer Duty

You may be eligible for a home concession on the transfer duty if the Property is vacant land being purchased to construct your first principal place of residence that you will occupy within 24 months after settlement ("**first home vacant land concession**").

If you are eligible, no transfer duty is payable for purchases of first home vacant land up to \$250,000 in value. The concession progressively reduces as the value of the acquired vacant land increases up to \$400,000. There is no concession where the value is \$400,000 or greater and transfer duty is then payable at ordinary rates.

Strict eligibility requirements apply to the concession.

We strongly suggest that if you intend on applying that you check your eligibility for the concession by using the Queensland Government's on-line eligibility test (available on its website at [www.qld.gov.au](http://www.qld.gov.au)) or by telephoning the Office of State Revenue directly on 1300 300 734.

Usually you will not meet the eligibility requirements for the first home vacant land concession if:

- a. you are purchasing an investment property;
- b. you are purchasing using a company, unit trust or discretionary trust;
- c. you have held an interest in residential land somewhere in the world;
- d. there will be more than one home constructed on the vacant land; or
- e. there was a building, or part of a building, on the land when you bought it.

You should tell us as soon as possible if:

- f. a concession applicant is under 18 years old; or
- g. a trustee or guardian is purchasing for the benefit of legally disabled beneficiaries.

### **Disposal of property**

You will lose your entitlement to the full concession if you sell, transfer, lease, extend a lease, rent, surrender a lease to another person or otherwise grant possession of the Property to another person within 12 months of occupying the house. Repayment of all or part of the concession may be required and penalties and interest can apply.

If any of these things apply, you must notify the Office of State Revenue within 28 days of the event happening for liability reassessment. If you do not, significant additional penalty duty may be payable and interest will be charged from when you are liable to notify. If applicable, this is your responsibility and is outside the scope of our retainer.

However, please note the Office of State Revenue generally does not consider the following to be a disposal of the Property:

- a. an intervening event such as a natural disaster, incapacity or death prevents you from occupying the home;
- b. you occupy the home as your principal place of residence, then leave it vacant for the rest of the 1 year occupancy period; or
- c. you transfer part of the Property to your spouse.

It is important to consider the potential effect that any dealing with the Property may have on your entitlement to a concession for transfer duty. You should contact us to discuss any queries you have in relation to this issue.

## 9.8. Additional Foreign Acquirer Duty ("AFAD")

AFAD applies to property transactions which are liable to transfer duty if:

- a. the duty liability arises on or after 1 October 2016;
- b. the Property is AFAD residential property (see below); and
- c. the acquirer under the transaction is a foreign acquirer.

AFAD residential property is property in Queensland that is or will be used solely or primarily for residential purposes, where particular conditions are met. These include:

- d. established homes and apartments;
- e. vacant land on which a home or apartment will be built;
- f. land for development for residential use; and
- g. refurbishment, renovation or extension of a building for residential use.

AFAD residential property does not include property used for hotel and motel purposes.

A person will be a "foreign acquirer" if the person is:

- a. a foreign individual - an individual other than an Australian citizen or permanent resident. However, AFAD will not apply to a New Zealand citizen who holds a permanent visa, or who holds a special category visa as defined in the *Migration Act 1958* (Cth);



- b. a foreign corporation - a corporation incorporated outside Australia or a corporation in which foreign persons have a controlling interest; or
- c. a trustee of a foreign trust - a trust where at least 50% of the trust interests are foreign interests.

AFAD is an additional duty imposed on the transaction's dutiable value.

However, if there are multiple buyers and only one is a foreign acquirer, AFAD will only apply to the extent of the foreign acquirer's interest under the transaction. Liability for AFAD will not affect any entitlement to a home concession for transfer duty.

If, within three years of the transaction, the acquirer becomes a foreign corporation or the trustee of a foreign trust, it is important to note that the Commissioner of State Revenue must make a reassessment to impose AFAD on the transaction. This may occur, for example, because of a change in the controlling interest in the company or interests in the trust.

If this becomes applicable, you must take action to inform the Commissioner of the changed circumstances within 28 days. If you do not, significant additional penalty duty may be payable and interest will be charged from when you are liable to notify the Commissioner. If applicable, this is your responsibility and is outside the scope of our retainer.

You should call us as soon as possible to discuss this issue if you think AFAD may apply to your transaction.

## 9.9. Related Parties

**You must tell us, as soon as possible, if you have a business or personal relationship with the Seller or if the consideration for the sale is less than market value.** If so, this will have duty implications and we will require a valuation of the Property using three comparable sales within the last three months. If applicable, these valuations must meet certain criteria and are required before duty is assessed and paid. You should call us as soon as possible to discuss if you think this may apply, as a failure to obtain the valuations can result in serious consequences for you (e.g. the imposition of penalty duty and interest).

## 9.10. Aggregation Of Transfer Duty

If you buy two or more properties or enter into two or more contracts that the Office of State Revenue considers arise from the one arrangement you may be liable to pay more transfer duty based on the aggregate value of the assets being purchased.

Please contact us as soon as possible if you have:

- a. previously bought a property from any of the Sellers noted in the Contract (including family members or associates of any of the Sellers, such as companies or officeholders related to any of the Sellers);
- b. bought an adjoining or nearby property from anyone - particularly to develop together with this Property;
- c. bought a business in conjunction with this transaction;
- d. negotiated this Contract or Property together with or shortly after other contracts or property; or
- e. otherwise have reason to believe that the Office of State Revenue may consider this transaction as one transaction with another contract or agreement.

## 9.11. Instalment Contract

An off the plan contract can become an instalment contract for many reasons including:

- a. the deposit is more than 20%; or
- b. the deposit is stated to be non-refundable in all circumstances; or
- c. the Buyer is given a rebate off the purchase price which makes the deposit more than 20% of the rebated purchase price; or
- d. the Buyer is required to pay money to the Seller (other than a 20% deposit) before receiving a transfer and the amount payable under the Contract exceeds market value for what is provided in exchange. For example, a rent to buy contract may require instalment payments which exceed the market rent that would otherwise be payable.

The effect of the Contract being an instalment contract is:

- e. If you default in the payment of any instalment or part of the purchase price (other than a deposit), the Seller cannot terminate the Contract until 30 days after having served a notice giving you 30 days within which to make payment. If you choose to make payment within the 30 day period (including any default interest payable under the Contract) then the Seller cannot terminate. This means that where the default is in the payment of the balance purchase price, you can effectively obtain another 30 days in which to settle.
- f. The Seller is prohibited from re-selling or re-mortgaging the Property before settlement.
- g. The Seller may be required to comply with the National Credit Code, including the requirements for pre-contractual disclosure, ongoing notices and certain pre-requisites to enforcement.

Unless you instruct us to investigate the possibility that your contract is an instalment contract, we will assume that this investigation will not be of any benefit to you and that you wish to settle the purchase on the settlement date. If, of course, your capability to settle on the settlement date changes at any time, you should let us know.

## 10. IMPORTANT INFORMATION – SETTLEMENT STEPS

### 10.1. Pre-Settlement Inspection

Unless we tell you otherwise, your Contract will entitle you to undertake a pre-settlement inspection of the Property. We suggest you make arrangements with the Seller to undertake that inspection. You may wish to engage a consultant to assist you undertake the inspection.

### 10.2. Priority Notice

We will lodge a priority notice on title before settlement. This helps protect your interest in the Property by preventing the registration of any conflicting interest (such as a mortgage or transfer to an unrelated third party, but not a caveat or a writ of execution) until the earlier of:

- a. 60 days after we lodge the notice (subject to any extension); or

- b. your transfer and all related documents are registered; or
- c. it is withdrawn.

A priority notice may be extended by 30 days by lodging a request to extend the notice before it lapses.

### 10.3. Transfer Documents

Title to the Property will be transferred to you after settlement when transfer documents are registered in the Land Titles Office. The transfer documents must be signed by the Seller and by you although we are able to sign the transfer documents on your behalf

The transfer documents will not be prepared until the title for the Property has been created. In off-the-plan transactions, it is common practice for the Seller's lawyers to prepare the transfer documents (as a large number of them may need to be signed by their client at the same time).

After settlement, we will lodge the transfer documents for registration unless you have a financier, in which case they will be responsible for lodging the transfer documents for registration. Registration of the transfer is critical to your ownership of the Property and you should follow up your financier after settlement to ensure registration. If you require us to follow up your financier, please let us know (but this will be an extra cost to you).

### 10.4. Utility Services

You will need to make your own arrangements for connecting electricity, gas, telephone, internet, pay-TV services and other utility services to the Property. If a service provider will not arrange for connection from settlement without authority or confirmation from the Seller please obtain this via the real estate agent or from the Seller directly. It is beyond the scope of our retainer.

## 11. ELECTRONIC CONVEYANCING (OR E-CONVEYANCING) – IF APPLICABLE

### 11.1. What Is E-Conveyancing?

E-conveyancing allows for an "electronic" settlement of a conveyancing transaction through an online exchange such as PEXA. The system operates Australia and is supported by legislation in Queensland.

The system does not cover all aspects of the conveyancing process but does allow for the preparation and signing of documents and their lodgement in the Land Titles Office as well as the completion of financial transactions involved in a conveyance (such as settlement money transfer and transfer duty payment) to occur electronically. Traditionally, each of these steps is handled by a paper process where printed documents would be signed by parties and documents and cheques for settlement funds are physically exchanged at settlement.

The main advantage of an electronic settlement process is efficiency. Not only does the process make it unnecessary to attend a physical settlement for exchange of documents and funds, when the exchange occurs, cleared funds are credited to the recipient's account within a very short time. This has particular benefits for a Seller who will not be required to wait for cheque clearing procedures following a settlement.

### 11.2. When Can E-Conveyancing Be Used?

The electronic settlement process cannot be used for all conveyancing transactions and can also only be used if all parties agree to it. The process is only available to financial institutions, and parties who engage a legal practitioner.

In our First Letter we will tell you whether the Contract makes provision for e-conveyancing to be used for settlement. Even if it does, the use of e-conveyancing for settlement will likely depend on the agreement of all parties (including financiers) to do so.

### 11.3. Client Authorisation And Verification Of Identity

We require your authority to use e-conveyancing for settlement of the transaction. That authority must be provided in the form of a Client Authorisation. A separate authorisation form must be signed by each Buyer. If e-conveyancing is to be used, we will contact you closer to settlement to discuss arrangements for the signing of a Client Authorisation.

As a Client Authorisation allows us to undertake the settlement of the transaction on your behalf (and to sign documents for you), we are required to undertake a prescribed process to verify your identity. This will require you to attend at our office for a face-to-face meeting where you will need to produce identity documents and sign the Client Authorisation. If a face-to-face meeting is not possible, a VOI agent can undertake the verification of identity process.

### 11.4. Risks Of Using E-Conveyancing

Although the system may have advantages for the parties in relation to the efficiency of arranging settlement and the transfer of funds, a party contemplating the use of the system should be aware of the following risks:

- a. The electronic settlement may be delayed by system failures. If e-conveyancing is proposed, it will be important to consider how the Contract deals with the issue of system failure to ensure that your rights are not adversely affected because a relevant computer system is inoperative.
- b. In some circumstances, settlement may proceed (and settlement funds will be disbursed) even though the electronic lodgement of documents in the Land Titles Office that would normally be part of the electronic settlement process is not available. Lodgement of a priority notice (see item 10.2 above) will help to protect a buyer's position. In addition, PEXA provides insurance for loss incurred if a dealing is lodged prior to lodgement of the Buyer's documents which prevents registration of the Buyer's documents or takes priority over them.
- c. A party to a transaction may, after having previously agreed to use the system, elect to withdraw from it. Once again, it will be important to consider how the Contract deals with this issue. For example, if the Contract does allow parties to withdraw from the system, the parties may still need to prepare for a traditional (paper based) settlement process to ensure that the other party is still able to satisfy its settlement obligations on time. Having to prepare for both methods of settlement may erode any efficiencies and costs savings and even add to the work involved.
- d. One of the main advantages of electronic settlement is the transfer of funds to the recipients of the settlement proceeds within a very short time. This will include not only the Seller and the Seller's financial institution but also authorities to whom money is paid to discharge an

outgoing. Any arrangement that involves the transfer of funds to a nominated bank account carries with it the risk that an error may result in funds being credited to the wrong account. The speedy transfer of funds may make any wrongfully transferred funds more difficult to track or recover.

- e. A traditional settlement involves a physical exchange of documents and funds (provided by bank cheques) and, generally speaking, at any time until that exchange has taken place a party may refuse to settle. An electronic settlement will require the respective parties to commit themselves to settlement at an agreed time (when the electronic workspace for the transaction will lock). The settlement process is to commence at this time and, unlike a traditional settlement (where settlement may be aborted until final exchange), the parties will not be able to abort the settlement after the workspace locks and the settlement process has commenced. In limited circumstances, this may mean you discover issues with the Property and, while the Contract has not settled, you may be unable to exercise any rights.

If you have any questions about how e-conveyancing works or whether it may be used for your transaction, please contact us to discuss them.

## 12. PERSONAL PROPERTY SECURITIES – IF APPLICABLE

### 12.1. What Are Personal Property Securities And How Do They Affect This Transaction?

*The Personal Property Securities Act 2009 (Cth) (“PPSA”)* applies to security interests in personal property, including goods and chattels, financial property, shares and intellectual property (personal property).

PPSA doesn't apply to land, buildings or fixtures that form part of the land.

The PPSA may apply if, in addition to the land, personal property is sold to you which is not a fixture. Title to that personal property must be transferred at settlement free from encumbrances.

### 12.2. What Is Affected By The PPSA?

A chattel, good or other personal property (other than crops) is considered to be a “Fixture” if it is affixed or annexed to the land in such a way as to become part of the land (taking into account the degree/ mode/ object of annexation). Fixtures are not affected by the PPSA. All other goods will generally be considered chattels and may be affected by the PPSA.

For example:

- a. An air-conditioning unit, satellite dish, oven, rangehood, window furnishings or carpets are usually fixtures and the PPSA may not apply.
- b. A clothes dryer, furniture package, fridge or washing machine (if not affixed) are chattels to which the PPSA may apply.
- c. Items such as solar panels or water tanks/pumps may be considered a chattel depending on how these items are part of the Property (e.g. if they are affixed, and if so, how).

### 12.3. When Do I Need A Specific Release?

If:

- a. personal property is included in the sale; and
- b. a security interest is noted on the PPS register for that property; and
- c. none of the extinguishment rules apply,

then the Seller is required to obtain from the secured party either a letter or financing change statement, which releases the personal property and provide it at settlement. If you are uncertain about the legal position of the chattels, we recommend you instruct us to request a specific release from the Seller.

To enable us to consider if any of the extinguishment rules apply, please provide your instructions on whether any personal property being sold as part of the Property is worth less than \$5,000, is subject to a security interest and is being sold for “new value”.

Please tell us about any personal property included in the purchase so we can consider the impact of the PPSA on the transaction and protect your interests accordingly.