



Greyson Legal **Publications**

Commercial and Industrial Property (non-strata titled)



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In this publication we deal with non-strata titled Commercial and industrial property (“Commercial Property”) – which is concerned with buying and selling non-residential real property, such as:- industrial land, commercial offices, factories, sheds, warehouses, and the like.

There are a number of issues which arise when dealing with Commercial Property that do not generally arise in relation to residential conveyancing. Some of these issues are outlined below:

Type of Contract

Most Commercial Property transactions utilise the QLS_REIQ Contract for Commercial Land and Buildings. References to clauses in this Publication are references to that Contract.

Purchase Structure

Prior to entering into the Contract of Sale consideration should be given, from the Buyer’s perspective, as to the appropriate purchasing entity. For example:- sole individual ownership, joint individual ownership (like a Partnership), company purchaser or buying through a trust.

Thought should be given to issues around:

- limiting liability;
- taxation;
- obtaining finance;
- how simple or complex the Buyer wants to structure the purchasing entity;
- costs of setting up the structure.

It is advisable to seek advice from an accountant as well as obtaining legal advice at the structuring stage.

Due Diligence

When purchasing, appropriate due diligence investigations of the Property should be undertaken. What should or should not be investigated will vary from property to property depending on the specific circumstances. Issues to consider may include one or more of:

- are the buildings on the land compliant with the *Building Act 1975* and *Building Regulation 2006* and Building Code of Australia (BCA) (as applicable);
- what is the zoning of the property. What conditions apply to the zoning. Have the conditions been complied with;
- details of current building approvals. Location of building plans as approved by Council;
- have any notices been issued by Council or other authority related to property. If so, have they been complied with

Certificate of Classification

A certificate of classification is a document that specifies a building's classification and describes the way it can be used.

There are 10 classes of buildings defined under the Building Code of Australia (BCA), each of which has a different use.

If a building was built after 1 April 1976, it should have a certificate of classification with its building approval.

A certificate of classification contains information about the use of the building, ongoing maintenance requirements, fire safety and other special requirements. It needs to be displayed to ensure this information is readily available for people who occupy the building, Queensland Fire and Rescue Service (QFRS) officers and local government officers.

Clause 4.1 (i) of the Contract requires the Seller to provide the Buyer with a Certificate of Classification at settlement.

Lease

Is the property subject to a lease. If so, clarifications in regards to the lease should be obtained, such as:

- is the lease registered or unregistered;
- is it a "retail" premises to which the Retail Shop Leases Act will apply;
- what are the terms and conditions of the lease;
- what is the status of rent and outgoings – are they paid up to date;
- has a bond or security been paid - if so, who holds it;
- are there any options for renewal – if so, has the option been properly exercised;
- clarification as to what are the landlord's fixtures and fittings (versus what belongs to the tenant);
- etc.

If rent and/or outgoings have been paid in advance, the purchase price is typically reduced by the amount of rent paid by the tenant for any period after the date of settlement.

If a tenant has paid a cash bond, a reduction in the purchase price can be made to the purchase price at settlement equivalent to the amount of the cash bond. If, however, a tenant has provided a bank guarantee, then usually a new bank guarantee is required in favour of the Buyer and the current bank guarantee is exchanged for a new bank guarantee at settlement.

Buyers should also check that the tenant has complied with any statutory and regulatory requirements, such as, trade waste permits (if applicable to the tenant's business).

Asbestos

The *Workplace Health & Safety Regulation 2011* imposes statutory obligations upon the owners of buildings in relation to asbestos. For example, in relation to maintaining an Asbestos Materials Report and Register at the premises.

Contaminated Land

The *Environmental Protection Act 1994* imposes liability upon the owner of land for contamination or environmental harm. From a Buyer's perspective it is important to ascertain the extent of any liability under this legislation.

Searches can be undertaken of the contaminated land register (CLR) and environmental management register (EMR). The searches will indicate if the land is or is not listed on the EMR or the CLR; what, if any, contaminants (as notified to the government) are on the land; and if there is a site management plan for the land.

Clause 7.6 of the Contract allows a Buyer to terminate the Contract or seek compensation if the property the Seller breaches a warranty in the Contract in relation to notifiable activities and contamination.

GST

An assessment needs to be made prior to the Contract of Sale being entered into as to how GST is to be dealt with. For Sellers the obligation to pay GST depends on whether the Seller is registered (or required to be registered) for GST purposes. If the Seller is not registered and not required to be registered, then generally no GST will be payable on the purchase price. If the Seller is registered for GST purposes, the Seller is obliged to pay GST (unless some special exemption applies, such as the going concern exemption).

Stamp Duty

From a technical standpoint under the Duties Act (Qld), both parties are liable to pay the stamp duty. But the usual practice is that the stamp duty on the purchase price (inclusive of GST) is payable by the Buyer.

Risk

Under the Contract, risk usually moves from the Seller to the Buyer from 5pm on the next business day after the Contract has been signed by both parties. Buyers should take out appropriate insurance to minimise their risk.

Encumbrances

A Buyer should check whether there are any encumbrances affecting the property, such as:- leases, easements, covenants, etc. Searches can be undertaken to assist with this.

There is an obligation on the Seller to also disclose encumbrances. A Buyer may be entitled to terminate a Contract (or compensation) if an encumbrance has not been disclosed in the Contract and the Buyer would be materially prejudiced if they were required to proceed with the purchase.

Land Tax

Land tax is a charge attached to a property (as opposed to a person or entity). If a property is sold and any outstanding land tax is not paid at settlement, the obligation to pay the land tax falls to the new buyer.

A land tax search can be carried out to determine if any land tax is owing.

The above are just some matters to consider.

For assistance with buying or selling a commercial or industrial property or property law matter generally, contact [Greyson Legal](#).

Disclaimer

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