

# SELLER TO KEEP

## Residential Conveyancing Booklet – Sellers

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## 1. WHY READ THIS BOOKLET?

This Residential Conveyancing Booklet (“the Booklet”) is to be read in conjunction with our letter (“the First Letter”) and the enclosures to the First Letter.

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

We may give you advice during your transaction on rights that you could have, such as rights to terminate the contract or to claim compensation from the buyer. This advice may be general (eg advice contained in the Booklet) or specific (eg contained in the Contract and Property Report). Alternatively you may form a view that you no longer wish to sell 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** (e.g. If you take steps or actions after you become aware of some rights). 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 sale, you should 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 sale, 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 sale.

### 2.1. What is included in our retainer? (What we will do)

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

If you instruct us to exclude any of the steps that are generally considered usual and necessary 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?

Our retainer does not extend beyond what is usual and necessary in the conveyancing process. We consider the following to be excluded:-

#### a) Commissioning a survey

Please note that we do not conduct a survey – this is your responsibility (if you decide to do so).

Issues such as errors in the boundaries or area of the Property or encroachments by structures onto or from the Property will generally not be identified unless a survey is conducted. Whilst it is not usual for a Seller to conduct a survey, a Buyer may have rights of termination or compensation if any encroachments are identified and notified before settlement. If you are aware of any of these issues affecting the land please tell us so they can be disclosed in the Contract.

#### b) Document Storage

We may destroy the file relating to this transaction on the earlier of any specified time agreed between our firm and you OR seven (7) years after settlement of the transaction or the termination of engagement.

It is your responsibility to retain copies, and originals (where appropriate), of all correspondence and sale documentation. This may be required for taxation, duties or other evidentiary purposes at a later date. For example, if the Property was held as an investment at any time, then your documentation may be required for Capital Gains Tax (“CGT”) purposes.

#### c) Eligibility for Grants and Other Schemes Advice

If you have previously obtained the first home owners' grant, first home owners' construction grant, building boost, great start grant or a first home, home or first home vacant land duty concession, your sale of the Property may affect your continued eligibility for these schemes. We do not check whether you will have any obligation to refund a part or all of your entitlement to a concession or grant. See paragraphs 9.5 and 9.6 for further information.

#### d) Financial and tax advice

We do not give advice on the commercial viability, tax and other financial implications of the sale. If you require advice on the commercial viability or the tax implications of the sale (including Capital Gains Tax, Goods and Services Tax and land tax) you should seek specialist advice such as from 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 if you bought the Property before CGT or GST regimes were introduced or are selling:

- i. an investment;
- ii. with or as part of a business;
- iii. after you substantially renovated or developed the Property;
- iv. as the executor or beneficiary of an estate;
- v. as a foreign owner; or
- vi. you did not use the Property solely as your main residence.

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

If you are proposing to provide finance to the Buyer to assist the Buyer to purchase the Property, you must tell us. Such an arrangement would raise a number of significant risks that would require separate advice which is not part of our retainer.

**e) Succession and matrimonial advice**

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

**f) Building contracts and other related agreement**

If relevant, we recommend that you obtain legal advice on any building contracts or other related agreements as this is beyond the scope of our retainer with you (unless agreed to for an additional cost).

**g) National Rental Affordability Scheme (NRAS) lease or arrangement**

We will not be providing advice on any NRAS lease related to your sale 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 suffer loss.

<b>3. EXPLANATION OF THE IMPORTANT CONTRACT TERMS</b>
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The Contract includes a number of technical and legal terms that have been considered by the Courts that 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:-

- a) private treaty, where you usually negotiate the contract price and terms with the buyer, often with the assistance of a real estate agent;
- b) auction, where terms are set by you and the price determined by competitive bid, subject to a reserve; or
- c) tender, this is another form of competitive bidding.

**3.2. Form of contract**

There are two forms of contract recommended by the Queensland Law Society. They are:-

- a) Houses and Residential Land; and
- b) Residential Lots in a Community Titles Scheme.

**Please read all of your Contract.**

In this section we point out contract terms important to your sale. This advice is of a general nature and may differ if your contract has been altered by the inclusion of specific special conditions. Where there is inconsistency between a special condition and a standard condition generally any special condition will override the standard condition to the extent of the inconsistency

**Please ensure you read all of the documentation we have provided you in relation to your particular contract.**

**3.3. Reference Schedule**

The reference schedule contains the particulars relevant to your contract. **You must check they are accurate and tell us as soon as possible if they are not.**

**3.4. Time essential**

Time is of the essence of the contract. **This is a legal term that means you must perform your obligations strictly the due date.** For example, you must be able

to settle by 4.00pm AEST on the settlement date or else the buyer may either terminate or seek to enforce the contract. In both cases, the buyer may claim compensation from you.

The contract provides that if anything is to be done on a day that is not a business day, it must be done on the next business day. Under the contract business days are days other than any public holiday in the place named in the contract for settlement, any day in the period 27 December to 31 December (inclusive) and Saturdays and Sundays. However, this date calculation does not apply to statutory dates (e.g. statutory cooling off period).

### 3.5. Natural disasters

If a party, after making all reasonable efforts, is not able to meet their settlement obligations because of a natural disaster (for example the January 2011 South-East Queensland floods) then in certain limited circumstances time will no longer be of the essence.

When the natural disaster no longer prevents performance of settlement obligations there are notices that must be served to make time once again of the essence. The suspension of time will then end and both parties are obliged to settle on the date stated in the notice.

### 3.6. Default interest

The contract provides that at settlement the buyer must pay interest on any late payment from the due date for payment. Interest accrues at the Default Interest Rate noted in the Reference Schedule of the contract, or if no rate is specified at the contract rate fixed by the Queensland Law Society.

### 3.7. Deposit

Payment of the deposit is a sign of the buyer's intention to proceed with the contract. It is usually a substantial amount (but no more than 10%). If the deposit is only a nominal amount and the buyer is a corporate entity, you can instruct us to request director or other guarantees prior to the contract being signed.

The deposit is generally held in trust by an agent or solicitor until settlement and following settlement the deposit will be paid to you (usually less the agent's commission).

If the buyer terminates the contract for a valid reason, then the deposit is usually repaid to the buyer. **If the buyer does not pay the deposit on time or the buyer otherwise breaches the contract, you may be able to terminate the contract or seek an order from the court requiring the buyer to settle.** You may be able to keep the buyer's deposit and recover from the buyer any part of the deposit not paid. If you are obliged to

pay GST you will have to pay GST on the kept deposit. You may also be liable to pay your agent's commission but may be entitled to claim this and other compensation from the buyer.

### 3.8. Finance (if applicable)

If the contract is subject to finance, the buyer is required to take all reasonable steps to obtain finance approval and notify us as to whether finance is approved before 5:00pm on the finance date. If the buyer does not notify us that finance is approved then the contract remains on foot and either party can terminate the contract. The buyer also has a continuing right to give notice of receipt of satisfactory finance or alternatively to waive the benefit of the finance condition up until the time the contract is terminated by you.

If the buyer gives notice to terminate the contract on the basis that the buyer has not obtained a satisfactory finance approval, it may be appropriate to request evidence that the buyer has taken reasonable steps to obtain the approval. If the buyer has failed to take reasonable steps to obtain finance approval, the buyer may be prevented from relying on the finance condition to terminate the contract.

### 3.9. Building and Pest ("B&P") Inspections (if applicable)

If the contract is subject to satisfactory B&P inspection reports on the Property, the Buyer must take all reasonable steps to obtain at least one report. The buyer must use licensed inspectors for the reports and the reports must be in writing, otherwise the buyer will not be able to terminate the contract on the grounds that they are not satisfied with the B&P inspection. If the lot you are selling is a lot in a Community Titles Scheme, the reports must relate to the lot itself.

**The buyer must notify us as to whether the reports are satisfactory before 5:00pm on the inspection date, otherwise the Contract remains on foot and either party may terminate.**

If the buyer terminates the contract then you are entitled and we recommend that you request a copy of any reports from the buyer. The buyer must provide them without delay. If the buyer gives notice of an unsatisfactory report contact us as soon as possible to discuss getting a copy of the report and whether the buyer would be 'acting reasonably' by terminating in the circumstances.

The information in the report may assist you to negotiate to keep the current buyer or it may assist you to rectify the deficiency in the property or adopt a different marketing strategy.

The buyer also has a continuing right to give notice of receipt of satisfactory reports or waive the benefit of the B&P condition up until the time the contract is terminated by you.

### 3.10. Cheques for settlement

Under the contract, you are not entitled to require payment of the balance purchase price at settlement by means other than bank cheque without the buyer's consent. The contract only requires the buyer to pay for bank cheques for the seller and the seller's financier. If you require additional cheques to be drawn for the balance purchase price (eg to the ATO for withholding tax), you must pay the cost, the buyer incurs in drawing those cheques as bank cheques (unless the buyer has consented to a request on your behalf that the funds be provided by means other than bank cheque).

## 4. INSURANCE

The property is at the buyer's risk from 5:00pm on the first business day after the contract date. Despite this, we strongly recommend that you maintain your insurance policy until we have confirmed that settlement has been effected. There are many circumstances in which the risk will pass back to you without notice (even after the contract is unconditional) and failure to maintain adequate insurance could result in significant loss to you.

You have a continuing obligation until settlement to take reasonable care of the property and if the property becomes "unfit for occupation" as a dwelling before settlement, then the buyer may have a right to withdraw from the contract.

However, if the property is damaged in any way between the Contract Date and settlement (for example, due to fire or vandalism) then you will likely be able to require the buyer to settle in accordance with the contract irrespective of the damage (unless the buyer has another right of termination it can exercise, such as a residence being so destroyed or damaged as to be unfit for occupation).

## 5. HOW DOES THE *PROPERTY OCCUPATIONS ACT 2014* ("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 the property is used primarily for the purposes of 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 as the parties to 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, the buyer may be entitled to a five business day cooling off period.

The cooling off period starts on the day the buyer receives from you or your agent a copy of the contract signed by both parties or, if that day is not a business day, then on the next business day. If you signed the contract before the buyer did, the cooling off period starts on the day that the buyer signed the contract and communicated the buyer's acceptance of your offer.

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

The buyer is entitled to terminate the contract during the cooling off period. If the buyer exercises that right, you 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 the buyer within 14 days after the termination.

The buyer may shorten the cooling off period or waive the benefit of it entirely by giving written notice to you of the shortening or the waiver. It is up to you whether you wish to insist on this from the buyer or not. If you require the buyer to shorten or waive the benefit of the cooling off period, please call us to discuss this.

### 5.3. Particular words must be in the Contract

If POA applies, you are required to ensure that, when you first give the buyer the proposed contract for

signing, it contains a conspicuously written note (immediately above and on the same page where the buyer signs to indicate the buyer's intention to be bound by the contract) which draws their attention to the cooling off period and termination penalty. It must also include a recommendation that the buyer obtain an independent property valuation and independent legal advice before signing the contract.

If the required statement is not included in the contract, you or your 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 the buyer a right of termination. The standard REIQ contracts for residential property include the required notice.

## 6. WARRANTIES AND DISCLOSURE

### 6.1. Seller's warranties

Under the contract the seller gives warranties about various things which could affect the property, in particular:-

- a) that you are the registered owner of the property;
- b) you are capable of completing the sale;
- c) there are no unsatisfied judgments, orders or writs affecting the property (and if a unit, the common property) and no current threats or claims that might lead to a judgment order or writ affecting the property (and if a unit, the common property);
- d) there are no unregistered encumbrances, leases or other dealings;
- e) in relation to the *Environmental Protection Act 1994* ("EPA"):
  - i) there is no outstanding obligation to give notice under the EPA of a notifiable activity on the land (including the scheme land if in a body corporate);
  - ii) you are not aware of facts or circumstances that may lead to the land being classified as contaminated under the EPA (including the scheme land if in a body corporate)..

### 6.2. Consequence of breach of warranty

If you breach any of these warranties the buyer generally may:-

- a) terminate the contract no later than 2 days before settlement; or
- b) claim compensation, before settlement, and proceed to settlement.

### 6.3. Property adversely affected

If the property (including any part of the Scheme Land if the property is in a body corporate) is affected at the contract date by any of the following:-

- a) the present use is not lawful;
- b) the land is affected by a proposal of a competent authority (e.g. Transport Infrastructure);
- c) access or any services to the land passes unlawfully through other land;
- d) an authority has issued a current notice to treat, or notice of intention to resume;
- e) there is an outstanding condition of a development approval attaching to the Property which, if complied with, would constitute a material mistake or omission in your title;
- f) the property is affected by the *Queensland Heritage Act 1992* or is included in the World Heritage List;
- g) the property is declared acquisition land under the *Queensland Reconstruction Authority Act 2011*;
- h) there is a charge against the land under the *Foreign Acquisitions and Takeovers Act 1975*;

and these facts are not disclosed in the contract, then the buyer is entitled to terminate up until settlement. If the buyer does not terminate in accordance with the contract, the buyer will be treated as having accepted the property subject to these issues.

### 6.4. What you may need to disclose

To enable us to make the appropriate disclosure or to advise you on the consequences of non-disclosure, please call us if you are aware of any of the following, or other particular or unusual features affecting the property, such as:-

- a) unregistered encumbrances and other government rights or interests that may affect the property, for example, water, sewerage or combine drains through the property;
- b) access rights for geothermal exploration or production under the *Greenhouse Gas Storage Act 2009*, *Geothermal Energy Act 2010*, or the *Petroleum and Gas (Production and Safety) Act 2004*;
- c) notices to do work issued by the local government or any court or tribunal;
- d) building covenants;
- e) easements;
- f) equitable mortgages;

- g) leases;
- h) known minor encroachments by fences or trees;
- i) any heritage listings;
- j) declarations of beach area;
- k) road widening or any notice of a proposed road widening;
- l) proposed resumptions;
- m) any unsatisfied judgments, orders or writs affecting the property, the common property or body corporate assets;
- n) any threatened claims notices or proceedings that may lead to a judgment order or writ (e.g. orders or applications to QCAT in relation to trees on the property); or
- o) ongoing conditions of development approvals, for example, the existence of a bushfire management plan affecting the property.

If you fail to make proper disclosure in the contract the buyer may have rights to terminate the contract and claim compensation. For example, if you fail to disclose in the contract that a sewerage or drain line passes over or under your property this will be a defect in title which, if material to the buyer, may allow the buyer to terminate the contract or claim compensation.

### 6.5. EPA Disclosure

The *Environmental Protection Act 1994* (“EPA”) requires that you make a specific disclosure before entering into an agreement with the buyer 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 a notice or evaluation under the EPA (generally about possible contamination or notifiable activities on the land such as underground fuel storage); or
- c) a magistrate has issued an order under the EPA for an authorised person to enter the land to conduct an investigation or to carry out work.

If any of these situations arise and they are not disclosed in a notification by you under the EPA before the buyer enters into the contract then the buyer may terminate the contract by notice given before the earlier of settlement or possession. If you do not comply with these disclosure obligations you may still give disclosure after the contract has been entered into, but in that case the buyer will be given a period of 21 business days after your disclosure to terminate the contract.

If the buyer terminates the contract because of your failure to make relevant disclosure, all money paid by the buyer under the contract must be refunded.

Please contact us as soon as possible if you think any of these issues may apply to the land or if you think that it may be contaminated (including the common property if in a community titles scheme). If the contract has not been signed it is important that these issues be disclosed in a notice to the buyer before entering into the contract.

### 6.6. Administrative Advices

Administrative advices may also reveal other interests impacting on the land that require disclosure by you such as heritage listing or agreements, coastal protection notices, nature conservation orders, vegetation clearing offences or Milton Brewery notices (for a unit).

In addition, if an administrative advice is lodged on the title where land is declared acquisition land under the *Queensland Reconstruction Authority Act 2011* (Qld) then the following applies:-

- a) you are not able to sell the land other than to the relevant authority; and
- b) if you do want to sell the land the relevant authority must acquire it.

If as at the Contract Date the land is declared to be acquisition land and disclosure has not been made in the contract then the buyer may be entitled to terminate the contract by giving notice before settlement.

If there is an administrative advice of this nature on your land, you should not sign a contract to sell the land to any person other than the relevant authority. However, if you have already signed a contract:-

- a) the contract is not invalid and the buyer is treated as having received notice that the land is declared acquisition land;
- b) your rights as seller and any rights that the buyer may have will depend upon the terms of the contract, including possible rights of termination for the buyer.

If a coastal protection or tidal works notice is given under the *Coastal Protection and Management Act 1995* (Qld), then this should appear as an administrative advice on the title. If you sell land which is subject to an undischarged coastal protection or tidal works notice then the contract may be of no effect unless you give the buyer written advice of the undischarged notice not less than 14 days before settlement, or if settlement is less than 14 days after the date of the contract, at or before entering into the contract.

There may also be unregistered interests affecting the title under statute such as access agreements under the *Greenhouse Gas Storage Act 2009*; *Geothermal Energy Act 2010*; *Petroleum and Gas (Production and Safety) Act 2004*. Please tell us as soon as possible if you think any of these issues may affect the property.

The buyer rights in relation to any administrative advice depend on the content of the notification which gives rise to the administrative advice and the extent of disclosure in the contract or otherwise, including possible rights of termination.

### 6.7. Urban Encroachment

Chapter 7 Part 4 of the *Planning Act 2016* (Qld) contains provisions about Urban Encroachment.

These provisions provide for the registration of specific administrative advices on title in geographical areas that are known to be affected by the emission of aerosols, fumes, light, noise, odour, particles or smoke.

The *Planning Act* provides:

- a) for the registration of existing uses;
- b) for the mapping of affected areas;
- c) the lodgement of an affected area notation as an administrative advice on the title; and
- d) that the owner of premises that are registered must ask the Registrar of Titles to record that Part 4 applies to all lots within the affected area stated in the registration;
- e) for restrictions on the owner or occupier of affected premises, which are the subject of an application for intensification of use from taking proceedings against any person carrying out an existing use who has acted in compliance with the conditions of its approval and any environmental laws.

There is no statutory or contractual right to terminate a contract if it is discovered that the property being sold is in an affected area, except in the Milton Rail Precinct as set out below.

For premises in the Milton Rail Precinct, if you are an applicant under a development application and when you enter into a contract for the sale of all or part of the premises, the registration is not recorded in the appropriate register because you have failed to give notice to the Registrar of Titles, the buyer may end the contract by giving notice of termination at any time before settlement. If you are unsure as to whether this applies to your property, please contact us as soon as possible.

In addition, for premises which are in an affected area (other than registered premises) you or your agent must

before leasing the premises, give a notice to any tenant stating that the premises is in an affected area and noting the restriction on the tenant taking proceedings about the emission of aerosols, fumes, light, noise, odour, particles or smoke from registered premises in the affected area.

### 6.8. Owner Builder Notice

If:-

- a) building work has been carried out on the property by a person who is not licensed to carry out that building work; and
- b) the land is offered for sale within 6 years after the building work is completed,

then before a contract is signed, you must give the buyer a notice (in duplicate) which contains details of the building work and states that the work has been carried out under an owner-builder permit by the person named in the notice. The notice must also include the warning required by the *Queensland Building and Construction Commission Regulation 2003*. The buyer must sign 1 copy of the notice and return it to you on or before signing the contract.

If a required notice and warning are not given as set out above, then you will be taken to have given the buyer a contractual warranty that the building work was properly carried out. The effect of this is that if the work turns out not to have been properly carried out then the buyer may have a right to claim compensation from you.

Please let us know if you conducted any work as an owner-builder so that we can prepare the relevant notice.

### 6.9. Consumer Guarantees

In some circumstances where goods are being supplied as part of the sale of the property, the consumer guarantees contained in the Australian Consumer Law will apply. These guarantees cannot be contracted out of, however, where:-

- a) the value of each of those goods (if sold separately) is under \$40,000; and
- b) the goods are not goods of a kind ordinarily acquired for personal, domestic or household use, for example industrial air-conditioning or other plant,

it is possible to limit your liability under some guarantees to the repair or replacement of those goods, that is, you can limit claims for any other reasonably foreseeable loss or damage resulting from failure to comply with a consumer guarantee.



If you think this applies and you would like us to include a special condition to limit your liability in this way, please contact us to discuss.

### **6.10. Neighbourhood Disputes**

Please tell us if you are currently in dispute with neighbouring property owners about fences or trees as these disputes may need to be disclosed to the buyer. In particular, please tell us if you are aware of any:-

- a) notices to fence from a neighbour;
- b) applications to the Queensland Civil and Administrative Tribunal (“*QCAT*”) in relation to fencing or trees; or
- c) *QCAT* orders in relation to fencing or trees affecting the property.

In relation to trees:

- a) you must give copies of these documents relating to trees to the buyer before the buyer enters into the contract and specific disclosure may need to be made in the contract. If copies of documents relating to trees are not given then you may be liable to pay a significant financial penalty and the buyer may terminate the contract at any time before settlement or you may be liable to comply with the order following settlement.
- b) if the buyer terminates in these circumstances before settlement you may also be liable for the buyer’s reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract; and
- c) if the buyer completes the purchase and you have not completed all work in relation to a *QCAT* tree order which has not been given to the buyer before they entered into the contract, you will remain liable to carry out the work required under the order.

In relation to fences:

- a) you have warranted in the contract that there are no unsatisfied fencing notices, orders or applications existing at settlement that were not disclosed in the contract to the buyer; and
- b) if an unsatisfied notice, order or application exists at settlement then the buyer may be entitled to terminate the contract or claim compensation from you.

You are also obliged under the contract to promptly give the buyer a copy of any notice, proceeding or order, received after the contract date that affects the property.

You must not, after the contract date, give any notice to another party or seek or consent to any order or agreement that affects the property without the buyer’s prior written consent.

Please contact us as soon as possible with details of any disputes relating to dividing fences or trees so that we can ascertain if disclosure has, must or can still be made and advise you accordingly.

## **7. IMPORTANT INFORMATION - GENERAL**

### **7.1. Signing Contract**

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 the party against whom it is to be enforced.

Traditionally, land sale contracts will be printed on paper and the parties will affix their signatures to 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 in relation to the identification of the parties and their consent to the electronic signing process are met. 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 Buyer may deny signing the contract and allege that a third party without authority signed the contract;
- b) the Buyer is a corporation and alleges the signing party did not have authority; and
- c) the Buyer alleges the signature used is not the Buyer's signature.

If you are considering the use of an electronic signature tool in relation to the contract, please contact us to discuss this issue. It is important to ensure that the process proposed to be used satisfies the relevant requirements to create an enforceable 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 need to discuss the signing process with you.

### **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 efforts, such as obtaining personal identification from you, to assist to minimise the risk that fraud is committed.

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

- 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 bank or mortgage accounts (at your financier's request) – without first verifying 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 bank 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. Information Regarding the Property

If requested before settlement, you must give the Buyer:

- a) copies of all documents about any unregistered interest in the property;
- b) full details of all continuing tenancies to allow the Buyer to properly manage the Property after settlement;
- c) sufficient details (including the date of birth of each Seller who is an individual) to enable the Buyer to undertake a search of the Personal Property and Securities Register;

- d) further copies or details if any information previously given ceased to be complete and accurate.

Please let us know if there are any documents or details that you have that may be requested. The Buyer may be entitled to claim compensation if this information is not provided and as a result they suffer a loss.

## 8. IMPORTANT INFORMATION – SEARCHES AND USE

### 8.1. Present Use

If the present use is not lawful under the relevant town planning scheme as at the contract date and this has not been disclosed in the contract then the buyer may be able to terminate the contract up until settlement.

### 8.2. Survey

Under the contract the buyer is entitled to survey the land to establish if there are errors in the boundaries or area of the land, there exists any encroachment onto or from the land or there are mistakes or omissions in describing the property. If any of these issues arise then they may be entitled to claim compensation or terminate the contract providing notice is given to you before settlement.

## 9. IMPORTANT INFORMATION – OWNERSHIP AND PAYMENTS

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

Under laws designed to ensure that foreign residents meet their liability for capital gains tax 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 GST withholding laws apply to contracts entered into on or after 1 July 2017 where the property sold has a market value of \$750,000.00 or more. (For contracts entered into after 1 July 2016 but before 1 July 2017, the CGT withholding laws apply where the property sold has a market value of \$2 million or more and the CGT withholding amount is 10%).

If the CGT withholding laws apply, the buyer must pay the required amount to the ATO promptly after settlement unless the Seller produce 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 a buyer is not required to pay any part of the purchase price to the ATO at settlement.

A clearance certificate will usually be given if the seller is an Australian resident. If you already have a

clearance certificate, please provide a copy of it to us as soon as possible so that we may verify its validity and currency. If you do not have a clearance certificate, immediate steps should be taken to apply for a certificate.

If the value of the property being sold attracts the application of the CGT withholding laws and you instruct us to make the application on your behalf, we will need your authority (and other relevant information including tax file numbers) to apply. We note this is an additional fee to your conveyancing fees.

If you are a foreign resident, an application can be made to the ATO for the issuing of a variation notice to lower the amount of the required CGT withholding. You should seek independent taxation advice in relation to this issue.

Under the Standard Contract, if the CGT withholding laws apply, you irrevocably direct the buyer to pay the required CGT withholding amount to the ATO unless, prior to settlement, you produce a clearance certificate or you produce a notice from the ATO varying the CGT withholding amount to nil.

If a clearance certificate cannot be obtained, the amount you receive at settlement will be reduced. Please contact us immediately if you think this reduction may affect your ability to secure releases of mortgages affecting the property or to complete associated transactions.

The applicability of the CGT withholding laws depends on the market value of the property (i.e. it must have a market value of \$750,000.00 or more for the laws to apply). In most cases, market value will be determined by the purchase price payable under the contract.

If the transaction involves a purchase price of \$750,000.00 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 \$750,000.00, it may be appropriate to obtain an independent valuation of the property for the purpose of specifying an apportionment of the price in the contract.

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 \$750,000.00 or more.

If a withholding is made, the amount paid is a non-final tax. You will need to lodge an income tax return declaring any capital gain and the CGT withholding tax credit. Any excess credit will be returned. You will only be entitled to a credit if the buyer has remitted the withholding payment to the ATO. It will be important to verify that the buyer has made the required payment.

## 9.2. GST

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 the Contract.

Generally, 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).

If applicable, the effect of this GST withholding will be to reduce the amount you receive at settlement of the sale of a lot. Please contact us if you think this reduction may inhibit your ability to secure releases of mortgages affecting the Property or to complete associated transactions.

If the GST withholding arrangements apply to the Contract, the standard contract terms require the Buyer to provide you with a bank cheque at settlement for the GST amount. This will allow you to control the GST funds and ensure that they are promptly remitted to the Australian Taxation Office so that you will be entitled to credit for the GST paid.

In connection with the sale of residential premises, a Seller must give a written notice to the Buyer before settlement stating whether the Buyer is required to make a payment under the GST withholding provisions referred to above. If a payment is required, the notice must also state your name and ABN, the amount the

Buyer will be required to pay, when the Buyer will be required to pay the amount and, if some of the consideration will not be expressed as an amount of money, the GST inclusive market value of that consideration.

### 9.3. Agent's commission

If your property is being sold through an agent, we will let the agent know when settlement has been effected. If the agent holds the deposit then the usual procedure is for the agent to deduct commission from the deposit and forward the balance (if any) to you.

If the deposit is not sufficient to pay the agent's commission then you will need to arrange to pay any balance to the agent.

You should be aware that the agent is not entitled to charge you a commission where the agent sells your property to a related party such as a family member, an agent from their agency or a family member of an agent at their agency. If you believe this may apply to your transaction, you should contact us as soon as possible. Any advice on whether the agent is entitled to charge you a commission is outside the scope of our retainer and may incur additional legal fees.

### 9.4. Land tax

The standard position under the contract is that you will be responsible for all land tax for the land for the land tax year current at the settlement date. This means that if you are liable for land tax in relation to the land you will not be able to recover from the buyer the amount of the land tax liability for the parcel being sold attributable to the period following settlement unless the standard contract is amended to allow recovery of land tax.

### 9.5. Land Valuation Act 2010 (QLD) ("LVA")

An administrative advice called a Land Valuation Act Notice may be recorded on title. If applicable, this notice alerts potential buyers that a deduction for site improvement or an offset allowance applies to the land. You should specifically instruct us if you have applied for or have been granted any deduction or allowance as in certain circumstances the Land Valuation Act Notice may not yet have registered on the title to your property and may register before settlement.

However, on change of ownership, any existing deduction for site improvement or an offset allowance will no longer apply. The calculation of local government rates, state land rent and possibly land tax will be based on the unimproved value (with these deductions).

A property details report, available by searching the Queensland Valuation and Sales (QVAS) database at any of the DNRM business centres, specifically states the amounts of the site improvement deduction total and the unadjusted value.

If you are a Seller with a deduction for site improvement or an offset allowance:-

- a) you need to be aware that the deduction for site improvements will be lost on a sale and this will impact on the land value for rating and taxing purposes;
- b) you need to ensure that neither you nor any real estate or other agent acting on your behalf makes representations to the buyer about the rates or tax liabilities that are currently payable or that will be payable by the buyer after the property has settled as this information could potentially be misleading to the buyer and could impact on the buyer's decision to ultimately purchase the property; and
- c) we suggest you check to make sure the offset allowance or deduction has reduced your rates and land tax.

### 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 which is generally the higher of the consideration payable under the contract and the Property's unencumbered market value.

It is a liability of both the seller and buyer. However the contract determines that it is the responsibility of the buyer to pay this liability. If the buyer does not pay the duty then the Office of State Revenue may seek recovery of the duty from you as seller. This is, however, unlikely as the buyer will need to pay duty before the property can be registered in their name.

In some circumstances, Additional Foreign Acquirer Duty (AFAD) may be payable in relation to a transaction. 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:

- Established homes and apartments;
- Vacant land on which a home or apartment will be built;
- Land for development for residential use; and
- 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 foreign individual i.e. an individual other than an Australian citizen or permanent resident. However AFAD will not apply to a New Zealand citizen who is the holder of a permanent visa, or who is the holder of a special category visa as defined in the *Migration Act 1958 (Cth)*.
- A foreign corporation i.e. a corporation incorporated outside Australia or a corporation in which foreign persons have a controlling interest; or
- A trustee of a foreign trust i.e. a trust where at least 50% of the trust interest are foreign interests.

AFAD is additional duty imposed on the dutiable value of the transaction. While the Buyer is responsible under the Contract for payment of the AFAD, the Office of State Revenue may seek recover the AFAD from you as Seller. You should inform us if you think the Buyer is liable for AFAD in relation to the transaction. If AFAD is applicable, we will ask the Buyer to provide evidence of its payment.

You must tell us if you have a business or personal relationship with the buyer or if the consideration for the sale is less than market value. If so, this will have duty implications and the buyer will need to obtain a valuation of the property using three comparable sales in the last three months for duty assessment purposes. If applicable, it is important that we alert the buyer's lawyer to this fact as if the buyer does not fulfil its obligations regarding the payment of duty then the Office of State Revenue can seek to recover any shortfall directly from you including penalties and interest. Recovery of incorrect or unpaid duty from you may occur years after settlement and could compound into substantial amounts. You should call us to discuss if you think this may apply in the circumstances of this sale.

If you obtained a transfer duty concession when purchasing the property on the basis that you would not dispose of it for a period of at least 12 months from occupying it as your principal place of residence, then

you should now review whether you have met your obligations. If you:-

- (a) purchased an existing home and did not occupy the home within 12 months of settlement;
- (b) purchased vacant land to build on and you have not built and occupied the house within 2 years;
- (c) had the seller or the seller's tenants in the residence and they did not vacate the property within 6 months of settlement or the tenants stayed longer than the original lease; or
- (d) have already transferred, leased, rented, or otherwise granted exclusive possession of your property within 12 months of occupying the house as your principal place of residence; or
- (e) never occupied the house as your principal place of residence at all;

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

### **9.7. First Home Owner's Grant, First Home Owner's Construction Grant, Qld Building Boost Grant and Great Start Grant**

If you obtained either the First Home Owner's Grant, the First Home Owner's Construction Grant, the Queensland Building Boost Grant or the Great Start Grant and if now, due to the current sale, you no longer satisfy the eligibility requirements for those grants, you should notify the relevant State Government departments who administer those grants with details of the sale as you may be required to repay some or all of those grant monies. To investigate whether you are required to notify, you should check the forms signed and information received when you applied for the grants, and the Queensland Treasury website ([www.treasury.qld.gov.au](http://www.treasury.qld.gov.au)).

We do not give any advice or reminders in relation to these grants or whether you may have to notify and repay money. You should check this for yourself.

### **9.8. Rates and Water Notices**

Please forward to us a photocopy of the latest Council Rates and Water Utilities Notices for the property and tell us if they have been paid or are still outstanding. If the notices are still outstanding you should instruct us as to whether you intend to make payment before settlement and, if so, provide us with evidence that the council/water provider has received payment before

settlement. (This is so we can calculate the appropriate adjustments.)

### 9.9. Instalment Contract

A contract can become an instalment contract for many reasons including:-

- a) the deposit is more than 10%; 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 10% of the rebated purchase price; or
- d) the buyer is required to pay money to you (other than a 10% 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 the payment of instalments which exceed the market rent that would otherwise be payable.

The effect of the contract being an instalment contract is:-

- a) if the buyer defaults in the payment of any instalment or part of the purchase price (other than a deposit) you cannot hold the buyer in default under the contract until 30 days after you serve a notice on the buyer giving them 30 days within which to make payment. If the buyer chooses to make payment within the 30 day period (including any default interest payable under the contract) then you cannot terminate the contract as a consequence of the buyer's initial non-payment. This means that where the default is in the payment of the balance purchase price, the buyer can effectively obtain another 30 days in which to settle;
- b) you are prohibited from re-selling or re-mortgaging the property before settlement; and
- c) you 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.

An instalment contract should be avoided or, at the very least, you should be aware the contract is or has become an instalment contract.

<b>10. IMPORTANT INFORMATION – SETTLEMENT STEPS</b>
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### 10.1. Pre-settlement Inspection

Under the contract the buyer is entitled (after giving reasonable notice to you) to enter the property once for

the purpose of conducting a pre-settlement inspection to check on the condition of the property. You need to co-operate with the buyer and if a request for inspection is received, we suggest you make arrangements directly with your agent and ensure your agent is present when the buyer inspects the property.

You should ensure that you do not modify the property in any way after the contract date, otherwise the buyer may be able to terminate the contract or claim compensation from you (if the modifications are significant and the issue is raised before settlement).

### 10.2. Transfer documents

All parties comprising the seller need to sign the transfer documents.

Any individuals must sign in the presence of a Justice of the Peace, Commissioner of Declarations or a Legal Practitioner. If signing documents in Australia you will need to ask a suitable witness to witness your signature on the transfer documents and produce at least one form of photographic proof of identity showing your signature (such as a driver's licence) as well as supporting documentation (such as the current certificate of title or local government rates notice) linking you to the property.

A company must have two directors, a director and a secretary or if a sole director company, the sole director sign the transfer.

If you are signing documents outside of Australia, an overseas agent will be required to verify your identity and witness your signature. Please contact us to discuss this option.

You will need to arrange for all signatories to be in a position to sign the transfer documents expeditiously once they are received. If you would like to attend at our office for the purpose of executing transfer documents please call us to make an appointment.

### 10.3. Keys and codes

At settlement, you must deliver to the buyer all keys, codes or devices in your possession or control for all locks or security systems on the property. You will need to make a written record for the buyer of all codes and combinations, if applicable, necessary to fasten or unfasten any lock including electronic devices in the property. If the buyer requests that we deliver the keys at settlement you will need to deliver them to our office before settlement. Failure to deliver the keys as requested may result in the buyer terminating the contract and seeking compensation from you. The usual situation is that the keys are left with the agent before settlement for collection by the buyer after the agent is notified that settlement has been effected.

#### 10.4. Chattels

Before settlement you must remove all chattels not included in the sale and any substantial rubbish on the property. You may also remove any fixtures that have been excluded from the sale. You are deemed to have abandoned any property not removed before settlement and the buyer can dispose of that property as they think fit. Contact us for advice before acting if you think this applies.

If the property is currently tenanted and the tenancy is not noted on the contract, then this obligation requires that both your property and any tenant's property must be removed before the actual time of settlement on the settlement date.

#### 10.5. Utility Services

No adjustments are made at settlement for charges for usage of electricity, gas, telephone, internet or pay-TV and other utility services. We recommend that you arrange for disconnection of these services on the proposed settlement date so that readings and charges only up to that date are billed to you.

Please check your agreements with service providers for any fees or terms relating to discontinuing the service as this is beyond the scope of our retainer.

#### 10.6. Early possession

There are a range of issues you should consider before agreeing to early possession, such as implications on land tax liability, recovering possession and general risk of damage to the property. If you agree to let the buyer into possession of the property before settlement, the contract provides that the Buyer:

- a) must maintain the property in substantially its condition at the date of possession except for fair wear and tear (which means that the buyer must not only look after the property but must refrain from making any alterations to the property including any improvements on the land and any landscaping);
- b) entry into possession is under a personal licence that you can revoke at any time;
- c) must insure the property to your satisfaction;
- d) indemnifies you against any expense or damages incurred by you as a result of their possession of their property.

You may also choose to impose other conditions that you deem appropriate before agreeing to grant early possession. We can discuss other possible conditions if you receive a request for early possession.

There is significant risk that you may incur expenses or suffer loss if you enter into early possession, including if:

- a) the buyer does not settle and has not maintained the property –you may need to seek compensation from the buyer;
- b) the buyer does not settle and has improved the property in any way – although you are not specifically required under the contract to compensate the buyer for any improvements the buyer may commence court action to seek compensation, which may be costly;
- c) you revoke the buyer's licence to possession (which you can do for any reasonable reason and at any time) and the buyer resists eviction from the property, does not repay your costs of eviction or you suffer loss whilst the buyer is being evicted (e.g. you cannot tenant or sell the property) and are not successful in claiming compensation from the buyer for that loss; or
- d) you unsuccessfully seek to enforce the indemnity the buyer has provided to make a claim for any expenses or damage incurred as a result of the buyer's possession (e.g. the buyer becomes bankrupt).

The rights of both parties under the contract may be affected by the buyer taking possession of the property before settlement. In some limited circumstances, it may be to your advantage to grant early possession to the buyer.

If you are considering granting early possession to the buyer please contact us.

#### 10.7. Electrical Safety Switch

Please let us know if an approved electrical safety switch for general purpose socket outlets has been installed in the property under the Electricity Regulations.

#### 10.8. Smoke Alarms

Failure to install compliant smoke alarms is an offence under the *Fire and Emergency Services Act 1990*. If the property does not have compliant smoke alarms installed, you should ensure this is done immediately. You will need to declare whether compliant alarms are installed, in the transfer documents.

### 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

known as PEXA. The system will operate across 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.

#### **11.3. Client Authorisation and Verification of Identify.**

We require your authority to use e-conveyancing for settlement of the transaction. That authority must be provided in the form of the Client Authorisation (which accompanies our First Letter if we are PEXA subscribers and are able to use e-conveyancing for settlement). A separate Client Authorisation form must be signed by each Seller.

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. Please contact us to discuss details of the identity documents required. If a face-to-face meeting is not possible, an agent can undertake the verification of identity process. Please contact us to discuss this option.

#### **11.4. Risk 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 e-conveyancing should be aware of the following risks:

- a) The electronic settlement may be delayed by system failures. The Contract provides that if a settlement cannot occur by 4pm (AEST) on the settlement date because a relevant computer system is inoperative, a party will not be in default (despite that time is of the essence of the Contract) and the settlement date is deemed to be the next business day. While that risk also exists in circumstances where a traditional (paper based) settlement process is used, in the electronic environment the settlement date extension will be automatic. Generally speaking, apart from where the Land Titles Office computer fails and titles cannot be searched, in a traditional settlement, any extension will still be a matter for negotiation between the parties (i.e., a party is not automatically entitled to an extension of time because of the failure of its financier's computer system) and a party may impose conditions on an extension to protect itself from financial loss.
- b) A party to a transaction may, after having previously agreed to use the system, elect to withdraw from it by giving written notice to the other party. That notice cannot be given later than five business days before the settlement date unless:
  - i. the transaction is excluded by the rules;
  - ii. a party's solicitor is unable to complete the transaction due to death, a loss of legal capacity or the appointment of a receiver or administrator; or
  - iii. a party's financial institution is unable to settle using the system.

If one of the exceptions applies, the settlement date will be extended by a period of five business days. This means in practice that the parties will still need to prepare for a traditional (paper based) settlement process to ensure they are still able to satisfy 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.

- c) 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.

- d) 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). 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. Any rights that you might have under the Contract are not able to be exercised from locking.

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 the buyer 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 goods other than fixtures 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 we will seek to obtain (on your behalf) from the secured party either a letter or financing change statement, which releases the personal property being sold and provide it to the buyer 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 secured party.

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 sale so we can consider the impact of the PPSA on the transaction and protect your interests accordingly.

## 13. POOL SAFETY – IF APPLICABLE

### 13.1. Pool Safety Laws

The *Building Act 1975* (Qld) requires owners of swimming pools to comply with the pool safety standard in Part MP3.4 of the Queensland Development Code. The standard, which deals primarily with swimming pool barriers, was introduced on 1 December 2010 and pool owners were given until 30 November 2015 or an earlier date of sale to comply.

### 13.2. What is a “swimming pool”

A regulated swimming pool is any excavation or structure capable of being filled with water to a depth of 300mm or more including a pool, spa or wading pool, but generally does not include a fish pond (or similar ornamental water feature), dam, water tank, watercourse, spa bath in a bathroom (unless continually filled with 300mm or more of water) or birthing pool.

If you have any doubt as to whether a structure on the property is a pool you should contact us.

### **13.3. Non-shared pool – obligation to obtain Pool Safety Certificate**

Residential non-shared pools generally exist on properties that are not units.

There are questions in the contract's reference schedule about pools and pool safety certificates.

If there is a non-shared swimming pool on the property (or on adjacent land used in association with the property) and there is no Pool Safety Compliance Certificate ("PSCC") or Exemption Certificate ("EC") in effect, you must not enter into a contract to sell the property without giving the buyer a Form 36 Notice of No Pool Safety Certificate.

In addition, if you will not be giving a PSCC or EC you must, before settlement, notify the chief executive of the Department of Housing and Public Works that a PSCC is not in effect. We will provide a copy of the Form 36 Notice of No Pool Safety Certificate to the chief executive.

If you indicated in the contract that a current PSCC or EC exists then you must hand over a copy of a current PSCC, building certificate that may be used instead of a PSCC or an exemption from compliance before settlement, failing which the buyer can terminate the contract. If any of the certificates expire before settlement, you must obtain a new certificate before settlement.

If you indicate that there is no PSCC or EC or do not complete the questions, (unless the contract is one mentioned in items 5.1(b) to (e) above), the contract is conditional upon the buyer obtaining from a licensed pool safety inspector:

- (a) confirmation that the pool safety requirements have been met and the issue of a PSCC; or
- (b) the issue of a Notice of Non-conformity confirming the works required before a PSCC can be issued.

Under the contract, the buyer has until the Pool Safety Inspection Date to notify us that:

- (a) a pool safety inspector has issued a PSCC in which case neither party has further rights; or
- (b) if a PSCC is not issued, that they are terminating (acting reasonably); or
- (c) the buyer elects to waive the benefit of the condition and proceed to settlement, in which case the buyer becomes responsible for obtaining the PSCC within 90 days of settlement.

You are also entitled to obtain a PSCC in this period and if you do then you should tell us and we will give notice that the condition is satisfied and the buyer's

right to terminate will end. You may prefer to obtain the PSCC yourself in circumstances where you want to avoid the possibility of the buyer terminating the contract because a PSCC is not obtained by the buyer, (e.g. If there is some minor non-conformity).

If a PSCC has not issued and the buyer does not give notice, the contract remains on foot and both you and the buyer have a right to terminate the contract, unless a copy of a current PSCC is received. The buyer also has the right to waive the benefit of the condition.

### **13.4. Shared Pool**

In the case of a shared pool (e.g. a pool on the scheme land of an apartment building) the body corporate is responsible for obtaining the PSCC. You have an obligation where a PSCC is not in effect, to give a Notice of No Pool Safety Certificate to:-

- a) before the buyer entering the contract – to the buyer; and
- b) after settlement - the body corporate (being the owner of the shared pool) and the chief executive of the Department of Housing and Public Works.

We will provide a copy of the Form 36 Notice of No Pool Safety Certificate to the chief executive.

The owner of the shared pool (usually the body corporate) then has the responsibility to obtain a PSCC.

### **13.5. Prohibition on letting**

If there is no PSCC for a pool you are prohibited from entering into a lease or tenancy without obtaining one.

### **13.6. Penalties**

If the contract does not proceed for any reason in circumstances where the pool safety standard has not been met in relation to a swimming pool on the property you will obviously be responsible for compliance with the standard. There are substantial penalties for non-compliance.

### **13.7. Pool Safety Register**

Owners of swimming pools are responsible for ensuring that their pool is recorded in the Pool Safety Register. Failure to do so can result in a fine.

## **14. IF SELLING A UNIT – IF APPLICABLE**

### **14.1. Body Corporate disclosures**

You must notify the buyer of any notices of body corporate meetings you receive and of any resolutions passed after the contract date. If the buyer is materially prejudiced by any resolutions passed after the contract date, the buyer may terminate the contract. If disclosure is not made before settlement, the buyer may

sue for compensation. Please tell us if you are, or become aware of any of the following:-

- a) any proposal to record a new Community Management Statement or a notice of meeting for that purpose (which may include proposed adjustments to lot entitlements within the Scheme);
- b) whether all body corporate consents to improvements made by you to common property are in place;
- c) whether the exclusive use allocations given to the lot are recorded or changed in the Community Management Statement (for example, car parking); and
- d) a change in the insurance details for the building and public liability for the body corporate.

#### **14.2. Implied warranties given about the body corporate**

The BCCM Act also contains certain implied warranties that you are deemed to have given to the buyer. Please tell us if you are, or become aware of any of the following:-

- a) any patent or latent defects in the common property or body corporate assets (for example, substantial building work that requires repair, which can include common boundary walls of the lot or exclusive use areas and may include repairs required as a result of issues such as concrete cancer);
- b) any actual or contingent or expected liabilities of the body corporate not part of the body corporate's normal operating expenses (for example, significant debts or judgments that the body corporate is liable to or other liabilities that may result or have resulted in the levying of a special contribution); and
- c) anything else you are aware of regarding the affairs of the body corporate which may affect the buyer.

If any of the above exist and are not disclosed to the buyer before entering into the contract the buyer may have a right to compensation and a right to terminate the contract up until 14 days after the buyer's copy of the contract is received by the buyer or someone else acting on the buyer's behalf.

If you don't know whether any of the above exist, then to ensure appropriate disclosure is made to the buyer so that we may avoid the buyer obtaining a right of termination, we recommend that you instruct us to conduct a full search of the body corporate's records before entering into the contract.

#### **14.3. BCCM Disclosure Obligations**

You have disclosure obligations under the contract, at common law and pursuant to statute. Generally, the consequences of failing to give the required disclosure is that the buyer will have a right of termination of the contract or compensation.

The disclosure statement given with the contract must contain the following information:-

- a) details of the secretary or body corporate manager or in a specified 2 lot scheme, the person responsible for keeping records;
- b) details of the body corporate administrative and sinking fund levies that apply to the lot you are selling;
- c) details of improvements on common property for which you may be responsible;
- d) details of any body corporate assets; and.
- e) that there is a committee of the body corporate or a body corporate manager engaged to perform the functions of the committee.

If the disclosure statement contains errors or is incomplete and the buyer would be materially prejudiced if required to complete the contract, then the buyer may have rights to terminate the contract. This may apply where issues are identified that are of particular importance to the buyer's purchase.

The only way to ensure the relevant information is disclosed in the disclosure statement and the contract is to conduct a full search of the body corporate records. Whilst there is a risk in not doing so, it is considered to be low if we obtain a copy of the registered CMS, you provide us with the information we have requested and instruct us to obtain a Body Corporate Information Certificate before preparing or giving a disclosure statement.

Unless you instruct us otherwise, we will not perform a full search of the body corporate records and will rely on the registered CMS, the information you disclose to us and the Body Corporate Information Certificate. If you would prefer that we conduct a full search of the body corporate records you should call us as soon as possible.

#### **14.4. Community Management Statement (CMS)**

The CMS contains information relevant to the buyer, including which regulation module applies to the scheme.

The CMS also contains information regarding the CSLE and the ISLE.

The CSLE is the basis for calculating your proportion of body corporate administrative and sinking fund levies payable (except for insurance) and is the value of your voting rights on an ordinary resolution.

The ISLE is the basis for calculating your portion of the insurance premium, your share of the common property, your interest on termination of the scheme and the unimproved value of the lot.

The CMS specifies:

- a) the CSLE for the lot you are selling and the aggregate CSLE (which is the total of all CSLE's for all the lots in the scheme and determines what proportion of the body corporate levies you will be liable to pay compared to other lots);
- b) for a scheme established before 14 April 2011 the lot entitlements must be equal unless there is an explanation in the CMS as to why it is just and equitable in the circumstances for them not to be equal (however, no explanation is required if the scheme was established before 4 March 2003);
- c) for a scheme established after 14 April 2011:-
  - i) that the CSLE are based on the equality principle or the relativity principle;
  - ii) if the equality principle applies, the lot entitlements must be equal, unless there is an explanation in the CMS as to why it is just and equitable in the circumstances for them not to be equal;
  - iii) if the relativity principle applies, the CMS must include an explanation which demonstrates the relationship between the lots by reference to one or more particular relevant factors, including the following:-
    - how the community titles scheme is structured;
    - the nature, features and characteristics of the lots;
    - the purposes for which the lots are used;
    - the impact the lots may have on costs of maintaining the common property; and
    - the market values of the lots.
- d) the ISLE for the lot and the aggregate ISLE (which is the total of all ISLE's for all the lots in the scheme and determines what proportion of the body corporate insurance you are liable to pay compared to other lots). For a scheme established after 14 April 2011, the CMS

includes either a statement that the ISLE reflects the respective market values of the lots or an explanation as to why it is just and equitable in the circumstances for the ISLE not to reflect the respective market values of the lots.

- e) the by-laws which apply to the scheme; and
- f) if exclusive use areas have been allocated, include plans (and a supporting by-law) showing the exclusive use areas allocated to various lots in the scheme.

If you are the original owner for the Community Titles Scheme established on or after 14 April 2011 and the buyer reasonably believes:-

- a) the CSLE are inconsistent with the principle upon which they were decided; and
- b) the buyer would be materially prejudiced if compelled to complete the contract,

the buyer may terminate the contract before it settles, by notice in writing, given not later than 30 days (or a longer period agreed between the buyer and the seller) after the buyer or the buyer's agent receives a copy of the contract. The notice must identify the relevant section of the BCCM Act upon which the buyer relies.

The *Body Corporate and Community Management and Other Legislation Amendments Act 2012* ("Amending Act") changes the process for the review of Body Corporate CSLEs. As a consequence, the Scheme in which your lot is situated may be affected by a review of the CSLEs and as a consequence of the review, the proportion of the body corporate levies paid by lot owners may change.

The Amending Act also removes certain rights which existed for a lot owner to apply for a review of how the levies are calculated.

We are not familiar with your circumstances or the history of the body corporate and specific advice about these changes is outside the scope of our current retainer. If you are concerned about the potential impact of the Amending Act on your lot or any recent amendment to the CSLEs in the Scheme then you should seek specific legal advice on your particular circumstances as a matter of urgency.

#### **14.5. Body corporate levy notices**

Please forward to us a photocopy of the latest body corporate levy notice for the property and tell us if the levies have been paid or are still outstanding. If the levies are still outstanding you should instruct us as to whether you intend to make payment before settlement and, if so, provide us with evidence that the body corporate has received payment before settlement.

We require information about levy notices so that we can calculate the appropriate adjustments as well as considering your disclosure obligations to the buyer.

While liability for the regular periodic contributions levied by the body corporate are apportioned between the parties in the same way as rates, you will be solely responsible for the payment of any special contribution for which the body corporate has issued a levy notice on or before the contract date. The buyer is responsible for any special contribution levied after the contract date. Special contributions should be disclosed to the buyer in the contract (irrespective of which party is responsible for their payment).

#### **14.6. Body corporate searches**

We engage a search agent to conduct a body corporate records inspection on your behalf as each body corporate is in different geographic locations and it would be uneconomical for us to do so.

The information received from a search agent is generally limited to a search of the most recent records and levies which are the matters most likely to impact on your sale.

It would generally be too expensive to conduct a more extensive search of all of the body corporate records.

Our advice to you will be limited to interpreting the search results in the reports received.

Accordingly, our retainer does not include specific advice about any issues that would only be discovered by an extensive historical body corporate search, such as, for example:-

- a) lot entitlement changes (past, proposed or possible future amendments);
- b) checking that all meetings, motions, notices and other records of the body corporate are in order and in compliance with body corporate law and regulations (including meetings and motions originally allocating or subsequently re-allocating exclusive use areas);
- c) checking all past and present infringements of the body corporate by-laws by the seller and other body corporate members;
- d) review of all the body corporate by-laws to check whether any are inappropriate, unenforceable or illegal;
- e) a review of the body corporate by-laws to check whether pets are allowed and on what conditions or body corporate records for past approvals of pets;
- f) whether any statutory easements for services run through the lot or allocated exclusive use areas;

- g) body corporate agreements with body corporate managers, service providers or employees;
- h) other agreements that the body corporate may have in place, including those with other bodies corporate for the sharing of exclusive use areas such as car parking or facilities such as gyms or common areas;
- i) a review of any Building Management Statement and checking compliance with its terms; or
- j) other body corporate matters that will not generally give rise to statutory or contractual rights of termination or compensation.

There is a risk that not all adverse issues with a body corporate will be discovered. If you would like us to arrange a more extensive search of all body corporate records, please tell us urgently. Any additional searches and advice will be at extra cost to you.

#### **15. COMBUSTIBLE CLADDING - IF APPLICABLE**

##### **15.1. Building Regulation 2006 (Qld)**

Under Part 4A of the *Building Regulation 2006* (Qld) (**Cladding Regulations**), which came into effect on 1 October 2018, an owner of a private building is required to undertake a process to identify whether the building is affected by combustible cladding. Cladding is a type of "skin" or extra layer installed on the outside of a building. Some forms of cladding are now known to contribute to the spread of fire on the outside of buildings. Works to remove combustible cladding or to address fire risk (if required) may be very expensive at the cost of lot owners.

The Cladding Regulations apply to a building if:

- a) the building is a class 2 to 9 building (which includes most residential and commercial buildings other than standalone houses) of a Type A or Type B construction (which is essentially any building of at least three storeys) but may also include some two storey buildings;
- b) a building development approval was given after 1 January 1994 but before 1 October 2018 for constructing the building or for altering cladding on the building; and
- c) the building is owned by one or more private entities or private entities hold more than a 50% interest in the building.

Determining whether the cladding regulations apply to a particular building may require the advice of a building industry professional.

In the case of a building that comprises 2 or more lots (such as where the building comprises a community titles scheme), the body corporate is taken to be the owner of the building.

### **15.2. Rectification**

The purpose of the Cladding Regulations is to identify buildings which may be affected by combustible cladding. The Cladding Regulations do not impose obligations for removal of cladding or for other rectification work. Removal or rectification work may be required in some cases to ensure compliance with relevant laws or insurance requirements. In some cases, fire safety measures in a building may adequately address risks arising from the cladding.

### **15.3. Notice that a building is affected**

If a building is affected by combustible cladding, the building owner must display a notice to that effect in a conspicuous position near the main entry point to the building.

Please inform us if you believe that the building may have cladding, the Cladding Regulations may apply to the Property or if you are aware of any steps being taken by the body corporate in relation to identifying combustible cladding on the Property. You may have an obligation to disclose to the Buyer the presence of non-conforming cladding on the Property.