Buying or selling a commercial or industrial property in Queensland...

Client Guide

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For most people, the sale or purchase of a commercial or industrial property (including retail shops and farming property) is a big step in their lives and the business or investment decision to do so is not taken lightly. Whether you are a seller or a buyer, you should obtain advice from experienced professionals including a solicitor, accountant and finance broker before signing a legally binding contract.

Given that there are now so many issues to consider before buying or selling a commercial or industrial property, we have prepared this guide to help you.

Who prepares the contract?

Contracts are usually prepared by a solicitor experienced in the legal complexities of commercial conveyancing. Traditionally, the seller's solicitor prepares a contract, but in practice it often depends on which party's solicitor is asked first to prepare the contract. We can usually provide a first draft of a commercial contract to our clients within 24 hours of receiving detailed instructions.

Is there a standard contract that can be used?

The Real Estate Institute of Queensland (REIQ), in consultation with the Queensland Law Society, has prepared an REIQ Commercial Land and Buildings Contract. This is commonly used for commercial, industrial land, retail and farming and is comprised of:

(i) Items Schedule - the main body of the contract where information specific to the property is inserted;

(ii) Standard Conditions - 34 standard conditions that apply to the contract unless excluded by a special condition; and

(iii) Special Conditions – as negotiated between the seller and buyer for the particular property.

You should read and understand the standard conditions as you may want to change or remove some of these standard clauses. You will be bound by all the standard conditions, unless a special condition is inserted varying a particular standard condition.

The sale of each commercial or industrial property is a unique transaction and it is not practical to apply the same commercial contract to each and every commercial sale. It is not as simple as completing the items schedule and then the contract is complete. If you approach it this way, expect to get burnt in the process. The parties may intend the transaction to be dealt with in one way, but the standard conditions may have the opposite effect. Remember – if there is a dispute between you and the other party, you must revert back to what is written in the contract.

Is there a cooling off period for a commercial or industrial land contract?

Although a 5 day cooling off period applies to some Queensland contracts, such as residential land and house contract transactions and unit sales, no statutory cooling off period applies to commercial land contracts.

I am the buyer – should I purchase the property in my own name?

The basic choices include buying the property:

- in your own name;
- in joint names as a partnership (if there is more than one of you);
- in the name of a company;
- in your name as trustee of a discretionary family trust or a unit trust or a superannuation fund;
- in the name of a company as trustee of a discretionary family trust, a unit trust, or superannuation fund; or
- a combination of the above.

It is vital that you obtain advice from your accountant and solicitor on how to buy the property prior to signing the contract. Do not sign a contract first and then obtain advice. If the buying entity is amended after a contract is signed and before settlement occurs, you will need the seller's cooperation to make the change and extra legal costs may be incurred.

There is also no guarantee that the seller will cooperate to vary the buyer entity. If the sale is completed and you decide that someone other than the buyer (such as a company or trustee of a trust) should own the property, then this could involve a further transfer of the property and extra stamp duty and capital gains tax may be payable.

You should never insert a buying entity followed by the words 'or nominee', (unless we have added a suitable "nominee" special condition). If you change the buying entity, you may incur double stamp duty liability.

Why would I choose one ownership structure rather than another?

Often the choice of what buying entity you use is driven by the taxation implications and/or asset protection reasons. For example, a company is taxed differently to an individual and some capital gains tax concessions are not available to companies but are available to individuals.

You should discuss these issues with your accountant or financial advisor, who will already know your personal circumstances and will consider the taxation implications and guide you on the most suitable structure.

> John found the perfect piece of industrial land to construct a hangar for his airplane. The real estate agent convinced John to sign a contract straight away to avoid another interested buyer signing a contract first. John signed the contract in his own name. After speaking with his accountant it was decided that it was better for the buyer entity to be a company. John required the seller's consent to change the name of the buyer entity. The seller would only agree if John paid a premium of $10,000. Had John proceeded with the contract and purchased the land in his own name and later transferred the land into his company name, he would have been required to pay stamp duty of approximately $20,000. With regret, John agreed to pay the seller the $10,000 and kicked himself for not obtaining professional advice before signing the contract.

Your accountant or financial advisor will want to know specific information pertaining to the

commercial or industrial property you are buying including the purchase price, GST implications, how you are funding the purchase, the level of income you expect to generate from tenants and whether you expect to make long term capital gain from an eventual sale of the property.

> Patrick purchased a commercial building in his own name. His intention was to operate an existing business from the building. The business was owned by a company so the land was purchased in Patrick's own name to enable the Going Concern concession for GST to be claimed. Two years later, part of the roof collapsed, severely injuring an employee. WorkCover commenced court proceedings against Patrick, as the landlord, despite the tenant being an entity affiliated with Patrick. Patrick does not hold appropriate insurance and is very concerned that he may need to sell his home to pay any judgment debt. If Patrick had purchased the land in a different entity, such as a company, his personal property may not have been exposed to any liability associated with the commercial property and Patrick may not be exposed to losing his home.

Are the tax implications the only thing to consider when choosing what structure to use when you are the buyer?

No – it is vital that you also consider asset protection issues. The choice of the buying entity can help enormously in protecting your wealth if some unexpected claim is made against you which is not covered by insurance (or the insurer fails, such as HIH).

Whoever buys the property will be exposed to potential liability - there is just no avoiding it. A lot of people think that choosing a company to own the property avoids that risk, but the reality is that a company needs at least one director and directors can find themselves personally exposed to certain liabilities of the company. There can also be adverse capital gains tax implications if a company owns the property.

If you wish to protect your wealth and not expose everything you own to the risks associated with owning a property, then it is important that you separate your wealth from the risks.

We can help you do this by guiding you on the choice of the best buying entity structure – in consultation with your financial advisor, accountant and insurance broker. Please ask us for our "Client Guide to Asset Protection" which explains these issues more fully.

Are guarantors required in a contract?

Consider this scenario – you sign a contract to sell your commercial property and the day before the settlement date of the contract, the buyer wrongfully terminates the binding contract. The buyer is a company with assets of only $1. Yes, the buyer is in breach but in reality, it may not be in your best interests to take the buyer to court, because even if you obtain a judgement against the buyer, as the saying goes 'you can't get blood out of a stone' and the buyer may not have assets to trace in order to satisfy the judgement.

What can be done to avoid this occurring? If the buyer is a company or trust, require the individual trustees or the directors of the company to be liable in their own personal capacity, to perform the obligations of the buyer entity contained in the contract. Hopefully the guarantors will have assets. As the seller, you will then be entitled to sue the guarantors personally (usually the directors of

the company or trustees) and any assets such as the family home in the guarantors' name, may be available to seize and sell to pay any judgement from the net sale proceeds.

The REIQ Commercial Land and Building Contract does not contain a provision for a "buyer's guarantor", so a special condition will need to be inserted to protect your interests as the seller.

As a buyer you should also consider asking for a guarantee from the seller, if the seller is a company or trust, regarding the seller's warranties contained in the standard conditions of the contract.

Does the Goods and Services Tax (GST) apply to the sale of a commercial or industrial property?

If you are the seller the obligation to pay GST depends on whether you are registered (or required to be registered) for GST purposes. If you are not registered and not required to be registered, then generally no GST will be payable on the contract. If you are registered for GST purposes, you are obliged to pay GST unless some special exemption applies. If you are the buyer and registered for GST you can claim the GST component in your next business activity statement. This can cause a cash flow problem for you as the buyer in having to fund the GST although only short term.

Stamp duty is also increased because it is payable on the purchase price plus GST.

A GST concession or exemption may apply to the contract, the most common being the Margin Scheme and the Going Concern...but the contract must be correctly written.

What is the Margin Scheme concession?

If the Margin Scheme is to be applied to a Commercial Land and Building Contract, GST is still payable by you if you are the seller, but at a reduced rate. The Margin Scheme may be applied if:

- you purchased the property before 1 July, 2000; or
- you purchased the property on or after 1 July, 2000 and if:

  (i) the Margin Scheme was applied in the contract between you and the previous owner of the property; or

  (ii) the previous owner was not registered for GST and was not required to be registered.

  AND the parties mutually agree to apply the Margin Scheme, in writing prior to settlement of the contract (ideally by way of a special condition in the contract).

If the Margin Scheme is applied, you as the seller are not required to pay 10% on top of the purchase price to the ATO for GST. Instead the following occurs if:

- you have owned the property prior to 1 July 2000, you are to obtain a valuation of the property as at 1 July 2000 and GST will be payable on the difference in value from what the property was worth on 1 July 2000 compared to what the property is being sold for.

  For example, if a property was worth $200,000 on 1 July 2000 and was subsequently sold on 1 July 2006 for $600,000, then GST would be payable on $400,000 i.e. 1/11 of $400,000 is $36,363 GST payable. If full GST was payable on this transaction (rather than the Margin Scheme), this would total $60,000. By applying the Margin Scheme, this is a GST saving of $23,637; and

- you acquired the property after 1 July 2000, GST is payable on the difference between the price you paid for the land and the sale price.

For example, if you acquired the land in April 2004 for $500,000 and sold it 3 months later for $600,000 then GST would be payable on $100,000 i.e. 1/11 of $100,000 is $9,090.90 GST payable. If full GST was payable on this transaction (rather than the Margin Scheme), then this totals $60,000. By applying the Margin Scheme, this is a GST saving of $50,909.10.

If the Margin Scheme is applied, the buyer is not entitled to claim an input tax credit for any GST paid in relation to the transaction and the seller is not required to give the buyer a tax invoice.

What is the Going Concern exemption?

The Going Concern exemption may apply if you supply to the buyer all the things that are necessary for the continued operation of an enterprise. Namely, leasing the property to commercial or industrial tenants (on fixed term written leases that continue after the settlement date) and you carry on the enterprise (ie as lessor of commercial property) until the date of completion, and both parties agree that the contract will include the Going Concern exemption.

This means that no GST is payable and you are obliged to provide all things to enable the buyer to continue the enterprise of leasing the property to commercial or industrial tenants. The contract must be written correctly in this regard or the exemption will be lost. The buyer must be registered for GST with an ABN as at the date of settlement or the Going Concern exemption cannot be claimed.

As the enterprise is "leasing to a commercial or industrial tenant", the terms and conditions of each lease are relevant. If only part of the building is leased or if the lease is informal, then this can have an impact on whether a Going Concern exemption can be claimed. For example, if only part of the property is tenanted but you as the seller are actively searching for new tenants for the balance of the property, then despite the entire property not being leased, it is still likely that the Going Concern exemption could be applied. This is provided you have proof that you have been actively seeking a tenant such as having the property listed with a real estate agent or by placing advertisements in the local newspaper. What if you use ⅓ of the building for storage and then lease out the remaining ⅔ to tenants? Is this a Going Concern? Yes. Provided there are existing written valid leases for the tenants then it may be a Going Concern for ⅔ the sale price but GST would be payable on the part of the land that is not a commercial leasing enterprise i.e. ⅓ of the property and hence ⅓ of the sale price.

Debbie owns a party supply business. After years of hard work she saved enough money to buy the business premises she had been leasing from Paul. A contract was signed for $500,000. Debbie purchased the property in her company's name, which was the same entity used to operate the business. The parties applied the Going Concern exemption and no GST was paid. Five years later, Debbie was audited by the ATO who decided the Going Concern exemption could not be applied as a leasing enterprise cannot be conducted between two parties that are of the same name. Paul was required to pay the ATO GST on the transaction and therefore Debbie was required to pay an extra $50,000 unexpectedly within seven days. Paul had the added burden of needing to pay the GST and penalties and interest of approximately $20,000. The contract did not include a special condition dealing with penalties or interest and therefore Paul could not pass this cost on to Debbie. It is very important that both parties obtain legal and accounting advice in relation to GST on a contract.

If the property is vacant land, then there is no existing enterprise and the Going Concern exemption cannot be claimed.

There is a practice direction that has been issued by the ATO, which is some 30 pages long. It describes in detail what needs to be satisfied for a sale to be considered a Going Concern. There are detailed requirements imposed by the ATO that must be met to apply the Going Concern exemption.

Legal and financial advice should be obtained to make sure that GST is dealt with correctly in a contract from the perspective of both the seller and buyer.

What happens if the parties apply a GST exemption to a contract incorrectly?

Let's say you sell your commercial property and apply the Going Concern exemption. Sometime later, the ATO audits your affairs and advises the Going Concern exemption has been invalidly applied to the contract. As a result, GST is payable to the ATO plus penalties and interest.

Say the audit was conducted two years after you sold the commercial property and the penalties and interest total more than double the original amount of GST. What can you claim back from the buyer if this happens? You can only claim the GST. You need to pay the penalties and/or interest, unless a special condition is inserted in the contract that states otherwise.

If you are a seller, you need legal advice about inserting a special condition in the contract that deals with the above scenario. Otherwise you could potentially be left with a large tax liability with the ATO.

What if you are confident that a GST exemption would apply but do not want to take a risk with penalties and interest?

Either party to the transaction can make an application to the ATO for a private tax ruling. There is no fee payable to the ATO for this service, but you will incur legal fees and/or accounting fees associated with the preparation of the application. The time frame to obtain a ruling, at the time of printing, is up to 3 months.

The parties can either wait until the private ruling is issued before finalising the contract or insert a special condition outlining what is to occur if an unfavourable tax ruling is made. This may involve the parties agreeing for part of or the whole potential GST liability amount being paid by the buyer at settlement and held in your solicitor's trust account.

The moneys could be released to the buyer if a favourable tax ruling is received or otherwise paid to the ATO. If the parties settle and no moneys are held in trust, you as the seller are responsible for paying the GST liability to the ATO. You will be left with the task of seeking reimbursement from the buyer.

Risk - who is responsible for insuring the property after a contract is signed?

The standard conditions of the REIQ Commercial Land and Building Contract state the property is at the risk of the buyer from 5pm on the next business day after a contract has been signed by both parties. Therefore, as the buyer, you should immediately arrange an insurance cover note for the property. We recommend that you seek advice from an insurance broker to ensure you take out adequate insurance.

To be prudent, we recommend that if you are the seller you also maintain the existing insurance until the property is sold. Why? If neither party insures the property and the property is burnt down

after a contract is signed but before it becomes unconditional and the buyer validly terminates the contract, then your only right as the seller is to seek the funds to construct a new building from the buyer and this can quickly become very complex and expensive.

You should also consider other insurance that may be relevant to you. This may include life insurance, income protection or specific property insurance. If you are obtaining a loan to buy a property, you need to consider how you would continue to make mortgage payments if you became ill and could not earn your usual income or your tenant defaulted. Your insurance broker will be able to provide detailed advice on what policy may best suit your circumstances.

> Bailey signed an unconditional contract to purchase a commercial building and later made an appointment to see his solicitor to discuss the terms and conditions of the contract. Prior to meeting with his solicitor, the building was set on fire by an arsonist and the entire building burned to the ground. Pursuant to the standard conditions contained in the contract, the risk of the property was Bailey's responsibility. Bailey had not organised insurance for the building and was not even aware that the property was at his risk. Bailey's financier would no longer lend the same amount for vacant land and Bailey was unable to proceed with settlement on the due date. The seller subsequently terminated the contract and sued Bailey for damages. It is very important that a buyer be aware that the risk of the property passes to them from 5pm on the next business day after a contract has been signed by both parties.

Who is liable to pay stamp duty on the contract?

Under the *Duties Act (Qld)*, theoretically both parties are liable to pay the stamp duty, but the usual commercial convention is to include a clause in the contract stating that the stamp duty on the purchase price (inclusive of GST) is payable by the buyer (ie clause 23 of the Standard Conditions in the REIQ Commercial Contract). It is important to note that if the buyer does not pay the stamp duty in accordance with the contract conditions, then the Office of State Revenue can require that you, as the seller, pay the duty.

There may be a stamp duty concession available if the property is being transferred or gifted from yourself to your spouse or child. Please ask us about this if it is relevant.

The rate of transfer duty is calculated on a sliding scale of a $1.50 to $5.25 per $100 (subject to change) or part thereof, depending on the purchase price. The duty is calculated on the amount the buyer paid or the unencumbered value of the assets acquired, whichever is the higher amount.

What items are included or excluded in the sale?

If you are the seller you must disclose in the contract any fixtures you intend to remove. Fixtures are items that are permanently fixed or built into the property. For example air conditioners in walls, cold rooms and machinery or equipment that has been affixed to the ground or building structure.

If tenants have installed their own fixtures and fittings in the property, these should be excluded in the contract, as this will not form part of the property being sold.

Chattels are any movable items. If any are included in the sale, they should be specifically listed in the contract as "included items", for example air conditioners temporarily affixed in windows, office

chairs and desks. The buyer is to receive clear title to the property, fixtures and chattels, so you must ensure if any of the chattels are under finance or secured by a creditor, the amount owing to the creditor must be fully paid out at settlement.

Is a seller required to disclose any encumbrances registered on the title of the property? What happens if this does not occur?

It is crucial that any encumbrances affecting the property be disclosed in the contract. Encumbrances include any leases, easements, covenants etc that will remain after settlement. A buyer is entitled to terminate a contract at any stage prior to settlement if an encumbrance has not been disclosed in the contract and the buyer can show that they would be materially prejudiced if they were required to proceed with the sale.

Alternatively, the buyer may be entitled to claim compensation from you for failure to disclose an encumbrance. To avoid possible termination of a contract, you need to ensure that all encumbrances (whether they are registered on the title or not) are recorded in the contract.

Building covenants

Building covenants commonly contain minimum requirements to be met before a building can be constructed on particular land or it may restrict the landowner from using the land for certain purposes. For example, a building to be constructed in a subdivision may need to be of a minimum size or perhaps owners are not entitled to construct any shed on the land. Building covenants are commonly used by developers to preserve the standard of quality of a subdivision. In Queensland, building covenants are usually not capable of being registered over the land.

The building covenants are made legally binding by a developer inserting them into a contract of sale. The original purchaser of the land commonly agrees to not sell the property to a third party without having the third party agree to be bound by the building covenants. In an attempt to have the original buyer attach the building covenants to any subsequent sale contracts, commonly a clause is inserted in the building covenants to require the original buyer to pay the developer liquidated damages if the original buyer breaches the building covenants.

If you are selling your property, you should check the contract from when you purchased the property to ensure that it does not refer to building covenants, and if it does, you will need to refer to the covenants in the contract when selling the property to someone else.

How is land tax dealt with?

Land tax is a charge attached to a property and therefore if a property is sold and land tax is not paid at settlement, the land tax must be paid by the new buyer. A land tax search is usually performed by the buyer's solicitor to determine if any land tax is owing. If so, it is usually paid at settlement from settlement money.

As per the standard conditions of the REIQ Commercial Land and Building Contract, land tax is apportioned between a seller and buyer if the unimproved land value of the property exceeds a threshold value set each year by the Office of State Revenue (that requires an individual to start paying land tax). Land tax will vary whether the seller is a company, trustee or natural person. If an adjustment is made at settlement, the buyer is required to pay the land tax from the day after settlement to the end of the financial year and the seller is obligated to pay the proportion of the land tax for the financial year from 1 July to the date of settlement and any previous financial years.

Does any information have to be disclosed to a buyer before a commercial or industrial land contract is signed?

If the sale involves vacant commercial land **and** you as the seller have utilised the services of a real estate agent, you are required to give the buyer a

signed written notice, prior to the contract being signed, which outlines some specific information contained in the *Property Agents and Motor Dealers Act 2000 (Qld).* This requirement is to advise the buyer that the land is of a commercial nature and is not capable of being used for residential purposes. This notice is not required to be given if a real estate agent is not affiliated with the sale in any way.

If a notice is required and is not signed or given to the buyer before a contract is signed, then within six months of the date of the contract, the buyer may have the right to:

- terminate the contract and obtain a refund of any deposit. You will also be required to reimburse the buyer for any expenses relating to the sale such as legal or accounting fees; or
- if the contract has proceeded to settlement, the buyer can force you to retake ownership of the property in exchange for payment of the purchase price and any out of pocket expenses incurred by the buyer relating to the sale. This will include legal and accounting fees relating to the initial transfer of the property to the buyer and the re-transfer back to you of the property. You will also be required to reimburse the buyer for any stamp duty paid on the initial transfer of property from you to the buyer (if the buyer does not receive a refund from the Office of State Revenue) and pay any stamp duty on the transfer of the property back to you.

You and the agent are jointly and severally liable to repay the buyer which means the buyer can seek reimbursement from either or both parties.

Property in a Community Titles Scheme (Body Corporate)

If the commercial land being sold is a commercial lot in a community title scheme, you as the seller are required to submit a signed disclosure statement (either signed by you or your agent) to the buyer, before the contract is signed and a Form 14 contract warning statement must be attached to the front of the contract (as required by the *Body Corporate and Community Management Act 1997 (Qld)).*

Other requirements include that the most current version of the Form 14 is to be used and the contract must be presented to the buyer in the correct order. A cover letter is only allowed if the draft contract is faxed to the buyer and even then, the cover letter must not exceed 1 page.

If the draft contract is emailed then the Form 14, disclosure statement and contract need to be in the correct order.

If you do not comply with the above requirements, the buyer may be entitled to terminate the contract any time before settlement of the contract. Even if you become aware after a contract is signed that the above requirements have not been complied with and you request the buyer to waive the right to terminate the contract and the buyer agrees, the buyer still has the statutory right to terminate the contract until settlement.

If any information contained in the disclosure statement is incorrect, the buyer does not automatically have a right to terminate the contract. The buyer only has this right if the buyer gives written notice to you to terminate within fourteen days of the buyer (or their agent) receiving a copy of the signed contract and the buyer would be materially prejudiced if compelled to complete the sale.

Does the property contain asbestos?

In accordance with the *Work Health and Safety*

Regulation 2011, if a building is constructed prior to 31 December 2003, then an Asbestos Materials Report and Register must be held at the premises. This legislation was amended on 1 January 2012 whereby a person in control of a workplace is to:

- develop and implement an Asbestos Management Plan;
- investigate the premises for the presence or possible presence of asbestos and develop and maintain a register of the identified or presumed asbestos;
- develop measures to remove the asbestos or otherwise to minimise the risks and prevent exposure to asbestos;
- assess the condition of any asbestos that is found and the associated asbestos risks; and
- ensure that control measures are implemented as soon as possible and are maintained as long as the asbestos remains in the workplace.

This obligation rests with the tenant and the landlord of the premises. There are substantial fines that may be imposed if a party does not comply with the above.

Gary wanted to invest in a commercial property with a good return. He located a commercial building that was leased to a national company. The leasing schedule contained all the relevant information such as the current rent, the existing term of the lease and details of option terms. Gary signed a contract and on the day before settlement, the parties exchanged settlement statements, which outlined the adjustments to be made at settlement. It then became clear that the current rent as disclosed in the lease schedule was incorrect and the annual rent was in fact $3,000 less. Gary elected to terminate the contract and the seller was required to return the deposit to Gary, despite the contract being unconditional.

The standard conditions of the contract does not allow the buyer to terminate if asbestos is found in the building. Rather, the obligation is to simply have the Asbestos Management Plan available at settlement. There are a number of local businesses that can prepare the reports.

If the building was constructed in 2004 or after, it should not contain asbestos products and materials and the Act does not require a Report to be conducted over the building.

What is a Certificate of Classification and does a seller need to provide this when selling a commercial or industrial property?

If the commercial or industrial building was constructed on or after 1975 or an approval has been obtained from the local council to modify the building, on or after 1975, then the *Building Act 1975 (Qld)* applies.

Once construction work is completed, the local council is required to perform a final inspection and if the building work complies with the building standards, then a certificate of classification is issued. This is proof that a final inspection has been performed of the building works and that it complies with the *Building Act 1975 (Qld)*.

In accordance with clause 4(i) of the standard conditions of the REIQ Commercial Land and Buildings Contract, a certificate of classification is required to be provided by you as the seller to the buyer at settlement for ea ch building permit issued pursuant to the *Building Act*. If the *Building Act* applies to a building, it is not able to be lawfully occupied unless the certificate has been issued. An owner also may not be covered by their insurance if a certificate of classification does not exist for the building.

A buyer can conduct a search of the local council records to obtain a list of building approvals for the property and whether a final inspection has been carried out for each permit. The buyer can

also request a copy of any issued certificates of classification, normally for a small fee from the council.

If a certificate does not exist for each and every building permit, you must arrange for the council to inspect the property. If the building work complies with the building regulations applicable at the time of construction, then a certificate will be issued (for a fee).

Alternatively, if the building does not comply with the building regulations relevant at the time of construction, you are obligated to perform any necessary building works, so that a certificate of classification can be issued and provided to the buyer. This may involve spending thousands of dollars before a certificate will be issued.

Alternatively, you can consider inserting a special condition in the contract to the effect that you are not obligated to provide any certificates of classification to the buyer (ie the buyer acquires it "as is").

Is a buyer bound by any existing leases applicable to the property?

The items schedule in the REIQ Commercial Land and Building Contract provides disclosure of any existing leases. This is the lease schedule. This information includes the name of the tenant, the lease term, whether there are any options for the tenant to extend the lease, the rent payable and the use of the property by the tenant.

If you are the seller, you are required to give a copy of all leases (and a statement to that effect) to the buyer after the contract is signed. The buyer then has seven days to terminate the contract if they are not satisfied with the terms and conditions of any lease. If the buyer does not terminate the contract, they are bound by the disclosed leases, after completion of the contract.

One important issue that a buyer should review in a lease is whether the lease contains a personal guarantee from directors if the lessee is a company. If not, is there a sufficient rental bond or bank guarantee in case the tenant defaults? Why is this so important? If the tenant is a company, it may not hold any assets and if the tenant breaches the lease you want to ensure you either hold security by way of a bank guarantee or cash bond or the directors are personally liable. If the lease does not contain any of these things, as you cannot amend the lease you will need to weigh up the risk of default by the tenant against buying the commercial property with the current lease in place.

What if the information in the lease schedule is incorrect?

Any information recorded in the lease or service contract schedule must be correct. If it is incorrect, the buyer is entitled to terminate the contract at any time before settlement, even if the contract is unconditional. For example, if the rent is recorded as higher than what the tenant actually pays or the lease term recorded is longer than what it actually is, then these are both examples of when a buyer could potentially terminate the contract at any time prior to settlement.

What if the *Retail Shop Leases Act 1994 (Qld)* applies?

This legislation contains a schedule of the various business types that are considered retail businesses. This legislation will apply if the tenant operates a business type contained in the legislation or if 5 or more of the tenants in a building wholly or predominately carry on a retail business. The lease is then considered a retail shop lease.

This legislation has been designed to protect tenants and restricts what can be contained in the lease. If there is an inconsistency between what is contained in the lease compared to the legislation, then the legislation will prevail.

In retail shop leases, the costs and outgoings that the landlord can claim from the tenant are restricted. For example, if a new retail shop lease document is to be prepared, each party (lessor and lessee) bear their own legal costs. A specific tribunal deals with disputes between the landlord and tenant of retail shop leases.

At least seven days before a lease commences, the landlord is to give to the tenant a disclosure statement that outlines general information such as what the rent and outgoings will be. If this is not provided, the tenant has the right to terminate the lease within six months and claim damages.

The standard conditions of a REIQ Commercial Land and Buildings Contract contain a statement by you as the seller to confirm that as far as you are aware, you have complied with the legislation. This reduces the risk to the buyer that a new tenant may terminate an existing lease due to lack of disclosure within six months of the lease commencing, and after the property is sold to a third party.

Can the seller enter into a new lease or modify the terms of an existing lease, after a contract of sale is signed?

As per the standard conditions in an REIQ Commercial Land and Buildings Contract, without the consent of the buyer, you cannot:

- accept a surrender of lease;
- grant a new lease;
- vary an existing lease;
- assign an existing lease; or
- negotiate or set new rent.

Otherwise, you will be in breach of the contract.

What happens if at the date of settlement, the tenant has paid rent in advance to the seller or is in arrears or default?

If rent has been paid in advance, the sale price is reduced by the amount of rent paid by the tenant for any period after the date of settlement. If the tenant is in arrears, then no adjustment is made between you and the buyer and it is up to you to obtain the moneys direct from the tenant after settlement.

You will also give the buyer a Notice of Attornment. This is a notice that the buyer can give to the tenant after settlement, to confirm that the property has in fact been sold to the buyer and it directs the tenant to pay future rent to the buyer.

What happens if a tenant has paid a cash bond or provided a bank guarantee to the seller?

If a tenant has paid a cash bond, a reduction is made to the sale price at settlement equivalent to the amount of the cash bond. If a tenant has provided a bank guarantee, then usually a new bank guarantee is prepared in favour of the buyer and the current bank guarantee is exchanged for a new bank guarantee at settlement. This will be at the tenant's cost or your cost, depending on the wording contained in each lease.

Sam signed a contract to purchase commercial premises located in a body corporate complex which included a lease to a pizza business. One week before completion the tenant who operated the pizza business approached the seller to modify the permitted use of the lease to enable him to sell chickens as well as pizza. The seller agreed to this amendment without Sam's consent. Sam was approached by another tenant in the complex that sells chickens and complained to Sam that the pizza business was now allowed to sell the same product as him. This gave Sam the right to terminate the contract because the seller had amended the lease without Sam's consent.

What is due diligence?

A buyer of a commercial or industrial property should consider inserting a special condition into the contract making it subject to the buyer being satisfied with its due diligence enquiries, within a set period of time. This allows the buyer time to conduct searches and tests (such as soil tests, building and pest inspection reports, town planning and development searches, review any leases, air-conditioning system inspection reports, etc) and if the buyer is not satisfied with its enquiries, the contract can be terminated and the deposit refunded.

Some buyers are of the mistaken belief that if the contract is subject to finance and they make investigations and decide not to buy the property they can say their finance was not approved and easily terminate the contract. A buyer is required to make reasonable efforts to obtain finance and if a buyer wants to terminate on the basis that finance is not approved, you may refuse to release the deposit until the buyer obtains a letter from the proposed financier to confirm that a finance application was made but was not successful or the finance terms offered were not acceptable.

Joe signed a contract to purchase a hotel. Joe requested his solicitor conduct certain searches on the property and the matter proceeded to settlement. Four weeks later the Department of Emergency Services conducted a random inspection of the premises and Joe received a direction to complete a substantial amount of rectification work as the premises did not comply with the existing fire standards. Joe could have conducted a search with the Department of Emergency Services prior to settlement, whereby they attend the premises and conduct an inspection and advise of any necessary rectification work. Depending on the terms of the contract, Joe may have had the right to claim all or part of the costs of the rectification work from the seller. As the rectification work was requested after the date of settlement, it is now Joe's responsibility to complete the works.

If I am a buyer, what searches can be carried out on the property?

There are a number of common searches performed when you purchase a commercial property. They include:

- Main Roads – to determine if the Department of Main Roads has any current plans to resume part of the property or determine if there are any current notices affecting the property;
- Rates and water search – to determine when rates have been paid to and obtain a water meter reading to make a water adjustment at settlement;

- Title search – to determine that the seller is the registered owner, whether there are any encumbrances on the title and whether there are any registered mortgages;
- Plan – obtain a copy of the plan to make sure the correct property details are on the contract;
- Company search – if the seller is a company, a search of that company is performed to determine if there are any fixed or floating charges over assets of the company or if a receiver or liquidator has been appointed;
- Contaminated Land Register – a search is undertaken of this register to make sure the property is not recorded as contaminated; and
- Land Tax.

There are a number of other searches available such as (but not limited to):

- Town planning certificate – this is a search conducted with the local council to determine things such as the zoning of the property;
- Building approval certificate – this is issued by the local council and is a list of building approvals relevant to the property;
- Body corporate certificate – if the land is part of a body corporate then a certificate of information can be obtained from the body corporate and it confirms such things as when administration and sinking funds have been paid up to;
- Department of Emergency Services – a search of their records can be arranged to make sure there are no outstanding fire notices relating to the property or it can be arranged for a representative to inspect the property to
- determine if any action is required to ensure the building complies with current fire standards; and
- Other searches are available for rural/farming properties from places such as DPI, Sunwater, etc.

We can provide you with an outline of the searches that are available so you can choose the searches for us to obtain on your behalf.

Please contact us if you require advice on the searches that are available to help you decide which searches should be obtained.

What about trade waste?

As time goes by, the world is becoming more focused on environmental issues. In recent times, local councils are being reviewed by other government departments, such as the Environmental Protection Agency, to ensure that any discharge into local waterways or the ocean is at an acceptable standard.

As a result, the local governments are now being more proactive to ensure that commercial and industrial property owners or their tenants hold a trade waste licence and are monitoring the quality of trade waste that is released into the sewer system.

The local councils consider the property owner primarily responsible for trade waste issues regardless of whether the property is tenanted.

It is crucial that a buyer review any existing leases of the property to ensure that the tenants can be held responsible to obtain a licence (if required) and be liable to pay for any fines or penalties for violation of trade waste policies or legislation.

For example, you own a commercial property and your sole tenant operates a mechanic workshop from the premises. The tenant has 1,000 litres of oil to dispose of. To cut costs, the tenant waits until 1am and pumps the oil down the drain at the business premises. This oil blocks 1.5km of sewer pipe within the vicinity. After extensive scientific investigations, the council is able to prove that the oil originated from your property and it will take 3 days to pump out and repair the sewer pipes.

The council issues you with a notice to repair the blocked pipes and this is estimated to cost $30,000. You would be primarily responsible to pay the local council, despite the premises not being under your control. You would need to review the lease to ensure that you could pass this cost to the tenant.

If a trade waste licence has not been issued in recent times for the property, there is a risk that the council will require rectification work, such as upgrading of grease traps, before a licence will be issued. You need to review the lease to determine whether you or the tenant would be responsible for paying for any rectification work.

If you are a buyer, you may also consider the seller being responsible, as per a special condition in the contract, for the cost of rectification work.

What if the buyer is paying the seller the purchase price over time rather than in a lump sum?

If the buyer is not paying the full purchase price at settlement, then this is commonly called "vendor financing". This is not common in the sale of commercial properties. You would need to agree on whether the buyer will be required to pay interest on the outstanding balance until payment and consider whether the seller requires security or a loan.

The security may include a registered mortgage over the commercial property, registration with REVS of a bill of sale over any motor vehicle or boat owned by the buyer, a registered mortgage over any other real property owned by the buyer or if the buyer is a company, a fixed and floating charge registered with the Australian Securities Investment Commission. A seller would need to ensure that they receive sufficient moneys from the buyer at settlement to pay out any existing mortgage that is already registered over the property.

Help and advice from your accountant

Your accountant can help and advise you on determining a buyer entity, apportionment of price between goodwill and plant and equipment, GST issues, review of seller's financial records and due diligence, cash flow and other financial management issues.

What do I do now?

Visit our website (www.mckayslaw.com) and see the checklist for commercial or industrial properties. Complete it and return to us so we can prepare a contract of sale quickly and cost effectively.

You will need to choose a group of trusted professionals including a solicitor, accountant/ financial advisor, banker and insurance broker. These parties will cover different issues relating to the sale or purchase of a commercial property, relevant to each person's expertise such as tax savings, asset protection strategies and essential terms of the commercial contract. It is important that these professionals co-operate and work together for your benefit. This creates efficiency and savings in time and money for you and less stress. We can provide you with contact details of some reputable professionals, if you do not already have advisors in these key areas.

We have offices in Brisbane, Mackay, Gold Coast and Surat Basin. Our solicitors specialise in the areas of the law in which they work. Please call us so we can make sure you have the right solicitor to help you with buying or selling a commercial property or any other legal work by calling us on 1300 625 297.

> Note that this guide relates to the sale and purchase of businesses situated in Queensland and may not be accurate to transactions in other jurisdictions.

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