

## Development of Commercial Accommodation – Selected Issues

1	Introduction	1	3	Structuring Development Activities	14	
	1.1	Overview	1	3.1	Income Taxation of Property Development	14
	1.2	Commercial Accommodation	2	3.2	Mixed Developments	16
	1.3	Market Analysis	4	3.3	Long Term Construction Contracts	19
	1.4	Structuring Approaches	6	3.4	Partitions	20
2	Investment Regulation	7	3.5	CGT on Land Held as Trading Stock (CGT Event K4)	23	
	2.1	Managed Investment Scheme	7	3.6	Stamp Duty & Custodian Arrangements	24
	2.2	Foreign Investment Review Board	10	3.7	GST purchaser withholding rules	27

## 1 Introduction

### 1.1 Overview

The development and operation of commercial accommodation raises complex regulatory, contractual, commercial and taxation issues.

Strong investor demand continues for investment in commercial accommodation in the hotel, serviced apartment and student accommodation sectors.

The hotel property sector is currently outperforming all other classes, particularly in Melbourne and Sydney, with 22% Chinese visitor growth the dominant contributor resulting in continued strong interest by investors based on projected 10 year expected growth of international visitors (5.6%) and domestic visitors (3.1%) annually.<sup>1</sup>

The serviced apartment industry has been the strongest performing accommodation sector over the past decade with a 4.7% revenue increase due to international and domestic business traveller resulting in continued strong interest by investors as room numbers pipeline keep pace with demand.<sup>1</sup>

Purpose built student accommodation development projects anticipate 5.5% growth in beds in Melbourne (2017-2018) resulting in continued strong interest by investors who are closely watching occupancy uptake and stabilisation of new assets in the current project pipeline.<sup>2</sup>

Hotels, serviced apartments and student accommodation developments have tested the demarcation between residential premises and commercial residential premises for various taxes. Structuring developments is becoming more complex (particularly mixed

<sup>1</sup> IBIS World, Serviced Apartments in Australia: Market Research Report January 2017.

<sup>2</sup> Savills, Australian Student Accommodation Market Report 2017 at 40.

developments) as developers are seeking alternate funding/investment structures to finance capital development costs.

This paper discusses selected regulatory, contractual, commercial and taxation issues in the hotel, serviced apartments and student accommodation sectors of commercial accommodation including:

- (a) technical categorisations of commercial accommodation;
- (b) market analysis of commercial accommodation;
- (c) FCT audit activities; and
- (d) structuring approaches and tax issues for the development activities.

This paper does not discuss other forms of commercial accommodation or sharing-economy residential accommodation (e.g. Airbnb, Stayz) which is treated as residential leasing nor structuring approaches and tax issues for the accommodation management activities.

## 1.2 Commercial Accommodation

### Introduction

Commercial accommodation consists of a variety of residential style accommodations such as hotels, motels, inns, hostels and boarding houses.

Regulatory and taxation legislation uses various terms such as 'commercial accommodation', 'commercial residential premises' or 'serviced strata scheme' to describe short term residential style accommodation where the occupier has non-exclusive occupancy.

Regulatory and taxation legislation generally relies upon the ordinary meaning of 'hotel', 'serviced apartment' and 'student accommodation', but may modify the ordinary concept.

Usually categorising commercial accommodation as a hotel, serviced apartment or student accommodation does not alter the regulatory or taxation consequences. However, there are some circumstances where differences potentially arise, particularly in respect of student accommodation.

### Accommodation Attributes

The attributes of commercial accommodation include:<sup>3</sup>

- (a) the physical character, zoning and planning of the premises is residential;
- (b) the main purpose is accommodation;
- (c) multiple occupancy sleeping arrangements on premises;
- (d) non-exclusive occupancy of any particular part of the premises;

---

<sup>3</sup> ATO Ruling GSTR 2012/6: GST Commercial Residential Premises at [142], [187] and [197].

- (e) availability to the public or segment of the public;
- (f) business-like commercial intention and procedures;
- (g) independent central management of that accommodation rather than as agent;
- (h) the provision of cleaning and other service in the tariff;
- (i) the provision of utilities in the tariff;
- (j) short term occupancy rather than for extended periods; and
- (k) the provision of common areas in addition to the rooms.

The main indicia for distinguishing commercial accommodation from residential accommodation is the short duration of stay, non-exclusive occupancy rights and independent central management of the accommodation.

It is often difficult to delineate between one form of commercial accommodation and another in circumstances where the building and services provided cross over traditional ordinary concept demarcations.

### **Hotel**

The ordinary meaning of 'hotel' is a building in which overnight accommodation, food and alcoholic drink is available to travellers or tourists with common features including a non-exclusive right of occupancy, a restaurant or dining room for guests, furnished rooms with a bed and living space furniture and supplied linen and towels and cleaning and services provided by staff included in the tariff.<sup>4</sup>

The main indicia for distinguishing a hotel from a serviced apartment is the room design (lack of kitchen and laundry facility) and extent of services (inclusion of dining facilities and daily cleaning services).

### **Serviced Apartment**

The ordinary concept of 'serviced' apartment' is an apartment in a building complex in which all apartments provide self-contained accommodation and where integrated reception, business and leisure facilities may be provided.<sup>5</sup>

The industry operates self-contained apartments for short-term (1-6 nights), medium term (7-30 nights) and long term (more than 30 nights). Service apartments contain a kitchen/kitchenette and separate lounge and dining facilities but fewer complex facilities (e.g. pools) or daily services (e.g. room service, daily cleaning).<sup>6</sup>

The main indicia for distinguishing student accommodation from serviced apartments is the special purpose occupancy for students and the longer term duration of the occupancy.

### **Student Accommodation**

The ordinary concept of student accommodation is or is similar to a 'hostel' being a supervised place of accommodation supplying board and lodging at comparatively low

---

<sup>4</sup> *ECC Southbank P/L v FCT* [2012] FCA 795 at [48] and [51]- [55].

<sup>5</sup> *South Steyne Hotel P/L v FCT* [2009] FCAFC 155 at [28] – [29].ATO Ruling GSTR 2012/6 at [145].

<sup>6</sup> IBIS World, *Serviced Apartments in Australia: Market Research Report* January 2017.

rates to students, nurses or special class of people with common features including the provision of food.<sup>7</sup>

Over 50% of student accommodation developments comprise self-contained studios with the balance distributed 40% shared apartments and 10% dormitory rooms (influenced by university developments).<sup>8</sup> Affordability of student rents is a key barrier in student accommodation developments.

The different style of student accommodation may be more akin to serviced apartments (self-contained studios with kitchenette), hotels (self-contained studios without kitchenette) or hostel (shared or dormitory rooms).

GST distinguishes between student accommodation in connection with schools (GST free education supply)<sup>9</sup>, student accommodations in connection with an education institution not a school (input taxed residential)<sup>10</sup> and other student accommodation (taxable supply commercial accommodation).<sup>11</sup>

Accordingly, the GST supply of student accommodation may vary depending on the attributes of the premises and the relationship of the premises to an education institution.

## 1.3 Market Analysis

### Hotels

The hotel property sector is currently outperforming all other classes, particularly in Melbourne and Sydney.<sup>12</sup>

In the current cycle (2016 & 2017), 8,562 rooms are under construction (a 55% increase in supply) but all may not proceed because of financing pressures.<sup>13</sup>

The projected 10 year expected growth of international visitors (5.6%) and domestic visitors (3.1%) annually with Chinese visitors year on year growth of 21.9% with an average 40 nights stay.<sup>14</sup>

Revenue per available room (RevPAR) in Melbourne and Sydney continue to grow at 2.2% year on year (0.8% Melbourne; 4.4% Sydney 2016).<sup>15</sup>

Sydney hotel performance is projected to continue with high occupancy rates (85.9% flat), average daily room rate (ADR) (up 7%) and RevPAR (up 5.7%) igniting a new hotel boom.<sup>16</sup>

Melbourne hotel performance is performing well with stable occupancy rates (83.4% up 1.1%), ADR (up 4.5%) and RevPAR (up 4.4%). However, with new room supplies and financing pressures, the Melbourne hotel market may not maintain RevPAR.<sup>17</sup>

Australia's top 10 hotel operators (40.4% by market) have been diversifying their offerings including Double Tree by Hilton, Ritz-Carlton by Marriott International and Hyatt Place by Hyatt.

<sup>7</sup> *ECC Southbank P/L v FCT* [2012] FCA 795 at [48] and [65]- [57].

<sup>8</sup> Savills, *Australian Student Accommodation*, Market Report 2017 at 12.

<sup>9</sup> Sec. 38-105 GSTA 1999 (e.g. boarding schools and hostels).

<sup>10</sup> Sec. 40-35 and sec. 40-65 GSTA 1999; GSTR 2000/1.

<sup>11</sup> Sec. 195-1 'commercial accommodation' GSTA 1999; GSTR 2012/6.

<sup>12</sup> Savills, *Australian Hotel Market Report 2017* at 3.

<sup>13</sup> Savills, *Australian Hotel Market Report 2017* at 11.

<sup>14</sup> Savills, *Australian Hotel Market Report 2017* at 7.

<sup>15</sup> Savills, *Australian Hotel Market Report 2017* at 6.

<sup>16</sup> Savills, *Australian Hotel Market Report 2017* at 10.

<sup>17</sup> Savills, *Australian Hotel Market Report 2017* at 11.

Significant sector providers are Accor Hotels (France),<sup>18</sup> Hilton Hotels & Resorts (USA),<sup>19</sup> Hyatt (USA),<sup>20</sup> InterContinental (UK),<sup>21</sup> Mantra Group (Aust)<sup>22</sup> and Marriott International (USA).<sup>23</sup>

## **Serviced Apartments**

The Australian serviced apartment sector has grown in the past 5 years with net yields of 5-6% (Sydney CBD), lower building costs (40% cheaper per m<sup>2</sup>) and operating costs.<sup>24</sup>

Serviced apartments pricing is significantly cheaper than hotels and provides greater in-room residential style facilities and amenities.<sup>25</sup>

Revenue growth is likely to slow from 6% to 2.9% due to strong competition from alternate residential accommodation providers (e.g. Airbnb).<sup>26</sup>

Significant sector providers are Accor Hotels (France), Mantra Group (Aust), Meriton Suites (Aust), Quest Apartment Hotels (Aust), and Toga Group (Aust)<sup>27</sup>.

## **Student Accommodation**

Melbourne has seen a rapid rise student accommodation projects in the last 12 to 24 months.

In the current cycle (2016 & 2017), less than 11% of full time student live in of purpose built student accommodation development with the Melbourne market having the largest development pipeline of 16,294 beds with continued strong demand (5.5% growth) principally driven by University developments (27% of that growth).<sup>28</sup>

Increasing student numbers (largely driven by international students) and the availability of new development sites near the University of Melbourne and RMIT University city campuses will likely continue this growth with total Victorian student numbers in student accommodation increasing from 7.2% (2015) to 11.4% (2025).<sup>29</sup>

Investment yields in Melbourne (2017) are (6.75%-7.25% (prime); 7.25%-8.00% (secondary) but are likely contracting. Debt funding of developments including student accommodation remain challenging and record number of investors seek to access the student accommodation markets with more completion likely in the independent third party management of student accommodation.<sup>30</sup>

Significant sector private owner/operators are CLV/Centurion, HRL Morrison, Iglu and Urbanest. Significant sector private manager/providers are Student Housing Australia and UniLodge/HRL Morrison.<sup>31</sup>

---

<sup>18</sup> E.g. Sofitel, Grand Mecure, Sebel, Pullmans, Swizzotel, Novotel, Mecure, and Ibis.

<sup>19</sup> E.g. Hilton, Double Tree, Embassy Suites, Hilton Gardens.

<sup>20</sup> E.g. Park Hyatt, Grand Hyatt, Hyatt Regency, Hyatt Hotels, and Hyatt Place.

<sup>21</sup> E.g. InterContinental, Crown Plaza, Hotel Indigo, and Holiday Inn.

<sup>22</sup> E.g. Mantra, Peppers, BrakFree.

<sup>23</sup> E.g. Ritz-Carlton, Renaissance Hotels, Marriott, Westin Hotels, Le Meridien, Sheraton, Courtyard, and Four Points.

<sup>24</sup> IBIS World, Serviced Apartments in Australia: Market Research Report January 2017.

<sup>25</sup> IBIS World, Serviced Apartments in Australia: Market Research Report January 2017.

<sup>26</sup> IBIS World, Serviced Apartments in Australia: Market Research Report January 2017.

<sup>27</sup> E.g. Adina Apartments, Vibe, Travelodge, Rendezvous, Medina and Kurrajong).

<sup>28</sup> Savills, Australian Student Accommodation Market Report 2017 at 2.

<sup>29</sup> Savills, Australian Student Accommodation Market Report 2017 at 12 - 15.

<sup>30</sup> Savills, Australian Student Accommodation Market Report 2017 at 37.

<sup>31</sup> Savills, Australian Student Accommodation Market Report 2017 at 39.

## 1.4 Structuring Approaches

### Structuring the Development Activities

Commercial accommodation development activities are usually structured with the landowner entity funding the acquisition of land and development works by a combination of capital/financing, investor capital/financing, off-the-plan sales and/or partnering with developer/builders on turn-key development terms<sup>32</sup> or for the receipt of development product (e.g. apartments).

To reduce development risks or to permit off-the-plan sales, the landowner entity may undertake a mixed development of retail shops, commercial offices, residential apartments and commercial accommodation.

The landowner will usually sell sufficient of the development off-the-plan (e.g. the retail shops) to reduce financing costs to retain development product (i.e. the commercial accommodation) or will sell the proposed retained development product (i.e. the commercial accommodation) off-the-plan to a related entity to undertake the commercial accommodation activities.

Historically, the landowner entity might sell the proposed retained development product (i.e. the commercial accommodation) off-the-plan to a related entity to realise profit in the landowner entity and to segregate the development product from the risks of the landowner entity.

Alternatively, the landowner entity might sell the proposed commercial accommodation to participant's off-the-plan conditional on participation in the proposed commercial accommodation activities.

Changes in the Victoria off-the-plan duty concession adversely affects these approaches.

Where the developer uses investor capital/financing, the arrangement may be a regulated managed investment scheme. If those investors are foreigners, the arrangement may be regulated by the foreign investment board.

One must consider and weigh the regulatory, commercial and taxation consequences of these approaches to determine the most cost-effective approach.

### Structuring the Accommodation Management Activities

Commercial accommodation activities are usually structured with the landowner entity or entities licencing the commercial accommodation to a central management entity to undertake the commercial accommodation activities to guests and students.

The landowners or different investors may hold interests in the central management entity or the central management entity may be an independent professional operator.

Where the central management entity has landowner/investor participation, the arrangement may be a regulated managed investment scheme. If those investors are foreigners, the arrangement may be regulated by the foreign investment board.

---

<sup>32</sup> A 'turn-key' or 'modified turn-key' arrangement requires the developer/builder to incur and carry development costs and to render an

account only upon achieving a milestone (e.g. at lock up or practical completion stages) or upon sale of the development (respectively).

Usually the central management entity acts in an independent capacity conducting the commercial accommodation activities rather than as agent for the landowners.

Where each room is separately owned, the licencing of the room to a central management entity to undertake accommodation activities may have a residential character rather than a commercial accommodation character and may constitute a regulated managed investment scheme.

The central management entity may contract with marque hotel or serviced apartment or student accommodation chains for branding rights (generally hotel chains) or franchise rights (generally serviced apartment chains).

Where the marque chain is foreign, the central management entity will need to comply with Australia's international tax obligations.

One must consider and weigh the regulatory, commercial and taxation consequences of these approaches.

## **2 Investment Regulation**

### **2.1 Managed Investment Scheme**

#### **Introduction**

Where the developer uses investor capital/financing, the arrangement may be a regulated managed investment scheme.

Where the central management entity has landowner/investor participation, the arrangement may be a regulated managed investment scheme.

ASIC regulates the establishment, transfer, management and administration of certain structures and investment scheme such as property developments by numerous investors, unless excluded from MIS registration.

Civil and criminal penalties may apply to individuals, entities and officers and promoters that contravene these laws.

#### **Managed investment scheme**

A MIS is a scheme where people contribute money or property which are pooled or used in a common enterprise to acquire a scheme interest to produce financial or property benefits for those people with the scheme interest without any day-to-day control of the operation of the scheme.<sup>33</sup>

A single venture may constitute a scheme.<sup>34</sup>

In larger developments and managed accommodation activities, the landowners/investors generally do not have day-to-day control.<sup>35</sup>

---

<sup>33</sup> Sec. 9 'managed investment scheme' CA 2001.

<sup>34</sup> Cvetanoski v Filaria P/L [2002] ATCSC 103.

<sup>35</sup> ASIC v IP Product Management Group P/L [2002] VSC 255; Burton v Arcus [2006] WASC 71 at [80].

Generally, use of a trust,<sup>36</sup> a partnership<sup>37</sup> or a joint venture<sup>38</sup> is a pooled funds MIS and loans<sup>39</sup> and contract based contributions are a common enterprise MIS.<sup>40</sup>

Interest bearing loan contributions,<sup>41</sup> property developments<sup>42</sup> and offers to sell strata residential apartments subject to participation in a services apartment or hotel arrangement<sup>43</sup> are a MIS.

A 'managed investment scheme' includes 'management rights scheme' and managed 'services strata unit scheme' such as serviced apartments, hotels, motels and resorts where the landowners contributes their rights to a common and interdependent enterprise where the return depends on the arrangement.<sup>44</sup>

A MIS does not include certain partnerships,<sup>45</sup> a company, related companies or a franchise.<sup>46</sup>

### Registered managed investment scheme

A MIS must be registered if it has more than 20 members and was promoted by person (or associate) in the business of promoting managed investment schemes, but is exempt from registration if all the issued interests under the scheme would not require a product disclosure statement (PDS) to be given.<sup>47</sup>

Multiple MIS of 20 or fewer members may be aggregated into one conglomerate scheme if there are not separate assets pools to which the people with scheme interests have exposures in different proportions or from operators perspective there is a single scheme.<sup>48</sup>

Joint holders of a scheme interest count as a single person and scheme interests held on trust are deemed held by the beneficiaries that are presently entitled to the income or capital of the trust.<sup>49</sup>

If there are more than 20 members, the promotor or operator of the scheme will contravened the law unless they prove that they did not know, and had no reason to suspect, that the interest was held on trust.<sup>50</sup>

### Class Order & Regulatory Guide Exclusions

Because of the onerous capitalisation and reporting obligations, most property developments seek to be excluded from MIS registration.

From 19 September 2016, ASIC has issued a new consolidated instrument exempting certain commercial accommodation schemes.<sup>51</sup> The commercial accommodation exemptions are not often satisfied.

---

<sup>36</sup> *Mirvac and Mirvac Funds* [1999] NSWSC 147.

<sup>37</sup> *ASIC v McNamara* [2002] FCA 1005.

<sup>38</sup> *ASIC v Comcash Australia P/L* [2004] QSC 491 at [21].

<sup>39</sup> *ASIC v Pegasus Leveraged Options Group P/L* [2002] NSWSC 310.

<sup>40</sup> *BOSI Security Services Ltd v ANS Bank Group Ltd* [2011] VSC 255.

<sup>41</sup> *ASIC v Pegasus Leveraged Options Group P/L* [2002] NSWSC 310.

<sup>42</sup> *Mirvac and Mirvac Funds* [1999] NSWSC 147.

<sup>43</sup> *Co-op Building Society of South Australia Ltd v ASC* (1993) 113 ALR 244; ASIC CO 02/303.

<sup>44</sup> Ch. 5C CA 2001; ASIC Regulatory Guide RG 140 Strata schemes and management rights scheme at [RG 140.1], [RG 140.24], [RG 140.30] and [RG 1.40.31] – RG 140.38].

<sup>45</sup> Sec. 115 CA 2001.

<sup>46</sup> Sec. 9 'managed investment scheme' CA 2001.

<sup>47</sup> sec. 601ED CA 2001.

<sup>48</sup> *ASIC v IP Product Management Group P/L* [2002] VSC 255; *ASIC v Pegasus Leveraged Options Group P/L* [2002] NSWSC 310.

<sup>49</sup> Sec. 601ED(4) CA 2001.

<sup>50</sup> Sec. 601ED(7) CA 2001.

<sup>51</sup> Sec. 601QA(1)(a) CA 2001; ASIC Instrument 2016/869.



A 'management rights scheme' which is a services strata unit scheme' of interests in real property to be made available to a manager for use as part of a serviced apartment, hotel, motel or resort will be an exempt MIS if:

- (a) there are no payments to operator other than for the strata unit or reasonable operation fees and expenses;
- (b) purchase of the unit was not conditional on participation in the services strata unit scheme; and
- (c) the strata units can be withdrawn from participation in the services strata unit scheme within 90 days.<sup>52</sup>

Alternatively, a service strata unit scheme of interests in real property to be made available to a manager for use as part of a serviced, apartment, hotel, motel or resort will be an exempt MIS if the investment is an amount of not less the \$500,000 (including any amounts paid for any associated chattels, costs and expenses).<sup>53</sup>

Certain serviced apartment schemes that operated before 19 September 2016 under other class orders are grandfathered.<sup>54</sup>

From 19 September 2016, a real property rental schemes made available to a licenced real estate agent for letting purposes (including day to day management of any lease arrangement) other than a serviced apartment, hotel, motel or resort complex is an exempt MIS.<sup>55</sup>

### **PDS exclusions**

Most commercial accommodation developments will be structured to satisfy the PDS exclusions for small scale offerings, sophisticated investors or foreign investors.

A MIS is exempt from registration if all the issued interests under the scheme would not require a PDS to be given.<sup>56</sup>

A small scale offering does not require a PDS if made as personal offers for up to 20 investors to contribute up to \$2m in a rolling 12 months.<sup>57</sup>

A sophisticated investor offering does not require a PDS if the offer is made by an ASFR licensee and the minimum investment is \$500,000 and a qualified accountant with 6 months experience certifies that the investor (including controlled entities) has net assets of at least \$2.5m or gross income for the last 2 financial years of at least \$250,000.<sup>58</sup>

A PDS is not required for recommendations,<sup>59</sup> issues<sup>60</sup> or sales<sup>61</sup> not in Australia.<sup>62</sup>

For example, ASIC does not seek to regulate internet offers of investments if the offers, invitation or advertisement is not targeted at persons in Australia and contain a meaning jurisdictional disclaimer that persons in Australia cannot participate.<sup>63</sup>

---

<sup>52</sup> ASIC Instrument 2016/869 at [5] formerly ASIC CO 2/3004.

<sup>53</sup> ASIC Instrument 2016/869 at [13] formerly ASIC CO 02/185.

<sup>54</sup> CO 02/245, CO 02/303 (strata unit schemes before 15 May 1999), CO 02/304, CO 07/189 & CO 07/186.

<sup>55</sup> ASIC Instrument 2016/870 formerly ASIC CO 02/182 - sunset 1 October 2017 but extended ASIC Consultation Paper 250 (February 2016).

<sup>56</sup> Sec. 601ED(2) CA 2001.

<sup>57</sup> Sec. 708(1) CA 2001.

<sup>58</sup> Sec. 708(8) CA 2001.

<sup>59</sup> Sec. 1012A CA 2001.

<sup>60</sup> Sec. 1012B CA 2001.

<sup>61</sup> Sec. 1012C CA 2001.

<sup>62</sup> Reg 5C.11.05A CR 2011.

<sup>63</sup> ASIC RG 141.

Accordingly, if a MIS is only open to participation by foreign resident investors not physically in Australia, the issue of the interest in, for example, an Australian property development will likely be exempt from issuing a PDS so is an exempt MIS.

## Operating an unregistered MIS

The MIS regulates the investment and conduct of property development funds, trusts and companies unless exempt. ASIC may apply for an injunction<sup>64</sup> and wind up an unregistered MIS.<sup>65</sup> The person with a scheme interest may void the interest at any time.<sup>66</sup>

The promoters or operators will commit an offence subject to fines and up to 5 years imprisonment,<sup>67</sup> may be liable to pay compensation<sup>68</sup> and may be disqualified for a period or for life from managing companies.<sup>69</sup>

## 2.2 Foreign Investment Review Board

### Introduction

Where developer uses foreign investor capital/financing, the arrangement may be regulated by the foreign investment board (**FIRB**).

Where the central management entity has foreign landowner/investor participation, the arrangement may be regulated by FIRB.

FIRB restricts some Australian investments by foreign residents without the prior written exemption from FIRB. Foreign persons may be forced to divest unauthorised Australian investments or be subject to penalties (or both).

For FIRB purposes, 'commercial land' includes 'commercial residential premises' as defined for GST purposes and, from 1 July 2017, certain student accommodation<sup>70</sup>

### Restricted acquisitions

A foreign person must notify FIRB of a significant action (e.g. change of control of land,<sup>71</sup> or land corporation or land trust etc.) or a notifiable action (e.g. changes that do not result in a change of control of land etc.)<sup>72</sup> that satisfy the Australian land interest type and thresholds and is not exempt.

Relevantly, a foreign person must get FIRB approval before acquiring a legal or equitable interest<sup>73</sup> in or option or transfer right to<sup>74</sup> Australian land being:

- (a) residential land<sup>75</sup> on which one dwelling is or less than the prescribed number of dwellings could be constructed (but excluding commercial residential premises);

---

<sup>64</sup> Sec. 1324(1) CA 2001.

<sup>65</sup> Sec. 601EE CA 2001; *ASIC v Chase Capital Management P/L* [2001] WASC 27.

<sup>66</sup> Sec. 601MB CA 2001; *Ellison v Luttre P/L* [1999] FCA 399.

<sup>67</sup> Sec. 301ED(5) CA 2001; e.g. *DPPC v Letten* [2014] VCC 1285.

<sup>68</sup> Sec. 1325(1) CA 2001.

<sup>69</sup> Sec. 206E CA 2001; *ASIC v Hutchings* [2001] NSWSC 522.

<sup>70</sup> FIRB Guidance Note GN 14: Commercial land; FIRB Guidance Note GN 15 Accommodation Facilities.

<sup>71</sup> Sec. 43 FATA 1975.

<sup>72</sup> FIRB Guidance Note 35.

<sup>73</sup> Sec. 12 FATA 1975 - a strata title occupancy interest, a right to occupy exceeding 5 years, a profit a prendre exceeding 5 years or profit sharing arrangement exceeding 5 years, a share in a land corporation or agricultural land corporation or a unit in or share in the trustee of a land trust or agricultural land trust.

<sup>74</sup> Sec. 15 FATA 1975.

<sup>75</sup> Sec. 4 'residential land' FATA 1975; FIRB Guidance Note 3.

- (b) vacant commercial land<sup>76</sup> (including commercial residential premises<sup>77</sup> but excluding residential land);
- (c) developed commercial land (including commercial residential premises) that is valued at more than \$252m<sup>78</sup> (or \$55m if the owners have a right to occupy the commercial residential premises).

'Commercial residential premises' as defined for GST purposes includes hotels, serviced apartments and any other similar premises, but not student accommodation.<sup>79</sup> However, student accommodation is treated as commercial for FIRB purposes, unless exempt.<sup>80</sup>

The acquisition of a dwelling will be developed commercial residential premises and not residential land where the dwelling is leased to or managed by a facility operator and is available for rent or use as part of the commercial accommodation business and the management agreement limits the rights of the owner to receipt of an income stream and not occupancy.<sup>81</sup>

Relevantly, from 1 July 2017 FIRB approval is not required for student accommodation if:<sup>82</sup>

- (a) the premises provide accommodation to students in connection with an education institution that is not a school (i.e. a university);
- (b) the foreign person is not a foreign government investor; and
- (c) the land is valued at less than \$252m<sup>83</sup> (or less than \$55m if the owners have a right to occupy the commercial residential premises).

In particular, if the commercial accommodation development grants the investor in the landholder a right to occupy the land (e.g. student accommodation), it will be considered residential land and exempt from notification if valued at less than \$55m.

The student accommodation is 'in connection' with an education institution that is not a school if:<sup>84</sup>

- (a) accommodation is provided exclusively for students of a particular education institution (e.g. university);
- (b) there is a formal agreement between the accommodation owner and the education institution to provide accommodation to the students of the education institution.

The exemption for student accommodation formally connected with a particular education institution (i.e. university) will not apply to privately operated student accommodation developments.

### Foreign persons

Foreign persons do not need to apply for FIRB approval if:

---

<sup>76</sup> Sec. 4 'commercial land' FATA 1975; FIRB Guidance Note 14.

<sup>77</sup> Se. 4 'commercial residential premises' FATA 1975 - as defined in the GSTA 1999; FIRB Guidance Note 15.

<sup>78</sup> A \$55m threshold applies for commercial and that is a mine or critical infrastructure (such a port).

<sup>79</sup> Sec. 195-1 'commercial residential premises' GSTA 1999.

<sup>80</sup> FIRB Guidance Note 15.

<sup>81</sup> FIRB Guidance Note 15.

<sup>82</sup> Reg. 38(5) FATR 2015 (Cth); FIRB Guidance Note 15.

<sup>83</sup> A \$55m threshold applies for commercial and that is a mine or critical infrastructure (such a port).

<sup>84</sup> Reg. 38(5) FATR 2015 (Cth); FIRB Guidance Note 15.

- (a) an Australian citizen not ordinarily resident in Australia;
- (b) a New Zealand citizen or Australian permanent resident;
- (c) foreign persons acquiring property as joint tenants (not tenants in common) with their spouse who is an Australian citizen, a New Zealand citizen or Australian permanent resident;
- (d) acquisitions in conformity of a will or testamentary devolution (e.g. intestacy or survivorship).

Accordingly, acquisition by a foreign person of Australian residential land and vacant commercial land for property development into commercial accommodation will require an exemption from FIRB.

A foreign person must get FIRB approval before acquiring:

- (a) a substantial interest (at least 20%) in an Australian entity that is valued at more than \$252m (or \$1,094m if the foreign person is from Chile, China, Japan, Korea, NZ or USA);<sup>85</sup> or
- (b) a real estate interest or securities in land corporations or trusts that have a majority of assets in land.

Accordingly, acquisition by a foreign person of shares in an Australian land corporation or units in an Australian land trust in which property development will occur will generally require an exemption from FIRB.<sup>86</sup>

However, acquisition by a foreign person of shares in an Australian central management entity of commercial accommodation is unlikely to need FIRB approval.

A foreign person is:<sup>87</sup>

- (a) an individual not ordinarily resident in Australia;<sup>88</sup>
- (b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds or together holds at least a 20% substantial interest;
- (c) a trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds or together holds at least a 20% substantial interest;
- (d) a foreign government; or
- (e) any other person prescribed by the regulations.

An individual is ordinarily resident in Australia if:<sup>89</sup>

- (a) an Australian citizen; or

---

<sup>85</sup> FIRB Guidance Note 44.

<sup>86</sup> FIRB Guidance Note 5.

<sup>87</sup> Sec. 4 'foreign person' FATA 1975; FIRB Guidance Note 31.

<sup>88</sup> FIRB Guidance Note 22.

<sup>89</sup> Sec. 5 FATA 1975.

- (b) present in Australia for 200 or more days in the immediately preceding 12 months which is not subject to any limitation as to time imposed by law including as an unlawful non-citizen under the MA 1958; or
- (c) present in Australia immediately before the last departure for 200 or more days in the immediately preceding 12 months which is not subject to any limitation as to time imposed by law including as an unlawful non-citizen under the MA 1958.

A temporary resident<sup>90</sup> is an individual that holds a 12 month temporary visa, is in Australia under a bridging visa and has applied for permanent visa or as prescribed by regulations.

Although termed 'ordinarily resident in Australia' the test applies a 200 or more day's calculation. While this provides for simplicity, it is not aligned with tests of residency for income tax, duty or land tax purposes.

### Exemption Certificates

The Treasury secretariat or FCT secretariat may issue an exemption certificate.

FIRB will generally issue an exemption certificate to:<sup>91</sup>

- (a) foreign persons (including temporary residents) to purchase vacant land<sup>92</sup> for residential development;
- (b) foreign persons (including temporary residents) to purchase new dwellings (e.g. off the plan);<sup>93</sup>
- (c) temporary residents to acquire one established dwelling for use as a residence in Australia on condition that it is sold within 3 months of ceasing to be temporary resident by leaving Australia;<sup>94</sup>
- (d) foreign persons (including temporary residents) to acquire established dwellings for redevelopment provided the redevelopment increases Australia's housing stock (e.g. demolishing one dwelling and building two or more in its place);<sup>95</sup>
- (e) foreign persons (including temporary residents) who have a substantial Australian business to purchase established dwellings to house their Australian based staff.<sup>96</sup>

Accordingly, FIRB will generally issue an exemption certificate to foreign persons (including temporary residents) to purchase vacant land for residential development and to acquire established dwellings for redevelopment provided the redevelopment increases Australia's housing stock.

Exemptions certificates will also be granted to individuals acquiring student accommodation granting a right to occupy but not to hotel accommodation or serviced apartments because there is no right to occupy the premises.

---

<sup>90</sup> Sec. 4 'temporary resident' FATA 1975; FIRB Guidance Note 2.

<sup>91</sup> Treasury, Australia's Foreign Investment Policy Guide, 1 July 2016 at 5.

<sup>92</sup> FIRB Guidance Note 19.

<sup>93</sup> FIRB Guidance Note 4 and Guidance Note 8.

<sup>94</sup> Sec. 59 FATA 1975.

<sup>95</sup> FIRB Guidance Note 6.

<sup>96</sup> FIRB Guidance Note 7.

## Penalties & Avoidance

A criminal penalty of \$135,000 (or 3 years imprisonment) for individuals or \$675,000 for companies or a civil penalty of \$45,000 for individuals or of \$225,000 for companies may be imposed if land is acquired without a FIRB exemption or land is not owned, developed and sold in accordance with any exemption certificate.<sup>97</sup>

A third party, such as an advisor, that knowingly assists with a breach is subject to the same penalties.<sup>98</sup>

The Treasurer may prohibit a proposed significant action or require disposal of a significant action in relation to a scheme to avoid the application of FATA 1975 if the scheme achieved or would achieve that purpose.<sup>99</sup>

## 3 Structuring Development Activities

### 3.1 Income Taxation of Property Development

#### Introduction

The income taxation of a property project is complex as up to three taxation regimes may apply to levy tax. The transfer of land may be taxable:

- (a) as a disposal of trading stock of a property development business;<sup>100</sup>
- (b) as a profit making scheme;<sup>101</sup> or
- (c) as a taxable gain on the disposal of a CGT asset.<sup>102</sup>

The trading stock regime provides an exclusive regime for the taxation of land that constitutes trading stock held in the ordinary course of a development business.<sup>103</sup> Profit is taxed or deductions allowed on the difference between opening and closing trading stock value.<sup>104</sup> The key factors to weigh in determining whether the particular property project was part of a business of property development are:

- (a) the taxpayer's purpose in acquiring and carrying out the project;<sup>105</sup>
- (b) the taxpayer's history of property development or investment;<sup>106</sup>
- (c) the extent of personal involvement of the taxpayer;<sup>107</sup>
- (d) the reasons for developing the land;<sup>108</sup>
- (e) the duration of ownership;<sup>109</sup>

---

<sup>97</sup> FIRB Guidance Note 11 and Guidance Note 12.

<sup>98</sup> Regulated Powers (Standard Provisions) Act 2014 (Cth) and sec. 11.2 Criminal Code Act 1995 (Cth); FIRB Guidance Note 13.

<sup>99</sup> Sec. 78 FATA 1975; FIRB Guidance Note 42.

<sup>100</sup> Div. 70 ITAA 1997.

<sup>101</sup> Sec. 6-5 ITAA 1997.

<sup>102</sup> Pt 3.1 and 3.3 ITAA 1997.

<sup>103</sup> Sec 118-25 ITAA 1997; R. Parsons, *Income Taxation in Australia*, Law Book Company Ltd, 1985, [12.3] re profit making scheme

<sup>104</sup> Sec. 70-5 ITAA 1997.

<sup>105</sup> *FCT v Whitfords Beach P/L* [1982] HCA 8 (new shareholders intent to develop) & *Stevenson v FCT* 91 ATC 4476; (1991) 22 ATR 56 (change in development purpose).

<sup>106</sup> *FCT v Whitfords Beach P/L* [1982] HCA 8 (new shareholders had a history of developments) & *Crow v FCT* 88 ATC 4620; (1988) 19 ATR 1565 (multiple successive history of development).

<sup>107</sup> *Stevenson v FCT* 91 ATC 4476; (1991) 22 ATR 56 (significant involvement of landowner); cf *Casimaty v FCT* 97 ATC 5135; (1997) 37 ATR 358 (most aspects delegated to contractors and agents).

<sup>108</sup> *FCT v Whitfords Beach P/L* [1982] HCA 8 (systematic for a profit); cf *Casimaty v FCT* 97 ATC 5135; (1997) 37 ATR 358 (piecemeal as increasing debt and deteriorating health dictated).

<sup>109</sup> *Scottish Australian Mining Co Ltd v FCT* (1950) 81 CLR 188 & *Casimaty v FCT* 97 ATC 5135; (1997) 37 ATR 358; cf *Stevenson v FCT* 91 ATC 4476; (1991) 22 ATR 56.

- (f) the scale of the sub-division;<sup>110</sup> and
- (g) the extent of any construction work undertaken.<sup>111</sup>

Where the acquisition of land is for an isolated profit-making purpose (e.g. sale), its realisation a taxable revenue profit<sup>112</sup> and not generally subject to CGT.<sup>113</sup> The FCT considers that the sale of property will be a profit-making scheme if the taxpayer had a profit-making intent at the time the sale transaction is entered into and it need not be established that the profit arose in the manner initially intended.<sup>114</sup> The FCT considers the following factors to determine whether an isolated transaction constitutes a profit making scheme:

- (a) the nature of the entity undertaking the operation or transaction;
- (b) the nature and scale of other activities undertaken by the taxpayer;
- (c) the amount of money involved in the operation or transaction and the magnitude of the profit sought or obtained;
- (d) the nature, scale and complexity of the operation or transaction;
- (e) the manner in which the operation or transaction was entered into or carried out;
- (f) the nature of any connection between the relevant taxpayer and any other party to the operation or transaction;
- (g) if the transaction involves the acquisition and disposal of property, the nature of that property; and
- (h) the timing of the transaction or the various steps in the transaction

Where the land is not trading stock or a profit-making scheme, the increase in value is a taxable capital gain on disposal tax included in the assessable income of the taxpayer.<sup>115</sup>

Capital gains on assets acquired before 20 September 1985 are disregarded.<sup>116</sup>

An individual or trust that has held a CGT asset for at least 12 months may reduce the capital gain by 50% and a superannuation fund may reduce the capital gain by 33% under the CGT general discount.<sup>117</sup> A number of exemptions (e.g. the main residence exemption<sup>118</sup>) and concessions (e.g. small business concessions<sup>119</sup>) may also apply in particular circumstances.

Where the trading stock, profit making scheme or capital gains tax regimes do not apply (e.g. pre-CGT assets), the proceeds of the project are not taxed.

---

<sup>110</sup> *FCT v Whitford's Beach P/L* [1982] HCA 8 (magnitude of development does not convert it into a business); cf *Stevenson v FCT* 91 ATC 4476; (1991) 22 ATR 56 (magnitude of development is highly persuasive).

<sup>111</sup> *Stevenson v FCT* 91 ATC 4476; (1991) 22 ATR 56 (extensive services and utilities provided); cf *Casimaty v FCT* 97 ATC 5135; (1997) 37 ATR 358 (minimal works to obtain council approval).

<sup>112</sup> R. Parsons, *Income Taxation in Australia*, Law Book Company Ltd, 1985, e.g. para 12.8; *FCT v Myer Emporium Ltd* [1987] HCA 18.

<sup>113</sup> Sec. 118-20 ITAA 1997.

<sup>114</sup> *Ruling* TR 92/3.

<sup>115</sup> Sec. 102-5 ITAA 1997.

<sup>116</sup> Sec. 104-10(5) ITAA 1997 - Disposal of a CGT Asset: CGT event A1; Determination TD 7.

<sup>117</sup> Sec. 115-25 ITAA 1997; *Determination* TD 2002/10.

<sup>118</sup> Div. 118-B ITAA 1997.

<sup>119</sup> Div. 152 ITAA 1997.

Post-CGT buildings and intangible improvements to pre-CGT Assets are separate post-CGT Assets. These improvements are subject to the CGT regime, requiring capital proceeds to be apportioned.

A post-CGT building or structure is a separate asset to the pre-CGT land.<sup>120</sup> Accordingly, the building component of a property development on pre-CGT land, is taxable. The FCT considers that the increase in land value attributable to Council approval for rezoning and development will be a separate post-CGT Asset and separately taxable under the CGT regime.<sup>121</sup>

Tax planning to retain the pre-CGT status of land usually involves appointing a separate development entity to undertake any development so that the landowner remains very passive so that the property project does not become a profit-making scheme.

### **FCT Audit Activities**

The FCT has as part of an increased focus on property development commenced an audit program of small-medium enterprise property developers around several issues including:<sup>122</sup>

- (a) the use of SMSFs to undertake or fund the property development for sale properties;
- (b) disposing of property shortly after the completion of development and returning receipts as capital gain gains;
- (c) the conduct of property development within the wider economic group of related entities or and returning receipts as a capital gain;
- (d) incorrect recognition of profit where related entities undertake a development (i.e. related party development fees or sales of the completed development);
- (e) inflation of deductions for property developments;
- (f) incorrect attribution of costs in multi-purpose developments where units are retained for rent.

While not specifically directed at commercial accommodation developments, the issues being raised equally apply to commercial accommodation developments.

Accordingly, this paper focuses on development issues currently subject to FCT audit.

## **3.2 Mixed Developments**

### **Introduction**

To reduce development risks or to permit off-the-plan sales, the landowner entity may undertake a mixed development of retail shops, commercial offices, residential apartments and commercial accommodation.

There is uncertainty regarding the income tax treatment of mixed developments.

---

<sup>120</sup> Section 108-55(2) of the 1997 Act.

<sup>121</sup> CGT Determination No. 5; sec. 108-70(2) ITAA 1997.

<sup>122</sup> Commissioner Jordan, Commissioner's address to the National Press Club, 5 July 2017



*ARM Construction P/L v FCT* has stated that:<sup>123</sup>

*The decisive factor in determining whether or not the units...became trading stock at any time...was the primary or substantial intent or purpose of the parties, which intention or purpose was carried into execution. The fact that they may have had a secondary or subsidiary purpose in selling the units if that became necessary in order to discharge their subsequent borrowing...did not stamp upon the units the character of trading stock...*

*...[So] far as the unsold town houses are concerned, the situation is the same...I am of the opinion that the town houses in fact retained... as well as the 13 sold, could not be characterised a "trading stock", a conclusion which extends to the shop and the terrace houses. But I consider that the profits arising on the sale of the...properties in fact sold is assessable under the provisions of sec. 26(a). So far as the shop and the two terrace houses are concerned, I find that it was the intention of the appellants from the outset to sell them in order to assist funding the development, an intention which related with greater certainty to the shop than to the terrace houses.*

Broadly,

- (a) the properties intended to be sold and in fact sold would be a profit-making scheme;
- (b) the properties intended to be held for investment and in fact sold due to financing requirements retain their capital status;
- (c) the properties intended to be held and in fact held retain their capital status.

Care may need to be exercised in applying this case as only 13 of 48 (i.e. 28%) townhouses were sold. It is unclear whether the case would be decided differently where (for example) more than 50% of the property development must be sold to discharge borrowings.

The FCT appears to treat a project based on its predominate character unless the taxpayer can substantiate the intention for each part of a mixed development.

## **Attribution of Development Expenses**

The FCT is auditing the attribution of development expenses as a general deductible,<sup>124</sup> absorbed into cost of trading stock or profit making scheme or the cost base of the CGT asset which may result in the acceleration of deductions.

While interest, council rates and land tax are a general tax deduction,<sup>125</sup> capital expenditures are generally absorbed into the costs of the land and deferred until sale.

For trading stock purposes, expenses are absorbed into the cost of the product with recognition of expense deferred until sale.

For trading stock purposes, the following costs of development should be characterised as part of the cost price of the land and not a general deduction:<sup>126</sup>

- (a) the cost of 'infrastructure land' (i.e. that part of the broad acres land on which services and utilities were to be build and transferred to the Council);

<sup>123</sup> *ARM Construction P/L v FCT* 87 ATC 4790, 4806; (1987) 19 ATR 337.

<sup>124</sup> Sec. 8-1 ITAA 1997.

<sup>125</sup> E.g. TD 92/132 profit making scheme.

<sup>126</sup> *FCT v Kurts Development Ltd* 98 ATC 4877; (1998) 39 ATR 493.

- (b) the costs of 'infrastructure works' (e.g. the cost of establishing services and utilities<sup>127</sup> on the 'infrastructure land'); and
- (c) the 'external costs' (e.g. the costs of 'headworks' including the provision of services and utilities<sup>128</sup> to the land, but on land not owned by the taxpayer).

For profit making scheme purposes, recognition of expenses is deferred until sale.

For profit making scheme purposes, 'profit' is calculated according to profit and loss accounting methodology and not receipts and outgoings tax accounting. The profit calculation assumes the profit arises from one transaction and not from a continuing business. The methodology of calculating the profit has not received much judicial comment.<sup>129</sup> The profit is the difference between the price realised on disposal, less the costs of acquisition and the costs of selling.<sup>130</sup>

For capital gains tax purposes, recognition of expenses is deferred until sale.

For capital gains tax purpose, the gain is calculated as the difference between the adjusted sale proceeds and the adjusted cost base of the asset.<sup>131</sup> Development expenses are allocated to

- (a) The 1st element of cost base - amounts of money or property paid or given, or required to be paid or given, to acquire the asset.
- (b) The 2nd element of cost base - incidental costs of acquisition (e.g. advice costs, transfer costs, stamp duty, advertising costs and valuation fees).
- (c) The 3rd element of cost base' - non-capital costs of ownership (e.g. interest not otherwise deductible, repairs and insurance costs and rates and land tax).
- (d) The 4th element of cost base - capital expenditure increasing the asset's value.
- (e) The 5th element of cost base - capital expenditure to preserve title.

### Allocation of Development Expenses

The FCT is auditing the allocation of development expenses between the different classes of developed land which may result in greater expenses allocated to land sold (reducing profit) rather than to land retained to defer tax liabilities.

The allocation of development expenses should occur on a logical and reasonable basis such as proportionate land area or proportionate land value.<sup>132</sup>

---

<sup>127</sup> e.g. internal access roads, internal street lighting, internal sewage and drainage and parklands.

<sup>128</sup> e.g. external road works to the broad acres, downstream sewage and drainage to the broad acres and external parklands and contributions to civil services such as school improvements and expansions.

<sup>129</sup> *FCT v Whitfords Beach P/L* [1982] HCA 8 (the decision when remitted to the Federal Court to determine the profit of the transaction).

<sup>130</sup> *FCT v McClelland* (1969) 118 CLR 353, 358.

<sup>131</sup> Sec. 102-5 ITAA 1997.

<sup>132</sup> E.g. TR 97/25 property development allocation of capital expenditure to building and structural improvements.

## 3.3 Long Term Construction Contracts

### Introduction

The FCT is auditing long term construction contract arrangements which accelerate deductions and provide extended tax deferrals. The FCT has rewritten the long-term construction contract ruling.<sup>133</sup>

Because capital costs are generally absorbed into the costs of the development with recognition of expenses deferred until sale, some developers may structure the development to access those deductions.

### Acceleration of Expenses Structuring

Under some development agreements, the risks of development is transferred to the developer/builder. A 'turn-key' or 'modified turn-key' building contract may require developer/builder to incur and carry development costs and to render an account only upon achieving a milestone (e.g. at lock up or practical completion stages) or upon sale of the development (respectively).

The developer/builder deducts all these outgoings on a current year basis and returns income in the later years when the milestones are met or the development is sold (as applicable).<sup>134</sup> The FCT appears to have accepted this approach in respect of arm's length contracts.<sup>135</sup>

The developer/builder may deduct these losses against other income from other projects deferring tax. Where the deduction for each successive project expenses increases sufficiently to off-set the income from the previous project, an extended tax deferral may be achieved.

The landowner only brings into account the increase in value of the land resulting from the building at the later years when the milestones are met or the development is sold.

Where the landowner and the developer/builder are related, as a group, the group has effectively accelerated the deduction for the building costs and deferred tax.

### FCT approach

The FCT requires developer/builder to apply normal accounting methods for long term construction contracts that extend over two income years.<sup>136</sup>

The 'basic method' and 'estimated profit basis' are alternate accounting methods available to the developer/builder to return income in respect of a 'long term construction contract' over the term of the development.<sup>137</sup>

The basic method returns income (e.g. all progress and final payments) derived in an income year less all outgoing deductions incurred in carrying on the building business in an income year.<sup>138</sup> The estimated profit basis returns the ultimate profit or loss over the duration of the contract on a reasonable basis in accordance with accepted accounting standards.

---

<sup>133</sup> Ruling IT 2450 (W) TR 2017/D8.

<sup>134</sup> *Henderson v FCT* 70 ATC 4016; (1970) 1 ATR 596; *Barratt v FCT* 92 ATC 42745; (1992) 23 ATR 339.

<sup>135</sup> Determination TD 94/39.

<sup>136</sup> Ruling IT 2450 (W) TR 2017/D8.

<sup>137</sup> Ruling IT 2450.

<sup>138</sup> This represents the simple application of the statutory provisions; *Grollo Nominees P/L v FCT* 97 ATC 4585; (1997) 36 ATR 424.

The FCT has attempted unsuccessfully to require developer/builder to use the estimated profit basis where derivation of income for Builder P/L is deferred under the building contract.<sup>139</sup>

The FCT has rewritten IT 2450 in TR 2017/D8 to reference new accounting standard AASB 15 and consolidate certain related rulings.<sup>140</sup> TR 2017/D8 confirms that the completed contracts method remains unacceptable for income tax purposes.

## 3.4 Partitions

### Introduction

Co-owners of land or parcels of land often wish to exchange ownership interests to become sole owners of specific land or specific parcels of land.

This process of partitioning land may have adverse income tax, CGT, GST and Victorian stamp duty consequences if done incorrectly.

The administrative approach adopted by the FCT or the CSR for partitions and bare trusts also varies significantly.

### Partitioning Land

A partition of land occurs when W and B as co-owners of both 'white acre' and 'black acre' exchange their interests so that W solely owns white acre and B solely owns black acre or when W and B as co-owners of one parcel of land divided the land into separate lots and exchange their interests so that W solely owns lot 1 and B solely owns lot 2.<sup>141</sup>

A partition requires some of the co-owners to exchange interests and does not apply where co-owners transfer their interest to one or more of the co-owners without taking any exchange of land.<sup>142</sup>

Where land is subdivided and some lots are sold, a partition may occur in respect of the balance of the subdivided land.<sup>143</sup>

Where the value of the subdivided land exchanged is different, 'owelty' (equalisation money) may be paid.<sup>144</sup>

### Bare Trust

A similar result to a partition may arise when W and B as co-owners acquired one parcel of land on the basis that W is absolutely entitled to lot 1 and B absolutely entitled to lot 2 upon subdivision of the land.

A bare trust arises where the trustee holds property as a cypher for the beneficiaries without any interest in the property other than that existing by being a trustee and having legal title and without any duty or further active duty to perform except to convey it to the beneficiaries.<sup>145</sup>

---

<sup>139</sup> *Grollo Nominees P/L v FCT* 97 ATC 4585; (1997) 36 ATR 424.

<sup>140</sup> TD 92/131(W), TD 92/186(W), TD 94/39(W), TD 94/65(W) and TD 94/87(W).

<sup>141</sup> *CSR (Vic) v Christian* [1991] 2 VR 129 at 138 & 143.

<sup>142</sup> *CSR (NSW) v Webeck* [2015] NSWCATAP 279 at [47].

<sup>143</sup> *Maybelina Investments P/L v CSR (Vic)* [2004] VCAT 549 at [14].

<sup>144</sup> *Croghan v. Grosvenor* [1991] SASC 3066 at [9].

<sup>145</sup> *Herdegen v FCT* (1988) 20 ATR 24 at 32 - 33; *Corumo Holdings P/L v C Itoh Ltd* (1991) 24 NSWLR 370 at 398.

Care is required in preparing the documentation where the land will be held pursuant to a bare trust for development purposes as this may alter the co-owner's rights so that there is no bare trust.<sup>146</sup>

Separate bare trust deed and bare trust directions are commonly prepared to ensure the trustee has no active duties under the bare trust deed.

### Income Tax

The transfer of land may be taxable as a disposal of a CGT asset, trading stock or a profit-making scheme asset with different income taxation consequences.

There are no CGT, trading stock or profit making scheme consequences upon the subdivision of land into transferable interest.<sup>147</sup>

However, upon exchange of the interests for sole ownership of specific land, each co-owner disposes of their interests in the balance land with CGT, trading stock or profit-making scheme consequences.<sup>148</sup>

TD 92/148 provides the following example:

Example: A and B were joint owners of a one hectare block of land acquired in 1986. In 1992, they subdivide the land. A took a one-half hectare block (block 1) and B took the other one-half hectare block (block 2). A acquired a 50% interest in land constituted by block 1 in 1986 and acquired the remaining 50% interest from B in 1992. Similarly, B acquired a 50% interest in the land constituted by block 2 in 1986 and acquired the remaining 50% interest from A in 1992. A and B have each disposed of their 50% interest in that land constituted by blocks 2 and 1 respectively, in 1992.

The result is different when the land was acquired under a bare trust where each co-owner's interest in the land is referable to an 'absolute entitlement' to specific land upon subdivision.

A bare trust is legislatively or administratively transparent so the beneficiary and not the bare trustee is subject to the tax consequences.

If a beneficiary is absolutely entitled to a CGT asset as against a trustee (disregarding any legal disability), the CGT consequences apply to the beneficiary and not the trustee.<sup>149</sup>

The FCT considers that this CGT absolute entitlement provision does not apply where more than one taxpayer is beneficially entitled to the interest in the CGT asset.<sup>150</sup> Accordingly, a bare trust partition might only be effective if each co-owner takes sole ownership of specific subdivided land.

Where co-owners transfer land to a trustee to expressly subdivide and retransfer specific lots back to each co-owner, the land does not become trading stock.<sup>151</sup>

Income of a bare trust is assessable to the beneficiaries and not the bare trustee.<sup>152</sup>

---

<sup>146</sup> *White Rock Properties P/L v CSR (Vic)* [2015] VSCA 77 at [64].

<sup>147</sup> CGT Determination 7; *Barina Corporation Ltd v FCT* (1985) 4 NSWLR 96; *FCT v Whitfords Beach P/L* [1982] HCA 8.

<sup>148</sup> *Johnson v FCT* [2007] AATA 1322 at [16]; TD 45; TD 92/148; sec. 70-100 ITAA 1997; GSTR 2009/2 at [79] - [85].

<sup>149</sup> sec. 106-50 ITAA 1997.

<sup>150</sup> TR 2004/D25.

<sup>151</sup> *Starco P/L v FCT* [2002] AATA 6.

<sup>152</sup> *Colonial First State Investments Ltd v FCT* [2011] FCA 16; cf *PSLA 2000/2*.

A bare trustee is generally exempted from lodging taxation returns, because it is a transparent trust.<sup>153</sup>

The proposed taxation of trust reforms may modify this approach.<sup>154</sup>

## GST

There are no GST consequences upon the subdivision of land into transferable interest.<sup>155</sup>

However, upon exchange of the interests for sole ownership of specific land, each co-owner disposes of their interests in the balance land with GST consequences, if GST registered or required to be GST registered.

GSTR 2009/2 provides the following example:

*Example 6 - Supply in the course or furtherance of an enterprise carried on by one co-owner and not the other co-owner*

79. *Two friends, Caroline and Shaun, purchase a block of land as tenants in common in equal shares with the intention to subdivide the land, to construct two houses and to take a house each.*
80. *Caroline's intention in entering into the arrangement is to use the house she acquired as her primary residence. Caroline is not carrying on an enterprise in these circumstances. In Caroline's case, the purpose of the arrangement is private and domestic in nature.*
81. *Shaun's intention in entering into the arrangement is to sell the house he acquires for a profit. Shaun is carrying on an enterprise in these circumstances because the activities are business activities or activities in the conduct of a profit making undertaking or scheme and therefore an adventure or concern in the nature of trade.*
82. *Shaun and Caroline agree that Shaun will take Lot 1 which includes House 1 and Caroline will take Lot 2 which includes House 2.*
83. *Caroline and Shaun give effect to the partition, after the completion of construction, by Shaun transferring his interest in Lot 2 to Caroline and by Caroline transferring her interest in Lot 1 to Shaun.*
84. *The transfer by Caroline of her interest in Lot 1 to Shaun is not in the course or furtherance of an enterprise she carries on. Caroline's transfer of her interest in Lot 1 to Shaun does not have any connection with an enterprise that she carries on.*
85. *In contrast, the transfer by Shaun of his interest in Lot 2 to Caroline is in the course of furtherance of an enterprise he carries on. Shaun's transfer of his interest in Lot 2 to Caroline is connected with his enterprise of selling new residential premises for profit.*

The result is different where the land was acquired under a bare trust and each co-owner's interest in the land is referable to an 'absolute entitlement' to specific lots upon subdivision.

A bare trustee does not conduct a GST enterprise. The beneficiaries carry on the GST enterprise using the property held on bare trust. The beneficiaries make the supplies and are entitled to input tax credits.<sup>156</sup> Any supply or acquisition or election to apply the margin scheme or going concern exemption by the bare trustee is made on behalf of the beneficiaries.<sup>157</sup>

---

<sup>153</sup> PSLA 2000/2.

<sup>154</sup> Treasury, *Taxing trust income - options for reform*, October 2012 at Ch. 5 regarding the taxation of bare trusts.

<sup>155</sup> GSTR 2009/2 at [50].

<sup>156</sup> GSTR 2008/3 at [45].

<sup>157</sup> GSTR 2008/3 at [81] & [83].

Transactions between the bare trustee and the beneficiaries are ignored.<sup>158</sup> The transaction between beneficiaries may be a supply if the beneficiary is GST registered or required to be GST registered.<sup>159</sup>

Where each co-owner's interest in land is referable to a specific lot upon subdivision, each co-owner will be considered to be the owner of the whole of the specific lot allocated to the co-owner upon subdivision, so there are no supplies upon exchange of interests in the other lots to become sole owner.

### Victorian Stamp Duty

In Victoria, a partition levies duty only on the relative transfer of value between co-owners.<sup>160</sup>

*Ruling DA.017* provides the following example:

#### Example

X and Y own land in Victoria valued at \$100,000 with a respective 30% and 70% interests in the land. The land is partitioned under an agreement such that after the partition, each has an interest of \$50,000 in the land.

No duty would be charged on the transfer of Y's interest in the land because the value of Y's interest in the land prior to the partition (ie \$70,000) exceeds the value after the partition (ie \$50,000). Duty would be charged on the transfer of X's interest in the land because the value after the partition (ie \$50,000) is greater than that before the partition (ie \$30,000). Duty would therefore be charged on the transfer of the interest in land to X and calculated on a value of \$20,000.

The result is different where the land was acquired under a bare trust and each co-owner's interest in the land is referable to a 'beneficial ownership' to specific lots upon subdivision.

Under a bare trust, where each co-owners land is referable to a specific lot upon subdivision, each co-owner will be considered to be the owner of the whole of the specific lot allocated to the co-owner upon subdivision, so there are no supplies upon exchange of interests in the other lots to become sole owner.

If documented correctly, the transfer of the interests in land into sole ownership pursuant to the bare trust where each co-owner's interest in referable to specific lots upon subdivision would be exempt.<sup>161</sup>

The partitioning or distribution of interests pursuant to a bare trust may operate differently in other jurisdictions.

## 3.5 CGT on Land Held as Trading Stock (CGT Event K4)

### Introduction

The FCT is currently auditing the opening value of a capital asset for trading stock purposes when it commences to be held as trading stock.

---

<sup>158</sup> GSTR 2008/3 at [64].

<sup>159</sup> GSTR 2008/3 at [72].

<sup>160</sup> sec. 27 DAV 2000.

<sup>161</sup> sec. 34 DAV 2000 property vested in an apparent purchaser or sec. 35 DAV 2000 transfer to and from a trustee or nominee: *White Rock Properties P/L v CSR (Vic)* [2015] VSCA 77 at [103] - [104].

The trading stock regime<sup>162</sup> provides an exclusive regime for the taxation of land that constitutes trading stock.<sup>163</sup> Where there is a delay between the landowner acquiring the land for CGT purposes and the land commencing to be held as trading stock, part of the disposal may be on capital account<sup>164</sup> and some on trading stock account.<sup>165</sup>

Developers are often acquiring property on delayed settlement terms which may result in part of the proceeds on acquisition being a discounted capital gain.

### Delayed Settlement

When a taxpayer starts holding an item which the taxpayer already owns as trading stock but was not held as trading stock, the taxpayer is:

- (a) deemed to have sold the asset for its market value for capital gains tax purposes;<sup>166</sup> and
- (b) deemed to have sold the item at either cost or market value (at the taxpayer's election) just before it became trading stock.<sup>167</sup> Market value as at the time the Property starts to be held as trading stock is determined by the usual valuation methodologies.<sup>168</sup>

For capital gains tax purposes, land is acquired at the date of signing the standard land acquisition contract<sup>169</sup> or at the earlier of settlement or taking possession under a terms land acquisition contract.<sup>170</sup>

For trading stock purposes, land cannot become trading stock until it is 'held' for the purpose of resale,<sup>171</sup> the taxpayer has dispositive power over the trading stock or power to direct or control the disposal of the trading stock<sup>172</sup> and a business activity which involves dealing in land has commenced.<sup>173</sup> A taxpayer that does not have property in the stock will not be able to dispose of it.<sup>174</sup>

Accordingly, where there is a delay in settlement and the purchaser does not have a right to possession of the land, the land will not become trading stock until settlement.

Any increase in value between the contract date and settlement is subject to capital gains tax<sup>175</sup> rather than as trading stock.<sup>176</sup>

Where settlement is delayed by more than 12 months, the capital gain may be subject to the CGT general discount.

## 3.6 Stamp Duty & Custodian Arrangements

### Introduction

It is relatively common for a development land to be held by a custodian or nominee on behalf of/beneficially for co-owners to simplify administration of activities.

---

<sup>162</sup> Div. 70 ITAA 1997.

<sup>163</sup> Sec 118-25 ITAA 1997: capital gains tax; R. Parsons, *Income Taxation in Australia*, Law Book Company Ltd, 1985, para 12.3: profit making scheme.

<sup>164</sup> Sec. 104-220 (CGT event K4) ITAA 1997.

<sup>165</sup> Sec. 70-30 ITAA 1997.

<sup>166</sup> Sec. 104-220 (CGT event K4) ITAA 1997.

<sup>167</sup> Sec. 70-30 ITAA 1997.

<sup>168</sup> Determination TD 97/1.

<sup>169</sup> Sec. 104-10 (CGT event A1) ITAA 1997; *Aurora Developments P/L v FCT* [2011] FCA 232 at [255]; Ruling GSTR 2000/28 at [13] & [25].

<sup>170</sup> Sec. 104-15 (CGT event B1) ITAA 1997; *Central Equity Ltd v FCT* [2011] FCA 908 at [59], [67] & [68]; GSTR 2000/28 at [6].

<sup>171</sup> Determination TD 92/124 at [1].

<sup>172</sup> Ruling IT 2670 at [4] - [5].

<sup>173</sup> Determination TD 92/124 at [1].

<sup>174</sup> Ruling IT 2670 at [12].

<sup>175</sup> Sec. 104-220 (CGT event K4) ITAA 1997.

<sup>176</sup> Sec. 70-30 ITAA 1997.



There is currently uncertainty regarding the stamp duty treatment of custodian or nominee transactions.

Duty is levied at ad valorem rates<sup>177</sup> on the dutiable value<sup>178</sup> (e.g. greater of consideration<sup>179</sup> given for or unencumbered value<sup>180</sup>) of dutiable property<sup>181</sup> (e.g. land) the subject of a dutiable transaction<sup>182</sup> (e.g. transfer or change in beneficial ownership), unless exempt.

The CSR considers the provisions apply differently depending on whether the bare trustee acquires the dutiable property from the beneficial owner under the bare trust or directly from a third party.

The CSR considers that where a bare trustee acquires dutiable property from the beneficial owner under the bare trust, the transfer to the bare trustee and the declaration of bare trust by the bare trustee is exempt under the transfer to trustee or nominee exemption.<sup>183</sup>

The CSR considers that<sup>184</sup> where a bare trustee acquires dutiable property directly from a third party, duty is levied on the bare trustee on the acquisition<sup>185</sup> and then separately on the declaration of bare trust<sup>186</sup> unless the declaration is exempt under the apparent purchaser exemption<sup>187</sup> or under the contemporaneous acquisition and declaration of bare trust double duty exemption.<sup>188</sup>

### Bare Trust

The CSR has disputed whether a custodian arrangement is a bare trust for the purposes of various duty exemptions.<sup>189</sup>

A bare trust arises where the trustee holds property as a cypher for the beneficiaries without any interest in the property other than that existing by being a trustee and having legal title and without any duty or further active duty to perform except to convey it to the beneficiaries.<sup>190</sup> An active duty means duties bare or naked of the duties decreed by the settlor.<sup>191</sup> The bare trustee, however, retains its duties including of ownership, reasonable care and proper administration.

Complex activities such as conducting a business might not be susceptible to a bare trust relationship,<sup>192</sup> so a bare trust relationship may not exist other than in respect of the passive holding of assets.

An express bare trust arises by sufficient declaration of intent to create an immediate trust over property<sup>193</sup> and must be in writing for land.<sup>194</sup> An implied or resulting bare trust arises where a person purchases property with the proceeds of another without

---

<sup>177</sup> Variable rate up to 5.5%.

<sup>178</sup> Sec. 20(1) DAV 2000.

<sup>179</sup> The amount paid and value of property given on an arm's length dutiable transaction.

<sup>180</sup> The market value of dutiable property on a non-arm's length dutiable transaction (e.g. transfer between relatives or associated entities).

<sup>181</sup> Sec. 10 DAV 2000.

<sup>182</sup> Sec. 7 DAV 2000.

<sup>183</sup> Sec. 35 DAV 2000 transfer to trustee or custodian exemption.

<sup>184</sup> <http://www.sro.vic.gov.au/limited-recourse-borrowing-arrangements-custodian-trusts-and-holding-trusts>

<sup>185</sup> Sec. 7(1)(a) DAV 2000.

<sup>186</sup> Sec. 7(1)(b) DAV 2000

<sup>187</sup> Sec. 34 DAV 2000 apparent purchaser exemption.

<sup>188</sup> Sec. 17(3) DAV 2000.

<sup>189</sup> Ruling DA.024; *White Rock Properties P/L v CSR (Vic)* [2015] VSCA 77 at [103] - [104]; *Arrigo v CSR (Vic)* [2016] VCAT 1111; *Pascu v CSR (Vic)* [2016] VCAT 668.

<sup>190</sup> *Herdegen v FCT* [1988] FCA 419 at [37] – [38]; *Corumo Holdings P/L v C Itoh Ltd* (1991) 24 NSWLR 370 at 398; *Thorpe v Bristle Ltd* (1996) 16 WAR 500 at 505.

<sup>191</sup> *Herdegen v FCT* [1988] FCA 419 at [37] – [38].

<sup>192</sup> *Old Papa's Franchise System P/L v Camisa Nominees P/L* [2003] WASCA 11 at [57] – [59]

<sup>193</sup> *Kauter v Hilton* (1953) 90 CLR 86 at 97; *Associated Alloys P/L v ACN 001 452 106 P/L* (2000) 202 CLR 588 at 604.

<sup>194</sup> Sec. 53 PLAV 1958.

presumption of advancement,<sup>195</sup> an express trust declared does not exhaust the whole beneficial interest<sup>196</sup> or an absolute gift fails to transfer beneficial ownership.<sup>197</sup>

The bare trustee must acknowledge the bare trust relationship to ensure there is no presumption of advancement.<sup>198</sup> However, the acknowledgement should not grant the bare trustee any active duties because a trustee with active duties (e.g. a power of sale) is not a bare trust.<sup>199</sup>

A subsequent joint venture or partnership agreement may confer on the trustee such an extensive array of discretionary powers to deal with the land so as to alter the terms of the bare trust and create a new trust.<sup>200</sup>

### Nominee Transfer Exemption

The CSR has raised issues of whether the transfer to and from a trustee or nominee exemption applies on retransfer to the beneficial owners to be held for investment where the custodian acquires the land directly from the vendor rather than from the beneficial owners.

No duty is chargeable under the transfer to a trustee or nominee exemption in respect of a transfer of dutiable property by the transferor to a trustee or nominee or declaration of trust by the trustee or nominee for the transferor and held solely as trustee or nominee of the transferor without any change in beneficial ownership of the property.<sup>201</sup>

The nominee must hold the property on bare trust for the beneficial owner.<sup>202</sup> The transfer to a trustee or nominee exemption only applies where the property is held solely as trustee of the transferor.<sup>203</sup>

It is unclear whether the exemption applies to a transfer directly to the trustee or nominee by a third party under a tripartite agreement where the acquirer has beneficial ownership in respect of the dutiable property.<sup>204</sup>

If the exemption does not apply, the CSR may exempt the transfer from duty under another exemption.

### Apparent Purchaser Exemption

The CSR has raised issues of whether the apparent purchaser exemption applies because the beneficial owners did not provide all the consideration for the acquisition (including the deposit and payments under any mortgage).

No duty is chargeable under the apparent purchaser exemption in respect of a declaration of trust by the apparent purchaser in respect of identifiable dutiable property vested in the apparent purchaser upon trust for the real purchaser who provided or will provide the money for the purchase of the dutiable property whether or not there has been a change in the legal description of the property (e.g. by subdivision).<sup>205</sup>

---

<sup>195</sup> *Calverley v Green* (1984) 155 CLR 242 at 246-247.

<sup>196</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708, 718 & 738.

<sup>197</sup> *Vandervell v IRC* [1967] 2 AC 291.

<sup>198</sup> sec. 19A(3) PLAV 1958; *House v Caffyn* [1922] VLR 67.

<sup>199</sup> Ruling DA .024 (Withdrawn); *Yellowco Five P/L v CSR (Vic)* [1993] 2 VR 529 and *CSR (Vic) v Victoria Gardens P/L* [2000] VSCA 233; *White Rock Properties P/L v CSR (Vic)* [2015] VSCA 77 at [92].

<sup>200</sup> *White Rock Properties P/L v CSR (Vic)* [2015] VSCA 77 at [56] & [64].

<sup>201</sup> Sec. 35(1)(a) & (b) DAV 2000 transfer to trustee or custodian exemption.

<sup>202</sup> Ruling DA .024 (Withdrawn); *Yellowco Five P/L v CSR (Vic)* [1993] 2 VR 529 and *CSR (Vic) v Victoria Gardens P/L* [2000] VSCA 233; *White Rock Properties P/L v CSR (Vic)* [2015] VSCA 77 at [92].

<sup>203</sup> *White Rock Properties P/L v CSR (Vic)* [2015] VSCA 77 at [99] & [107].

<sup>204</sup> *Trust Company of Australia Ltd v CSR (Qld)* [2003] HCA 23; *Sportscorp v CSR (NSW)* [2004] NSWSC 1029.

<sup>205</sup> Sec. 34 DAV 2000 transfer to an apparent purchaser exemption.

The apparent purchaser must hold the property on bare trust for the real purchaser.<sup>206</sup>

The real purchaser must provide the entire purchase price (including the deposit) and must obtain the loan and make all loan repayments<sup>207</sup> or the exemption does not apply.

The purchase price of land is the amount of money or money's worth that is paid to the vendor of the land in exchange for the acquisition of the legal and equitable ownership of the land.<sup>208</sup>

Where part of the purchase price is raised and paid by bank loan secured by a mortgage over the property, the contribution is made by the persons liable for repayment of the loan.<sup>209</sup>

The identity of the property must remain the same.<sup>210</sup> Accordingly, if during the development process a body corporate begins to hold common property, the identity of the land has changed.<sup>211</sup>

The provisions do not allow a part exemption to the extent the real purchaser paid the purchase price.<sup>212</sup>

### 3.7 GST purchaser withholding rules

From 1 July 2018, the proposed GST purchaser withholding rules require a purchaser (and not the vendor) of new residential premises or potential residential land included in a property subdivision plan and not previously sold to remit GST on the purchase price.<sup>213</sup> The provision only applies to new residential premises or potential residential land as defined for GST purposes so will not apply to hotels, serviced apartments and student accommodation.

However, student accommodation 'in connection with an education institution not a school' (i.e. a university) is excluded from the definition of 'commercial accommodation' so might be subject to GST purchaser withholding rules in limited circumstances.

'Residential premises' to be used predominately for residential accommodation (regardless of the term of occupation) are input taxed but not to the extent they are 'commercial residential premises' or 'new residential premises'.<sup>214</sup>

'Commercial residential premises' does not include 'premises to the extent used to provide accommodation to students in connection with an education institution that is not a school' because the student accommodation is an input taxed supply of residential premises.<sup>215</sup>

The indicia of whether student accommodation is 'in connection' with an education institution that is not a school are:<sup>216</sup>

- Whether the education institution has any input in the running of the accommodation facility including the setting of rental charges and determining the relationship between the supplier of the accommodation and the occupier. The input may be made through a third party.

---

<sup>206</sup> *Apostolou v CSR (Vic)* [2008] VCAT 310.

<sup>207</sup> *Berkers v CSR (Vic)* [2004] VCAT 2022; *Shergold v CSR (Vic)* [2006] VCAT 694.

<sup>208</sup> *Calverley v Green* (1984) CLR 242 at 257-258.

<sup>209</sup> *Calverley v Green* (1984) CLR 242; *Horesh v CSR (Vic)* 91 ATC 2016; *Alter v CSR (Vic)* 91 ATC 2019; *Williams v CSR (Vic)* [2004] VCAT 1367.

<sup>210</sup> *Triantafyllis v CSR (NSW)* [1998] NSWSC 112.

<sup>211</sup> *Sportscorp v CSR (NSW)* [2004] NSWSC 1029 at [44].

<sup>212</sup> *CSR (Vic) v Pattison* (2001) 47 ATR 71.

<sup>213</sup> sec. 14-250 TAA 1953 Exposure Draft Treasury Laws Amendment (2017 Measures No. 9) Bill 2017 (Cth).

<sup>214</sup> Sec. 40-65 GSTA 1999.

<sup>215</sup> Sec. 40-35 GSTA 1999; GSTR 2001/1 at [152].

<sup>216</sup> GSTR 2001/1 at [150].

## **RIGBY COOKE LAWYERS**

- Whether there is any specific or implied requirement that preference must be given to students of the education institution.
- Whether the housing facility is constructed on land owned by the education institution.
- Whether the land has been acquired or utilised by the education institution for the purpose of entering into agreements for the construction and running of the housing facility.
- Whether the facility is in fact to be occupied by students of the education institution during the academic year or at other times.
- Whether the education institution has any interest in the entity that is providing the accommodation. The interest may not always be directly reflected.
- How the housing facility is marketed.
- The identity of the operator and the nature of their business (is their business the supply of accommodation to students).
- The intention of the education institution in entering into any arrangements and any relevant agreements relating to the housing facility.
- Whether the provision of the facility reflects an education institution's charter or other governing instruments.

Accordingly, GST purchaser withholding might apply to the sale of student accommodation to investors where there is a central management arrangement dedicated to the students of an education institution. A similar sale of student accommodation without the connection to the education institution would not be subject to GST purchaser withholding.

**20 November 2017**

Copyright: ©2018 Rigby Cooke Lawyers

Liability limited by a scheme approved under Professional Standards Legislation.

This publication contains comments of a general nature only and is provided as an information service. It is not intended to be relied upon as, nor is it a substitute for specific professional advice. No responsibility can be accepted by Rigby Cooke Lawyers or the authors for loss occasioned to any person doing anything as a result of any material in this publication.