WE NEED TO KEEP A REAL ESTATE PURCHASE IN AUSTRALIA CONFIDENTIAL. CAN THIS BE DONE?

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Australia Real Estate Alert

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Ours is an age of identity fraud, data breaches, public registers, and political and media interest in the ownership of Australian real estate.

Take a moment to consider the real estate-related data that can be readily accessed through a land titles office and online property platforms or even purchased for a relatively modest sum.

While steps are being taken to put in place a framework for the creation of a register of the beneficial ownership of ASX-listed entities, Australia does not have a general register of information as to the beneficial ownership of land.

Unsurprisingly, there are many legitimate reasons why a buyer or seller of real estate in Australia may want to either keep a transaction, their identity or the key commercial terms private and confidential or to manage when this information becomes known.

These reasons could include the following:

- A risk that the identity of the buyer may inflate the seller's price expectations.
- A risk that the identity of the buyer may produce an adverse reaction from neighbours.
- A plan to acquire multiple parcels of land, in the same location, from different entities where confidentiality is an imperative.
- A desire to avoid a person's financial capacity being subject to media scrutiny.
- A desire to not be included in the various Australian and global lists of wealthy individuals and families for reasons of privacy or personal security.
- A past history between the buyer and the seller that could make the transaction more difficult to complete.

There is no silver bullet or simple solution that will guarantee anonymity, but there are steps that can be taken to minimise the information that makes its way into the public domain. The suggestions below will not guarantee anonymity, but if a level of confidentiality or anonymity is required, then the below list will give you the best chance of achieving that objective.

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MAKE YOUR EXPECTATIONS CLEAR

It cannot be assumed that all parties to a transaction and advisors have the same objectives or priorities in relation to confidentiality. Communicate and emphasise your requirements. Be specific and provide examples of what can and cannot be done.

USE CONFIDENTIALITY AGREEMENTS

Confidentiality agreements at any early stage of discussions are an effective step to both securing confidentiality and setting expectations for the parties involved. To protect against unwanted disclosure, parties should clearly define the information or categories of information to be protected and the scope of each party's nondisclosure obligations. Confidentiality obligations should be included in a terms sheet/heads of agreement (and expressed to be binding), even if the balance of the document is expressed to be nonbinding.

Edge Development Group Pty Ltd v Jack Road Investments Pty Ltd (as trustee for Jack Road Investments Unit Trust) [2019] VSCA 91 considered whether a signed letter constituted a binding contract for the sale of land. One of the relevant issues in this case was whether the confidentiality obligations outlined in a confidentiality deed poll were effective in requiring the parties to keep confidential information—specifically, the terms of the proposed land sale—until either a written agreement terminated the deed or the confidential information became generally available to the public. Ultimately, the court determined that the confidentiality obligations were part of ongoing negotiations, noting that the purpose of the confidentiality deed poll was to prevent a third-party bidder from learning the commercial terms of the transaction, particularly the price.

ENGAGE A REAL ESTATE AGENT TO ACT FOR THE BUYER

The use of a buyer's agent partly removes the buyer from the transaction. It becomes unnecessary for the buyer to engage directly with the seller or the selling agent.

APPOINT AN AGENT TO ENTER INTO THE CONTRACT

A person (the agent) can enter into an agreement to acquire real estate on behalf of another person (the principal). For example, the buyer could be “Mr Smith as agent.”

It is not essential that the agent discloses to the seller that the agent is acting on behalf of an undisclosed principal. However, caution is necessary to ensure that such arrangements do not contravene any warranties or representations made in the contract.

There should be a separate written agreement between the principal and their agent in relation to the appointment to act as agent and the scope of the rights and obligations of the principal and the agent. This document is also needed to make clear to the revenue and taxing authorities the capacity in which the agent (named buyer) was acting.

When adopting an agent/principal structure, the identity of the principal becomes known when the transfer of land form is created, because the principal is named on the transfer form. This means the seller will come to know the identity of the actual buyer before completion.

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Duty advice must be taken when using an agency structure to ensure a “double duty” liability is not accidentally triggered.

THE USE OF A BARE TRUSTEE

A bare trust is an arrangement where one person (the trustee) holds assets, such as real estate, on behalf of another person (the beneficiary). The trustee has no interest in the real estate and must follow the directions of the beneficiary in relation to the assets of the trust and must transfer the real estate to the beneficiary when requested to do so or sell the real estate to a third party if directed by the beneficiary to do so. Because the trustee has no beneficial interest in the real estate, there is usually no duty on the transfer of the real estate from the trustee to the beneficiary.

As explained by the High Court of Australia in *CGU Insurance Limited v One.Tel Limited (in liq)* [2010] HCA 26 at [36], the trustee of a bare trust has no active duties to perform other than those which exist by virtue of the office of the trustee, with the result that the property awaits transfer to the beneficiaries or awaits some other disposition at their discretion.[1]

A bare trust can be a useful mechanism for ensuring privacy and maintaining the anonymity of the beneficiary. If real estate is purchased by a trustee of a bare trust, the identity of the beneficiary is not disclosed and does not become public. The bare trustee contracts to buy the real estate and takes title to the real estate at settlement/completion.

A bare trust structure is one arrangement by which a professional trustee, lawyer, accountant, real estate agent or other advisor may acquire real estate and hold that real estate (usually on a temporary basis) on behalf of another person.

USE OF AN AFSL OR CUSTODIAN

An Australian Financial Services Licensee (AFSL) or a custodian structure may also provide useful mechanisms in maintaining the confidentiality of a real estate buyer's identity. An AFSL is a license granted by the Australian Securities and Investments Commission that is necessary for any business dealing in financial products, including managed investment schemes. An AFSL holder may operate a managed investment scheme, which can involve holding property and making investment decisions on behalf of investors.

A custodian structure, on the other hand, involves appointing a custodian to hold legal title to a property on behalf of a managed investment scheme or other entity. The custodian's primary role is to safeguard and administer the property, ensuring it is held separately from the custodian's own assets and appropriately accounted for. This structure can be particularly useful for preserving the confidentiality of the real estate buyer's identity, as the custodian holds the legal title while the beneficial ownership remains with the investors or the managed investment scheme.[2]

THE NAME, OWNERSHIP OR STRUCTURE OF THE BUYER

Simple matters such as the name of the buyer, the shareholder(s) and the directors can readily enable the buyer to be identified.

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It can assist with the maintenance of confidentiality to use professional advisors as directors of an entity (either permanently or for a discrete period of time).

OFF-MARKET TRANSACTIONS

On-market transactions are often associated with a significant sales and marketing campaign. These campaigns generate interest in both the real estate itself and the identity of the buyer. In contrast, off-market transactions are conducted with greater discretion and do not result in the creation of the same volumes of information, data and market interest as on market campaigns.

INCLUDE A CONFIDENTIALITY OBLIGATION IN THE TRANSACTION DOCUMENTS

A confidentiality obligation in real estate transaction documents generally requires that certain information shared between the parties remain confidential and is not disclosed to third parties. Some of the pertinent questions which need to be addressed include the following:

- Does the transaction document include an obligation to maintain confidentiality?
- What is the extent of the confidentiality obligation?
- Are the parties required to ensure that their respective advisors also maintain confidentiality?
- Are media announcements permitted?
- Does the wording of any media announcement need to be mutually agreed upon?
- Can the selling agent retain details of the transaction to use in valuation reports and comparable transactions analysis?

It is not uncommon for high-value real estate transactions to be recorded using the “industry standard terms and conditions.” For example, in Western Australia the general conditions for the sale of land contain no obligations in relation to privacy, confidentiality or media statements.

It is important to check that the transaction document expressly address confidentiality.

BACK-TO-BACK TRANSACTIONS AND INADVERTENT DISCLOSURES

A back-to-back transaction arises where there are two sale and purchase contracts concerning the same property in place at about the same time, as follows:

- One contract between the seller and Buyer 1 at a purchase price of AU$X.
- A second contract between Buyer 1 (as seller) and Buyer 2 at a purchase price greater than AU$X.

Usually, the following is true:

- The seller is unaware of the second contract.

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- Buyer 1 will be anxious to ensure that the seller does not become aware of the second contract.
- If the seller becomes aware of the second contract, the seller may refuse to complete the first contract or renegotiate the price.

Care must be taken to ensure that the following occurs:

- There is strict compliance with laws, including those in relation to misleading and deceptive conduct.
- There is strict compliance with duties to government agencies.
- Parties are properly briefed as to the transaction and the necessity of confidentiality.
- Ordinary actions as part of the settlement process do not inadvertently breach confidentiality (subject to the first two bullet points above).
- Due diligence by Buyer 2 may need to be limited and is undertaken in a discrete manner (subject to the first two bullet points above).

TIMING FOR LODGEMENT OF THE TRANSFER OF LAND FORM AT THE LAND TITLES OFFICE

There is no general legal requirement to lodge the transfer of land form at the relevant land tiles office immediately following settlement/completion. Of course, there is usually a contractual obligation to do so.

There are a number of sound legal reasons why a buyer should proceed to quickly lodge the transfer of land form at the relevant land tiles office.

But a buyer and seller can do the following:

- Agree that the buyer has a longer period of time after settlement/completion within which to lodge the transfer of land form at the relevant land tiles office.
- Take steps to protect the buyer's position, given the purchase price has been paid, until the transfer of land form is lodged.

Until the transfer is registered, the change of ownership will not become public and the seller will still appear to be the owner of the property.

NAME REDACTION AT THE LAND TITLES OFFICE

All Australia states operate a searchable public register of information in relation to real estate transactions and land ownership.

For example, in Western Australia the Transfer of Land Act 1893 does not provide for the redaction of parts of registered instruments for commercial or other considerations. However, Landgate (the Western Australian land registry) does offer name suppression in limited circumstances. Name suppression is generally available only to people who can prove they are at risk of harm should their details be easily discoverable. Such individuals may include high-profile figures or high net-worth individuals who face security threats.

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In New South Wales (NSW), the Real Property Act 1900 similarly does not allow for the automatic suppression of names from the land title register for privacy or commercial reasons. However, name suppression may be granted in specific circumstances, and NSW Land Registry Services may suppress personal information from its public registers in response to a direction from the Office of the Registrar General. Such circumstances would be limited to situations where an individual faces significant risk to personal well-being or safety.

UNDERSTAND THE PERSONALITY OF YOUR COUNTERPARTY

An agreement in relation to confidentiality is of limited value if the counterparty is unlikely to adhere to it. Knowledge of the counterparty can be a powerful tool to preserve your confidentiality.

If you buy from an unsuitable seller or sell to an unsuitable buyer, agreements as to confidentiality and privacy obligations may be of limited value. Due diligence of the counterparty is a vital aspect of all land transactions.

HOW ARE DISPUTES TO BE RESOLVED?

Australian court processes are relatively public. Preserving confidentiality in the event of a dispute over a land sale and purchase agreement is more likely if the parties are required to resolve any disputes by confidential arbitration or confidential mediation followed by confidential arbitration. But for confidential arbitration to apply, a suitable clause needs to be included in the sale and purchase agreement.

For example, in *Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82, the dispute resolution clause in the deed required the parties to first attempt to resolve their dispute through confidential mediation. If mediation was abandoned, the matter would then be automatically referred to confidential arbitration. The arbitration was to take place at a location chosen to maintain confidentiality, and the decision of the arbitrator(s) was to be binding and specifically enforceable.

ANTI-AVOIDANCE

In Australia, buyers of real estate have a raft of obligations to state and federal government agencies. These obligations must be strictly complied with, and the matters identified in this article are not a way of avoiding these obligations. For example, foreign investment approvals must be obtained when required and foreign ownership disclosures must still be made.

Also, taxing and revenue authorities can share information.

The matters raised in this article are designed to assist with maintaining privacy and confidentiality to the extent possible. It is important to note however that the techniques outlined in this article may not always preserve confidentiality.

HOW CAN K&L GATES HELP YOU?

We are focused locally and connected globally.

At K&L Gates, our lawyers have a deep understanding of all aspects of real estate and land development law.

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We advise private and public corporations as well as family offices on a wide range of issues in the real estate sector.

We can assist with:

- Buying and selling assets in a variety of sectors.
- Preparing and negotiating confidentiality agreements.
- Setting up family offices.
- Direct and indirect tax advice.
- Transaction structuring.
- Due diligence.
- AFSL advice.

FOOTNOTES

[1] Heydon & Leeming, Jacobs' Law of Trusts in Australia (2006 ed) [3.15].

[2] *Trust Company of Australia Ltd v Commissioner of State Revenue* [2003] HCA 23 at [97]-[98]; *Spangaro v Corporate Investment Australia Funds Management Ltd* [2003] FCA 1025 at [1]; *Wellington Capital Ltd v Australian Securities and Investments Commission* [2014] HCA 43 at [14].

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