TAX & DUTY CONSIDERATIONS OF LAND PARTITIONS

A paper presented by Michael Bennett for the Macquarie Tax Group

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[1] A paper initially prepared by the author in 2010 and updated to the date of 10 April 2015.

1 Partitioning

1.1 Partitioning

In *Comptroller of Stamps (Vic) v Christian* 90 ATC 5046, Young CJ in Eq, as his Honour then was, referred to the following description of 'partition' given in the first edition of *Halsbury's Laws of England* (Vol 21, para 1512):

> *The legal term partition[(a)] is applied to the division of lands, tenements and hereditaments belonging to co-owners[(b)] and the allotment among them of the parts[(c)] so as to put an end to community of ownership between some or all of them[(d)].*

The parenthetical letters were footnotes, of which (c) reads:

> *Thus if three persons are co-owners, tenants in fee simple of Blackacre, Whiteacre and Greenacre, the transaction by which one of them becomes sole owner tenants in fee simple of Blackacre, another of Whiteacre, and the third of Greenacre, is a partition.*

and (d) reads:

> *Thus in the example given in note (c) supra, a transaction by which Blackacre, while the other two remain co-owners of Whiteacre and Greenacre, is a good partition. This can only be by agreement of those persons between whom a community of ownership is left subsisting.*

Therefore, partitioning refers to jointly held land (whether as joint tenants or tenants in common) being transferred to one or more of the co-owners of the land. That is, it is a 'partition' of the co-owner's interests in the land, and involves the disposal by each co-owner of their interest in one of the blocks to the other co-owner, and a corresponding acquisition by each co-owner from the other co-owner of their interest in the land.

A partition over land with more than two owners can be limited to some only of those multiple co-owners (and the other co-owners receiving monetary compensation).

A partition of land can, of course, be effected voluntarily between the co-owners; but it is not limited to these situations. There are circumstances in which a court may order partition. An often used example is s 66G of the *Conveyancing Act* 1919 (NSW),[2] where, in relation to land that is co-owned, the court may, on application of one or more of the co-owners, appoint trustees to hold the land on a statutory trust for sale or, on the basis of subsection (4), on a statutory trust for partition.

Subsection 66G(4) provides that if, on an application for the appointment of trustees on statutory trust for sale, any of the co-owners satisfies the court that partition of the property will be more beneficial for the co-owners interested to the extent of upwards of a moiety in value than sale, the court may (with the consent of the encumbrances of the entirety (if any)), appoint trustees of the property on statutory trust for partition. The powers of the court under this provision extend to appointing a statutory trust for partition for part only of the property and a statutory trust for sale of the balance.

[2] There are equivalent provisions in other jurisdictions.

The cases show that, despite the significant costs of the application itself and of the trustee's effecting the sale, it is difficult to resist a s 66G application. The rationale of this approach is that the detriment to the petitioning co-owner is their being bound to the property of which they desire an exit whereas the detriment to the resisting co-owner is merely the costs involved in the transaction (it being assumed that an auction sale will bring about market value proceeds).

Although, on order of the court under s 66I of the *Conveyancing Act* 1919 (NSW) the co-owners may bid at the auction, it is a particularly expensive way to obtain the entire interest in the property. If at all possible, agreement between the co-owners before court adjudication is the commercial outcome.

1.2 As Compared to Subdivision

The partitioning of land should not be confused with the subdivision of land:

- Torrens title subdivision is the vertical subdivision of land and involves the creation of new allotments from an existing block of land. Although, on application for subdivision the New South Wales Land and Property Information Department ('**NSW LPI**') (effectively the lands Registrar) often issues a new Deposited Plan comprised of the subdivided lots.

- Strata title subdivision is the subdivision (be it horizontal, vertical or both) of a building or buildings into strata lots and common property. Each of the owners will own a lot and the body corporation will have ownership of the common property, which may include external walls, roof and driveways.

Whilst the practical steps of partitioning may involve the subdivision of the land into smaller lots before the land is capable of being transferred to one or more co-owners, the partition process is essentially the transfer of the divided parts of the land between co-owners or, as parenthetical footnotes (c) and (d) above confirm, the transfer of jointly owned parts of different lots.

As considered below, subdivision, and in particular strata title subdivision, leads to issues with respect to partitioning because of the existence of common properties.

1.3 Relevant Steps

Using the simplest example, the 4 steps that typically occur in partitioning land are:

Step	Event
1	Owners X, Y and Z acquire land as co-owners.
2	Owners X, Y and Z enter into a deed of partition, where they agree to each take a lot of the land after the development in satisfaction of their interest.
4	Owners X, Y and Z develop the land.
5	By way of partition: 1. Owner X will transfer his interest in lot 2 to Owner Y and lot 3 to Owner Z 2. Owner Y will transfer his interest in lot 1 to Owner X and lot 3 to Owner Z 3. Owner Z will transfer his interest in lot 1 to Owner X and lot 2 to Owner Y The end result is that Owners X, Y and Z will be the sole owner of lots 1, 2 and 3 respectively.

As discussed under the:

- Capital Gains Tax heading at point 2 below, the timing of the partition can affect the amount brought to tax under any subsequent CGT events; and
- Stamp Duty heading at point 4 below, the timing of the partition can affect whether or not *ad valorem* or nominal duty is paid on the transfers.

1.4 Benefits of Partitioning

The benefits of partitioning are that parties can come together to develop land into (hopefully) more valuable uses and (hopefully) profit from doing so. The partition allows the development to occur without additional stamp duty imposts (other than nominal duty) or capital gains tax imposts until the co-owner later takes steps in relation to their post-partition property

1.5 Tax & Other Issues Arising in the Paper

This paper will consider:

- in Part 2 – the income tax and capital gains tax (‘**CGT**’);
- in Part 3 – the Goods and Services Tax (‘**GST**’);
- in Part 4 – the stamp duty; and
- in Part 5 – Strata title issues,

considerations of partitioning land.

2 Income tax and CGT considerations when partitioning

The Commissioner of Taxation (the '**Commissioner**') has provided guidance on his views of the income tax and CGT tax aspects of a partition. It will be seen, however, that GST is the more significant issue in relation to partitions and therefore is considered in more detail than CGT and income tax.

2.1 Income or Capital Account

The tax consequences of a partition will differ depending on whether the taxpayer holds the relevant land on revenue account or on capital account. One of the mains differences arises because an asset held for more than 12 months will have the capital gain halved (for individuals and trusts) or discounted by one-third (for regulated superannuation funds) before it is brought to tax.[3] A more significant difference arises in the partition context because of s 106-50 of the *Income Tax Assessment Act* 1997 (Cth) (the '**1997 Act**').

The question – are an investor's activities taxed on revenue or capital account – is a difficult question to answer. Two cases[4] that were almost identical subdivisions of farmland resulted in the courts holding one was a business and the other merely the realisation of a capital asset. These, and other cases on the issue, show significant weight is put on the taxpayer's intention when purchasing the property. Being able to prove just what those intentions were is critical. It is in this context that *August v Commissioner of Taxation* [2013] FCAFC 85 is relevant and a cause of concern in this regard.

Mr August acquired various shops in the same centre from 1997 to 1999, renovated them, put tenants in them on long-term leases and sold them in 2006. Despite holding the properties for up to 9 years, and claiming he intended to hold them until his death, the Full Court found his primary intention in purchasing the properties was to resell them at a profit.

Against his arguments of long-term investing was the following. First, Mr August had sought advice on where to purchase from a friend who was in the business of property investing. Secondly, soon after the last lease was secured Mr August had consulted a real estate agent about selling, though he said it was merely out of interest in the properties' then value. Mr August had also obtained a bank valuation 6 months prior and, although he subsequently wanted a non-bank[5] valuation, the court held the later valuation was unnecessary other than for sale purposes. Thirdly, that agent took it on themself to source potential purchasers and, having obtained a good offer, persuaded Mr August to sell. The Court did not accept the good offer as the reason for the sale. Finally, Mr August's circumstances did not change at the time of selling, "So why sell?" reasoned the court.

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[3] There may also be a different tax outcome depending on the taxpayer's revenue and capital loss position.

[4] *Stevenson v Commissioner of Taxation* (1991) 29 FCR 282 and *George Casimaty v Commissioner of Taxation* (1997) 151 ALR 242

[5] Which can be significantly higher than a bank valuation.

Although Mr August's explanations might be considered reasonable, especially in the face of 7 to 9 years of stated intention, the Full Court held the purchases were made to resell at a profit. It seems any taxpayers selling assets – or partitioning land in anticipation of sale – should consider their entire circumstances as their long held intentions may not be accepted.

2.2 Ordinary Income Tax

Where the real property is held on capital account – as, despite the decision in *August v Commissioner of Taxation,* is most likely to be the case – the partitioning of the real property would not of itself have any ordinary income tax consequences. The CGT consequence will be discussed below.

There would, however, be ordinary income tax consequences if, for instance, at the time of the partitioning the land is held as trading stock of a partnership carried on by the joint co-owners of the real property. In that event section 70-100 of the 1997 Act would apply such that there would be a deemed disposal at market value of each identifiable parcel of land by the partnership and an acquisition at market value by the partner or partners who continue to own a parcel. Though the partners would have the election for closing value rather than market value (if there is an at least 25 percent continuing ownership and certain other conditions are met). This is a limited situation and most property developers or investors need not worry themselves with this provision.

2.3 CGT

If land is held on capital account the partition of that land will have CGT consequences involving disposals and acquisitions. Often clients consider that there will be no CGT consequences of a partition because the parties never receive any monetary consideration as a result of the partition and they don't end up with more or less than they had pre-partition.

For example, in *Johnson v FCT* [2007] ATAA 1322 Senior Member McCabe said at [15] and [16]:

> *Dividing the parcel in two for the purposes of a transfer to each joint owner effectively requires those owners to relinquish ownership of the CGT assets in the shares in the other parcel in return for clear title to the shares in the parcel they are acquiring. It is as if the CGT assets contained in each share have to be unpacked and redistributed so that the taxpayer ends up holding half the number of shares in his or her own right – and those shares do not contain any CGT assets belonging to the other (former) joint owner.*
>
> *This rearrangement and reallocation of the ownership of CGT assets constitutes a disposition of the CGT asset, and is therefore a CGT event [being A1]: s 104-10. Subject to the legislation, tax is levied on the capital proceeds from a CGT event less the cost base of the asset. The capital proceeds are the sum of the money received in respect of the transaction (no money changed hands in this case) and the market value of any other property received (in this case, the market value of the interest acquired in the shares): s 166-20.*

An example will illustrate. Where Tim and Tom jointly hold land, the CGT consequences for Tim where the land is partitioned are:

1. Tim will acquire from Tom the interest formerly held by Tom in the part of the land that Tim continues to hold; and
2. Tim will dispose of to Tom the interest formerly held by Tim in the land that Tom continues to hold.

Tom's position is the reverse of the above.

Thus an owner that acquires the interest in the previously jointly owned property after 19 September 1985 will make a capital gain or capital loss from the partition by way of CGT event A1 happening. Whether it is a capital gain or capital loss that is made will depend on whether the market value of the disposal exceeds the owner's cost base of the interest in the land that has been disposed of.

The owner will also acquire their new interest, being the interest disposed of by the other co-owner, for market value. This further interest will be a separate CGT asset than the initial interest held: *Taxation Determination TD 45*. This applies to each interest as the number of co-owners increases. For instance, (being Example 3 taken from *GST Ruling GSTR 2009/2* discussed below) where Angie, Joanne and Nicole acquire interests in Purpleacre after 19 September 1985, after partition Angie would hold three separate CGT assets: her initial interest in Purpleacre, her interest acquired from Joanne and her interest acquired from Nicole.

That the various interests are separate CGT assets has relevance in a number of situations, including:

1. the application of the CGT small business concessions (in Division 152 of the 1997 Act) will be determined separately in relation to each CGT asset. For example, one separate CGT asset may, but another CGT asset may not, meet the active asset test despite their both being part of the property;

2. if the owner is an individual, trust or a regulated superannuation fund, the timing of the 12 months for the general discount in Division 115 of the 1997 Act will be applied separately to each CGT asset; and

3. where one or more, but not all, of the separate CGT assets were acquire before 20 September 1985.

There are two CGT exemptions that at first seem to be relevant to partitioning, but on closer examination are seen to be offering little assistance. They both relate to strata title conversions.

2.3.1 Section 118-42

This section applies to the transfer of units in a building that are not held by way of strata title into a stratum titled ownership structure. The section reads:

> *If:*
>
> *(a) you own land on which there is a building; and*
>
> *(b) you subdivide the building into stratum units; and*

(c) *you transfer each unit to the entity who had a right to occupy it just before the subdivision;*

a capital gain or capital loss you make from transferring the unit is disregarded.

You require an existing building, and the ultimate recipients must have a right to occupy the particular unit(s), at the time of the subdivision for this to apply. These two requirements significantly limit the situations in which section 118-42 of the 1997 Act may assist when partitioning.

2.3.2 Strata Title Conversion Rollover

Capital gains tax rollover relief is available under section 124-190 of the 1997 Act where the ownership arrangement for a home unit or apartment is converted into strata title. The rollover is only available where:

- persons who formerly held units under the previous ownership scheme are, immediately after the conversion, the only holders of strata title units in the building; and

- the unit owners hold the same or substantially the same rights to occupy the units after the conversion as they did before.

The effect of the rollover is simply that the change in legal title to the home unit or apartment is treated for CGT purposes as if it were the same as the previous ownership interest. The Commissioner's views on this rollover are set out in *Taxation Ruling TR 97/4: Income tax: capital gains: roll-over relief for buildings subdivided under strata title law into stratum units and common property*.

2.3.3 Planning Ahead

Other than in relation to the stamp duty considerations, the timing of partitioning actions and the correct sequences of steps is most important for the CGT issues.

The concerns raised above can be addressed by planning. For CGT purposes it is therefore desirable to agree the partition as early as possible, as this will capture more of the gain in the concession. However, as set out below, in order to fall within the stamp duty relief, the partition cannot be entered prior to the co-owners jointly owning the relevant property.

If the co-owners enter into a deed whereby they acknowledge that the land is to be held on bare trust[6] for the benefit of each other in accordance with the proposed plan of subdivision each co-owner will hold their interest in the other co-owners post-partition lot on bare trust for that other co-owner. That is, the land is legally registered in the names of all co-owners as tenants in common in each shares but the each co-owner holds their interest in one post-partition lot absolutely and the balance of that post-partition is lost held for the benefit on bare trust by the other co-owner(s).

[6] But the Commissioner's view in *Taxation Ruling TR 2004/D25* at [10] is that being a 'bare trust' is not the test; rather, it's the ability to call fall the particular asset. The author comments below on the soundness of this view.

For example, the deed would give effect to the following ownership structure prior to the acquisition of the property:

Pre-partition

Post-partition Lot 1	*Post-partition Lot 2*	*Post-partition Lot 3*
Co-owner 1:	*Co-owner 2:*	*Co-owner 3:*
Legally & beneficially owns 1/3	*Legally & beneficially owns 1/3*	*Legally & beneficially owns 1/3*
1/3 held by co-owner 2	*1/3 held by co-owner 1*	*1/3 held by co-owner 1*
1/3 held by co-owner 3	*1/3 held by co-owner 3*	*1/3 held by co-owner 2*

Post-partition

Lot 1	*Lot 2*	*Lot 3*
(former) Co-owner 1	*(former) Co-owner 2*	*(former) Co-owner 3*

The benefit of this ownership structure is that when the beneficially held interests are transferred to the beneficiary under the bare trust (this occurs on giving effect to the partitioning) it will not trigger a CGT event. This is because of section 106-50 of the 1997 Act, which states:

> *If you are absolutely entitled to a *CGT asset as against the trustee of a trust (disregarding any legal disability), this Part and Part 3-3 apply to an act done by the trustee in relation to the asset as if you had done it.*

That is, the beneficiary for whom the interest(s) are held on bare trust is treated as the owner of the CGT asset – for CGT purposes they are considered to own the interest from the time the property was acquired.

This solution helps when the co-owners know of their future partitioning at the time the property is acquired, or soon thereafter.

Further, a separately to s 106-50 of the 197 Act, the declaring of the trust will not be CGT event E1 or E2 because:

(a) the co-owner beneficiary is the only person absolutely entitled to that particular post-partition property held by the co-owner trustee; and

(b) the trust is not a unit trust.

See ss 104-55(5) and 104-60(5) of the 1997 Act.

2.3.4 Commissioner's View on s 106-50 & CGT Events E1 and E2

Although the Commissioner agrees that a beneficiary can be absolutely entitled to certain assets, he does not include in this land if there is more than one beneficiary: *Taxation Ruling TR 2004/D25, Income Tax: capital gains: meaning of the words 'absolutely entitled to a CGT asset as against the trustee of a trust' as used in Parts 3-1 and 3-3 of the Income Tax Assessment Act 1997.*

This is a draft ruling that, for over 10 years now, has not been finalized. It is doubtful whether the Commissioner's reasoning would be accepted by a court or the Administrative Appeals Tribunal, as there seems no difference between land and a share in a company (which may not strictly be fungible as they are separately numbered and separately identifiable).

The Commissioner's reasons, so far as is relevant for present purposes, is as follows:

> ***Core Principle***
>
> *10. The core principle underpinning the concept of absolute entitlement in the CGT provisions is the ability of a beneficiary, who has a vested and indefeasible interest in the entire trust asset, to call for the asset to be transferred to them or to be transferred at their direction. This derives from the rule* Saunders v. Vautier *applied in the context of the CGT provisions (see Explanation paragraphs 41 to 50). The relevant test of absolute entitlement is not whether the trust is a bare trust (see Explanation paragraphs 33 to 40).*
>
> ...
>
> ***Core principle: applying it practice***
>
> *20. The most straight forward application of the core principle is one where a single beneficiary has all the interests in the trust asset. ...*
>
> ***One beneficiary with all the interests in a trust asset***

21. A beneficiary has all the interest in a trust asset if no other beneficiary has an interest in the asset (even if the trust has other beneficiaries).

22. Such a beneficiary will be absolutely entitled to that asset as against the trustee for the purposes of the CGT provisions if the beneficiary can (ignoring any legal disability) terminate the trust in respect of that asset by directing the trustee to transfer the asset to them or to transfer it at their direction (see Explanation paragraphs 76 to 79).

More than one beneficiary with interests in a trust asset

23. If there is more than one beneficiary with interests in the trust asset, then it will usually not be possible for any one beneficiary to call for the asset to be transferred to them or to be transferred at their direction. This is because their entitlement is not to the entire asset.

24. There is, however, a particular circumstance where such a beneficiary can be considered absolutely entitled to a specific number of the trust assets for CGT purposes. This circumstance is where:

- *the assets are fungible;*
- *the beneficiary is entitled against the trustee to have their interest in those assets satisfied by a distribution or allocation in their favour of a specific number of them; and*
- *there is a very clear understanding on the part of all the relevant parties that the beneficiary is entitled, to the exclusion of the other beneficiaries, to that specific number of the trust's assets.*

25. Because the assets are fungible, it does not matter that the beneficiaries cannot point to particular *assets as belonging to them. It is sufficient in these circumstances that they can point to a specific number of assets as belonging to them. See Explanation paragraphs 80-126.*

…

54. Therefore, the requirements for absolute entitlement within the context of the CGT provisions cannot be satisfied if there are multiple beneficiaries in respect of a single asset such as land. While each beneficiary may have an interest in, and therefore be entitled to, a share of the land, the asset to which the provisions refer is the land and no beneficiary in this case is entitled to the whole of it.

55. Even if the asset to which the provisions refer is a beneficiary's undivided share in the land (and, as discussed, we do not agree that it is), the beneficiary could not insist upon having that undivided share transferred to them. To do so may prejudice the other beneficiaries because the sale of the remaining undivided share may not realize the same amount as if the whole of the land had been sold and the proceeds distributed: see Re Horsnaill *[1909] 1 Ch 631 and* Wilson v Wilson *(1950) 51 SR (NSW) 91.*

In this regard the Commissioner may take further comfort from more recent cases of:

- *Attorney General of New South Wales v Homeland Community Ltd & Ors* [2013] NSW 748 at [63] per Windeyer AJ;
- *Michael Victor Henley, in the Estate of Hedy Jadwiga Weinstock and Leo Arie Weinstock* [2013] NSWSC 975 at [46] and [65] per Slattery J; and
- *Feeney v Feeney* [2008] NSWSC 890 at [21] per White J.

But these cases deal with the real property and trust law considerations, not the fact that the relevant underlying asset, for CGT purposes, is the CGT asset. As made clear above, each separate part of a post-partition lot, which a registered holding co-owner holds for another co-owner, is a separate CGT asset.

Therefore, there are numerous trusts with one trustee and one beneficiary, not fewer trusts with one trustee and numerous beneficiaries. In relation to the specific CGT asset that is held for a particular co-owner, that co-owner could call for the CGT asset. It seems, therefore, that partitions involving three or more participants can involve absolute entitlement.

It is also unsatisfactory that *Taxation Ruling TR 2004/D25* remains in draft form. In the National Tax Liaison Group meeting of December 2010 (at item 9 of the minutes[7]) the Australian Taxation Office ('**ATO**') representatives made clear that:

- the status of the ruling remains unclear; and
- the ATO considers the finalization of the ruling as intricately linked to how it will deal with bare trusts, which also remains an unresolved issue.

Regardless of the disputed views above, this issue clearly does not impact on partitions involving two co-owners, but any more and the Commissioner's view must be seriously considered (despite the criticisms raised).

2.3.5 No economic benefit

Importantly, the recent Full Court of the Federal Court decision in *Taras Nominees Pty Ltd as Trustee for the Burnley Street Trust v FCT* [2015] FCAFC 4 (Perram, Robertson and Pagone JJ) dealt with a "novel" argument, that no taxable gain could arise in circumstances where the taxpayer had not received any capital proceedings from a CGT event (such as with a partition).

For that submission the taxpayer called in aid the observation of Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, cited with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, that:

> *The context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.*

[7] Arising in the context of insurance proceeds trusts and self-managed superannuation funds.

The taxpayer also relied on dicta of the United Kingdom Court of Appeal in *Booth v Ellard* [1980] 1 WLR 1443. In upholding the first instance judge's (Kenny J) view that *Booth v Kenny* was not relevant, the Full Court said:

> *The Court of Appeal in* Booth v Ellard *was not, of course, concerned with the terms of the 1997 Act nor with the terms of the specific trust and joint venture agreement to which Taras is party. Significantly, however, s 22(5) of the UK Act with which the Court of Appeal was concerned in* Both v Ellard, *unlike the provisions in contention in this appeal, contemplated joint ownership Further more, a fundamental difference between the facts in that case and those in this appeal (and which points against the policy of nonassessability of a gain until receipt of 'capital proceeds' which Taras sought to invoke), is that Taras did receive something in return for the transfer of its land because upon transfer it became entitled to the benefits flowing from the contributions to the joint venture of the land of others as well as the commercial advantages flowing from participation in the joint venture. It would not, therefore, be 'capricious and unreasonable' for the legislature to contemplate the occurrence of a CGT event upon a transaction of the kind entered into by Taras and the other joint venturers because the disposal made by Taras of its land was in return for the acquisition of interests in the land of others and the commercial benefits from the bargain. Those interests and benefits included rights to the development of the land and to distributions of cash determined under clause 6.2 of the joint venture agreement. The restrictions that Taras had upon its beneficial interest in its land by these arrangements were matched by restrictions in its favour upon the rights attaching to the land contributed to the joint venture by the other land owners.*

There will therefore be no comfort to partitioning parties, should they otherwise be liable to income tax or CGT, that no economic benefit of income or capital proceeds were received at the time of the partition.

3 GST Consequences of Partitioning

So far as GST is concerned the Commissioner of Taxation's views on partitioning are set out in *GST Ruling 2009/2 Goods and Services Tax: Partitioning of Land*. This applies to co-owners whether they are joint tenants or tenants in common.

The term 'partition' is not defined in the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) (the '**GST Act**') and, for the purposes of *GSTR 2009/2,* it refers to:

> *either:*
>
> - *the division of land and the transfer of the divided parts between the co-owners; or*
> - *if the land is already divided and held by the co-owners, the transfer of the divided parts between the co-owners,*

so that one or more co-owners become the owner in severalty of a specifically ascertained part(s) of the land.

It can be seen this concept of partition is similar to that discussed earlier.

3.1 Mere Subdivision is not subject to GST

The usual course is that a single parcel of land is first subdivided and, once this has occurred, the post subdivision lots are subjected to the partition. This initial stage of subdivision, before the partitioning, is not subject to GST because the Commissioner does not consider there to be a supply. At [50] of *GSTR 2009/2* he says:

The Commissioner considers that the subdivision of land by co-owners does not constitute a supply for purposes of GST. All that results is that the subdivided land is held under different titles by the same owners. While the effect of the subdivision is to create new rights and titles in substitution of the original rights and titles, there is no change in the ownership of the subdivided land. Accordingly, where land is jointly held, a subdivision, by itself, does not involve a transfer of any interests in the land between the co-owners.

3.2 Partitioning

For the Commissioner to subject the post-subdivision property to GST there must be a "taxable supply" as defined by section 9-5 of the GST Act, which states:

You make a taxable supply if:

a) you make a supply for consideration; and

b) the supply is made in the course or furtherance of an enterprise that you carry on; and

c) the supply is connected with Australia; and

d) you are registered, or required to be registered.

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.

Each relevant element of taxable supply will be considered in turn. However, the broad position is that the Commissioner considers the partitioning of real property is a taxable supply.

3.3 Supply for Consideration

The transfer of an interest by each co-owner to any other co-owner is a supply for consideration, in the Commissioner's opinion, because the transfer of property is the supply of that property and it is being supplied for consideration, being the property received under the partition. The following paragraphs of *GSTR 2009/2* explain the position adopted by the Commissioner.

46. *Under a partition by agreement, the transfer or conveyance by each co-owner of their respective interest in the land to be taken by the other co-owners in severalty is a supply as defined in subsection 9-10(1).*

47. *The term 'supply' is broadly defined in subsection 9-10(1) as 'any form of supply whatsoever'. This wide definition of the term includes the transfer or conveyance of an interest in or right over land and by a co-owner.*

48. *To effect a partition under an agreement, all the co-owners agree to divide the land and to mutually transfer or convey their respective interests in the parts to be taken and enjoyed in severalty by the other. Each transfer or conveyance is a supply.*

…

90. *In* Commissioner of Taxation v Reliance Carpet Co Pty Ltd *[[2008] HCA 22] the High Court noted that, under section 9-15, consideration includes, among other things, any payment 'in connection with' a supply of anything. In analyzing the decision of the European Court of Justice in* Societe thermal d'Eugenie-les-Baines v Ministere de l'Economie, des Finances et de l'Industrie *[[2007] 3 CMLR 1003], the High Court gave some indication that the connection between consideration and a supply need not be direct (see paragraph 30 of the judgment), though it did not expand on what the extent of the connection needs to be.*

91. *For land transactions 'consideration' may be regarded as anything that 'moves' the transfer. In* Re Navakumar v Commissioner of State Revenue *[[2007] VCAT 476] Deputy President Macnamara of the Victorian Civil Administrative Tribunal said:*

> *Consideration is a very wide concept. In Equity consideration generally denotes something of significant value, at common law something purely nominal such as $1, a peppercorn or a chocolate wrapper may constitute consideration. In revenue law the meaning of consideration is wider still, it is that which 'moves' the conveyance or transfer. See* Archibold Howie Pty Ltd v Commissioner of Stamp Duties (NSW) *(1948) 77 CLR 143, 152 per Dixon J.*

92. *Although a partition ordinarily does not involve a monetary payment, consideration is not limited to a payment of money. It includes a payment in a non-monetary or in an 'in kind' form. This includes acts, forbearances, and goods or property.*

93. *The consideration for a co-owner transferring their interest in land to the other co-owners is the transfer or conveyance made by the other co-owners of their respective interests in another part of the land to the first co-owner. The transfer or conveyance by the other co-owners together with any owelty money paid or payable is consideration received by the first co-owner for the supply of their interest to the others.*

…

97. *The value of the consideration is the sum of the GST inclusive market value of all the other co-owners' interests in the part of the land acquired by a co-owner plus any owelty money received in respect of the partition.*

98. *The Commissioner considers that the transfer of an interest in a part of the land by a co-owner is 'in connection with', 'in response to' or 'for the inducement' of the supply by each of the other co-owners of their respective interests in a part of the land.*

The above paragraphs show how broad the supply for consideration net is cast. It will be extremely difficult to argue that there is no supply for consideration when a partition occurs.

Further, an 'owelty' (or a sum of money) may be given to make up for any differences in value of the land the co-owners receive after a partition, or to compensate for the value of land given up without receiving an interest in any other land in return: *GSTR 2009/2* at [30] and [31].

3.4 Enterprise

The Commissioner takes a very wide view of what will be in furtherance of an enterprise. Practically, a partition by a co-owner who carries on an enterprise will be in furtherance of that enterprise. This is so even where the partition brings the enterprise to an end.

At [57] and [58] of *GSTR 2009/2* the Commissioner says:

> *It is the Commissioner's view that if land is applied or intended to be applied in an enterprise carried on by a co-owner, a supply of that co-owner's interest in the land under a partition by agreement or court order for co-owners to effect a partition is in connection with the enterprise and is a supply in the course or furtherance of that enterprise.*
>
> *Further, where the partition of that land results in the termination of the enterprise which was carried on, the supply of the interest in the land by the co-owners would still be in connection with the enterprise carried on by the co-owner and is a supply in the course or furtherance of the enterprise.*

Thus, where property developers effect a partition to complete the development, it will still be in furtherance of the development enterprise.

The focus on this issue is therefore on whether or not an enterprise is being carried on in the first place. In this regard the Commissioner sets out his views as to what factors, which must be determined on a case-by-case basis, are relevant to determining the existence of an enterprise in *Miscellaneous Taxation Ruling MT 2006/1*.

It is possible that a partition will be in furtherance of an enterprise of some but not all of the co-owners. In these circumstances only the co-owner(s) carrying on an enterprise will make a taxable supply. The following example from [79] to [85] of *GSTR 2009/2* illustrates the point:

> *Example 6 – Supply in the course or furtherance of an enterprise carried on by one co-owner and no the other co-owner*
>
> *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.*
>
> *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.*
>
> *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.*
>
> *Shaun and Caroline agree that Shaun will take Lot 1 which includes House 1 and Caroline will take Lot 2 which includes House 2.*
>
> *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.*
>
> *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.*
>
> *In contrast, the transfer of his interest in Lot 2 to Caroline is in the course or 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.*

As the example shows, this is a situation that may arise fairly regularly. It would also apply where the co-owner (in this example Shaun) was to hold their property for long term rental derivation.

Importantly, however, the carrying on of an enterprise will only require GST registration if it is done on a regular and continuous basis and derives at least $75,000 in income: see *GST Determination 2000/9 Goods and Services Tax: if you let out residential premises do you need to get an ABN for PAYG purposes or register for GST?*

In the above example Shaun, whether seeking to turn a profit under $75,000 or to derive rental income under $75,000 per annum, would not need to register for GST.

3.5 Connected with Australia / Registration

Whether or not a supply is connected with Australia (see section 9-25 of the GST Act) or whether the entities are registered / required to be registered (Part 2-5 of the GST Act) are, in the context of this paper, straightforward issues and will not be discussed any further.

3.6 No Supply to yourself

If the partition is a taxable supply and therefore subject to GST, the co-owners will only be supplying so much of the property that they provide to the other co-owners; that is, they will not 'supply' their own interest to themselves. At [49] of *GSTR 2009/2* the Commissioner says "*a co-owner does not make a supply of its own interest in the land that it is to take in severalty.*"

3.7 Court ordered partition

In relation to a court ordered partition the Commissioner considers the fact that the partitioning is involuntary (in the sense that it is required in order to comply with a direction of a Court) does not of itself remove the GST liability of the taxable supply.

The Commissioner's view is expressed at [51] to [56] of *GSTR 2009/2:*

> *If a court makes an order for partition under which the co-owners are directed to execute a transfer or conveyance of their interests in the parts of the land to be taken by the others, the Commissioner considers that each co-owner makes a supply of each interest transferred. Each co-owner is required to comply with the order by doing something.*
>
> *In* Goods and Services Tax Ruling GSTR 2006/9 Goods and services tax: supplies*, the Commissioner takes the view that to make a supply 'an entity must do something'.*
>
> *The above view receives support in the decision of* Deputy Presidents Walker and Block in Re Hornsby Shire Council v Commissioner of Taxation *[[2008] AATA 1060]. The Deputy Presidents considered at [70], held that the judgment in* Westley Nominees Pty Ltd & Anor v Coles Supermarkets Australia Pty Ltd & Anor *[[2006] FCAFC 115] provides support for the Commissioner's view that positive action (that is by doing something) is required to make a supply. Accordingly, the making of a supply by a co-owner of their interest in land, pursuant to section 9-10, requires there to be some positive action on behalf of the co-owner.*
>
> *In* C & C *[[2001] FMCfam 194], in the context of Family Court proceedings, the Federal Magistrates Court in that case ordered '... the Wife ... do all acts and things necessary to seek a partition of the title to the real property ...'.*
>
> *Further, in* Schnytzer v Wielunski *[[1978] VR 418 at 430], the Supreme Court of Victoria '... ordered that the said land the subject of the action be partitioned between the parties and that the parties join in a transfer of the lot numbered 2 ... to the defendants absolutely and ... lot numbered 1 ... to the plaintiffs absolutely.' It was also '... ordered that the conveyancing and like costs of giving effect to the partition so ordered be borne by the plaintiffs ... and the defendants ... in equal shares.'*
>
> *It is evident from the above cases that a co-owner is required to do something to effect the partition. The transfer or conveyance by the co-owner of its interest in the land is a supply. It is irrelevant that the co-owners were compelled by the order to make the supply. In accordance with the Commissioner's view, in order to make a supply a co-owner has to do something, that is the making of a supply by the co-owner requires positive action by the co-owner. However it does not require that act to be voluntary.*

Whether this is correct is open to further consideration. Whether the effect of a court ordered partition involves the co-owner taking a step is open to doubt. See, for instance, the authorities on s 71 and 78 of the *Trustee Act* 1925 (NSW) dealing with vesting orders following a change of trustee.

Regardless, the Commissioner's current view is that a court ordered partition will be subject to GST and needs to be factored into any decision to approach the court for relief. It is unlikely, however, to of itself provide a defence to the resistant co-owner.

3.8 Margin Scheme and Partitioning

Depending on the circumstances of the property the margin scheme (in Division 75 of the GST Act) may be used to reduce the GST payable on a taxable supply. When it applies the margin scheme calculates the GST liability of certain taxable supplies of real property based on the difference between the consideration for the supply and the cost of its acquisition (that is, the so

called margin) rather than on the amount of consideration for the supply (as is the general liability rule).

This calculation does not, however, take into account any input tax credits otherwise available from acquiring or developing the interest supplied. That is, those input tax credits are not able to be claimed. It is therefore a matter of 'running the numbers' on whether the margin scheme is the more beneficial way to calculate the GST liability.

The Commissioner takes the view that the margin scheme can be applied to a taxable supply of land by a co-owner under a partition by agreement or a court ordered partition if the requirements of Division 75 of the GST Act are otherwise satisfied: *GSTR 2009/2* at [100]. In this regard the Commissioner considers the requirement for a 'sale' despite that term usually requiring the interest in land being supplied in exchange for a monetary price. He says, in *GSTR 2009/2* at [105]:

> *the Commissioner considers that the ordinary meaning of "sale" and "selling", the context provided by section 9-70 and the policy underlying Division 75 support a broader interpretation of the term 'selling' in section 75-5.*

The alternative argument, that a partition does not constitute a 'sale' because of the lack of monetary consideration is acknowledged but not favored by the Commissioner.

The calculation of the margin may differ, depending on:

- whether the land was acquired before or after 1 July 2000; and
- whether a partition occurs before 17 March 2005 on the one hand or on or after 17 March 2005 on the other hand. This date is relevant on the basis that section 75-11 of the GST Act, instead of section 75-10, applies to certain supplies made on or after 17 March 2005.

In the case of land acquired after 1 July 2000, to calculate the margin where a partition occurred prior to 17 March 2005, s 75-10 of the GST Act applies and the margin is the amount by which the consideration for the supply exceeds the consideration for the acquisition. Where land was acquired prior to 1 July 2000 and a partition occurred prior to 17 March 2005, the margin would be the difference between the consideration for the supply and the value at the valuation date as prescribed in Division 75 of the GST Act.

If the circumstances in section 75-11 apply – for example, if the land was acquired from an associate or from a joint venture operator – the margin must be calculated under s 75-11 and not under section 75-10.

3.9 Partnerships

A partnership is an entity for the purposes of the GST Act. In *GSTR 2009/2* the Commissioner states that an in-specie distribution of real property from a partnership to a partner is a supply of that land. It can be a supply of an interest by way of a partition. The consideration for the in-specie distribution is the reduction in the value of the receiving partner's interest in the partnership. The Commissioner also states that the margin scheme can apply to such taxable supplies provided the requirements of Division 75 of the GST Act are satisfied.

The Commissioner acknowledges an alternative view; that partnership land cannot be partitioned because it can only be sold on dissolution of the partnership. The Commissioner considers that despite a court potentially ordering a sale rather than a partition where a partnership exists, this fact does not preclude the partners agreeing to the partition of partnership land as between them.

3.10 Joint Ventures

Often when undertaking a property development the co-owners will do so via a joint venture. Transfers between co-owners who are joint venturers are treated in the same way as the supplies described above – the Commissioner does not distinguish between a GST joint venture and other joint ventures for this purpose.

Under a partition, the transfer by each participant in a joint venture of their interest in land is a taxable supply provided all the conditions of s 9-5 of the GST Act are satisfied: *GSTR 2009/2* at [161]. Transfer of interests between the participants in the joint venture is a supply made for consideration *GSTR 2009/2* at [163].

Particularly, the rule in section 51-30(2) of the GST Act, relating to supplies between a GST joint venture operator and a GST joint venture participant, does not, in the Commissioner's opinion, apply to negate the taxable treatment of a partition supply made between a GST joint venture operator and a GST joint venture participant. The rationale for this is that on partition a GST joint venture participant would be acquiring the interest in the land for his or her own purposes and not for purposes of the GST joint venture activities.

4 Stamp duty implications

Although there are provisions of the stamp duty legislation dealing with partitions (s 30 of the *Duties Act* 1997 (NSW) (the '**Duties Act**'), and this will be the focus of this section of the paper, it is also necessary to consider the apparent purchaser concession (s 55 of the Duties Act), which can afford concessional duty in specified dealings between parties with interests in land.

They will be considered in turn.

4.1 Partitioning

In New South Wales, the Duties Act provides specifically for the partitioning of land in section 30,[8] which states:

> ***30 Partitions***
>
> ***(1) What is a partition?***
>
> *For the purposes of this section, a partition occurs when dutiable property comprised of land in New South Wales that is held by persons jointly (as joint tenants or tenants in common) is transferred or agreed to be transferred to one or more of those persons.*

[8] See also s 27 of the *Duties Act* 2000 (Vic); s 31 of the *Duties Act* 2001 (Qld); s 26 of the *Duties Act* 2001 (Tas); s 39 of the *Duties Act* 2008 (WA); and s 29 of the *Duties Act* (ACT). South Australia and the Northern Territory, which retain their *Stamp Duty* legislation (from which other jurisdictions have moved to the *Duties Act* legislation) have more limited provisions.

(2) Single dutiable transaction

For the purposes of this section and sections 16 and 18, a partition is taken to be a single dutiable transaction.

(3) Dutiable value

The dutiable value of a partition is the greater of:

(a) the sum of the amounts by which the unencumbered value of the dutiable property transferred, or agreed to be transferred, to a person by the partition exceeds the unencumbered value of the interest held by the person in the dutiable property transferred, or agreed to be transferred, to each person by the partition immediately before the partition, and

(b) the sum of any consideration for the partition paid by any of the parties.

(3A) (Repealed)

(4) Minimum duty

The minimum duty chargeable on a transaction that effects a partition is $50.

(5) Who is liable to pay the duty?

Duty charged by this section is payable by the persons making the partition or any one or more of them.

(6) Anti-avoidance criteria

This section does not apply in respect of a partition if the Chief Commissioner is satisfied that the partition is part of a scheme to avoid duty on an exchange of land that was not jointly held by the parties before the scheme was entered into.

For stamp duty purposes, under section 30(1) of the Duties Act, a partition is taken to occur in New South Wales when dutiable property comprised of land that is held by persons jointly (as either joint tenants or tenants in common) is transferred or agreed to be transferred to one or more of those persons. The partitioning of land is a dutiable transaction under Chapter 2 of the Duties Act.

The 'dutiable value' of the partition (on which *ad valorem* duty will be charged) is provided for by subsection 30(3) of the Duties Act. However, the minimum duty chargeable is $50.

If the unencumbered value of the undivided share of the co-owner in the property immediately before partition were:

- equal to or less than the unencumbered value of the divided part taken by the co-owner on partition, then the total excess value would be nil; and
- more than the unencumbered value of the divided part taken by the co-owner on partition, then the total excess value would be that amount.

Consequentially, if no additional consideration is paid in relation to the partition, the dutiable value will be nil and the partition will be charged with the minimum duty of $50 under section 30(4) of the Duties Act.

4.1.1 Timing

Timing of the partition is important as the maximum benefit of the provisions only apply if the partition occurs in the appropriate sequence. The joint parties must hold the land: subsection 30(1). That is, the partition cannot be entered *before* the land is purchased.

There is a motivation to enter the partition as early as possible – because the earlier the partition the greater the amount of capital appreciation, which is likely if there are development or subdivision works undertaken to improve the property's value, will be protected from CGT until a subsequent CGT event happening to the co-owner. This tension with the stamp duty provisions is resolved by entering the partition agreement as early as possible, but only after the co-owners jointly hold the land.[9]

4.1.2 Revenue Ruling No DUT 35

The Chief Commissioner of State Revenue (the '**Chief Commissioner**') has issued a ruling in relation to s 30 of the Duties Act.[10] It is Revenue Ruling No DUT 35, entitled *Partitions of Land* (the **'Partition Ruling'**), [6] of which states:

> *A partition under Section 30 is confined to dutiable property comprised of land in NSW. All other property, both dutiable and non-dutiable (such as shares, land not in NSW and cash) is to be disregarded when calculating duty on a partition.*

The Partition Ruling also confirms that s 30 will not apply to deceased estates, for which s 63 of the Duties Act is relevant: Partition Ruling at [13].

The evidentiary requirements of the Chief Commissioner are set out in the Partition Ruling, at [14], as follows:

> *In addition to the documents effecting the partition, the following documents are required to be lodged to enable assessment of duty on a partition:*
>
> *i. evidence of value (and a copy) for each parcel of land subject to the partition. The evidence of value should be in accordance with Revenue Ruling DUT 012.*
>
> *ii. a current Certificate of Title or each parcel of land subject to the partition.*

Revenue Ruling No DUT 12, entitled *Dutiable Transactions Evidence of Value* deals specifically with land at [12] to [15]. It provides:

> *12. Where evidence of value of land is required to determine the adequacy of the consideration as outlined in paragraph 8 above, the following are acceptable:*

[9] But note the Commissioner's views on CGT Events E1 and E2, which suggests that the partition agreement should predate purchasing the relevant property. The author questions the Commissioner's view underlying this reasoning.

[10] Footnotes now update the ruling to ensure the nominal duty is $50, rather than the previous $10.

a. a "declaration by a competent valuer" as outlined in paragraph 13; or

b. a private opinion or expression of value by a registered valuer, identifying the specific property; or

c. an agreement which is evidence of a recent arm's length sale of the property; or

d. a valuation required by a financial institution for finance purposes, with the proviso that such valuations are often conservative and may indicate that the property has a higher unencumbered value.

If this evidence of value indicates that the consideration is adequate, no further evidence of value will be required.

13. *If the above evidence of value indicates that the unencumbered value of the land exceeds the consideration by a significant amount, a "declaration by a competent valuer" will be required, being either:*

a. a valuation by the Valuer General of the improved land value; or

b. a valuation by a registered real estate valuer within the meaning of the Valuers Registration Act 1975 of the full market value, being a comprehensive valuation of the property in its present condition indicating that an inspection of the property has been undertaken. (Brief market appraisals, estimates of value or other statements that do not indicate a full inspection of the subject property has been undertaken will not be acceptable.)

14. *If there is no consideration or nominal consideration, evidence of value must consist of either a "declaration by a competent valuer" as referred to in paragraph 10 or an agreement which is evidence of a recent arm's length sale of the property.*

15. *Where the property is vacant and unimproved land, the most recent notice of valuation by the Valuer General for rating purposes would be acceptable.*

4.1.3 Consolidation and Partitioning

Also important for s 30 of the Duties Act is the issue of consolidated lots. The Chief Commissioner further states, in the Partition Ruling at [5], that the extent of the application of section 30 to partitions of land:

> *... is not restricted to instances where the partition involves one parcel of land or adjoining parcels of land. Section 30 also applies to that is held by partners in a partnership, that is, the partnership factor will be ignored and for the purposes of a partition, it would be the partners legal ownership of the land that is relevant.*

The Chief Commissioner at [11] and [12] also referred to the 'dual entitlement' practice that transfers between proprietors in dual entitlement is subject to *ad valorem* duty:

> *Section 30 only applies to land in NSW that is held by persons jointly either as joint tenants or tenants in common. Land that is not held jointly cannot be assessed under Section 30. Land held in the form of a dual entitlement is not held jointly because the ownership is in severalty.*
>
> *A dual entitlement is a practice of the Department of Lands which acts as a stay of registration until single ownership of an entire lot is obtained. Dual Entitlement titles can arise following a consolidation of adjoining parcels of land and the creation of a new consolidated lot.*

As the consolidated lots are 'Dual Entitlement' titles, the registered proprietors of the consolidated lots are not held jointly, as owners, by the registered proprietors on the new titles . Section 30 of the Duties Act provides that:

> For the purposes of this section, a partition occurs when dutiable property comprised of land in New South Wales that is **held by persons jointly (as joint tenants or tenants in common)** is transferred or agreed to be transferred to one or more of those persons. [emphasis added]

As a result, if the consolidated lots are subdivided, the 'partitioning' concession contained in section 30 of the Duties Act will not apply, as the registered proprietors do not jointly hold the consolidated lots.

This is confirmed by *Aoun Investments Pty Ltd v Chief Commissioner of State Revenue* [2006] NSWSC 1394 in which Gzell J held that:

> *To constitute a partition ... [for the purposes of section 30 of the Duties Act] ... the lots the subject of the transfers in question had to be held by the plaintiffs as joint tenants or tenants in common. The lots were not so held.*

There the parties held their interests in severalty rather than as joint proprietors (this was a result of the NSW LPI's practice of registering interest via a dual ownership or multiple ownership folio upon consolidation where the are not lodge transfers between the co-owners). As there was no partition within the meaning under section 30 of the Duties Act, section 30 did not apply and the plaintiffs were liable for *ad valorem* duty on the transfers.

4.2 Apparent Purchaser Provisions

Dealings in land in similar, but obviously not identical, circumstances to partitioning may benefit from the apparent purchaser provisions in s 55 of the Duties Act. This is the exemption that applies to afford relief from double duty where a limited recourse borrowing arrangement is used by a regulated superannuation fund pursuant to s 67A or 67B of the *Superannuation Industry (Supervision) Act* 1993 (Cth).

It is not applicable to partitions of land, because the co-owners have paid for their own interest. But it is worth keeping in mind when considering land transactions entered by clients as the circumstances, especially if they attend on you after steps to effect the transaction have been

undertaken, may not fall within the partition provisions. It is therefore useful to be aware of s 55, and indeed the other concessions in Part 6 of the Duties Act.

Section 55 of the Duties Act provides:

> *(1) Duty of $50 is chargeable in respect of:*
>
> *(a) a declaration of trust made by an apparent purchaser in respect of identified dutiable property:*
>
> *(i) vested in the apparent purchaser upon trust for the real purchaser who provided the money for the purchase of the dutiable property, or*
>
> *(ii) to be vested in the apparent purchaser upon trust for the real purchaser, if the Chief Commissioner is satisfied that the money for the purchase of the dutiable property has been or will be provided by the real purchaser, or*
>
> *(b) a transfer of dutiable property from an apparent purchaser to the real purchaser if:*
>
> *(i) the dutiable property is property, or part of property, vested in the apparent purchaser upon trust for the real purchaser, and*
>
> *(ii) the real purchaser provided the money for the purchase of the dutiable property and for any improvements made to the dutiable property after the purchase.*
>
> *(1A) For the purposes of subsection (1), money provided by a person other than the real purchaser is taken to have been provided by the real purchaser if the Chief Commissioner is satisfied that the money was provided as a loan and has been or will be repaid by the real purchaser.*
>
> *(1B) This section applies whether or not there has been a change in the legal description of the dutiable property between the purchase of the property by the apparent purchaser and the transfer to the real purchaser.*
>
> **Note.** *For example, if the dutiable property is land, this section continues to apply if there is a change in the legal description of the dutiable property as a consequence of the subdivision of the land.*
>
> *(2) In this section,* ***purchase*** *includes an allotment.*

The Chief Commissioner has summarised the provision as follows in Revenue Ruling No DUT 30, entitled *Property Vested in an Apparent Purchaser* (the **'Apparent Purchaser Ruling'**):

> *Section 55 therefore provides concessional duty treatment in the context of resulting trusts under which the apparent purchaser is trustee and the real purchaser is the beneficial owner of the trust property. ...*

4.2.1 Apparent Purchaser Provisions

The Apparent Purchaser Ruling confirms a number of important aspects of the s 55 concession. They follow.

The real purchaser need not have provided all of the funds themselves; if borrowed funds for the purchase (or part thereof) it will be sufficient if they are liable to repay those funds: Apparent Purchaser Ruling at [6]. However, it does require that the real purchaser provide the whole of the purchase money (whether by available funds or borrowings for which the real purchaser is liable to repay): Apparent Purchaser Ruling at [11].

It also applies where the relevant transfer to the real purchaser, from the apparent purchaser, is of part only of the relevant property: Apparent Purchaser Ruling at [10].

The evidence required to apply the apparent purchaser concession is set out in Apparent Purchaser Ruling at [13] thus:

> *The apparent purchaser (trustee) must furnish a statutory declaration stating:*
>
> *(a) the intention of the parties regarding the beneficial ownership of the property at the time of purchase by the apparent purchaser,*
>
> *(b) why the property was purchased in the name of the apparent purchaser,*
>
> *(c) who actually provided the purchase money for the property, including any deposit payable under the agreement for the purchase of the property, and*
>
> *(d) the date of birth of the real purchaser (if he or she was under 18 years of age at the time of the purchase by the apparent purchaser) or, if the real purchaser is a company, the date of its incorporation.*

Generally, evidence of bank statements showing the payments is required: Apparent Purchaser Ruling at [14]. If any improvements were undertaken on the property documents showing the real purchaser effecting them or, if the apparent purchaser that he or she did so as agent, should be provided: Apparent Purchaser Ruling at [15].

It is also said, in Apparent Purchaser Ruling at [18], that to stamp the declaration of trust with nominal duty under s 55(1)(b) requires the following evidence:

- *statutory declaration by the purchaser named in the agreement stating:*

  (a) who actually provided the money, including the deposit if any, for the purchase of the trust property; and

  (b) if the beneficiary is a company, the date of its incorporation,

- *the stamped agreement evidencing the purchase of the trust property by the trustee, (or a copy of the stamped transfer where no agreement was executed), and*

- *the evidence referred to in paragraph 14 above.*

Improvements to the property are also permitted under the apparent purchaser concession. It is partly for this reason that advisors should remember this concession when dealing with a client with development and subdivision intentions. The changes arose from amendments taking effect 20 June 2006. They amended s 55(1)(b) and inserted s 55(1B) of the Duties Act. The changes were consistent with Gzell's J decision in *Sportscorp Australia Pty Ltd & Ors v Chief Commissioner of State Revenue* [2004] NSWSC 1029 discussed below.

4.2.2 Platinum Investments – timing is important

An important case in relation to s 55 of the Duties Act is the Court of Appeal of the Supreme Court of New South Wales' decision in *Chief Commissioner of State Revenue v Platinum Investment Management Ltd* (2011) 80 NSWLR 240. In *Chief Commissioner of State Revenue v Platinum Investment Management Ltd* the majority of the Court[11] held that *ad valorem* duty was payable on a declaration of trust over shares that came into existence two days after the declaration. It was held that there could be a declaration of trust over future property. In doing so the majority held that the words 'to be vested' and 'to be held in trust' contain the concept of futurity with respect to the declaration of trust. It was further held that the 'identifiable property' for the purposes of duty on a declaration of trust does not require that the property exist at that time.

All three judges, however, held that apparent purchaser concession did not apply on the basis of *Commissioner of Stamp Duties (NSW) v Pendal Nominees Pty Ltd* (1989) 167 CLR 1, which was to the effect that the apparent purchaser provision is not available if a declaration is made before there is an apparent purchaser. But the previous exemption being there considered, under the *Stamp Duty Act* 1920 (NSW), did not have the futurity elements contemplated by ss 55(1)(a) of the current legislation. The outcome of this matter is therefore questionable.[12]

5 Further complications with Strata Titles

Another issue to consider is whether the property to be developed will be strata titled. In both the decision in New South Wales, in *Sportscorp Australia Pty Ltd & Ors v Chief Commissioner of State Revenue* [2004] NSWSC 1029, and in Queensland in *Growing Wealth Pty Ltd & Ors v Commissioner of Stamp Duties* [200] QCA 418, Courts have separately concluded that a completed strata titled lot is not the same property as was held by the trustee / agent when the beneficiary / principal first became entitled. This is problematic particularly with respect to the stamp duty implications, where the transfer will be assessed for *ad valorem* duty twice. That is, *ad valorem* duty is charged on the acquisition of the property by the trustee / agent from third

[11] Campbell JA and Handley AJA, Macfarlan JA dissenting.
[12] The Property Council of Australia's July 2011 submissions to the NSW Office of State Revenue, in relation to the Apparent Purchaser Concession, are useful in this regard.

party, and subsequently charged again on the transfer by the trustee / agent to the beneficiary / principal.

If the transfer to the beneficiary / principal by the trustee / agent is a transfer of an interest in the land prior to the registration of the strata title plan (i.e., the property is strata titled when held by the investors), then adverse stamp duty consequences may be averted. Therefore, consideration must be given as to whether the property should be acquired by an agent / nominee initially, and when the property should be transferred to the principal / beneficiary (i.e., whether before or after strata titling).