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taxation and commercial

Partitioning Land – How do
you ensure there are no
unexpected tax liabilities?

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1	Overview of the process of partitioning	3
1.1	What is a partition?	3
1.2	Partition VS Subdivision	3
1.3	Steps of partitioning.....	4
2	Income tax, CGT and GST considerations when partitioning	4
2.1	Ordinary Income Tax Aspects of Partitioning.....	5
2.2	CGT Aspects of Partitioning.....	5
2.2.1	<i>Section 118-42</i>	6
2.2.2	<i>Strata Title Conversion Rollover</i>	6
2.2.3	<i>Tax Planning to address the CGT Issues</i>	7
2.3	GST Consequences of Partitioning	8
2.3.1	<i>Mere Subdivision is not subject to GST</i>	8
2.3.2	<i>Partitioning of the Land</i>	9
2.3.3	<i>Supply for Consideration</i>	9
2.3.4	<i>Furtherance of an enterprise</i>	10
2.3.5	<i>Connected with Australia / Registration</i>	11
2.3.6	<i>No supply of your own share</i>	11
2.3.7	<i>Court ordered partition</i>	11
2.3.8	<i>Can the Margin Scheme Apply to a Partition?</i>	12
2.3.9	<i>Partitions by Partnerships</i>	13
2.3.10	<i>Partitions by Joint Ventures</i>	13
3	Stamp duty implications	14
3.1	Aoun Investments	15
3.2	Sportscorp Australia	16
3.3	Revenue Ruling No DUT 35	17
3.4	Growing Wealth Pty Ltd	19
4	Dealing with financiers and security arrangements	20
5	Body corporate and common property issues and timing consequences.....	20
6	Illustrative examples and documentation requirements.....	21
6.1	Example One – NSW partition stamp duty calculation	21
6.2	Example Two – NSW partition stamp duty calculation.....	22
6.3	Example Three – Queensland partition stamp duty calculation	22
6.4	Example Four – NSW partition stamp duty calculation	23
6.5	Documentation requirements.....	23

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1 Overview of the process of partitioning

1.1 What is a partition?

Partitioning refers to the situation where land that is held jointly (whether as joint tenants or tenants in common) is 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 block to the other co-owner, and a corresponding acquisition by each co-owner from the other co-owner of their interest in the land.

Broadly speaking, land can be held jointly either in a joint tenancy or in tenancy in common. In a joint tenancy, each joint tenant owns the whole of the property jointly with the other owners. A joint tenancy relationship is characterised by survivorship, that is, upon the death of a joint tenant, that person's interest will pass to the survivor(s) in the joint tenancy subject to any alteration made before death, or any court order.

This means that the interest a joint tenant has in a joint asset prior to death would not form part of his/her estate; rather, it will become the property of the survivor.

On the other hand, in a tenancy in common, each of the tenants in common owns a defined interest in the property that is separate and distinct from the other co-owners. There is no survivorship and the tenants in common can freely deal with his/her interest in the property.

In *Comptroller of Stamps (Vic) v Christian* 90 ATC 5046, Young CJ 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.

It is plain from the above discussion that 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 partitioning can occur by express agreement between the co-owners, or by Court order (see for instance section 66G of the *Conveyancing Act 1919* (NSW) ('**the Conveyancing Act**')).

1.2 Partition VS 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. Strata title subdivision is the horizontal subdivision of a building or

buildings into strata lots and often 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.

Subdivision and in particular strata title subdivision may lead to issues with respect to partitioning because of the existence of common properties. This will be discussed later in this paper.

1.3 Steps of partitioning

The transaction steps which typically occur in partitioning land are outlined in the table below:

Step	Description
One	Owner A and Owner B acquire land as co-owners.
Two	Owner A and Owner B develop the land.
Three	When the land is developed, it will be subdivided into two lots, lot 1 and lot 2. Each of the subdivided lot will be held by Owner A and Owner B as co-owners.
Four	Owner A and Owner B 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.
Five	By way of partition, Owner A will transfer his interest in lot 1 to Owner B. Likewise, Owner B will transfer his interest in lot 2 to Owner B. The end result is that Owner A will be the owner of lot 2 and Owner B will be the owner of lot 1.

2 Income tax, CGT and GST considerations when partitioning

The Commissioner of Taxation has provided guidance on his views of the GST, CGT and income tax aspects of a partition. There are tips and traps to be learnt in these areas when undertaking a partition of real property.

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 Ordinary Income Tax Aspects of Partitioning

Where the real property is held on capital account, as 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 *Income Tax Assessment Act 1997* (Cth) ('**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.

2.2 CGT Aspects of Partitioning

Contrary to the belief of many clients, if the land is held on capital account the partition of that land will have CGT consequences involving disposals and acquisitions. The reasons why many clients consider that there will be no CGT consequences of a partition may be that they 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; 2007 ATC 2161 Senior Member McCabe said at paragraphs 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: 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 the CGT interactions that occur. Where the land is held by two joint (X and Y), the CGT consequences for X where the land is partitioned are:

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

The position for Y 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 (see *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 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 will be determined separately in relation to each CGT asset. For example one separate CGT asset may not meet the active asset test, but another separate CGT asset may meet the test;
2. if the owners is an individual, trust or a superannuation fund, the timing of the 12 months for the general discount in Division 115 of the *Income Tax Assessment Act 1997* (Cth) 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 2 CGT exemptions that at first seem to be relevant to partitioning, but on closer examination are seen to be offer little assistance. They both relate to strata title conversions.

2.2.1 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 strata 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.

It can be seen that you require an existing building and that the ultimate recipients have a right to occupy the particular unit(s) at the time of the subdivision. These two requirements significantly limit the situations in which section 118-42 of the 1997 Act may assist when partitioning.

2.2.2 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 titled. 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*.

2.2.3 Tax Planning to address the CGT Issues

The above results may be overcome by some simple forward thinking (that is, tax planning) prior to the initial purchase of the property. If the co-owners enter into a deed whereby they acknowledge that the land is to be held on bare trust 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).

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

Pre-partition

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

Post-partition

<i>Lot 1</i>	<i>Lot 2</i>	<i>Lot 3</i>
<i>Co-owner 1</i>	<i>Co-owner 2</i>	<i>Co-owner 3</i>

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 partitioning) 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; it obviously does not assist property developers or co-owners who first consider the option of partitioning after the property has been acquired.

2.3 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.

The differences, if any, between this definition and the concept of partition discussed earlier in this paper are not significant enough to warrant attention; the paper proceeds on this basis.

2.3.1 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 of Taxation does not consider there to be a supply. At paragraph 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.

This is not necessarily the case for a partitioning of the post-subdivision property.

2.3.2 Partitioning of the Land

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.

2.3.3 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. 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 divided 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*.

Although extracted at length, the above paragraphs show how broad the supply for consideration net is cast. It will be extremely difficult, if not impossible, to argue that there is no supply for consideration when a partition occurs.

2.3.4 Furtherance of an 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 paragraphs 57 and 58 of *GSTR 2009/2* he 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 paragraphs 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 not 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 acquires 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.

2.3.5 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.

2.3.6 No supply of your own share

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 paragraph 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.*"

2.3.7 Court ordered partition

As stated earlier in the paper, a partition of land may be effected by either an agreement between the co-owners or as a result of a court order. In relation to a court ordered partition the Commissioner considers that the fact partitioning is not voluntary (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 paragraphs 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], 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 n9-10, 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.

Thus, a court ordered partition, for instance under section 66G of the Conveyancing Act because one of the co-owners wishes to sell, will be subject to GST.

2.3.8 Can the Margin Scheme Apply to a Partition?

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 available, the margin scheme allows the calculation of the GST liability attaching to certain taxable supplies of real property to be based not on the amount of consideration for the supply (as is the general liability rule), but on the difference between the consideration for the supply and the cost of its acquisition (that is, the so called margin). This calculation does not, however, take into account any input tax credits otherwise available from acquiring or developing the interest supplied.

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 satisfied: *GSTR 2009/2* at paragraph 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. It is said in *GSTR 2009/2* at paragraph 105 that:

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, section 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 section 75-11 and not under section 75-10.

2.3.9 Partitions by Partnerships

It is well known that 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 themselves.

2.3.10 Partitions by 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.

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 their own purposes and not for purposes of the GST joint venture activities.

3 Stamp duty implications

New South Wales Stamp Duties

In New South Wales, the *Duties Act 1997* (NSW) ('the **NSW Duties Act**') provides specifically for the partitioning of land in section 30, 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.

(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 NSW 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 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) as provided for subsection 30(3) of the NSW Duties Act is the greater of:

- the sum of amounts by which the unencumbered value of the subdivided lots which are agreed to be transferred under the deeds exceeds the unencumbered value of the interest held by that person in the original property. That is, duty is payable if the unencumbered value of the

divided part of the property taken by the co-owner exceeds the unencumbered value of the undivided share in the whole that was held by the registered proprietor; and

- the sum of consideration for the partition which may be paid by the parties.

However, the minimum duty chargeable is \$50.

If the unencumbered value of the undivided share of the co-owner in the original property that is being partitioned is equal to or less than the unencumbered value of the divided part taken by the co-owner, then the total excess value would be nil. As a result, if no consideration is paid for the partition by the parties, the dutiable value will be nil and the partition will be charged with the minimum duty of \$50 under section 30(4) of the NSW Duties Act.

3.1 Aoun Investments

Aoun Investments Pty Ltd v Chief Commissioner of State Revenue [2006] NSWSC 1394

Facts

In August 2003, *Aoun Investments Pty Ltd* ('**Aoun**'), the first plaintiff, became the registered proprietor of land at Telopea in New South Wales. The Second plaintiff, Boutros Najm Aoun, was already the registered proprietor of the land adjoining to the land owned by Aoun.

The plaintiffs executed a deed of partition in August 2003. In the deed, the plaintiffs agreed to develop the two adjoining blocks of land as a strata plan with 12 lots, and to consolidate the lands into one lot (lot 24) as a requirement of a development application. The plaintiffs agreed to partition the property between them, where Aoun was to hold lot 1-6 and Boutros was to hold lot 7-12.

The two adjoining blocks of land was consolidated and development consent was granted.

When development of the land has completed in October 2004, the folio for lot 24 was cancelled upon registration of the strata plan; instead, folios were created for lot 1 to 12 in the strata plan. The registered proprietors of lots 1, 2, 4, 5, 6, 8, 9, 10 and 12 were the first plaintiff of the part formerly in lot 27 and the second plaintiff of the part formerly in lot 28. The registered proprietor of lots 3, 7 and 11 was the first plaintiff.

Justice Gzell described the New Titles as 'Dual Entitlement'. It is the practice of New South Wales Land and Property Information, in the absence of transfers between registered proprietors, to issue a dual ownership or multiple ownership folio upon consolidation describing the interests in the consolidated land by reference to the interest that was held by each proprietor under the previous folios cancelled by operation of the plan of consolidation until the matter is resolved by transfers between the registered proprietors or to a third party or third parties.

A transfer was lodged with the Office of State Revenue in November 2004 where lot 1, 2, 4, 5 and 6 was transferred from the second plaintiff to the first plaintiff. A transfer from the first plaintiff to the second plaintiff of lots 7, 8, 9, 10, 11 and 12 was also lodged on the same date.

The transfers were initially stamped with nominal duty. However the Chief Commissioner of State Revenue subsequently issued a notice of assessment charging *ad valorem* duty on the transfers. The plaintiff's notice of objection against the assessment was rejected by the Commissioner and the plaintiffs seek review by the court.

Issue

Whether by the instrument of consolidation the plaintiffs were deemed to hold their interests in the consolidated lots as tenants in common.

Decision

Justice Gzell at paragraph 29 of *Aoun Investments* considered that ‘dual entitlement’ titles do not provide for co-ownership of property, but rather ‘ownership in severalty’:

In my view, the expression ‘joint proprietors’ ... connotes some form of co-ownership of property and is to be distinguished from the situation in which two or more persons are owners of particular parts of property, even those parts are included in a single certificate of title. That form of ownership is described as severalty. ... property is said to belong to persons in severalty where the share of each is ascertained (so that he can exclude the others from it) as opposed to joint ownership) as opposed to joint ownership, ownership in common, and coparcenary, where the owners hold in individual shares.

Further, at paragraph 30 of *Aoun Investments*, Justice Gzell held that:

In my view, the plaintiffs hold in severalty in this case. When lot 24 was created, the first plaintiff had title to a particular part of it, namely that part formerly in lot 27. Likewise, the second plaintiff had title to the other part of Lot 24, namely that formerly in lot 28. There was no entitlement to possession and enjoyment of the whole of the land in either the first plaintiff or the second plaintiff. Their rights were distinct and not rights of co-ownership.

That is, the expression ‘joint proprietor’s does not extend to the situation where the owners of the land had title only in respect of particular parts of the property to the exclusion of the other owners, notwithstanding that those parts of the land were included in a single Certificate of Title.

As a result, Justice Gzell concluded 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 by the plaintiffs as joint tenants or tenants in common. The lots were not so held.

As there was no partition within the meaning under section 30 of the NSW Duties Act, section 30 did not apply and the plaintiffs were liable for *ad valorem* duty on the transfers.

3.2 Sportscorp Australia

Sportscorp Australia Pty Ltd & Ors v Chief Commissioner of State Revenue [2004] NSWSC 1029

Facts

The first three plaintiffs of the case entered into a partnership to develop land in New South Wales. The fourth plaintiff, Queenscliff Estate Pty Ltd (**‘Queenscliff’**) was appointed by the first three plaintiffs as their agent, and Queenscliff acquired the land which it subsequently developed for residential accommodation.

Queenscliff registered a strata plan with respect to the development and the lots were transferred to the first three plaintiffs as tenants in common, and subsequently partitioned between them.

There was no dispute as to the operation of the partition provisions under the NSW Duties Act. However, the NSW Chief Commissioner of State Revenue assessed the transfers from Queenscliff to the first three plaintiffs with *ad valorem* duty. The plaintiffs argued that the transfers should be assessed for nominal duty of \$10.

Issue

Whether the transfers were additional instruments effecting a single dutiable transaction, transfers of dutiable property from the apparent purchaser to the real purchasers, or to beneficiaries in conformity with trusts, transfers back to the transferors, or transfers in consequence of the retirement of a trustee.

Two of the plaintiffs also claimed exemption for property transferred within a corporate group.

Decision

It was held that the interposition of the trust relationship also causes difficulties in the event that land is acquired by a trustee, strata titled and then distributed to the beneficiaries.

It seems that *Sportscorp* stands for the proposition that the transfer to the beneficiaries as tenants in common before the strata titling will not give rise to adverse stamp duty implications. The Court held that ‘... the identity between the dutiable property transferred from the apparent purchaser with the dutiable property vested in the apparent purchaser and that identity was lacking ...’, with the result that the transaction was subject to *ad valorem* stamp duty.

Gzell J distinguished *Growing Wealth* in *Sportscorp* on the basis that in *Sportscorp*, all the transferees had an interest as tenants in common in equal shares in the land that was acquired by the nominee/agent, and the subsequent transfers to them were also as tenants in common in equal shares. The Court in *Sportscorp* held that the main point of difference as between the property initially acquired by a nominee / agent, and that which was transferred to the principal was that the interest held by the nominee / agent and the creation of common property after the strata titling caused a different nature.

In discussing the application of section 57 of the Duties Act (i.e. nominal duty on transfers from trustee to beneficiary), the Court at paragraph 56 observed that:

The absence of common property from the property transferred makes it neither wholly nor substantially the same as the property the subject of the resulting trust deed.

A similar conclusion was reached with respect to the transfer back from nominee stamp duty concession contained in section 56 of the NSW Duties Act.

3.3 Revenue Ruling No DUT 35

The Commissioner of State Revenue observed at paragraph 6 of Revenue Ruling No DUT 35, entitled *Partitions of Land (‘the Ruling’)* that:

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 Commissioner further stated 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 land 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. 8. Duty on a partition is assessed in accordance with Section

The Commissioner also referred to the ‘dual entitlement’ practice at paragraphs 11 and 12 and confirmed the decision in *Aoun Investments* 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 NSW Duties Act will not apply, as the registered proprietors do not jointly hold the consolidated lots.

Queensland Stamp Duties

The relevant provision in Queensland for the partitioning of land is section 31 of the *Duties Act 2001* (Qld) ('**the Queensland Duties Act**'), which states:

31 Partitions

- (1) This section applies to dutiable transactions under which dutiable property held by persons jointly as joint tenants or tenants in common is transferred, or agreed to be transferred, to 1 or more of the persons (a *partition*).
- (2) The dutiable value of each dutiable transaction comprising the partition is the greater of the following—
 - (a) the amount by which the unencumbered value of the dutiable property transferred, or agreed to be transferred, is more than the unencumbered value of the interest held by the transferee in the property immediately before the transaction;
 - (b) the consideration paid by any party to the transaction.
- (3) For assessing transfer duty on each of the dutiable transactions, the transactions must be aggregated and treated as a single dutiable transaction.
- (4) The transfer duty imposed on the dutiable transactions under this section must be apportioned between the transactions as decided by the commissioner.
- (5) This section does not apply to a transaction if section 48 applies to the transaction.

It should be noted that although section 31 of the Queensland Duties Act appears very similar to subsection 30 of the NSW Duties Act, the provisions have been applied by the respective state revenue authority differently.

In Queensland, the predecessor of section 31 did not avail the co-owners of the same concessions as the NSW partitioning provisions. Broadly, under the old section 55 of the *Stamp Act 1894* (Qld), upon the partitioning, the co-owner will be subject to stamp duty based on the unencumbered value of the interests (which are acquired by the co-owner).

It is the Queensland commissioner's practice to allow a credit for the value of the property previously owned by the transferee when the partition takes place. For example, if two parties owned a half interest in two adjoining lots, and intend to take an entire lot each separately, then the subsequent transfers would attract duty on half the value of the property transferred.

Even though the Stamp Act 1894 was repealed and the Queensland Duties Act commenced on 1 March 2002, the Queensland Commissioner has sought to apply section 31 in a manner similar to the old section 55 so that a credit is given up to a value being the proportion in the property previously held. However, the Commissioner does not allow that credit to ultimately reduce the dutiable value to nil.

The major difference in practice in New South Wales and Queensland can be summarised as follows:

New South Wales	Queensland
Stamp duty payable: <ul style="list-style-type: none">- Unencumbered value of divided part <u>greater than</u> share of undivided whole	Stamp duty payable: <ul style="list-style-type: none">- Calculate stamp duty on unencumbered value of divided part- Less stamp duty on value already held

3.4 Growing Wealth Pty Ltd

Growing Wealth Pty Ltd & Ors v Commissioner of Stamp Duties [2000] QCA 418

Facts

The three appellants in this case were principals who engaged Strata Representatives Australia Pty Ltd ('Strata') as their agent to acquire land, subdivide the land and construct on each of the subdivided lots a separate residential unit. The appellants provided consideration for a total price of \$1,080,000 for the acquisition and construction, and the amount each appellant contributed is proportionate to the interest each of them took in the property as tenants in common.

At the completion of the development, Strata transferred each of the subdivided lots to the appellants as tenants in common with each holding an interest in the lot which corresponds to the amounts they have contributed.

The Queensland Commissioner of Stamp Duties assessed the transfer from Strata to the appellants for *ad valorem* duty on the consideration of \$1,080,000. The appellant argued that they were entitled to one of the following exemptions under the *Stamp Act 1894* (Qld) (now replaced by the Queensland Duties Act):

- the exemption under subsection 53(9) with respect to the transfer of property to the principal by an agent who initially acquired the property for the principal;
- the Commissioner's power to exclude from the total amount or value of the land to be assessed to take into account any improvements claimed by the transferee (i.e., the appellants) to have been effected by the transferee or at his or her own expenses; and

- the concession under section 55 with respect to the partitioning of land.

Issue

Whether a piece of land acquired by principals via an agent, which was developed, strata titled and then transferred to the principals, was the same property as that which was initially acquired by the agent.

Decision

In considering the concession under subsection 53(9) for transfers from an agent to the principal, the Queensland Court of Appeal concluded that a lot in a strata titled development was not the same 'property' as that which was acquired by the agent before the development. The Court observed at paragraph 11 that:

It may be accepted that, when it acquired the property consisting of the raw land, Strata did so by purchase, evidenced by contract of sale, as agent for all appellants as tenants in common in proportion to the amounts for which they agreed to subscribe. But in the event that it was only the agent of the appellants to the extent of their proportional interests in the whole of that land. What it later transferred to each appellant by the transfer assessed was not its proportional interest in the whole of the land but property of a different kind created by acts done pursuant to the Body Corporate and Community Management Act, property which was not in existence when Strata acquired the land.

The Court at paragraphs 12 and 13 of *Growing Wealth* held that the provision of common property as a result of the strata titling caused a change in the character of the land:

Even if the subdivision which had created the property transferred by the transfer had been a traditional subdivision of land it would, in our opinion, have been difficult to bring the transfer within the terms of the section. The property purchased as agent for the transferees would not have been that which was transferred to them. What would have been transferred would have been the whole interest in part of the land which the transferor had acquired as agent for the transferee and others in common.

However the application of the provision is made even more difficult by the nature of a subdivision under the Body Corporate and Community Management Act. Not only was what was transferred something which was not in existence when Strata acquired the land, it was property consisting of a bundle of statutory rights created by the Act upon registration of a community titles scheme.

4 Dealing with financiers and security arrangements

An issue to be determined is how the participants will be funding their investment. This is particularly important when one participant is debt funding the arrangement but others may not be. The issue to be determined is whether the security / funding risk can be limited so as to not expose the land being developed.

Typically, financiers will want a mortgage over the whole of the property notwithstanding that it may be held, for example, in a tenancy in common.

5 Body corporate and common property issues and timing consequences

Another issue to consider is whether the property to be developed will be strata titled.

In both the decision of *Growing Wealth* and *Sportscorp*, the NSW and the Queensland Supreme Court has separately concluded that the 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 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).

6 Illustrative examples and documentation requirements

6.1 Example One – NSW partition stamp duty calculation

Assumptions:

- Vacant land is purchased in NSW by Investor A and Investor B with their interests in the land as equal tenants in common;
- Investor A and Investor B construct two apartments on the land (Lot 1 and Lot 2);
- Investor A and Investor B decide to partition the property, whereby they receives one apartment each;
- At partitioning, the total value of the strata titled lots is \$5.9m. Lot 1, to be transferred wholly to Investor A has an unencumbered value after strata titling of \$2.7m; whereas Lot 2, to be transferred wholly to Investor B, has an unencumbered value after strata titling of \$3.2m.

The NSW stamp duty payable in respect of each lot as a result of the partition is:

Property / Transferee	Unencumbered value of divided part taken ('A')	Unencumbered value of undivided share in whole ('B')	(A-B)	Duty
Lot 1 – Investor A	\$2.7 m	50% of \$5.9m = \$2.95m	Negative	Nil
Lot 2 – Investor B	\$3.2m	50% of \$5.9m = \$2.95m	\$250,000	\$7,240
TOTAL	\$5.9m	\$5.9m		

6.2 Example Two – NSW partition stamp duty calculation

Assumptions as per Example One above, except that when Investor A and Investor B acquired their interest in the land as tenants in common, it equated to the proportionate values of the strata titled lots.

The NSW stamp duty payable in respect of each lot as a result of the partition would be:

Property / Transferee	Unencumbered value of divided part taken ('A')	Unencumbered value of undivided share in whole ('B')	(A-B)	Duty
Lot 1 – Investor A	\$2.7 m	45.76% of \$5.9m = \$2.7m	Nil	Nil
Lot 2 – Investor B	\$3.2m	54.24% of \$5.9m = \$3.2m	Nil	Nil
TOTAL	\$5.9m	\$5.9m		

6.3 Example Three – Queensland partition stamp duty calculation

Assumptions:

- Investor A and Investor B acquire vacant land as tenants in common for \$100,000.
- The total stamp duty paid when the land is acquired is \$2,350 (i.e., \$1,175 each).
- Investor A and Investor B build two apartments on the land for a total cost of \$300,000. The market value of the total developed property is \$500,000 (i.e., \$250,000 per apartment).
- Investor A and Investor B decide to partition the property, whereby they will receive one apartment each.

The Queensland stamp duty payable in respect of each apartment upon partition (assuming that they are of equal value) is:

Unencumbered value	\$250,000.00
Total stamp duty on unencumbered value	\$7,225.00
Less: credit on proportion already owned	\$3,162.50
Investor' liability	\$3,162.50

The Queensland stamp duty payable by each investor is:

Proportionate duty paid on acquisition of land	\$1,175.00
Duty paid on partition	\$3,162.50
Total duty paid	\$4,337.50
Stamp duty if purchased apartment	\$7,225.00
Actually paid	\$4,337.50
Savings	\$2,887.50

6.4 Example Four – NSW partition stamp duty calculation

Based on the same facts as Example Three above, the NSW stamp duty payable in respect of each apartment would be:

Property / Transferee	Unencumbered value of divided part taken ('A')	Unencumbered value of undivided share in whole ('B')	(A-B)	Duty
A	\$250,000	50% of \$500,000 = \$250,000	Nil	Nil
B	\$250,000	50% of \$500,000 = \$250,000	Nil	Nil
	\$500,000	\$500,000		

6.5 Documentation requirements

In Revenue Ruling No DUT 35, the NSW Commissioner of State Revenue stated that

10. Where there is an Agreement for Partition, the Agreement is stamped with ad valorem duty (or the minimum \$10 [or \$50 if executed on or after 1 January 2009]) and any transfers in conformity with that Agreement are charged with \$2 each [or \$50 if executed on or after 1 January 2009] under section 18(2). Where there is no Agreement, one instrument is stamped with ad valorem duty (or the minimum \$10 [or \$50 if executed on or after 1 January 2009]) and any additional instruments which effect the partition are charged with \$10 [or \$50 if executed on or after 1 January 2009] each under section 18(1).

Practically speaking, when effecting a partition and seeking to avail the section 30 of the NSW Duties Act concession, the following steps should be taken:

1. Entering into a development agreement before development commences. This deals with, amongst other things, the development of the property and strata titling / subdivision.
2. Entering into a deed of partition. This document outlines which subdivided / strata titled properties are going to whom.
3. Obtaining a value of each individual strata titled / subdivided item of land, which is subject to the deed of partition.
4. Finally, submitting the deed of partition, the valuation along with a transfer for stamping pursuant to section 30 of the NSW Duties Act.