Contract for the sale and purchase of land 2017 edition

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ABOUT THE AUTHOR

Tony Cahill was admitted to practice in 1981. After 13 years with a medium-sized city law firm, Tony commenced practice on his own account at Chatswood. In July 2002, Tony commenced a 'sabbatical' from private practice to concentrate primarily on legal education and writing.

He is a member of the Law Society's Property Law Environmental, Planning and Development Committees. He has been a member of the Re-Draft Committees for the editions of the Contract for the Sale of Land since 1992, and the editions of the Contract for the Sale of Business since 2000.

In 1995, Tony completed the Property Agency TAFE course which was then the most usual educational qualification for holders of licences under the former *Property, Stock and Business Agents Act 1941*.

He was a co-author with Russell Cocks and Paul Gibney of the first NSW edition of *1001 Conveyancing Answers*, and is currently the co-author with Gary Newton of *Conveyancing Service New South Wales* and *Annotated Conveyancing and Real Property Legislation New South Wales*, both published by LexisNexis Butterworths.

Tony has been a part-time lecturer at the University of Technology, Sydney, in construction law, property transactions, legal studies, and real estate law, and has lectured at the Sydney and Northern Sydney Institutes of TAFE in various law subjects. He currently lectures in the Applied Law Program at the College of Law, Sydney.

Using the contract for sale and purchase of land
August 2017

Tony Cahill

Revision of the Law Society – REI Joint Copyright Contract

The joint copyright standard contract for sale of land had settled over the past two decades or so into a four to five year revision and reissue cycle. That has now accelerated dramatically.

In the second half of 2009 the Law Society informed the profession (via *Monday Briefs*) that a review of the standard contract was underway. The new edition was publicly released on 17 November 2014. Why the lengthy gestation period?

- Discussion about the most effective delivery mode.
- Uncertainty about the way in which supplies of going concerns and farmland is to be treated for GST.
- Amendments to the contract to reflect the introduction of electronic conveyancing.

There was only an 18 month gap between the 2014 contract and its successor. The passage of Federal legislation introducing a withholding tax on some sales of real estate meant work commenced on a new edition of the contract in the latter half of 2015. The 2016 edition was released on 30 May 2016.

An "interim" revision (styled the 2016/17 edition) was released on 21 June 2017 taking into account changes to the Foreign Resident Capital Gains Tax regime effective from 1 July 2017.

A more comprehensive review (driven largely by the staged repeal and re-enactment of the *Conveyancing (Sale of Land) Regulation*) led to the publication of a 2017 edition. This was released on 31 July 2017.

Reproduction of the standard form

A frequently asked question relating to intellectual property issues is what is the status of photocopies of the contract. The short answer is that an exchanged contract is not invalid simply because one of the exchanged parts is a photocopy (or for that matter a facsimile copy). I understand the policy of the joint copyright holders is that there is no objection to producing photocopies of the “blue” pages to comply with statutory obligations (such as making available a copy of the proposed contract prior to the estate agent marketing residential property) or arming prospective purchasers (for instance, so they can seek legal advice about the draft contract – an especially important step in an auction context). Exchange should take place using original documents rather than photocopies. For each transaction using the “paper” contract there should be two “blue” contracts.

A form letter was sent by the Law Society on behalf of the Joint Copyright Committee to all law firms in late 2010 reminding practitioners of the Committee’s stance on copyright.

An electronic version of the 2005 edition was released in late 2009, and has been available for purchase from the Law Society Shop. Its take-up was extremely limited. Use of the electronic version was also licensed to a number of commercial providers.

The joint copyright holders have decided that the 2014 and later editions of the land contract will only be sold in an electronic format rather than on “blue”. The electronic form has been available from the ECOS portal via the Law Society website since 17 November 2014. Pages 3 and following of the electronic form are in a PDF format and watermarked with the address of the property. Pages 1 and 2 are in a word-processor compatible format, and the standing permission to produce “your own version” of pages 1 and 2 (possibly via your practice management software) continues for the e-only editions. Pricing depends on whether the purchaser of the electronic form has registered for the website, the Law Society membership status and whether the purchase is of the PDF pages only.

Transitioning between the various land contracts

Unlike some previous editions (for example, the editions issued in 1988 and 2000) there is no imperative to change to the new edition as from a specific date.

The 2014 edition is preferable if the vendor proposes that the transaction will proceed through the National Electronic Conveyancing System via PEXA, or if the vendor is contemplating a deposit bond or guarantee in place of the traditional cash or cheque deposit.

The 2016 and now 2016/17 editions are preferable if the property has a swimming pool or if the federal withholding tax obligations might apply.

The 2017 edition was issued to take into account the changes to the *Conveyancing (Sale of Land) Regulation* with effect from 1 September 2017.

Foreign Acquisitions and Takeovers Act 1975

The Act has been substantially recast with effect from 1 December 2015. The key changes of note to property practitioners are:

- All but the first two sections have been renumbered (even if not amended). For example, the final section of the Act (the regulation-making power) was section 39 on 30 November 2015, and became section 139 as at 1 December 2015. It follows that you should review any boilerplate provisions in your letters of advice and other documents – if there is a reference to a specific section number of the Act that reference will now be incorrect.
- The substantial interest threshold has been increased from 15% to 20%.
- Reduced screening thresholds have been introduced in the agricultural sector (and a new concept of an “agribusiness” has been introduced).
- Increased criminal penalties and civil penalties now apply.
- A register of foreign ownership of agricultural land has been established. This is to be a “private” Register (as distinct from the current, publicly available Torrens registers in the various jurisdictions) and will be built from information provided to the

ATO direct, and information provided by state authorities such as Land Registries and Revenue Offices.

- The thresholds for "agribusinesses" and "agricultural land" now $55 million and $15 million respectively.
- The Commissioner of Taxation (rather than Treasurer) now deals with residential real estate.
- "30 day decision period" can be extended in certain circumstances.
- Fees are now levied on foreign investment applications (see *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* and the accompanying Regulation).

The "basic" fees structure for residential applications was initially set as follows:

- Up to and including $1 million - $5000
- Over $1 million and less than $2 million - $10000
- $2 million but less the $3 million - $20000
- Additional $ 10000 per million thereafter

The fees are indexed to CPI as at 1 July each year.

The imposition of fees raises at least two practical consequences:

1. What will be the position of an intending foreign bidder at auction? An intending purchaser can apply for an "Established dwelling exemption certificate (auctions)" permitting the purchase of one property – either under the hammer or once passed in via post-auction negotiations. The application must specify maximum price – if the price is exceeded a breach occurs. The certificate is valid for 6 months and attracts the "basic" fee noted above. For more details see FIRB Guidance Note GN9.

2. Developers hoping to sell to foreign investors can apply for a developer exemption certificate (similar to the former "advanced off the plan" certificates). As was previously the case the development must be marketed in Australia. The development must comprise 50 or more residential lots, and be DA approved. The developer must pay an initial application fee of $25,000, and is liable for a per dwelling fee for each foreign sale at the "basic scale". The developer also has regular reporting obligations. If a foreign purchaser acquires interests greater than $3 million then the

purchaser must apply for approval. For more details see FIRB Guidance Note GN8.

The 2017 Federal Budget announced further changes to the foreign acquisitions regime. Among the key changes were a reorganisation and simplification of some of the fees, and a reintroduction of the requirement that no more than 50% of the sales in a development be to foreign persons.

State Revenue changes – land tax

The role of the OSR in NSW as a data collector for the Federal Register of foreign ownership of land has some consequences for the conveyancing process.

In November 2015 the six States and the ACT agreed to develop a register of foreign ownership of all land. The agreed commencement date was 1 July 2016. The ATO administers the register, with each participating jurisdiction nominating a state agency to act as the primary data capture organ for the jurisdiction. In NSW that role fell to the Office of State Revenue.

The OSR has long collected data on property transactions – notably via the stamping process, but also through the NOS system and via land tax applications. It appears the ATO had concerns about the timeliness and accuracy of the existing datasets.

The *Taxation Administration Amendment (Collection and Disclosure of Information to Commonwealth) Bill 2016* was introduced into Parliament on 11 May 2016. The Act took effect on 1 July 2016.

The main focus of the amending legislation is to amend the *Taxation Administration Act* to confirm that OSR is empowered to collect and pass on information to the Commonwealth. The information required to complete a section 47 application will inevitably increase.

Of greater practical significance is an amendment to the *Conveyancing (Sale of Land) Regulation 2010.* A new clause 8A in the Regulation provides:

8A Implied term of contract for all contracts on or after 1 July 2016

(1) For the purposes of section 52A (2) (b) of the Act, the following terms are prescribed for all contracts for the sale of land entered into on or after 1 July 2016:

(a) in the case where the date for completion is specified in the contract:

(i) if that date is 14 days or less after the day on which the contract is made—the term set out in clause 4 of Schedule 2, or

(ii) if that date is more than 14 days after the day on which the contract is made—the term set out in clause 5 of Schedule 2,

(b) in the case where the date for completion is not specified in the contract:

(i) if the parties to the contract have agreed on a date for completion that is 14 days or less after the day on which the contract is made—the term set out in clause 4 of Schedule 2, or

(ii) if the parties to the contract have agreed on a date for completion that is more than 14 days after the day on which the contract is made—the term set out in clause 5 of Schedule 2, or

(iii) if the parties to the contract have not agreed on a date for completion—the term set out in clause 5 of Schedule 2.

(2) In Schedule 2, current land tax certificate, in relation to a contract for sale, means a certificate issued under section 47 of the Land Tax Management Act 1956 (as is relevant to the land the subject of the contract for sale or, in the case of a contract for the sale of land comprising one or more lots in a proposed plan of subdivision, the land from which the lot is to be created), being a certificate applied for by, or on behalf of, the vendor that is issued:

(a) in the year in which the contract is to be completed, or

(b) no more than 3 months before the date on which service is required under a term set out in Schedule 2.

Schedule 2 to the Regulation is amended by adding new clauses 4 and 5:

4 Land tax certificate—contracts completing in 14 days or less

(1) The vendor must serve, on the day that the contract is made, a current land tax certificate.

(2) The purchaser does not have to complete before the date on which the certificate is served.

5 Land tax certificate—contracts completing in more than 14 days and contracts where no completion date agreed

> (1) The vendor must serve, at least 14 days before completion, a current land tax certificate.
>
> (2) The purchaser does not have to complete earlier than 14 days after service of the certificate.

The 2017 Regulation recast and renumbered the clause, but there appears to be no change in substance.

The focus has shifted from a purchaser applying for a section 47 certificate so that now the applicant will almost always be the vendor. The certificate must be 'current' within the meaning of the Regulation. In most cases a certificate applied for prior to exchange will still be 'current' for the purposes of the clause (and where there is a completion date of 14 days or less it is expected that an application will be made pre-exchange). Where the date for completion is extended beyond the 'usual' time, the vendor should consider postponing their application so the certificate does not lose its currency. Where the vendor is selling off the plan, the application should be made prior to registration of the subdivision plan (otherwise the vendor in a large subdivision will be put to the expense of multiple certificates).

The other point to note is that the vendor's obligation is to serve a 'current', not a 'clear', land tax certificate. The obligation of a vendor to provide an unencumbered title (existing under the general law, and affirmed by clause 16.3) will ground the duty to remove any land tax charge. Clause 16.6 in the 2016 and subsequent editions confirms that if a party (now probably the vendor but possibly the purchaser) serves a land tax certificate disclosing a charge, the vendor must serve evidence showing the charge is no longer effective.

State Revenue changes – 2017 Budget

The *State Revenue and Other Legislation Amendment (Budget Measures) Bill 2017* was introduced into Parliament on 20 June 2017.

The key changes of interest to property practitioners set out in the Bill (drawing from the Explanatory Note) are:

(a) the Duties Act 1997 is amended:

(i) to make further provision with respect to the duty exemption and concession scheme for first home buyers (including by increasing the cap on property value for acquisitions eligible under the scheme, extending eligibility to certain joint purchasers under shared equity arrangements and removing a limitation restricting the scheme to new homes), and

(ii) to make further provision with respect to duty charged on certain residential land transactions involving foreign persons (including by increasing, from 4% to 8%, the rate of surcharge purchaser duty payable on those transactions and providing for an exemption from, or refund of, surcharge purchaser duty in certain circumstances), and

(iii) to limit a provision enabling a purchaser to defer liability for duty on an agreement for the sale of land “off the plan” to purchasers who intend to use and occupy the residence as a principal place of residence for a continuous period of at least 6 months, and

(iv) to abolish duty on lenders mortgage insurance, crop insurance and livestock insurance, and to abolish duty for small businesses on commercial vehicle insurance, commercial aviation insurance and occupational indemnity insurance,

(b) the First Home Owner Grant (New Homes) Act 2000 is amended to reduce (from $750,000 to $600,000) the first home owner grant cap for a contract to purchase a new home,

(c) the Land Tax Act 1956 is amended to make further provision with respect to land tax levied on residential land owned by foreign persons (including by increasing, from 0.75% to 2%, the rate of surcharge land tax payable on the land, and providing for an exemption from, or refund of, surcharge land tax in certain circumstances),

(d) the Land Tax Management Act 1956 is amended to extend the principal place of residence exemption to land used and occupied by an owner under certain shared equity arrangements.

Most of the amendments took effect as from 1 July 2017.

The surcharge land tax rate change will operate for the 2018 land tax year.

A handful of provisions (largely beneficial to taxpayers including certain corporate Australian-based developers and some foreign persons who meet a residency requirement) have retrospective effect.

Foreign resident capital gains withholding payments

The *Tax and Superannuation Laws Amendment (2015 Measures No. 6) Bill 2015* passed both Houses of the Federal Parliament on 22 February 2016. Among other things, the amending legislation inserts a new Subdivision 14-D into Schedule 1 of the *Taxation Administration Act 1953* (Cth).

The provisions apply in relation to acquisitions on or after 1 July 2016.

The regime applies to, among other things, any sales of direct interests of real estate (including company title interests), subject to a threshold (initially $2,000,000, reduced to $750,000 as from 1 July 2017) based on the market value of the asset. The obligation to remit resides with the purchaser (with the amount to be reconciled against any tax lability of the vendor). The administration of the new system relies primarily on online applications, with the implementation of a “clearance” system for transactions involving direct property interests.

The Law Society and the Law Council have identified a number of practical problems with the regime. If the value of the property meets or exceeds the threshold, a purchaser will have to withhold a percentage (initially 10%, increased to 12.5% as from 1 July 2017) of the price (in fact strictly speaking not the price as defined in the contract – see s 14-200(3)(a)(i)) and remit that to the ATO unless the purchaser receives:

- A clearance certificate <u>in respect of each vendor</u>; or
- A statement from the ATO that a lesser amount is payable.

Furthermore, the provisions contemplate that the required amount generally must be paid by electronic means and is payable on the day of completion. The withholding obligation extends to options but with markedly different operation than is the case with sales. Specifically, neither the clearance certificate system nor the threshold exemption threshold apply to options. Furthermore, since options do not proceed through a process of ‘exchange’ and ‘settlement’, payment timing will differ.

The 2016 edition of the contract:

- Adds a clearance certificate check box to the list of documents
- Adds new definitions relevant to FRCGW to clause 1
- Amends clause 16.7 (now restructured into subclauses and 'bullet points') to confirm the purchaser's obligation to withhold the 'remittance amount' from the price
- Adds a new substantive provision – clause 31.

Clause 31.1 states the scope of the clause – the threshold requirements are:

- Contract made on or after 1/7/16
- Not an 'excluded transaction' (the most common type will be transactions where the market value is less than $2 million)
- A clearance certificate relating to each vendor is not attached to the contract.

Clause 31.2 sets out four key obligations of the purchaser:

- Provide evidence of registration as a withholder with the ATO at least 5 days before the date for completion.
- Produce settlement cheque for the 'remittance amount' at settlement (unless PEXA is used).
- Forward the cheque immediately after completion.
- Serve evidence the payment has been received.

These obligations do not apply where the vendor has served a clearance certificate in respect of each vendor.

Where the vendor serves a clearance certificate or variation certificate after exchange the purchaser does not have to complete until at least seven days after service (clause 31.4).

The withholding registration and payment obligations cease to apply once a clearance certificate is served in respect of every vendor (clause 31.5).

Significant changes to the FRCGW regime were announced in the Federal Budget on 9 May 2017. As from 1 July 2017:

- The proportion of "excluded transactions" will be significantly reduced by lowering the threshold from $2,000,000 to $750,000;

- The withholding rate will increase from 10% to 12.5%.

The former change did not necessitate an amendment to the provisions of the 2016 edition of the joint copyright contract (though the warning note about FRCGW in the 2016 edition would no longer be accurate).

The latter change was problematic in that the 2016 edition referred to the rate of 10% in the definition of ‘remittance amount’ in clause 1.

The problem is not as dramatic as might otherwise be the case in that the entire contract is expressed to be “subject to *legislation* that cannot be excluded” (of which the *Taxation Administration Act* is an example). Further, Sch 1 s 16-20(2) of the Act provides:

> (2) An entity is discharged from all liability to pay so much of the total amount payable to *acquire a *CGT asset as is equal to any amount the entity pays to the Commissioner under Subdivision 14-D in relation to the acquisition.

However one can imagine arguments between parties about a tension between the entitlement of a purchaser to withhold the amount required to be remitted under the legislation and the procedures envisaged currently under clause 31.

Where a transaction is entered into on or after 1 July 2017, one (ultra-minimalist) amendment to the 2016 edition of the contract would be to change 10% to 12.5% in the definition of “remittance amount”. This would not of course “future-proof” the contract against subsequent changes to the rate. The 2016/17 edition has included a new definition – “FRCGW rate” defined by reference to the percentage mentioned in s14-200(3)(a) of Schedule 1 to the *TA Act*. The definition of “remittance amount” has been consequentially amended. That drafting style mirrors what has been done in the contract with the definition of *GST rate.*

Clause 31 has been amended to remove a superfluous reference to the provision only applying where the contract was entered into on or after 1 July 2016.

For more abundant caution, clause 20.11 now specifically mentions that a change to legislation might include a change to a rate.

The 2017 edition further tweaks the clause, dealing with situations where:

- The purchaser is not identical with the transferee because of a direction given under clause 4.3;

- There is a variation certificate showing a nil amount payable.

Unfair contract terms

What is the impact of the UCT provisions in ACL on the 2014 and 2016 editions?

- The form has been re-titled "Contract for the sale and purchase of land".
- A counterbalance to clause 9 has been included with the insertion of a new clause 8.2:

> 8.2 If the vendor does not comply with this contract (or a notice under or relating to it) in an essential respect, the purchaser can *terminate* by *serving* a notice. After the *termination* –
>
> 8.2.1 the purchaser can recover the deposit and any other money paid by the purchaser under this contract;
>
> 8.2.2 the purchaser can sue the vendor to recover damages for breach of contract; and
>
> 8.2.3 if the purchaser has been in possession a *party* can claim for a reasonable adjustment.

In April 2015 the Government released an exposure draft of a *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill* 2015. The Exposure Draft Bill proposed that, to quote from an accompanying Ministerial Statement:

> [A] court will be able to strike out a term of a small business contract that is considered unfair. For example, a term that allows a big business to unilaterally change the price or key terms during the course of the contract could be considered unfair.
>
> The protections will apply to businesses that employ less than 20 persons for transactions under $100,000*, or $250,000* for contracts that last longer than 12 months.

*Following amendments pressed in the Senate, the thresholds mentioned above have been increased to $300,000 and $1,000,000 respectively.

The extension of the unfair contracts terms provisions to small business contracts applies as from 12 November 2016. Note that where an existing contract is renewed or varied that will in some circumstances bring the contract within reach of the small business protections.

While the monetary thresholds will exclude many sales or purchases of realty, it may be that some sales and purchases of business and possibly (depending on how one calculates the transaction "price") some commercial leases will be impacted by the amendments. Loans to small businesses will also potentially be impacted by the amendments to the ASIC Act.

Loose-fill asbestos

The *Home Building and Duties Amendment (Loose-fill Asbestos Insulation Affected Premises) Act 2015* was assented to, and commenced, on 5 November 2015.

The amendment Act inserts a new Division 1A into Part 8 of the Act. Sections 119A to 119C are set out below:

119A Definitions

In this Division:

affected residential premises means any residential premises that are listed on the Register, but does not include any premises of a class that is excluded from this definition by the regulations.

loose-fill asbestos insulation means loose-fill amosite or crocidolite asbestos used as ceiling insulation.

Register means the register required to be maintained under section 119B.

residential premises means any building that is wholly or partly used (or is wholly or partly designed, constructed or adapted for use) as a place of residence.

119B Register

(1) The Secretary is to maintain a register of residential premises that contain or have contained loose-fill asbestos insulation.

(2) Residential premises are to be listed on the Register if the Secretary is satisfied that the presence of loose-fill asbestos insulation at the premises has been verified in accordance with the regulations.

(3) Other residential premises may be listed on the Register in the circumstances prescribed by the regulations.

(4) The Register is to include the following particulars in relation to residential premises that are listed on the Register:

(a) the address and title particulars (such as the Lot and DP numbers) of the land where the premises are located,

(b) any other particulars that are prescribed by the regulations.

(5) The names of owners or occupiers of residential premises who are individuals are not to be included on the Register.

(6) The Register is to be in the form determined by the Secretary and is to be available for inspection by the public.

(7) The Secretary is to remove the following particulars relating to affected residential premises from the Register:

(a) all particulars if the Secretary is satisfied that the premises have been demolished and the land on which the premises were erected has been remediated,

(b) any particulars that the Secretary is satisfied:

(i) are false, erroneous or misleading, or

(ii) have been erroneously included in the Register,

(c) any other particulars in the circumstances prescribed by the regulations.

119C Warning signs

(1) The owner of affected residential premises must ensure that a compliant warning sign is displayed at any place at the premises that is prescribed by the regulations.

(2) This section does not require the owner of a lot in a strata scheme to display a compliant warning sign at any part of the premises that is not comprised in the lot.

(3) If affected residential premises are the subject of a strata scheme, the owners corporation for the scheme must ensure that a compliant warning sign is displayed at any place at the premises that is prescribed by the regulations and consists of common property.

(4) A person must not remove, or cause or permit to be removed, a compliant warning sign from affected residential premises.

(5) Despite subsection (4), a compliant warning sign may be removed from affected residential premises by a person authorised under section 126 (1) to enter the premises.

(6) The Secretary may, by order published in the Gazette, extend the application of this section to any premises specified in the order if the Secretary is satisfied that there are reasonable grounds to suspect that the premises contain loose-fill asbestos insulation.

(7) In this section:

affected residential premises includes any premises in relation to which an order under this section is in force.

compliant warning sign means a sign about loose-fill asbestos insulation that complies with any requirements (including any requirements about its display) prescribed by the regulations.

lot, ***owners corporation*** and ***strata scheme*** have the same meanings as in the *Strata Schemes Management Act 1996*.

Maximum penalty: 200 penalty units in the case of a corporation and 50 penalty units in any other case.

The *Home Building Amendment (Loose-fill Asbestos Insulation) Regulation 2016* and the *Residential Tenancies Amendment (Loose-fill Asbestos Insulation) Regulation 2016* were both published on the Legislation Website on 27 May 2016. The first-mentioned Regulation commenced on that date. The amendments to the *Residential Tenancies Regulation* have a staged commencement. The obligation to disclose to a tenant that the premises are listed on the LFAI Register commenced as from 30 May 2016. The corresponding amendments to the prescribed form of residential tenancy agreement commence on 30 October 2016.

The Government has also amended Schedule 4 of the *Environmental Planning and Assessment Regulation 2000* (which prescribes the content of a section 149(2) certificate) to require disclosure if the premises are on the

Register. The amendment was published on the Legislation Website on 16 June 2016, and commenced on 20 June 2016.

The 2017 Regulation adds a warning notice about loose-fill asbestos insulation to the list of prescribed documents in Schedule 1.

Reforms to insurance cover under the Home Building Act

Since 1 July 2010, NSW Government has been sole supplier of coverage (via the State Insurance Regulatory Authority). The Government has long-standing concerns about operation of the Home Building Compensation Fund, and in particular its financial viability. According to the SIRA website (as at June 2017), the Fund has sustained $95 million in losses since 2013 and is accruing unfunded liabilities at rate of over $1.7 million per week.

The Government's response was to introduce the *Home Building Amendment (Compensation Reform) Bill* 2017. The Bill was assented to on 27 June 2017. Some (broadly machinery) provisions commenced on 30 June 2017. The major changes (those requiring amendments to the Regulation) were not commenced on that date.

The key features of interest to conveyancing practitioners are:

- Reopening the home building insurance market to private insurers.
- Allowing coverage to be provided in two as well as one insurance contract – non-completion coverage and breach of statutory warranty coverage.
- Prohibiting claims more than 10 years after work completed.
- Vesting regulatory functions over private insurers via SIRA including licensing of insurers.
- Setting up an indemnity scheme to provide a remedy where a licensed insurer becomes insolvent.
- Allowing development of approved "alternative indemnity products".
- Enabling regulations to exempt builders doing work on behalf of the Crown or State owned corporations from insurance requirements.

- Adoption of new terminology:
- **Construction period insurance contract**: must cover a person for whom work is done and the person's successors in title against the risk of loss arising from non-completion of work, and breaches of statutory warranty, where the contractor becomes insolvent, dies or disappears before completing the work
- **Warranty period insurance contract**: must cover a person for whom work is done and the person's successors in title against the risk of loss arising from a breach of statutory warranty where the contractor becomes insolvent, dies or disappears.
- One policy can cover both classes of risk.

How are the key provisions relevant to vendors and purchasers (sections 95 to 96B) affected?

- References to "the Secretary" (Commissioner for Fair Trading) are changed to "the Authority" (that is, SIRA).
- A Note is added cross-referencing Part 6B (which deals with alternative indemnity products).
- The reference in s95 to "insurance under the Home Building Compensation Fund" changed to "insurance under this Part".

Query whether these changes go far enough:

- Should ss 96 and 96A refer to "one or more" contracts of insurance being disclosed in contracts for sale?
- There is no attempt to clarify the "conspicuous note / prominent statement" dilemma.

Deposit "top up" clauses – an ongoing debate

The use of clauses allowing the purchaser to pay part of the deposit at a time later than the formation of contract has continued to feature in litigation over the past decade.

The deposit serves three primary functions in a vendor-purchaser transaction:

- it is an "earnest", something which indicates the genuineness of the buyer;

- it is a security for performance by the purchaser – the purchaser runs the risk of losing the deposit on default in an essential respect;
- it is part of the price.

Some property professionals would add a fourth function – the deposit is the amount out of which the estate agent typically receives commission.

In the 1996 edition of the joint copyright contract this clause was substantially redrafted to take into account two developments:

- The increasingly prevalent part payment of deposits.
- The use of deposit bonds and guarantees.

Clause 2 contemplates the possibility that part of the deposit might be paid after exchange of contracts. The practice is permissible (for instance, a deposit payable in two instalments passed without any comment by the High Court in *Romanos v Pentagold Investments Pty Limited* (2003) 217 CLR 367, [2003] HCA 58), although not in general recommended.

A growing body of cases decided since the issue of the 2005 contract illustrate potential problems with 'staggering' the time for payment of the deposit: *Luong Dinh Luu v Sovereign Developments Pty Ltd* [2006] NSWCA 40 (clause ineffective); *Australian Land Co Pty Limited v Tumut Festival Centre Pty Limited* [2006] NSWSC 828 (clause upheld; *Sovereign Developments* distinguished); *Iannello v Sharpe* (2006) NSW ConvR ¶56-162, [2006] NSWSC 713; (2007) 69 NSWLR 452, 12 BPR 23,887, NSW ConvR ¶56-179, [2007] NSWCA 61 (provision attempting to provide for a top-up found at first instance to be effective; Court of Appeal held that the clause was ineffective; considering the contract as a whole the deposit was in fact only 5%, despite the amendment to page 1 of the printed form); *Cloud Top Pty Limited & Anor v Toma Services Pty Limited & Anor* [2008] NSWSC 568: BC200804579 (clause held to be effective); and *Boyarsky v Taylor* [2008] NSWSC 1415 (clause ineffective). In *Boyarsky* Brereton J considered both *Sovereign Developments* and *Iannello* (but not *Cloud Top)*, and declined to order that the purchaser make the second payment. His Honour observed (at [48] to [51]):

> 48 I turn then to the second question, which is whether an order should be made requiring payment of the second instalment of the deposit. In *Luu v Sovereign Developments Pty Ltd* [2006] NSWCA 40, Bryson JA, speaking for the Court of Appeal, held that provisions requiring a 5 per cent deposit to be topped up to 10 per cent on default were void as a penalty. In *Iannello v*

Sharpe [2007] NSWCA 61; (2007) 69 NSWLR 452, Hodgson JA, in the Court of Appeal, rejected two attempts to distinguish the relevant condition in that case from that in *Iannello v Sharpe*. Two reasons were advanced in the present case for distinguishing the present special condition from those in *Luu* and *Iannello* in that case. The *first* was that in each of those cases, the obligation to pay the second instalment of the deposit was in terms conditioned on default, and that is not so in the present case, where the provision does not refer to default but simply requires payment "upon the completion date". The *second* was that in this case there were circumstances in which the deposit could become payable and have effect as an earnest for performance of the purchaser's obligations under the contract.

49 As to the first of those arguments, it is correct that in this case the provision is not conditioned on breach or default under the contract. That, however, is not an answer. Where the right to receive such a payment arises on the happening of any number of events, some only of which are breaches of contract and some of which are not, but the event in the particular case is one which is a breach of contract, then the provision is a penalty and void [*Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86; *Bridge v Campbell Discount Co Ltd* [1962] AC 600; *O'Dea v All States Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, 367, 390; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 184-185, 211; *Bartercard Ltd v Myallhurst Pty Ltd* [2000] QCA 445, [2]]. Even if, which for reasons to which I shall come I doubt, the second payment was exigible in events other than breach of contract, on the facts of this case it is exacted on breach of contract, and in those circumstances is a penalty and void.

50 In any event, I do not see how it could become payable under the present contract in circumstances that did not involve a breach by the purchaser of the contract. It was hypothesised that it could become payable as an earnest of the purchaser's continuing commitment to the contract where an extension was granted by the vendor of time to complete. That would itself involve either a contractual variation to the completion date or at least some allowance of an indulgence outside what was required by the contract so as to involve a departure from rather than adherence to the terms of the contract. If the contract is applied according to its terms, the only circumstance in which the second instalment would become due would be if, in breach of special condition 15, the purchaser did not complete on the completion date. Accordingly, both reasons advanced for distinguishing *Iannello* do not apply. As Hodgson JA said (at [33]), an unconditional promise to pay an amount on default cannot itself count as a deposit, because that is the very sort of promise that would normally amount to a promise to pay a penalty, unless it is a genuine pre-estimate of damages. In the light of *Luu* and *Iannello*, it could not seriously be argued, and indeed it was not, that the second instalment of five per cent could be seen as a genuine pre-estimate of damages.

> 51 Accordingly, I would hold that the obligation to pay the second instalment "upon the completion date" is void as a penalty.

For a useful (and in my view cogent) review of the authorities see *Rana v Dalla Costa* [2014] NSWSC 1113 per Harrison AsJ.. In that case the staggered arrangement was held to be effective. The relevant special conditions were in these terms:

> "B7 DEPOSIT
>
> In the event that the Purchaser pays less than 10% of the purchase price as deposit pursuant to clause 2 of this contract and if the Purchaser commits a default hereunder then the whole of the 10% deposit will become due and payable notwithstanding that this contract is not completed. This clause will not merge on completion and the Vendor will be entitled to sue for recovery of so much of the 10% deposit that remains outstanding.
>
> B14 DEPOSIT
>
> (a) The deposit of $50,000.00 is payable as follows:
>
> (i) An initial deposit of $25,000.00 upon exchange; and
>
> (ii) The balance of $25,000.00 within 70 days of the date of this Contract for Sale.
>
> (b) The Purchaser acknowledges that the initial deposit of $25,000.00 is nonrefundable and is to be released to the Vendor immediately after exchange of Contracts.

(It is notable that the time for payment of the final tranche (70 days after exchange) was much earlier than the due date for completion (some seven months after exchange).

In *Kazacos v Shuangling International Development Pty Ltd* [2016] NSWSC 1504 the plaintiffs entered into a contract to sell a property at Sydney CBD property to the first defendant. The purchase price was $17 million. The Completion Date was 12 months after the date of the contract. The deposit was said to be $1,700,000 but special condition 52.1 provided that one half of the deposit, equal to five per cent of the price, was payable on the making of the contract. The other half, equal to a further five per cent of the price, was payable on the earlier of the Completion Date and the

date on which the contract was actually completed. Only $850,000 was paid on exchange. White J held that the second tranche constituted a penalty and did not form part of the deposit.

What advice should then be given to vendors when a purchaser requests a reduced deposit? In the light of the Court of Appeal decisions of *Luu* and *Iannello* in particular, I suggest:

- If the deposit is to be reduced from the "usual" 10 per cent, it is likely (both in a legal and practical sense) that the amount recoverable if the purchaser defaults in a way that brings cl 9 of the contract into play is that reduced amount.
- The vendor should be advised about alternatives to a cash or cheque deposit (for instance, a deposit bond or guarantee).
- The front page of the contract and any special conditions should be checked for internal consistency as to the amount of deposit, although such consistency in itself will not ensure that the second payment is characterised as a deposit.
- A special condition providing for a further payment on a specified date (for instance, the fifth business day after the contract date) or the happening of a particular event (for example, the receipt of development approval – see *Romanos v Pentagold Investments Pty Ltd,* cited earlier) – is less likely to strike difficulty than a further payment triggered by a (serious) default.
- A clause which requires a post-exchange payment to be made at a time when the purchaser could fairly be said to be "in earnest", rather than at a time when the purchaser has demonstrated an unwillingness or inability to proceed, is less likely to be open to challenge.
- The express categorisation of the second payment as part of the deposit will not be conclusive.
- While there is a divergence of approach in the decisions at first instance, the two Court of Appeal decisions each held a top-up clause to be ineffective.

Deposit bonds or guarantees

There were two clauses in the 2005 edition dealing with satisfaction of the deposit by a "bond or guarantee", either in whole [2.6] or in part [2.7].

These clauses excluded the operation of the preceding provisions of cl 2, together with cl 3 (in the 2000 edition relating to investment of deposit, and in the 2005 edition relating to release of the deposit to pay vendor duty), to the extent that the deposit was covered by a bond or guarantee.

The clause contemplates the use of a bond or guarantee, but only if the vendor accepts the bond or guarantee. Purchasers and their solicitors should not automatically presume that a bond or guarantee will be acceptable; it is a matter for inquiry in each case.

The 2014 edition includes a clause dealing substantively with deposit bonds or guarantees (the drafters have adopted *deposit-bond* as a portmanteau). The threshold is that the vendor will need to explicitly choose to choose a deposit-bond – the default choice in the printed form is "no".

Some issues which should be considered in advising a vendor client about a proposal to tender a bond or guarantee are:

- The bond may be useful where a purchaser cannot provide a "normal" 10 per cent deposit.
- Is the bond issuer financially sound?
- Does the bond have a time limit for its operation, and, if so, will the time limit be sufficient (allowing for possibly substantial delay between the due date for completion and the time for calling on the bond)? Should the contract address the possibility of a substitute bond?
- How is the validity of the bond to be verified? The banking of a cheque tests its validity; what corresponding steps might be taken for verifying a bond?
- Is the bond truly unconditional, or will the issuer require further evidence prior to paying out on the bond? To put it another way, are there circumstances in which the issuer will decline payment?
- Who holds the bond? If a bond is to be used, it is in the interests of both parties for the bond to be handed over on the making of the contract. It should be retained by the vendor until completion, and, given the occasional forged deposit bond, its veracity should be checked. The developing practice seems to be that on completion the bond is returned to the purchaser's solicitor. If a replacement bond is required during the transaction perhaps there

should be specific provision that the older bond be returned to the purchaser.

- If there is a claim on the bond, the claimant should comply strictly with the terms of the bond. A vendor whose solicitor provided the bond issuer with the wrong notice of termination (the client had, it seemed, terminated both a contract for sale and a lease by written notice issued on the same day – the vendor's solicitor supplied the notice of termination of lease, not the notice of termination of the sale contract) failed to recover under the deposit bond in *Reliance Developments (NSW) Pty Limited v Lumley General Insurance Limited* [2008] NSWSC 172. The case also highlights the prudence in checking details for service of documents on the bond issuer. The bond referred to an "address" for service of notices by setting out a fax number and a Post Office Box. Between the date of issue of the bond and the termination of the contract for sale the bond issuer had relocated from Hurstville to North Sydney, and there was some delay in the hard copy documents (and for that matter the fax) coming to the attention of the bond issuer.
- If there is a dispute about the validity of termination of the contract, what should the bond issuer do? If the bond is paid out to the vendor, and it is subsequently found that the purchaser had validly rescinded the contract, is the purchaser exposed to a claim by the bond issuer by way of subrogation? This issue arose in *Detmold v Oldtex Pty Ltd* [2005] NSWSC 1197. Young CJ in Eq observed (at [67] to [72]):

> 67 The deposit under the contract was secured by a deposit bond issued by the third defendant in the sum of $40,500. On 21 June 2004 Ms Maitland wrote to the issuers of the bond enclosing a notice of termination of the contract for sale, advising that the deposit had not been paid and demanding payment.
>
> 68 On 25 June that $40,500 was paid to Oldtex Pty Ltd. On 25 June the issuers of the bond claimed on the plaintiffs, pursuant to the indemnity agreement which they had signed, $40,500, and in due course claimed interest as well.
>
> 69 On 28 May Ms Maitland wrote to NOT Lawyers:
>
> > We refer to the above matter and to your letter dated 19 May 2004 and confirm that our client terminates the contract. Our client is entitled by reason of such termination to call upon the deposit bond.

> 70 It is odd that this letter talks about confirming the termination. There does not appear to have been any actual termination. However, for all intents and purposes certainly after May 2004 each party recognised that the contract was no longer on foot.
>
> 71 So then there has been, on the part of the purchasers, a rescission of the contract, as they were entitled to do. They were entitled to do this either in equity, under the doctrine of innocent misrepresentation (see eg *Redgrave v Hurd* (1881) 20 Ch D 1) or under the *Trade Practices Act.* Rescission basically is an act of the parties, provided that the contract is executory, and there is no need to make any restitution, as appears to be this case (see eg *Kramer v McMahon* [1970] 1 NSWR 194).
>
> 72 As the parties have indicated, both parties have accepted the contract is at an end, so I do not see any need to make any further order. However, the plaintiffs are out of pocket by the conveyancing costs, which they have incurred, and they are also possibly liable to the issuers of the bond ...

If the parties agree at the last minute to use a bond or guarantee, the estate agent should be informed.

The 2014 edition’s clause 3 (unaltered in the 2016 and subsequent editions) addresses most of the above issues.

Priority notices

The *Real Property Amendment (Electronic Conveyancing) Act* 2015, among other things, facilitates the introduction of priority notices into NSW.

These notices are likely to be most useful in providing an alternative to a “*Black v Garnock”* caveat. The key differences between a caveat and a priority notice are likely to be:

Effect: A priority notice will not “freeze the Register” to the same extent, and across as broad a range of dealings, as a caveat does.

Duration: A priority notice will have a fixed duration of 60 days (with the possibility of one extension for a further 30 days). A caveat will remain of indefinite duration.

Fee: The lodgment fee for a priority notice is a fraction of a caveat lodgment fee (and in general, there should be no need for a lodgment fee for a “withdrawal of priority notice”).

PEXA Specific: Caveats can be lodged in both the paper and the PEXA environment. Priority notices are only available via the PEXA platform.

Priority notices and the related dealings are available as from 28 November 2016.

Strata law reform and clause 23

The *Strata Schemes Management Act 2015* (in the rest of this section of the paper referred to as "MA") and the *Strata Schemes Development Act 2015* ("DA") received Royal Assent on 5 November 2015. Once the new Acts commenced the statutes underpinning the familiar strata framework (the *Strata Schemes Management Act 1996, Strata Schemes (Freehold Development) Act 1973* and the *Strata Schemes (Leasehold Development) Act 1986*) were repealed. The 2015 Acts could not commence until supporting regulations were drafted (and industry was prepared for the changes to the existing regime). To that end draft Regulations and accompanying Regulatory Impact Statements were released in late April 2016, with the consultation period ending on 27 May 2016. Following the consultation process a *Strata Schemes Management Regulation 2016* was published on the Legislation Website on 12 August 2016. The Management Act and its Regulation commenced on 30 November 2016 (except for the provisions relating to building bonds, which were originally scheduled to commence on 1 July 2017. However in May 2017 the Government introduced legislation into Parliament to postpone commencement until 1 January 2018). The *Strata Schemes Development Regulation* 2016 was published on the NSW Legislation Website on 4 November 2016. The entirety of the DA and its Regulation also commenced on 30 November 2016.

The editions of the contract prior to 2017 did not reflect the updated terminology. However, the "transitioning" provision in the standard form (clause 20.11) means the prior editions are still usable in a strata context.

The 2017 edition:

- Reformats the clause –subheadings have been introduced, and some previously unnumbered subclauses have been allocated numbers (notably clause 23.2).

- Embraces the terminology in the 2015 Acts – “capital works fund”, “strata information certificate” and “strata information notice” (the latter two including the corresponding items for community schemes).
- The combined effect of the 2017 Regulation and an amended definition of “change” (now clause 23.2.1) means that when using the 2017 contract (or when using any earlier edition on or after 1 September 2017) **all** strata by-laws (including model by-laws) should be attached to the contract, with the model by-laws set out in full.
- Clause 23.6 amended – there is no longer need to consider whether work had started on or before contract date when determining liability for non-regular periodic contributions.

GST changes and clause 13

Clause 13 has been significantly amended in the 2017 edition.

- Clause 13.1 has received a refresh in its drafting style. Rather than listing words and phrases with the same meaning as in the *GST Act*, the 2017 edition states that words and phrases have the same meaning in the contract as in the GST Act unless the contract sets out a different definition (e.g. “price”).
- Clause 13.4.3 – the going concern clause now requires an unregistered purchaser to become registered with a “date of effect of registration” on or before completion. As the clause formerly stood, a purchaser could register for GST with an effective date up to three months after settlement and be entitled to the retention sum.
- Clause 13.3 has been amended – clarifying how adjustments are to be calculated inter partes, and also those involving third parties (such as rent).
- Clause 13.12 has been added - where the vendor liable for GST on rents and profits, adjustment of those amounts should be on a GST-**exclusive** basis (otherwise purchaser receives a windfall).

Conveyancing (Sale of Land) Regulation 2017

The 2017 Regulation was published on the Legislation Website on 28 July 2017, and commences on 1 September 2017.

The key significant changes relate to:

- Schedule 1: Disclosure of ALL strata by-laws (not just exclusive use / common property rights by-laws as in earlier versions of the Regulation)
- Schedule 1 warnings – removal of the swimming pools warning, insertion of a warning about loose-fill asbestos insulation
- Schedule 1 item 2 – sewerage authority diagrams – a requirement to include two diagrams where available in the ordinary course of administration from the relevant authority (for example, the two diagrams from Sydney Water commonly obtained in conveyancing transactions). Sch 1 requires:

  > Diagrams from a recognised sewerage authority (if available from the authority in the ordinary course of administration) that purport to show the following:
  >
  > (a) the location of any sewer lines on the land upstream of the point of connection to the authority's sewer main (including the point of connection),
  >
  > (b) the location of the authority's sewerage infrastructure for the property downstream of the point of connection to the authority's sewer main (including the point of connection).

- Schedule 3 – the statutory adverse affectations have been expanded:
  - ✓ The existing warranty about orders under s124 of the *Local Government Act* 1993 has been extended to include orders under the corresponding section of the *Environmental Planning and Assessment Act* 1979 (s121B).
  - ✓ The 2010 Regulation listed as an adverse affectation rights of way under sections 164 and 211 of the *Mining Act 1992.* A third possibility (section 235C) has been added..

- ✓ Emergency orders, control orders, individual biosecurity directions and biosecurity undertakings under the *Biosecurity Act* 2015 (continuing an amendment to the 2010 Reg which took effect from 1 July 2017).

- ➢ Schedule 3 includes a warranty about a "strata renewal" adverse affectation:

> (a) the owners corporation has passed a motion for a resolution under Part 10 of that Act [the SSD Act] that a strata renewal proposal warrants further investigation by a strata renewal committee, and
>
> (b) the owners corporation has established (or has not yet established but continues to be required to establish) a strata renewal committee to give effect to the resolution, and
>
> (c) minutes of the meeting recording the resolution that are required to be kept under Schedule 1 to the Strata Schemes Management Act 2015 have not yet been prepared.

The strata renewal warranty is problematic. It seems the purchaser loses the protection of a right to rescind if the minutes of the relevant meeting have been prepared. At that stage there will be no notation on title indicating that a strata renewal proposal is in train (a notation is required on the common property folio once the required level of support has been reached). There may also be evidentiary difficulties in determining when minutes are "prepared". Another issue is how a purchaser might test the warranty. It seems an inspection of the owners corporation records will assume even greater importance. Of course, such an inspection typically takes place prior to exchange of contract whereas adverse affectations are assessed as at the date of exchange. The currently prescribed form of section 184 certificate offers little additional assistance.

Mine Subsidence Compensation Act – a "special" warranty

Section 15(5) of the *Mine Subsidence Compensation Act* 1961 provides:

(5) Where any improvement has been erected or altered or subdivision has been made in contravention of this section (a ***contravening improvement*** or ***contravening subdivision***):

(a) such contravention shall not invalidate any instrument intended to affect or evidence the title to any land, but a purchaser may cancel any contract for sale and recover any deposit or instalment of purchase money paid together with reasonable costs and expenses where such contravention relates to the land purchased,

(b) no claim under section 12 or 12A or application under section 13A is to be dealt with or any payment made under this Act in respect of the following:

(i) any contravening improvement, any household or other effects fixed or attached to a contravening improvement or any household or other effects damaged as a consequence of damage to a contravening improvement,

Note.
For example, no claim may be made in respect of items placed in or around an unapproved house that are damaged by the collapse of that house.

(ii) any improvement on land within a contravening subdivision that was erected or altered after the land was subdivided,

(iii) any household or other effects on land within a contravening subdivision for the purpose of erecting or altering an improvement.

Note.
The Board may issue a certificate of compliance under section 15B (3A) in respect of an improvement or a subdivision of land that was erected or made without the approval of the Board. The certificate of compliance is for all purposes deemed to be conclusive evidence that the requirements of this Act relating to the improvement or the subdivision had been complied with up to the date of the certificate.

The right to "cancel" a contract for sale has been in existence, and substantially unaltered, since the commencement of the *Mine Subsidence Act* 1928.

The remedy would operate similarly to a breach of statutory warranty under the *Conveyancing (Sale of Land) Regulation* 2010 but with some significant differences:

- The Regulation allows the operation of a Schedule 3 warranty to be excluded by a disclosure in the contract – there is no such exclusion under the 1961 Act;

- The restrictions on the purchaser's right of rescission found in clause 16(3) of the Regulation are not replicated in the Act.

- In general, where a contract is rescinded under the Regulation, neither party can recover damages, costs and expenses from the other (clause 18(3), subject to the limited exceptions in clause 18(4)). A purchaser can recover "reasonable costs and expenses" arising from a section 15(5) cancellation.

Whether a property is in a Mine Subsidence District is a prescribed matter to be included in a section 149(2) certificate.

Typically, a purchaser buying a property in a mine subsidence district will apply for a certificate under section 15B of the Act. That section provides:

15B Certificates of compliance

(1) Any person may apply to the Board for a certificate under this section with respect to any improvement erected within a mine subsidence district or land within a subdivision within such a district.

(2) An application for a certificate under this section shall be made in writing, be accompanied by the prescribed fee and state the name and address of the applicant, and the particulars of the improvement or land in respect of which the certificate is required.

(3) Where the Board is satisfied that an improvement referred to in an application under this section was erected in accordance with the Board's approval and that any alterations to any such improvement were so made, or that any subdivision containing any land referred to in such an application was made in accordance with the Board's approval, or that any departure from any such approval is such that it need not be rectified, the Board shall, if the application was made in accordance with subsection (2), issue to the applicant a certificate under this section in respect of such improvement or land.

(3A) The Board may also issue a certificate under this section in respect of an improvement that was altered or erected, or a subdivision of land that was made, without the approval of the Board if the Board is satisfied that it is appropriate to do so having regard to the circumstances of the case.

(3B) The Board must not issue a certificate under subsection (3A) in relation to the following:

(a) an improvement that is a residential building that was altered or erected more than 15 years before the application for the certificate was made, unless the Board is of the opinion that:

(i) the failure to obtain the approval was not the fault of the applicant, or

(ii) exceptional circumstances exist,

(b) an improvement that is not a residential building, unless the Board is of the opinion that exceptional circumstances exist.

(4) The production of the certificate shall for all purposes be deemed conclusive evidence in favour of a person having an estate or interest in the land that the requirements of this Act relating to the improvement or the subdivision had been complied with up to the date of the certificate.

(5) If the Board refuses to issue a certificate under this section, it shall notify the applicant for the certificate of the refusal and the reasons therefor.

Procedures for applying for section 15B certificates were changed with effect from 1 March 2017. The MSB (rebranded Subsidence Advisory NSW) website set out the change:

"1. Certificates will be issued electronically to reduce turnaround times.

2. An applicant requesting a 15B Certificate for residential improvements will be <u>required to provide a statutory declaration from the existing landowner</u> confirming the property has been built in accordance with the relevant mine subsidence building regulations. This statutory declaration will replace a physical inspection carried out by Subsidence Advisory NSW, resulting in faster and more efficient issuing of Certificates.

> N.B. There will be no change to the current process for obtaining a 15B Certificate for commercial or infrastructure improvements. Subsidence Advisory NSW will continue to undertake an inspection for these requests." (underlining added).

The practical difficulties for both vendors / landowners and purchasers will be obvious to practitioners.

Fortunately, the FAQs located deeper in the website provide some comfort:

> If you are not the current landowner you must organise for the current landowner to complete a statutory declaration on your behalf OR where this is not available, schedule for SA NSW representative to undertake an inspection of the property in order to have a 15B issued.
>
> So if no statutory declaration is available:
>
> "SA NSW can provide in these instances, a scheduled inspection of the property by an accredited Project Manager.
>
> Please note if you require an inspection it will delay the processing time of your application by 10 business days depending on availability of a Project Manager."

In late April 2017 the requirement for a supporting statutory declaration was abandoned.

The *Coal Mines Subsidence Compensation Act* 2017 passed both Houses on 8 August 2017. That Act repeals the former Act. Among other things, the new Act redefines the boundaries of districts, and abolishes section 15B certificates. The former section 15(5)(a) has been carried over into the new Act.

* * * * *