The Contract for Sale and Purchase of Land 2014 edition and eConveyancing

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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 and 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 Sydney and Northern Sydney Institutes of TAFE in various law subjects.

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Introduction

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

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 – see section 3 of this paper.
- Uncertainty about the way in which supplies of going concerns and farmland is to be treated for GST purposes – discussed in more detail below.
- Amendments to the contract to reflect the introduction of electronic conveyancing – see the concluding sections of the paper.

The layout of pages 1 and 2

The 2005 edition 'condensed' the variable information which had previously been contained on two pages. The object was to allow the vendor's practitioner (if the practitioner chose) to complete the variable information simply by completing page 1 of the printed form (or the practitioner's own computer-generated page 1).

Since the issue of the 2005 edition, one (I believe justified) criticism of the layout of page 1 is that the condensing of information has been taken rather too far, so that there is sometimes insufficient space to fill in the variables. The concern has been addressed in a more spacious layout in the 2014 edition of the contract – the tax information and space for details of a strata or community managing agent have been moved onto page 2.

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 – see *Essington Investments v Regency Property Group* [2003] NSWSC 828). I understand the policy of the joint copyright holders is that there is no objection to producing photocopies of the hard copy, traditionally "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. An electronic version of the 2005 edition was released in late 2009, and has been available for purchase from the Law Society Shop.

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.

It appears the above principles are not followed by all users of the printed form. The joint copyright holders have announced that the 2014 edition will only be sold in an electronic format rather than on "blue" – available from the ECOS portal via the Law Society website as from 17 November 2014. Pages 3 and following of the electronic form are watermarked with the address of the property. The buyer of the e-form is permitted to print the paper copies necessary for the transaction.

Co-agents

The details of the vendor's agent are required to specify who holds and invests the deposit under clause 2 and who holds money if there is a claim under clause 7. If more than one agent is involved, you need to distinguish between the listing agent (the one who has the agency agreement with the vendor) on the one hand, and the selling or conjunction agent (the agent who is the first point of contact for the purchaser). The listing agent should be named first and full details given. In the 2000 and earlier editions the

selling agent can be added by name on the final line prefaced by the words "in conjunction with". In the 2005 edition there is a specific term "Co-agent". Mentioning both agents will minimise the risk of the purchaser being embroiled in any commission dispute, particularly where the contract contains the commonly used additional provision in which the purchaser warrants that it was not introduced to the property by any agent other than one named in the contract.

One further development since 2005 is the rise of the buyer's agent. That class of agents was first formally recognised under the *Property, Stock and Business Agents Act* in September 2003, and is a growing sector of the industry. While a buyer's agent may have an important role in negotiation the sale, they typically have no formal, ongoing role in the conduct of the conveyance after exchange. However, space is provided on page 1 of the 2014 edition to insert the name of a buyer's agent. The definition of "depositholder" in clause 1 is extended so that the buyer's agent is the depositholder for those matters where there is neither a vendor's agent nor a vendor's solicitor.

The List of Documents on Page 2

In editions prior to the 2005 edition, this page contained the documents list, choices, tenancy details, and particulars of any strata managing agent. In the 2005 edition, much of that information has been relocated onto page 1 (or in a few cases dealt with elsewhere in the contract or not at all). As part of the formatting process for the 2014 edition, some particulars have "spilled back" onto page 2.

The *Home Building Act 1989* and its impact on conveyancing practice is worthy of a separate seminar, but some brief comments should be made about matters highlighted in the 2005 and 2014 editions.

The 2005 edition included one new item relevant to home warranty insurance – Item 16: Brochure or Note (*Home Building Act 1989*). This item will be relevant where the vendor is a developer, an owner-builder or a "person who does building work otherwise than under a contract (within the meaning of the Act)." Because of the introduction of section 96B in the 2014 amending legislation, the word "note" has been replaced by "warning".

It should also be noted that in the absence of an express statutory provision, there is no obligation to attach certificates of insurance or any other relevant documentation to the contract (although it would be nice if this were done even though there is no duty to do so). So for instance a client who has had their house built in 2012 by the holder of a contractor licence, or who was supplied with a kit home in 2011, has no statutory obligation to attach any documentation regarding home warranty insurance (known as insurance under the Home Building Compensation Fund since 15 January 2015) to the contract for sale. This view is confirmed by the reasoning in *Adderton v Festa Holdings Pty Ltd & Ors* [2003] NSWSC 1065; *Festa Holdings Pty Ltd & anor v Adderton & ors* [2004] NSWCA 228.

Issues regarding whether there has been any building work done to which the Act applies, the identity of the builder, whether or not a permit or licence was issued under the Act, and particulars of insurance, should ideally be addressed prior to exchange of contracts. From the vendor's perspective, it is vital to identify whether the vendor has obligations under sections 95, 96 and 96A (and section 96B as from 15 January 2015), and to prepare the contract in a way that meets those obligations. From the purchaser's perspective, there are two issues. The right to rescind for a lack of insurance will not arise independently of the Act, so the purchaser's position should be assessed before the purchaser is contractually bound. Where a purchaser has a right to render the contract void, the purchaser needs to be aware of that right. A solicitor who failed to advise their purchaser clients of a right to rescind under section 95 was held liable in damages in *Livingstone v Mitchell* [2007] NSWSC 1477; BC200711121. In that case, the purchaser's solicitor inquired about the applicability of the Act in post-contractual requisitions. The replies indicated that the property was insured, named an insurer, and quoted a policy number. Unfortunately, the details related to a home and contents policy, not a policy under the Act. The case highlights the prudence of verifying insurance details by obtaining certificates of currency.

Can the purchaser lose rights of rescission given under the Act by estoppel, waiver, or election? *Zucker v Straightlace Pty Ltd* (1987) 11 NSWLR 87 held that the common law doctrine of election applied to the 1988 version of the *Conveyancing (Sale of Land) Regulation*. In consequence, where the purchaser has a right of rescission under the Regulation, the purchaser could consider his or her position but, during that period, must not do

anything inconsistent with the purchaser reserving his or her position. It seems unlikely that the doctrine applies to rights under sections 95, 96 or 96A of the *Home Building Act* in the light of the reasoning in *Tudor Developments Pty Ltd v Makeig* [2007] NSWSC 1116; BC200708585. In that case, Young CJ in Eq held that estoppel could not validly be pleaded against a defendant for a plaintiff's non-compliance with section 96A of the Act. In that case, the fact that the purchaser knew that insurance had been effected did not preclude the purchaser from rescinding the contract on the grounds of a failure to provide a certificate of insurance in the prescribed form. The appeal by the developer was dismissed by a majority of the Court of Appeal (Basten JA, Beazley JA agreeing; Handley AJA dissenting): *Tudor Developments Pty Ltd v Makeig* [2008] NSWCA 263.

The home warranty insurance regime moved, with effect from 1 July 2010, from a private funding model to being underwritten by the Government.

The *Home Building Amendment Act* 2014 received assent on 5 June 2014. Most of the provisions commenced on 15 January 2015 (some provisions mainly relating to form and content of building contracts are scheduled to commence on 1 March 2015). A new *Home Building Regulation* 2014 also commenced on 15 January 2015.

The amending Act made significant changes to the principal Act as it affects conveyancing practice (among many other topics). Notably:

- Definitions formerly scattered through the Act and the Regulation are consolidated into a comprehensive Dictionary (Sch 1)
- Home warranty insurance is renamed as "insurance under the Home Building Compensation Fund"
- A new definition of "completion date" applies to a new building in a strata scheme (new section 3C)
- The distinction between structural and non-structural defects is replaced with concepts of "major defects" and "major elements of a building" (s 18E(3) and (4))
- Most significantly, a new section 95:

➢ Abolishes statutory cover for owner-builder work (s 95(1))

- Requires disclosure by way of a conspicuous note of details of the owner-builder permit and the absence of owner-builder insurance (s 95(2))
- The new section 95 does not apply where the sale occurs more than 7 years and 6 months after date of the permit (s 95(3))
- The consumer warning requirement applies not only to the owner-builder but to successors in title (s 95(4))

- A new section 96B(1) provides: "A contract for the sale of land comprising a house or unit that is excluded from the definition of ***dwelling*** in this Act because it was designed, constructed or adapted for commercial use as tourist, holiday or overnight accommodation must contain the warning required by this section if work has been done on the land in the previous 6 years that would have been residential building work had the house or unit not been excluded from the definition of ***dwelling***."

- The 96B warning is a "prominent statement" to the effect that the property does not have protection under the Act.
- The section prohibits entering into the contract unless the statement is attached; the contract is voidable if no statement in contract.

- Savings and transitional provisions affect ss 95, 96B. Schedule 4 clauses 131 and 132 of the Act provide.

131 Insurance obligations of owner-builders

Section 95 (and sections 97 and 101 in their operation in respect of that section) as in force before being amended by the amending Act continues to apply to and in respect of the following contracts:

(a) a contract of insurance or a contract for the sale of land entered into before the commencement of the amendment of section 95,

(b) a contract for the sale of land entered into after that commencement if a contract of insurance that complies with this Act is in force in relation to the work concerned when the contract is entered into.

132 Contracts for sale of exempt dwellings

Section 96B (Obligations of sellers of excluded dwellings (houses and units used for commercial purposes)) does not apply to a contract for the sale of land entered into before the commencement of that section.

The disclosure requirements relating to sale of properties on which a swimming pool (within the meaning of the *Swimming Pools Act* 1992) is situated were to change with effect from 29 April 2014, the date which is 18 months after the date of assent to the *Swimming Pools Amendment Act* 2012. These changes were canvassed at seminars in the first quarter of 2014. On 28 March 2014 the Office of Local Government announced that the commencement of the new disclosure requirements when selling or leasing would be postponed for twelve months – that is, 29 April 2015. On 26 February 2015 the Government announced a second 12 month postponement – that is, to 29 April 2016. The postponements recognised that there were a number of practical problems in the implementation timetable.

The amending Act, which largely but not entirely commenced on 29 October 2012, imposes new obligations on the owner of a swimming pool to which the Act applies.

Section 3 of the principal Act defines a swimming pool as follows:

> ***swimming pool*** means an excavation, structure or vessel:
>
> (a) that is capable of being filled with water to a depth greater than 300 millimetres, and
>
> (b) that is solely or principally used, or that is designed, manufactured or adapted to be solely or principally used, for the purpose of swimming, wading, paddling or any other human aquatic activity,
>
> and includes a spa pool, but does not include a spa bath, anything that is situated within a bathroom or anything declared by the regulations not to be a swimming pool for the purposes of this Act.

For conveyancing purposes the key features of the amendment Act are:

i. Extension of the operation of the Act to a wider class of premises. Prior to the amendments section 4 of the Act stated that the Act applied to swimming pools situated, or proposed to be constructed or installed, on premises on which a residential building, a moveable dwelling, a hotel or motel is located (with an exclusion for premises occupied by the Crown or a public authority). Section 4 (among other provisions) has been amended to replace the reference to "hotel or motel" with "tourist and visitor accommodation", which is defined by

reference to the Standard Instrument. The Dictionary to the *Standard Instrument (Local Environmental Plans) Order 2006* defines "tourist and visitor accommodation" as follows:

> ***tourist and visitor accommodation*** means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following:
> (a) backpackers' accommodation,
> (b) bed and breakfast accommodation,
> (c) farm stay accommodation,
> (d) hotel or motel accommodation,
> (e) serviced apartments,
> but does not include:
> (f) camping grounds, or
> (g) caravan parks, or
> ….(h) eco-tourist facilities.

ii. Limiting the scope of exemptions contained in sections 8, 9 and 10 of the Act (which relate to pools constructed prior to August 1990, existing pools on small properties or large or waterfront properties). For example, section 9 of the Act as amended provides:

> **9 Exemption for swimming pools on large properties**
>
> (1) This section applies to swimming pools the construction or installation of which commenced before 1 July 2010.
>
> (2) A swimming pool that is situated on premises having an area of 2 hectares or more is not required to be surrounded by a child-resistant barrier so long as the means of access to the swimming pool from any residential building situated on the premises are at all times restricted in accordance with the standards prescribed by the regulations.
>
> (3) The diagram in Part 3 of Schedule 1 illustrates the provisions of this section.
>
> (4) A reference in this section to a residential building does not include a reference to a structure (such as a garage or shed) that is ancillary to the building if the structure is not itself used for residential purposes.
>
> (5) This section ceases to apply in respect of a swimming pool if a barrier is erected on the premises (between the swimming pool and a residential building)

as a barrier to direct access to the swimming pool from any residential building situated on the premises.

Those amendments commenced on assent.

iii. A new Part 3A (sections 30A to 30E) requires registration of the pool with a central registry (registration to be effected either directly by the owner, or indirectly by the owner notifying the local authority (typically the Council, which is entitled to charge a fee of $10 to act as the intermediary) which in turn informs the registry). Part 3A commenced on 29 April 2013. The Act contemplates a moratorium against prosecution for failure to register until 29 October 2013 (Sch 3 cl 19 – given a rush of attempts to register just prior to that date the Minister for Local Government requested councils to not initiate any proceedings before mid-November 2013).

iv. A new Part 2 Division 5 of the Act inserts sections 22A to 22G which in summary: requires local councils to develop a mandatory pools inspection regime; allows an owner to apply to either the council or an accredited certifier for an inspection; sets out the contents of a "section 22D" certificate of compliance (to replace the former section 24 certificate); imposes an obligation on an accredited certifier to issue a written notice to the owner if the pool does not comply (and send a copy to the council). Part 2 Division 5 also commenced on 29 April 2013. The maximum fee for an initial inspection by Council has been prescribed as $150, with a further $100 payable if a second inspection is necessary (no fee if payable for third or subsequent inspections). The fees chargeable by accredited certifiers will presumably be governed by market forces.

v. Amends the *Conveyancing (Sale of Land) Regulation 2010* to add a new prescribed document to Schedule 1 if the contract relates to land on which there is a swimming pool covered by the Act: either
(a) a valid certificate of compliance; or
(b) a relevant occupation certificate plus evidence that the swimming pool is registered.

That amendment is not to apply until 29 April 2016.

vi. Requires a landlord on entering into a residential tenancy agreement to ensure that the swimming pool is registered and that the pool has either a valid certificate of compliance or a "relevant occupation certificate" (one less than three years old and that authorises the use of the pool) and that a copy of the document is provided to the tenant.

It is not entirely clear how the amendments will operate when selling or leasing where the swimming pool is situated on common property (or to be situated on common property – for example, an off the plan sale). Nor is it clear whether the existing Swimming Pools Warning will be considered otiose once the more detailed documentation has to be attached.

The most recent advice from the OLG website is that it can take up to 90 days before a Council can issue a certificate of compliance (anecdotally, the time frames can be significantly longer, and could well be very much longer where the pool is located on common property within a strata or community scheme).

It had been hoped that the requirements on sale or lease would be further fine-tuned between March 2014 and 29 April 2015, but this has not occurred to date (and is unlikely to occur before the State election). A further 12 month postponement hopefully allows that further fine-tuning to in fact occur. Almost certainly the provisions will be reviewed as part of the review of the *Conveyancing (Sale of Land) Regulation* – a new regulation is due on 1 September 2015.

When receiving instructions from vendors it is vital to ask whether a swimming pool (as widely defined) is associated with the property (including strata and community schemes with a pool). A vendor who exchanges prior to 29 April 2016 will be governed by the more vendor-friendly provisions. If exchange does not occur by 28 April 2016, marketing of the property and producing a contract with all necessary vendor disclosure documents attached may have to be postponed.

When receiving instructions from purchasers it would be prudent to mention the swimming pool changes, not least because when the purchaser who contracts prior to 29 April 2016 comes to sell or lease it will be

possibly doing so under a different regulatory regime than applied when they acquired the property. Purchasers into strata and community schemes should also consider the possibility that the owners corporation may have an impending liability the cost of ensuring pool compliance.

There is an excellent article in the February 2015 *Law Society* by Maged Jebeile outlining the changes in more detail.

Deposit-bonds

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 addresses most of the above issues.

> **3 Deposit-bond**
>
> 3.1 This clause applies only if this contract says the vendor has agreed to accept a *deposit-bond* for the deposit (or part of it).
>
> 3.2 The purchaser must provide the original *deposit-bond* to the vendor's *solicitor* (or if no solicitor the *depositholder*) at or before the making of this contract and this time is essential.
>
> 3.3 If the *deposit-bond* has an expiry date and completion does not occur by the date which is 14 days before the expiry date, the purchaser must *serve* a replacement *deposit-bond* at least 7 days before the expiry date. The time for service is essential.
>
> 3.4 The vendor must approve a replacement *deposit-bond* if –
>
> > 3.4.1 it is from the same issuer and for the same amount as the earlier *deposit-bond;* and
> >
> > 3.4.2 it has an expiry date at least three months after its date of issue.

3.5 A breach of clauses 3.2 or 3.3 entitles the vendor to *terminate*. The right to *terminate* is lost as soon as –
3.5.1 the purchaser *serves* a replacement *deposit-bond*; or
3.5.2 the deposit is paid in full under clause 2.
3.6 Clauses 3.3 and 3.4 can operate more than once.
3.7 If the purchaser *serves* a replacement *deposit-bond*, the vendor must *serve* the earlier *deposit-bond*.
3.8 The amount of any *deposit-bond* does not form part of the price for the purposes of clause 16.7.
3.9 The vendor must give the purchaser the *deposit-bond* –
3.9.1 on completion; or
3.9.2 if this contract is *rescinded*.
3.10 If this contract is *terminated* by the vendor –
3.10.1 *normally*, the vendor can immediately demand payment from the issuer of the *deposit-bond*; or
3.10.2 if the purchaser *serves* prior to *termination* a notice disputing the vendor's right to *terminate*, the vendor must forward the *deposit-bond* (or its proceeds if called up) to the *depositholder* as stakeholder.
3.11 If this contract is *terminated* by the purchaser –
3.11.1 *normally*, the vendor must give the purchaser the *deposit-bond*; or
3.11.2 if the vendor *serves* prior to *termination* a notice disputing the purchaser's right to *terminate*, the vendor must forward the *deposit-bond* (or its proceeds if called up) to the *depositholder* as stakeholder.

Submission of transfer

Clause 4.1 (dealing with the requirement to submit the transfer) has been expanded to require the purchaser to submit additional information. This reflects the introduction of optional no CTs (also known as eCTs) and the requirements for the discharging mortgagee when completing a CoRD (Control of the Right to Deal) consent.

LPI has started producing editions of folios for which no (duplicate) Certificate of Title has issued. The availability of optional no CTs (also known as eCTs) is initially limited to:

- First mortgagees; which are
- Authorised Deposit-Taking Institutions;
- Having access to PEXA; and
- Choosing to dispense with a paper CT for that property.

As at the end of 2014, the number of properties for which the current edition of the folio is an eCT is in the order of hundreds (though this number will increase substantially depending on the uptake of PEXA). Any transaction with an eCT will require a CoRD-holder consent to be lodged

at LPI prior to lodgment of the dealings (realistically, prior to settlement on a sale) and in the original iteration will require the discharging mortgagee to particularise all dealings to which it consents (for instance, the transfer and an incoming mortgage).

For further details see LPI Circular 2014/03 (and note clause 4.1.2 of the 2014 contract):

> 4.1 *Normally*, the purchaser must *serve* at least 14 days before the date for completion –
>
> 4.1.1 the form of transfer; and
>
> 4.1.2 particulars required to register any mortgage or other dealing to be lodged with the transfer by the purchaser or the purchaser's mortgagee.

Requisitions

The contract has, since 1996, used an extended definition of requisition, to cover objections and questions as well. Apart from some re-wording consequential upon this change, the new clause was substantially unchanged from the 1992 to the 2005 editions.

The contract continues the philosophy of not attempting to codify what requisitions (now used in the widest sense of the term) the purchaser can make. It is worth remembering that the 1992 and subsequent editions speak in terms of dealing with those requisitions "a purchaser is or becomes entitled to make". The threshold question of entitlement must always be considered.

The contract is silent as to the vendor's obligation to reply (implicit – if the purchaser is entitled to make a requisition, the purchaser is entitled to a reply). Nor is there express mention of when replies must be sent (the general law position – replies within a reasonable time – is preserved; also see [21.1] about the general obligation under the contract to do things within a reasonable time). Generally it would be prudent for a vendor's solicitor to have answered requisitions before issuing a Notice to complete – see for example *Winchcombe Carson Trustee Co. Ltd v Ball-Rand Pty Ltd* [1974] 1 NSWLR 477.

For cases considering the law of requisitions, see *Adolfson v Jengedor Pty Ltd* (1995) 6 BPR 14,147; (1996) NSW ConvR ¶55-775 and *Australian*

Mortgage v Baclon [2001] NSWSC 774. In the latter case, Justice Austin held that a requisition seeking a stamped or certified copy of a document relating to a development application would (if it were a requisition at all), be a requisition covered by cl 5.1 of the contract, and the failure to make that requisition within time was one of the reasons for the purchaser's failure in the litigation.

The adequacy of replies to requisitions, and the consequences of inadequate replies in the context of a vendor issuing a notice to complete, was considered in the case of *Crowe v Rindock Pty Ltd and anor* [2005] NSWSC 375.

Increasingly vendors are including a special condition requiring purchasers to raise requisitions by use of a particular form on inquiries (and sometimes attaching replies to the contract). To the extent that vendors and their advisers are thinking about requisitions prior to formation of contract, that development is arguably welcome. There are also certain efficiencies in this technique, particularly where the vendor is selling a large subdivision off the plan. Where the practice becomes objectionable I suggest is in those special conditions which go on to say that the purchaser cannot raise **any** requisition **other than** those on the attached form.

Clause 5 of the 2014 edition now allows for the possibility that a vendor may attach a form of requisitions. The clause differs from many of the special conditions in current use in that it expressly preserves the right of a purchaser to raise other requisitions:

> 5.1If a form of *requisitions* is attached to this contract, the purchaser is taken to have made those *requisitions*.
>
> 5.2If the purchaser is or becomes entitled to make any other *requisition*, the purchaser can make it only by *serving* it –
>
> 5.2.1 if it arises out of this contract or it is a general question about the *property* or title - *within* 21 days after the contract date;
>
> 5.2.2 if it arises out of anything *served* by the vendor - *within* 21 days after the later of the contract date and that *service*; and
>
> 5.2.3 in any other case - *within* a reasonable time.

Unfair contract terms

Sections 24 and 25 of the *Australian Consumer Law* are the key operative provisions governing unfair contracts:

24 Meaning of *unfair*

(1) A term of a consumer contract is ***unfair*** if:
   (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
   (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
   (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
   (b) the extent to which the term is transparent;
   (c) the contract as a whole.

(3) A term is ***transparent*** if the term is:
   (a) expressed in reasonably plain language; and
   (b) legible; and
   (c) presented clearly; and
   (d) readily available to any party affected by the term.

(4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

25 Examples of unfair terms

(1) Without limiting section 24, the following are examples of the kinds of terms of a consumer contract that may be unfair:
   (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
   (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
   (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
   (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
   (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

(g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(k) a term that limits, or has the effect of limiting, one party's right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

(2) Before the Governor-General makes a regulation for the purposes of subsection (1)(n) prescribing a kind of term, or a kind of effect that a term has, the Minister must take into consideration:

(a) the detriment that a term of that kind would cause to consumers; and

(b) the impact on business generally of prescribing that kind of term or effect; and

(c) the public interest.

The mirror provisions in the ASIC Act are ss 12BG and 12BH.

It is instructive to benchmark conveyancing documents in common use to see whether any of the provisions "tick" one or more of the boxes in sections 3 or 4. To take the example of the joint copyright contract, consider whether any of these provisions may (arguably or conceivably) fall foul of the new regime:

- Clause 2 (Deposits and other payments before completion) – only a purchaser pays a deposit to secure performance obligations;
- Clause 5 (limiting the manner in which, and the time within which, a purchaser can make a requisition)

- Clause 6.3 (limiting the right to claim compensation "to the extent the purchaser knows the true position")
- Clause 7.1 (allowing a vendor to rescind in the purchaser makes an "unwelcome" claim)
- Clause 7.2.4 and 7.2.6 (limits on the rights of a purchaser under the arbitration regime)
- Clause 8 (allowing a vendor to rescind if confronted with an "unwelcome" requisition – query whether such a term is "expressly permitted" by section 56 of the *Conveyancing Act* 1919 and so within ACL Sch 2 s 26(1)(c)).
- Clause 9 (only operational if a purchaser defaults; no corresponding regime for vendor defaults)
- Clause 10 (restrictions on rights of purchaser)
- Clause 18 (obligations imposed on purchasers if in early possession)
- Clause 20.1 (deeming items to be attached, and thereby imposing an evidential burden)
- Clause 22 (FATA Act clause – the right of vendor to terminate for breach)
- Clause 23.8 (restrictions on the purchaser's right to rescind)
- Clause 28.2 (vendor's right to make minor alterations to an unregistered plan)

The topics frequently covered by special conditions could well see this list extended.

I suggest many or all of these clauses would be reasonably necessary to protect the legitimate interests of a vendor, and so not "unfair".

What is the impact of the ACL on the 2014 edition?:

- 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:

8.2If 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.

Electronic Conveyancing

Electronic Conveyancing (Adoption of National Law) Act 2012

This Act received assent on 20 November 2012, and was proclaimed to commence on 1 January 2013. The Act was the first legislative step in the implementation of electronic conveyancing.

National Electronic Conveyancing (NEC) is to be the new environment for completing real property transactions and lodging land title dealings throughout Australia, aiming to assist industry participants in more efficiently **completing** conveyancing and mortgage transactions. It is not strictly speaking an electronic **conveyancing** environment – contract formation, vendor disclosure, and even (in NSW) requisitions will still be paper-based. NEC will allow for electronic settlement, funds movement, revenue collection and lodgment / registration.

The key concepts (and, sadly, key acronyms) in electronic conveyancing can be summarised as follows:

- The Registrars in each jurisdiction will be the ultimate guardians of the integrity of the system and will work co-operatively through the Australian Registrars' National Electronic Conveyancing Council (ARNECC).
- Initially, there will be one Electronic Lodgment Network (ELN) administered by a single operator (ELNO). There is the potential for (and some interest in) other ELNs being established in due course. Each ELNO will need approval by the Registrar in a participating jurisdiction.

- The initial ELNO was called National E-Conveyancing Development Ltd (NECDL) which is developing a system called Property Exchange Australia (PEXA). The company was renamed to mirror the platform early in 2014. The current shareholders in PEXA are Governments, major lenders and certain other corporates.
- The Registrar will impose conditions on an approval of an ELNO, including compliance with operating requirements and participation rules.
- The ELNO will enter into participation agreements with subscribers (typically solicitors, conveyancers and financial institutions).
- The participation rules deal, inter alia, with client authorisations, digital signing, document retention and the need to comply with the operating requirements and participation rules.
- Non-electronic conveyancing will be available for those unwilling or unable to "move to the e way".
- Each participating jurisdiction has now passed its own enabling legislation adopting the Electronic Conveyancing National Law (an appendix to the enabling Bill passed in the lead jurisdiction). Compare the former Uniform Consumer Credit Code (pre National Credit Code). New South Wales is the lead jurisdiction – hence the *Electronic Conveyancing (Adoption of National Law) Act* 2012. The 2012 Act is high-level legislation. Detailed amendments to the *Real Property Act* 1900 to make it "e-conveyancing friendly" were passed in March 2014. Further amendments to the 1900 Act will "align" many paper-based conveyancing procedures with their electronic equivalents – see discussion below.

What still needs to be done?

- Settling the final terms of the Model Operating Agreement and Model Participation Rules – ongoing consultation between ARNECC and stakeholders, particularly regarding the drafting of the client authorisation form. An updated version of the MPR

issued in March 2014; a further update has been released for consultation.

- Verification of Identity arrangements will need to be put in place – in this regard Australia Post, ID Secure and ZipID have announced services by which they will verify the identity of clients and securely transmit that information electronically to the subscriber / practitioner. Other commercial organisations are likely to enter the space.

- Determining the fate of the CT – a discussion paper was issued by LPI in late 2012. It appears likely that the preferred option will be to allowed certain institutional mortgagees to "opt out" of a paper CT, with the possibility of extending the range of those who can opt out as the system evolves. A key concept will be the CORD (Control Of the Right to Deal – with the property). We are already seeing properties for which there is no paper CT – the practical consequences are usefully set out in LPI Circular 2014/3.

- More detail about the financial nuts and bolts – to take one example, can a practitioner without a trust account be a subscriber (PEXA will offer a "PEXA Source Account" which could assist those practitioners without a trust account facility), and will the relevant regulator be happy with the details?

- Redrafting standard forms in common use (e.g. retainer / costs agreements perhaps) to make them e-ready.

- The transaction cost of using PEXA through a sponsor. The PEXA fees when dealing directly with PEXA were released in mid-October 2014 and are now available online via http://www.pexa.com.au/pricing-schedule. Key price points where financial settlement occurs (ex GST; single / multiple titles) are:

    - Discharge of mortgage: $35 / $44 – payable to PEXA by DM

    - Transfer: $95 / $108 – payable by V and also by P

    - Mortgage: $47 / $60 – payable to PEXA by IM.

    - Caveat or withdrawal of caveat: $13 / $23

    - Notice of Sale or Consent (e.g. CoRD consent): $0

- Risk allocation - to the satisfaction of all stakeholders.

What then is the (hoped-for) timeframe for implementation?

- A limited range of transactions were brought into scope as from June 2013 – Stage 1 deployment was limited to mortgages, discharges of mortgage and refinances. Initially one bank (CBA) and one land registry (Victoria) had access to PEXA. Banks and land registries will be progressively brought within scope throughout the 2013-14 financial year – CBA, NAB and ANZ were in scope by late October 2013. The NSW Land Registry came into scope in early October 2013.
- Release 2 of PEXA opens up the scope to multi-party transactions, and therefore to matters involving solicitors and conveyancers. Release 2 can accommodate transfers, settlements, caveats and "notices" [presumably e.g. a "priority notice" (Qld) or "settlement notice" (Tas)]. Limited deployment involving selected trial sites commenced on 10 November 2014, with the first electronic lodgment of a caveat in NSW on 12 November. The first transfer was lodged electronically on 24 November; the first transaction involving a Discharge of Mortgage, Transfer and Mortgage was lodged on 27 November. PEXA anticipates the platform will be opened to all interested during the first quarter of 2015.

PEXA Preparation

What issues will practitioners need to consider with the introduction of PEXA and its extension to transfers? I suggest there are several threshold questions which will need to be addressed:

1. Can I ignore PEXA totally and keep my conveyancing practice PEXA-free? In theory a practitioner could choose to continue their practice without moving away from the existing paper-based system, since e-conveyancing is optional and will remain so for the foreseeable future. However, there may be some practical difficulties in pursuing this path.

- It is likely that lenders will promote e-conveyancing to their customers in preference to transacting in the paper environment. That promotion might involve differential fee structures depending

on whether the transaction is processed traditionally or electronically.

- It is also possible that competitors will promote the availability of e-conveyancing to would-be clients.
- It is almost certain that over time paper-based conveyancing procedures will change to align the process with e-conveyancing. We already see optional no Certificates of Title (also known as eCTs); re-design of the paper-based LPI approved forms is, it is understood, in progress; other changes (such as aligning the Verification of Identity requirements between paper and e-conveyancing and allowing transfers to be signed by practitioners acting for vendors rather than by vendors personally) may well flow. Amended legislation will be needed; to that end the *Real Property Further Amendment (Electronic Conveyancing) Bill* 2014 was introduced into Parliament on 12 November 2014. The Bill would have permitted the introduction of priority notices in NSW; allow for the proclamation of a "cessation day" for the abolition of certificates of title; and allow for the publication of "conveyancing rules" which will assist in aligning paper conveyancing with its electronic counterpart. The Bill will probably lapse on the proroguing of Parliament, and can be expected to be reintroduced after the 2015 election. If that occurs many of the changes will probably commence in the second half of 2015.

2. *Should I adopt e-conveyancing in my practice?* Practitioners will need to undertake an internal cost-benefit analysis. Adopting e-conveyancing will have costs associated with training, compliance obligations and in some cases perhaps the need for technology upgrades. A practice which undertakes only the occasional conveyance, or which has unreliable internet speed and connectivity, or where the practitioner is constantly "on the road" without support staff (sadly there is no smartphone app available – yet – for e-conveyancing) may find adoption problematic.

3. If I propose to use e-conveyancing, do I prefer to deal directly with PEXA or will I work with one or more of the four PEXA Sponsors? The sponsors are InfoTrack, GlobalX Information, SAI Global Property and Veda. A sponsor will assist with product support and training, and is likely to provide a familiar, and to some extent integrated, interface. Once

Sponsor pricing is released it will be possible for practitioners to make an informed decision about which path is more suitable.

4. Is this specific transaction able to proceed electronically? There are significant impediments to the universal application of electronic conveyancing. These include:

- As of Release 2 going live, only mortgages, discharges, caveats, withdrawals of caveat and transfers will be in scope in New South Wales. So a transaction which involves some other dealing being provided at settlement (for example, a Notice of Death or a lease intended to be registered) will not be within scope. Furthermore, it seems that certain types of transfer (for instance, a transfer granting easement or a transfer by mortgagee exercising power of sale) will not be able to be processed electronically in Release 2 of PEXA.
- PEXA will initially be limited to handling a maximum of three or four "linked" or chain settlements.
- If one party in a transaction (or in a chain) prefers not to use PEXA the transaction will default to paper.

Even in those transactions where PEXA is available, sometimes it may not be the most efficient way to proceed. Consider a matter where the vendor's practitioner notes a discrepancy between the name of the vendor as instructed and the name on the Register. In the paper environment, there are a number of mechanisms which the practitioner might adopt to deal with this (special condition plus statutory declaration; drawing the contract in the same way as appears on the title; arranging with LPI for the Register to be amended prior to completion). Some of those existing strategies may be problematic or unavailable in the PEXA environment.

5. *How might the contract for sale regulate the parties once PEXA is open for transfers?*

Clause 30 of the 2014 edition will deal with a matter proceeding as an electronic transaction. You should note:

- The clause is quite lengthy – the single longest clause in the printed form. The drafters were tempted to limit the contract to a provision to the effect that that "a party will settle electronically and obey all the rules". However, it was decided that a more detailed, prescriptive provision will be necessary in the early days of a novel

system, and will assist in educating users of the contract about some of the important issues and potential traps in electronic conveyancing.

- As a first step, the vendor will need to indicate whether it proposes that the transaction should proceed electronically. One way of doing that would be a choice at the front of the contract. The default choice (the one in BLOCK LETTERS) will be NO.
- Once a purchaser is found, the purchaser will need to advise whether it wishes to proceed electronically. The time limit for so doing is 14 days; longer than the usual cooling off period, but workable within the typical 42 day time frame between exchange and settlement. In default of the purchaser advising that it wishes the transaction to proceed electronically, the transaction will default to paper.
- A party will need to be able to opt out of the PEXA environment during the transaction because, for example, it may become impossible to proceed electronically if the chain of settlements becomes too long or a party in the chain does not wish to proceed electronically. The contract addresses any fee or disbursement consequences which flow.
- Depending on the PEXA fee structure, there may also need to be an adjustment of those fees (and associated LPI fees) as between vendor and purchaser if the transaction proceeds to settlement. It is understood that, at least initially, PEXA will only charge fees if a matter settles electronically.
- Any party to a PEXA transaction can create a workspace. The clause envisages that the vendor will do so, but provides that if the vendor has not "started the ball rolling" within seven days of being informed by the purchaser of the purchaser's intention to proceed electronically, the purchaser can create the workspace. The clause then goes on to specify timeframes for action and response (including invitations to those not party to the contract for sale – the discharging and incoming mortgagee).
- The contract takes users through the key steps needed to populate the workspace and digitally sign and certify (clauses 30.5 to 30.8).

- Submission of adjustments and timing of the payment direction are spelt out (clause 30.9). The clause envisages that adjustments will be submitted at least two business days, and payment details entered at least one business day, before the date for completion.
- Each party must ensure that all necessary certifications under the ECNL are provided and properly given (clause 30.10.2).
- There are provisions dealing with "catastrophe scenarios" such as the failure of computer links between LPI, PEXA and the RBA at the appointed settlement time (clause 30.12, 30.13).
- The contract also addresses how a paper certificate of title and other documents outside the workspace but important to the settlement process (order on agent, letter of attornment, original survey etc) are to be dealt with (clauses 30.14, 30.15).
- The clause needs a detailed definitions sub-clause (clause 30.16).

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