

Contract for sale & purchase of land 2017

Eastern Suburbs Law Society

26 August 2017

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Scope of this presentation

- Development of the latest editions of the contract
- Delivery modes and transitioning – which edition is appropriate?
- *Conveyancing (Sale of Land) Regulation 2017*
- Mine subsidence – a “special” statutory warranty
- “Foreigners” law reform –FATA, Land tax and purchaser surcharge duty; FRCGW
- Priority notices – now mentioned in clause 10.1
- GST and strata clauses
- Other changes in the 2017 edition
- A 2018 edition?

Progress towards the new contracts

- New edition replacing 2005 contract first mooted mid-2009.
- Release date of 2014 edition 17 November 2014.
- 2016 edition prompted mainly by Federal withholding tax to commence on 1 July 2016. Released 30 May 2016.
- Federal budget changes to FRCGW prompted an “interim” 2016/17 edition – released 21 June 2017.
- More comprehensive review to align with the new *Conveyancing (Sale of Land) Regulation* – 2017 edition released 31 July 2017.

Transition to latest edition

- Unlike some previous editions (1988; 2000) currently (as at August 2017) no imperative to change to new edition as from specific date.
- Pad-based and electronic 2005 editions withdrawn from sale on release of 2016 edition.
- ECOS portal has latest version available to purchase, and to inspect.
- However, any contract prior to the 2017 edition will need to be reviewed before 1/9/17.

Which edition of the contract?

- The release of the 2017 edition sees five versions of the joint copyright form in current use in NSW.
- The various editions do not have such major differences that a chain could not proceed with different editions forming links in the conveyancing chain.
- Despite this, there are circumstances where the use of an earlier edition than the current version is inappropriate.

The 2014 or later edition is preferable to 2005 when...

- A party is contemplating using PEXA.
- The vendor is contemplating accepting a deposit bond or guarantee.

If a bond or guarantee is in prospect the 2005 edition should not be used unless an appropriate special condition is included – *Parke v Mamo* [2016] NSWSC 1129. In that case the effect of a deposit bond absent a special condition was that the vendor's entitlement to a deposit (or a replacement bond) was lost when the original bond expired.

The 2016 edition is preferable to 2014 when...

- Sale is not an FRCGW excluded transaction.
- The property includes a swimming pool to which the provisions of the *Swimming Pools Act* 1992 apply.

The 2014 edition was drafted based on the proposed amendments to the pool disclosure obligations on sale (that is, three possible disclosure documents in the pick-a-box list).

The 2016 edition reflects the final version of disclosure (5 possible pool pick-a-boxes).

The 2016/17 edition is preferable to 2016 edition when...

- FRCGW is relevant (especially if there is an obligation to “fully withhold” – that is, no clearance certificate or variation in respect of every vendor).
- Land tax is adjustable (due to the reference to surcharge land tax in clause 14).

The 2016/17 contract and FRCGW

- Warning regarding FRCGW amended to remove reference to a specific threshold.
- New definition in clause 1 – FRCGW percentage – referencing Taxation Administration Act.
- Withholding amount defined by reference to FRCGW percentage.
- Clause 31 amended to remove reference to contract being entered into on or after 1/7/16.

The 2016/17 contract and land tax

- Traditionally, there has been controversy between vendors and purchasers on whether it is fair to adjust land tax.
- If a 2016 or earlier edition of the contract requires a land tax adjustment, any adjustment will include surcharge land tax.
- Surcharge land tax has no threshold, and the usual PPR exemption does not apply, so potentially the amount will be both substantial and often unexpected.
- The 2016/17 printed provisions explicitly exclude surcharge land tax from any adjustment.

And if all that is not confusing enough.....

- The use of previous editions will need to be considered in the light of the staged repeal of the *Conveyancing (Sale of Land) Regulation 2010*.
- Most importantly, the changes to the list of prescribed documents in Sch 1 will impact on
 - Contracts exchanged; and
 - Residential properties marketed on or after the commencement date of 1/9/17.

Conveyancing (Sale of Land) Regulation 2017

- Published on Legislation Website 28/7 – commences 1/9/17.
- Stated to be primarily “machinery” and “no appreciable burden, cost or disadvantage” in the changes.
- Majority of the clauses renumbered.
- Usual updating of names of Government authorities.

Conveyancing (Sale of Land) Regulation 2017

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
- Schedules 1 and 3 sewerage authority diagrams
- Schedule 3 statutory adverse affectations
- Schedule 3 new strata renewal adverse affectation

Schedule 1 warnings as from 1/9/17

- Swimming pools warning deleted; replaced by Loose-fill asbestos warning (with usual typeface and font size requirements, so DO NOT copy off this slide!!!!).

WARNING—LOOSE-FILL ASBESTOS INSULATION

Before purchasing land that includes any residential premises (within the meaning of Division 1A of Part 8 of the Home Building Act 1989) built before 1985, a purchaser is strongly advised to consider the possibility that the premises may contain loose-fill asbestos insulation (within the meaning of Division 1A of Part 8 of the Home Building Act 1989). In particular, a purchaser should:

- (a) search the Register required to be maintained under Division 1A of Part 8 of the Home Building Act 1989, and
- (b) ask the relevant local council whether it holds any records showing that the residential premises contain loose-fill asbestos insulation.

For further information about loose-fill asbestos insulation (including areas in which residential premises have been identified as containing loose-fill asbestos insulation), contact NSW Fair Trading.

Sewerage authority diagrams

- In short: If two diagrams are available from a “recognised sewerage authority (defined in clause 3(1)) ATTACH BOTH.
- Sch 1 item 2:

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).

Statutory adverse affectations in Sch 3

- Now need to warrant as to orders under not only s124 LG Act but those under corresponding section of EP&A Act (s121B).
- Rights of way under *Mining Act 1992* – ss 164, 211 and 235C.
- 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).
- And a new warranty where the contract relates to land comprising or including a lot in a freehold strata scheme:

As at the date of the contract and except as disclosed in the contract:

The strata renewal warranty

(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.

- So purchaser loses protection if the minutes of the relevant meeting have been prepared.
- Vital to check OC records (via strata inspection).

Mine Subsidence Compensation Act – a “special” warranty

- Section 15(5)(a):
 - (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,
- Right to cancel has been available since at least the late 1920s (under predecessor legislation).

A more potent remedy

Compare this provision with the consequences of a breach of statutory warranty under the C(SoL) Reg:

- Availability of “reasonable costs and expenses” under the MSC Act.
- Right to rescind is unfettered under the Act – clause 17(3) of the 2017 Regulation limits the right to rescind.
- A disclosure in the contract can preclude C(SoL) Reg rescission right. It appears the MSC right to cancel would operate even if the contract disclosed the true position.

Testing the Mine Subsidence right to cancel – s 15B(1) to (3)

(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.

(not to be confused with s 15C)

15C Certificates of compensation claims paid

(1) Any person may apply to the Board for a certificate under this section stating whether or not on a date specified in the certificate any claim for compensation under this Act had been paid, or was pending, in respect of any improvement or any household or other effects specified in the application.

(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 the household or other effects in respect of which the certificate is required.

Changed procedures from 1/3/17

From MSB “Certificates” homepage accessed 4/4/17

- “1. Certificates will be issued electronically to reduce turnaround times.
2. An applicant requesting a 15B Certificate for residential improvements will be required to provide a statutory declaration from the existing landowner 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.”

Changed procedures from 1/3/17 (2)

From MSB “Certificates” FAQs 4/4/17 (underlining added)

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.

If no statutory declaration 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.”

.... And now the good news...

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

Mine Subsidence – the way forward

- *Coal Mine Subsidence Compensation Act 2017.*
- Received assent 14 August 2017.
- Will require supporting Regulation – likely to issue in the second half of 2017.
- New legislation abolishes certificate regime.
- Unfortunately, the provision in s15(5)(a) of the 1961 Act has carried over into the new legislation.
- An untestable right of rescission?

Foreign Acquisitions and Takeovers Act 1975

- Act fundamentally rewritten with effect from 1 December 2015 (but still the 1975 Act).
- All but the first two sections 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.
- Practice tip: Check any form letters of advice which refer to sections of the Act and update.
- Clause 22 of the land contract (and corresponding clauses in business and water contracts) sufficiently broadly drawn to continue unamended.

Who is a 'foreign person'? – s 4 FAT Act

- an individual not ordinarily resident in Australia; or
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or

Who is a ‘foreign person’? – s 4 (continued)

- the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or
- a foreign government; or
- any other person, or any other person that meets the conditions, prescribed by the regulations:
 - Certain general partners in limited partnerships
 - Some foreign government investors

See FIRB Guidance Note GN31 for more details.

Land tax s47 changes from 1/7/16.

- *Taxation Administration Amendment (Collection and Disclosure of Information to Commonwealth) Bill 2016*
- Bulk of provisions relate to authorising information gathering.
- Amended *Conveyancing (Sale of Land) Regulation 2010* to effectively shift the onus of applying for a section 47 certificate to the vendor.
- Implied term that a vendor must serve a 'current land tax certificate' on the purchaser, in most cases at least 14 days before completion.
- 2017 Reg amends wording of the clause, but it seems no substantive change.

A 'current' land tax certificate

Clause 6(2) of the 2017 Regulation (clause 8A(2) in predecessor):

- a certificate issued under section 47
- either pre- or post-subdivision (better if it is pre-subdivision from a fees perspective)
- applied for by, or on behalf of, the vendor (so not passed down a chain)
- 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 (see Schedule 2 of the Regulation).

‘Current’ does not equal ‘clear’

- The vendor’s section 47 certificate need **not** be clear for the current land tax year at the time of service.
- Further, a matter may roll over into the following land tax year.
- The obligation to cause the unencumbered legal title to pass means a vendor will have to arrange for any land tax charge cleared by completion.
- Subtle rewording of clause 16.6 in the 2016 and later editions – contractual clearance obligation triggered if **either party** serves a certificate disclosing a charge.
- A section 47 is now important even for property which would be exempt for land tax.

State Revenue Legislation Amendment (Budget Measures 2016) Act 2016

- Passed by both Houses 23 June 2016.
- Substantial amendments to Duties Act effective 21 June 2016.
- New Chapter 2A imposing ***surcharge purchaser duty*** on certain dutiable transactions relating to ***residential land*** (defined in s104I) giving rise to a transfer to a ***foreign person*** (defined in s104J – similar but not identical to FAT Act definition).
- Other basic concept: ***residential-related property*** (s104K).
- Rate = 4% of dutiable value (s 104J(1)).
- Section 49A ‘off the plan’ concession no longer applies if **any** purchaser or transferee is a foreign person (limited further in 2017 Budget).

State budget 2017

- Increase rate of purchaser surcharge duty from 4% to 8%.
- Refunds and exemption for some foreign persons who are Australian-based developers (s104ZJA) or “exempt permanent residents” (s104ZKA).
- Changes to duties exemption and concession scheme – caps, existing as well as new homes, shared equity relief.
- Residence requirement introduced into s49A.
- Abolition of (inter alia) lender mortgage insurance duty.

State budget 2017 - 2

- Land Tax changes:
- Surcharge land tax rate increased to 2% as from 2018 land tax year.
- Refunds and exemptions for some foreign persons who are Australian-based developers or exempt permanent residents – mirroring the *Duties Act* changes.

“Foreign person” and “foreign trustee” – s 104J

104J (1) In this Chapter:

foreign person means a person who is a foreign person within the meaning of the Foreign Acquisitions and Takeovers Act 1975 of the Commonwealth, as modified by this section.

foreign trustee means a person who is a foreign person because of the person’s capacity as the trustee of a trust.

“Foreign person” and “foreign trustee” – s 104J

(2) The definition of foreign person in the Foreign Acquisitions and Takeovers Act 1975 of the Commonwealth is modified as follows:

- (a) an Australian citizen is taken to be ordinarily resident in Australia, whether or not the person is ordinarily resident in Australia under that definition,
- (b) a New Zealand citizen who holds a special category visa, within the meaning of section 32 of the Migration Act 1958 of the Commonwealth, at any particular time is taken at that time to be an individual whose continued presence in Australia is not subject to any limitation as to time imposed by law.

Land tax surcharge – s 5A Land Tax Act 1956

- (1) Land tax is payable under this section in respect of residential land owned by a foreign person (*surcharge land tax*).
- (2) In respect of the taxable value of all the residential land owned by the foreign person at midnight on 31 December in any year (commencing with 2016), surcharge land tax is to be charged, levied, collected and paid under the provisions of the Principal Act and in the manner prescribed under that Act for the period of 12 months commencing on 1 January in the next succeeding year at the rate of 0.75% of that taxable value as assessed under the Principal Act.
- (3) Surcharge land tax is payable in addition to any land tax payable in respect of the residential land under the other provisions of this Act, and is so payable even if no land tax is payable under those other provisions.

Capital gains withholding tax obligations

- *Tax and Superannuation Laws Amendment (2015 Measures No. 6) Bill 2015* passed both Houses on 22 February 2016.
- As from 1 July 2016, the sale and purchase of interests in real property (including leases) and mining rights will need to deal with a non-final withholding tax where vendor is foreign.
- \$2,000,000 (but note reduction to \$750,000 as from 1/7/17) threshold based on market value will exclude some sales.
- Obligation to remit resides with the purchaser.
- Implemented via a “clearance” system for sales, and a system relying on a vendor declaration for indirect interests in, and options over, real property.

Practical issues of concern

- If the value of the property exceeds the threshold, purchaser will have to withhold the nominated percentage of the “price” (which itself has definitional difficulties) and remit to the ATO unless the vendor serves on purchaser:
 - A clearance certificate; or
 - A statement from the ATO that a lesser amount is payable.
- On a sale and purchase, vendor is effectively a foreigner unless proves the contrary to the ATO’s satisfaction.
- Amount generally to be paid by electronic means and due on the day of completion according to the Act!
- The threshold does not apply to options or ‘indirect’ transactions.
- See www.ato.gov.au/frcgw for latest information & guidance, including (belatedly) information on options, deceased estates and trusts.

FRCGW Changes in the 2016 edition of the contract

- New item 22 in the list of documents – *clearance certificate*.
- Clause 1 new definitions – note especially ‘clearance certificate’ and ‘remittance amount’.
- Clause 16.7 – confirms obligation to withhold any *remittance amount* from the price.
- Detailed clause 31 – applies only if:
 - the transaction is not an excluded transaction; and
 - A clearance certificate for each vendor is not attached to the contract.

Purchaser's obligations under clause 31.2

- 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.

Consequences for vendor re FRCGW

- See new Warning 11 on page 4 of the 2016 edition.
- If a clearance certificate or variation is served during the course of the matter, the vendor cannot compel completion until at least 7 days after service.
- The vendor cannot refuse to complete merely because the purchaser is complying with its withholding and remitting obligations.

The 2016 contract and the 1/7/17 changes to FRCGW

- The provisions of sale do not mention the figure of \$2 million (though the Warning about FRCGW does).
- Clause 1 of the contract refers to the original 10% withholding figure.
- The provisions of the *Taxation Administration Act* override the contractual provisions – so as from 1 July 2017 12.5% will be the appropriate withholding figure.

The 2016/17 and 2017 contracts and FRCGW

- Warning regarding FRCGW amended to remove reference to a specific threshold.
- New definition in clause 1 – FRCGW percentage – referencing TA Act.
- Withholding amount defined by reference to FRCGW percentage.
- Clause 31 amended to remove reference to contract being entered into on or after 1/7/16.
- Further tweaks in 2017 edition covering situations where transferee does not accord with the purchaser because of a clause 4.3 direction, and where there is a variation to nil.

Priority notices

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:

- *Threshold requirement*
- *Effect of lodging*
- *Duration*
- *Fee*
- *PEXA specific*

Caveat or priority notice? – points to consider

1. A caveat can be used to protect a legal or equitable interest; a priority notice is available where “a person *intends to lodge a dealing to give effect to an entitlement to a legal or equitable estate or interest in land*” (s 74T(1)).

- Each must be grounded in a legal or equitable interest in land.
- Where there is no dealing to be lodged to give effect to the interest, a PN is inappropriate.

Caveat or priority notice? – points to consider 2

2. A caveat once lodged is of indefinite duration; a priority notice endures for 60 days (with only one possible extension, for 30 days).

- So, where the interest sought to be protected exceeds (or is likely to exceed) 90 days, a PN will be of limited utility.
- The effect of a succession of priority notices.

Caveat or priority notice? – points to consider 3

3. Lodgement of a caveat will not preclude the recording in the Register of 28 classes of other dealings **unless the caveat itself prohibits the recording** (s76H(5)).

By contrast, the corresponding section governing priority notices (s74W(2)) only identifies 9 classes of dealings, but does not allow the drafter of the PN to prohibit any of those dealings being recorded.

Caveat or priority notice? – points to consider 4

4. Caveats can be lodged through both paper and PEXA channels. A priority notice can only be lodged through PEXA.

5. Lodgment fee for a PN is significantly lower (\$37.86; \$15.69 for extension or withdrawal plus in each case a small PEXA fee) than for a caveat.

Clause 13 changes in the 2017 edition

- Clause 13.1 – drafting style change. Rather than listing words and phrases with the same meaning as in the *GST Act*, now have same meaning as in the Act unless the contract defines differently (e.g. “price”).
- Clause 13.4.3 – going concern clause now requires an unregistered purchaser to become registered with a “date of effect of registration” on or before completion

Clause 13 changes in the 2017 edition – 2

- Clause 13.3 amended and clause 13.12 added – clarifying how adjustments are to be calculated inter partes, and also those involving third parties (such as rent).
- Where vendor liable for GST on rents and profits, adjustment of those amounts should be on a **GST-exclusive** basis (otherwise purchaser gets a windfall).

Clause 23 changes in the 2017 edition

- Reformatting clause – use of subheadings, additional numbering inserted (in particular, clause 23.2).
- Terminology in the 2015 Acts embraced – “capital works fund”, “strata information certificate” and “strata information notice” (the latter two including the corresponding items for community schemes).
- Clause 23.6 amended – no longer need to consider whether work had started on or before contract date when determining liability for non-regular periodic contributions.

Clause 23 changes in the 2017 edition – annexing by-laws

- Prior to 1 September 2017, the Reg only required disclosure of exclusive use (now called common property rights) by-laws.
- The editions of the contract up to and including 2016/17 required disclosure of all by-laws **other than model by-laws** (definition of “change”).
- If using 2017 edition **or** if contract exchanges on or after 1/9/17 all by-laws **including the full text of model by-laws** must be attached.

Other minor changes in the 2017 edition

- Warning 6 now reminds purchasers of the possibility of surcharge purchaser duty.
- Clarifying phrases added to clauses 7.2.5 and 7.2.6.
- Clause 16.7 recast for clarity – appears to be no substantive change.

A 2018 edition???

The next edition may need to take into account:

- How strata renewal operates in practice – will the Schedule 3 warranty be sufficient or should the contract do more?
- The changes to the GST treatment of new residential premises and new (it seems residential) subdivisions announced in the 2017 Federal Budget to take effect as from 1 July 2018.
- The increased usage of PEXA as 1 July 2019 approaches.
- Imminent changes to Crown Lands legislation.

Any questions?