Conveyancing update August 2018

Tony Cahill
Legal Author and Commentator

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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 Conveyancing for the Law Extension Committee.

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Revision of the Law Society – REI Joint Copyright Contract

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

In the second half of 2009 (four years after the publication of the 2005 edition) 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.

The Law Society announced in early 2018 that there will be a 2018 edition to take into account further legislative change, notably the GST residential withholding obligations slated to take effect on 1 July 2018. The 2018 edition was released on 14 May 2018.

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 they had 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 decided that the 2014 and later editions of the land contract will only be sold in an electronic format rather than on "blue". The pages of the electronic form commencing with the statutory notices are in a PDF format and watermarked with the address of the property. The pages setting out the variable information are in a word-processor compatible format, and the standing permission to produce "your own version" of those pages (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. If a prior edition is used and the contract is exchanged (or residential property is marketed) on or after 1 September 2017 regard should be had to the 2017 Regulation.

The 2018 edition is preferable to earlier editions for properties which are any of:

- Residential;
- Required to settle electronically;
- Strata; or
- Affected by crown land legislation.

Conveyancing (Sale of Land) Regulation 2017

The 2017 Regulation was published on the Legislation Website on 28 July 2017, and commenced 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).
  - ✓ As from 15 September 2017, two further items were added to the list of adverse affectations:

> **29** A mandatory code compliant certificate under Part 5A of the *Local Land Services Act 2013* that requires the establishment of a set aside area.
>
> **30** A remediation order under Part 11 of the *Biodiversity Conservation Act 2016*.

- Further adverse affectations have been added consequential on the commencement of the *Building Products (Safety) Act 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.

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 provided:

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 was 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.

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 in respect of each vendor; 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" was 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 is no longer 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.

GST residential withholding obligations

The 2017 Federal budget announced a GST integrity measure focused on vendor/developers who fail to remit the GST collected at settlement (and sometimes re-emerge in the property sector with a "phoenixed" entity). The proposal was that purchasers rather than vendors of certain residential property be responsible for remitting GST.

A Consultation Draft Bill focused on how the measure would be implemented was released to the public in late 2017. There was extensive industry feedback, not universally positive.

A markedly different Bill was introduced into Parliament early in 2018 and had passed by the end of March.. The measure will apply to:

- Contracts entered into on or after 1 July 2018; and
- Some contracts entered into before 1 July 2018 – there is a carve-out if consideration (other than the deposit) is first provided before 1 July 2020. This carve-out should apply to all but the longest-term off the plan developments entered into before 1 July 2018.

The measure will apply to new residential premises (excluding commercial residential premises and substantially renovated premises) and to most (but not all) potential residential land which is included in a property subdivision plan.

The withholding amount is usually either:

- 7% of the contract price if the margin scheme is used (though this percentage can be increased by Ministerial direction); or
- One-eleventh of the contract price in any other case.

There is a different rate again for certain supplies to an associate.

The amount will typically be payable at completion (but possibly earlier if any of the non-deposit consideration is supplied before settlement).

It is envisaged that a vendor of residential premises will give notice to the purchaser prior to settlement of whether the purchaser is required to make payment under the measure, and if so to provide certain other particulars. Unlike the FRCGW clearance certificate, a vendor notice saying there is no obligation to withhold is not conclusive.

Further details will become available once the ATO publishes supporting materials.

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. They are referred to in clause 10.1.9 of the 2017 and 2018 editions as

matters which might be disclosed in the contract but about which a purchaser can still raise a requisition or claim or rescind or terminate (as has long been the case for caveats, charges, mortgages and writs).

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).

In the 2018 edition, a new clause 13.13 has been added dealing with obligations arising from the introduction of the GST integrity measure – in particular, relating to the arrangements for payment of the withholding amount. The clause mirrors closely the provision dealing with FRCGW payment arrangements.

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 (now postponed 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.

Both the MA and the DA are total rewrites of the former Acts.

The DA has consolidated the two previous strata development statutes into a single Act. The structure of the new DA is broadly similar to the 1973 Act (with provisions strategically inserted to accommodate issues specific to strata leasehold). The DA concludes with nine Schedules, most of which deal with topics familiar to those practitioners dealing regularly with the existing development statutes.

The novel (and the most controversial) aspect of the above is the introduction of a strata renewal process in Part 10 of the DA.

The management of strata schemes has had the most wide-ranging changes. The Government has indicated there are in excess of ninety amendments to the provisions of the 1996 Act. Furthermore, the structure of the MA is markedly different from its 1996 predecessor.

Some important changes in terminology to flag at the outset – the executive committee is now to be called a "strata committee"; what has been called the sinking fund is now described as the "capital works fund"; and caretakers are now "building managers". The familiar section 109 certificates and section 118 notices are given names – a strata information certificate and a strata information notice.

The strata renewal process introduced by the new Part 10 of the DA is in addition to the existing powers of the Supreme Court to vary or terminate

(and the Registrar-General to terminate) a strata scheme. These are now set out in Part 9 of the DA. Division 5 of Part 9 deals with termination of leasehold strata schemes on expiry of all leases of the lots and common property.

Part 10 does not apply to leasehold strata schemes. Nor does it apply to those freehold strata schemes relating to a parcel that is the subject of a development contract, or in which one or more of the lots in the scheme are, or form part of, a retirement village (DA s153).

Where the strata scheme was registered prior to 30 November 2016, Part 10 will not automatically apply. Schedule 8 clause 8 of the DA provides:

> **8 Application of Part 10 to existing freehold strata schemes**
>
> (1) Part 10 applies to a freehold strata scheme in existence immediately before the commencement of that Part only if the owners corporation has, by resolution, decided the Part applies to the scheme.
>
> (2) Despite subclause (1), a person may give a strata renewal proposal under Part 10 to the owners corporation before the resolution is passed.
>
> (3) The resolution may be passed before or at a general meeting convened to consider a strata renewal proposal.
>
> (4) If the resolution is passed at a general meeting convened to consider a strata renewal proposal, it must be passed before the proposal is considered.
>
> (5) The owners corporation must record details of the resolution on the strata roll.
>
> (6) A resolution referred to in this clause cannot be revoked.

The transitional provision contemplates that the owners corporation may consider whether it wishes to be open to the strata renewal process prior to any proposal being received. In practice it is more likely that consideration of the issue will only be prompted if a proposal is received.

Once an "opt-in" resolution is passed, it is irrevocable. Those taking interests in such strata schemes (for example purchasers, and perhaps mortgagees) will prudently inspect the records of an owners corporation prior to exchange to check whether such a resolution has been passed.

Many of the key definitions are set out in DA s154 – most significantly:

collective sale of a strata scheme means a sale of the whole strata scheme.

compensation value, in relation to a lot, means:

(a) the compensation to which the owner of the lot would be entitled as determined under section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* (subject to any modifications prescribed by the regulations), or

(b) if the regulations prescribe a different method of determining that value—the value of the lot determined in accordance with that method.

court means the Land and Environment Court.

developer means a person or group of persons proposing to carry out a redevelopment of a strata scheme in accordance with a strata renewal plan.

dissenting owner, in relation to a strata renewal plan, means an owner of a lot in relation to which a support notice is not in effect under this Part for the plan.

independent valuer means a qualified valuer who:

(a) has appropriate experience or expertise to undertake valuations for the purpose of this Part, and

(b) has no pecuniary or other interest that could reasonably be regarded as capable of affecting the qualified valuer's ability to give the valuations in good faith.

market value, in relation to a building and its site, means the value of the building and its site determined in accordance with the regulations.

redevelopment of a strata scheme means a redevelopment of the whole strata scheme in a way that alters the scheme to the extent that its termination and replacement by a further strata plan is necessary.

required level of support, in relation to a strata renewal plan for a strata scheme, means the support (given in support notices that are in effect under this Part) of the owner or owners of at least 75% of the lots, other than utility lots, in the scheme.

strata renewal plan means a strata renewal plan prepared in accordance with this Part for a strata scheme.

Division 2 of Part 10 outlines the process of submission and consideration of a strata renewal proposal. Any person (lot owner or otherwise) can submit a written proposal for sale or redevelopment (DA s156(1)). The

proposal must include certain prescribed matters (set out in clause 30 of the Regulation):

(1) For the purposes of section 156 (2) of the Act, a strata renewal proposal must include the following:

(a) the warning notice set out in subclause (2),

(b) the name and address of the person giving the proposal (the ***proponent***),

(c) details of the financial interests (if any) that the proponent has in any of the lots in the strata scheme,

(d) a general description of the proposal and the purpose of the proposal,

(e) how the proposal will be funded,

(f) an estimate of the total cost (including application fees and legal fees) of obtaining an order from the court to give effect to the strata renewal plan,

(g) whether the proponent will provide any monetary contributions (whether initial or continuing) towards the reasonable costs and expenses incurred by the strata renewal committee or owners corporation in relation to the following:

(i) preparing a strata renewal plan,

(ii) obtaining specialist consultant reports,

(iii) obtaining an order from the court to give effect to the plan,

(h) if the proponent is to provide any monetary contributions, what (if any) security (such as cash, bond, bank guarantee) will be provided,

(i) the potential (if any) for owners to buy back into the development following the collective sale or redevelopment,

(j) if the proposal is for a collective sale of the strata scheme:

(i) an indicative sale price and an explanation of how that price was determined and the distribution of that sale price on current unit entitlements, and

(ii) the proposed timetable for the collective sale, including a proposed completion date and the

proposed date by which owners will be required to vacate premises forming part of the scheme,

(k) if the proposal is for the redevelopment of the strata scheme:

(i) details of the proposed terms of settlement that are to be offered to each lot owner, and

(ii) how the redevelopment will be funded by the proponent, and

(iii) details of any planning approvals and other authorisations that would be required before the redevelopment can start and how and when the proponent intends to obtain those approvals and authorisations and whether they will be obtained before an application is to be made to the court for an order to give effect to the strata renewal plan, and

(iv) the proposed timetable for the development, including an estimate of the period from the start of the redevelopment to its completion, and

(v) the estimated date on which owners must provide vacant possession to the proponent.

(2) The warning notice required by subclause (1) (a) is to be to the effect of the following, being a notice on the front of the proposal that is legibly printed, in bold type, with the words shown in capital letters in the heading being at least 14 point, and the rest of the notice printed in letters at least 10 point:

IMPORTANT NOTICE TO OWNERS IN STRATA PLAN [*insert plan number*]

This renewal proposal may have significant legal, financial and taxation consequences for you. It may also impact on the rights of your tenants, mortgagees, covenant chargees or caveators which may in turn have impacts on you. You should ensure that you understand your rights and obligations and how this proposal will affect you.

The strata committee must consider the proposal as soon as practicable (but in any case within 30 days) after receipt (DA s157). This initial strata committee meeting is to decide whether the proposal warrants further consideration by the owners corporation.

If the strata committee believes the proposal warrants further consideration, it must convene a meeting of the owners corporation. Again, this meeting is to be convened as soon as practicable, but in any case within 30 days (DA s158).

If the owners corporation believes the proposal warrants further investigation, it elects a strata renewal committee (DA ss160-163).

DA section 164 deals with the function and operation of the strata renewal committee:

> **164 Function and operation of committee**
>
> (1) The function of the strata renewal committee is to prepare a strata renewal plan, relating to the strata renewal proposal for the strata scheme, for consideration by the owners corporation and the owners in accordance with this Part.
>
> (2) In exercising its function, the strata renewal committee:
>
> (a) must not spend more than the amount that the committee has, by resolution of the owners corporation made from time to time, approval to spend in preparing the strata renewal plan, and
>
> (b) may engage persons to help it prepare the strata renewal plan (for example, a person who gave the strata renewal proposal to the owners corporation), if the owners corporation has delegated to the committee the authority to do so.
>
> (3) The strata renewal committee may at any time ask the secretary of the owners corporation to convene a general meeting to approve:
>
> (a) amounts that may be spent by the committee in preparing a strata renewal plan, or
>
> (b) any other matter relating to the operation of the committee or the exercise of its function.
>
> (4) If, when an act or proceeding of the strata renewal committee was done, taken or commenced, there was:
>
> (a) a vacancy in the office of a member of the committee, or
>
> (b) any defect in the election of a member,
>
> any act or proceeding of the committee done in good faith is as valid as if the vacancy or defect did not exist and the committee were fully and properly constituted.

The committee operates for one year unless it is earlier dissolved or the owners corporation extends the period (DA ss166-7).

A strata renewal plan must deal with the matters set out in DA s170:

170 Content of strata renewal plan

(1) A strata renewal plan for a strata scheme must include the following information:

(a) a general overview of the strata renewal proposal to which it relates,

(b) a full and frank statement by the proposed purchaser or developer of their intended use of the strata parcel,

(c) if the plan is for a collective sale of the scheme:

(i) the name of the purchaser, if known, or a proposal for marketing the parcel for sale by public auction or tender, and

(ii) the sale price (if known), or a minimum reserve price for the sale or details of the way in which a minimum reserve price for the sale is to be set, and

(iii) the proposed completion day for the sale, and

(iv) the proposed day on which the owners of the lots are to provide vacant possession of their lots, and

(v) the details, prescribed by the regulations, about costs and expenses to be deducted from the sale price, and

(vi) any other terms and conditions of the proposed sale that the strata renewal committee considers are significant,

(d) if the plan is for a redevelopment of the scheme:

(i) the name of the proposed developer, and

(ii) details of any planning approvals, or other authorisations under an Act or otherwise, required before the redevelopment can start, and

(iii) an estimate of the period from the start to completion of the redevelopment, and

(iv) details of any periods during which the owners of lots will be required to provide vacant possession because of the redevelopment, and

(v) details of arrangements for financing the redevelopment, and

(vi) details of the terms of settlement and the amounts to be paid to each dissenting owner for the purchase of the owner's lot, and

(vii) details of the terms of settlement for each supporting owner including the amount and timing of any payments to be made to the owner and, if the owner has a right to buy back into any future scheme, details of that right,

(e) any other information or document about the proposed collective sale or redevelopment prescribed by the regulations.

(2) Subsection (1) does not limit the matters that may be included in a strata renewal plan.

(3) If a strata renewal plan is for a collective sale of a strata scheme, the plan must provide for the purchase of each owner's lot at not less than the compensation value for the lot.

(4) If a strata renewal plan is for a redevelopment of a strata scheme, the plan must provide for each dissenting owner's lot to be purchased at not less than the compensation value for the lot.

The plan is then to be considered by the owners corporation (DA ss172-3).

Those lot owners in favour can lodge a support notice (DA s174) which can be withdrawn prior to the required level of support being obtained (DA s175).

If the required level of support is reached, the returning officer must notify each lot owner and the Registrar-General (DA s176).

If the required level of support is reached, a further meeting of the owners corporation is convened to decide whether to apply to the Court (DA s178). The application must be accompanied by the material set out in DA s179(1):

(a) a copy of the plan,

(b) a copy of each support notice that is in effect under this Part for the plan,

(c) the names of each dissenting owner and each registered mortgagee and covenant chargee of a dissenting owner's lot,

(d) a declaration given by the owners corporation identifying the steps taken in preparing the plan and obtaining the required level of support in accordance with this Part,

(e) if the plan is for a collective sale of a strata scheme:

(i) a declaration given by the purchaser, if known, disclosing the nature of any relationship, whether personal or commercial, the purchaser may have with the owner of any lot in the scheme, and

(ii) a report of an independent valuer that includes details of the market value of the whole building and its site (at its highest and best use) and details of the compensation value of each lot,

(f) if the plan is for a redevelopment of a strata scheme:

(i) a declaration given by the developer disclosing the nature of any relationship, whether personal or commercial, the developer may have with an owner of any lot in the scheme, and

(ii) a document specifying the amount to be paid to each dissenting owner for the owner's lot, and

(iii) a report of an independent valuer that includes details of the market value of the whole building and its site (at its highest and best use) and details of the compensation value of each dissenting owner's lot, and

(iv) a document detailing enough financial information to show there is a secure source of finance for the carrying out of the proposed redevelopment under the plan,

(g) any other information or document about the proposed collective sale or redevelopment prescribed by the regulations.

Any dissenting owner, registered mortgagee or covenant chargee, proposed purchaser in a collective sale and the local council or proposed developer can object to the application (DA s180).

The court must make an order giving effect to the strata renewal plan if satisfied as to the matters set out in DA s182(1):

(a) the relationship, if any, between the owners of lots and the purchaser or a developer has not prevented the plan being prepared in good faith,

(b) the steps taken in preparing the plan and obtaining the required level of support were carried out in accordance with this Act,

(c) all notices required to be served under sections 179 and 181 have been served,

(d) if the plan is for a collective sale—the proposed distribution of the proceeds of sale apportioned to each lot is not less than the

compensation value of the lot and the terms of the settlement under the plan are just and equitable in all the circumstances,

(e) if the plan is for a redevelopment—the amount to be paid to a dissenting owner is not less than whichever of the following is greater:

(i) the compensation value of the owner's lot,

(ii) an amount equal to the total consideration that would accrue to the dissenting owner under the plan in relation to the redevelopment and the owner's lot if that owner had given a support notice for the plan,

(f) if the plan is for a redevelopment—the terms of the settlement under the plan, as those terms apply to any dissenting owner, are just and equitable in all the circumstances,

(g) any other matter prescribed by the regulations.

The court has a limited power to vary the proposal (DA ss182(2), (3))., and power to make ancillary orders (DA s186).

The order attaches to the parcel, and binds, among others, purchasers and other successor owners and occupiers (DA s187).

DA s188 deals with costs:

188 Costs

(1) Unless the court otherwise orders:

(a) the reasonable costs of proceedings for an application for an order to give effect to a strata renewal plan that are incurred by a dissenting owner are payable by the owners corporation, and

(b) the owners corporation cannot levy a contribution for any part of the costs on a dissenting owner.

(2) The regulations may prescribe other matters for or with respect to the costs of proceedings for an application for an order to give effect to a strata renewal plan.

Part 11 of the Management Act introduces a regime to deal with building defects in new strata schemes involving residential building work (in some cases extending to mixed use schemes). The scheme will not operate in circumstances where insurance under the Home Building Compensation Fund is required (s191(3)). The developer will generally be required to arrange the appointment of a building inspector who must provide an interim and a final inspection of, and report on, the building work within nominated timeframes. Coupled with the inspection process, the developer

will need to provide to Fair Trading a building bond in the amount of 2% of the contract price for the building work.

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 in two respects. There is no longer need to consider whether work had started on or before contract date when determining liability for non-regular periodic contributions. Furthermore, the liability as between vendor and purchaser will be apportioned by looking not to the date on which the amount was "levied" but rather to when the "contribution was determined". The new terminology reflects more closely sections 81 and 83 of the *Strata Schemes Management Act* 2015 (and it is suggested removes some ambiguity about when precisely a contribution is "levied").

Environmental Planning and Assessment Amendment Act 2017.

This Act received assent on 23 November 2017.

In January 2018 the Department of Planning and Environment announced via its website a commencement date of 1 March 2018.

Unfortunately, the "official" announcement – by publication on the NSW Legislation Website – only occurred on 28 February 2018 (at 11:51 am).

That delay is doubly unfortunate because, among other things, the amendment Act restructures and renumbers (using decimal numbering) all the provisions in the existing Act – even those which are otherwise unamended.

To take two provisions of interest to property practitioners:

- A section 149 certificate has become a section 10.7 certificate.
- Section 149A has become section 6.26.

It was also unclear the extent to which the existing Regulation (and the 2017 savings and transitional regulation which formed a Schedule to the amending Act) would be amended until 28 February 2018. The *Environmental Planning and Assessment Amendment Regulation* 2018 inserted clause 4A into the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation* 2017 in these terms:

> **4A Interpretation—renumbered or relocated provisions of Act**
>
> (1) In this clause:
>
> ***document*** means any Act or statutory or other instrument or any contract or agreement, and includes any document issued or made under or for the purposes of any Act or statutory or other instrument.
>
> (2) A reference in any document (whether enacted, issued or made before or after the commencement of this clause) to a provision of the Act that has been renumbered or relocated by the *Environmental Planning and Assessment Amendment Act 2017* is taken to be a reference to the renumbered or relocated provision. Anything done or omitted to be done under any such provision of the Act before it was renumbered or relocated is taken to have been done or omitted under the provision as renumbered or relocated.
>
> (3) A reference in any document (whether enacted, issued or made before or after the commencement of this clause) to any such renumbered or relocated provision of the Act is

taken to include a reference to the provision before it was renumbered or relocated.

(4) This clause is subject to any contrary intention in the provision in which a relevant reference occurs.

(5) In this clause:

relocated includes repealed and re-enacted, with or without modification.

Note.
See the concordance table of renumbered and relocated provisions at the end of historical notes to the in-force version of the *Environmental Planning and Assessment Act 1979* on the NSW legislation website.

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.

Vendor disclosure amendments – swimming pools

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 commencing 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. In February 2015 OLG announced a further postponement until 29 April 2016. On 11 March 2016 OLG announced a modified disclosure regime. The postponements and modification recognised that there were a number of practical problems in the implementation timetable.

As originally drafted, the reforms amended 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.

> **Note that the March 2016 modification announcement allows for a third disclosure path – a 'certificate of non-compliance' which will shift the rectification obligations to the purchaser, to be done within 90 days of settlement.**

It has never been not entirely clear how the amendments would 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). **The March 2016 announcement indicates that the disclosure obligations on sale will *not* apply where the sale is of a strata or community lot and there are more than two lots in the scheme, or where the sale is off the plan..**

Nor is it clear whether the existing Swimming Pools Warning will be considered otiose now that the more detailed documentation has to be attached. As at the date of preparation of this paper the warning first introduced in 2010 remains a prescribed document.

When receiving instructions from vendors it is vital to ask whether a swimming pool (as widely defined) is associated with the property (including two-lot strata and community schemes with a pool). Marketing of the property and producing a contract with all necessary vendor disclosure documents attached may have to be postponed.

Note that the obligations on a landlord of premises where a swimming pool is situated are more onerous than those imposed on a vendor.

The 2014 edition of the contract included three swimming pool checkboxes in the list of documents based on the disclosure obligations as originally proposed – namely:

- Certificate of compliance
- Evidence of registration
- Relevant occupation certificate

The 2016 edition added two further possibilities:

- Certificate of non-compliance
- Detailed reasons of non-compliance

Additionally, the definition of 'work order' in the 2016 edition was amended to confirm that notices of non-compliance by an accredited certifier (issued under s22E of the Act) and the corresponding notices issued by the local council (issued under clause 18B of the Regulation) are not 'work orders' for the purposes of the contract.

Vendor disclosure amendments – *Home Building Act*

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 2011 by the holder of a contractor licence, or who was supplied with a kit home in 2010, has no statutory obligation to attach any documentation regarding home warranty insurance to the contract. 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 since its commencement), 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 impacts on vendor disclosure obligations when selling with effect from 15 January 2015. The key changes of relevance to property practitioners are:

- 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)

> **3C Date of completion of new buildings in strata schemes**
>
> (1) This section applies to residential building work comprising the construction of a new building in a strata scheme (within the meaning of the Strata Schemes Management Act 1996) where the issue of an occupation certificate is required to authorise commencement of the use or occupation of the building.
>
> Note. Section 3B provides for the date of completion of other residential building work.
>
> (2) The completion of residential building work to which this section applies occurs on:
>
> (a) the date of issue of an occupation certificate that authorises the occupation and use of the whole of the building, unless paragraph (b) applies, or
>
> (b) the occurrence of some other event that is prescribed by the regulations as constituting completion of the work.
>
> (3) If a contract to do residential building work (the primary contract) comprises the construction of 2 or more separate buildings, the date of completion of that work is to be determined as if there were a separate contract for each separate building (with each contract on the same terms as the primary contract) so that the work for each building will have a separate completion date. For the purposes of this section, a building is separate if it is reasonably capable of being used and occupied separately from any other building.
>
> Note. Separate buildings can still have the same completion date if they are completed at the same time.

> (4) This section applies for the purpose of determining when completion of residential building work occurs for the purposes of any provision of this Act, the regulations or a contract of insurance under the Home Building Compensation Fund.
>
> (5) In this section:
>
> ***building*** means any structure that, as a new building, requires the issue of an occupation certificate to authorise its use and occupation.
>
> ***occupation certificate*** means an occupation certificate under the Environmental Planning and Assessment Act 1979.
>
> Note. A swimming pool, tennis court or detached garage can be a building for the purposes of this section if an occupation certificate is required to authorise its use and occupation. If a structure in a strata scheme does not require an occupation certificate, section 3B will apply to it instead of 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 for property practitioners, the 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 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 sections 95 and 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.

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) commenced on 1 January 2018.

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.

The 2018 edition adds an item to the List of Documents to allow evidence of an alternative indemnity product to be attached.

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.

Submission of transfer

Clause 4.1 (dealing with the requirement to submit the transfer) has been expanded in the 2014 and subsequent editions 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) holder consent. For further details see LPI Circular 2014/03 and the LPI Factsheet dated January 2015. Practitioners should note that the proportion of eCTs has increased (and will continue to increase) exponentially as financial institutions receive mandated eCTs when transacting (and when bulk cancellations of paper certificates of title held by financial institutions occur – this will take place during September 2018).

The expanded clause is in these terms:

> 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.

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