



Winter 2010 Edition

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OFF THE PLAN CONTRACTS OF SALE: CERTAINTY NEEDED FOR SUNSET CLAUSES

Until recently, "off the plan" contracts of sale have included clauses which allow the vendor/developer a reasonable extension of time to register the plan of subdivision. The right to extend the date to register the plan of subdivision can materially prejudice purchasers who are, in effect, locked in to a contract with an uncertain completion date.

Last year, the Victorian Supreme Court sent shivers through the development industry when it held that provisions in a contract of sale which permitted the vendor to extend the date for registration of the plan of subdivision contravened section 9AE of the Sale of Land Act 1962 (Vic) ("Act") and were therefore invalid (*Clifford & Anor v Solid Investments Australia Pty Ltd* [2009] VSC 223).

Bonjiorno J held that the option under section 9AE of the Act to 'specify' a time for registration of the plan of subdivision other than the period of 18 months specified in the section, requires the vendor to nominate a time in explicit terms or conveying it with unambiguous clarity. This means that a definite period of time must be fixed so that a purchaser knows the date after which the contract may be rescinded. Once the time has been specified, it cannot subsequently be extended by the vendor

The case went on appeal and judgment was handed down in March 2010: *Solid Investments Australia Pty Ltd v Clifford & Anor* [2010] VSCA 59. The Court of Appeal unanimously dismissed the appeal and confirmed Bonjiorno J's findings about the plain meaning of section 9AE of the Act.

The clear message for vendors is to ensure that contracts of sale are drafted in such a way that sunset dates are clearly specified. This is especially important as Lenders conducting due diligence investigations on pre-sale contracts as part of their assessment of property development loan applications, will also need to be satisfied that the contracts do not breach the Act

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THE “OVERARCHING” CIVIL PROCEDURES BILL (VIC) 2010

In his speech on 20 June 2010, the Victorian Attorney General Mr Hulls hoped that the proposed Civil Procedures Bill could achieve more pre-trial settlements and greater power to the Judges to case-manage. On 22 June 2010, the Civil Procedures Bill (VIC) 2010 (“**CP Bill**”) was introduced to the Legislative Assembly¹ aiming at, *inter alia*,

1. unifying the civil dispute resolution in the Supreme, the County and the Magistrates Court; and
2. facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute (“**overarching purpose**”: see also, s 7) through “an overarching obligations for participants”: s 1.

Coverage

The CP Bill extends its coverage to all civil proceedings except proceedings in the VCAT and nine (9) other Acts² (s 4). It also does not override the *Charter of Human Rights and Responsibilities Act 2006* and any doctrines of privilege at common law, under a statute or otherwise (s 6).

Considerations for the Courts

A Court must seek to give effect to the overarching purpose with regards to the objects in s 9 such as interests of justice, timely determination and manage a case in a manner proportionate to its complexity and the size of the claim. More specifically, pre-litigation processes, reasonable attempt to resolve dispute by agreement or to narrow the issues in dispute, the degree of promptness (or lack of) with which the parties have conducted the proceeding, compliance with the applicable overarching obligation, etc are important factors for the Courts (s 9).

¹ A copy of the CP Bill can be downloaded from: [http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cboca256da400837f6b/70a5b31ff525a498ca25774b0005f14d/\\$FILE/561435bi1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cboca256da400837f6b/70a5b31ff525a498ca25774b0005f14d/$FILE/561435bi1.pdf)

² the Family Violence Protection Act 2008; the Stalking Intervention Orders Act 2008; the Confiscation Act 1997; the Proceeds of Crime Act 1987 of the Commonwealth and the Proceeds of Crime Act 2002 of the Commonwealth; the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and the Children, Youth and Families Act 2005; the Coroners Act 2008; the Victims of Crime Assistance Act 1996; the Sentencing Act 1991.

Overarching Obligations

For litigants or a party related to the litigant (such as lawyers, insurers, litigation funder except witness and expert witness), the “overarching obligation” is particularised in ss 10 to 27 (inclusive) and it is applicable to interlocutory processes as well as appeals (ss 10 & 11).

It is important to note that the overarching obligations prevail over any legal obligation, contractual obligation or other obligation (s 12) but it does not override

- the “paramount duty” to the court to further the administration of justice in relation to any civil proceeding in which that person is involved (s 16);
- legal practitioner’s duty to the Court (s 15); and
- any duty or obligation of a legal practitioner to a client (s 13).

The overarching obligations include:

- to act honestly (s 17),
- not to pursue a case that is frivolous or vexatious or is an abuse of process (s 18),
- to avoid undue delay and expense by only taking steps to resolve or determine dispute (s 19),
- to co-operate in the conduct of civil proceeding (s 20),
- not to mislead or deceive (s 21),
- to use reasonable endeavours to resolve dispute (s 22), to narrow the issues in dispute (s 23),
- to ensure costs are reasonable and proportionate (s 24),
- to minimise delay (s 25),
- to disclose existence of documents (s 26) within the limits (similar to the current implied undertaking of discovery) allowed in s 27.

Failure to observe the overarching obligations may result in, on application of an interested party to the proceeding or on the Court’s own motion, monetary penalties in terms of legal costs or penalty interest, order for rectification, order to exclude specified steps or any other orders to remedy the prejudice suffered by the opponent (s 29(1)).

Such an application is available even after finalisation of the proceeding (s 30) by a separate application for extension of time under s 31. Indeed, support may be found at common law where prejudice to a party’s case arising from the failure of another party to give proper discovery which denies the disadvantaged party of chance



of fair trial.³ What is different here is an application when the original proceeding was finalised: at common law, an application for a new trial based on a failure to make proper discovery requires the disadvantaged party to prove that there is a real possibility of a different result had the other party complied with its obligation for discovery.⁴ Section 31, on the other hand, substantially lowers the hurdle by only requiring the disadvantaged party to prove that it “was not aware of the contravention of the overarching obligations until after” judgement was delivered in the original proceeding: s 31. While this is a further indication that Courts must give weight to the overarching obligations, whether this requirement ousts a Judge’s discretion is an interesting factor begging to be considered.

Pre-litigation Requirements

Except proceedings exempt in s 32, all parties to a dispute must take reasonable steps and at their own cost (s 37) to resolve the dispute by agreement or to clarify and narrow issues in dispute before initiating a proceeding s 34. Exchanging “correspondence, information and documents” were identified and alternative dispute resolution processes are also mentioned in s 34.

Care must be exercised when exchanging documents as part of the reasonable steps. Although s 35 brings over the implied undertaking as to confidentiality of documents obtained on discovery from common law and contravening such obligation constitutes contempt of court,⁵ presumably, the exceptions such as subpoena for production or voluntary disclosure under the common law implied undertaking would be equally applicable under s 35. Of course, parties may agree to waive the obligation or a court may release it (s 35).

A court may order costs, or part of, incurred by a party’s when complying with the pre-litigation requirements be paid by another party (s 38(1)) or it’s representatives (s 38(2)).

³ See, *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 2 NSWLR 340.

⁴ *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 141-2; 102 ALR 487 at 490-1 and *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128.

⁵ See *United States Surgical Corp v Hospital Products Int Pty Ltd* (NSWSC, ED No 2094/90, 7 May 1982, unreported), McLelland J.

A mere failure to comply with the pre-litigation requirements is no bar to commencing a proceeding (s 36) but has, for example, potential costs consequences (s 39).

Requirements after commencing a Proceeding

A major development here is the introduction of multiple certifications to accompany any substantive document. Substantive documents include an originating motion, a writ, complaint, defence, reply, counterclaim and defence to counterclaim, third party notice and its defence but not include a summons or affidavits (s 3).

Certificates include

- *Overarching obligations certificate* to confirm that the client has read and understood the overarching obligations and the paramount duties (s 41). This certificate is only required with the first substantive document.
- *Proper basis certificate* by lawyers or the litigant-in-person confirming that each allegation of fact or each denial has proper basis (s 42). Such certificate must accompany the first substantive document and any subsequent amended substantive documents carrying significant amendments.
- *Pre-litigation requirements compliance certificate* to advise compliance with section 34 or reasons for non-compliance (s 43). Only one such certificate is required for the first substantive documents.

Allowance for subsequent filing of the certificates is provided in s 44 in urgent cases (e.g. facing expiring limitation period, freezing order, interlocutory applications).

Again, no certification is no bar to commencing a proceeding (s 45) but courts will take such failure to certify into account (s 46).

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More on the *Civil Liability Bill (VIC) 2010* in our next Newsletter



IR & ER BRIEFING: THE FIRST FULL PAY PERIOD ON OR AFTER 1 JULY 2010

The First Annual Wage Review Decision

On 3 June 2010, the Minimum Wage Panel, a division within the Fair Work Australia (“FWA”) handed down its first annual wage review decision (“**Decision**”) after conducting the review between March and June 2010,

As a result and taking effect from the first full pay period on or after 1 July 2010,

1. all modern award minimum weekly wages are to be increased by \$26.00 per week or 69 cents per hour based on week working hours of 38;
2. for award-free or agreement-free employees, the National Minimum Wage Order ruled that,
 - 2.1. for adult award-free or agreement-free employees, the National Minimum Wage is also increased by \$26 per week or 69 cents per hour for a full-time employee of on working 38 hours a week which, in turn, translates into a weekly minimum wage of \$569.90 per week or a minimum hourly pay of \$15;
 - 2.2. for employees with disability whose productivity is not affected a minimum wage of \$569.90 per week or \$15 per hour based on a 38 hour week, and for employees with disability whose productivity is affected, an assessment under the Supported Wage System, a productivity assessment system; and
 - 2.3. a casual loading of 21 per cent.

The Newly Indexed the High-income Threshold

Under the Fair Work Act 2009 (“FW Act”), award-/enterprise agreement-free employees may be prevented from accessing unfair dismissal jurisdiction if their annual rate of earnings exceeds indexed “high-income threshold”.

Effective from 1 July 2010, the newly indexed high-income threshold is **\$113,800** per annum representing an increase of \$5,500 from the previous financial year.

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IN-HOUSE

New Premises

After many years at 555 Lonsdale Street, we commenced business from our new premises at Level 7, 469 Latrobe Street, Melbourne on 1 December 2009. Our telephone number, facsimile number and postal address have remained the same. Feel free to drop in to see us at our new premises.

Welcome back, John!

With great pleasure, Anderson Rice welcomes the return of John Lancefield. John is a partner who has a broad practice in litigation and commercial law. He is an experienced litigator and acts for clients in a diverse range of industries. John also provides commercial advice, drafts agreement and regularly deals with the ACCC.

John has particular expertise in

- Product liability
- Competition law including ACCC notifications and authorisations
- Misleading and deceptive conduct
- Supply agreements
- Trade mark disputes
- Insolvency

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