**Consumer Property Acts Review**

**SUBMISSION**

|  |  |
| --- | --- |
| **TO:** | Consumer Property Law Review  Policy and Legislation Branch  Consumer Affairs Victoria |
| **FROM:** | David P Lloyd & William F Rimmer |
| **DATE:** | 9 May 2016 |
| **RE:** | Consumer Property Acts Review  *Sale of Land Act 1962* proposed amendments |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

We provide this memorandum in our capacity as the authors of *Sale of Land Act Victoria* (Thomson Reuters, 2015).

In our submission there are three important amendments should be made to the *Sale of Land Act 1962*:

***1. Early deposit release – acceptance of title - section 27***

There is a shortcoming in s 27(7) which exists because the standard contract of sale of land dispenses with the former practice of the purchaser delivering requisitions on title and substitutes contractual warranties on the part of the vendor. In these circumstances, title is normally not accepted by the purchaser until completion. The purchaser may, of course, indicate acceptance of title at an earlier point in time. A form commonly employed by vendors when seeking a release of the deposit under s 27 includes a statement to the effect that the purchaser has accepted title.

Whilst s 27(5) effectively deems acceptance of title where the purchaser gives notice under s 27(4), the position is otherwise where no notice under s 27(4) is given and it is sought to rely upon s 27(7) for having the deposit released.

Unlike subsection (5), subsection (7) does not deem the purchaser to have accepted title or deem the contact to be one that does not contain any condition enuring for the benefit of the purchaser, as it refers only to the authorisation required by sub-section (1) rather than by subsections (1), (2) and (3). In consequence, there is some doubt as to a stakeholder’s entitlement to release the deposit to the vendor in reliance upon s 27(7), as acceptance of title normally does not occur until settlement where requisitions on title have been dispensed with.

A suitable solution would be to replace the present section 27(2)(b) with the following:

(b) where the purchaser has accepted title or has not given prior notice of an objection to title that remains unsatisfied.

This reflects the current standard form of contract, which contains no conditions deeming title to have been accepted at any time before completion. The existing form of s 27(2)(b) presupposes the existence of conditions that were in the old Table A of the Seventh Schedule to the *Transfer of Land Act* *1958* which deemed title to be accepted before completion in certain circumstances. Those conditions are now repealed and no longer apply to sales of land under the present standard form contract.

***2. Early deposit release – Foreign resident capital gains withholding - section 27***

The *Tax and Superannuation Laws Amendment (2015 Measures No.6) Act 2015 (Cth)* relevantly includes Schedule 2 - Foreign resident capital gains withholding payments. The legislation adds a new Subdivision 14-D of Schedule 1 to the *Taxation Administration Act 1953 (Cth)* (TAA)*.*

Broadly speaking, the legislation requires purchasers of land under a contract entered into o or after 1 July 2016 at a price of $2 million or more to pay to the ATO immediately after settlement an amount equal to 10% of the actual purchase price set out in the contract (excluding any applicable GST for which the purchaser may claim an input credit) or such other sum as is set out in a variation certificate issued by the ATO*,* unless a clearance certificate in respect of the vendor issued by the ATO has been provided to the purchaser.

The legislation discharges the purchaser from any contractual liability, so that a purchaser is entitled to deduct the relevant amount at settlement of the sale.

The difficulty is that at settlement under the contract there may be insufficient funds after allowing for a deduction of up to 10% of the price pursuant to the TAA to discharge all mortgages affecting the land, resulting in the vendor being unable to settle and the contract falling over. In those circumstances the purchaser should be entitled to have the deposit refunded. But what if the deposit has previously been released pursuant to s 27 and the vendor no longer has the funds?

It is proposed that s 27 be amended to allow the potential TAA withholding amount to be factored into account by a purchaser in deciding whether to allow a release of the deposit at an early date and prior to settlement.

The suggested wording of a new sub-section (4A) is as follows:

(4A) For the purpose of subsection (4), the purchase price is to be reduced by any amount payable by the purchaser under s 14-200 of Schedule 1 to the *Taxation Administration Act 1953 (Cth)*.

***3. Cooling-off – service of notice - section 31***

Section 31(3) allows for a cooling-off notice to be given to the vendor or the vendor’s agent. One would assume Parliament had in mind, in enacting the provision in the early 1980s, that a purchaser could give the notice to anyone held out by the vendor as their agent, such as an estate agent in particular. After all, s 31 seems designed to give protection to purchasers of land who change their mind after signing a contract.

However, in *Tan v Russell* [2016] VSC 93 it was effectively determined that estate agents, legal practitioners and conveyancers are not authorised to accept a cooling-off notice under s 31. In the light of this case it seems that the only safe course for a purchaser is to give the notice directly to the vendor.

Perhaps needless to say, it may be impracticable for a purchaser to seek out the vendor within the three business days allowed by s 31 for the purpose of giving the notice to the vendor directly. The vendor may be interstate or overseas, for instance.

This somewhat undermines the evident statutory intent of s 31 that purchasers have an effective means of terminating a contract within the three day period if they decide to cool off, by serving a notice on the vendor’s agent.

We suggest a new sub-section (3A) which might be worded as follows:

(3A) For the purposes of this section an estate agent of the vendor or a legal practitioner or conveyancer acting for the vendor is an agent of the vendor.

DPL

WFR

Barristers-at-Law

Clerk B, Owen Dixon Chambers

205 William Street, Melbourne