

Property Law Update

Summer 2009

New water trading rules in the Murray-Darling Basin

by Phillip Ng, Lawyer



Much of the recent debate about water trading has concerned the implications for the Murray-Darling Basin (“Basin”).

In October 2008, the Australian Competition and Consumer Commission (“ACCC”) released its draft water trading rules for the Basin (“Rules”). These followed the introduction of the *Commonwealth Water Act 2007* in March 2008 and the subsequent Council of Australian Governments’ meeting, where each of the relevant state governments agreed to refer certain powers to the Commonwealth. The Rules are a key component of a broader water market and trading scheme for the Basin which is being implemented by the Commonwealth under the *Water Act 2007*.

The ACCC drafted the Rules as advisor to the Minister for Climate Change and Water, Senator Penny Wong, and will also be responsible for enforcing the Rules once enacted.

According to the ACCC, the Rules are intended to support “efficient and sustainable water use” of the resources in the Basin, “free up the trade of water access rights” and “give farmers flexibility to trade their water access rights”. In practice, many irrigation infrastructure operators have argued that the Rules would unreasonably restrict their current operations in the Basin and should be amended.

Key recommendations

Transformation and trade

At present, there is no specific right for an irrigator to transform their share of a bulk water entitlement into a single water right. The draft Rules will require operators to transform irrigation rights upon request by an irrigator. The practical effect is that a member irrigator may permanently transform an irrigation right against an operator into a water access entitlement held by a party other than the operator. As a consequence, irrigators will be able to trade and elect to terminate their delivery rights with their existing operator.

Termination fees and security

Under the Rules, operators will be entitled to impose certain restrictions on the transformation of irrigation rights. These include termination fees and also the right to request security prior to allowing transformation or trade of more than 80% of an irrigation right.

Penalties

Operators are specifically prohibited under the draft Rules from preventing or unreasonably delaying transformation. The maximum penalty which will apply to operators who breach this prohibition is over \$24,000.

Next steps

The ACCC’s final advice to the Minister on the Rules is due to be delivered shortly.

It is anticipated that the final version of the Rules will be tabled in Parliament in early 2009. Once the Rules have been tabled, there will be a transitional period until September 2009 which is intended to allow time for operators to ensure that their practices comply with the Rules. The implementation of the market and trading scheme for the Basin is likely to progress at a slower rate due to a delay in states referring their powers for the Basin to the Commonwealth.

If you require more information about the proposed changes or their impact on your business, please contact Ned Boyce or Bill Hazlett.

In this issue

- Buying and selling real estate to be made easier
- Changes to the *Strata Schemes Management Act 1996* (New South Wales)
- Deposit bonds
- The productivity commission report into retail tenancy leases in Australia
- Mortgagee’s to take note – amendment to the *Property Law Act* (Queensland)
- New South Wales mini-budget – impact on property

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Buying and selling real estate to be made easier

by Murray McCutcheon, Senior Consultant

Property purchases, whether for the family home or a commercial investment, can be extremely stressful and difficult, unless familiar with and regularly involved in the process.

Buying in one state and selling in another

The stress and difficulty compounds if buying in one state and selling in another, particularly if the proceeds from the sale are to be used for the purchase at the same time. This is because in different states different standard forms of contract are used. Indeed, in some states there are multiple forms of contract which change the rights and obligations of parties and can complicate settlements planned to occur either simultaneously, on the same day, or in the same general period.

As one of four members of a sub-committee of the Law Institute of Victoria, I have been working to make the buying and selling of property easier both in each particular state and between states. The sub-committee consulted with the Real Estate Institute of Victoria, the legal practitioners' insurers and numerous groups within the Victorian Government. The outcome was that the main part of a new contract has now been gazetted in regulations which require estate agents to use the contract.

Improvements to the standard form of contract

As a start, the standard form of contract for the sale of real estate in Victoria has been completely revised to be fairer for both vendor and purchaser and clearer, so both understand their rights and obligations. Because there are many decisions about the old form of contract which provided guidance about how it should be interpreted, effort was made to retain the general concepts, while at the same time ensuring that the new contract is written in consistent plain English.



The contract now includes all of the contractual rights and obligations between the parties and there is no need to refer to any other document. The 28 clauses of the contract are grouped under 4 major headings and in a logical order of priority as to significance and importance.

The most significant change has been the inclusion of vendor warranties which replace what were known as "requisitions on title". The warranties are vendor promises to deliver good title to the land described in the contract, with vacant possession or subject to the lease and free of encumbrances on the title, other than those described in the contract. This mechanism avoids the need for the purchaser to make searching and costly enquiries.

The change is an efficiency gain but vendors will need to be diligent in understanding and checking the promises they are making.

Next steps

In my role as chair of the Law Council of Australia's Legal Practice Section and member of its property law committee, I am now working on a draft contract to have application in each Australian Jurisdiction and be as consistent as possible within them. This is very difficult as each state has its own legislation requiring particular matters to be included in their form of contract. However, it should be possible to provide a contract in which the general principles are the same.

Changes to the *Strata Schemes Management Act 1996 (New South Wales)*

by Maria Katsiaris, Special Counsel

A number of important changes to New South Wales strata laws were introduced by the *Strata Management Legislation Amendment Act 2008*, which came into effect on 1 August 2008.

Caretakers and building managers

While the definition of a caretaker in section 40A of the Act remains unchanged, the amendments make it clear that any person fitting the description in section 40A is a caretaker, regardless of whether they are described as a building manager, resident manager or by any other title.

This change is an important protection for lot owners because it ensures that a caretaker cannot avoid the requirements of the Act by simply using a different title.

Caretakers can be employed to assist the owners corporation in carrying out its functions. Caretakers cannot enforce by-laws or carry out any other similar functions of the owners corporation.

Parking by-laws

This change prevents the owners corporation from making by-laws that provide a right to park on common property during the 'initial period' of a strata scheme. The initial period is the period from the commencement of the strata scheme up until one third of the unit entitlements have been sold.

The Act previously contained an exemption in section 56, allowing by-laws to be made in the initial period, authorising an owner to park a vehicle on the common property. This provision often led to disputes when developers would give to another lot owner the right to park in the visitor car parking space. The exemption in section 56 has been removed which means by-laws may not be made in the initial period authorising the grant of parking rights. Any such by-laws can only

be made after the expiry of the initial period when owners other than developers can vote.

Proxies voting under the contract for sale

The Act provides for voting by proxy at owners corporation meetings. Proxy appointments allow owners who are unable to attend meetings to vote on matters under consideration.

This change in the Act prevents an original owner from casting a vote by means of a proxy or power of attorney, if the proxy/power of attorney was given by another lot owner under a contract of sale or ancillary to that contract. The Act states that a provision in a contract requiring the giving of a proxy or power of attorney is unenforceable.

Proxies and powers of attorney can be given to the original owner if they are given by a person connected to the original owner.

These changes mean that the amendments will protect strata buyers from terms in sale contracts which require them to provide proxy voting rights or a power of attorney to the developer of the strata scheme. As a result a developer or person connected with a developer cannot make use of a proxy voting appointment or power of attorney obtained by a condition in a contract of sale.

Developers who have a clear idea of how the development will progress will now have to register a development contract along with the strata documentation. The development contract could then set out the matters which the incoming lot owner agrees to support at meetings. In the early stage of a development this may prove impractical or unnecessarily restrictive for a developer.

If development contracts are not possible, the contracts for sale with each individual purchaser should set out specific matters which the incoming owner agrees to support at meetings.

Executive committee

There are new disclosure requirements about the constitution of executive committees.

Members of the executive committees must now disclose any personal, business or financial connection they have with the developer or caretaker. Connection with the original owner or caretaker renders a person ineligible to be elected or appointed to the executive committee unless they comply with the disclosure obligations in the Act.

Building disputes

The *Home Building Act 1989* ("HBA") provides for complaints about defective work on the common property to be made to the Office of Fair Trading by an owners corporation or community association.

A change in the HBA means an owner of a lot in a strata scheme may make a notification of a building dispute to the Office of Fair Trading about work on the common property.

New provisions place obligations on owners corporations and caretakers about Office of Fair Trading inspections of common property. Caretakers and other persons who control access to areas of the common property must cooperate and provide such assistance as is reasonable to enable the inspection to be carried out.

Deposit bonds

by Ned Boyce, Partner



What is a deposit bond?

A deposit bond is a guarantee by a financial provider to pay an agreed sum of money (deposit) to a vendor if a contract is terminated. The terms 'deposit guarantee' and 'deposit bond' are used interchangeably and should not be confused with a 'bank guarantee'. A deposit bond can be purchased usually from an insurance company. The cost of the bond depends on the amount and the term of the bond. Deposit bonds can be useful for purchasers wishing to minimise cash outlays or who do not have the cash available to pay a cash deposit.

When is it used?

Deposit bonds have been available in New South Wales for many years. The use of deposit bonds is recognised in the standard contract for the sale of land in NSW. In Victoria, a special condition needs to be inserted into a contract for the sale of land in order to effectively use a deposit bond, as the standard Contract for Sale of Land now in use does not take into account deposit bonds.

When an agent or lawyer receives 'deposit moneys' they must be paid into a trust account and held on a stakeholder basis. If there is a default the money is available. With a deposit bond

the money is only available if a claim can be made pursuant to the terms and conditions of the bond. In this sense a deposit bond is not as physically secure as deposit monies.

In Victoria, section 27 of the *Sale of Land Act* permits early release of a deposit held by an estate agent or a lawyer where there is no condition enuring for the benefit of the purchaser and the purchaser has accepted, or is deemed to have accepted, title. If a deposit bond is held then, unless the wording of the bond specifically permits it, it cannot be cashed to effect an early deposit release. From a vendor's perspective this can be a serious shortcoming. There is no such provision in New South Wales where the parties are contractually free to agree the release of the deposit at any time.

In off-the-plan purchases it is not unusual to see a purchaser requesting the use of a deposit bond. In some instances purchasers contract to purchase a number of apartments and obtain multiple deposit bonds with an intention of selling one or more of these apartments before final settlement with the developer. If the purchaser cannot find a buyer and cannot pay the balance of the sale price the vendor may be at risk of recovering costs and any reduction

in the sale price on a subsequent sale if the first purchaser becomes insolvent or cannot be located.

There is a place for a deposit bond in the correct circumstances which usually is a situation where a purchaser does not have cash available to pay a deposit when that purchaser is both selling and simultaneously buying. In addition, for developers the use of deposit bonds will often facilitate sales off-the-plan.

In our experience a bank guarantee is preferable to a deposit bond. A bank guarantee usually has no sunset date which removes any difficulty if the completion date under the contract for sale is extended beyond the sunset date in a deposit bond. In addition, particularly for investor purchasers of off-the-plan units, a bank guarantee is usually only issued by a bank if it has security against this exposure under the guarantee. With a deposit bond an insurance company extracts a premium in consideration for issuing the bond but usually does not require the party to deposit funds or give any security to meet any potential liability under the bond. Many financiers will only accept a limited number of deposits paid by deposit bonds as qualifying contracts to enable the developer to obtain its development finance which may reflect the experience of lenders that there is a greater rate of default by purchasers who use deposit bonds rather than a bank guarantee or cash deposit.

What to watch out for

When using a deposit bond, care needs to be exercised about the sunset date, the method of making a demand and whether the payment is made directly to the vendor or to the stakeholder under the contract. Unfortunately there is no common approach by the issuers of deposit bonds about these matters, in contrast to our experience with bank guarantees.

The productivity commission report into retail tenancy leases in Australia

by Bill Hazlett, Partner

The above report extensively examines the market for retail tenancy leases from legal, economic and commercial perspectives.

While the Commission found that overall the market is operating effectively, it suggested change focusing on:

- a. improving, where practicable and cost-effective, education, information and dispute resolution procedures; and
- b. removing the more restrictive elements of retail tenancy legislation and divisions between jurisdictions.

The Commission favoured an approach to:

- a. improve features of the current system like dispute resolution and information and disclosure which are working well (80% of formal disputes are settled at mediation or before proceeding to a tribunal or court hearing);
- b. unwind provisions in each state and territory that have sought to govern market behaviour (like coverage definitions and minimum lease terms);
- c. improve the alignment of regulations and practices with the broad market for commercial tenancies, and

- d. move towards a national consistency in legislation.

As part of the encouragement of nationally consistent (plain English) models for retail tenancy leases and for tenant and landlord disclosure statements, the Commonwealth Government has now commenced a project to produce a uniform common disclosure statement for all retail tenancy leases throughout Australia. This is the first step and may well result in a standard document with state specific provisions set out in an annexure.

Mortgagees take note – amendment to the *Property Law Act* (Queensland)

by Lynette Reynolds, Partner

On 3rd December 2008 the Queensland Parliament introduced and passed new legislation intended to provide additional protection for mortgagees when mortgagees exercise power of sale rights. The Queensland legislation has always imposed an obligation upon mortgagees exercising a power of sale to take reasonable care to ensure that the property is sold at the market value. These provisions have now been further strengthened as follows:

1. The references to a mortgagee have been amended to include a reference to a mortgagee including an attorney for the mortgagor, or receiver acting under a power delegated to the receiver by a mortgagee.
2. Additional obligations have been imposed for prescribed mortgages. A prescribed mortgage is a mortgage over residential land where the mortgagor's home is on the land.

For the purposes of the definition it does not matter that a residence is also used for a business purpose if the residence is primarily used as the mortgagor's home. The residence does not stop being the mortgagor's home because the mortgagor ceased using the residence as the mortgagor's home at the time the default occurred or at any time within six months before the default occurred. References to "home" mean a residence occupied by the mortgagor as the mortgagor's principal place of residence.

The additional obligations imposed upon a mortgagee or a receiver are:

- a. to adequately advertise the sale;
- b. obtain reliable evidence of the property's value;

- c. maintain the property, including by undertaking any reasonable repairs;
 - d. sell the property by auction, unless it is appropriate to sell it in another way; and
 - e. do anything else prescribed under a regulation (so far additional requirements have not been imposed).
3. Penalties are imposed upon a mortgagee for a breach of these provisions up to \$75,000.

These new provisions apply to existing and future mortgages and charges over Queensland property. However, the provisions do not apply where the statutory notice exercising a power of sale had been given and the 30 day period of time for remedy had elapsed before 12 December 2008.

New South Wales mini-budget

by Maria Townsend, Partner

The New South Wales mini budget released on 11 November 2008 announced significant changes to stamp duty and other revenue laws.

1. Deferred abolition of certain duties

The planned abolition of:

- duty on unquoted marketable securities (previously scheduled for 1 January 2009)
- mortgage duty for non residential property (previously scheduled for 1 July 2009), and
- transfer duty on non-land business assets (previously scheduled for 1 January 2011)

will be deferred until 1 July 2012.

2. 'Land rich' duty

The 'land rich' duty provisions charge duty on certain acquisitions of shares and units in companies and unit trust schemes, at the same rate as a transfer of land. Currently, these provisions apply

if the entity in which the shares or units are to be acquired:

- a. has land holdings in New South Wales with an unencumbered value of \$2,000,000 or more, and
- b. its land holdings comprise 60 per cent or more of the unencumbered value of all its property.

The 60 per cent threshold will be abolished from 1 July 2009 with the consequence that any relevant entity which holds New South Wales land with a value of at least \$2,000,000 will be subject to 'land rich' duty.

Nominal duties

From 1 January 2009, nominal duties on a range of documents (such as duplicates and trust deeds) will be increased.

Transfers of land, duplicate contracts and the like, will increase from \$2 to \$10 and duty on trust deeds will now be increased from \$200 to \$500.

3. Land Tax

The marginal rate of land tax for land taxpayers with total taxable land holdings above \$2.25 million has been increased from 1.6 per cent to 2%. The increase will apply from the 2009 tax year.

4. Parking space levies

Parking space levies will increase as at 1 July 2009 from \$950 to \$2,000 per year for each off-street, non residential parking space in the Sydney, North Sydney and Milsons Point business districts and from \$470 to \$710 per year for the business areas of St Leonards, Chatswood, Parramatta and Bondi Junction.

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