



OFF THE PLAN CONTRACTS LOOK SHAKY AFTER CASE OF SOLID INVESTMENTS

The Supreme Court of Victoria has handed down a decision in a recent case (*Clifford & ors v Solid Investments Pty Ltd*) which will have developers and lenders nervously reviewing their loan agreements for development projects involving "off the plan" contracts.

It is usual for "off the plan" contracts to contain a clause which specifies a date by which the plan of subdivision has to be registered. These are known as "sunset clauses". In recent times, it has become common practice that another clause is included in such contracts which entitles the vendor to an extension of the timeframe contained in the "sunset clause" to allow for any delays in completion of the development. In a single decision handed down by Bongiorno J, the Supreme Court held that these extensions do not comply with the provisions of the *Sale of Land Act 1962* (the "Act").

Accordingly, purchasers of "off the plan" contracts will be entitled to cancel their contracts at any time before settlement, where the date for registration of the plan of subdivision has been extended beyond the initial timeframe provided for in the "sunset clause".

The purchasers in this case purchased two lots on an unregistered plan of subdivision under separate contracts in a multi-storey development at Eastern Beach, Geelong. Both contracts contained a "sunset clause" which provided that the purchasers would be entitled to avoid their contracts if the proposed plan of subdivision was not registered 30 months after the date of sale (referred to as the Plan Registration Date). The contracts also provided for the vendor to extend the Plan Registration Date in the event of certain delays, beyond the vendor's reasonable control ("extension clause"). The vendor could in such circumstances, extend the Plan Registration Date to a later date. Extension clauses are often required by the vendor's financier as a pre-condition of finance.



The vendor exercised the extension clause on three occasions. After receiving the second notice of extension, the purchasers' solicitors issued a notice of rescission of the contracts, asserting that the extension clause was ineffective pursuant to the provisions of Section 9AE of the Act.

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Section 9AE deals with a purchaser's right to rescind a contract if the plan of subdivision is not registered within a specified time. Subsection 9AE(2) provides that "if the plan is not registered within 18 months after the date of the prescribed contract of sale of a lot on a plan of subdivision, or, if the contract specifies another period, before the end of that specified period the purchaser may, at any time after the expiration of that period but before the plan is registered, rescind the contract."

Bongiorno J found that the initial 30 month "sunset clause" period specified in the contracts complied with Section 9AE because it specified another period other than the prescribed 18 months from the date of sale. However, His Honour held that the extension clause in the contracts was inconsistent with the provisions of the Act. His Honour referred to the underlying purpose and social policy behind the introduction of provisions in the Act relating to "off the plan" contracts in 1985, before concluding that the intention of the provisions in Section 9AE was to provide certainty to the purchasers of "off the plan" contracts. His Honour remarked that "the creation of that certainty was the statutory trade-off for permitting a vendor to sell lots off the plan", whereas previously vendors could not do so.

His Honour observed that the insertion of extension clauses enabled vendors to transfer project risks to their purchasers, which was

contrary to the intention of the Act. Generally it is a requirement of a prudent vendor's financier to have such a clause inserted in the contract. This practice serves to give added security to the financier, ultimately at risk if the development fails, where the risk of the loan is partly offset by the strength of pre-sale contracts.

The consequences of this decision can be catastrophic for developers with ongoing projects that have failed, or are likely to fail, to meet the timeframe for registration of the plan specified in the "sunset clause". The problem is compounded by the fact that many developers rely on staged funding to complete the development works, but may not be able to do so if their pre-sale contracts have evaporated.

For many lenders, it means that they will have to reassess construction loan facilities of ongoing development projects to ensure that they are completed within the timeframe specified in the "sunset clause", especially in the current environment. It may also be an opportune time to ensure that a valid Tripartite Agreement between the financier, the developer and the builder is in place.

The decision is currently being appealed. However in the meantime, we urge lenders to contact us if uncertain about the effect of the decision on particular loan facilities.

NATIONAL CONSUMER CREDIT PROTECTION BILL

The *National Consumer Credit Protection Bill 2009 (Cth)* was introduced into the House of Representatives on 25 June 2009.

Some of the key points in the reform include the following:

NEW LICENSING REQUIREMENTS

Any person engaged in credit activities is required to apply for and maintain an Australian Credit Licence (ACL) regulated by the Australian Securities and Investments Commission (ASIC). The deadlines to apply for an ACL are as follows:

- **31 December 2009:** all current credit providers and credit service providers must be registered to apply for an ACL. We understand that registration will be a straightforward process which will be available on the ASIC website.
- **1 January 2010:** all new credit providers and credit service providers must be licensed before commencing business.
- **30 June 2010:** all registered persons must have applied for their ACL.

RESPONSIBLE LENDING CONDUCT

The new regime introduces "responsible lending conduct" obligations on ACL holders. This includes requirements on lenders/ finance brokers to make an assessment as to whether a loan would be unsuitable for the consumer and disclosure of commissions they will receive. The introduction of these requirements have been postponed until January 2011 and may be subject to further review.



EXTERNAL DISPUTE RESOLUTION SERVICE

As a requirement of holding an ACL, licensees will be required to subscribe to an external dispute resolution scheme approved by ASIC. No information on the identity of those external dispute resolution providers has been provided. Similarly no details on how to become a member of those providers has been provided.

NATIONAL CREDIT CODE

A new National Credit Code (NCC), which largely incorporates the provisions of the current Uniform Consumer Credit Code (UCCC), will be introduced.

RESIDENTIAL PROPERTY INVESTMENT LOANS

The NCC expands the application of consumer credit laws to apply where credit is provided to

purchase, renovate, improve or refinance residential property for investment purposes.

Lenders will need to review their documentation and procedures for investment property loans to ensure that loans to individuals for investment in residential property will comply with the NCC.

PURPOSE DECLARATIONS

The NCC provides that a declaration will now be ineffective if, the credit provider or a relevant person knew or had reason to believe; or would have known, or had reason to believe, if they had made reasonable enquiries about the loan's purpose, that the credit was in fact to be applied for a Code purpose.

Lenders will need to review their documentation and procedures to ensure that the loan's purpose is reasonable in the relevant circumstances and ensure all relevant enquiries

are made. This is especially so when dealing with representatives, finance brokers and other intermediaries who would conduct the initial interview to determine the loan's purpose and what enquiries are made by those entities.

COMPARISON RATE SCHEDULES

While the requirements to display a comparison rate in certain advertisements will be retained, the current UCCC requirements for comparison rate schedules will be removed.

REVIEW UNJUST TRANSACTIONS, UNCONSCIONABLE FEES AND CHARGES

Under the NCC ASIC will have new powers to make applications to a court to review unjust transactions and examine unconscionable interest rate changes, fees or charges if it considers that it is in the public interest to do so. This is currently limited to only a debtor, mortgagor or guarantor to do so under the UCCC.

SECURITY OVER ESSENTIAL HOUSEHOLD GOODS

The NCC brings in line the prohibition under Bankruptcy laws, to exclude mortgagees from taking a regulated mortgage over goods that are essential household property or goods used by the mortgagor to earn income. This includes household property which is reasonably necessary for the domestic use of the debtor's household, having regard to current social standards.

HARDSHIP THRESHOLD

The threshold for hardship applications will be increased to \$500,000.00.

TERMS CONTRACTS

The NCC will introduce new criteria in determining when credit is provided and regulated where contracts relate to the sale of land or goods by instalments.

PERSONAL PROPERTIES SECURITIES BILL

In the latest July edition of McKean Park Matters, we informed you that the Personal Property Securities Bill 2009 ("PPS Bill") was introduced into the House of Representatives. This represents a major step towards the overall shifting of credit laws from a State level to a national level. The reforms will be supported by a referral of legislative powers from the States and New South Wales has already passed a Bill referring its powers to the Commonwealth, with other States expected to follow suit.

We have outlined a few key points of note below:

NATIONAL REGISTER

The PPS Bill provides rules for the creation, extinguishment and enforcement of security interests in personal property. A single national personal property securities register will be created for the registration of security interests in all property other than land. The Government has already commenced the process of migrating security interests in personal property recorded on existing registers to the national register.

ONLINE REGISTRATIONS

The register will provide for online registrations of personal securities, making it more efficient and accessible.

TYPES OF PERSONAL PROPERTY

One of the aims of the reforms is to streamline the way lenders take security over the traditional forms of tangible (such as motor vehicles, boats, machinery) and intangible property (such as company charges, shares, contracts and licences). But it will also allow lenders to consider taking security over any other sort of personal property not previously considered as registrable security interests (such as leases).

PRIORITY

The PPS Bill also provides rules for determining priority among competing security interests.



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This will include existing security interests transferred to the national register. Prospective lenders will be able to search the register to determine whether personal property is subject to a pre-existing security interest.

NEW CONCEPTS INTRODUCED

ATTACHMENT

The concept of "attachment" is introduced, which is the process by which a security interest comes into existence. Broadly speaking, "attachment" happens when a debtor has rights in the collateral, the secured party has given value to obtain the security and the debtor has signed a security agreement relating to the collateral.

Unlike with the regulation of company charges, lenders will be able to register an interest in property as collateral before a security interest has "attached" or has been created. Usually, this happens once a security agreement is signed. Lenders will therefore be able to reserve priority before providing credit. There are processes in the PPS Bill to

ensure that this is not abused by frivolous claims although it remains to be seen whether it will provide a practical solution.

PERFECTION

Another concept introduced is the process of "perfection", which gives the security interest holder priority over other claimants to the collateral in accordance with the priority rules in the Bill. Generally speaking, a security interest is perfected when the security interest has attached and a financing statement has been registered or the secured party has possession of the collateral.

PURCHASE MONEY SECURITY INTEREST

The PPS Bill introduces a separate category of priority interests referred to as purchase money security interest (PMSI). A PMSI is a security interest that is given by a debtor to a secured party who provided credit used to purchase the collateral that is the subject of the PMSI. This concept is commonly found in equipment leases and hire purchase agreements. The PPS Bill provides that PMSIs will take priority over other prior perfected non-PMSIs in the same collateral.

NEW CATEGORIES

There will also be special rules on priorities in relation to agricultural products, fixtures, accessions and commingled goods.

ENTITIES

The reforms will allow lenders to register an interest against personal property belonging to an individual as well as foreign companies.

COMMENCEMENT

Following further consultation with the Council of Australian Government and other stakeholders, it was announced by the Attorney-General on 8 July 2009 that the reforms will be implemented in May 2011. It was also announced that the IT framework would be in place by May 2010.

This is a sensible move to allow time for businesses and consumers to understand and respond to the reforms.

We invite you to contact us if you have any queries regarding any aspects of these new laws.



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