

COVID-19 AND ITS IMPACT ON CONVEYANCING TRANSACTIONS

The sudden and dramatic impact of the Covid-19 event has necessitated Federal and State Government actions that are having largely unprecedented impacts on our personal and business lives.

These Government actions are also raising issues for most professions and industries, including conveyancing, and it is important for practitioners to be aware of their potential impact on a transaction requiring specific actions or communication with you clients and the other parties to the transaction.

Some issues that may now arise include:

1. Withdrawal of finance approval

Due to the sudden large number of job stand-down's in the economy, we have received reports that some financial institutions are requiring confirmation of the purchaser's employment status prior to exchange of contracts and again in the days leading up to settlement and, where the purchaser's circumstances have changed, the loan offer has been withdrawn.

Recommendation:

Advise your clients in writing, before the Contract becomes binding, to consider their employment situation and ensure that they are aware of the consequences if they cannot complete, including loss of deposit and a possible claim for further damages especially if the market drops as is currently expected by market experts.

Consideration may need to be given to the inclusion of a special condition, making the contract subject to financial approval of the purchaser's financial institution, or alternatively giving the purchaser a right of rescission if an existing approval is withdrawn by the financial institution before completion.

Conveyancers should advise purchasers under an existing contract to contact their financial institution or mortgage broker to confirm the current status of their loan.

2. Properties subject to an existing tenancy

On 24 March last, both Houses of the NSW Parliament passed the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020* (Covid-19 Bill). The Bill received assent and commenced on 25 March. The Covid-19 Bill amends several pieces of legislation, (including the *Residential Tenancies Act 2010* (RTA) and the *Retail Leases Act 1994* (RLA)) to provide for the creation of additional regulations to manage the impact of the Covid-19 pandemic such additional regulations to be effective for a period of up to 6 months from commencement.

In the case of the RTA and RLA a new regulation may be created prohibiting a landlord/owner/proprietor from:

1. Recovering possession of premises from a tenant or resident of the premises;
2. Terminating any sort of tenancy arrangement (such as a residential tenancy agreement, retail or commercial lease), occupancy agreement or site agreement;
3. Regulating or preventing the exercise of enforcement of another right of a landlord/owner/proprietor relating to the premises; and
4. Exempt a tenant/resident/homeowner from the operation of a provision of a relevant Act*.

*The definition of "relevant Act" for the purpose of 4. above includes:

1. *Residential Tenancies Act 2010*;
2. *Retail Leases Act 1994*;
3. *Boarding Houses Act 2012*;
4. *Residential (Land Lease) Communities Act 2013*;
5. *Agricultural Tenancies Act 1990*; and
6. *_Any other Act relating to the leasing of premises or land for commercial purposes.

Such amendment has not yet been made but it is expected, particularly given the Prime Minister's announcement of a moratorium over the weekend just passed.

*The broad reference to "any other Act relating to the leasing of premises or land for commercial purposes" has created some uncertainty in the market as to whether this is intended to apply to commercial leases (other than retail leases). Clarification from the Government should be forthcoming.

Recommendation:

It is anticipated that the enabling regulations will have wide powers and members should, when published, refer to the regulations when advising clients in sale, purchase, leasing and other ancillary and consequential issues arising from a transaction.

Consequently, it is, where relevant, important that you point out the likelihood of these emergency measures and advise, your clients accordingly. A tenant's failure to pay rent is already covered by the contract, however where the contract provides for vacant possession, the vendor may be unable to comply. The parties will need to consider the ramifications if the vendor is unable to remove the tenant while the relevant regulation remains in force.

Parties should also be advised to contact their insurance brokers or underwriters to ascertain whether any shutdown of relevant premises, or a lockdown generally, caused by quarantinable diseases or biosecurity reasons directly relevant to the COVID-19 pandemic (including any loss of rent and/or business interruption) is covered by their insurance.

3. One or more parties directly affected by Covid-19

Should the vendor or the purchaser (or potentially one of their households), have contracted Covid-19 or, having been overseas or having had contact with someone who has contracted Covid-19 and specifically required to self-isolate, there are a number of issues that will need to be considered.

In most cases, self-isolation or quarantine is required for 14 days and in the majority of cases may have no impact on the completion date, unless the self-isolation or quarantine commences towards the end of the completion period, in which the standard Notice to Complete period of 14 days should cover any further extension though the parties may wish to discuss extending the Notice period to 21 days for delays due to Covid-19.

However, should a party be infected (and not just potentially infected), some cases of infection can last up to several weeks before the patient is declared clear. There is also the possibility that both parties are infected or considered potentially infected at different times thus further delaying completion.

Recommendation:

It may be wise to consider the inclusion of a clause to provide for the party actually affected to have the right to extend the completion period or possibly to give the other party the right to rescind the contract if the delay is going to be substantial, possibly beyond the expiry of the purchaser's loan approval.

There is also the issue of establishing what constitutes "being affected". Testing is only available in very specific circumstances. Someone displaying minor symptoms may indeed be carrying the virus and ordered to self-isolate for an extended period until the symptoms have gone without there being a formal test. It may be that the parties will have to agree to rely on a medical certificate provided by the party's general practitioner.

4. Properties directly or potentially affected by COVID-19:

There is also the question of who has the responsibility for cleaning the property and the standard of cleaning, should the vendor or a member of the vendor's household be diagnosed with the virus. It would be hoped that generally speaking a responsible vendor and a prudent purchaser would both clean the property given the current environment - but in the event of a vendor or a member of the household being infected or suspected of being infected by Covid-19, there should be a clear agreement between the parties as to who is responsible for the cleaning of the property at the time of settlement or, possibly who has the financial responsibility of the cleaning if say, the purchaser wishes to choose professional cleaners for peace of mind but for the work to be done at the vendor's expense.

5. Other situations that may require additional clauses:

- (a) **Lockdown:** Under the [Public Health \(COVID-19 Restrictions on Gathering and Movement\) Order 2020](#) (Sch1, Items 8) persons are currently permitted to move premises. However if this is amended or

revoked we expect that the rules of the lockdown will provide some direction with regards to the contractual relationship between vendors and purchasers, however a special condition may be required to cover this scenario either by putting the contract “on hold” until such time as agreed (eg a date following the time the order is lifted), or possibly giving the parties the right to rescind if the lockdown period is longer than agreed time limit.

- (b) **Settlement chain:** Consideration may need to be given as to whether this transaction is part of a chain and what happens to this transaction if a linked transaction further down the line is delayed or rescinded.
- (c) **Removalists:** Under the [Public Health \(COVID-19 Restrictions on Gathering and Movement\) Order 2020](#) (Sch1, Items 2) persons are currently permitted to attend work. However in case this provision is amended or revoked, the contract may need to make provision for a situation where the Vendor is unable to provide vacant possession.

6. Other issues that may apply

1. Disclosure of a Material Fact:

You will be familiar with the requirement that real estate agents to disclose material facts. Until recently it was necessary to look at the decision of *Hinton and Ors v Commissioner for Fair Trading* and the guidelines produced by REINSW to formulate what in fact was a material fact. However with the recent amendments to the Property & Stock Agents Act 2002 (PSAA) (formerly Property, Stock & Business Agents Act 2002) and its associated Regulations, what constitutes a material fact is now set out in the Regulations (see [cl. 54](#)). For the present case, cl. 54(1)(b) requires disclosure if *the property is subject to significant health or safety risks*.

[s52\(1\)\(b\) PSAA](#), provides that a person who suffers loss or damage by conduct of another person that is in contravention of the Act may recover the amount of the loss or damage by action against the other person or against any person involved in the contravention. It is arguable if a practitioner needs to also maintain caution in such circumstances. While there is no specific requirement in the Conveyancers Licensing Act or associated Regulations, or the Legal Profession Uniform Law, in *Hinton* it was held that the duty of disclosure rests with someone who is “involved in trade or commerce”. It therefore may be prudent that practitioners make their clients aware of the obligation to disclose should the practitioner be aware of a party actually or potentially be infected with the virus.

2. Force Majeure:

It is unusual to find a force majeure clause within a lease or contract for sale of land. The common law does not recognise force majeure in and of itself and so the effect of the clause must indicate both the content of the concept and the consequences of the force majeure. It is unlikely that a force majeure will apply to contracts for the sale of land in the present circumstances. It is noted that force majeure clauses, when included, are designed to cover situations that are completely unexpected and unforeseeable - to include a clause specifically around Covid-19 removes the applicability of any force majeure clause.

3. Frustration:

Frustration operates to bring a contract to an end in circumstances where an outside intervening event has occurred, through no fault of either party, with the effect that the contractual obligations are impossible to perform or changes the obligation into a fundamentally different obligation. This concept is difficult to establish and has a narrow application. The duration of a lockdown needs to be considered but in the case of COVID-19 it is likely that the inability to perform the contract is temporary. For further information on Frustration see Part 3.2 of the Australian Consumer Law and the NSW Fair Trading legislation.