

PEP Talk

Issue 3

Recent developments in Property, Environment and Planning law September 2011



In this issue:

Significant Planning Changes in New South Wales	1
Limits to “Puffery”: Misleading and Deceptive Representations Made During Contract Negotiations	3
Options to Renew and Retail Lease Extension	5
Vendors Beware	8
Residential Tenancies Early Termination	9

MAKINSON & d'APICE
— L A W Y E R S —

Significant Planning Changes in New South Wales

“Existing Part 3A projects that fall within one of the SSI classes will be dealt with under the new ” SSI regime

After its election to power earlier this year, the NSW Government has moved quickly to make significant changes to the planning system in NSW. We have set out below some of the major changes to the development assessment system:

1. Major projects

Part 3A of the *Environmental Planning and Assessment Act* (the **EP&A Act**) has been repealed in respect of new projects and replaced with an alternate system for the assessment of projects of genuine state significance.

Some of the projects already in the Part 3A system which have substantially progressed within the pre-existing assessment process will continue.

For significant projects which are remaining in the old Part 3A system, the Minister’s role will be delegated to the independent Planning Assessment Commission (**PAC**).

2. New processes for significant development

The EP&A Act now proposes establishment of an environmental assessment framework for two broad categories of major development, namely State Significant Development (**SSD**) and State Significant Infrastructure (**SSI**).

Projects that fall under these categories will be assessed by the Department of Planning and Infrastructure whilst projects that do not qualify under either of these categories will be assessed by the relevant local council.

Classification of development between SSD and SSI will be categorised in a proposed State Environmental Planning Policy to be called *State Environmental Planning Policy (State and Regional Development) 2011*. This SEPP will set parameters around what will constitute SSD or SSI.

Under this new regime the Minister will delegate decision making authority for all SSD projects lodged by private developers.

Under this delegation, the PAC will determine larger and more controversial projects, while senior officers of the Department of Planning and Infrastructure will determine projects which have attracted fewer than 25 submissions by members of the public objecting to the proposal and where the local council has also not objected.

The Minister’s determination will generally be limited to SSI proposals put forward by state agencies, other Ministers and public proponents.

(Continued on page 2)

Significant Planning Changes in New South Wales

(Continued from page 1)

The Minister will also have the power to 'call in' development proposals following advice from the PAC.

Existing Part 3A projects that fall within one of the SSI classes will be dealt with under the new SSI regime.

Other pre-existing Part 3A projects will continue to be dealt with under Part 3A as long as Director General's requirements have been issued for the project before the repeal of Part 3A. If that is not the case then these projects will be assessed as SSD (or by Council if they don't fall within one of the SSD classes).

It is estimated that around 55% of the projects that would otherwise have been determined by a Joint Regional Planning Panel will now be determined by the local council.

Joint Regional Planning Panels will now focus on regionally significant development in excess of \$20 million. The applicant will now have the right to refer a development application in the \$10 million to \$20 million range that has been undetermined by the local council for more than 120 days to the regional panel for determination (except where the chairperson of the panel considers the delay has been caused by the applicant).

3. Complete overhaul

In addition to the changes above, the Government has now resolved to embark on a major review of the planning system defining how planning decisions are made. This will include the creation of new State planning legislation in the place of the EP&A Act.

A planning review panel will be established to oversee the review and to provide independent advice to the Minister for Planning and Infrastructure and the Government.

The review will take place over a period of approximately two years with a discussion paper setting out options expected to be released in 2012 prior to the submission of draft legislation to the Parliament.

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Limits to “Puffery”: Misleading and Deceptive Representations Made During Contract Negotiations

The recent Supreme Court of Victoria decision in *Bovino Pty Ltd v The Casey Group Holdings Pty Ltd* serves as a timely warning to Vendors and real estate agents across Australia as to the likelihood of Contracts being set aside due to false representations made during negotiations and damages being awarded under the new *Competition and Consumer Act*.

Facts

1. Bovino Pty Ltd (**Vendor**) entered into negotiations with the Casey Group Holdings Pty Ltd (**Purchaser**) to sell to the Purchaser a large parcel of land in Victoria.
2. Mitchell, the property manager of the Purchaser, was a friend of the real estate agent involved in the sale.
3. The Purchaser initially required the right to withdraw from the Contract should it fail to obtain a planning permit for its proposed development.
4. The agent left a voicemail message on Mitchell's message bank to the following effect:



- The Purchaser's offer was not accepted;
 - There was another purchaser willing to enter into an unconditional Contract;
 - Unless the Purchaser made a better, unconditional offer by 5pm that day, it would lose the opportunity to purchase the property.
5. In fact, at the time that the message was left, there was no unconditional offer from another purchaser.
 6. The Purchaser submitted that because Mitchell was a friend of the agent, he trusted the truthfulness of the agent's message and increased the counter-offer by \$100,000 and made it unconditional. This new offer was accepted and the parties entered into an unconditional Contract.
 7. The Purchaser later discovered that planning approval for the development of the Property may not be forthcoming by the time for completion.
 8. The Purchaser did not complete the Contract and the Vendor commenced proceedings against the Purchaser for specific performance of the Contract and damages.
 9. The Purchaser alleged that the oral representation by the Vendor, through the agent, was false, misleading and deceptive and in breach of section 52 of the *Trade Practices Act 1974*.

(Continued on page 4)

Limits to “Puffery”: Misleading and Deceptive Representations Made During Contract Negotiations

(Continued from page 3)

Held

The agent did not challenge the existence or contents of the voicemail message and claimed that he did not have a precise recollection of any communication with Mitchell around that time. The alleged message had been long since deleted by the time the proceedings were heard. In the circumstances, the Court extensively examined other pieces of evidence, and considered the context behind the two offers made by the Purchaser and also took into account the fact that the agent was a long-term acquaintance and friend of Mitchell. The Court concluded that the message must have been left by the agent to the Purchaser because it was “the most plausible explanation for the unusual course taken” by the Purchaser to increase its counter-offer by \$100,000 and to accept the removal of the right to withdraw from the Contract, which was a fundamental protection.

The Court held that the message communicated by the agent on behalf of the Vendor amounted to misleading and deceptive conduct that was intended to and did convey to the Purchaser the false threat that there was other purchaser willing to enter into an unconditional contract at the time when there was no such purchaser. The Purchaser would not have otherwise entered into the Contract in the terms of its second offer had it not been for the representation conveyed from the message.

Consequently, the Court ordered the Contract be declared void and the deposit and extension fees paid by the Purchaser be refunded by the Vendor plus interest.

Comment

The case serves as a stark example of the consequences of agents inappropriately asserting pressure upon potential purchasers and the limits as to the kind of representations that are allowed to be made in similar circumstances. False representations made to a potential purchaser which induced it to enter into a contract that it otherwise would not have entered into, could lead to such contracts being declared void and money paid under the contract refunded to the purchaser.

Vendors and their agents should take care in relation to what is communicated to potential purchasers, whether verbally or in writing. Agents should especially take care as to the representations made to purchasers (or purchasers’ representatives) who they are personally acquainted with. Even in circumstances where there is no direct evidence of a misleading and deceptive representation having been made, it is clear that the Courts are comfortable with exploring whether such representation had likely been made.

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“The case serves as a stark example of the consequences of agents inappropriately asserting pressure upon potential purchasers”

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LAWYERS

Options to Renew and Retail Lease

Late exercise of option

Generally, a Tenant must strictly comply with the terms of an option to renew clause in a lease if it wishes to exercise the option as otherwise the Tenant will not be entitled to the option term. This is particularly true in respect of the stipulated time periods for exercise of the option. Courts have continually required the Tenant to have exercised the option within the option exercise window noted in the Lease and have been reluctant to grant any extension to the specified option exercise period unless there has been some unconscionable action by the Landlord.

However, a recent Court decision has demonstrated that there is some flexibility in determining whether an option term should be granted despite the option having been exercised outside the option exercise window stipulated in the lease. The Court

held the Tenant was entitled to the option term despite the fact that the Tenant had provided the exercise of option notice after the last date open to the Tenant, to do so. The Court found that the parties actions after the late exercise of option were consistent not with the parties agreeing that the Tenant had failed to exercise the option but instead were consistent with the parties agreeing to enter into a lease for the further term.

The Tenant was held entitled to a lease for the option term as though the Tenant had complied with the option clause as the discussions and correspondence between the parties following the Tenant's late exercise of option evidenced that the parties had agreed to the new option term regardless of the Tenant not strictly complying with the option exercise window.

(Continued on page 6)

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Options to Renew and Retail Lease



(Continued from page 5)

This case is of importance to Landlords in showing that Landlords must be careful after any purported exercise of option by a Tenant to ascertain whether the option has been validly exercised and if not, to make it clear in any negotiations with the Tenant that the negotiations are for a new lease and not a further term pursuant to the option clause.

Loss of right to option term

Despite the Tenant having served an exercise of option notice within the option exercise period a Landlord may, where the lease permits it, deny a Tenant an option lease if the Tenant has been in breach of the Lease during the initial term. For the Landlord to do so, the Landlord must, within 14 days of receiving the Tenant's

notice of exercise of option, provide the Tenant with a statutory notice under the Conveyancing Act (NSW).

The notice must specify the breach by the Tenant that the Landlord relies upon to refuse the grant of option. If the Landlord does not provide such notice to the Tenant, the Landlord will be prevented from relying on a breach of the Lease to avoid the option term. It is important to note that even if the Landlord serves the notice the Tenant may still be able to obtain relief against the breach that prevented the granting of the option term, by commencing court proceedings.

It is essential that the Landlord's notice strictly comply with the statutory requirements for the notice. Any failure to comply regarding the timely service of the notice or failure to disclose in the notice all information prescribed by the legislation may result in the notice being deemed ineffective and preclude the Landlord from refusing to grant the option on the basis of the Tenant's default.

(Continued on page 7)

Options to Renew and Retail Lease

(Continued from page 6)

Retail Lease – extending the term

Under the Retail Leases Act (NSW) a Tenant might be entitled to extend the term of its Lease if the Landlord has not first complied with Section 44 of the Act. This section will not apply to a Lease containing an option to renew.

Section 44 requires the Landlord to provide the Tenant with notice that the Landlord intends to offer the Tenant a new Lease of the Premises (and such notice must contain certain details regarding the terms of the new Lease) or alternatively inform the Tenant that the Landlord will not be offering the Tenant a renewal of Lease. The Landlord must provide this notice within 6 to 12 months prior to the terminating date of the Lease

(unless the Lease is for a term of 12 months or less in which case the Landlord must provide the notice within 3 and 6 months prior to the terminating date of the Lease). If the Landlord does not give a notice, the Tenant's Lease will be extended until the end of six months after the Landlord gives the notice if the Tenant requests an extension to its Lease on this basis prior to the terminating date of the Lease. Many retail Tenants and Landlords are possibly unaware of the operation of this clause. However, it is particularly important to Landlords who require vacant possession of the Premises for a particular reason, such as redevelopment of the land on which the Premises is situated. If the Tenant elects to extend the term pursuant to this clause it could cause substantial inconvenience and expense to the Landlord.

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Vendors

Vendors may be surprised to learn that their real estate agent may be entitled to their full commission in circumstances where a Contract for Sale of Land is terminated as a result of a default on the part of the Purchaser.

In the past, where a Contract for Sale of Land was terminated by a Vendor following non-completion by the Purchaser, the real estate agent was not entitled to a commission. This was the case even though the vendor was allowed to retain the forfeited deposit.

In the recent case of *Kukulovski (as liquidator of National Andrews Pty Ltd) v Georges* [2011] NSWSC 359, Justice Barrett of the Supreme Court of New South Wales confirmed this position in holding that, in the absence of an express clause to the contrary, an agency agreement did not give a real estate agent the inherent right to recover a commission from the Vendor in circumstances where the Contract for Sale of Land was terminated as a result of the Purchaser's breach of the Contract.

In response to feedback from its members, the Real Estate Institute of New South Wales has recently amended the standard agency agreement to provide a new contractual right for real estate agents to be paid their commission if a sale falls through due to

the Purchaser's non-performance of the Contract for Sale of Land, in circumstances where the agent's fees are equal to or less than the forfeited deposit.

Of course, vendors are still able to negotiate with their real estate agent to have this clause struck out prior to executing the agency agreement if they do not wish for it to apply to them.

Vendors should ensure that they are aware of the circumstances in which their real estate agent may retain their commission prior to signing an agency agreement.

It has been our experience that Vendors do not usually seek legal advice prior to signing an agency agreement and of course once the agreement has been signed, it is usually too late to re-negotiate.

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Residential Tenancies Early Termination

RESIDENTIAL TENANCIES ACT 2010

NEW RIGHTS FOR EARLY TERMINATION BY TENANTS

The new Residential Tenancies Act 2010 (RTA) commenced on 31 January 2011.

The RTA introduced numerous significant changes to the existing law relating to the rental of residential property in NSW.

One new provision of particular importance to Landlords is Section 100 which sets out various rights of a Tenant to terminate a Residential Tenancy Agreement early without compensation to the Landlord.

Section 100 (1) states that a Tenant may terminate a fixed term agreement by giving not less than 14 days notice to the Landlord on any of the following grounds:

- that the Tenant has been offered, and accepted accommodation in social housing premises;
- that the Tenant has accepted a place in an aged care facility or requires care in such a facility;
- that the Landlord has notified the Tenant of the Landlord's intention to sell the residential premises and did not disclose

(Continued on page 10)



Residential Tenancies Early Termination

(Continued from page 9)

the proposed sale before entering into the residential tenancy agreement; and

- that a co-tenant or occupant or former co-tenant or occupant is prohibited by a final apprehended violence order from having access to the residential premises.

Importantly, any such termination notice served by the Tenant pursuant to Section 100(1) of the RTA may nominate a termination date that is **before** the end of the fixed term of the residential tenancy agreement.

Section 100(1)(c), which relates to the Landlord's intention to sell the premises, is perhaps the most concerning for Landlords. It is quite likely that at the time the parties entered into the residential tenancy agreement, the Landlord may have not had any intention to sell the premises and accordingly had nothing which the Landlord was legally required to disclose to the Tenant at that time. Despite

that, if the Landlord subsequently decides to sell the premises then, in accordance with the new provisions of Section 100, the Tenant may terminate the agreement.

In the event that the Tenant does terminate, the Tenant is not liable to pay any compensation to the Landlord for the early termination of the agreement.

In view of these new provisions, Landlords should consider at the time of listing a property for sale which is occupied by a Tenant, including in the Contract for Sale a special condition confirming that the Purchaser is aware of the Tenant's rights to terminate the agreement under Section 100 (1) of the RTA and will accept vacant possession of the premises on settlement if the Tenant exercises the right to terminate.

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“In the event that the Tenant does terminate, the Tenant is not liable to pay any compensation to the Landlord for the early termination of the agreement”

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Back issues

All issues of our Property newsletters are available online at www.makdap.com.au. Articles in the two previous issues include:

September 2010

- New Property 'Tax'
- New Home Owners Warranty
- Building and Occupation Certificates
- Copyright in Architect's Plans

December 2009


- Effect of the new unfair contract terms law on property transactions
- External control of tenants
- Defects and disclosure

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