



Property 'Taxes'

Introduction of new fees

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Construction Law Specialists join Makinson & d'Apice

We are delighted to announce that construction law litigation specialists Baker McDonell Lawyers will join forces with Makinson & d'Apice from September 2010.



“Partner, David Baker has over 25 years legal experience and is an Accredited Specialist”

Baker McDonell has a strong focus on building and construction law and has earned impressive credentials in this sphere. We are very excited by the addition of their team of seven to complement our property and construction practice. These construction dispute professionals will greatly expand our expertise and experience in this area to provide you with a comprehensive service offering in each and every aspect of

construction and property management law.

Partner, David Baker has over 25 years legal experience and is an Accredited Specialist who has an extensive track record in building law and home warranty insurance appeals. He has adjudicated major building cases on the Fair Trading Tribunal and has served as both corporate solicitor and legal manager of the Building Services Corporation. He acts for builders, developers and strata corporations in building disputes and can advise on building disputes, contracts or security of payment issues.

We would welcome an opportunity to discuss this with you further to see how our expanded capabilities in this area can best meet your needs.



New Property 'Tax'

“The fees will apply to transfers including easements & profits”



The New South Wales Minister for Lands announced in May 2010 that new ‘ad valorem’ fees would be introduced with effect from 1 July 2010. This has now been passed by both Houses of Parliament and came into effect on 1 July 2010.

As a result, amendments to the fee schedule of the *Real Property Regulation* 2008 were introduced in Parliament on 8 June 2010 as part of the 2010-11 budget process. These have also been passed by Parliament.

These regulations provide for ad valorem fees which are significant and are payable in addition to stamp duty payable on the purchase of property.

The fees will apply to transfers including easements and profits à prendre at the following rates:

This ‘tax’ has been named the ‘Torrens

Assurance Levy’.

As a transitional provision, the levy is not payable for transfers executed to give effect to a Contract for Sale entered into before 1 July 2010 or if the dealing is a transfer first executed before 1 July 2010.

The levy is nominal for dealings other than transferring the ownership of an interest in land to give effect to a sale. However, as can be seen below, the amount of the levy is significant in relation to property sales. This levy is raised under the provisions of the *Real Property Act* and therefore the exemptions that apply under the *Duties Act* will not apply to this levy.

Please do not hesitate to contact us should you require further advice in relation to the levy.

Bill d’Apice is a partner of Makinson & d’Apice.

Less than \$500,000.00	\$4.00
A transfer executed to give effect to a sale where the purchase price exceeds \$500,000.00 but not \$1,000,000.00	\$4.00 plus 0.2% of the amount by which the purchase price exceeds \$500,000.00
A transfer executed to give effect to a sale where the purchase price exceeds \$1,000,000.00	\$1,004.00 plus 0.25% of the amount by which the purchase price exceeds \$1,000,000.00

New home warranty insurance arrangements

On 8 November 2009,

the Government announced major structural reforms to the Home Warranty Insurance Scheme in New South Wales. Legislation to commence the new scheme is currently before Parliament and it is proposed that the new scheme will commence on 1 July 2010.

Under the *Home Building Act 1999 (Act)*, Home Warranty Insurance (**HOW**) is required to be taken out by building contractors in certain circumstances when performing residential building work. HOW provides cover to the consumer of up to \$300,000 in circumstances where their builder is no longer capable or willing to complete a project or rectify defective work.

In the past, HOW has been provided by private insurance companies. Under the new scheme the Government will underwrite and capitalise the Home Warranty Insurance Scheme, which will be fully funded by premiums. The new model will still be operated by the private sector, by way of a competitive tender, for the provision of services in relation to the issue of project certificates, collection of premiums and claims handling.

Tender specifications for operating the scheme, underwriting procedures and arrangements for premium pricing have

been finalised and expressions of interest for appointment to the Builder Management Services panel are currently being sought. It is anticipated that the Builder Management Services panel will be in place by 1 July 2010.

The Government has taken these steps to reform the Home Warranty Insurance Scheme as a result of a substantial contraction of the insurance market which has occurred following the Global Financial Crisis. Several insurers have withdrawn or announced their intention to withdraw from the market including Lumley General, CGU Insurance Limited and Vero. As a result of this contraction in the market, there is evidence that an increasing number of builders in NSW are unable to obtain cover. This is not only a problem for consumers, who may find that building work is being performed without the benefit of insurance, but is also a problem for the wider economy as it has the potential of forcing those builders who are unable to obtain insurance out of business which has a flow on effect across various sectors.

Despite the new scheme, cover for building projects already issued by insurers will remain in force for the duration of the policy, allowing consumers to make claims where necessary. Existing consumer benefits provided by the current Home Warranty Insurance Scheme will also be

maintained. However, under the new arrangements, there will also be scope to provide and implement enhanced benefits including the level and type of cover.

It is proposed that builders who currently have eligibility with one of the three existing insurers will be transferred to the Government scheme automatically, with no changes to their existing eligibility profile. Builders will be notified in writing of the transfer. The exception is builders who have provided security to their insurer. These builders will be contacted separately and given information about transferring to the Government insurer. Builders will not be asked to provide bank guarantees under the new scheme.

The plan is to incorporate a "managed" cover offering as part of the new scheme arrangements. This type of cover is designed to assist new entrants to the industry or existing builders who have low equity in their business, obtain cover. The underwriting criteria for the new scheme are still being finalised. New builders will need to meet these criteria in order to be eligible.

Craig Munter is a senior associate at Makinson & d'Apice.

Building Certificates and Occupation Certificates

“The council may require the applicant for a Building Certificate to supply such information including building plans.”

It is not uncommon for there to be confusion from time to time as to the purpose of and benefits in Building Certificates and Occupation Certificates. The Certificates serve different purposes and have different benefits to parties obtaining or relying on such Certificates.

The purpose of this article is to provide an overview of these Certificates.

Building Certificate

Building Certificates are issued by the Council under section 149(D) of the *Environmental Planning and Assessment Act 1979 (EPA Act)*.

An application for a Building Certificate may be made by:

a) the owner of the land;

b) any person with the owner's consent;

c) the purchaser under a Contract for sale of the property that comprises or includes the building or the purchaser's solicitor or agent; and

d) a public authority that has notified the owner of its intention to apply for the Certificate.

The Council may require the applicant for a Building Certificate to supply such information including building plans, specifications, survey reports and certificates as may be reasonably necessary to enable the proper determination of the application. However, the Council cannot require a new or more recent survey certificate to be supplied when there has been no material change to the building since the





Building Certificates and Occupation Certificates

“The effect of a Building Certificate is specified in section 149 (E) of the EPA Act.”

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date of the survey which is supplied to the Council.

The Council is required to issue a Building Certificate if it appears that:

- a) there is no matter discernable by the exercise of reasonable care and skill that would entitle the council to:
 - i) order the building to be demolished, altered, added to or rebuilt; or
 - ii) to take proceedings for an order or injunction requiring the building to be demolished, altered, added to, or rebuilt; or
 - iii) to take proceedings in relation to any encroachment by the building onto land vested in or under the control of the Council, or
 - iv) there is such a matter but in the circumstances the council does not propose to make any such order or take any such proceedings.

If the Council refuses to issue a Building Certificate, reasons must be given for the refusal to the applicant, which should be

sufficiently detailed to indicate what needs to be done to enable the Council to issue the certificate.

The effect of a Building Certificate is specified in section 149(E) of the EPA Act. Relevantly, the Certificate operates to prevent the Council:

- a) from making an Order under the EPA Act requiring the building to be repaired, demolished, altered, added to or rebuilt; and
- b) from taking proceedings in relation to any encroachment by the building onto land vested in or under the control of the Council.

in relation to matters existing or occurring before the date of the issue of the Certificate.

The Certificate operates to prevent the council for a period of seven years from the date of issue of the Certificate from making such an Order in relation to matters arising only from the deterioration of the building as a result solely of fair wear and tear.

However the Certificate does not operate to prevent the council from:

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- a) making an Order which relates to fire safety; or
- b) from taking proceedings against any person with respect to that person's failure:
 - i) to obtain a development consent with respect to the erection or use of the building; or
 - ii) to comply with the conditions of a development consent.

The Council is required to keep a record of Building Certificates issued in such form as it thinks fit. A person can inspect that record at the council and may obtain a copy of the Building Certificate with the owner's consent and the payment of a fee.

An applicant has a right of appeal to the Land and Environment Court against the refusal to issue a Building Certificate or the need to supply further information. The Court may direct the council to issue a Building Certificate on such conditions as the Court thinks fit.

Occupation Certificates

An Occupation Certificate is a certificate that authorises:

- a) the occupation and use of a new building; or

Building Certificates and Occupation Certificates

- b) a change of building use for an existing building.

A person must not:

- a) commence occupation or use of the whole or any part of a new building; or
- b) effect a change of building use for the whole or any part of an existing building;

unless an Occupation Certificate has been issued in relation to that part of the building.

A new building is relevantly defined to include an altered portion of or an extension to an existing building. Building is defined as including a part of a building and any structural part of a structure but does not include a manufactured home, moveable dwelling or associated structure or part of a manufactured home, moveable dwelling or associated structure. The definition includes residential and commercial properties as well as cottages and flats.

However, the obligations in relation to Occupation certificates do not apply:

- a) if the erection of the building or change of building use is or forms part of exempt development or development that does otherwise require development consent;



Building Certificates and Occupation Certificates

(Continued from page 6)

b) after expiration of 12 months from the date on which the building was first occupied or used;

c) to such persons or in such circumstances as may be prescribed by the regulations; or

d) to a building that has been erected by or on behalf of the Crown or by or on behalf of a prescribed person.

Under the Conveyancing Sale of Land Regulation clause 6 from 1 July 2003 there is a prescribed term in respect of certain Strata units bought off a plan that the vendor must serve at least 14 days before completion the original or copy of an Occupation Certificate which should be either an interim or final Occupation Certificate in relation to the building or part of the building of which the lot and access to the lot forms part. Clause 6(1) of the regulation specifies when that implied term will apply.

Vendors should be aware of the possibility of including in the contract an express provision that an Occupation Certificate in relation to the building (or part of the building of which the lot and access to the lot form part) will not be issued before completion and that occupation of the lot will not commence before the Occupation Certificate is issued. In the majority of transactions such a provision would not be in the interests of purchasers and should be resisted.

A similar prescribed term applies to the sale of a land and house package in certain circumstances.

An Occupation Certificate may be an interim or final Certificate and may be issued for the whole or any part of the building. There are significant restrictions imposed on the issue of final Occupation Certificates.

Unless certain circumstances are satisfied, a Final Occupation Certificate must not be issued to authorise a person



to commence their new use of a building resulting from a change of building use for an existing building.

Under the regulation, in certain circumstances a prerequisite to a final Occupation Certificate is the existence of

a Final Fire Safety Certificate involving the New South Wales Fire Brigades.

There is an entitlement to appeal against the refusal of a final Occupation Certificate.

The need for an Occupation Certificate does not obviate the need for a Building Certificate however, where an Occupation Certificate is required because the building or part of it was erected or altered after 1 July 1998 or there was a change of use after that date the Building Certificate is also required.

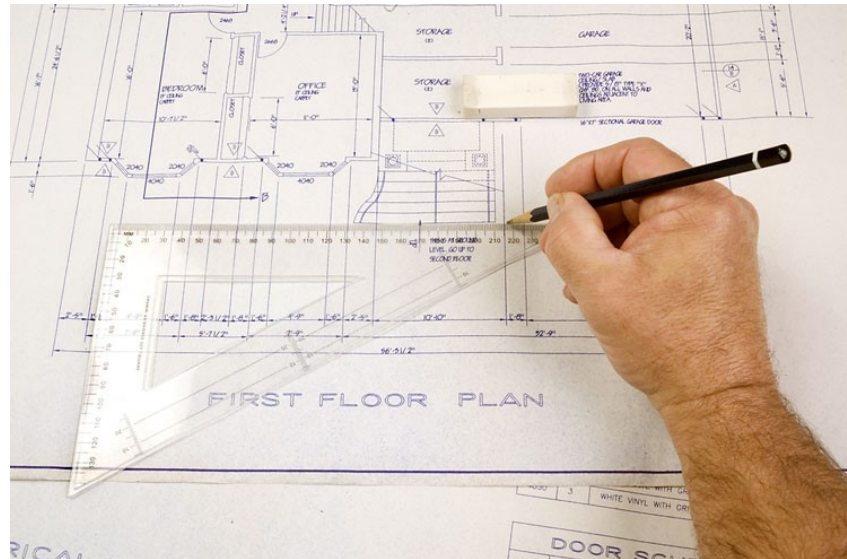
In conveyancing transactions each of the vendors and purchasers and their mortgagees has an interest in ensuring that the need for an Occupation Certificate has been satisfied or will be satisfied before completion of the sale. That may necessitate a special condition in the contract rendering it subject to obtaining an Occupation Certificate before completion.

It is suggested that vendors including developers should obtain Occupation Certificates when required before the property is marketed for sale. A copy of that certificate should be attached to the contract. If the property has not been fully completed when contracts are negotiated the contract should require the vendor at its expense to obtain an Occupation Certificate and the contract should be conditional on it being obtained before completion.

Chris Drayton is a partner of Makinson & d'Apice and Craig Munter is a senior associate.

Copyright in Architect's Plans

“Artistic work is protected by the Copyright Act and would include a building or a model or drawings of a building”



Copyright is given recognition and protection by virtue of the *Copyright Act* which principally protects the form in which ideas are expressed but not the ideas themselves. It first arises when the artistic work is reduced to writing or to some other material form.

There is no registration process involved, however the duration of protection is seventy (70) years from the death of the author of the works.

Artistic work is protected by the Copyright Act and would include a

building or a model or drawings of a building, whether or not the building or the drawings contain any artistic quality.

In order to assign copyright to a third party the form of assignment must be in writing and signed by the author. However, as copyright comprises personal property it is also transmissible pursuant to a will and by operation of law.

Infringement generally occurs if

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Copyright in Architect's Plans

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carried out in relation to a substantial part of the original work and is generally assessed by reference to the quality of what is taken rather than the quantity.

In circumstances where a land owner employs an architect to prepare plans for a building on a site, copyright remains with the architect who then grants a licence to the owner to use those plans on the site in return for payment of the architect's fee. The architect could therefore prevent anyone else copying his plans or erecting a building from them. However should the owner sell the site, an implied licence usually extends to

avail the purchaser of the use of the same plans.

Certain steps need to be taken when using plans for a building in these circumstances to ensure the person using the plans has protection from any potential infringement of copyright.

A land owner and an architect can reach a separate agreement about the use of such plans for other buildings or ownership of the copyright should they wish.

Graham Martin is a partner of Makinson & d'Apice.



Land Tax Reductions and Refunds

“A few years ago, the Valuer General’s valuation methodology was reviewed externally and criticised for systematically undervaluing properties.”



Land tax is always an issue for landowners and this is more the case this year than in the past. Landowners may have received significantly higher land assessments than in previous years. It may be the right time to scrutinise land holdings for potential exemptions and to challenge listed land values that seem too high.

Many NSW landowners have seen land tax bills rise steeply over the past three years. The causes of these increases include the imposition of a higher land tax rate for property values exceeding a premium threshold and the full effect of the land value averaging system. These causes are outside of landowners’ control. However, landowners can take action in respect of what is usually the main cause of the land tax increases being the rise in the land values notified by the Valuer General. It has not been uncommon for landowners to have received notices showing valuations that have doubled over a period where the real land values have stagnated or even fallen. Whatever the historical position, for many landowners, the notified land values are now in excess of the current real market value of their properties.

Background

The properties subject to 2010 land tax

assessments are those owned at 31 December 2009 which are not exempt. For non-exempt properties for the 2010 year, land tax amounts to approximately 1.6% of the combined land value in excess of \$376,000.00. It should be noted that special trusts may not be entitled to the land tax free threshold and corporate groups only receive the benefit of one threshold, not one per company. A premium rate of 2% applies to the aggregate land value exceeding \$2,299,000.00. For the 2010 land tax year, the value upon which land tax is payable is the average of the values of the land at 1 July 2007, 1 July 2008 and 1 July 2009.

A few years ago, the Valuer General’s valuation methodology was reviewed externally and criticised for systematically undervaluing properties. As a result, the methodology was reformed and from 2006-2007, many landowners began to experience steeply increased notified land values as the Valuer General sought to “catch-up” for previously undervalued properties. Under the three year land value averaging system, landowners typically did not experience the full effect of the land value rises as increased land tax payable until the 2009 or 2010 land tax assessments. The more recent

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Land Tax Reductions and Refunds

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assessment notices showed the average over three years at the increased values. The Valuer General's notified land value rarely reflects an actual valuation of the specific property. Rather, it usually reflects the sum of average increases in the values of properties of the same type in the same local government area (called "components"). Hence a property can be overvalued because it has been allocated to a non-representative component or because it has features which detract from its value compared with other properties in the same component. It is also not uncommon for a notified value based on the sum of average increases, especially in view of the recent deliberate "catch-up", to have departed from the reality of the real market value for the property in question. It needs to be remembered the notified land value is supposed to be for the land as if it was without improvements.

Reducing land tax and perusing refunds

The good news is that action can be taken to correct excessive land values and reduce land tax payments and/or

obtain refunds. Objections can be made to the Valuer General (now within the Land and Property Management Authority). To be successful, landowners need to be able to demonstrate that the notified land values are excessive based on recent sales of comparable land. Hence, simply submitting a valuation obtained from an independent valuer is usually not



enough. The effect of a successful objection can flow through to land tax assessments (and Council rates) and result in land tax refunds for the past and land tax reductions in future assessments. In our experience, excessive valuations are more likely to have been made for commercial, retail and industrial property and high end,

free standing, residential land.

For clients concerned about their land tax assessments, we have an arrangement with a land tax specialist, Stephen Baxter of Indirect Tax Consulting Group. He will be pleased to meet with you on a no obligation basis to discuss your prospects of success in challenging land tax and land values. To explore this opportunity please contact Stephen directly on 9221 2888 or contact one of the solicitors in our office.

Stephen Baxter

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- Makinson & d'Apice provides professional legal services for Australian and International clients including corporations, financial institutions small businesses, non-profit bodies and personal clients. We provide prompt, authoritative, appropriate and cost-effective legal services and have done since 1859. An unrivalled reputation of integrity and experience, combined with the latest technology and research facilities is why Makinson & d'Apice is Sydney's member firm of the LAWWorld International Legal Network.



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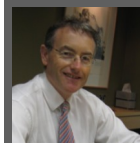
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Back issues

All issues of *Property newsletters* are available online at www.makdap.com.au. Articles in the last issue include:

December 2008

- A brave new world in planning law
- First Home Owner Boost Scheme
- Biodiversity Banking and Offsets Scheme
- GST on forfeited deposits
- Green Leases
- Land Tax increase


December 2009

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

Please feel free to circulate this newsletter to others who may be interested. If you like to receive future issues of *PEP Talk* via email, please register at http://www.makdap.com.au/resources_registration.cfm

Disclaimer: This publication is a non-comprehensive general outline of the law as at 10 June 2010. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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