

Conveyancing changes in NSW

September has seen the introduction of the *Conveyancing (Sale of Land) Regulation 2022* and the 2022 edition of the standard Contract for Sale of Land.

Conveyancing (Sale of Land) Regulation 2022

The Regulation does not make many substantive changes, and does not do much more than restructure its predecessor, to make it easier to navigate.

Importantly, the Regulation overcomes the problem created by the decision in *BP7 Pty Ltd v Gavancorp Pty Ltd [2021] NSWSC 265*, by excluding the right to a cooling off period in relation to the exercise of put options for the purchase of residential property.

This is achieved by s17(3) of the Regulation.

Section 17(3) provides that section 66S of the *Conveyancing Act* “does not apply to a contract made in consequence of the exercise of an option to compel the purchase of land”. [Section 66S is the provision that creates the right to a cooling off period under a contract to purchase residential property in NSW]. In other words, there is no right to a cooling off period in relation to a contract arising from the exercise of a put option for the sale of residential property.

Schedule 5 of the Regulation sets out the prescribed forms to be attached to options to purchase residential property and contracts for the sale of residential property. The right to cool off under a contract for sale of residential property does not apply (pursuant to cl 3(d) of the prescribed form of Cooling-off Notice at Form 1 in Schedule 5) “if the contract is made in consequence of the exercise of an option to purchase the property,”.

A cooling-off warning notice must still be attached to an option to purchase residential property in accordance with the requirements of s66ZH of the *Conveyancing Act*. And a grantee under an option to purchase residential property is entitled to cool off within 5 business days, unless the grantee delivers the usual form of cooling-off waiver certificate in accordance with s66ZF of the Act.

Contract for Sale of Land

The changes to the standard form of contract are largely stylistic, with an improved and clearer layout and more generous execution blocks.

A new clause 4 has been included which reflects the practical reality that electronic conveyancing transactions are now standard.

Electronic signing of the contract is also now permitted by standard conditions 20.16 and 20.17.

Clauses 14.5 and 16.1 now address the charge that may apply to residential properties purchased by first home buyers for under \$1.5m, where the vendor has elected to pay an annual property tax instead of stamp duty under the *First Home Buyer Choice Scheme*. (Operation of these provisions remains subject to the passage of legislation to enact the Scheme).

The issue in the case was whether the tenant had entered into a legally binding lease.

The facts closely follow the usual process for office leasing by institutional landlords in Australia.

In April 2021 the landlord (Centuria Property Funds Ltd and Trust Company (Australia) Ltd) entered into a HOA to lease office premises. The HOA was expressed to be non-binding and reserved the right of the parties to withdraw from the transaction at any time prior to execution of formal lease documents by both parties. The HOA also granted the tenant a right to early access to commence fitout, on certain conditions.

The Lease and Incentive Deed were then negotiated, signed by the tenant, and delivered to the landlord in late June/early July.

The evidence disclosed that the solicitors for the parties took a different approach to the transaction process: the tenant solicitor expected a formal exchange to occur: the landlord solicitor taking the approach that once the tenant had delivered the signed documents to the landlord there was nothing further to be done by the tenant (the only remaining condition being execution by the landlord) with the result that the tenant no longer enjoyed the right to unilaterally withdraw.

At the same time, access to the premises was granted to enable the tenant's IT contractors to commence some early works.

The landlord did not proceed to execute the documents, and the tenant gave notice that it withdrew from the transaction on 16 August 2021, before the landlord signed.

At first instance Darke J held that the right in the HOA to withdraw at any time up to execution of the formal documents by both parties had not been abrogated by the process described above. The tenant did not evince an intention to be bound by the documents prior to execution by the landlord: rather, the evident intention was to be bound when the landlord signed. Therefore, the tenant retained the right to withdraw at any time before the landlord signed.

The Court of Appeal agreed: at [72] "*There was no clear statement or conduct on the part of the [tenant] to indicate that the [tenant's] position had relevantly changed...such that its intention was to be bound by the relevant lease documents...at a time before the [landlord] had signed those documents*".

Darke J also held that the grant of early access was of little significance in determining whether the tenant had manifested an intention to be bound by the Incentive Deed and Lease.

The Court of Appeal again agreed. At [101]: *“The fact that access was provided... (for the limited purposes of IT installation and not fitout works perse) is consistent with an informal licence arrangement”*. The Court of Appeal did not consider that by taking advantage of the early access opportunity the tenant thereby evinced an intention immediately to be bound by the lease documents.

Accordingly, the tenant was free to walk. Had the landlord signed sooner, that right would have been lost.

The decision should be considered by institutional landlords in terms of the drafting of their HOAs, and in terms of the process they adopt around signing lease documents and granting tenant access. The facts of the case are consistent with industry practice, which sees landlords grant tenant access for fitout once they receive the signed lease, incentive deed, BG and COC, and then take months to themselves sign and return the documents to the tenant. While the legal consequences of this process may turn on the detail of each particular case, it would clearly be a mistake for landlords to assume that tenants are invariably bound in these circumstances.



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