

17 January 2014

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
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Dear Research Director

Property Occupations Bill 2013

Thank you for the opportunity to provide comments on the Property Occupations Bill 2013 (the Bill) which replaces aspects of the *Property Agents and Motor Dealers Act 2000* (PAMDA).

The Society was consulted in the process of forming the Bill and acknowledges that a number of the suggested drafting changes have been incorporated in the Bill. The Society is grateful to the Government for the opportunity to provide input at an early stage. The Society has long advocated that good stakeholder consultation is the key to good law.

The Bill has been reviewed by the Society's Property Development and Law Committee who were generally supportive of the proposed changes in particular the simplification of the warning statement and the removal of the requirement to direct a buyer's attention to the statement. However the members were keen to make a number of observations about the final text of the Bill, recognising that some of the matters identified have been policy decisions of the Government.

Waiving cooling off in residential property sales contract

The Committee noted that proposed section 167 of the Bill alters the way in which a person may waive or shorten their right to a cooling-off period in a residential property sales contract. In order to waive or shorten the cooling off period, under the current legislation, a person requires a certificate that an independent lawyer has explained to the buyer¹—

- the effect of the proposed contract
- the purpose and nature of the certificate

¹ PAMDA, ss 369A – 369B

- the legal effect of the buyer waiving or shortening their cooling off rights.

The Bill proposes that this can now be done simply by written notice from the buyer to the seller.

The Committee cautions against this change as it would be too very easy for an unscrupulous or rogue seller/agent to obtain a signed notice of waiver from a buyer who did not realise the implications of what they were signing. This risk is particularly heightened for buyers who are unfamiliar with the process of residential contract formation in Queensland.

Members of the Society report that buyers rarely obtain legal advice prior to committing to a contract for the purchase of residential property and are often unfamiliar with the terms of the contract they have signed.

Accordingly the protection of the independent lawyers certificate should be retained. The argument for the reduction of red tape does not outweigh the protection afforded to vulnerable buyers. In this regard the Committee was of the view that the requirement for independent legal advice was crucial for the cooling off period to be of any real consumer protection.

The Committee notes that the cooling off and independent advice for waiver were key elements of the measures taken to address the marketeering of residential property.

The Committee notes that in New South Wales a similar certificate is required to waive cooling off rights².

Extended auction exemption to 2 business days and form of the 'particular matters'

The Committee noted that proposed section 160(1)(b)(ii) operates to make a contract signed within two days of an auction with a registered bidder at an auction to be excluded from the requirements of the Part and the application of the cooling off provisions.

Whilst the Committee agreed in principle with the change we note that resultant amendments have been made to the 'particular matters' in clause 165 to make the statement equivocal so that it can appear on either auction contracts or private treaty agreements. We continue to suggest that this will lead to confusion for members of the public about whether they have the benefit of the cooling off provisions.

While this approach may reduce red-tape for selling agents, it will add red-tape (and possibly costs) to the conveyancing process as:

- (a) buyers risk losing their deposits if they wrongfully terminate contracts in the mistaken belief they have the benefit of a cooling off period
- (b) it will not be apparent to a buyer's lawyer on the face of the contract whether there is a cooling off period. This will create an additional step in the conveyancing process as it will necessitate a buyer's lawyer giving detailed advice in each case about when a cooling off period applies. Further enquiry and investigation will often be required
- (c) where buyers are purchasing following an auction using corporate or trustee entities, it may be impossible for the buyer's solicitor to ascertain whether the entity named on the contract was exactly the same entity as that registered to bid at the auction
- (d) in some instances it may not be possible to ascertain whether there is a cooling off period before the period expires.

² *Conveyancing Act 1919 (NSW)*, s66W

The Committee is firmly of the view that the 'particular matters' should only be included on a contract where there is a cooling off period. Where a pre-printed form of contract is utilised (which is almost invariably the case), it would be a simple matter for the person preparing the contract to rule through the 'particular matters' section.

The benefit of this approach is:

- (a) it removes any uncertainty and risk from a buyer's perspective
- (b) it imposes a very simple obligation on the person preparing and attending to execution of the contract. This is the person best able to identify whether the cooling off period applies
- (c) where that person makes a mistake and forgets to delete the 'particular matters' the only consequence is that the buyer receives the benefit of a cooling off period. Unlike the present position (where contracts may be terminated on technical grounds which might not be readily apparent to a seller) the particular matters would clearly identify to *both parties* that a cooling off period applied.

Proposed contract to include particular matters

Whilst the Committee commends the approach adopted in proposed section 165 of removing the need for a warning statement to be attached to the proposed relevant contract and for particular matters to be incorporated within the body of the contract, the Committee does not agree with the removal of the existing termination right for a buyer where a seller fails to comply.

The particular matters to be included go to the heart of the consumer protection requirements of the Bill, advising purchasers of the existence of the cooling off period and also suggesting that purchasers obtain legal advice prior to binding themselves to the contract. This information is of crucial importance to an ill-informed buyer and is presented where the buyer signs to indicate the buyer's intention to be bound.

This obligation appears to be both effective at alerting a buyer to salient facts and efficient in terms of the low compliance burden placed upon sellers and their representatives. It is envisaged that the particular matters would be included in the standard form contracts and would be in place in 'regular' transactions automatically.

The Committee saw the rationale for this approach in the fact that the new requirement is quite modest and would be included within the text of the standard conveyancing contracts and developers are likely to ensure that the text is included within the standard developers' contracts. It was thought that this would cover almost all residential property transactions and would not enliven the termination right in those cases. The Committee was concerned, however, for those occasions where a shyster was intent upon deceiving and pressuring a buyer into a sales contract. In those cases it is likely that:

- the buyer would not have the existence of the cooling off period brought to their attention
- the buyer may not seek legal advice on the terms of the contract promptly

- the buyer may consequently not take action within the required timeframes to terminate the contract within the cooling off period.

The Committee considered that these were the cases where the consumer protection aspects of the Bill were most needed. However, as s167 currently stands, a deceived buyer has no remedy and is bound by the contract. The omission of the particular matters is a regulatory offence, which may or may not be prosecuted by the relevant regulatory authority depending on the evidence available to them. This is little comfort to a deceived buyer.

For these reasons the Committee was of the view that in order to ensure that the consumer protection elements of the Bill are still effective, while also reducing red tape and better facilitating residential property sales, a time-limited termination right to the buyer should apply if the particular matters are not included within the contract. The Committee was of the view that the current 90 day time limitation of termination rights may be appropriate so as not to frustrate long-term agreements where a buyer has not sought advice or has not taken any action on the sale contract within a three month period.

The Committee noted that the approach described above has been in place in New South Wales for some time³ and has not lead to the technical terminations and disputes which the former versions of PAMDA engendered. Again in NSW the relevant wording is in place on the standard agreements and accordingly 'regular' transactions are excluded from the operation of the termination right.

Terminating relevant contracts

Proposed section 168 now provides that a party may terminate the contract during the cooling-off period by giving signed notice of termination to the seller. Previously the buyer was obliged to state in the notice that the contract was terminated under the relevant section of PAMDA relating to terminations by cooling off⁴.

While the new requirement is less onerous, the Committee has concern that there may now be uncertainty about which right of termination a buyer is exercising where the buyer could have multiple grounds for termination (for example, a contract that is subject to finance or subject to a satisfactory pest inspection). This may in turn lead to disputes as it will be unclear whether the buyer is entitled to retain the termination penalty. Whilst the Committee agrees the existing provision is overly prescriptive, a buyer who is relying on the cooling off period to terminate should be required to indicate that it is doing so.

Definition of residential property

Proposed section 21 is a significantly simplified definition of 'residential property', which is supported.

With respect to the current drafting, however, we note that the definition includes property that is "intended to be used, for residential purposes". We agree that a definition that merely focuses on the current use at the time the contract is signed is not appropriate as the cooling

³ *Conveyancing Act 1919* (NSW) s66X

⁴ PAMDA s370A(2).

off provisions are intended to apply to off-the-plan apartment sales and vacant land sales in housing estates. However the proposed definition is problematic in that:

- it is unclear whose and at what time the intention is relevant;
- a seller may not necessarily know a buyer's intention for a property;
- it is not clear if a contract to sell a vacant development site for construction of apartment buildings would fall within the definition (ie whilst the buyer's intention is commercial, the ultimate intention is for residential use);
- it is unclear whether a holiday apartment being purchased by an investor for short term letting is being used for commercial or residential purposes.

Commission in sale with beneficial interest

The Committee noted that the prohibition on recovery of commission where an agent acquires a beneficial interest in a property has been removed⁵ in proposed section 155.

The Committee's view was that commission would generally not be recoverable in such circumstances under general equitable principles relating to agent's dealings with its principal. The Committee therefore does not support this aspect of the proposed Bill.

The Committee also noted that equitable principles require that for consent to be effective, it must be fully informed consent. The Committee was concerned that the wording of the section may reduce the general law duties and considered that this be provided for in the section and that the existing form (PAMD Form 28) be amended to enable all relevant facts and circumstances to be disclosed in light of the agent's general law obligations and obligations in sub-section (4)(a)(ii). An example of required disclosure would be where the agent has knowledge (not publicly available) of a planning scheme change which would increase the market value of the property.

Administrators

Proposed section 6 of the Bill exempts liquidators and controllers appointed under the Corporations Act from certain requirements. However the Committee noted that the definition did not extend to receivers appointed over the assets of individual licensees under a mortgage or security interest. This is particularly an issue where receivers are appointed to operate management rights businesses which are often owned by individuals rather than corporations. The Committee acknowledges that the appointment of receivers over individuals is not regulated and accepts it is not appropriate for unqualified and unlicensed persons to be entitled to act as agents and operate a trust account. However in practice the persons appointed are insolvency practitioners and are entitled to act as liquidators under the Corporations Act.

The Committee proposes that this practical issue be overcome by extending the exemption to persons who are appointed as receivers for an individual licensee provided they are *entitled to be appointed* as the liquidator of a corporation under the Corporations Act.

Security deposits in large scale transactions

The Committee noted that a new exemption has been introduced in proposed section 8 for large scale non-residential property transactions/management.

⁵ PAMDA, s145A(4)(b)

The Committee noted that it was common for managers of large shopping centres and office buildings to hold substantial security deposits provided by tenants. The Committee expressed concern that, as a result of the exemption from the Act, there would not be any requirement for these security deposits to be held in an audited trust account. This would create a significant risk of loss to the tenants, most of whom would be small business owners, in the event of fraud or insolvency of the property management company.

Transitional arrangements

The Committee notes that proposed section 266 of the Bill provides the transitional arrangements for contracts 'entered into' prior to commencement.

The transitional arrangement does not deal with complying contracts delivered to a buyer prior to the commencement which are formed on or after the commencement.

For the sake of certainty for industry and to avoid the considerable burden of having to reissue contracts issued but not entered into before the commencement date it would be beneficial if the section clarified that a contract:

- given to a buyer before the commencement
- which complied with the obligation to have attached a warning statement under section 368A(2)(a) of PAMDA
- entered into on or after the commencement
- is deemed to have complied with proposed section 165 of the Bill.

In substance the information contained in the 'particular matters' in proposed section 165 is a subset of the information contained on the Form 30c warning statement and therefore there would be no prejudice to a buyer from the deeming proposed.

Thank you again for providing the Queensland Law Society with the opportunity to provide comments. If you wish to discuss any aspect of these submissions, please contact the Society's Principal Policy Solicitor, Mr Matt Dunn, on 3842 5889 or via email on m.dunn@qls.com.au.

Yours faithfully



Ian Brown
President