

# The impact of COVID-19 on the sale and purchase of land

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**Presenter:**

- David Lloyd, Barrister, Victorian Bar

## Legislative materials

- National Cabinet Mandatory Code of Conduct – SME commercial leasing principles during COVID-19 - where it all started
- *COVID-19 Omnibus (Emergency Measures) Act 2020*
- *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*
- *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020*
- *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*
- None of these statutory instruments directly addresses the sale of land generally, or contracts for the sale of land

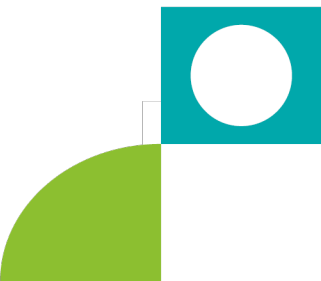
## On-line auctions

- *Sale of Land Act 1962*, section 41(1)(b)
- *Sale of Land (Public Auction) Regulations 2014*, regulation 7
- All these requirements designed for traditional style auctions
- eBay style on-line bidding
- On-line auctions via Zoom, WebEx, or similar technology



## Electronic signing & exchange of contracts

- *Sale of Land Act 1962*, section 32(2)
- LIV/REIV contract of sale of land, general condition 1
- *Instruments Act 1958*, s 126(2)
- *Electronic Transactions (Victoria) Act 2000*, especially Part 2A (sections 14A to 14E)
- *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*, Part 2 Division 3 – deeds and mortgages
  - “remote” witnessing



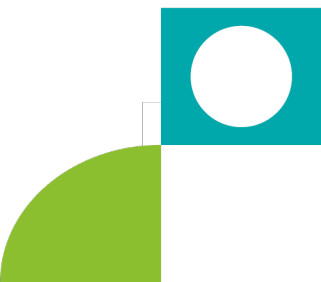
## Electronic signing & exchange of contracts (cont.)

- LIV “COVID-19 Guidance on witnessing documents electronically” (9 April 2020 version – may have been updated) – issues with formal execution of formal documents by a company – sale of land contracts usually signed by one director only on behalf of company – LIV/REIV contract, general conditions 2 and 3



## Potential settlement difficulties

- Pre-settlement physical inspection
- Delay in finance due to lenders being busy or short-staffed
- Re-valuation of property & loan to valuation ratio (LVR)
- Liability of lender to purchaser where approval is conditional
- Electronic completion through PEXA
- Position of purchaser who is unable to complete
- Force majeure
- Frustration of contract



## Sale subject to commercial lease or licence

- Scope of COVID-19 commercial lease regulations – “eligible lease”
- Regulation 10 – “rent relief” - waiver or deferral of rent, or both
- Documenting the change: regulation 10(6): an agreement to waive or defer payment of rent does not affect the “demise” but rather the mode or manner of performance, hence a formal variation of lease is not required
- Regulation 13 – extension of term
- Documenting the change: extension of the lease term affects the demise - writing and signatures required: *Property Law Act 1958*, section 53



## Sale subject to residential tenancy

- New & temporary Part 16 of *Residential Tenancies Act 1997*
- Section 540 – reduction of rent by VCAT order
- Section 543 – reduction of fixed term by VCAT order





# **Webinar - COVID-19 Omnibus Act 2020 and the effect on sale of land**

17 June 2020

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# Outline of Topics

Issues for purchasers arising out of the *COVID-19 Omnibus Act 2020* and the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases And Licences) Regulations 2020*

1. Purchaser unable to complete

2. Purchase subject to commercial leases :

- a) Non-payment of rent before and after settlement date (Reg 9)
  - i. Adjustment at settlement
  - ii. Enforcement after settlement
- b) rent reduction, waiver or deferral (Reg 10)
- c) abandonment / surrender
- d) extensions to the term (Reg 13)

# 1. Purchaser unable to complete

- ❑ COVID-19 has badly affected income.
  - ❑ Many purchasers who signed contracts before 29 March 2020 have been hard hit by the fall-out from the epidemic
  - ❑ Neither the Act nor the Regulations confer any relief on purchasers experiencing hardship
  - ❑ Being unable to obtain finance due to –
    - Financial hardship
    - Events outside either party's control affecting a financier's ability to approve and provide finance on time
- do not relieve a purchaser from its obligation to perform on time

# Purchaser unable to complete

## ❑ FRUSTRATION

- A purchaser may be relieved if circumstances post-contract through no fault of either party make performance of the contract commercially impractical such that the commercial purpose of the contract is frustrated
- For example, where the subject matter of the contract is destroyed –
  - Destruction of the land through an earthquake [mere destruction of improvements would not be enough]
  - Compulsory acquisition of a material part of the land sold
- BUT by itself inability to pay money is not enough: although a purchaser's obligation to pay the price is conditional on the transfer of the property (so the land becoming unavailable to transfer post contract would be a frustrating event), if the vendor has the land available to transfer at settlement, the purchaser's obligation to settle is absolute

# Purchaser unable to complete

## ❑ FORCE MAJEURE

- This is not a concept with any application under the general law
- It depends entirely on there being a special condition in the contract of sale providing for particular agreed circumstances in which one or other or both of the parties may terminate
- It is unlikely a pre 29 March 2020 contract will have any condition within it relieving a purchaser from its obligation to perform due to financial hardship caused by pandemics or other health-related events

# Purchaser unable to complete

## ❑ *Tanwar Enterprises v Cauchi*

- Illustrates the point that a purchaser whose unconditional obligation it is to tender the price at settlement where time is of the essence is not relieved from termination by the vendor for default where the purchaser's financier is unable to provide finance on the due date
- Time was of the essence – vendor had right to rescind without notice
- Purchaser was relying on funds from Singapore. On the due date, the financier was impeded from transferring funds due to the implementation of new anti-money laundering procedures.
- The money became available overnight and the purchaser was ready in the morning, but the vendor refused to complete and terminated.
- The High Court held that there was no equity preventing the vendor from relying on their legal right to terminate. There was no burden on the vendor's conscience arising from the circumstances of the purchaser's financier's last-minute inability to transfer funds

❑ In the same way - vendor terminating due to an unforeseen health event impeding the purchaser's access to funds needed to compete is not unconscionable

## 2(a) Non-payment of rent by tenant at settlement

- ❑ If land is sold subject to a lease which becomes an eligible lease after the day of sale, the position of the purchaser may be affected if the tenant is in default under the lease
- ❑ Reg 10 – a tenant under an eligible lease is not in breach for non-payment of rent and may not be evicted or have any security called upon if –
  - the tenant requests a rent reduction under Reg 10(1);
  - the tenant and landlord agree or enter into some other arrangement [eg waiver of rent]; and
  - the tenant complies with that agreement or other arrangement.
- ❑ For a lease, ss 141 and 142 of the *Property Law Act* will have application: the purchaser will become the landlord on the acquisition of the reversion at settlement
- ❑ The purchaser must settle despite non-payment of rent (if the tenant complies with Reg 9) AND will be subject to Reg 9 from settlement

## 2(a)(i) Adjustment at settlement

General condition 23 in the LIV August 2019 standard form contract:

- 23.1 ... [A]ny rent and other income received in respect of the property must be apportioned between the parties on the settlement date and any adjustments paid and received as appropriate.
- 23.2 The ... rent and other income must be apportioned on the following basis:
- (a) the vendor is ... entitled to the rent and other income up to and including the day of settlement;

Rent reduction under Reg 10 (partial waiver): the vendor and purchaser adjust the reduced rent between them in the usual way

Rent deferral under Reg 10: the purchaser must allow to the vendor and pay when received the portion of the deferred rent attributable to the period up to and including the settlement date



## 2(a)(ii) Enforcement after settlement

❑ Absent a special condition, the vendor has no standing to sue for unpaid rent (reduced rent during the relevant period or deferred rent after the relevant period) once settlement has occurred

➤ the legal right to rent (and therefore to sue for it) passes to the purchaser at settlement under s 141 of the PLA ([\*Denham Bros Ltd v W Freestone Leasing Pty Ltd\*](#) [2004] 1 Qd R 500 (QCA))

➤ the vendor has to sue in the name of the purchaser, on the basis that the vendor is entitled to the rent as against the purchaser in equity up to and including the settlement date

## 2(b) Variation or waiver of rent or outgoings

- ❑ The Regulations contemplate the landlord (ie the vendor if a contract of sale is only foot) providing relief to a tenant under an eligible lease -
  - at least 50% of any rent relief agreed with the tenant must be by way of a waiver of rent [meaning the rest can be a deferral] (Reg 10)
  - outgoings must be waived to the extent reasonable, if the tenant has become unable to operate its business from the premises during the relevant period (Reg 14)

## 2(b) Variation or waiver of rent or outgoings

- ❑ Is the purchaser bound by such a variation/waiver/deferral?
  - It would be surprising if not, given the vendor's obligations and the tenant's rights are statutory and in the nature of emergency remedial legislation
  - As between vendor and purchaser it is suggested: YES. A vendor's powers to act as owner of the property and to vary tenancies is suspended generally pending completion of the purchase. (Williams, *Vendor and Purchaser*, 4<sup>th</sup> ed, [1149]) However, a rent reduction that is necessary to make in the ordinary course of management by a prudent owner of the estate will bind the purchaser. (*Sherwin v Shakspear* (1854) 5 DE G M & G 515, 537)
  - As between tenant and purchaser it is suggested: YES. A purchaser takes subject to a person's rights if the purchaser buys with notice of that other person's rights so long as the rights are proprietary (eg a lease or even some licensees, which would include the kind of licensees covered by the definition of "eligible lease". (*Clyne v Lowe* (1968) 69 SR (NSW) 433) It is suggested that a purchaser is also bound by changes to those rights effected by law at settlement by virtue of ss 141 & 142 of the PLA. In any event, the purchaser cannot object to necessary variations to those rights made by the vendor in the ordinary course acting prudently (as above).
- ❑ It would be prudent for a vendor faced with a request for a rent reduction from a tenant under Reg 10(1) to consult the purchaser before agreeing to it

## 2(c) Abandonment / surrender

- ❑ The position of the purchaser (and the vendor for that matter) if the tenant ceases operating its business at the premises during the relevant period could be difficult.
  - The vendor (before settlement) and the purchaser (after settlement) may not evict the tenant or take any step to evict the tenant while the tenant and landlord are engaged in the steps in Reg 10(1) to (5) to negotiate a reduced rent. (Reg 9)
  - The process up to step (5) is controlled, but under Reg 10(5), the tenant has the right to “negotiate in good faith” with the landlord after receiving an offer from the vendor under Reg 10(3). Proving that obfuscation and half-hearted engagement in negotiation is not “in good faith” will be difficult.
  - Neither the vendor nor the purchaser will be able to treat the premises as abandoned or seek a new tenant until the sitting tenant either clearly abandons the premises once and for all or surrenders the eligible lease.
  - Furthermore, it is not yet clear whether the whole procedure under Regulation 10 would have to recommence with the “new” landlord once the purchaser takes on the reversion at settlement
  - Worse still, since the tenant is not in breach while not paying rent (under Reg 9), if the end of the relevant period is reached without an agreement under Reg 10(6) being reached, the tenant may (on one argument) never have to pay that rent nor face eviction for non-payment

## 2(c) Abandonment / surrender

- ❑ If however the tenant does abandon the premises unequivocally or surrender the lease, then the general law will apply.
- ❑ The position at general law is established by a number of old English authorities (as explained by Professor Butt in *The Standard Contract for Sale of Land in New South Wales* (2<sup>nd</sup> ed 1988) 728ff (cf in particular at 730)
  - The vendor should consult the purchaser about surrender or reletting. Generally, the vendor's power to change tenants is suspended pending settlement and the vendor will be liable to compensate the purchaser for loss if a lease is terminated against the purchaser's will.
  - If the purchaser wants the property to be left vacant and is willing to compensate the vendor for the loss of rent [not usually an issue unless there is a long settlement] the vendor should not relet the property.
  - If the purchaser does not agree to compensate for loss of rent, the vendor may relet provided that the lease is on commercial terms no less favourable than under the previous lease and for a market rent.
  - If consultation is not possible (eg the purchaser is in default or is unco-operatand the vendor knows the purchaser is buying the property as a letting proposition, the vendor may relet, and must if not to do so would result in a deterioration of the value of the property. But if the reletting would devalue the premises as compared with leaving it vacant [as could be the case with COVID-19 regulations still affecting commercial leases during the relevant period] the vendor has a duty not to relet.
- The key here is the vendor's duty not to act in a way which diminishes the value of the property. The best way to avoid disputes with a purchaser at settlement is to consult. There is a duty to re-let if the property's value will deteriorate if left vacant, and a duty not to re-let if the property is worth more vacant. A vendor who does not take steps as required under these duties may not be "ready and able" to settle without compensating the purchaser on the settlement date.
  - The purchaser will be bound by the new lease.

## 2(c) Abandonment / surrender

- If consultation is not possible (eg the purchaser is in default or is unco-operative) and the vendor knows the purchaser is buying the property as a letting proposition, the vendor may relet, and has a duty to do so if to leave the premises vacant would result in a deterioration of the value of the property.
- But if the reletting would devalue the property as compared with leaving it vacant [as could be the case with COVID-19 regulations still affecting commercial leases during the relevant period] the vendor has a duty not to relet.

❑ The key here is the vendor's duty not to act in a way which diminishes the value of the property. Many of the cases establishing these principles are derived from the now discredited analysis of the vendor's and purchaser's interests under the contract as one of trustee and beneficiary (see *Tanwar Enterprises v Cauchi* for the High Court's rejection of this analysis). It is suggested, however, that the principles distilled by Professor Butt are so long-standing that they remain good law, until the High Court says otherwise.

❑ The purchaser will be bound by any reletting to a new tenant, unless the vendor's failure to act in accordance with duties to relet or not to relet in particular cases means the vendor is not ready and able to complete in accordance with the contract on the due date (*Crnokak v Avifed Pty Ltd* (1991) NSW ConvR 55-560 (Young J))

## 2(d) Extensions to the term

- ❑ If rent is deferred under a variation agreement under Reg 10(6), the landlord is required to offer the tenant an extension of the term equivalent to the period of the deferral of the rent payment obligation. (Reg 13)
- ❑ Unlike an agreement to vary the rent, an extension to the term is deemed in law to be a surrender of the existing term and a regrant of the lease for the extended term.
- ❑ Therefore, it is suggested that it falls under the principles for a surrender and reletting outlined above.
  - ❑ The purchaser should be consulted.
  - ❑ In this case, the purchaser does not have an option to require vacant possession subject to compensating the vendor for lost rent.
  - ❑ If consultation is impractical, the vendor may defer the rent and extend the term if by doing so it is acting reasonably to preserve the value of the property. Given that the only other option the vendor has is to keep negotiating, which only results in the tenant being relieved of paying any rent, the vendor must be entitled to make such an agreement and bind the purchaser to it, if the purchaser will not co-operate.
  - ❑ As Professor Butt notes (at 731), the vendor is entitled to protect its own commercial interests, even if it is a trustee

Questions?