

Property Update

September 2009

2009 General Conditions for the Sale of Land



General Overview

The 2009 General Conditions for the Sale of Land are the 11th revision of the General Conditions, first published in 1970.

The 2002 General Conditions were a 'plain English' major re-write of the General Conditions. The 2009 General Conditions are essentially an updating of the 2002 General Conditions and in the main retain the same clauses as in the 2002 General Conditions.

The most noticeable changes are to account for changes in legislation since 2002. For example, the *Town Planning and Development Act 1928* (WA) has been repealed and replaced by the *Planning and Development Act 2005* (WA) and the reference in the 2002 General Conditions to DOLA has been changed to Landgate, which is the latest incarnation of what we commonly knew as 'The Titles Office'.

About Lavan Legal:

Lavan Legal is the largest independently owned law firm in Western Australia, comprising of over 200 staff which includes 21 partners.

The Property Services Group, a division of Lavan Legal, pride themselves on being the leaders in property and planning law. Advising on all aspects of property acquisition, disposals and developments including syndications. We have one of the few accredited leasing experts available to clients who has significant Australia-wide experience on very large and complicated leasing developments.

At Lavan Legal we believe in building long lasting relationships with our clients. We continue to provide the best legal advice and service, so that we can continue to improve our understanding of our clients' needs, staff, history, motivations and directions. We provide clients with regular industry insights, updates on changing technology, market insight, and business strategies in an effort to take the relationship to a more successful position. We are committed to increased efficiency through increased innovation and process improvement.

Some specific changes

Clause 1.9 – Interest on the deposit

Clause 1.9 provides that interest on the deposit is payable to the buyer. It was always assumed that interest on the deposit would remain in trust until settlement. Clause 1.9 has been amended to make it clear that the buyer is not entitled to any interest on the deposit until settlement.

Clause 2.8 – Land sold subject to Remediated Site Memorial

Since the introduction of the 2002 General Conditions, the *Contaminated Sites Act 2003* (WA) (**Contaminated Sites Act**) has come into force pursuant to which the Department of Environment and Conservation (**DEC**) can classify a site as 'Remediated for Restricted Use' (**Restricted Use Classification**).

As a result, clause 2.8 has been incorporated in the 2009 General Conditions. This provides that, where the land sold is vacant land and is subject to a Restricted Use Classification, it will be sold subject to the Restricted Use Classification unless it unreasonably affects the proposed use or materially affects the value of the land.

Where a residence has been constructed, the land will be sold subject to the Restricted Use Classification where it can be reasonably expected that the use of the residence will continue after settlement.

Clause 3.3 – Duty and stamp duty

Following the coming into operation of the *Duties Act* on 1 July 2008, 'stamp duty' remains payable on documents executed up to and including 30 June 2008 and 'duty' is payable on documents executed on and after 1 July 2008.

Clause 3.3 has been amended to take account of that change.

Clause 4.4 – Seller ready willing and able to settle

Clause 4.1 of the 2009 General Conditions provides that if settlement is not completed within three business days after the settlement date the buyer must pay to the seller a settlement interest on the balance of the purchase price.

Clause 4.4 provides that if the seller is not ready, willing and able to complete settlement on the settlement date, the seller is not entitled to interest under clause 4.1 until the seller is in fact ready, willing and able to complete settlement and the seller has given prior notice of that fact to the buyer.

The 2002 General Conditions did not specify the date from which interest was payable where the seller gives such a notice. Clause 4.4 in the 2009 General Conditions now provides that where the seller gives such a notice before the settlement date, or within three business days after the settlement date, interest will be calculated and payable from and including the settlement date.

Clause 6.6 – Rent

Clause 6.6 has been amended to provide that the seller is entitled to rent up to and including possession or settlement and the buyer is entitled to rent as from the day following possession or settlement.

Clause 6.9 – Where property is leased

Clause 6.9 deals with issues where the property is leased and provides that where a person has guaranteed the obligations of the tenant under the lease, the benefit of the guarantee is treated as having been automatically assigned to the buyer.

Clause 7.3 – Buyer not liable for land tax

Clause 7.3 of the 2002 General Conditions

provides that there will be no adjustment of land tax where the property includes a residence and:

- (1) the area of land is less than 2 hectares; and
- (2) that land is not used for any purpose other than for an agricultural purpose

(Agricultural Land Exemption).

The *Land Tax Assessment Act 1976* has been repealed and replaced, but the new *Land Tax Act 2002* does not incorporate the Agricultural Land Exemption.

Accordingly, clause 7.3 of the 2009 General Conditions now provides that there will be no adjustment of land tax and the buyer will not be liable for land tax where on possession or settlement, the property consists of a residence which is capable of being used as a residence and for no other purpose.

Clause 7.4 – Settlement date 30 June

Where land tax is to be apportioned, clause 7.4 of the 2009 General Conditions provides that if the settlement date is 30 June and settlement does not occur for a reason attributable to the buyer, the buyer must pay the land tax assessed as at 30 June as if that land is the only land owned by the seller - that is, on what is referred to as a 'single ownership' basis.

Clause 7.4 has created problems where the seller owns land other than the land which is the subject of the contract and the buyer delays settlement beyond 30 June. Clause 7.4 now provides that where settlement is delayed beyond 30 June for a reason attributable to the buyer, the buyer is liable to pay the actual land tax assessed on 30 June, subject to certain specified conditions.

Clause 8 - Risk

The 2009 General Conditions recognise that a seller, as well as the buyer, may be prejudiced by

damage to or destruction of a building between contract and settlement.

Accordingly a new clause 8.5 has been incorporated which provides that where the seller has insured a building and the building is damaged or destroyed before settlement, the seller may terminate the contract on certain conditions.

Clause 8.8 of the 2009 General Conditions sets out procedures to determine the reduction of the purchase price where neither the seller nor the buyer has terminated the contract and the reduced purchase price must be determined.

Clause 10 – Strata

A number of changes have been made to the representations and warranties given by the seller in respect to the sale of a strata lot.

Clause 10.3 incorporates an indemnity by the seller in favour of the buyer which now expressly covers any loss incurred by the buyer arising from a breach of a representation or warranty under clause 10.2.

The indemnity by the seller under clause 10.2 excludes any matter specified in the contract to which the buyer has agreed in writing to be bound, but a buyer has a right to terminate a contract for the sale of a strata lot where the circumstances specified in Part V of the *Strata Titles Act 1985* apply.

Clause 10.3(b) expressly provides that any right of the buyer to terminate the contract under Part V of the *Strata Titles Act 1985* is in addition to

any right of the buyer to terminate the contract arising from the default of the seller.

Clause 10.4, which relates to voting, has also been significantly amended.

Clause 13 – Subdivision

Clause 13.2 of the 2002 General Conditions and the 2009 General Conditions both provide that where a contract relates to part of a lot, the contract is conditional on the following:

- (a) An application for subdivision being lodged with the West Australian Planning Commission (**WAPC**) within three months of the contract date.
- (b) Approval for subdivision being granted by the WAPC within six months of the contract date, or any longer period specified in the contract.

Clause 13.2 has been amended to provide that, even if the WAPC grants approval subject to a condition, the WAPC will be treated as having granted approval, but if a condition imposed by the WAPC is not satisfied within the time specified in the contract, the contract will be terminated at midnight on the date when the period for approval by WAPC expires, without the requirement for notice.

Clause 13.5 – Unacceptable condition imposed by the WAPC

Clause 13.5 of the 2009 General Conditions provides that if the WAPC imposes a condition with respect to approval for subdivision with which either of the seller or the buyer is unwilling to comply, the buyer or the seller may

terminate the contract.

The period within which the seller or the buyer may elect to terminate the contract has been extended from ten business days to fifteen business days.

Clause 13.5 also recognises that in some cases the WAPC, in granting approval for subdivision, may impose a condition that the approval is subject to a condition or requirement imposed by another government authority or entity, other than the WAPC.

Clause 13.5 now provides that in such circumstances, the same provisions apply to the other authority as applied to the original approval by the WAPC.

Conclusion

The General Conditions were developed for use primarily for the sale of residential property, or 'cottage conveyancing'.

The General Conditions can also be used for sale of other land, including commercial and industrial property, but there is always a risk in doing so that you will need to amend some of the provisions of the General Conditions to suit the particular circumstances of your contract.

Finally, the changes from the 2002 to the 2009 General Conditions outlined above are not intended to be an exhaustive list, as there are numerous other drafting changes. This overview is intended only to be a snapshot of some of the more important changes.

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