

1 January 2011 start for *Civil Procedure Act 2010 (Vic)*

The *Civil Procedure Act 2010 (Vic)* will come into operation on 1 January 2011. It reforms civil proceedings conducted in the Supreme Court, County Court and Magistrates Courts, but not VCAT. It will apply to all civil proceedings in those courts that have commenced before and after 1 January 2011.

The Act introduces the new concepts of overarching purpose and obligations. Overarching obligations will not apply to proceedings where the court has already begun to hear the proceeding prior to 1 January 2011. The overarching purpose of the Act is the just, efficient, timely and cost effective resolution of disputes. The overarching obligations apply to lawyers and parties to the proceeding as well as insurers and expert witnesses. These are set out in sections 17 to 25.

The Act also provides for mandatory pre-litigation requirements and they must be complied with from 1 July 2011. These include the obligation to take reasonable steps to resolve the agreement or narrow the issues in dispute before proceedings are issued. Parties and their lawyers must certify that pre-litigation steps have been taken at the time of issuing proceedings. Practitioners must also certify that allegations, denials and non-admissions in pleadings have a proper basis on the factual and legal material available.

Practitioners should make themselves familiar with this new legislation.

What is a GAIC Recording?

The *Planning and Environment Act 1987 (Vic)* ('the Act') was amended by the *Planning and Environment Amendment (Growth Areas Infrastructure Contribution) Act 2010 (Vic)* on 1 July 2010. The amendments created new requirements for purchasers of certain land or owners undertaking subdivision or obtaining building permits on certain land to pay a growth areas infrastructure contribution ('GAIC'). At this time the GAIC currently payable is \$80,000 or \$95,000 per hectare depending on the type of land.

Properties affected by these changes include four categories of land set out in s.201R and s.201RC(2)-(5) of the Act. In general terms it includes land brought into the Urban Growth Boundary ('UGB') between 28 November 2005 and 31 December 2006, or land in the UGB after 2 December 2008 as well as land in the Melton Shire council plan LEGL./09-317 brought within the UGB after 19 May 2010. Practitioners should look very carefully at the definitions in the Act. It will include land in the shires of Casey, Hume, Melton, Mitchell, Whittlesea, and Wyndham.

Land that is subject to GAIC payments will have a notice registered on title ('GAIC recording'). The notice is worded: 'NOTICE Section 201UB *Planning and Environment Act 1987*'.

It makes no mention of GAIC in the wording. **All practitioners and staff practicing in the property area should be aware of the name of this notice and that it means that a GAIC may be payable on this land.**

These notices were only placed on title between 1 and 12 July 2010 for some land and on 4 or 30 August 2010 for other land. Practitioners should ensure they have up to date title searches for land in the relevant shires to ensure any GAIC recordings are disclosed.

Practitioners should also make themselves familiar with the new s.32(2)(da) and s.32(3)(f) of the *Sale of Land Act 1962 (Vic)*. These new provisions require a notice to purchasers in the vendor's statement where there is a GAIC recording on title and also that various certificates be attached to the vendor's statement.

Disclosing unregistered easements

We have previously recommended that practitioners obtain and include in vendor statements s.239G certificates, now called 'water information certificates' (pursuant to s.158 of the *Water Act 1989* (Vic)). This certificate has in the past disclosed any unregistered easements, drains or sewers affecting the property.

A practitioner has brought to our attention the fact that some water information certificates are not disclosing the sewer on the face of the certificate but are now referring to a 'property sewerage plan' or a 'water property services plan' which discloses where the pipes and drains are located. Practitioners should ensure they obtain a copy of this further plan as the water information certificate by itself may not be sufficient to comply with the requirements of s.32((2)(b) of the *Sale of Land Act 1962* (Vic).

Risk Management Seminars for 2011

LPLC will be running its **Country Risk Management** programme in May 2011. Brochures will be sent to country practitioners in March next year and will be available on the website at the same time. The dates are as follows:

- **Wodonga**, Thursday 5 May 2011
- **Shepparton**, Friday 6 May 2011
- **Bendigo**, Monday 9 May 2011
- **Mt Eliza**, Friday 13 May 2011
- **Warrnambool**, Tuesday 17 May 2011
- **Ballarat**, Wednesday 18 May 2011
- **Traralgon**, Tuesday 24 May 2011
- **Mildura**, Thursday 26 May 2011

The **2011 city Risk Management Intensive** will be held on the following dates:

- Wednesday 27 July 2011
- Tuesday 9 August 2011
- Wednesday 17 August 2011

Brochures for the city intensive will be sent out in June 2011 and will be available on the website at the same time.

Subject to finance extensions – not what they appear

We have seen circumstances recently where extensions to 'subject to finance' clauses were misunderstood. Many subject to finance clauses provide for an 'approval date', being the date by which the purchaser's loan must be approved.

They also provide that the purchaser has two clear business days after the approval date to notify the vendor that approval has not been obtained and the contract is ended. Problems arise when an extension of time to obtain approval has been granted.

In some cases the vendor's solicitor or conveyancer did not make it clear, or the purchaser's solicitor did not 'read the fine print' or misunderstood the offer made to extend time. Often the purchaser's solicitor thought that the extension was to the approval date, and that the provision in the contract providing for notification within two business days after the new approval date still applied. The vendor's representative maintained that the extension of time was to a certain date and that notification had to be given by that date and not two days later.

Whenever extensions of time for finance are negotiated make sure it is clearly spelt out and understood by both sides when notification must be given. This is particularly important where the clients negotiate the extension between themselves. In such instances practitioners should always confirm in writing the client's understanding of how the extension is to work.

Purchasers who rescind must remember their caveats

LPLC has advocated in the past that practitioners acting for purchasers should lodge a caveat for their clients as soon as practicable.

Many practitioners tell us that they do so as a matter of course unless the client elects not to.

Practitioners need to remember to remove the caveat in the event that the purchaser elects to end the contract after serving a rescission or default notice. While the purchaser may have a claim or entitlement against the vendor for the return of the deposit that constitutes a charge on the land sufficient to support a caveat¹, the entitlement claimed in the original caveat as purchaser no longer exists and the original caveat needs to be removed.

¹ See clause 28.3(b) of the standard form contract prescribed by the Estate Agents (Contracts) Regulations 2008.

WHY RISK MANAGEMENT?

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LEGAL PRACTITIONERS' LIABILITY COMMITTEE

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