

SPECIAL CONDITIONS AND LINGERING LAND TAX

Purchasers need clear and thorough advice where special conditions prevent them from clearing unpaid land tax.

Ensuring unpaid land tax, especially arrears, is paid at settlement of a property is good practice to protect purchaser clients. However, there are special conditions in some contracts of sale that prohibit a purchaser from deducting an amount at settlement to pay unpaid land tax including any arrears. These special conditions are not standard and practitioners need to be on the lookout for them and advise purchaser clients about the risks they pose.

Standard sale of land contract

Land tax is a first ranking charge over the land and it is important it is addressed in the settlement process. Typically, it is adjusted as if the vendor had paid the full amount as at the settlement date on a single holding basis.¹ That is, the pro rata amount from the settlement date to the end of the year is adjusted by adding it to the purchase price. Where the vendor has not actually paid the full amount because, for example, they are paying by instalments, best practice from the purchaser's perspective is to then pay the balance of the land tax to the State Revenue Office (SRO) from the settlement proceeds owing to the vendor. This also applies where there are arrears of land tax. That way, the purchaser is assured there is nothing owing against the property.

The purchaser clearing any land tax owing from the vendor's proceeds of sale, supports the warranty given by the vendor in general condition 6.3(e) of the standard LIV Contract of Sale of Land dated August 2019, which states that at settlement the purchaser will be the holder of an unencumbered estate in fee simple in the land.

Special conditions

There are special conditions that prohibit the purchaser from deducting any amount at settlement to pay outstanding land tax and any arrears. In some special conditions the vendor warrants that they will pay the outstanding land tax.

There may be good reason for the special condition if there are multiple lots sold off-the-plan and it is difficult to ascertain exactly how much land tax is owing against any particular lot at settlement. In those circumstances, it would be good practice for the vendor to allow payment of the outstanding land tax at settlement for the first lot, and provide evidence of that for the remaining lots.

Purchaser clients should be warned about the effect of these clauses, in particular, that if the vendor fails to pay the outstanding land tax the SRO may pursue the purchaser for payment. See s98 of the *Land Tax Act 2005* (Vic).

Recommendations

Review your firm's checklists and precedent letters of advice to incorporate the matters set out below.

Acting pre-contract and during the cooling-off period

- Check whether the contract contains any special conditions changing the usual position about adjustment and payment of land tax.
- Advise the client of any such special conditions and seek instructions to request that the special conditions be deleted, or that evidence be given at settlement that the land tax has been paid.
- Where the vendor will not agree to delete, advise the client of:
 - the amount they will need to pay as an adjustment of land tax
 - the risk that the vendor fails to pay any outstanding land tax despite any warranty
 - any outstanding land tax is a first charge over the land. See s96 of the *Land Tax Act 2005*.
- If within the cooling off period, seek the client's instructions as to whether they want to proceed with the contract.

Acting post contract and after the cooling-off period has expired

Advise the client of:

- the amount they will need to pay as an adjustment of land tax
- the risk that the vendor fails to pay any outstanding land tax despite any warranty
- any outstanding land tax is a first charge over the land. See s96 of the *Land Tax Act 2005*.

Land tax clearance certificate

When acting for a purchaser, always get a property clearance certificate (previously known as a land tax clearance certificate) which confirms how much land tax is due and unpaid on the land. This is important because under s96(4) of the *Land Tax Act 2005*, only the amount in the certificate can constitute a charge on the land.

See also LPLC article "Land Tax adjustments aren't standard". ■

This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

1. General condition 23 of the standard LIV contract of sale of land dated August 2019 provides for the adjustment of land tax on a single holding basis.

TIPS

- Carefully review contracts for special conditions preventing the purchaser from paying out land tax from the vendor's settlement balance.
- Advise clients of the consequences of special conditions preventing them from clearing unpaid land tax at settlement.
- Seek to negotiate a change to those special conditions or proof of payment of land tax by the vendor.
- When acting for purchasers, always obtain a property clearance certificate confirming how much land tax is due and unpaid on the land.

