

2003

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

CIVIL LAW (SALE OF RESIDENTIAL PROPERTY) BILL 2003

EXPLANATORY STATEMENT

**Circulated by authority of the
Attorney-General
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Explanatory Statement

This explanatory statement relates to this Bill as introduced into the ACT Legislative Assembly.

Overview of Bill

The Civil Law (Sale of Residential Property) Bill 2003 establishes a new process for the making and exchange of contracts for the sale of residential property in the ACT. The Bill is designed to reduce significantly the incidence of the unethical practice of gazumping and provide increased levels of consumer protection for both buyers and sellers of residential property.

The Bill introduces four major reforms to address gazumping and improve consumer protection. The first reform requires sellers to have a contract of sale prepared prior to listing a property on the market. Attached to this contract will be a number of due diligence documents and reports. Secondly, real estate agents will now be able to complete contract documents and execute exchange. Thirdly, the Bill introduces a five working day cooling-off period for private treaty sales, but not sales by auction, during which period a buyer may rescind the contract. In balancing the rights of buyers and sellers, the bill imposes a modest financial disincentive on the exercise of the right to cool-off. Buyers who exercise the right to cool-off will forfeit 0.25 per cent of the purchase price of the property. This measure will protect the rights of sellers and maintain the integrity of the conveyancing system. Fourthly, the Bill includes compulsory statutory warranties in the contract for the protection of buyers of residential property.

This Bill also addresses the unethical practice of dummy bidding at public auctions. This practice involves a person, whether the seller, agent, auctioneer or another person, making a false bid at an auction in order to inflate the sale price of the property. The aim of these provisions is to prevent the unfair and deceitful practice from occurring, as it distorts the market and artificially drives up property prices.

Strict Liability Offences

The majority of offences in the Bill are strict liability offences. A strict liability offence under section 23 of the Criminal Code means that there are no fault elements for any of the physical elements of the offence. Essentially, this means that conduct alone is sufficient to make the defendant culpable. However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. Clause 23(3) of the Criminal Code makes it clear that other defences may still be available for use in strict liability offences.

Strict liability offences do not have a mental element, or mens rea. However, the actus reus, the physical actions, do have a mental element of their own, for example, voluntariness. For this reason, the general common law defences of insanity and

automatism still apply as they go towards whether a person has done something voluntarily, as well as whether they intended to do the act.

Outline of Provisions.

PART 1 Preliminary

Clause 1 Name of Act

This clause sets out the name of the Act as the *Civil Law (Sale of Residential Property) Act 2003*.

Clause 2 Commencement

The Act will commence on 1 July 2004.

Clause 3 Dictionary

This clause explains that the dictionary at the end of the Act is part of the substantive provisions of the Act.

Clause 4 Notes

This clause makes it clear that the notes in the Act are explanatory only and do not form part of the substantive provisions of the Act. By contrast, where the Act includes an example, the example is part of the substantive provisions of the Act having regard to section 132 of the *Legislation Act 2001*.

Clause 5 Offences against Act - application of Criminal Code etc

This clause explains that the Criminal Code applies in relation to offences against the Act.

PART 2 Sale of residential property

Clause 6 Application of pt 2

This clause makes it clear that Part 2 applies to a contract or proposed contract for the sale of a residential property. However, this Part does not apply to a contract or proposed contract arising from the exercise of an option to buy where the option was contained in a will or sublease, or where the period for the exercise of the option was longer than 60 days. Inter-family transfers and transfers to related corporate entities will also be excluded.

Clause 7 Definitions for pt 2

This clause defines various terms for the purposes of Part 2.

Clause 8 Meaning of residential property

This clause defines which land is residential property for the purposes of Part 2. It also makes clear which land will not be regarded as residential property for the purposes of Part 2.

Clause 9 Meaning of required documents

This clause details the documents that must be obtained and made available to the buyer for inspection before a residential property is offered for sale. This clause codifies the due diligence process currently undertaken by a prospective buyer of a residential property. The aim of this provision is to enhance consumer protection by arming buyers with all relevant information about the property they are intending to purchase at an early stage of the contractual process. This will eliminate one of the factors that contribute to the practice of gazumping by reducing the amount of time it takes to form a binding contract.

For some types of residential properties where it is inappropriate to conduct these types of inspections, a building conveyancing enquiry and a building inspection report or a pest inspection report are not required.

The purpose of subclause 9(3) is to ensure that where a person prepares particular required documents, they must be independent and not have a family, employment or financial relationship with the seller or the seller's agent or solicitor.

Clause 10 Proposed contract to be available for inspection

This clause makes it an offence for a seller who offers to sell or invites an offer to buy a residential property not to make available for inspection by a prospective buyer all of the required documents listed in clause 9. An offence against this provision carries a maximum penalty of ten penalty units and is a strict liability offence.

Clause 11 Certain conditions to be included in contract

This clause introduces statutory warranties into every contract for the sale of residential property to which this Act applies. The clause provides that a contract for the sale of residential property must include certain conditions. Where a contract fails to include a condition required under subclause (1), the deeming provision in subclause (3) will import the condition into the contract. A breach of a condition under this clause may have the effect of allowing the buyer to rescind the contract; however, in some circumstances, the buyer may elect to complete the contract and claim damages from the seller. Certain exclusions have been included to cover a mortgagee in possession, official receiver, a trustee in bankruptcy and a sale pursuant to a Court order.

Clause 12 Cooling-off period

This clause provides a clear five working day cooling-off period to apply to every contract for the sale of residential property. During this period the buyer may

exercise her or his right under clause 14 to rescind the contract. Subclause (2) provides that the cooling-off period will not apply to a sale of residential property in certain defined circumstances. A cooling-off period may be extended or shortened by a provision of the contract or by written agreement between the buyer and seller. Where the cooling-off period is shortened, the provision or agreement will not take effect until the buyer has received legal advice and gives the seller a certificate that complies with clause 17.

Clause 13 Buyer may waive cooling-off period

The purpose of this clause is to allow a buyer who has sought legal advice to waive his or her cooling-off right before signing the contract. This can only be done where the buyer's lawyer has signed a certificate that complies with clause 17 and the buyer gives a copy of the certificate to the seller before signing the contract.

Clause 14 Right to rescind during the cooling-off period

The purpose of this clause is to allow the buyer to rescind the contract by notice in writing to be given to the seller. This notice can only be given during the cooling-off period and will be ineffective if it is given after completion of the contract. A rescission notice must be signed by the buyer or the buyer's lawyer. If the question of whether the rescission notice has been given arises in legal proceedings, the buyer bears the burden of proving that the notice has been given.

Clause 15 Consequences of rescission

Where a rescission notice is given under clause 14, the contract is taken to be rescinded from the time it was entered into subject to the rights and obligations set out in the provision. Any amount paid by the buyer under the contract (eg. the deposit) must be repaid to the buyer, less an amount equal to 0.25 per cent of the purchase price, which is forfeited to the seller.

Clause 16 Effect on agent's right to commission

Where a contract has been rescinded during the cooling-off period under clause 14, or due to a breach of a condition in clause 11, an agent is not entitled to receive any commission or expenses from a seller.

Clause 17 Certificate

This clause sets out the form and content of the certificate that must be provided by an independent lawyer in circumstances where a buyer waives their cooling-off right under clause 13, or shortens the cooling-off period in clause 12. The clause clearly sets out the information that must be contained in the certificate.

Clause 18 Buyer to reimburse seller for cost of certain reports

The purpose of this clause is to balance the burden of costs of conducting due diligence enquiries for the property by allowing a seller to recoup the cost of obtaining pest and building inspection reports.

Clause 19 Compensation to buyer for false report etc

This clause provides a right to compensation for a buyer who has incurred loss or expense as a result of a due diligence report required under subparagraphs 9(2)(f)(ii), (iii), (v) and (vi) which was false or misleading in a material particular, or was prepared without the exercise of reasonable care and skill. The buyer may seek compensation from the person who prepared the report.

PART 3 - Energy efficiency ratings

Clause 20 Definitions for pt 3

This clause defines various terms used in Part 3.

Clause 21 Industry and environment impact statement

The purpose of this clause is to require the Minister to inform the Legislative Assembly of the likely costs and benefits to the real estate industry, the housing industry and consumers generally, resulting from an energy efficiency rating statement made by regulation.

Clause 22 Energy efficiency rating – advertising

This clause makes it a strict liability offence for a person to publish an advertisement for the sale of premises if the advertisement does not contain a statement of the energy efficiency rating of the habitable part of the premises. The clause also makes it a strict liability offence for a person to publish an advertisement for the sale of premises which includes a false or misleading energy efficiency rating statement. Both offences carry a maximum penalty of five penalty units.

Clause 23 Energy efficiency rating statement

This clause requires the seller to provide to the buyer a copy of an energy efficiency rating statement for the habitable part of the premises before the parties enter into a contract for the sale of premises. Where premises for sale have been subject to building work that affects the energy efficiency rating of the habitable part of the premises, a new energy efficiency rating must be provided. The clause also requires the buyer to certify in writing that s/he has received a copy of an energy efficiency rating statement. The seller is liable to compensate the buyer an amount equal to 0.5 per cent of the purchase price of the property if s/he fails to provide an energy efficiency rating statement before entering into a contract for the sale of premises.

PART 4 Public auctions of residential property

Clause 24 Definitions for pt 4

This clause defines various terms for the purposes of this Part.

Clause 25 Bidders record

The purpose of this clause is to assist the ACT Office of Fair Trading to enforce the provisions of this Part by identifying individuals who may have been involved in dummy bidding at auctions.

This clause requires that before a residential property may be offered for sale at a public auction, the agent must make a record of the people who can bid at the auction. Subclause (2) provides that particular details must be included in the bidders' record for each bidder, and each bidder is to be assigned an identifying number (to be known as a bidder number). Where a person is bidding on behalf of another person (to be known as the principal), details of both the person bidding and the principal are to be recorded in the bidders' record by the agent. The agent must keep the bidders' record for a period of three years after the auction. The right of a seller to inspect the bidders' record and details outlining how the record may be made and kept, may be provided for under the regulations.

Clause 26 Bidder's name and address to be established by proof of identity

The purpose of this clause is to maintain the integrity of the auction process by preventing people from bidding under false names.

This clause makes it an offence for an agent to enter a person's details into the bidders' record unless they have sighted proof of identity for the person. Where a person is bidding on behalf of a principal, the agent cannot enter the details of the person unless they have sighted a written authority containing the name and address details of the principal. An offence against this provision carries a maximum penalty of 50 penalty units and is a strict liability offence.

Subclause (4) prohibits an agent from entering any details of a person in the bidders' record where the agent knows or is reckless about whether the details are false. No offence will be committed if the details are not false in a material particular. An offence against this provision carries a maximum penalty of 50 penalty units.

Clause 27 Confidentiality of bidders record

The purpose of this clause is to prevent an agent from using information obtained through the auction process in an unauthorised way. The clause provides that an agent commits an offence if they disclose information contained in a bidders' record, or if they use the bidders' record, or the information contained in it, for any purpose other than the auction.

Accordingly any use of the information for other purposes, including but not limited to, the marketing of other properties or the sourcing of future listings will place an agent in contravention of this provision. An offence against this provision carries a maximum penalty of 50 penalty units and is a strict liability offence. No offence will be committed if the disclosure is required or authorised under this Act or another Territory law.

Clause 28 Bids only to be taken from recorded bidders

The purpose of this clause is to maintain the integrity of the auction process by ensuring that only recorded bidders bid at an auction. An auctioneer commits an offence if the auctioneer takes a bid from a person at a public auction who is not displaying their bidder number or takes a bid from a person and does not audibly acknowledge the person's bidder number when taking the bid. An offence against this provision carries a maximum penalty of 50 penalty units and is a strict liability offence.

Subclause (3) gives legal protection from liability to an auctioneer who refuses to accept a bid from a person at a public auction for the purposes of this provision. Subclause (4) states that the taking of a bid in contravention of this provision does not invalidate the bid, and the bid will be as valid for all purposes as if this provision had not been enacted. This subclause ensures that all sales at public auction are legally binding, and that a seller of residential property by public auction does not suffer any disadvantage or loss as a result of the auctioneer taking a bid in contravention of this provision.

Clause 29 Dummy bidding prohibited

This clause prohibits a seller of residential property or a person acting on their behalf from making a bid at a public auction of residential property. An offence against this provision carries a maximum penalty of 100 penalty units. However, this will not apply to a bid made in accordance with clause 29 which allows an auctioneer to make a bid for a seller under certain conditions.

Clause 30 Permissible seller bid

This clause permits an auctioneer of residential property at a public auction to make one bid for a seller if the conditions under which the auction is conducted permit the making of a bid, and the auctioneer announces publicly that the auction conditions permit the making of the seller's bid, and immediately before or when making the bid the auctioneer audibly states to the bidders that the bid is being made for the seller. Subclause (2) provides that it is not sufficient for an auctioneer to identify a bid as a seller's bid by identifying the seller by name only, without also stating that the person named is the seller.

Clause 31 Offences by auctioneers about bids

This clause prohibits an auctioneer of residential property at public auction from accepting a bid at the auction if the auctioneer knows that the bid was made by or for a seller of the property. An offence against this provision carries a maximum penalty of 100 penalty units.

Subclause (2) prohibits an auctioneer of residential property at public auction from acknowledging the making of a bid at the auction if no bid was made. An offence against this provision carries a maximum penalty of 100 penalty units and is a strict liability offence.

Clause 32 Auction conditions to be available before auction begins

The purpose of this clause is to ensure that potential buyers of residential property at auction are able to inform themselves before the auction commences about the conditions under which the property is to be sold. An offence against this provision carries a maximum penalty of 50 penalty units and is a strict liability offence.

Clause 33 Last seller bids must be identified if property passed in

The purpose of this clause is to ensure that potential buyers of a property passed in at auction are aware that the final bid made at the auction may have been a seller's bid and to require full disclosure where this was the case.

This clause applies where a public auction of residential property is held and the property is not sold and the last bid made at the auction was a bid made by the auctioneer on behalf of the seller of the property. This clause prohibits a person from disclosing the amount of the last bid without also clearly stating that the last bid was made on behalf of the seller of the property. An offence against this provision carries a maximum penalty of 100 penalty units and is a strict liability offence. For the purposes of subclause (2), a statement is made if it is published in an advertisement by the person or is made orally or in writing by the person to a prospective buyer of the property.

Subclause (3) requires that a person who tells someone else the amount of a last bid to enable this amount to be published, must also tell the other person that the bid was made for the seller of the property. Failure to comply with this provision is an offence. An offence against this provision carries a maximum penalty of 50 penalty units and is a strict liability offence.

Subclause (4) provides that a publisher who published the fact that a residential property was passed in at auction for the amount of the last bid without also stating that the bid was made for the seller of the property is guilty of an offence. An offence against this provision carries a maximum penalty of 50 penalty units and is a strict liability offence.

Subclauses (2) and (4) will not apply if the person making the statement or publishing the amount was not present at the auction and relied on a statement made by a person who purported to know what happened at the auction. It will be sufficient compliance with subclauses (2) and (4) if the amount is described as a 'seller bid'.

Clause 34 Disruption of auction prohibited

The purpose of this clause is to prevent interference with the proper conduct of the auction. This clause applies to a person intending to make a bid or a person acting for someone else intending to make a bid at a public auction of residential property. A person commits an offence if the person intentionally prevents someone else from bidding at the auction. The extended application of criminal responsibility in Part 2.4 of the Criminal Code also applies and would cover circumstances where a person attempts to prevent the person from participating in the auction. The offence carries a maximum penalty of 50 penalty units.

PART 5 Miscellaneous

Clause 35 Service on lawyer

This clause provides an alternative means of service of documents authorised or required to be served under this Act.

Clause 36 Operation of Act cannot be excluded etc

This clause makes it clear that a contract for the sale of residential property or any other agreement or arrangement cannot exclude, modify or restrict the operation of this Act. The clause also provides that this Act does not affect any right or remedy otherwise available.

Clause 37 Making false or misleading statements

This clause makes it an offence for a person to make a false or misleading statement or omit anything without which the statement is misleading in a relevant document. Relevant documents include the energy efficiency rating statement, a pest treatment certificate, a pest inspection report, or a building inspection report. A breach of this provision carries a maximum penalty of 100 penalty units. However, a person does not commit an offence where the statement is not false or misleading in a material particular or the omission is not misleading in a material particular.

A person also commits an offence if they recklessly make a statement that is false or misleading or omits anything without which the statement is misleading in a relevant document. This offence carries a maximum penalty of 50 penalty units. A person does not commit an offence if the statement is not false or misleading in a material particular or the omission is not misleading in a material particular.

Clause 38 Giving false or misleading documents

This clause makes it an offence for a person to give a relevant document to someone else where they know that the document is false or misleading or omits anything without which the document is misleading. This offence attracts a maximum penalty of 100 penalty units. A person does not commit an offence if the document is not false or misleading in a material particular or the omission does not make the document misleading in a material particular.

A person does not commit an offence if when they give a document knowing that it is false or misleading to another person, they attach a statement signed by them acknowledging that the document is false or misleading in a material particular and indicating in the document the material which they know to be false or misleading.

Clause 39 Approved forms

This clause provides that the Minister may approve forms for this Act and that an approved form is a notifiable instrument.

Clause 40 Regulation-making power

This clause provides that the Executive may make regulations for this Act and that the regulations may prescribe offences with maximum penalties of not more than 10 penalty units.

PART 6 Repeals and Consequential Amendments**Clause 41 Repeal of Energy Efficiency Ratings (Sale of Premises) Act 1997**

This clause repeals the *Energy Efficiency Ratings (Sale of Premises) Act 1997*.

Clause 42 Acts amended - sch 1

This clause provides that consequential amendments are made to the Acts mentioned in Schedule 1. These are the *Agents Act 2003*, *Fair Trading Act 1992* and *Legal Practitioners Act 1970*.