

## Aged Care

September 2009

### Who would want to be a retirement living developer?

After a recent South Australian District Court decision, it appears that only licensed builders can carry out built form property developments in South Australia. If this is true, then it is an astonishing result. Although the decision concerned a residential dwelling, it has possible application to retirement village and aged care developers.

And because it is a possible result, all developers (and builders) need to make sure that their contracts are prepared properly and that they minimise the risk of this case being used against them.

The case is *Forlyle v Tiver*.  
The relevant facts are:

1. Forlyle was the developer of town houses.
2. Forlyle bought a block of land on Stanley Street North Adelaide and subdivided it into three allotments.
3. Forlyle sold one allotment to Mr & Mrs Tiver and entered into a written 'development agreement' in which Forlyle agreed to build a town house on that allotment. The agreement included promises by Forlyle to build in a proper and workmanlike manner and it also provided for progress payments from the Tivers to Forlyle during the building process.
4. Forlyle later entered into a contract with Parletta Constructions (a licensed builder) for Parletta to build three substantial town houses on the allotments.

A common arrangement you might say.

There was no question that the construction of the town houses was 'building work' within the meaning of the *Building Work Contractor's Act*. However, the definition of a "building work contractor" under the Act came into focus. The Act says that a building work contractor is:

- A person who carries on the business of performing building work for others; or
- A person who carries on the business of performing building work with a view to the sale or letting (whether by lease, licence or other agreement) of land or buildings improved as a result of the building work.

The Act then says that the word "perform" in relation to building work includes:

- Causing building work to be performed;
- Organising or arranging for the performance of building work.



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The Court decided that, based on this definition, Forlyle had itself “performed” building work. Therefore, Forlyle should have been licensed as a builder despite the fact that every single piece of building work was done by a licensed builder!

Although the decision was appealed to the Supreme Court, regrettably this important issue was not the subject of the appeal. So, at this time, the case represents the law in South Australia.

Unfortunately, the District Court was not informed about the 2003 decision in the Queensland Supreme Court in *PJS Development Pty Ltd v Tong* where the Court interpreted a similar provision of the Queensland legislation to only require a developer to hold a builder’s licence if the developer actually carried out the building work. The Queensland Supreme Court found that if it was to be interpreted otherwise, it would have a profound impact on ‘off the plan’ contracts.

Although Forlyle’s case related to a domestic building work contract, and the Court used the language of the legislation which applies to domestic building work contracts to justify its decision, the ramifications of the decision are more widespread. In my opinion, it is arguable that the only person who can develop a built form project without being licensed as a builder is a person who intends to occupy that built form for their own purposes. For example, a person building a residential dwelling, or a company building an office block for its own occupation, does not need a builder’s licence.

Also, a possible interpretation of Forlyle’s case is that the following “developers” need to be licensed as builders, even though they would normally employ a licensed builder to actually do the building work:

- ‘Mum and Dad’ developers dividing a block of land and putting up two homettes for sale or lease

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- The developers in a situation like Forlyle’s case

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- Office building developers looking to sell or lease the completed product

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- Shopping centre developers looking to sell or lease the completed product

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- Landlords fitting out leased premises for tenants in accordance with an agreement to lease

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- Retirement village operators building units for lease or licence to residents

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- Aged care operators constructing aged care facilities for licence to residents

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- Developers of short term accommodation such as hotels, motels and caravan parks

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This outcome is not what parliament could possibly have intended. The purpose of the legislation is to make sure that only licensed builders do building work.

If you are a developer or a ‘spec’ builder, you need to make sure that the documents you use for your developments are properly set up and worded to minimise the risk of falling foul of Forlyle’s case. So before you sign anything make sure you take our advice. If you don’t, it may end up costing you. You may also face a fine under the *Building Work Contractors Act*.

## Transfer of liability for site contamination – watch out!



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The long awaited amendments to the *Environment Protection Act 1993* dealing with transfer of liability for site contamination became law on 1 July 2009.

The key law is section 103E. This states that if site contamination exists at a site and if the property is sold or transferred under a written agreement in which the purchaser assumes liability for all or a specified part of the contamination at the site, the purchaser is to be taken to have assumed that liability as if the purchaser had caused the site contamination.

Section 103E requires that for the agreement to be effective, the vendor must have first given to the purchaser a notice in approved form, setting out the legal effect of the agreement. In addition, a copy of the agreement has to be lodged with the EPA. Also, such an agreement will not be effective if the Court decides that the purchaser did not acquire the land in a genuine arm's length transaction.

This law applies to liability for site contamination.

### What is "liability for site contamination"?

This is defined in the Act as liability for the following:

- Requirements for site assessments to be carried out
- Requirements for site remediation
- Requirements for a site contamination audit
- Liability for damage to property caused by carrying out requirements of a site contamination assessment or site remediation
- Requirements to take out specified action to make good any environmental damage and to take specified action to prevent or mitigate further environmental harm
- Requirements to pay the reasonable costs and expenses of the EPA or other public authority in taking action to prevent or mitigate environmental harm caused by a contravention
- Requirements to pay compensation for personal injury or loss or damage to property resulting from a contravention of the Act
- Payment of exemplary damages
- Payment of civil penalties for contravention

The EPA in its information sheet on site contamination (EPA 854/09) expresses the view that in order to transfer liability, site contamination must be known to exist. I take this to mean that the EPA is of the view that the procedure in section 103E must be observed to effectively transfer liability for **known** contamination. It follows that, if there is no **known** contamination, but there is in fact contamination there, liability for that contamination can be transferred without observing the requirements of section 103E. There is nothing in section 103E which requires that site contamination must be **known** to exist, which means that there is a discrepancy between the information sheet and the legislation. That leaves open the possibility that the requirements of section 103E apply where site contamination exists but is not known to a vendor to exist. It is quite common for a vendor, who does not specifically know of any contamination, to want to transfer liability for any latent contamination. In my view, many vendors will seek to obtain the protection of section 103E by including transfer of liability clauses in their contracts, giving purchasers the approved notices, and lodging the agreements with the EPA in these circumstances.

When the contract transferring liability is lodged with the EPA, the entire contract will be on the public register. Some vendors and purchasers will be concerned about privacy and confidentiality. In those cases, rather than including the transfer of liability clauses in the main contract, it may be best to deal with transfer of liability in a separate document to the sale contract, and lodge it separately to the contract.

As mentioned, where there is a transfer of liability, the purchaser will be treated as having caused the site contamination. This will result in liability not only for contamination on the site but also contamination that has moved or migrated offsite. Careful drafting of the transfer of liability clauses is needed if this consequence is not acceptable.

The new Form 1 vendor statement which has been applicable from 1 September 2009 includes a significantly enlarged section on particulars relating to environment protection. Amongst these is disclosure of details of any agreement under section 103E.

Vendors and purchasers should carefully consider their positions after obtaining legal advice before entering into any contracts and ensure, where necessary, that the requirements of Section 103E are observed.

## ATO extends generosity to retirement village developers

If you are a not-for-profit operator of a retirement village, and you can meet the definition of a retirement village under the GST legislation, then the supply of your new units is GST free. One of the benefits of that is that you can claim input tax credits for any GST that you have paid in respect of the construction of retirement living units.

However, if you are a private retirement village operator or your retirement village did not meet the definition required under the GST legislation, you will welcome the release by the ATO of a ruling called "GSTR 2009/4" (the "ruling").

In essence, the ruling allows developers of retirement villages to claim a portion of input tax credits for the construction costs of retirement living units during the period of leasing the units to residents - provided the units are being held by the developer for ultimate sale.

The ruling applies not only to retirement village developers, but any developer who builds new residential premises.

If you are a private operator of retirement villages, and you build the village - but only intend to lease or licence the units to residents with no intention of sale - then the supplier of the retirement village unit is input taxed. This means that no GST is charged but no input tax credits can be claimed for the cost of construction.

However, many private retirement village operators construct a retirement village with the intention to ultimately sell it. The ability to sell the village and sell it for an appropriate price depends on having filled the village with residents. Ultimately, that means that those residents will pay a deferred management fee, and accordingly, the value of the village is enhanced.

In these circumstances, the ATO ruling recognises that there is a duality of purpose in the developer's conduct and a retirement village developer can now claim some GST credits for the construction costs of the village.

Even better, the ATO ruling allows developers to potentially go back up to 4 years and re-claim GST credits which may not previously have been claimed.

In determining whether an operator has a duality of purpose, there are a number of objective factors to consider. The relevant factors are things such as business plans or minutes of meetings, loan applications and past activities of the operator.

Where an operator can establish a duality of purpose, the ATO requires developers to apportion the GST credits on a fair and reasonable basis. Unfortunately, the calculation set out in the ruling does not easily fit how a retirement village operates. We recommend that you seek our advice when trying to apply the formula.

The need for a careful and considered approach to this was highlighted by the recent case of *GXCX v Commissioner of Taxation* in the Administrative Appeals Tribunal where the Tribunal decided that the mere intention to sell at a later time was not sufficient to enable GST credits to be claimed.



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