



30 July 2009

All Practitioners in New Zealand

Dear fellow practitioner

THE NEW REINZ AGREEMENT FOR BUYING AND SELLING REAL ESTATE

By now, many of you who practise in the property sector will be aware that the Real Estate Institute has produced a new agreement for buying and selling real estate.

In addition, the New Zealand Law Society is conducting seminars throughout New Zealand aimed at bringing practitioners up to speed with the new REINZ form.

You may also have seen an article in the National Business Review on 22 July 2009. The article referred to comments made by the Chief Executive of REINZ and a Hamilton practitioner. The article quotes the Hamilton practitioner as saying; "The overriding consideration has been to make sure [the clauses used] are legally sound and suitable for the current real estate environment". The Chief Executive is quoted as saying; "People who are buying or selling a property have a right to understand the implications of what they are signing."

Given such comments I felt it was necessary to communicate with all practitioners the Auckland District Law Society Inc's views about this new agreement.

Background

The ADLS/REINZ Standard Form Agreement, and its predecessors, has been in use for over 20 years. Its genesis arose out of the need for a recognised and standard form agreement, which worked fairly between the vendor and the purchaser to overcome a number of varied forms then in use throughout the country. The Agreement owes its present clauses to a prolonged period of extended scrutiny and comment by judges, academics, solicitors and real estate agents. Not long after its introduction, the form became universally accepted and used throughout New Zealand.

Not only did the form provide ease of use, but it provided certainty to practitioners, real estate agents and clients alike.

In summary, the form has been around for a long time. It is tried and tested. It provides certainty not only for our clients, but also the various professionals who have used it. Over time, the form has been vigilantly maintained and improved as appropriate.

As you would expect, ADLS Inc is very concerned about the re-introduction of a different form of agreement into the New Zealand market. This has re-created the concern (and perhaps

confusion) that originally led to the ADLS/REINZ Standard Form Agreement being developed in the first place.

ADLS Inc made a number of attempts to dissuade REINZ from producing its own agreement - as did the NZLS Property Law Section. Unfortunately, REINZ has gone ahead anyway.

An examination of the form by ADLS property practitioners has led to the observation that the REINZ form appears to markedly favour purchasers. It attempts to introduce new principles into settled areas of vendor and purchaser law – perhaps unsuccessfully.

Issues of concern (by way of example only) include the following areas.

- An ability for a purchaser's lawyer to withhold consent to the title for anything that "could" be registered on the title, that "might" affect a purchaser's future use of the property;
- Service of notices;
- The "time of essence" regime applying automatically to many mundane provisions – such as production of s 36 certificates for sale of unit titles;
- An inability to requisition for "defective" cross lease titles;
- Ambiguous wording introduced into key clauses which were previously well settled areas of law;
- A contractual obligation (where titles are not available on settlement) for a vendor's lawyer to give undertakings to a purchaser;
- Uncertainty as to the operation of the requirement that a "building report" be obtained as a condition of the agreement proceeding;
- Vendor liability for breach under the agreement continuing well past settlement;
- Onerous, unclear and open ended warranties by the vendor.

ADLS Inc retained the services of Dr Don McMorland, barrister, to provide an independent and impartial review of the new REINZ form. Dr McMorland will be well known to many practitioners in New Zealand from their days at Auckland University's Law School. Dr McMorland is co-author of a number of text books and publications on property law including Land Law in New Zealand (Hinde McMorland & Sim) as well as being the editor of Butterworths Conveyancing Bulletin. Dr McMorland has taught land law and vendor and purchaser for over thirty years.

Dr McMorland has provided ADLS Inc with a copy of an article he is about to publish in Butterworths Conveyancing Bulletin on the new REINZ form. In his article Dr McMorland makes a number of observations about the REINZ form which should be treated by practitioners as signalling concerns about provisions relating to:

- Title and the ability to requisition;
- The form of approvals and consents;
- Code compliance requirements;
- Settlement procedures and dispute resolution.

Dr McMorland concludes his article by saying:

“Many problems will arise quite quickly [for the REINZ form] in the absence of any history or judicial interpretation for guidance. Given the compulsory mediation clause, most of those will be settled privately and will add nothing to the sum of knowledge as to the meaning and operation of the agreement. Others may become notorious, having arisen quite commonly, and it is imagined that these will engender a number of variations to the [REINZ form] during the early stages of its life”.

In conclusion, it seems the use of the form may well lead to increased conveyancing costs for clients and increased problems between vendors and purchasers.

Where to from here?

The purpose of this letter is to alert you to the difficulties which ADLS Inc perceives will arise as a result of the introduction and use of the new REINZ form.

Indeed, you may feel it is desirable to write to any institutional and property dealing clients to warn them of the difficulties which may arise if the REINZ form is used. In this regard, attached is a template letter which you may consider using for this purpose.

Many of you will be aware that clients have a tendency to sign agreements for sale and purchase without any prior consultation with their lawyers. This is a practical reality and, apart from advising against the desirability of this, there is little lawyers can do to prevent this from occurring. However, if clients do choose to seek early advice in relation to the sale or purchase of a property then it would be prudent to point out the benefits of using the “tried and true” standard ADLS/REINZ Agreement over the new REINZ form.

If you conclude the use of the REINZ form will increase conveyancing costs (and risk) for your client due to its uncertain application, this point should be made clear to your client. You may also wish to bring this issue up with the real estate agency who may introduce the use of the form to your client.

Rest assured that ADLS Inc will continue to support the 8th Edition form. At present the ADLS Inc Documents & Precedents Committee is undertaking a review of the form in relation to changes required as a result of e-dealing. As soon as the new Unit Titles legislation is in place, further changes will be required.

The Committee is also considering a new “split delivery” of the agreement. This would allow the agreement to be used as a four page agreement and would incorporate the general terms of sale by reference. Given however, that the new REINZ form may cause some confusion in the marketplace, any decisions on this have been temporarily put in abeyance..

Thank you for taking the time to read this letter. If you require any further information on the contents of this letter, please do not hesitate to contact me.



Anna Fitzgibbon
President