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Are there boundaries to freedom of contract?



Does contract as we know it continue to exist? That it may not is a fairly bold proposition...greatly discussed of course since Grant Gilmore's *The Death of Contract*' in 1974. Gilmore argued that:

The most dramatic changes touching the significance of common law in modern life also came about, not through internal developments in common law, but through developments in public policy which systematically robbed contract law of its subject matter...removing from 'contract' transactions and situations formerly governed by it... [p6]

In August this year, a [Queensland Court of Appeal decision](#) provided evidence to support Gilmore's thesis, upholding a purchaser's right to end an otherwise valid residential land purchase. The reason? The vendor's solicitors, in sending the contract to the purchaser's solicitors, failed to draw their attention to the warning statement attached to the front page. This breached s368A(2) of the *Property Agents and Motor Dealers Act 2000* (Qld) ('PAMDA').

Does this provision, and its interpretation, really protect consumers? Or is it instead a blunt instrument that erodes all the assumptions we make about the foundations of contract law?

The Decision

In *Modi & Clements v SDW Projects Pty Ltd*, the solicitor for the vendor sent to the purchasers' solicitors two sets of documents.

- The first contained as its first page, visible through the clear plastic cover, the PAMDA warning statement followed by the information sheet and the contract.
- The warning statement and contract had previously been signed by the buyer.
- The contract recorded that the buyer had received the information sheet.

The covering letters either 'enclosed the contract of sale and disclosure statement for your attention'; or 'enclosed the signed contract for your attention'.

Did the 'contract of sale' refer to all the documents bound together? Or did it refer to the sale agreement alone, independently of the warning and disclosure statements? In *Boylan v Gallagher* [2012] 1 Qd R 120, the court had found that reference to the 'put and call option document' in the context referred to the warning statement and deed as a single composite document.

However this decision was distinguished.

About Me



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In this case, the solicitors for the vendor failed to comply with PAMDA because they failed to draw the purchasers' solicitors' attention to the warning statement. This was the clear intention of Parliament in drawing up PAMDA. It did not matter that the purchaser or their agent (which includes their solicitor) actually saw the warning, or would have seen the warning. The obligation is to draw their attention to it.

In failing to do so, the purchasers were entitled to terminate the contract under s370 PAMDA.

Why do these provisions exist?

The Act was brought in on the back of schemes designed to entrap the unwary 'mum and dad' investor into buying land in Queensland. People would be flown to the Gold Coast and shown properties, signed up to a contract involving a developer, an agent and sometimes a lawyer and valuer who were all financially interested in the scheme. For those from other jurisdictions accustomed to a cooling off period, under the then-existing law in Queensland, they were bound to complete.

In response, the premise of PAMDA is the protection of purchasers of Queensland residential property through a cooling off period and a warning statement. The warning statement, amongst other things, advises purchasers to seek legal advice before entering into a contract. A warning statement is therefore seen to be a means of protecting the consumer from entering into a contract without making sufficient inquiry into their obligations and into issues such as the value of the property.

Additionally, the Act regulates the qualification of real estate agents, and requires solicitors to declare their independence from each transaction in which they act. The Act therefore contains a suite of provisions designed to work together to protect buyers.

The residential property components of the Act have been amended fairly significantly since its introduction - often in response to litigation that highlighted its unworkability. Likewise, there have recently been calls to reduce the training qualifications for real estate agents nationally - surely out of step with the consumer protection ideals of the legislation.

Is PAMDA effective?

While it is good to see that PAMDA continues to be amended to respond to gaps and problems involving the legislation, the parliamentary reaction time is slow and occurs after the effects of the legislation result in poor outcomes. *Modi & Clements* is an example of the lag in responding to problems in the Act's operation. The issue in this case occurred in 2007 and the relevant provisions were amended in 2010, recognising just the kind of problem encountered in this decision. They aimed to:

simplify the processes for the delivery and presentation of contracts for the sale of residential property, while still maintaining consumer protection provisions, and thereby promote greater certainty in residential property sales.

Of course these amendments came too late for the parties in *Modi & Clements*.

In light of the questionable outcome in this decision, independently of each amendment to particular provisions the foundation of the legislation is effective.

One of the problems with the Act that I have previously identified [see [here](#) and [here](#) and [here](#)] is its failure to identify the nature of power within the vendor purchaser relationship. In applying across the board - to all sellers and buyers of residential property in Queensland - it not only captures 'mum and dad' buyers (consumers) identified as the beneficiaries of the legislation, but also those who sell. Likewise, it captures developers (ostensibly those with power in the marketplace) when they transact as buyer as well as seller.

Unlike other types of consumer protection, the relative power of the buyer and seller in a residential land contract will shift with the market. There may be some types of parties (such as cashed-up corporate developers) who may always be in a position to exercise power, but there are many variables in a volatile property market. This means that the Act can be exploited.

It is difficult to see, in the decision in *Modi & Clements*, how the buyers were somehow

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disadvantaged when their solicitors' attention was not specifically drawn to a warning statement *that they had already signed and acknowledged*. While parliament has now plugged this gap in the Act, the ongoing need for amendments perhaps reveals the precarious consumer protection foundation of the Act.

Meanwhile, the Act continues to represent boundaries to freedom of contract while not necessarily protecting the disadvantaged party. While there is obviously a need to protect buyers from dishonest sellers, the utility of the warning statement provisions and associated right to terminate, needs to be investigated.

In one sense, it shifts the burden of liability to the agents and lawyers - if they fail to conform to the prescriptive elements of the warning statement, they will bear the risk of the seller's loss of contract. This is the case where there is not necessarily anything substantively wrong or unfair about the contract or the property itself, and even if the buyer has all the relevant information before them. If property agents' training requirements are wound back, there is further potential for the burden of risk to shift to unwitting parties.

The Act continues to shift power to the buyer absolutely and pays no heed to the terms of the transaction itself or the relative bargaining positions of the parties. In this sense, it continues to represent a blunt, technical and bureaucratic instrument in a field that represents itself as the coming together of minds.


Perhaps Gilmore's thesis is accurate and through provisions such as PAMDA, if we have not removed, we have at least shifted our understanding of the principles of contract law in this context where assumptions of freedom of contract are bounded by legislation and potential exploitation.

* Image from <http://multitext.ucc.ie/images/1780.jpg>

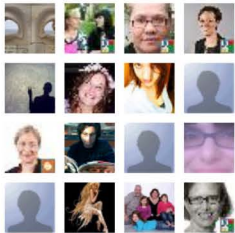
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