



Purchase of real estate – acting for purchasers

Legal Practitioners' Liability Committee

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24 June 2025

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Case study: the same missed easement, three years later

- **Transaction A, March 2022:** Lawyer reviews Section 32. Misses unregistered sewerage easement. Client discovers easement six months later when applying for granny flat building permit, property has gained \$150,000 in value. Client grumbles but accepts it.
- **Transaction B, March 2025:** Same oversight with severe financial implications. Client is struggling with mortgage payments on a property now worth \$100,000 less than purchase price and he can't build his intended granny flat.



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7+ major changes to Victorian taxes affecting property transactions

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Managing risk through good systems

- **Precedents** incorporating **checklists**, to make sure advice is given on all relevant issues
- **Workflows** to remind you to do key steps like check certificates or ask for a copy of the trust deed
- **Intake forms** so you get all the right information
- Quarterly reminders to **update** intake forms, precedents and workflows or **train** your staff given client feedback or legal change.

<https://lplc.com.au/resources/webinars/tech-solutions-for-risk-reduction-in-property-law>



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Property investigation

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What might a lawyer miss?

- Miss a **covenant**?
 - Clients may face restrictions on planned extensions or second dwellings.
 - Height and setback regulations can hinder development plans.
- Miss an easement?
 - Unregistered sewerage pipes and other **easements** might be overlooked, affecting construction.
 - Access rights can limit privacy and property usage.
- Not read the **owners corporation** certificate?
 - Special levies may not be adequately disclosed.
 - Pending litigation can be expensive.



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Contracts that might need extra scrutiny

Multiple lots being sold

Rural properties (water rights, agricultural restrictions, septic systems)

Industrial/commercial zoning (environmental issues, contamination history, existing use rights for residential use)

Laneway enclosures (properties enclosing old laneways and discontinued roads which may or may not be on title)

Staged developments (ongoing construction impacts, access issues)

Old certificates (section 32 statements over 3 months old)

Missing water information certificates (unregistered easements won't be disclosed)

"Available" instead of "connected" for services

Inconsistencies between certificates (different information on same issue, different lot numbers or addresses listed)

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Practice tips (due diligence)



Have a detailed intake form to collect instructions for a contract review. Ask about intended use.



Have a detailed form for collecting instructions for a purchase. Use the LPLC one if you don't have one. Ask do they want you to look for ways to get out of the contract?



Have good precedents for contract reviews and first letters that prompt the author to consider all relevant issues and provide simple explanations



Your role isn't just to collect certificates and attach them to files. You need to read them, compare them, think about them and document advice given.

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Finance condition

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20. LOAN

- (c) ... shall include penalties and interest.
- 20.1 If the particulars of sale specify that this contract is subject to a loan being approved, this contract is subject to the lender approving the loan on the security of the property by the approval date or any later date allowed by the vendor.
- 20.2 The purchaser may end the contract if the loan is not approved by the approval date, but only if the purchaser:
- (a) immediately applied for the loan; and
 - (b) did everything reasonably required to obtain approval of the loan; and
 - (c) serves written notice ending the contract, together with written evidence of rejection or non-approval of the loan, on the vendor within 2 clear business days after the approval date or any later date allowed by the vendor; and
 - (d) is not in default under any other condition of this contract when the notice is given.
- 20.3 All money must be immediately refunded to the purchaser if the contract is ended.

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Case Study: Sarah and Mark's Home Purchase

- First-home buyers Sarah and Mark sign a contract for \$850,000 with finance approval due Tuesday 5:00 PM. Their lawyer receives the contract Friday afternoon.
- **Monday:** Client calls excitedly - "We got pre-approval!" But the letter shows:
 - Pre-approved for only \$680,000 (needed \$765,000)
 - Subject to valuation and final credit assessment
 - **The lawyer's first mistake:** Didn't recognise this wasn't real approval.
- **Tuesday 2:00 PM:** Bank valuation comes in at \$780,000. Bank will only lend \$624,000 - client needs to find extra \$141,000.
- **Tuesday 4:30 PM:** Client calls - "We spoke to the vendor. He'll drop the price to \$820,000 and extend to Thursday."
- **The lawyer's mistake:** Says "Great, I'll confirm in writing" but doesn't send it until 4:55pm.
- **Tuesday 5:30 PM:** Vendor's lawyer calls - "No extension agreed. Your deadline passed. Contract is now unconditional."



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Practice tips (finance)



When you receive a contract, immediately check it for any conditional clauses. Diarise the dates and advise your client clearly about the conditions, what the client must do to comply with them and the consequences if they are not met.



Confirm with the client any approval they receive is in writing is final and not conditional, and is for an amount sufficient for their needs.



Do not leave requests for extensions of time for finance approval unanswered. Chase up the answer before the time expires



Confirm any oral agreement to extend time in writing

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Building & pest condition

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20.3	All money must be immediately refunded to the purchaser if the contract is ended.
21.	BUILDING REPORT
21.1	This general condition only applies if the applicable box in the particulars of sale is checked.
21.2	The purchaser may end this contract within 14 days from the day of sale if the purchaser:
(a)	obtains a written report from a registered building practitioner or architect which discloses a current defect in a structure on the land and designates it as a major building defect;
(b)	gives the vendor a copy of the report and a written notice ending this contract; and
(c)	is not then in default.
21.3	All money paid must be immediately refunded to the purchaser if the contract ends in accordance with this general condition.
21.4	A notice under this general condition may be served on the vendor's legal practitioner, conveyancer or estate agent even if the estate agent's authority has formally expired at the time of service.
21.5	The registered building practitioner may inspect the property at any reasonable time for the purpose of preparing the report.
22.	PEST REPORT
22.1	This general condition only applies if the applicable box in the particulars of sale is checked.
22.2	The purchaser may end this contract within 14 days from the day of sale if the purchaser:
(a)	obtains a written report from a pest control operator licensed under Victorian law which discloses a current pest infestation on the land and designates it as a major infestation affecting the structure of a building on the land;
(b)	gives the vendor a copy of the report and a written notice ending this contract; and
(c)	is not then in default.
22.3	All money paid must be immediately refunded to the purchaser if the contract ends in accordance with this general condition.
22.4	A notice under this general condition may be served on the vendor's legal practitioner, conveyancer or estate agent even if the estate agent's authority has formally expired at the time of service.
22.5	The pest control operator may inspect the property at any reasonable time for the purpose of preparing the report.

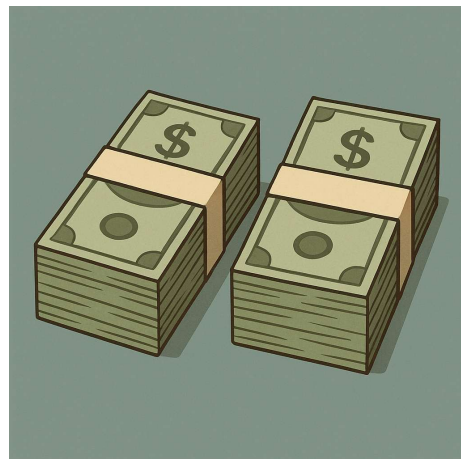
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Double duty from nominations

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Double duty risk area – “additional consideration”

- Defined in s 32B *Duties Act 2000* (Vic)
- Includes any monetary consideration exceeding the original payment.
- Applicable to both monetary and non-monetary arrangements.
- Can include “parallel arrangements” such as building contracts.

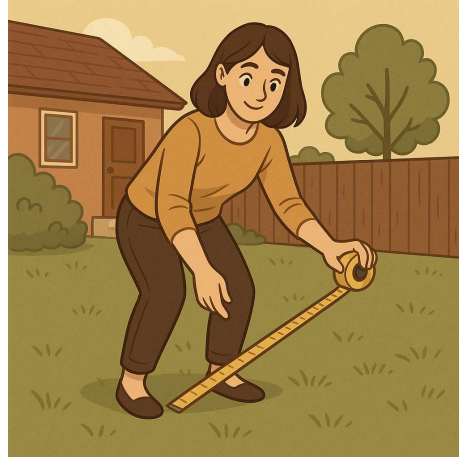


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Double duty risk area – “land development”

- Defined very broadly in s 3 of the Act. Includes:
 - Preparing a plan of subdivision or steps to register a plan.
 - Applying for or obtaining a planning or building permit
 - Requesting a planning scheme amendment.
 - Doing anything requiring a building permit.
 - "Developing or changing the land in any way that would lead to the enhancement of its value" eg
 - Construction, alteration, extension, or demolition
 - Site preparation, clearing, boundary pegging
 - Infrastructure installation

Timing is critical: If land development occurs after the contract date but before the nomination, double duty is triggered.



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"relative" in relation to a natural person, means a person who is—

- (a) a child or remoter lineal descendant of the person or of the partner of the person;
- (b) a parent or remoter lineal ancestor of the person or of the partner of the person;
- (c) a brother or sister of the person or of the partner of the person;
- (d) the partner of the person or a partner of any person referred to in paragraph (a), (b) or (c);
- (e) a child of a brother or sister of the person or of the partner of the person;
- (f) a brother or sister of a parent of the person or of a parent of the partner of the person

Limited safe harbours for “land development”



Development costs reflected in original contract price (s 32J(3)(a))



All development occurs AFTER nomination signed and dated (s 32J(3)(b))



Existing concessions (s 32N)



Exemptions for transfers to “relatives” and corporate reconstruction concessions (s 32W)

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Practice tips (nominations)

In your **intake form**, ask:

Do you intend to do any development prior to settlement (or ask the vendor to)?

Do you intend to nominate?

If so, the client sorts the nomination before doing any development (OR make sure the price reflects vendor works).

Include nomination warnings in **initial letters** – eg *"Complete nominations BEFORE any development activity. This includes permit applications, demolition, site work, or anything that might increase land value. Failure to observe this timing triggers double stamp duty."*

Listen for things like early site access or permit applications or late nominations.

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Case study: Ben, a planning permit and a trust

- Ben signs a contract to buy property in Coburg.
- He applies for a planning permit, then decides to nominate to his discretionary trust
- The planning permit application is considered 'land development'.
- This results in double duty on the same property.
- If nomination had occurred first, only one lot of duty would apply.



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Case study: Linh, Mel and a nomination fee

- Linh signs contract. Changes mind.
- Agent finds Mel who is willing to step in.
- Agent negotiates for Mel to pay Linh a \$10,000 nomination fee, plus reimburse her deposit
- This results in double duty on the same property.

This triggers the 'additional consideration' pathway to double duty.

- Linh pays duty on the \$3 million contract value
- Mel pays duty on \$3.01 million (the \$3M purchase price plus the \$10K fee)
- **Note:** The deposit reimbursement doesn't count as additional consideration - that's an "excluded cost[s]". But any fee or benefit to the original purchaser does.

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**Foreign
purchaser
additional duty
(FPAD)**

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A “foreign purchaser” (s 3 and 28A) can be:

- A **foreign natural person** (not an Australian citizen, not a permanent visa holder, not a NZ citizen with a special category visa).
- A **foreign corporation** (incorporated outside Australia, or controlled by foreign persons/entities).
 - A company is a foreign corporation if more than 50% of shares/voting power is held by foreign persons/entities.
- A trustee of a **foreign trust**.
 - A trust is a “foreign trust” if a foreign person/entity has a substantial interest (more than 50% beneficial interest in capital) or, for discretionary trusts, if any potential beneficiary is a foreign person (s 3)
- **Discretionary trusts:** If the trust deed does not expressly exclude foreign beneficiaries, the trust is deemed a foreign trust, even if no distributions have been made to foreign persons



“From 1 March 2020, the State Revenue Office will no longer apply the practical approach” – see <https://www.sro.vic.gov.au/foreign-purchaser-additional-duty-and-discretionary-trusts-2020>

Main exemption: joint tenants with non-foreign spouse for PPR (s 69AJ)

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Practice tips (FPAD)



In your contract review and purchase **intake forms**, ask the right questions to diagnose if clients meet the ‘foreign’ test. If clients give vague answers, keep asking until you have enough documentation about visas to be satisfied you have the correct answer. Then make sure DOL is filled out correctly.



In your **workflow**, include a task early to request any discretionary trust deed and check it for foreign beneficiaries (or to request citizenship info of unitholders or shareholders).



In your **precedents**, where a trust is purchasing, include a prompt to advise on this (and template paragraphs depending whether the deed already excludes foreign beneficiaries).

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Ongoing obligations for duty concessions, eg residence

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What clients think: 'It's our home - of course it's exempt.'

What the law requires: Actual occupation for a full year."

You have an obligation to:

- Ask the right questions about clients' actual living arrangements
- Explain the 12-month requirement clearly
- Explain the requirement to notify the SRO and repay the concession, especially if they say something that suggests they might
- Document the advice you give

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Case study

- **Florence** buys her first home claiming the PPR concession. During settlement preparation, she casually mentions her employer is 'probably' sending her to London for 2 years. DOL is already signed and the lawyer completes the transaction.
- **The lawyer's mistake:** Didn't probe the timing or explain the compliance risk.
- **The reality:** Florence left for London 3 months after settlement, renting out the property. Full duty plus penalties became payable.
- **What the lawyer should have done:** Explored the overseas assignment timing and advised about the exemption risk.



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Practice tips (ongoing obligations)



Pay attention to red flags like property is uninhabitable, current tenancy with 11+ months remaining, client mentions possible work relocation or property in a remote location



In your **precedent** email sending DOL, include a warning reminding them of any conditions or ongoing obligations associated with duty concessions/exemptions



In your **intake form**, where you ask if it will be their PPR, note the 12 month residence requirement for certain exemptions/concessions and penalties for non-disclosure and compliance

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**Stay in your lane
– acting outside
your expertise**

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**Good intake
forms**

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Precedents + workflows

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Put your records on!

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Acting for a purchaser involves more than getting to settlement

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Questions?

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