

CONVEYANCING SERIES 2020

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Best practice for purchasers

Contact information

Phil Nolan, Risk Manager | LPLC

T: 03 9672 3800 E: phil.nolan@lplc.com.au

Website

lplc.com.au

Social media



@LPLC_AU



@LPLCAU



[Linkedin.com/company/lplc](https://www.linkedin.com/company/lplc)

Quote

An agent's main job is to talk people into changing their mind.

- Orhan Pamuk

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Key take-a-ways

- Recognise that purchasers need thorough and timely legal advice about buying real estate.
- Ensure you recommend that purchasers undertake a due diligence and define your role in relation to any due diligence.
- Know your limit. For any non-legal issue recommend that the purchaser contact an appropriate expert.
- Use a checklist to obtain necessary information from the purchaser.
- Keep good file notes.

1. Introduction

Best practice for practitioners acting for purchasers is to lift the lid on buying real estate to enable purchasers to make informed decisions.

This is a win-win situation given practitioners have an obligation to ensure clients make informed decision. See rule 7 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

Rule 7

Rule 7 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 imposes an obligation on practitioners to:

'.....provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter.....'

Practitioners must also:

'.....inform the client..... about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.....'

Keeping these requirements in focus will help practitioners assist purchasers during the conveyancing process.

Your comments

2. Warnings

Before we look at the claims and risk management issues when acting for a purchaser, we will consider three warnings relevant to acting for a purchaser:

- 2.1 Scams
- 2.2 Buyer advocates
- 2.3 Conflict - nomination

2.1. Scams

Fraudsters are targeting conveyancing transactions because of the simple fact that money is changing hands.

Consider the need to alert purchaser clients of the potential for a fraudster to try and contact them and ask them to send money to the fraudsters account, usually pretending the email is from your office and the account is in the firm's name.

We are aware of several instances where clients received scam emails purportedly from their law firm directing payment to a new bank account. Typically, the fraudster became aware of the work the firm was doing for the client after gaining access to either the client or firm's email account.

Tips

At the start of every matter, tell your clients:

- your firm's trust account details. Also tell them they will not change.
- if the client receives an email about any payments, they must telephone the firm to verify the position, and not respond to the email.

Put this information in your firm's standard engagement letter.

We also suggest adding a warning to your firm's standard email signatures along the lines of:

WE TAKE THE RISK OF CYBERFRAUD SERIOUSLY AND SO SHOULD YOU.

Hackers have impersonated law firms and requested payment via email using their own account details. It is important you take the extra step to verify any bank account details you receive in an email from our firm by speaking to us before transferring money. Use a search engine to find our website and verify our phone number and call us. Do not reply to any emails asking for payment before verifying its authenticity with us. Finally, discuss this important issue with colleagues and other firms, so everyone is aware of the risks.

Did you know?

In the UK banks must verify every bank account number and bank account name before transferring funds. For more information go to:

<https://www.bbc.co.uk/news/amp/business-45900955>

Your comments

Further information

Please refer to the LPLC Cyber Security Guide available on our website here:

<https://lplc.com.au/risk-management/cyber-security/>

2.2. Buyer advocates

Consider the need to ask your purchaser client whether they have engaged a buyer advocate. It might be that the purchaser has concerns with the conduct of the buyer advocate.

Case of interest

For an interesting case about the conduct of a buyer advocate see:

Doerrenberg and Gauci v Prime Estate Pty Ltd [2017] VCAT 2028

This case was about a property in Patterson Street, Moonee Ponds. The buyer advocate told the purchaser that:

'.....the contract of sale had been reviewed by a lawyer and that nothing of concern had been discovered.....'. [36].

As it turned out no legal advice had been obtained and the Tribunal determined that the conduct of the buyer advocate was misleading and deceptive.

I expect any lawyer reviewing the section 32 statement would have advised the purchaser that the garage next to the house was not in fact part of their lot being purchased. The purchaser was successful in their claim against the buyer advocate and was awarded \$80,625.

Question

Have you ever inserted details of a buyer advocate or purchaser's estate agent in the particulars of sale?

Note

The LIV sale of land contract contains a panel in the particulars of sale to insert details of the purchaser's estate agent.

Your comments

2.3. Conflict – nomination

Rule 11 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* is about avoiding conflicts and states that:

11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.

In the words of Dal Pont:

'.....The potential consequences of a concurrent conflict requires alertness to the possibility of conflict arising, especially when the retainer is first contemplated..... client perceptions [that there is no conflict] cannot be trusted uncritically.....the lawyer is best placed to identify a conflict....'

See *Lawyers' Professional Responsibility* by G E Dal Pont Lawbook co. 2013.



Question

What do you do to deal with any potential conflict when acting for a purchaser where there is a nomination?

Your comments

Question

What do you do to identify any potential conflict when acting for a purchaser where there is a nomination?

Your comments

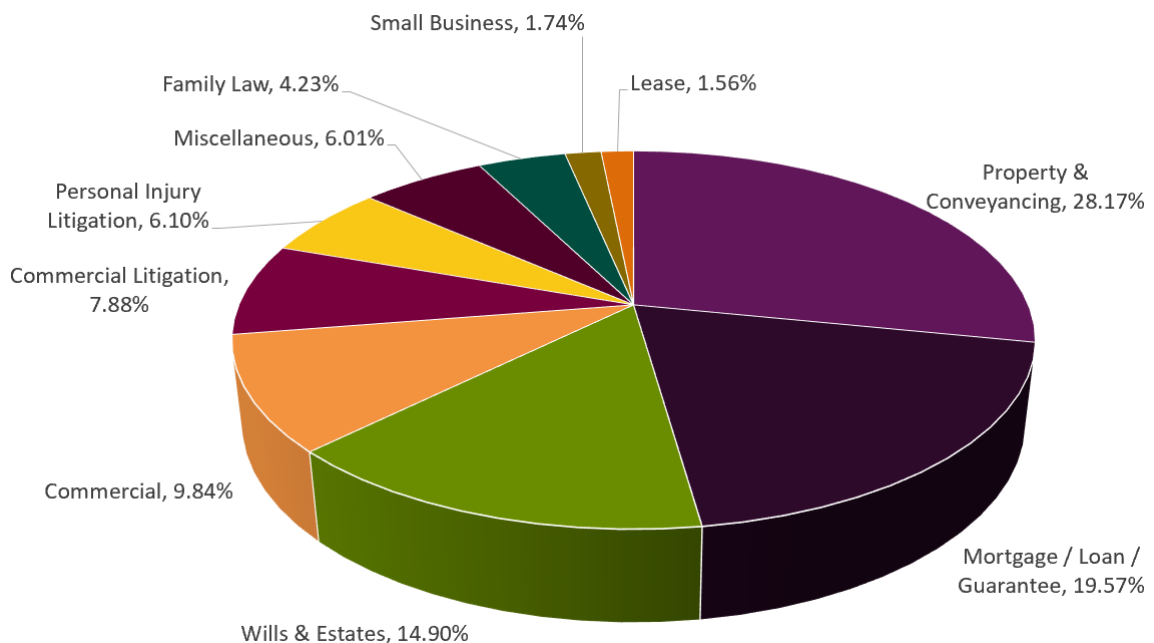
2.4. Where to now?

The remainder of this handout contains details of claims and risk management measures relating to due diligence, knowing when to refer the client to another expert, use of checklists, file notes and other critical matters for the client to consider.

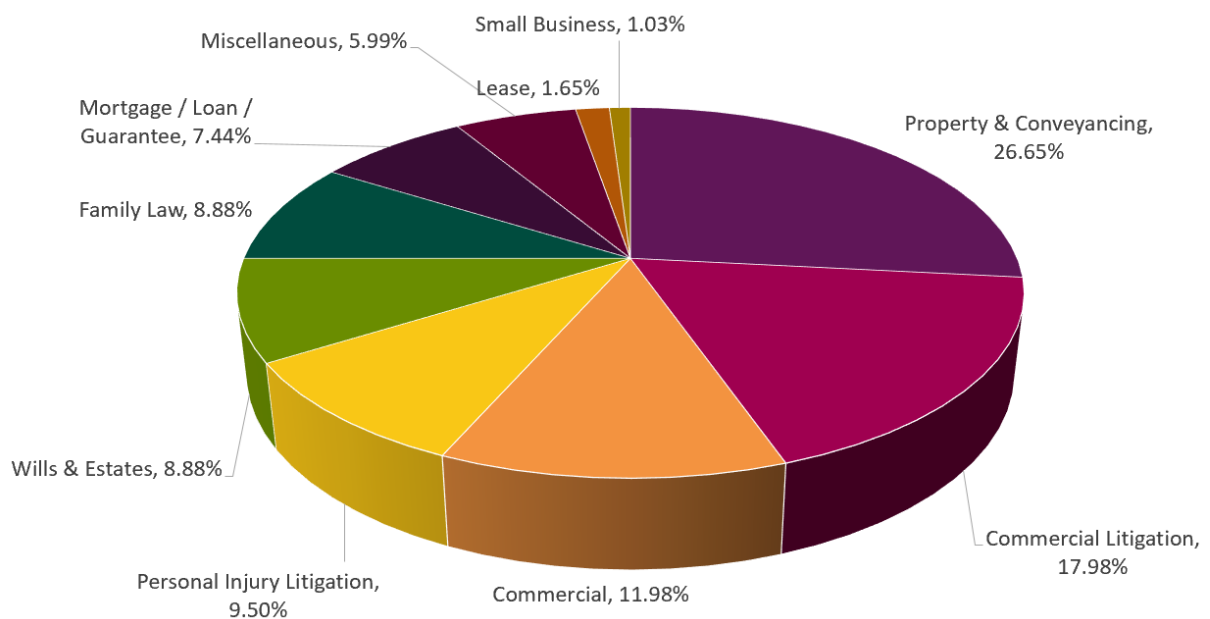
3. Claims

Conveyancing claims were approximately 27 per cent of all claims in the 2019/20 policy year and are estimated to cost \$12 million. A substantial number of these claims are due to errors when advising a purchaser.

3.1. Cost of claims by area – 2019/20



3.2. Number of claims by area – 2019/20



4. Examples of claims when acting for a purchaser

4.1. No pre-contract advice on GST

In this claim the practitioner acted for the purchaser of commercial offices. The purchaser informed the practitioner that they wished to purchase the property inclusive of GST and subject to obtaining a change of permitted use to residential as he intended to live there and given that the office building had originally been a dwelling.

The practitioner drafted a special condition dealing with this issue. The parties ultimately agreed that the purchase price be exclusive of GST and the sale be a going concern because it was currently leased. The client intended to terminate the commercial lease several months after settlement and use it as a residence.

The problem with this structure was pointed out to the client by his accountant after the contract was signed. By changing the creditable purpose uses from going concern to private use within two and half years after the purchase, GST would become payable.

The client claimed that the practitioner should have provided GST advice prior to the exchange of contracts as to the different GST consequences of treating the property as a dwelling and input taxed compared to an office and sold as a going concern.

The purchaser's practitioner failed to appreciate the GST consequences where a change of creditable use occurred so soon after the sale.

Your comments

4.2. No advice on building approvals

The client entered into a contract to purchase the land and a B & B business. The section 32 statement showed there were no building approvals in the last seven years. The client's practitioner did not apply for a building approval certificate, warn the client of the risks of not doing so or to make enquiries with council. When the client went to sell the land several years later it was discovered a building permit had been issued to the original vendor but no final inspection had ever been undertaken and the council had required works to be done to rectify the illegal structures. A claim was made against the practitioner for the cost of rectification works and the difference in the sale price once the new purchasers discovered the problem.

4.3. Easement revealed in search and client not informed

The practitioner acted for the purchaser and was provided with the contract of sale and the section 32 statement. However, the section 32 statement was 18 months old and since it had been prepared, a plan of subdivision had been approved with a three-meter sewerage easement at the rear of the property. The practitioner did the necessary searches but failed to draw the client's attention to the easement prior to settlement. As a result, the client lost the chance to either rescind the contract or perhaps negotiate a lesser price and had to relocate the sewerage line.

Your comments

Case to note

In *Snopkowski v Jones* (Legal Practice) [2008] VCAT 1943, the tribunal found the practitioner had been asked by the client in general terms if any liability would flow from him transferring his property to his wife's name.

The practitioner advised the couple that the procedure to transfer the property would be relatively simple and the only cost would be the practitioner's fees and a Titles Office fee. The practitioner said the issue of CGT did not even occur to her.

The tribunal held that when a practitioner is asked whether there would be any financial implications upon transfer of the property, it is reasonable to expect the practitioner would at least advise the clients to seek advice from their accountant or a tax lawyer relating to the issue of CGT. By failing to alert the clients to the possibility of CGT liability, the practitioner had breached the standard of care required of a practitioner in such a situation.

Your comments

5. Due diligence

Experienced conveyancing practitioners will know that some due diligence is always required when acting for a purchaser.

One approach is to give the client a list of common due diligence issues and let the client decide what due diligence they will do and what due diligence the firm will do.

For example, the client may wish to check any planning controls affecting their intended use of the property.

Before they are able to make this decision they need to understand certain matters including:

- (a) Caveat emptor
- (b) What is in the statutory due diligence checklist
- (c) That the vendor has limited disclosure obligationsCritical risk issues

Question

What due diligence do you commonly do for purchaser clients?

Your comments

5.1. Caveat emptor

Caveat emptor is Latin for 'buyer beware'. Practitioners should tell purchasers that this applies to them and that there is a heavy burden on them to undertake an extensive due diligence before entering into a contract to buy real estate.

Suggestion

Tell purchaser clients a story to re-enforce your message. This story could be based on the facts in *Meier v Balbin* [2013] VCAT 57.

The vendor in this case built a new house in late 2017 and sold in 2018. After settlement the purchaser brought a claim for compensation for defects in the building including discolouration and rust staining of the render. The VCAT member commented that:

'.....The general appearance of the render finish would have been apparent prior to the sale contract.....'. [37]

Essentially this is what the member had to say about such defects:

'.....It is reasonable,that a purchaser of a home makes allowance for known or patent defects when negotiating the purchase price and, as such, the purchaser can have no "loss" arising from a breach of the warranties in respect of such defects. By "patent" I mean a defect which ought reasonably have been observable on inspection and the significance of which, in terms of a likely need for rectifications, ought reasonably have been appreciated.....'. [91]

Your comments

5.2. Defect in quality vs. defect in title

Explaining to purchaser clients the difference between a defect in quality compared to a defect in title will also help them understand why it is important to do a due diligence.

A defect in title gives rise to a right to rescind.

Question

What is a defect in title?

To quote JF Burrows it is an:

'.....awkward question of what, precisely, constitutes a defect in title....'

See the article by JF Farrow 'Rescission for defect in title under the torrens system' [1971] AdelLawRw 6; (1971) 4(1) Adelaide Law Review 130.

Examples given in the article include an undisclosed restrictive covenant and the inability of the vendor to transfer the land to the purchaser where a material part of the land was a road.

A defect in quality does not give the purchaser a right to rescind. An example of a defect in quality is an oven which does not work. Caveat emptor applies to defects in quality. If the defect was not there at the day of sale, for example the oven worked on the day of sale but did not work when the final inspection occurred, then the purchaser may have a right to seek compensation unless the damage is from fair wear and tear.

GC 31 (formerly 24) of the standard LIV / REIV contract of sale of land is about disputes in relation to goods.

GC 24 was considered in the case of *Patmore and Anor v Hamilton* [2014] VSC 275.

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2014/275.html?stem=0&synonyms=0&query=%22general%20condition%2024.4%20%22>

In this case Justice Digby explained how general condition 24.4 worked.

45. Pursuant to General Condition 24.4, the purchaser may nominate an amount not exceeding \$5,000 to be held by the stakeholder. Clause 24.4 does not reflect an agreed intention that the nominated sum proposed to be withheld is the subject of any limitation beyond the agreed cap of \$5,000, although its nomination under Clause 24.4 must relate to the purchaser asserting that the property is not in the condition required by general condition 24.2 at settlement.

46. Clause 24.4 requires no justification or substantiation of the amount nominated by the purchaser. The purchaser may nominate, in my view, any sum up to \$5,000 without substantiating the sum withheld. The fixing of a modest amount by way of an agreed cap is, it would appear, the only intended prescription applying to the sum of the amount to be withheld.

Of course there are a number of other grounds on which a purchaser may seek to end a contract and/or seek compensation. For example, misrepresentation or breach of warranty.

If the building is new there might be other claims. See for example, the case of *Moorabool Shire Council & Anor v Taitapanui & Ors* [2006] VSCA 30. In this case the dwelling was three years old and had to be demolished because there were so many defects. The purchaser successfully sued the building inspector, who was



employed by the local council, for his failure to exercise reasonable care.

Another condition in the standard contract dealing with building issues is general condition 21. This general condition is optional and must be selected by checking the box in the particulars of sale.

Pursuant to this condition, any building inspection report must be by a registered building practitioner or architect.

Risk management tips

Inform the purchaser that they should diarise the due date for any report(s) and when notice must be given to the vendor and to keep us informed of their progress.

Make it clear to the purchaser that a report by anyone else is not acceptable and may be challenged by the vendor and as a consequence the contract may become unintentionally unconditional.

Your comments

Background

The general condition refers to the right to terminate if the report discloses any 'major building defect'.

Question

How do you define 'major building defect'?

Your comments

5.3. Guidance

Consider the relevance of the definition of 'structural defect' and 'structural element' in the domestic building insurance ministerial order:

"structural defect" in relation to a building, means any defect in a structural element of the building that is attributable to defective design, effective or faulty workmanship or defective materials (or any combination of these) and that:

- (a) results in, or is likely to result in, the building or any part of the building being required by or under any law to be closed or prohibited from being used; or
- (b) prevents, or is likely to prevent, the continued practical use of the building or any part of the building; or
- (c) results in, or is likely to result in:
 - (i) the destruction of the building or any part of the building; or
 - (ii) physical damage to the building or any part of the building;
 or
- (d) results in, or is likely to result in, a threat of imminent collapse that may reasonably be considered to cause destruction of the building or physical damage to the building or any part of the building;

"structural element" in relation to a building, means:

- (a) any internal or external load-bearing component of the building that is essential to the stability of the building or any part of it, including (but not limited to), foundations, floors, walls, roofs, columns and beams; or
- (b) any component (including weatherproofing) that forms part of the external walls or roof of the building;

A NSW government publication refers to a 'major defect' and states that:

A two-step test decides if a problem is a 'major defect' asking:

- 1. Is the defect a major element of the building? (a fire safety system, waterproofing, or something key to the building's stability or structure; eg. foundations, footings, walls, roofs, beams or columns.*
- 2. Will the defect cause or be likely to cause part or all of the building becoming uninhabitable or unable to be used for its intended purpose? Or, will the defect cause or be likely to cause the collapse or destruction of the building, or part of it?*

To be considered a major defect, it must meet the criteria of the first step, then the second step. An example may be that waterproofing has not been properly installed on a building rooftop, and water has entered the building

leading to walls, windows and floor beams being ruined. This passes the first step as it is considered to be a major element as it relates to waterproofing. It should also pass the second step as it could cause, or be likely to cause, the destruction of the building or part of it. It is therefore likely to be considered a 'major defect' and covered under the 6-year warranty.

Here is a link:

<http://www.houspect.com.au/nsw/general-versus-major-building-defects-difference/>

Two relevant cases:

[Clarke v Mariotis \[2009\] VSC 279](#)

In this case the purchaser validly rescinded the contract of sale on the basis that a drainage problem building report showed major structural defect. The report revealed drainage problems and corrosion in columns.

In this case both vendor and purchaser accepted that "major structural defect" refers to '*...a shortcoming, imperfection or lack of something that pertained to the structure and was important, serious or significant...*' [35].

Justice Hansen stated that:

The expression "major structural defect" is to be understood in the sense of encompassing an important, serious or significant but not minor shortcoming that is in or relates to the structure of the building. [41]

[Edwards v Woods \(Building and Property\) \[2017\] VCAT 290](#)

In this case the deficiencies in the pergola did not amount to a major structural defect.

5.4. Statutory due diligence checklist

Guidance as to what due diligence a purchaser needs to undertake can be found in the Victorian Government prepared due diligence checklist which has its statutory basis in the *Sale of Land Act 1962* (Vic). See s.33A, s.33B and s.33C.

The online version of this checklist contains 47 hyperlinks a purchaser should refer to as part of their due diligence.

Matters referred to in the checklist include:

- Obtaining information about any applicable owners corporation.
- Investigating any possible contamination of the property.
- Checking what services are connected and / or available to the property.
- Verifying any permits issued or required for the use of the property.
- Importance of checking boundaries.

Risk Management Tips

Ensure the purchaser has received the due diligence checklist from the selling agent and/or vendor.

The checklist must be made available to any prospective purchaser by the vendor where the vendor has not engaged a selling agent. Otherwise the responsibility falls on the selling agent to make the checklist available to prospective purchasers.

The penalty for failing to provide the checklist is up to 60 penalty units (\$9,913.20).

Invite the purchaser to provide you with confirmation that they understand the information in the checklist and have reviewed the relevant websites hyperlinked in the online checklist.

Consider offering to assist purchasers to investigate the issues raised in the checklist as relevant to the matter at hand and charge accordingly.

Your comments

5.5. Vendor limited disclosure obligations

Purchaser clients need to understand that the vendor has only limited disclosure obligations. For example, there is no requirement for a vendor to disclose any contamination of the land. Common contamination includes asbestos.

One exception and where disclosure is required is where a notice has been issued for the clean up of the contamination by an authority. See section 32D of the Sale of Land Act 1982. One case about contamination issues is *McLennon v Clapham and others* [2019] ACTSC. Also known as the Mr Fluffy case.

In 2009, the clients were proposing to buy a residential property to live in and engaged a firm to act. They provided a copy of the unsigned contract to the firm and then met the firm's conveyancing clerk to go through the contract. Before this purchase, the house had been insulated with loose-fill asbestos and had purportedly undergone a removal process.

There were documents attached to the contract in relation to asbestos including an asbestos advice fact sheet and a certificate of completion of asbestos, removal work. In 2014, after receiving a letter from the ACT Government, the clients had the property tested. It was at this point, years after purchase, that the clients learnt about the dangers of loose-fill asbestos. Here are the comments from this case about a practitioner's role in conveyancing matters:

A solicitor owes a general duty to explain legal documents to the client, or at least to ensure that the client understands the material parts. In particular, a solicitor should explain any unusual provisions or any provisions of particular relevance to the clients proposed activities, or which might influence the client in deciding to enter the contract. [50]

In the case of a property transactions, a solicitor should explain both the relevant risks attending the purchase of property and the consequences of that risk to the client. [51]

A solicitor acting for the buyer of property is paid not only for what the solicitor, in fact, does, but also for the responsibility he or she assumes in trying to protect clients from financial loss if things go wrong. [52]

A solicitor has a duty to warn a client of a material risk inherent in the proposed purchase. [52]

You can find more details about this case in the Law Institute Journal May 2019 edition in the article by Stephen Bubb titled - The perils of pre-contract advice. Also available on the LPLC website at:

<https://lplc.com.au/lij-articles/the-perils-of-pre-contract-advice/>

Another case to consider about due diligence and land contamination is *Premier Building and Consulting Pty Ltd v Spotless Group Limited & Ors* [2007] VSC 377.

The land in this case was subject to an environmental audit overlay which specified that a Certificate of Environmental Audit was required prior to occupation.

Your comments

6. Referring clients to other experts

Here is a list of some issues where it makes sense to recommend to the client that they contact another appropriate expert:

- (a) If the client requires information about the value of the property recommend they contact a valuer or real estate agent (if any).
- (b) If the client has any concerns about the title boundaries recommend that they engage a land surveyor to undertake a check survey.
- (c) In relation to any insurance recommend that the client contacts their insurer or insurance broker. Insurance to consider includes:
 - o Public liability.
 - o Building replacement.
 - o Landlord insurance.
 - o Title insurance.

If the property is affected by an owners corporation and insurance is required, recommend that the client considers contacting the insurer for the OC as it may be simpler to get any required top insurance from the same insurer. Insurance information will be in the OC certificate in the section 32 statement or available from the managing agent.

- In relation to use of the property, restrictions and potential development, recommend that the client considers engaging a town planner.
- For detailed information about any building issues recommend that the client considers engaging a building practitioner.

For general information about building works, including owner builder works, recommend that the client contacts Consumer Affairs Victoria on 1300 55 81 81 and/or the Victorian Building Authority on 1300 815 127.

In the event that the purchaser wishes to end the contract, usually it is necessary to obtain advice from a barrister who specialises in property law. Explain to the client the process for briefing a barrister and the additional cost involved having obtained costs disclosure from the barrister. For urgent matters it makes sense to obtain the initial advice by having a conference with the barrister which the client may also attend.

For a case about how important it is to consider the various issues about terminating a contract before taking certain steps see: [Tymstock Pty Ltd v Patrick \[2019\] VCC 1092](#)

In this case there were competing rescission notices. One issued by the purchaser alleging breach of section 32 of the *Sale of Land Act 1962* and one issued by the vendor rescinding the contract due to the purchaser's failure to settle on the due date. The purchaser issued the rescission notice on the basis that the vendor failed to disclose a public acquisition overlay (PAO).

One issue which was crucial to the decision that the purchaser's rescission should be set aside was the conduct of the purchaser. The purchaser had sought an extension to the settlement date, which was agreed and the vendor submitted (and the judge agreed) that given this the PAO evidently did not affect Mr Patrick's willingness and desire to settle on the property, if he was so able. [13]

Your comments

7. Other critical risk issues

The following is a list of a number of critical risk issues you need to consider raising with the purchaser.

7.1. The land

Always identify the land and the owner of the land.

Usually this information is obtained from the register search statement. You also need to refer to the document described as the diagram location showing the land. Commonly the diagram location is contained in a title plan or the plan of subdivision. Refer the purchaser to the relevant documents and explain them to the purchaser.

Ensure the purchaser understands that sometimes the area shown on the diagram location does not match the actual physical boundaries to the property and that if in doubt they should engage a land surveyor to do a check survey.

The rights of the purchaser where there is a discrepancy in title was considered in the recent case of *Wollert Epping Developments Pty Ltd v Batten* [2019] VSC 618. GC 7 was formerly GC 3 in Table A in the Seventh Schedule to the *Transfer of Land Act 1958* (Vic). In this case the purchaser discovered an encroachment on the boundary equal to 0.92% of the area being purchased (approximately 58 hectares).

Because the discrepancy was so minor, the purchaser did not succeed in their claim.

In determining whether the discrepancy is substantial it is necessary to consider the rule in *Flight v Booth* [1834] EngR 1087:

'..... to the effect that a significant discrepancy will justify avoidance of the contract by the purchaser, and the associated 'rule of thumb' that a 5% or greater diminution in area is likely to be considered significant. [81]

*This rule of thumb was referred to in an ex tempore judgment of Nathan J in *Ventura v Maladale Pty Ltd & Ors.*[105] Nathan J noted that 'it is common place that the statistical measure of significance is a variation from a mean of*

five per cent or more.’ [106] Counsel for the Vendors submitted that the discrepancy on the southern boundary of the property in the present case was only 0.92% of the total area sold, and therefore could not be considered significant. [107] [82]

Given this it is essential to tell the purchaser they need to do a physical inspection of the boundaries. This is crucial to make sure they have purchased the right property and to check for other potential problems. For example, possible boundary fence issues.

For land in a plan of subdivisions or where there are multiple lots such as an apartment and accessory units, it would be useful for you to purchasers to highlight the lots on the plan with a highlighter pen.

Your comments

7.2. The buildings

Also tell the purchaser they need to determine whether there are any illegal works, owner builder works or encroachments. This is usually done by engaging a building practitioner to inspect any buildings on the property and providing a report.

A vendor who is not a registered building practitioner and who has done owner builder works needs to provide the purchaser with an owner builder inspection report. See s.137B of the *Building Act 1993 (Vic)*.

If an owner builder inspection report is provided, ensure the purchaser has read this report and understands that any defects listed in the report are not covered by any statutory insurance and the vendor is not obliged to remedy the identified defects.

We have seen claims against purchasers’ practitioners for failing to advise that the purchaser could avoid the contract because the vendor had not complied with the owner builder requirements. This often occurs because appropriate enquiries were not made to determine whether the vendor was an owner builder.

Your comments



7.3. Intended use

Ask the purchaser what their intended use is for the land.

This is important to know as the sale documents may disclose conditions which may restrict or prohibit this use which the client needs to know about.

Depending on the practitioners experience in dealing with any planning issues, it may be that the practitioner needs to recommend to the client that they seek advice from a town planner to deal with any planning issues.

Example of a claim

LPLC has seen claims where no planning issues were raised with the purchaser.

In one claim the property was zoned commercial but the purchaser wished to reside in the property. This is understandable given the advertising referred to use as a dwelling. Unfortunately, the vendor did not have a permit for use as a dwelling and no pre-existing use rights.

The claim arose because the practitioner did not raise with the client the planning restrictions disclosed in the section 32 statement.

Your comments

8. Checklists

8.1. 27 questions to ask the purchaser

LPLC has prepared a checklist of questions to ask purchaser clients.

You can find the checklist here:

<https://lplc.com.au/checklists/key-risk-checklist-purchase-of-land-questions-for-the-purchaser/>

Also refer to appendix 1 for a copy of the LPLC Key Risk Checklist - Purchase of land – questions for the purchaser.

Question

Do you have any suggested amendments to the LPLC Key Risk Checklist - Purchase of land – questions for the purchaser?

Note

LPLC regularly updates the conveyancing checklists so routinely compare one you are using to the LPLC checklist. One recent change is to include a question about flammable cladding.

Your comments

9. Five questions to ask yourself

9.1. Is the vendor entitled to sell the property?

Verify the vendor's title to sell, identify the property correctly and conduct all necessary searches. Build the cost into your standard price.

9.2. Have I given my advice in writing to the purchaser?

Have a comprehensive standard letter of advice recommending pre-purchase checks and inspections and warning your client of the risks of not doing them. Get clear instructions about what the client thinks they are buying, including chattels. Don't rely on the completeness or accuracy of the vendor's disclosure statement. Do your own searches. Carefully review the contract documents, plans and searches to identify features or characteristics of the property that are unusual or of potential concern.

9.3. How much will I charge?

No client wants to be taken by surprise or unprepared for settlement due to unexpected costs. Use a checklist and carefully check calculations of applicable GST, stamp duty, land tax, other charges and adjustments. If you are not charging a fixed price, give a realistic estimate of your costs and inform the client promptly if the estimate is exceeded. Be clear about any disbursements to be charged.

9.4. Have I lodged a caveat?

There seems to be two approaches to lodging a caveat:

- (a) Give the client the choice and warn them of the risk of not lodging a caveat;
or
- (b) Lodging a caveat on the basis that the client is told this is essential legal work in a conveyancing matter.

Question

What is your approach?

Your comments

9.5. Will settlement funds be safe?

There have been numerous instances in Victoria and elsewhere of a cyber criminal accessing a law firm or client’s computer system and monitoring a conveyancing transaction. The fraudster then sends an email purportedly from the law firm to the unsuspecting purchaser misdirecting the transfer of money intended for the firm’s trust account. You need to warn purchaser clients of this risk at the start of every matter and [advise them in writing of the necessary precautions](#).

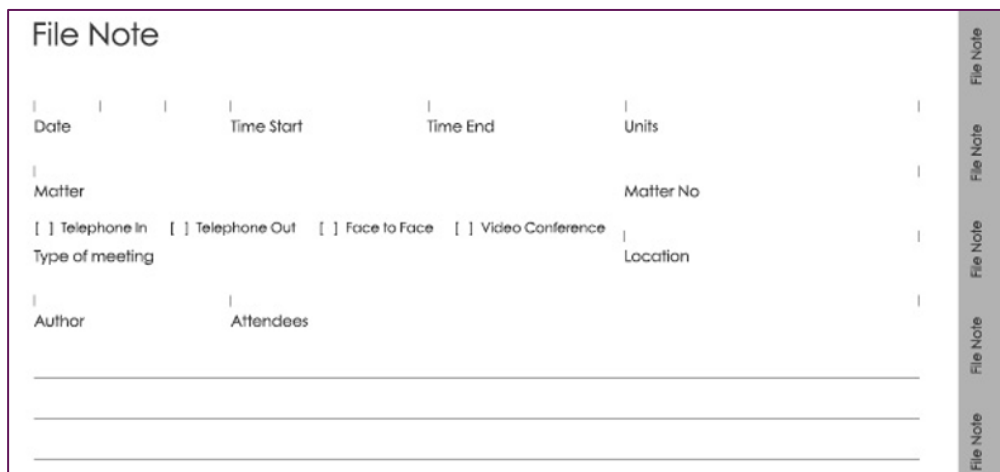
10. Keep good file notes

There is a lot of information about keeping good file notes on the LPLC website. There is no doubt good files notes can save a practitioner in circumstances where the client’s recollection about the advice does not reconcile with the file notes. It may be that some practitioners struggle to keep good file notes simply because their workload is too great.

Recommendations

(a) Design and use your own standard file notes

LPLC has designed a number of file notes. One file note is for use on all matters and contains headings for crucial information. Here is a screenshot of the header from the file note showing the crucial information to be recorded.



Date	Time Start	Time End	Units
Matter		Matter No	
<input type="checkbox"/> Telephone In <input type="checkbox"/> Telephone Out <input type="checkbox"/> Face to Face <input type="checkbox"/> Video Conference		Location	
Author	Attendees		

LPLC File note pads are available for purchase.

Bundle of 23 note pads = \$112.00 (includes GST and postage – Please note all orders outside of Victoria will incur an additional \$25 postage charge)

- 100 sheets in each pad
- 2-hole punched with cardboard backing

See also the LPLC [File note – meeting to advise about a guarantee](#) to assist practitioners when they are advising third party guarantors and providing a solicitor’s certificate of their advice.

Here is a screenshot of some of the first page of the file note:

File note – meeting to advise about a guarantee

Date:	Start time:	End time:	File no.:
Attendee (client):			Author:

Interpreter

Name and address of interpreter:

If no interpreter used, state reason no interpreter required:

Issues discussed arising from documents

Lender:

Borrower:

Mortgagor:

Guarantor:

Purpose for the loan:

Loan Amount: \$.....

Interest: Rate: Higher: Lower:

When payable:

Security provided: (description/address/volume/folio)

If more than one person present - conflict issues considered. (N/A)

(See rule 11 of the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#))

- Do the people have the same interest in the transaction?
- Do the people have the same assets or value of assets at risk?

Summary of explanation to client – regarding guarantee and mortgage

The lender has agreed to lend money to the borrower.

You are being asked to provide your property as security for the repayment of all money owing to the lender.

To do that you are asked to sign these documents _____

These documents entitle the lender to register a mortgage or caveat over your property.

LPLC has also designed a type of file note to record information that should be provided when delegating work.

You can find the LPLC File note – meeting to advise about a guarantee and the LPLC

Delegation/supervision instruction sheet on the LPLC website in the checklist section here: <https://lplc.com.au/category/checklists/>

(b) Use the latest technology

Audio recording - through devices such as mobile phones, tablets, smart pens, smart watches, laptops and even a dicta-phone.

Make electronic file notes through an app that allow handwritten file notes to be made directly onto the tablet. Alternatively, there are smart pens that can be used to make file notes and record meetings and then load the file note in an electronic format onto a computer or tablet. These notes are linked to the audio recording of the meeting and can be emailed to the client to read and listen to.

Use a voice activated word processing programs so that the recording is typed up automatically as a file.

Cases to highlight the importance of having good file notes

For more general comment on the importance of keeping good records, note the comments of senior member Olding in *Skourmallas and Commissioner of Taxation* [2019] AATA 5535:

I note that Mr Skourmallas’s case was not assisted by the absence of contemporaneous records regarding his use of the vehicles, such as for test drives or in marketing the vehicles to dealers. Rather than being emboldened by his success in this review, Mr Skourmallas might prudently improve his record-keeping by, for example, maintaining complete and accurate logbooks of the use and marketing of any vehicles purchased for sale. [115]

For a case specifically relevant to practitioners where the files notes saved the day see *Anthony v Vaclav* [2009] VSC 357.

Mrs Vaclav’s solicitor took detailed file notes of the critical conversations he had with Mrs Vaclav and the judge accepted that those conversations took place as recorded in the file notes.

The solicitor gave evidence that he was concerned that Mrs Vaclav was vulnerable and that the price agreed upon was too low. He questioned her and satisfied himself that she knew what she was doing and was happy to sell her house at the price agreed. The judge found that ‘critically she was specifically advised by her solicitor on the important issue of the sale price, and understood his advice.’

The judge found that the timing and quality of Mrs Vaclav’s solicitor’s advice was such that any inequality between Mr Anthony and Mrs Vaclav was neutralised. He also found that there had been no undue influence nor was she of unsound mind.

Question

Will your file notes stand up to a review by the court?

Your comments

Legislation most relevant to purchasers

- *Sale of Land Act 1962* (Vic)

Further information

- FAQ's – Conveyancing
<https://lplc.com.au/risk-management/faqs-conveyancing/>
- Conveyancing resources
<https://lplc.com.au/checklists/key-risk-checklist-conveyancing-resources/>
- Various checklists
<https://lplc.com.au/category/checklists/>
- LPLC Cyber Security Guide available on our website here:
<https://lplc.com.au/risk-management/cyber-security/>
- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*
<http://www.legalservicescouncil.org.au/Pages/information-resources/legislation-and-rules.aspx>

List of cases referred to in this handout

Doerrenberg and Gauci v Prime Estate Pty Ltd [2017] VACT 2028 – buyer advocate and misrepresentation.

Snopkowski v Jones (Legal Practice) [2008] VCAT 1943 – limits of retainer.

Meier v Balbin [2013] VCAT 57 – caveat emptor.

Patmore and Anor v Hamilton [2014] VSC 275 – condition of goods at settlement.

Moorabool Shire Council & Anor v Taitapanui & Ors [2006] VSCA 30 – purchaser claim against builder.

Clarke v Mariotis [2009] VSC 279 – major structural defect.

Edwards v Woods (Building and Property) [2017] VCAT 290 – not a major structural defect.

McLennon v Clapham and others [2019] ACTSC – limits of retainer.

Premier Building and Consulting Pty Ltd v Spotless Group Limited & Ors [2007] VSC 377 – contamination of land and rights of purchaser.

Tymstock Pty Ltd v Patrick [2019] VCC 1092 – conduct of purchaser prior to rescission.

Wollert Epping Developments Pty Ltd v Batten [2019] VSC 618. GC 7 – identity of land.

Flight v Booth [1834] EngR 1087 – discrepancy in title boundary.

Skourmallas and Commissioner of Taxation [2019] AATA 5535 – keeping good records.

Anthony v Vaclav [2009] VSC 357 – lawyers keeping file notes.