



# CONVEYANCING SERIES 2020

Mastering the essentials

Presented by Phil Nolan, Risk Manager, LPLC





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Mastering the essentials

Best practice for purchasers



# Introduction – best practice for purchasers

## Zoom poll

What is your mind set when you are acting for a purchaser?

- This is just another conveyance.
- I am not getting paid enough to do this conveyance.
- What risks are there for me and my purchaser client.
- I can see things from the purchaser's perspective.

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

## Key takeaways and introduction

- 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 so you know when to refer the purchaser to an appropriate expert.
- Use a checklist to obtain necessary information from the purchaser.
- Keep good file notes.

# What we will cover today

## First half

- Warnings
- Claims data
- Due diligence

**10 minute leg stretch**

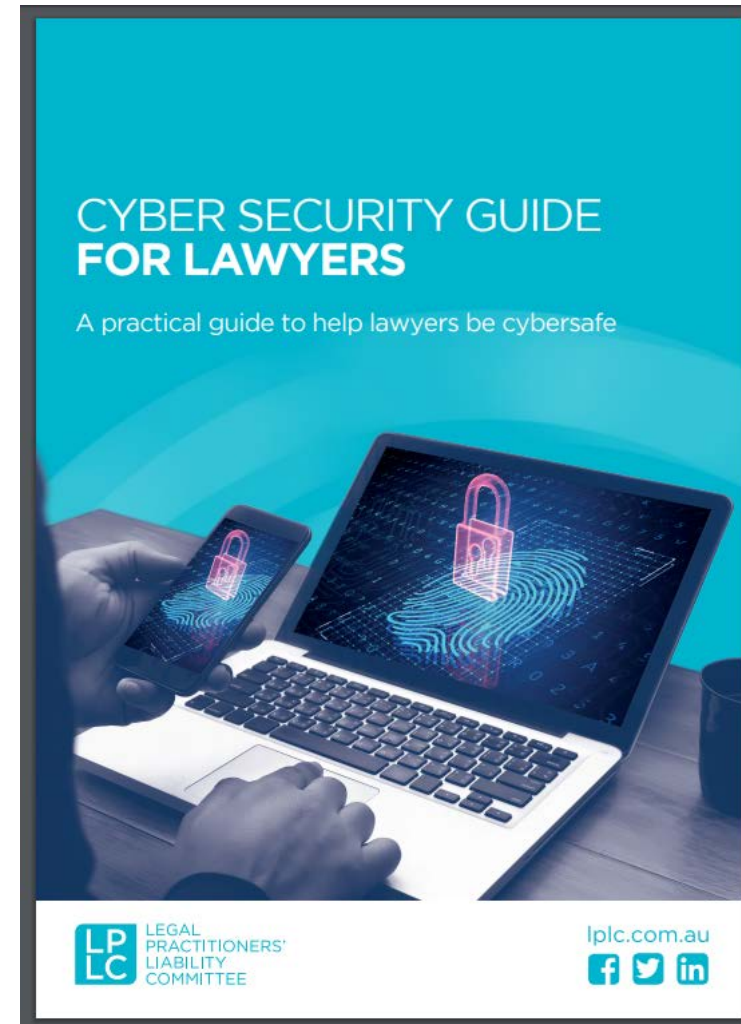
## Second half

- Other critical issues
- Checklists
- File notes





# Warning - scams



## Warning - buyer advocate



Garage

51 Pattison Street Moonee Ponds - *Doerrenberg and Gauci v Prime Estate Pty Ltd* (Civil Claims) [2017] VCAT 2028



## Warning - buyer advocate



*51 Pattison Street Moonee Ponds*

*Doerrenberg and Gauci v Prime Estate Pty Ltd (Civil Claims) [2017] VCAT 2028*

## Warning - buyer advocate

### Zoom poll

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

Yes

No

## Warning – conflict and nomination

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

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.

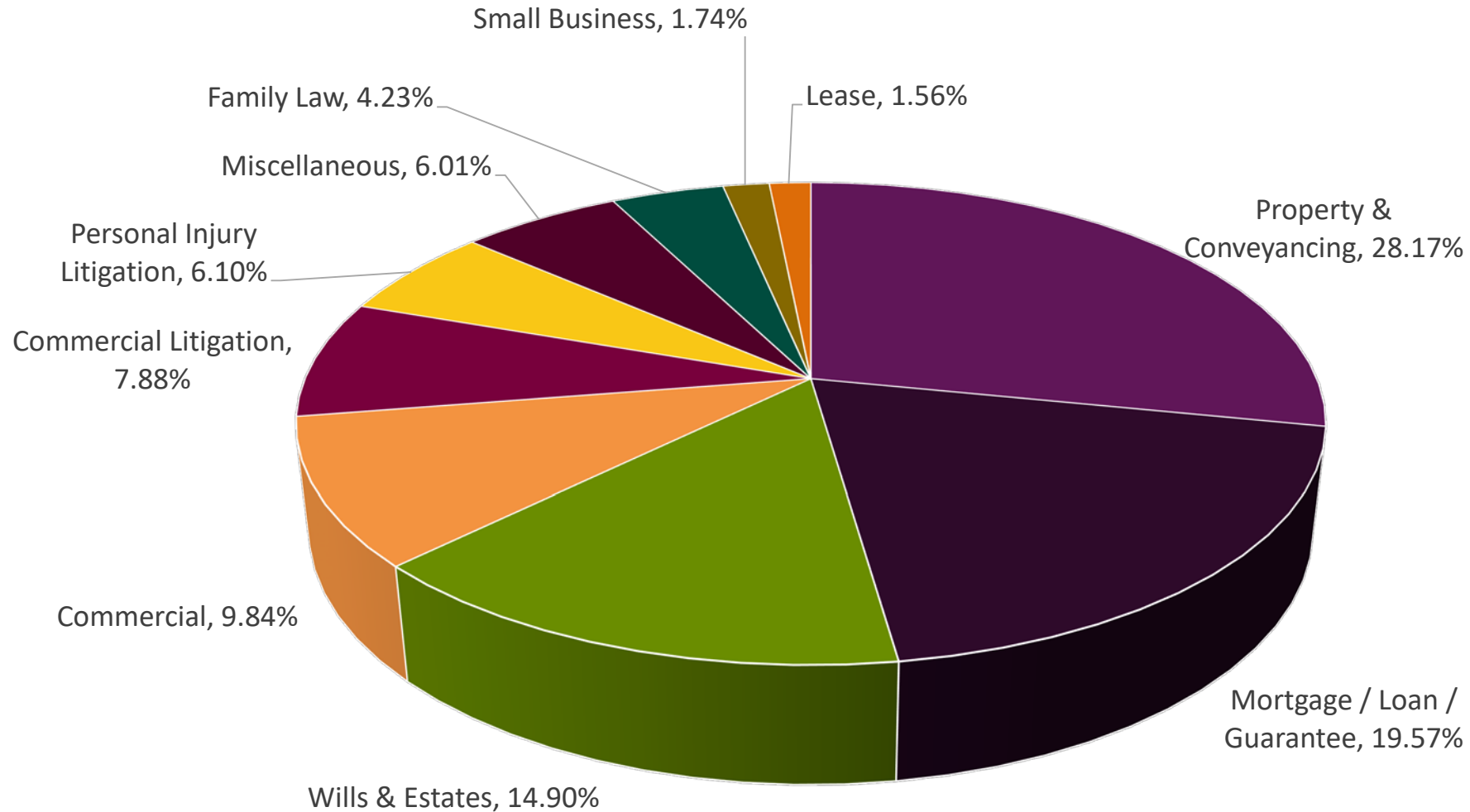
# Warning – conflict and nomination

## Zoom poll

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

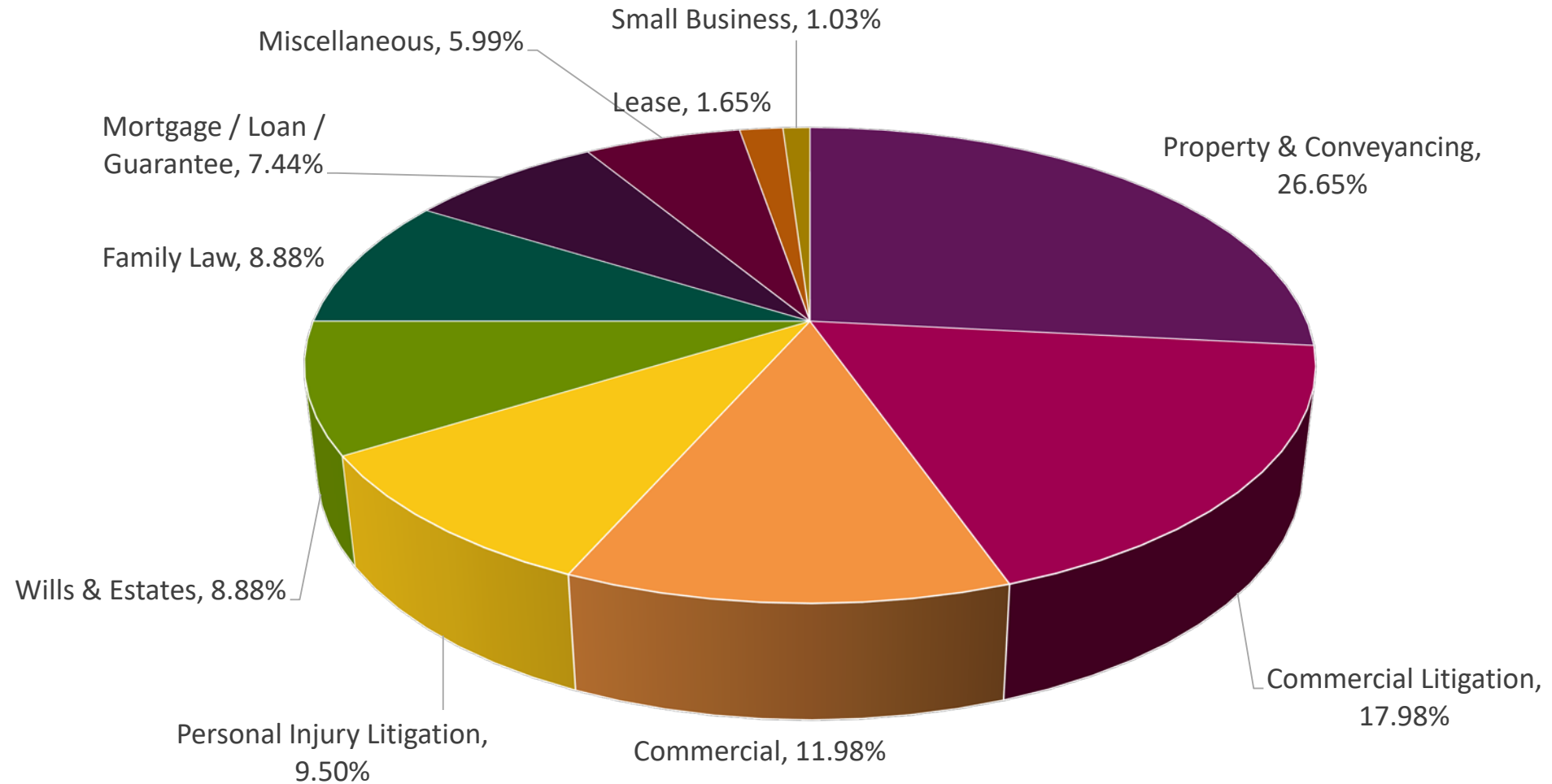
- Check whether they are related or are associates.
- Check whether their interests are the same.
- Obtain consent to act for both.
- Not act for the nominee.

# Claims data - cost of claims 2019-20





# Claims data - - number of claims 2019-20



# Due diligence - introduction

## Zoom poll

Which of the following is part of your usual due diligence when acting for a purchaser?

1. Google search.
2. Obtain relevant searches and certificates.
3. Go through the Consumer Affairs due diligence checklist with the purchaser.
4. All of the above.

## Due diligence – story time

### **Case - *Meier v Balbin* [2013] VCAT 57**

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

‘.....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]

## Due diligence – story time

### Examples of patent defects



# Due diligence – Consumer Affairs Victoria due diligence checklist

## Tip

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

S.33B of the *Sale of Land Act* 1962 (Vic)



## Due diligence checklist

### What you need to know before buying a residential property

Before you buy a home, you should be aware of a range of issues that may affect that property and impose restrictions or obligations on you, if you buy it. This checklist aims to help you identify whether any of these issues will affect you. The questions are a starting point only and you may need to seek professional advice to answer some of them. You can find links to organisations and web pages that can help you learn more, by visiting the [Due diligence checklist page on the Consumer Affairs Victoria website](https://consumer.vic.gov.au/duediligencechecklist) (consumer.vic.gov.au/duediligencechecklist).

### Urban living

#### Moving to the inner city?

High density areas are attractive for their entertainment and service areas, but these activities create increased traffic as well as noise and odours from businesses and people. Familiarising yourself with the character of the area will give you a balanced understanding of what to expect.

#### Is the property subject to an owners corporation?

If the property is part of a subdivision with common property such as driveways or grounds, it may be subject to an owners corporation. You may be required to pay fees and follow rules that restrict what you can do on your property, such as a ban on pet ownership.



## Due diligence - vendor limited disclosure obligations

Purchaser clients need to understand that the vendor has only limited section 32 disclosure obligations.



Dispute with neighbour

Dust from unsealed country road



# Due diligence - vendor limited disclosure obligations - contamination

**Case - *McLennon v Clapham and others* [2019] ACTSC**



## Due diligence - vendor disclosure and section 12(d) of the *Sale of Land Act 1962*

Any person who, with the intention of inducing any person to buy any land—

(d) makes or publishes any statement promise or forecast which he knows to be misleading or deceptive or fraudulently knowingly conceals any material facts or recklessly makes any statement or forecast which is misleading or deceptive;

shall be guilty of an offence against this Act and shall for every such offence be liable to a penalty of not more than 50 penalty units or to imprisonment for a term of not more than twelve months.

# Due diligence - vendor disclosure and section 12(d) of the *Sale of Land Act 1962*

## Zoom poll

Which of the following is a material fact?

- Water damage from a bath which flooded.
- Front fence damage from a motor vehicle collision.
- Suicide.
- Drug laboratory.



# Due diligence - vendor disclosure and section 12(d) of the *Sale of Land Act 1962*





## Due diligence – latent defect vs. patent defect



Latent defect



Patent defect

## Due diligence – latent defect vs. patent defect

Case - *De Lutis v Housing Guarantee Fund Ltd* [2004] VCAT 2544

‘.....Where however I buy at auction a property that has a defect so patent that it must reasonably be supposed that it would have been known to the parties bidding at the auction then the price that I pay must be expected to represent the value of the house in its apparent state that is, with the patent defect; in this case, the blemishes caused by the rust spotting. Of course, as was pointed out in Cameron's case, this argument holds only for patent defects that must be presumed to be already reflected in the price paid by the purchaser.....’

# Due diligence - defect in title vs. defect in quality

## Zoom poll

- Which of the following is a defect in title?
- Failure to disclose a restrictive covenant.
- Termites in floors bearers and wall frame.
- Goods included in sale damaged after sale but before settlement.

# Due diligence - defect in quality vs. defect in title

Defect in title



Defect in quality





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10 minutes leg stretch





## Other critical issues - GC 21- building report

### Background

General condition 21 states that the right to terminate only arises where the report discloses any 'major building defect' in the structure. It follows that a purchaser needs to know what a major building defect is.



Opal tower Sydney

## Other critical issues - GC 21 - building report

### Zoom

Which of the following are 'major building defects'?

- Drainage problems and corrosion in support columns.
- Failure to provide weather strips to cladding joints.
- Lack of support under box gutters.



Opal tower Sydney

## Other critical issues - GC 21 - case

*Clarke v Mariotis* [2009] VSC 279

3A Braeside Avenue, Camberwell

Drainage problems and corrosion in columns classified as major structural defects.



## Other critical issues - referring clients to other experts

- Valuer
- Land surveyor
- Insurer / broker
- Town planner
- Building practitioner
- Barrister



## Other critical issues – GC 7 – identity of land

- 7.1 An omission or mistake in the description of the property or any deficiency in the area, description or measurements of the land does not invalidate the sale.
- 7.2 The purchaser may not:
  - (a) make any objection or claim for compensation for any alleged misdescription of the property or any deficiency in its area or measurements; or
  - (b) require the vendor to amend title or pay any cost of amending title.



## Other critical issues – GC 7 – identity of land

### The land

Case - *Wollert Epping  
Developments Pty Ltd v  
Batten* [2019] VSC 618

405 Epping Road, Wollert



# Other critical issues

## The buildings

- Any illegal works
- Any owner builder works
- Inspection report

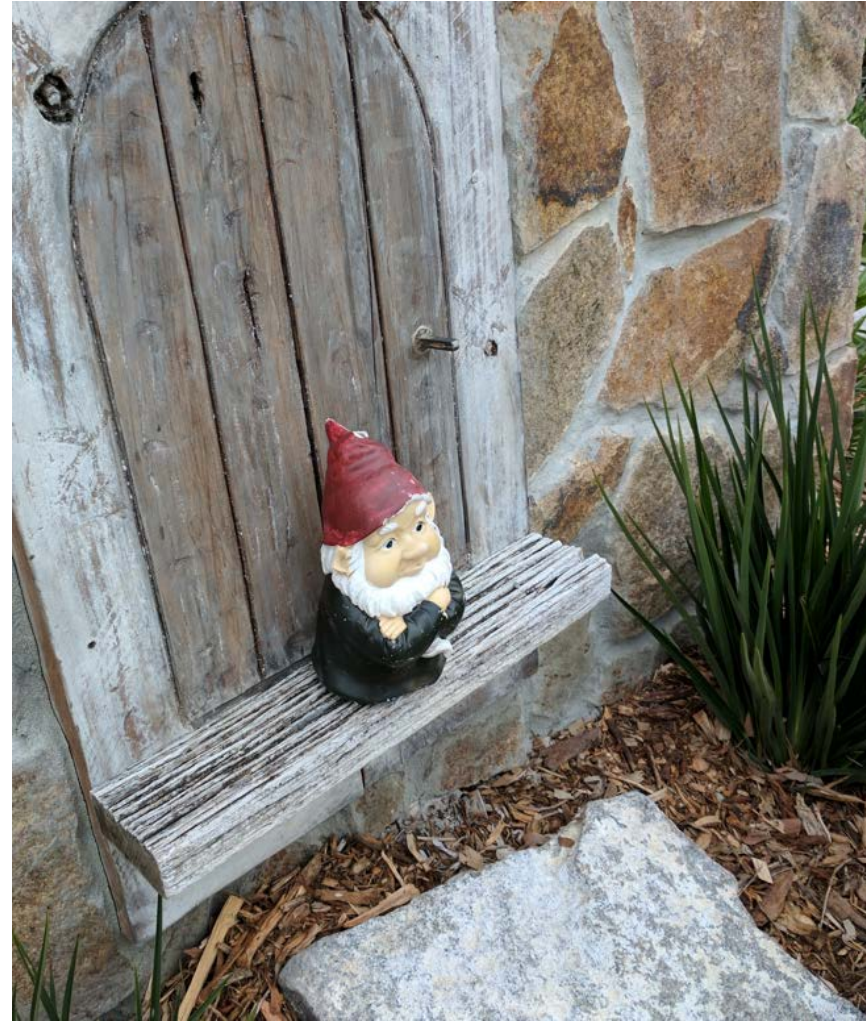




# Other critical issues

## Intended use

- Restrictions in section 32 statement
- Planning restrictions



# Checklists

## Key Risk Checklist



### Purchase of land - questions for the purchaser

#### Responses required without delay

- ☐ Circle yes or no as applicable.
- ☐ Provide the additional information as indicated.
- ☐ If you do not know the answer or are unable to provide the additional information please insert the words 'not known'.
- ☐ Please sign where indicated at the foot of the final page and forward this completed list and all necessary information to the sender.

Question	Answer
Title	
1. Who is to be registered on the title(s) to the land?	Insert details: ..... ABN:.....share..... ..... ABN:.....share.....
If more than one person how do you want to be recorded as owners?	..... ABN:.....share.....
<input type="checkbox"/> Joint proprietors – on death property goes automatically to other joint proprietor(s).	
<input type="checkbox"/> Tenants in common – on death share in property forms part of deceased's estate.	If tenants in common please advise the share to be held by each person. Consider issues such as: <ul style="list-style-type: none"><li>• amount paid in cash by each person</li><li>• liability for repayment of any debt / expenses</li><li>• contributions by third parties ie parents</li><li>• entitlement to equity</li><li>• amount to be paid on sale</li></ul>
If they are not named in the contract we will need to do a nomination. Nomination must occur without delay to avoid double duty.	
Proof of identity is required in accordance with the <a href="#">Model Participation Rules</a> issued by ARNECC for anyone who is to be registered on title.	

## PURCHASER CHECKLIST POST CONTRACT



Property address:

Our ref:

Settlement date:

Purchaser Client / Client contact:

Client email:

Phone:

Mob:

Vendor:

Vendor's legal rep:

Phone:

Mortgagee details:

Phone:

SEE PURCHASER PRE-CONTRACT CHECKLIST FOR ITEMS 1 TO 8			
9	9.1	Provide written advice to client re items 2 and 3 in Purchaser Pre-Contract Checklist	<input type="checkbox"/>
	9.2	Record important dates in your diary	<input type="checkbox"/>
10	10.1	Obtain title search and apply for rating certificates/ updates (if required)	<input type="checkbox"/>
	10.2	Check with client if any Nomination proposed: Nominee: Name: ..... Nominee Address: .....	<input type="checkbox"/> Yes <input type="checkbox"/> No
	10.3	Prepare Nomination and Sub-sales Statutory Declaration form	<input type="checkbox"/> Yes <input type="checkbox"/> No
11	11.1	Principal Place of Residence (PPR)	<input type="checkbox"/> Yes <input type="checkbox"/> No
	11.2	Prepare PPR form (if applicable)	<input type="checkbox"/>
12		Prepare and lodge caveat	<input type="checkbox"/> Yes <input type="checkbox"/> No - Lodged: ..... Dealing No: .....
13		Prepare and submit requisitions on title to vendor's legal representative (if applicable)	<input type="checkbox"/> Yes - Date submitted: ..... <input type="checkbox"/> N/A (new contract)
14		Section 27 release of deposit -	
	14.1	If received, send to client for signing or object if not satisfactory	<input type="checkbox"/> Date sent to client: ..... Date to object (28 days from receipt) .....
	14.2	Signed section 27 received from client - send to vendor's legal representative	<input type="checkbox"/> Date sent: .....
15		Transfer of land	<input type="checkbox"/> Joint proprietors <input type="checkbox"/> Tenants in common <input type="checkbox"/> N/A
	15.1	Prepare and explain to client	<input type="checkbox"/> Equal shares - 50/50 or <input type="checkbox"/> Proportions - .....
	15.2	Received from client and forwarded to vendor's legal representative	<input type="checkbox"/> Date sent to client: ..... <input type="checkbox"/> Date sent to vendor's legal rep: .....
16		Mortgage	
	16.1	Contact mortgagee and provide copy documents	<input type="checkbox"/> Date: .....
	16.2	Check with mortgagee - mortgage documents returned, insurance arranged and ready to settle	<input type="checkbox"/>



# Checklists

LPLC regularly updates the conveyancing checklists so routinely compare the one you are using to the LPLC checklist.

One recent change is to include a question about flammable cladding.

See question 24.



Lacrosse - 673 La Trobe Street, Docklands



# Checklists

## Zoom poll

Do you use a checklist to obtain information from your purchaser clients?

Yes

No

## Checklists - 5 questions to ask yourself

1. Is the vendor entitled to sell the property?
2. Have I given my advice in writing to the purchaser?
3. How much will I charge?
4. Will the settlement funds be safe?

## Checklists - 5 questions to ask yourself

### 5. Have I lodged a caveat?

There seems to be a number of approaches to lodging a caveat.

#### Zoom poll

What is your preferred approach to lodging a caveat?

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

## Design and use your own standard file notes

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

	File Note	File Note	File Note	File Note
e Note				

Date:	Start time:	End time:	Author:
Attendee (client):			File no.:
Conflict considered if more than one client	Same interest in the transaction? Same assets or value of assets at risk?		
Interpreter name: Or reason why not			
Interpreter address:			
Documents reviewed			
Lender			
Borrower(s)			
Mortgagor(s)			
Guarantor(s)			
Purpose of the loan			
Loan amount	\$		
Interest rate	%	Penalty rate	% payable
Security description Vol/folio or address			

- ☐ 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 the documents referred to above.

# File notes - recommendation

Use the latest technology





## File notes – guidance from cases

*Kermani v Gaylard & Ors* [2011] VSC 46 the following comment is made about the reason for making good file notes:

‘.....I consider it is unlikely that he would have a clear recollection of the specifics or substance of what was discussed and what advice he gave, without the benefit of a written record.....’ [106]

*Renard & Geach* [2013] FCCA 617:

‘.....A lawyer should always make clear and contemporaneous notes of any advice given to a client, and for exactly the reason that has led to this litigation – that is, to support any assertion that such advice has been given and to refute any assertion that it has not.....’  
[79]

## Key takeaways and conclusion

- 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 so you know when to refer the purchaser to an appropriate expert.
- Use a checklist to obtain necessary information from the purchaser.
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