

# CONVEYANCING SERIES 2020

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COMMITTEE



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# Contract of sale tune-up

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## Quote

*Sell your cleverness and buy bewilderment.*

- Rumi

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## Introduction

Conveyancing claims were approximately 27 per cent of all claims in the last policy year and are estimated to cost \$12 million. A number of these claims are due to errors in contracts of sale of land.

One of the frustrations for LPLC is the repetition of common mistakes made by practitioners in conveyancing matters including errors in contracts.

One trend of concern has been a regular number of claims every year arising out of conflict of interest. Most of these claims come from smaller practices acting in property matters.

In addition to contracts of sale of land received where there is a claim, LPLC regularly receives contracts from practitioners who have a risk management question. Sometimes the question is about their own contract and others are about contracts prepared by another law firm or a conveyancer.

Most reviewed contracts contained a number of special conditions. For example, about CGT clearance certificates and GST withholding. Some of the special conditions amended the general conditions.

The material in this handout is based on all of this information.

Before we consider the claims and risk management issues, the first section of this handout contains a number of warnings considered relevant when dealing with contracts of sale relating to:

- scams involving contracts of sale
- seller advocates
- conflict
- no contract, and/or no section 32 statement
- sale subject to lease.

The remainder of this handout contains details of claims and risk management measures. The information appears in the same order as they appear in the contract of sale:

- signing
- cooling off
- particulars of sale
- general conditions
- special conditions.

### **Important announcement**

Remember to regularly review your standard contract of sale. Things to check include typos and amendments required because of changes in the law.

## Warnings

### Scams involving contracts of sale

When acting in a conveyancing transaction you need to be alert for potential scams which may impact on the firm and clients.

This is especially important when acting for a vendor who is to receive funds at settlement.

Warning bells should go off where you did not act for the vendor when they purchased the property, the vendor is interstate or overseas and/or the vendor is only contactable by email.

#### Example

In one scam doing the rounds a lawyer receives an email from a person looking to sell their property.

The lawyer is asked to click on unsafe hyperlinks or open attachments to view further details.

The purpose of this email is to introduce malware to your computer or trick you into visiting a fake login page where you are asked to enter your username and password details.

Once an email account is compromised, cyber-criminals have numerous techniques and tools at their disposal to obtain all of your passwords which may enable access to online accounts.

#### Risk management tip

Consider including this wording in written communications with clients:

*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.*

#### Your comments

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## Seller advocates

Most practitioners would be aware of the use of buyer advocates.

Did you know vendors sometimes engage seller advocates to assist the vendor with the sale of their property? The advocate would usually provide a list of preferred agents and lawyers.

Seller advocates will liaise with the selling agent and vendor's lawyer.

It has been reported that a seller advocate provided a lawyer with a list of special conditions to be included in the contract of sale.

One of those special conditions provides that the vendor may terminate the contract at any time prior to settlement in the event the vendor receives a better offer.

### Question

What issues would you raise with your client about the use of this special condition?

### Your comments

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## Conflict

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 identify any potential conflict when acting for a vendor in a conveyancing matter?

### Your comments

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When dealing with any potential conflict, the following three issues should be considered;

**1. Who is my client?**

Sometimes it takes a bit of detective work to determine who the client is.

**Example**

A title search discloses that an individual person is the registered proprietor.

However, the land tax certificate obtained for the section 32 statement refers to a trust.

In this example, you need to determine whether the registered proprietor is also a trustee of the trust and whether there are any other trustees.

Some of your detective work would include asking the client for their ABN to see if an ABN search also refers to the same trust.

Once the client is identified, it may then be necessary to determine who has the authority to instruct you.

**Example**

A title search discloses that a company is the registered proprietor.

You obtain a company search and it discloses that there are multiple directors and secretaries.

The person who provides instructions is the general manager of the company and the company has a board who oversees the running of the company.

**Question**

Who should you take instructions from?

**Your comments**

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## Example

A corporate attorney instructs you to sell a property owned by the company.

## Action

Verifying their authority would include examining the power of attorney.

Once the client is identified, other issues to check include the client's capacity and their right to deal.

Sometimes it is also necessary to check that the person instructing you has authority.

## Further information about right to deal

Refer to the ARNECC Model Participation Rules Guidance Note no. 4, [https://www.arnecc.gov.au/\\_data/assets/pdf\\_file/0012/698961/MPR-Guidance-Note6-Compliance-Examinations.pdf](https://www.arnecc.gov.au/_data/assets/pdf_file/0012/698961/MPR-Guidance-Note6-Compliance-Examinations.pdf), which provides that:

*'.....Verifying right to deal will require you to sight supporting evidence that includes the name of the person whose right to deal is being verified and the property or transaction details. The supporting evidence should allow you to link the registered interest holder or transacting party to the land.....'*

An example is an original council rates notice showing the name of the registered proprietor on the notice.

## 2. Am I acting for more than one client?

Multiple client/vendor situations may include acting for:

- **Selling agent and vendor**

This sort of situation is unusual but usually arises where the vendor or a relative of the vendor is a director or employee of the selling agent.

The conflict arises where there is a dispute about payment of commission and the agent alleges that the practitioner was also acting for the agent and given this the practitioner must cease acting for the vendor.

- **Vendor and purchaser**

## Warning

Note the prohibition against acting for vendor and purchaser in s.29W of the *Sale of Land Act 1962* (Vic).

*'.....A legal practitioner or conveyancer whose principal place of business is within a 50 kilometre radius of the intersection of Elizabeth and Bourke Streets in Melbourne must not act for both vendor and purchaser under a terms contract.....'*

- **Company and shareholder**
- **Trustee and beneficiary**
- **Vendor and mortgage**

- **Executor and beneficiary**
- **Attorney and donor**

**Your comments**

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**Beware the ‘implied retainer’**

A related issue is to consider the need to tell anyone who is not your client, that you do not act for them.

This is to avoid the situation of a non-client misunderstanding your role and thinking that you act for them. In some claims we have seen the non-client allege there was an implied retainer.

**Example**

You act for an executor. The sole asset of the estate is the deceased’s principal place.

The executor is the eldest of three children of the deceased.

The will provides that the net proceeds of the sale of the house are to be paid equally to the three children.

During the conveyance you have a number of conversations with each of the three beneficiaries about the conveyancing process and distribution of the proceeds.

In one of those conversations one of the children tells you that they cared for the deceased for the 10 years prior to his death and they feel they should get more than the other two.

You tell them they should seek their own advice about this issue.

After the assets are distributed this beneficiary finds out from a friend that they should have brought a claim against the estate as they were an eligible person as set out in the *Administration and Probate Act 1958 (Vic)*. They contact you and ask you why you did not tell them about this possible claim.

You remind them that you told them, to seek their own advice. They don’t recall this conversation.

About 4 months later you get notice of a complaint to the Legal Service Board alleging you had an implied retainer and failed to advise, acted in conflict and favoured the other two beneficiaries to the detriment of the complainant.

### 3. Comply with rule 11

Note rule 11 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* about conflict.

#### Question

What do you do to ensure clients have given informed consent in accordance with rule 11.3?

11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor or law practice may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

11.3.1 is aware that the solicitor or law practice is also acting for another client, and

11.3.2 has given informed consent to the solicitor or law practice so acting.

#### Your comments

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#### Conflict resources

LIV conflict of interest guidelines 15 September 2016

NSW Law Society FAQs - Professional ethics, tactics and communications with clients

Lawyers' Professional Responsibility by G E Dal Pont Lawbook Co. 2013

#### No contract and/or no section 32 statement

It is not unusual in some transfers of property for there to be no contract and no section 32 statement.

This sometimes happens where the parties are related or in agreement about the transfer and the parties have decided that it is just a simple transfer and no contract or section 32 statement is necessary.

Experienced practitioners know these sorts of transfers are anything but simple and should be treated no differently to an arm's length conveyance.

One practitioner told LPLC that the way they deal with clients who believe related party transfers are simple is to give them a list of issues which need to be addressed.

This list includes items such as duty payable, capital gains tax, notification to various authorities and dealing with any mortgage on title.

## Exercise

### Background

You act for one of two beneficiaries. Your client and her brother are in dispute over two properties owned by them as tenants in common in equal shares with their recently deceased father.

As no agreement could be reached with the brother, your client made application to VCAT for the sale of two properties.

At the direction of VCAT a mediation was held, and the parties reached terms of settlement which provided that one property was to be transferred to your client and the other property to the brother.

### Question

Which documents would you prepare to effect the change in ownership?

### Your comments

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### Further comments

Dealing with a client who wants a simple transfer is the subject of our blog 'It's just a transfer of land'.

You can find our blog here <https://lplc.com.au/blog/just-transfer-land/>

In addition to the reasons stated above, another reason a contract may be required is for tax purposes.

### Example

When transferring commercial premises subject to a lease the going concern exemption will not apply unless the parties agree in writing.

This is usually documented in the contract of sale.

Failing to prepare a contract of sale may result in this requirement being overlooked.

Having a contract will probably make it simpler to satisfy the ATO requirements when providing evidence of a CGT event, including, price and date of disposal of the asset.

### Relevant case

In relation to the need to have a section 32 statement note the comments in *Snapper Holdings Pty Ltd v Lentini* [2018] VSC 800:

The statement is made in this case that:

*It is clear that the lack of a vendor's statement does not automatically render the Terms void, but rather makes the Terms voidable. Furthermore, a purchaser's right to rescission as prescribed in s 32K is not automatically invoked; the section makes clear that a purchaser may rescind a contract.*

In this case no section 32 statement was given.

**Your comments**

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**Sale subject to a lease**

Consider how often does a client sell a property where there is an existing tenant and either the contract:

1. provides for vacant possession at settlement and the vendor will terminate the lease before settlement by giving the tenant the appropriate notice; or
2. is entered into on the basis that the lease will continue after settlement and the purchaser is entitled to receipt of the rents and profits.

**Issue to consider**

Where a property is leased and given the moratorium, is it possible for the vendor to provide vacant possession?

**Possible solutions**

Consider including in the contract a condition that settlement will take place on the later of 30/60/90 days or 14 days from written notice that the tenant has vacated.

**Your comments**

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## Contract of sale of real estate issues

### Signing

In some claims one issue to be dealt with was the way a contract was signed.

The most common situation is where a contract of sale is signed by an attorney and it is subsequently discovered that the power of attorney was not valid.

The affected party may look to blame their lawyer for failing to check that the power was valid.

Other issues about signing include:

- authority to sign for a company
- authority to sign for a trust.

### Question

Do you rely on section 126 or section 127 of the *Corporations Act 2001* (Cwlth) in relation to the signing of a contract of sale?

### Your comments

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### S.126

*A company's power to make, vary, ratify or discharge a contract may be exercised by an individual acting with the company's express or implied authority and on behalf of the company. The power may be exercised without using a common seal.*

### S.127

*A company may execute a document..... if the document is signed by:*

- (a) *2 directors of the company; or*
- (b) *a director and a company secretary of the company; or*
- (c) *for a proprietary company that has a sole director who is also the sole company secretary--that director.*

The most recent case about authority to sign is *Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corporation* [2020] NSWCA 144.

### Did you know?

The standard REIV appointment of selling agent contains a clause enabling the selling agent to sign the contract of sale on behalf of the vendor.

## Cooling-off - wrong notice

In some contracts seen by LPLC the practitioner acting for the vendor has used an old form of contract.

As a result, statutory changes have not been made to the contract. We have seen the same with section 32 statements.

Sometimes the error is not picked up for many years.

One contract seen recently contained the pre-2010 form of cooling off notice.

The wording for the cooling off notice was amended pursuant to the *Consumer Affairs Legislation Amendment (Reform) Act 2010 (Vic)* (Act) whereby section 31(5)(e) of the Sale of Land Act was repealed.

This section stated that the cooling off did not apply where:

(e) the purchaser has sought and received independent advice from a legal practitioner before signing the contract.

The consequences of not keeping up with legislative changes and/or using old forms can be devastating for a vendor given section 31(7) provides that:

*'Where a contract to which this section applies does not contain the notice required by subsection (6) the purchaser may rescind that contract at any time before he becomes entitled to possession or to the receipt of rents and profit.'*

### Lesson

Regularly review your standard contract of sale to ensure it is up to date.

## Particulars of sale mistakes

### Identity of the vendor

Mistakes in relation to the description of the vendor include:

- listing the name of a trust as the vendor

For example, "The Smith SMSF Trust No.1" is shown as the vendor in the particulars of sale.

In this example, the trustee(s) should be shown in the particulars of sale as the vendor. This may or may not include the further wording referencing the trust. Of course, the details should match those on the title.

For more information about this issue see the article by Russell Cocks: Putting our trust in property (LIJ November 2006 p.80).

- listing a business name as the vendor
- not all registered proprietors are listed as vendors.

This is sometimes due to an oversight. Other times, it may be that the name of the vendor in the particulars of sale are correct but do not accord with the title.

### Example

Two parties are registered on title as joint proprietors.

One owner transfers their interest to the other based on advice from their accountant.

Before the transfer is registered, again based on advice from their accountant to off-set losses against capital gains, the transferee instructs a practitioner to prepare a contract, in the name of the transferee, for the sale of the property.

### Question

How would you deal with this in the contract of sale?

### Your comments

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### Some issues to consider

The possibility that there may be a delay in having the head transfer registered.

Including a special condition in the contract dealing with the head transfer noting that you can no longer have a directing party in a transfer of land form.

Any evidence required pursuant to s.32I of the *Sale of Land Act* of the right to sell the land.

### GST

LPLC receives a number of claims every year about GST. In some claims we have seen errors in the particulars of sale in relation to GST.

This is sometimes because there has been a misunderstanding about the client's GST position. Other times this is due to an oversight.

### Example - plus plus GST

In one GST claim a practitioner was instructed to act in the sale of a café. The property was subject to a month to month tenancy. None of the GST boxes were completed in the contract of sale which meant the sale was GST inclusive.

Just prior to settlement the client complained to the practitioner that they expected to receive GST in addition to the price. Settlement was affected on the basis of the vendor reserving their rights about payment of GST.



The client's view was that the practitioner should have raised any GST issues with them and explained the effect of the contract prior to the client signing.

The matter eventually settled with a substantial payment to the vendor client.

In other claims the words 'margin scheme' or 'going concern' have not been inserted in the particulars of sale.

### Relevant case

The case of *A & A Property Developers Pty Ltd v MCCA Asset Management Ltd* [2017] VSCA 365 is an example of an oversight which may result in a claim.

This case concerned the interpretation of a contract of sale for 42 Grant Crescent, Ringwood.

'GST' was inserted in the relevant box in the particulars of sale instead of 'plus GST' as required by general condition 13.

At first instance the court considered pre and post contractual discussions, but they did not clarify the GST position and concluded that the contract price was GST inclusive.

The Court of Appeal overturned this decision and determined that the price was plus GST.

See at paragraph 51:

*'.....there is sufficient indication in the contract that the parties agreed to reverse the default allocation of the risk of liability for GST. I do not consider that the absence of the single word 'plus' precludes that conclusion.....'*

### Goods/chattels

In some claims a vendor has expressly instructed the practitioner that certain items are excluded from the sale but the goods are mistakenly included in the description of goods in the particulars of sale.

In one claim, the client wrote the list of exclusions in the practitioner's vendor checklist.

Unfortunately, this was overlooked in the preparation of the contract.

Some contracts seen by LPLC included fixtures in the list of goods included in the sale. This may be confusing to a vendor and purchaser.

The best practice is to:

- include only goods in the particulars of sale based on specific instructions from the vendor
- include a special condition listing any items which are specifically excluded
- alert the client to the situation where there may be some grey as to whether an item is a good or a fixture

- where there is any doubt as to whether an item is a fixture or a chattel also deal with this in your special conditions.

### Relevant case

An example of just such an item is a dishwasher which was one of the items in dispute in the case of *Farley v Hawkins & Ors* [1996] QCA 520.

Mrs Farley died very shortly after her marriage to her second husband.

In her will, Mrs Farley left her house and land to her children from her first marriage and her personal items i.e. chattels/goods to Mr Farley her second husband.

Mr Farley removed a dishwasher and shed from the land as he believed that they were chattels i.e. personal items left to him by Mrs Farley.

Mrs Farley's children disagreed; they believed that the shed and dishwasher were both fixtures and part of the land which they inherited from their mum.

### What do you think?

#### Your comments

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### Some land not included

In these sorts of claims some land which should have been included in the particulars of sale is overlooked.

This might occur because the vendor is an executor and not aware of the extra title(s).

This is sometimes combined with the situation where the executor and/or practitioner have made an assumption that all of the land being sold is in the one title.

Other claims have arisen where an accessory unit is overlooked and as a result not included in the particulars of sale.

### Example

Property purchased in 1984 and used as a principal place of residence.

In 1985 the owner replaced the rear fence with a new fence, outside -the title boundary, enabling the owner to take exclusive possession of half of a laneway which abutted the rear boundary of their property.

In 2001 the vendor obtained a title for that part of the lane which had been adversely possessed.

The vendor passed away in December 2018. Their property was subject to a mortgage to Westpac which had been repaid but the mortgage was never discharged.

The executor obtained the title for the property from Westpac and in accordance with the will arranged for the property to be sold.

The executor was not aware of the additional title, which had been left by the deceased in a shoe box under a cabinet.

### Question

What due diligence would you do to assist you to identify any additional land?

### Your comments

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## General conditions

### Vendor warranties – GC 2.1

Given that there is no longer a prescribed form of contract as the *Estate Agents (Contracts) Regulations 2008* (Vic) expired on 11 August 2018, the LIV has amended its form of contract by inserting the word 'former' before the reference to the regulations.

Other options

1. Re-write your contract to remove any reference to the regulations.
2. Insert a special condition stating that the regulations have lapsed.

### Nominee – GC 18 (now GC 4)

LPLC has seen numerous claims where a practitioner has failed to properly advise clients about any nomination issues. Most issues are where a practitioner is acting for a purchaser who nominates.

One issue to consider when acting for a vendor is the need to amend general condition 18 about nomination to include a requirement for any director of a corporate nominee to provide a guarantee and indemnity.

### Further information

For a case about the legal effect of nomination see *Rise Home Loans Pty Ltd v Dickinson & Anor* [2009] VSC 555.

[http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2009/555.html?stem=0&synonyms=0&query=title\(rise%20home%20loans%20\)&nocontext=1](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2009/555.html?stem=0&synonyms=0&query=title(rise%20home%20loans%20)&nocontext=1)

In this case the court rejected the submission that a nominee can be considered a party to the contract. Justice Mukhtar also rejected the assertion that there was a

novation of the contract in favour of the nominee where the nominee pays the balance of the purchase price.

Also see the article by Russell Cocks: Easy nominations 2008 82 (1 & 2) LIJ p. 82.

### Loss or damage before settlement – GC 24 (now GC 31)

Sometimes a dispute may arise as to the condition of goods at settlement compared to the condition they were in at the day of sale.

LPLC has seen claims where inadequate advice is given to either the vendor or purchaser about their rights pursuant to general condition 24.

When acting for a vendor this may mean that the vendor agrees to some of the purchase price being withheld until the dispute is settled but is not advised about the obligation on the purchaser to pay the same amount.

Other claims have arisen because there was no agreement reached at the time the money was withheld as to the terms of release.

Issues to consider include whether a vendor would prefer to delete general conditions 24.4 – 24.6 and ensuring the terms of the retention of funds include an agreed mechanism for releasing the funds.

#### Relevant case

GC 24 was considered in: *Patmore & 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.*

When might a contract for the sale of the land provide that the land does not remain at the risk of the vendor?

See general condition 24.1:

*'The vendor carries the risk of loss or damage to the property until settlement.'*

## Your comments

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## Relevant case

*Black Creek Deer Farm Pty Ltd v Australia and New Zealand Banking Group Limited*  
[1995] VSC 17

## Legislation

S.32F(a) – SL Act

## Point to note

When transferring the risk to the purchaser consider the need to delete general condition 24.1 and 24.2

## Special conditions

Issues seen in special conditions include:

### Misuse of LIV special conditions

In this situation a box is checked for a LIV special condition which should not have been checked and vice versa.

## Question

Do you delete the irrelevant LIV special conditions or leave them in but not check the relevant box?

## Your comments

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## ACL

Consider whether any terms breach the Australian Consumer Law. Note in particular s.23 and 24 of the ACL.

Refer to the article by William Rimmer 'Trojan Horses' LJ August 2016.

## Requisitions

Numerous contracts seen by LPLC made refer to requisitions.

General condition 2.2 removes the purchasers right to make requisitions.

This has been the position since the 2008 version of the LIV form of contract prescribed by the *Estate Agents (Contracts) Regulations 2008*. It follows that it is not necessary for special conditions to state that the purchaser will not make any requisitions.

## Priority notices

Most off the plan contracts seen by LPLC contained a special condition prohibiting the lodging of a caveat.

Consider the need to also prohibit lodging a priority notice.

## Typos

Typos are common and happen for various reasons. Numerous contracts of sale reviewed by LPLC contained typos.

Sometimes a typo can have a substantial impact on the meaning of the special conditions.

Attention to detail is the key to avoiding typos. Practically this includes:

- doing spelling and grammar check
- having someone else review
- avoiding late night drafting.

## Example

A special condition was inserted in a contract whereby the purchaser gave a warranty that they were an 'ordinary resident' instead of 'ordinarily resident' in relation to their foreign investment status.

In some special conditions dealing with foreigners, reference was made to the 'Foreign Acquisition and Takeovers Act 1975. The reference should be to 'Acquisitions'.

Special conditions referred to the incorrect year for legislation. A common one was 'Sale of Land Act 1958' instead of '1962'.

## Use of defined terms

Most contracts do not contain a dictionary.

Including a dictionary can save a lot of time and reduce the possibility of a typo.

For example, in some contracts a special condition referred to a 'sunset' date and included in this special condition was the sunset period. For example, 24 months.

We have seen claims where a change to the sunset date was overlooked.

Putting the sunset date at the start of the special conditions in a dictionary as defined terms probably gives a practitioner a better chance to identify the need to change the date.

In some contracts capital letters were used but the words were not defined. For example, 'Builder', 'Common Property'.

### Inadequate reference to legislation

Examples include referring to 'Building Legislation', 'Planning Laws', 'Statutory by-laws', 'Building Control Act'.

These terms were not defined and the risk with this sort of description is that a court or tribunal may find that the special condition is void for uncertainty.

### Relevant case

Here is an example of a case where a special condition came under scrutiny and failed the test of certainty. See *Silvanna Pty Ltd v Screecree Pty Ltd* (Civil Claims) [2016] VCAT 678.

The member in this case made the following comment about the special condition dealing with adjustments:

*In my view, the drafting of this clause is clumsy at best. What does "not being assessed separately" mean? Is it directly connected to the "larger area"? What is the "larger area"? Is it Lots 1 and 2 referred to in the assessment on the one plan of subdivision, or is it any and all of the property owned by the Vendor at a given point in time and taken into account in the proportional tax assessment?*

### Incorrect cross referencing

It is common for special conditions to reference other special conditions or general conditions in the contract of sale.

In some contracts the cross referencing was wrong. This was most likely due to the deletion of an unrelated special condition and automatic renumbering.

### Multiple words for the same thing

Some contracts referred to:

- land
- property
- lot number
- property sold
- property described in the particulars of sale.

Given 'land' is used in the particulars of sale, be consistent and use 'land' throughout your special conditions.

Another example is where the special conditions in the same contract randomly referred to:

- lawyer
- legal practitioner
- solicitor
- barrister and solicitor.

Given 'legal practitioner' is used in the particulars of sale, be consistent and use 'legal practitioner' throughout your special conditions.

Another minor issue was the use of 'goods' and 'chattels' throughout the same contract. This may be confusing for clients.

### Replacing the general conditions with special conditions

It is common to see special conditions amending the general conditions.

In some contracts reviewed by LPLC, general conditions were replaced with special conditions.

For example, general condition 13 about GST was replaced with a special condition.

Sometimes this was done for no apparent reason.

### Relevant case - *Cityrose Trading Pty Ltd v Booth & Anor* [2013] VSC 504

In this case the GST special condition was determined to be void for uncertainty and as a result the price was GST inclusive.

### Failure to deal with certain issues

In some claims the practitioner overlooked the need to include a special condition to deal with certain issues.

### Example

You act for a vendor selling a commercial office subject to a lease.

The tenant provided a security deposit by way of a bank guarantee equal to 6 months' rent.

Pursuant to the lease the tenant is responsible for payment of all council and water rates.

The vendor instructs you that they cannot find the original lease.

### Risk management tip

Consider the need to include a special condition in the contract dealing with any lease issues relating to:

- how adjustments are to be made
- how any bank guarantees will be dealt with, especially where it is a term of the lease that the tenant provide a replacement bank guarantee to a purchaser on the sale of the property





## New LIV contract August 2019

With the sunsetting of the prescribed form of contract in August 2018, the Law Institute Victoria (LIV) issued a new form of contract in August 2019.

Prior to this, in June 2018, the LIV made a minor amendment to the standard contract to refer to the 'former' prescribed form as a temporary measure.

### My question to you is:

Which form of contract are **you** using?

### Your comments

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## Preliminary issues

### Typos

#### Did you know?

The first print of the August 2019 contract contained a number of typos. For example, GC 13.1 referred to section **223** of the *Transfer of Land Act 1958*. This should have been section **23** of the *TLA*.

The LIV have since corrected the errors and re-issued the contract.

#### Action

Check the version of the contract which you are using to make sure it does not have this error. If it does have this error then you are not using the corrected version.

### Your comments

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### Is this an off-the-plan contract?

The contract contains off-the-plan warnings and refers to settlement 14 days after registration of the plan.

#### Question

What additional special conditions would you insert to make the contract an off-the-plan contract?

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### Auction contract

When using the contract for an auction, consider what general conditions you need to delete and the changes you need to make to the particulars of sale.

#### For example

Delete GC 20 about subject to finance.

Delete the reference to the 'Loan' in the particulars of sale.

#### Your comments

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#### Did you know?

The standard REIV appointment of selling agent contains a clause enabling the selling agent to sign the contract of sale on behalf of the vendor.

### Cooling-off wording change

In the new LIV form the wording of the cooling-off notice has been changed to align with s.31.

#### Action

Check the wording of the cooling-off notice in your contract of sale against the wording in the LIV August 2019 contract.

Here is the amended wording:

### IMPORTANT NOTICE TO PURCHASERS – COOLING-OFF

**Cooling-off period** (Section 31 of the *Sale of Land Act 1962*)

You may end this contract within 3 clear business days of the day that you sign the contract if none of the exceptions listed below applies to you.

You must either give the vendor or the vendor's agent **written** notice that you are ending the contract or leave the notice at the address of the vendor or the vendor's agent to end this contract within this time in accordance with this cooling-off provision.

You are entitled to a refund of all the money you paid EXCEPT for \$100 or 0.2% of the purchase price (whichever is more) if you end the contract in this way.

**EXCEPTIONS:** the 3-day cooling-off period does not apply if:

- you bought the property at a publicly advertised auction or on the day on which the auction was held; or
- you bought the land within 3 clear business days before a publicly advertised auction was to be held; or
- you bought the land within 3 clear business days after a publicly advertised auction was held; or
- the property is used primarily for industrial or commercial purposes; or
- the property is more than 20 hectares in size and is used primarily for farming; or
- you and the vendor previously signed a contract for the sale of the same land in substantially the same terms; or
- you are an estate agent or a corporate body.

### Purchaser's estate agent – particulars of sale

I expect that this addition was made at the request of REIV.

#### Question

Do you think it's necessary to include this informaton in the particulars of sale?

#### Your comments

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#### Case of interest

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

***Doerrenberg and Gauci v Prime Estate Pty Ltd [2017] VACT 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....' See at paragraph 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 that 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.

### Vendor warranties – GC 6.1

GC 6.1 states that:

*The vendor warrants that these general conditions 1 to 35 are identical to the general conditions 1 to 35 in the form of contract of sale of land published by the Law Institute of Victoria Limited and the Real Estate Institute of Victoria Ltd in th emonth and year set out in the header of this page.*

Make sure that you amend and/or delete the warranty in GC 6.1 whenever you change the standard form. You will have noted that GC 6.1 covers more than the warranty in the former GC 2.1 simply because August 2019 contract consolidates all of the general conditions and all of the LIV special conditions from June 2018.

### Identity of land – GC 7

GC 7 states that:

- 7.1 An omission or mistake in the description 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 the 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.

#### Did you know?

GC 7 was recently considered by the Supreme Court in the 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.

#### Relevant article

Measurement discrepancies by Russell Cocks LIJ December 2019

#### Your comments

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## Loan – particulars of sale and GC 20

The LIV has maintained the reference to any loan in the particulars of sale which needs to be completed where the sale is subject to finance.

### What has changed?

Some additional wording has been added to GC 20 (formerly GC 14). In addition to giving notice to terminate if finance is not approved a purchaser must also provide:

‘.....written evidence of rejection or non-approval of the loan.....’

### Question

What evidence will you ask your purchaser client to provide?

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### Risk management tip

Consider including additional wording in your retainer letter to the client, telling the client to:

‘.....Please keep us updated about your progress in obtaining your loan. You should make application immediately.

The contract places an onus on you to expressly notify the vendor in writing to terminate the contract if finance is not approved within the period allowed.

You must also provide the vendor with evidence that you have complied with your obligations under the contract to apply for finance.

If the notice and evidence are not given by the due date specified in the particulars of sale, the contract automatically becomes unconditional.

You should diarise important dates as specified in the contract including the due date for finance.....’

### Your comments

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In claims about subject to finance issues, purchaser clients usually complain that the practitioner failed to advise on the meaning and effect of the subject to terminate the contract within the specified time.

Conditional clauses, like 'subject to finance' continue to catch purchasers and their practitioners out.

For subject to finance clauses there are some common errors.

- The practitioner and/or the client fail to realise the pre-approval letter from the financial institution is not a final approval and is conditional on a valuation. When the valuation is obtained it is too low for the purchaser's needs but by then the contract has become unconditional.
- The practitioner and/or client do not realise the amount approved for finance is less than required.
- The client is not given sufficient warning by their practitioner of the requirement to notify the vendor in writing by a specified time if finance cannot be obtained, and the consequence of not doing so.
- Delays occur in seeking an extension of time for finance approval or notifying that no finance was obtained, usually caused by oversight or administrative errors.

### Examples of claims

#### Client not warned

The purchaser's practitioner wrote to the client soon after receiving instructions relating to the purchase and informed him of the date by which finance needed to be approved. The practitioner also asked the client to notify the practitioner if finance had been approved by the required date. He did not warn the client of the consequences of not providing the information in time. The client appeared to be relatively sophisticated and the practitioner assumed the client knew the consequences.

When the approval letter was received, it was for less than the client required and subject to valuation. The client did not tell the practitioner until sometime after the approval date. The client alleged he thought if he could not get finance, the contract was automatically avoided. He says he did not realise the vendor had to be notified by a certain date in order to avoid the contract.

#### Client doing some of the negotiating

The purchaser's bank was not prepared to lend the purchaser the amount he needed because the valuation was less than the purchaser had agreed to pay. While the purchaser's practitioner was negotiating with the vendor's practitioner about when the 'subject to finance' clause expired and an extension, the purchaser simply spoke directly with the vendor and arranged an extension of time to obtain another valuation. The purchaser's practitioner was told of the oral extension by his client but did not confirm it in writing.

When the purchaser received the second valuation he decided to avoid the contract but the vendor said the extension was only to allow the purchaser to make an application for finance from a specific bank and the contract had now become

unconditional.

The purchaser's practitioner was blamed for not having told the client to avoid the contract when the first approval date was looming and for not confirming the extension date in writing. It could be said the client was very bossy, wanting to do his own negotiations and the practitioner let himself be pushed around.

### Risk management tip

When a contract has a 'subject to finance' clause a number of things need to occur.

- Write to your purchaser client immediately on receipt of the contract setting out clearly the date by which finance must be obtained. Spell out the consequences if the vendor is not notified in time that finance has not been obtained.
- Confirm with the client any approval that receive is in writing, is final and not conditional, and is for an amount sufficient for their needs. Where time permits, ask the client to give you a copy of the letter of approval for finance and ensure you check these points.
- If the approval is unconditional, seek instructions to request an extension of time until the conditions have been met.
- 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.
- When time is about to expire, pay careful attention to requests for extensions or notification that the contract is at an end. Take steps to ensure letters dictated are actually typed and sent or faxes or emails are sent to the correct person/places.

For more information, see the LPLC blogs:

On the subject of finance – Part 1

<https://lplc.com.au/blog/on-the-subject-of-finance-part-1/>

On the subject of finance – Part 2

<https://lplc.com.au/blog/subject-finance-part-2/>

Not so perfect putt

<https://lplc.com.au/blog/perfect-putt/>

### Your comments

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## Nomination – GC 4

Most contracts I have reviewed whilst working at LPLC include an amendment to general condition 4 (previously GC 18) about nomination to include a requirement for any director of a corporate purchaser or nominee to provide a guarantee and indemnity.

For a case about the legal effect of nomination, see *Rise Home Loans Pty Ltd v Dickinson & Anor* [2009] VSC 555, available via AustLII.

In this case the court rejected the submission that a nominee can be considered a party to the contract. Justice Mukhtar also rejected the assertion that there was a novation of the contract in favour of the nominee where the nominee pays the balance of the purchase price.

### Your comments

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## General condition 24.8 - CGT clearance certificate

Any or document evidencing variation of the amount in accordance with section 14-235(2) of Schedule 1 to the Taxation Administration Act 1953 (Cth) clearance certificate must be given to the purchaser at least 5 business days before the due date for settlement.

### Question

What do you do if the certificate is not provided in breach of GC 24.8?

- Nothing
- Wait to receive one
- Issue a default notice
- Proceed to settlement

### Your comments

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## Legislation relevant to contracts

- *Instruments Act 1958 (Vic)* – s.126
- *Sale of Land Act 1962 (Vic)* – s. 13 and s.48A
- *Electronic Conveyancing (adoption of National law) Act 2013 (Vic)*
- *Property Law Act 1958 (Vic)* – s.41, s.42, s.43, s.53
- *Electronic Transactions (Victoria) Act 2000 (Vic)* – ss.8, 9, 10 and 11
- ACL – s.23 and s.24
- *Limitation of Actions Act 1958 (Vic)* – s. 5LPLC resources relevant to contracts

## 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/>

## List of cases referred to in this handout

*Snapper Holdings Pty Ltd v Lentini* [2018] VSC 800 – no section 32 statement provided.

*Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corporation* [2020] NSWCA 144 – authority to sign for company.

*A & A Property Developers Pty Ltd v MCCA Asset Management Ltd* [2017] VSCA 365 – 'GST' not 'plus GST' in particulars of sale.

*Farley v Hawkins & Ors* [1996] QCA 520 – is a dishwasher a fixture or chattel?

*Rise Home Loans Pty Ltd v Dickinson & Anor* [2009] VSC 555 – effect of nomination.

*Patmore & Anor v Hamilton* [2014] VSC 275 – dispute about damaged goods.

*Black Creek Deer Farm Pty Ltd v Australia and New Zealand Banking Group Limited* [1995] VSC 17 – vendor carries the risk until settlement.

*Silvanna Pty Ltd v Screecree Pty Ltd (Civil Claims)* [2016] VCAT 678 – defective special condition about adjusting land tax.

*Cityrose Trading Pty Ltd v Booth & Anor* [2013] VSC 504 – GST condition void for uncertainty.

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

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