

CONVEYANCING SERIES 2020

Mastering the essentials



Presented by Phil Nolan, Risk Manager, LPLC

CONVEYANCING SERIES 2020

Mastering the essentials

Contract of sale tune-up



Quote

*Sell your cleverness and
buy bewilderment.*

Rumi



Introduction

Zoom poll

Conveyancing claims are what percentage of claims notified to LPLC for 2019/20?

- 17 per cent of claims
- 27 percent of claims
- 37 per cent of claims
- 47 per cent of claims



Introduction

Conveyancing claims data

- Repetition of common errors like:
 - Failure to deal with conflicts
 - Contract of sale errors



What has changed?

August 2018

The *Estate Agents (Contracts) Regulations 2008* (Vic) sunset.

August 2019

The Law Institute issued a new contract of sale of land.

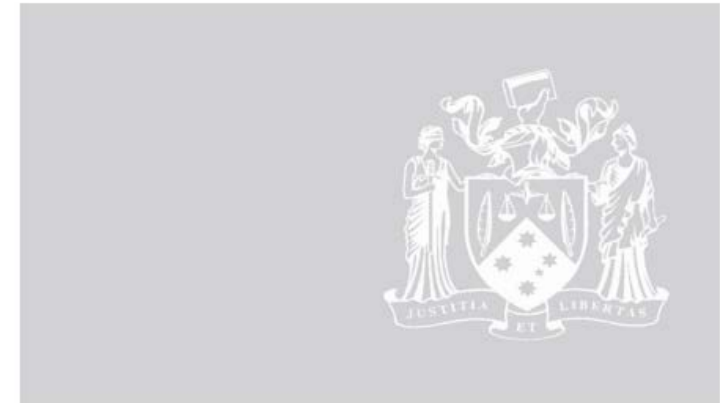
March 2020

Disclosure of material facts



Contract of Sale of Land
VOID

Property



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What we will cover today

Part 1 - contract of sale
warnings:- scams, seller
advocates, conflict, no
contract, subject to lease

Part 2 - contract of sale risk
management:- signing,
cooling off, particulars of
sale, general conditions,
special conditions

Part 3 – LIV / REIV contract of
sale August 2019: - form of
contracts in use, not an off-
the-plan contract, not an
auction contract, cooling off
- wording change,
purchaser's estate agent,
general conditions

Part 1

Contract of sale warnings:

- scams
- seller advocates
- conflict
- no contract
- Subject to lease

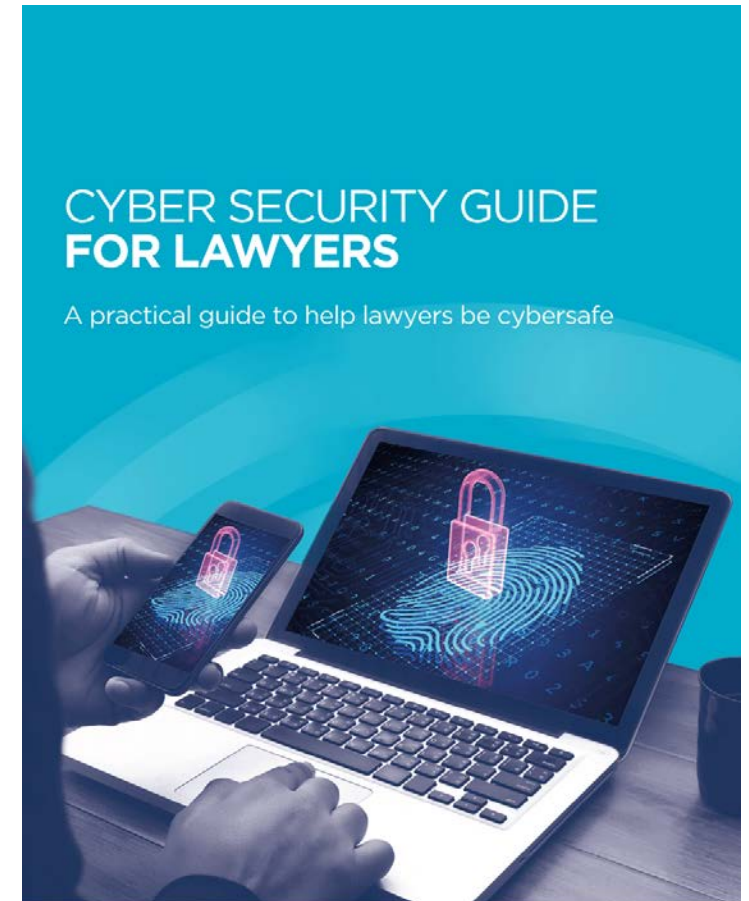


Scams

- Phishing – email scam with unsafe links
- Vishing – deceit over the phone to obtain passwords
- Hacked emails – direction to pay money to fraudsters account
- Fake law firms

More information

Go to the cyber security section on the LPLC website and check out our cyber security guide.



Cyber security - Free online training course

LPLC has sent email to practitioners inviting them to do our free online cyber security course.

Email me if you want the link to do this training.



The banner features a dark background with a silhouette of a person using a smartphone. In the top left corner, the text 'LAW & CYBER' is displayed. In the top right corner, there is a 'MENU' icon consisting of three horizontal lines. The LPLC logo is prominently shown in the upper right. The main text reads: 'Cyber risk is a unique professional risk for lawyers. In this course you'll learn that cyber risk is everyone's responsibility in a law firm, how cyber events and human error occur, and practical steps to protect your business and your clients.' Below this, the title 'Cyber risk for lawyers' is written in a large, bold font. At the bottom left, there is a button with the text 'Enrol here'. In the bottom right corner, the text 'LAW & CYBER' is repeated in a lighter font.

Seller advocates

Zoom poll

Would you include this special condition in your contract of sale?

'.....vendor may terminate at anytime prior to settlement if they receive a better offer.....'

- Yes
- No



Conflict

Zoom poll

What do you do to identify any potential conflict when acting for a vendor in a conveyancing matter?

- Run a conflict check through the firm's clients data base
- Check current / closed files
- Ask around the office
- All of the above



Conflict – who is my client?

Example

A title search discloses that a company is the registered proprietor and your company search discloses multiple directors.

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

Possible conflict between:

- Company
- Directors
- General manager



Conflict – rule 11.3

Rule 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:

- is aware that the solicitor or law practice is also acting for another client, and
- has given informed consent to the solicitor or law practice so acting.

Conflict rule 11.3

Zoom poll

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

- Obtain written consent at the start of a matter
- Use a precedent form of written consent
- Confirm in correspondence that the client consents
- None of the above

No contract - 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.

No contract - exercise

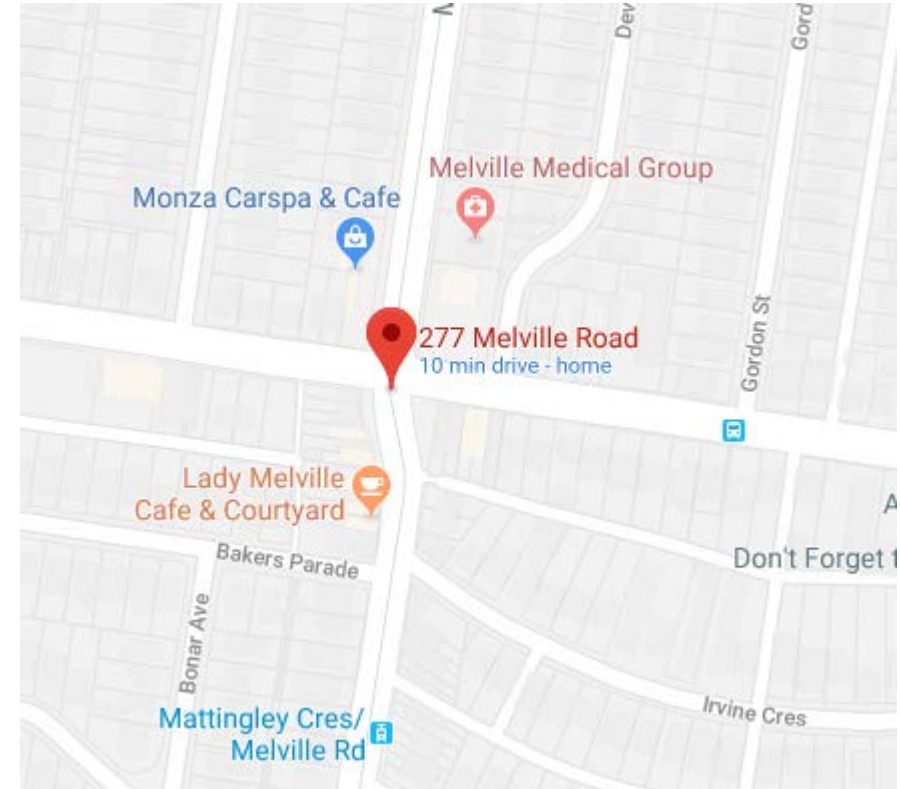
Zoom poll

Would you prepare a section 32 statement and contract of sale in relation to the change in ownership?

- Yes
- No

Relevant case – a tale of two properties

Snapper Holdings Pty Ltd v Lentini [2018] VSC 800



Subject to lease

Issue to consider

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

Possible solutions

Sale is subject to a lease – no vacant possession.

Settlement will take place on the later of 30/60/90 days or 14 days from written notice that the tenant has vacated.



Part 2

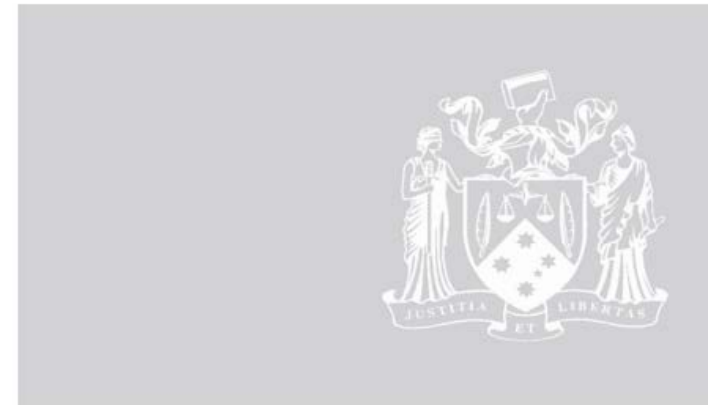
Contract of sale issues

- signing
- cooling off – wrong notice
- particulars of sale
- general conditions
- special conditions



Contract of Sale of Land VOID

Property



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Signing options – Corporations Act

S.126 - A company's power to make...a contract may be exercised by an individual acting with the company's express or implied authority...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.*

Signing options – Corporations Act

Zoom poll

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?

- Section 126
- Section 127

Particulars of sale mistakes

- Identity of the vendor
- GST
- Goods/chattels – see *Farley v Hawkins & Ors* [1996] QCA 520
- Some land not included



Particulars of sale mistakes - identity of the vendor

Background

You act for ABC Pty Ltd as trustee of the ABC SMSF Trust who is selling a piece of real estate owned by the SMSF.

Zoom poll

How would you record the vendor in the contract of sale?

- ABC Pty Ltd
- ABC SMSF Trust
- ABC Pty Ltd in its capacity as trustee of the ABC SMSF Trust

Particulars of sale mistakes - GST

GOODS SOLD WITHLAND: All fixtures and fittings of a permanent nature.

PRICE:
Deposit: \$ ~~802,000~~ 812,500
Residue: \$ ~~80,000~~ 81,250
 \$ ~~720,000~~ 751,250

PAYMENT OF DEPOSIT: The Deposit shall be paid on Monday September the signing hereof by the Purchaser.

PAYMENT OF RESIDUE: The Residue or balance of the purchase price shall be paid on the latest of the following dates, namely:
 (a) the date, being 14 days after the Proposed Plan of Subdivision is registered by the Registrar of Titles and
 (b) the 14th day of December November

SETTLEMENT DATE: Is the date upon which vacant possession of the Property and the Chattels (if any) must be provided, namely, upon acceptance of title and payment of the price.

PURCHASER'S FINANCE: This Contract is subject to finance details of which are as follows:
 Lender: _____
 Loan being not less than: \$ _____
 Approval Date: _____

DAY OF SALE: The _____ day of _____ 20__

Special Conditions This contract does not include any Special Conditions unless the words 'Special Conditions' appear in this box to the right:	Special Conditions
GST (General Condition 13) The price includes GST (if any) unless the words 'Plus GST' appear in this box to the right:	Plus GST
If this is a sale of a 'farming business' the words 'Farming Business' will appear in the box to the right:	Not Applicable
If this is a sale of a 'going concern' the words 'Going Concern' will appear in the box to the right:	Not Applicable
If the margin scheme will be used to calculate GST then the words 'Margin Scheme' will appear in the box to the right:	Not Applicable
Lease (General Condition 1.1)	Not Applicable

Goods sold with the land (general condition 2.3(f)) (list or attach schedule)

Including all fixed floor coverings, electric light fittings, window furnishing, fittings and fixtures as inspected.

Payment (general condition 11)

Price \$ _____

Deposit \$ _____ 10% by _____ (of which \$ _____ has been paid)

Balance \$ _____ payable at settlement

GST (general condition 13)

The price includes GST (if any) unless the words 'plus GST' appear in this box

GST

If this sale is a sale of land on which a 'farming business' is carried on which the parties consider meets requirements of section 38-480 of the GST Act or of a 'going concern' then add the words 'farming business' or 'going concern' in this box

If the margin scheme will be used to calculate GST then add the words 'margin scheme' in this box

Settlement (general condition 10)

is due on _____



42 Grant Crescent Ringwood

*Case - A & A Property Developers Pty Ltd v
MCCA Asset Management Ltd [2017] VSCA 365*



GST and the LIV August 2019 contract of sale of land

GST (general condition 19)

Subject to general condition 19.2, the price includes GST (if any), unless the next box is checked

- GST (if any) must be paid in addition to the price if the box is checked
 - This sale is a sale of land on which a 'farming business' is carried on which the parties consider meets the requirements of section 38-480 of the GST Act if the box is checked
 - This sale is a sale of a 'going concern' if the box is checked
 - The margin scheme will be used to calculate GST if the box is checked

Particulars of sale mistakes – goods

Goods or fixtures?

ker, from the
the 75 per cent
cluded many

inner-city and
ue to do well.
he middle
nat has been a
ear compared to
quite flat?" he

the property
c of growing
e Westpac
k of Consumer
March.
ist Bill Evans
nalled that the
ad gained

break, only 60
ext weekend.

29 Thomas Street, Windsor
Passed in \$2.5 million
AGENT RT EDGAR
ASKING PRICE \$2.5 MILLION-PLUS

The vendors of this renovated Victorian work in the antiques business and evidence of this abounded across the three, light-filled levels.

While some chattels, such as the Italian chandelier, were excluded, others like the ornate wrought iron French balustrade and carved oak doors remained.

As appealing as they were aesthetically, they didn't entice the 40 gathered to bid. Auctioneer Warwick Anderson had to pass the property in on a vendor bid of \$2.5 million. The reserve is \$3.15 million.

JOANNE BROOKFIELD

20.com.au

Particulars of sale mistakes – goods/chattels

Relevant case

Farley v Hawkins & Ors [1996] QCA
520

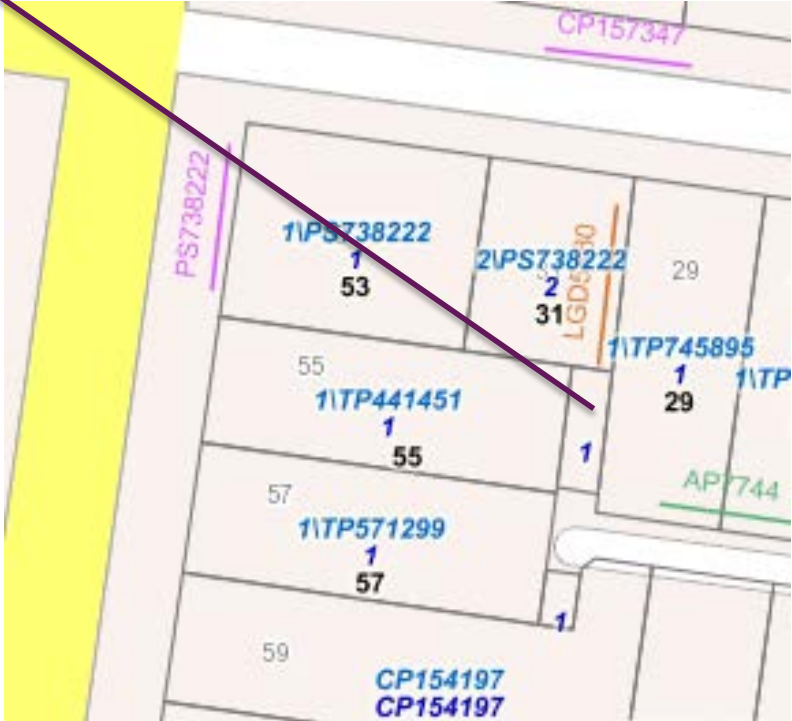


Particulars of sale mistakes - some land not included

Lot 1 not included

Collingwood

Footscray



General conditions

Most contracts I have reviewed whilst working at LPLC include an amendment to general condition 31 (previously GC 24) about loss or damage before settlement by deleting GC 31.4 - 31.6.

Case about GC 31 (previously GC 24)

[Patmore & Anor v Hamilton](#) [2014] VSC 275

Special conditions

THE TERMS OF THIS CONTRACT SHALL NOT BE ALTERED BY ANY OTHER INSTRUMENT WHATSOEVER.

(d) This Special Condition shall not merge on completion of this contract.

16. INTERPRETATION AND AMENDMENT OF THE GENERAL CONDITIONS GC25 & GC28.4(a)

Wherein appearing the singular shall include the plural, the male gender shall include the female gender or a body corporate 1. In GC 25 the word " purchaser" shall be substituted for the word "party" where it first appears and 2. In GC28.4(a) the words "the deposit up to" shall be deleted and the purchaser grants an equitable charge over all his real estate as security for the 10% of the price.

Special conditions

Where a taxable supply is made under this contract for consideration which represents its value, then the party liable to pay for the taxable supply must also pay at the same time and in the same manner as the value is otherwise payable the amount of any GST payable in respect of the taxable supply.

*Cityrose Trading Pty Ltd v Booth & Anor
[2013] VSC 504*



Special conditions

- Misuse of LIV special condition
- ACL
- Requisitions
- Priority notices
- Typos

Examples

Use of 'ordinary resident' instead of 'ordinarily resident' in relation to their foreign investment status.

Reference to 'Foreign Acquisition and Takeovers Act 1975'. The reference should be to 'Acquisitions'.

Special conditions

- Use of defined terms
- Inadequate reference to legislation
- Incorrect cross referencing
- Replacing general conditions with special conditions
- Failure to deal with certain issues

Part 3 - LIV / REIV contract of sale - August 2019 issues

- form of contracts in use
- not an off-the-plan contract
- not an auction contract
- cooling off - wording change
- purchaser's estate agent
- GC 6.1 - warranty
- GC 7 – identity of land
- GC 20 - loan
- GC 4 - nomination

Part 3 - LIV / REIV contract of sale

August 2019

Zoom poll

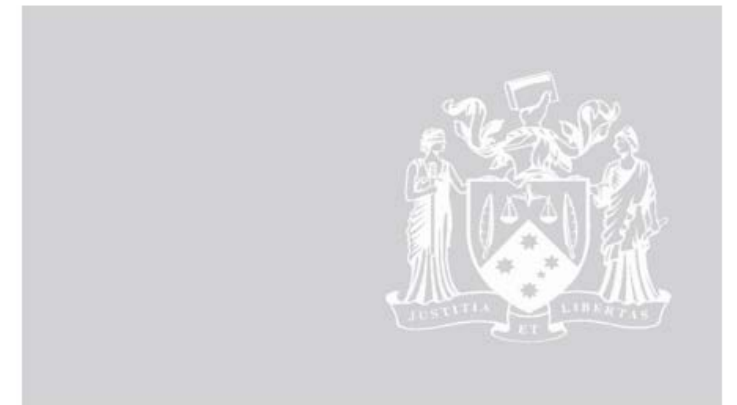
Which form of contract are **you** using?

- Your own
- New LIV form
- Previous LIV form
- Table A of the seventh schedule of the *Transfer of Land Act 1958* (Vic)
- Other



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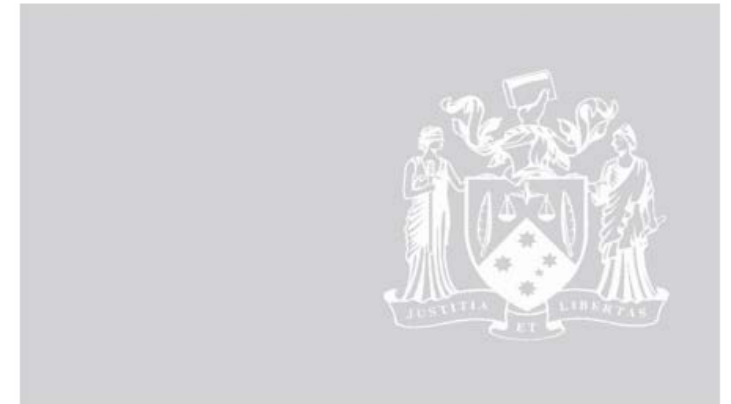
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LIV / REIV contract of sale August 2019



Contract of Sale of Land VOID

Property



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Preliminary issues

- Typos
- Is this an:
 - ❖ off-the-plan contract?
 - ❖ auction contract?

Cooling-off wording change

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

Zoom poll

Do you think it is necessary to include 'Purchaser's estate agent' in the particulars of sale?

- Yes
- No

Case of interest about buyer advocates

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



51 Patterson Street Moonee Ponds

Vendor warranties – GC 6.1 (formerly GC 3)

Warning

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 the August 2019 contract consolidates all of the general conditions and all of the LIV special conditions from the June 2018.



Identity of land – GC 7 (formerly GC 3)

Case to note

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

405 Epping Road,
Wollert



Loan – particulars of sale Contract of sale – errors

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.....’

Zoom Q&A

What evidence will you ask your purchaser client to provide?



Nomination – GC 4

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

Case about the legal effect of nomination

[Rise Home Loans Pty Ltd v Dickinson & Anor](#) [2009]

VSC 555.

General condition 24.8 - CGT clearance certificate

Any clearance certificate.....must be given to the purchaser at least 5 business days before the due date for settlement.

Zoom poll

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

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