



CONVEYANCING SERIES 2021

Mastering the essentials

Subdivisions and risk management

Presented by | Phil Nolan, Risk Manager, LPLC



Introduction

“We’re taking action to make sure that Victorians aren’t ripped off by dodgy developers.” - *Marlene Kairouz, Former Minister for Consumer Affairs.*

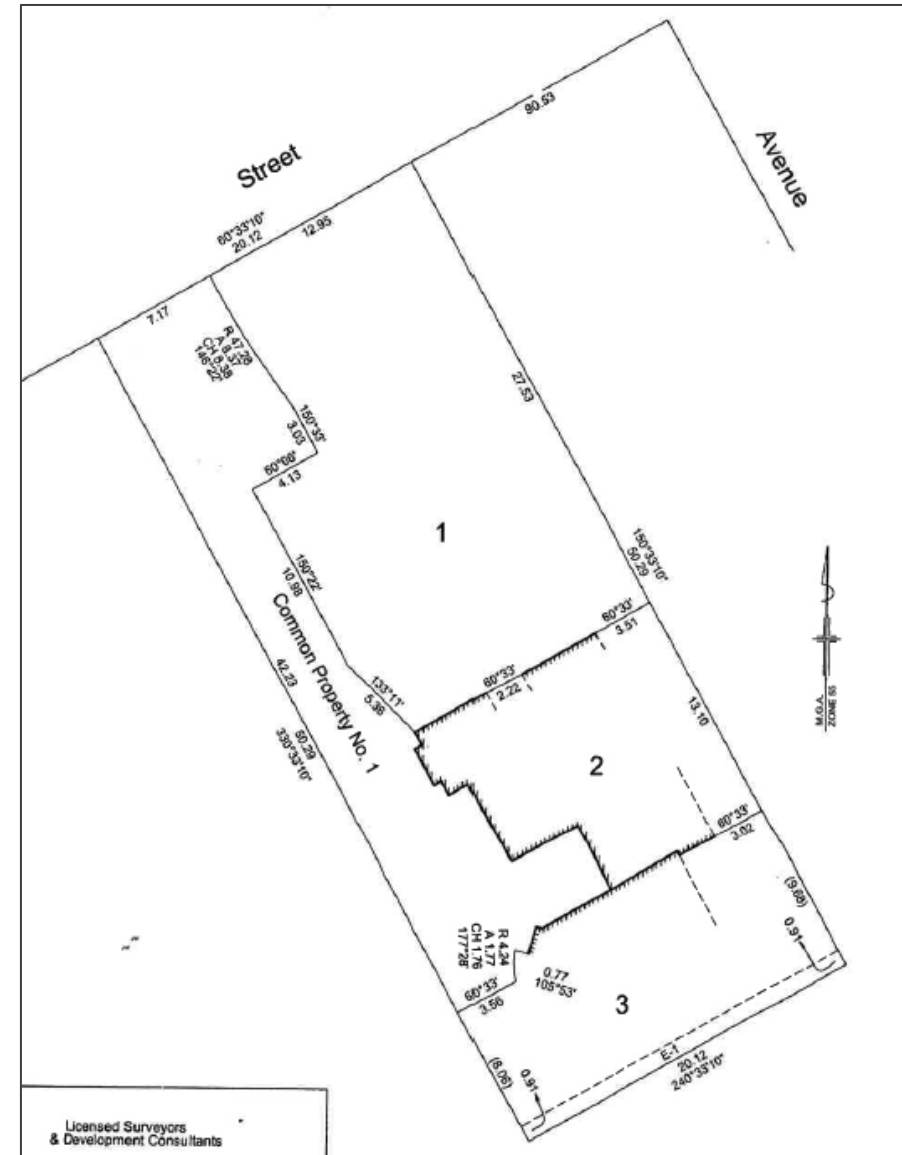


Introduction

Zoom poll

How many subdivision matters do you do each month:

- a) 1 – 5
- b) 5 – 10
- c) 10 – 20
- d) More than 20



Key take-aways

- Recognise that special issues arise when selling land subject to a subdivision compared to other land sales.
- Make sure your retainer sets out what you will do, won't do and what the client needs to do.
- Use a checklist to ensure subdivision action items are completed in sequence and without omission.

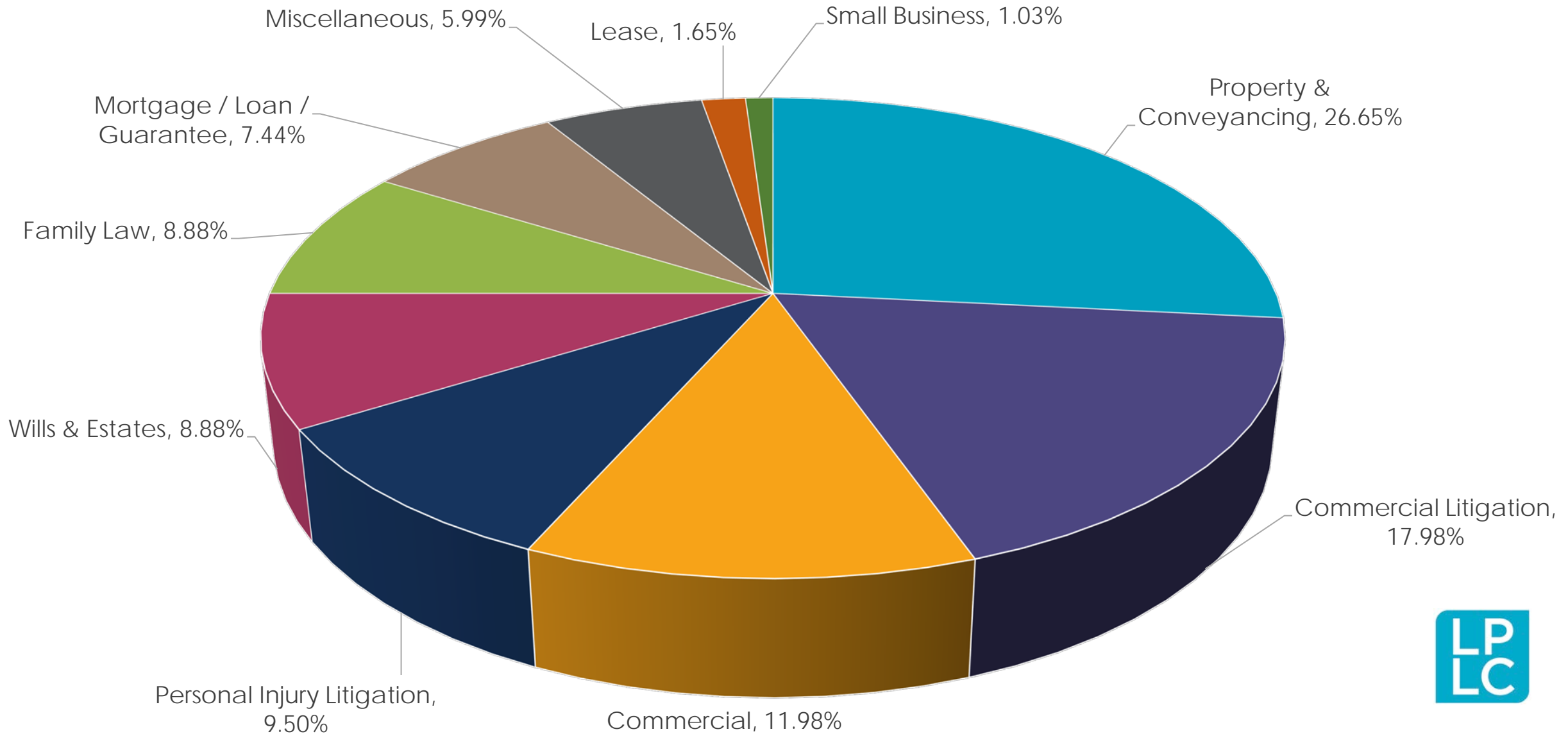


What we will cover

- Claims data
- Retainer letters
- Checklists
- Relevant legislation
- Conveyancing best practice program
- Off-the-plan contracts
- 4 warnings



2019/20 claims data - statistics



Claims data – your risk profile

Zoom poll

Who do you usually act for in subdivision matters?

- a) Vendor
- b) Purchaser
- c) Lender
- d) Other

Based on our claims data, you have a higher risk profile when acting for the vendor.



Claims data – acting for vendor

- Transfer of wrong lot
- Breach of s.9AA
- Deposit issues
- Delay in registration
- OC insurance
- Defective special conditions



Claims data – acting for purchaser

- Missed opportunity to rescind
- Missed accessory unit
- Missed differences between proposed plan and registered plan



Examples of claims

- Basement car park disappeared
- Deposit monies not correctly held



Exercise - subdivision retainer

Background

You act for a first-time developer of land.

The client owns a site in suburban Melbourne and is looking to subdivide and engage a builder to construct 6 new townhouses and to renovate the existing buildings.

The client asks you to prepare an off-the-plan contract for a fixed fee.



Image source: Arun Developers

Exercise - subdivision retainer

Action

Make a list of five matters which you will raise with your client in your retainer letter.

Zoom Q & A

Insert one of your listed items into the Zoom Q & A.



Retainer letter

A retainer letter should include:

- details of both the client's and lawyer's roles and obligations in the relationship
- information about the staff who will have carriage of the matter and contact details of their supervising principal(s)
- grounds for termination. For example, failure to pay costs when due, failure to provide timely instructions, not taking advice.



Retainer letter



Matters to consider including in your retainer letter when instructed to act for a developer:

Legal work included
in the fixed fee

Legal work which can be
undertaken by the
practitioner not covered
by the fixed fee.

Matters which the firm
is unable to do

Things that the client
needs to do

Retainer letter



Comments on the 4 areas:

Legal work included
in the fixed fee

Legal work which can be
undertaken by the
practitioner not covered
by the fixed fee.

Matters which the firm
is unable to do

Things that the client
needs to do

Checklists

Reasons for using checklists:

- Good risk management
- A way to pass on knowledge in a simple, usable and systematic form
- They are good for the brain
- They are about changing a culture and embracing teamwork and discipline not just about ticking off on crucial items
- They help get the routine right



Exercise - subdivision checklist

Insert in the table at page 16 of the handout five critical items that need to be addressed when acting for a client subdividing land and include your comments as to why the item is critical.

Zoom Q & A

Insert one of your listed items into the Zoom Q & A.



Subdivision checklist

Items to consider including:

- The limitation period for any unregistered plan to be registered
- The contract accurately describes what is being sold
- Whether there is any required owners corporations insurance
- Compliance with the relevant sections of the Sale of Land Act
- Warn clients of any non-compliance and any rescission rights



Relevant legislation and subdivisions

- Subdivision Act 1988 (Vic) - section 7
- Planning & Environment Act 1987 (Vic) – section 68

Zoom poll

Have you ever seen a planning permit which did not have an expiry date specified in the permit?

- a) Yes
- b) No



Relevant legislation and subdivisions

Sale of Land Act 1962 (Vic)

Section 9AA, section 9AB, section 9AC,
section 9AE(1), section 9AE(2)

Zoom poll

How often have you seen or prepared an
off-the-plan contract which does not
contain a sunset date?

- a) Never
- b) 1 – 5 per year
- c) More than 5 per year



Relevant legislation and subdivisions

Sale of Land Act 1962 (Vic)

- Section 10B
- Section 10C
- Section 10D
- Section 10E
- Section 10F



Relevant legislation and subdivisions

Sale of Land Act 1962 (Vic)

- Section 10F

In the Sale of Land Act "sunset clause" means a provision of a residential off-the-plan contract that provides for the contract to be rescinded if -

- (a) the relevant plan of subdivision in respect of the lot has not been registered by the sunset date; or
- (b) An occupancy permit has not been issued in respect of the lot by the sunset date;

9AE(2) If the plan of subdivision is not registered within 18 months after the date of an off-the-plan contract for the sale of a lot on that plan of subdivision, or, if the contract specifies another period, before the end of that specified period, the purchaser may, at any time after the expiration of that period but before the plan is so registered, rescind the contract.

Relevant legislation and subdivisions

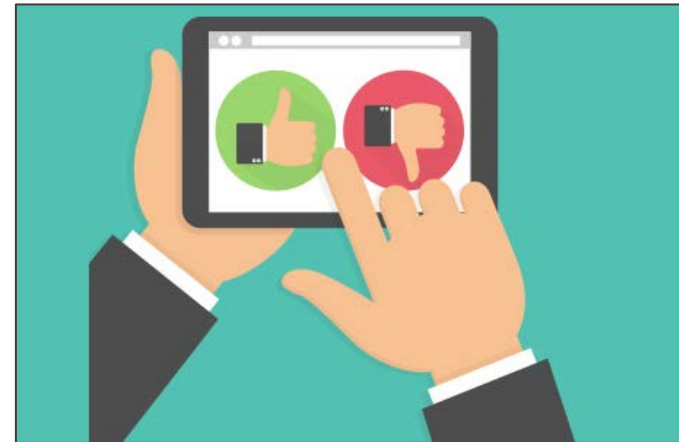
Sale of Land Act 1962 (Vic)

- Section 10F

Zoom poll

Are you required to include the wording from section 10F in an off-the-plan contract where a vendor does not specify a sunset date in their contract but relies on the 18-month period pursuant to section 9AE(2) of the Sale of Land Act 1962?

- a) Yes
- b) No
- c) Unsure



Relevant legislation and subdivisions

Sale of Land Act 1962 (Vic)

- Section 11



Image source: StrataPlus

LPLC Conveyancing Best Practice program and off-the-plan contracts

Testimonials

'... thanks again for your time yesterday...I found it very helpful to be able to talk through the issues that plague sole practitioners...'

Sole practitioner in the suburbs

'... thank you for the comments, they were incredibly helpful...'

Small suburban law firm

'... Thank you for attending our office yesterday... we very much appreciate your advice and will certainly be making use of the resources available on the LPLC website...'

Small suburban law firm



LPLC Conveyancing Best Practice Program and off-the-plan contracts

Zoom poll

Are you interested in participating in the LPLC conveyancing best practice program?

- a) Yes!
- b) No thanks.



Risk management comments about off-the-plan contracts

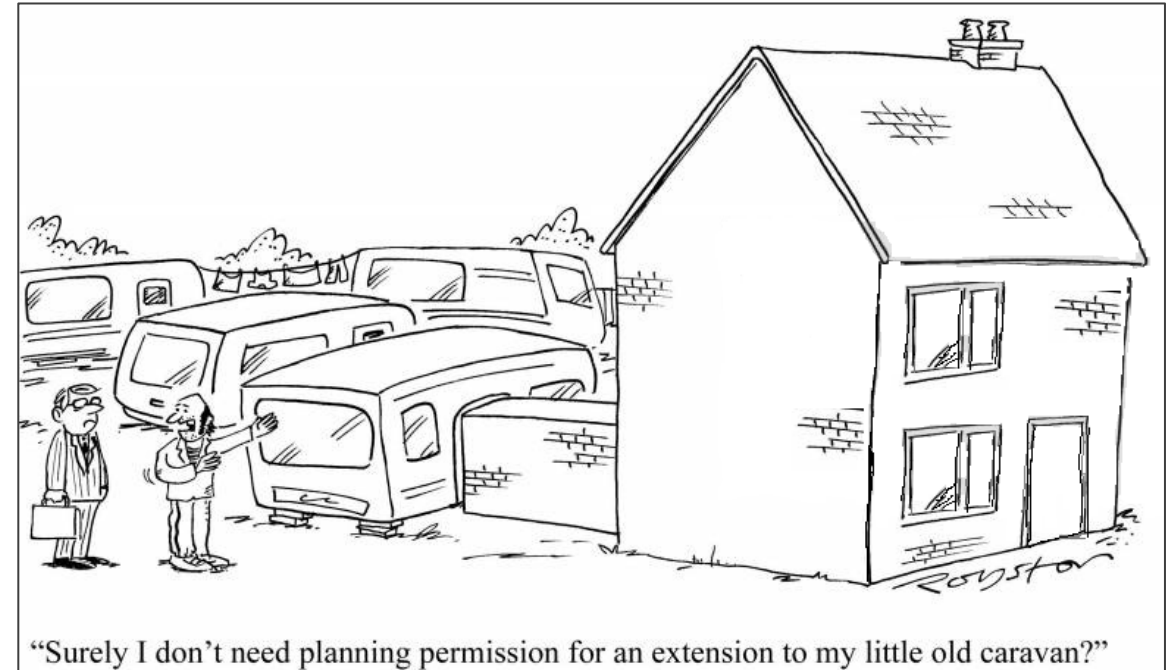
- Requisitions
- Typos

A warranty that the purchaser was an 'ordinary resident' instead of 'ordinarily resident' in relation to their foreign investment status.

- Inadequate reference to legislation

Examples include referring to:

1. building legislation
2. planning Laws
3. statutory by-laws
4. Building Control Act.



Risk management comments about off-the-plan contracts

- Failure to define

Zoom poll

Background – special condition

In the event of any rate, tax, assessment or other apportionable outgoing in respect of the Property **not being assessed separately** on the Settlement Date then the rate, tax or assessment in respect of the Property shall be deemed to be the amount that bears the same proportion to the total rate assessed on **the larger area** as the area of the Property bears to the larger area or as the lot liability of the Property bears to the lot liability of the area that is the subject of the assessment (as the case may be).

Risk management comments about off-the-plan contracts

- Failure to define

Zoom poll

Does this special condition give the vendor the right to recover land tax based on the proportional tax value for the purpose of adjustments?

- a) Yes
- b) No
- c) Not sure



Risk management comments about off-the-plan contracts

Relevant case

Silvanna Pty Ltd v Screecree Pty Ltd (Civil Claims) [2016] VCAT 678

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?

Risk management comments about off-the-plan contracts

- Multiple words for the same thing

In one contract the land was described:

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

Suggestion

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



Image source: SnackNation

Risk management comments about off-the-plan contracts

- Failure to deal with certain issues

Zoom poll

Does your off-the-plan contract prohibit the lodging of a priority notice?

- a) Yes
- b) No
- c) Don't act for vendors selling off-the-plan




Session break: 3 steps to recharge

1. Get your circulation going

- Stand up and stretch your arms way up high
- Try some jumping jacks
- Bend down and try to touch your toes

2. Reduce eye strain

- Look away from your computer and gaze at an object in the distance  at least 20 seconds
- Adjust your computer display settings – like brightness or contrast

3. Remember to stay hydrated

- Drink a big glass of water
- Have a refill ready for the next part of the session!



ACL and off-the-plan contracts

Exercise - background

Note section 23 of the ACL relevantly provides that:

- (1) A term of a consumer contract is void if:
 - (a) the term is unfair; and
 - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A **consumer contract** is a contract for:
 - (a) a supply of goods or services; or
 - (b) a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

ACL and off-the-plan contracts



Zoom poll

Is this a valid term in an off-the-plan contract:

The Purchaser agrees that the Building Plans and Specifications may be varied or altered by the Vendor or the Builder from time to time in any manner the Vendor or the Builder (as the case may be) considers necessary or desirable, including by substituting any of the fixtures, fittings finishes and appliances specified in the Building Plans and Specifications with fixtures, fittings, finishes or appliances of like quality.

- a) Yes
- b) No
- c) Not sure

Other issues to consider

- Unusual adjustments

Did you know that some off-the-plan contracts contain a special condition where adjustments are made from the **day of sale** and not settlement?

A number of practitioners who contacted LPLC about this issue, informed us that the retrospective land tax adjustment in favour of the vendor was as much as \$10,000.



Other issues to consider

- Scams

Risk management tips

At the start of every matter, tell your clients:

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

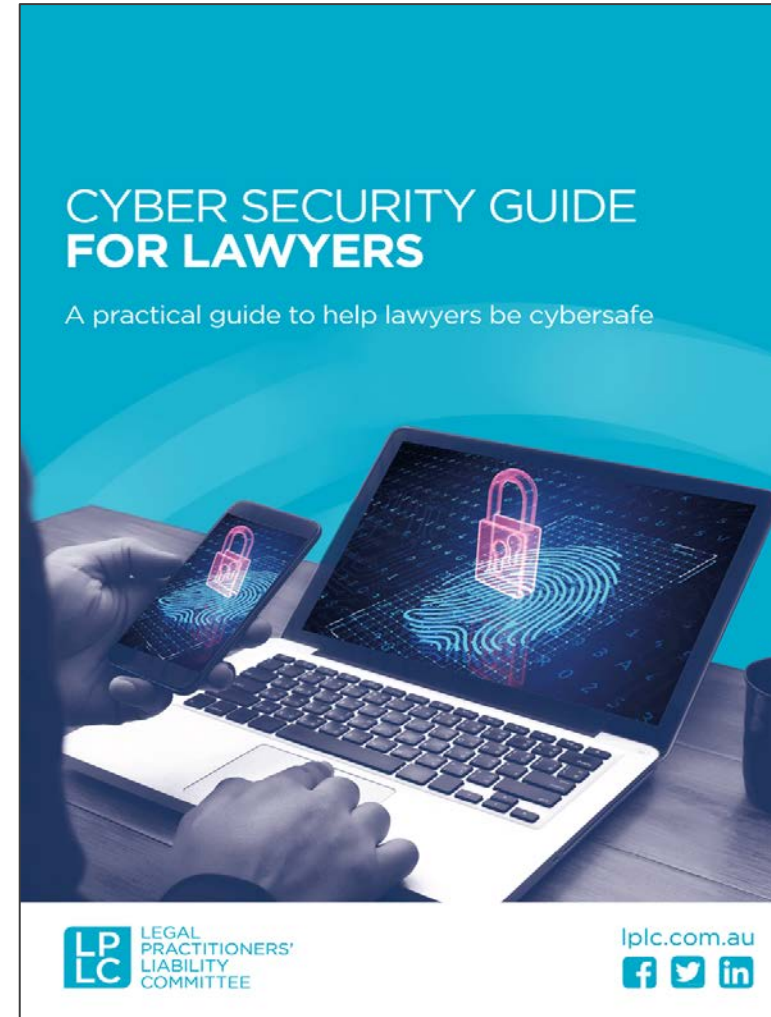
And add a warning to your firm's standard email signatures



Image source: Alpine Security

Other issues to consider

- Scams



Other issues to consider

- Conflict – acting for developer and another party

Question

What do you do to keep track of any potential conflict when acting for a developer?

Zoom Q & A

Insert one action which you do in the Zoom Q & A.



Other issues to consider

- GST withholding

Zoom poll

When acting for a developer, subdividing land, how do you provide the GST withholding notice to purchasers?

- a) It is attached to the contract
- b) The required information is contained in a special condition in the contract
- c) The notice is given at another time. For example, when the notice is given of registration of the plan of subdivision



Contact

If you have a question and would like to speak to an LPLC Risk Manager, you can contact LPLC via phone on **03 9672 3800** during business hours, or via email at: lawyersrisk@lplc.com.au.

Zoom poll

Do you see any benefit in the Law Institute of Victoria issuing a pro-forma off-the-plan contract of sale?

- a) Yes
- b) No





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