

# CONVEYANCING SERIES 2021

Mastering the essentials



LEGAL  
PRACTITIONERS'  
LIABILITY  
COMMITTEE



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# Subdivisions and risk management

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## Quote

*".....We're taking action to make sure that Victorians aren't ripped off by dodgy developers..."*

Minister for Consumer Affairs, Marlene Kairouz

[Domain - 19 March 2019](#)

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## 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.

## Introduction

There are many risks to manage when advising clients about the purchase or sale of land on a plan of subdivision.

Many claims involving subdivisions relate to off-the-plan sales, although claims still arise where there are existing subdivisions particularly relating to:

- identifying the right title and accessory unit(s) for purchaser clients
- owners corporations.

Failing to deal with tax issues is another area rich in claims not just in relation to the subdivision of land but for all conveyancing transactions.

Considering the number of Acts and Regulations that apply to subdivisions it is not surprising that there are claims in this area especially given that these laws are subject to regular change. Here are some recent examples:

- changes to owners corporations pursuant to the [Owners Corporations and Other Acts Amendment Bill 2019](#). This Bill awaits assent. Strangely, when I checked the Bill on 21 January 2021 section 2 provided that:

*If a provision of this Act does not come into operation before 1 January 2021, it comes into operation on that day.*

I have sought clarification from Parliament and assume section 2 will be amended to have a much later commencement date.

- the new sunset clause requirements pursuant to the *Sale of Land Amendment Act 2019* (Vic)
- GST withholding regime applies to potential residential land that is included in a property subdivision plan.

## Your comments

## Zoom poll

How many subdivision matters do you do each month:

- 1 – 5
- 5 – 10
- 10 – 20
- More than 20

The more you do, the greater your risk profile and chance of having a claim.

## Claims data

Every year LPLC sees claims involving subdivisions.

## Acting for vendors

Practitioners acting for vendors get sued for:

- transferring the wrong lot on a plan of subdivision, often because the lot number and street number for the unit are mixed up
- not ensuring the contract for the sale of a lot on an unregistered plan of subdivision ('off-the-plan sale') complies with the statutory requirements such as section 9AA of the *Sale of Land Act 1962 (Vic)*

Section 9AA of the *Sale of Land Act 1962 (Vic)* requires any off the plan contracts to specify various things including that:

- the deposit must be paid to a legal practitioner, conveyancer or licensed estate agent acting for the vendor to be held by the legal practitioner, conveyancer or licensed estate agent and held on trust for the purchaser until the registration of the plan of subdivision;
- the deposit moneys payable under the contract do not exceed 10 per cent of the purchase price of the lot.

Where a deposit is not held in accordance with that section the purchaser has the right to rescind pursuant to section 9AE(1) of the *Sale of Land Act*.

- allowing the deposit to be dealt with otherwise than in accordance with the contract
- not promptly attending to registration of the plan of subdivision, giving the purchaser the right to rescind

- not advising on or obtaining owners corporations insurance as required by the *Owners Corporations Act 2006* (Vic). This may give a purchaser the right to rescind pursuant to section 11 of the Sale of Land Act.
- not drawing clearly worded special conditions setting out the responsibility of the vendor and purchaser for certain agreed works, usually in a broadacre subdivision.

### Acting for purchasers

Practitioners acting for purchasers get sued for:

- not spotting a breach of a statutory obligation imposed on the vendor. This may deprive the purchaser of the opportunity to rescind.
- not ensuring car parks or accessory units are transferred.
- not advising about accessory lot(s) such as a car space.
- not detecting a material difference between the proposed plan of subdivision in the section 32 statement and the plan finally registered, usually with the lot size having been reduced, or a change in the boundary or an easement being added.

### Zoom poll

Who do you usually act for in subdivision matters?

- Vendor
- Purchaser
- Lender
- Other

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

### Examples of claims

#### Basement car park disappeared

The purchaser client bought an apartment off-the-plan expecting a basement car park to be included as part of the purchase. The registered plan did not provide for the basement car park. Despite having correctly obtained a copy of the final plan prior to settlement, the practitioner failed to notice this. Settlement occurred and the client did not get what they had anticipated.

While the vendor had failed to comply with its obligation under section 9AC(1) of the *Sale of Land Act* to notify the purchaser of a change to the plan prior to registration, thereby depriving the purchaser of the statutory right to rescind under

section 9AC(2), the practitioner should have picked up the change prior to settlement. If the practitioner had done so, the client could have taken action to rescind claiming that the change was material or a breach of a fundamental term of the contract.

### **Your comments**

### **Deposit monies not correctly held**

The practitioner acted for the purchaser in an off-the-plan contract. A non-standard contract was used and breached section 9AA of the SLA by not providing for payment of deposit monies into trust. This failure provided the purchaser with grounds to rescind the contract at any time up to the date of registration.

When the purchaser encountered problems with the vendor developer, the practitioner did not pick up the failure to deal properly with the deposit in the contract and failed to advise the client of his right to get out of the contract. Instead, lengthy disputation occurred which continued after settlement relating to significant building defects. The purchaser turned on the practitioner for failing to advise that they could have rescinded and avoided all the extra costs and inconvenience.

### **Your comments**

### **Relevant cases**

See - Everest Project Development Pty Ltd v Mendoza & Ors [2008] VSC 366

The court found the wording of the contract of sale did not comply with sections 9AA to 9AH relating to how the deposit bond could be called on.

Practitioners drawing off-the-plan sales contracts should also be aware of a few cases about breaches of the Sale of Land Act including about the need to specify a time for registration of the plan of subdivision in explicit terms and that this date cannot be extended unilaterally by the vendor. See:

- Clifford & Anor v Solid Investments Australia Pty Ltd [2009] VSC 223

The court found that the vendor could not unilaterally extend the date for

registration of a plan of subdivision.

- Harofam Pty Ltd v Allen & Ors [2013] VSCA 105 and Harofam Pty Ltd v Scherman [2013] VSCA 104

The court rejected the vendor's right to extend the due date for registration unilaterally on the basis that there were delays beyond the control of the vendor.

## 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.

### Action

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

1.

2.

3.

4.

5.

### Zoom Q & A

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

### Your comments

## Retainer letters

Retainer letters are important as they help practitioners manage their clients' expectations. A retainer letter may 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.

A retainer letter when acting for a developer helps the client to understand that developing land is a complicated process involving many experts. Clients will probably ask for a fixed fee for off-the-plan conveyancing sales. For these clients the retainer letter should describe the legal services included in the fixed fee.

Another purpose of a retainer letter is to avoid a dispute. At the same time that a retainer letter is provided to the client, consider also giving the client:

- the prescribed costs disclosure statement (this can be included in the retainer letter)
- your costs agreement (this can be included in the retainer letter)
- a brochure with general information about how the firm operates. For an example, refer to the LPLC brochure Working together - roles and obligations.

You can find the brochure here:

<https://lplc.com.au/resources/client-resources/working-together-roles-obligations>

Retainer letters also ensure practitioners do not make assumptions about the level of business sophistication of the client. It is probably an easy assumption to make that a client who owns land and is looking to develop it knows what they are doing. Our claims show that even sophisticated clients don't always understand what we would consider basic legal concepts.

Below is a list of matters to consider including in a retainer letter for a developer about each parties' roles and obligations:

- legal work included in the fixed fee
- legal work which can be undertaken by the firm not covered by the fixed fee
- matters which the lawyer is unable to assist
- things that the client needs to do.

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

Legal work included in the fixed fee:		
1.	Contract	Prepare a proforma contract of sale for client approval. Explain important elements of the contract to the client. Make amendments to the proforma after client input.
2.	Section 32 statement	Prepare a proforma section 32 statement pursuant to section 32 of the <i>Sale of Land Act 1962</i> for client approval. Obtain and review necessary title and property search(es) such as planning and council land information certificate to be attached to the section 32 statement.
3.	Exchange	Review Contract of Sale received from you or the selling agent and, if necessary, forward to the purchaser's legal representative.
4.	Deposit	Check initial deposit paid and if necessary, request transfer to trust account from selling agent. Invest deposit in term deposit.
5.	Correspondence	<p><b>To you</b></p> <p>Four standard letters to you when:</p> <ol style="list-style-type: none"> <li>1. Contract exchanged.</li> <li>2. Plan registered.</li> <li>3. Providing statement of adjustments and settlement statements for your approval.</li> <li>4. Settlement has taken place.</li> </ol> <p><b>To other side</b></p> <p>Letter to purchaser's legal representatives after receiving signed contract advising them we act, confirming position in relation to the deposit.</p> <p>Three circular letters to the purchaser's legal representatives advising Plan of Subdivision (PS) has been approved and making settlement arrangements.</p>
6.	Duty	Prepare all necessary declarations for duty purposes for approval by you for processing on duties online.
7.	Financier	Liaise with mortgagees to arrange discharge of any mortgage(s) and to book settlement.

**Legal work included in the fixed fee:**

8.	Transfers of land	Check and sign transfers of land.
9.	Subdivision	Prepare application to register plan using SPEAR.
10.	Adjustments	Review council, water and land tax notices and invoices for owners corporation fees such as insurance. Prepare and distribute Settlement Statement and Statement of Adjustments to the Purchaser's lawyers/representatives.
11.	Settlement	Arrange the financial settlement on PEXA.
12.	Post Settlement	Complete and send notifications to council and water authority and the owners corporation.

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

1.	Deposit bonds / guarantees	Issues regarding deposits: For example, renewal of deposit bonds, demanding payment of a deposit bond or bank guarantee, non-payment and early release of deposits.
2.	NICO	Dealing with any joint property interests and any other additional work where the subdivision is not a common ownership subdivision.
3.	Restrictions on title	Drafting, reviewing and registering any restrictions on title including easements, covenants, agreements with the local council.
4.	Owners corporations	Owners corporations including, but not limited to set up, holding first meeting, dealing with manager and any titles office issues.
5.	Town planning	Such as advice about permitted use, permit conditions, open space contribution issues.
6.	Building	Contract advice and dealing with any building issues including for example, discussions with site manager regarding completion of building works and building defects.
7.	Finance	Advice on your finance documents, providing any required information to your financier(s) and any broker.
8.	Litigation	For example, applying to VCAT where a permit is refused, seeking specific performance of a contract, vendor or

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

		purchaser summons in the Supreme Court.
9.	Leases	Drafting and arranging execution of leases and providing executed leases to parties.
10.	Default	Any action regarding default pursuant to any contracts of sale to foreigners and any reporting obligations.
11.	FIRB approval	Seeking approval of the foreign investment review board for the sale to foreigners and any reporting obligations.
12.	Managed investment scheme	Advising on any managed investment scheme issues, preparing disclosure documents.
13.	Financial services license	Advising on any financial services licensing issues, completing application.
14.	Joint venture / partnership / shareholder agreement	Drafting any agreements and advising on matters in relation to any joint venture, partnership, shareholder agreement.
15.	Real estate agent	Advice on terms of engagement of any real estate agent.
16.	Withholding	CGT and GST withholding.

**Matters which the firm is unable to do:**

1.	Insurance	Any insurance required for the development.
2.	Tax	We are unable to advise on any Federal Government taxation issues including payment of: <ul style="list-style-type: none"> <li>• income tax.</li> <li>• GST such as completing your BAS statements.</li> <li>• CGT.</li> </ul>
3.	Lot liability and entitlement	The appropriate lot liability and entitlement for the lots on the subdivision.
4.	Valuation	The value of the site or lots to be sold.
5.	Financial products	Financial products advice. For example, giving a recommendation on which lender to choose.
6.	Employees	Your employees such as termination of employment, entitlement to superannuation.
7.	Conflict	Any matters where we have a conflict which cannot be resolved. For example, section 29W of the <i>Sale of Land Act</i>

**Matters which the firm is unable to do:**

		1962 (Vic) prohibits us from acting for vendor and purchaser for a terms contract. We are also unable to act for you and any purchaser(s) lender.
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**Things that the client needs to do:**

1.	Experts	Engage experts as necessary and provide us with their contact details.
2.	Plans and specifications	Provide us with a copy of plans and specifications for the property and proposed plan of subdivision to be included in the contract of sale/section 32 statement.
3.	Planning	Provide us with a copy of any planning permit(s) issued for the property to be included in the section 32 statement. In conjunction with your town planner, conduct a review of any planning permit(s) including to ensure the commencement and expiry dates are still achievable. It may be that you need to seek an extension from council regarding the relevant dates.
4.	Duty	Provide necessary information to enable us to complete any declarations required for duty purposes. This may include you providing us with advice from your valuer, builder, and quantity surveyor.
5.	Insurance	Discuss any insurance requirements in relation to the development with your insurer or insurance broker. It may be that the vendor has none or inadequate insurance. Insurance to consider includes: <ul style="list-style-type: none"><li>• public liability.</li><li>• building works/replacement.</li></ul>
6.	Valuation	Consult your valuer to advise you on any valuation issues.
7.	Taxation	Discuss with your accountant the impact that any taxes may have on your development, including: <ul style="list-style-type: none"><li>• Income tax.</li><li>• GST.</li><li>• CGT.</li></ul> Following your discussions with your accountant and to enable us to complete the proforma contract of sale you

**Things that the client needs to do:**

		need to tell us how the sales will be treated for GST purposes.
8.	Lot liability and entitlement	Consult your valuer, quantity surveyor and land surveyor about the lot entitlement and lot liability calculations.
9.	Building works	Comply with your obligations pursuant to any building contract and liaise with the builder as necessary.
10.	Finance	Apply for and obtain any necessary finance to fund the development.
11.	Costs	Pay our accounts in accordance with our costs agreement.
12.	Conduct	Perform your obligations as set out in any of our communications to you. For example, provide timely instructions, inform us of any unreasonable delays in the project.

**Your comments**

## Checklists

Good risk management includes using a checklist in matters involving the subdivision of land.

Other reasons for using checklists include:

- a way to pass on knowledge in a simple, usable and systematic form
- they are good for the brain. Try using a checklist to refocus and to make sure your brain doesn't trick you into skipping a step or two!
- 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 so you can focus more on the individual client.

Checklists are not about taking away a lawyer's judgement but freeing them up to use their good judgement. Good judgement is what makes a good lawyer along with courage, wits and improvisation.

### LPLC checklists

You can find checklists on the LPLC website dealing with many areas of law including:

- Property and conveyancing
- Commercial
- Commercial litigation
- Family law
- Practice management
- Wills and estates.

Here is a link to the LPLC checklists:

<https://lplc.com.au/risk-advice/find-resources?types=4822>

Below is an exercise about making a subdivision checklist.

Your subdivision checklist, like the LPLC checklists assist practitioners avoid a claim. The LPLC checklists are not meant to be exhaustive or prescriptive. The content is made up from data mined from claims, input from practitioners and experience of the staff at LPLC.

Some of the checklists are designed in a tick-a- box style. For example, the tax issues checklist. This checklist contains the most common taxes and related charges. Ticking a box indicates who is responsible for considering the selected item. Both practitioner and client may be selected. A column has been included for initial comments. You could adopt this approach for your checklist about subdivisions.

Don't wait for the worst to happen – make your own subdivision checklist and use the numerous LPLC checklists.

**Feedback**

Please contact Phil Nolan at [phil.nolan@lplc.com.au](mailto:phil.nolan@lplc.com.au) or 03 9672 3800 for any feedback about the LPLC checklists. We are always looking for ways to improve them.

**Further information**

Have a read of the 'Checklist Manifesto' by Atul Gawande.

**Exercise – subdivision checklist**

Insert in the table below:

1. five critical items that need to be addressed when acting for a client subdividing land.
2. include your comments as to why the item is critical.

Subdivision checklist		
#	Item	Comments
1.		
2.		
3.		
4.		
5.		

**Zoom Q & A**

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

## Some relevant subdivision legislation

It is necessary to be aware of legislation relevant to subdividing land to properly advise a client and avoid a claim. Below is a list of legislation which we have seen in claims involving the subdivision of land.

### Subdivision Act 1988 (Vic)

#### Section 7

The certification of a plan is valid for five years from the date of certification.

Failing to register a plan certified by a council within the five-year limitation period is not uncommon. The reasons for missing the time limit are varied. Sometimes it is a lack of knowledge by the lawyer that the time limit exists or failing to check the legislation carefully enough to find the right time limit, as well as failing to diarise the dates effectively and a variety of other slip ups or errors.

#### Risk management tip

Identify the date of certification and diarise the five-year period and advise the client of the limitation period and the importance of acting before then.

#### Delays in registering a plan

There are also many reasons for the delay in registering a plan of subdivision, which may result in the five-year period to register the plan being exceeded.

#### Risk management tip

Ask the developer to keep you informed of any delays and inform the developer, in writing of the 5-year period and when it will expire.

#### Relevant case

For a case about delay and registration of a plan of subdivision see [Parissis v Etna \[1998\] VSC 124](#).

The contract in this case contained the usual sort of condition that the developer would use their best endeavours to procure the certification and registration of the plan by the Plan Registration Date.

Delays in registering the plan included damage to an adjoining building from excavation works, plans had to be redrawn and new planning and building permits were required.

#### Your comments

## Planning & Environment Act 1987 (Vic)

### Section 68

Contains limitation periods for the expiry date for any planning permit including for the subdivision of land. Unless there is a contrary provision in the planning permit, a planning permit for the subdivision of land expires five years after certification of the plan of subdivision. This mirrors the validity period in section 7 of the Subdivision Act.

Once the period has expired, the plan of subdivision will need to be recertified by the council and that can be costly. In some instances, it may also be necessary to apply for a new planning permit to subdivide the land. The same tips as outlined above about section 7 of the Subdivision Act apply in relation to section 68.

### Zoom poll

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

Yes

No

## Sale of Land Act 1962 (Vic)

### Section 9AA

The contract must provide that deposit monies be paid into the trust account of a legal practitioner, conveyancer or licensed estate agent until the registration of the plan of subdivision.

### Section 9AB

Details of any works affecting the natural surface level of the land must be disclosed in the contract or, if carried out after the date of contract but before registration of the plan, must be disclosed as soon as practicable after details become known to the vendor.

### Section 9AC

The vendor must notify the purchaser of any proposed amendments to the plan of subdivision prior to registration and, if the changes materially affect the lot, the purchaser may rescind within 14 days of being so notified.

### Section 9AE(1)

Any breaches of sections 9AA and 9AB may result in the purchaser rescinding before the plan is registered.

### Section 9AE(2)

The purchaser may rescind if the plan is not registered within 18 months (or such other period specified in the contract) of the contract date.

### Zoom poll

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

- Never
- 1 – 5 per year
- More than 5 per year

### Section 10B

Prohibits a vendor from rescinding a residential off-the-plan (ROTP) contract under a sunset clause unless the written consent of each purchaser to the rescission has been obtained and each purchaser has been given at least 28 days written notice before the proposed rescission.

The notice must specify:

- the reason why the vendor proposes to rescind the contract
- the reason for the delay in registering the plan of subdivision or the issuing of

the occupancy permit

- that the purchaser is not obliged to consent to the proposed rescission.

### Section 10C

Any attempt to contract out of sections 10A and 10B will be of no effect.

### Section 10D

Any attempt to rescind an off the plan contract in contravention of sections 10A to 10C will be taken to be a breach of the contract. This would entitle the purchaser to take all contractual remedies available to them for a breach of contract such as issue a default notice and rescind the contract and claim damages.

### Section 10E

A vendor can also apply to the Supreme Court for an order permitting rescission of a ROTP contract under a sunset clause if it is just and equitable in the circumstances. Section 10E details matters the court must take into account when determining whether it is just and equitable to order rescission of the contract.

### Section 10F

Prescribes that all off-the-plan contracts must include a statement that:

- the vendor is required to give notice of a proposed rescission of the contract under the sunset clause
- the purchaser has the right to consent to the proposed rescission but is not obliged to consent
- the vendor has the right to apply to the Supreme Court for an order permitting the vendor to rescind the contract
- the Supreme Court may make an order permitting the rescission of the contract if satisfied that making the order is just and equitable in all the circumstances.

A failure to provide the statement in the contract will expose the vendor to a penalty of 240 penalty units for a natural person or 1,200 for a body corporate. At the time of writing one penalty unit was \$165.22.

The *Sale of Land Amendment Act 2019* (Vic) brought in the changes to sections 10A to 10F with section 10F operating from 1 March 2020. Refer to the LPLC alert for more information about the changes brought in by this amending Act.

You can find the alert here:

<https://lplc.com.au/resources/lplc-article/retrospective-changes-to-off-the-plan-sunset-clauses-now-law>

## 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?

- Yes
- No
- Unsure

## Legislation

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.

## Your comments

## Section 11

Unless the owners corporation has the required insurance, the purchaser may avoid the sale at any time before settlement.

## Your comments

## LPLC conveyancing best practice program and off-the-plan contracts

As contracts of sale, including off-the-plan contracts and vendor statements, are important documents in a conveyance and getting them wrong can lead to expensive claims. LPLC has a program to assist firms identify improvements in preparing contracts and vendor statements. To date over 100 firms have been invited to be involved.

### Process

Firms send LPLC copies of a contract and vendor statements which they have prepared in the previous six months and for a matter which has settled. If they act for vendor's selling off-the-plan, they are invited to also provide their proforma off-the-plan contract of sale.

A report is prepared about the documents and sent to the firm.

A meeting with the firm can also be arranged to discuss issues with the documents identified in the LPLC report as well as issues we see in the claims involving defective conveyancing documents. On average this meeting takes approximately an hour.

If you would like to be involved in this project, email: [phil.nolan@lplc.com.au](mailto:phil.nolan@lplc.com.au).

### Testimonials

'...thanks again for allowing me to be part of the process. It was fantastic....'

Sole practitioner in the suburbs

'... 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

### Zoom poll

Are you interested in participating in the LPLC Conveyancing Best Practice Program?

Yes – include your name in the Zoom Q&A and Phil will be in touch.

No thanks.

## Risk management comments about off-the-plan contracts

Below is a list of the six most common comments about off-the-plan contracts reviewed by LPLC as part of the conveyancing best practice program.

### 1. Requisitions

Numerous special conditions referred to requisitions and some even referred to Table A of the Seventh Schedule to the Transfer of Land Act 1958 (Vic). General condition 6.2 in the LIV standard contract copyright August 2019 removes the purchasers right to make requisitions. This has been the position since the 2008 version of the LIV form of contract formerly 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.

### 2. Typos

Typos were common and sometimes the typo had a substantial impact on the meaning of the special conditions.

#### Examples

- 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.
- Special conditions referred to the incorrect name and year for legislation.

For example:

- Sale of Land Act 1958
- Owner Corporations Act 2006
- Foreign Acquisition and Takeovers Act 1975

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

- always do a spelling and grammar check
- having someone else review your off-the-plan contract
- avoiding late night drafting.

### 3. Inadequate reference to legislation

Examples include referring to:

- building legislation
- planning Laws
- statutory by-laws
- Building Control Act.

#### 4. Failure to define

Terms such as builder, common property, council, planning laws were commonly not defined. The risk is that a court or tribunal may find that the special condition which contains words which are not defined is void for uncertainty.

#### 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).

Question

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

- Yes
- No
- Not sure

#### 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?*

Including terms in a dictionary can also 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.

## 5. Multiple words for the same thing

Some contracts used multiple words to describe something. This is confusing to say the least.

Here are some examples from some off-the-plan contracts received by LPLC.

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.

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

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

### Suggestion

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.

## 6. Failure to deal with certain issues

In some claims the practitioner overlooked the need to include a special condition in the off-the-plan contract to deal with a relevant issue.

For example, a contract prohibited the lodging of a caveat but did not deal with priority notices.

Refer sections 91C – 91J of the *Transfer of Land Act 1958* (Vic).

### Zoom poll

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

Yes

No

Don't act for vendors selling off-the-plan

### ACL and off-the-plan contracts

It was suggested to firms who participated in the conveyancing best practice program that they review their off-the-plan special conditions to determine whether any might breach the Australian Consumer Law (ACL).

### Exercise - ACL and off-the-plan contracts

#### 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.

### 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.

Yes

No

Not sure

## Relevant case

*Mirvac (Docklands) Pty Ltd v La Rocca* [2006] VSC 48

## Further reading

'Trojan horses' by Bill Rimmer Barrister LIJ August 2016.

## Other issues to consider

Below is a list of three warnings relevant to acting for a client subdividing land in relation to:

- unusual adjustments
- scams
- conflict
- GST withholding.

## 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.

## Risk management tip

Always inform your purchaser client, especially pre-contract of any adjustments which are unusual. For example, land tax adjusted other than on a single holding basis and other than being adjusted as at the settlement date.

## Scams

Fraudsters are targeting conveyancing transactions, including sales off-the-plan because of the simple fact that money is changing hands. You need to alert clients that a fraudster may try send emails impersonating your firm and ask the client to send money to the fraudsters account, instead of your firm's account.

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

## 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.

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

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

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

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

Also use the LPLC email banner:



You can find the banner on the LPLC website here:

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

**Further information**

Refer to the LPLC Cyber Security Guide available here:

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

**Did you know?**

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

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

**Your comments**

## Conflict – acting for developer and another party

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

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

In the words of Dal Pont:

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

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

Note also rule 8.7 of the previous rules (Professional Conduct and Practice Rules 2005) contained a prohibition on acting for a developer and any other party:

*A practitioner must not act in any matter relating to land for a person carrying on business as a builder, developer or subdivider where the practitioner is acting or intending to act for any other party contracting with that person or entity in the course of that business in relation to the land.*

### 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.

### Your comments

## GST withholding

The GST withholding regime applies to potential residential land that is included in a property subdivision plan and where:

- the land does not contain buildings used for commercial purposes
- the recipient is not registered for GST and does not acquire the land for a creditable purpose, (section 14-250(1) and (2))

**Property subdivision plan** as defined in section 195-1 of the GST Act means a plan for the subdivision of real property that is registered (however described) under an Australian law.

Based on the definition of 'property subdivision plan' a Crown Allotment is not caught by the GST withholding requirement.

### **LIV standard contract**

The LIV standard contract copyright August 2019 provides that:

The vendor must at least 14 days before the due date for settlement provide the purchaser and any person nominated by the purchaser under general condition 4 with a GST withholding notice in accordance with section 14-255 of Schedule 1 to the Taxation Administration Act 1953 (Cth), and must provide all information required by the purchaser or any person so nominated to confirm the accuracy of the notice.

See general condition 25.3.

### **Zoom poll**

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

- It is attached to the contract
- The required information is contained in a special condition in the contract
- The notice is given at the same time notice is given of registration of the plan of subdivision

### **Risk management tip**

If the notice / required information is not provided at the time of signing, make a diary entry to remind you that the notice must be given at least 14 days prior to settlement.

### **Your comments**

### **Zoom poll**

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

Yes

No