

# Risk Management Intensive

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## What property lawyers do well

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Contact me if you have any risk management questions.

### Quote

There is always one more thing to learn.

Steve Jobs

### Thought for this session

What do you need to do better in your property law practice?

### Executive summary

Five things property lawyers do well:

- Create precedents.
- Obtain all relevant certificates and searches.
- Know about the *Sale of Land Act 1962* (Vic) and *Transfer of Land Act 1958* (Vic).
- Adapt to change.
- Understand the value of their work.

### Further LPLC conveyancing information

- Practice risk guide [Claim free conveyancing](#).
- [Property](#) risk management practice section.
- Checklists.
- Bulletins.



## Conveyancing best practice program

### Background

Conveyancing claims were approximately 30 per cent of all claims in the last policy year and are estimated to cost approximately \$12 million. A substantial number of these claims are due to errors in contracts of sale of land and section 32 statements.

As section 32 statements and contracts of sale are the most important documents in a conveyance, it is essential that firms get them right.

Given this, we devised a new program to visit firms and assist them identify improvements in preparing contracts of sale of land and section 32 statements.

To date 30 firms were invited to participate and more firms will be contacted over the coming year.

### Process

Firms are invited to send LPLC copies of two contracts and section 32 statements which they have prepared in the previous six months.

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 listing comments about the documents and sent to the firm.

A meeting with the firm's conveyancing staff, including practitioners and clerks, is then held where we discuss issues with the documents identified in the LPLC report as well as issues we see in the claims involving defective conveyancing documents.

The meeting takes approximately an hour to an hour and a half.

### Invitation

If you would like to be involved in this project please send an email to:

[phillip.nolan@lplc.com.au](mailto:phillip.nolan@lplc.com.au)

## Create precedents

Most contracts reviewed contained a number of special conditions. Some of the special conditions amended the general conditions.

- Common amendments to the general conditions included the deletion of general conditions 24.3, 24.4 and 24.5.

In off-the-plan contracts some practitioners also deleted general condition 24.2.

General condition 24 was considered in [Patmore & Anor v Hamilton](#) [2014] VSC 275.

In this case Justice Digby explained how general conditions 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.*

- Practitioners also amended general condition 18 about nomination to include a requirement for any director of a corporate nominee to provide a guarantee and indemnity.

The legal effect of nomination was considered in [Rise Home Loans Pty Ltd v Dickinson & Anor](#) [2009] VSC 555.

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.

## Additional special condition

Some contracts included a special condition, in addition to the LIV special conditions dealing with the process for completing the State Revenue Office (SRO) form one on duties online.

Pursuant to this special condition, the vendor agreed to initiate the duties form

and invite the purchaser's representative to complete the form at least five business days prior to settlement.

The purchaser's representative was obliged to complete the duties form no less than three business days prior to settlement.

The special condition also specified consequences where a purchaser fails to comply and payment of an amount where the purchaser requests the vendor to amend the duties form. One common amendment would be a change to the settlement date as a result of a default by the purchaser.

### Did you know?

The *Estate Agents (Contracts) Regulations 2008* (Vic) will sunset on 11 August 2018.

### Quiz

What amendments would you make to this special condition?

The purchaser shall not prior to settlement lodge any caveat pursuant to section 89 of the *Transfer of Land Act 1958* (Vic) over or with respect to the property or the parent title described in the particulars of sale.

### Question

What off-the-plan special conditions may breach section 23 of the Australian Consumer Law?

### Further information

See article by William Rimmer 'Trojan Horses' LJ August 2016.

## Section 23 - Unfair terms of consumer contracts

- (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.

## Section 24 - Meaning of unfair

- (1) A term of a consumer contract is unfair if:
  - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
  - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
  - (a) the extent to which the term is transparent;
  - (b) the contract as a whole.
- (3) A term is transparent if the term is:
  - (a) expressed in reasonably plain language; and
  - (b) legible; and
  - (c) presented clearly; and
  - (d) readily available to any party affected by the term.
- (4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

## Obtain all relevant certificates and searches

Of the section 32 statements we reviewed, most practitioners attached at least the following certificates and searches:

- Register search statement.
- Planning certificate.
- Land information certificate.
- Water information statement.
- Land tax clearance certificate.

### Register search statement

#### Comment

A red flag went up for about 20 per cent of the section 32 statements reviewed.

The issue identified was failing to include in the section 32 statement a description of covenants which appeared in the 'encumbrances' panel in the register search statement. A description is required in accordance with section 32C of the *Sale of Land Act 1962* (Vic).

Sometimes a plan of subdivision was referred to in the 'encumbrances' panel because the covenant was in the plan. Usually the covenant is described in the plan of subdivision.

One section 32 statement reviewed contained a plan of subdivision and in the schedule on the first page of the plan of subdivision there was a reference to a 'transfer M123456T'. This transfer contained a restrictive covenant which was not described in the section 32 statement.

#### Risk management tip

Check the 'encumbrances' panel and the plan of subdivision for any covenants and include a description in the section 32 statement.

### Planning certificate

Some section 32 statements contained a planning property report available for free from Land Channel through Land Victoria.

Here is a link:

<http://services.land.vic.gov.au/landchannel/jsp/reports/ReportsIntro.jsp>

Another report available from Land Channel is the bushfire prone report.

Note section 32C(b) of the *Sale of Land Act 1962* (**SOLA**) requires a vendor to state when land is in a bushfire prone area. Most section 32 statements did not contain this report.

### **Risk management tip**

Consider the need to include the bushfire prone report in section 32 statements.

### **Land information certificate**

Almost all section 32 statements contained a Land Information Certificate.

Unfortunately, most section 32 statements also stated that there were no charges over the land.

The words 'not applicable' appeared in item 1.2 of the standard LIV section 32 statement.

This is incorrect given that there are a number of charges over land created by statute including the fire services levy pursuant to the *Fire Services Property Levy Act 2012* (Vic).

This sort of error is similar to but not as serious as the error in *McHutchison v Asji* [2017] VSC 258. In this case the section 32 statement recorded that sewerage was connected to the property when section 32H of the Sale of Land Act actually requires a vendor to state which services are 'not connected'.

The property was, in fact, serviced by a septic tank. This should have been evident from the Yarra Valley Water certificate attached to the statement which included an infrastructure plan which showed no sewer main connected to the property.

Justice Digby found the certificate was not enough to overcome the wrong reference to 'connected' in the section 32 statement and he was not convinced the vendor acted honestly and reasonably. Orders were made for the return of the deposit with the vendor to pay the purchaser's legal costs.

Attaching the correct certificate may not be enough to remedy a mistake in the wording of the section 32 statement.

### **Risk management tip**

Insert details of the fire services levy in item 1.2 and state in item 1.2 'refer to attached land information certificate'.

### **Water information statement**

Most section 32 statements reviewed contained this certificate. The ones that did not had a copy of the vendor's water rates notice. This is risky.

The main reason for attaching the statement is that it may contain details of any unregistered easements such as water, sewerage or drainage affecting the property, consents for build over easement works and/or notices issued affecting the property.

This information will not be in the water rates notice provided by the client.

## Relevant case

*Payne v Morrison (1992) VConvR 54-428*

This case concerned the failure to disclose a combined sewer and the right of the purchaser to rescind.

A combined sewer is usually an unregistered easement which will be disclosed in the water information statement.

## Risk management tip

Always attached a water information statement and check with the client whether any structures are built over any easements. This would usually constitute a breach of the terms of the easement and should be disclosed pursuant to section 32C of the Sale of Land Act.

## Land tax clearance certificate

Some section 32 statements did not contain a land tax clearance certificate mostly because the property being sold was the principal place of the vendor and exempt from land tax.

## LPLC recommendation

Always obtain a land tax clearance certificate to confirm the amount (if any) of land tax which may be payable.

This is especially important when acting for a purchaser so that the purchaser has the benefit of the protection pursuant to section 96(4) of the *Land Tax Act 2005* (Vic) which provides that only the amount in the certificate can constitute a charge on the land.

Also check whether the client will have two possible principal places at the same time. This can happen where the client buys a new principal place and moves into it but at the same time sells their current principal place.

The client should be advised of the need to apply for a dual principal place exemption. If this is not obtained it may be that land tax is assessed on the property being sold which would be adjusted at settlement.

The client may be unhappy that land tax is being adjusted and that they now have to go through the process of trying to obtain a refund and/or apply for the exemption which could have been avoided.

## Question

What discussions do you have with clients about obtaining a building information certificate?



## Know about the *Sale of Land Act 1962 (Vic)* and *Transfer of Land Act 1958 (Vic)*

Knowledge of all legislation relevant to the sale of land is important.

It was clear from our discussions with practitioners and their staff that they understood the disclosure obligations in the *Sale of Land Act 1962* and some sections in the *Transfer of Land Act 1958*.

What seemed to be lacking was an understanding of some of the more obscure provisions in the *Sale of Land Act* and some ancillary legislation particularly relating to tax, such as GST and changes to the *Building Energy Efficiency Disclosure Act 2010 (Cwlth)*.

The main disclosure obligations are contained in sections 32, 32A – 32I of the *Sale of Land Act*. Other relevant disclosure are:

- section 30 – definitions
- section 32J – certificates can be provided
- section 32K – rescission where there is a breach
- section 32L – offence to provide false or incomplete information
- section 32O – circumstance where vendor is not required to give purchaser another section 32 statement.

### Unusual provision

One unusual provision is section 11 of the *Sale of Land Act* provides that:

*‘a person cannot sell a lot affected by an owners corporation unless the vendor or the owners corporation has a current insurance policy in accordance with the Owners Corporations Act 2006. Where a lot is sold in contravention the purchaser may avoid the sale at any time before the contract is completed.’*

For a two-lot subdivision which does not have owners corporation insurance, a purchaser would not have any rights pursuant to section 11 because any two-lot subdivision is exempt from obtaining insurance. See section 7(1) of the *Owners Corporations Act 2006 (Vic)*.

### Risk management tip

Where a practitioner is instructed that an owners corporation of a three or more-lot subdivision is inactive they should alert their clients to the requirement to obtain any required owners corporation insurance given a purchaser may rescind in reliance on section 11 of the *Sale of Land Act*.

## Release of deposit

Section 27 of the Sale of Land Act came up at most meetings and firms expressed their frustration at how much time is spent dealing with release of deposit issues.

Some practitioners were not aware of the right of a purchaser to rescind where a vendor knowingly or recklessly supplies false information to the purchaser regarding any section 27 particulars. See section 27(8).

Some practitioners mentioned that when they are acting for a vendor seeking release of the deposit they refer the purchaser's legal representative to *McEwen v Theologedis* [2004] VSC 244. However, the same practitioners usually said that when acting for a purchaser who wishes to object they refer the vendor's legal practitioner to the more recent case of *Aurumstone Pty Ltd v Yarra Bank Developments Pty Ltd* [2017] VSC 503.

The general consensus about the Aurumstone Pty Ltd case is that any contingent condition or essential term justifies the refusal to release the deposit.

There is some difference of opinion as to what constitutes a contingent condition or essential term.

A subject to finance condition is one such condition that would justify objection to release until satisfied.

## Transfer of Land Act 1958 (Vic)

Knowledge about the Transfer of Land Act was mostly centred around forms which were used in the conveyance, such as the transfer of land.

What is apparent from discussions with the firms and some recent claims is that some practitioners were not aware of certain dates from which only PEXA can be used. For example, standalone transfers of land could only be done using PEXA from 1 March 2018.

In one claim the practitioner had a paper standalone transfer of land rejected by the Land Registry. The transfer was dated after 1 March 2018 and on which duty had been paid. The purchaser client was paying cash and the vendor selling had no mortgage over the title. Hence the transfer of land was a standalone.

When the practitioner went to do the transfer on PEXA the SRO required duty to be paid again and the practitioner was told by the SRO they could apply for a refund of the first set of duty paid.

I expect that the client was unhappy with this arrangement. I don't understand why the SRO was unable to acknowledge that payment had already been made.

### Tip

For more information on the digital transformation timelines refer to the regularly updated PEXA industry timeline. The easiest way to find the timeline is google 'PEXA digital transformation timeline'.

Here is the timeline as at 4 July 2018:

Instrument	WA <sup>#</sup>	VIC	NSW+	SA
Standalone mortgage discharges	1 Aug-16 <sup>**</sup>	1 Aug-16 <sup>**</sup>	1 Mar-17 <sup>**</sup>	3 Apr-17
Standalone mortgages (consumer) <sup>**</sup>	1 Aug-16	1 Aug-16	1 Mar-17	3 Apr-17
Standalone mortgages (commercial)	1 Dec-17	1 Aug-17 <sup>**</sup>	1 Aug-17 <sup>**</sup>	12 Feb-18
Refinances	1 Dec-17 <sup>^^</sup>	1 Aug-17 <sup>**</sup>	1 Aug-17 <sup>**</sup>	12 Feb-18
Standalone caveats	1 Dec-18	1 Dec-17 <sup>^</sup>	1 Jul-18	-
Standalone withdrawals of caveat	1 Dec-18	1 Dec-17 <sup>^</sup>		
Non-ADI discharges, mortgages and refinance	-	1 Dec-17 <sup>^</sup>	1 Jul-18	12 Feb 18
Standalone transfers	1 Dec-18	1 Mar-18 <sup>^</sup>	1 Jul-18	-
Standalone survivorship	-	1 Mar-18 <sup>^</sup>	-	-
All combinations of discharge, transfer and mortgage transactions in PEXA	-	-	1 Jul-19	-
All combinations of transfer transactions in PEXA	1 Dec-18	1 Oct-18 <sup>^</sup>	-	-
All transactions	-	1 Aug-19 <sup>^</sup>	-	-

*\*\* Where the mortgagee is an Authorised Deposit-taking Institutions (ADI) and conveyancers and lawyers acting for an ADI.*  
*\*\*\*Excludes out of scope titles.*  
*+ Excludes mortgages with bespoke terms over 4,000 characters.*  
*^ If a party is a subscriber or is represented by a lawyer/conveyancer.*  
*^^ Includes both Deposit-taking Institutions (ADI) and Non-Deposit-taking Institutions.*  
*# In scope transactions only. Excludes transactions by those ineligible to become Subscribers. Transfers required to be lodged electronically where contract of sale is signed on or after the specified date.*

### *Building Energy Efficiency Disclosure Act 2010 (Cwlth)*

This act commenced on 1 July 2010 and introduced a new regime for companies to disclose energy efficiency ratings for commercial buildings with an office floor space over 2,000 square metres before selling or leasing.

All the section 32 statements we reviewed referred to 2,000 square meters which is incorrect. The threshold for energy efficiency disclosure in commercial office space changed on 1 July 2017 to 1000 square metres or more.

For more information see the Australian Government website Commercial Building disclosure and see also previous articles by LPLC on energy efficiency disclosure requirements.

## Question

When acting for a mortgagee how do you satisfy sections 74(1A) and 87A of the *Transfer of Land Act 1958*?

### Section 74(1A) - creation and nature of mortgages and charges

- (1A) The Registrar may register a mortgage if the mortgagee has—
- (a) signed the mortgage; and
  - (b) certified that—
    - (i) the mortgagee holds a mortgage granted by the mortgagor; and
    - (ii) the mortgage held by the mortgagee is on the same terms as the mortgage lodged for registration.

### Section 87A - mortgagee to verify identity of mortgagor for execution of mortgage or variation of mortgage

- (1) In respect of a mortgage or a variation of mortgage, a mortgagee must take reasonable steps to verify the authority and identity of a mortgagor to ensure that the person executing the mortgage, or on whose behalf the mortgage is executed, as mortgagor is the same person who is, or is to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.
- (2) For the purposes of subsection (1), the mortgagee is considered to have taken reasonable steps to verify the authority and identity of the mortgagor if the mortgagee has taken steps consistent with any verification of identity and authority requirements—
- (a) determined by the Registrar in accordance with section 106A; or
  - (b) set out in the participation rules (within the meaning of the Electronic Conveyancing National Law (Victoria)).

## Adapt to change

It was clear from the contracts reviewed that the practitioners were excellent at adapting to change.

This was demonstrated by the use of special conditions dealing with the CGT regime and more recently, the new GST withholding regime.

To understand how good we are at adapting to change, consider the list below of the many organisations practitioners are now paying money to at or before settlement for a fairly standard conveyance.

- GST for the ATO – note the new withholding obligations.
- CGT for the ATO – this was intended to capture CGT payable by foreigners.
- Rates for councils.
- Rates for water authorities.
- Land tax for SRO.
- Absentee owner surcharge for SRO.
- Fire services levy for councils.
- Congestion levy for SRO.
- Duty for SRO.
- Commission for selling agents.
- Rent for managing agents.

There are a number of other changes on the horizon. Here are just a few.

- Anti-money laundering and counter terrorism financing legislation  
Refer to information provided by Patrick Oliver and Naomi Fink.
- Personal Property Securities Act

The review of the PPSA undertaken by Bruce Whittaker was tabled before the Commonwealth Parliament on 18 March 2015.

I was recently informed by a Senior Legal Officer at the Private International Law and Commercial Law Unit in the Attorney-General's Department that the government intends to release its response to the review in mid-2018. In the second half of 2018 it also intends to release a public consultation package consisting of draft implementing legislation and PPSR screen shots.

- Review of property legislation

For a number of years Consumer Affairs Victoria has been undertaking a review of the following legislation:

- *Estate Agents Act 1980*
- *Owners Corporations Act 2006*

- *Conveyancers Act 2006*
- *Sale of Land Act 1962.*

The purpose of the review is to identify opportunities to modernise, improve and make the legislation more efficient.

Perhaps we will see amending legislation for the Sale of Land Act later this year.

- State Revenue Office

Forms used for land tax and duty purposes have changed substantially over the last few years and I expect there will be more changes in the months ahead.

One change that seems necessary is removing the requirement to insert the settlement date in the duties form one.

Inserting the date means that if the date changes the form needs to be re-signed. When using duties online and/or PEXA it should be obvious to PEXA and the SRO when a settlement has taken place.

I also note the recent announcement by the SRO that they will no longer accept paper notification of acquisition by a trust for land tax purposes. This form is known as LTX form 8.

This form must now be completed online. You can find instructions on completing online forms the SRO [website](#).

## Question

What proactive marketing activities do you do?

## Understand the value of their work

Most lawyers told us that they provide good value for the conveyancing services they provided.

However they also felt pressure to reduce their fees in order to gain work over competitors in their local area. Some referred to conveyancers as their main competition and other referred to other law firms.

One matter which came up during firm visits was how much firms charged for conveyancing.

How much do you charge for conveyancing?

The prices quoted ranged from \$800 plus GST plus disbursements to \$1,500 plus GST plus disbursements.

Other comments which was made were that:

- clients shopped around
- clients did some of their own research before engaging the lawyer (this might be about the firm by going to their website or about conveyancing issues)
- clients did not value the work undertaken by the firm.

LPLC recommended to the firms visited that they start educating their clients about how difficult conveyancing matters can be. This is also about being proactive.

One way to do this is for firms to have material explaining a particular conveyancing issue so clients appreciate how much work is involved. See attached example of a brochure prepared by LPLC.

The client who understands the amount of law involved and how complicated conveyancing can be is more likely to value the lawyer and less likely to argue about the price.

Value adding is another thing lawyers can do. For example, when a client asks the lawyer to help with a conveyance the lawyer can recommend the client make a will and/or revisit their will as the conveyance may impact on their will.

Seeking feedback from clients is a way to improve engagement. Try doing a [survey monkey](#).