

# CLAIM FREE CONVEYANCING

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LEGAL  
PRACTITIONERS'  
LIABILITY  
COMMITTEE

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## Introduction

Claims against solicitors arising from conveyancing transactions are regular and consistent. Time and cost pressures, in what is a technical area of the law, can result in simple errors.

The number of conveyancing claims in the period 2006-2009 averaged 120 per year (which is 24% of all claims made to the LPLC in that period). Expensive errors in the 2008-2009 year for commercial property have resulted in estimates of \$11 million compared to the previous years where the costs were between \$3 million and \$9 million.

*Claim Free Conveyancing* (February 2010 edition) has been produced by the LPLC to help solicitors avoid the most common mistakes made in conveyancing transactions. By being aware of how and why mistakes occur, you will be in a better position to protect against claims. Our commentary and the Vendor's Solicitor and Purchaser's Solicitor Checklists in this booklet are designed to help you achieve that objective.

## The causes

The three major underlying causes of claims in the conveyancing area are:

- simple oversights;
- poor engagement management; and
- failure to manage the legal issues.

Using checklists and keeping written records of client instructions and agreements between the parties can go a long way to minimising exposure in this area.

# The most common mistakes

## 1. Defective Section 32 Statements

This area continues to attract a significant number of claims against solicitors acting for vendors.

Claims usually arise from the solicitor failing to:

- ensure that current and accurate information is used when preparing the Section 32 Statement. This occurs particularly when the vendor is in a hurry and/or there are unreasonable time frames. The solicitor may take shortcuts such as recycling old certificates or using an old copy of the certificate of title resulting in serious consequences for the vendor client.
- include necessary current certificates like owners corporation certificates, water authority information certificate, building approval certificates, Heritage Victoria certificates etc... and current plans of subdivision.
- accurately identify and indicate in the Section 32 Statement whether services are 'connected' or not. Too often, the misleading description 'available' is used resulting in claims.
- seek instructions to obtain information statements from the relevant water authority to provide current information about any unregistered easements affecting the land.
- check that real estate agents have complied with requests made by the solicitor to amend, update or attach relevant certificates to the Section 32 Statement.
- check location of property to see whether any potential development contributions charges may apply in outer growth corridor areas.

### EXAMPLES:

#### Recycled certificates

The solicitor was instructed to prepare a Section 32 Statement that same day. The solicitor did so using information from the file created several years earlier when acting for the client in the original purchase of the property. The Section 32 Statement stated that the property was zoned Residential C but failed to indicate that there had been changes in the meantime which meant that the property was subject to a significant landscape overlay. The purchaser's solicitor did further searches and found this out. The purchaser then rescinded the contract.

### 'Short form' Section 32 Statement

The solicitor for the vendor prepared the Section 32 Statement but a water information statement was not attached. After the contract was signed, the purchaser's solicitor obtained a statement from the relevant water authority. It had an attached plan showing the course of a declared main drain running underneath the kitchen of the house. The purchaser was unable to raise the finance needed to complete the purchase as the bank refused to advance the finance after being informed of the easement. The purchaser rescinded and demanded return of the deposit. The vendor resisted, but after costly court action, the purchaser was successful.

### Real estate agent held to account

On the instructions of the vendor (who thought that 'connected' sewerage included connection to a septic tank), the solicitor prepared the Section 32 Statement. Luckily, before the parties signed the contract, the solicitor picked up the error and instructed the estate agent to amend the statement to indicate the sewerage was 'not connected'. Correctly, he kept a file note of these instructions. The buyer was signed up. Unfortunately, the agent had not amended all copies of the statement; the vendor's copy had been changed but the purchaser's had not. The purchaser found out about the lack of sewerage and rescinded the contract. The vendor took action against the real estate agent and the solicitor. The solicitor had protected his position by keeping good file notes. Without these the solicitor would have shared the liability with the agent.

### Issues on the horizon

With the current focus on climate change and emission trading schemes, practitioners should keep abreast of developments in the law in this area. It is expected that Section 32 Statements may require some form of 'sustainability statement' in the near future.

For any property located in outer suburban or rural areas near Melbourne that have been identified as growth corridors, check that the property is not affected by any potential development contribution liabilities or similar infrastructure tax or charges that need to be addressed in the contract.

## WE RECOMMEND:

- When asked to prepare a Section 32 Statement on short notice:
  - » Make it clear to your client and the selling agent that it takes at least a week, sometimes longer, to obtain all necessary certificates required to prepare a Section 32 Statement and a statement prepared in a hurry may be invalid.
  - » Point out to your client that an invalid Section 32 Statement risks avoidance of the contract by the purchaser which may then involve double agent's fees, delay and possibly a lower sale price.
  - » Point out that an invalid Section 32 Statement also carries the risk of an action for damages for misrepresentation.
  - » If, despite this advice, your client insists that the statement be prepared in a hurry, confirm the advice in writing to both your client and the selling agent. A pro forma letter can be found at Appendix One.
- Do not rely on the duplicate certificate of title. Always conduct an up to date title search.
- Apply for a fresh set of certificates. Make it your practice to obtain from the relevant water authority an information statement, which is necessary to establish whether there are any unregistered easements such as water, sewerage or drainage affecting the property or notices issued affecting the property. Read each certificate carefully.
- Make proper enquiries to ensure that the Section 32 Statement accurately states whether services are connected (which means the services are actually operating on the property) or not connected. Avoid use of the term 'available' as this is misleading and arguably does not comply with the disclosure required by section 32(2)(ea) of the *Sale of Land Act 1962* (Vic) ('the Act').
- Where the property is part of subdivided property, confirm whether an owners corporation exists and if so advise your client about the need for an owners corporation certificate (even if the owners corporation is said to be 'inactive'). See Appendix Four for more details on this issue.
- When instructing estate agents to amend, update or attach relevant certificates to the Section 32 Statement, keep a file note of those instructions and, when given verbally, confirm the instructions in writing.

## 2. No advice about matters relating to the land

This category of claims relates to advice given, or the lack of advice, by solicitors acting for purchasers.

There are three common scenarios.

- The solicitor gives no or inadequate pre-contractual advice on a pertinent issue. The clients later allege that had proper advice been given, they would not have signed the contract.
- The solicitor fails to make post-contract enquiries and searches, the results of which would have given the clients cause to avoid the contract.
- The solicitor's post-contract searches and enquiries reveal some critical information (which the vendor had not provided in the Section 32 Statement) which is not passed on to the clients. The clients later say that had they known of the information they would have attempted to avoid the contract.

Specific errors made by solicitors include failing to:

- advise on zoning or planning scheme matters or the existence of a restrictive covenant with the result that the client cannot use the property as intended.
- detect the existence of drainage/sewerage easements resulting in the purchaser client being unable to build or extend where intended on the property.
- detect discrepancies in the Section 32 Statement, particularly about whether services are connected to the property or not.
- advise on unusual lease provisions (where tenanted commercial premises are involved), such as worthless rental guarantees, the existence or non-existence of options to renew, whether a 5 year term has been created by virtue of the *Retail Leases Act 2003* (Vic) or the early termination rights of the tenant.
- advise the client to check measure the boundaries of the property.
- adequately handle all issues relating to water shares.

**EXAMPLES:****No advice on building approvals**

The client entered into a contract to purchase the land and a B & B business. The Section 32 Statement showed there were no building approvals in the last 7 years. The client's solicitor did not apply for a building approval certificate or warn the client of the risks of not doing so. When the client went to sell the land several years later it was discovered that a building permit had been issued to the original vendor but no final inspection had ever been undertaken and the council had required works to be done to rectify the illegal structures. A claim was made against the solicitor for the cost of rectification works and the difference in the sale price once the new purchasers discovered the problem.

**Easement revealed in search; client not informed**

The solicitor acted for the purchaser and was provided with the contract of sale and the Section 32 Statement. However, the Section 32 Statement was 18 months old and since it had been prepared a plan of subdivision had been approved with a three metre sewerage easement at the rear of the property. The solicitor did the necessary searches but failed to draw the client's attention to the easement prior to settlement. As a result, the client had to relocate the sewerage line and had lost the chance to either rescind the contract or perhaps negotiate a lesser price.

**'Available' not connected**

The solicitor acted for the purchaser. The Section 32 Statement indicated that sewerage was 'available'. The client assumed that 'available' meant connected. The solicitor applied for an information statement from the local water authority. On the back page of the statement it was noted that the property was likely to be part of a sewerage development in the future and the landowner would be required to contribute to the cost. This was not detected by the solicitor who only read the front page. After settlement, the client discovered that the sewerage was not connected. The client blamed the solicitor and sought to claim the difference in value between the sewered and unsewered land.

**WE RECOMMEND:****When providing pre-contractual advice**

- ☑ Carefully check the contract, Section 32 Statement and associated certificates and, if anything 'unusual' is detected, warn the purchaser client and confirm your advice in writing.
- ☑ In particular, be on the look out for zoning issues, planning overlays, restrictive covenants and unusual lease provisions (where tenanted commercial premises are involved).
- ☑ Obtain instructions to make further investigations, if necessary. If instructed not to do so, confirm this in writing with the client.

**When instructed to act post-contract**

- ☑ Apply for a full set of certificates, particularly where the Section 32 Statement contains certificates that are outdated (say 3 months old as a 'rule of thumb') or is incomplete (for example, where it does not include a water information statement disclosing any unregistered easements).
- ☑ Make sure you carefully compare the results of your searches with the information in the Section 32 Statement. Advise your client of any discrepancies or differences and the client's rights to avoid the contract, if any.
- ☑ Always advise your client to check measure the property and point out to them the shape of the property on the title.
- ☑ In the event that a Section 32 Statement indicates that services are 'available', advise your client that 'available' may not mean connected and that further enquiries should be made to determine if the services are connected.
- ☑ Always review any related documents contained in the Section 32 Statement (for example a lease) and provide advice regarding all relevant terms contained therein.

## 3. Subdivisions

The number and value of claims involving issues related to subdivisions have continued to be significant in the last three years. Many of the claims relate to 'off the plan' sales, although claims still arise in relation to existing subdivisions, particularly in relation to right title and accessory units.

In essence, solicitors acting for vendors get sued for:

- transferring the wrong lot on a plan of subdivision often because the lot number and street unit number are mixed up.
- the contract for the sale of a lot on an unregistered plan of subdivision not complying with section 9AA of the *Sale of Land Act 1962 (Vic)* (the Act) by not providing that deposit monies are to be held in accordance with that section, thereby giving the purchaser the right to rescind pursuant to section 9AE(1) of the Act.
- not promptly attending to registration of the plan of subdivision, giving the purchaser the right to rescind pursuant to section 9AE(2) of the Act.
- failing to advise on or obtain body corporate insurance as required by section 11 of the Act, usually in relation to two lot subdivisions.
- failing to draw clearly worded special conditions setting out what the vendor and purchaser will do in relation to the subdivision development.

Solicitors acting for purchasers get sued for:

- failing to spot a section 9AA or 9AE(2) breach thereby depriving the purchaser client of the opportunity to rescind.
- failing to ensure car parks or accessory units are transferred.
- failing to detect a material difference between the proposed plan of subdivision in the contract of sale and the plan finally registered (usually the lot size has been reduced or there has been a change in the boundary or an easement has been added).

### EXAMPLES:

#### Basement carpark disappeared

The purchaser client bought an apartment off the plan expecting a basement car park to be included as part of the purchase. The plan that was ultimately registered did not provide for the basement car park. Despite having correctly obtained a copy of the final plan prior to settlement, the solicitor failed to notice this. Settlement occurred and the client did not get what had been bargained for. While the vendor had failed to comply with its obligation under section 9AC(1) of the 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 solicitor should have picked up the change prior to settlement. If the solicitor had done so, the client could have taken action to rescind on the basis that the change represented a breach of a fundamental term of the contract.

#### Deposit monies not correctly held

The solicitor acted for the purchaser in an off the plan contract. A non-standard contract was used and, in breach of section 9AA of the Act, the contract did not provide 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 solicitor did not pick up this failure and advise the client of this way out of the contract. Instead, lengthy disputation occurred which continued after settlement in relation to significant building defects. The purchaser turned on the solicitor for failing to advise that the purchaser could have rescinded and avoided all the extra costs and inconvenience.

Practitioners should be aware of two cases in 2009 that directly affect 'off the plan' sales. In *Clifford & Anor v Solid Investments Australia Pty Ltd* [2009] VSC 223 it was said that contract 'sunset' clauses must specify a time for registration of the plan of subdivision in explicit terms and cannot be subsequently extended by the vendor. In *Everest Project Development Pty Ltd v Mendoza & Ors* [2008] VSC 366 it was found that the wording of the contract of sale did not comply with section 9AA to 9AH in relation to how the deposit bond could be called on.<sup>1</sup>

<sup>1</sup> See the bulletin *Recent decisions affecting 'off the plan' sales* at [www.lplc.com.au](http://www.lplc.com.au). *Clifford's case* is currently on appeal.

## WE RECOMMEND:

- ☑ Carefully check plans of subdivision and contracts of sale to ensure that the plan is current and that the contract accurately describes what is being bought or sold.
- ☑ Check the registered plan of subdivision carefully. Do not assume that because the subdivision plan number is the same as the plan attached to the contract (or that the vendor has not notified the purchaser of any amendments) that no amendments have been made to the plan.
- ☑ When acting for a vendor of a lot on an unregistered plan, ensure compliance with the obligations imposed by the *Sale of Land Act* 1962 (Vic) and warn of the consequences of any breach (including that the purchaser may rescind). Specifically:
  - » **Section 9AA:** the contract must provide that deposit monies be paid into the trust account of a legal practitioner or licensed estate agent or into a special purpose account with an authorised deposit-taking institution.
  - » **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 9AE(1):** any breaches of sections 9AA and 9AB may result in the purchaser rescinding before the plan is registered.
  - » **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(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. See LPLC's bulletin on *Recent cases affecting 'off the plan' sales*, July 2009 on our website at [www.lplc.com.au](http://www.lplc.com.au).
- ☑ Be aware of the insurance requirement imposed by Section 11 of the *Sale of Land Act* if the lot is affected by an owners corporation. Unless the owners corporation has the required insurance, the purchaser may avoid the sale at any time before settlement.

- ☑ Similarly, when acting for a purchaser check compliance by the vendor with the *Sale of Land Act* obligations and, if there is non-compliance, advise the purchaser client of the right to rescind.
- ☑ Check all precedent Special Conditions to ensure that they deal with these issues, in particular section 9AE(2).

## 4. Domestic owner builders: *Building Act 1993* breaches

The complex provisions of the 'owner builder' sections of the *Building Act 1993* (Vic), particularly as they relate to domestic owner builders, continue to catch solicitors out.

Failure to ensure compliance with sections 137B and 137C results in the contract being voidable at the option of the purchaser at any time before settlement. The domestic owner builder requirements are summarised in **Appendix Two**.

When acting for a vendor, there are several common scenarios.

- The solicitor focuses on the pre-contract disclosure obligations (building approvals within 7 years; certificate of insurance and condition report) completely overlooking the need for the section 137C warranties in the contract.
- The solicitor assumes that because the domestic owner builder work is less than \$12,000 in value, the requirements do not apply. The insurance requirements do not apply in these circumstances but the condition report and warranties are still necessary.
- The solicitor forgets to check when preparing a Section 32 Statement that the condition report is less than 6 months old, or fails to warn the vendor or the agent that the Section 32 Statement should not be used once the condition report is more than 6 months old.
- In other cases, there has been a failure to assemble sufficient information for the solicitor to make an assessment of whether the requirements apply or not. This is often coupled with a failure to warn the client of the consequences of non-compliance (the purchaser can avoid the contract) and the critical timing issues (the requirements must be met pre-contract).

Recently we have also seen claims against purchasers' solicitors for failing to advise that the purchaser could avoid the contract because the vendor had not complied with the owner builder requirements, often because appropriate enquiries were not made to determine that the vendor was an owner builder.

### EXAMPLE:

#### Domestic owner builder works overlooked

The solicitor received instructions to prepare auction contracts and a Section 32 Statement for the sale of a residence. The solicitor knew a garage had been constructed by a registered builder but did not turn his mind to the status of a further addition (an extra room) carried out by the vendor as domestic owner builder for \$45,000. The Section 32 Statement prepared by the solicitor included a property information certificate from the local council listing both building permits. However, the Section 32 Statement failed to include a condition report or a certificate of insurance in respect of the further addition and the contract did not include the warranties. The purchaser avoided the contract and the vendor incurred significant losses, as soon after there was a significant drop in the market and a much lower price was obtained.

### WE RECOMMEND:

- ☑ Take detailed instructions from a client intending to sell domestic property, including answers to the following questions:
  - » Have any building permits been issued in the last 7 years or has there been any other building work in that time?
  - » Who did the building work? (Unless a registered builder's name is on the building permit, sections 137B and 137C will apply.)
  - » What was the value of the building work (more than \$12,000)?
  - » When did the building work commence?
  - » Was any occupancy permit or certificate of final inspection issued?
- ☑ Warn your client in writing of the timing issues and the consequences of non-compliance.
- ☑ If the requirements apply, ensure that the condition report and certificate of insurance (insurance is only required where the value of the building work is more than \$12,000) are provided with the Section 32 Statement and that the section 137C warranties are set out in the contract.
- ☑ When acting for a purchaser, check in whose name any building permits were issued.

## 5. Allowing conditional contract to become unconditional

Mistakes in relation to 'subject to finance' clauses have increased in the last few years. The common errors are:

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

### EXAMPLES:

#### Client not warned

The purchaser's solicitor wrote to the purchaser soon after receiving instructions in relation to the purchase and informed him of the date by which finance needed to be approved and asked that the client notify the solicitor if finance had been approved by that date. He did not warn the client of the consequences of not providing that information in time. The client appeared to be relatively sophisticated and the solicitor assumed the client knew the consequences. When the approval letter was received, it was for less than the client required and subject to valuation. The client did not tell the solicitor until some time after the approval date. The client alleged that he thought that if he could not get finance, the contract was automatically avoided. He said he did not realise that the vendor had to be notified by a certain date in order to avoid the contract.

#### Client doing some of the negotiating

The purchaser's bank was not prepared to lend the purchaser the amount he needed because the valuation was less than the purchaser had agreed to pay. While the purchaser's solicitor was negotiating with the vendor's solicitor in relation to when the 'subject to finance' clause expired and an extension, the purchaser spoke directly with the vendor and arranged an extension of time to obtain another valuation. The purchaser's solicitor was told of the oral extension by his client but did not confirm it in writing. When the purchaser received the second valuation he decided to avoid the contract but the vendor said the extension was only to allow the purchaser to make an application for finance from a specific bank and that the contract had now become unconditional. The solicitor for the purchaser was blamed for not having told the client to avoid the contract when the first approval date was looming and for not confirming the extension date in writing. The solicitor had been bullied by a very bossy client!

## WE RECOMMEND:

When a contract has a 'subject to finance' clause:

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

## 6. GST

Far from being a simple tax, the introduction of GST on 1 July 2000 imposed a layer of complexity for solicitors acting in conveyancing transactions.

Solicitors need to consider whether:

- a vendor client is registered or required to be registered for GST;
- the sale is in the course or furtherance of an enterprise;
- the nature of the property being sold is such that it attracts GST; and
- the supply falls within one of the exemptions.

The supply of residential premises does not attract GST unless the sale is the first since the residence was constructed or undergone substantial renovation, in which case GST will be payable.

Where a supply may qualify as GST-free, the elements of the exemptions need to be considered. In the case of the farming exemption, has the farm been farmed for five years immediately preceding settlement? In the case of the going concern exemption (in the context of sales of tenanted non-residential premises) will the property be tenanted at the date of supply?

Then there are questions of whether the contract should be GST exclusive or inclusive and whether or not the margin scheme should be applied and, in this regard, close attention needs to be paid to the proper completion of the GST provisions in the particulars of sale.

Not surprisingly, claims arise in this area. Interestingly, the number and cost of claims have not varied significantly over the last 9 years. The average has been 9 claims a year costing approximately \$160,000 per annum. The mistakes made have also not varied greatly from year to year.

In essence, vendor's solicitors are sued for:

- failing to include a GST clause in the contract;
- including the wrong GST clause in the contract (a GST inclusive clause instead of a GST exclusive clause) or contradictory clauses in different parts of the contract;

- purporting to apply the margin scheme in circumstances where it is not available (usually because full GST was paid on the acquisition of the property) or no agreement was reached to apply the margin scheme;
- failing to obtain the professional valuation for margin scheme purposes (when required) by the end of the tax period in which settlement falls;
- using the supply of a going concern exemption in circumstances where the strict requirements of section 38-325 of *A New Tax System (Goods and Services Tax) Act 1999* are not met; or
- failing to collect GST at settlement, often because someone wrongly assumes that it is not payable, such as where the property sold is vacant residential land.

Purchaser's solicitors are sued for failing to:

- provide pre-contractual advice on the existence and consequences of a GST exclusive clause in the contract;
- protect a commercial purchaser's entitlement to an input tax credit (when purchasing on a GST inclusive basis) by failing to exclude the application of the margin scheme;
- advise the purchaser of the effect of a margin scheme provision or a mixed supply on the availability of an input tax credit; or
- ensure that the tax invoice provided at settlement was correct.

#### EXAMPLES:

##### Margin scheme not available

The solicitor acted for a developer client selling an expensive parcel of land. The contract was prepared on a GST exclusive basis, with the 'option' of the purchaser one month before settlement requesting application of the margin scheme (the contract was entered into before the amendments to section 75 of *A New Tax System (Goods and Services Tax) Act 1999* which require the vendor and the purchaser to agree in writing that the margin scheme is to apply). The day before settlement the purchaser asked for the margin scheme to be applied and provided a valuation equalling the purchase price, with the result that there was no margin and therefore no GST payable. The transaction settled on that basis.

After settlement, the vendor's accountant advised that the margin scheme was not available because full GST had been paid and claimed on the acquisition. The vendor then looked to the purchaser to recover the GST. The purchaser refused and was persuaded only after expensive litigation to change its position. The solicitor for the vendor was exposed for not having checked the availability of the margin scheme with the client or the accountant when preparing the contract or, later, when considering the out of time request for application of the margin scheme by the purchaser.

##### No pre-contract advice on GST exclusive clause

The solicitor provided pre-contract advice regarding the client's proposed purchase of a property on the city fringe which the client wanted to develop into residential apartments. The solicitor provided a good letter of advice concerning issues with the existing planning permit, contamination, the location of an easement, the timing of proposed demolition works and stamp duty. He otherwise described the contract as 'standard'. No reference was made to the GST clause which provided the price was GST exclusive and allowed for the application of the margin scheme.

## Margin scheme not used

The client planned to purchase land for residential development and was initially advised by its solicitor that the margin scheme should be applied. The purchase proceeded by way of a put and call option and thirty percent of the land was sold immediately for commercial purposes. The sale was finalised almost two years after the initial legal advice. The margin scheme was not applied. The client subsequently realised that it could not then sell the developed residential land using the margin scheme. The client and its lawyers had been sidetracked by the complicated factors and delay in the sale and had lost sight of the importance of using the margin scheme.

### WE RECOMMEND:

#### When acting for the vendor

- ☑ Consider whether the GST 'threshold criteria' are present.
  - » Is the vendor registered or required to be registered for GST?
  - » Is the sale in the course or furtherance of an enterprise?
- ☑ If 'yes' to both questions, consider whether the real property being sold will attract GST.
  - » Is it vacant land (including residential vacant land)?
  - » Is it new residential premises (including substantially renovated premises)?
  - » Is it commercial residential premises?
  - » Is it non-residential premises?
- ☑ If the real property being sold will attract GST, ensure that there is a clear GST treatment in the contract. Consult your client about whether the GST clause should be inclusive or exclusive and whether or not the margin scheme is available and should apply.

- ☑ If the margin scheme should apply, ensure there is agreement in writing between the parties to this effect. If a professional valuation is required, advise your client in writing of the time frame in which the valuation must be obtained (ie. by the end of the tax period in which settlement falls).
- ☑ If the real property is farmland, consider whether:
  - » The farmland exemption (section 38-480) will apply with the result that no GST will be payable on the sale of the freehold, although GST will be payable on livestock, plant and equipment.
  - » The supply of a going concern exemption (section 38-325) will apply with the result that no GST will be payable on the sale of the freehold, livestock, plant and equipment.
- ☑ If the real property is tenanted commercial premises, consider whether the technical requirements of section 38-325 and the ATO ruling GSTR 2002/5 are met with the result that no GST will be payable on the sale. In particular:
  - » The vendor and the purchaser must agree in writing that the supply is of a going concern.
  - » The purchaser is registered or required to be registered for GST.
  - » The sale is not to the tenant.
  - » There is a tenant at the date of supply (usually settlement) and the contract provides for receipt of rents and profits – not vacant possession.
  - » The tenant is in occupation pursuant to a lease or periodic tenancy – not just a tenancy at will.
  - » If there is a temporary vacancy, it will be necessary to show that a new tenant is being actively sought or the property is undergoing necessary refurbishment. However, this will not be sufficient if the premises have never been let.

**WE RECOMMEND** *continued:*

- ☑ Even if you consider that the sale will be GST-free under the farmland exemption or as the supply of a going concern, include in the contract a GST exclusive 'claw back' clause (with an expanded definition of GST to include penalties and interest) and a non-merger clause to protect your client.
- ☑ If a tax invoice is required, ask that your client provide it. Alternatively, check that your client is GST registered (not just ABN registered) before purporting to prepare a tax invoice on your client's behalf.
- ☑ If GST is payable in addition to the purchase price, ensure it is collected at settlement!

**When acting for the purchaser pre-contract**

- ☑ Advise on the existence and consequences of any GST exclusive clause.
- ☑ If the price is GST inclusive and your GST registered commercial purchaser is expecting to claim 1/11th of the price as an input tax credit:
  - » Recommend that your client seek advice from his or her accountant about whether the proposed purchase is a 'creditable acquisition' for which an input tax credit can be claimed.
  - » Check whether the vendor is GST registered (not just ABN registered) and consider negotiating a special condition that the vendor shall remain GST registered up to and including the date of supply. Your client will not be entitled to an input tax credit if the vendor is not GST registered at the date of supply.
  - » Check whether the margin scheme is to be applied. Application of the margin scheme will deprive your client of an input tax credit but would normally be regarded as important if the property is to be redeveloped and sold for residential purposes.
- ☑ Check the validity of any tax invoice provided at settlement.

## 7. Disbursement of settlement money without authority

This category of claims has recently increased in cost and number to bring it into the top 10. These claims arise in a variety of ways.

**EXAMPLES:****The silent vendor**

The law firm acts for several parties who own property either jointly or as tenants in common. Instructions are given by just one of the vendor-clients as to how the proceeds of sale are to be disbursed at settlement. When that client absconds with the money the other, 'silent' vendor-client argues that the law firm had no authority to disburse the money as it did.

**Owners in dispute**

The law firm acts for one of several owners of property who are in dispute. Often a matrimonial or de facto separation is involved. The parties agree that the property will be sold and the proceeds of sale are to be held by the law firm pending resolution of the dispute. At some point the client gives instructions for the proceeds to be paid in a certain way and the operator at the law firm either does not know or does not remember and takes no steps to check the basis on which the money was being held. The money is paid out as directed in breach of the trust on which the money was being held. While the law firm does not act for the other disputing vendor, it nevertheless owes them a duty to act in accordance with the agreed trust and cannot just act on its own client's instructions if this involves a breach of trust.

## WE RECOMMEND:

- ☑ While it may seem obvious, practitioners are reminded that money held on trust must be dealt with in accordance with the terms on which it was accepted. If it was agreed that the money would be placed in a joint interest-bearing account in the names of both parties or paid out to discharge a particular debt, then that is what must happen. The law firm that holds the money on trust is responsible for seeing that it happens.
- ☑ The terms of the trust should always be revisited before any money is paid out.
- ☑ Where the parties cannot agree on how the money is to be paid out and the terms of the trust do not squarely deal with the situation, the practitioners should not just 'take a punt' and pay it to their client or the party who shouts the loudest! Rule 12 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* sets out a procedure for a stakeholder's interpleader. Practitioners are urged to pursue this procedure where it is available.

## 8. Intra-family transfers

These claims continue to arise where the solicitor acts for an existing client who wishes to transfer property to a family member, usually a child. The solicitor then also acts for the child. In recent times the failure to advise that CGT may be payable on the transfer of the property has also become an issue.

Always consider CGT, stamp duty, land tax, GST and any effect to pension entitlements that may apply to any transfer between family members or related entities. If any of these are applicable, recommend to the client that they consult with their taxation/accounting advisers before any transfer proceeds.

## EXAMPLES:

## No advice about CGT

In the decision of *Snopkowski v Jones (Legal Practice)* [2008] VCAT 1943, the Tribunal found that the solicitor had been asked by the client in general terms what if any liability would flow from him transferring his property to his wife's name. The solicitor advised the couple that the procedure to transfer the property would be relatively simple and that the only cost would be the solicitor's fees and a Titles Office fee. The solicitor said the issue of capital gains tax did not even occur to her. The Tribunal held that when a solicitor is asked whether there would be any financial implications upon transfer of the property it is reasonable to expect that the solicitor would at least advise the clients to seek advice from their accountant or a tax lawyer in relation to the issue of CGT. By failing to alert the clients to the possibility of CGT liability the solicitor had breached the standard of care required of a legal practitioner in such a situation.

## Lack of 'useable trail'

An elderly client came with her granddaughter to see the solicitor and instructed that she wished to have her property transferred to the granddaughter so that the granddaughter could obtain a loan for extensions to the home. In return, the client could continue to live there. The solicitor advised against the arrangement but failed to advise that an alternative would be for the client to retain the property and obtain a loan with the granddaughter acting as guarantor.

The transfer proceeded and there was the inevitable falling out several years later. The client alleged that the solicitor did not protect her interests and failed to give her any warnings. The solicitor maintained that he did warn against the arrangement but could not prove it as he had not kept any file notes or sent the advice in writing.

### WE RECOMMEND:

- ☑ Never act for both parties.
- ☑ When the other party is unrepresented, tell him or her you are not acting and recommend the party obtains separate representation and advice. Confirm this in writing.
- ☑ Warn the transferor client in writing of the dangers in these types of arrangements, in particular that the transferee will have the right to encumber the property.
- ☑ Find out what the transferor client is trying to achieve by the transaction and consider if there are other ways of achieving the desired result. Advise your client of those options.
- ☑ Warn the transferor to seek advice from an accountant about possible CGT liability if the property is not the longstanding residence of the transferor.

## 9. Lost title or delayed settlement

This category of claims is new to the list of top ten most expensive claims. These claims arise in the following types of scenarios:

- Administration errors where documents (often transfers with title deeds) are sent back to the solicitor's office for amendments and are mistakenly put on the file. The file is then closed without anyone checking what is sitting on the file.
- The documents are lost or delayed in transit or at a third party's office such as the local council, bank or surveyor and the solicitor does not do enough to chase up the matter.
- Titles are discovered missing at the time the client attempts to sell because they were never transferred when the client bought the property, often because no one realised that there were multiple titles for the property.
- The contract had special conditions which required other things to be done before settlement could occur, such as the obtaining of an easement over adjoining property or the purchase of other property. The solicitor lost sight of those conditions and did not pursue them, resulting in delay.

### EXAMPLE:

#### Missing titles

The sale contract indicated that the property consisted of 5 titles but prior to settlement the purchaser's solicitors discovered that two titles were missing. Two of the existing titles were in fact only 'one equal undivided half part or share of the land' and so the other 'half part of share' titles needed to be found. The previous vendor had failed to convey those titles and refused to do so when the current vendor requested them. Three months after the problem was discovered, proceedings were issued to compel the previous vendor to transfer the titles. Those proceedings took 12 months. Just as they were resolved in the current vendor's favour, his solicitor discovered a third title was missing — this time to a narrow strip of land that had been previously conveyed by the council to the previous vendor. Again the previous vendor would not hand over the title and further proceedings had to be issued. The total delay as a result of the missing titles was 3 years and 8 months. The delay was argued to have cost both the vendor and purchaser significant damages.

## WE RECOMMEND:

- ☑ Carefully check all files before closing them to ensure that there are no original documents left on the file.
- ☑ Keep track of how the matter is progressing and if one party is taking too long to do something, write to them and insist the matter be dealt with. Do not let it languish. Diarise for follow-up action regularly.
- ☑ Read the titles carefully, whether acting for the vendor or purchaser, to ensure that all titles have been accounted for— especially look out for titles that are only 'half part or share' of the land or interest titles.
- ☑ Where the contract is conditional on other transactions or arrangements, clarify with your client whose responsibility it is to deal with those matters and keep progressing them if it is your responsibility.

## 10. Drafting errors

The number of drafting errors in conveyancing has increased in recent years. Many of the errors occur in sale contracts, the transfers of land for subdivisions or where a contract has been renegotiated and subsequently changed.

Typographical errors in the transfer of land are by far the most prevalent mistakes. Very often an earlier draft of a restrictive covenant is transcribed on to the transfer and while they may look very similar, they specify different lots for different restrictions or miss an important accepted use. Other mistakes have included omitting one of the titles to be transferred or referring to a dimension in a covenant as 'metres' instead of 'square metres'. While it may just seem like a formality, transfers of land need to be very carefully proofread to ensure they are accurate and that the correct covenants have been used.

Mistakes often occur when precedents are used: for example failing to take out clauses that are not relevant such as an abatement of rent clause in a license when that has not been agreed to.

Particular clauses that practitioners should check carefully are those dealing with remuneration for the vendor by way of rights to purchase, or receive in lieu of payment, a unit in the proposed development. Claims have arisen when such clauses have either been inexplicably deleted from subsequent drafts of contracts or not drafted well enough to protect the vendor in the event the development does not go to plan.

## WE RECOMMEND:

- ☑ Always proofread transfers of land and double check the wording of any restrictive covenant.
- ☑ When contracts are renegotiated, amended or reproduced, always proofread to ensure that no clause has 'dropped out'.
- ☑ When using precedent agreements carefully check that only relevant clauses have been left in.
- ☑ Where the vendor is to receive other benefits under the contract besides payment at settlement, consider whether the relevant clauses adequately cover all contingencies.

## LPLC Vendor's Solicitor Checklist

This is not a comprehensive checklist but it will help you to avoid most of the mistakes made by vendor's solicitors in conveyancing transactions. The checklist can be photocopied for ongoing use.

CLIENT

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MATTER

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### Section 32 Statements

#### When preparing a Section 32 Statement:

- Do not rely on **duplicate certificates** of title. Always conduct an up to date title search. Read the titles to ensure they are not just a 'half part or share' of land. Assess whether the titles you have cover all of the land being sold.
- When asked to prepare a **Section 32 Statement in a hurry**, always advise your client of the risks and confirm the advice in writing (see **Appendix One**).
- Do not rely on certificates that are **more than 3 months old**.
- Read** all certificates as soon as they are received.
- Consider the possibility of **unregistered easements**. Question your client about the existence of agreements with neighbours or a neighbour's use of an access track or water pipes across your client's land.
- Apply to relevant **water authorities** for information statements and ensure these are attached to the Section 32 Statement.
- Include a **plan of subdivision**, if appropriate.
- Attach a **planning certificate** from the responsible authority.
- Obtain a statement from the relevant municipality relating to **building approvals**.
- Provide a **condition report** and **certificate of insurance** if the client is an owner builder (warranties go in the contract). See **Appendix Two**.

- Indicate whether **services** are connected or not connected. Avoid use of the term 'available'.
- Carefully check a revised Section 32 Statement to ensure that no documents have been left out.
- Where a property is part of a subdivision involving an owners corporation, include a **current owners corporation certificate** and the statutory documents.
- Confirm in writing any request to a real estate agent to amend, update or attach certificates to the Section 32 Statement.

### Domestic owner builders

- Take detailed instructions from a client intending to sell domestic property, including answers to the following questions:
  - Have any building permits been issued in the last 7 years or has there been any other building work in that time?
  - Who did the building work? (Unless a registered builder has taken responsibility for the work, sections 137B and 137C will apply.)
  - What was the value of the building work?
  - When did the building work commence?
  - Was any occupancy permit or certificate of final inspection issued?
- Warn your client in writing of the need to provide insurance, **condition reports** and **warranties** and the consequences of non-compliance.
- If the requirements apply, ensure that the condition report and certificate of insurance (insurance is only required where the value of the building work is more than \$12,000) are provided with the **Section 32 Statement** and that the section 137C warranties are set out in the contract (see **Appendix Two**).
- When the Section 32 Statement contains an owner builder condition report confirm in writing when sending the Statement to the client or the real estate agent that the Section 32 Statement should not be used if the **condition report is more than 6 months old** and the consequences if it is used.

## Terms contracts

- Consider whether the contract is a **terms contract**. If so and the property is subject to a mortgage, **ensure compliance** with section 29M of the *Sale of Land Act 1962 (Vic)* by giving particulars of mortgage (Schedule 1) and section 290 by discharging the mortgage within 90 days. If the terms contract requires multiple payments, ensure compliance with subsection 32(2)(f) by giving details of the cost of vendor finance (Schedule 2) in the Section 32 Statement.

## Subdivisions

### If the contract is for a lot on a plan of subdivision:

- Check that the plan of subdivision is **current**.
- Check that the contract **accurately describes** what is being sold.
- If the lot is affected by an owners corporation, is there **insurance** as required by section 11 of the *Sale of Land Act 1962 (Vic)* and Part 3, Division 6 of the *Owners Corporations Act 2006 (Vic)*?

### If the contract is for a lot on an unregistered plan of subdivision:

- Ensure compliance with the relevant sections of the *Sale of Land Act*. Warn your client of the dangers of non-compliance (eg. rescission by the purchaser). Specifically, check the following:
  - **Section 9AA:** does the contract provide for the deposit monies to be paid into the trust account of a legal practitioner or licensed estate agent or into a special purpose account with an authorised deposit-taking institution?
  - **Section 9AB:** have details of any works affecting the natural surface level of the land been disclosed in the contract or, if carried out after the date of contract but before registration of the plan, been disclosed to the purchaser?
  - **Section 9AC:** have any proposed amendments to the plan of subdivision prior to registration been notified to the purchaser?
  - **Section 9AE(2):** has the plan been registered within 18 months (or such other period specified in the contract) of the contract date?

## GST

- Consider whether the GST 'threshold criteria' are present.
  - Is the vendor registered or required to be registered for GST?
  - Is the sale in the course or furtherance of an enterprise?
- If 'yes' to both questions, consider whether the real property being sold will attract GST.
  - Is it vacant land (including residential vacant land)?
  - Is it new residential premises (including substantially renovated premises)?
  - Is it commercial residential premises?
  - Is it non-residential premises?
- If the real property being sold will attract GST, ensure that there is a clear GST treatment in the contract. Consult your client about whether the GST clause should be inclusive or exclusive and whether or not the margin scheme is available and should apply.
- If the margin scheme should apply, ensure there is agreement in writing between the parties to this effect. If a professional valuation is required, advise your client in writing of the time frame in which the valuation must be obtained (ie. by the end of the tax period in which settlement falls).
- If the real property is farmland, consider whether:
  - The farmland exemption (section 38-480) will apply with the result that no GST will be payable on the sale of the freehold.
  - The supply of a going concern exemption (section 38-325) will apply with the result that no GST will be payable on the sale of the freehold, livestock, plant and equipment.

- If the real property is tenanted commercial premises, consider whether the technical requirements of section 38-325 and the ATO ruling GSTR 2002/5 are met, with the result that no GST will be payable on the sale. In particular:
  - The vendor and the purchaser must agree in writing that the supply is of a going concern.
  - The purchaser is registered or required to be registered for GST.
  - The sale is not to the tenant.
  - There is a tenant at the date of supply (usually settlement) and the contract provides for receipt of rents and profits – not vacant possession.
  - The tenant is in occupation pursuant to a lease or periodic tenancy – not just a tenancy at will.
  - If there is a temporary vacancy, it can be shown that a new tenant is being actively sought or the property is undergoing necessary refurbishment. However, this will not be sufficient if the premises have never been let.
- Even if you consider that the sale will be GST-free under the farmland exemption or as the supply of a going concern, include in the contract a GST exclusive 'claw back' clause (with an expanded definition of GST to include penalties and interest) and a non-merger clause to protect your client.
- Have your client prepare the tax invoice. Alternatively, check that your client is GST registered (not just ABN registered) before purporting to prepare a tax invoice on your client's behalf.
- If GST is payable in addition to the purchase price, ensure it is collected at settlement!

## Rescission

### To rescind a contract:

- Read the contract carefully to determine if your client is entitled to rescind the contract and the grounds on which it may be done.
- Use the precedent rescission notice (see **Appendix Three**) making sure that you particularise the default and state the condition in the contract that you are relying on to rescind the contract.
- Do not pre-empt the other party and issue a rescission notice too early. If issuing a rescission notice for failure to pay the balance of purchase monies by the due date, wait until the day after the settlement is due.
- Allow sufficient time in the notice for the defects to be remedied. Time should run from the date of service not the date of the notice. Check what specific requirements have been provided for in the contract.
- Record details of service in case proof is later needed.

## Other

- Clarify in writing who you are acting for in family transactions. Only act for one party. When acting for the transferor:
  - always explore why your client wishes to transfer the property and what other options are available to meet your client's needs;
  - advise of the risks of the transaction; and
  - confirm all advice in writing.
- Obtain written authority from all vendors before disbursing the balance of settlement monies to one of several vendors.

## LPLC Purchaser's Solicitor Checklist

This is not a comprehensive checklist but it will help you to avoid most of the mistakes made by purchaser's solicitors in conveyancing transactions. The checklist can be photocopied for ongoing use.

### Review of contracts and Section 32 Statements

- When you receive a contract, immediately check it for any **conditional clauses**. Diarise the dates and advise your client clearly about the conditions, what the client must do to comply with them and the consequences if they are not met.
- Consider whether the contract is a **terms contract**. If so and the property is subject to a mortgage, have particulars of mortgage been provided or will the mortgage be discharged within 90 days? If multiple payments are required, have details of the cost of vendor finance been provided?
- Read all **certificates** when they come in and carefully compare them with the information in the Section 32 Statement. Advise your client if the Section 32 Statement is defective and if there is a possibility that the contract might be avoided.
- If the vendor is a **domestic owner builder**, consider whether there are any grounds to avoid the contract for non-compliance with the insurance, condition report and warranty requirements under the *Building Act 1993* (Vic) (see **Appendix Two**).
- Advise your client about **any easements or restrictive covenants** on the property. Apply to the relevant water authority for information statements and check these for any unregistered easements (such as water, sewerage or drainage).
- Identify any **zoning restrictions** or overlays and recommend your client check whether the proposed use of the land will be adversely affected by them.
- If the Section 32 Statement indicates that **services** are 'available', advise your client to check if they are in fact connected.
- Advise the client to **measure** the land (or if unusual circumstances warrant it, to have it surveyed) to ensure it corresponds with the measurements on title.

### Subdivisions

#### If the contract is for a lot on a plan of subdivision:

- Check that the **plan** of subdivision is **current**.
- Check the contract **accurately describes** what is being sold.
- If the lot is affected by an **owners corporation**, is there insurance in place as required by section 11 of the *Sale of Land Act 1962* (Vic) and Part 3, Division 6 of the *Owners Corporations Act 2006* (Vic)?
- If the lot is affected by an owners corporation, has an owners **corporation certificate** and attachments been provided? (see **Appendix Four**).

#### If the contract is for a lot on an unregistered plan of subdivision:

- Check that the vendor has complied with the relevant sections of the ***Sale of Land Act***. If any breaches are detected that allow your client to rescind the contract, advise your client accordingly. Specifically, check the following:
  - **Section 9AA:** does the contract provide for the deposit monies to be paid into the trust account of a legal practitioner or licensed estate agent or into a special purpose account with an authorised deposit-taking institution?
  - **Section 9AB:** have details of any works affecting the natural surface level of the land been disclosed in the contract or, if carried out after the date of contract but before registration of the plan, been disclosed to the purchaser?
  - **Section 9AC:** have any proposed amendments to the plan of subdivision prior to registration been notified to the purchaser?
  - **Section 9AE(2):** has the plan been registered within 18 months (or such other period specified in the contract) of the contract date?

## GST

- Advise on the existence and consequences of any **GST exclusive** clause.
- If the price is GST inclusive and your GST registered commercial purchaser is expecting to claim 1/11th of the price as an **input tax credit**:
  - Recommend your client seek advice from his or her accountant about whether the proposed purchase is a 'creditable acquisition' for which an input tax credit can be claimed.
  - Check whether the vendor is GST registered (not just ABN registered) and consider negotiating a special condition that the vendor shall remain GST registered up to and including the date of supply. Your client will not be entitled to an input tax credit if the vendor is not GST registered.
  - Check whether the margin scheme is to be applied. Application of the margin scheme will deprive your client of an input tax credit.
- Check the **validity of any tax invoice** provided at settlement.

## Rescission

### To rescind a contract:

- Read the contract carefully to determine if your client is **entitled** to rescind the contract and the grounds on which it may be done.
- Use the precedent rescission notice (see **Appendix Three**) making sure that you **particularise the default** and state the condition in the contract that you are relying on to rescind the contract.
- Do not issue a rescission notice too early.
- Allow sufficient **time** in the notice **for the defects to be remedied**. Time should run from the date of service, not the date of the notice.
- Record **details of service** in case proof is later needed.

## Nominations

- Where there is a **nomination**, check and advise your client if the provisions of Chapter 2, Part 4A of the *Duties Act 2000* (Vic) apply. When dealing with property outside Victoria, seek expert advice on the duty requirements.

## Other

- Clarify, in writing who you are acting for, especially in **family transactions**. When the transferor is unrepresented, recommend in writing that the transferor obtain independent legal advice.
- Check your file for **original documents** before closing it.

## Appendix One

### Suggested form of letter to client if requested to prepare a Section 32 Statement in a hurry.

'You have requested me to provide, at very short notice, the statement required by section 32 of the *Sale of Land Act 1962 (Vic)* for the sale of your property.

I confirm my advice that a period of at least a week and sometimes more is required to make all the enquiries and obtain all the certificates that are necessary to ensure that the statement is correct and valid.

In the present case, I have done the best I can in the limited time available. However, in the circumstances I cannot guarantee the validity of the statement.

If the statement is not valid, the purchaser may withdraw at any time up to final settlement. If that happens, the purchaser will recover the deposit and you will probably be liable for agent's commission on the first sale as well as on any resale, and also be faced with additional legal costs.

It is appreciated that by delaying the sale until all the information is available you may lose a prospective purchaser, but I do want you to understand the risk involved in proceeding on the basis of the statement as now prepared.'

## Appendix Two

### Owner builder obligations

The owner builder provisions of the *Building Act 1993 (Vic)* are complex. The following is provided as a summary of those provisions. Solicitors should familiarise themselves with sections 137B, C and D of the Act as well as the current Ministerial Order (at the time of publication: Ministerial Order published in the Government Gazette No. S98 dated 23 May 2003).

#### Who is a domestic owner builder?

The Act does not define in any detail what constitutes an 'owner builder'. However, it does provide that the provisions apply to 'a person who **constructs** a building'. A domestic owner builder is therefore someone who 'constructs' domestic building work on his or her own property, however it does not include a subsequent owner of the property. These provisions also apply to registered building practitioners who own the property on which they have 'constructed a building' where that building is a home i.e. domestic property only — not commercial property. Registered building practitioners in this instance are often referred to as 'builder owners'.

#### What does 'construct' mean?

'Construct' includes not only the domestic owner builder personally building, altering or extending a building, but also the domestic owner builder causing, managing or arranging for another person (other than a registered builder who accepts responsibility for the work by being nominated on the building permit as the builder) to do so. It includes new houses and alterations and additions to existing buildings or structures. For example: adding a veranda, pergola, deck or garage; enclosing a veranda, renovating a bathroom or kitchen may all be considered an 'alteration to the building'.

**The key to determining who is an owner builder is the building permit.** If the owner is listed on the building permit as both the 'owner' and the 'builder' then he or she is an owner builder and the provisions of section 137B apply. If no building permit was issued (whether it was required to be or not) then the owner will automatically be considered an owner builder.

### When do domestic owner builder obligations arise?

Subsection 137B(2) provides that domestic owner builder obligations arise if a contract to sell is entered into within the prescribed period, which is defined in subsection 137B(7) as being:

- 6 years and 6 months after the **date of completion** of the work. Completion means an occupancy permit has been issued (new houses) or a certificate of final inspection has been issued (alterations and additions).

**OR**

- 7 years after the **date of commencement** of the work, which is the date of the issue of the building permit, if neither an occupancy permit nor a certificate of final inspection has been issued.

**OR**

- 6 years and 6 months after the **certified date of commencement**, which is the date that the client declares in a statutory declaration to be when the works commenced.

### What are the obligations if a domestic owner builder is selling within the prescribed period?

- In all cases, the following statutory warranties by the vendor must be set out in the contract of sale:
  - that all domestic building work carried out in relation to the construction by or on behalf of the vendor of the home was carried out in a proper and workmanlike manner;
  - that all materials used in that domestic building work were good and suitable for the purpose and, unless stated otherwise, new; and
  - that the domestic building work was carried out in accordance with all laws and legal requirements (including the *Building Act* and its regulations).

- A condition report which is no more than 6 months old at the time of contract prepared by a prescribed building practitioner (such as an architect, building surveyor or building inspector) must be given to the buyer pre-contract; and
- If the value of the work is more than \$12,000, and the owner is not a registered building practitioner, then building insurance must be obtained and a certificate of currency given to the buyer pre-contract. The insurance must cover structural defects for 6 years and non-structural defects for 2 years. Note, however, that the insurance can only be invoked on the death, insolvency or disappearance of the domestic owner builder.

The *Building Act* requires that both the condition report **and** the insurance obligations apply if selling within the **prescribed period (6 years and 6 months or 7 years)**. However, the Ministerial Order provides that insurance is required to cover only the period of **6 years from practical completion**. Therefore, if selling after 6 years but within 6 years and 6 months of the date of issue of the occupancy permit or certificate of final inspection, it appears that only the condition report must be given to the buyer pre-contract as the insurance is not required (or available) for the remainder of the period.

While the 7 year prescribed period in the Act runs from the **'date of commencement'** of the work, the relevant 6 year insurance requirement in the Ministerial Order runs from the **'date of practical completion'** of the work — ignoring the commencement date altogether. Practical completion, for the purposes of the Ministerial Order, means the date when the domestic building work is completed (save for minor omissions or defects).

Accordingly, it would appear that practitioners will have to determine when practical completion occurred, even if no occupancy permit or certificate of final inspection was ever issued, because if selling 6 years after the date of practical completion of the work, insurance is not required (or apparently available in the market).

### What happens if the domestic owner builder obligations are not complied with?

The buyer can choose to avoid the contract at any time prior to settlement. Also, the client may be prosecuted with a maximum penalty of 100 penalty units (\$11,682). If any of the warranties are breached, the purchaser (and any subsequent purchaser) can take proceedings against the vendor.

### Who is a commercial owner-builder?

Section 137B also applies to non-registered-building-practitioner owners (lay owners) who 'construct' (build or make alterations to) commercial buildings but it does not apply to registered building practitioners who own commercial land and build or make alterations to commercial buildings.

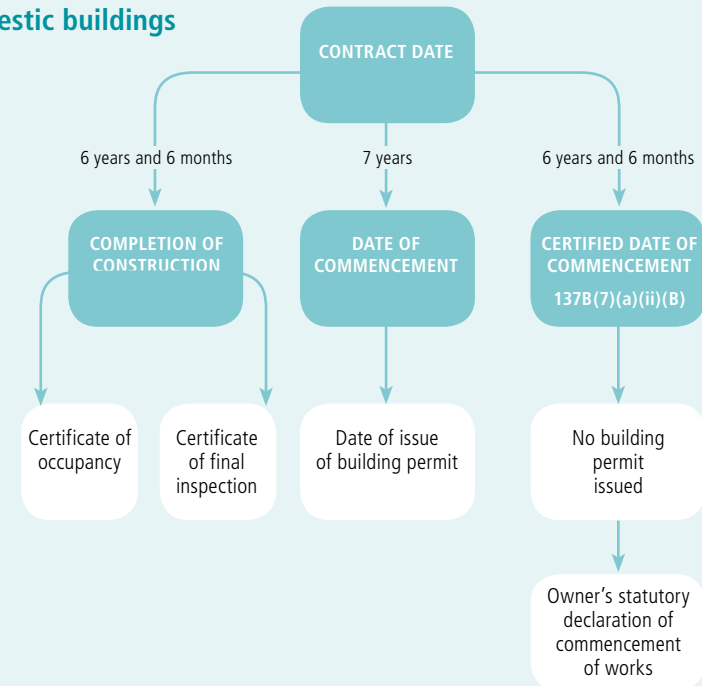
The requirements for commercial owner-builders are different to domestic owner-builders. The prescribed period is **10 years and only the condition report needs to be supplied.**

OWNER-BUILDER DOMESTIC		BUILDER-OWNER DOMESTIC	
\$12,000 or less	More than \$12,000	\$12,000 or less	More than \$12,000
Condition report	Condition report	No condition report	No condition report
No insurance	Insurance	No insurance	Insurance
Warranties	Warranties	Warranties	Warranties

**Mortgagees in possession** and **executors or administrators** of the estate of the person who constructed the building – will now be considered 'owner-builders' (see 136(5AA))

### Prescribed period

#### Domestic buildings



## Appendix Three Rescission Notice

To: The Purchaser / Vendor and To: The Solicitor for the Purchaser / Vendor

### SCHEDULE

1. Vendor:
2. Purchaser:
3. Date of contract:
4. Land description:
5. Property address:
6. Due date:
7. Particulars of default(\*):
8. Interest rate:
9. Legal costs(\*\*):

TAKE NOTE that you are in default under the contract referred to in the Schedule and that the particulars of default are specified in Item 7 of the Schedule.

TAKE FURTHER NOTICE that the vendor/purchaser intends to exercise his/her/its rights unless:

- the default is remedied within 14 days of the service of this notice upon you; and
- the proper legal costs specified in Item 9 and interest on the amount due under the contract at the rate specified in Item 8 are all paid within 14 days of service of this notice upon you.

AND TAKE FURTHER NOTICE that unless the default is remedied and the legal costs and interest paid in accordance with this Notice the contract will be rescinded pursuant to [general condition 28 of the contract] use this phrase if the contract is the standard form of contract prescribed by the Estate Agents (Contracts) Regulations 2008 (Vic) otherwise insert the relevant clause.

Dated the      day of      20

Solicitor for the Vendor/Purchaser

(\* ) Suggested wording where purchaser fails to pay residue:  
'The Purchaser/s has/have defaulted in the performance of the Purchaser's/s' obligations under the contract by failing to pay to the Vendor the residue of purchase money and adjusted apportionable outgoings on the due date or at all.'

(\*\*) a specific amount must be included here so the defaulting party knows exactly what has to be paid to rectify the default.

## Appendix Four Owners corporation certificates

Subsection 32(3A) of the *Sale of Land Act 1962* (Vic) ('the SLA') requires that a current owners corporation certificate and the attachments referred to in subsection 151(4) (b) of the *Owners Corporations Act 2006* (Vic) ('the Act') be included in any Section 32 Statement where the property is affected by an owners corporation.

**Subsection 151(4)(a)** of the Act sets out that the owners corporation certificate must include **prescribed information** in relation to the matters listed in (i) to (xiii) of that subsection.

**Subsection 151(4)(b)** of the Act requires that the certificate be accompanied by:

- a copy of the owners corporation rules - model rules where no specific rules have been made by the owners corporation as set out in Schedule 2 of the *Owners Corporation Regulations 2007*;
- an information statement (Schedule 3 of the *Owners Corporation Regulations 2007*);
- a copy of all resolutions made at the last AGM;
- a statement advising that further information can be obtained by an inspection of the owners corporation register.

A fee of up to \$150 inclusive of GST is prescribed for the certificate.

**Failing to include an owners corporation certificate in the Section 32 Statement, or providing false information in the certificate, will give the purchaser a right to rescind the contract at any time before settlement.**

This is subject to any right that may exist under subsection 32(7) of the SLA to excuse the vendor's non-compliance.

For further information on who must issue owners corporation certificates and what procedures are required see 'Risk Management Publications' on our website at [www.lplc.com.au](http://www.lplc.com.au) and click on 'Risk Bulletins'.

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