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A New Form Contract for Sale of Land and its Impact on your Practice

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***New Form of Contract for Sale of Land
and its Impact on Your Practice***

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NEW FORM OF CONTRACT FOR SALE OF LAND AND ITS IMPACT ON YOUR PRACTICE

Presented on 12 March 2015 at Legalwise Property Law Conference 2015

BY

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INTRODUCTION.

1. The statutory underpinning of contracts of sale of land in Victoria is the Estate Agents Act s. 53A(1)(a) which provides in substance that an estate agent or agent's representative can only use a standard form of contract permitted by the Regulations made under that Act (the "statutory form" or "statutory contract"), or one approved by the Legal Services Board or a professional association, or a contract prepared by an Australian legal practitioner or a licensee (within the meaning of the Conveyancers Act 2006). In practice the only contract approved by the Legal Services Board or a professional association is the Contract of Sale of Real Estate co-published by the LIV and the Real Estate Institute of Victoria (the "standard contract"), the latest edition being published in September 2014.
2. Both the statutory and the standard contracts interact with the statement under s. 32 of the Sale of Land Act 1962 (formerly called a "Vendor's Statement" and now called a "section 32 statement") which in fact contained some of the contractual terms until it was removed in 2014. Accordingly this topic also takes in changes to this statement effected by the Sale of Land Amendment Act 2014.
3. To get to the 2014 standard contract some background assists (the author does not warrant that this covers all standard contract forms). The last new whole statutory contract came into existence in 2008 in the form comprising Form 1 and Form 2 in the Schedule to the Estate Agents (Contracts) Regulations 2008. (A Note to r. 5 noted that s. 53 of the Interpretation of Legislation Act 1984 permitted forms to the like effect of the prescribed form). A new standard contract repeating the statutory contract was then also published.
4. The statutory contract was amended by the Estate Agents (Contracts) Amendment Regulations 2011, r. 1 of which stated the objective as being: to amend it to comply with amendments to the Sale of Land Act by Part 7 of the Consumer Affairs Legislation Amendment (Reform) Act 2010, and; as a consequence of the enactment of the Personal Property Securities Act 2009 (Cth) ("PPSA"). These regulations came into force on 1 March 2012. Then followed the standard contracts published in March 2012 and June 2013. The latter contract included special conditions:

1. Replacing the statutory general condition 7 as to security interests to which the PPSA applied.
 2. Replacing parts of the statutory general condition 13 as to GST, as it concerned land on which a farming business had been carried on.
 3. Replacing part of statutory general condition 17 as to service, now providing for service by email.
 4. Replacing the statutory general condition 4 as to nomination.
 5. Adding a condition to the effect that where a purchaser was deemed to have given the deposit release authorisation for the purposes of s. 27 of the Sale of Land Act the purchaser was also generally deemed to have accepted title.
5. On 13 May 2014 assent was given to the Sale of Land Amendment Act 2014, the main purpose of which (s. 1(a)) was to amend the Sale of Land Act 1962 to re-enact, reform and modernise the provisions relating to section 32 statements. On 26 August 2014 the Estate Agents (Contracts) Amendment Regulations 2014 were made. Their objective (r. 1) was materially stated to be to amend the statutory (called standard) form to –
- (a) insert a warning notice for off-the-plan sales for the purposes of s. 9AA(1A) of the Sale of Land Act 1962;
 - (b) amend the statutory form following the enactment of the Sale of Land Amendment Act 2014; and
 - (c) amend certain general conditions of the statutory form.
- This amendment to general conditions in the statutory contract largely repeated the special conditions in the 2013 standard contract as to security interests to which the PPSA applied, GST, service by email, and nomination. The biggest change to all previous contracts was, because of the amendment to the Sale of Land Act, to take section 32 statements outside the contract.
6. Finally is the standard contract dated September 2014. It follows the 2014 statutory form but adds two special conditions. One is to repeat of the special condition as to acceptance of title found in the 2013 standard contract (not taken up in the 2014 statutory form) and the other is a long condition covering electronic conveyancing.
7. This topic is headed “New”, which is a relative term. One could take all amendments to the standard form from 2008 in order, which however would mix the important with the unimportant, and state them in no particular chronological order. It is easiest to give precedence to the major very recent changes, deal with other changes, and then deal separately with section 32 statements. Then

are recent Supreme Court cases interpreting terms in the foregoing contracts and section 32 statements. Accordingly it is proposed to deal with the topic as follows

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- A. Complicated new conditions or complicated amendments to conditions:
 - 1. Electronic conveyancing: special condition 2.
 - 2. PPSA: general condition 7.
 - 3. Release of deposit and acceptance of title: general condition 12 and special condition 1.
- B. Simple new conditions or simple amendments to conditions.
 - 1. Off-the-plan sales.
 - 2. Cooling-off period.
 - 3. Purchaser taking over mortgage: general condition 1.3.
 - 4. Omission or mistake in description etc: general condition 3.1.
 - 5. Builder warranty insurance: general condition 8.
 - 6. Payment of deposit if land sold is lot on an unregistered plan of subdivision: general condition 11.2(b).
 - 7. No payment by draft on authorised deposit-taking institution: general condition 11.4(b).
 - 8. Fees on cheques: general condition 11.6.
 - 9. GST: general condition 13.
 - 10. Service: general condition 17.
 - 11. Nomination: general condition 18.
 - 12. Signatory for private company: general condition 19.
 - 13. Terms contract: general condition 23.1.
 - 14. Default notice: general condition 27.
- C. Section 32 statements.
- D. Recent Supreme Court interpretation of the standard contract and section 32 statements - General principles.
 - Essential and non – essential terms.
 - Options open to the innocent party.
 - The innocent party not terminating, time ceasing to be of the essence and notices to complete.
 - Notices of default.
 - Termination by acceptance of repudiation where no effective notice of default.
 - Loss of the right to rescind by by affirmation or election.
 - The effect of back-up notices to complete or of rescission.
- E. Recent Supreme Court interpretation of particular conditions in the standard contract and section 32 statements.
 - Vacant possession.

The warranty that the vendor had not previously sold the land.

Time of day for settlement.

GST.

Subject to finance.

Loss and damage before settlement.

Section 32 statements – what tenancy issues are to be disclosed?

Sundry alleged breaches of s. 32 and one actual breach - *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542.

A. **Complicated new conditions or complicated amendments to conditions:
(1) Electronic conveyancing: special condition 2.**

8. It is first proposed to set out the background. I acknowledge my debt particularly to the following, in which further information may also be found: “Introducing E-Settlement” by Russell Cocks, December 2014 LIJ p. 77; “E-Conveyancing: What you need to know” by Simon Libbis, January/February LIJ p. 78; “The Brave New World of Electronic Conveyancing” by Murray McCutcheon, Russell Cocks and David P. Lloyd, March LIJ p. 36; and information on the Property and Environment Law Section of the LIJ site.
9. Electronic dealings cannot be lodged directly with Land Victoria but must be processed through an Electronic Lodgement Network (ELN) which can also provide the facility for funds transfers. E-conveyancing stores the data required for lodgement of dealings at Land Victoria and the transfer of funds at settlement. At a nominated time the funds are transferred and data lodged.
10. The entity that owns the ELN is an Electronic Lodgement Network Operator (ELNO). There is only one ELNO, which is Property Exchange Australia Limited (PEXA). On 27 January it launched its electronic conveyancing platform in Victoria. It is accordingly now available for settlements and lodgements.
11. A solicitor requires client authorisation to lodge electronically. Before the client signs the authorisation the solicitor is required to take reasonable steps to verify the identity of the client. The client authority covers solicitors signing documents on the client’s behalf, submission of documents for lodgement, transfer of funds for settlement, and doing anything else necessary. Clients no longer see or sign documents; rather solicitors certifying the electronic instrument with a digital signing certificate.

12. The solicitor is required to certify that: the solicitor has identified the client; the solicitor holds a client authorisation; the solicitor has obtained, considered and retained the requisite supporting evidence; the particular instrument in question is correct and compliant with relevant legislation; and the paper title has been obtained and destroyed. As to the last certification, once settlement has occurred the title subsequently issued is called an eCT, which simply means that there is no paper title and that the party with control of the title is noted on it.
13. The funds required for settlement can be transferred from a solicitor's trust account, the PEXA source account, or an earlier electronic settlement.
14. An electronic settlement can only occur if all parties involved are using the system.
15. I now in succeeding paragraphs summarise the special condition, with commentary. First, there is a box beside the title of this condition. If it is marked "EC" then settlement and lodgment will be conducted electronically in accordance with the Electronic Conveyancing National Law and this condition applies. The Victorian Electronic Conveyancing (Adoption of National Law) Act 2013 applies the Electronic Conveyancing National Law as set out in the Appendix to the Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW).
16. Special condition 2.1: The condition has priority over any other provision to the extent of inconsistency.

This means the whole of special condition 2 has priority.
17. Special condition 2.1: The condition applies if the contract of sale specifies, or the parties subsequently agree in writing, that settlement and lodgment (spelt "lodgement") of the instruments necessary to record the purchaser as registered proprietor will be conducted electronically in accordance with the ECNL.

(Obviously, the contract of sale so specifies if "EC" has been marked).
18. Special condition 2.2: A party must immediately give written notice if reasonably believing that settlement and lodgment can no longer be conducted electronically.

Commentary: The parties can accordingly opt out of doing the conveyance electronically without penalty. This may occur because –

- (a) a party acts too slowly;
- (b) there are too many linked settlements. PEXA's system will allow for up to three settlements to be linked. It may not be known that the limit is being exceeded until after the contract is entered into;
- (c) if there are say three linked settlements, at least one of them may turn out to be non – electronic. If the prior settlement is paper the bank cheques used at that settlement may not clear that day. Or if the prior settlement is electronic it may not be possible to draw the cheques for the subsequent paper settlement that day;
- (d) it may be necessary to deal with a party emerging between the time of the contract and settlement, eg a caveator who has to be paid out but who does not desire to join in the electronic process.

19. Special condition 2.3: Each party must be, or engage a representative who is, a subscriber for the purposes of the ECNL, ie able to conduct the transaction electronically. Each party must also ensure that any other persons associated with the transaction for whom that party is responsible is, or engages, a subscriber for the purposes of the ECNL.

An example of an associated person is a incoming financier.

20. Special condition 2.4: As soon as reasonably practicable the vendor must open the Electronic Workspace (“workspace”), being an electronic address for service of notices and communications.

Commentary: Therefore all subscribers should monitor the relevant workspace for significant communications such as rescission notices. This can be done manually or, when subscribing to PEXA, by selecting the option that the subscriber receive an email or SMS message every time a notice is posted into the workspaces for which the subscriber has registered their participation.

21. Special condition 2.5: At least 7 days before the due date for settlement the vendor must nominate a time of day for locking the workspace. When the workspace is locked the parties must be in a position to settle.

Commentary: The March LIJ article referred to above states that special condition 2.5 is currently redundant because PEXA requires that the time for settlement be

selected at the same time as the date for settlement. However this special condition will cease redundancy if PEXA alters this requirement or other electronic lodgment network operators emerge with different requirements.

22. Special condition 2.6: Settlement occurs when the workspace records: either exchange of funds or value between financial institutions in accordance with the instructions of the parties; or, if there is no exchange of funds or value, that the documents necessary for the purchaser to become registered proprietor have been accepted for electronic lodgement.

Commentary:

- (a) settlement in a paper transaction occurs when cheques are exchanged for documents and this condition carries this through. It is anticipated that the delay between settlement and registration will be reduced to under a second;
- (b) the first part of this condition applies even where purchaser and vendor use the same financial institution and so the incoming and outgoing mortgagee are identical.

23. Special condition 2.7: if, after locking of the workspace at the nominated settlement time, settlement in accordance with special condition 2.6 has not occurred by 4 pm, or 6 pm if the nominated time for settlement is after 4 pm, the parties must do everything reasonable necessary to effect settlement:

- (a) electronically on the next business day; or
- (b) at the option of either party, otherwise than electronically as soon as possible.

Commentary:

- (a) the failure may be attributable to electronic system failure, for example: the Land Titles Office system may be unavailable for a final search or title activity check; unavailability of computer systems of the State Revenue Office, a bank, the Reserve Bank, a subscriber, the internet generally;
- (b) the parties to a failed electronic settlement attempt must make a re-attempt electronically or otherwise;
- (c) the financial settlement funds which have been reserved will be remitted to their original institutions and accounts. If the transaction is to proceed electronically the parties' subscribers and the financiers will need to re-authorise the financial settlement statement and otherwise take steps to complete the settlement.

24. Special condition 2.8: If a mistaken payment is made the parties must do everything reasonably necessary to assist in tracing and identifying the recipient and recovering the payment.

Commentary: this mistake may occur for example by mistyping, miscommunication between a party and its subscriber, or by subscriber error.

Regardless of this condition –

“It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract”:

Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596 at 607 per Mason J.

25. Special condition 2.9: The vendor must before settlement:
- (a) deliver any keys, security devices and codes (“keys”) to the estate agent named in the contract;
 - (b) direct the agent to give the keys to the purchaser or the purchaser’s nominee on notification of settlement by the vendor, the vendor’s subscriber or the Electronic Network Operator;
 - (c) deliver all other physical documents and items (other than goods sold) to which the purchaser is entitled at settlement, and any keys if not delivered to the agent, to the vendor’s subscriber or absent a subscriber confirm in writing to the purchaser that the vendor holds those documents, items and keys at the vendor’s address; and
 - (d) pursuant to direction to vendor’s subscriber, or personally, give such documents, items and keys, to the purchaser or purchaser’s nominee on notification of settlement by the Electronic Network Operator. LIV December: ie after settlement;

Commentary: This special condition attempts to deal with documents or things which are or should be dealt with at a physical settlement, such as keys and leases.

26. Special condition 2.10: At least 7 days before the due date for settlement the vendor must provide the original of any document required to be prepared by the vendor in accordance with general condition 6 (this is the transfer of land document and any document required for assessment of duty on the transaction relating to matters that are or should be within the knowledge of the vendor).

Commentary: as payment of duty will be simultaneous with settlement all requirements of the SRO must be satisfied before settlement. This will require the purchaser's subscriber to certify via Duties Online that all documents are in order. Accordingly the vendor must provide the purchaser with any original document required for assessment of duty, such as a goods declaration or off the plan declaration.

A. **Complicated new conditions or complicated amendments to conditions:
(2) PPSA: general condition 7.**

27. The 2008 form of general condition 7 dealt with release of company charge. This was replaced in 2012 by the condition concerning property subject to a security interest to which the Personal Property Securities Act 2009 (Cth) ("PPSA") applies. In 2014 this was itself replaced.
28. Before turning to the text of the term it assists to consider the PPSA more generally. In October 2011 the PPS reform established a single, national, online, register (or public noticeboard) of "security interests" in personal property, and a new rule-based system to determine priorities between competing security interests. Personal property is known as "collateral" if a security interest is attached to it. A secured party obtains a security interest over "collateral" either by agreement or simply because the Act says so. Many aspects of contracts of sale of land are not caught by the PPSA because –
- (a) it does not apply to the creation or transfer of an interest in land: PPSA s. 8(1)(f)(i), 10 (definition of "land" and "personal property");
 - (b) it does not apply to an interest in a fixture: PPSA s. 8(1)(j), 10 (definition of "fixtures");
 - (c) sometimes chattels also pass under a contract of sale, eg window furnishings, pool equipment, garden furniture and light fittings. Section 47 provides that, subject to certain exceptions, a buyer of personal property, for new value, that the buyer intends to use predominantly for personal, domestic or household purposes, takes the personal property free of any security interest if the market value of total new value given for it is not more than \$5,000.
29. However the PPSA may impact a sale of land because –
- (a) the personal property falls outside the above exemption;
 - (b) a licence ("licence" being within the definition of "personal property" in s. 10) is also being transferred, such as: to use adjoining land; an unused

- road licence; a liquor licence; a licence to graze stock; a licence to use a boat ramp and/or a pipeline;
- (c) the land may be subject to a lease where the vendor has received a cash security deposit from the tenant. This creates a security interest in favour of the vendor;
 - (d) the vendor may have leased goods on the land to a tenant;
 - (e) the vendor may retain rights over the fitout, eg pursuant to a lease incentive;
 - (f) the PPSA may apply to the vendor's right to deal with goods abandoned by a tenant;
 - (g) before the introduction of the PPSA a charge against a company asset could be registered at ASIC. These charges are migrated to the PPS Register, which however can only apply to the personal property the subject of the charge.

See generally the bulletin on the LPLC site "Sale of Land and the PPSA" dated 11 September 2013 and the Property Law page by Russell Cocks in the May 2014 LIJ.

30. A summary of the 2012 general condition 7 is –
- (a) The condition applied if any part of the property is subject to a security interest to which the PPSA applied (7.1) and the word and phrase definitions in the PPSA apply (7.11);
 - (b) Subject to general conditions 7.3 and 7.4, if the security interest was registered in the Personal Property Securities Register (PPSR), the vendor was required to ensure that at or before settlement the purchaser received:
 - (i) a release (in writing and in a form published by the LIV, Law Council of Australia or the Australian Bankers Association: general condition 7.5) from the secured party of the security interest, or;
 - (ii) a written statement in accordance with s. 275(1)(b) of the PPSA stating that the amount or obligation secured is nil at the due date for settlement, or;
 - (iii) a written approval or correction in accordance with s. 275(1)(c) of the PPSA indicating that, on the due date for settlement, the personal property included in the contract is not or will not be property in which a security interest is granted (7.2);(These expressions are hereinafter referred to as a release, statement, approval or correction).
 - (c) However this did not apply in respect of any personal property sold in the ordinary course of the vendor's business of selling personal property of that

kind unless, in the case of goods that may or must be described by serial number in the PPSR (“serial number”), the purchaser advised the vendor at least 21 days before the due date for settlement that the goods were to be held as inventory (7.3);

- (d) The vendor was also not obliged to ensure that the purchaser received a release, statement, approval or correction in respect of any personal property not described by serial number and predominantly used for personal, domestic or household purposes and with a market value not exceeding \$5,000 or any greater amount prescribed for the purposes of s. 47(1) of the PPSA (7.4). (This expression as to predominant use for the foregoing purposes with a particular market value is hereinafter referred to as a “the predominant use”).;
- (e) At or as soon as practicable after settlement the purchaser must provide the vendor with a copy of any release (7.6);
- (f) In addition to ensuring a release is received under general condition 7.2(a), the vendor must ensure that at or before settlement the purchaser receives a written undertaking from a secured party to register a financing change statement to reflect that release, if the property being released includes goods of a kind that are described by serial number (7.7);
- (g) At least 21 days before settlement the purchaser must advise the vendor of any security interest that the purchaser reasonably requires to be released (7.8), failing which the vendor may delay settlement until 21 days after the purchaser gives this advice (7.9) in which event the purchaser must pay interest from the due date for settlement until the earlier of the date on which settlement occurs or 21 days after the vendor receives the advice and the vendor’s reasonable costs as though the purchaser was in default (7.10).

- 31. A summary of the 2014 general condition 7 is set out in this and succeeding paragraphs. What is stated in (a) of the previous paragraph of this paper continues to apply, with the exception that “unless the context requires otherwise” qualifies whether words and phrases have the same meaning as in the PPSA: general conditions 7.1, 7.15.
- 32. A new requirement is that, so that the purchaser can search the PPSR for any security interest as to which (see next paragraph) the vendor must ensure that the purchaser receives a release, statement, approval or correction, the purchaser may at least 21 days before the due date for settlement request the vendor to provide the vendor’s date of birth (general condition 7.2) which (general

condition 7.3) the purchaser must only use for the purposes specified in 7.2 and keep secure and confidential.

33. The vendor must ensure that at or before settlement the purchaser receives a release, statement, approval or correction (general condition 7.4). The release must be in writing, must be effective in releasing the goods from the security interest, and must be in a form allowing the purchaser to take title to the goods free of that security interest (general conditions 7.7, 7.8). In 2012 the statement in writing was required to set out that the amount or obligation that is secured is nil at the due date for settlement; in 2014 this is changed from “the due date for settlement” to “at settlement”. In 2012 the approval or correction was required to indicate etc “on the due date for settlement”; in 2014 this is changed to “on settlement”.
However, subject to what is stated in the next sentence, what is set out in general condition 7.4 does not apply if the purchaser intends to use the personal property for the predominant use or it is sold in the ordinary course of the vendor’s business of selling personal property of that kind (general condition 7.5). But the vendor does have to so ensure if such personal property is of a kind that may or must be described by serial number or the purchaser has actual or constructive knowledge that the sale constitutes a breach of the security agreement that provides for the security interest (general condition 7.6).
34. What is stated in (e) and (f) of paragraph 30 above continues to apply (general condition 7.9, 7.10).
35. What is set out in (g) of paragraph 30 above applies, except that what the purchaser must advise at least 21 days before the due date for settlement is not, as stated in 2012, “any security interest that the purchaser reasonably requires to be released”, but is “any security interest that is registered on or before the day of sale on the Personal Property Securities Register, which the purchaser reasonably requires to be released” (general conditions 7.11 – 7.13).
36. Finally, notwithstanding that general condition 7.1 provided that this general condition applied if any part of the property was subject to a security interest to which the PPSA applied, the vendor is not required to ensure that the purchaser receives a release “in respect of the land” (general condition 7.14).
37. Accordingly what is new in general condition 7 in 2014 is as follows –

- (a) The provisions requiring the vendor to provide date of birth to enable the purchaser to search the PPSR for any security interests affecting any personal property for which the purchaser may be entitled to release, statement, approval or correction.

The LPLC also suggest –

- (i) including a special condition requiring the vendor to provide evidence of date of birth;
 - (ii) where assets include goods and fixtures the contract should point avoid future argument identify which are which.
- (b) In 2012 the vendor was, subject to exceptions, required to ensure that the release was one “releasing the security interest in respect of the property”. In 2014 the release it to be one “releasing the property from the security interest”.
- (c) In 2012 the vendor was, subject to exceptions, required to ensure that the statement in writing as to nil security and the approval or correction was at or on “the due date for settlement”; in 2014 this is at or on “settlement”.
- (d) In 2012 the vendor was not obliged to ensure that purchaser received a release, statement, approval or correction in respect of any personal property sold in the ordinary course of the vendor’s business of selling etc, unless, in the case of goods that may or must be described by serial number, the purchaser advised the vendor at least 21 days before the due date of settlement that the goods are to be held as inventory. In 2014 two changes are made as to goods sold in the ordinary course of the vendor’s business etc. First, as to goods that may or must be described by serial number, there is no requirement for the purchaser to give advice before settlement. Secondly, the vendor is obliged to ensure that the purchaser receives a release, statement, approval or correction if the purchaser has actual or constructive knowledge that the sale constitutes a breach of the security agreement that provides for the security interest.

The LPLC suggests including any relevant PPS Register registration numbers in the contract for the avoidance of any doubt especially in relation to describing the releases which must be provided at settlement.

- (e) In 2012 the vendor was not obliged to ensure that the purchaser received a release, statement, approval or correction in respect of any personal property not described by serial number and used for the predominant use. In 2014, however, the vendor was obliged to ensure that the purchaser received a release, statement, approval or correction in respect of personal property that “the purchaser intends to use” for the predominant use if the personal property was of a kind that may or must

be described by serial number or the purchaser had actual or constructive knowledge that the sale constitutes a breach of the security agreement that provides for the security interest.

- (f) In 2012 the release from the secured party releasing the security interest in respect of the property was required to be in writing and in a form published by the LIV, Law Council of Australia or the Australian Bankers Association. In 2014 it was required to be in writing, effective in releasing the goods from the security interest, and in a form allowing the purchaser to take title to the goods free of that security interest.
- (g) In 2012 the purchaser was required to advise the vendor of any security interest that the purchaser reasonably required to be released at least 21 days before the due date for settlement. In 2014 this was changed from “any security interest” to “any security interest that is registered on or before the day of sale on the Personal Property Securities Register”;
- (h) In 2014 is added that notwithstanding that general condition 7.1 provided that this general condition applied if any part of the property was subject to a security interest to which the PPSA applied, the vendor is not required to ensure that the purchaser receives a release “in respect of the land”.

**A. Complicated new conditions or complicated amendments to conditions:
(3) Release of deposit and acceptance of title: general condition 12 and special condition 1.**

- 38. General condition 12.1 in the 2008 standard contract was amended in 2012. It in substance provided that the deposit must be released to the vendor if:
 - (a) the vendor provided proof to the reasonable satisfaction of the purchaser that the total amount of debts secured against the property did not exceed 80% of the sale price (2008);
the vendor provided particulars, to the satisfaction of the purchaser, that the total amount of debts secured against the property did not exceed 80% of the sale price (2012); and
 - (b) at least 28 days had elapsed since the day of sale (2008);
at least 28 days had elapsed since particulars were given to the purchaser of what debts there were (2012); and
 - (c) all conditions of the Sale of Land Act 1962 had been satisfied (2008).
all conditions of s. 27 of the Sale of Land Act 1962 had been satisfied (2012).
- 39. The June 2013 standard contract included a special condition (to take its place as general condition 12.4) to the effect that where a purchaser was deemed to have

given the deposit release authorisation for the purposes of s. 27 of the Sale of Land Act the purchaser was also generally deemed to have accepted title. This is repeated in the standard contract dated September 2014 as special condition 1. The combined effect of this special condition and general condition 12 is –

“12. Stakeholding

12.1 [as stated above]

12.2 The stakeholder must pay the deposit and any interest to the party entitled when the deposit is released, the contract is settled, or the contract is ended.

...

12.4 Where the purchaser is deemed by section 27(7) of the Sale of Land Act 1962 to have given the deposit release authorisation referred to in section 27(1), the purchaser is also deemed to have accepted title in the absence of any prior express objection to title.”

40. Special condition 1 cannot be understood without reference to s. 27(1) – (7), which roughly provides:
- (1) a purchaser may in writing authorise certain persons holding deposit moneys as a stakeholder to release them to the vendor etc;
 - (2) this only operates, inter alia, if the purchaser has accepted title or may be deemed to have accepted it;
 - (3) the authorization is not effective unless the vendor gives certain particulars as to mortgages and caveats, and the purchaser has given notice under s. 27(4) that he is satisfied with those particulars;
 - (4) if the purchaser is satisfied of those particulars he shall give the vendor written notice to that effect within 28 days of receiving the particulars;
 - (5) this notice shall be deemed to be the authorization required by subsections (1) (2) and (3);
 - (6) if the purchaser is not satisfied with the particulars he shall within 28 days give written notice stating this and his reasons;
 - (7) where the purchaser fails to give either notice within the time limited he shall inter alia be deemed to have given the authorization required by s. 27(1).
41. Special condition 1, inserting general condition 12.4, is inserted because of a point of obscurity in the drafting of s. 27, namely is the stakeholder authorized under s. 27(7) to release a deposit paid in the sale of Torrens land if the purchaser has not accepted title? On the one hand s. 27(2) says that s. 27(1) only applies where the vendor has accepted title or is deemed to accept it, but on the other hand where s. 27(7) might operate the position is less clear. The special condition overcomes this. This is discussed in detail in “Safe Deposits” by William Rimmer, October 2013 LIJ p. 46.

B. Simple new conditions or simple amendments to conditions:

(1) Off-the-plan sales.

42. The 2014 Regulations insert a notice to purchasers, headed s. 9AA(1A) Sale of Land Act 1962, that: the purchaser may negotiate with the vendor about the amount of the deposit, up to 10 per cent of the price; a substantial period of time may elapse between the day of signing the contract and becoming registered proprietor of the lot, and; the value of the lot may change between the day of signing and the day of becoming registered proprietor.

B. Simple new conditions or simple amendments to conditions:

(2) Cooling-off period.

43. In the 2008 version the cooling-off period does not apply if the purchaser received independent advice from a legal practitioner before signing the contract. This is deleted in 2012. In 2008 two exceptions are if the property is used “mainly” for industrial or commercial purposes and a property over 20 ha. is used “mainly” for farming; in 2012 “mainly” becomes “primarily”. In 2008 an exception is “you and the vendor previously signed a similar contract for the same property”; in 2012 this becomes “have previously signed a contract for the sale of the same land in substantially the same terms”.

B. Simple new conditions or simple amendments to conditions:

(3) Purchaser taking over mortgage: general condition 1.3.

44. In 2008 form general condition 1.3 provided -
- “If the particulars of sale provide that the purchaser is taking over an existing mortgage:
- (a) the purchaser assumes liability for the mortgage; and
 - (b) the price is satisfied to the extent of any mortgage money owing at settlement; and
 - (c) the vendor must treat any payment made by the purchaser under the mortgage as a payment made to the vendor under this contract.”

This is revoked in 2012.

B. Simple new conditions or simple amendments to conditions:

(4) Omission or mistake in description etc: general condition 3.1.

45. In the 2008 form general condition 3.1 provided –
- “An omission or mistake in the description, measurements or area of the land does not invalidate the sale”.
- In 2012 this is changed to –
- “An omission or mistake in the description of the property or any deficiency in the area, description or measurements of the land does not invalidate the sale”.

B. Simple new conditions or simple amendments to conditions:

(5) Builder warranty insurance: general condition 8.

46. In 2008 general condition 8 provided that the vendor must provide at settlement details of any current builder warranty insurance if requested in writing at least 21 days before settlement. In 2012 this is changed to the vendor warrants that the vendor will provide at settlement details of any current builder warranty insurance in the vendor's possession if requested in writing at least 21 days before settlement.

B. Simple new conditions or simple amendments to conditions:

(6) Payment of deposit if land sold is lot on an unregistered plan of subdivision: general condition 11.2(b).

47. In 2008 general condition 11.2(b) provided that if the land sold is a lot on an unregistered plan of subdivision the deposit must be paid (i) to the vendor's licensed estate agent or legal practitioner or conveyancer and held by such person on trust for the purchaser until the registration of the plan of subdivision or (ii) if the vendor directs into a special purpose account. In 2012, in substance (ii) goes out, and so the condition is now that the deposit must be paid to the vendor's estate agent, legal practitioner or conveyancer and held by such person on trust for the purchaser until the registration of the plan of subdivision.

B. Simple new conditions or simple amendments to conditions:

(7) No payment by draft on authorised deposit-taking institution: general condition 11.4(b).

48. In 2008 at settlement payment may be made or tendered inter alia by draft drawn on an authorised deposit-taking institution. This is omitted in 2012.

B. Simple new conditions or simple amendments to conditions:

(8) Fees on cheques: general condition 11.6.

49. In 2008 general condition 11.6 provided that the purchaser must pay bank fees on up to three bank cheques at settlement, but the vendor must pay the bank fees on any additional bank cheques requested by it. In 2012 in substance "bank cheques" is altered to cheques drawn on an authorised deposit-taking institution and if the vendor requests additional cheques the vendor must reimburse the purchaser for the fees.

B. Simple new conditions or simple amendments to conditions:

(9) GST: general condition 13.

50. In 2008 the purchaser was required to pay to the vendor any GST payable by the vendor inter alia if the particulars of sale specified that the supply –
- (a) is a farming business and the supply does not satisfy the requirements of section 38-480 of the GST Act (general condition 13.1(b)). In 2012 the words “(or a part of it)” are inserted after “supply”. In 2014 “is a farming business” was replaced by “is of land on which a farming business is carried on”;
 - (b) is a going concern and the supply does not satisfy the requirements of section 38-325 of the GST Act (general condition 13.1(c)). In 2012 the word of is inserted before going and “(or a part of it)” are inserted after “supply”.
- In 2008, general condition 13.4 provided that if the particulars of sale specified that the supply was a farming business the vendor and purchaser provided certain warranties. In 2014 “is a ‘farming business’” was replaced by “is of land on which a ‘farming business’ is carried on.”

**B. Simple new conditions or simple amendments to conditions:
(10) Service: general condition 17.**

51. In 2008 general conditions 17.1 and 17.2 provided for when any document sent by post was taken to have been served, that any document etc required to be served could be served by or on a party’s legal practitioner or conveyancer, and was sufficiently served if served personally, by prepaid post or in any manner authorised by law or the Supreme Court for service. In 2012 this was slightly amended, and a new general condition 17.3 equated “give” a demand etc with “serve” etc. In 2014 general condition 17.1 and 17.2 were replaced by conditions that provided for service by email, taken to be served at the time of receipt, and otherwise repeated the previous conditions.

**B. Simple new conditions or simple amendments to conditions:
(11) Nomination: general condition 18.**

52. In 2008 general condition 18 provided that the purchaser may nominate a substitute or additional purchaser, but the named purchaser remains personally liable under this contract. In 2014 the word purchaser where first appearing becomes “transferee”.

**B. Simple new conditions or simple amendments to conditions:
(12) Signatory for private company: general condition 19.**

53. In 2008 general condition 19 made such a signatory personally liable for the due performance of the purchaser’s obligations. In 2012 the words “in the case of default” by the company were added after “obligations”.

**B. Simple new conditions or simple amendments to conditions:
(13) Terms contract: general condition 23.1.**

54. In 2008 general condition 23.1 provided that if the contract was a terms contract, any mortgage had to be discharged before the purchaser becomes entitled to possession or the receipt of rents and profits unless the vendor satisfied the Sale of Land Act 1962 ss. 6(1) and (2). In 2012 these section numbers are replaced by "29M".

**B. Simple new conditions or simple amendments to conditions:
(14) Default notice: general condition 27.**

55. In 2008 general condition 27 a default notice is "served". In 2012 this is changed to "given".

C. Section 32 statements.

56. From the enactment in the 1980s of legislation related to vendor's statements in s. 32 of the Sale of Land Act to 2014 the standard form of contract has provided that the terms of the contract are contained in the following order of priority: Particulars of sale; Special conditions, if any; General conditions; and Vendor's Statement. And following this has been the statement that the Vendor's Statement is attached to and forms part of this contract. In 2014 this is deleted.
57. The Sale of Land Amendment Act 2014 s. 4 substitutes a new s. 32 from 1 October 2014. The main changes are –
- (a) The vendor is no longer required to attach the section 32 statement to the contract (s. 32(1)) but the LPLC recommends that this nonetheless occur to make it easier to prove that the purchaser received a signed section 32 statement.
 - (b) The vendor may sign with an electronic signature (s. 32(2)) but the LPLC comments that it is not clear what this means.
 - (c) The vendor must provide a copy of the Register Search Statement (undefined but generally understood to be a title search): s. 32I(a). It is insufficient to attach a copy of the duplicate certificate of title.
 - (d) The vendor must attach the document or part of the document referred to as "the diagram location" in the Register Search Statement that identifies the land and its location (s. 32I(a)). This effectively requires attachment of the plan of subdivision or title plan number. The LPLC site comments that unclear is both what is meant by "part of" and whether it suffices to include a

title plan if that is what is referred to in the “diagram location” and not include any plan of subdivision referred to in a title plan. To avoid difficulty the LPLC recommends attachment of any plan of subdivision referred to in the diagram location and on any title plan.

- (e) The vendor must provide the name of any planning overlay affecting the land (s. 32C(d)(iv)). However the requirement, formerly in s. 32(2)(c)(iv) to disclose that a planning instrument prohibits construction of a dwelling house on the land located outside the “metropolitan area” is abolished.
- (f) Only notices, orders, declarations, reports or recommendations or approved proposals directly and currently affecting the land (of which the vendor might reasonably be expected to have knowledge) need to be disclosed (s. 32D(a)).
- (g) Section 32D(b) contains broader disclosure obligations relating to land in relation to livestock disease or contaminated by agricultural chemicals.
- (h) The vendor must specify if an owners corporation is inactive (s. 32F(1)(b)). This is defined in s 32F(2) as certain things not having occurred in the previous 15 months. If so then it is unnecessary to specify the information prescribed for the purposes of s. 151(4)(a) of the Owners Corporation Act 2006 or provide a certificate. The LPLC also point out that inactivity in the form of no owners corporation insurance policy gives the purchaser the right to avoid the contract if the property is in a three or more lot subdivision (Sale of Land Act s. 11, Owners Corporation Act s. 7(1)).
- (i) Assuming the owners corporation is not inactive, and to cover the situation where the vendor cannot provide an owners corporation certificate containing the information prescribed for the purposes of s. 151(4)(a) of the Owners Corporation Act 2006 the vendor can just provide the information itself (s. 32F(1)(a)(A)) with the usual attachments.
- (j) The vendor must specify which services are not connected (s. 32H) but is no longer required to state the name of the authority.

For completeness, s. 33A now requires provision of a due diligence checklist for prospective purchasers of vacant residential land or land on which there is a residence, but does not give a right of rescission for non provision.

D. Recent Supreme Court interpretation of the standard contract and section 32 statements - General principles.

Essential and non – essential terms.

- 58. The law derived from *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 is –

- (a) The question whether a term in a contract is a condition or a warranty, ie, an essential or a non-essential promise, depends upon the intention of the parties as appearing in or from the contract.
- (b) The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.
It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and the commercial purpose it served, that determines whether a term is “essential”.
- (c) However, non-essential terms or promises can in some circumstances be “intermediate” – ie a breach of a nonessential term can be serious in terms of its consequences or “as going to the root of the contract” or as depriving the other party of a “substantial part of the benefit to which [it was] entitled under the contract”.
- (d) The innocent party can terminate for breach of a condition/essential term or for a serious breach of a non-essential term. Otherwise the remedy if any is damages.

Options open to the innocent party.

59. What options are open to an innocent party who is in a position to terminate the contract? In *Qin v Smith (No. 2)* [2013] VSC 476 the vendors committed an anticipatory breach of the contract by stating in advance that they would not give vacant possession. However, Derham AsJ noted that –
- (a) repudiation by way of anticipatory breach did not put an end to the contract unless the innocent party elected to accept it and rescind the contract – in which case the innocent party could also maintain an action for damages for the anticipatory breach;
 - (b) accordingly the innocent party may continue to treat the contract as on foot and hold the repudiating party to the performance of his obligations. If those obligations remain unperformed when the time for performance arrives, the anticipatory breach will be converted into an actual breach.

The innocent party not terminating, time ceasing to be of the essence and notices to complete.

60. In *Qin v Smith (No. 2)* the purchaser wanted to go on with the contract and so it remained on foot despite the repudiatory conduct of the vendor. Derham AsJ stated the following law –
- (a) If the contract was kept on foot the repudiating party may, upon giving reasonable notice, withdraw the repudiation and complete the contract and the innocent party remained bound by the contract, enabling the repudiating party to take advantage of any breach by the (previously) innocent party or any supervening event which would discharge the previously repudiating party from liability.
 - (b) However the innocent party did not commit a breach if the repudiation by the other party made it futile or pointless to attempt to perform an obligation.
 - (c) On the settlement day passing without the purchaser electing to rescind, time ceased to be of the essence until it was made essential again by a party giving reasonable notice of intention to complete the contract, typically by a notice to complete. (An example of time being again made of the essence by other means, namely an ineffective notice of rescission, is *Burke and Riversdale Road Pty Ltd v Gemini Investments Pty Ltd* [2003] VSC 33).
61. However, despite a late settlement time may not cease to be of the essence. In *Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd* [2014] VSC 57 the amended contract provided for settlement on 18 December 2010. The vendor's solicitors appointed 20 December 2010 for settlement but the purchaser's nominee did not settle. Its solicitor, however, requested an extension to 17 January 2011. On 12 January 2011 the vendor's solicitor advised the nominee's solicitor that the vendor agreed to settle on 17 January, on certain conditions, and appointed 3.30 pm on that day for settlement. The nominee's solicitors agreed. The nominee then again did not attend settlement. Counsel argued that what occurred on 12 January was conditional and insufficient to reinstate time as being of the essence. Garde J, however, held that time had never ceased to be of the essence - in a contract where the parties have stipulated that time is of the essence, a mere extension of time where a new date is substituted for the agreed date does not result in time ceasing to be of the essence.
62. A notice to complete must give a reasonable time. In *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542, the agreed settlement date of 3 December 2010 having passed, the vendor gave a notice to complete which the purchaser's

solicitors received on 15 February 2011 requiring completion by 21 February and stating that time was now relevantly of the essence. The purchaser did not comply. Williams J held that time had ceased to be of the essence after the December settlement date, but that the February notice did not make it again of the essence because of not giving a reasonable time to comply – there must be strong evidence to justify a notice allowing for less than 14 days for completion of a contract for the sale of land. Accordingly a subsequent rescission notice based on this notice to complete was ineffective.

Notices of default.

63. Recent authorities on the form of notices include –
- (a) Generally: *U108 Pty Ltd v Sing Fan & Ors* [2010] VSC 12.
 - (b) General condition 27 assumes the existence of a default which could be cured. However a warranty, as to the happening of a prior event, eg that the vendor had not previously sold the land, could not later be remedied. Accordingly a default notice based on this was not valid: *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542 at [103]. Williams J did not give further guidance – but quare the correct course in these circumstances is, if the breach is of an essential term or a serious breach of an intermediate term, simply to write accepting the repudiation.

Termination by acceptance of repudiation where no effective notice of default.

64. Foundational older cases are *Holland v Wiltshire* (1954) 90 CLR 409, *Nund v McWaters* [1982] VR 575 and *Burke and Riversdale Road Pty Ltd v Gemini Investments Pty Ltd* [2003] VSC 33. In *Amanatidis v Syed & Anor* [2009] VSC 350 Hansen J upheld the action of a vendor who, without prejudice to its argument that it had validly rescinded pursuant to a notice, wrote stating that it rescinded by accepting the purchaser's repudiation by not paying the residue of the purchaser price on the due date.

Note: There is some risk in terminating a contract by acceptance of repudiatory conduct, and accordingly if in doubt you should always serve a notice and keep rescission for repudiatory conduct without a notice in reserve. If the person purportedly making the acceptance of repudiatory conduct is wrong, ie there has been no repudiatory conduct by the other party, the purported acceptance is itself a repudiation which the other party can then accept to terminate the contract.

Loss of the right to rescind by by affirmation or election.

65. A right to rescind may be lost by conduct consistent only with an intention to affirm the contract. Examples of arguable affirmation arose in the long chain of facts in *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542. The vendor falsely warranted that it had not previously sold the land (General Condition 2.3(d)). The vendor argued that if (contrary to the conclusion of Williams J) this breach gave the purchaser the right to rescind, a without prejudice letter by the purchaser's solicitors concerning possible contract extension, and another letter inter alia seeking evidence of cancellation of the previous contract, were affirmatory: this argument was rejected as the letters were not consistent only with the intention to affirm the contract. On the other hand, Williams J held that the vendor's subsequent notice to complete was affirmatory.
66. Election is a choice between rights which the elector knows he or she possesses and which are alternative and inconsistent rights. Two situations occurring at settlement illustrate the law. The first situation is that a vendor entitled to rescind for non-payment of purchase money upon the stipulated date who does no more than give the purchaser the opportunity to pay within a limited time thereafter does not waive the right to rescind for non-payment: *Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd* [2014] VSC 57 at [84].
67. The second situation occurred in *Qin v Smith (No. 2)* [2013] VSC 476. The contract provided for vacant possession on settlement on 24 September 2012. The contract disclosed that the purchaser had a solicitor. The chronology then was –
- | | |
|-------------------|---|
| Early August 2012 | Agent tells purchaser that tenants had refused to vacate early and vendors could not give vacant possession on the settlement day, and that the purchaser could either cancel the contract or accept the property subject to the lease. The purchaser did not want to do either, but thought she had no other choice. |
| 7 – 13 August | The purchaser, believing that she had only the choice previously stated by the agent, states that she would settle in accordance with the contract but subject to the lease. In particular, she sent a text message on 11 August stating "I would still like to take the property". |
| 14 August | Purchaser's solicitor informs purchaser and agent of purchaser's right to vacant possession and that she was not required either to vary the contract or cancel it. |
- Derham AsJ held that the purchaser had not elected to settle on the due date subject to the lease. The text message of 11 August 2012 was not an unequivocal election between inconsistent rights. Even if it was the law that a

person in the position of the purchaser should be taken to know her contractual rights, this contract did not clearly lay out her rights, and what was required in this case was knowledge of the kind only available with the advice of a solicitor. The judge described as “extraordinary” the submission that the purchaser elected between inconsistent rights when only two of the three rights were presented to her by an agent who had by-passed her solicitor.

68. An election argument was upheld later in the same case: his Honour held that the subsequent action of the vendor in writing agreeing to complete the contract according to its terms, and withdrawing a notice of default and rescission, amounted to unequivocal waiver by election of any right to rescind.

The effect of back-up notices to complete or of rescission.

69. In *Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd* [2014] VSC 57 following the failure of the nominee purchaser to settle in January 2011 the vendor served a notice of default and rescission, which subsequently expired. In late March the vendor served another notice of default and rescission. Garde J held that –

- (a) the contract was rescinded by the first rescission notice (see also *A & S Boesley Pty Ltd v Stoney & Anor* [2014] VSC 323, appeal dismissed in *Stoney v A & S Boesley Pty Ltd* [2014] VSCA 237);
- (b) it was, however, permissible for a party, claiming to have terminated a contract, to give a notice to complete which was expressed to be without prejudice to its contention that the contract was terminated. This took effect as an offer to revive the agreement, capable of being accepted by performance in accordance with the terms of the notice to complete, and it was also then possible for the other party to do something consequent upon the service of the notice which could create an estoppel.

E. Recent Supreme Court interpretation of particular conditions in the standard contract and section 32 statements.

Vacant possession.

70. In *Qin v Smith (No. 2)* [2013] VSC 476 the contract of sale was dated 25 July with settlement due on 24 September 2012. The Vendor's Statement, also included in the contract, disclosed that the property was leased until 4 January 2013. However, under heading “Lease (General Condition 1.1)” the purchaser was at settlement entitled to vacant possession, unless the words ‘subject to lease’ appeared in the appropriate box. The box contained the words “not applicable”.

And General Condition 10.1 provided that at settlement the purchaser must pay the balance of the purchase price and the vendor must give either vacant possession or receipt of the rents and profits in accordance with the particulars of sale.

Before the settlement date the vendors told the purchaser that the tenants had refused to vacate early and vendors could not give vacant possession at settlement. Derham AsJ held:

- (a) The fact that the contract incorporated a Vendors' Statement which disclosed a lease expiring after settlement did not affect the obligation to provide vacant possession under General Condition 10.1. The General Conditions also took precedence over the Vendors' Statement.
- (b) However the purchaser did not in this case elect to terminate the contract for failure to provide vacant possession and it remained on foot. Then, when the tenant did subsequently vacate, the purchaser was not in breach by not tendering the balance of purchase price when the tenants subsequently vacated. By implication the vendor would have had to give a notice to complete.

The warranty that the vendor had not previously sold the land.

71. An example of a non-essential term or an intermediate term not founding termination is in *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542. The vendor warranted that it had not previously sold the land (General Condition 2.3(d)). However it had previously entered a contract to sell the land to another (friendly) party under which no money had been paid and the time for completion had passed. Before the time for completion of the second contract it was common ground that the previous contract was at an end and the previous purchaser withdrew its caveat. Nonetheless the second purchaser served a rescission notice based on breach of this General Condition.

Williams J held:

- (a) General Condition 2.3(d) was not an essential term: the vendor's principal obligation was to transfer an unencumbered estate in the land, at settlement, and before this it could take any necessary steps to ensure that that principal obligation would be met. There was no common intention that the relevant part of general condition 2.3(d) should be an essential term;
- (b) If this General Condition was an intermediate term then to justify termination the breach must effectively deprive the purchaser of a substantial part of the benefit to which it was entitled under the contract – this test was not satisfied because the principal benefit for the purchaser under the contract was the transfer of an unencumbered title at settlement.

Time of day for settlement.

72. General condition 10.3 provides that subject to the contrary agreement of the parties “settlement day” means 10 am - 4 pm - General condition 10.3. Thus in *Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd* [2014] VSC 57, where settlement was fixed for 3.30 pm, the purchaser was in default from that time – the argument (at [81]) that settlement could have occurred any time up to midnight was invalid.

GST.

73. In *Duoedge Pty Ltd v Leong & Anor* [2013] VSC 36 the price specified in the particulars of sale was “916,000 GST inclusive”. The purchaser claimed an input tax credit of one eleventh of this amount, which was disallowed on the ground that the acquisition of residential property was not a taxable supply under the GST Act as there was not a creditable acquisition by the contract. The purchaser claimed a refund of this amount from the vendor, contending that it was not part of the purchase price but paid on account of GST. A Magistrate upheld this submission on the basis of an alleged implied term.

Dixon J held that there was no implied term and allowed the appeal. Under the contract the GST risk lay with the vendor, because of the particulars of sale (although adding “GST inclusive” was not the correct way to complete the standard form of contract – the absence of the words “plus GST” in the box confirms the handwritten addition of the words “GST inclusive”), with which general condition 13 was not inconsistent.

Subject to finance.

74. In *Putt v Perfect Builders Pty Ltd* [2013] VSC 442 the contract was subject to a particular lender approving a loan of \$475,000 by a particular date. The purchaser was required (general condition 14.2) to do everything reasonably required to obtain approval of the loan. A loan for \$476,000 was applied for. The application was declined on the ground that the loan had failed to meet all the necessary requirements for approval because “Valuation confirms the property is unacceptable for AFG to consider”. The purchasers failed to obtain a refund of the deposit because they failed to establish compliance with general condition 14.2. There was insufficient evidence of: an application for a loan of \$475,000, or; the purchasers doing everything reasonably required to obtain approval of such a loan.

Loss and damage before settlement.

75. A recent example of a purchaser having the right to terminate the contract, because of the vendors' insistence on an untenable position, and exercising that right, is *Patmore & Anor v Hamilton* [2014] VSC 275. General condition 24 as to loss and damage before settlement, inter alia required the vendor to deliver the property in the same condition as on the day of sale, except for fair wear and tear, and did not permit purchaser to delay settlement for breach of this requirement, but established a mechanism for the purchaser to nominate an amount up to \$5,000 to be diverted at settlement to a stakeholder to be subsequently argued over.

Water damage occurred after date of contract, which Digby J held to be outside fair wear and tear, but the vendor refused the purchaser's attempt to divert \$2,640 in part by not joining in nominating a stakeholder and purportedly rescinded for the purchaser's breach. The purchaser subsequently successfully rescinded.

Section 32 statements – what tenancy issues are to be disclosed?

76. In *Vouzas v Bleake House Pty Ltd* [2013] VSC 534 –
- (a) a company leased a hotel from Bleake House for 15 years from 2006. Later that year the lessee's interest was assigned to the Collingwood Football Club;
 - (b) in August 2008 Collingwood announced that it had signed Heads of Agreement to sell the hotel business with 6 – 12 months settlement, subject to conditions;
 - (c) In October 2008 Vouzas received draft copies of the Vendor's Statement and proposed contract of sale. The Vendor's Statement incorporated a copy of the lease and the assignment, and a statement by the vendor that to the best of its knowledge there was no existing failure to comply with the terms of any restriction;
 - (d) Vouzas then saw public representations by the vendor that there was a long lease to an "AAA" tenant and as to annual rental income and annual rental increases. He was unaware of the Heads of Agreement or of the "consent" by Bleake House to the proposed assignee from Collingwood, but knew of the possibility that Collingwood might enter such a transaction;
 - (e) Bleake House entered a contract of sale to Vouzas;
 - (f) Subsequently Collingwood entered formal contract of sale of business containing the same conditions as those in the Heads of Agreement.

Section 32(2)(b) of the Sale of Land Act required "a description of any easement, covenant or other similar restriction affecting the land ... ". Did this require disclosure of a lease or related documents? Macaulay J. –

- (a) inclined to the view that a lease had to be disclosed, but found it unnecessary to decide the question because in any event it was not false to say that the property was leased to Collingwood and the vendor was not required to disclose more – the uncertain nature of the proposed assignment from Collingwood did not sensibly falsify the fact that the land was leased to Collingwood;
- (b) held that a vendor was not obliged to supply information regarding: any conditional agreement to assign a lease; any assignment of lease; and any consent by the freehold owner to the assignment; and
- (c) would if necessary have excused the vendor under s. 32(7).

Sundry alleged breaches of s. 32 and one actual breach - *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542.

77. In this case the only breach of s. 32 was non-disclosure of a land tax charge registered on title approximately 4 weeks before the contract. Other alleged breaches, dismissed by the court, were:

- (a) omission of a planning permit, although the underlying VCAT determination and orders were included - s. 32(3)(ba)(iv) only required a statement of the content of a planning permit if there was a staged subdivision (which this was not), and sufficient town planning evidence had been provided;
- (b) misstatement of the address of the land – not a requirement of s. 32;
- (c) a statement of the outgoings as not exceeding a particular figure – in the circumstances correct;
- (d) omission of a particular EPA Register extract - whilst s. 32(2)(e) (new s. 32D(a)) might be regarded as requiring the inclusion of an EPA Register extract, which provided that the site was listed on, or was in the vicinity of a site listed on the EPA Priority Sites Register, the particular extract was not relevant here;
- (e) omission of reference to an unregistered mortgage - there was no obligation to disclose a mortgage to be discharged before or at settlement (new s. 32A(a)).

The vendor was excused under s. 32(7) for not disclosing the land tax charge, because –

- (a) It was irrelevant whether it had acted dishonestly in a matter extraneous to s. 32;
- (b) the charge was only registered shortly before the contract and the Vendor's Statement did disclose all relevant details about the land tax arrears and

noted the vendor's responsibility to pay them, and the vendor left all legal aspects of the sale to its solicitor;

- (c) the vendor acted reasonably because its director believed that the land tax arrears were not significant, because they were to be paid out of settlement monies, and any negligence by its solicitor concerning non disclosure of the charge was not to be attributed to the client;
- (d) the vendor ought fairly to be excused; and
- (e) the purchaser was in substantially as good a position as if all the relevant provisions of s. 32 had been complied with, chiefly because the vendor had before the date of settlement of the contract undertaken to the Commissioner of State Revenue to collect the outstanding land tax at the settlement of the sale.

Under the new equivalent of s. 32(7) (s. 32K(4)) the result would be the same.

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Friday 21 March 2014