Below are some of the questions most commonly asked of the LIV Property Law Inquiry Service, and the answers to those questions. This service is available to legal practitioners on (03) 9607 9378 (Monday, Wednesday, Friday 10am-1pm).

The answers have been prepared on the basis that Forms 1 and 2 of the Contract of Sale of Real Estate prescribed by the Estate Agents (Contracts) Regulations 2008 (2008 Contract) are used in the conveyancing transaction.

**Authorised Deposit-Taking Institutions**

**Is there a list of authorised deposit-taking institutions?**
A list of authorised deposit-taking institutions under the Banking Act 1959 (Cth) is available at www.apra.gov.au.

**Adjustments**

**Can adjustments be re-adjusted?**
Yes, if adjustments are effected in error.

**If settlement is delayed, should I re-adjust?**
Yes, adjustments should be as at the day of settlement.

**How do I adjust:**

1) **with a pensioner remission?**
   Simple rule – treat it as a part-payment and remember that the vendor must receive the ultimate benefit.
   General Condition 15.2(d), 2008 Contract

2) **if more than the property sold is included in rate assessment?**
   Usually adjustment should be based on proportion by area.

3) **in respect of a Plan of Subdivision with rates unpaid at settlement?**
   Suggest that the vendor pay rates in full at the first settlement and provide proof of payment at subsequent settlements.

**My clients are purchasing a house. I have discovered that there is a land tax liability affecting the land. The vendor is a company which owns no other land. My clients intend to use it as a principal place of residence. Should an apportionment of land tax be calculated for settlement purposes? The vendor’s solicitors insist I do so.**

Yes. General Conditions 15.1 and 15.2(b) of the 2008 Contract apply, although this may be unfair to your clients. Obviously in future years the principal residence exemption will apply to your clients and they will not be required to pay land tax.
If there is more than one title being sold under the same contract do I adjust land tax for all titles combined on a single holding basis or for each title separately on a single holding basis?

The adjustment is to be made for all titles combined on a single holding basis.

If the property is leased which party is entitled to the rent on the day of settlement?

The vendor is entitled to the rent which accrues on the day of settlement.

*General Condition 15.2(a), 2008 Contract*

The lease provides that the tenant is responsible for payment of all rates. Rates have been assessed although they are not yet overdue. Can the vendor insist that settlement proceed without adjustment on the basis that the tenant is liable to pay?

No. The vendor is liable for the periodic outgoings up to and including the day of settlement.

*General Condition 15.2(a), 2008 Contract*

**Certificate of Occupancy**

At settlement the purchaser is insisting that the vendor provide a copy of the certificate of occupancy in respect of the property. Is the vendor under an obligation to do so?

No, the vendor is not under an obligation to provide a certificate of occupancy.

**Chattels**

I act for a vendor who recently sold her house. When preparing the contract the estate agent did not include the refrigerator under the heading of “goods” in the Particulars of Sale. A dispute has now arisen with the purchasers as my client arranged for the refrigerator to be removed last week. It was built in and connected to the water inlets and outlets. The purchasers’ solicitor wants to withhold money at settlement. Is the refrigerator a fixture or a chattel?

Practitioners should refer to common law tests of degree of annexation and intention of annexation to determine whether the refrigerator is a fixture or a chattel (or “good” for the purposes of the 2008 Contract).

The refrigerator will likely be a fixture if it is annexed using a relatively permanent method of annexation. However, the intention of the person/s who brought the refrigerator onto the premises must also be considered.

Refer *Farley v Hawkins & Ors* [1996] QCA 520, A dishwasher was a fixture where the benches and the cupboards were constructed to incorporate a dishwasher, and the floor in that area had not been tiled. The dishwasher was connected to inlets and outlets for water, the latter of which was integrated with the drainage system of the dwelling house. The absence of a dishwasher left a glaring and unsightly gap in the kitchen.
Company Charges

We act for a purchaser of real estate; the vendor is a company. We have conducted a company search which has disclosed that there is a fixed and floating charge over the company. The vendor’s solicitor has refused to provide a Form 312. Can we insist on the vendor providing a Form 312? Can we adjust the ASIC fee against the vendor?

The vendor must provide at settlement a Form 312 if requested in writing to do so at least 21 days before settlement, except if the charge is the proprietor of a registered mortgage over the land. The vendor must pay the registration fee if the purchaser requires registration of the Form 312.

General Condition 7, 2008 Contract

Consumer Price Index

Where is Consumer Price Index information available?

Please see www.abs.gov.au

Cooling-off and Exchange

I act for the purchaser who signed a contract seven days ago and the agent took the contract away to have the vendor sign but has not been back in contact. My client wishes to cool off.

The purchaser will have lost the right to cool off after the expiry of three clear business days. However, if the vendor has not yet signed the contract and the purchaser is aware of this, the purchaser may withdraw his or her offer to purchase the property on the basis that the vendor has not yet accepted the offer.

Co-ownership

Can a joint owner unilaterally sever a joint tenancy?

Under section 72 of the Property Law Act 1958 (Vic), a person can transfer his or her interest to him or herself to sever the joint tenancy and create a tenancy in common. However, the duplicate certificate of title will need to be produced to the Land Registry before the nature of the interest can be changed.
Defects

The purchaser, before settlement, has discovered that the property has a number of defects such as defective drainage and cracked walls. Can the purchaser avoid the contract?

No, provided s137B of the Building Act 1993 (Vic) does not apply. The principle of caveat emptor still applies, and a purchaser should complete inquiries prior to signing the contract. In the absence of fraudulent concealment, misrepresentation or express agreement, a vendor of real estate is not liable to a purchaser for defects in a building or land rendering it dangerous or unfit for occupation, even if the vendor has created the defects him or herself or is aware of their existence.

Deterioration

My client has conducted an inspection of the property prior to settlement and has discovered:

a) That the vendor has removed the curtains which were included in the contract. Settlement is today. Can I deduct the estimated cost of replacement from settlement money?

General Condition 24.2 of the 2008 Contract requires the vendor to deliver the property and goods/chattels in the same condition as when the contract was signed, fair wear and tear excepted. However, this does not entitle the purchaser to make a deduction at settlement, as the condition specifically states that if any goods/chattels are not in the required condition, the purchaser may claim compensation from the vendor after settlement. The procedure for claiming compensation is set out in General Conditions 24.2 to 24.6 of the 2008 Contract.

b) That there is substantial rubbish on the property. Is the vendor required to remove the rubbish?

If the rubbish was on the property as at the day of sale then the vendor is not obliged to remove the rubbish unless there is a special condition in the contract requiring the vendor to do so.

Direction Transfer

The vendor has asked me to prepare a direction transfer but I have some concerns about the head consideration. May I just submit a transfer from the vendor to my client?

General Condition 6 of the 2008 Contract requires the purchaser to prepare the instrument of transfer, but in the absence of a special condition in the contract requiring a direction transfer the purchaser is only obliged to prepare a transfer from the vendor to the purchaser.
Domestic Building Work

My client is arranging for a building to be transported from one site to another. Does he need to comply with the provisions of the Domestic Building Contracts Act 1995 (Vic)?

No, because s6 of the Domestic Building Contracts Act 1995 (Vic) (DBCA) specifically exempts this type of work as far as the transportation is concerned. The re-siting of a house on land zoned residential which involves construction or erection and the need for a building permit might well cause the DBCA to apply (see s5(i)(e)).

My client is selling a house constructed by her predecessors on title. These people were owner builders and failed to take out insurance even though the building was constructed in 2008 and an occupancy certificate obtained. Does she need to comply with s137B of the Building Act 1993 (Vic)?

No, because s137B(2) refers to “a person who constructs a building” as being obliged to comply with that section. As your client did not construct the building, there is no apparent obligation to comply.

My client is an owner builder who obtained a building permit to construct a home in May 2008. He has completed the home but has not obtained an occupancy permit or certificate of final inspection. He now wishes to sell his home. Does he need to purchase insurance pursuant to s137B of the Building Act 1993 (Vic)?

Yes. There is a requirement for the vendor to comply with s137B (see s137B(7): definition of “prescribed period”).

My clients are registered builders selling a new home built by them on land owned by them. Do they need to provide anything else to prospective purchasers other than an insurance policy?

Yes. They must provide the warranties contained in s137C of the Building Act 1993 (Vic) (see s137B(2)(d)). These warranties are set out in General Condition 2.6 of the 2008 Contract.

My client has just signed a contract note to purchase a new home from an owner builder which does not provide a report from a prescribed person. An occupancy permit was granted in May 2008. Is this grounds for avoiding the contract?

Yes, because s137B(3) of the Building Act 1993 (Vic) provides that a contract which does not provide a prescribed report in these circumstances is voidable any time prior to completion of the contract.

My clients have signed a contract of sale as purchasers which incorporate a building contract as well as the normal purchase of a block of land. The vendor and builder is the same person. The contract provides for a 10 per cent deposit to be paid and a three day cooling off period. My clients now wish to withdraw from the contract. Can they do so?

Yes. A major domestic building contract is required to provide for no more than a 5 per cent deposit and give a five day cooling off period. As the contract is a building contract as well as a land contract it has not complied with ss31-35 of the DBCA unless the contract falls under the exclusion provision provided for under s3(4) of the DBCA.
My clients constructed a garage when renovating their home. Is the construction of the garage “building work” within the meaning of the DBCA?

Yes. Refer to s5(1)(c) of the DBCA.

My clients constructed a carport this year as owner builder. Their house is 15 years old. The cost of construction was $3000. A building permit was obtained in 2008. Do my clients need to comply with any aspects of the DBCA?

Yes, s5(1)(e) of the DBCA provides that where a property is zoned residential and a building permit is required to be obtained to construct a building, the building comes within the definition of “building works”. As the cost of construction was under $12,000 there is no need for your clients to purchase insurance but a condition report and s137C Building Act 1993 (Vic) warranties will need to be provided to prospective purchasers.

Early Settlement

During the course of the contract the vendor asked the purchaser to settle one week early. The purchaser agreed to this request and an appointment to settle on the earlier date was made. At the last moment the purchaser was unable to settle on the earlier date but was able to settle prior to the original date fixed for settlement. Is the purchaser obliged to pay penalty interest?

Yes. Where an earlier or later date is agreed between the parties and confirmed, either in writing or orally, then that date becomes the settlement date and failure to settle on that date constitutes a breach of contract.

File – Solicitor’s Lien

A new client has approached me and instructed me to take over his affairs but he has a dispute with his former solicitor in respect of one file. I do not need that file, which is complete, but I do need a number of other current files. Can I get them and what am I entitled to?

The solicitor's lien is a general lien over all files in the custody of the solicitor and he or she may therefore hold all files until all his or her costs are paid. You will not receive the whole contents of every file as the solicitor is only obliged to hand over documents which belong to the client, not documents which belong to the solicitor.

Foreign Investment

I act for a resident of a foreign country. He wishes to purchase a property in Melbourne for his daughter to live in while she is at university here. Do I have to inform any government department?
Yes. If your client enters into a contract to purchase any property which is not exempt (see http://www.firb.gov.au/content/Exemptions/exemptions.asp), it should be conditional upon foreign investment approval from the Foreign Investment Review Board. More information is available at www.firb.gov.au.

Growth Areas Infrastructure Contribution

Where can I find information about the growth areas infrastructure contribution?

Information is available at www.gaa.vic.gov.au.

GST

Where can I find information about GST?

A comprehensive selection of common GST questions and answers is provided to assist legal practitioners acting in conveyancing, leasing and litigation matters is available on the Legal Practitioners’ Liability Committee website, at www.lplc.com.au/FAQsGST.html.

Illegal Structures

My inquiry at the local council has revealed that the vendor has not obtained a permit for the pergola constructed at the rear of the property my client has contracted to buy. Can my client avoid the contract?

No, in the absence of a notice served prior to the contract the purchaser may not avoid. Any notice served after the date of the contract will be the purchaser’s responsibility.

Lease – Guarantee

My clients have purchased a property subject to an existing tenancy. The tenant has now defaulted and I wish to enforce against the guarantor but I did not obtain a specific assignment of the guarantee. Can my client enforce the guarantee?

The case of Lang v Asemo Pty Ltd [1989] VR 773 is authority for the proposition that your client may enforce the guarantee. For an article on the assignment of guarantee, see LIJ, October 1984, p1137.
Mortgagee’s Sale

We are acting for purchasers of land being sold by a mortgagee pursuant to s77 of the *Transfer of Land Act 1958* (Vic) (TLA). Our title search discloses that there is a caveat lodged after the mortgage claiming an interest in the land pursuant to a constructive trust. Do we need to insist that the vendor provide a withdrawal of caveat?

Yes. A caveat registered subsequent to the mortgage claiming an equitable interest requires the vendor to provide a withdrawal of caveat.

However, upon registration of a transfer by a registered mortgagee in exercise of its power of sale, any caveat claiming an interest by virtue of an unregistered mortgage or charge will lapse pursuant to s91(2B) of the TLA.

Nomination

My client wishes to exercise its rights to nominate under the contract. The contract provides that should such right be exercised, my client is obliged to pay the vendor's solicitor's costs in the sum stipulated. Can the vendor's solicitors insist on my client paying these costs?

No. Section 42(3) of the Property Law Act 1958 (Vic) provides that such a clause would be unenforceable.

The purchaser has a common law right to nominate which may be exercised separately from any contractual right.

Owners Corporation Funds

The vendor is demanding that my client allow as an adjustment at settlement a proportion of the capital funds accumulated by the owners corporation of which the vendor is a member. Should I do so?

No, such funds are not an apportionable outgoing and are not adjustable between vendor and purchaser.

Owners Corporation Insurance

My client is selling her villa unit. It is one of the lots on a three lot subdivision. There is a driveway which is common property. I’ve been told there’s no owners corporation, and my client has her own public liability insurance cover for the common property. Is there likely to be any problem with the sale?

Yes, your client is prohibited from selling her unit unless the owners corporation has a public liability insurance cover in place at the date of sale. As there is common property there is an owners corporation, even though it may be inactive (a very common scenario with small subdivisions). If there is no owners corporation public liability insurance cover in place on the day of sale, the purchaser may cancel the contract at any time until completion, even if a cover is arranged subsequently.
Section 7 of the Owners Corporations Act 2006 (Vic) exempts two lot subdivisions from this requirement and therefore a vendor’s own public liability insurance cover would be sufficient.

Owners Corporation Levy

My client has purchased a strata title unit and the vendor’s statement made no reference to any levy. I now find that the owners corporation had been discussing a proposal to repaint the premises for some months prior to the contract and has resolved to obtain quotes. These were presented to a meeting after my client had signed the contract and a levy raised at that meeting. Settlement is approaching. Who is responsible for the levy?

General Condition 21 of the 2008 Contract imposes responsibility for notices received after the date of the contract on the purchaser. The Property Law Dispute Resolution Panel has consistently held that no legal liability arises until the formal levy is imposed, therefore your client is responsible for the levy. However s32(3A) of the Sale of Land Act 1962 (Vic) requires disclosure of information by the owners corporation. Given that the levy relates to “future” work and it is your client who will gain the benefit of the works, subsec (7) may save the vendor. The purchaser’s position in this regard would be stronger if the levy related to works performed on the premises prior to the date of the contract.

Penalty Interest Rate

The current rate is set out in “The Age” Law List each Monday. Historical rates are set out in Quick Reference section of this Directory and also at www.justice.vic.gov.au.

Penalty Interest – Time

The contract was due for settlement on 31 July, which was a Sunday. Settlement in fact occurred on Wednesday, 3 August as a result of the purchaser’s delay. Is the purchaser liable to pay three days interest (from 31/7 - 3/8) or two days (from 1/8 - 3/8)?

General Condition 16.2 of 2008 Contract of the contract provides for settlement to be extended to the next working day if the due date falls on a Sunday. Accordingly, the purchaser was not in default until after 1 August and so is liable to pay only two days’ interest.

Penalty Interest – Vendor

Settlement has been delayed for two days as a result of the vendor’s default. Is the purchaser entitled to claim penalty interest on the balance of purchase money?

General Condition 25 of 2008 Contract provides that if either party defaults then penalty interest shall be payable “upon any money owing”. The vendor owes no money to the purchaser and therefore there is no amount on which penalty interest can be paid.
However, the vendor is liable to pay compensation for reasonable foreseeable loss pursuant to General Condition 25 of the 2008 Contract of Sale (see below).

Penalty Interest – Rent

The purchaser took possession of the premises on an occupational fee basis prior to settlement. The purchaser then failed to settle on the due date and the vendor claimed penalty interest. Is the purchaser liable to pay both rent and interest?

Yes, the obligations to pay rent and penalty interest are separate and distinct.

Power of Attorney

Can donor appoint several attorneys with minimum number required to act?

Uncertain. Refer to ss199 and 120 of the Instruments Act 1958. It may be possible to create limited powers.

Can an attorney obtain a copy of the donor’s Will?

Uncertain. Sections 54 and 58G of the Guardianship & Administration Act 1986 grant power to the Victorian Civil and Administrative Tribunal to “open” wills. There is no provision for an attorney. However, see Law Institute Journal, December 1994, p94.

Reasonable Expenses

The purchaser was five days late in settling. What expenses can the vendor claim pursuant to General Condition 25 of the 2008 Contract?

In the absence of specific information included in the contract as to likely expenses facing the vendor in the event of default, the Property Law Disputes Resolution Committee has consistently taken the view that penalty interest payable as a result of the default is meant to be a reasonable pre-estimate of the damages suffered by the aggrieved party. On that basis, the Committee has rejected claims for:

- extra interest paid on bank bills;
- extra interest paid on mortgage;
- additional loan fee;
- extra interest paid as a result of bank calculating interest monthly; and
- additional interest paid to own vendor.

The vendor was five days late in settling. What expenses can the purchaser claim pursuant to General Condition 25 of the 2008 Contract?

A purchaser may claim reasonable expenses such as additional rent, but will be required to mitigate the loss – thus any interest that the purchaser would have been paying if settlement had proceeded must be offset against the loss. The practical result is that the purchaser will rarely have a claim except where mortgage funds are drawn down for settlement which is then cancelled.
Settlement – Time and Place

Where should settlement take place and at what time may the purchaser settle?

The basic principles as to the location of settlement are that the purchaser must seek out the vendor and that settlement follows the title. Thus the vendor may nominate the location of settlement, although there is an ultimate test of reasonable-ness such that a Victorian transaction settlement would at least have to be within the state.

As to time, General Condition 10.3 of the 2008 Contract provides that settlement must be conducted between the hours of 10.00 a.m. and 4.00 p.m. unless the parties agree otherwise.

Subdivision

Can my client pre-sell the new unit he or she proposes to build?

Yes. Section 9AA of the Sale of Land Act 1962 (Vic) permits general pre-selling, subject to certain restrictions.

Swimming Pool Fences

The vendor has not fenced the swimming pool. Does the purchaser have any rights?

The fact that the vendor has not complied with these regulations does not improve the purchaser’s position. The vendor may be liable for a fine, but this is just like any other illegal structure situation and the purchaser is not entitled to require the vendor to comply with the regulations prior to settlement. The purchaser should fence the pool immediately to comply with the Building Regulations 2006 (Vic).

Tender

The vendor’s solicitor has informed me that he will not be in a position to settle on the due date. Do I need to formally tender the balance of settlement money to protect my client’s interest?

If it is clear that the vendor will be unable to settle then it would appear that formal tender is not necessary, although it would be prudent to obtain the vendor’s acceptance of that situation.
Title Searches and Final Searches

Settlement is due and I cannot obtain a title search or a final search for the purchaser. Can the vendor charge penalty interest?

If you cannot obtain either a title search or a final search for the purchaser, you should contact Land Victoria to ascertain why and to identify the expected time frame for a search to be delivered. The purchaser will then need to make a decision about proceeding with settlement in the absence of a title search or final search or waiting until one can be obtained. If settlement does not proceed as scheduled, then the purchaser may be exposed to a claim for penalty interest and costs if the vendor is in a position to make title in all other respects. Whether those amounts are claimable against the Consolidated Fund will depend upon the reasonableness of the actions of the purchaser. Please see section 110(3)(a) of the Transfer of Land Act 1958 (Vic).

Vendor’s Title

The vendor’s solicitor has lodged a transmission application at Land Registry transferring the property to his client. Settlement is in two days and a check search has indicated that the transmission application is stopped due to a spelling error. Is the purchaser obliged to settle?

The vendor must give good title at settlement and a stopped dealing precludes him or her from doing so. The purchaser is entitled to insist that dealings pass legal examiners if the nature of the dealing is such as to create doubt. Where there is a clear error, the vendor fails to make good title and is not entitled to call for settlement.