It is undesirable to give or accept undertakings — any problem should be remedied before completion. For example, if a document needs to be produced at LPI, it should be produced prior to settlement. An undertaking cannot be given in respect of something to be done by or on behalf of a party to the transaction or a third party: see r 6 of the Solicitors' Rules.

At settlement, the usual procedure is to deal with documents first and, when these are satisfactory, with money afterwards.

[P201.310] Documents — no mortgage

Where the vendor has no mortgage and the vendor's solicitor holds the documents of title, the vendor's solicitor will produce to the purchaser's solicitor:

- the certificate of title or other document of title;
- the duly signed transfer;
- a direction as to payment; and
- a survey report and any building certificate in existence if the originals are held by the vendor's solicitor.

The purchaser's solicitor will check the transfer for due signing and witnessing: see [P201.240]–[P201.250].

[P201.315] Documents — outgoing mortgage

Discharge step: if there is a vendor's mortgage to be discharged, the procedure is as follows.

Step 1 The vendor's mortgagee's solicitor or representative will produce to the vendor's solicitor:

- the certificate of title or other document of title;
- the discharge of mortgage; and
- a survey report and any building certificate in existence held by them.

Step 2 The vendor's solicitor will, if requested, sign a receipt for these documents, and hand over the vendor's authority to receive them, if required. The vendor's solicitor will be concerned to ensure that:

- the discharge of mortgage is in order so that the vendor is released from further liability; and
- all documents of title which the purchaser's solicitor will require have been received.

When satisfied that all documents are in order, the vendor's solicitor passes to the purchaser's solicitor:

- the documents of title and discharge of mortgage in all cases; and
- if the originals are available, the survey report and any building certificate(s) if the purchaser's solicitor requires them (as the purchaser's solicitor should if the purchaser has not obtained a new survey report and building certificate).

Step 3 The purchaser's solicitor then checks these documents to ensure that, with the transfer, the purchaser will obtain a good title to the property, for example, checking the discharge of mortgage to see that it contains the right details and has been properly executed.

The vendor's solicitor will also hand to the purchaser's solicitor the duly executed transfer. The purchaser's solicitor would check that the transfer has been properly signed and witnessed in dense black or dark blue non-copying ink: see [P201.240]–[P201.250].

The LPI does not require the original mortgage document to be lodged with its discharge. Nevertheless the purchaser's solicitor should obtain the original mortgage if it

is available, as this is a badge of the identity of the party receiving the mortgagee's payout moneys on settlement (contrast a discharge forged by an imposter). The handing over of the mortgage will, in addition, prevent any other dealing by the mortgagee (eg, a sale of the mortgagee's interest) between the date of settlement and the date on which the purchaser obtains the protection of the registration of the discharge. In practice, the original mortgage is rarely handed over. This is because there are personal covenants between the mortgagor and the mortgagee which should remain confidential.

[P201.320] Other matters

The vendor's solicitor would hand over any necessary direction for payment: see [P201.290].

The purchaser's solicitor would then sometimes obtain from the vendor's solicitor the keys to the property. If arrangements have been made with the purchaser's solicitor beforehand, the keys can be collected by the purchaser from the agent after settlement. This is often more convenient for the purchaser. The vendor's solicitor should telephone the agent after settlement to inform the agent that the keys may be handed over to the purchaser.

The purchaser's solicitor would also hand to the vendor's solicitor the order on the agent to account for the deposit.

Some further matters are involved when the property includes a lot in a strata or community title scheme, but as to these see Practice Paper P207 *Strata Title Conveyancing*.

Where the vendor's solicitor and the purchaser's solicitor are geographically distant from each other, and settlement is to take place at the vendor's solicitor's office, or where settlement is to take place at the office of a mortgagee's solicitor whose office is geographically distant from that of either or both, settlement is often done by an agent appointed by any of the parties' solicitors.

The vendor's solicitor might agree to settle at a place convenient to the purchaser's solicitor and appoint an agent or law stationer to handle the settlement. However, under cl 16.3 of the standard contract, the purchaser's solicitor must pay the vendor's additional expenses, including any agency or mortgagee fee.

Remember that the procedures outlined above can be changed and that every settlement may present its own problems. The objective:

- of the vendor's solicitor is to ensure that the vendor can give a good title and receive all the moneys due to the vendor; and
- of the purchaser's solicitor is to ensure that the purchaser gets a good title to the property, pays no more money than the purchaser is obliged to pay under the contract, and gets the benefit of possession, with such inclusions and services as the purchaser is entitled to under the contract.

If these objectives are kept in mind, the respective solicitors, using their professional knowledge and skills, should be able to make proper decisions in relation to any problems which may arise on settlements.

AFTER SETTLEMENT

[P201.325] Order on agent

[V21] After completion, the order received from the purchaser's solicitor should be forwarded to the agent so that the deposit may be accounted for to the vendor. The amount that the vendor receives from the deposit will usually be reduced by the amount of the

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agent's sales commission and any expenses incurred by the agent on behalf of the vendor. If the deposit has been invested, the vendor will also receive the vendor's share of the interest in accordance with the terms of the contract.

[P201.330] Insurance policy

[V22] *Discharge step*: If you received a building insurance policy from a mortgagee, you send the building insurance policy and re-assignment to the insurance company for cancellation and refund of unexpired premium.

[P201.335] Notice of sale

[V23] Documents which effect a change of ownership of Torrens title property will not be accepted for registration at LPI unless a paper/hard copy notice of sale form (NOS) is lodged with the document or an electronic notice of sale (eNOS) has been submitted.

LPI has introduced an electronic notice of sale (eNOS), pursuant to an amendment to s 39 of the Real Property Act 1900 (NSW). The eNOS is an alternative to NOS and is accessed through the LPI website. All details required on the eNOS are the same as those required on the hard copy notice of sale. For a more detailed commentary on eNOS, see Practice Paper P202 *Purchase of Residential Land* at [P202.245].

Dealing forms that must be accompanied by a notice of sale (eg, Transfer) now all include a section that allows for the eNOS ID number to be inserted and certification by the solicitor (or licensed conveyancer) acting for the purchaser. This section of the dealing form is completed only when eNOS is used. If a hard copy notice of sale is used then the section is left blank and a completed NOS lodged with the dealing.

If NOS is used, LPI scans the notice of sale and electronically transmits the information to government authorities (including local councils, water boards and county councils) involved in provision of water supply, Livestock Health and Pest Authorities (LHPA) (formerly the Rural Lands Protection Boards), the Valuer General and the Office of State Revenue.

Nevertheless, a vendor's solicitor:

- may send a separate notice to an authority covered by the LPI notice, if the authority can levy rates or charges (eg, the local council or the relevant water authority, but not the Valuer-General); and
- does send a separate notice to any authority not covered by the LPI notice, if the authority can levy rates or charges or is otherwise relevant.

The vendor's solicitor can either ask the purchaser's solicitor to provide a copy of the NOS or eNOS (which can be printed from the LPI website) depending on which is used, and forward a copy of such notice of sale to the authorities, or the vendor's solicitor can forward a notice in the form of a letter advising of the sale. This practice was established prior to the introduction of the notice of sale, when solicitors for the parties each separately informed the relevant authorities of the change in ownership.

The appropriate notification is important because, until received by the authority, the vendor will remain liable as a ratepayer and the purchaser will not receive notices in respect of the land. Both NOS and eNOS appear in Appendix 11.

[P201.340] Outgoing mortgagee

Discharge step: If there is an outgoing mortgagee's solicitor (banks generally handle their discharges of mortgage through their own securities departments), you would:

- inform the client that the mortgage has been discharged; and
- confirm that the mortgagee's solicitor's costs on the discharge have been paid by the mortgagor (vendor).

REPORT TO CLIENT

[P201.345]

[V22] After completion, you should report to the client. There is no standard format for doing this.

Write to the vendor:

- advising that the matter has been completed;
- providing details of the amount received and how it was calculated: see [P201.260];
- advising that you have forwarded to the agent the authority to account for the deposit along with directions for payment of the balance of that deposit after the agent has deducted commission and expenses if appropriate;
- reporting the forwarding of necessary notices of transfer;
- advising the vendor to cancel or transfer any insurances over the property and possibly obtain a refund of unexpired premium; and
- advising of the implications of capital gains tax, succession and estate planning and income tax matters.

Discharge step: Where a vendor's mortgage has been discharged, advise the client as to the amount paid to discharge the mortgage (this amount having previously been confirmed with the vendor). Usually the discharging mortgagee will have been holding the vendor's insurance policy which will have been reassigned to the vendor at settlement. You should forward this to the insurer for cancellation and for a refund of any unexpired premium.

If you have obtained an authority to deduct costs and disbursements from the proceeds of sale, send a cheque to the client for the balance only. Alternatively, send the proceeds without deduction, leaving the client to pay the costs and disbursements separately or asking the agent to account to the vendor via you. There are occasions when a client may prefer this to be done so that the client's accounting records show proceeds of sale and costs of sale as separate entries.

Enclose with the final letter a tax invoice for costs and disbursements for acting in the matter, and furnish a trust account statement if appropriate (as in Appendix 14).

ELECTRONIC CONVEYANCING

[P201.350]

Land and Property Information is at the forefront of the development and implementation of a national electronic conveyancing system for Australia — Property Exchange Australia (PEXA).

Electronic conveyancing will be implemented progressively throughout Australia. The system provides an electronic environment for the parties to a conveyancing transaction to use for the settlement and to electronically lodge the documents for registration. Victoria was the first state to go live (in June 2013) with electronic conveyancing. Implementation of the process in New South Wales is in two stages. The first (released in September 2013) is for single party transactions being standalone discharges, standalone mortgages and refinances involving four financial institutions. The second stage is for multi-party transactions including transfers, settlements, caveats and notices, and will involve more financial institutions. The second stage is scheduled for release in late October 2014. At that stage, PEXA will support new mortgages, mortgage discharges, refinances, notices, caveats and transfers including online lodgment and financial

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settlement. Shortly after the October deployment, a number of pre-selected practitioners in the Melbourne and Sydney metropolitan regions will participate in the first stage of the roll-out. A staggered roll-out has been adopted to allow existing members of the PEXA community the opportunity to gain familiarity and confidence in the additional functionality before broadening it to the wider market.

While the metropolitan network is developing, PEXA will also launch in select regional hubs including, in the first instance, Wollongong (New South Wales). These hubs will form community networks, allowing those practitioners that transact together on a day-to-day basis to all transition to e-Conveyancing together. The PEXA Team will work closely with each community to ensure the transition from a paper world into an electronic environment is as seamless as possible. From February 2015, the PEXA roll-out will extend to all Victorian and New South Wales property lawyers and conveyancers. See more at http://www.pexa.com.au.

CONCLUSION

[P201.355]

This practice paper has dealt with the common steps in the sale of residential Torrens title property.

Steps which are peculiar to strata title are considered in Practice Paper P207 *Strata Title Conveyancing*.

Some of the steps mentioned in this paper are considered in greater detail in other Practice Papers.

Always bear in mind that the contract is the governing document, and no step should be taken after exchange without prior consideration of the contract and its relevant provisions. Further, remember that the manner and order of taking the steps mentioned and discussed in this practice paper are by no means immutable. Every conveyancing transaction may present its own peculiar problems, having regard to the provisions of the contract, the nature of the title, and the circumstances of the case. As solicitor for the vendor, you must be prepared in every instance to take appropriate steps to overcome the problems which may be presented. The ability to do this is a skill which can be developed, but it can be developed only if you have a sound knowledge and appreciation of the law relating to real property.

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APPENDIXES

APPENDIX 1 — SPECIMEN CORRESPONDENCE

[P201.390]

[P201.10]

[Note:
- Italics are used for comments, notes and signatures. The notes simply indicate the steps taken, to give some background to the documents. In practice there would be detailed file notes of any advice given or instructions received.
- In practice the correspondence would be kept in reverse chronological order, that is, first item at the bottom, last item on top.
- In practice the file might include a checklist.
- Letters leave out "Dear . . ." to save space.
- Letters include the name of the client in the heading, even with letters to the client, to make the copies easier to identify and file.]

DOCUMENT 1 — INSTRUCTIONS

(Date) Vendor came in. See instruction sheet. Client signed retainer. Obtained cheque for $(amount) on account of disbursements.

DOCUMENT 2 — SEARCHES AND ENQUIRIES

(Date) Memo to search firm.
(Date) Record of enquiries sent out — s 149(2) & (5) certificate, drainage diagram, sewer reference sheet.
(Date) Search received — for an example see Appendix 2 (folio) and Appendix 3 (plan).
(Date) Enquiries received —
- *for examples of a s 149 certificate see Appendix 4*
- *for an example of a drainage diagram see Appendix 5*
- *for an example of a sewer reference sheet excerpt see Appendix 6.*

DOCUMENT 3 — LETTER TO MORTGAGEE

KL:34521

(Date)

The Manager
South-West Bank Ltd
7 Landsborough Street
SYDNEY NSW 2000

Vitric — Mortgage of 25 Cook Street, Eastwood — Mortgage No R345678

We act for the mortgagor John Francis Vitric in this matter.

We understand there is a mortgage to your bank.

Please forward to us a copy of any survey report or building certificate held and advise if you hold the original(s).

Yours faithfully

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DOCUMENT 4 — LETTER FROM MORTGAGEE

SOUTH-WEST BANK LIMITED
ACN 001 958 732

7 Landsborough Street, SYDNEY NSW 2000
Phone (02) 9233 7000 Fax (02) 9233 1265

our reference: Ms Cheung
your reference: KL:34521

(Date)

Simons & Prince
Solicitors
67 Ainslie Street
HURSTVILLE NSW 2220

Vitric — Mortgage of 25 Cook Street, Eastwood

Thank you for your letter of *(date)*.

We enclose a copy of the survey report. We hold the original.

We do not hold a building certificate.

Yours faithfully

L Cheung

Survey report — for an example see Appendix 7.

DOCUMENT 5 — LETTER TO AGENT WITH LISTING CONTRACT

KL:34521
Mr Naran

(Date)

The Manager
Hepworth Real Estate Pty Ltd
45 Nettle Street
RYDE 2112

Vitric — Sale of 25 Cook Street, Eastwood

We act for the vendor in this matter and understand your company is the agent.

We enclose a photocopy of the listing contract.

Please advise us when you have found a purchaser.

Yours faithfully

DOCUMENT 6 — LETTER TO CLIENT WITH COPY OF LISTING CONTRACT

KL:34521

(Date)

Mr J F Vitric
25 Cook Street
EASTWOOD 2122

Vitric — Sale of 25 Cook Street, Eastwood

We enclose a photocopy of the draft contract which we have sent to the estate agent.

Please review it carefully and contact us if you have any enquiries.

Yours faithfully

(Date) Vendor rang — discussed draft contract — OK.

DOCUMENT 7 — LETTER FROM AGENT+

HEPWORTH REAL ESTATE PTY LIMITED 45 Nettle Street RYDE 2112
ACN 000 562 876 Phone (02) 9807 9856
Real Estate Agents Fax (02) 9807 9845

our reference: Mr Naran
your reference: KL:34521

(Date)

Simons & Prince
Solicitors
67 Ainslie Street
HURSTVILLE NSW 2220

Vitric — Sale of 25 Cook Street, Eastwood to Poulos

Thank you for your letter of *(date)*.

We have now found a purchaser. Details are enclosed.

Please let us know when contracts have been exchanged.

Yours faithfully

J. Naran

Sales advice

Vendor	John Francis Vitric
Address	25 Cook Street, Eastwood
Vendor's solicitor	Simons & Prince, 67 Ainslee Street HURSTVILLE NSW 2220

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DX 186 HURSTVILLE
Attention: KL:34521 580–6643

Purchaser	Mary Anna Poulos
Address	1/34 Juniper Street MOUNT COLAH 2079
Purchaser's solicitor	Tanner Wise & Co 33 Bent Street HAYMARKET NSW 2000 DX 1596 SYDNEY Attention: Ms Tanner 9232 5682
Property	25 Cook Street, Eastwood
Inclusions	Blinds, curtains, fixed floor coverings, and light fittings
Price	$910,000.00 (deposit: 10% on exchange)

(Date) Phoned vendor to confirm details.

DOCUMENT 8 — LETTER SUBMITTING DRAFT CONTRACT

KL:34521
Ms Tanner

(Date)

Tanner Wise & Co
Solicitors
DX 1596 SYDNEY

Vitric — Sale of 25 Cook Street, Eastwood to Poulos

We act for the vendor in this matter and understand you act for the purchaser.

We enclose a draft contract.

It is to be clearly understood that no binding contract is to come into effect until such time as a formal exchange is effected.

Please let us know when you are ready to exchange.

Yours faithfully

If cooling-off period to be waived also send a draft s 66W Conveyancing Act Certificate.

Contract — for an example of page 1, see Appendix 8. Also see Practice Paper P203 Contracts for the Sale of Land.

Note: If the contract is done as an original and copy, the letter encloses the copy — so that the vendor signs the original, and on exchange the purchaser gets the original (the best evidence).

(Date) Vendor came in to sign contract
(Date) Arranged exchange by phone.
(Date) Exchanged. Rang vendor — contracts exchanged — should continue insurance.

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DOCUMENT 9 — LETTER CONFIRMING EXCHANGE

KL:34521

(Date)
Mr J F Vitric
25 Cook Street
EASTWOOD 2122

Vitric — Sale of 25 Cook Street, Eastwood to Poulos

We confirm that contracts were exchanged on *(date)* with the cooling-off period waived and that you should continue to keep the property insured.

The contract provides for settlement on or about [*date*] and we will contact you again closer to that time.

Yours faithfully

DOCUMENT 10 — LETTER TO AGENT WITH DEPOSIT

KL:34521
Mr Naran

(Date)
The Manager
Hepworth Real Estate Pty Ltd
45 Nettle Street
RYDE 2112

Vitric — Sale of 25 Cook Street, Eastwood to Poulos

Thank you for your letter of *(date)*.

Contracts were exchanged on *(date)*.

We enclose a cheque for $ *(amount)*, which is the deposit. [*If there is agreement in the contract for the deposit to be invested, add "The parties agreed in the contract to have the deposit invested. Please arrange for that to be done, in accordance with clause 2.9 of the contract. The vendor's tax file no is . . ."*].

Please acknowledge receipt.

Yours faithfully

DOCUMENT 11 — LETTER TO MORTGAGEE RE DISCHARGE

KL:34521
Ms Cheung

(Date)

The Manager
South-West Bank Limited

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It follows that before you can prepare a contract, you will need to obtain:

- the relevant prescribed documents (eg, by search or enquiry);
- enough information from the client to make appropriate disclosure; and
- enough material (eg, a copy of a survey report and a building certificate) to make appropriate disclosure.

This practice paper will mention each item and each piece of material in the standard contract for sale, as we come to it. The essential procedures for obtaining these are detailed in Practice Paper P201 *Sale of Residential Land*.

The vendor has protection under cl 10 of the standard contract for irregularities affecting the property which do not fall within the matters required to be disclosed under the C(SL)R, for example, a joint service connection (cl 10.1.2) for which there is no easement. Clause 10.1.9 excludes the purchaser's rights in respect of anything the substance of which is disclosed in the contract. Therefore, depending on the extent of disclosure, a special condition may be required in addition to cl 20.2 (which states that anything attached to the contract forms part of the contract).

The meaning of "substance" was addressed by Young J of the Supreme Court of NSW in his decision in *Le Lievre v Swindells* (1986) 4 BPR 9119. That case concerned cl 11 of the 1982 edition of the form of contract of sale of land (published by the Law Society of New South Wales and Real Estate Institute) which is a provision similar to cl 10.1.9 of the 2005 edition (referred to in this paper as the "2005 contract" or "standard contract"). His Honour considered "substance" to be a very vague word but determined that disclosure of the substance was higher than the lesser state of disclosure of the existence. His Honour determined that (under the 1982 edition of the contract) it was necessary that the substance was clear to the average reader and not necessarily the average solicitor. His Honour's comments may be the reason for the conveyancing practice of solicitors for vendors changing the word "substance" to "existence" in cl 10.1.9 of the 2005 contract in an endeavour to further restrict the rights of a purchaser. However, such an amendment will not get the vendor very far, if it gets the vendor anywhere at all. This is because:

(a) cl 4 of the C(SL)R requires a number of documents to be attached to the contract;
(b) the warranty in cl 1 Pt 1 Sch 3 of the C(SL)R allows the purchaser to rescind unless certain matters are "disclosed" — meaning, presumably, in substance disclosed; and
(c) whether the C(SL)R applies or not, a court is unlikely to require specific performance by the purchaser in the absence of full and fair disclosure of a defect in title.

For further discussions on "substance" in a later case when vendor disclosure applied, see *Firsby Pty Ltd v Erina Street Investments Centre Pty Ltd* (1990) 5 BPR 11,302; (1991) NSW ConvR ¶55-563. See also [P203.95] below.

STANDARD CONTRACT FOR SALE

[P203.20]

The standard contract for sale consists of a main contract comprising 13 pages, being pages 1–2, 2a, 3–12: see [P203.25] and following.

A vendor's solicitor may add (or a purchaser's solicitor in due course may request) additional clauses to go into the contract — known as "special conditions": [P203.180].

If a provision in the standard contract does not apply in the particular case, you can either:

- leave it alone (the usual practice) — the first line of the clause will usually indicate to the reader that the clause does not apply (and in theory any crossing out requires the initials of the parties and witnesses); or
- cross it out — which reduces the number of clauses that have to be looked at (but in theory any crossing out requires the initials of the parties and witnesses).

If a provision in the standard contract needs to be altered because of office practice or in the particular case, you can (depending on office practice) either:

- override it by a special condition (the more common method); or
- make the alteration on the standard contract itself — physically difficult, requiring the initials of the parties and witnesses.

If you have any comments or questions about the standard contract, write to Responsible Legal Officer, Property Law Committee, Law Society of NSW, 170 Phillip Street, Sydney 2000, DX 362 Sydney. If you want to send in a copy of a document, you can white-out or otherwise mask names and other personal information to maintain client confidentiality.

The following paragraphs deal with each item in the 2005 contract.

PAGE 1 — 2005 CONTRACT

[P203.25]

Copyright

The international copyright symbol © with a more detailed copyright notice appears at the top of page 1.

The standard contract is published by the joint committee of the Law Society of New South Wales and the Real Estate Institute of New South Wales (REINSW). Any request for copyright permission should be directed to the secretary of the committee, c/-REINSW.

The standard contract is available electronically on a property by property basis and can be completed and printed on white paper. The electronic version leaves out any reference to vendor duty and has pages 3 to 12 watermarked with the address of the property. See eshop.lawsociety.com.au/index.php/ecos.

Also, you can prepare your own version of pages 1 and 2 on a computer or typewriter: see statement at top of page 1 of the standard contract. Also, page 2a is available separately in electronic form: www.lawsociety.com.au/idc/groups/public/documents/internetcontent/312846.pdf.

Pages 3 to 12 are available electronically on a property by property basis, watermarked with the address of the property.

Alternatively, all the pages of the contract are available on the blue paper on which the joint committee prints them.

Pre-printed alternatives

The standard contract in numerous places gives the person preparing its document two or more pre-printed choices in completing it. One of these choices is set in block capitals.

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Clause 20.15 provides that the wording in block capitals is the default if no selection is made. You must therefore ensure that the correct box is marked in each case.

Term — meaning of term

Page 1 supplies some definitions — as to other definitions, see the discussion of cl 1 in [P203.50].

Vendor's agent

This determines the meaning of "Vendor's agent". Beneath it is "Co-agent" for any conjunction agent.

Clause 1 provides for the vendor's agent to be the depositholder. It will need amending if the co-agent is to be the depositholder and to minimise the risk of the purchaser being embroiled in any commission dispute.

The vendor may want the deposit paid straight to the vendor. This is undesirable from the purchaser's viewpoint, as the vendor may become insolvent, and be unable to complete the sale or refund the deposit. The charge in cl 2.8 is subject to any existing rights, may be void in the event of insolvency, and may at least take time and trouble to enforce.

If the deposit is to be payable to the vendor, in cl 2.1 change "the depositholder as stakeholder" to "the vendor" — or have an overriding special condition.

If there is more than one agent, find out which one, if any, is holding any deposit money at that time, so:

- you know how much more to get on exchange for sending to the depositholder (cl 2.4); and
- you can check that the money held by any other agent is sent to the depositholder (cl 2.4) and if necessary invested by that person (under cl 2.9).

If no agent appears to be involved:

- you can leave this blank or insert "Nil"; or "Without the intervention of an agent"; and
- a vendor will usually assume no commission is payable, and have negotiated the price accordingly — therefore ask and advise the vendor about agent's commission:
  - — if the vendor has employed an agent, and commission is payable if a purchaser is introduced by the agent, consider a clause by which the purchaser indemnifies the vendor against any agent's commission payable if the purchaser was in fact introduced by the agent (or whatever the test is in the agency agreement);
  - — if the vendor has employed an agent, and commission is payable whether or not the purchaser was introduced by the agent, consider the terms of the agency agreement and the circumstances in which the liability for commission arises, and advise the vendor accordingly.

As to risks for the vendor or purchaser as regards agent's commission, see M Parasyn, "Real estate agent's commission: How a purchaser may become liable" (1992) 30(6) *Law Society Journal* 57.

Note also strict compliance of the agent with s 55 of the Property, Stock and Business Agents Act 2002 (NSW) (PS&BA Act) is essential. If the agency agreement is not in writing, the prescribed terms are not contained in the agency agreement, or if the agreement is not served within 48 hours of it being signed by the vendor (unless s 55(5) applies) the claim by the agent for commission fails.

Insert the name of the agent — usually a company or business name, not the name of the salesperson handling the matter.

If you want to mention the salesperson — for quick future reference on the front of the contract — you can add the name.

Insert as many address and contact details as are available, for quick future reference.

Vendor

The standard contract does not prompt the required details as did its predecessor, but the details required are:

(a) In the case of an individual — insert the name and address.

(b) In the case of a corporation, see the Corporations Act 2001 (Cth):

- the contract will be a "public document" of both parties: s 88A(1)(b);
- for a company, add the Australian Company Number: s 153, for example, AB Pty Ltd ACN 000 002 001 (in the case of the vendor, this also provides information needed for the transfer, to avoid cl 4.2 applying);
- for an Australian registered body, add the Australian Registered Body Number and — if the body is not a bank — the place of incorporation (State, Territory or other jurisdiction: see s 9 "place of origin"): s 601DE, for example XY Building Society ARBN 000 001 002 incorporated in Victoria; and
- add an address — this need not be the registered office.

(c) If there are two or more vendors:

- insert the name and address for each — make it clear whether or not an address relates to both vendors, for example for two vendors:
  - — "A and B both of (address)"; or
  - — "A of (address 1) and B of (address 2)";
- there is no need to indicate whether the vendors are joint tenants or tenants in common — even for old system, the usual covenants for title will relate only to each vendor's interest, whatever it might be (cl 25.6.3; s 78(1) of the Conveyancing Act);
- there is no need to change "Vendor" to "Vendors" — the word "vendor" is used throughout the contract, and the singular includes the plural (s 181(1)(b) of the Conveyancing Act); and
- the contract binds and benefits them separately and together: cl 20.4.

The address has significance for service purposes: see cl 20.6.4, s 170(1) of the Conveyancing Act.

Vendor's solicitor

Whether a party is represented by a solicitor (Legal Profession Act 2004 (NSW)) or a licensed conveyancer (Conveyancers Licensing Act 2003 (NSW)), the term "solicitor" is used. References to a solicitor throughout the contract include a licensed conveyancer (cl 1 "solicitor"). Because of the definition in cl 1 and because of the intended audience for this paper, this paper will simply refer to solicitors.

Insert the firm or individual names under which the vendor's solicitor practises with the address, telephone and document exchange numbers. A reference to the individual solicitor handling the matter may be convenient but, in view of the service of notice provisions in cl 20.6, the firm name should be used as the "vendor's solicitor", with the individual solicitor handling the matter mentioned in brackets or as part of the office reference.

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Completion date — 42nd day after the contract date (clause 15)

See cll 15 and 21 generally regarding time limits. As to special completion dates, see cl 27.9 and cl 28.5.

If you think 42 days is too long or too short, you can cross out "42nd" and put a different number to the right — or cross out all the wording, and add a date in the space provided, for example, "19/12/xx".

If the time for completion is to be an essential term, add the words "and time is of the essence". This contractual term requires performance within the specified time as an essential matter and overrides cll 15 and 21. Breach of such an essential term by one party provides to the other party the remedy to terminate the contract if the innocent party decides to avail itself of such remedy. See also [P203.90] and [P203.120] below.

Land (address, plan details and title reference)

The contract is a contract for the sale of both:

- land (governed by, for example, Conveyancing Act); and
- goods (governed by, for example, Sale of Goods Act 1923 (NSW)).

All the provisions of the contract apply to "the property", that is, the land and the goods, with the exception of cl 2.8 (land), cl 10.2 (inclusions) and provisions necessarily confined to the land (cll 14.4.2, 14.5, 17.2 and 27).

What is a fixture is left to the general law.

The transfer of an electricity, gas or telephone service can be left to the parties, without a special provision in the contract. The vendor will cancel the service to escape further liability. The purchaser will apply for the service so that it is not disconnected. The purchaser will arrange a meter reading so the purchaser does not have to pay for the vendor's use of the service.

The standard contract does not have prompts for the title details. Solicitors know that they are required to set out the address of the property and the correct title details.

First, insert the address of the property, and then the lot and plan details. For a lot in a plan to be registered before completion, state that the lot forms part of an unregistered plan and provide the details of the lot(s) and plan(s) for all the land to be subdivided by the plan to be registered. The existing plan or plans are required under cl 4(1)(b) and Sch 1 item 3(b) of the C(SL)R.

In the case of land under old system, a full description by metes and bounds will be required (unless the land can be described as a lot in a deposited plan: see s 195(1) of the Conveyancing Act). The metes and bounds description will have to be attached to the contract.

For land under the Real Property Act 1900 (NSW) (Real Property Act):

- in the case of a computer folio, insert the folio number (eg, "5/SP1234") and attach a copy of a computer folio certificate (a search, not the certificate of title); and
- in the case of a manual folio, insert the volume and folio numbers (eg, "Vol 2345 Fol 123)" and attach a copy of the manual folio.

For old system, insert the registration details of the relevant document containing a description of the land, for example, "Book 5678 No 998" and, although not required by legislation, it is advisable to attach a copy of the document.

The 2005 contract does not require the title and nature of the title to be stated on the front page. Clause 10.3 removes the difficulty in earlier contracts when Qualified or Limited title were incorrectly referred to as Torrens title and purchasers required the

vendor to register a Primary Application converting the property to Torrens Title. The title is shown on the property certificate which must be attached to the contract (the search or the copy of a manual folio).

As the estate is also shown on the property certificate attached to the contract, there is no necessity for the estate to be stated on the front of the contract. Clause 16.3 includes the words "being an estate in fee simple" in brackets. The word "normally" at the start of cl 16.3 means this is subject to any other provision of the contract: cl 1. The other provisions of the contract include cl 10.1.9 which provides that the purchaser cannot make a claim or requisition or terminate the contract in respect of anything the substance of which is disclosed in the contract. This would cover the disclosure of an estate or interest less than a fee simple in a property certificate attached to the contract: cl 20.2.

Vacant possession/subject to existing tenancies

Vacant possession is the default choice. Therefore, if the property is being sold subject to an existing tenancy, it is imperative that the box be selected and a full copy of the lease be annexed to the contract.

Improvements

The concept of land includes any improvement (building or other structure) on the land. However, mentioning an improvement may help the purchaser if by completion the improvement has been demolished or altered, or there is the risk of an order for its demolition or alteration.

You should mark the box or boxes which describe the improvements. If you do not mark anything, the default choice "HOUSE" applies. If the improvements comprise a unit, carspace and storage shed you should mark the items "home unit", "carspace" and "other", and add next to "other" the words "storage shed".

Attached copies

There are two boxes that provide for documents:

- "Documents in the List of Documents [on page 2] as marked or as numbered"; and
- "Other Documents" — for ancillary documents such as a development approval.

This is a good prompt to both parties to check that the correct documents are attached.

Heavy black border

The heavy black border encloses matters which an estate agent is authorised to amend or add for residential property (s 64(1) of the PS&BA Act), and a few incidental matters, for example, deposit, balance, contract date.

Inclusions

Listed are 12 of the most common or controversial items, with boxes next to each item. A 13th box is next to the word "other", with space to add in other items. There is no default choice, as there is with many other boxed items.

You should:

(a) mark those items which are to be included. If only some of a particular item are to be included (eg, all curtains except those in the main bedroom), mark the item and use the "Exclusions" area to mention the curtains in the main bedroom;
(b) for any inclusions not on the printed list, mark the box "other" and list the other items either in the space provided or on an attached sheet;

(c) if the purchaser requires it — list any inclusions where there could be any doubt they are fixtures. List here or in a special condition, for example "The land includes. . ." (rather than "Included in the sale are . . .", as the purchaser will want cl 2.8 to apply). The charge under cl 2.8 attaches not only to the land, but also to all fixtures upon the land.

If any of the inclusions are not in a good state of repair, a note to that effect could be made in the list — cl 10.2 is a limited provision.

Usually the purchaser will want to inspect the inclusions before exchange of contracts. It would be prudent to have the vendor and/or the vendor's agent or representative present at the time of the purchaser's inspection so that the state of repair and condition of the inclusions is within the knowledge of both parties.

Exclusions

Here list any items which are (or might appear to be) fixtures and are not included in the sale. If there is not enough space use an attached sheet with a special condition ("The exclusions are. . ."). If an item is in the printed inclusions list and might be a fixture but is *not* included in the sale, then include it here for safety's sake — do not rely on simply not marking the box. For example, if a TV antenna is not included in the sale, then the box next to "TV antenna" in the inclusions list should be left blank, and "TV antenna" should be listed as an exclusion.

Purchaser

See the comments as to the vendor, above, subject to the following.

If a buyer has not been found, the name and choices will be left blank until later. If and when there is only one purchaser, the choices are irrelevant and can be left alone: [P203.20].

Purchaser's solicitor/conveyancer

See the comments as to the vendor's solicitor, above, subject to the following.

If a buyer has not been found, the name, details and choice of practitioner (solicitor or licensed conveyancer) will be left blank until later.

Price

If a buyer has not been found, this box will be left blank until later.

Deposit . . . (10% of the price, unless otherwise stated)

This is a backup provision in case the deposit figure is not filled in before the making of the contract:

- this will always happen with an auction, as the contract is made, and the provisions as to the deposit have to be able to take effect, on the fall of the hammer, before the blank space is filled in — even if for convenience the figure is inserted later;
- this may happen with residential property — the deposit is not one of the things an agent is authorised to fill in, although in practice agents complete all the details within the heavy boxed area.

A deposit of more than 10% may be void as a penalty, and 10% is the maximum that can be kept or recovered under cl 9.1.

Sometimes a small "holding deposit" is paid before exchange. Usually this has no legal significance: the vendor is free to sell the property to someone else, and the deposit, whether the whole deposit or a small "holding deposit", is refundable if contracts are not exchanged.

It is becoming common practice for estate agents in some areas of Sydney to exchange contracts with a cooling-off period on a deposit of 0.25% of the purchase price. Some contracts provide for the balance of the 10% deposit (the deposit that is generally paid under the terms of the standard contract) to be paid at the end of the cooling-off period, should the purchaser not elect to rescind. There is even a practice that the deposit paid on exchange is limited at 0.25% and the remaining 99.75% of the purchase price is paid on settlement.

Balance

This is not necessary — it can be calculated and does not have to be defined — but it is classical.

Date

Contract Date . . . (if not stated, the date this contract was made)

The date is left blank until exchange of contracts, when the date of the exchange is inserted. If the property is sold at auction, the date will be the date of the auction.

The date which eventually appears here is usually accepted as the date of "first execution" for duty purposes: see [P203.32] regarding warning 6.

Execution clauses

You may need to add a special execution clause (eg, power of attorney) or several execution clauses (different vendors signing before different witnesses) which may require an annexure page for such purpose.

Purchaser – Joint Tenants – Tenants in Common – In Unequal Shares

If and when there are two or more purchasers:

- if you know whether they are taking as joint tenants or tenants in common, mark the appropriate choice;
- if you do not know:
  - — you can leave the choices alone, pending the views of the purchasers; or
  - — if neither choice is marked by exchange, the purchasers take as joint tenants (see "block capitals" statement in cl 20.15, overriding s 26 Conveyancing Act);
- in the case of tenants in common, if the shares are equal, mark that box. If the shares are not equal, mark the "in unequal shares" box and state the shares, for example, "A as to a 3/4 share and B as to the balance". This is:
  - — safer than "as to a 1/4 share", as there is a risk one share will be altered at the last minute without the other; and
  - — clearer than using "respectively" (as in "A and B as to a 3/4 share and the balance respectively");
- the effect of the choices is that:
  - — at law a joint tenant has an interest (in the contract or in due course the land) which on death will cease, leaving the other as sole owner (even though the burden of the contract will remain with both: cl 20.4, 20.6.3);
  - — at law a tenant in common has a share (in the contract or in due course the land) which on death will pass into that tenant's estate; and
  - — in equity the purchasers may hold in a different capacity (eg, "joint tenants at law, tenants in common in equity"), depending on, for example their relationship and who supplied the purchase money.

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Spouses more often than not usually buy as joint tenants. This has the advantage that the land passes to the survivor without the need to obtain probate (although of course probate may be necessary for other reasons). However, it should not be assumed that spouses intend to have a joint tenancy (eg, they may wish to be able to provide for present or future children by will).

A joint tenancy does not guarantee that the survivor will receive the land, as there may be a severance of the tenancy or an intervention by the Family Court, or a court may include the share in the notional estate, pursuant to a claim under Chapter 3 (Family provision) of the Succession Act 2006 (NSW).

Business partners usually buy as tenants in common, so their respective estates will benefit. However, consider the terms of the partnership agreement, for example, it may provide for unequal shares, or for a few partners to hold any partnership property as trustees for all the partners, and trustees buy as joint tenants.

Whether there is one purchaser or more than one purchaser, there may be a trust in favour of a third party. In general this is not mentioned in the contract — the capacity of the purchaser being no business of the vendor.

There is the special case of "A as trustee for B Pty Ltd, a company to be formed", or with a novation clause (if the company adopts the contract, A is released). There is a real risk of incurring double ad valorem duty with use of these devices, and with shelf companies being readily available it is simpler and safer to buy a shelf company and make it the purchaser.

Tax information (the parties promise the information is correct as far as each party is aware)

Page 1 also deals with vendor duty (now abolished), land tax and GST, which pursuant to cl 20.14 are contractual.

Vendor duty

Vendor duty was introduced in New South Wales on 1 June 2004 and abolished on 2 August 2005. The standard contract was drafted after the introduction, and before the abolition, of vendor duty.

As vendor duty is no longer payable on land in New South Wales, this practice paper will not address when it was applicable or the choices for it on page 1.

Land tax

If an adjustment of land tax is required, you must note this by selection of a box on page 1.

If you do not mark a choice, the choice in block capitals applies: cl 20.15. For example, with the "Land tax adjustment required" choice, if you do not mark "Yes" or otherwise indicate a land tax adjustment is required, the vendor will be left to bear any land tax: cl 14.4.1.

See discussion of cl 14.4 as to the calculation of the adjustment, then:

- if there is no possibility of there being any adjustable land tax (eg, land is exempt or its adjusted value is below the threshold), mark "NO", so as not to concern the purchaser and possibly delay exchange; or
- if there is any possibility of there being any adjustable land tax, mark "Yes".

GST

First there is an optional box for the GST amount, which states "The price includes GST of: $". As this box is optional it can:

- be deleted;
- be left blank;
- include the amount of GST payable;

- state "1/11th of the price";
- state "Nil"; or
- state "See Special Condition (number)".

The other boxes for GST on page 1 are as follows:

GST: Taxable supply	☐ NO	☐ yes in full	☐ yes to an extent
Margin scheme will be used in making the taxable supply	☐ NO	☐ yes	

This sale is not a taxable supply because (one or more of the following may apply) the sale is:

- ☐ not made in the course or furtherance of an enterprise that the vendor carries on (section 9-5(b))
- ☐ by a vendor who is neither registered nor required to be registered for GST (section 9-5(d))
- ☐ GST-free because the sale is the supply of a going concern under section 38-325
- ☐ GST-free because the sale is subdivided farm land or farm land supplied for farming under Subdivision 38-O
- ☐ input taxed because the sale is of eligible residential premises (sections 40-65, 40-75(2) and 195-1)

If the supply is taxable, either tick or cross the "yes in full" or "yes to an extent" depending on whether the supply of all the land or only part of the land in the sale attracts GST.

Page 1 provides whether the margin scheme will be used in making the taxable supply, with the election of crossing or ticking the box marked NO or yes.

Since the passing of the Tax Laws Amendment (2005 Measures No 2) Act 2005 (Cth) amending the GST Act it is necessary for the parties to agree that the margin scheme applies. This is effected by the marking of the box as NO or yes, and the provisions of cl 20.14. There are several GST rulings by the ATO on the margin scheme, and these should be referred to prior to agreement being reached.

If the supply is not GST taxable, it is recommended you place a tick or cross in the NO box even though it is the default box, and then mark by tick or cross the relevant box relating to the exemptions available.

The remainder of the boxes for GST are for when the sale is not a taxable supply. If you mark the first choice "NO", then naturally the margin scheme does not apply, so you can leave the default box as it is or cross out the reference to the margin scheme. You must, however, select the correct box stating why the sale is a non-taxable supply.

The previous edition of the contract included a note about GST as to whether consideration was GST inclusive. This resulted in confusion leading to litigation, such as *Igloo Homes v Sammut Constructions* [2004] NSWSC 123 (NSWSC 15/12/04, per Campbell J), where it was held that special conditions relating to GST being in addition to the price overrode the note on page 1, and despite the note the purchaser was required to pay GST.

Whether, under the 2000 contract, a taxable supply was taxable in full or to an extent under the contract became an issue in the case of *ETO Pty Ltd v Idameneo (No 123) Pty Ltd* [2003] NSWSC 1096 (NSWSC 21/11/03, Young CJ in Eq); [2004] NSWCA 368 (NSWCA 5/11/04). The court interpreted the word "not" in the 2000 edition cl 13.91.1 to be satisfied by nothing. The situation for a mixed supply has been addressed by the amended cll 13.7.1, 13.8.2 and the rewritten cl 13.9. For further reading on GST, refer to Practice Paper T103 *Goods and Services Tax — The Basic Concept.*

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Abbreviations

2008 Amendment Act	Environmental Planning and Assessment Amendment Act 2008 (NSW)
DCP	Development Control Plan
EIS	Environmental Impact Statement
EP&A Act	Environmental Planning and Assessment Act 1979 (NSW)
EP&A Regulation	Environmental Planning and Assessment Regulation 2000 (NSW)
EPI	Environmental Planning Instrument
L&EC Act	Land and Environment Court Act 1979 (NSW)
LEC	Land and Environment Court
LEP	Local Environmental Plan
LG Act 1919	Local Government Act 1919 (NSW) (now repealed)
LG Act 1993	Local Government Act 1993 (NSW)
LPI	Land and Property Information, a division of the NSW Office of Finance and Services
REP	Regional Environmental Plan
s	section
SEPP	State Environmental Planning Policy
SIS	Species Impact Statement

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INTRODUCTION

[P206.10]

The multiplicity and complexity of government controls over land development and land use in New South Wales is well known. When a person proposes to purchase, sell or lease any real property, his or her solicitor must examine the planning, building and taxation status of the property. Solicitors also become involved in these areas whenever they act for clients wishing to subdivide, build upon or otherwise develop land.

This practice paper outlines the broad scheme of the relevant environmental planning, local government and subdivisional law.

The relevant legislation applies to most areas of the state and is contained in the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act). The EP&A Act, together with regulations and other subordinate legislation, concentrates on land use planning, building and development, as well as subdivision of land and use of resources.

When initially drafted in the 1970s, the EP&A Act was a simple piece of legislation, providing for development, local decision-making and community participation, but it was drafted and passed in a regulatory climate very different from that of today. Since 1 September 1980 when the EP&A Act came into force, it has been amended more than 100 times. The objects in s 5 of the EP&A Act as originally drafted included protection of the environment but did not include ecologically sustainable development, the provision of affordable housing, or the protection of the environment as encompassing the protection and conservation of native animals and plants, including threatened species, populations and ecological communities and their habitats. Major amendments were made to the EP&A Act in 1995, and in 2008 the NSW Government introduced further sweeping reforms to the EP&A Act. The 2008 reforms were legislated in the Environmental Planning and Assessment Amendment Act 2008 (NSW) (2008 Amendment Act) and received assent on 25 June 2008. That Act commenced (in part) on 1 August 2008 and other sections commenced on various dates in late 2008 and in the years following. Note that, as at the date of writing, certain provisions of the 2008 Amendment Act have not yet commenced.

In addition to miscellaneous amendments the major amendments introduced were to environmental planning, development assessment, development contributions, and certifications of development.

The most significant regulation under the EP&A Act is the Environmental Planning and Assessment Regulation 2000 (NSW) (EP&A Regulation). This legislation was to be automatically repealed in 2005, pursuant to s 10(2) of the Subordinate Legislation Act 1989 (NSW), but its operation has been extended and it is currently due to be repealed on 1 September 2014.

Under the EP&A Act a single consent replaces the "subdivision/development approval/building approval" processes of the past.

Note that the planning system has been reviewed and the NSW Government has now released two Exposure Bills (Exposure Planning Bill 2013 and Exposure Planning Administration Bill 2013) in relation to the implementation of a new planning system. Developments in this regard should be closely monitored as very substantial changes are proposed. However, the focus of this practice paper is necessarily on current law and practice. Information regarding the New South Wales government's review of the planning system is available on the Department of Planning & Infrastructure website: www.planning.nsw.gov.au/a-new-planning-system-for-nsw.

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DEVELOPMENT APPLICATIONS

[P206.15] Control of development

Whilst *all* development is regulated by the EP&A Act, there are a number of other Acts that control land development in New South Wales, for example:

- Heritage Act 1977 (NSW);
- Coastal Protection Act 1979 (NSW);
- National Parks and Wildlife Act 1974 (NSW);
- Native Vegetation Act 2003 (NSW);
- Water Management Act 2000 (NSW); and
- Threatened Species Conservation Act 1995 (NSW).

These other Acts are particularly relevant to both the environmental plan-making regime and to the consideration by consent authorities of development applications provided for in the EP&A Act. Both require the consent authority to participate in consultation and concurrence processes so that the views of specialised public agencies are incorporated into their decisions and actions.

Development on specific land is restricted by applicable environmental planning instruments (EPIs), of which the most numerous are local environmental plans (LEPs): see EP&A Act ss 53–60. These are prepared by local governments, sometimes at the direction of the Minister. The Governor may, by order published in the Government Gazette, prescribe the form and content of local environmental plans or any other environmental planning instrument, known as a *standard instrument*: s 33A.

The *standard instrument* will not be a matter for consideration by a council when deciding whether to grant development consent under s 79C(1) of the EP&A Act until such time as a council publicly exhibits a draft LEP for its area that adopts the relevant standard instrument provisions. The Standard Instrument (Local Environmental Plans) Order 2006 prescribes the format and content of a principal local environmental plan for an area for the purposes of s 33A.

Where more detail is needed than is contained in the LEP, a development control plan (DCP) may be prepared by a council. However, a DCP must not contain provisions which conflict with the LEP: see s 74C.

Besides LEPs, there are also State environmental planning policies (SEPPs), made by the Governor. Although the title of this EPI suggests that it might comprehend areas larger than LEPs, this is not necessarily so. The geographical area may be quite small. Actually, the focus of such EPIs is on the planning of matters of regional or state significance, for example, major employment generating activities: see ss 37–38. Besides SEPPs, the Minister may *declare* development to be "State significant development": s 89C. In such cases, the Minister is the consent authority and the project is assessed differently: ss 89C–89L and Pt 4.

Section 36(1) deals with inconsistencies between instruments and provisions:

> In the event of an inconsistency between environmental planning instruments and unless otherwise provided:
> (a) there is a general presumption that a State environmental planning policy prevails over a local environmental plan or other instrument made before or after that State environmental planning policy, and
> (b) (Repealed)
> (c) the general presumptions of the law as to when an Act prevails over another Act apply to when one kind of environmental planning instrument prevails over another environmental planning instrument of the same kind.

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As these instruments provide the details of what use may be made of any land, it may be necessary to refer to particular EPIs when a client is buying, selling, leasing or developing. It is the council's responsibility to accurately list any relevant EPIs applicable to any particular parcel of land on a certificate (see s 149 and cl 279 and Sch 4 of the Regulation) upon application, and the payment of the appropriate fee, being made to it. If any doubt about the interpretation of EPIs arises, a visit to the council offices and discussions with the council's planning officers is recommended.

Note that the 2008 Amendment Act repealed Pt 3 Div 3 (regional environmental plans) of the EP&A Act. That repeal took effect on 1 July 2009 and there will be no further regional environmental plans (REPs).

The legislative scheme for environmental planning control is distributed among four broad elements:

(a) Division 4.1 of Pt 4 of the EP&A Act — provides for the assessment of development declared to be a project to which this division applies by either a State Environmental Planning Policy or by an order of the Minister published in the Government *Gazette* (State significant development).

(b) Part 4 of the EP&A Act (Development assessment) — lays the foundation for the legislative scheme and contains the major concepts and matters of principle.

(c) EPIs — identify particular forms of development established by the EP&A Act. An EPI is defined by s 4 to mean: "an environmental planning instrument (including a SEPP or LEP but not including a DCP [development control plan]) made, or taken to have been made, under Part 3 and in force". Note that this definition was added by the 2008 Amendment Act. Under the former definition, an EPI was "a State environmental planning policy, a regional environmental plan, or a local environmental plan, and except where otherwise expressly provided by this Act, includes a deemed environmental instrument".

(d) EP&A Regulation — contains much of the detail which leads to the granting of consent. The regulations also largely determine whether development is designated development or advertised development: see [P206.25] and [P206.40].

The decision-making system is based on different types of development which are accompanied by a level of assessment which reflects the complexity and likely impact of a development.

The categories in Pt 4 include exempt development, complying development, advertised development, integrated development, as well as categories of designated development. Whilst procedures for some categories are different and others overlap, generally speaking the more complex developments will attract additional assessment procedures. The latter include procedures for public participation as well as concurrence procedures.

[P206.20] Definition of development

Section 4(1) of the EP&A Act provides:

> *development* means:
> (a) the use of land, and
> (b) the subdivision of land, and
> (c) the erection of a building, and
> (d) the carrying out of a work, and
> (e) the demolition of a building or work, and

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(f) any other act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument,

but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.

What is caught by the definition is often the subject of controversy. It is clear, however, that it, and therefore the EP&A Act, applies irrespective of whether building operations may be contemplated. Section 4(2)(a)–(f) expands the definition of "*development*" and lawyers should also refer to these subsections for the broadened definitions. Its relevance to strata plans is discussed in [P206.145].

[P206.25] Different kinds of development

Because there are different kinds of development, the definitions of what they are is important in this context:

- **Advertised development** means, inter alia, "development, other than designated development, that is identified as advertised development by the regulations, an environmental planning instrument or a development control plan": s 4.
- **Building** includes "part of a building and any structure or part of a structure, but does not include a manufactured home, a moveable dwelling or associated structure or part of a manufactured home, a moveable dwelling or associated structure".
- **Complying development** is local development that can be addressed by specified predetermined development standards: s 76A(5). Such development is controlled by complying development certificates (cl 126 and Sch 1 Pt 2 of the EP&A Regulation lists the matters which must be included in the application and the documents which must accompany it). These can be issued by a consent authority or an accredited certifier: s 85A. Complying development cannot be designated development or development that requires the concurrence of a person (other than the consent authority or, in certain circumstances, the Director-General of National Parks and Wildlife). Nor can it be carried out on land that is critical habitat; that is within a wilderness area or that comprises, or on which there is, an item of heritage: s 76A(6). Procedures for this type of development are principally governed by ss 84–87 in Div 3 of Pt 4 of the EP&A Act and by cll 125–137 of Pt 7 of the EP&A Regulation.

  Complying development is routine development like alterations and additions to a home. Councils decide what is complying development and set the standards which need to be complied with. These are contained in the LEP. Where councils have not included such provisions in the LEP, SEPP No 60 *Exempt and Complying Development* will apply.
- **Exempt development** means development which is identified in an environmental planning instrument as development which is of "minimal environmental impact": s 76(2). Such development may proceed without development consent: s 76(3). It often includes things like pergolas, fences and garden sheds. These are contained in the LEP. Where councils have not included such provisions in the LEP, SEPP No 60 *Exempt and Complying Development* will apply.
- **Subdivision of land** is defined in s 4B. This definition accords with the common law definition. In summary, this means the division of land into two or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition, which may (but need not) be effected by:
  - conveyance, transfer or partition; or

  - any agreement, etc, rendering different parts of the land available for separate use, occupation or disposition. It also includes the registration of a plan of subdivision within the meaning of s 195 of the Conveyancing Act 1919 (NSW) or a strata plan or a strata plan of subdivision within the meaning of the Strata Schemes (Freehold Development) Act 1973 (NSW) or the Strata Schemes (Leasehold Development) Act 1986 (NSW).

  The definition does not include a lease (of any duration) of a building or part of a building; the opening or dedication of a public road by the Crown, a statutory body representing the Crown, or a council; the acquisition of land; a division of land effected by a transaction referred to in s 23G of the Conveyancing Act 1919 (NSW); or the registration of a plan of consolidation, etc: s 4B(3). See [P206.75] and following.
- **Integrated development** is development (not being complying development) that, in order for it to be carried out, requires development consent and approval under other environmental legislation listed in s 91.
- **Designated development** is development that is declared to be designated development by an EPI or the regulations: s 77A. It is important to determine if a development proposal might be designated because such development attracts additional controls. Common examples, listed in the EP&A Regulation (see Sch 3): are agricultural produce industries, aircraft facilities, aquaculture, artificial waterbodies, bitumen pre-mix and hot-mix industries, breweries, cement works, ceramic and glass industries, chemical industries and works, chemical storage facilities, coal mines, coal works, composting facilities or works, concrete works, contaminated soil treatment works, crushing, grinding or separating works, drum or container reconditioning works, electricity generating stations, extractive industries, limestone mines and works, livestock intensive industries, livestock processing industries, marinas or other related land and water shoreline facilities, mineral processing or metallurgical works, mines, paper pulp or pulp products industries, petroleum works, railway freight terminals, sewerage systems and sewer mining systems, shipping facilities, turf farms, waste management facilities or works, wood or timber milling or processing works and wood preservation works. Public advertising and scrutiny are specified for such developments (see s 79) and the Minister may direct that a review be held by the Planning Assessment Commission and may determine the application after that inquiry: s 80. In every case a detailed environmental impact statement (EIS) is required: s 78A(8). After the document is placed on display, any person can examine it and make objections to the granting of consent by writing to the council.
- **Critical habitat** is land defined in the Threatened Species Conservation Act 1995 (NSW) and declared to be critical habitat under Pt 3 of that Act: s 4. In this case a species impact statement (SIS) must accompany the development application and the concurrence of or consultation with the Director-General of National Parks and Wildlife will usually be required: see EP&A Act, ss 78A and 79B.
- **Major infrastructure and other projects** — Div 4.1 of Pt 4 of the EP&A Act makes provision for the environmental assessment and approval of certain development that is State significant development.
- A **concept plan** is necessary for certain major infrastructure projects. Sections 75M, 75N and 75O set out the nature and scope of concept plans, the procedures by which the Minister can require the submission of a concept plan, the procedures for the environmental assessment, public consultation and approval

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of a concept plan. The Minister may determine that the project or part of the project may be subject to Pt 4 or Pt 5 of the EP&A Act in which case subsequent approvals must be generally consistent with the concept plan and the assessment requirements of the Minister. The Minister may by order declare that a stage of the project is exempt or complying development, or not designated development.

[P206.30] Environmental planning instruments (EPIs)

Some EPIs include instruments made before the EP&A Act, but all include instruments made after its commencement. EPIs vary from one local government area (council area) to another although all local government areas are required to replace them with the standard instrument set by the Standard Instrument (Local Environmental Plans) Order 2006. All EPIs prescribe "zones" and what is permissible in them.

The pre-EP&A Act controls were introduced in the Local Government Act 1919 (NSW) (LG Act 1919) and are referred to as "deemed environmental planning instruments". A definition of "deemed environmental planning instrument" was previously included in s 4(1) of the EP&A Act but was omitted by the 2008 Amendment Act. Those instruments remain in force: see EP&A Act, Sch 6 Pt 21 cl 123; and Sch 3 cl 2 of the Miscellaneous Acts (Planning) Repeal and Amendment Act 1979. They are described in a s 149 planning certificate as prescribed planning schemes or interim development orders. A s 149 planning certificate includes details of matters affecting the particular property, such as zoning, resumption and contamination. Clause 279 and Sch 4 of the EP&A Regulation provide a list of matters which must be included in a planning certificate. These include the names of each State Environmental Planning Policy, Local Environmental Plan and Developmental Control Plan, affecting a particular property. Draft instruments must also be included. Note that existing regional environmental plans continue in force post the commencement of the 2008 Amendment Act and are taken to be environmental planning instruments: EP&A Act Sch 6 Pt 21 cl 120.

Obtaining a planning certificate is an important step in the conveyancing process. The certificate indicates what development restrictions apply to a parcel of land.

As noted above (at [P206.15]), the 2008 Amendment Act inserted a new definition of "environmental planning instrument" in s 4 of the EP&A Act. That is an EPI is defined to mean "an environmental planning instrument (including a SEPP or LEP but not including a DCP) made, or taken to have been made, under Part 3 and in force".

Although a SEPP may not apply to all areas of the state, it must be "of significance for environmental planning for the State": see s 37 of the EP&A Act. Current SEPPs are available from the NSW legislation website: www.legislation.nsw.gov.au. EPIs are reproduced in LexisNexis Butterworths *Local Government Planning and Environment NSW*, vol B and Lawbook's *Planning and Development Service NSW*, and see Appendix 1 of this practice paper.

How does a lawyer determine whether a specific development proposal requires development consent?

As mentioned above, all EPIs relevant to the land the subject of the inquiry must be shown on the s 149 planning certificate under s 149(2) of the EP&A Act.

The EPI or zoning control most commonly consists of a map and a written statement. From those documents it is possible to determine whether a particular proposed use is one which can be carried out with prior development consent. In some instances, particular types of use are prohibited on the land the subject of the inquiry.

Where development consent is required, a development application must be made to the local authority. Each consent authority has its own form of development application

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which should be obtained by the applicant. Because the permitted/prohibited uses applicable to land may change quite frequently, a lawyer should have available a current s 149 planning certificate. The certificate should give the answer as to whether development consent for a proposed use might be required. Where doubt remains as to that question, the lawyer should make enquiries of the council concerned as to the appropriate planning control.

In most cases the controlling EPI is an LEP. However, it is by no means uncommon for development of an allotment to be controlled concurrently by other EPIs, including a prescribed planning scheme or interim development order in conjunction with a single LEP, REP or SEPP. It is also possible that a mixture of LEPs, REPs and SEPPs might apply.

For example, an LEP may prescribe that development consent is required to build a dwelling house or for a commercial purpose or for a shop, while SEPP 4 *Development Without Consent and Miscellaneous Complying Development* provides in many instances that development consent is not necessary for that same purpose or use. The inconsistency between the LEP and SEPP 4 is resolved by an examination of the language used and the proper construction of both EPIs. In this respect, SEPP 4 provides that in the event of any inconsistency between the policy and the provisions of another EPI, the provisions of the policy (that is, SEPP 4) will prevail to the extent of the inconsistency: cl 5.

The failure by a person to comply with any relevant EPI in carrying out development clearly constitutes a breach of the EP&A Act (subject to existing use provisions). See s 122 of EP&A Act and ss 123 and 127 for proceedings for contravention.

[P206.35] Development control plans (DCPs)

Whilst LEPs control the use that may be made of land, councils can provide additional details controlling development through the making of DCPs: s 74C. Typically, a DCP might show positions of local roads and pathways, details of contributions under s 94 for provision or improvement of amenities or services, minimum allotment sizes, floor space ratios and maximum building heights. However, when a DCP is in conflict with an LEP, the DCP will be invalid to the extent of the conflict: see *Leichhardt Council v Minister for Planning (No 2)* (1995) 87 LGERA 78 at 89; BC9504608; *North Sydney Council v Ligon 302 (No 2)* (1996) 93 LGERA 23; BC9605482; *Taperell v Randwick CC* (2000) 108 LGERA 309; BC200003382; *Zhang v Canterbury CC* (2001) 51 NSWLR 589; [2001] NSWCA 167; BC200103130 and *7-Eleven Stores Pty Ltd v Sydney CC* (2004) 138 LGERA 125; BC200401964.

A s 149 planning certificate makes specific reference to DCPs affecting the land in the certificate, and lawyers must examine the details in a DCP to determine the opportunities or restrictions which apply to the land.

[P206.40] Development applications

The 2008 Amendment Act increased the number of bodies that may be a "consent authority" in relation to a development application. In addition to the local council and the Minister, a consent authority now includes a new Planning Assessment Commission and a new joint regional planning panel. The 2008 Amendment Act amended the definition in s 4 of the EP&A Act accordingly.

To determine the controls applicable to most development applications see Pt 4 of the EP&A Act and Pt 6 of the EP&A Regulation 2000 (NSW). In the case of the City of Sydney, also examine the City of Sydney Act 1988 because it contains provisions regarding major developments in the city and uncompleted developments. Some specific controls must also be noted.

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A development application can only be made by the owner or a person authorised in writing by the owner: s 78A and cl 49. See *Rose Bay Afloat Pty Ltd v Woollahra Council* (2002) 126 LGERA 36; BC200207662; *Motbey v Hollis* (2003) 124 LGERA 227; BC200300600; *Maule v Liparoni* (2002) 122 LGERA 140; BC200201339 and *Rose Bay Marina Pty Ltd v Minister for Urban Affairs and Planning* (2002) 122 LGERA 255; BC200204315. The requirement for the owner's consent can be satisfied at any time before the determination of the development application: *Harris Farm Markets Pty Ltd v Ashfield Fresh Pty Ltd* (2002) 121 LGERA 176; BC200203738. An owner's consent via a letter and "only on the basis set out in this letter" was held not to constitute a valid consent as owner: *Mulyan Pty Ltd v Cowra SC* (1999) 105 LGERA 26. If the development application relates to a project governed by Div 4.1 of Pt 4 of the EP&A Act, which applies to the assessment and approval of all major projects (State significant development) that need the approval of the Minister, the owner's consent must be given at any time before the determination of the development application unless the owner is a public authority, the development application relates to a critical infrastructure project or to a mining or petroleum production project or to a linear infrastructure project. In such cases, it is unnecessary: cl 8F.

A development application must:

- contain information and be accompanied by documents specified in Sch 1, Pt 1 of the EP&A Regulation;
- if the consent authority requires, be in the form approved by the authority;
- be accompanied by a development application fee (prescribed by Pt 15 of the EP&A Regulation); and
- be delivered by hand, posted or transmitted electronically to the principal office of the consent authority, but may not be sent by fax: see cl 50.

Since 1 December 2003, a development application that relates to a residential flat building must be accompanied by a design verification from a qualified designer. This is a statement in which the qualified designer verifies that he or she has designed or directed the design of the residential flat development and that the design quality principles set out in Pt 2 of the *State Environmental Planning Policy No 65 — Design Quality of Residential Flat Development* are achieved: cl 50(1A).

The application includes a statement of environmental effects.

Additional requirements in relation to the making of a development application apply to applications for designated development, for integrated development and applications for development that affect threatened species. For example, when the proposal is for designated development, the application must be accompanied by an EIS: s 78A(8).

[P206.45] Carrying out of development

Environmental planning instruments (EPIs) may classify development as:

- development that does not require development consent: s 76;
- development that requires development consent: s 76A; and
- development that is prohibited: s 76B.

Characterisation of the use of a building work or land, being the proposed development, is a critical step in applying the above threefold classification of development and the procedures that must be followed. Characterisation is separate from and prior to an evaluation of the planning merits and is a jurisdictional fact.

The main steps in the development application process (except for complying development) are set out in ss 78A–81 of Pt 4, Div 2 of the EP&A Act and in cll 47–57 of the EP&A Regulation.

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Additionally, the procedures by which application is made for development that requires consent differ according to whether the development:

- is designated development (which it may be declared to be by an environmental planning instrument or the regulations — see ss 77A and 79 and cll 77–81);
- is or is not integrated development: see ss 90–93B; or
- is State significant development: see Pt 4 of the EP&A Act and State Environmental Planning Policy (Major Development) 2005.

Note that there are additional procedures for development that is to occur incrementally, known as "staged development": ss 80, 83A–83D.

[P206.50] Development consents

In general, a development consent is issued only after careful consideration of all issues.

Section 79C of the EP&A Act dictates what a consent authority must take into consideration when determining a development application. The matters to be considered are as follows.

> (1) **Matters for consideration — general** In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
> (a) the provisions of:
> (i) any environmental planning instrument, and
> (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
> (iii) any development control plan, and
> (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
> (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
> (v) any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),
> that apply to the land to which the development application relates,
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
> (c) the suitability of the site for the development,
> (d) any submissions made in accordance with this Act or the regulations,
> (e) the public interest.

There are five broad criteria (s 79C(1)) and a consent authority must give "proper consideration" to those which are relevant. Failure to do so is in breach of s 122 and may render the consent void: see *Parramatta City Council v Hale* (1982) 47 LGRA 319; *Concrite Pty Ltd v South Sydney CC* (1998) 101 LGERA 170; *Carstens v Pittwater Council* (1999) 111 LGERA 1; *Noble v Cowra SC* (2001) 114 LGERA 440; BC200104061 and *Terrace Tower Holdings Pty Ltd v Sutherland SC* (2003) 129 LGERA 195; BC200305942.

Section 79C(1A) (a sub-section that is to be inserted by the 2008 Amendment Act but has not yet commenced) provides that a consent authority may reject a submission that it considers was made primarily to secure or maintain a commercial advantage for the objector.

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Sections 80 and 80A allow a council to determine an application by the granting of consent either unconditionally or subject to conditions, or by the refusing of consent. If the application is approved with conditions as to use, it is very difficult to have such conditions placed on title as restrictive covenants. But if there is a change in an EPI which permits a use without consent, then a condition or restriction placed on premises in a development consent would be removed. A clause in an EPI may declare covenants found on title to be of no effect in regard to the application of the terms of that EPI. This is made possible by s 28. If a purchaser's solicitor finds a restrictive covenant on title documents, it is advisable to check the applicable EPIs since the restrictive covenant may be suspended by the EPI.

A developer may wish to stage the development. A staged development application sets out concept proposals for a site, for which detailed proposals for separate parts of the site are to be dealt with by subsequent development applications. See ss 83A–83D.

Section 94 (payment towards provision or improvement of amenities or services) enables a council to require, as a condition of consent, the dedication of land free of cost to the council or the payment of a monetary contribution or both where a council is satisfied that the proposed development:

- will require or is likely to require the provision of public amenities and public services; or
- will increase the demand or is likely to increase the demand for public amenities and public services.

The imposition of such a condition can only be made pursuant to a contributions plan approved: see s 94B. Contributions plans should be checked in appropriate circumstances to verify that a council has validly imposed a condition. The specific requirements of s 94 cannot be avoided: *Meriton Apartments Pty Ltd v Minister for Urban Affairs and Planning* (2000) 107 LGERA 363; [2000] NSWLEC 20. A contributions plan must be quite specific in providing any formulas for calculating contributions: *Easeport Pty Ltd v Leichhardt Municipal Council* (2001) 112 LGERA 376; [2001] NSWLEC 2; BC8902788.

Although s 94(2) requires that the condition be reasonable, the section does not prevent a council from requiring a contribution for public amenities or services already constructed or provided in preparation for (or to facilitate) the development: s 94(3). However, there is a proviso: the development must benefit from the amenities or services or the condition may be invalid. The council may accept the dedication of land or the provision of a material public benefit in satisfaction of a condition imposed pursuant to the section: s 94(5).

The Minister may direct a council to limit the types of public amenities and services for which a s 94 condition may be imposed, and similarly, to limit the means or factors by which contributions are calculated, to limit the contributions levied and to limit the things which can be specified as an item of material public benefit: s 94E.

See generally, in regard to contributions, *Toadolla Co Pty Ltd v Dumaresq Shire Council* (1992) 78 LGERA 261; BC9202854; *Parramatta City Council v Peterson* (1987) 61 LGRA 286; *Collin C Donges & Associates Pty Ltd v Baulkham Hills Shire Council* (1989) 67 LGRA 370; [1992] NSWLEC 129; BC8902788.

The courts have been active in creating tests to determine the validity of conditions of consent imposed pursuant to ss 80, 80A and 94. In the House of Lords decision in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731, the following tests were formulated:

- conditions must be for a planning purpose and not for an ulterior purpose;
- conditions must fairly and reasonably relate to the development; and

- conditions must not be so unreasonable that no reasonable planning authority could have imposed them.

See also *Cardwell Shire Council v King Ranch Aust Pty Ltd* (1984) 53 ALR 632; 54 LGRA 110.

As an alternative to obtaining contributions towards public amenities and public services through the imposition of conditions of development consent (as provided for under s 94), a council or other consent authority may (if authorised by a development contributions plan) impose a condition of development consent that requires applicants to pay a levy of the percentage of the proposed cost of the development. In addition, planning authorities (including the Minister) are specifically authorised to obtain development contributions for any public purpose through voluntary planning agreements with a developer: ss 93C–93F.

Section 93E requires a consent authority or planning authority to hold any monetary contribution or levy paid under Div 6 for the purpose for which the payment was required, and to apply the money towards that purpose within a reasonable time.

Section 93F provides for voluntary agreements between planning authorities and developers, under which the developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose. A public purpose includes the provision of (or the recoupment of the cost of providing) public amenities or public services, affordable housing, transport or other infrastructure, the funding of resulting recurrent expenditure, the monitoring of the impacts of development and the conservation or enhancement of the natural environment. The section also sets out the persons who may be parties to a planning agreement and the matters for which provision must be made in a planning agreement.

A planning agreement will be registered by the Registrar-General in relation to the land to which it applies and thereby to bind successors in title to the land: s 93H. Planning agreements are thus important in the conveyancing process and lawyers should be alert to the possibility that a property may be affected by such agreement.

A provision in an environmental planning instrument or a consent authority cannot require that a planning agreement is entered into before a development application is made or development consent is granted or has effect: s 93I.

Section 93J prevents merit appeals under the EP&A Act in connection with planning agreements. General court remedies such as judicial review are not affected.

If the development is abandoned, it might be difficult to obtain a refund of any contributions made pursuant to conditions of a development consent, especially if the council has expended the funds: see *Denham Pty Ltd v Manly Council* (1995) 89 LGERA 108; BC9506770.

Although the legislation does not expressly prohibit a refund neither s 94 nor the regulations expressly provide for it.

There is no binding authority as to whether a person who makes a s 94 contribution as a condition of a development consent is entitled to a refund of those moneys. There are, however, a number of decisions in the Land and Environment Court (LEC) where obiter remarks to that effect have been made. See *Frevcourt Pty Ltd v Wingecarribee SC* (1993) 80 LGERA 75; BC9303865; *Toadolla Co Pty Ltd v Dumaresq SC* (1992) 78 LGERA 261; BC9202854. Pearlman J did not rule out the possibility of a refund (although she did not refer to it) in *Engadine Area Traffic Action Group Inc v Sutherland SC* (2004) 134 LGERA 75; BC200403240.

However, in the decision of *Frevcourt Pty Ltd v Wingecarribee SC* (2005) 139 LGERA 140; [2005] NSWCA 107; BC200501970, the Court of Appeal listed various matters as tending to a construction that there is no power to refund contributions.

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[P207.525] Description of the proposed lot — changes

It is to be expected that changes may occur in the development proposal between exchange of contracts and completion in off the plan situations. Marketing generally occurs at an early stage (before construction commences) when all aspects of the development have not been finalised.

In the absence of the contract specifying the rights of the parties for changes to the property, the general law rule will apply. The test applied at general law is the rule in *Flight v Booth* (1834) 1 Bing NC 370; 131 ER 1160 (which also applies equally to off the plan sales). This test is in very brief terms whether there is a substantial or material difference between what the purchaser contracted to buy and what the vendor purported to deliver to the purchaser. Depending on the extent of the difference, the purchaser may be entitled to rescind, or may only have a claim in damages.

Generally, there will be a test in the contract (by special condition) in relation to the rights of the purchaser for changes to the strata lot from the description of the lot set out in the contract (generally that description of the property in the contract is by reference to the draft strata plan, draft floor layout plan and the schedule of finishes attached to the contract).

Cases which assist in the analysis of the acceptable and non acceptable changes in the proposed lot are *Imamovic v Kalamalka Constructions Pty Ltd* (1975) 49 ALJR 244, *Tarling v Mogdon Investment Pty Ltd* (1986) ATCSC 82, *Wait v Reed* [1997] ANZ ConvR ¶455; BC9700166, *Cannon v Mid-Coast Holdings Pty Ltd* and *Pansdowne Properties Pty Ltd v Kerswell* (1984) 3 BPR 9239; NSW ConvR ¶55-173; BC8400381. These are discussed at Appendix 4.

[P207.530] Description of the proposed lot or improvements — certainty

If an essential term of the contract is not agreed with sufficient certainty, the contract will be void for uncertainty.

Obviously, in the off the plan context this will have particular relevance in relation to the lot which is the subject of the sale. The vendor's conveyancer should ensure that the proposed lot is described in sufficient detail.

Ideally, the contract should incorporate, as attachments, a draft strata plan, a draft floor layout plan for the apartment and a schedule of finishes (for the apartment and the common property). It may not be crucial if one of these is omitted (although there would be great difficulty in describing a lot in a proposed strata plan without the inclusion of a draft strata plan). However, it is strongly recommended that all three of these plans and documents be included to minimise the risk that the property is not described with sufficient certainty.

A case which shows the importance of the description of the property is *Williams v King* [1995] ANZ ConvR ¶104; BC9402032, which is discussed in Appendix 4.

Another important case regarding representations is *Zhang v VP302 SPV & Ors* [2009] NSWSC 73, which is also discussed in Appendix 4.

There have been several recent decisions in relation to loss of views with off the plan purchases. In the case of *Higgins v Statewide Developments Pty Ltd* (2010) NSWSC 183, a purchaser entered into a contract annexing a draft strata plan. The property was marketed by the agent as having 180-degree water views. When the plan was registered and the purchaser was able to inspect it, it was found that a wall had been constructed which obscured the water views. The purchaser purported to rescind and the vendor rejected the purported rescission and issued a notice to complete. When completion did

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not occur, the vendor terminated and sought to retain the deposit and damages from the purchaser. Amongst other things, the purchaser argued that the rule in *Flight v Booth* applied given that there was a misdescription of the property in that the property the vendor could deliver was substantially different from what was contracted to buy. The purchaser argued that a reference to the draft plan incorporated a reference to the marketing model of the property. The court found that a reference to the draft plan in the contract could only be to that particular plan and there were no warranties in the contract regarding views. It could thus not conclude that changes substantially detrimentally affected the property. Whilst it could not find for the purchaser and ruled in favour of the developer, the purchaser lodged a cross-claim for return of the deposit. Section 55(2A) of the Conveyancing Act 1919 (NSW) provides that "in every case where the court refuses to grant specific performance of a contract, or in any proceeding for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit with or without interest thereon". The court exercised its discretion and ordered return of the deposit to the purchaser on the basis that the vendor had not suffered a loss.

[P207.535] Change in character of the development proposal

A vendor may reserve the right in the contract special conditions to change the nature of certain aspects of the development. If this is the case, the purchaser will not have cause to complain if the change occurs within the parameters of what was disclosed.

An undisclosed change in character would need to be significant to allow the purchaser to rescind. *Silva v Tarval Pty Ltd* NSW ConvR ¶55-533; BC9002284 is one such case. The purchaser was able to rescind because the vendor altered the use and character of the proposed development (as it was depicted in the contract special conditions and draft strata plan) between exchange and completion. This case is discussed in Appendix 4.

[P207.540] Suggestions for special conditions to supplement or amend clause 28

For an off the plan sale, cl 28 in itself will not generally be sufficient (see [P207.450]–[P207.475]). The clause works more effectively for the sale of lots off the plan in a land subdivision. However, for a strata subdivision, the clause should be appropriately changed or supplemented by special conditions.

Some of the important matters which should be the subject of special conditions are as follows:

(a) *Variations to plans and documents*

The vendor in an off the plan contract should set out the rights of the purchaser if there is a difference between the lot as constructed and the lot as described in the contract. This involves stating by special condition a test of what constitutes a change which is not permitted and the consequences of such a change.

It is usual for the vendor to seek to limit the purchaser's right to rescission only (not allowing a claim for damages). The test applied is commonly that the purchaser can rescind if the variation or change to a plan or document attached to the contract is "detrimental and substantial" or "material and adverse" or "detrimental and not minor". These tests are consistent with that which will be applied at general law: (see [P207.525]. However, at general law a change may not be such as to allow rescission, but nevertheless give rise to a right for damages.

In some cases, the vendor will deem certain changes to be detrimental (and acknowledge that the purchaser can rescind if those circumstances arise). For

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example, the vendor may include a provision allowing rescission if the actual area of the apartment is at least 5% less than the area shown in the draft strata plan attached to the contract. Some purchasers feel that they require certainty in relation to the minimum size of the apartment. However, the purchaser's conveyancer should ensure that this does not come at the expense of entitling the purchaser to rescind in other circumstances. In other words, the purchaser should still be entitled rescind if there are other changes (not to the size) which have a detrimental effect.

(b) *Standard of construction*

Clause 28 of the contract does not contain an obligation on the vendor to construct the property (or the building of which the property forms part) to a certain standard. The vendor should be obliged to construct the improvements in a good and workmanlike manner.

(c) *Finishes*

The contract should include a schedule of finishes and inclusions for the property and the common property. A clause should be included in the contract giving the vendor the flexibility to change the finishes and inclusions (in a limited way) and the purchaser should have appropriate rights if the finishes and inclusions have changed.

It is common for vendors to specify that the finishes and inclusions can only be changed to finishes and inclusions of equivalent quality.

A dispute resolution mechanism should be included to deal with a dispute in relation to whether a finish or inclusion was changed to a finish or inclusion of equivalent quality. Vendors seek to prohibit the purchaser from rescinding if there is a change to the quality of the finishes or inclusions. The purchaser would be entitled to make a claim for damages if any finishes or inclusions are changed to inferior quality finishes or inclusions.

(d) *Defect rectification*

The developer vendor will generally obtain a 12 months' defect liability period from the builder. Purchasers have a reasonable expectation that they will also obtain the benefit of a defect liability provision. Generally, the vendor will be prepared to grant the purchaser defect liability rights that continue for a period which does not exceed the vendor's defect liability period.

It is generally accepted that the defect liability provision in the contract will not allow the purchaser to refuse to complete the purchase until all defects are remedied. Rather, only serious defects are required to be rectified before completion. Any other defects of a minor nature can be rectified by the vendor as soon as possible after completion.

(e) *Disclosures*

The vendor should include special conditions disclosing matters which are likely to affect the purchaser, especially matters arising out of the development consent. It is not uncommon for development consents to require dedications of land, public access over certain parts of the land or the creation of easements or positive covenants. It is in the vendor's interests to disclose those matters in the contract.

(f) *Creation of easements*

The vendor should seek to reserve appropriate rights to create easements which are necessary or desirable, so long as they do not unduly affect the purchaser. This right should be reserved by the vendor even if the vendor has included a draft easement instrument in the contract (which the vendor will be entitled to change, within limits).

Easements requirements of statutory authorities (for water, sewer, electricity, etc) are sometimes not known until later in the development process. The same type of test as set out above regarding variations to plans and documents should apply to the creation of easements not previously disclosed (eg, the purchaser can rescind if the easement has a detrimental and substantial affect).

(g) *Reservation of rights to pass resolutions*

After the initial period expires, the vendor does not have control of the voting rights. The vendor should consider whether there are any crucial motions to be passed after the initial period for which it is necessary to "secure" the purchaser's voting rights. For instance, if an important part of the development proposal is to have the owners corporation accept a lease of land adjoining the scheme, that resolution must be passed at the end of the initial period of the strata scheme to be effective. Therefore, the vendor can seek to tie up the necessary votes contractually.

(h) *Home Building Act*

The vendor should consider the implications of the Home Building Act and whether a clause under the regulations is required to be included in the contract: see [P207.490].

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[P207.545] Purchaser stamp duty concession

The Duties Act 1997 (NSW) provides that duty is payable within 3 months after the expiry of 12 months after exchange of contracts (unless completion is to occur before then, in which case the duty is due by completion).