


GLADSTONE LAW CONFERENCE 2009 – PAMDA AND THE CONVEYANCING PROTOCOL – BEST PRACTICE AND RECENT DEVELOPMENTS



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Conveyancing Protocol and Recent Cases

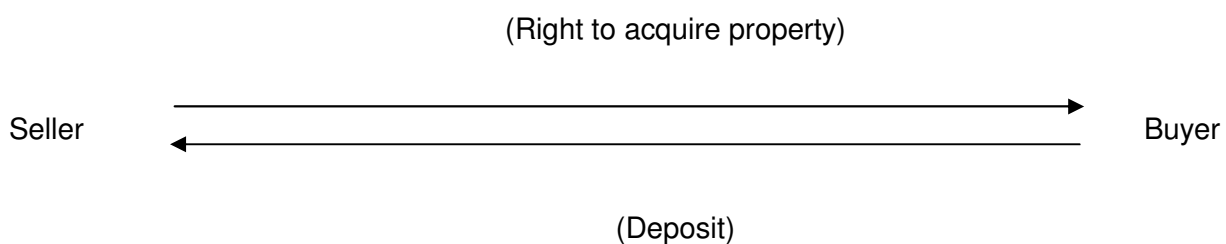
Acknowledgment must be given to Professors Sharon Christensen and Bill Duncan who initially prepared the case notes for the recent cases summarised below.

GST AND DEPOSIT

FCT v Reliance Carpet Company Pty Ltd [2008] HCA 22

Contract of sale with a 10% deposit. Buyer failed to complete and seller forfeited deposit.

Commissioner assessed the seller for GST on the deposit.



HIGH COURT HELD:

1. Upon entering a contract a seller makes a supply of real property characterised as the right to acquire by conveyance in due course the property. This was also characterised as the supply of interim obligations.
2. Acknowledged this would lead to a seller making 2 supplies but liability would only be imposed on the transaction that was completed.

IMPACT ON CONVEYANCING

- Only impacts on contracts where GST is payable – input taxed residential contract would be excluded.
- Seller with a 10% deposit with lose 1/10th in GST.

- Options:

1. Deposit 11%

Not viable as contract will be an installment contract and risk that deposit a penalty. Also for GST purposes the payment will be an installment and GST immediately payable rather than settlement.

2. Deposit 10% of GST inclusive price

Not an installment contract. This is the usual case for residential “input taxed” contracts or “developer” contracts where purchasing off the plan, even if GST is payable by the seller.

3. Deposit 10% of GST exclusive price + gross up clause

Requiring the payment of extra 10% on default could be a penalty – difficult to recover.

PROTOCOL

- Requires a practitioner to:

- give consideration to the client’s GST position;
- advise the client that in the event of forfeiture of the deposit GST is payable (only if the transaction was liable to GST); and
- consider the best method for protecting the seller.

WRITS AND SETTLEMENT NOTICES

Black v Garnock [2007] HCA 31

FACTS

- Contract of sale entered.
- Buyer advised by creditor that judgment sought against seller.

- Buyer's lawyer proceeded to settlement.
- After settlement and before lodgment of transfer a writ of execution lodged against the title.

HCA

- Would not remove the writ or injunct the sale by the sheriff to allow of the buyer to complete.

IMPACT ON CONVEYANCING AND PROTOCOL

- Same position could arise in Queensland if buyer failed to protect their interest through caveat or settlement notice.
- Protocol requires the lodgment of a settlement notice prior to settlement (no change required).
- Settlement notice will prevent the lodgment of a writ or warrant of execution.

COMMUNITY TITLE

Menniti v Winn [2008] QCA 66

FACTS

- No body corporate in operation.
- Contract for sale of all units in building signed.
- Disclosure statement accurately disclosed no body corporate and related information.
- Buyer attempts to terminate contract for failure to comply with s.206.
- Argued that implied obligation to ensure that body corporate established and operating prior to sale and to disclose the position if that was the case.

QCA

- BCCMA requires a seller to accurately inform the buyer of the state of the body corporate.
No obligation to advise what position should be.

Lee v Surfers Paradise Beach Resort Pty Ltd [2008] QCA 29

FACTS

- Sale of unit off-the-plan.
- Original disclosure statement did not include information about identity of proposed caretaker, dates of the agreement and the lot for the caretaker.
- No further statement given by seller once seller aware of the information.

QCA

- Identity, dates and the lot are all information the seller is required to advise to buyer as 'terms of the engagement' under s.214.
- A failure to advise by settlement may allow termination under s.217 if the buyer is materially prejudiced. No material prejudiced proved.

Bossichix Pty Ltd v Martinek Holdings P/L [2008] QSC 278

- Contract for the sale of a unit off-the-plan.
- Settlement to be:
 - "14 days after the Seller notifies the Buyer that the Building Format Plan is registered".
- Buyer terminated the contract under s.212 BCCMA.
- Held
 - To comply with s.212 contract should provide for settlement after "creation of the scheme" or "registration of the Plan and Community Management Statement"

- Did not consider if contract should also state “settlement must not take place earlier than 14 days after...”

IMPACTS OF BOTH CASES ON CONVEYANCING AND PROTOCOL

1. Provided a disclosure statement under BCCMA, s.206 is factually true, there is not requirement to advise the buyer of what the situation should be under the Act.
2. Identity of a caretaker, the commencement of the agreement and the lot to be occupied are ‘terms of the engagement’ and need to be advised. However, a failure to do so is unlikely to materially prejudice the buyer.
3. Contract for off-the-plan should provide the settlement 14 days after creation of scheme not registration of the plan.

PROTOCOL

1. Amended Community Title (off-the-plan) Protocols to note names, commencement and lot occupied are ‘term of engagement’ requiring disclosure.
2. Already consistent with decision on s.212.

PAMDA

- Can a contract provide for a payment of money from a real estate agents trust account to the seller prior to settlement?
- Can a buyer waive the right to terminate under s.367?
- Is failure to use the current approved form 30c fatal?
- Is the sale of a tourist resort residential property?
- Can a failure to give a direction under s.366 – 366B or 365 be waived?
- Is PDF a document ‘protected against unauthorised change’?

FACTS

- Contract of sale - \$3.5m – deposit \$100K
- Variation granting an extension and requiring
 - a further deposit payment of \$100,000 and
 - a new Special Condition which provided that the agent would pay the deposit to the seller as soon as practicable after the payment of the balance deposit and the buyer will have no claim against the seller except where the seller is in breach

QCA – not an installment contract because deposit refundable in event of seller breach

Keane JA (in dicta)

- Not invalid under PAMDA because received with a written direction for payment

IMPACT AND PROTOCOL

Installment Contract

- Strong indication by Keane JA that if deposit had been “absolutely” non-refundable an installment contract would be created.
- Protocol amended to clarify deposit must be non-refundable in all events for an installment contract to be created.

PAMDA

- Position in relation to release of deposit and PAMDA not settled, recommended that if pre-settlement payment that deposit held by lawyer or paid directly

FACT

- Seller signed a Form 21a v1 instead of v2.
- The only difference in the forms was the phone number of the OFT.

QCA

- Mandating an approved form did not require strict compliance such that s.49 Acts Interpretation Act is negated.
- Departure from the approved form was minor and therefore complied.

IMPACT AND PROTOCOL

- Failure to use the approved form will not be fatal if differences are minor (e.g. different phone number but redirected to new number, new logo).
- Protocol not amended – provides for correct form to be used and checked with OFT if in doubt.

FACTS

- Seller failed to attach a warning statement to the contract under s.366 (pre 2005).
- Two year settlement.
- Buyer took possession, accepted title, leased the property without consent and undertook renovations.
- Prior to settlement, buyer terminated.

Douglas J

- Acting consistently with the existence of the contract with knowledge of the failure to comply with PAMDA until close to settlement was not a waiver.
- Statutory right to terminate is not lost just because you take further steps in the matter towards settlement.
- No evidence of estoppel.
- Intimation that waiver not possible prior to settlement.

Hedley Commercial Property Services P/L v BRCP Oasis Land P/L [2008] QSC 261

FACTS

- Vacant land in an area zoned 'Tourist and Residential' (proposed lot 203).
- DA:
 1. over the whole of the land prior to subdivision for resort development; and
 2. in relation to the re-configuration of the lot into the proposed lot 203 and 2 other lots.
- Seller failed to give a direction when sending the Put and Call option by email (s.366A) and again when sending the executed contract to the buyer (s.365).
- Buyer purported to terminate.

Fryberg J

FACTS

- Land was not residential property because although in a residential area DA2 which related to the property was for 'other than residential purposes'.

- In any event no failure to comply with s.366A and failure to comply with s.365 was waived by the buyer.

IMPACT OF DECISION

Residential Property

- Vacant land is not residential property if it is within a residential area but:
 - a DA for resort style or hotel accommodation is current; and
 - a DA for reconfiguration of the lot is current.
- For a DA to relate to the property there must be a physical connection between the DA and the land.
- Decision casts doubt on whether the sale of a hotel or resort style units is residential property.

PAMDA Compliance

- A substance as opposed to form approach taken to the giving of a direction:
 - Incorporation of a previous direction by express reference was considered sufficient; and
 - Indication that 'please find enclosed' will be sufficient direction.
- Direction only required where contract sent 'for signature' under s.366, s.366A or s.366B.
- Waiver of s.366A direction:
 - Possible to waive the direction by signing the warning statement correctly (reference was made to *Juniper*).
- A PDF document not protected by password or encryption is not a document protected against unauthorised change.

- A direction given for the purposes of s.366A will not satisfy the need for a direction under s.365.
- Until compliance under s.365 neither party are bound (questions *Blackman v Milne*).
- A buyer can waive the right to withdraw under s.365 – application for Land Sales exemption by buyer was a waiver of right to withdraw.

PROTOCOL

Direction to the buyer

- Should expressly direct the buyer to Warning Statement and contract – ‘please find enclosed’ not recommended.
- Direction should be given when sending proposed contract for signing **and** executed contract.

Waiver

- Whether a buyer can effectively waive by conduct the right to a direction or the right to withdraw under s.365 is still unclear.

PDF

- Currently no requirement for password but will be reconsidered in light of decision.

LAND SALES ACT

Three Pty Ltd v Body Corporate for Savoir Faire Community Titles Scheme 34841 [2008] QCA 167

- Contract for purchase of proposed allotment – no effective development permit or approval for operational works under s.8 *Land Sales Act 1984*.
- Sale subject to s.19(6) where contract conditional upon exemption being granted under s.19(2) provided that exemption made within time specified by s.19(7).

- Section 19(7) provides that exemption must be made “***within 30 days after event that marks entry of a purchaser upon a purchase***”.
- Application for exemption made more than 30 days after purchaser signed contract but less than 30 days after vendor signed.
- Vendor contended that exemption application not made within time specified.
- Issue – was the “event that marked the entry of the purchaser upon the purchase” the execution of the contract by the purchaser along or execution by vendor?
- Held by Court of Appeal
- The exemption must be sought within 30 days after the purchaser signs contract not after vendor signs contract. The “event which marks the entry of the purchaser upon the purchase” is the signing of the contract by the purchaser accepting the offer to purchase.

IMPACT OF DECISION

- Solicitors who do not act to seek exemption under s19 LSA within 30 days of the date of signature of the contract by the purchaser run the risk of having a void contract under s.8 of the LSA although later signed by the vendor.

PROTOCOL

- If seeking exemption under s.19 LSA must act within 30 days after signature by Purchaser to seek that exemption notwithstanding the contract may never be signed by the vendor.

Begley v Fisigi Pty Ltd (2007) Q Conv R 54-672; [2007] QCA 252

- Vendor of proposed allotment failed to give purchaser compliant disclosure plan before purchaser signed contract as required by s.9(1) *Land Sales Act 1984*.
- Pursuant to s.9(5), purchaser had right to avoid contract if written notice was given to vendor “prior to vendor giving the purchaser the registrable instrument of transfer for the allotment”.

- Vendor returned signed transfer to purchaser one week before settlement subject to undertaking to hold stamped transfer on behalf of vendor pending settlement.
- Purchaser gave notice to avoid one day before settlement.
- s.6 of LSA defined “registrable instrument of transfer” as one “capable of immediate registration subject to its being properly stamped under the *Duties Act 2001*”.
- Issue – what is meaning of expression “registrable instrument of transfer”?
- Court of Appeal.
- The requirement of being “capable of immediate registration” is not met by a transfer which upon its face is compliant with the requirements of the Registrar (of Titles) but is “practically incapable of being registered”.
- The expression “immediate” should be construed as meaning “no real impediment to registration”.
- Transfer provided here for limited purpose (stamping) only and not for the purpose of registration.
- Purchaser able to avoid the transaction.

IMPACT OF DECISION

- Purchaser effectively has until completion in the usual sense of that word to avoid a contract for sale of an allotment for failure of the vendor to meet the requirements of s.9 of the LSA relating to the provision of a Disclosure Plan or Disclosure Statement.

PROTOCOL

- The submission of a transfer signed by the vendor in the proper registrable form for “stamping purposes only” to be hold on the vendor’s behalf pending settlement has no consequences in relation to the right to avoid the contract under the LSA (and has no other

legal consequences in relation to the completion of the sale) as property in the instrument remains with the vendor until completion.

SPECIAL CONDITIONS

Exceptional Sunrise Pty Ltd v Jones (2008) Q Conv R 54-701; [2008] QSC 190

- Contract subject to purchaser obtaining development approval satisfactory to purchaser by 1pm on “approval date” failing which purchaser would terminate contract and recover deposit.
- If purchaser did not terminate by approval date, vendor could do so and keep deposit.
- Purchaser could waive benefit of condition and settlement would then be 30 days from date vendor receives notice of waiver.
- The clause was made expressly for benefit of both vendor and purchaser.
- Purchaser sought extension of time to obtain approval which was rejected by vendor.
- Purchaser then sought to waive benefit of condition at 2.06pm on “approval date”.
- Vendor rejected this waiver as not being made by 1pm on “approval date”.
- Vendor asserted contract terminated at 1pm on approval date as notice of approval not given and no waiver prior to that time.
- Purchaser claimed contract still on foot and sought specific performance of contract.
- Held:
 - vendor lawfully terminated contract;
 - purchaser could only waive prior to 1pm on approval date and had failed to do so thus giving vendor express right to terminate which the vendor exercised;

- the express right of the vendor to terminate was equated by the court with the expression “the contract shall be at an end” as interpreted by the Court of Appeal in *Donaldson v Bexton [2006] QCA 559*; and
- clear intention of clause was to have issue of approval resolved one way or another by approval date.

IMPACT OF DECISION

- By giving vendor express right to terminate in circumstances plus expressly making clause for benefit of both parties required that any waiver by purchaser had to be exercised prior to actual time for fulfilment of condition.

PROTOCOL

- Beware of use of “non standard clauses”.
- Do not agree to them unless you know the consequences of their operation.
- Best idea to follow provisions of clauses that have been interpreted by courts.

OR

- Utilise the form of clause in standard contract e.g. the finance clause which expressly gives purchaser continuing right to waive or terminate up until completion providing the vendor has not terminated beforehand.

A hypothetical – Could it happen to you?

When you look at the facts, think of your conveyancing practice and ask yourself the question –
Could this happen to me?

If the answer is yes or maybe, then you need to change the way you carry out conveyancing.

LOST CONTRACT -V- COP OUT CONVEYANCER.

The facts.

Lost Contract engaged the local real estate agent to sell its property. The local real estate agent prepared the contract and had the buyer sign the contract. The contract had a PAMDA Form 30c warning statement attached to the front page of the contract, however the agent forgot to direct the buyer's attention to the warning statement.

The contract is signed by the seller and sent to Cop Out Conveyancer. Cop Out Conveyancer receives the contract and contacts Lost Contract to confirm engagement. Lost Contract says to Cop Out Conveyancer, *"I just want to make sure that the contract is unconditional as I am keen to purchase another property"*. Cop Out Conveyancer notes that the contract was dated on Saturday and calculates that the cooling off period expires at 5.00p.m. next Friday.

Lost Contract rings 5.00p.m. Friday and is told *"no notice has been given terminating the contract under cooling off and therefore the contract is unconditional"*.

Lost Contract attends an auction and on the assumption the sale is unconditional, is bold enough to purchase a property at auction on a cash unconditional basis and pay a 10% deposit. Two days before the due date for settlement Cop Out Conveyancer receives a letter from the buyer's lawyer terminating the purchase contract under clause 367(2) of PAMDA on the grounds that the seller or its agent has not drawn the buyer's attention to the Warning Statement. As a result of the

termination of the sale Lost Contract is not able to complete its acquisition which is terminated and the 10% deposit forfeited as liquidated damages.

The following extracts from the judgement are relevant:

1. It is clear that in giving the contract to the proposed buyer, the seller's agent has failed to direct the proposed buyer's attention to the warning statement as required under Section 366B(4) of PAMDA.
2. The direction under Section 336B(4) of PAMDA is a warning statement requirement.
3. If a warning statement requirement for a proposed relevant contract is not complied with, then under Section 367(2) the buyer under a relevant contract may terminate the relevant contract by notice in writing.
4. PAMDA is for the protection of consumers and must be strictly complied with. There is no doubt that the buyer had an absolute right to terminate the contract as a result of the failure of the agent to comply with the warning statement requirements of PAMDA in the delivery of the contract.
5. What remains to consider is the position of Cop Out Conveyancer. Cop Out Conveyancer is not the party initially at fault as it was the agent who delivered the contract.
6. The duties of a solicitor when acting in a conveyance is expressed by the High Court in *Fox -v- Everingham*¹, set out below:

"The Retainer given by the Foxes to the respondents [the practitioners] obliged the respondents to act generally in the Foxes' interests in and about their entering into the Contract and their taking of title to the property pursuant thereto. At the least that obligation required the respondents, either themselves or by an employee qualified to do so, to go through the Contract with the Foxes and explain the salient points of it to them. In this way their principal rights and obligations under it would be explained as would the

¹ 50ALR at 337

general course the matter might be expected to take. The respondents were also under an obligation to explain to the Foxes provisions of the Contract which were in an unusual form and which might affect their interests as they were known by the respondents to be”.

“The respondents were also under an obligation which required them to give attention, before the Contract was signed by the Foxes, to the question of whether it, from their point of view, contained adequate provisions to protect them against a variety of contingencies which might reasonably have been foreseen as likely to arise if things did not go as expectedThe Foxes were entitled to rely on the respondents to see to it that the Contract was adequate to protect their interests”.

“In cases such as the present a solicitor is paid not only for what he in fact does, but also for the responsibility he assumes in trying to protect clients from financial loss if things go wrong. It is easy enough to act for people if things go as they are expected to. But it is because the unexpected will sometimes happen that solicitors are rightly paid fees which they command. The corollary of this proposition is that if they do not measure up to the standard which is required of them, they are liable for breach of the obligation which they owe to clients.”

7. The solicitor is responsible for ascertaining whether or not the contract is enforceable and it is fundamental in ascertaining this fact to determine whether the contract complies with PAMDA.
8. The solicitor in this instance did not properly investigate whether there had been PAMDA compliance and, as a consequence, failed to alert the client to the agent’s failure to comply with PAMDA and the potential consequences of PAMDA non-compliance.
9. Had the solicitor properly carried out its duty to the client and informed the client of the potential problem with the contract then the client would not have proceeded to purchase the new property unconditionally at the auction.

10. The solicitor has by its failure become responsible for the mistake of the agent and is liable for damages.

YOU CANNOT EXCLUDE PAMDA ADVICE FROM A RETAINER

Some practitioners have suggested a simpler approach to PAMDA investigation would be to exclude consideration of PAMDA issues from the conveyancing retainer.

I would strongly advise against this approach for the following reasons:

1. consideration of PAMDA issues is fundamental to a determination as to the whether or not the contract is enforceable.
2. The enforceability of the contract is at the very heart of the conveyance and, in my view, it is not possible to act in the conveyance without first considering whether you have a valid and enforceable contract.
3. The protocol supports this view at item 1.3 – Acting for a Buyer - where it says the following:-

“The practitioner may limit the nature and extent of their retainer by a suitably worded exclusion. However, it should be noted that it is unclear whether the notations within the retainer will be effective to exclude liability for a claim in negligence. General exclusions may not prevent a Court from implying a duty of care at law particularly where the risk of loss is foreseeable, and assumption of responsibility has occurred and the client is in a vulnerable position. Practitioners should therefore be very specific about the type of work or advice that will not be undertaken and explain clearly any risks associated with the exclusion of the work.”

In my view it is appropriate to exclude from a retainer tax or matrimonial advice which are side issues but not PAMDA advice.

If Cop Out Conveyor had sent off a client agreement which excluded PAMDA advice from the retainer, I do not think it would have made any difference to the judgment for the following reasons:

- (1) the claim is based on negligence and not contract law;
- (2) the Courts in negligence actions have generally ignored exclusion clauses which appear in the fine print of a contract.

Consideration as to whether the contract is enforceable goes to the heart of the conveyance and it is not possible to continue to act in circumstances where you do not know whether the contract is enforceable or not.

It is also not possible to explain to a client the risks associated with excluding from your work consideration of an issue (PAMDA Compliance) which is fundamental to the enforceability of the contract.

IDENTIFYING THE RISKS IN CONVEYANCING

David Durham of Lexon has in the last 2 years visited many of Queensland's firms and understands the everyday workings of a law firm. David has, in his introduction to this topic, presented a scenario that would be familiar to all practitioners in practice – conflicting instructions, competing clients, one urgent matter requiring priority over another urgent matter.

David has also provided for us statistics on conveyancing claims which are alarming.

The profession cannot continue with the current level of conveyancing claims – for the simple reason that our insurers will not take on the risk without a substantial increase in premium.

Our situation is not helped by PAMDA², BCCM³ or LSA⁴, or the court's strict interpretation of consumer protection legislation.

I have talked to the Office of Fair Trading about the prospect of change to the PAMDA Legislation and the response is:

- (1) the officer I spoke with had seen some draft changes to PAMDA resulting from the review but no changes were proposed to Chapter 11 – Residential Property Sales;

² Property Agents and Motor Dealers Act 2000

³ Body Corporate and Community Management Act 1997

⁴ Land Sales Act 1984

- (2) not one prosecution yet of an agent for failing to prepare a contract properly – Office of Fair Trading assume that when contracts fall over it becomes a civil action between the parties and the Office of Fair Trading are not involved;
- (3) very few complaints from consumers at present;
- (4) no marketeering claims in the last 12 months or so.

I think from this feedback that there is not likely to be any change to Chapter 11 (Residential Property Sales) of PAMDA in the short term.

I also doubt – now that the precedent has been set – that the courts are going to change their attitude to consumer protection legislation, nor are we the only state to go through this – *Everest Project Developments Pty Ltd v. Mendoza & Ors*⁵ is a Victorian case where 33 off the plan contracts were terminated for technical breaches of the *Land Sales Act (Vic)*.

Why are there so many claims? I have been hands-on in conducting conveyances, read the case law, been through the introduction of PAMDA and interviewed the claims managers at Lexon – there are several areas which repeatedly give rise to claims.

These are:

- (1) errors in the client engagement process:
 - (a) not getting instructions right;
 - (b) not understanding the particular requirements of a client;
- (2) errors in the procedural aspects of conducting a conveyance:-
 - (a) missing time limits or critical dates;
 - (b) PAMDA non compliance;
 - (c) failure to advise on contract terms;
 - (d) failure to properly implement the terms of the contract;
 - (e) failure to search; and

⁵ [2008] VSC 366 (19 September 2008)

- (f) failure to properly interpret a search.

WHAT IS BEST PRACTICE?

What should our aim be for best practice in Conveyancing? – There is no reason why there should be any professional negligence claims in conveyancing. Why?

1. the procedure is relatively simple;
2. the case law is relatively certain;
3. the legislation relatively prescriptive;

A conveyancing Practitioner should be in no doubt as to what the practitioner needs to do in order to conduct a conveyance properly.

WHAT HAS LEXON DONE TO HELP?

As you are aware Lexon has released the Conveyancing First Letters for use free of charge by the profession. Go to www.lexoninsurance.com.au. you will then need to login using your QLS user id and password. Then click on the “First Letters” link. The letters are password protected and can only be used by practitioners who are insured by Lexon.

Lexon has had a mixed reaction to the introduction of these letters for the following reasons:-

- (1) practitioners don't like to change the way they practice nor are they prepared to spend the time to change their systems;

My Response - The problem with leaving things as they are is that conveyancing lawyers are leaving themselves open to claims such as the one against Cop Out Conveyancer and end up paying the cost of lost opportunities when contracts fall over. These costs should be borne by the market in fluctuating prices but because conveyancing lawyers are making mistakes, or not properly identifying

the mistakes of others, the finger can be pointed at us and our profession has to pay – ultimately at an additional cost to the profession which the profession cannot continue to bear;

(2) the letters are too lengthy, why does a client need all this information?

My response is that the letters are intended to be a detailed letter. The First Letter saves you time by including as many of the 101⁶ steps recommended by the protocol as is possible in one letter – yes it is lengthy but in order to comply with the protocol you need in some way or another to give the client all of this information. It is also the easiest way to establish to a court that you have given advice to the client on all these matters. You would be surprised at how many clients actually take the time to read the First Letters. We are also pleasantly surprised in our practice at the number of people who take the time to properly fill in the questionnaire and return it to us together with additional comments that clearly show to us that they have read the information in the First Letters.

WHAT ELSE CAN LEXON DO TO HELP?

Lexon has released to the profession for use free of charge a detailed Protocol Checklist. The Protocol Checklist comes as a package of four documents. The following two Protocol Checklist packages have been released to the profession, as follows.

- (1) Resident Checklist 6 “Acting for Buyer House and Land – Engaged Post Contract” which comprises four documents. These documents are:
 - (a) Document No. 1 - Residential Checklist 6;
 - (b) Document No. 2 - Mandatory PAMDA compliance checklist;
 - (c) Document No. 3 - File note; and

⁶ Estimate only

- (d) Document No. 4 - searches worksheet.
- (2) Residential Checklist 2 – “Acting for Seller House and Land - Engaged Post Contract”, which comprises the following four documents:
- (a) Document No. 1 – Residential Checklist 2;
 - (b) Document No. 2 - Mandatory PAMDA compliance checklist;
 - (c) Document No. 3 - file note; and
 - (d) Document No. 4 - searches worksheet.

We have on display a mock file which has been put together using the Lexon Conveyancing Documents relevant to Acting for a Buyer – House and Land – Engaged Post Contract, as an example of the way in which Lexon envisage a conveyancing file should be set up and conducted.

The Protocol Checklist package is now available for practitioners to download free of charge from the Lexon website.

Some Brief Comments on the way in which the Protocol Checklists are to be used

DOCUMENT NO. 1 – PROTOCOL CHECKLIST - MAIN OPERATING DOCUMENT

We did not want to create extra work by adding another layer of documents to the conveyancing process, so instead we have designed the checklist so that it becomes part of your file. You can throw away note pads, loose bits of papers conveyancing manuals etc. You can leave the protocol on the shelf – and create your conveyancing file out of the checklist.

This document is intended to be bound into your file as the first document as shown in the mock file in your conference pack.

There is an option to use an A3 version and to fold over each page as you go through each step in the conveyance or, alternatively, to use an A4 version.

It is preferable that the documents be in colour, however this is not essential.

The Checklist contains notes to user as follows:

Notes to User	
This checklist:	
<ul style="list-style-type: none">• is intended to be used as a practical tool to assist a practitioner in carrying out, and recording, the steps necessary to conduct a conveyance in accordance with the Queensland Conveyancing Protocol (the “<i>Protocol</i>”);• assumes REIQ Contract for Sale of Houses and Residential Land, sixth edition;• contains notes to user in <i>italics</i>;• must be either:<ul style="list-style-type: none">➤ bound into file as first document on file (A3 version); or➤ attached with a bulldog clip to the inside cover of the file (A4 version);• must be ticked when appropriate action is completed;• must be initialed by supervising partner/solicitor where required; and• may be used as a workbook to record diary notes and other matters relevant to the conveyance;	

The Checklist contains important qualifications as follows:

Important Qualification

This checklist:-

- is ***not*** a comprehensive list of all matters which must be attended to in a conveyance;
- does ***not*** cover all matters which may arise in the course of a conveyance; and
- does ***not*** deal with the unexpected if things go wrong.

A practitioner must always act in the conveyance in a responsible and professional manner, in accordance with the requirements of the Protocol and the law.

The intention of the checklist is to set out the detailed steps of a conveyance in the order in which those steps will occur and to ensure that each step is completed.

The checklist is designed to allow the conveyancer to have the conduct of the file subject to some important qualifications:

- (1) a conveyancer must have a supervising practitioner sign off on the critical steps of a conveyance, for example:
 - (i) to check that the PAMDA compliance checklist has been properly completed;
 - (ii) prior to sending confirmation or termination letter on finance;
 - (iii) to check the searches worksheet;
 - (iv) to check the transfer documents;
 - (v) to sign settlement notice; and
 - (vi) to check that all steps have been completed prior to settlement; and
- (2) the conveyancer must refer matters to the supervisor practitioner when there is an issue, for example:-
 - (i) if there is a potential conflict;

- (ii) if you are instructed to terminate as the result of an unsatisfactory building inspection;
- (iii) if settlement is not able to be booked on time;
- (iv) if there are adverse search results.

The checklist for a buyer is broken up into 22 separate and distinct steps in the conduct of a conveyance which I will go through quickly with you.

[NOTE – TAKE THE GROUP THROUGH THE CHECKLIST]

DOCUMENT NO. 2 – MANDATORY PAMDA CHECKLIST

The Mandatory PAMDA checklist is a step by step process to determine:

- (a) if PAMDA applies; and
- (b) if so, whether the requirements of PAMDA have been complied.

The PAMDA checklist is completed in step 1 of the protocol checklist.

[NOTE – TAKE THE GROUP THROUGH THE PAMDA CHECKLIST]

PAMDA COMPLIANCE QUERY - WHERE BUYER PREPARES CONTRACT

Q: Does Chapter 11 (Residential Property Sales) PAMDA apply where there is no agent involved and buyer arranged for the preparation and signing of the Contract with the seller?

A: Yes

There are 2 stages at which this question must be considered:

11. Part 2 Chapter 11 PAMDA – “First Notice”

Section 366B imposes the obligation on a “*seller or seller’s agent*” at the time of the initial delivery of a contract to a buyer to attach the warning statement and direct the buyer’s attention to the warning statement and various other docs.

- If the buyer/buyer’s agent prepares the contract then I consider that the direction is not necessary, although the warning statement must be attached as the first/top sheet. If I

were acting for a buyer, I would refer my client's attention to the warning statement anyway and explain its effect.

- A seller would be ill advised to sign a contract where no warning statement had been attached when buyer signed contract.
- **Conclusion:** If buyer/buyer's agent has prepared the contract then I do not think the "first notice" ie. a direction by the seller/seller's agent to the warning statement and other contract docs is necessary.

12. Part 1 Chapter 11 PAMDA – "Second Notice"

Section 365 PAMDA states that the parties are not bound under a relevant contract until:

"...the buyer or the buyer's agent receives the warning statement and the relevant contract from the seller or the seller's agent in a way mentioned in subsection (2)".

Subsection (2) then requires that the message directing the buyer's attention to the warning statement and various other contract docs be given.

- There is no exclusion from the definition of "relevant contract" in the case where a contract is prepared by the buyer/buyer's agent.
- In the recent Hedley Commercial case, initial form of put/call option was prepared by buyer's (Hedley's) lawyer – there was no suggestion in this case that seller's lawyers were exempted absolutely from compliance with chapter 11 PAMDA.
- Section 363 states one of the purposes of Chapter 11 as being "to enhance consumer protection for buyers of residential property". This protectionist approach has been consistently applied by the courts in PAMDA cases.

Conclusion: Seller must always give the "second notice" pursuant to section 365 after "proposed relevant contract" has been signed by both parties and is then a "relevant contract" otherwise the cooling off period will not commence to run and contract would be able to be terminated by buyer at any time prior to completion.

DOCUMENT NO. 3 - FILE NOTE

In my research I was amazed at the number of claims arising out of solicitors either:

- (a) failing to understand their instructions at the beginning of a matter;
- (b) failing to identify the correct client; or
- (c) failing to grasp the issues in respect of the conveyance that were important to the client.

The intention of this file note is to go on a “fishing expedition” and discover all of the issues that are relevant to the conveyance up front so that this information can be factored into the conduct of the conveyance. The information obtained will then enable you to complete the First Letter. The instructions to user in the file note are relevant.

Instructions to user:

- The intention of this file note is to obtain information from the client about the conveyance so that you can act in the best interests of the client.
- This can best be achieved by asking open ended questions.
- You may need to explain the legal concepts to your client before your client can answer the question correctly.
- Give the client time to tell you about their conveyance without interruption. Take notes of the information you receive and ask questions to clarify if necessary. Ask client “Is there anything else?”

The file note then deals with the following:

- (a) Confirmation of Instructions – it is vital to find out who are acting for and to get proper authorisation.
- (b) Client Contact Details – there are many issues and a lot of time wasted because lawyers have failed to obtain client contact details or find that at a critical point in the conveyance a

client is unavailable – the file note is a record that you have made it clear to the client up front that the client must be available at all times and that you have collected and recorded contact information. This hopefully triggers the client to take action to ensure that this is the case.

- (c) Client identity – if you explain the need for this over the phone I am sure you will receive a much better reaction than asking in any other way.
- (d) Lawyer's Certificate – must be given by a lawyer and forms part of the file note. This is so that you can then send out the signed certificate with the First Letter.
- (e) Contract Information – this is where you check the contract details and then continue with your fishing expedition.
- (f) Contract Conditions – important to explain these up front and early in the process.
- (g) Deposit – again it is important to be explained.
- (h) Costs and Searches – Needs to be explained up-front so searches can be started early.

DOCUMENT NO. 4 – SEARCHES WORKSHEET

This document is intended to be attached to the inside cover of the file and records:

- (a) search;
- (b) when sent;
- (c) when results received;
- (d) when results checked;
- (e) any comments

It is to be completed by the conveyancer and must be checked by the supervisor practitioner.

Conclusion

I suggest that:

1. the use of the Lexon Protocol Checklist in your conveyancing will improve your ability to address all the issues in conveyancing;

2. you encourage your conveyancing staff to use these documents;
3. you hold internal workshops in your office to run through these documents and explain them and their use to your staff;
4. If you are a supervising practitioner make yourself available whenever necessary to sign off on the steps in the checklist that require a supervising practitioner to check.
5. If there are problems which are identified in the conveyancing process take the time out of your day to address those problems immediately and solve them early before they fester and become potential claims.
6. Give your clients the service they deserve when conducting a client's conveyance with the ultimate objective being:
 - (a) satisfied clients; and
 - (b) a significant reduction in claims arising out of conveyancing practice and procedure.