

CHAPTER 17

THE BUYER-SELLER RELATIONSHIP

FOCUS TOPICS

- 17.1 THE STANDARD CONTRACT
- 17.2 THE REAL ESTATE AGENT
- 17.3 THE SELLER'S PROMISES
- 17.4 PROTECTING THE BUYER
- 17.5 PERFORMING THE CONTRACT
- 17.6 REMEDIES FOR BREACH
- 17.7 THE FUTURE OF THE STANDARD CONTRACT

FOCUS OBJECTIVES

To understand and appreciate:

- ▶ all contracts for the purchase of a home must be 'in writing';
- ▶ there is a standard form of contract available to buy a home;
- ▶ the legal position of a real estate agent;
- ▶ the seller is not required to disclose everything about the property to the buyer;
- ▶ the ways in which the buyer can be protected;
- ▶ the contract is performed by conveying the title and paying the price, subject to adjustments; and
- ▶ the standard contract governs the relationship of buyer and seller.

17.1 THE STANDARD CONTRACT

In Queensland, all contracts for the sale and purchase of land must be in writing. This means that there **must be a written** memorandum or note of an oral agreement to create the contract. The written note must contain the names of the parties, a description of the land, the price, and be signed by the parties. To protect consumers, and to reduce the cost of preparing agreements, the **Real Estate Institute of Queensland (REIQ)** and the **Queensland Law Society (the Law Society)** have co-operated to produce the standard contract for houses and land (the standard contract). The latest edition of this contract (the ninth edition) is available from your local Real Estate Agent. Some sections of the contract relevant to the topics in this chapter are set out as required.



17.2 THE REAL ESTATE AGENT

APPOINTMENT OF THE AGENT

Clause 10.1 of the standard contract confirms the appointment of the agent named in the contract as the **agent of the seller**.

- ▶ **10.1 Agent:** The Agent is appointed as the Seller's agent to introduce a buyer.

The terms of the agent's appointment can be decided by agreement. Terms commonly included are:

- ▶ the period during which the agent is authorised to act for the seller;
- ▶ whether it is an exclusive, sole or other agency; and
- ▶ the rate of commission to be paid upon sale of the property.

THE AGENT'S COMMISSION

By ss 138–141 of the *Property Agents and Motor Dealers Act 2000* Qld (PAMD), a real estate agent cannot sue for his/hers fees, charges or commission unless:

- ▶ he/she holds a licence under the Act as an individual or a corporation;
- ▶ his/her engagement or appointment as an agent is in writing signed by the person to be charged with fees or commission; and
- ▶ the fees are no more than the fees prescribed under the Act, although they are negotiable, subject to any other requirements of the Act.

Once the above requirements are met, the agent may be entitled to his or her commission from the seller. Unless there is some special agreement, the agent will only be entitled to his or her commission from the seller if his or her efforts have been **the effective cause of the sale**.

If there is a dispute about commission, this always involves analysing the particular contract and the circumstances which surround it. In the words of a High Court judge, 'It is a question of fact depending on the circumstances of the case'.

The standard commission for a real estate agent is calculated as follows:

5% of the first \$18,000 of the sale price plus 2.5% of the balance.

What is the commission payable where the sale price is:

- | | | |
|----------------|------------------|------------------|
| (a) \$250,000? | (b) \$300,000? | (c) \$400,000? |
| (d) \$500,000? | (e) \$1,000,000? | (f) \$1,800,000? |

What Motivates Estate Agents Most?

by Tim O'Dwyer M.A., LL.B Queensland Solicitor & Consumer Advocate

Below is part of an email advert sent out this week to Queensland estate agents by a company which is in the business of supplying contract forms, statutory forms and other computer software to the real estate industry. Nothing like an offer of free advice and guidance to catch the attention of self-interested realtors.

“Hi, Real Estate Dynamics and ADL Software proudly invite you to attend one of the free seminars Real Estate Dynamics has prepared to help you learn how the new Act affects you and your workplace.

- ▶ Prepare Contracts
- ▶ Present Contracts legally
- ▶ Safeguard your commission
- ▶ Safeguard against being fined
- ▶ Safeguard against being sued



DON'T RISK YOUR OWN COMMISSION ATTENDANCE IS ESSENTIAL!”

What catches my cynical attention here particularly is the repeated emphasis on not risking commissions as well as on agents' being safeguarded from being fined or sued.

Nary a word in the blurb about protecting their clients' interests, or ensuring consumers are given genuine opportunities to be independently advised.

The clear intention here is to ensure that agents confidently continue to be able to prepare, present and sign-up contracts as securely, legally and safely as possible so consumers won't think to get their own independent legal advice.

Meantime the Queensland Law Society slumbers on, while it and the Office of Fair Trading remain oblivious to the obvious fact that real estate consumers' best protection is a statutory probation on legally-unqualified agents' preparation of contracts.

1. Where was the article in the advert placed? [K] [I]
2. To whom is the article addressed? [K]
3. What does the writer of the article say is emphasised? [K] [I]
4. What objection does the writer of the article have to the advertisement? [K] [I]
5. Do you agree with the writer that homebuyers should be encouraged to obtain independent legal advice before signing a contract to buy a home? [I] [E]

THE AGENT'S DISCLOSURE OBLIGATIONS

These are set out in ss 138 and 268 of the PAMD. PAMD Form 27c must be completed and handed to the buyer before the contract for sale of residential property is entered into. Part of PAMD Form 27c is set out below.

SELLING AGENT'S DISCLOSURE TO BUYER

– what we must tell you before you sign.

TO THE BUYER: The purpose of this form is to make you aware of relationships that your selling agent has with persons to whom they refer you, and of benefits that your selling agent and other people receive from the sale.

▶ RESEARCH

Access the Office of Fair Trading website at www.fairtrading.qld.gov.au. Download and read PAMD Form 27c. Set out in your own words the disclosure requirements on the form. [I] [E]



Hypothetical



Facts: Dorothy suffered a psychotic condition. She wanted to sell her property so she could move into a nursing home. She approached Peter, a Real Estate Agent, to sell her property for her. Peter offered to buy it from her so she could move into the nursing home more quickly. Peter told Dorothy her property was worth \$450,000 and brought her a contract immediately to sign, which he arranged to be witnessed by an employee in his office. The PAMD form 27c was not attached to the contract, or given to Dorothy beforehand.

Dorothy happened to tell her neighbour Gwen what happened, and that she did not want to proceed with the contract. Gwen arranged for Dorothy to see a lawyer. The lawyer arranged for a psychiatrist to do a report as to her capacity and a registered valuer to provide a valuation of Dorothy's home. The valuer's opinion was that the property was worth \$600,000. The psychiatrist stated Dorothy lacked capacity to make a proper decision when she signed the contract.

Peter sued Dorothy, requiring her to perform the contract.

Legal Issue: Could Dorothy successfully defend Peter's court action? Give your reasons.

17.3 THE SELLER'S PROMISES

The seller promises in Clause 7.4 of the standard contract that he or she:

- ▶ will be the registered owner of the land;
- ▶ will be able to complete the contract unless he or she dies or becomes mentally incapable after the date of signing;
- ▶ is not aware of any completed, current, or threatened court proceedings affecting the property;
- ▶ has no obligation to give a notice to the administering authority under the *Environmental Protection Act 1994* (Qld) (EPA); and
- ▶ is not aware of any facts that would lead the land to be classified as contaminated land under the EPA.

If the seller makes a promise that is not correct, the buyer can end the contract by giving notice to the seller.

The seller does not promise that the present use of the land is lawful.

It is clear from this term in the contract and from the contract generally that **it is not the seller's responsibility to give information** to the buyer about the property. However, this is not to say that the seller should not make appropriate disclosures before entering the contract.

H

Hypothetical

Facts: Pamela had been informed that a gas pipeline might be laid across her property.

She knew that if a gas pipeline had to be laid, it might restrict the use and enjoyment of part of the land. Pamela did not know whether or not she ought to tell any intending buyer about the rumour as she knew that it would mean she may be offered less for the property. There was a large vacant area next to the house, which could be used for a tennis court and this could be affected if the gas pipeline was installed.

Pamela also knew that the neighbour to the rear had built a garage which was half a metre inside the boundary of her land. At the time of buying the land, she had arranged a survey and decided to go ahead with the purchase despite the encroachment because she liked the property and it did not inconvenience her in the use and enjoyment of her backyard.

Legal Issue: What should Pamela say during negotiations with any intending buyer?

Answer: Pamela went to her lawyer and she gave her the following advice:

'I would not tell anyone about the gas line, Pamela. From what you have told me, you do not know that it is really going to happen and you have not received any official notification from anyone that a pipeline is to be built through your property. Of course, if you are notified by the gas corporation that a pipeline is to be built through your property, then you should tell any intending buyer.

Certainly, as you are the registered owner of the land, the law presumes that you have a special knowledge of your title deed and any restrictions affecting your rights of ownership. However, you are not required to carry out a search of your own land at the titles office or with other instrumentalities so that you can give an up-to-date answer to enquiries by an intending buyer.

You are not required by the contract to tell any intending purchaser about the encroachment into your backyard, unless you are specifically asked about the boundaries. When you are asked about the boundaries, you should disclose any information you have about the encroachment to the intending buyer. Generally speaking, you should invite the buyer to carry out his own independent check. It is the buyer's responsibility, not yours. However, if you disclose the encroachment before entering into the contract, it could stop the buyer using the encroachment to end the contract.'



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▶ *WHAT DO YOU THINK?*

Is it fair that a seller is not obliged to tell a buyer anything other than make the promises which are set out in the standard contract? What do you think should be the law on this question? [I] [E]

17.4 PROTECTING THE BUYER

A buyer is protected by:

1. The 'cooling off' period
2. Legal advice
3. The terms of the contract

1. THE 'COOLING OFF' PERIOD

Under the *Property Agents and Motor Dealers Act 2000 (Qld)* (PAMD), a warning statement is attached to the front of the standard contract. The buyer is warned to obtain independent legal advice and an independent valuation of the property before signing. The buyer has **five days to change his or her mind** and end the contract from the time that he or she receives a copy of the signed contract.

This is called the "cooling off period". Part of the form 30c containing the warning statement is reproduced below.

PAMD Form 30c



ABN: 24 830 236 406

Department of **Employment, Economic
Development and Innovation**

Warning statement

Property Agents and Motor Dealers Act 2000 - Chapter 11

This form is effective from 1 October 2010

Instructions

This form is to be attached to a proposed relevant contract of sale for residential property to be read and signed by a proposed buyer **BEFORE** the proposed buyer signs the proposed relevant contract.

The seller or seller's agent must give the proposed buyer a clear statement directing the buyer's attention to the proposed relevant contract and to this warning statement before the proposed buyer signs the proposed relevant contract. Failure to give the proposed buyer a clear statement may give the buyer a right to terminate the contract under section 370 within 90 days of receiving a copy of the relevant contract unless settlement occurs earlier.

Property address

Note: If no street address is applicable, use lot and plan information to identify the property

Street name and number 321 Johnson Drive

Suburb Strathpine

State

Postcode

WARNING

DO NOT sign the proposed relevant contract for the above property until you have read and understood ALL SECTIONS of this form. DO NOT sign if you feel pressured.

The relevant contract is subject to a five (5) business day cooling-off period. You may terminate this contract during the cooling-off period. However, the seller may deduct a termination penalty of up to 0.25% of the purchase price from the deposit.

You should obtain independent:

- **legal advice** See note 1
- **valuation** See note 2

Cooling-off period

What is the cooling-off period?

The cooling-off period is five (5) business days, during which you can change your mind about purchasing this property. Use this time to seek independent legal advice and an independent valuation of the property.

When does the cooling-off period start?

Your cooling-off period starts on the day you receive a copy of the completed relevant contract from the seller or seller's agent. The proposed contract becomes a relevant contract when both parties have signed. In any dispute about the commencement of the cooling-off period, it will be up to the seller to prove the buyer received a copy of the relevant contract. If you receive a copy of the relevant contract on a day other than a business day, the cooling-off period commences on the first business day after you receive a copy of the relevant contract.

When does the cooling-off period end?

Your cooling-off period ends at 5.00pm on the fifth business day after the cooling-off period started. A business day is a day other than a Saturday, Sunday or public holiday.

Can I waive or shorten the cooling-off period?

Yes, but only if you engage an independent lawyer who must give you a lawyer's certificate explaining the purpose and nature of the certificate. You should seek advice from your lawyer about the effect of waiving or shortening your cooling-off period. If you are waiving the cooling-off period, the lawyer's certificate must be given to the seller or seller's agent before you and the seller enter into the relevant contract.

What should I do during the five (5) day cooling-off period?

It is strongly recommended that you seek independent legal advice and obtain an independent valuation of the property during this time and that you understand and agree with the terms and conditions of the contract.

How do I terminate the contract during the cooling-off period and what happens if the relevant contract is terminated?

If you want to terminate the contract at any time before the end of the five (5) day cooling-off period, you must give a signed, dated notice to the seller indicating that you wish to terminate the contract during the cooling-off period. The notice must state that the relevant contract is terminated under section 370A of the *Property Agents and Motor Dealers Act 2000*. The seller must refund your deposit within 14 days of the termination. The seller may deduct a termination penalty of up to 0.25% of the purchase price. Make sure you terminate any building contract associated with this property if you terminate this contract during the cooling-off period.

What happens after the cooling-off period ends?

If you do not terminate the contract during the cooling-off period, you are legally bound by the contract, subject to the terms and conditions of the contract.

Practical application

P

1. Where must the form 30c be attached? [K] [I]
2. When must the form 30c be signed? [K] [I]
3. If the form 30c is not signed by the buyer before signing the contract what are the consequences? [K] [I]
4. What is the cooling off period and how does it operate? [K] [I]
5. Does the cooling off period advantage the buyer or seller? [K] [I] [E]
6. Why do you think Parliament passed laws for a cooling off period? Do you think it was a good idea? Set out your reasons. [I] [E]

2. LEGAL ADVICE

The buyer (or his/her lawyer) should make sure that the standard contract covers all of the terms and conditions which are important for that particular buyer, and the particular property. Ensuring that the Reference Schedule is filled out correctly protects the buyer from leaving out some matter which is going to be of importance. In addition, when a lawyer has had an opportunity to talk to the buyer about the property and its character and about the particular needs of the buyer, it is often the case that special conditions need to be added in the contract. For example, a buyer may want something done to the property before settlement, or simply want to end the contract if enquiries about the property are not satisfactory to the buyer.

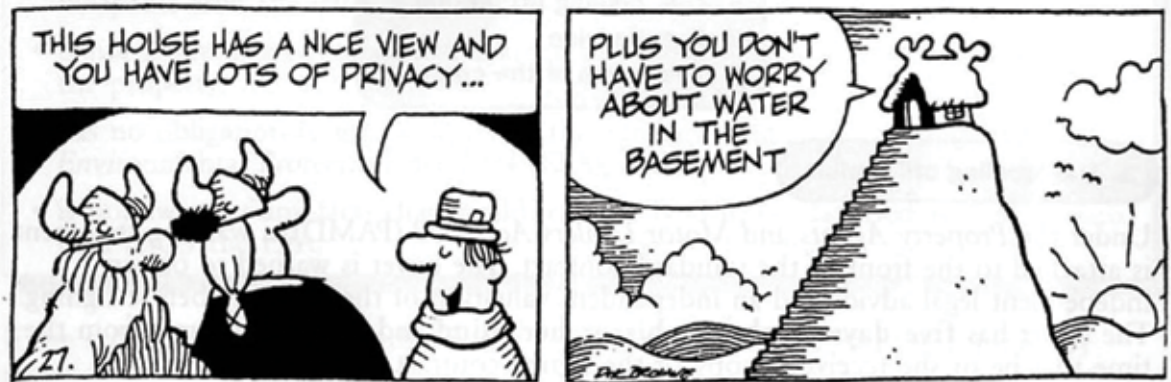
The lawyer for a buyer should ask the buyer questions about the property and suggest appropriate special conditions to be included. There is a special place in the standard contract just above where the buyer and seller sign on page 4 to insert special conditions. Usually these special conditions are drafted by the lawyer and sent to the agent to include in

the contract. The seller can either accept or reject these conditions. It is not unusual for a special condition to be included in the contract. There are many kinds of special conditions drafted to meet particular circumstances. A special condition which ensures that a buyer can carry out due diligence on a property before committing to the purchase is set out below.

SPECIAL CONDITIONS

1. This contract is subject to and conditional upon the buyer being satisfied with any searches the buyer carries out on the property within 14 days of the date of the contract.
2. If the buyer is not satisfied with the results of the searches it carries out on the property the buyer can terminate the contract by giving notice in writing before the expiry of the 14 day period stipulated.
3. On termination, any deposit paid by the buyer to the seller is to be returned to the buyer.

The special conditions inserted in the contract override the general terms of the contract. The general terms must be read subject to any special condition which varies the general terms.



3. THE TERMS OF THE CONTRACT

The buyer is protected by the terms of the standard contract, particularly in clause 7.

- a. Sub-clauses 7.1 and 7.2 ensure that the buyer must receive a good, unencumbered title to the property;
- b. The seller promises he or she is the owner and there are no claims on the property (see subclauses 7.4(1)(a) and 7.4(2));
- c. Subclause 7.4(3) protects the buyer if the land is contaminated or the owner is conducting an illegal activity which infringes the *Environmental Protection Act 1994* (Qld).
- d. Sub-clause 7.5 protects the buyer if there is a mistake in the boundaries or area of the land, if there is an encroachment by structures onto or from the land, and/or if there is a mistake or omission in describing the property or the seller's title to it.
- e. Sub-clauses 7.6 and 7.7 protect the buyer in relation to work or expenditure on the property and matters where various authorities or other persons have taken steps or have rights that adversely affect the land.
- f. Sub-clause 7.8 simply establishes the rights and obligations of the seller and buyer where the property has not been fully fenced or adequately fenced.
- g. Sub-clause 8.1 says that the property is at the risk of the buyer from 5pm on the date of the contract. The buyer should immediately therefore arrange insurance cover for the property.

All of the matters under clause 7, can be the subject of enquiries made of responsible persons and authorities – often government departments, to find out information about the property. These searches are more usually done after the contract is signed. However, a buyer could easily do these searches before signing the contract if he or she wishes. They can also be provided for in a special condition in a more general way that gives the buyer greater protection.

P Practical application

Facts: Ralph decided to upgrade to a better home. To do this he would need to sell his existing home. He found a property which he could afford and commenced negotiating through the agent.

He agreed to pay the seller, Caroline, \$800,000.

Ralph decided to consult his solicitor about the following matters:

1. The payment of a deposit. Ralph has \$1,000 available immediately and can get up to \$80,000 in ten days. The agent suggests a total deposit of 10% (\$80,000).
2. Ensuring the airconditioner in the main bedroom is included in the sale. The airconditioner is fitted to a window and could easily be removed.
3. Borrowing money to cover part of the purchase price.
4. Protecting himself so that money from the sale of his home is used to buy the new property.
5. Carrying out a building inspection to ensure the property is structurally sound and a pest inspection for termites and other pests.
6. Ensuring that the construction of the pergola and swimming pool fences comply with council regulations. When asked, the seller said that they did comply but that the Council had never been requested to inspect the pergola or the swimming pool fence and give its approval.
7. Ensuring that one boundary fence is constructed at the cost of the seller prior to settlement.
8. Ensuring that a large quantity of timber and other refuse in the backyard is removed to the dump by the seller prior to settlement.
9. Ensuring the seller is responsible for any risk to the property until the date of settlement.
10. Ensuring that an electrical safety switch and smoke alarm are installed in the dwelling.
11. Ensuring that the seller is responsible for satisfying any requirement to make the swimming pool safe, including obtaining a Pool Safety Certificate.
12. Ensuring that the seller pays for the costs of any order by the Queensland Civil and Administrative Tribunal (QCAT) to remove a tree from the land pursuant to the *Neighbourhood Disputes Resolution Act 2011* (Qld).

Legal Issue: Does the standard contract protect the buyer and/or cover each of the factual circumstances set out above? If not, what special conditions should be written into the contract?

Your tasks: To do this exercise you need a copy of the standard contract.

1. The deposit is a sum of money paid by the buyer to the seller at the time of signing the contract or within a short period after signing the contract. By paying a deposit, the buyer shows that he or she really intends to proceed with the bargain. Ultimately, when the balance of the purchase price is paid at settlement, the deposit is applied as part payment. If the sale does not proceed, the buyer may be entitled to the return of the deposit. Clause 2 of the standard contract applies. Fill out a copy of the Reference Schedule to show the price, payment of \$1,000 deposit on signing, and the balance \$79,000 ten days from the date of the contract.
2. Under 'Property' on the Reference Schedule, list the airconditioner as an included chattel. Refer to page 3 for a discussion of the meaning of 'property' under the contract.

Practical application

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3. Fill out the finance item in the Reference Schedule. Write on the Reference Schedule, where appropriate, the words 'sufficient to complete the purchase', 'a bank, credit union, or building society', and fourteen days from the date of contract. Clause 3 of the standard contract (set out below) then applies.

3. FINANCE

- 3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount from the Financier by the Finance Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain approval.
- 3.2 The Buyer must give notice to the Seller that:
 - (1) approval has not been obtained by the Finance Date and the contract is terminated; or
 - (2) the finance condition has been either satisfied or waived by the Buyer.
- 3.3 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 3.2 by 5pm on the Finance Date. This is the Seller's only remedy for the Buyer's failure to give notice.
- 3.4 The Seller's right under clause 3.3 is subject to the Buyer's continuing right to give written notice to the Seller of satisfaction, termination or waiver pursuant to clause 3.2

After reading Clause 3 above, explain to Ralph his rights and obligations under this clause. Ralph's solicitor maintains that if the Finance item in the Reference Schedule is properly filled out, Ralph is adequately protected by Clause 3.

4. Ralph's solicitor correctly maintains that there is no term of the standard contract which makes the completion of the purchase of the new home subject to the sale of Ralph's existing home. A special condition to this effect must be included in the contract. Draft this condition. Mark where it goes on the standard contract as 'sale of Ralph's home'.
5. Fill out the building and pest inspection item in the Reference Schedule and rewrite it in your notebook. Clause 4 of the standard contract then applies.

4. BUILDING AND PEST INSPECTION REPORTS

- 4.1 This contract is conditional upon the Buyer obtaining a written building report from the Building Inspector and a written pest report from the Pest Inspector (which may be a single report) on the Property by the Inspection Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain the reports (subject to the right of the Buyer to elect to obtain only one of the reports).
- 4.2 The Buyer must give notice to the Seller that:
 - (1) a satisfactory Inspectors report under clause 4.1 has not been obtained by the Inspection Date and the Buyer terminates this contract. The Buyer must act reasonably; or
 - (2) clause 4.1 has been either satisfied or waived by the Buyer.
- 4.3 If the Buyer terminates this contract and the Seller asks the Buyer for a copy of the building and pest reports, the Buyer must give a copy of each report to the Seller without delay.
- 4.4 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 4.2 by 5pm on the Inspection Date. This is the Seller's only remedy for the Buyer's failure to give notice.
- 4.5 The Seller's right under clause 4.4 is subject to the Buyer's continuing the right to give written notice to the Seller of satisfaction, termination or waiver pursuant to clause 4.2.
- 4.6 If required under the *Queensland Building Services Authority Act 1991*, the Inspector referred to in clause 4.1 must hold a current licence under that Act.

Advise Ralph of his rights and obligations under Clause 4. Ralph's solicitor maintains that this clause adequately protects Ralph. Is this correct?

6. Ralph's solicitor suggests that Clause 7.6 of the standard contract might apply. The property information search, which is normally done after the contract is signed, would show if there had been an application for building approval lodged for these structures. However, if the search shows that:

1. Building approval has not been sought; or
2. If it has been sought, but a final inspection has not been carried out as required by the Building Act, then clause 7.6 does not adequately protect the buyer. This is because the local authority responsible to issue a notice to the owner requiring something to be done, does not do so unless someone pays for it to inspect the work and check whether or not there has been compliance.

Ralph's solicitor suggests that it would be better to put in a special condition which protects him. This special condition should require the seller to pay for the cost of a council inspection, then do any work that is necessary to meet council requirements before settlement. If the seller does not agree then Ralph is responsible to fix these things after settlement at his expense. Draft a special condition as suggested by Ralph's solicitor.

7. Clause 7.8 of the standard contract applies. However, to meet Ralph's request, his solicitor says that she needs to draft a special condition making the seller responsible to construct the boundary fence prior to settlement. Ralph tells her that it is agreed that the boundary fence is to be the same quality as the one already in existence, and that if it is not finished prior to settlement he is allowed to hold back \$2,500 until the fence is finished. Draft a special condition to meet Ralph's requirements.
8. Ralph's solicitor advises him that there is no clause in the contract requiring the seller to remove the timber and refuse in the backyard prior to settlement. It is, however, the responsibility of the seller to ensure the property is in the same condition as it was at the date of the contract. Ralph requests his solicitor to draft a special condition requiring the seller to remove the rubbish and entitling him to retain enough money at settlement to cover the cost of arranging for someone to take the rubbish to the dump if it is not removed prior to settlement. The cost of taking the rubbish to the dump is quoted at \$1,000. Draft a special condition to this effect.
9. Clause 8.1 applies.

8.1 RISK

The Property is at the Buyer's risk from 5pm on the first Business Day after the Contract Date

Under this term Ralph is responsible for the risk unless the standard contract is changed. If 8.1 is not changed, Ralph would need to take out insurance cover immediately to cover risk to the property. Ralph's solicitor says that she needs to draft a special condition making the seller responsible for the property until 5.00p.m. on the date of settlement. Draft this special condition.

10. The seller must notify the buyer by filling out the Electrical Safety Switch and smoke alarm items in the Reference Schedule, as to whether these items are installed or not. If they are not, the buyer must install them as required by the relevant legislation.

The only way to make the seller responsible for installing these items if they are not installed at the date of the contract is to include a special condition which says this. Draft a special condition making the seller responsible for installing a smoke alarm and an electrical safety switch in the dwelling before settlement.



Practical application

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11. Clause 4.7 applies. Clause 4.7 is complicated.

If the pool safety certificate is issued, the contract proceeds without difficulty. If not, the buyer can request a pool safety inspector to inspect the pool and issue a notice of nonconformity, if the pool does not comply with the necessary safety standards. If there is non-compliance, the buyer can terminate the contract but does not have the right to make the seller fix the problem. Ralph's solicitor says that the best way to deal with the issue is to include a special condition which requires the seller to be responsible for completing any necessary work that is needed for a pool safety certificate to issue before settlement. Draft this special condition.

12. If an order has been made or an application is to be heard under the *Neighbourhood Disputes Resolution Act 2011* (Qld) and the buyer is given notice by the seller of this under the contract, this makes the buyer responsible for continuing the application or carrying out the order after settlement. These orders and applications are about trees that cross boundaries. The Act says that if the seller does not give notice and there is an order or an application on foot the buyer can terminate the contract. Ralph's solicitor tells him that the other option is to include a special condition in the contract making the seller responsible to finalise any application and carry out the requirements of any order or future order made by QCAT. Draft this special condition.

17.5 PERFORMING THE CONTRACT

After signing the contract, the buyer must carry out the terms of the contract strictly according to the time stated. Clause 6 states that time is of the essence.

The steps which are taken to put the contract into effect are referred to as conveyancing. The most important of these are:

a. Approval of finance	The buyer notifies the seller if finance is approved or not.
b. The building and pest inspections	The buyer notifies the seller if he or she is satisfied with the building and pest inspections.
c. Special conditions	The buyer notifies the seller if any special conditions are satisfied or not.
d. Searches	The buyer carries out the searches he or she is entitled to do under Section 7 of the contract
e. Preparing and stamping transfer documents	Transfer documents are prepared by the buyer and sent to the seller for the seller to sign and return to the buyer to be held for stamping purposes (stamp duty tax) on an undertaking that they will not be dealt with until settlement. The reason is that the transfer must usually be stamped before settlement. This involves taking possession of the documents and lodging them and paying the stamp duty. If the buyer is borrowing money, the stamped transfer will be handed to the lender (usually a bank) at settlement to lodge for registration.
f. Adjusting the purchase price	Calculations need to be made to apportion the responsibility for outgoings (eg. rates, land tax) up to the settlement date to the cost of the seller and after settlement, to the buyer.
g. Settlement (completion)	All parties attend. This is the climax of the transaction and involves exchange of title and transfer documents from the seller (or mortgagee) for money from the buyer and/or the buyer's mortgagee. Immediately prior to settlement, the buyer or his or her solicitor should do a check search at the Titles Office's records to ensure that no one has lodged any encumbrance or caveat on the seller's title.

D. SEARCHES

The buyer is entitled to investigate the matters affecting the property. These rights are set out in Clause 7 of the standard contract. A search is a form of an enquiry made of the body (often a government department) which has responsibility for the particular matter. The types of searches and their purposes are set out below.

SEARCH	PURPOSE
1. Searching the title and conducting a survey	To obtain up-to-date details about the current state of the sellers' title to check the details of the owner, including any encumbrances or dealings with the title. A survey will establish that the boundaries are correct, the area of the land, and whether or not there are any encroachments.
2. Department of Transport and Main Roads search	To enquire as to whether or not the Department has any requirements for the subject property, eg. a road going through the property.
3. Contaminated lands search	To ascertain if the land is contaminated and unable to be used for residential purposes.
4. Property information search (local authority)	To advise of any building permits which may have been granted and other information about the property such as drainage easements. To check the building records to see if all approvals have been finalised.
5. Land tax search	To enquire whether any Land Tax is payable on the land which should have been paid by the seller.
6. Rates search (local authority)	To enquire whether or not the current rates remain unpaid and whether there are any arrears of rates or fire service levy which must be paid by the seller before settlement.
7. Flood enquiry	To ascertain if the land is below the highest known flood levels.
8. Town planning certificate (short/long)	To enquire as to the zoning of the land and any uses to which the council has consented which may be carried out on the land.
9. Bankruptcy search	To ascertain if the seller is bankrupt and therefore unable to pass good title.

1. SEARCHING THE TITLE AND CONDUCTING A SURVEY

A title search is used to check that:

- ▶ the person shown as owner on the contract is the person shown as the registered owner of the land;
- ▶ the real property description of the land shown on the contract is the correct description of the title;
- ▶ the area of the land is the same as the area shown on the contract; and
- ▶ the land seen by the buyer and shown on the contract is the land which is identified by the correct real property description.

If the title search discloses an error which is material (significant), the buyer may terminate the contract.

2. DEPARTMENT OF TRANSPORT AND MAIN ROADS SEARCH

Hypothetical

H

Facts: Frank fell in love with a small colonial cottage in the western suburbs of Brisbane. He instructed his solicitor to do the conveyance. In the course of carrying out the usual searches on behalf of Frank, his solicitor carried out a search at the Department of Transport and Main Roads to determine if the Department knew of any requirements for future roads which might affect the property. The search came back stating 'Part of the subject property may be required for future road works'.

Legal Issue: Outline the options available to Frank. What are the possible consequences of each choice?

The importance of carrying out a Department of Transport and Main Roads search can be seen from the Hypothetical above. As we have seen earlier, the duty of a seller to disclose details of the property falls short of being required to search his or her own title deed or the public records of every government organisation which may create a right or interest in the land. On the other hand, it is up to the buyer to search for any defects in the property.

3. CONTAMINATED LANDS SEARCH

The Contaminated Land Register commenced on January 1992. The effect of this register is to ensure that people do not buy land which has been contaminated.

4. PROPERTY INFORMATION SEARCH

A property information search is carried out at the relevant council or local authority. It provides information about:

- ▶ the current position of the rates, including whether or not they are in arrears;
- ▶ the current position of the water usage (water rates), including when any meter was last read;
- ▶ whether or not the land is flood prone; and
- ▶ details of approvals for all activities conducted on the land, including any notices given to rectify, or failure to comply with approval requirements (eg. a final plumbing inspection on a new house).

The consequences of an adverse property information search are set out in clause 7.6 on the standard contract. Generally any valid notice or order by any competent authority or Court requiring work to be done or money spent in relation to the property must be fully complied with:

- (a) if issued before the Contract Date, by the Seller before the Settlement Date;
- (b) if issued on or after the Contract Date, by the Buyer.

▶ RESEARCH

Look up the website of your local authority or contact it and obtain the documents to complete for a full property information search. Outline briefly the information which can be obtained. [K] [I]



P

Practical application

Facts: Jonah wants to buy a property at Ipswich. Before signing the contract Jonah takes advice from his lawyer. Jonah accepts his lawyer's advice and asks for a special condition giving him the right to terminate the purchase up to 2 days before the settlement date if any enquiry he makes about the property is not to his satisfaction. The contract is also subject to finance and to a building and pest inspection to be carried out 21 days from the date of the contract. Settlement is to be 30 days from the date of the contract. Finance is approved. The building and pest inspection does not raise any issues about the property. The property information search includes a building records search. It is returned by the Ipswich City Council 23 days after the date of the contract. This search shows that the owners in 1994 had made an application for approval to re-stump the property. The building inspector in his report had said that some of the stumps had been changed and mended and they seemed satisfactory. However, the building records search showed that the owners never arranged for the building department of the Ipswich City Council to do a final inspection after the job was finished. This is a compliance requirement which had never been satisfied.

Jonah's lawyer advised him that he would be responsible for doing this once he became the new owner. This was because the Ipswich City Council may find that the job had not been completed as required and want more work to be done.

Issue: If Jonah had not ensured that the due diligence special condition was inserted, would he be entitled to terminate the contract under clauses 7.6 or 7.7?

Answer: Jonah is advised by his lawyer that because no notice was ever issued, even though the final inspection should have been carried out, clause 7.6 does not apply. Jonah needs to rely on the due diligence special condition to terminate the contract.



▶ YOU BE THE JUDGE

In the above Practical Application these facts actually happened in a conveyance. Assuming the Seller knew that the stumping job had never had the final inspection, do you think that the seller should have disclosed this to the buyer before signing the contract? What are the options that are open to both parties to resolve the issue? Do you think the standard conditions treat the parties fairly in this particular situation? Would you make any change to the standard contract? If so, what changes do you think should be made? [K] [I] [E]

5. LAND TAX SEARCH



▶ RESEARCH

Look up the website of the Department of Natural Resources and Mines at www.dnrm.qld.gov.au or contact the relevant department and find out the following information:

- Who pays land tax? [K] [I]
- How is land tax calculated? [K] [I]
- When is land tax payable? [K] [I]
- When was land tax first levied? Why? [K] [I]
- Do you think that the system of land tax is fair? Give your reasons. [E]



F. ADJUSTING THE PURCHASE PRICE

At settlement, there can be quite a number of adjustments to the purchase price under the contract. These include:

RATES	WATER USAGE CHARGES	LAND TAX	RENT
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The standard contract has a detailed clause dealing with adjustments to the purchase price. The general principle is set out in Clause 2.6(1).

2.6 Adjustments to Balance Purchase Price

- (1) The Seller is liable for Outgoings and is entitled to Rent up to and including the Settlement Date. The Buyer is liable for Outgoings and is entitled to Rent after the Settlement Date.

Calculating the adjustments between a seller and a buyer is a complicated exercise which is best left to an experienced conveyancer. However, the prospective home owner should note that where adjustments are not made correctly there can be ongoing consequences. For example, under the *Local Governments Act 1936* (Qld), rates continue to be a charge on the land when ownership changes. What this means is that any buyer who does not adjust the charges at settlement, to which the local authority is entitled, will find that he or she must pay the whole amount. The new owner (buyer) could then sue the old owner (seller) for rates which should have been paid prior to settlement. A change of ownership does not enable a new owner to escape liability for any arrears in rates or charges owed by the previous owner of the land.

G. SETTLEMENT (COMPLETION)

At settlement, the performance of the contract by both parties is complete. On the appointed day, all parties (including lenders) or their representatives meet. At this meeting:

1. the seller gives to the buyer, any documents necessary to:
 - ▶ give a clear, unencumbered title to the buyer;
 - ▶ allow the buyer to become registered at the Titles Office as the owner; and
 - ▶ the keys to the dwelling; and
2. the buyer pays the seller the balance of the purchase price after adjustments for outgoings and the deposit.

17.6 REMEDIES FOR BREACH

The standard contract now sets out in clause 9 the rights of both the seller and the buyer if either defaults.

Clause 9.1 does not change the common law rights of the parties. It simply confirms them. If there is a breach of an essential term or a fundamental breach of an intermediate term either the buyer or the seller can affirm or terminate the contract.

The remedy of the seller and buyer are the same if either chooses to **affirm the contract** when a breach occurs. Each may sue the other for:

1. damages;
2. specific performance; or
3. damages and specific performance.



On the other hand, if either the seller or the buyer chooses to terminate the contract because of the breach their respective rights are different.



If the seller terminates it may do all or any of the following:

1. resume possession of the Property;
2. forfeit the Deposit and any interest earned;
3. sue the Buyer for damages;
4. resell the Property.

If the buyer terminates it may do all or any of the following:

1. recover the Deposit and any interest earned;
2. sue the Seller for damages.

The **measure of damages** of the seller on a resale is, as set out in clause 9.6:

- (1) The Seller may recover from the Buyer as liquidated damages:
 - (a) any deficiency in price on a resale; and
 - (b) its expenses connected with this contract, any repossession, any failed attempt to resell, and the resale; provided the resale settles within two years of termination of this contract.
- (2) Any profit on a resale belongs to the seller.

Additionally the seller can claim by clause 9.7:

- ▶ any loss caused by the default, including legal costs

Clause 9.8 of the contract now states that the buyer may claim damages for any loss it suffers as a consequence of the seller's default, including its legal costs on an indemnity basis.

It is important to note, as stated earlier, that any rights at common law are preserved by the contract in addition to those which it sets out to govern the relationship of the buyer and seller.



17.7 THE FUTURE OF THE STANDARD CONTRACT

THE PURPOSE OF THE STANDARD CONTRACT

The purpose of the standard contract which has been developed by a committee of the Real Estate Institute of Queensland (REIQ) and the Queensland Law Society (QLS), has been to prepare a contract which:

- ▶ makes it cheaper for buyers and sellers to enter a contract because of the standard terms.
- ▶ can be updated quickly to respond to the demands for the market and changes in the law.
- ▶ provides a fair balance between buyers and sellers.

The standard contract makes the buyer responsible for ensuring that he or she protects himself or herself. The buyer must make sure all of the conditions cover what he or she requires. The buyer must also carry out enquiries about the character and title of the property. In Queensland, the contract is binding once it is signed, subject to the five day cooling off period. There are different contract regimes in the other states. In New South Wales and the ACT, the searches are done before the contract becomes binding and disclosure must be made by the seller before signing. In New South Wales, the contract is not normally binding until a lawyer has given the client advice. This is not the case in Queensland.

The joint committee of the REIQ and QLS, which meets regularly, in theory, enables very prompt responses to changes in the law and in the industry where all stakeholders agree.

The majority of agents in Queensland, if not all of them, support and use the standard contract. It is very unlikely that a solicitor would be able to do conveyancing for the fixed fees which are currently charged, if there was more than one contract on the market, and the solicitor had to advise the consumer about the contract before it was signed.

SOLICITOR TIM O'DWYER INVITES STUDENTS TO FIND ANSWERS TO CRITICAL QUESTIONS

Early in the movie *Lethal Weapon 3* there is a delightful scene where a Californian real estate agent shows a young couple through the home of one of the trouble-attracting heroes.

Everything goes well until the agent reveals that a picture window has been replaced after a car crash and shootout, and that a bedroom has been remodelled "due to unexpected bomb damage".

"I have to tell you these things, it's the law, it's called full disclosure," he tries to explain to these prospective buyers – but they flee in horror.

When his homeowner-client protests, the agent explains again, "I had to tell them everything, it's the law, OK, full disclosure. You must have heard of it?"



Mandatory full disclosure by sellers of real estate is common across the United States

When I recently travelled to the U.S. I spent time in the mid-west state of Minnesota, and visited a real estate lawyer in the city of Hibbing (where singer/songwriter Bob Dylan grew up). When I asked about sellers' disclosure, this lawyer sounded a lot like the agent in the movie.

"Sellers have to tell these things, it's the law, it's called full disclosure," he said as he handed me a copy of the relevant Minnesota Statute and his State Bar Association's standard residential purchase contract.

This is the law of full disclosure, Minnesota-style:

'Before signing an agreement to sell, the seller shall make a written disclosure to the prospective buyer (including) all material facts pertaining to adverse physical conditions in the property of which the seller is aware that could adversely and significantly effect an ordinary buyer's use and enjoyment of the property, or any intended use of which the seller is aware. The disclosure must be made in good faith and based upon the best of the seller's knowledge at the time of the disclosure.'

Because this statute provides little guidance on what might be 'material facts', the Bar Association's contract incorporates a list of questions for sellers to answer in detail.

There are questions about such matters as past flooding, cracked floors or walls, ice damage, fire or smoke damage, structural alterations and roof repairs.

Sellers are even asked if they keep pets indoors, if there is any asbestos in the property and if anyone ever smoked tobacco in the house.

Now to some critical real estate questions closer to home. I would like to invite Legal Studies students to find answers to these questions:

- ▶ Why do Queensland real estate laws place few (if any) disclosure obligations on sellers?
- ▶ Why do the terms of the standard contracts used by Queensland real estate agents give little redress to buyers who might find out from their post-contract searches and investigations the sort of material facts which U.S. sellers must disclose?
- ▶ Why has the Queensland government not followed the example set in the Australian Capital Territory where comprehensive disclosure by sellers has been mandatory since 2004? Why did the United Kingdom government follow this A.C.T. precedent in 2007?
- ▶ Why does the Queensland government's approach to real estate consumer protection seem essentially to be that 'buyer beware' is preferable to 'truth-in-selling'?
- ▶ Why must a statutory Warning Statement be given to residential buyers, but no warning particularly about obtaining independent legal advice) is given to sellers? And why residential only?
- ▶ Why is the buyers' Warning Statement so wordy?
- ▶ Why do most buyers ignore the Warning Statement given to them by sellers' agents? (You may find part of the answer in the previous question.)

And here are a few more questions you might try to find answers for:

- ▶ Why does Queensland law give cooling-off rights to residential buyers but not residential sellers? And why not to non-residential buyers or sellers?
- ▶ Why should there be a financial penalty on buyers who exercise their right to cool off?
- ▶ Why have Queensland real estate agents been allowed by law to prepare contracts intended to be legally binding?

- ▶ Why until recently, did Queensland's standard residential contracts contain no clauses detailing buyers' rights if sellers default or are in breach?
- ▶ Why is there little obvious and effective public education of Queensland's real estate consumers?
- ▶ Why do real estate consumers need to be educated and protected? And protected from what and whom?

Have fun, and try not to become too disappointed about what you do discover. As former Prime Minister Gough Whitlam said: 'Maintain your rage and enthusiasm'.

[Tim O'Dwyer is a well-known Queensland solicitor and out-spoken consumer advocate.
Visit his website at watchdog@argonautlegal.com.au]



▶ WHAT DO YOU THINK?

The standard contract is the product of co-operation between the Queensland Law Society and the Real Estate Institute of Queensland. Do you think that the availability of this standard contract and the balance it promotes between the rights of buyers and sellers is fair? Research the views of writers on www.australianrealestateblog.com.au before writing your answer. [I] [E]



REVIEW

1. What promises does a seller make under the standard contract? What does the contract say the seller specifically does not promise? If the seller makes a promise which is not correct, what can the buyer do?
2. What questions does a seller have to answer?
3. What is the purpose of the deposit paid by the buyer after signing the contract for sale and purchase of land?
4. Why would a buyer be upset and want to renegotiate a contract where the seller has substantially overstated (by, say, 30 per cent) the area of the property in the contract?
5. What are 'searches'? Why is it important to carry out searches when buying land?
6. Who is responsible for the local authority rates after settlement? What should a seller do when the rates prior to settlement are not paid by the buyer and not adjusted for at settlement?
7. What happens at settlement?
8. What damages can a seller recover where a buyer is in default under the contract?