

2020 DBL SOLICITORS



CONVEYANCING MANUAL



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SOLICITORS

DEVLIN BUCHANAN LILICRAP

WHY SHOULD YOU CHOOSE DBL SOLICITORS?

EXPERIENCE

Property Law and Conveyancing involve complicated process requirements with strict timelines and conditions to adhere to. In many cases the process falls in place seamlessly, however when things go wrong it is critical to have a specialist in your corner.

Spanning more than 25 years DBL Solicitors now draws on unique local experience across a wide range of property law areas including conveyancing, property development, contract negotiation, leasing and property disputes. Our clients often benefit from other in-house specialist areas including Family Law, Wills and Estate Planning, Commercial Law and Litigation.

DBL combines sophisticated legal solutions with local knowledge in easily accessible locations.

EXCEEDING YOUR EXPECTATIONS

In addition to compelling legal solutions, we also undertake to:

- Provide accurate and reliable advice and information when required;
- Identify and resolve possible legal issues in a transaction before they become problematic;
- Declare actual perceived conflicts as soon as we become aware of a conflict;
- Act ethically, fairly and honestly, in all dealings with you;
- Take all reasonable measures to prevent the disclosure of confidential information; and
- Offer a range of seminars and discussions for you and your staff.

AFFORDABLE AND EFFECTIVE

DBL Solicitors is flexible and agile enough to respond quickly, without being hindered by unnecessary layers of management and administration. Our focus is on maintaining costs at an affordable level to provide certainty for our clients.

Property Law is often the first introduction to legal services for many clients and a unique opportunity for us to contribute towards our client's legal needs throughout their lifetime.

For more information and a full list of services, please visit dbl.com.au

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WHO IS THIS GUIDE FOR?

Spanning over 25 years, DBL successfully completed tens of thousands of conveyancing transactions. Regarded as a leader in property law, new buyers and sellers trust DBL with their property transfers. DBL enjoys sharing some of this knowledge and experience with our clients and agents.

We are also proud to be at the forefront of this industry change in Queensland. Our property law services now include electronic settlements as an optional service through PEXA, our preferred service provider.

Many property transactions are completed without significant delay, however sometimes buying or selling a dream home can quickly turn into a nightmare. Where a contract is challenged the result is often significant time delays and expensive legal costs.

This guide assists agents and clients with pro forma clauses which focus on the most common circumstances not dealt with under standard Terms of Contract during residential contract negotiations.

These clauses should assist you in drafting properly worded contracts and avoid contract disputes. We strongly recommend to contact us for clarification as the clauses are only pro forma and will not be appropriate in all circumstances.

References in this manual to the Terms of Contract are to those contained in the Fifteenth Edition REIQ Contract for Houses and Land and the Eleventh Edition REIQ Contract for Residential Lots in a Community Titles Scheme.

We welcome your feedback and suggestions to this guide. An electronic copy of this guide is available at: <https://www.dbl.com.au/>

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1.2 Authority to Sign Contract - Agency

If the Contract is to be signed by a person acting as an Agent for the Seller or Buyer, the signing Clause to be added under where the authorised agent signing for the Seller/Buyer would be:

ANDREW BARTON PATERSON by his duly appointed agent **HENRY ARCHIBALD HERTZBERG LAWSON**

- (a) While there doesn't have to be a signed appointment of the person signing as agent, one should be provided and retained on your file.
- (b) A Power of Attorney document does **not** have to be prepared to enable one person to sign a Contract on behalf of another. A written authority signed by the Principal appointing their Agent as his Agent should be signed and dated prior to the Agent signing the Contract.
- (c) Although the **Contract** may be signed by an authorised Agent, **transfer documents** cannot be signed by an Agent unless a Power of Attorney has been registered with the Department of Natural Resources, Mines and Energy/Titles Registry Office and a registration number obtained.

1.3 Signing Under a Power of Attorney – Unregistered and Registered

The signing clause for an unregistered Power of Attorney would be:

WALTER JAMES LEWIS by his duly constituted Attorney **ALAN REGINALD LANGER**

The signing clause for a registered Power of Attorney would be:

ROBERT JAMES LEE HAWKE by his duly constituted Attorney **PAUL ANDREW KEATING** pursuant to Power of Attorney registration number [1]

LEGEND: [1] Registration number of Power of Attorney

1.4 Subject to Registration of Power of Attorney

Where the Seller has prepared a Power of Attorney document but it is not registered, the Contract can still be signed, subject to the registration of the Power of Attorney document at the Department of Natural Resources, Mines and Energy/Titles Registry Office.

This enables the Contract to be entered into while allowing time for the Power of Attorney document to be registered so that the appointed Attorney can sign the transfer prior to settlement.

1. This Contract is conditional upon the registration with the Department of Natural Resources, Mines and Energy of a Power of Attorney prepared by the Seller in favour of [1] ("the Attorney") within twenty-one (21) Days of the Contract date ("the Due Date").
2. The Attorney must take all reasonable steps to procure the registration.
3. If the registration of the Power of Attorney referred to in this Special Condition is not obtained by the Due Date, this Contract may be terminated by the Seller, or the person acting on the Seller's behalf, by notice to the other party whereupon the Deposit must be refunded to the Buyer.

LEGEND: [1] Name of Attorney

NOTE: The signing clause should be in accordance with paragraph 1.3 (above) for unregistered Power of Attorney documents.

2. LAND SALES ACT CONTRACTS

Where a Seller is proposing to sell a Property in respect of which there is not presently a separate Title in existence, the Seller should have its Solicitor consider the need for Special Conditions for the Contract as the Contract may be governed by the Land Sales Act 1984 ("LSA"). As the Agent, you may face prosecution if you attempt to sell a Property in contravention of the provisions of the LSA.

Presently, the LSA does not apply to the sale of proposed lots where the sale arises from the reconfiguration of land into not more than five (5) lots.

NOTE: Even if the LSA does not apply to a contract, the Seller may also need to comply with pre-contract disclosure obligations on the Seller under the Body Corporate and Community Management Act 1997.

3. BUILDING INSPECTION CLAUSES

NOTE: The REIQ/ QLS Contract contains provisions in Clause 4.1 for building and pest inspections which will enable the Buyer to terminate if the Buyer does not obtain reports to the Buyer's satisfaction.

Where it is proposed to insert a restricted form of a building inspection clause, such as to allow for the termination of the Contract for structural soundness only, Special Conditions may be used.

The Special Conditions below contemplate that the Inspection Date details be complete in the Items Schedule.

3.1 Building Report Subject to Structural Soundness

1. Clause 4.1 of the Terms of Contract does not apply in relation to a Building Report and to that extent is replaced by this Special Condition:
 - 1.1 This Contract is conditional upon the Buyer obtaining by the Inspection Date a building report as to structural soundness of the dwelling house on the Property;
 - 1.2 If the report from a Building Inspector or qualified Engineer concludes that the dwelling is structurally unsound, the Buyer may by notice to the Seller by 5pm on the Inspection Date terminate this Contract in which even the Deposit must be refunded to the Buyer; and
 - 1.3 If the Buyer fails to give such notice by 5:00pm on the Inspection Date this Special Condition is deemed to be satisfied.

3.2 Option to Seller to Rectify Structural Defect

1. Clause 4.1 of the Terms of Contract does not apply in relation to a Building Report and to that extent is replaced by the following:
 - 1.1 The Buyer must by the Inspection Date, at the Buyer's own expense, obtain a Building Inspection Report ("the Building Report") from a Building Inspector or a qualified Engineer on the dwelling on the Property.
 - 1.2 The Buyer must by 5 pm on the Inspection Date give notice to the Seller of:
 - a) The Buyer's acceptance of and satisfaction with the Building Report; or
 - b) The Buyer's waiver of this Special Condition; or
 - c) A list of those structural defects disclosed in the Building Report which the Buyer requires to be rectified.

Provided however if the Buyer fails to give such notice by 5 pm on the Inspection Date, the Buyer is deemed to be satisfied in all respects relating to The Building Report.
2. In the event that the Buyer gives notice to the Seller of a list of structural defects, the Buyer must give to the Seller contemporaneously with that notice, a copy of the Building Report. The Seller must within [1] Business Days from the receipt of the notice and report, give notice to the Buyer of:
 - termination of this Contract; or
 - the Seller's agreement to rectify the structural defects listed in the Buyer's notice given pursuant to clause 1.2 hereof, by the Settlement Date. Such rectification must be completed in a proper and workmanlike manner.

Provided however that if the Seller fails to give such notice then this Contract is deemed to be at an end and the Deposit must be refunded to the Buyer.

LEGEND: [1] Number of Business Days for Seller to respond to Buyer's notice

NOTE:

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- (a) This clause allows the Seller an option to rectify any structural defects in the dwelling revealed in the report. The Buyer has to give a list of defects to the Seller who has the option to rectify or terminate; and
- (b) Be sure to complete the particulars of the Buyer's Inspection Date on the second page of the Contract.

3.3 Subject to Buyer Obtaining Searches with Respect to Council Approvals

1. Should it be established within [1] Business Days of the Contract Date ("the Investigation Date") that all permissions, consents and approvals required from the relevant Local Authority or other body having jurisdiction over the construction of the improvements on the property have not been obtained or complied with in full, the Buyer may by notice to the Seller, terminate this Contract in which case the Deposit must be refunded to the Buyer.
2. If the Buyer does not give notice by 5:00pm on the Investigation Date, then this Clause will no longer apply and is deemed to be satisfied.

LEGEND: [1] Number of Business Days from Contract Date for the Buyer to make enquiries

4. PEST INSPECTION CLAUSES

NOTE: Where it is proposed to insert more limited pest inspection clauses than is provided under the standard Terms of Contract (such as to allow for termination of Contract only where there is current termite activity) Special Conditions may be used.

4.1 Pest Report Subject to Pest Activity

- 1.1 Clause 4.1 of the Terms of Contract does not apply in relation to a Pest Inspection.
- 1.2 This Contract is conditional upon the Buyer obtaining by the Inspection Date a Pest Report as to the existence of pest infestation in the dwelling on the Property.
- 1.3 If the Pest Report concludes that the dwelling is currently infested by termites borers or the like the Buyer may by notice to the Seller by 5 pm on the Inspection Date terminate this Contract in which event the Deposit must be refunded to the Buyer. If the Buyer fails to give such notice this clause is deemed to be satisfied.

NOTE:

- (a) This clause is more limited than clause 4.1 of the Terms of Contract and allows the Buyer to terminate only for reasons of evidence of current pest infestation rather than the report being "unsatisfactory to the Buyer" as per 4.1 of the Terms of Contract. The clause is applicable to the dwelling only and not any other structures on the Property. The clause can be varied to include other structures if need be.
- (b) Be sure to complete the particulars for the Buyer's Inspection on the second page of the Contract.

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4.2 Option to Seller to Rectify Pest Activity

1. Clause 4.1 of the Terms of Contract does not apply in relation to a Pest Inspection and to that extent is replaced by the following:
 - 1.1 The Buyer must by the Inspection Date at the Buyer's expense obtain a Pest Inspection Report ("the Pest Report") from a Pest Inspector on the dwelling on the Property.
 - 1.2 The Buyer must by 5 pm on the Inspection Date give notice to the Seller of either:
 - d) The Buyer's acceptance of and satisfaction with the Pest Report; or
 - e) A list of those areas of current pest activity disclosed in the Pest Report which the Buyer requires to be rectified.
2. In the event that the Buyer gives notice to the Seller pursuant to clause 1.2, the Buyer must give to the Seller contemporaneously with that notice, a copy of the Pest Report.
3. The Seller must within [1] Business Days of the receipt of the notice and report give notice to the Buyer of:
 - 3.1 termination of this Contract; or
 - 3.2 the Seller's agreement to treat the current infestation and rectify the areas of the dwelling affected by pest activity listed in the Buyer's notice given pursuant to clause 1.2 hereof, by the Settlement Date. In such event, the Contract will be varied to require the Seller to attend to those tasks prior to settlement as a condition of the Contract. The Seller must provide evidence of any treatment.
4. If the Seller fails to give such notice, then this Contract is deemed to be at an end and the Deposit must be refunded to the Buyer.

LEGEND: [1] Number of Business Days for Seller to respond to the Buyer's notice

NOTE:

- (a) This clause allows the Seller an option to treat any current infestation and rectify the areas of the dwelling affected by the pest activity. The Buyer has to give details of the infestation and rectification required to the Seller who has the option to treat and rectify or terminate.
- (b) Be sure to complete the particulars of the Buyer's Inspection Date on the second page of the Contract.

5. POOL SAFETY INSPECTION CLAUSES

The "Pool Safety Inspection Date" means the date inserted in the Reference Schedule under 'Pool Safety'.

If a date is not inserted in the Reference Schedule, then the Pool Safety Inspection Date is deemed to be the **earlier** of:

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- (a) the Building/ Pest Inspection Date; or
- (b) 2 days before the Settlement Date.

If there is not a Building/Pest Inspection Date, then the Pool Inspection Date is two (2) Business Days before the Settlement Date.

Where the Reference Schedule indicates that there is a pool on the Property and confirms that there is no Compliance or Exception Certification, then the Standard Terms make the Contract subject to a Pool Inspection, even where the Buyer has received a Notice of no Pool Safety Certificate.

5.2 Buyer to Obtain Pool Safety Certificate after Settlement

1. The Buyer and the Seller agree that clause 4.2 of the Terms of Contract does not apply.
2. The Buyer acknowledges that a Pool Safety Certificate has not been issued for the pool on the Land and the Buyer agrees to obtain a Pool Safety Certificate at his/her own cost within ninety (90) days of the Settlement Date.

5.3 Subject to Seller Obtaining Pool Safety Certificate

If it is the case that the Seller does not have a Safety Certificate at the date of Contract, but wishes to obtain one by Settlement, there should be a Special Condition inserted as follows:

1. The Buyer and the Seller agree that clause 4.2 of the Terms of Contract does not apply.
2. The Seller is to obtain a Pool Safety Certificate for the pool on the Land, at the Seller's cost, within [1] days from the Contract Date ("the Due Date"). The Seller must provide to the Buyer a copy of the Pool Safety Certificate by the Due Date.
3. In the event that the Seller has not provided a Pool Safety Certificate to the Buyer by 5 pm on the Due Date, either party may by notice terminate the Contract and the Deposit must be refunded to the Buyer.
4. The parties agree that the Seller shall be permitted to make minor alterations to the Property in order to obtain a Pool Safety Certificate.

LEGEND: [1] Number of Business Days to obtain a Pool Safety Certificate

6. SUBJECT TO SALE CLAUSES

6.1 Subject to Sale and Settlement of Buyer's Property where there is no Existing Contract

1. This Contract is conditional upon:
 - 1.1 the Buyer entering into a Contract ("the Buyer's Contract") for the sale of the Buyer's property situated at [1] by [2];
 - 1.2 the Buyer's Contract becoming unconditional by [3]; and
 - 1.3 the completion of the Buyer's Contract.
2. If either condition is not fulfilled, either party may by notice to the other, terminate this Contract in which event the Deposit must be refunded to the Buyer.
3. At any time prior to termination of this Contract, the Buyer may by notice to the Seller, unilaterally waive application of this clause in which case this clause will no longer apply.
4. The Buyer must at all times act reasonably including in relation to this Special Condition and the Buyer's Contract.
5. The Buyer must advise the Seller immediately upon any of the following events:
 - 5.1 The Buyer entering the Buyer's Contract;
 - 5.2 The Buyer's Contract becoming unconditional;
 - 5.3 The termination of the Buyer's Contract after [1];
 - 5.4 The completion of the Buyer's Contract.

LEGEND: *[1] Address of the Buyer's Property*
 [2] Date by which the Buyer's Contract is to be entered into
 [3] Date by which the Buyer's Contract must become unconditional
 [3] Date by which the Buyer's Contract is to be completed

6.2 Subject to Settlement of an Existing Contract on Buyer's Property

1. This Contract is conditional upon completion of the Contract dated [1] with respect to the sale of the Buyer's Property situated at [2] ("The Prior Contract") by a date no later than [3].
2. If the Prior Contract is not completed by [3], then either party may by notice to the other, terminate this Contract in which event the Deposit must be refunded to the Buyer.
3. At any time prior to termination of this Contract, the Buyer may by notice to the Seller, unilaterally waive application of this Clause in which case this Clause will no longer apply.
4. The Buyer must, at all times, act reasonably including in relation to this Special Condition and the Prior Contract.

LEGEND: *[1] Date of prior Contract*
 [2] Address of Buyer's Property
 [3] Settlement Date of Prior Contract

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6.3 Subject to Settlement of an Existing Contract on Buyer's Property where Seller requires Buyer's Contract to be Unconditional by a certain Date

1. This Contract is conditional upon the Contract dated [1] with respect to the sale of the Buyer's property situated at [2] ("The Prior Contract"):
 - 1.1 becoming unconditional in respect to finance, building and pest inspections and all Special Conditions and Notice of the satisfaction of such conditions by the Buyer to the Seller by no later than 5:00pm [3]; or
 - 1.2 being completed by no later than [4]; or
2. Should either condition not be satisfied, either party may by notice to the other, terminate this Contract in which event the Deposit must be refunded to the Buyer.
3. At any time prior to termination of this Contract, the Buyer may by notice to the Seller, unilaterally waive application of this Clause in which case this clause will no longer apply.
4. The Buyer must, at all times, act reasonably including in relation to this Special Condition and the Prior Contract.
5. The Buyer must immediately notify the Seller of:
 - a) The satisfaction of material conditions under the prior Contract such as Building and Pest, Finance and Special Conditions;
 - b) The termination of the Prior Contract; and
 - c) The completion of the Prior Contract.

LEGEND: *[1] Date of Prior Contract*
 [2] Address of Buyer's Property
 [3] Date prior Contract is to become Unconditional
 [4] Settlement Date of Prior Contract

6.4 Subject to Seller being Released from Prior Contract – Back Up Contract

1. This Contract is conditional upon the valid termination of a Contract of Sale dated [1] between the Seller and [2] ("the Earlier Buyer") with respect to the Property ("the Prior Contract") by 5 pm on [3] failing which either party may by notice to the other, terminate this Contract in which event the Deposit must be refunded to the Buyer.
2. The Seller must give the notice to the Buyer forthwith upon the termination of the Prior Contract.
3. The Seller must, at all times, act reasonably.
4. The Seller may waive the benefit of this Special Condition.

LEGEND: *[1] Date of Prior Contract*
 [2] Name of Buyer under Prior Contract
 [3] Date for valid termination of Prior Contract

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7. SUNSET CLAUSE

If a better offer is received, then this Contract is to be made unconditional or is to be terminated.

1. In the event the Seller receives a written offer on terms considered by the Seller to be more favourable before this Contract becomes unconditional, the Seller may give notice ("the Notice") to the Buyer of such an offer together with a copy of the offer.
2. The Buyer, upon receipt of the Notice may elect to declare this Contract unconditional in relation to clauses 3 and 4 of the Terms of Contract and any Special Condition by giving notice of such election ("Notice of Election") to the Seller by 5 pm on the day being [1] Business Days of receipt by the Buyer of the Notice.
3. Should the Buyer not deliver a Notice of Election in accordance with this Special Condition, then this Contract is deemed to be at an end and the Deposit must be refunded to the Buyer. Neither party will after that date have any claim against the other except in respect of any breaches of Contract which may occur prior to the date of termination.

LEGEND: [1] Number of Business Days to declare Contract unconditional

NOTE: This clause can be adapted to suit any conditional Contract.

8. FLOOD CLAUSES

8.1 Subject to Flood Enquiries

1. This Contract is conditional upon the Buyer being satisfied within [1] Business Days of the Contract Date that the Property is not likely to be affected by flood waters ("the Due Date").
2. If the Buyer is not satisfied with its enquiries, the Buyer may by notice to the Seller by 5 pm on the Due Date terminate this Contract, in which event the Deposit must be refunded to the Buyer in full.
3. In the event that the Buyer does not terminate this Contract by 5 pm on the Due Date, then this Special Condition shall be deemed to be satisfied and this Contract shall no longer be subject to this Special Condition.
4. The Buyer must immediately take all such steps and make all such reasonable enquiries that may be necessary to satisfy the Buyer.
5. The Buyer must act reasonably in relation to this Special Condition.

LEGEND: [1] Number of Business Days for Buyer's flood enquiries

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8.2 Buyer's Acknowledgement that the Property is Affected by Flood

1. The Buyer acknowledges that the Property, or part of it, has in the past been subject to flooding and the Buyer has entered into this Contract with this knowledge. The Buyer must not raise any requisition or objection to the Title of the Seller and confirms that the previous flooding cannot be relied upon as a grounds for termination of this Contract or compensation in any form whatsoever.
2. The Buyer acknowledges that no warranties or representations by the Seller or the Agent in relation to flooding have been made to the Buyer relied upon by the Buyer in entering this Contract.
3. The Buyer may not allege any Title Encumbrance by reason of the Local Authority or other government agency identifying that the Property is subject to flooding and consequently that any use of the Property may be affected by reason of flooding.

9. DEPOSIT AND COMMISSION CLAUSES

9.1 Deposit – Standard Terms

The standard terms of Contract require the Buyer to pay the initial deposit “on the day the Buyer signs this Contract unless another time is specified below”. That wording does not contemplate:

The Buyer wishing to delay payment of the Initial Deposit pending the Seller accepting the Buyer's offer;

A delay in the Buyer's funds being received by the Deposit Holder as a result of a funds transfer.

We recommend that any initial deposit that is not to be paid by cash, cheque or immediately cleared funds should be made payable:

“within 2 Business Days of Contract Date”.

9.2 Insufficient Deposit - Protection of Seller's Agents Commission

1. In the event that the Deposit held by the Deposit Holder is not sufficient to pay the Seller's Agent its commission and advertising expenses plus GST as applicable then the Buyer and Seller agree that the Buyer is hereby irrevocably authorised and directed to pay the balance commission and advertising expenses plus any GST applicable on behalf of the Seller to the Agent from the Balance Purchase Price on the Settlement Date. This Special Condition is expressed to be for the benefit of the Agent in accordance with Section 55 of the Property Law Act 1974 as amended. The Seller by executing this contract accepts the benefit of this Special Condition on behalf of the Agent.

9.3 Deposit Paid by Bank Guarantee

Many Sellers, including developers, will allow Buyer's to pay the Deposit by way of a Bank Guarantee or Bank Bond. The standard Terms of Contract do **not** allow a Deposit (or any part) to be paid by Bank Guarantee or Deposit Bond.

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The following clause allows a Buyer to lodge a Bank Guarantee or Bond in place of a Cash Deposit:

1. The Buyer will be entitled to deliver to the Deposit Holder an unrestricted Bank Guarantee ("The Bank Guarantee") from a bank ("the Bank") approved by the Seller in an amount equal to the amount of the Deposit, in place of the deposit.
2. If the Buyer fails to provide a Bank Guarantee in lieu of the Deposit (and does not otherwise pay the Deposit in accordance with the Terms of Contract) then the Buyer will be in breach of this Contract entitling the Seller to all rights specified in the Terms of the Contract arising from a failure to pay the deposit.
3. The Deposit Holder may make demand on the Bank under the terms of the Bank Guarantee, after request from the Seller, for payment of the sum guaranteed in any circumstances in which the Seller is entitled to forfeit the Deposit under this Contract, at which time the Deposit Holder will deal with the monies received from the Financial Institution in accordance with the Terms of this Contract.
4. The payment by the Bank under the Bank Guarantee will, to the extent of the amount, be paid in satisfaction of the Buyer's obligation to pay the Deposit under this Contract.
5. On the Settlement Date, the Buyer will pay the full Balance Purchase Price without deduction for any amount of any Bank Guarantee provided by the Buyer. In exchange for payment of the Balance Purchase Price pursuant to the Terms of the Contract, the Seller must arrange for the return of the Bank Guarantee to the Buyer.
6. The Seller hereby irrevocably directs the Buyer and/or the Buyer's Solicitor to pay to the Agent from the Balance Purchase Price, contemporaneously with Settlement, the amount of the commission and advertising expenses plus GST payable to the Agent.
7. Where the Buyer has paid any amount by way of deposit through a means other than a Bank Guarantee, then, upon the buyer paying the full deposit by Bank Guarantee in accordance with this Special Condition, any other amount paid by way of deposit shall be refunded to the Buyer.

9.4 Release of Deposit Prior to Completion – When Unconditional

1. Notwithstanding clause 2.4 of the Terms of Contract, the parties hereby authorise and direct the Deposit Holder to release to the Seller the Deposit, less the amount of the Agent's commission and advertising costs plus GST, upon:
 - 1.1 clauses 3 and 4 of the Terms of Contract; and
 - 1.2 all Special Conditions of this Contract, being satisfied or waived, as the case may be.
2. The parties agree that the Deposit may still be refundable to the Buyer in the event that the Settlement of the sale of the Property does not proceed by reason of default on the part of the Seller and thus this Contract shall not be deemed to be an instalment Contract and the rights of the parties in respect of a default by the other party remain unchanged.

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10. DECEASED ESTATE CLAUSES

10.1 Subject to Registration of Record of Death – Deceased Joint Tenants on Title

1. This Contract is conditional upon the registration of a Form 4 Request to Record Death (“the Form 4”) with the Department of Natural Resources and Mines and Energy/Titles Registry, so that the Seller is recorded as the sole registered owner by the Settlement Date. The Seller must take all steps as may be necessary to effect the lodgement and registration of the Form 4 as expeditiously as possible.
2. The Seller must give notice to the Buyer of the registration of the Form 4 as soon as practicable after receiving the Registration Confirmation Statement from the Department of Natural Resources, Mines and Energy/Titles Registry.
3. If this Special Condition is not satisfied by [1] either party may terminate this Contract and any monies paid by way of deposit must be refunded to the Buyer.

LEGEND: [1] Date for satisfaction of Special Condition

This clause is necessary when the Property is owned by two (2) people as joint tenants and one (1) of the owners has died.

The Contract should be prepared in the name of the surviving joint tenant only.

Allow at least fourteen (14) days from lodgement of registration of Record of Death and check with the Seller’s Solicitors how long it will be before the Request will be lodged at the Titles Office/Land Registry Office.

10.2 Subject to Registration of Transmission by Death

1. This Contract is conditional upon registration with the Department of Natural Resources, Mines and Energy/Titles Registry Office of a Transmission by Death in favour of the Seller in the Seller’s capacity as [1] by the Settlement Date. The Seller agrees to take all such steps as may be necessary as expeditiously as possible to effect the lodgement and registration of the Transmission by Death.
2. The Seller must give notice (“Notice of Registration”) to the Buyer of the registration of the Transmission by Death as soon as practicable after receiving the Registration Confirmation Statement from the Department of Natural Resources, Mines and Energy/Titles Registry Office.
3. If this Special Condition is not satisfied by [2] either party may terminate this Contract and any monies paid by way of deposit must be refunded to the Buyer.

LEGEND: [1] Add either “Personal Representative” or “Devisee” (Beneficiary)
[2] Date for satisfaction of Special Condition

This clause is necessary when the Property is registered in the name of a deceased person and is to be transferred to the Buyer as Personal Representative of the Estate or the Seller as ultimate owner (i.e. devisee/beneficiary).

The Contract should be prepared in the name of the Personal Representative of the deceased as Personal Representative or in the name of the Devisee as Seller.

Variations may be required if the Property is owned by more than one (1) person.

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Allow at least one (1) month from lodgement for registration of Transmission by Death. Check with the Seller's Solicitors how long it will be before the application for Transmission by Death will be lodged at the Department of Natural Resources, Mines and Energy/Titles Registry.

11. POSSESSION AND ACCESS CLAUSES

11.1 Access Clause

Clause 8.5 of the Contract allows for the Buyer to take possession before settlement. There is a difference between **access**, which may be to simply perform tests or store goods, and **possession**, which would mean the Buyer taking possession of the entire property to the exclusion of the Seller prior to settlement.

1. The Seller hereby authorises the Buyer and their servants and Agents to enter upon the Property, upon giving [1] Business Days' notice for the purpose of [2];
2. The Buyer indemnifies the Seller against any damages incurred by the Seller as a result of the Buyer's access to the property.

LEGEND: [1] Number of Business Days' Notice
[2] Insert details of reason for access (ie. valuations, renovations, repairs, investigations,, soil tests etc.)

11.2 Early Possession

1. The Seller agrees to give the Buyer's possession of the Property on [1]. The Buyer waives its rights pursuant to Clause 3, 4 and 7 of the Terms of Contract, apart from clause 7.1, from the date the Buyer enters into possession of the Property. Possession of the Property is given by the Seller to the Buyer in accordance with the Terms of Contract.

LEGEND: [1] When possession is to be given.

A residency of twenty-eight (28) days or less does not require documentation to be completed under the Residential Tenancies and Rooming Accommodation Act 2008 (Qld).

Where the Buyer agrees to rent the property for a period of more than 28 days prior to settlement, the relevant special conditions as follows:-

11.3 Rental Before Settlement (more than 28 days)

1. The Buyer agrees to rent the property from the Seller and:
 - 1.1 The Seller agrees to rent the property to the Buyer from [1] until the Settlement Date.
 - 1.2 The Seller and Buyer agree that the amount of rent to be paid by the Buyer to the Seller from the date of possession until the Settlement Date will be \$[2] per week payable upon completion of this Contract or earlier termination of the Contract following the Buyer taking possession.
 - 1.3 The parties agree that the Terms of the Tenancy will be those as are contained in the standard REIQ Residential Tenancy Form, a copy of which is annexed hereto and the parties agree to execute the said Tenancy Agreement contemporaneously with the Buyer obtaining possession of the property. Clause 8.5 of the Terms of Contract (or 8.6 of the Contract for *Residential Lots in a Community Titles Scheme*) do not apply.

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LEGEND: [1] Buyer's possession date
[2] Amount of rent per week

A completed copy of the REIQ Residential Tenancy Agreement should be annexed to the Contract and a separate Tenancy Agreement in that same form should be signed before possession by the Buyer.

11.4 Rented by Seller for more than 28 days after Completion

Where the Property is to be Rented Back by the Seller from the Buyer after Settlement for a period of less than 28 Days the Residential Tenancies and Rooming Accommodation Act does not apply.

Where the property is rented back by the Seller **for more** than 28 days, the following Clause is recommended:

1. The Buyer agrees to rent the Property to the Seller on and from the Settlement Date for a period of [1] at a rental of \$[2] per week to be paid [3] weeks in advance, by the Seller to the Buyer at Settlement, commencing on Settlement Date.
2. The parties agree that the Terms of the Tenancy will be those as are contained in the standard REIQ Residential Tenancy Agreement, a copy of which is annexed hereto and the parties agree to execute a Tenancy Agreement in that form contemporaneously with or prior to the completion of this Contract. Clause 5.3(1)(d) of the Terms of Contract does not apply and clause 5.5 will be read accordingly.

LEGEND: [1] Period of Tenancy
[2] Amount of rent per week/month
[3] Number of weeks rent must be paid in advance

A completed copy of the REIQ Residential Tenancy Agreement should be annexed to the Contract and a separate Tenancy Agreement in that same form should be signed before Settlement. This clause can be altered to suit the circumstances.

11.5 Bond Clean

1. This Contract is subject to the Seller having the Property cleaned to "Bond Clean Standard" prior to Settlement.
2. The Agent will in its sole opinion, determine whether the clean has been completed sufficiently.
3. The term "Bond Clean Standard" shall mean a standard of cleanliness and presentation which in the opinion of the Agent presents the property fit for human habitation and shall be a state similar to that executed as the commencement and end of a residential tenancy. In the event that the Seller does not comply with this condition, the Buyer shall be entitled to deduct from the Balance Purchase Price an amount reasonably required to engage a cleaner to clean the Property to a "Bond Clean Standard", such amount to be based on the Agent's opinion as what amount is reasonable.

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12. SEARCH CLAUSES

12.1 Subject to Soil Test

1. This Contract is conditional upon the Buyer obtaining a Soil Test Report to the Buyer's Satisfaction within [1] business day from the Contract Date ("the Soil Test Report Date").
2. If the Soil Test Report is not to the Buyer's satisfaction, the Buyer may by notice to the Seller, terminate this Contract by 5 pm on the Soil Test Report Date, in which event the Deposit must be refunded to the Buyer.
3. The Buyer must, at all times act reasonably and take all reasonable steps to obtain a Soil Test Report.
4. If the Buyer does not terminate this Contract by 5 pm on the Soil Test Report Date, the Buyer shall be deemed to be satisfied with the report of the Soil Test and this condition shall be satisfied.
5. This Special Condition may be waived by the Buyer at any time prior to 5pm on the Soil Test Report Date.
6. The Buyer must act reasonably in relation to this Special Condition.

LEGEND: [1] Number of Business Days to obtain a Soil Test Report

12.2 Body Corporate Search

1. This Contract is conditional upon the Buyer conducting a satisfactory inspection of the Body Corporate records within [1] Business Days from the Contract Date ("the Due Date").
2. If the Buyer is not satisfied with its inspection of the Body Corporate records, then the Buyer may terminate this Contract by written notice to the Seller at any time before 5 pm on the Due Date whereupon the Deposit monies must be refunded to the Buyer.
3. If the Buyer does not terminate this Contract by 5 pm on the Due Date, then this condition is deemed to be satisfied.
4. This Special Condition may be waived by the Buyer at any time prior to 5pm on the Due Date.
5. The Buyer must act reasonably in relation to this Special Condition.

LEGEND: [1] Number of Business Days in which to complete Body Corporate Records search

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12.3 Due Diligence Clause – Basic

1. This Contract is conditional upon the Buyer conducting a satisfactory investigation in relation to the Property within [1] Business Days from the Contract Date (“the Due Diligence Date”).
2. If the Buyer is not satisfied with its investigations of the Property, the Buyer may terminate this Contract by written notice to the Seller at any time before 5 pm on the Due Diligence Date whereupon the Deposit must be refunded to the Buyer.
3. If the Buyer does not terminate this Contract by 5 pm on the Due Diligence Date, then this condition is deemed to be satisfied.
4. This Special Condition may be waived by the Buyer at any time prior to 5pm on the Due Diligence Date.

LEGEND: [1] Number of Business Days for Buyer’s Due Diligence investigations.

12.4 Buyer’s Acknowledgement of Disclosure

1. The Buyer acknowledges the following facts have been disclosed to the Buyer who, notwithstanding the Terms of Contract, agrees to raise no objection thereto nor exercise any right to terminate this Contract or claim any form of damages or compensation in respect of the following:

[List Disclosures]

Examples of Disclosure:

- (a) The Property has previously been adversely affected by flood;
- (b) The Land is affected by a proposal of a competent authority to alter the dimensions of a road or railway abutting the Land and waives all rights in relation to clause 7.7 of the Terms of Contract;
- (c) The swimming pool fence may not comply with all statutory requirements;
- (d) A final building clearance has not been obtained from the Local Authority in respect of [1];
- (e) There is an encroachment on the Land by a structure on an adjoining Property and the Buyer has relied upon his/her/its own enquiries in relation to such encroachment and waives his/her/its rights in relation to same pursuant to clause 7.5 of the Terms of Contract; and
- (f) The property is the subject of unregistered statutory encumbrances in relation to sewer/water/drainage.

NOTE: The above sub-clauses are simply examples and can be used separately.

Any disclosure of a “Title Encumbrance” should also be noted in the Reference Schedule “yes” to indicate that the property is affected by Title Encumbrances.

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12.5 No Reliance on Representations

1. The Buyer acknowledges that they have not relied on any representation by the Seller or any other person or corporation in and about entering into this Contract other than as set out herein and that the conditions and stipulations herein constitute the only agreement between the Buyer and Seller.

12.6 Subject to Survey

1. Notwithstanding anything to the contrary contained herein, this Contract is subject to and conditional on the Buyer obtaining a survey of the property to the buyer's satisfaction, in their absolute discretion, within [1] Business Days of the Contract Date ("the Survey Date").
2. In the event that the Buyer does not obtain a survey to the Buyer's satisfaction by the Survey Date, the Buyer may terminate this Contract by notice to the Seller by 5.00 pm on the Survey Date, in which case the Contract shall be at an end and all deposit monies shall be refunded in full to the Buyer.
3. The Buyer must act reasonably in relation to this Special Condition.
4. If the Buyer does not terminate this Contract by 5.00 pm on the Survey Date, this special condition is deemed to be satisfied.

13. TITLE CLAUSES

13.1 Subject to Issue of Substitute Title

1. This Contract is subject to the issue from the Department of Natural Resources and Mines/Titles Registry Office of a substitute Certificate of Title in the name of the Seller or a dispensation from lodging a Certificate of Title, as the case may be, within [1] Days of the Contract Date ("the Due Date"). The Seller must immediately make the necessary application at the Seller's cost to the Titles Office/Land Registry Office.
2. The Seller must immediately notify the Buyer of the satisfaction of the Special Condition.
3. The Settlement Date is to be [2] Days after the receipt by the Buyer of the notice by the Seller that this Special Condition is satisfied. If the Seller has not provided notice to the Buyer that this Special Condition is satisfied by 5:00pm on the Due Date, then either party may terminate this Contract by notice to the other and the Deposit must be refunded to the Buyer.

LEGEND: [1] Number of Days for substitution of Title or Dispensation from Lodging Certificate of Title Length of time allowed for application to be processed. We recommend an absolute minimum of twenty-one (21) days.

NOTE: Only necessary in instances where a Seller cannot locate the paper Certificate of Title for the Property. Many properties no longer have a Certificate of Title.

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13.2 Subject to Prior Transfer

1. In addition to any documents required pursuant to the Terms of Contract to be delivered at Settlement the Seller must deliver to the Buyer and the Buyer must accept at Settlement a stamped Transfer pursuant to the Land Title Act 1994 such as is required to transfer Title in the Property to the Seller (the "Prior Transfer") together with an undertaking from the Seller or the Seller's Solicitor that the Seller will answer all requisitions which may issue from the Land Registry Office in relation to that Prior Transfer and the Seller will pay the registration fees and any requisition fee which may issue in relation to the Prior Transfer.

13.3 Subject to Transfer by Direction

1. The definition of "Transfer Documents" in the Terms of Contract includes a stamped transfer with an intermediate purchaser, **PROVIDED ALWAYS** that the Seller is liable for all Stamp Duty and registration fees in relation to the prior transfer and Contract and must stamp the prior transfer prior to Settlement of this Contract.

14. MISCELLANEOUS CLAUSES

14.1 Sale by Owner Builder

1. The Buyer acknowledges that the Buyer has received in duplicate a Notice pursuant to the Queensland Building and Construction Commission Act 1991 (as amended) advising the Buyer that the building was constructed by an Owner Builder and executed and returned one copy of that Notice to the Seller, prior to the execution of this Contract.

NOTE: In addition to the insertion of the above clause on the Contract, a notice in **duplicate** pursuant to the Queensland Building and Construction Commission Act 1991 needs to be given by the Seller to the Buyer **before** the execution of the Contract. A draft notice is outlined below.

Owner Builder Notice Under Queensland Building Construction Commission ACT 1991

1. I/We [1] hereby give notice pursuant to the Queensland Building and Construction Commission Act 1991 that the following works were undertaken on the property located at [2] as detailed in the attached copy of Application for Owner-Builder Permit:

[3]

2. And these works as detailed in the said notice have been carried out under an Owner-Builder Permit by myself/ourselves being the nominated permit holder/s named in the said Owner-Builder Permit, the said property having been offered for sale within six (6) years after completion of the said building work and I/we give warning in the following terms.

WARNING:

THE BUILDING WORK TO WHICH THIS NOTICE RELATES IS NOT COVERED BY INSURANCE UNDER THE QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION ACT 1991 AS AMENDED.

Dated this day of

.....
(Sellers to sign)

I/we [4] hereby acknowledge that we receive the original of this notice prior to signing a Contract of Sale in relation to the abovementioned Property.

Dated this day of

.....
(Buyers to sign)

[TO BE GIVEN IN DUPLICATE]

LEGEND: [1] Full name of Sellers
 [2] Address of Property
 [3] Details of building work i.e. construction of dwelling
 [4] Full name of Buyer/s

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14.2 Subject to Foreign Investment Review Board Approval

- 1.1 Clause 10.2 of the Terms of Contract does not apply.
- 1.2 Where the Buyer is a foreign person for the purposes of the Foreign Acquisition and Takeovers of Land Act 1975, completion of this Contract is subject to the Buyer obtaining approval from the Federal Treasurer on terms satisfactory to the Buyer for the purchase of the Property within [1] days from the Contract Date.
- 1.3 If such approval is not obtained by that date, then either party may terminate this Contract by notice to the other and the Deposit must be refunded to the Buyer. The Buyer agrees to do all acts and things as may be reasonably necessary to obtain such approval.

LEGEND: [1] Number of days to obtain approval. We recommend a minimum of forty (40) days.

14.3 Subject to Body Corporate Approval for Pet

1. This Contract is subject to and conditional upon the Body Corporate providing written approval within [1] days from the Contract Date (“the Pet Approval Date”) that the Buyer may keep a [2] in the Property.
2. Should approval not be obtained by the Pet Approval Date the Buyer may elect to waive the benefit of this clause or terminate the Contract and all deposit monies will be refunded in full.
3. If the Buyer has not elected to waive the benefit of this clause or terminate the Contract by 5 pm on the Pet Approval Date then the Seller may elect to terminate this Contract and all deposit monies will be refunded to the Buyer in full.

LEGEND: [1] Number of days to obtain approval.
[2] Details of pet.

14.4 Property at Seller’s Risk until Settlement Date

1. Notwithstanding the provisions of the Terms of Contract, the Seller and Buyer hereby agree that the property shall be at the Seller's risk up to and until completion of the Contract.

14.5 Property Sold and Accepted “As Is, Where Is” – No Objections by Buyer

1. This Property is sold by the Seller and accepted by the Buyer on an “As Is, Where Is” basis. The Buyer has relied upon their own investigations and judgement in assessing:
 - 1.4 the condition of the Property;
 - 1.5 the location of the Property (including but not limited to any and all encroachments and / or misdescriptions);
 - 1.6 the Title Encumbrances (with the exception of any mortgage, writ or caveat which must be released at or by settlement); and
 - 1.7 the requirements of any competent authority;

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and hereby waives any right they may have under the Contract or otherwise to terminate this Contract or to claim compensation from the Seller or any related party in connection with the abovementioned matters.

NOTE: Any Title encumbrances must still be disclosed in the Reference Schedule.

15. METHODS OF CALCULATION OF TRANSFER DUTY

DBL can provide estimates of Transfer Duty using the calculator provided by the QLD Office of State Revenue (OSR).

Details of transfer duty, rates and criteria for concessions and exemptions can be found on the OSR Website.

15.1 Transfer Duty Rates

Investment / Vacant Land:

<https://www.qld.gov.au/housing/buying-owning-home/advice-buying-home/transfer-duty/how-much-you-will-pay/calculating-transfer-duty/transfer-duty-rates>

First Home Concession:

<https://www.qld.gov.au/housing/buying-owning-home/advice-buying-home/transfer-duty/how-much-you-will-pay/calculating-transfer-duty/home-transfer-duty-concession-rates>

Home Concession:

<https://www.qld.gov.au/housing/buying-owning-home/advice-buying-home/transfer-duty/how-much-you-will-pay/calculating-transfer-duty/home-transfer-duty-concession-rates>

Transfer Duty Calculator:

http://amun.osr.qld.gov.au/sap/osrqld/wd_tfr_calc_com

15.2 Additional Foreign Acquirer Duty (AFAD)

Additional duty of 7% (presently) applies to acquisitions of residential land by foreign persons (including companies and trusts). A foreign person excludes those who are Australian Citizens or **permanent residents**. The duty will also **not apply** to a New Zealand citizen who is the holder of a permanent visa or is the holder of a special category visa under the *Migration Act 1958 (Cth)*.

<https://www.business.qld.gov.au/industries/service-industries-professionals/professional-financial-services/transfer-duty/investors/afad>

Theoretically the issue of Transfer Duty payable by a Buyer is not a concern of the Seller's Agent. To reduce the risk of the Buyer getting "cold feet" after finding out about the AFAD, it may be something about which the Buyer should be directed to obtain legal advice prior to the contract being entered into.

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15.3 Acreage With House

Transfer Duty on acreage properties depends on the use of the Property. If all of the Property is used for residential use and enjoyment, then, for Transfer Duty purposes, concessional Transfer Duty rates will apply to the total amount paid.

If part of the Property is not used for residential purposes, for example farming purposes, then the value of the residential part of the property will have to be ascertained. The concessional rate of Transfer Duty will apply to the value of the residential area and the investment rate of Transfer Duty will apply to the value of the balance of the land.

NOTE: Situations like these are normally assessed by the Office of State Revenue on a case-by-case basis. We recommend that you contact the Office of State Revenue or our firm to discuss these matters when applicable.

16. GST WITHHOLDING INFORMATION

The REIQ Contract asks whether the Buyer is registered for GST and acquiring the Land for a creditable purpose. Generally the answer to this question will be "No". If the Buyer is a registered entity acquiring the Land for a creditable purpose, then the Seller does not need to notify the Buyer in writing as to whether or not there is a requirement to withhold.

The answer to the second question as to whether the Buyer is required to make a payment under the Withholding Law or not, this depends on whether the property is 'new residential premises' (i.e. a new home) or 'potential residential land'.

Whether land is 'potential residential land' can sometimes be problematic. The assumption should be that all vacant land in a residential area is 'potential residential land' and if in doubt, the Sellers should seek legal advice. There are some circumstances where the sale is vacant land but the Seller is not registered, or required to be registered, for GST.

Generally the amount which will be withheld will be 1/11th of the purchase price but when the Margin Scheme applies, the rate may be 7%.

17. FOREIGN RESIDENT CAPITAL GAINS WITHHOLDING INFORMATION

Foreign resident capital gains withholding applies to vendors disposing of certain taxable Australian property. The legislation imposes an obligation on buyers to withhold 12.5% of the purchase price and pay it to the ATO where the Seller has not obtained a clearance from the ATO. This applies to all sales where the market value is \$750,000 or more (including where the Sellers are Australian residents).

It is wise to advise any Seller where the market value is likely to be \$750,000 or more to apply for a Clearance Certificate at the time of listing the property so that any delays experienced in obtaining the Clearance Certificate do not hold up settlement. The Seller can obtain a Clearance Certificate by downloading a form from the ATO website:

<https://www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Capital-gains-withholding--Impacts-on-foreign-and-Australian-residents/?anchor=Clearancecertificates#Clearancecertificates>.

NOTE: Only a Seller who is an Australian resident can be granted a clearance certificate by the ATO. So if you have clients from overseas who have invested in Australia we strongly

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recommend they get the appropriate advice on their property portfolios from their Accountants before listing and selling their property.

A foreign resident seller can claim a credit for the foreign resident capital gains withholding payment by lodging a tax return for the relevant year.

Ensure all Sellers of property which might sell for over \$750,000 have Clearance Certificates. Provide a copy of the Clearance Certificate with the Contract.

Identify whether Sellers are foreign residents.

Where the Seller of property worth over \$750,000 is a foreign resident and proposes to list with you, ensure the Seller obtains advice about the Foreign Resident Capital Gains Withholding Payment regime.

18. DISCLAIMER

Whilst care has been taken in the preparation of this manual, no responsibility is accepted by DBL Solicitors or its staff for any errors, omissions or inaccuracies whatsoever.

This text is not intended nor is it suitable for members of the public, but as a guide to assist Real Estate Agent's in the preparation of Contracts for the Sale of Land and Residential Dwellings. It is not to be relied upon as comprehensive legal advice.

DBL Solicitors encourages all Real Estate Agent's to arrange for a member of our staff or another Solicitor to examine all Contracts before forwarding them to Seller's and Buyer's for signing so that any ambiguity or uncertainty about the effect of certain clauses can be addressed.