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In 1995 Tony completed the Property Agency TAFE course which is the most usual educational qualification for holders of licences under the Property Stock and Business Agents Act 1941.

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Introduction

This paper is designed to provide an overview of the law and practice relating to what are commonly called “requisitions on title”. After analyzing some of the general principles governing requisitions, the paper will consider several cases which raise practical problems about making (and replying to) requisitions.

The classification of requisitions and objections

The scope of the questions, inquiries, and demands made by a purchaser on a vendor go far beyond what are strictly called requisitions on title. The matters covered in a typical transaction are a mix of perhaps half a dozen different classifications of “requests”.

Why a session on requisitions?

- The making of, and replies to, requisitions are both seemingly inevitable parts of a variety of conveyancing transactions (most often, but not limited to, sales and purchases).
- Arguably, the primary rationale for requisitions has largely evaporated with the decline in common law title and the rise in vendor disclosure. Therefore, it may be worth considering whether requisitions have a role to play in conveyancing as performed in “modern times”. It is interesting to note that since 28 September 2008 one of the forms of contract available for use in Victoria has replaced the purchaser’s right to raise requisitions with wide-ranging (but excludable) contractual warranties – Estate Agents (Contracts) Regulation 2008 section 5 and forms 1 and 2 in the Schedule to the Regulation.
- There have been a number of relatively recent cases focusing on the requisitions process and highlighting some of the problems which can arise.
The first traditional differentiation is between “requisitions” and “objections”. Strictly, a requisition is a request by the purchaser for the vendor to take some action, or to provide some information. By contrast, an objection is a statement by the purchaser that the vendor is unable to complete the contract in accordance with its terms.

Practitioners who have only ever used the 1996 or later editions of the contract for the sale of land can place the above distinction in their ‘trivia file’ – see the definition of “requisition” in cl 1. In other documents involving “requisitions”, the distinction may still be significant. Despite the terms being used interchangeably by many practitioners, occasionally a case will turn on the distinction. For example, a contract for sale which precludes any “requisition or inquiry” concerning the title did not prevent the purchaser making an objection to title – *Waddell v Wolfe* (1874) LR 9 QB 515. The logic of this is that the courts will construe strictly a clause which purports to remove the rights of a purchaser to raise matters regarding potential problems with the property by way of requisition or objection.

The leading Australian authority on requisitions (*Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd* (1972) 128 CLR 529) recognised four categories of objections and requisitions:

1. **Requisitions or objections as to title:** these are matters relating to the title to the subject matter of the sale – for example, easements or covenants affecting the property, or encroachments. Such matters are commonly contrasted with matters relating to the quality of the subject matter of the sale, which are not properly the subject of a requisition or objection as to title – to take one example, whether a property is subject to flooding. If a purchaser is allowed to ask a question about quality matters, such right will arise under one of the other categories.

2. **Requisitions or objections as to conveyance:** these are matters which go to the way in which the subject matter of the sale is to pass to the purchaser. They differ from the first category in that, typically, a conveyance matter relates to either the form of documents required to vest title in the purchaser or to the activities of third parties, such as discharging mortgagees or existing caveators. Some examples include the use of a transfer by direction, the proper execution of documents to be handed over on
settlement, and, it is suggested, the time and place for settlement
(for a more comprehensive list see Skapinker: Sale of Land in
NSW: Commentary and Materials (5th edition, 2010) at para
10.60).

3. **Requisitions in the nature of general enquiries**: these are best
described as matters about which solicitors are accustomed to ask.
To quote Barwick CJ in Godfrey Constructions (cited above; at
page 536):

> Some of these requisitions may relate to structures on the land or
to physical features connected with it, which may not accord with
the contractual terms as, for example, the connection of water or
sewerage services through common facilities. These are, in my
opinion, truly requisitions demanding something of or some
action on the part of the vendor. Other ‘requisitions’ are merely
inquiries for information. Some of this information the purchaser
might have been able to ascertain by his own endeavours: perhaps
he really seeks the vendor’s admission of the facts.

(For the sake of completeness it should be noted that the specific
example provided by His Honour is dealt with by the standard
contracts).

Stonham provides a list of common matters falling within this
category – for example, matters to be dealt with on completion,
such as adjustments or the documents to be handed over; the
existence of any statutory notices, matters affecting the nature,
quality, use or the value of the property; or any matters which
might be relevant to equitable relief if a problem arises under the
contract.

4. **Requisitions in the nature of reminders**: examples of these
include a requisition that a caveat must be removed prior to
settlement, or that vacant possession must be delivered on
completion. On one view, these are not truly requisitions at all,
since they do nothing more than remind a vendor of something
which the vendor is contractually obliged to do in any event.
However, High Court authority is not to be trifled with.

Why worry about these classifications? Principally, because they are
relevant to the limiting of time for the making of requisitions. This will be
discussed in more detail below; suffice to say at this stage that certain
types of requisitions can be made outside the time limits contained in the
contract.
What does the standard contract say about requisitions?

The principal provision in the current standard contract dealing with requisitions is provision 5, which says:

5  Requisitions

If the purchaser is or becomes entitled to make a requisition, the purchaser can make it only by serving it —

5.1 if it arises out of this contract or it is a general question about the property or the title – within 21 days after the date of this contract;

5.2 if it arises out of anything served by the vendor – within 21 days after the later of the date of this contract and that service; and

5.3 in any other case – within a reasonable time.

Provision 8 is also relevant:

8  Vendor’s right to rescind

The vendor can rescind if —

8.1 the vendor is, on reasonable grounds, unable or unwilling to comply with a requisition;

8.2 the vendor serves a notice of intention to rescind that specifies the requisition and those grounds; and

8.3 the purchaser does not serve a notice waiving the requisition within 14 days after that service.

Finally, provision 10 is relevant in that it sets out what are not appropriate matters for requisitions (or claims, rescission or termination):

10.1.1 the ownership or location of any fence as defined in the *Dividing Fences Act* 1991;

10.1.2 a service for the property being a joint service or passing through another property, or any service for another property passing through the property (‘service’ includes air, communication, drainage, electricity, garbage, gas, oil, radio, sewerage, telephone, television or water service);

10.1.3 a wall being or not being a party wall in any sense of that term or the property being affected by an easement for support or not having the benefit of an easement for support;

10.1.4 any change in the property due to fair wear and tear before completion;

10.1.5 a promise, representation or statement about this contract, the property or the title, not set out or referred to in this contract;
10.1.6 a condition, exception, reservation or restriction in a Crown grant;
10.1.7 the existence of any authority or licence to explore or prospect for gas, minerals or petroleum;
10.1.8 any easement or restriction on use the substance of either of which is disclosed in this contract or any non-compliance with the easement or restriction on use; or
10.1.9 anything the substance of which is disclosed in this contract (except a caveat, charge, mortgage or writ).

It is probably more interesting to consider what the contract does not say:

➢ There is no reference in those clauses of the 1996 or later editions of the contract (as there was in the earlier editions) to “objections”. This is because, as previously mentioned, the 1996 contract now defines “requisition” to include a question or objection (but not a claim).

➢ The contract does not specify what are proper or appropriate requisitions. Whether a purchaser is entitled to make a requisition is governed by the general law (although clause 10 provides a detailed list of matters about which the purchaser is not entitled to requisition). For this reason, knowledge of the ‘traditional’ classifications of requisitions is necessary to deal with an unusual matter the subject of a requisition.

➢ Nor does the contract impose an obligation on a vendor to reply to requisitions. It is clear that, if a purchaser is entitled to make a requisition, the purchaser is entitled to an answer.

➢ The contract also imposes no time for answers to requisitions to be supplied – at least not explicitly. The parties should note the general obligation imposed by provision 21.1, which states: “If the time for something to be done or to happen is not stated in these provisions, it is a reasonable time”.

So what does the contract in fact do about requisitions?

➢ The contract specifies how a requisition is to be made. Note that a requisition, to be effective, must be served – which means served in writing on the other party (provision 1). Whatever may be the position at common law, oral requisitions are ineffective under this contract.
The contract divides requisitions into three groups, and in each case specifies the time within which requisitions must be made. These groups are:

1. “21 days after contract” requisitions. These will be the most common category of requisitions, and include:
   - General questions about the property;
   - General questions about the title;
   - Requisitions arising out of the contract.

   What is a “requisition arising out of the contract”? I suggest these would include any matters covered by a specific contractual provision, or an attachment to the contract (to the extent the latter category is not excluded under provision 10).

2. “21 days after service” requisitions. Clause 5.2 provides for requisitions arising out of anything served by the vendor. If served on or before the date of the contract, the purchaser has 21 days after the date of the contract to raise a requisition. If served after the date of the contract, time starts to run from the time of service.

   Most requisitions which would fall within this clause would relate to an abstract of title (assuming the vendor did not take the hint contained in cl 25.3, and attach the abstract to the contract or ‘lend’ it to the proposed purchaser before the contract was made). To give another example: a purchaser who receives from the vendor a copy of a notice of exercise of option sent to the vendor by the current lessee would have 21 days from service to raise a requisition.

3. “In any other case” requisitions – the time limit is a reasonable time, which will depend on all the circumstances. For an example of a requisition which might fall within provision 5.1.3, consider a survey obtained by the purchaser which discloses a problem.

As to time limits, note that the time for making requisitions is “of the essence”. The relevant authority in New South Wales is Shenstone v Hewson (1927) 28 SR (NSW) 53, which itself followed an English
decision, *Oakden v Pike* [1865] 34 LJ Ch 62. This approach has been criticised by various academic writers as being inconsistent with the overall approach to time limits in the contract, namely that time under the contract is generally not of the essence. The question is not free from doubt (see Butt: *The Standard Contract for Sale of Land in New South Wales* (2nd Ed, LBC 1998) at page 270, particularly the discussion of *Falconer v Wilson* [1973] 2 NSWLR 131 at page 270 footnote 71), but given the antiquity of *Shenstone’s* case it would be unwise for a practitioner acting for a purchaser to send requisitions out of time.

**Are there any requisitions to which these time limits do not apply?**

The common law has recognised several situations where, despite any contractual provision limiting the time within which requisitions must be made, the rights of the purchaser were preserved. Some of these situations are recognised in the latest edition of the contract for sale.

The major areas where “out of time” requisitions are allowed are:

1. Objections or requisitions as to conveyance – on the basis that such requisitions are, by their nature, requirements that the vendor convey to the purchaser all outstanding interests in the land, and so constitute no more than a demand that the vendor do what it is already obliged to do.

2. Reminders about the vendor’s obligations under the contract – on the same reasoning as set out above.

3. Claims for compensation – earlier editions of the contract tended to blur the distinction between, on the one hand, requisitions (and what were formerly distinguished as objections), and claims for compensation on the other hand. The latest edition of the contract removes much of the potential for confusion, firstly, by splitting the concepts between separate clauses, and secondly, by specifying that a claim for compensation can be made at any time up to completion.

4. The rule in *Want v Stallibrass* (1873) LR 8 Ex 175 – this case is the leading authority for the proposition that there are some objections to title which are so significant that they go to the “root of the title”; or to put it another way, the title was “wholly bad”. The logic of this principle, is that a purchaser cannot be regarded as having waived the right to insist on “the very basis of the
contract” being carried out. *Want v Stallibrass* involved a sale by a vendor as trustee under a will. The power of sale only arose on the death of the life tenant. At the date of the contract, the life tenant was alive (the reports are silent as to whether the life tenant was also well). An objection was raised out of time. The court held that the purchaser had not lost the right to raise the objection. The difficulty with this principle, is that it is not at all clear what constitutes a “wholly bad” title, and the doctrine has been successfully invoked in cases where the title could not be regarded as wholly bad. For example, the English case of *Re Brine and Davies’ Contract* [1935] Ch 388, applied the principle where the contract had promised a registered title but the abstract disclosed merely a possessory title. By contrast, the New Zealand case of *Ferguson v Hansen* [1931] NZLR 1156, held that a failure to disclose that 25% of the property had statutory restrictions on occupancy (with which the purchasers complied but which would restrict the market on resale) was not within the principle. Butt summarises the case law at pages 334 to 340, and correctly describes the cases as not “easily reconcilable inter se”.

5. **Requisitions *aliunde*** (from another source): historically, this class of requisitions arose from an era when the abstract was the sole source of information about the title. If the abstract failed to disclose a significant matter subsequently discovered by the purchaser during its investigation of title, it was thought unreasonable that a purchaser could not raise an objection or requisition. The principle is of less relevance in an era of registration, and there is no Australian authority which squarely raises the question of whether such requisitions have a place in the Torrens Title system. However such requisitions are contemplated by the standard contract, and would fall within cl 5.3.

**What should a vendor do about requisitions served out of time?**

What should a vendor do when confronted with requisitions apparently served out of time? A practice has developed with some practitioners acting for vendors, to supply answers “without prejudice”, or “by way of courtesy”.

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This practice has been criticised judicially. To quote Young J in *Pemberton Australia Pty Ltd v CPS Services Pty Ltd* (1990) NSW ConvR ¶55-534:

… it may well be that correspondence between solicitors will disclose that even though the vendor’s solicitor has said that she will not answer requisitions because they were out of time, that the course of correspondence effectively overrules that position. As one cannot blow hot and cold, there may be cases where the course of correspondence operates as an acquiescence in the late making of requisitions and can amount to the abandonment of the waiver …

In summary, it is probable that a purchaser can rely on replies furnished out of time.

On that basis, should the vendor refuse to reply to all requisitions where the requisitions are served out of time? The short answer is “no”, because of the possibility of some requisitions and questions being permitted to be made out of time. I suggest you analyse the questions to see whether any of them fall within one of the exceptional categories. The most likely examples will be “reminder” type requisitions – that is, those which deal with existing contractual obligations. It may be prudent in that situation to inform the purchaser:

(a) that the requisitions were received out of time.
(b) that accordingly, the vendor does not propose to provide an answer to every requisition.
(c) confirming that the vendor will comply with its existing contractual obligations.
(d) inviting the purchaser to advise you urgently if it believes it is entitled to a more specific reply to one or more of the requisitions.

**Should a purchaser serve requisitions out of time?**

Obviously it is not good practice to send requisitions out of time. Suppose, however, the purchaser’s practitioner is aware that the time for sending requisitions has passed. Is it worthwhile to send the requisitions anyway? I suggest yes, for the reasons dealt with in the preceding paragraph – an imprudent vendor may supply answers to all the requisitions, or you may be able to insist on replies to at least some of the questions.
Can a purchaser make an “improper” requisition?

A purchaser will sometimes raise a requisition which is invalid. Most commonly, this is because the requisition is precluded by the contract (for example, provision 10). Occasionally, the requisition may be objectionable, for example, because of its width (a fishing expedition will not be a proper requisition), or because it seeks to join the practitioner for the vendor, as well as the vendor, in the reply. If the requisition is objectionable, the vendor can decline to answer it (courtesy would indicate that the vendor’s reply specify why the requisition has not been answered).

What can a purchaser do about proper, but unanswered, requisitions?

The appropriate course for a purchaser in this situation is to allow a reasonable time for the supply of answers, and failing that, to issue a notice to perform. The failure to comply with such an order may give rise to a right of termination (which realistically a purchaser may not want) or a right to seek specific performance of the vendor’s contractual obligations (including answers to the requisitions).

What a purchaser generally should not do is issue a Notice to Complete. It has been held that a purchaser who issues a Notice to Complete, without requiring the vendor to answer outstanding requisitions, has waived the right to receive answers (Falconer v Wilson [1973] 2 NSWLR 131). In that case, the vendor was in breach of contract; the purchaser gave not a notice to perform but a notice to complete; the inference was that “the purchaser thereby waived all obligations precedent to completion and went simply to his right to have the contract completed”. For a more recent case on this point see Gustin v Taajamba Pty Ltd (1988) NSW ConvR ¶55-433.

Unwelcome requisitions and clause 8

Clause 8 has a distinguished pedigree. With the complexity of common law title, unwelcome requisitions were common, and the vendor typically gave itself an ‘out’. Over time, that clause extended to claims for compensation as well. However, the courts have tended to develop their own interpretations of such clauses. The main points to note are:

(a) The purchaser must have made a proper requisition.

(b) The clause clearly applies to requisitions (including objections) as to title – Pierce Bell Sales Pty Ltd v Frazer (1973) 130 CLR 575
– a case dealing with the removal of a restriction to transfer of a crown lands transfer.

(c) Despite the ‘expanded’ definition of requisition in cl 1 of the contract, it is not settled whether cl 8 in its present form will extend to other requisitions. The two leading High Court decisions are the Godfrey Constructions case, cited earlier, and Gardiner v Orchard (1910) 10 CLR 272; each case was, obviously, on an earlier edition of the contract, with significantly different wording, and in each case the various judges were divided.

(d) The vendor is not allowed to rescind using cl 8 for ulterior purposes – that is, the clause is limited in its operation to its purpose. See for example Re Deighton and Harris’ Contract [1898] 1 Ch 458.

(e) The vendor must act bona fide – Woolcott v Peggie (1889) 15 App Cas 42; Gardiner v Orchard cited above.

(f) The vendor must not have been reckless in entering into the contract. For example, Noske v McGinnis (1932) 47 CLR 563 involved a male vendor entering into a contract knowing his wife had lodged a caveat. The vendor was held not to be entitled to rescind under a clause akin to cl 8.

Much of the above falls within the concept of the vendor behaving reasonably. The concept is embodied in the standard clause by use of the words “on reasonable grounds” – words which are deleted by many practitioners acting for vendors. Apart from sending a message to prospective purchasers that the vendor feels the need to attempt to reserve the right to act unreasonably (not one designed to fill the prospective buyer with confidence), there must be considerable doubt, given the history of judicial glosses, whether such an amendment will actually work. The amendment is not one I would recommend to my clients.

One final point to note. Clause 8 must be read in the light of s 56(1) of the Conveyancing Act 1919, which requires that any notice of intention to rescind under a contract in a cl 8 situation must give the purchaser a reasonable time to waive the requisition. That provision is non-excludable. Clause 8 nominates a time of 14 days (although, like the rest of the contract, the clause is “subject to any legislation that cannot be excluded”).
A vendor issuing a notice under cl 8 will need to consider whether 14 days is, in the particular circumstances, a reasonable time.

**Attaching a standard forms of requisitions to contracts**

Practitioners acting for vendors are increasingly choosing to annex a standard form of requisitions (and possibly the replies) to the printed form. The trend is most noticeable in (but is not limited to) sales off the plan. Vendors and their practitioners argue that they do not want to be faced with every purchaser using a slightly different form of requisitions covering precisely the same ground. Purchasers quite properly take the view that they should have the right to raise any proper requisitions.

Can a compromise be achieved?

Clauses attaching a standard form of requisitions (and perhaps the replies to those) are not in themselves objectionable. Indeed, on one view many matters which are traditionally the subject of post-contractual requisitions would be better addressed as part of the process of contract drafting and formation. Where the practice becomes objectionable, it is suggested, is where the special condition removes the right of the purchaser to raise requisitions beyond the attached form, even as regards topics not contemplated in the form.

**Some case studies**

The decision of *Adolfson v Jengedor Pty Ltd* (1995) 6 BPR 14,147; (1996) NSW ConvR ¶55-775 contains some useful discussion on making and answering requisitions, as well as other matters (for example, defects in title and validity of a notice to complete).

The chronology was as follows:

(a) 4/3/94: contract exchanged (1992 edition) between A as vendor and J Pty Ltd as purchaser. The contract contained a number of special conditions. Three relevant special conditions dealt with: purchase of property in present condition and subject to faults and defects in quality both latent and patent; vendor’s right to issue 14 day notice to complete; and early possession.

(b) 7/3/94: printed form of requisitions on title submitted. Two significant questions are set out below:
Q. 14 Does any road, drain, sewer or stormwater channel intersect or run through the land? If so, what rights exist in respect thereof?

Q. 17(d) Are there any restrictions on the use of, or development of, the subject land by reason of land slip, bush fire, flooding, tidal inundation, noise exposure, subsidence or other risk?

(c) Shortly after 7/3/94: replies to requisitions supplied. The answer to each of the two questions above was: “The vendor relies on the Contract”.

(d) 14/4/94: purchaser took possession under licence in accordance with the contract.

(e) 27/5/94: due date for completion.

(f) 2/6/94: purchaser’s solicitor sought a one month extension for completion – request denied on 7/6/94.

(g) 9/6/94: vendor’s notice to complete served. The notice expired on 28/6/94.

(h) 27/6/94: letter from purchaser’s solicitor stating that during investigation as to title, it had been discovered that the property was detrimentally affected by the effluent run-off from the Richmond Racecourse adjoining the subject property. The letter went on to allege that the replies to the requisitions had been erroneous or misleading. The purchaser’s solicitor sought an extension of the notice to complete to 19 July to have further investigations carried out. The request was rejected.

(i) 29/6/94: notice of termination from vendor’s solicitor.

(j) 1/7/94: further request from purchaser’s solicitor for new date for settlement of 19 July 1994 – rejected by vendor.

(k) 6/7/94: purchaser’s caveat.


(m) 10/8/94: vendor commenced proceedings for declarations as to termination and forfeiture of deposit, order that defendant vacate the premises, and damages for mesne profits. Cross-claim for specific performance and compensation of $32,000.

His Honour heard detailed evidence about an alleged blockage in a septic tank system on the property, alleged flow of effluent from the racecourse into the subsoil on the front lawn of the property, and also a dam on the property. There were conflicts in the evidence between the parties, and
experts retained by the parties. His Honour generally preferred evidence by
or on behalf of the plaintiff to the evidence of the defendant, and the
findings of fact meant the defendant had to fail.

Of more general interest are his Honour’s comments about whether the
vendor was entitled to issue a Notice to Complete. The defendant claimed
three bases for resisting the termination following the Notice to Complete:
(a) the Notice to Complete was invalid because there was an existing
defect in title;
(b) the Notice to Complete was invalid because requisitions were not
properly answered;
(c) the Notice to Complete did not allow sufficient time for
compliance because the necessary investigative and remedial
work would take longer than 14 days.

His Honour rejected each of these submissions:
(a) His Honour considered several cases dealing with whether sewer
and stormwater mains constituted a defect in title, including the
New South Wales Court of Appeal decision of Micos v Diamond
(1970) WN (NSW) 513. His Honour concluded:

It should not be thought that merely because there is a sewer pipe
or an easement for drainage over the property that there is of
necessity a defect in title. One must look at the contract, the land
and the effect on the land of the sewerage pipe. In the instant case,
there are no statutory rights of any sewerage authority in the land,
there is no effect on any building; all there is if the defendant’s
evidence is accepted, is that there is pollution in the dam which
the defendant wants to fill in anyway because it breeds
mosquitoes which deleteriously affect his wife’s breeding dogs.
The problem, accordingly, cannot, in my view, be classed as a
defect in title which would inhibit the issue of a notice to
complete.

(b) As to the answers to requisitions, His Honour distinguished
between requisitions (or objections) “in the strict sense”, and the
wider category of “general questions about the property” (to use
the terminology of cl 5.2 of the 1992 contract). An outstanding
reply in the former case may mean that the vendor will not be
considered to be ready, willing, and able to complete, and, in His
Honour’s words, “unless the problem can be remedied during the
currency of the notice to complete (my emphasis) the notice to
complete may well be invalid”. In the latter case, while the
purchaser may be entitled to issue a notice to perform limited to the supply of a proper answer to the question, the failure to answer will not preclude issue of a vendor’s notice to complete. In this case, His Honour held the answer to the first requisition was not sufficient, as cl 10.1.2 only precludes requisitions in respect of a sewerage service for another property passing through the subject property. However, had the purchaser pressed the point,

… it is almost certain that the vendors could have given a proper answer in the time delimited by their own notice to complete, the answer either being ‘There are no roads or stormwater channels passing through the property’ or perhaps ‘Not to the vendors’ knowledge, purchaser should rely on its enquiries’.

As to the second reply, His Honour again considered this was not wholly dealt with in the contract, but an answer in the form “Not to the vendors’ knowledge” would have been in order. In essence, the purchaser’s failure to press for proper replies meant the vendors were still entitled to issue a notice to complete.

(c) His Honour considered that, on the facts of this case (in particular the inactivity by the purchaser between mid-March and 27 June regarding the problems), a fourteen day notice to complete was sufficient. His Honour indicated there may be a case where, despite the presence of a clause like special condition 6, a Court might allow a longer period than 14 days. His Honour reserved consideration of the situation where “… on the facts as both parties knew them as at the time of giving the notice to complete, there is a problem, which despite the proper endeavours of the other side, cannot be reasonably remedied within the 14 day period”. This case was not such a situation.

The case of Australian Mortgage and Properties Pty Ltd v Baclon Pty Ltd and ors [2001] NSWSC 774; [2001] ACL Rep (Issue 10) 355 NSW 58 occupied seven hearing days (and six appearances in the Expedition List) before Austin J. In large part the time occupied by this case appears to be due to the plaintiff’s lack of legal representation for most of the hearing. His Honour’s judgment contains a detailed exposition of what His Honour referred to as “a chequered history in a procedural sense” [at paras 5 to 52], and constitutes a useful caveat for anyone who is minded to undertake Supreme Court litigation without full legal representation.
By contract (2000 edition plus additional typed special conditions) dated 20 September 2000, Baclon agreed to sell to Australian Mortgage for a price of $1,395,000. Among the special conditions were what might be called ‘typical’ clauses regarding a 14-day notice to complete and 12% interest on the balance of the price if late settlement occurred. The deposit (approximately 5% of the price) was released on exchange. The purchaser’s address was noted as being care of an accountant’s office.

One other special condition is of significance. Special condition 12 was in the following terms:

The Purchaser acknowledges that she is aware that a Development Application for the building of a 4 bedroom 2 storey residence has been approved by the Council of the Municipality of Woollahra and annexed hereto and marked with the letter ‘B’ is the Development Application No 5/00 dated 11 July 2000. The Purchaser acknowledges and agrees that she will accept the property subject to the aforesaid approval and will make no requisition, objection, claim for compensation or rescind or terminate this Agreement in respect of the said approval or any matter contained in the said annexure.

His Honour noted that a s 66W certificate had been provided, although the form of certificate showed no indication that the purchaser was a company, and to whom, on behalf of the company, any explanation may have been provided [at 62].

The transaction also involved a deed of licence, also dated 20 September 2000. The terms are extracted at paras 64 to 75 of the judgment. The property was to be occupied at no fee if completion of the purchase contract took place by 1 November 2000; thereafter, an occupation fee of $200 per day was to apply.

The first correspondence of significance occurred about 4 weeks after exchange, a letter in which the vendor’s solicitors noted that requisitions had been waived, and calling for a transfer and adjustments. Some time between that letter and 1 November it appears an issue was raised by Mrs Howard, an undischarged bankrupt and the mother of a director of the purchaser company, about sighting the original of an earlier Development Application. Subsequently, it was suggested on behalf of the purchaser that the failure to comply with this request meant the vendor was not ready, willing, and able to issue a notice to complete. His Honour rejected this contention, and outlines the reasons for so doing in an extract which is a very useful reminder as to the nature of requisitions [at 83-86]:
83 First, a request or demand for a certified or stamped copy of a document relating to the development application would, if it be a requisition at all, be a requisition arising out of the contract or a general question about the property or title, falling within printed clause 5.1. There is no evidence to suggest that a requisition was served within 21 days after the contract date (20 September 2000) as required by printed clause 5.1. Indeed, Mr Spanko’s [the vendor’s solicitor] oral evidence, which I accept, was to the effect that there was no written requisition. Therefore, assuming everything else in the purchaser’s favour, the effect of clause 5.1 was that it had become too late to make a requisition, even in proper written form, well before 1 November 2000.

84 Secondly, the matter that had been raised on about 1 November appears to have been a request for the development application duly stamped and approved by Council (according to Spanko Soulsos’ letter of 1 November, which I accept as evidence of this fact). Evidence to which I shall refer indicates that stamped plans were never released to Baclon, because it did not make a building application or pay the requisite fee, and therefore the ‘stamped and approved’ document requested by Mrs Howard did not exist. If there had been an original ‘development application duly stamped and approved by the Council’, that document would have belonged to Baclon and, even apart from Special Condition 12, nothing in the contract for sale would require that the original document be handed over to the purchaser prior to completion.

85 Thirdly, I am not satisfied on the balance of probabilities that Mrs Howard had authority to make any requisitions on behalf of Australian Mortgage as purchaser. The making of requisitions would have placed her at risk of breach of what is now s 206B (3) of the Corporations Act, since that would ex facie be conduct in the management of the company’s affairs. While there is no evidence that the director of Australian Mortgage, Kellie Howard, was actively involved in the company’s business and affairs, neither is there evidence that she acquiesced in her mother purporting to conduct the conveyancing transaction on the company’s behalf generally, or to make requisitions pursuant to the contract on its behalf.

86 Fourthly, in my opinion Special Condition 12, on its proper construction, precluded the purchaser from making a requisition requesting that the original documentary development approval or any certified or stamped copy of it, or of any plans connected with it, be made available by the vendor. Special Condition 12 required the purchaser to accept the property subject to the development approval and precluded it from making any requisition in respect of the development approval. The words ‘in respect of’ are words of very wide import. Therefore as a matter of literal construction, Special Condition 12 prevented a requisition seeking documents with respect to the development approval, because such a requisition would be ‘in respect of’ the approval. Moreover, it is plain on the face of the contract that Special Condition 12 was intended to relieve the vendor of any
obligations with respect to the matter of development approval, on the basis that the vendor disclosed in the contract what had occurred and by that special condition left it to the purchaser to make its own inquiries and its own arrangements on that subject.

The vendor’s solicitors issued a Notice to Complete on 9 November 2000, and a second Notice to Complete on 6 December 2000. His Honour held that each notice was validly issued [paras 89 to 109]. The significance of the second Notice may, in part, be explained by correspondence between the solicitors then acting for the purchaser and the vendor’s solicitor, confirming that a document furnished by the vendor's solicitors “satisfied the outstanding requisition” [at para 97].

Late on 22 December 2000, the vendor’s solicitors prepared correspondence terminating both the contract for sale and the licence agreement. The contract-related letter was posted on 22 December 2000; the licence-related letter on 26 December 2000. It was a busy period – in fact, the office of the vendor’s solicitor had intended to close for the Christmas break at noon that day.

On 13 February 2001, the vendor purported to re-enter and take possession of part of the premises. His Honour found in favour of the vendor in relation to the re-entry.

On 14 February 2001 the then solicitors for the purchaser made a proposal (rather sketchy in detail) to re-activate the matter and effect settlement.

On 15 February 2000 the purchaser sought various orders in the nature of declaratory relief. The vendor cross-claimed seeking declarations as to the validly of its actions, and certain related orders. This action triggered various cross-claims by Mrs Howard against various parties, including her two children who were the directors of the purchaser.

His Honour found in favour of the vendor on all points (including a claim for the balance of the 10% deposit, recoverable by special condition in the event of default).

As to the claims by Mrs Howard, all these failed. As to some of the claims, His Honour considered she did not have standing to seek the relief, and that s 36C of the Conveyancing Act 1919 did not assist her [para 146 to 148]. A lack of evidence of readiness, willingness, and ability to complete the purchase contract was also fatal [at para 150].
In addition to highlighting the risks of vendor-purchaser litigation without proper legal representation, and an analysis of the nature of requisitions, the case does also flag the risks of permitting a purchaser to occupy under licence if the purchase does not proceed to completion.

For an extremely comprehensive analysis of the law and practice relating to requisitions, see the decision of Santow J in *Gogard Pty Ltd v Satnaq Pty Ltd* (1999) 9 BPR 17,171; [1999] NSWSC 1283.

A Court of Appeal decision considering the obligations of a party (and its legal adviser) in replying to requisitions is *Bebonis v Angelos; Christopoulos v Angelos* [2003] NSWCA 13 (10/2/2003 per Handley, Beazley and Heydon JJA). The genesis of the litigation is outlined in the leading judgment of Handley JA (at [2] to [7]):

2. The proceedings have arisen from the failure of the Registrar-General to register an easement on the vendors’ title. On 26 May 1976 they contracted to purchase two shops and an attached flat at 341 Condamine Street, Manly Vale (the property) from a Mrs Arnold for $38,850 (blue 63). The contract reserved to Mrs Arnold a right of carriageway over a strip of land 3.658 metres wide at the rear of the property to provide vehicular access from King Street to the rear of the adjacent properties she owned at 339 and 337 Condamine Street (66). At the time the property was occupied by tenants under a two years’ lease (67).

3. The transfer from Mrs Arnold to the vendors purported to reserve the right of way in accordance with the contract (70). It was registered in due course but the Registrar-General failed to record the right of way on any of the titles.

4. On 27 May 1979 the vendors contracted to sell the property to the purchasers for $97,000 (78). It was sold subject to a monthly tenancy (86), but not subject to the right of way. The contract annexed a survey report and diagram dated 30 June 1976 (i.e. after the date of the contract with Mrs Arnold) obtained by Messrs Demetrios, Angelos & Co, who had acted for the vendors on the purchase (84-5). The diagram showed an area at the rear of the property “used as access way for properties to south”, and the survey report stated “the rear of the subject land is in use as an access to the properties to the south and the Certificate of Title indicates that there is no Right-of-way across the subject property” (84).

5. The 1979 contract contained the following special condition relating to the survey (81):

Annexed hereto is Survey Certificate made by Wicks & Wicks Pty Limited dated 30 June 1976 and the purchasers acknowledge having inspected same and shall not raise any
objections or requisitions or make any claim for compensation with respect to contents therein.

6 On 9 April 1979 Mr F J Kavanagh, the solicitor for the purchasers, wrote to Demetrios, Angelos & Co, who were acting for the vendors, enclosing requisitions on title (54). The first of these was “Is the vendor aware of (a) Any easement, right or licence affecting the land and not shown upon the Certificate of Title and not discoverable by search?” (55) On 20 April the solicitor, who was handling the sale on behalf of the vendors at Demetrios, Angelos & Co, answered the requisition 1(a): “We are instructed No”. The sale was completed and the purchasers became registered with a title which it appeared was not encumbered by any right of way.

7 On 24 August 1983 the Registrar-General, having discovered the error, amended the register to record the right of way on the purchasers’ title, and wrote to advise them that he had taken this action (15).

Lengthy litigation ensued involving the parties, the vendors’ solicitor and the Registrar-General. Part of the appeal dealt with the operation of s 127 of the Real Property Act 1900, and the Court of Appeal held the trial judge was in error in holding that s 127 barred a possible claim against the vendors and their solicitor (at [34]). For our purposes, the major interest in the case is as to the solicitor’s role. The Court of Appeal upheld the trial judge’s finding that the solicitor had not been negligent (at [36] to [40]), and commented further (at [41] to [42]):

41 Until Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 a misrepresentation in an answer to a requisition could only have given the purchaser a cause of action in tort if the vendor or his solicitor had been guilty of fraud. In these circumstances it is arguable that the implied term required the vendor impliedly to warrant that reasonable care had been taken in preparing the answers, in order to give business efficacy to the whole procedure. Since a purchaser would rarely discover the falsity of an answer prior to completion business efficacy would also seem to require that the implied warranty should not merge on completion. Compare Palmer v Johnson (1884) 13 QBD 351 CA.

42 There is no reason why an implied term requiring the exercise of reasonable care should exclude a duty of care in tort (compare Midland Bank Trust Ltd v Hett Stubbs & Kemp [1979] Ch 384). A solicitor acting for one party does not ordinarily owe a duty to another but exceptionally may do so if a responsibility to that party has been assumed. El-Kandari v J R Brown & Co [1988] QB 665 CA; and Connell v Odlum [1993] 2 NZLR 257 CA. However in Gran Gelato Ltd v Richcliff (Group) Ltd [1992] Ch 560 Nicholls VC held that the solicitor for an intending vendor owed no duty of care to the purchaser in answering preliminary enquiries before contract although the vendor owed such a duty. It
might be thought anomalous that the lay client should owe a duty which ordinarily will be performed through a solicitor without the solicitor also owing such a duty. It is not necessary to decide this question but reference might usefully be made to Brown v Raphael [1958] Ch 636 CA and William Sindell plc v Cambridgeshire County Council [1994] 1 WLR 1016 CA.

The vendors were held to be negligent in the provision of their replies (at [80] to [82]):

80 In England it seems that vendors who formally answer requisitions from their purchaser owe a duty of care. Gran Gelato Ltd v Richcliff (Group) Ltd [1992] Ch 560, 569. In Australia the point is covered by the principles stated by Barwick CJ in The Mutual Life & Citizens Assurance Company Ltd v Evatt (1968) 122 CLR 556. The purchasers sought “information” from the vendors by their requisitions (ibid 570). The vendors were entitled to refuse to answer so much of requisition (1)(a) as fell within special condition 1 but, through their solicitor, they elected to answer and by their voluntary act attracted a duty to be careful in preparing their answer (ibid 570).

81 The vendors’ solicitor gave the information “willingly and knowingly” being aware of the circumstances and the purchasers were identified (ibid 570). The circumstances were calculated to cause a reasonable person in the position of the vendors to realise that they were being trusted by the purchasers to give information which the vendors were believed to possess or to which they had access (ibid 571). The subject matter was of a serious or business nature (ibid 571), and the circumstances were such that the vendors ought to have realised that the purchasers intended to act on the information in completing their purchase (ibid 571). It was clearly reasonable for the purchasers to seek, accept and rely upon the answer (ibid 571). If the requisition was not excluded by the special condition, and the vendors were contractually bound to answer it there would still be a duty of care in tort arising from the relationship created by the contract [para 42]. I would therefore uphold the Judge’s decision that the vendors owed a duty of care.

82 The question of breach is not without difficulty because the vendors did not give evidence and it seems clear that in 1976 and 1979 they were not fluent in English (black 16, 18, 79), were not particularly well educated (79), and would have had little knowledge of the law. Nevertheless the circumstantial evidence is formidable. They purchased the property by private treaty through an estate agent at Dulwich Hill. Their poor knowledge of English, especially then, would make them seek out a Greek-speaking estate agent for their real estate investment, just as they sought out a Greek-speaking solicitor, and it may be inferred that they did so. This inference is supported by other evidence. The agent referred to in the purchase contract (blue 16) may be compared with that referred to in the later sale contract (blue 78). Mr Christopolous gave evidence that he purchased the property through an agent
who spoke Greek and was known to him (black 28) and from what he said it seems that the estate agents on the two contracts were the same (black 29).

The adequacy of replies to requisitions, and the consequences in the context of a vendor issuing a notice to complete, was considered in the case of *Crowe v Rindock Pty Ltd and anor* [2005] NSWSC 375. In that case by contract of sale dated 19 September 2003, the defendants agreed to sell and the plaintiff, Mrs Crowe, agreed to buy property 38 Murdoch Street, Cremorne for $1,530,000. The contract provided for a deposit of $76,500 and for completion 84 days after the contract date, namely 12 December 2003.

Standard cl 10 of the contract was amended from the printed form. Relevantly the clause read:

10 Restrictions on rights of purchaser

10.1 The purchaser cannot make a claim or *requisition* or *rescind* or *terminate* in respect of:

... 

10.1.9 anything the existence of which is noted in this contract (except a caveat, charge, mortgage or writ)

... 

10.3 For the purposes of this clause 10 the Vendor discloses all of the information appearing in the copy documents attached to this Contract even if the Contract does not refer to that disclosure.

The changes were the “substance/existence” change in 10.1.9, and the additional cl 10.3.

The s 149 certificate attached to the contract relevantly provided:

The subject land is NOT proclaimed as a Mine Subsidence District within the meaning of Section 15 of the Mine Subsidence Compensation Act 1961.

The land is NOT AFFECTED by a policy, adopted by the Council or adopted by any other public authority and notified to the Council for the express purpose of its adoption by that authority being referred to in planning certificates issued by the Council, that restricts the development of the land by reason of the likelihood of landslip, bushfire, flooding, tidal inundation, subsidence, acid sulphate soils or any other risk except contamination.

The purchaser’s s 149 certificate had the same statement except that the words “except contamination” were omitted.
A printed form of requisitions was sent on 30 September 2003. Among those requisitions were the following:

12. (a) Evidence must be furnished that all covenants, agreements, etc (if any) mentioned in the Contract and shown or noted on the title have been complied with; and any not in accordance with the Contract must be removed before completion.

17A (c) Is there any currently applicable development approval or consent to the use of the premises?

(d) Are there any restrictions on the use of, or development of, the subject land by reason of the likelihood of landslip, bush fire, flooding, tidal inundation, noise exposure, subsidence or any other risk?

20. Has the subject land been proclaimed to be a mine subsidence district within the meaning of the Mine Subsidence Compensation Act, 1961?

Replies were sent by letter dated 5 December 2003. To each of those requisitions the reply was “The purchaser must rely on his own inquiries”. In the words of Windeyer J (at [11]):

It is fair to say that had the reply to 12(a) been “there are none” and the replies to the others “not to the vendors’ knowledge” this litigation would probably not have commenced. It is generally accepted that a reply in the form of reply given is an insufficient response to a proper requisition, whereas the response “not so far as the vendor is aware, but the purchaser should make his own inquiries” is proper. See In Re Solomon & Davey (1879) 10 ChD 366; Stonham The Law of Vendor and Purchaser (1966) [1011]; Butt: Standard Contract for Sale of Land in NSW 2nd Edition [545].

On 8 December 2005 there was a phone call between the solicitor for the purchaser and the clerk with day to day carriage of the matter on behalf of the vendor. Issues were raised about the adequacy of those replies. The vendor’s representative asked for those concerns to be put in writing, and the purchaser’s solicitor agreed to do this by fax. The solicitor’s evidence was that he did not regard the reduction of those concerns to writing as urgent. That may seem a little strange considering how close the due date for settlement was, but is perhaps explainable because the purchaser was having difficulties about finance and may have been unable to settle in part because the purchaser had not by then put her finance in place.

Despite no fax being received by 16 December, the solicitor for the vendor faxed amended replies to two of the requisitions in these terms:
Requisitions in Conveyancing Transactions

Tony Cahill

12 (a) There are no such covenants.

17A (c) Not to the vendors’ knowledge however the purchaser should make own inquiries.

The letter finished “All other answers remain as in our letter dated 5 December 2003”.

A few minutes after sending that fax, the vendor’s solicitor sent a second fax – a Notice to Complete. The nominated date for compliance with the Notice was 15 January 2004. The sufficiency of that time was not disputed, but unsurprisingly other aspects of the validity of the purported Notice were. By letter of 12 January 2004, the purchaser’s solicitor stated:

We submit that the notice to complete is not valid as it was issued prematurely as our request for amended answers to certain requisitions on title was not satisfied until the moment that the notice to complete was served on us.

The vendor’s solicitor gave Notice of Termination on 19 January 2004.

His Honour identified five issues for determination (at [19]):

(a) Were the four relevant requisitions allowed under the contract and general law;
(b) Were the two outstanding requisitions allowed under the contract and general law;
(c) Was the vendor entitled to serve a notice to complete shortly after furnishing the answers to 12(a) and 17A(c);
(d) Did the purchaser waive the right to an answer to 17A(d) and 20;
(e) Did the contract preclude the right to make requisitions 17A(d) and 20.

On the specific requisitions (at [21] to [25]):

12: Not relevant to the transaction. The question should not have been asked and therefore need not have been answered

17 A (c): Matter not going to title, but nevertheless a valid requisition – original answer insufficient.

17 A (d): Impermissible because of its breadth – in effect a “wide and searching interrogatory” in large part because of the use of the phrase “or any other risk”.

20: A proper question in relevant circumstances (although His Honour doubted whether a property in Cremorne would fall within the net of “relevant circumstances”).

Clause 10 of the contract did not preclude the valid requisitions (at [26]).
As to the short time between the sending of amended replies and issuing the Notice to Complete, the failure to give a proper answer to requisition 17A(c) and 20 before 12 December 2003 meant that the vendors were not entitled to expect completion on the completion date provided for by the contract. In fact the vendors were in breach by failing to give any reply prior to 8 December 2003 as such a time was not reasonable. Had a proper reply been given prior to the date for completion in the contract, even if only a few days – but not minutes, – it might be that even taking into account the default in failing to respond at all within a reasonable time, the default could have been overlooked (at [27]).

His Honour also expressed the view that cl 5.2 of the contract did not allow a purchaser 21 days after receiving the replies to requisitions to raise supplementary requisitions. To the extent that the decision of Gzell J in McIntyre v Marshall [2004] NSWSC 412 suggested a further 21 days would always be available, Windeyer J found himself unable to agree with that decision. Such a view would not accord with the reality of a typical 42 day contract.

In summary, the vendor was in breach for failing to provide proper replies to requisitions, and that breach disentitled the vendor from issuing a Notice to Complete when the vendor did.

His Honour’s concluding comments are instructive (at [31] to [34]):

31 Neither side comes well out of this. Solicitors for purchasers should make requisitions appropriate to the property the subject of the contract; solicitors for vendors should give proper answers to requisitions and should not have their staff insist upon receiving unnecessary faxes when they could work through the problem by talking to the opposing solicitor themselves. They should in any event give proper replies. As I have said, just why [the vendor’s solicitor] decided to respond to requisition 17A(c) and not (d) or 20, remains a complete mystery, as he did not give evidence.

32 Counsel in their careful arguments referred me to many decisions on requisitions, but none determining the question here, namely whether a purchaser admittedly without funds to complete, can rely on an inadequate reply to a requisition, to buy more time in the hope that funds will eventuate from some source. [The purchaser’s solicitor] could have been pressed further in cross-examination than he was; for instance he was not asked whether the reason he did not pursue a further response to requisition 20 was that he accepted it as irrelevant to the subject property.
Mr Murr, SC said at the outset that the purchaser stood upon her entitlement to rely on her strict rights under the law. That is what parties in difficulty in conveyancing matters invariably do when served with a notice to complete. The courts have not held that they cannot do so. The uninformed view that conveyancing work is easy work of a routine nature is quite incorrect as this case shows.

I summarise this rather long judgment as follows:

a. Requisitions 17A(c) and 20 were proper requisitions to which the vendors were required to give a proper answer. They did not do so before the date fixed for completion.

b. This meant that the purchaser was not in default for failing to complete on the date for completion in the contract.

c. The answer given to 17A(c) on 16 December was adequate. But as the date fixed had passed it was necessary to allow a reasonable time after the reply was made before it could be said the purchaser was in default, so as to justify a notice to complete. That time had not passed.

d. The purported termination consequent upon the expiry of the notice to complete amounted to a repudiation the purchaser was able to accept and which she did accept, bringing the contract to an end and entitling her to a refund of deposit.

e. It is not necessary to make a final determination about requisition 20. It was a proper question and the response inadequate and late. While I would have thought there was no genuine concern about mines subsidence in Cremorne, the fact the information is shown on the s149 certificate for a Cremorne property goes some way to counter this.

f. If the final time for completion had not been validly fixed, the fact the purchaser did not have the funds at the date originally fixed or when the time claimed to be fixed by notice expired is not fatal to her claim. She may have somehow got the funds by an appropriate date; she may have extracted further time from the vendor.

g. The plaintiff is entitled to return of the deposit. The parties should agree on the interest.

Building the foundation for an appropriate requisition (and response): domestic building

The task is to prepare and deal with matters arising from domestic building work. For present purposes we can disregard any questions of compliance with the local government laws from time to time.
The issues

Some of the issues for consideration BY THE PURCHASER’S SOLICITOR:

- What information does a purchaser need?
- What information would a purchaser like to have?
- What questions should a purchaser ask?
- When should a purchaser ask the questions?
- If the purchaser asks questions before exchange, of what value are the answers?
- If the purchaser asks questions after exchange, of what value are the answers?
- What answers are “satisfactory”?
- What rights does the purchaser have arising out of “unsatisfactory” answers?

Some of the issues for consideration BY THE VENDOR’S SOLICITOR:

- What information does a vendor’s solicitor need from the vendor?
- When should that information be sought?
- Are there any matters which should be disclosed in the contract?
- What questions (if asked) might cause problems to the vendor, and how should those issues be addressed by the vendor’s solicitor?
Some tips for handling these issues

1. Work from specifics rather than abstract generalities. If you aren’t sure what questions to ask, think about particular problems from practice. For example, to work out what questions you might ask about domestic building work, you might consider this scenario:

<table>
<thead>
<tr>
<th>Relevant date</th>
<th>Nature of improvements</th>
<th>Value</th>
<th>Who did the work?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/6/01</td>
<td>Main dwelling</td>
<td>$80,000</td>
<td></td>
</tr>
<tr>
<td>1/4/03</td>
<td>Extra bedroom and kitchen</td>
<td>$20,000</td>
<td></td>
</tr>
<tr>
<td>1/7/06</td>
<td>Garage and carport</td>
<td>$15,000</td>
<td></td>
</tr>
<tr>
<td>1/3/09</td>
<td>Rear sundeck</td>
<td>$14,000</td>
<td></td>
</tr>
</tbody>
</table>

The dates are important to work out which legislation applies (and in what form, given the frequent amendments to the domestic building legislation). The nature of the work, and the value, is to ascertain whether the work is within the scope of the legislation (for simplicity’s sake, all the above work is within the scope of the legislation). Who did the work, is significant, because of the insurance requirements.

2. Each party needs to consider whether the question/requisition is “proper”. Consideration should be given as to the category of requisition into which these issues fall. This is relevant to consider the “appropriateness” of the question – important to both purchaser (am I allowed to ask this question?) and vendor (do I have to answer this?).

3. Know your contract. Is the matter “solved” by the contract – either a specific printed clause (for example cl 10) or a “special condition”?

4. Is the requisition of a type where the vendor can rely on cl 8 (see discussion of clause 8 above)? If not, does the vendor have any other remedy when faced with an unwelcome requisition?
5. Does the purchaser want to raise a requisition about this sort of matter? Is a claim for compensation available as a preferred alternative?

6. Know the law.

Are matters relating to Home Warranty Insurance properly dealt with as post-contract requisitions on title? The answer appears to be “in the absence of an express statutory provision giving rights post-exchange, no”.

It is now clear that, at general law (that is, unless there was a statutory right provided by the Home Building Act 1989), a failure to comply with the insurance provisions of the Act goes to quality rather than to title. In Adderton v Festa Holdings Pty Ltd & Ors [2003] NSWSC 1065, Gzell J held there was no obligation on an on-seller to arrange insurance cover where the predecessor in title had not done so. His Honour then continued (at [21] to [25]):

21 It was argued on behalf of the plaintiff that even if there was an obligation upon him to obtain alternative insurance, that was not a proper subject of a requisition on title strictly so called that could prevent him from requiring the first defendant to complete until a reasonable time after he had complied with the requisition (Adolfson v Jengedor Pty Ltd (1995) 6 BPR 14,147).

22 The contract for sale of the dwelling extended the definition of the term “requisition”. It did not, however, extend to a claim. In my view, the first defendant was entitled to resist completion of the contract for sale of the dwelling only if the absence of insurance of the residential building work was a defect in title to the property.

23 I doubt that the absence of such insurance goes to the title to the property. The first defendant contracted to acquire clear title to land and dwelling. There was no impediment to it acquiring that title.

24 In Sullivan v Dan (1996) 7 BPR 14,974, Bryson J held that the lack of compliance with the conditions of a development consent by a local council was not a defect in title. I regard a lack of insurance, if required, in like vein.

25 However, this is an issue that it is unnecessary for me to decide in view of my finding that the plaintiff was not obliged to remedy a lack of insurance by WDD Constructions Pty Ltd. It is an important question that ought not to be the subject of mere obiter dicta.

The decision of Gzell J was confirmed on appeal (Festa Holdings Pty Ltd & anor v Adderton & ors [2004] NSWCA 228, 13/7/2004). Indeed, the Court of Appeal expressly addressed the issue about whether a lack of
home warranty insurance constituted a defect in title in the following terms (per Mason P at [54] to [55], [58] to [60]):

54 The subject matter of the Contract was land described as a freehold estate under Torrens title. Legal and practical enjoyment of that land was in no way undermined by the non-existence of a contract of insurance underpinning whatever rights the Purchaser might wish to assert against the original builder under the statutory warranties. Nothing in the evidence suggests that there was any basis for a claim against the builder at the time when the Contract was entered into (cf Carpenter v McGrath (1996) 40 NSWLR 39).

55 Not even the quality of the subject property is affected by the absence of insurance. All that has happened is that the Vendor (not having the benefit of insurance) did not promise to include that benefit as part of the Contract subject-matter. For all that one knows, the value of the absent insurance was taken into account in the negotiated contract price.

…

58 Nothing in the Contract addressed the question of insurance under the Act. The Vendor had not bargained for nor obtained any such insurance from his vendor, Windy Dropdown. He had not been obliged to do so before he completed the purchase of the land from Windy Dropdown. Nor was he obliged by statute, contract or fiduciary obligation to procure such insurance for the benefit of his purchaser, a procurement that the appellant conceded was virtually impossible.

59 Gzell J held that s94 prescribed the effect of the original builder’s failure to insure. Nothing required the Vendor to obtain alternative insurance cover for his purchaser. Indeed, s94(1C)(a) was a counter-indicator. In the absence of a contractual requirement obliging the Vendor to obtain alternative insurance cover, his answers to requisitions 18B and 29 were appropriate. The absence of insurance imposed no impediment to the Purchaser obtaining clear title to the land and dwelling that were the subject of the Contract. His Honour refrained from deciding that there was a defect in title, although he favoured the view that there was not a defect.

60 It will be seen that I agree substantially with the reasoning of the learned primary judge. Unlike him, I think it necessary to grasp the defect of title issue. I have concluded that there was no such defect when the Act and the Contract are analysed. The second appellant’s argument is essentially circular and flawed in its statutory analysis. Insurance cover would have been an advantage to the Purchaser to the extent that any of the statutory warranties were breached within the seven year timeframe, but this was insufficient to give it a right to insist that the Vendor obtain such cover.
Issues regarding whether there has been any building work done to which the Act applies, the identity of the builder, whether or not a permit or licence was issued under the Act, and particulars of insurance, should ideally be addressed prior to exchange of contracts. From the vendor’s perspective, it is vital to identify whether the vendor has obligations under ss 95, 96 and 96A, and to prepare the contract in a way that meets those obligations. From the purchaser’s perspective, there are two issues. The right to rescind for a lack of insurance will not arise independently of the Act, so the purchaser’s position should be assessed before the purchaser is contractually bound. Where a purchaser has a right to render the contract void, the purchaser needs to be aware of that right. A solicitor who failed to advise their purchaser clients of a right to rescind under s 95 was held liable in damages in Livingstone v Mitchell [2007] NSWSC 1477; BC200711121. In that case, the purchaser’s solicitor inquired about the applicability of the Act in post-contractual requisitions. The replies indicated that the property was insured, named an insurer, and quoted a policy number. Unfortunately, the details related to a home and contents policy, not a policy under the Act. The case highlights the prudence of verifying insurance details by obtaining evidence independent of the vendor about home warranty insurance.

It should be noted that given the restrictions on seeking relief from insurers under the home warranty insurance scheme, practitioners may need to consider the availability of common law remedies. The High Court has had cause to consider the liability of a builder in tort to successors in title to building works.

Bryan v Maloney (1995) 182 CLR 609 is authority for the proposition that a builder can be liable in tort to a subsequent owner of a dwelling where the subsequent owner suffers economic loss. Whether that principle extended to a warehouse and office complex was the subject of the proceedings in Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 (High Court of Australia, 1 April 2004). The High Court agreed with the Queensland Court of Appeal that there was no cause of action in negligence against the builder. However, the members of the High Court indicated that the basis for finding for the builder was not as simple as finding a distinction existed between residential dwellings and commercial premises. The decision in Woolcock says that any attempt to draw what is described as a ‘bright line’ between the principle in Bryan and the
circumstances in *Woolcock* was flawed. As stated in the joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ (at [17]):

… [I]t may be doubted that the decision in *Bryan v Maloney* should be understood as depending upon drawing a bright line between cases concerning the construction of dwellings and cases concerning the construction of other buildings. If it were to be understood as attempting to draw such a line, it would turn out to be far from bright, straight, clearly defined, or even clearly definable. As has been pointed out subsequently, some buildings are used for mixed purposes: shop and dwelling; dwelling and commercial art gallery; general practitioner’s surgery and residence. Some high-rise apartment blocks are built in ways not very different from high-rise office towers. The original owner of a high-rise apartment block may be a large commercial enterprise. The list of difficulties in distinguishing between dwellings and other buildings could be extended.

Callinan J provides an even more detailed list of issues raised by *Bryan v Maloney* (at [202], omitting footnotes):

(a) ...

(ii) Does *Bryan v Maloney* apply not only to dwelling houses in the narrow sense but also to other dwellings, for example, residential apartments in a multi-storey development, like the building in *Opat v National Mutual Life Association of Australasia Ltd*? Does it apply to ‘mixed’ buildings, like a shop and dwelling or a building comprising a dwelling and commercial art gallery or a general practitioner’s residence combined with surgery? In the case of a ‘mixed’ building, if the decision is applicable, then does it apply to the whole building, or only to the residential part of it, or does the answer to this question depend on some such notion as that of ‘dominant use’?

(iii) Does the decision apply to dwellings which are not the principal residence of the purchaser, for example, an apartment in or near the city for occasional use, or a holiday home?

(iv) What if the value of the dwelling is only a small part of the total value of the house and land, as where a modest dwelling is bought which stands on a very large piece of land or on land which is, by reason of its location, exceptionally valuable? What of a house forming part of a large rural property stocked with cattle or used for viticulture? What of a rural property with two houses, one intended for occupation by a manager? Do the houses in the last two examples answer the description of Toohey J, ‘a house that is a non-commercial building’?

(b) If the decision is not confined to houses, or to houses and other dwellings, then to what other buildings does it apply? The joint
judgment left open the position of buildings other than permanent dwelling houses, while Toohey J, as just mentioned, limited his decision to ‘a house that is a non-commercial building’. In Western Australia, Malcolm CJ has accepted the existence of a duty of care to a subsequent occupier on the part of the builder of a commercial greenhouse.

The decision in *Bryan v Maloney* was delivered at a time when proximity was regarded as a significant touchstone in determining liability in negligence. The “proximity” approach has been subsequently rejected by the High Court, but no clear principle has emerged as its successor. While *Bryan v Maloney* is still good law, the doctrinal basis for the decision is dubious; at least one of the Justices of the High Court indicated in *Woolcock* that were the issue in *Bryan* before him today, he would be inclined to overrule it (Callinan J at [211] at following). One of the factors which influenced His Honour was the existence of statutory schemes of home warranty insurance (such as the *Home Building Act 1989* (NSW)) providing protection to consumers purchasing dwelling houses (although it should be said that such schemes existed at the time of the decision in *Bryan* and arguably gave stronger levels of protection than their counterparts do today).

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