



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

Mandatory CPD 2013

Writing Special Conditions

Real Estate Sales Representatives

Distance Learning Participant Manual



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Welcome to Mandatory CPD for 2013

The purpose of the CPD program is to assist industry members in updating and developing their knowledge and skills in the areas of industry practice and legislative requirements.

The Department has determined the subject matter for all mandatory sessions in 2013.

The subject to be covered in this session is:

Writing special conditions focusing on:

- understanding the components of a well written special condition
- understanding the importance of covering all of these components when writing a special condition
- using a matrix tool as a checklist for writing special conditions

The material here is provided to assist you to improve your understanding of special conditions. It is not legal advice and should not be taken as such.

Any questions arising out of this training may be addressed to the Department of Commerce on **1300 30 40 54**



Why are special conditions important to you?

Non-compliance

Department of Commerce (DOC) proactive compliance visits to real estate agents have identified that inadequately written special conditions in real estate sales contracts can lead to confusion, complaints and possible litigation between the buyer and the seller as well as compliance breaches.

There may be implications for sales representatives if poor wording on a special condition they have written contributes to a problem between a buyer and a seller.

Poorly written conditions may breach the *Code of Conduct for Agents and Sales Representatives 2011 (Real Estate and Business Agents Act 1978) (the Code)*. This could potentially lead to a fine, suspension, loss of licence or registration. The following sections of the Code are particularly relevant when writing special conditions:

- Section 4: General duty to principal.
- Section 7: Duty to behave fairly.
- Section 9: Standard of service.



Legal

There may be a number of legal and other ramifications as a result of poorly written special conditions including:

- breaches of legislation - e.g. the Australian Consumer Law (ACL), with respect to one sided terms or conduct likely to mislead or deceive;
- risk of litigation by the seller or buyer seeking to recover damages;
- negative repercussions in relation to employment;
- consequences of claims on professional indemnity and fidelity insurance, such as increased agency premiums; and
- the clause being unenforceable or having unintended consequences.

Loss of commission

If a contract falls over due to poorly written special conditions you do not get paid – a waste of your time and a loss of income.

Repeat and referral business

Repeat and referral business is your cheapest and most easily acquired customer.

Mud sticks – there can be a loss of reputation when clients spread the word of what happened to them that is very difficult to address, let alone reverse.

Time and stress

What about the time spent ‘fixing’ a problem and explaining or debating a badly written condition? How much anxiety is caused for you and your clients?

Types of Contractual Terms

All contracts have terms - they provide the detail of the agreement. To write effective terms, you must understand the different types of terms you use and how they work. *Ask yourself the following questions to see how much you already know. (Answers are below and on page 31).*

TRUE OR FALSE QUIZ - What do you know already about terms?

1. The price of the property is an ' essential ' term of the contract	
2. If a term is an ' express ' term it is one that has to be done quickly	
3. In a written contract the only terms that can be enforced are those written down	
4. Conditions are always terms but not all terms are conditions	

Essential terms are conditions so fundamental that without them the deal can't be worked out, for example the price, the parties' names and the legal description of the property. Other terms that the parties consider essential can and should be clearly specified, in detail.

Written contracts (such as those used for the sale of land) always contain **express** terms - any and all terms that are explicitly agreed upon (verbally or in writing) are '**express**' terms. Contracts also have **implied** terms (implied by law or by facts). The existence of consumer and other laws means that every contract for the sale of land in WA is subject to implied terms and/or statutory guarantees that are enforceable, even though not written in the contract.

Conditions and warranties

The most important terms in contracts are referred to as 'conditions'. **Conditions** are terms important enough that if they are not fulfilled, one (or both) parties is not willing to enter into (or continue) the contract. If a condition is not satisfied, the party requiring it is usually entitled to treat the contract as *void* or to *rescind*.

Warranties are less important terms. They have been described as **statements** or **stipulations** that are secondary to the main purpose of the contract. If they are breached the wronged party may seek monetary damages for the loss, but the contract itself will stand. **You must understand the difference between these two types of terms.** If writing terms in a contract for the sale of property, ensure such terms reflect the true intent of the parties and that both parties have the same understanding of the impact the term has on the contract. **If the intent is clear to all parties it is much less likely the parties will end up in court.**

Many problems arise because one party thinks a term is an essential condition that could stop the contract, but the other does not, and the wording is not definitive. Trying to make a contract conditional on a relatively minor matter can also cause problems - minor matters should be warranties. If a dispute results, a court will consider the intent of the parties in deciding whether a term is a *condition* or a *warranty*, but courts may also overrule that intent.

'Conditions precedent' and 'Conditions subsequent'

A 'condition precedent' is a term intended to make it clear that if a requirement is not met, the contract does not come into existence. Using the words '**this contract is subject to...**' and then asking for an action indicates a 'condition precedent'. A 'condition subsequent' can also be used to allow for termination of a contract that would otherwise be binding, e.g. "*If Local Government approval is not supplied within 7 days of Acceptance, this Contract is void*".

So what are Special Conditions?

When a term is added to a pre-drafted contract such as REIWA's *Contract for the Sale of Land by Offer and Acceptance* (the O & A), it is referred to as a 'special condition'.

Not all terms added to the O & A are actually 'conditions' in the legal sense. Some are 'conditions' which if not fulfilled will bring the contract to an end (e.g. '*this contract is conditional on finance.*') some are 'warranties' which if not fulfilled, can lead to damages being sought after settlement e.g. '*the seller agrees to have the property mown prior to settlement.*'

It may not be in the best interests of the seller to accept a 'condition' if a 'warranty' would suffice. If however the buyer requires a condition, the seller must reject it, renegotiate it, or accept it and understand the impact that it has.

Bear this in mind as you consider the examples within this course.

Joint form of General Conditions for the Sale of Land

In Western Australia contracts for the sale of land are accompanied by the *Joint Form of General Conditions* (JFGC) - these General Conditions apply to every sale of land in WA.

All parties to the Contract sign at the bottom of the contract document to say they have received a copy of the Joint Form of General Conditions, acknowledging these conditions.

Both the O & A the General Conditions themselves allow for conditions or special conditions within the contract to override the General Conditions.

Condition 3 of the O & A

The [year] General Conditions are incorporated into the contract so far as they are not varied by or inconsistent with the Conditions or Special Conditions of this contract.

Clause 25.2 of the JFGC - Contract takes priority

If there is a provision in the Contract which is inconsistent with a provision of this document, the provision in the Contract takes priority to the extent necessary to remove the inconsistency.

The JFGC conditions have been developed by REIWA and the Law Society of WA to cover many common situations that may cause dispute. Agents and sales representatives should become very familiar with these conditions and should not encourage the parties to a contract to use clauses that override the JFGC unnecessarily.

Although special conditions can override or vary a General Condition, try to ensure that Special Conditions do not conflict with General Conditions in an unintended way.

Some agencies discourage sales representatives from drafting special conditions without guidance for this reason, as the task is complex. Using pre-written clauses that have been vetted by legal advisers (either in-house or within industry associations) wherever practicable reduces the risk of error.

The intention of a Special Condition should be transparent and the consequences clear to all parties. While some straightforward matters are fairly simple to express, other matters can require a lot of possibilities to be covered. Legal advice in drafting such clauses is highly recommended.



The REIWA Subject to finance clause is included below. It is included to show the level of complexity needed in a condition that may cover what seems like a fairly straightforward issue - in this case, finance or no finance.



Condition 1 – Subject to Finance

Buyers signing a standard REIWA Offer and Acceptance choose either to sign to say that the “Finance Clause is Applicable” or indicate that the “Finance Clause is Not Applicable”.

*If a buyer signs to say the finance clause **is not applicable** (or if no information is completed in the “Finance Clause is Applicable” box) then Condition 1 - Subject to Finance does not apply.*

*If the buyer signs to say the finance clause **is applicable** then Condition 1 - Subject to Finance - on the reverse of the Contract applies.*

You can see below how many components there are to the Subject to Finance clause.

1. Subject to Finance

If the Buyer signs the “Finance Clause is Not Applicable” box in the Schedule then this Clause 1 does not apply to the Contract.

If any information is completed in or the Buyer signs the “Finance Clause is Applicable” box in the Schedule, then this Clause 1 applies to the contract.

1.1 Buyer’s Obligation to Apply for Finance and Give Notice to the Seller

(a) The Buyer must:

- (1) immediately after the Contract Date make a Finance Application to the Lender using, if required by the Lender, the Property as security; and*
 - (2) use all best endeavours in good faith to obtain Finance Approval.*
- (b) If the Buyer does not comply with Clause 1.1(a) or 1.1 (c) (1) then the Contract will not come to an end under clause 1.2 and the Buyer may not terminate the Contract under clause 1.3. The rights of the Seller under this Clause 1.1 will not be affected if the buyer does not comply with Clause 1.1.*
- (c) The Buyer must immediately give to the Seller or Seller Agent:*
- (1) an Approval Notice if the Buyer obtains Finance Approval or;*
 - (2) a Non Approval Notice if the Finance Application is rejected at any time while the Contract is in force and effect.*

1.2 No Finance Approval by the Latest Time: Non Approval Notice Given

This Contract will come to end without further action by either Party if on or before the Latest Time:

- (a) written Finance Approval has not been obtained; and*
- (b) the Buyer gives a Non Approval Notice to the Seller or Seller Agent.*

1.3 No Finance Approval by the Latest Time: No Notice Given

If by the Latest Time:

- (a) the Buyer has not given an Approval Notice to the Seller or Seller Agent; and*
- (b) the Buyer has not given a Non Approval Notice to the Seller or Seller Agent;*

then this Contract will be in full force and effect unless and until either the Seller gives written Notice of termination to the Buyer or the Buyer terminates this Contract by giving a Non-Approval Notice to the Seller or Seller Agent.

1.4 Finance Approval: Approval Notice Given

If by the Latest Time, or if Clause 1.5 applies, before the Contract is terminated:

- (a) written Finance Approval has been obtained; and*
- (b) the buyer has given an Approval Notice to the Seller or Seller Agent;*

then this Clause 1 is satisfied and this Contract is in full force and effect.

1.5 Notice Not Given by Latest Time: Seller's Right to Terminate

If by the Latest Time the buyer has not given an Approval Notice or a Non Approval Notice to the Seller or Seller Agent then at any time until an Approval Notice is given, the Seller may terminate this Contract by written Notice to the Buyer.

1.6 Buyer Must Keep Seller Informed: Evidence

- (a) If requested in writing by the Seller or Seller Agent the Buyer must advise the Seller or Seller Agent of:
 - (1) the progress of the Finance Application; and*
 - (2) provide evidence in writing of the making of a Finance Application in accordance with clause 1.1 (a) and of any loan offer made, or any rejection; and*
 - (3) if applicable, the reasons for the Buyer not accepting any loan offer.**
- (b) If the Buyer does not comply with the request within 2 Business Days then the Buyer authorises the Seller or Seller Agent to obtain from the Lender the information referred to in 1.6(a).*

1.7 Right To Terminate

If a Party has the right to terminate under this Clause 1, then:

- (a) termination must be effected by written Notice to the other Party;*
- (b) Clauses 23 and 24 of the 2011 General Conditions do not apply to the right to terminate;*
- (c) upon termination the Deposit and any other monies paid by the Buyer must be repaid to the Buyer;*
- (d) upon termination neither Party will have any action or claim against the other for breach of this Contract, except for a breach of Clause 1.1 by the Buyer.*

1.8 Waiver

The Buyer must waive this Clause 1 by giving written Notice to the Seller or Seller Agent at any time before the Latest Time, or if Clause 1.5 applies, before the Contract is terminated. If waived this Clause is deemed satisfied.

1.9 Definition

In this Clause:

Amount of loan means either the amount referred to in the Schedule or any lesser amount of finance referred to in the Finance Application. If the amount referred to in the Schedule is blank, then the amount will be an amount equivalent to the Purchase Price.

Approval Notice means a Notice in writing given by the Buyer or the Lender to the Seller, or Seller Agent to the effect that Finance Approval has been obtained.

Finance Application means an application made by or on behalf of the Buyer to the Lender to lend any monies payable under the Contract.

Finance Approval means:

- (a) a written approval by the Lender of the Finance Application or written offer to lend or a written notification of an intention to offer to lend made by the Lender; and
- (b) for the Amount of Loan; and
- (c) which is unconditional or subject to terms and conditions:
 - (1) which are the Lender's usual terms and conditions for finance of a nature similar to that applied for the Buyer; or
 - (2) which the Buyer has accepted by written communication to the Lender, but a condition which is in the sole control of the Buyer to satisfy will be treated as having been accepted for the purposes of this definition; or
 - (3) which, if the condition is other than as referred to in paragraphs (1) and (2) above includes:
 - (i) an acceptable valuation of any property;
 - (ii) attaining a particular loan to value ratio;
 - (iii) the sale of another property; or
 - (iv) the obtaining of mortgage insurance;and has in fact been satisfied.

Latest Time means:

- (a) the time and date referred to in the Schedule; or
- (b) if no date is nominated in the Schedule, then 4 pm on the day falling 15 Business Days after the Contract Date.

Lender means:

- (a) the lender nominated in the Schedule; or
- (b) if the Buyer makes a finance application to, or if no lender is nominated in the Schedule, any bank, building society, credit union or other institution which makes loans and in each case carries on business in Western Australia .

Non Approval Notice means a Notice in writing given by the Buyer or the Lender to the Seller, or Seller Agent to the effect that Finance Approval has been rejected or has not been obtained.

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Special Conditions

As discussed Special Conditions can be used to override or vary the General Conditions and to express terms specific to the individual contract.

If the intent and outcome of a special condition is not clear it may cause confusion or a dispute that may lead to legal action. A court can rule that the condition be set aside if it is too vague.

It is vital as a real estate agent or sales representative to understand the components of a Special Condition and the importance of covering all of these components.

In this Activity we will analyse a common type of clause to illustrate what can happen. Many agencies have a well written Pest Clause - the purpose of the exercise is to identify the components that are relevant when examining all Special Conditions.



Activity 1 Termite Clearance Certificate

Assume that the buyer in this case has requested this condition with the intent of not proceeding with the purchase of the property if timber pests or related damage are found.

Conditional upon the production of a Termite Clearance Certificate within 7 days from acceptance (at the Buyers expense) showing the property to be free from infestation prior to settlement.

Is this term a condition (which can stop the contract if it is not fulfilled) or a warranty? Why?

Is it effective for what the buyer's intentions were? Why?

Identify anything that could be changed to better reflect the buyer's intent.

How should such a clause be explained to the seller?

[For an explanation see the following two pages](#)

Looking at the implications of the clause used in Activity 1



The following questions explore a range of possible implications for the buyer, the seller and the sales representative.

Is the term a condition (which can stop the contract if it is not fulfilled) or a warranty? Why?

- *It is a condition (although not well written). It asks for action and uses the word 'conditional'*

Is it effective for what the buyer's intentions were? Why?

- *It may be partially effective - a reasonable person would understand that the contract is conditional on a Pest Certificate being procured by the buyer within 7 days, stating that the property is free of current termite infestation, so it should work in that scenario*

Identify anything that could be changed to better reflect the buyer's intent.

- *The condition refers to 'termites'. The buyer intended to cover all 'timber pests' - this should be changed to avoid dispute e.g. if borers or a fungal timber pest are found*
- *The intent was to also provide for the consequences if timber pest damage is found so this should be stated*
- *The condition should state explicitly that the contract will not proceed if timber pests or damage are found*
- *The condition should ideally spell out the consequences and steps after a report or certificate is completed.*

How should such a clause be explained to the seller?

If this condition appeared as-is on the contract, the seller should be told that if they accept the condition, the contract will end if termites are found, and that there will be no option under the contract to rectify the problem or to do a contract adjustment (unless the buyer offers this of their own volition).

Conditions can be negotiated - sometimes what one party wants is not acceptable to the other party, but a compromise can be reached. For example, the seller might decline to accept this condition as it stands, and suggest clearer wording and the option to rectify an infestation.

Whether or not there is modification to the wording, the sales person must ensure the condition is clear so that the parties can understand it, and decide whether to accept it or not.

If a complex condition is being proposed, the representative can suggest the parties seek legal advice (on the drafting or on the impact of the clause).

Activity 1 has focused on considering buyer intentions. This is relevant as they can request conditions in the contract and these should be faithfully represented to the seller.

You do however usually represent the seller and must be mindful in every scenario of the impact on them.

Some scenarios (with implications for the seller) that could arise if this clause were used just the way that it is presented in the Activity include:

The buyer does not arrange for a Termite inspection or for a Clearance Certificate

- *Is the clause automatically waived?*
- *Does the contract become unconditional immediately the 7 days have elapsed?*
- *Is the Contract at an end - was it conditional upon a report?*

The pest inspection does not result in a Termite Clearance Certificate

- *Is the contract automatically at an end?*
- *If the contract can be terminated, how does this happen?*
- *What would happen if the inspection uncovered evidence of*
 - *current infestation of timber pests other than termites*
 - *no live pests but some old timber pest damage*

Would the buyer be protected?



The pest inspection is not done by a suitably qualified person?

- *Is the report valid if (for example) a friend or relative of the buyer gives a report that does not clear the property?*
- *Does the seller have any recourse?*

How does the wording “free from infestation prior to settlement” affect the buyer’s right to end the Contract? *Could the seller treat the infestation prior to settlement and obtain a second report showing the property to be free from infestation and enforce the Contract?*

Willing seller / willing buyer

The special condition does not answer the questions raised above, even though the scenarios are not highly unlikely - that is why it would not be considered particularly well written. If you have a willing buyer and seller acting in good faith, many unexpected hitches can however be resolved, regardless of the wording in the contract.

If you do not have a willing buyer and willing seller, litigation may follow and the wording can become very important.

Any legal or dispute resolution process will seek first to determine the intent of the Special Condition. Wording that is not specific and does not clearly state intent is a risk.

- *Where does this leave the contract?*
- *What responsibility do you have if a serious problem is caused by a badly worded condition that you wrote?*

In many cases properties are “free” from termites, or all parties are willing to find a solution that is agreeable, so the strength of the written condition is not tested.

However, in a rapidly rising market the seller may be less willing to remedy and rectify and in a falling market the buyer may prefer to end the dealing rather than find a solution. The sales person can lose out as a result.

A well written clause that covers most reasonably likely contingencies and answers questions such as those above, can significantly reduce the potential for a dispute.

Introducing the matrix

The purpose of the following section and the Matrix presented is to provide you with a framework that you can use to check the strength of the Special Conditions you write yourself.

It is also important to examine the Special Conditions of others on contracts you are involved with.

This Matrix is a checklist to help you examine contract conditions and their potential consequences.

If you are presented with a Contract that uses Special Conditions and wording that you are not familiar with, your principal should be encouraged to seek expert advice.

A. What to Do?	✓
DOES IT CLEARLY STATE: 1. Specific Outcome and Why? What needs to be done and why is it being done?	
2. Who to Do (Credentials/Standards)? In the case of an inspection or rectification, does the person carrying out the inspection or work need to be licensed? What qualification should they have? Does a standard apply to what needs to be done? e.g.: <ul style="list-style-type: none"> ○ a particular “Australian standard” ○ 'like new' ○ 'in same condition' 	
3. If not, then what? If the buyer decides not to get a report what happens to the contract?	
4. Who to Arrange? Seller / Buyer	
5. Who to Pay? Seller / Buyer	
6. By When? Days from ...	



Activity 2 Matrix

Using the Matrix on the following page, examine the following Timber Pest Inspection - Special Condition and note how it covers the points in the matrix.

Assume that the buyer requested this condition with the intent of not proceeding with the purchase of the property if timber pests or related damage are found.

Timber Pest Inspection – Special Condition

1. *This contract is conditional upon a licensed pest control company (“Contractor”) issuing a Certificate in accordance with Australian Standards confirming that the Property is free from timber pest infestation and damage (“the Certificate).*
2. *The Buyer shall, at the Buyer’s own expense, employ a Contractor of the Buyer’s choice and the Certificate shall be obtained not less than 14 days after acceptance of the Offer date. The Seller shall allow the Contractor access to the Property to satisfy this condition.*
3. *If the Certificate reveals either the existence of active termite and/or white ant infestation or damage caused by termite and/or white ant infestation or both termite and/or white ant infestation and damage then the Seller may at the Seller’s option:*
 - a) *Treat such infestation and/or repair such damage at the Sellers cost prior to settlement; or*
 - b) *Give the Buyer the right to terminate the contract by giving written notice of termination to the Seller or the Seller’s agent on or within 48 hours of receipt of written notification from the Seller that the Seller is unwilling to affect such treatment and or such repairs.*

Does this condition fulfil all of the requirements of the matrix?

Could it be improved? If so how?

If this condition is used 'as-is' what risks are there?

This Activity is debriefed on pages 15 and 16



This matrix can be completed by learners individually, in groups or as the trainer debriefs the activity.

A. What to Do?	✓	Relevant wording	✓
DOES IT CLEARLY STATE:			
1 Specific Outcome and Why?			
2 Who to Do? (Credentials/Standards)			
3 If not, then what?			
4 Who to Arrange? Seller / Buyer			
5 Who to Pay? Seller / Buyer			
6 By When? Days from ...			
B. What Next?		Relevant wording	
DOES IT CLEARLY STATE:			
1 Specific Outcome and Why?			
2 Who to Do? (Credentials/Standards)			
3 If not, then what?			
4 Who to Arrange? Seller / Buyer			
5 Who to Pay? Seller / Buyer			
6 By When? Days from ...			

Looking at the implications of the clause used in Activity 2

The following questions explore a range of possible implications for the buyer, the seller and the sales representative.

Does this condition fulfil all of the requirements of the matrix?

Using the Matrix five of the six questions were at least partly covered. (See Answers in Activity 2 for completed matrix.)

Could it be improved? If so how?

The clause is not perfect - it could be improved, for instance in the way it states timeframes and standards.

This shows the matrix is not a 'magic wand'. You must still apply critical thinking, common sense and your experience to the process. Checking a Special Condition against the Matrix does however give you a framework - you can then improve the wording further if necessary.

Suggested concerns and improvements include:

1. The clause does not do all of what the buyer intended i.e. allow them to exit the contract without difficulty if a timber pest infestation or pest damage is found
 - *If the buyer told you that was their intent then is this clause the right one to use?*
2. The clause does not state what is to happen if the buyer does not get the report done.
 - *Be specific and state that if the certificate is not done by a stated time then the benefit of the clause is waived.*
3. The clause does not clearly cover the buyer if another type of timber pest such as fungus or borers is discovered.
 - *Use the industry accepted term 'timber pests' consistently- don't confuse the issue by saying timber pests in one part of a clause and termites/white ants in another part*
4. The term does not state consequences if the buyer doesn't get a Certificate. Would this mean the contract was at an end or that it became unconditional?
 - *Be specific about outcomes - either of those outcomes could be argued.*
5. The statement "*the Certificate shall be obtained not less than 14 days after acceptance of the Offer date*" is not clear. There is no last date for the result of the inspection to be communicated to the seller. This creates uncertainty and could delay settlement.
 - *"Not less than" seems to be an error - use a set date or number of days*
6. "*The seller is to fix the infestation and damage prior to settlement*" is not a clear deadline. If sellers left the repairs until very late how would buyers plan, book the removalist etc.
 - *Again use a set date or number of days*
 - *Include a time frame for every action and decision process*
7. There are no standards relating to who inspects or for the standard of repairs.
 - *Use standards as appropriate. Sellers are better protected if a licensed pest controller reports. Buyers are better protected if a licensed trades-person does repairs.*

If this condition is used 'as-is' what risks are there?

This clause carries some small risk for the parties themselves e.g. if the buyer seeks to be released from the contract and the seller tries to enforce the contract, they will have the cost and hassle of a dispute.

It is also possible that the buyer could make a claim against the seller under consumer law. They might claim that the contract had an unfair term, i.e. that the clause is one-sided (all the decision making power is with the seller).

They might also claim to have been misled by the representative, having relied on their expertise in the drafting of the condition, or that they should have known about the pest damage and disclosed it.

The representative risks being drawn into a dispute between the parties should one arise, and having a complaint against them personally.

Are we there yet?

So to sum up, the Matrix did not fully cover all the questions arising e.g. if the report was not done, or if it identified a problem with pests or damage.

- *What happens if no report is done?*
- *When are the pests to be treated and damage repaired?*
- *Who is to do the treatment and repairs?*
- *What happens if the decision by the seller is not to treat the pest or repair the damage?*
- *When does the seller need to decide if they were willing or unwilling to rectify the problems?*

No term can cover every eventuality, but this one could have been improved.



What next?

The same components as in the “what to do” stage need to apply to the “what next” stage. If a problem is discovered and action is required then the implications and consequences need to be clearly written and understood.

If there is a prewritten clause available, it may be the best option, but check it to see that it matches the intent of the party requesting the condition.

Terms should not be unilateral or unfair.

The Special Conditions matrix

A. What to Do?	✓	B. What Next?	✓
<p>DOES IT CLEARLY STATE:</p> <p>1. Specific Outcome and Why? What needs to be done and why is it being done?</p>		<p>DOES IT CLEARLY STATE:</p> <p>1. Specific Outcome and Why? What needs to be done and why is it being done?</p>	
<p>2. Who to Do (Credentials/Standards)? For the report - do they need to be licensed or have a certain qualification? What standard applies–</p> <ul style="list-style-type: none"> ○ a particular “Australian standard” ○ 'like new' ○ in same condition? 		<p>2. Who to Do (Credentials/Standards)? For the repair - do they need to be licensed or have a certain qualification? What standard applies –</p> <ul style="list-style-type: none"> ○ a particular “Australian standard” ○ 'like new' ○ in same condition? 	
<p>3. If not, then what? If the buyer decides not to get a report what happens to the contract?</p>		<p>3. If not, then what? If the seller decides not to fix the problem what happens to the contract?</p>	
<p>4. Who to Arrange? Seller / Buyer</p>		<p>4. Who to Arrange? Seller / Buyer</p>	
<p>5. Who to Pay? Seller / Buyer</p>		<p>5. Who to Pay? Seller / Buyer</p>	
<p>6. By When? Days from ... Set date</p>		<p>6. By When? Days from ... Set date</p>	

Note: It is important that you comply with your Agency’s policy in respect to Special Conditions.

Standards

Not every special condition will benefit from stated 'standards and credentials' being applied (e.g. as described in the Matrix approach).

Each Special Condition needs to be evaluated based on the intent of the party including it and the merit of being specific. Where practical it is preferable to be specific about the outcome taking into account licensing and health and safety considerations.

If repairs are involved, there may be an “implied standard” of repairs. If repairs are not at an appropriate standard the seller runs the risk that the buyer will refuse to settle. The buyer's willingness to proceed is the measure of the acceptable standard.

The purpose of the Two Step Matrix is to provide a framework to check that what is being agreed is clear and that all parties understand the requirements and implications.

Documentation

We have not touched on how special conditions are documented yet, but this can be important. The following points should be remembered.

Brief special conditions can be written in the blank space on the front of the contract provided they are legible and clear.

Do not use this method if it means being so brief that the meaning of the condition is unclear or you are unable to explain who needs to do what by when, and what will happen if they don't.

Longer special conditions are attached as an Annexure and a reference is made to this in the space provided e.g. “*Annexure A - Pest Clause forms part of this Contract*”. This allows you to include as much wording as is needed to be clear about what is to happen.

Many agencies have prewritten Special Conditions and Annexures or use those available from industry associations. The use of these can reduce the risks associated with poorly written clauses, if they have been checked by lawyers to ensure that they are well written.

Buyers should be advised to read such Annexures carefully to ensure they meet their requirements.

All parties should initial any amendments to the contract. Special conditions and Annexures should be signed by the buyer and seller, witnessed and dated.

Any further amendments (e.g. alterations as a result of counter-offers) must also be initialed.

Changes after acceptance require a formal written variation to be completed.

Once a 'condition' is satisfied, document this within the relevant time period to ensure that the agreement becomes binding.

Take great care with words / terminology used in special conditions. **If a term is not defined within the contract or by the *Joint Form of General Conditions* or by reference to an external source such as an Australian Standard, it may have no legal meaning in the contract, or the meaning may become the subject of dispute.**

Example of a Special Condition - Next door neighbour's dogs

“This contract is subject to the next door neighbour only keeping 1 of their 3 dogs at the property.”

A. What to Do?	✓	B. What Next?	✓
<p>DOES IT CLEARLY STATE:</p> <p>1. Specific Outcome and Why?</p> <ul style="list-style-type: none"> Which property is being referred to? When - settlement day or longer? What are the shire regulations? How can you enforce a condition on a third party? What about successors in title? 		<p>DOES IT CLEARLY STATE:</p> <p>1. Specific Outcome and Why?</p> <ul style="list-style-type: none"> If the neighbour is not willing to make the required change - what next? 	
<p>2. Who to Do (Credentials/Standards)?</p> <ul style="list-style-type: none"> Who will enforce - the shire, the RSPCA ...? Is there an agreement involving the neighbour? 		<p>2. Who to Do (Credentials/Standards)?</p> <ul style="list-style-type: none"> Not applicable. 	
<p>3. If not, then what?</p> <ul style="list-style-type: none"> If the neighbour refuses what is the buyers right under the contract? How will the buyer know if the neighbour has done this or whether they are just on holiday or out for the day of the pre-settlement inspection? 		<p>3. If not, then what?</p> <ul style="list-style-type: none"> If the seller cannot get a binding agreement with the neighbour then there is no remedy. What form would a binding agreement take? 	
<p>4. Who to Arrange? Seller / Buyer</p> <ul style="list-style-type: none"> Who to sort out the dog issue? The neighbour is not a party to this contract. 		<p>4. Who to Arrange? Seller / Buyer</p> <p>Third party clause.</p>	
<p>5. Who to Pay? Seller / Buyer</p> <p>Not applicable?</p>		<p>5. Who to Pay? Seller / Buyer</p> <p>Not applicable</p>	
<p>6. By When? Days from ...</p> <p>No time frame?</p>		<p>6. By When? Days from ...</p> <p>No time frame?</p>	

Is a better clause possible to address this issue?

A clause could be written with more detail, but it is obviously impossible for a neighbour to be bound by a condition if they are not a signatory to the contract. For this reason a special condition relying on a neighbour's commitment to certain actions is not recommended.

In one actual scenario a clause was written requiring a seller to provide a letter from a neighbour, confirming that the noise heard on the day of an inspection was not usual and was due to her 'dog sitting' two extra dogs. While this may have provided comfort to the buyer, it would not be enforceable - it would probably have been better to suggest that the buyer made their own enquiries with the neighbour before deciding whether to make an offer.



Activity 4 Review shortfalls in special conditions

In pairs or groups as directed by your trainer, find a key weakness in one or more of the following special conditions. Draft a special condition without this weakness. Use the matrix as a tool.

A Matrix is provided for each activity.

Answers can be found on pages 35 to 39 of this manual

4.1 ‘Purchasers request vacant possession’

This example is taken from a recent contract for a property that had a fixed lease in place. The fixed lease was not due to expire for more than 3 months after the due settlement date. The buyer's intent was to not buy unless they could have vacant possession.

Concerns or shortfalls?

Special Conditions matrix

A. What to Do?	✓	B. What Next?	✓
DOES IT CLEARLY STATE:		DOES IT CLEARLY STATE:	
1 Specific Outcome and Why?		1 Specific Outcome and Why?	
2 Who to Do? (Credentials/Standards)		2 Who to Do? (Credentials/Standards)	
3 If not, then what?		3 If not, then what?	
4 Who to Arrange? Seller / Buyer		4 Who to Arrange? Seller / Buyer	
5 Who to Pay? Seller / Buyer		5 Who to Pay? Seller / Buyer	
6 By When? Days from ...		6 By When? Days from ...	

Draft this special condition using the matrix

4.2 “The offer is subject to the sale and settlement of the buyers’ property no later than 1/7/13”. Settlement Date was to be 1/7/13.

Concerns or shortfalls?

Special Conditions matrix

A. What to Do?	✓	B. What Next?	✓
DOES IT CLEARLY STATE:		DOES IT CLEARLY STATE:	
1 Specific Outcome and Why?		1 Specific Outcome and Why?	
2 Who to Do? (Credentials/Standards)		2 Who to Do? (Credentials/Standards)	
3 If not, then what?		3 If not, then what?	
4 Who to Arrange? Seller / Buyer		4 Who to Arrange? Seller / Buyer	
5 Who to Pay? Seller / Buyer		5 Who to Pay? Seller / Buyer	
6 By When? Days from ...		6 By When? Days from ...	

Draft this special condition using the matrix



4.3 “This contract is subject to a building inspection report within 7 days of acceptance of this contract. If the report identifies any damage this contract will be at an end unless the seller pays for any repairs.”

Concerns or shortfalls?

Special Conditions matrix

A. What to Do?	✓	B. What Next?	✓
DOES IT CLEARLY STATE:		DOES IT CLEARLY STATE:	
1 Specific Outcome and Why?		1 Specific Outcome and Why?	
2 Who to Do? (Credentials/Standards)		2 Who to Do? (Credentials/Standards)	
3 If not, then what?		3 If not, then what?	
4 Who to Arrange? Seller / Buyer		4 Who to Arrange? Seller / Buyer	
5 Who to Pay? Seller / Buyer		5 Who to Pay? Seller / Buyer	
6 By When? Days from ...		6 By When? Days from ...	

Draft this special condition using the matrix



4.4 “The seller to replace and paint the bowed beam in the alfresco by settlement.”

Concerns or shortfalls?

Special Conditions matrix

A. What to Do?	✓	B. What Next?	✓
DOES IT CLEARLY STATE:		DOES IT CLEARLY STATE:	
1 Specific Outcome and Why?		1 Specific Outcome and Why?	
2 Who to Do? (Credentials/Standards)		2 Who to Do? (Credentials/Standards)	
3 If not, then what?		3 If not, then what?	
4 Who to Arrange? Seller / Buyer		4 Who to Arrange? Seller / Buyer	
5 Who to Pay? Seller / Buyer		5 Who to Pay? Seller / Buyer	
6 By When? Days from ...		6 By When? Days from ...	

Draft this special condition using the matrix



4.5 “Seller to provide a copy of shire approval for the patio within 7 days of acceptance.”

Concerns or shortfalls?

Special Conditions matrix

A. What to Do?	✓	B. What Next?	✓
DOES IT CLEARLY STATE:		DOES IT CLEARLY STATE:	
1 Specific Outcome and Why?		1 Specific Outcome and Why?	
2 Who to Do? (Credentials/Standards)		2 Who to Do? (Credentials/Standards)	
3 If not, then what?		3 If not, then what?	
4 Who to Arrange? Seller / Buyer		4 Who to Arrange? Seller / Buyer	
5 Who to Pay? Seller / Buyer		5 Who to Pay? Seller / Buyer	
6 By When? Days from ...		6 By When? Days from ...	

Draft this special condition using the matrix

Bring it together

We have identified that sometimes it is difficult to specify credentials and standards required in the “what next” stage of the Two Step Matrix.

We have also determined that it is important to be as specific as possible, because it can reduce uncertainty and prevent disputes.

A further example

“The seller is to have the property cleaned to a professional standard by the pre-settlement inspection.”

There may be a number of interpretations and potential misinterpretations of this Special Condition.

First, what is to be cleaned?

Does it include: gutters, fences, windows, fly screens, outdoor paving, exhaust fans, air conditioning vents, window tracks, carpets?

Secondly, how is the required professional standard to be defined and measured?

What is clean to one person is not necessarily clean to someone else. Consider whether the clause may cause conflict e.g. because:

- the seller may clean the property themselves believing their cleaning is of a professional standard yet the buyer find it unsatisfactory
- the seller may pay a professional cleaner for a specified number of hours, yet the standard may still not satisfy the buyer.

One possible solution is a clause requiring evidence that the property had been cleaned by a professional and that evidence satisfies the clause, rather than a subjective judgment as to cleanliness.



Look for other options

If you are aware that a proposed Special Condition is subjective and concerned that the contracting parties may not have the same standards, it may be easier and less time consuming to look for a different option.

It may be better to explain to both parties that subjective Special Conditions can cause confusion and disputes and suggest (for example) either:

- an adjustment to the agreed purchase price of the house; or
- an agreement that the buyer makes the cleaning arrangements with a specified contribution by the seller to the cost.

Avoiding conflict and delay is a win for the seller, a win for the buyer and a win for you as the salesperson.

Knowing when the complexity of a condition is beyond your expertise



It is important to remember that contract law is a complicated and specialised area of law. Do not give legal advice and wherever possible make use of prewritten clauses that have already been vetted by an expert.

Remember that while your first duty is to the seller, and to furthering their interests, you must not mislead the buyer, for instance by misrepresenting the impact of a special condition.

There are times when a condition may be risky to one of the parties or risky to you and the agency because it is outside of your normal expertise.

In these situations it is important to ask the buyer to arrange for a lawyer to draft the Special Condition. Suggest to your seller that they too seek legal advice as to whether the condition is in their interest before they agree to include it in the Contract.

Collect and check information when listing

Collecting property information at the time of listing can highlight issues that need resolving before a contract is written. This information can be used to reduce the need for special conditions.



Title searches

Title searches reveal encumbrances on the land, such as restrictive covenants, easements, encumbrances, deposited plans, strata plans, notifications, and changes to strata by-laws.

These may need to be followed up. Copies of the encumbrances should be obtained from Landgate and made available to prospective buyers. *Many agents now also complete an Interest Enquiry at Landgate - this can reveal many other interests that do not appear on Title.*

It is one thing to obtain copies of encumbrances - it is another to know what to look for and to understand the implications. If there are restrictions or encumbrances on the land that you do not understand you may need to consult your principal, a settlement agent, the seller, Landgate or a legal advisor.

If you can see an obvious discrepancy i.e. an aspect of a property which does not make sense when looking at the Title Search, then speak to the seller about your concern. The problem won't just go away.

Approvals and compliance certification

Using a disclosure form can protect the agency, the buyer and the seller. Ask the seller to provide copies of local government approvals, swimming pool compliance, RCD and smoke alarm compliance, structural reports, termite reports etc.

This could highlight shortcomings in compliance or approvals at a time when the seller can attend to these matters prior to the Contract negotiations. This can significantly reduce uncertainty and reduce the need for related Special Conditions.

Summary

- Understand the difference between conditions and warranties
- Collect and analyse information at the time of listing and try to resolve issues to avoid the need for Special Conditions
- Make use of pre-drafted Annexures and Special Conditions for common scenarios wherever practicable
- You may need to draft Special Conditions for matters not covered by your agency's 'standard' Special Conditions
- Always clarify Special Conditions included in contracts prepared by conjunctional agents
- Use terminology that has a defined meaning
- It may make sense to negotiate price and other solutions rather than draft highly subjective Special Conditions
- Obtain assistance and legal advice on matters relating to Special Conditions outside your area of expertise
- Always get special conditions signed by all parties

The Matrix is a checklist that may help you interpret and write Special Conditions.



Appendix 1 - Special Conditions Matrix

A. What to Do?	✓	B. What Next?	✓
DOES IT CLEARLY STATE:		DOES IT CLEARLY STATE:	
1 Specific Outcome and Why?		1 Specific Outcome and Why?	
2 Who to Do? (Credentials/Standards)		2 Who to Do? (Credentials/Standards)	
3 If not, then what?		3 If not, then what?	
4 Who to Arrange? Seller / Buyer		4 Who to Arrange? Seller / Buyer	
5 Who to Pay? Seller / Buyer		5 Who to Pay? Seller / Buyer	
6 By When? Days from ...		6 By When? Days from ...	



Appendix 2 - Quiz and Activity Answers

TRUE OR FALSE QUIZ

1. The price of the property is an 'essential' term of the contract	Yes - these are terms so significant that without them the agreement can't be finalised
2. If a term is an 'express' term it is one that has to be done quickly	No - in this context 'express' means any terms that have been explicitly agreed, whether verbally or in writing
3. In a written contract the only terms that can be enforced are those written down	<p>No - Contracts also have implied terms that are enforceable. Common practice, legislation and common law can all create implied terms in contracts for the sale of land and in the agreements agents enter into with property owners.</p> <p>For instance, there is an implied requirement for the parties to cooperate and to act in good faith.</p> <p>There are also consumer guarantees under consumer law that are not written in the contract yet can be enforced e.g. the guarantee that services will be delivered with due care and skill and that goods purchased will be as they were described.</p>
4. Conditions are always terms but not all terms are conditions	<p>Yes - there are two types of terms.</p> <p>Some terms are Warranties - (if breached the contract goes on but the wronged party can seek compensation for the term not being fulfilled as agreed) e.g. the seller warrants the house will be cleaned professionally but this does not happen - the buyer can seek the sum of money it costs to have the cleaning done.</p> <p>Some are Conditions (these can stop the contract if they are not fulfilled). They can be conditions subsequent (the contract exists but may be ended) or precedent (the contract doesn't exist until the condition is fulfilled).</p>

Activity 1 is debriefed on Pages 10 and 11 of this manual.

Activity 2 - Matrix of Condition

A. What to Do?	✓		✓
DOES IT CLEARLY STATE:		Wording that covers this point	
1 Specific Outcome and Why?		<i>a licensed pest control company (“Contractor”) issuing a Certificate in accordance with Australian Standards confirming that the Property is free from timber pest infestation and damage (“the Certificate).</i>	
2 Who to Do? (Credentials/Standards)		<i><u>The Buyer</u> shall, at the Buyer's own expense, employ a Contractor of the Buyer's choice ...</i>	
3 If not, then what?			
4 Who to Arrange? Seller / Buyer		<i>Buyer</i>	
5 Who to Pay? Seller / Buyer		<i>at the Buyer's own expense</i>	
6 By When? Days from ...		<i>not less than 14 days after acceptance of the Offer date.</i>	
B. What Next?			
DOES IT CLEARLY STATE:			
1 Specific Outcome and Why?		<i>Certificate saying no infestation</i>	
2 Who to Do? (Credentials/Standards)		<i>licensed pest control company</i>	
3 If not, then what?		<i>If no Certificate confirming that the Property is free from timber pest infestation and damage then then the Seller may at the Seller's option: a. Treat such infestation and/or repair such damage at the Sellers cost prior to settlement; or b. Give the Buyer the right to terminate the contract by giving written notice of termination to the Seller or the Seller's agent on or within 48 hours of receipt of written notification from the Seller that the Seller is unwilling to affect such treatment and or such repairs.</i>	
4 Who to Arrange? Seller / Buyer		<i>Seller</i>	
5 Who to Pay? Seller / Buyer		<i>Seller</i>	
6 By When? Days from ...		Not Covered	

Activity 3 No answer - this is an optional activity

Activity 4

As explained the first example (dogs barking) is better not covered by a condition. Some things are not within a seller's control. Neighbours are not bound by the contract, and sellers are unlikely to appreciate being asked to involve their neighbors. Buyers sometimes need to make their own enquiries and to understand that sellers cannot control every variable.

The following suggestions are provided for the other activities. Bear in mind that although a reasonable outcome might be negotiated in each case, clauses should be clear and robust so that they work even in the 'worst case scenario' where a buyer and seller are not in agreement and not negotiable in their attitudes.

4.1 “Purchasers request vacant possession”

Concerns or shortfalls

The statement '*Purchasers request vacant possession*' is not a meaningful term. The language is not strong enough to make vacant possession a condition of the contract, and must be looked at in the context of other contract wording, ie whether the lease was disclosed.

The *Joint Form of General Conditions* 6.1 (b) provides for vacant possession where the Property is not sold 'subject to' a Lease. The legal rights of the buyers in this type of situation therefore depend on whether the contract states 'subject to a lease' or not. If the contract is not 'subject to a lease', buyers are entitled to vacant possession under the contract.

It is important to note that under the *Residential Tenancies Act 1987*, tenants are also entitled to enforce their lease. If a seller agrees to vacant possession when a lease is in place, but the tenants are not willing to move, buyers cannot force them to. A sales representative could be breaching Australian Consumer Law if they were found to have bullied, harassed or coerced a tenant into moving out before their lease had expired. Buyers entitled to vacant possession may have the right to recover damages from sellers, or to delay settlement and claim penalty interest, depending on circumstances, if vacant possession is not provided.

In the actual case referred to, the sales person spoke verbally to tenants who indicated they were happy to move. The problem arose when the tenants had difficulty finding a new place and decided to stay until the end of their fixed lease. This caused stress for all parties, default notices and large penalties. Settlement did finally happen, almost 3 months late.

Special condition

Although parties might agree to a seemingly stronger clause such as '*this contract is subject to the seller providing a copy of a written agreement signed by the tenants agreeing to vacate the property prior to Settlement*', this clause and the provision of a letter would still not fully protect the buyer. A letter from the tenant would not remove their rights under the lease.

Making the offer '*subject to vacant possession prior to settlement*' is one option for the buyer, as they do not then need to settle if the tenant has not vacated the property. The seller should be advised of the risks of agreeing to this term however.

Note: The bottom line: it is very difficult to sell property with a fixed term lease if the buyer requires “vacant possession” on a date prior to the end of the lease. Tenants may exert their rights and penalties may result. It is not useful to write a weak, unenforceable term that gives the buyer unrealistic expectations and may make it seem that seller has been deceptive.

4.2 “The offer is subject to the sale and settlement of the buyers property no later than 1/7/13”. Settlement date: is stated as 1/7/13

Concerns or shortfalls

The usual intent for a buyer with a 'subject to sale' term is for the two properties to coincide, otherwise the buyer may not have anywhere to live in between. Problems can arise if one settlement is delayed however.

This clause is not in the best interest of the seller. There is no “48 hour clause” (actual wording used should be *2 Business Days* as this is a clearly defined term) to allow the seller to require that the buyer make their offer unconditional within two business days should another buyer be found.

There is also no date by which the buyer must have received an offer on their property. The contract may be conditional until the last day without any interest in the buyer's sale and no opportunities for the seller to accept another offer. It is also best to specify that the buyer's contract to sell their home must not be 'subject to sale'

Special condition

The following condition is a better more detailed clause but does still have defects, explained below*. **This highlights how for any issue that occurs reasonably often, a prewritten clause that has been vetted by lawyers is the safest option.** Either party can use ambiguities of meaning to avoid proceeding.

This sale is subject to the Buyers receiving an unconditional offer on their property situated at _____ by no later than _____ (use a date at least 30 days prior to settlement)

This offer is further subject to the settlement of the sale of the Buyer's aforementioned property within _____ days of the unconditional offer on the Buyers home (next to settlement date state: refer to special condition no:)

Should the Seller or Seller's Agent advise the Buyer or Buyer's Real Estate Representative in writing that they have received a more acceptable offer, the Buyer shall have _____ Business Days after the date of receipt of the Seller's/Sellers agent advice expiring at 5.00pm on the last day to make this Contract unconditional in writing and agree to proceed to settlement within 28 days, otherwise this contract is at an end and all monies shall be refunded without deduction. Receipt of the Seller or Seller's agent advice is deemed to be when the Buyer or Buyer's Real Estate Representative has received the advice by hand or fax receipt.

*Unconditional is not a defined term under the JFGC. It is best to specify the types of conditions that can't be accepted e.g. subject to sale.

*By hand or fax receipt does not specify a fax number or address for delivery

*Advice is not a defined term - Notice is the defined term that should be used, as there are specific rules for Notices under JFGC 21 e.g. as to how a Notice must be served.

NOTE: use capital letters for defined terms

4.3 “This Contract is subject to a building inspection report within 7 days of acceptance of this Contract. If the report identifies any damage this Contract will be at an end unless the seller pays for any repairs. ”

Concerns or shortfalls

If *subject to finance* is it efficient to do the report in 7 days?

“Any damage” is too vague. ‘*Serious Structural Defect*’ or ‘*Major Defect*’ and ‘*Minor Defect*’ are terms that have accepted definitions - *provide the definition or a reference to its source.*

Who is to do the inspection? Should the contract specify a licensed builder or person qualified in undertaking pre-purchase property inspections?

Does a standard apply? *Australian Standard AS 4349.1-2007 (Inspections of Buildings Part 1: Pre-purchase inspections – Residential buildings)* is the usual standard - it has definitions.

Who will pay? Seller paying for “any repairs” covers the who, but specify how the value will be determined. The seller may wish to do the repair – the clause does not actually allow for this.

What happens if the report is not done, or not done on time? Who should receive a copy and by when?

Special condition

Note: The main components that arise from use of the Matrix are in bold italics.

This offer is subject to a report being obtained from a ***Registered Builder*** under *Australian Standard AS 4349.1-2007 (Inspections of Buildings Part 1: Pre-purchase inspections – Residential buildings)* stating that the buildings are ***free from Major Defects***. This report is to be obtained by and at the ***expense of the Buyer(s)*** within ***seven (7) days*** of acceptance of this offer, finance approval or an unconditional offer on a subject sale property whichever is the latter, at the Buyer’s expense.

Should the registered builder recommend a ***further report*** the buyer has an additional 14 days from the date of the Registered Builder's report to obtain the further report.

Should the report or required further report disclose any ***Major Defects*** of a structural nature, the report ***must be presented to the Seller*** by the Buyer ***within seven (7) days*** of the inspection date, stating the extent, nature and location of such defects. The Seller will obtain quotes to remedy the structural problems within fourteen (14) days from the receipt of the report. If the Seller does not ***agree*** to pay for these repairs ***within fourteen (14) days***, the Buyer(s) may give written Notice that the ***Contract has now come to an end*** whereby any monies paid by the Buyer(s) shall be repaid without deduction. Should repairs ***not be able to be completed*** prior to settlement then the Buyer’s Representative is to hold funds equivalent to the quote to pay for the repairs.

Should the Buyer(s) ***fail to have the inspection*** carried out or fail to present the report to the Seller within the time frames specified above, then the Buyer shall be deemed to have ***waived the benefit*** of this clause whereby the Buyer(s) shall accept the buildings in their condition as at the date of this offer.

The Seller and Buyer acknowledge that any Defects included in the report must be of structural nature and shall ***not include Maintenance Items or Minor Defects*** mentioned in the report.

4.4 “The seller to replace and paint the bowed beam in the alfresco by settlement.”

Concerns or shortfalls

What to Do: Specific outcome not clear enough and no standard set or credentials identified.

If not then what: not stated.

What next: Not specific enough on what has to be done, and no standards set or credentials identified.

Poor timing “by settlement” – therefore seller can still be doing by morning of settlement.

This was a real case and the seller fixed it himself. The buyer was horrified at the pre-settlement inspection. The paint did not match and she wanted the entire alfresco painted before she settled.

Special condition

Option 1: Adjust the price and accept as is.

This is the simplest option.

Option 2: Special Condition

This Contract is subject to the Seller arranging a suitably qualified person to replace the damaged alfresco beam and re-paint it with matching paint to the alfresco. This work must be completed by the pre-settlement inspection. If the Seller has not carried out the replacement and painting by the pre-settlement inspection, the Seller agrees to reduce the purchase price by \$1,000.

4.5 “Seller to provide a copy of shire approval for the patio within 7 days of acceptance.”

Concerns or shortfalls

This does not clearly state that the contract is “subject to the seller providing a copy of local government approval for the patio within 7 days of acceptance.” If this does not happen what are the consequences?

The condition does not state what happens if the seller does not provide the buyer with a copy of the approval in time.

The terms 'shire ' and 'approval' are not legally defined. It would be more correct to say 'Local Government Authority' instead of 'shire', 'Building Permit' instead of 'approval' and 'Building Approval Certificate for Unauthorised Building Work' for the retrospective document. These terms are defined in the *Building Act 2011 (WA)*.

Is the condition satisfied if it turns out that the patio was not approved initially, provided the seller succeeds in gaining retrospective approval?

Is the condition satisfied if the retrospective approval is gained before settlement but not within the 7 days?

Do you think a court would consider the intent of the clause has been satisfied with a retrospective approval?

Special condition

Option 1:

The Seller is to provide to the Buyer a copy of the Building Permit for the rear patio from the Local Government Authority within 7 days or this Contract is at an end and all Deposit and other monies paid shall be repaid to the Buyer without deduction. (If only the original approval is acceptable).

Option 2:

The Seller is to provide to the Buyer a copy of the rear patio Building Permit or a copy of the Building Permit or Building Approval Certificate for Unauthorised Building Work for the rear patio from the Local Government Authority within 21 days of Acceptance of this Contract. Should the Seller not be able to provide a copy of a Building Permit or Building Approval Certificate for Unauthorised Building Work in the time specified, this Contract is at an end and all Deposit and all other monies paid shall be repaid to the Buyer without deduction.

The best approach may depend on the circumstances and the buyer's intentions after settlement. (Do they want to rectify the patio, to obtain approval after settlement, or to demolish the patio?)

The buyer may elect to proceed without approval or they may wish to request a price reduction from the seller.

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The information provided in this publication was adapted from material prepared by the Department of Commerce and the Real Estate Institute of Western Australia.

This material should not be taken as a statement of law.

The Department of Commerce and REIWA strongly recommend that you seek legal advice of a competent experienced lawyer who practices in this area if you are uncertain about your obligations.

Participants may also refer to the *Real Estate and Business Agents Act 1978*; the *Real Estate and Business Agents (General) Regulations 1979*; and the *Code of Conduct for Agents and Sales Representatives* and to any other relevant legislation.

