

Fact Sheet

BUYING A HOME

WHAT TO DO WHEN YOU FIND YOUR “DREAM HOME”?

You have spent several weeks assessing the market place and finally find the right property for you in a price range you can afford.

Step 1 – Holding Deposit

It is usual to pay a holding deposit to the agent as a sign of good faith. This can be any amount but should be significant so the vendor can see you are genuine. Remember there is no binding agreement until formal written contracts are signed by both parties. Agreements dealing with real property must, by law, be in writing containing sufficient information to clearly identify the property, the parties, the main terms and conditions and the price. Any holding deposit is refundable unless a written agreement says otherwise.

Step 2 – Get a Solicitor or Get Busy!

If you intend to use a solicitor, advise the agent your solicitor's name and details. The agent will normally then arrange for the vendor or the vendor's solicitor to send the counterpart contract (the duplicate copy of the contract to be signed by the purchaser) to your solicitor, unless the vendor requires an immediate exchange.

In that case you may need to sign the contract held by the agent, subject to a “cooling off” period – that is, a statutory right for you to pull out of the contract usually within 5 business days (although this can be extended with the vendor's consent) after you sign the contract. The consequence if you do withdraw is that you lose 0.25% of the price as a payment to the vendor for giving you the 5 day grace period (during which the vendor cannot sell to anyone else).

Step 3 – Arrange Your Finance

If you have not already done so, liaise with your lender to obtain urgent loan approval, in writing, so that you can safely proceed to sign and exchange (deliver) your contract. Most vendors insist that you waive your statutory right to the “cooling off” period so that when contracts are exchanged you are bound to purchase and most New South Wales vendors will generally not agree to a contract “subject to finance”.

(The “cooling off” period can only legally be waived, or given up, where a solicitor or barrister who does not act for the vendor signs a document called a “Section 66W Certificate” saying that he/she has explained the contract and the fact that there is a statutory cooling off period and that you have agreed to waive it in the particular transaction).

Step 4 – Arrange Pre-Purchase Inspections

This means that the vendor is under no legal obligation to advise you as to any physical or title defects the property may have, subject to certain disclosures required to be made in the contract, by law.

So, when it comes to the physical aspects of the property you should carry out all inspections and be fully satisfied that what you are buying is not structurally defective or termite infested. It is also usually better to ensure that the building and other structures comply with the building code and swimming pool laws before the contract is exchanged and becomes binding upon you.

Step 5 – Negotiate any changes you need to the contract

By law in NSW a draft form of the contract for sale must be prepared and available before the property is offered for sale. The contract usually includes 12 printed pages and a number of special conditions, as well as copies of certain documents relating to the title of the property.

You do not have to accept the terms of the contract, as drafted. You may negotiate these with the vendor, usually through the agent, or your solicitor up until exchange. You can do the negotiating yourself or instruct your solicitor to do so. Your solicitor will discuss the terms of the contract with you and suggest any changes they consider prudent.

However, it is important that you instruct the solicitor as to any matters specific to your needs. For example, the contract will provide a date settlement is expected to take place, however, you may be waiting for funds that won't be available before that day, or may have some other reason to either extend the date or bring it forward.

Step 6 – Exchange Contracts

Once you have satisfied yourself on all these aspects and negotiated any desired changes to the contract, you will sign the contract, obtain a 66W Certificate, if required and proceed to appoint a time to exchange the contract.

At the exchange you or your solicitor will attend on the vendor's solicitor, at an agreed time and at a place normally nominated by the vendor's solicitor, and deliver your signed counterpart contract (with any amendments made to it), the deposit cheque (or a cheque for the balance of deposit less the holding deposit, if any) and the 66W Certificate (if required).

You and the vendor or vendor's solicitor will check your copy of the contract against the vendor's signed copy to ensure they are identical in all respects. If they are different in any way, except for the most minor discrepancy such as an obvious insignificant typographical error, for example, there is a very real risk that the contract may be void (of no legal effect).

You will therefore appreciate that this checking of duplicate contracts function at exchange is crucial and not to be taken lightly. You will then take possession of the vendor's signed contract and hand the vendor's solicitor your signed counterpart. Then both contracts are dated.

What happens to the deposit?

In most cases the agent in a purchase and sale transaction will hold the deposit once the contract becomes binding until the purchase is completed. The deposit may be invested for the joint benefit of you and the vendor.

In this case interest on such invested deposit will generally be shared between you and the vendor. The deposit is held in trust and cannot be released without both parties giving written authority. This authority, on your part, may be contained in a special condition inserted in the contract by the vendor, so you should carefully check the contract before exchange, for any condition of this type.

What happens after exchange?

Once the contracts have been exchanged (or once the auction has ended by the fall of the hammer) the vendor is unable to sell to any other person and you are obliged to complete the contract. If you fail to complete the contract without good cause you stand to forfeit (give up to the vendor) the deposit, or a sum equal to 10% of the purchase price.

In some situations, you may even be liable to compensate the vendor for losses suffered by the vendor over and above this amount! . That is why it is important to have your finance approved and all other matters considered before you exchange - so you don't find on settlement you do not have sufficient funds or there are other problems which mean you cannot complete.

After exchange, subject to the specific terms of the contract you will normally be obliged to pay the balance of purchase price in 4 to 6 weeks. The actual completion date must be provided for in the contract, for the sake of certainty.

You will generally only be entitled to withdraw from the contract and get your deposit back (or rescind the contract) if the vendor's title is found in the meantime to be defective, or if any statutory warranty made by the vendor is disproved – for example, if your inquiry to Transgrid (the electricity authority) shows that it proposes to take an easement for transmission lines over the property but the vendor failed to disclose this affectation, you will generally be entitled to rescind.

After exchange of contracts you or your Solicitor will: -

1. make enquiries of relevant government departments and authorities;
2. ask the vendor a series of contractually - authorised questions (requisitions on title) to test the vendor's title to the property. (Sets of standard requisitions on title may be obtained from legal agents);
3. obtain a current survey and apply to the local council for a Building Certificate, where necessary or appropriate;
4. advise you of the amount and timing required for payment of stamp duty and attend on payment of stamp duty;
5. liaise with your lender to advise title details; obtain, read and advise you in respect of the mortgage documents; witness your signing of them; and provide necessary certificates to your lender;
6. advise you to take out building Insurance to insure the property against the risk of damage by fire, explosion, storm, etc and the date on which the insurance policy should commence. This will generally be on the date of completion or settlement, except where the vendor has allowed you into early occupation of the property (that is before settlement, which is the time you are normally entitled to move into the property).

This will not, of course, be needed if you are buying a Strata Title unit, villa home or townhouse as the Owners Corporation must insure all buildings under Strata Titles Law – the individual owners can simply insure their contents, usually. In this case, you must apply for a Certificate of Currency of insurance to make sure the owner's corporation has carried out its duty to maintain proper insurance.

7. arrange a suitable time and place for all parties to attend for settlement. The co-ordination of settlement can be very time consuming, particularly when there are a number of parties involved and agreed settlement appointments are cancelled or postponed;
8. in the case of a Strata Title property ensure the vendor supplies you with a certificate from the owner's corporation setting out the relevant financial information relating to your property (called "a Section 109 Certificate"), well before settlement. If the property is held under the Community Titles legislation, this is called a "Section 26 Certificate";
9. carry out a final physical inspection of the property as close as possible to the appointed settlement day. This should be done through the agent. You should carefully inspect the property to check for defects or damage done to it that did not previously exist (that is, to ensure the property is in the same condition as the last time you inspected it before exchange – that's what you contracted to buy, and that's what you should receive for your money!);
10. carry out final title search to ensure the title is as attached to, and represented in, your contract; and
11. attend and carry out settlement to make sure you receive a good legal title free of any encumbrance or fetter on the title.

Step 7 - Completion

What Actually Happens at Settlement?

At settlement (which is a term often used interchangeably with “completion” but is more appropriate to describe the procedure by which completion takes place) you will generally receive from the vendor:

- Certificate of Title (or Old System chain of title deeds if you are not dealing with Torrens Title);
- Transfer signed by the vendor;
- Discharge of any mortgage registered on title;
- Withdrawal of any caveat that may appear on your final search (which you would have obtained on the morning of settlement);
- Direction as to Payment.

You will hand over to the vendor:

- The settlement cheques, as per the vendor’s Direction;
- Order on the agent, authorising the agent to release the deposit held since exchange to the vendor.

You will then hand to your lender (mortgagee) who will have provided you with some, if not all, of the settlement cheques:

- Certificate of Title;
- Transfer;
- Discharge of Mortgage (if any);
- Withdrawal of any Caveat disclosed by your final search;
- Your cheque direction;
- Your final search (if requested); and
- Notice of Sale, duly completed by you.

Registration

Your lender should then promptly lodge the title documents on your behalf (together with its mortgage) for registration at the Land Titles Office. If you don’t have an incoming lender, you will need to attend to registration of the documents yourself (unless, of course, you have a solicitor, who will perform that duty for you as part of his/her role).

The Land Titles Office is located at Queens Square, Sydney. As the registration procedure is the means by which title to the property passes to you (at least in the case of Torrens and Strata Title) it must not be neglected or delayed. Registration is also extremely important, even though perhaps not quite as critical, in the case of Old System Titles.

The Notice of Sale from which you must complete and take to settlement, as outlined above, is the document that is required to enable the Land Titles Office to automatically notify the relevant rating authorities (in the Sydney notification area – your local council, Sydney Water Corporation and Valuer General’s Office).

Once that is done, the change of ownership will be recorded on the registers of those authorities so that rate and other notices relating to the property will be addressed to you, as owner, in the future.

On registration, the title deed (Certificate of Title) will issue showing you as the registered owner under the Torrens system. When you have a lender the title deed will also record the lender’s security interest in the property, which is known as a mortgage. In that case your title deed will be delivered to your lender (“mortgagee”) and held by it until you have repaid your loan and are therefore able to “discharge” your mortgage.

STAMP DUTY

Stamp duty is a tax which is payable to the New South Wales State Government on the transfer of land and certain other property in New South Wales (which is now called "Transfer Duty"). There are other types of stamp duties, including Mortgage Duty and Lease Duty. For the present purposes, however, we are mainly concerned with Transfer Duty.

Where no concession or exemption applies Transfer Duty is usually payable within 3 months of the date of the contract (but in practical terms must be paid before settlement or completion of your purchase and this usually within 4-6 weeks of the sale subject to what the contract says).

GST WARNING

Essentially, the Goods and Services Tax (GST) is not intended to apply to sales and purchases of established (as compared with newly constructed) residential properties. To that extent, GST should not normally impact on your purchase in a major or direct way.

However, GST may apply in certain circumstances including;

- the purchase of newly constructed (or substantially refurbished) residential properties;
- the purchase of a residence with the intention to use it for some commercial residential purpose (such as a guest house or boarding house);
- the purchase of a residence where you are in the business of purchasing, then perhaps renovating refurbishing and subsequently re-selling residential properties for a profit; and
- the purchase of a residential house or unit for example a unit purchase "off the plan" where you have the intention to immediately or in short term on-sell that property with a view to profit, particularly where you have a history of engaging in this type of activity or where you intend peruse course of conduct in relation to other properties in the future.

These brief notes are for your general information. They are not a definitive analysis of the subject and professional legal advice should be taken before any course of action is pursued. Your Solicitors at Barry F. Cosier & Associates can advise you further regarding any matters of this nature.



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