

PART 2:

Navigating the pre-purchase legal maze



As a first homebuyer, you'll spend time choosing a property and arranging a home loan, but how long do you spend getting to know the legalities? In the second of a two-part series, **Geri Forsaith**, founder of Sydney Property Conveyancing, explains why it can be a powerful strategy to know your legal responsibilities before you purchase

Buying a home is a legal process; this means that after signing and exchanging contracts you're legally bound to buy the property – and forfeit a substantial amount of your deposit if you don't go through with it.

So it's vital that buyers speak to their conveyancer or solicitor about the conveyancing process before exchanging contracts to avoid the common pitfalls.

The confidence that comes with knowledge helps the purchaser when negotiating price and also in securing the property quickly to reduce stress.

Let's look at the remaining legal issues you need to be aware of before signing on the dotted line.

Investment of the deposit

The deposit holder is usually the vendor's estate agent and if there isn't one, it's held by the vendor's conveyancer or solicitor. The agent should invest the deposit in an interest-bearing account and interest earned is usually split 50/50 between vendor and purchaser less any bank fees.

Both parties should give the agent their tax file numbers to avoid the top margin rate of taxation. Interest earned is paid by the agent to the purchaser and vendor after settlement.

If the deposit is held in a conveyancer's trust account, interest earned is payable to a Statutory Interest Account and may be applied to the Property Services Compensation Fund to assist with a client who may have suffered a monetary loss as a result of failure by a conveyancer to account for money that was entrusted to a licensee.

Release of the deposit

It's only been a recent development that vendors have requested the deposit to be released before settlement. Traditionally, it was held in trust to ensure the vendor sold the property to the purchaser at the agreed price.

Many experienced conveyancers and solicitors have concerns when the purchaser is asked to release the deposit. In the event the sale falls through, getting the deposit back from the vendor may prove to be difficult if it has already been used for other purposes.

It's common practice for some vendors to ask for the deposit to be released only for the purchase of another property.

In any event, a decision to release the deposit should only be taken after your conveyancer or solicitor has carefully considered the circumstances and you're aware of the risks involved.

Cooling-off period

When you buy a property in NSW there's usually a cooling-off period of five business days after you exchange contracts. On exchange, the buyer pays the agent 0.25% of the purchase price with the balance due before expiry of the cooling off period.

If the buyer wants to exercise their 'cooling off' rights in the five business days and get out of the contract, the vendor keeps the 0.25%.

If the buyer doesn't exercise their right, after the five days they're bound to pay the balance of deposit and proceed to buy the property.

In a market where there are a number of purchasers for one property, it may

be wise to exchange contracts with a cooling-off period, the effect being that the property is taken off the market and no other purchaser can secure it within the five days.

It gives the purchaser time to arrange pest and building inspections and strata searches, and get formal approval of the finance, as well as have the contract reviewed by their conveyancer or solicitor.

These checks can also be carried out before exchange of contracts without a cooling-off period but the property is still on the market and available to another purchaser.

Not all vendors agree to a cooling-off period and it's wise to ask the agent if the vendor will accept one when making your offer.

A cooling-off period doesn't apply if you buy a property at auction or exchange contracts on the same day as the auction after it's passed in.

Insurance

While it's the vendor's responsibility to hand over the property on settlement in the same condition as at the time of exchange, if there's no insurance policy in place, the question of where the money comes from may be an issue.

With a house, you have an insurable interest from the moment that you exchange contracts.

The purchaser's mortgagee requires a copy of a building insurance policy noting their interest as mortgagee and usually advises the minimum insurance they require, otherwise it should cover the insurable value of the property. These details are usually part of the loan-

document requirements, so insure it from the date of exchange of contracts.

For strata units, building insurance (and other related insurances such as workers compensation and public liability) is arranged by the owners corporation and the purchaser is required to obtain contents insurance and possibly third party insurance. Your solicitor or conveyancer arranges a certificate of currency of insurance for the building to confirm that it's current and also provides a copy to your mortgagee.

Pre-purchase inspections

The contract doesn't cover the quality of the buildings on the property – what you see is what you get, otherwise known as 'caveat emptor' or 'buyer beware'.

The buyer should organise both a pest inspection – which advises of any pest activity affecting the property – and a building report – which advises of any structural problems.

You may also want to consider having the electrical wiring and plumbing examined, as this isn't covered in a building inspection.

If you're buying a unit, townhouse or villa, you require a strata report. This summarises an inspection of the strata records of the owners corporation, identifying which insurances are in place, quarterly levies, any special levies, the financial position of the scheme, any ongoing maintenance problems and any issues noted in minutes of owners corporation meetings.

Any major issues highlighted in any of the reports may be used as a negotiating tool to reduce the purchase price.

Possession

If the contract notes that vacant possession is required on completion, the vendor must comply. Vacant possession not only means there's no-one living at the property, but also requires the removal of all belongings and rubbish.

It's the responsibility of the vendor to hand over the property in the same state as it was when contracts were exchanged.

If the contract is subject to existing tenancies, the vendor has to arrange with the letting agent for the transfer of bond money into the purchaser's name and any unpaid rent or monies payable under tenant's default are also to be attended to before completion.

The vendor's conveyancer or solicitor provides a Notice of Attornment on

settlement to the purchaser's conveyancer or solicitor which is a letter addressed to the tenant advising that the property has been sold and they are to direct their rental payments as stipulated by the new owner.

The purchaser is entitled to conduct a final inspection of the property before settlement to ensure there are no issues with the condition of the property. This should be arranged with the agent and is usually done the day before or the morning of settlement.

Time for completion

Standard completion time between exchange of contracts and settlement is 42 days (six weeks), however this can

'Settlement' is the final step taken in the conveyancing process to conclude the transaction when the title is transferred to the purchaser and they receive the keys

be negotiated between the parties prior to exchange.

This is a term of contract and means both parties have undertaken to adhere to it. It's something that can't be avoided and asking for an extension isn't normally granted as the vendor has usually already bought somewhere else.

If the purchaser doesn't complete the contract on or before this time, they're considered in default of the contract. The vendor's solicitor or conveyancer may issue a Notice to Complete to the purchaser and their solicitor or conveyancer which gives not less than 14 days' notice to complete it, starting on the day immediately following the one on which the Notice to Complete is served.

It's imperative that the contract is completed within this time, otherwise the purchaser may incur penalty interest on the balance of the purchase price at a rate of 10% calculated on daily balances, commencing on the completion date and continuing until completion of the contract. The interest varies from contract to contract.

If the purchaser doesn't complete the contract within the 14 days, the vendor's solicitors may terminate it and keep or recover the 10% deposit.

If the vendor has resold the property within 12 months of the termination, they may sue the purchaser to recover any

deficiency on the original sale price plus sue for the reasonable costs arising from resale and any attempted resale. Or, the purchaser may be sued to recover damages for breach of contract.

If the delay is due to the vendor, the purchaser is in the awkward position of trying to recover any monies lost due to the delay (ie, rent, removalists, storage) but this can prove difficult and needs to be examined on a case-by-case basis.

What happens on settlement day?

As the name suggests, 'settlement' is the final step taken in the conveyancing process to conclude the transaction when the title is transferred to the purchaser and they receive the keys.

The purchaser should make a final physical inspection of the property before settlement to make sure it's in the same condition as it was at date of exchange. If the purchaser has any concerns they should contact their conveyancer or solicitor without delay so that the issue may be resolved before settlement.

It's wise to leave the inspection until settlement day.

Settlement is usually attended by four parties: the vendor and the purchaser are represented by their respective conveyancer or solicitor, plus the discharging and incoming mortgagees.

The purchaser isn't required to attend settlement; your conveyancer or solicitor does this for you.

Immediately after settlement, the Transfer document and Mortgage are registered at the Department of Lands. The Valuer-General, local council and water authority (and strata manager, if applicable) are also notified of the ownership change. **YM**



Geri Forsaith is the founder of Sydney Property Conveyancing. Established in 2003, Sydney Property Conveyancing is an award-winning conveyancing practice dedicated to providing service excellence to NSW property purchasers and vendors and is today a successful conveyancing practice with the majority of conveyancing matters derived from client referrals. All views expressed are her own.