

PART 1:

Navigating the pre-purchase legal maze

As a first homebuyer, you're probably busy choosing a property and arranging a home loan, but how much time do you give to the legalities involved? In the first 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 buy

Buying a home is a legal process, which means that after signing contracts and exchanging them, you are legally bound to buy the property, – and will forfeit a substantial part of your deposit if you don't go through with it.

So, to avoid common pitfalls and mistakes, it is essential that every purchaser talks to their conveyancer or solicitor about the conveyancing process before exchanging contracts.

Confidence born of knowledge also helps the buyer when negotiating price and can assist in securing the property quickly to reduce stress.

First steps

You should aim early on to develop a

good business relationship with your conveyancer or solicitor so that they are familiar with your personal requirements. They need information about your mortgagee or mortgage broker as soon as possible to help them arrange a speedy request for valuation and loan approval.

Speed is of the essence especially when there are a few purchasers – or more – competing for the same property. If the contract reveals a fundamental problem such as zoning, the sooner you are aware of it, the better.

Analysing the contract

Every state in Australia has different conveyancing legislation and it is wise to use a conveyancer or solicitor who is

licensed and insured to practice in the one in which you are buying your home.

The contract identifies;

- the property
 - the names and addresses of parties
 - the price
 - the deposit
 - the date the parties agree to buy and sell (known as date of agreement or exchange date) and the completion date – ie when the balance of purchase monies is payable and legal title and possession are usually transferred
- The contract also allows for the adjustment of rates and taxes, rents rights, and the duties and obligations of each party.



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The contract protects both purchaser and vendor, although your conveyancer or solicitor advises you on the contract before exchange to ensure that the purchaser's interests (your interests as the buyer) are protected.

Once contracts are exchanged unconditionally, both parties are bound to performance of it and – be warned – changes to the contract after exchange are usually not entertained.

Negotiating the contract

When acting for a purchaser, your conveyancer or solicitor should recommend the following when reviewing a contract:

- land tax adjustment to be deleted if the property is to be the purchaser's principal place of residence
- completion date is suitable to the purchaser particularly if they are selling at the same time
- inclusions match the purchaser's expectations
- confirm all structures on the land comply with council requirements
- deletion of release of deposit clause if included in special conditions
- home warranty insurance certificate is included in the contract if the vendor has carried out building works of over \$12,000 in the last seven years
- copy of development application and any building certificate issued by the relevant council, and approved council plans if there has been recent development of the land
- obtain a copy of the survey from the vendor
- confirmation of vacant possession if required
- approval of sewer authority if structures were approved to be built over a sewer main, if required

Organising the title deed

A title deed, otherwise known as a Certificate of Title, is a single document

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issued by the NSW Department of Lands. These certificates are maintained by the NSW Department of Lands and detail the registered proprietor and registered interests such as mortgages, leases and easements.

Its purpose is to provide proof of title with accurate definition of boundaries and dimensions guaranteed by the State Government of NSW. The accuracy of the registry is called the 'principle of indefeasibility of title'.

The purchaser's identity

The purchaser's full name must be consistent with details on their birth certificate and any other identification documents, such as a driver's licence and passport provided in support of loan documents and any application for the First Home Owner Grant.

This is also important in order to avoid identity fraud – one of Australia's fastest-growing crimes.

Purchasers should think very carefully as to who is to be noted as the 'Purchaser' before entering into a contract.

If the purchasers are related parties under the *Duties Act 1997*, such as married or de facto couples, and one party wants to be taken off or added to the contract after exchange and before settlement, no additional stamp duty is payable.

If changes to purchasers' names are required after exchange of contracts, however, there may be stamp duty implications and each matter should be considered as a case-by-case scenario.

Description of the property

It is important for your conveyancer or

solicitor to check that the title details on the front page of the contract match those on the title search, the sewer diagram or strata plan in the contract.

For those buying a freestanding house, it is wise to get an identification survey before exchange of contracts to confirm the boundaries and dimensions of the property. Inconsistency in details of this kind may result in receiving advice on a contract that's incorrect or incomplete.

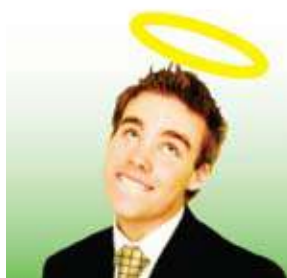
For example, a strata unit may include a car space that is on a separate title and if the details of it are not included in the contract, it may result in you purchasing the unit only – without the car space.

Inclusions

To avoid disputes, when reviewing a contract, your conveyancer or solicitor should always confirm the inclusions and exclusions with their client before exchanging contracts.

A fixture is an object which is physically attached to the land and forms part of it, such as an in-ground swimming pool, so it does not need to be specifically included in the contract. For example, a house which stands on the land, and is attached to it by foundations, is a fixture; so are windows and doors as they are fixed to the house. These need not be itemised in the contract.

The distinction between a fixture and a fitting is that if an item rests on the land by its own weight, it is a fitting, but if it is attached to the land other than by its own weight, it is a fixture and forms part of the sale. If you want to buy the fitting it needs to be specifically identified as part of the sale – eg the fridge or barbecue.



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Inclusions noted on the contract on exchange must be the same as on completion of the contract. For example, the vendor is not entitled to swap a new oven for an old one.

Land title

There are four types of title systems that exist in Australia today: old system title, Torrens title, strata title and crown lands, and depending on the type of title, it can put restrictions on your options.

Old system title

Old system title was the original registration system in Australia, whereby land transfer could be accomplished only through a complicated tracing of deeds for 30 years, resulting in a chain of title. This system was cumbersome, expensive and exposed to risk of title defects. It was substituted by Torrens title in 1858.

Torrens title

Torrens title (including company and community title) is the keystone of land ownership in Australia and has provided security and reliability since its introduction in 1858. It provides for a single document as evidence of 'title' for each parcel of land. Usually if you have a mortgage over the property the mortgagee retains the title document until you have repaid the loan.

- **Company title** was the most popular form of home-unit ownership before the introduction of strata title. Two requirements commonly found in the articles of association of a company title property are the directors' right to refuse a purchaser if they are not considered respectable and, secondly, the prohibition of leasing a unit without the directors' consent. Some mortgagees have issues with providing loans for company title units and a purchaser is wise to check their mortgagee's position.

- **Community title** land can be developed in stages and is often used for retirement villages, golf courses and the like.

Quite often there are controls as to what can be built on each individual lot to provide uniformity of appearance and easy operation of the complex. Restrictions on types of window coverings, landscaping and use of community property may apply.

Strata title relates to home units and is very common. When buying strata title, you are purchasing the airspace in the unit – the inner surface of the walls, the upper surface of the floor and the under surface of the ceiling and this area is the purchaser's responsibility.

The area not included in the unit is called the common property and includes places like corridors, pathways and stairwells. These are the responsibility of the owners' corporation and strata levies paid by the purchaser are allocated towards the upkeep and insurance of the common property. Restrictions on pets, floor coverings, airconditioning, the external appearance of your unit and use of common property may apply.

Crown land

Crown land grants were given in 1788, and were received by the first military officers and free settlers.

Crown land comprises about half of all land in New South Wales. Some of it is allocated to public use such as national parks, state forests, schools and so on.

Other significant portions of Crown land can be used for leasing for commercial or agricultural purposes, through to development and sale.

Disposal of Crown land is controlled by the Ministerial Corporation under the *Crown Lands Act 1989* and the advice of your solicitor or conveyancer is essential before proceeding with conveyancing

related to Crown land. If you are thinking of buying Crown land, you need to get appropriate advice.

The price

From the outset, there is a common misconception that if a buyer and agent agree on the purchase price, they are both legally bound to proceed even though the written contracts have not been signed and exchanged. This is incorrect. The parties are bound to the price only when contracts are signed and physically exchanged, and the deposit paid.

Ensuring unconditional approval of finance

Pre-approval of your finance is not sufficient to rely on and formal or unconditional approval should be received prior to exchanging contracts. Your personal situation may have changed since pre-approval and, as the purchaser, you have an obligation to update the mortgagee on any changes to your economic profile so that they are able to service the loan.

As soon as the purchaser's offer is accepted, they should notify their conveyancer or solicitor who then provides a copy of the contract with the agreed price and purchaser's details to the mortgagee or mortgage broker who in turn then arranges the valuation. Valuations usually take around five business days so, to secure the property, it is important to act quickly.

A valuation of the property is required to assist with formal approval. The valuation is then sent to the mortgage insurer, as mortgage insurance is required for loans of over 80% of the value.

First Home Owner Grant and first homebuyer concessions

After exchange of contracts, your conveyancer or solicitor provides you with the required form issued by the Office of State Revenue for exemption from stamp



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duty or a concession on it. A purchase price up to \$500,000 is exempt from stamp duty in NSW, and it is reduced on a sliding scale up to \$600,000.

The First Home Owner Grant application is usually arranged by the incoming mortgagee or mortgage broker when finance is formally approved. The grant is available on settlement.

If there is no mortgagee or the mortgagee is not accredited with the Office of State Revenue, the conveyancer, solicitor, or the client can apply for the First Home Owner Grant after the transfer of ownership is registered. The grant should then be available about two weeks after lodgement.

Stamp duty for second- and third-time (etc) buyers

Stamp duty is payable on all property purchases in NSW and is paid by the purchaser unless there is a special exemption provided for under legislation such as family law.

Stamp duty is required to be paid by three months after exchange of contracts or on settlement, whichever is earlier.

Duty is calculated on the dutiable value of the property, which is the higher of the purchase price and the current market value. Stamp duty in NSW is around \$18,000 on a \$500,000 purchase; about \$36,000 on a \$900,000 purchase; about \$68,000 on a \$1.5m purchase and about \$95,500 on a \$2m purchase.

There is additional stamp duty payable for premium property in respect of dutiable land over \$3m.

Stamp duty for purchases off the plan is required to be paid at or before 12 months from the date of the exchange of contracts or settlement, whichever is the earlier.

Legalities and your deposit

A binding contract for the sale of land should include contracts signed by the purchaser and the vendor, and



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a consideration (money) paid by the purchaser.

The amount of the deposit can be whatever the purchaser and vendor agree but it is usually 10% of the purchase price, which is stated on the front page of the contract. The deposit is usually paid into the agent's trust account on the exchange of contracts either by personal or bank cheque.

Note: The amount of 10% is conventionally accepted by the courts and the property industry as representing a monetary figure that is significant enough to compel both parties to complete the purchase.

If you, as the purchaser, want to pay a deposit of less than 10%, or by a deposit bond, your conveyancer or solicitor will negotiate with the vendor's conveyancer or solicitor before the exchange of contracts. Then, a special condition is usually included in the contract to reflect the 5% deposit or the use of a deposit bond.

If the property is to be bought at auction, a personal cheque can be drawn on the day. A bank cheque is also acceptable, but a deposit bond needs to be arranged by the mortgagee or mortgage broker before the auction.

If the purchaser does not complete the contract after exchange, they forfeit the entire deposit to the vendor. There may also be additional costs for deficiency on resale of property or damages for breach of contract. If the sale is completed, however, the deposit forms part of the purchase price.

Next issue, we look at the remaining legalities you need to consider before signing on the dotted line. **YM**



Geri Forsaith is the founder of Sydney Property Conveyancing, established in 2003. Today, it is a successful, award-winning practice dedicated to providing purchasers and vendors of property in New South Wales with service excellence. Visit the website: www.sydneypropertyconveyancing.com.au

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