



Property Law

Selling a Residential Property

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YOUR OUTCOME ■ OUR PURPOSE

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INTRODUCTION

Conveyancing is the legal process of transferring ownership of property. There are many parts to this process. We do some things and you must do some. This guide is designed to help you avoid problems that may arise when selling a property. It is concerned with residential property only: houses, units and vacant residential land.

ARRANGING A SALE

When you decide to sell your property, you should contact an estate agent to list the property for private sale or auction.

THE VENDOR'S STATEMENT

It is a requirement of the Sale of Land Act that a disclosure statement be given to the purchaser before they sign a contract of sale. This is known as a "vendor's statement" or a "section 32 statement". It is important that this statement is accurate and comprehensive as any omission or error, even though innocent, may result in a purchaser being entitled to withdraw from the contract before settlement.

CONTRACT FORMATION

When you receive and accept an offer for the purchase of your property that agreement will not usually be binding until you and the purchaser have signed a contract of sale. The usual procedure is that you as vendor and the purchaser sign separate copies of the contract of sale and these are then exchanged. It is at this point that you have an enforceable contract.

COOLING OFF

The Sale of Land Act provides that a purchaser may withdraw from a contract within 3 business days after

signing it. Therefore you should not regard the property as having been sold until this period has expired. There is no cooling off period if the property is sold at auction, or within 3 days of the auction date, or if the purchaser has received independent legal advice from a solicitor prior to signing. There are also some other exceptions which may apply.

AFTER EXCHANGE

Once contracts are exchanged we will administer your sale through to settlement.

FINANCE AND OTHER CONDITIONS

Contracts are often expressed to be "subject to finance". If your sale contract includes information relating to the purchaser's finance, the purchaser may be entitled to withdraw from the contract if loan approval for the amount specified is not received by the date provided in the contract. The purchaser must make reasonable efforts to get the loan approved. It is usually the purchaser's obligation to notify the vendor if loan approval has not been received within 2 business days after the date for approval. If no notice is received the purchaser is obliged to complete the purchase. If your sale contract contains any "special conditions" you must read them carefully and ensure that you have complied with them.

RELEASE OF DEPOSIT

The deposit can only be released to you before settlement if:

1. The contract is unconditional; and
2. You have given the purchaser a notice setting out the amount required to discharge any mortgages on the property; and
3. Either the purchaser consents to the release of the deposit or 28 days elapse after you make a request for the release of the deposit without a response from the purchaser.

In order to obtain a release of the deposit you should ask us to provide you with a deposit release authority. If you have a loan secured against the property, you should also obtain a letter from your lender confirming the amount required to repay the loan. Agents usually take their commission from the deposit when released because their work has been completed at that point. You should not generally expect that your deposit will be released prior to settlement.

SETTLEMENT

The settlement date is the date on which the balance of purchase money is payable. This will be specified in the contract. Please check to ensure that it is correct. Unless otherwise agreed you will need to have vacated the property by the settlement date. We will arrange for payment of the proceeds of sale in accordance with your directions. It will not be necessary for you to attend settlement.

THE VENDOR'S STATEMENT

As mentioned, a vendor's statement must be given to a purchaser before they sign a contract of sale. We will prepare the vendor's statement on the basis of the information you provide. When we give you the vendor's statement, please check it

carefully. If it does not contain all the information required the purchaser may withdraw from the contract of sale at any time before settlement.

In addition to including a copy of the title the vendor's statement must include the following:

1. The name of the planning scheme, the authority which administers it and the zoning of the property. If the planning scheme prohibits the construction of a residence, this must be stated;
2. A description of any easements, covenants or other similar restrictions affecting the land (whether registered or unregistered) and any existing failure to comply with the terms of any easements, covenants or restrictions. If you are aware of any building, including a garage or outbuilding having been built over an easement, you must let us know.

Covenants are often registered on the title and usually require the owner to use the land in a certain way, for example:

- ▶ Any house must be constructed of brick or brick veneer, or be of a certain minimum size;
- ▶ Units are prohibited;
- ▶ Fence heights are restricted.

If a covenant affects your title, a copy of the covenant must be included in the vendor's statement. You must also let us know of any failure to comply with the terms of the covenant;

3. The amount of any rates, state land tax or other charges affecting the land (including any arrears owing and any interest for late payment);
4. Details of any notice, order, report, recommendation, agreement or proposal affecting the land. This also means any notice, order, report, recommendation,

agreement or proposal issued for neighbouring land that might affect your land, for example, an application to construct units or some other development on a property near to you;

5. A statement as to whether or not electricity, gas, water, sewer and telephone are connected to the land; and
6. Where there is a residence on the land, details of all building permits or approvals granted within the period of 7 years prior to the date of the contract.

If any of the particulars set out in the vendor's statement change you must let us know before any contract is signed by a purchaser.

OWNER BUILDERS AND WORK CARRIED OUT BY OWNERS

Where you built the house yourself, or if you have carried out extensions, renovations or other works, special rules may apply. Even if the work was carried out by someone else (such as for example a garage company or other tradesperson), you may be considered an owner builder where the person who carried out the work was not a registered builder. Prior to selling, the special rules require an inspection report of the works, and insurance for the structure where the works were valued at over \$12,000.00 at the time they were built. A purchaser may withdraw from a contract if these special requirements are not met. If you have had any work carried out at the property that was not done by a registered builder, please let us know. If there were works carried out at the property prior to your purchase for which an earlier owner arranged the special structural insurance, you must supply us with a copy of the policy to be included in the vendor's statement.

TENANT IN POSSESSION

If the property has been let to a tenant and you intend to sell with vacant possession you must give the tenant notice to vacate. Please ensure that you or your agent does this and the settlement is not less than the required notice period given to the tenant. If the lease is current and for a fixed term the tenant cannot be required to vacate until the lease has expired. If the tenant does not vacate by the settlement date you will be unable to give vacant possession to the purchaser and the sale will be at risk. If the sale fails you may be liable to the purchaser for any loss suffered. If you sell the property tenanted, you should ensure that written notice is given to the tenant to enable the purchaser to gain access for the final inspection. Twenty-four hours notice to the tenant is usually required.

MORTGAGE

If your property is mortgaged you will need to have sufficient funds from the sale proceeds or otherwise to discharge that mortgage at settlement. Some lenders impose additional interest on the early discharge of a mortgage. Unless you tell us, we will assume that there will be sufficient funds from the settlement to pay out the mortgage. We will make the appropriate arrangements for the discharge of the mortgage directly with the lender.

IF YOU ARE SELLING YOUR UNIT

Includes all properties with Common Property and/or an Owners Corporation (previously called a "Body Corporate")

If your property has an owners corporation (**whether it is effectively operating or not**) further details will need to be provided in the vendor's statement to achieve a binding sale.

A disclosure document known as an **Owners Corporation Certificate** must be provided to a purchaser

and attached to your vendor's statement and contract. This certificate details certain information such as fees, charges, liabilities of the owners' corporation as well as other mandatory information and is accompanied by other documents and disclosure information.

If the owners' corporation associated with your property is functioning, the secretary or manager will be able to provide this certificate. A fee is usually payable to the owners' corporation for this certificate.

Where there are more than two units, Public Liability Insurance taken out in the name of the owners' corporation covering the unit and all common property must be in place before the unit is sold. This also applies to developments with only two units in certain circumstances.

Failure to have the proper insurance in place or to provide the owners corporation certificate will allow a purchaser to withdraw from a sale.

If the owners' corporation is not effectively functioning, it is in your interest to have proper processes put in place so that the mandatory sale requirements can be met for your sale. You should talk to us about this before entering into any contract.

What you must provide

If you have any of the following and you have not already done so, you should provide us with copies or originals of:

- ▶ House insurance policy;
- ▶ Building approvals;
- ▶ Certificate of occupancy or final inspection;
- ▶ Your contract for purchase of the property;
- ▶ Building Warranty Insurance;
- ▶ Council and water authority rate notices and any land tax notices;
- ▶ Any lease affecting the property;

- ▶ Any notices or orders which affect the property (including planning permits);
- ▶ The title.

Please note: If you are unable to provide any of the above documents, we may be able to obtain them. This may result in additional costs or disbursements.

GOODS AND SERVICES TAX AND REAL ESTATE

This is a brief overview of the application of the Goods and Services Tax (GST) to real estate.

What is the GST?

GST is sometimes referred to as a 'value added tax' or a 'consumption tax'. In Australia, the GST is a tax on supplies of goods or services, and as such is a tax on transactions. The GST impacts upon all transactions but only imposes a liability to GST when the supply is defined as a 'taxable supply'. Different taxation consequences arise when the relevant transaction is treated as an 'input taxed supply' (eg your bank fees), or a 'GST-free supply' (e.g. fresh food).

Who is liable for GST?

The liability for GST is often misunderstood. Although you may believe that the liability for GST is one for which the purchaser (the recipient of the supply) is liable (when you purchase a CD you pay the GST), in reality the GST is a liability of the supplier (the record store). Provisions in the GST law allow suppliers to pass the amount of their GST liability onto the recipients of the supplies provided certain requirements are met (e.g. GST inclusive prices or agreements noting that GST is charged in addition to the stated price). Therefore, if when you sell your property it is treated as a 'taxable supply' you are liable for the amount of the GST. It is important that this issue is considered when drafting your contract of sale, so that the amount of your GST liability may be identified and passed on to the purchaser (just as the record

store passes their GST liability on to you when you purchase a CD).

Is the sale of land subject to GST?

As noted above, only where the sale of the property is treated as a 'taxable supply' will the sale of land be subject to GST. Different taxation consequences arise when the relevant transaction is treated as an 'input taxed supply', or a 'GST-free supply'. Generally, the sale of land will be treated as a 'taxable supply' when you are considered to be carrying on an 'enterprise' for the purposes of the GST law (e.g. your activities in respect of the property have been conducted in a business-like manner), and the property:

- ▶ Is a commercial property; or
- ▶ Is a residential property that was not used for residential accommodation before 2 December 1998; or
- ▶ Is a residential property that has not previously been sold; or
- ▶ Is a residential property where the legal title to the property has changed (e.g. through subdivision or strata-titling); or
- ▶ Is a residential property that has undergone 'substantial renovations'; or
- ▶ Is a residential property that has been built, or contains a building that has been built, to replace demolished premises on the same land.

However, despite the general comments made above, the GST law is complex and the GST implications of every sale must be carefully considered.

Do I need to be registered for GST purposes?

Whether you must be registered for GST purposes, or whether it would be beneficial for you to be registered for GST purposes requires a careful consideration of your

individual circumstances.

Registration is required where you are considered to be conducting an 'enterprise' and your historical or projected turnover meets certain thresholds. You may wish to register (even when not required) so that you can claim the amount of GST you incur in selling your property (e.g. the GST on your agent's fees and legal costs). Generally, you would only choose to register when you were selling commercial property, vacant land or newly built homes to other GST registered persons.

How do I calculate the amount of the GST?

The GST is imposed at the rate of 10%. Accordingly you can calculate the GST included in a price by multiplying that price by 1/11. For example the GST on a GST-inclusive sale price of \$110,000 is \$10,000 (that is \$110,000 x 1/11). The GST is generally calculated on the value of the supply made. In the case of real estate, that is the value of the property. Special rules known as the 'margin scheme' can operate to reduce the amount of GST otherwise payable.

What is the margin scheme?

The 'margin scheme' enables you to reduce the amount of GST otherwise payable in respect of the sale of property that is treated as a 'taxable supply'. The special rule calculates the GST on an amount known as the 'margin' rather than the value of the property. The GST is calculated as 1/11 of the 'margin'. The 'margin' is calculated differently depending upon when you bought the property and the circumstances in which you bought the property.

The 'margin scheme' is not available for a sale of a property where the transaction under which the property was acquired was a 'taxable supply' and the 'margin

scheme' was not used in calculating the GST on that sale.

What should I do if I'm not sure of the application of GST in my circumstances?

If you are unsure of the GST implications of the proposed sale of your property you should contact us. Any advice provided by us in respect of your GST obligations will be charged at an hourly rate (billed in six minute intervals) in addition to our estimated cost for our conveyancing services.

CONTACT US

If you have any questions regarding this brochure or require any further information, please contact us:

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