



Buying, Selling and Building a Home

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Introduction

A contract to buy or sell a home is the most important contract most people will ever make.

Before approaching real estate agents or sellers, buyers should carefully consider the steps to take when a suitable home is found. It is important to avoid being drawn in by strong pressure to sign a contract immediately.

The proposed contract should be shown to a solicitor before signing. A solicitor can advise on many things including the form of the contract and relevant clauses, finance, mortgage terms, questions of joint ownership and any problems relating to the state of the property.

Similarly, maintaining a home and undertaking repairs or renovations can be significant aspects of life.

When deciding to build or to renovate, a person needs to develop a clear idea of what work is required before approaching a building contractor for a quote. Uncertainty about exact requirements can cause delay and even additional costs.

Buying a Home

Joint Tenants or Tenants in Common

When two or more persons are buying property together, they must decide whether to hold the property as joint tenants or tenants in common.

Joint tenancy is a method of owning property that allows all tenants to have their names on the title deed as co-owners. The effect of joint tenancy is that upon the death of one of the joint tenants, their share goes automatically to the other joint tenant by a legal process known as survivorship. This rule of survivorship will apply regardless of what the deceased says in their will.

Problems can arise where one or more joint tenants wish to sell their interest but the others do not. In such a case, it may be necessary to make an application to the court under the *Property Law Act 1974* (Qld) to have an order for partition made so that a sale can proceed.

For these reasons, joint tenancy is most suitable for a couple that intend to live permanently together and who want the property to go automatically to their partner upon death.

Tenants in common own property in individual shares, with the title being in the names of all of those buying the land. Usually, the tenants in common will be those who have provided the purchase monies. Traditionally, each person has a fractional share in the land in proportion to the amount of money they have provided towards the purchase price. If property is owned by tenants in common, on the death of one of the tenants in common, the deceased person's fractional share is distributed according to their will. If there is no will, the fractional share is distributed according to the rules that apply upon intestacy (see chapter on *Wills and Estates*).

Obtaining Finance for Buying a Home

Government assistance with buying a home

A buyer of a first home may be eligible to obtain government assistance. As government schemes offering assistance may vary from time to time, enquiries should be made to discover the exact level of assistance that may be available depending on the buyer's individual circumstances. Details of the Great Start Grant can be found on the website of the Office of State Revenue.

Obtaining a loan from a lender

The traditional method of buying a home is with a housing loan from a lender. Loans may be obtained from banks, building societies, credit unions, finance companies, some insurance companies and other forms of lending entities. Special loans are available in certain circumstances. For example, the Commonwealth Department of Veterans' Affairs manages a range of home loan subsidy schemes, and people on lower incomes or other targeted groups may be entitled to a range of housing services and loan schemes offered by the Queensland Department of Housing and Public Works.

The loan will almost always be secured by a mortgage over the property to be purchased. The potential home buyer should try to get some idea about the availability of such loans and the rates of repayment before entering a contract to purchase a property.

Subject to finance clauses

Lenders will usually give a general idea of their eligibility criteria before a contract of sale is signed. However, most lenders in Queensland require a copy of the signed contract before they will actually approve a particular loan. One reason for this is that they need to assess whether a mortgage over the new home will be an adequate security for the loan.

Because this assessment is made after the contract is signed, it is necessary to have a condition in the contract that it is subject to the buyer obtaining the necessary finance. Great care needs to be exercised when completing this clause. Inadequate subject to finance clauses cause many problems for buyers who have rushed into signing a contract.

Dealing with Real Estate Agents

When approaching real estate agents for particulars of homes, three things should always be remembered:

- The real estate agent's income is usually derived from commissions on sales (i.e. agents have a personal interest in trying to sell a property at the highest possible price).
- The agent has been appointed by the seller and owes a duty to that person; the agent does of course have ethical obligations to deal fairly with the buyer.
- The asking prices for homes are likely to be higher than the prices for which the owners expect to sell the properties. Buyers should be prepared to bargain for properties.

Conveyancing Process for Purchasing a Home

Solicitor or do it yourself

A number of people are prepared to do their own conveyancing. However, if a person doing their own conveyancing misunderstands a document, a clause in the contract or a search result, this misunderstanding could end in expensive and unnecessary litigation and loss.

If a person decides to do their own conveyancing, but a dispute occurs and they find themselves out of their depth, it is advisable to immediately seek assistance from a solicitor. Important contractual and statutory time limits may apply, and rights may be lost if not exercised strictly within time limits.

Conveyancing kits can be purchased from stationers. The kit should be obtained and read carefully before the contract of sale is signed, and it is important to allocate enough time to complete the necessary searches before settlement.

The discussion is not a substitute for engaging a solicitor; it is merely a consideration of some stages of buying a home and the principles that apply. Conveyancing is the process of transferring land from one person to another. The parties involved in the process of buying and selling are usually the real estate agent, the seller, the buyer and solicitors for the seller and buyer. A lender may also be involved if there are mortgages over the property.

Steps in conveyancing

1. Preliminaries (usually no solicitor involved at this stage)
 - inspect property
 - negotiate (real estate agent usually acts as an intermediary)
 - make sure defects in the title are disclosed by the seller
2. Formation of contract
 - real estate agent usually draws up the contract
 - buyer signs contract in duplicate, pays deposit and then delivers contract in duplicate back to seller
 - seller signs, and a copy of the contract is provided to the buyer
 - buyer has a five-business-day cooling-off period (if residential property)
3. Between contract and completion
 - buyer goes to a solicitor (if a solicitor is used)
 - buyer or their solicitor investigates title, searches various departments and may conduct a survey
 - any objections to title are delivered
 - transfer documents are delivered to seller
 - buyer or their solicitor attends to stamping contract

- adjustment of outgoings are worked out
4. Completion
 - if search results are satisfactory, the buyer pays balance of purchase money and the seller hands over duplicate certificate of title (if there is one), all documents necessary for registration and the keys for the property
 5. After completion
 - buyer (or their lender if finance is required) attends to registration of transfer, with the buyer becoming the legal owner upon registration
 - notification of the change of ownership is given to the relevant government departments.

Specific issues and considerations arise at each stage.

Contract for Buying a Home

It is advisable to have a solicitor peruse the contract. It may also be a good idea for a builder, architect or some other expert in the field to inspect the house to ensure that it is soundly constructed and to estimate how much repair work may be necessary after the house is bought. Alternatively, the contract may be made subject to a building and pest inspection condition.

Once agreement between the seller and the buyer is reached, the contract must be drawn up and signed. In Queensland, the real estate agent involved in the sale usually draws up the contract.

Ideally, a solicitor should read the contract before it is signed to ensure that the buyer's interests are protected. The solicitor should be informed of any particular requirements that the buyer may have, together with details of any representations that may have been made about the property by the seller or the real estate agent. The buyer should inform the solicitor of any plans for further development of the property or if the use that the buyer will make of the property varies from its current use.

Depending on the buyer's advice, the solicitor may need to insert special conditions into the contract of sale to adequately protect the buyer's interests.

For residential property in Queensland, as soon as both parties sign the contract and the buyer receives their copy of the contract of sale, both the buyer and seller are bound to the terms of that contract. Even though contracts for the sale of residential property in Queensland (other than contracts formed on a sale by auction and certain other limited exceptions) are subject to a statutory cooling-off period of five business days, buyers are ill-advised to sign a contract until they are completely satisfied as to the terms. Buyers should also be aware that if they take advantage of the statutory cooling-off period to withdraw from the contract, the seller is still entitled to retain a termination penalty of 0.25% of the purchase price.

There are standard forms of contracts of sale in Queensland. These forms are approved by the Queensland Law Society and adopted by the Real Estate Institute of Queensland. A buyer should not take the view that because a standard form contract is being used, everything will be straightforward. If a buyer is undertaking their own conveyancing, they will need to read the clauses of the contract carefully and be aware that failure to comply strictly with any time provision of the contract will give

the seller a right to terminate. As time is of essence in the standard form contract, this will also impact on any termination rights that the buyer may have, if the buyer fails to act within any time limit specified in the contract.

The Real Estate Institute of Queensland Contract for Buying a Home

The contract of sale is usually prepared by the real estate agent or, less frequently for house and land contracts, the seller's solicitors.

The standard Real Estate Institute of Queensland (REIQ) contract contains a reference schedule in which all pieces of information relevant to the sale are set out. In addition to the critical items (the purchase price, deposit and settlement date), other items that deal with fixtures and chattels should be checked to ensure they are correctly recorded. Details of any title encumbrances (e.g. easements) and tenancies that will exist at the time of completion of the contract must also be checked.

Buyers should be particularly wary of special conditions that are added to the contract. In some instances, sellers may delete certain provisions of the standard terms of contract without explaining the full significance of those deletions to the buyer. Specialist advice should be immediately sought if the buyer is unaware of the meaning of a special condition that has been added, or if there is any concern that the special condition may otherwise operate unfairly to the buyer.

In all cases, it is highly recommended that buyers and sellers obtain specialist advice about the effect of the contract of sale before signing.

Insurance

The REIQ contract provides that the property is at the risk of the buyer from 5 pm on the first business day after the contract date. As soon as possible after the contract is signed, it is very important that buyers protect their interest in the property by arranging appropriate insurance over the property.

A buyer who is obtaining finance to complete the purchase needs to be aware that most lenders will impose insurance requirements as part of making the loan available. In these circumstances, the buyer should ensure that any insurance that is arranged will satisfy the insurance requirements of the lender.

Finance clause

Clause 3 of the REIQ contract provides that the contract is conditional on the buyer obtaining approval of a loan for the finance amount from the financier by the finance date on terms satisfactory to the buyer. Clause 3 is only activated if each of these three items is completed in the reference schedule. Full and proper completion of these items will avoid potential disputes later.

The expression 'on terms satisfactory' permits a buyer acting honestly to subjectively decide whether any finance offered suits the buyer's particular needs. A buyer who does not act honestly may be sued for breach of contract.

It is important to notice that clause 3.1 specifies that a buyer must take all reasonable steps to obtain approval. A buyer is not able to escape contractual obligation simply by not applying for finance. In

fact, a failure to apply for finance approval would constitute a breach of contract that would entitle the seller to keep the deposit and may allow the seller to recover damages if loss can be demonstrated (beyond the extent of the forfeited deposit).

The clause stipulates that, when there is a failure to obtain the type of finance specified and that failure is not due to a fault of the buyer, the buyer has the right to terminate the contract and to receive all deposit monies back.

Buyers should be careful before they advise that finance approval has been obtained. Buyers should carefully consider the terms of the offer of finance to ensure it is what they need and what they applied for. For example, an approval subject to valuation or on normal bank terms is not an unconditional approval contemplated by the contract. Once a buyer advises that approval has been given, they may be in difficulties if the lender does not proceed with the loan. In these circumstances, a buyer could lose their deposit or be sued for any loss incurred by the seller (beyond the extent of the forfeited deposit).

Building and pest inspection reports clause

Clause 4.1 of the REIQ contract provides that the contract is conditional upon the buyer obtaining a written building report from a building inspector and a written pest report from a pest inspector (which may be a single report) on the property by the inspection date on terms satisfactory to the buyer. Like the finance clause, clause 4 is only activated if the inspection date is completed in the reference schedule. Again, the buyer must take all reasonable steps to obtain such reports (subject to the express right of the buyer to elect to obtain only one of the reports).

Clause 4.2 of the contract allows a buyer to terminate the contract if, acting reasonably, an inspector's report is unsatisfactory to the buyer. If requested by the seller, the buyer is required to provide the seller with a copy of each report without delay.

If a buyer fails to give notice under clause 4.2 by 5 pm on the inspection date, the seller may terminate the contract by notice to the buyer. This is the seller's only remedy for the buyer's failure to give notice.

Special conditions

Many types of special conditions can be added to the standard REIQ contract. For example, a buyer may require the contract to be subject to the sale of another property or the completion of certain work on the property before settlement.

These clauses should be prepared carefully to avoid any uncertainty. Ideally, a solicitor should draft an appropriate clause to suit the particular situation.

Searches Regarding Information of Property Before Settlement

The period between the date of the contract and the date set down for settlement is usually 30 days for a residential contract. However, this time period may be increased or reduced according to the

requirements of the parties. A buyer should be reluctant to agree to any shorter period of time unless confident that they will have adequate time to receive the results of their searches.

Before settlement, buyers should conduct searches to satisfy themselves that good title will be provided on settlement. Buyers should also prepare for settlement itself.

As soon as possible, a search of the property should be done at the Department of Natural Resources and Mines to see what mortgages or other encumbrances (e.g. easements) are registered in relation to the land and to confirm that the description of the land is properly recorded on the contract. A photocopy of the registered plan of the land may be obtained to ensure that the block of land being purchased is in fact what was inspected, and that its dimensions are correctly described in the contract.

After the land title searches are completed, the buyer should also carry out searches to find out further information about the property being purchased. The local authority is the best source of information and will provide particulars regarding:

- the amount of rates payable on the property and whether or not they are paid up
- the zoning or the use of land
- sewerage and drainage plans for the property
- any requirements for work to be done on the land
- past flooding of the land
- approvals for building improvements.

The Office of State Revenue will advise on the current position of land tax payable on the land or confirm that none is payable.

The Department of Transport and Main Roads will advise of future development, current proposal and resumption information, and any current proposals or future intentions for roads.

A search of the Supreme and District Court registers and the Bankruptcy register will indicate if certain termination rights may be available under the contract.

Depending upon the location and characteristics of the property, a number of other searches may need to be undertaken. For example:

- a survey to identify the boundaries of the land, the area and location of improvements
- Queensland Rail, to make sure there are no proposed railway lines for the property
- Australian Securities and Investments Commission
- Environmental Protection Agency, to determine if the property is on the Environmental Management register and the Contaminated Land register
- Energex and Ergon
- Queensland Building and Construction Commission

- Powerlink
- Personal Property Securities Register (where personal property is included in the sale)
- QCAT search for tree applications or orders under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld)
- Pool Safety register
- Heritage register
- Mining Tenures
- Body corporate records and body corporate orders (the conveyancing of a lot in a community title scheme is considered separately later in this chapter).

The forms for these various searches would usually be available from the authority to which enquiries are being directed. They should also be part of any standard conveyancing kit.

Necessary Documents for Settlement when Buying a Home

Transfer documents

The necessary transfer documents may be purchased from stationers or obtained from the Department of Natural Resources and Mines. They should also be part of a conveyancing kit.

The documents include a Form 1 Transfer and a Form 24 Property Information (Transfer), both available from the Queensland Government site here. These documents provide information to the local authority and Queensland government departments.

If finance is being obtained from a lender to complete the contract, the transfer documents will need to be stamped prior to settlement. If the property being bought will be the buyer's home or their first home, the buyer may be entitled to a stamp duty concession. To obtain this concession, a buyer will need to sign a particular form under the *Duties Act 2001* (Qld) (see Transfer duty below).

Certificate of title

At completion, the buyer must receive the duplicate certificate of title (if one is in existence) from the seller in exchange for the balance purchase price. A certificate of title will only be issued by the Department of Natural Resources and Mines if the owner of the land applies for a certificate (*Land Title Act 1994* (Qld) (Land Title Act)). The Department of Natural Resources and Mines will not, however, issue a certificate of title unless the mortgagee consents. If a certificate of title has been issued, this information will appear on the title search.

The REIQ contract provides that the seller only has an obligation to deliver a certificate of title if one is required to register the transfer to the buyer. In order to protect a buyer from fraud by the seller or other persons where there is no certificate of title, a settlement notice will need to be deposited.

Settlement notices

Under the Land Title Act, a buyer of land is entitled to deposit a settlement notice to protect their interest in the land between settlement and lodgement of the transfer. The settlement notice operates

to prevent the registration of most instruments (e.g. a mortgage or lease) that affect the interest in the land until the notice lapses or is withdrawn, removed or cancelled.

The settlement notice will not prevent the registration of certain instruments, usually interests registered with the consent of the buyer and other instruments that will not affect the interest of the buyer.

Where there is a certificate of title, another interest cannot be registered unless the title is produced to the Registrar of Titles. In most cases, a settlement notice only needs to be deposited where a certificate of title does not exist, as it is only in this case that another interest could be registered without the consent of the seller or the buyer after settlement.

Time for deposit of a settlement notice

There is no time restriction for the deposit of a settlement notice. However, a settlement notice will only be effective for a maximum of two months after deposit. This means, in order for the settlement notice to provide the maximum protection for the buyer, the notice should be deposited as close to settlement as possible. As the notice will not prohibit the registration of an instrument lodged prior to the settlement notice, it is important that a search is conducted to ensure that there are no instruments that have been lodged but not yet registered prior to deposit of the settlement notice. If an instrument has been lodged, the buyer should make an objection to title if the interest is not disclosed in the contract of sale. The buyer may be able to refuse to complete the contract if the defect in title is not removed.

Lapse, withdrawal, removal and cancellation of a settlement notice

A settlement notice will lapse two months after the date it is deposited, or when all instruments specified in the settlement notice have been lodged at the Department of Natural Resources and Mines, whichever happens first. The settlement notice may be withdrawn at any time during its currency by the depositor of the notice.

The settlement notice may be removed by order of the Supreme Court upon the application of an affected person.

The Registrar of Titles, in specified circumstances, may cancel the settlement notice.

Caveats

The advent of settlement notices has meant that the use of caveats in the conveyancing process is now less common. A caveat may be lodged by a person who has a caveatable interest in a lot. The caveat system provides protection for equitable and unregistered interests in land such as the interest of a buyer under a valid unconditional contract of sale. Once lodged in respect of a particular parcel of land, a caveat operates to prevent registration of dealings with that parcel, which are inconsistent with or may defeat the interest claimed in the caveat. The caveat also provides notice of the interest claimed when a search is undertaken of the title for the affected parcel of land. The caveat preserves the status quo allowing time, if necessary, for the validity of the interest claimed to be determined by a court. With certain exceptions, a caveat will lapse unless proceedings are started in a court of

competent jurisdiction to establish the interest claimed under the caveat and the Registrar of Titles is notified that a proceeding has been started within the time prescribed by s 126 of the Land Title Act.

An application for an order seeking the removal of a caveat may be made to the Supreme Court which may make the order on the terms considered appropriate. After a caveat has been lodged, it is not generally possible for the same caveator to lodge a further caveat on the same, or substantially the same, grounds as that in the original caveat without the leave of a court. A person who lodges a caveat without reasonable cause must compensate anyone who suffers loss or damage as a result. A judgement for compensation may include exemplary damages.

Completion of the Process of Buying a Home

As settlement day approaches, the responses to the various searches should be available. Transfer documents should be signed and, if necessary, stamped.

The seller and the buyer should calculate an apportionment of the rates, outgoings and land tax (if applicable) and discuss a place and time for settlement. The seller must advise the buyer of where the purchase monies are going (i.e. how much to the existing mortgagee and how much to the seller) so that the buyer can obtain the necessary bank cheques or arrange for the lending institution to obtain these cheques. A further search of the title should be carried out on the day of settlement.

Arrangements should be made before settlement for the transfer of gas, electricity and telephone accounts. These matters will always be the responsibility of the buyer, even if a solicitor is engaged.

At settlement, the balance of the purchase monies is handed over in return for the relevant transfer documents (if these have not already been received). The buyer is entitled to receive possession of the premises by receiving the keys to the property at the same time. As previously mentioned, the title deed will remain with the Department of Natural Resources and Mines. The owner may request a duplicate title, but any mortgagee must consent.

After completion

After completion, the buyer or the buyer's lender (where finance has been provided in exchange for the grant of a mortgage) will attend to the registration of the transfer, with the buyer becoming the legal owner upon registration subject to a registered mortgage where finance has been provided.

Notification of the change of ownership is given to the relevant government departments by way of the information contained in Form 24 Property Information (Transfer) that is referred to in the Form 1 Transfer as signed by the seller.

Conveyancing Process for Purchasing a Townhouse or Unit

The *Body Corporate and Community Management Act 1997* (Qld) (Body Corporate Act) governs the rights of owners of townhouses and home units. This Act provides for a community management statement that can be searched and which accurately sets out the scheme and future developments that may impact on the lot in question.

Although the Body Corporate Act seeks to provide consumer protection, the legislation itself is quite complex, and consumers should obtain legal advice before proceeding with a purchase of a townhouse or unit. In turn, community title complexes may find it more and more compelling to employ body corporate managers as independent people to assist in the management. The owner of a lot in a community title scheme will have title to the lot. A duplicate certificate of title can be issued if requested (if the mortgagee consents). The lot may be sold, leased or mortgaged as if it were an individual block of land but is subject to the provisions of the Body Corporate Act as they relate to the operation of the body corporate and the by-laws of the community title scheme.

The body corporate

The Body Corporate Act constitutes the owners of the individual lots into a legal entity called the body corporate. The body corporate has a range of duties including insuring and maintaining the building. It also has powers to impose levies on individual lot owners in order to carry out its functions.

The *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) (Body Corporate Regulation) provide for a number of separate modules including the standard module, small schemes module, accommodation module, commercial module and the specified two-lot schemes module. The Body Corporate Regulation applicable to each of the separate modules contains by-laws regulating the manner in which the body corporate operates and also set out rules for individual lot owners. These rules mainly regulate conduct affecting the enjoyment by other lot owners of their properties.

The body corporate is equipped with power to amend and add to these by-laws. As issues of this type can be complicated, expert assistance should be sought to ensure that the correct form of resolution is passed.

The decision-making procedure for the body corporate is set out in the Body Corporate Act and the relevant Body Corporate Regulation.

Disputes between the body corporate and individual lot owners are resolved using the methods set out in the Act. The Commissioner for Body Corporate and Community Management can play a significant role in many of these disputes.

Special Considerations in Buying a Townhouse or Unit

While the conveyancing process involved in purchasing a lot in a community title scheme is similar to the process for conveying a house and land, special considerations apply when purchasing a townhouse or a unit. As the laws in this area are complex, a buyer should consult a solicitor before proceeding with an intended purchase.

In order to sell a lot in a community title scheme, a seller must provide a disclosure statement in the prescribed statutory form. Consistent with the consumer protection ethos of the Body Corporate Act, there are also implied statutory warranties by the seller to the buyer to protect buyers from liabilities and potential problems. A breach of these warranties may enable the buyer to cancel the contract.

If the disclosure statement required by the Body Corporate Act is not given or if the disclosure statement is not substantially complete, then the buyer has the right to cancel the contract. If the disclosure statement contains inaccuracies, which are such as to materially prejudice a buyer, or if the buyer, having made reasonable efforts, is not able to verify the information, then again the buyer can cancel the contract.

The disclosure statement, among other things, will provide details of:

- the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot
- improvements on the common property for which the owner is responsible
- any other information prescribed under the regulation module applying to the scheme.

Given the importance of full and accurate disclosure, it is in the interests of both parties that the requirements of the Body Corporate Act receive careful attention. It is recommended that a buyer immediately seek expert assistance as to their contractual and statutory rights if they have any concerns about either the accuracy or fullness of the disclosure made by the seller.

After the contract is signed

The usual searches (as previously outlined) for the purchase of land should be made. In addition, a search of the records of the body corporate is necessary to ensure that the seller's name is properly recorded in the roll, to check for any changes in by-laws and to confirm that the body corporate's duties have been carried out with respect to such matters as insurance. This search, as well as obtaining a copy of the Community Management Statement, will also serve to identify any inaccuracies in the disclosure statement provided by the seller and may indicate if there is a breach of the implied statutory warranties. As well as having the records searched in person, buyers should obtain a body corporate information certificate from the body corporate pursuant to s 205(4) of the Body Corporate Act. The certificate incorporates a signed statement, which includes information about the members of the body corporate and levy contributions to the administrative and sinking funds.

A further search that should be undertaken is a search with the Commissioner for Body Corporate and Community Management in relation to any orders made under the Body Corporate Act that may impact on the community title scheme or the lot in question.

If the building is a class 2 or 3 building under the Building Code of Australia, a search of the local authority should be undertaken to ensure that a valid certificate of classification is current for the building.

Ideally, such searches should be carried out before the contract is signed to obtain the maximum protection, but in reality the pressure to sign the contract means this rarely occurs. If searches are carried out after the contract is signed, it is imperative that these searches are undertaken as soon as possible because certain rights to terminate may be lost if not exercised within strict time frames.

When preparing transfer documents, the buyer should also prepare a form of notice to the body corporate which provides information to the body corporate to maintain its records of addresses for

the service of notices on owners, any mortgages given or discharged and any leases or sub-leases entered into or terminated.

Purchasing property from a developer

When a lot in a community title scheme is bought before the building or complex is completed, it is bought 'off the plan'. In such cases, special considerations apply because the contracts involved may be lengthy and very complicated.

The developer (usually a company) is recorded as the original proprietor of all the lots. This allows the developer to pass special resolutions changing the by-laws and changing the rights between the owners of various lots. For example, a developer, as owner of all the lots, could enter into a management agreement with an associated company.

What a developer must disclose

The developer must provide the statutory disclosure statement which will include, among other things, a disclosure plan, details of proposed engagements of body corporate managers, letting agents and service contractors, details of proposed levies and a copy of the proposed community management statement. When a developer wants to vary the original statement, a further statement must at least 21 days before the date for completion be sent to the buyer. If the statement or further statement is later found to be deficient or if changes have been made and not provided for within the statement and they materially prejudice the buyer, then a right of cancellation may arise.

Outlays when Buying a Home

Conveyancing costs

Solicitors' costs

Competition among solicitors has substantially reduced conveyancing costs. However, it may not always be wise to take the cheapest quote. Check the service being offered.

On retaining a solicitor to do a conveyance, it is wise to discuss and agree on the cost of the conveyance beforehand including likely sundry expenses that will be charged in addition to professional fees.

Search and registration fees

Search fees must be paid at the Department of Natural Resources and Mines and to local councils and other authorities. The department charges registration fees for any release of mortgage (payable by the seller), the transfer and any mortgage.

Transfer duty

Transfer duty (previously referred to as stamp duty) on the contract of sale is usually the biggest outlay incurred during the purchase of a property. Transfer duty is payable by the buyer, usually before settlement if a lender is involved.

The transfer duty rates as listed on the Queensland Government website are effective from 21 September 2012 in Queensland.

When the buyer will live in the house as their home, a concessional rate of duty will apply. First home buyers may also be eligible for an additional concession. Information on transfer duty payable in these circumstances as well as the first home vacant land transfer duty concession may be obtained from the Office of State Revenue.

If the buyer and seller are related by blood or marriage, or if the Office of State Revenue is not satisfied that the contract price is the actual value of the property being transferred, a valuation of the property is necessary, and duty is charged on that assessed market value.

Mortgage costs

Before signing any contract, a buyer should be aware of all the costs that are involved in the purchase and the obtaining of a mortgage. Some lenders will engage solicitors to prepare mortgage documents. Buyers are often charged for this. Although most banks and many finance companies prepare their own mortgage documents, they may charge extra for such items as loan establishment fees and the cost of obtaining a valuation of the property.

Mortgage duty was abolished in Queensland from 1 July 2008.

Selling a Home

Dealing with Real Estate Agents when Selling a Home

When engaging an agent to sell a property, the seller is entering into a legal relationship with the real estate agency. This relationship may involve onerous obligations on the seller. By way of example, a seller may be required to pay commission to the agent even if the seller eventually finds a buyer or if the buyer found by the agent does not complete the purchase.

Written instructions

By law, when an agent is engaged to try to sell a property, they will require the seller to sign an appointment in the approved form. The agent can only recover commission if the agent has been properly appointed in accordance with that Act.

The seller should only sign the appointment form when they are satisfied that they understand everything contained in it, and the terms of the agreement are satisfactory, particularly concerning when commission will be payable by the seller. If a seller has any concerns whatsoever, they should obtain independent legal advice. Information may also be obtained from the Office of Fair Trading.

Deregulation of commission

The fees and commissions that an agent can charge for the purchase or sale of residential property have been deregulated (*Property Occupations Act 2014* (Qld)). This means that this is entirely a matter for negotiation.

Types of Agreements with Real Estate Agents

It is important for an owner who is about to appoint a real estate agent to be aware of the different types of agencies.

Open listing

An open listing is a written agreement entered between the owner and the selling agent under which the owner appoints the selling agent, in accordance with the terms of the agreement, to sell the property. Under the agreement, the seller keeps a right to sell the property themselves during the term of the agreement or to appoint additional selling agents to sell the property on terms similar to those under the agreement. With this type of appointment, the appointed selling agent is entitled to be paid only if they are the effective cause of the sale. The appointment of the agent can be terminated by either the owner or the agent at any time.

Exclusive agency

Under an exclusive agency, a selling agent is entitled, on the sale of the property and in accordance with the terms of an agreement, to receive the agreed commission or other reward, whether or not the selling agent is the effective cause of the sale. Where the property being sold is a residential property, the period of appointment can be up to a maximum of 90 days. The appointment may include the provision that at the end of the term of the exclusive agency, the appointment of the agent continues under an open listing that may be ended at any time by the agent or the owner.

A real estate agent may be reappointed for an exclusive agency for the sale of residential property for one or more terms of not more than 90 days.

Sole agency

The only difference between an exclusive agency and a sole agency is the entitlement of the selling agent to receive an agreed commission or other reward on the sale of the property. Under an exclusive agency, the agent will be entitled to the commission agreed, whether or not the agent is the effective cause of the sale. Where the agency is a sole agency, the agent would not be entitled to the commission if the seller is the effective cause of the sale.

For the sale of residential property (where this is the only property being sold), the term of a sole agency is negotiable up to a maximum of 90 days. The appointment may include provision that, at the end of the term of the sole agency, the appointment of the agent continues under an open listing that may be ended at any time by the agent or the owner.

A real estate agent may be reappointed for a sole agency for the sale of residential property for one or more terms of not more than 90 days.

Agents claim that the advantages of a sole or exclusive agency are that the seller only has to deal with one agent, only one key has to be given out, and there is a conscientious promotion of the property by the agent. On the other hand, owners need to be aware that the effect of these agencies is that the owner is locked into the agreement for a stated period of time. If the agent's promotion of the property is not satisfactory, the owner is unable to appoint other agents without breaching the agreement.

Auctioning a Home

When an owner decides to auction a property, it is placed in the hands of an agent. Once again, by law the owner will be required to sign an appointment in the approved form directing the agent to sell the property by public auction.

If residential property sells at auction, the agent is entitled to commission in accordance with the terms of the auctioneer's appointment. Similarly, if the property is sold before auction, the agent is also entitled to commission. This is so even if the owner or another agent finds the buyer; as in practice the agency is normally exclusive.

Real Estate Agent's Right to Commission and Incidental Expenses

The entitlement of the real estate agent and the auctioneer to recover commission, fees, charges and expenses will be regulated by the terms of the written appointment of the agent or auctioneer and by legislation. For a seller, it is important that the terms of the written appointment are carefully considered and the appointment fully and carefully completed. Legal advice should be sought if the seller has any doubts about the operation of the appointment or the circumstances in which the agent or auctioneer may be entitled to commission, fees, charges and expenses.

Legislation imposes certain conditions on the recovery of commission or expense by an agent or auctioneer. These conditions include that the:

- agent must hold a property agent's licence
- person must be authorised under the person's licence to perform the activity
- person must be properly appointed by the owner in the manner prescribed by the legislation
- person is not entitled to sue for, recover or retain a reward or expenses that are more than the reward or expenses stated in the appointment form and, in the case of expenses, actually expended.

Building a Home

Selecting a Builder

Before approaching a builder, a likely budget should be considered. However, to ensure that the best value for money is obtained, it might not be appropriate to disclose that amount to the builder at the initial stage.

Before choosing a builder, a list of licensed house builders should be prepared and quotes obtained. This list can contain names gathered from friends, industry associations, advertisements, the internet, trade directories or material suppliers (e.g. hardware stores). When looking at advertisements for builders' names, check for the Queensland Building and Construction Commission (QBCC) licence number, which should be displayed by law. The best recommendation for a builder is frequently from persons who have used a particular builder and were satisfied. The following questions may help to decide whether a recommended builder will be suitable:

- Were the sub-contractors easy to deal with and to have on the job?
- Were any necessary cost variations discussed and agreed in writing before the variation occurred?
- Was the work completed on time?
- Was the work completed in a satisfactory manner?

Quotes

Check that the builders who have quoted are all quoting to do the same work. Obtain at least three or perhaps as many as five quotes. The standard of the builder's quote documentation will give an insight into the builder's competence. A builder who pays little attention to their paperwork may pay the same sort of attention to the building work.

Do not select a contractor by price alone. It is important that a person feels comfortable with and confident about the contractor, who is likely to spend a significant amount of time around the family home during the project.

Licensing requirements

Before engaging the preferred builder, a check should be made with the QBCC to ensure that the builder is licensed and to find out if there are any records of complaints or disciplinary actions against them. A free licence search can be conducted online at the Queensland Building and Construction Commission (QBCC) website.

Under the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act), all builders, building designers and most trade contractors must be licensed to do building work. If a contractor is intending to deal directly with the homeowner, they are required to hold a QBCC licence card that records the builder's name. If the QBCC licence card is not produced, a person should not deal with that contractor. The card must be used to imprint the contractor's name on the contract. Providing the name on the contract matches the name on the card, a homeowner will be protected by the insurance provisions of the QBCC Act.

Owner-builder

If a person wishes to construct their own home or carry out major renovations as an owner builder, they must first obtain an owner builder permit from the QBCC (a permit is not required where the estimated value of the building work is under \$11 000). Before issuing a permit, the QBCC will require proof of ownership of the land on which the house is to be built.

In addition, the QBCC will require (subject to an exemption being granted) the person to have completed an owner builder course run by a course provider recognised by the QBCC. An owner builder course certificate must be less than five years old when the application is submitted.

It is the responsibility of an owner builder under the permit issued by the QBCC to ensure that the building work is properly carried out. This is still the case if an owner builder engages a licensed contractor. Therefore, it is important that the licensed contractor is selected carefully, and that the work to be carried out and the issue of responsibility are clearly specified in the written contract.

Notice on sale

If an owner builder sells property within six years of completing building work under an owner builder's permit, the prospective buyer must be given a notice before the contract of sale is signed. The notice must contain details of the building work and a warning that it is not covered by insurance under the QBCC Act. Failure to give the prospective buyer the required notice will result in the seller giving the buyer a contractual warranty (which cannot be excluded by the contract) that the building work was properly carried out.

Specifying the Building Work Required

If the building project involves domestic building work valued at \$3300 or more, various requirements are imposed on the contractor by the provisions of sch 1B of the QBCC Act.

From 1 July 2015, a 'dual contracts' system was introduced by the QBCC Act. Contracts with a contract price between \$3300 and \$20 000 are known as level 1 regulated contracts and those contracts for domestic building work for a contract price of \$20 000 or above are level 2 regulated contracts. Level 2 regulated contracts provide greater protection for owners. For example, agreements must be in writing and, among other things, include a description of the work, any plans and specifications for the work, the cost of the work and the completion date. For a level 2 regulated contract, the building contractor must also give the building owner a copy of the Consumer Building Guide before the owner signs the contract.

Contractors must provide clients with a copy of the written signed contract including any plans and specifications within five business days after entering into the regulated contract and before commencing work.

The Contract for Building Work

The QBCC has a range of contracts that comply with the requirements of the QBCC Act and cover all types of domestic building work. Before signing a contract, it is advisable to ensure that it complies with the QBCC Act. If a person has any doubts about the contract, they should consult a solicitor before they sign it.

Variations to be in writing

All variations must be recorded in writing, meet the formal requirements for a variation and a copy must be provided by the contractor to the homeowner within the time prescribed by the legislation unless the work is required urgently, and it is not reasonably practicable to produce a copy before work is commenced. The contractor must not start to carry out any domestic building work that is the subject of the variation before the owner agrees to the variation in writing.

Cooling-off period

Under the QBCC Act, homeowners may withdraw from a regulated contract during the cooling-off period, being within five business days of receiving from the contractor a copy of the signed contract and, for level 2 regulated contracts, if the owner did not receive the consumer building guide before receiving a copy of the signed contract, within five business days after the day on which the owner

receives the consumer building guide. To exercise this right, the homeowner must give written notice to the contractor of their intention to withdraw and must pay certain costs prescribed by the legislation.

Foundations data

Where a building project involves the construction or alteration of footings or a concrete slab, or where the project may adversely affect existing footings or slab, the contractor is required by law (subject to certain stated exceptions and at the owner's cost) to obtain appropriate foundations data before entering the contract and to provide a copy of this data to the owner on payment.

Dealing with a Building Contractor

Insurance

Part 5 of the QBCC Act provides for a statutory insurance scheme referred to as the Queensland Home Warranty Scheme. The Queensland Home Warranty Scheme insures the construction of a house, duplex, townhouse, villa unit, any residential unit (provided it is not a multiple-storey dwelling of more than three storeys) and related roofed buildings (e.g. garage, pool change room, gazebo or shed). It also insures building work that affects the structural performance of a residence or related roofed building, relocation or replacement of a roof, wall, internal partition, floor or foundations, extensions, decks and verandahs, bathroom and kitchen renovations, and installation and repair of the primary water supply.

All builders and trade contractors carrying out building work worth more than \$3300 on a residential dwelling are required to take out an insurance policy with the QBCC for this work. The builder or contractor pays the premium direct to the QBCC. A copy of the building contract is provided to the QBCC by the builder, and a certificate of insurance is issued. The certificate is posted to the consumer named in the contract, together with an insurance policy conditions booklet. If these are not received by the consumer, they should check with the QBCC as it may indicate that the builder has failed to take out the required policy.

In relation to pre-practical completion, the scheme provides financial assistance (to a maximum compensation amount of \$200 000) to consumers for non-completion, defects and subsidence or settlement, if a contractor fails to complete a contract for residential construction work and a contract is terminated by the insured (owner) for reasons that are not the owner's fault. Such circumstances will include cancellation of the contractor's QBCC licence and liquidation, bankruptcy or death of the contractor.

If the dispute resolution process fails to resolve disputes about defects, subsidence or settlement issues, or the contractor is incapable of rectifying defects or subsidence (e.g. due to liquidation or death), the scheme will cover consumers for the reasonable cost to rectify the defects, subsidence or settlement (to a maximum compensation amount of \$200 000).

In addition to these main heads of cover, a benefit may be paid for rental assistance if the property is rendered uninhabitable by the work. Payment may also be made to cover the cost of furniture removal

and storage costs necessarily incurred. Exact details are provided in the insurance policy conditions booklet that may be obtained from any QBCC office.

The insurance policy covers a period of six years and six months from the date the contract is signed, from the date of payment of the insurance premium or when the work is commenced, whichever is the earliest. The period of cover is extended where the work takes longer than six months to complete.

Payment under the policy

Non-completion claims require termination of the contract due to circumstances outlined in the policy. The cover granted is the extra cost to complete the residence up to the maximum insurance entitlement calculated on the original contract price. If the home is not commenced, the benefit is restricted to a refund of the money paid plus lost interest calculated at the rate nominated in the insurance certificate.

Defective construction is covered only after a contractor has failed to comply with the QBCC direction to rectify or any other direction of the Queensland Civil and Administrative Tribunal (QCAT). The only exceptions to this requirement are cases where the contractor's licence is suspended or cancelled, or the contractor is deceased, insolvent, bankrupt or in liquidation.

In certain circumstances, subsidence and/or settlement may be covered, whether or not the contractor is considered responsible for the failure. This is the only part of the cover that does not require default of the contractor.

Resolution of Building Disputes

The Queensland Building and Construction Commission

If work is below standard or incomplete, a complaint can be made to the QBCC. The QBCC employs qualified building inspectors to investigate complaints by consumers. The inspectors will decide whether the work is of an acceptable standard and, if necessary, can direct the builder to rectify or complete the work within a reasonable period. The QBCC can also arrange for the work to be completed or rectified under the insurance policy, when appropriate. Decisions of the QBCC can be reviewed by QCAT.

The Queensland Civil and Administrative Tribunal

The tribunal is intended to deliver justice in a way that is independent, efficient, expert, accessible and flexible. It makes decisions for a number of matters including domestic and commercial building disputes.

If a contractor does not comply with a QBCC direction to rectify, the QBCC can initiate disciplinary action against the contractor in QCAT. If a QBCC licensee or a homeowner disagrees with a QBCC decision, they are entitled to take the domestic building dispute to QCAT.

As detailed on the QCAT website, for a dispute to be heard by the tribunal it must be about:

- the erection or construction of a building
- the renovation, alteration, extension, improvement or repair of a building

- the provision of electrical work, water supply, sewerage or drainage, or similar services for a building
- the demolition, removal or relocation of a building
- any site work including the construction of a swimming pool, retaining structures, driveways or landscaping
- the preparation of plans and specifications, or bills of quantity relating to building work
- the inspection of a completed building
- work prescribed under a Regulation.

Making an application in relation to a building dispute

To make an application in relation to a building dispute, one of the following must be completed and lodged under the QBCC Act:

- Form 26—application domestic building dispute
- Form 25—application commercial building dispute
- Form 23—application to review a decision
- consent notice major commercial building dispute
- alleged defective work/incomplete work schedule.

Application forms are available on the QCAT website and can be lodged at the Brisbane office or at any Magistrates Court (other than the Brisbane Magistrates Court). After an application is made, the QCAT will review the information provided and give advice in relation to the next steps to be followed.

Fees

A full list of QCAT fees and allowances is available on the QCAT website.

Representation

Generally, all parties involved in a QCAT matter must be self-represented. However, a party involved in a disciplinary proceeding is automatically able to be represented. Any other party wishing representation must apply to QCAT. Representation may not be permitted.

Legal Notices

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