

Essential checklist for selling your property

Part 1

It just might be the right time for you, or perhaps, given the recent events in the world economy, you may be considering selling an investment property to free up capital for better use. Whatever your reasons, property lawyer David Singh explains all the issues you will need to consider when selling in this first instalment of a three-part series

This article is based on NSW law, so sellers in other states should seek specific advice in the state that they're selling in. Usually your solicitor will assist you in this regard.

Selling a property for the first time (or even a second or third time) can seem daunting. There are searches, inspections, enquiries, forms, perhaps discharge of a loan, legal issues, negotiations, deposit, signing an agreement with a sales agent, and more to be considered.

In this three-part series, we look at issues for you to keep in mind regarding your proposed sale of either your home, your first investment property or any other investment property you may have.

We give you 20 top tips to consider before making your sale – that is, before you exchange contracts. This list is by no means exhaustive and you should consider what is right for you in relation to your sale.

It is, however, a very good checklist covering many issues that most sellers will encounter.

Following these time-honoured principles will be a good start for ensuring that you are on the way to selling your property and realising the proceeds of sale, so you can in turn use them for an even better investment or enjoy the wealth you have created.

There are many issues that a prospective seller should consider because missing out on considering one issue may turn a possible fantastic sale into a difficult problem. To help you navigate this 'minefield', outlined below are some of the important steps a wise seller should take before signing and exchanging contracts to sell a property. Note that not all of the steps apply to all transactions.

The process below is based on NSW law. You should check with a solicitor familiar with the law in the state in which you are selling your property to obtain advice in relation to your sale.

Please note that, although there are numerous detailed points provided below, your appointed solicitor will take care of most of them for you.

1 Make the contract available

When you offer a residential property for sale, the law now says that your agent must have the proposed form of contract available for a buyer to inspect. The law also prescribes some documents that must be included in the contract.

These documents are discussed below. If these documents are not included in the contract, then the intending purchaser may be able to cancel the contract.

2 Avoid a verbal agreement

This can mean less time is lost between finding a buyer and tying up the sale with a binding contract in writing. A verbal agreement to buy or sell land is not binding.

Because the buyer can readily get information about the property through studying the draft contract and the documents attached to it, the early preparation of the contract helps speed up the sale and can reduce the chance of the buyer pulling out or being 'gazumped' (outbid by a later buyer before a contract can be signed).

3 Other information and documents needed

To prepare a draft sale contract, your solicitor needs information about the property which means your solicitor has to obtain title documents from the Land Titles Office, the section 149 certificate from the local council, and the sewerage diagram from the sewerage authority (if the property is seweraged).

As a minimum, you will need to let your solicitor know the lot and deposited plan number for the property.

A buyer can cancel a contract if the right documents are not attached to it.

4 Obtain a planning certificate

Your solicitor will apply to the council for a town planning certificate, also called a zoning or section 149(2) certificate, or maybe a section 149(2) and (5) certificate.

The section 149(5) certificate has additional information in it. This certificate tells the buyer about the zoning of the land and such things as development standards, local road proposals, and the risk of land-slip, soil contamination, bushfire, flooding and subsidence.

5 Obtain a sewer plan

Your solicitor will also apply for a sewer service plan.

It will show the location of the sewer line in relation to the boundaries of your land.

6 Include title information

In order to complete the contract, copies of land title documents must be included. They can be ordered from the Land and Property Information Office (also known as the Land Titles Office). Usually your solicitor will order the title searches and plans.

7 Complete your solicitor's questionnaire

Your solicitor's intentions are to make sure that your interests are fully protected and give you the speediest possible service.

• **Strata inspection:** If you are selling a strata property, then the seller is likely to carry out an inspection of the strata records.

9 Changes in the law

Changes to the law in recent years oblige sellers to give warranties (promises) to the buyer that the property is not affected by proposals or defects listed in the legislation. If a buyer finds before settlement that the seller is in breach of any of these warranties, the buyer can, by notice in writing, cancel the contract.

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It will help your solicitor do this if you give him or her information about the property. Usually your solicitor would ask you to complete a questionnaire about the property including the rates, the building history and if you have carried out any works at the property.

8 Expect the inspectors

A buyer may be advised to carry out these checks through an inspector:

- **Survey:** The buildings are located inside the legal boundaries and that there are no encroachments by or upon the property and that the walls or eaves and gutters are the right distance from the boundaries.
- **Pests:** The property is free of insect and fungal pests.
- **Pre-sale property inspection:** The buildings are free of defects and the land is not affected by flooding, land-slip, pollution, etc.
- **Council:** The building works are approved and development conditions met.
- **Pipes and drains and services:** These are legally located and connected.
- **Government authorities:** No proposals affect your property (such as resumption for road widening).

For example, the following warranty dealing with the quality and legality of buildings and structures must now be given by a seller: "[That] there is no matter in relation to any building or structure on the land (being a building or structure that is included in the sale of the land) that would justify the making of any **upgrading or demolition order** or, if there is such a matter, a **building certificate** has issued in relation to the building or structure since the matter arose".

We will continue this series with the second part of this article next month

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Part 2

Selling a property for the first time (or even a second or third time) can seem daunting. There are searches, inspections, enquiries, forms, loans, legal issues, negotiations and more to be considered. In this second instalment of a four-part series, we look at legal aspects of selling a property.

There are many issues that a prospective seller should consider, because neglecting just one may turn a possible sale into a problem. There are 20 important points that may need to be addressed before making your sale, ie, before signing and exchanging contracts. Not all of the steps apply to all transactions. This list is not exhaustive but it does cover many issues that most sellers will encounter.

Being aware of the issues and addressing them where relevant can help you in the process of selling your property and realising the proceeds of the sale. It is in your own interests to have as much information as possible, as it may make the difference between a fantastic sale and a minefield.

The process here is based on NSW law and applies to residential property. The solicitor you use will take care of

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most of the points for you. You should get legal advice from a solicitor familiar with the law in the state or territory where you propose to sell your property.

Let's continue with the list.

11 Checking warranties/proposals

Think about the things a buyer will want to investigate and your answers to the questions your solicitor will ask you. You may decide to remedy any blemish now, or disclose a defect or non-compliance by mentioning it in the sale contract.

Do any organisations including government departments or other associations have proposals in relation to your property? If so, the proposal must be disclosed in the contract, otherwise the buyer may be able to cancel the contract any time up to settlement of the sale. Let your solicitor know if there are any proposals in relation to your property.

Sometimes, a sale may be spoiled or the price driven down when a defect is revealed by the buyer's research. Worse still, the buyer may acquire legal rights to cancel the contract or to claim compensation from you.

The best advice is to clear up doubts before exchange of contracts so they don't become problems in the course of your sale.

12 Survey and building certificate (section 149D)

You may decide to have your property surveyed and to get a building

certificate from the council that says it has inspected your property and will take no action to require work to be done on it.

Be aware, however, that making an application carries the risk that the council may find something wrong and require you to fix it.

A local surveyor can prepare an identification survey report for a fee of about \$495.

A council can require a survey report to be lodged with the application for a building certificate but it cannot require a new survey if you have an old survey report and can say that no material change has happened to the property since the date of that report.

The council's fee for a building certificate is about \$210.

You can fairly expect that the marketing of your property is easier and the conveyancing swifter if a survey report and building certificate are attached to your contract.

For these reasons, your solicitor is likely to recommend that you apply for both before exchange of contracts, if you do not already have them. You need to tell your solicitor what you decide.

A survey and building certificate are not required by law to be included in the contract.

Many vendors of units/apartments elect not to obtain a survey and building certificate to attach to the contract because the building is the responsibility of the owners corporation and not an individual owner.

13 Home Building Act 1989

If building work has been done to your home by you or by a licensed builder in the past seven years, your buyer will get the benefit of insurance against building defects.

For residential building work worth more than \$5,000, started after 1 May 1997, or \$12,000 for work started after 2 April 2002, you or your builder should have insured the work against building defects under a policy of insurance and obtained a certificate of Home Owners Warranty insurance. That certificate must be included in the contract. A copy of the certificate of insurance must be attached to the sale contract. If not, the buyer may be able to cancel the contract.

Send your solicitor any certificate of insurance you have for building work on your dwelling, including any Home Owners Warranty Certificates of Insurance. If it is applicable and you do not attach it to the contract, this could entitle the buyer to cancel the contract. You must also be sure to include any brochure about consumer rights that the legislation requires you to include in the contract.

If you purchased the property 'off the plan' or carried out owner-builder work, you may already have a copy of the Home Owners Warranty Certificate of Insurance. Alternatively, you ought to have received it on settlement of your purchase. If you don't include the Home Owners Warranty Certificate of Insurance in the contract, the buyer may be able to cancel the contract. Forward a copy of the Home Owners Warranty Certificate of Insurance to your solicitor as soon as possible, and certainly before exchange of contracts.

If you are an owner builder or you have carried out work on the property within the last seven years, forward your solicitor documentation including:

- Occupation certificate
- Owner-builder permit
- Construction certificate
- Final inspection certificate from council/private certifier
- Home Owners Warranty Certificate of Insurance

Your solicitor is likely to discuss this further with you after you have completed and returned the documents. Your solicitor is also likely to forward you a questionnaire seeking information about the property.

You should return the completed questionnaire and any other documents to your solicitor as soon as possible after you receive such a request.

14 Goods and Services Tax

Note that GST has applied in Australia since 1 July 2000.

• Houses and land

Broadly, the sale of an existing 'second-hand' family home is exempt from GST. So, too, is the private sale of a block of land because it is not normally a 'taxable supply'.

However, a seller must pay GST on all services needed to complete a sale, such as advertising, agent's commission and legal fees.

The rate of tax is 10%. New homes and blocks of land (such as those built or developed and sold by property developers) are subject to GST, and also homes that have been created through substantial renovations (where all, or substantially all, of a building is removed or replaced).

• Business property/farm

On the sale of a business property, it is important to decide if GST is payable and, if so, to include the GST in the price. The law does not give a supplier a statutory right to recover GST from the recipient. So, the contract between seller and buyer must deal with GST.

Please ensure that you understand your GST position before you commit yourself to the sale, ie, before you exchange contracts.

15 Taxation

We recommend you ensure that you understand all the taxation consequences of your sale before exchange of contracts.

16 Vendor duty

This no longer applies.

17 Damages for buyer failing to complete on time

We recommend that, immediately prior to exchange of contracts, you prepare an estimate of damages that you will suffer if your potential buyer does not complete your sale on time.

It's likely to assist your solicitor if you forward any relevant paperwork and/or documentation that you have in relation to the property that is the subject of sale.

This includes:

- Your contract to purchase the property
- Any occupation certificate in relation to the property (this may be included in the contract you used to purchase the property)
- Home Owners Warranty Certificate of Insurance (this may be included in the contract you used to purchase the property)
- Details of any building works you or your builder carried out to the property
- Details of any insurance policy in relation to building works carried out
- Any certificates or notices in relation to the property
- Any real estate sales agency agreement along with your requirements for amendment
- Any building certificate in relation to the property
- Current council rates notice, water rates notice and strata levy notice and receipts for payment
- Your lender's details including contact details and loan number so your solicitor can arrange the discharge of any relevant mortgage
- Copies of any tenancy agreement
- Any other relevant documents, certificates, notices or related information in relation to either yourself and/or the subject property

Although it is not essential to supply any of these documents, if you do give them to your solicitor, it will assist him or her to prepare the contract more quickly and forward the contract to your agent in the shortest possible time.

We'll continue the list in the third part of this article next month. ■

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Part 3

It just might be the right time for you, or, given the recent events in the world economy, perhaps you're considering selling an investment property to free up capital for better uses. Whatever your reason, in this third instalment of a three-part series, property lawyer *David Singh* explains the issues to consider when selling

Selling a property for the first time (or even the second or third time) can seem daunting. There are searches, inspections, enquiries, forms, loans, legal issues, negotiations, a deposit and more to be considered.

In this third part, we look at some final issues for you to think over regarding the proposed sale of your property, whether it's your first investment property or another investment property, or your home.

We give you nine more tips to consider prior to making your sale and exchanging contracts. This list is by no means exhaustive and you should consider what is right for you in relation to your sale. It is, however, a very good checklist covering many issues that most sellers will encounter. Following these time-honoured principles will ensure that you are well on the way to selling your property and realising

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the proceeds so you can use them for an even better investment or enjoy the wealth you have created.

There are many issues a prospective seller should consider. Missing out on considering just one issue may turn a potentially fantastic sale into a difficult one. If you carefully consider all issues, then this can lead to a very successful result for you.

To help you navigate this minefield, outlined below are some of the important steps a wise seller would take before signing and exchanging contracts to sell a property. Note that not all of the steps apply to all transactions.

The process below is based on NSW law. You should seek advice from a solicitor familiar with the laws of the state or territory where the property you are selling is located. Although there are a number of points provided here for your information, your solicitor will take care of most of them for you.

18 The draft contract for sale Your solicitor will prepare a draft contract for you to study and approve.

19 Cooling-off period The law gives a purchaser of residential property the chance to cancel

the contract within five business days of the exchange of contracts. This is called a 'cooling-off period'. A purchaser who cools off and cancels a contract will forfeit 0.25% of the purchase price from the deposit to the seller. For example, if you are selling a property for \$400,000 and the purchaser rescinds (cancels) the contract, then usually the 'purchaser' must pay you, the seller, \$1,000. If your purchaser has paid more than \$1,000 as a deposit, then the remaining balance is returned to the purchaser.

Only the purchaser can rescind the contract using these cooling-off rights. Once the seller has signed and exchanged contracts, usually they cannot cancel the contract.

The purchaser can waive the cooling-off period. This may be done where the purchaser gives the seller's solicitor a certificate signed by the purchaser's solicitor saying that the effect of the contract has been explained to the purchaser and that there is no cooling-off period applying to the sale.

Without that certificate, you will be bound to sell but your purchaser will not be bound to buy except after five business days have passed. If you want to obtain a binding agreement straight away, you should insist that

your purchaser waive the cooling-off period. Your solicitor will usually prepare a section 66W certificate for the purchaser's solicitor to sign and forward that certificate to your sales agent along with the draft contract so that the purchaser's solicitor can easily sign the certificate if the purchaser instructs their solicitor to do so.

20 Contract provisions Your solicitor is likely to go through the contract with you and point out the more important parts. Your solicitor will also tell you about some of the legal aspects of selling real estate and explain what has to be done and what costs are involved.

Many provisions are there to protect both the seller and the purchaser if something unexpected happens. They have been worded in much the same way for a very long time and their meaning is known to experienced lawyers. The Law Society form of contract is accepted as setting a reasonable balance between the interests of both seller and purchaser.

Even so, we recommend that you study all the provisions of the contract so that you know what it says before you sign.

21 Your agent Your sales agency agreement must be written, otherwise your sales agent cannot claim commission.

22 The description of the property When you receive the draft contract from your solicitor, please check that the property is correctly and fully described, and that all improvements are mentioned.

23 Inclusions All fixtures are included in the sale without having to be named. Please check that the items marked in the inclusions box are those that you agree to sell.

By law, a fixture is something attached to the land so that it must have been intended to remain there permanently. To avoid doubt, it's best to name in the exclusions box any item that you want to keep and name in the inclusions box anything that is included in the sale.



Your solicitor will usually help you with this.

24 Placing the price The price is to be inserted when a sale has been negotiated, along with the name of the purchaser and the name of the purchaser's solicitor.

25 Paying the deposit The deposit is to be paid to the agent on exchange of contracts. If you the seller and the purchaser agree, it will be invested, with interest to be shared equally. You may decide to give your tax file number to the institution where the deposit is invested. If you do not, tax will be taken out of the interest earned on the deposit at the highest rate.

Alternatively, if you agree, then your purchaser may provide security for the deposit by way of a deposit bond. (Deposit bonds will be the subject of a future article in the legal column in *Your Investment Property* magazine.)

26 Completion date This is the day when the title of the property and possession are given to the purchaser in exchange for the money. It's also called the settlement date.

The contract usually sets the completion date at 42 days after the date of exchange but you and the purchaser may put a different date in the contract, or you can later agree to change the date to a date that suits you both. Different states have different standard duration of contracts, eg, in Queensland the usual contract duration is 30 days.

If you don't negotiate the date for settlement before the exchange of contracts then the purchaser may not agree to change the date after exchange of contracts. This is important because if you are selling one property and purchasing another property then you may need to ensure that your sale settles on the same day as your purchase otherwise you may not have sufficient funds to settle your purchase.

If a purchaser fails to complete the purchase on time, you may give written notice demanding settlement, usually no later than 14 days after the date of the notice. The purchaser risks the loss of the deposit to you the vendor if the demand is not met. If you are in this situation, you should ensure that you obtain legal advice. ■

David Singh will give further information about selling a property next month, in Your Investment Property, No. 21

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