



ADLV LAW

FIERCELY ON YOUR SIDE

SOLUTION BRIEF

Buying Property

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However, if you are not familiar with the legal and procedural requirements, you may miss out on valuable opportunities and benefits, including:

- Tax benefits: Certain property holding structures allow you to access certain tax breaks, including CGT, superannuation and Land Tax benefits;
- Building inspections: If do not include the relevant “subject to” clauses in your Contract, you may not be entitled to carry out a site inspection or have a professional structural report completed;
- Finance security and flexibility: You should make sure you have some contractual assurances about what will happen if you cannot get finance approved for the particular property you are purchasing; and
- Asset protection benefits: Popular ways of holding property include through a Self-Managed Superannuation Fund or a ‘family trust’.

Purchasing property can be a stressful process. We set out below a Checklist to help you plan each step along the way.

Get indicative financial approval

Before signing on the dotted line, you should speak with some banks and other lending institutions to make sure you are financially ready and able to purchase a property.

This will assist you know how much you have to spend and avoid delays when you have found the property that you would like to buy.

Establish the holding structure

Depending on your financial and legal circumstances, and the type of property you are planning to purchase, it may be beneficial for you to consider purchasing the property in a holding structure other than your own personal name.

Popular holding structures include:

- ‘Joint tenants’ or ‘tenants in common’ with another person;
- Family discretionary trusts;
- Self-Managed Superannuation Funds (SMSFs); and
- Unit Trusts.

As a general rule, companies are not recommended for holding property, because they do not benefit from the general 50% CGT discount on capital gains.

Holding property using a separate legal entity can have benefits including tax breaks, asset protection, and Estate Planning and succession advantages.

We strongly recommend that if you are purchasing a commercial property or investment property you seek some legal and financial advice about the best holding structure.

Co-Ownership Agreement

If you are purchasing the property with one or more other people then you should put in place a comprehensive Co-Ownership Agreement that clearly sets out how you are going to purchase the property, how it is going to be managed, and how and when it is going to be sold. This will avoid costly disputes down the track.

Nominate the correct entity that is purchasing the property

Ideally, you should establish the holding structure into which you are going to acquire the property before you sign the Contract – and then you should ensure that the name of this entity is put on the Contract.

If you do not name the correct entity on the Contract, or you establish the entity after you have signed the Contract, then you may be up for additional stamp duty. In some states this can double the amount of stamp duty payable.

In some states you can specify on the contract that the party purchasing the property is the person named on the Contract, ‘and/or their nominee’. If the nominee is in existence prior to the Contract, and the nominee has appointed the person named on the Contract to act on their behalf, then double stamp duty may be avoided. However, great care needs to be taken when using nominees.

Buying at auction

Different rules apply when you buy a property at auction. If you are the highest bidder over the reserve when the auctioneer’s hammer comes down, consider it yours!

Accordingly, you ought to make sure that you are satisfied with the condition of the property prior to the auction. Most real estate agents are happy to let you have building inspections carried out on the property before the auction date.

You should also make sure that you are confident about your financial status, because if you win at auction you are bound to buy the property, regardless of whether you can get finance approval later on.

If you buy at auction, you do not get a cooling off period, so make sure there are no unanswered questions before you place your bid.

Signing the Contract

Some points to consider before signing the Contract:

- If you intend to purchase the property through a holding entity, make sure you write the purchaser as '[Your name] and/or Nominee' OR write the holdings entity's name as the purchaser.
- If you wish to make your purchase subject to certain conditions, make sure the conditions are specified clearly in the Contract (i.e. "subject to suitable finance" or "subject to a satisfactory building inspection").
- Do not be afraid to ask questions or to get a professional advisor (i.e. a lawyer or accountant) to look over the Contract. Remember that the real estate agent is there to look after the vendor, not you.
- If you do not understand something, do not sign the Contract until you are satisfied you know what it means.
- Make sure you are clear on how long you have to cool off if you change your mind. If you are purchasing through a company, or at auction, you will generally not get a cooling off period.
- Settlement usually occurs 30 days after signing the Contract. However, vendors and their agents tend to be open to longer settlements if you need it. We also recommend scheduling settlement on the property for mid-week, so that if there are any hiccups you have a couple of days left to sort them out. There is nothing worse than having a Friday settlement delayed until the following week because your lending institution was not quite ready to settle.

Building Insurance

From the moment you sign the Contract you must take out building insurance on the property. The building insurance policy essentially protects your interest in the property. If the property is destroyed in the period between execution of the Contract and settlement, the vendors' insurer will pay out to the vendor and your insurer will pay out to you.

Qualifying for the GST “Going concern” exception

If the property you are purchasing is a commercial property, you will usually have to pay GST on the purchase price. However, if it is subject to a lease or satisfies some other criteria, then it may qualify for an exemption from GST as a ‘going concern’.

Because stamp duty applies to the GST-inclusive purchase price, qualifying for this exemption can save duty. Furthermore, you will not need to fund the GST before you qualify to claim it back.

You need to agree in writing with the vendor to treat the sale as an exempt ‘going concern’. It is best to include the agreement with the vendor in the Contract. However, you can also make an ‘Addendum to Contract’ to add this condition later, as long as both sides agree.

You are also required to be registered for GST prior to the settlement date.

Check the disclosures

In each state the vendor is required to provide you with certain disclosures about the property prior to signing the Contract. Make sure you get legal advice about what these disclosures mean.

Clearly set out your conditions

There may also be some additional conditions that you have negotiated with the vendor (i.e., relating to maintenance or improvements that need to be carried out prior to settlement). If this is the case, make sure these conditions are included in the Contract in the relevant section, or are included in an ‘Addendum to Contract’ (which can be added to the Contract later as long it is agreed to by both parties).

Cooling off

The standard cooling off period for private treaty Contracts (i.e. non-auction purchases) is usually 3 business days (but you need to check the rules in the relevant state). If the cooling off period is 3 days, then if you sign a Contract on a Thursday, your cooling off period will end on the following Tuesday. For this reason, many people choose to sign Contracts on a Friday, so that they have an extra couple of days to make enquiries.

Payment of deposit

The deposit amount you are required to pay will be stated on the Contract, and is usually in the region of 10% of the purchase price (although with residential properties this figure is often negotiated down).

You will be required to pay the deposit at the end of the cooling off period. The real estate agent will provide you with their Trust Account details into which to pay the deposit at the time of signing the Contract.

The agent holds your deposit as security for the undertaking to purchase the property that you have given the vendor by signing the Contract. If you do not follow through with the purchase, and there are no conditions in the Contract that allow you to terminate the Contract, then you will 'forfeit' your deposit and it will be paid to the vendor.

Engagement of solicitor or conveyancer

By now you are getting to the business end of the deal. Solicitors and registered conveyancers can act for you in the transfer of the property.

You may have a solicitor or conveyancer that you have used in the past that you would like to use again. If you do not know someone that you would like to use, word-of-mouth recommendations tend to be the best thing to rely on.

The benefit of having a solicitor act for you is that they are multi-skilled, which means they can also advise you on things like GST, stamp duty, superannuation and trust aspects, and your rights and obligations if things go wrong.

At the end of the day, you should choose someone you trust and are confident with, because it can be a stressful time, and you need someone who can ensure that things run smoothly.

Signing of Transfer

When you have selected and engaged a solicitor or conveyancer to act for you, they will prepare a document called a Memorandum of Transfer ('the Transfer'). The Transfer must be signed by you and the vendor. The Transfer is registered with the Lands Titles Office ('the LTO') after settlement, and is what gives the LTO the information it needs to issue a new Certificate of Title for the property.

When you receive the Transfer from your conveyancer/solicitor, make sure that your name(s) are spelt correctly and that all the other details are correct. If there is an error on the Transfer, it will appear on the new Certificate of Title.

Satisfaction of conditions

If you had any additional conditions in your Contract that the vendor was required to satisfy prior to settlement, now is the time that you should be following up with the agent to make sure that the work has been carried out.

If the work is not completed by settlement, you may withhold a reasonable portion of the purchase price (i.e., whatever you think it will cost you to have the work carried out by a contractor) until the work is completed.

Formal finance approval

If you are obtaining finance to enable you to make your purchase, now is the time to formalise your finance arrangements and sign the mortgage documents.

If finance falls through, and you have made settlement conditional on financial approval, then you must notify the vendor straight away that the condition has not been satisfied.

Receive Adjustment Statement and Settlement Statement

In the days prior to settlement, your solicitor or conveyancer will receive an 'Adjustment Statement' from the vendor's solicitor or conveyancer.

The Adjustment Statement records all the adjustments that must be paid to the vendor at settlement, such as water fees, council rates and land tax. The Adjustment Statement will show your solicitor or conveyancer exactly what is owed to the vendor (i.e. purchase price plus adjustments, less the deposit), and will provide cheque details for the payment of the settlement money.

Your solicitor or conveyancer will then prepare their own statement called a 'Settlement Statement', which will summarise for you the amount that they need from you to complete your purchase. Usually, this amount comprises the amount owing to the vendor as per the Adjustment Statement, plus conveyancing fees and the stamp duty payable on the purchase.

The Settlement Statement will also provide you with the details of how to provide the money to your solicitor or conveyancer. Ordinarily, they will require a bank cheque for the amount owing to the vendor and a deposit into their Trust Account for the stamp duty and conveyancing fees.

Payment of stamp duty and conveyancing fees

Usually, a day or two prior to settlement your solicitor or conveyancer will require you to pay to them the stamp duty and fees for your purchase.

The stamp duty amount will have already been provided to you on the Settlement Statement. The amount is calculated based on the purchase price of your property. You can verify the amount using the stamp duty calculator on the website of the relevant state revenue office.

Your solicitor or conveyancer will pay the stamp duty to the government when they get the Transfer stamped prior to settlement.

Provision of bank cheque

On the morning of settlement, you will need to provide your solicitor or conveyancer with a bank cheque for the settlement amount (the balance of the purchase price plus adjustments).

Sometimes the vendor may request multiple bank cheques made out to different recipients, depending on their mortgage circumstances, etc. Make sure that you are able to deliver the cheque to your solicitor or conveyancer in plenty of time, and that all the amounts on the bank cheque(s) add up correctly.

Settlement

Settlement usually occurs between 11am and 12.30pm at the nominated place for settlement. Your solicitor or conveyancer will attend settlement on your behalf.

After settlement, your solicitor or conveyance, or the mortgagee lending institution (i.e., the bank or other lender you are borrowing the money for the purchase from) will lodge the Transfer with the LTO for registration.

If you are buying the property freehold (i.e., to own it outright with no mortgage) the LTO will issue a new Certificate of Title to your solicitor or conveyancer directly. If you will have a mortgage on the property, then the new Certificate of Title will be sent directly to your lending institution for it to hold as security.

Your solicitor or conveyancer will call you to relay the good news – that you are now a property owner – after settlement is done and dusted.

Post-settlement processes

Congratulations! You are now a property owner!

- Collect your keys from the real estate agent or vendor.
- Arrange for gas and electricity to be connected or supplied to your property.
- Arrange for contents insurance for your property.
- Make sure your solicitor or conveyancer notifies the various authorities of your ownership, including water, gas, electricity and the local council.



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TALK TO US

What next?

If you would like to speak to someone about the steps to purchasing a property in more detail, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.

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