

A useful guide to the legal side of Buying and Selling Houses, Apartments and land throughout Victoria



Specialists in Conveyancing
For people living in the North Eastern Suburbs of Melbourne



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Introduction

Buying or selling your home, an investment property or land can be one of the biggest financial decisions that you make, so it's important to get it right, to protect you and your investment.

That's because, when it's the family home, or what the government calls "the principal place of residence" that is about the only investment that does not get taxed when it's sold. More importantly, it's also your home – you will invest not only a lot of money, but emotion in it.

So let's have a look at the "ins" and "outs" of buying and selling your house, apartment, investment property or vacant land.

Some Words Explained:

Real Estate

The word “real” has been handed down to us from the British legal system that the First Fleet brought to this country (along with the convicts). “Real” property, that is, houses, apartments and vacant land, was distinguished from “personal” property – in those days, sheep, cattle, horses, furniture, money – in fact anything that was not “Real” property. The word “estate” again comes from Britain – think of country houses and farms but now used for any houses, apartments, factories vacant land. Here we use the word “property” to describe “real estate” – it’s the same thing.

Vendor/Seller

The vendor is the person, company or a trust that is selling the property. We will call them the seller.

Purchaser/Buyer

As the name says, this is the person, company or trust that is buying the property. We will call them the buyer.

Contract

The Contract is the formal legal document that is signed by the buyer and the seller and is the legal basis for the sale or purchase.

Conveyancer

The conveyancer is the person who does the legal work for the buyer or seller of property. Both conveyancers and property lawyers do this work. Here at Tonkin Legal Group we have, as an important part of our team, Suzanna Toleski, who is an experienced conveyancer. St John Heath, one of the partners of Tonkin Legal Group, heads our Conveyancing Department and has overall supervision of property purchases and sales for clients. Here we will use “conveyancer” to cover both conveyancers and property lawyers.

Special Conditions

These are listed in the Contract and set out, for example, what items (called “chattels”) are to be left in or removed from the property at the time of the settlement of the sale or the purchase. For example, dishwashers usually stay with the property, while fridges and washing machines go with the seller when they leave. If the property is large, the seller may want to leave equipment such as ride-on mowers, chain saws and the like at the property, to be included in the purchase price. Those details would be set out in the Special Conditions.

Section 32 Certificate

This is a document required by law, to be prepared by the seller or their conveyancer. It comes from Section 32 of the Victorian Sale of Land Act. The Certificate sets out details of the property and includes a copy of the Certificate of Title, council and water rate notices, any council or other authority planning notices and details of any easements – for example, the right of an electricity, water or roads authority to have their services run under or above the property.

Caveat

A Caveat is a document that is filed with the Titles Office, usually by the buyer. It stops any dealings with the property until it is removed. So, if the buyer is concerned that the seller may try to sell the property to another buyer, the first buyer can lodge a Caveat. The Titles Office notifies the owner of the property (the seller) that the Caveat has been filed. If the sale to the original buyer proceeds, they withdraw the Caveat at or before the settlement of the sale.

PEXA

PEXA (it means “Property Exchange Australia”) is the new, electronic way to conduct much of the legal work involved in buying or selling real estate. It replaces most of the previous system of letters to and from the buyers’ and the sellers’ conveyancers, banks and anyone else involved in the sale or purchase of real estate. Without going into the details of how PEXA works, it is designed to simplify and speed up the legal side of property transactions. It does require some work from the seller and buyer, who have to go to a Post Office to have a document certified as to their identity before the property transaction can proceed.

Buying a Property

Let's walk through the procedure if you are buying a property.

The first steps – the Section 32 Certificate

If you are buying a property through a real estate agent, the agent will have a Section 32 Certificate that was prepared by the seller's conveyancer. The buyer takes that document to their conveyancer who makes sure that there are no "nasties" to do with the property – such as it being in a area subject to flooding or, at the other end of the scale, the local council may have building restrictions in bushfire areas. The conveyancer will raise any concerns that arise out of the Section 32 Certificate with the seller's conveyancer.

The Contract

The agent will also give the buyer a copy of the Contract for the sale of the property, which sets out the seller's proposed timing of the sale (usually settlement in 30, 60 or 90 days) and any special conditions. It's very important not to sign the Contract, which is a legally binding document, until you have discussed it with your conveyancer. A trap people have fallen into is to assume that they will be able to sell their existing property and settle the sale at the same time as their new purchase. Of course, that may not happen. In that situation, the buyer's conveyancer can negotiate with the seller's conveyancer to put a clause in the Contract to say that the buyer signs the Contract, subject to selling their own property within, say, 30 days. Remember that the agent is working for the seller, not the buyer, which makes it important that you discuss the Section 32 Certificate and the Contract with your conveyancer.

Finance

It's also vitally important that, if the buyer needs to get a loan to complete their purchase (which is usually the case), a finance clause is included in the Contract – for example, that the buyer will obtain finance within, say, 30 days of signing the Contract. If they can't get approval for a loan within that time, then the buyer can end the Contract.

Auctions

From the buyer's perspective, if a property is to be sold at public auction, the seller's conveyancer will prepare the Auction Contract. That, together with the Section 32 Certificate, is available from the agent's office and "Open for Inspections" at the property. It's wise to have your conveyancer explain the Contract to you before you go to the auction. And remember, if you are the highest bidder and the auctioneer's hammer comes down – you have bought the property – there's no going back – so you have to be absolutely sure that your finance is in place before the auction.

Deposits

At an auction, the successful buyer is required to pay a deposit to the agent. That is usually 10% of the purchase price. In a private sale, either with or without an agent, the deposit is paid when the Contract is signed by both the buyer and the seller – again usually 10%, but that can be negotiated.

PEXA again

Once the Contract is signed by both parties, the conveyancer gets to work to ensure that all the necessary documents are signed through the PEXA system, the lending bank is notified and the date for the settlement is agreed – that must be on or before the date on the Contract. If the buyer causes any delay – for example, they have not organised their finance, then they may have to pay penalty interest to the seller. On the day of the settlement, it all goes through electronically between the buyer's and the seller's conveyancers and the bank. The respective conveyancers contact their clients with the happy news that the sale is complete.

Selling a Property

Now let's see what's involved in selling. Much of what is said above about the buyer also applies to the seller.

The first steps – the Section 32 Certificate

It's the seller's job to arrange the Section 32 Certificate. They provide all of the necessary details that they have about the property to the conveyancer who then gets any further information from the council and other authorities and prepares the Certificate. The agents always want the Section 32 as soon as possible after the seller engages them to sell the property, so that they can give it to prospective purchasers.

The Contract

It's the seller's conveyancer who prepares the Contract. The seller will tell the conveyancer what they want put in the Special Conditions that we discussed earlier – whether the dishwasher is sold with the property, what about curtains, the above-ground pool, the birds in the aviary? The conveyancer then provides the Contract to the agent to show to possible buyers.

Finance

As an important part of their job, the seller's conveyancer will contact the seller's bank (via PEXA) to arrange for any mortgage to be paid out (called "discharged") at the time of the settlement of the sale.

Auctions

From the seller's perspective, the day of the auction, unless you have previously bought or sold properties, can be pretty scary. The agent will tell you to stay inside the house while the auction is in progress (but you can listen inside the front door) – they don't want the owners possibly showing any emotion – either happy or sad, while the auction is going on. If the property sells, the agent will bring the delighted buyer inside to meet you, the equally delighted seller, the Contract is signed by both parties and you can put the "SOLD" sticker on the board outside if you wish.

Deposits

A deposit, usually 10%, is paid to the agent by the buyer when both parties have signed the Contract, whether at auction or at a private sale. Subject to certain conditions, the agent can later release the deposit, less their commission, advertising and any auction expenses, to the conveyancer for passing on to the seller.

And PEXA again

The electronic PEXA system is used by the seller's conveyancer to ensure that the legal work involved in the sale goes through smoothly and the seller gets their money on settlement day – often to be used to buy another property, and frequently on the same day, so that the conveyancer is very busy getting all that organised.

Can't I do this **myself?**

Well, of course you can, but remember that buying or selling a piece of real estate may be the biggest financial decision in your life – you need to get it right or the consequences can be disastrous.

While there are books and kits on DIY Conveyancing, would you, if you had never driven a car in your life, jump in and try to drive after reading the Owner's Manual? Would you do your own dentistry or operate on your pet? Of course you wouldn't, so why would you try to do your own conveyancing, with so much money invested, when the price of engaging an experienced conveyancer is only a small part of the overall cost? It's cheap insurance and peace of mind.

As you have probably realised, the answer is to employ an experienced professional to carry out your legal work when buying or selling a house, apartment, investment property or land.



Susanna Toleski | Conveyancer

Tonkin Legal Group

T: (03) 9435 9044

E: stoleski@tonkinlaw.com



TONKIN
LEGAL GROUP

8-10 Flintoff Street
Greensborough Vic 3088
mail@tonkinlaw.com
www.tonkinlaw.com