

CONVEYANCING VICTORIA 2022



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SIMON LIBBIS

Conveyancing Victoria

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The new chapter which deals with the online process was prepared by Joan Lentini. Joan is the principal of Complete Conveyancing & Corporate Services Pty Ltd. She has over 40 years' experience in all aspects of conveyancing and has had a significant involvement in the online process.

Joan is the President of the Australian Institute of Conveyancers (Vic). She is actively involved in the education and mentoring of conveyancers.

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CONVEYANCING VICTORIA 2022

SIMON LIBBIS



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Preface to 2022 Edition

Welcome to your 2022 edition of *Conveyancing Victoria*. This is the eighth print version of the book, but in between the hard copies there have been updates to the electronic version. If you have not taken advantage of access to the online version you are missing out on this. So make sure you take it up. It costs nothing once you buy the book. To find out more about it go to the first page of the book.

There has been a lot going on in the world of conveyancing since the last edition. Electronic settlement and lodgment are now the norm. *The Sale of Land Act* is still being amended and interpreted by the Supreme Court. Practitioners have a greater responsibility for the calculation and collection of state and federal taxes. We have a new contract of sale. These are among the developments covered in this edition.

On top of this we now have to deal with the restrictions imposed as consequence of COVID-19. These include the closing of the offices of Land Use Victoria, limitations on physical settlements and the prohibition on carrying out property inspections. Whilst some of the changes may not be long term, it is likely that others will continue to impact on the way we practise. You can find out more by visiting the Covid-19 Hub on the Law Institute Website – https://www.liv.asn.au/Web/Resource_Knowledge_Centre/COVID19_Hub/Web/Content/Resource_Knowledge_Centre/COVID-19_Hub/COVID-19_Hub.aspx?hkey=b737f4ed-dfe9-4b6c-85b4-c537442caa02

The pace of change shows no sign of letting up. It is more important than ever to keep up to date with legislation, cases and processes. The prospect of doing this has become less daunting for me now that I have help from an expert conveyancing practitioner. Joan Lentini prepared the new chapter that sets out in some detail the online process. I am most grateful to Joan for this valuable contribution and hope that she will become an ongoing contributor to the book.

One of the great pleasures of authoring this book is the opportunity to continue working with my good friend Louis de Vries of Hybrid Publishers. I doubt that I could keep doing this without his encouragement, support and occasional gentle cajoling. Hopefully we will continue in this vein for years to come.

– Simon Libbis, January 2022

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1. What is Conveyancing?

Conveyancing is the transfer of interests or estates in land from one legal entity to another. The agreement to transfer the estate or interest is contained in a contractual document. This is the source document containing the agreement between the parties to the conveyancing transaction. The instructions to the Registrar of Titles to effect the relevant change in the Register are contained in approved forms.

Components

The usual conveyance has four basic components:

1. *Title and goods*

These are the subject of the conveyance, or what is being bought or sold. It includes the land with all its improvements, fixtures and fittings and the goods that are included in that sale. Fixtures are items which may once have been goods but have been so permanently attached to the land that they are regarded as part of it.

The title is at the heart of any conveyancing transaction. It gives you a full description of the land being dealt with and details of the registered proprietor and any registered encumbrances, restrictions and easements.

2. *Non-title restrictions and charges*

These are restrictions and charges not shown on the title but nonetheless affecting the title. For example:

- statutory restrictions such as those contained in section 42 of the *Transfer of Land Act 1958*;
- rates, taxes and other outgoings;
- water, sewerage and other service pipes laid on the property; and
- the zoning affecting the property and governing its use.

3. *Contractual documents*

Contractual documents include the contract of sale and the vendor statement (often referred to as the section 32 Statement or vendor's disclosure statement). There are specific requirements relating to the

drafting of these documents. The conditions contained in the contract must be adhered to and the relevant legislation complied with.

The form of contract used in most conveyancing is the one produced by the Law Institute of Victoria in conjunction with the Real Estate Institute of Victoria. This form of contract is widely used and accepted in the conveyancing industry.

4. *Title documents, settlement, stamping, lodging and registration*

The last element deals with documents or forms of direction to the Registrar. These flow from the contractual documents and enable a clear title to be delivered at settlement and the new proprietor to be registered on title.

Such forms as a withdrawal of caveat and discharge of mortgage are provided at settlement together with a transfer of land in exchange for funds. As will be explained later the paper forms have now largely been replaced by data transfer. In order to meet restrictions imposed as a consequence of Covid-19 where data cannot be lodged, there is a process for lodging imaged documents. Information about that can be found at – <https://www.land.vic.gov.au/land-registration/fees-guides-and-forms>.

Usually a deposit has been paid. Under certain circumstances, its early release can be obtained. The balance of the purchase money is due at settlement plus or minus an adjustment of outgoings. Such things as rates, taxes, registration fees on discharges and withdrawals and sometimes even stamp duty have to be adjusted between the vendor and the purchaser usually at the date of settlement.

The Participants

There are a number of players in a conveyancing transaction:

Vendor

In a conveyancing transaction a vendor is the party who is selling the land. The vendor is usually, but not always, also the registered proprietor on the title to the property. If not it will be necessary for the vendor to produce at settlement documentation to enable a transfer of the land from the registered proprietor to the purchaser.

The vendor:

- Puts the property up for sale, usually through an estate agent. An authority to sell is signed by the vendor and authorises the agent

to sell the property on specified terms and conditions.

- Arranges for the preparation of the vendor statement. The details required to be disclosed are set out in section 32 of the *Sale of Land Act* 1962.
- Has a contract for the sale of the property prepared. This contract sets out details of the property and goods (if any) being sold, the terms and conditions under which the vendor will sell the property, and the consideration or purchase price the vendor is willing to accept.
- Accepts an offer to purchase the property.
- Usually, but not always requests an early release of the deposit paid.
- Arranges for the discharge or removal of any encumbrance or restriction shown on the title which the purchaser has not contracted to accept.
- Signs the transfer of land submitted by the purchaser.
- Usually signs a statement (or statements) required by the State Revenue Office in relation to goods.
- Participates in settlement arrangements.
- Ensures that title documentation is available to be handed over at settlement.
- Arranges for notices to be sent to statutory authorities advising them of the change in ownership.

A flow chart for the vendor appears in Appendix 1. A detailed checklist that could be useful when acting for a vendor is set out in Appendix 2. In Appendix 3 is a sample of a letter that could be sent to vendor making an initial enquiry about the conveyancing process.

Purchaser

The purchaser in a conveyancing transaction is the party who contracts to buy the property from the vendor. The purchaser is usually, but not always, the party who signs the contract of sale.

The purchaser:

- Inspects the property and any documents available. This could include the draft or proposed contract and vendor statement.
- Negotiates with the vendor either directly or through an agent or representative for the purchase of the property.
- Makes an offer for the purchase of the property and usually, but not always, pays a deposit. When that offer is accepted in writing

- by the vendor a contract is in place
- Has the vendor statement checked. At this stage a title search and statutory certificates should be obtained.
 - Arranges for a caveat to be lodged on the title to the property to warn anyone searching the title that there is a contract in existence.
 - Measures the land.
 - If applicable, makes an application for finance to assist with the purchase of the property. If successful, the purchaser will sign mortgage and ancillary documents to secure the loan against the title of the property being purchased.
 - Arranges for a transfer of land and notice of acquisition to be prepared and signed.
 - Sometimes signs a statement (or statements) required by the State Revenue Office in relation to goods. This is usually provided by the vendor.
 - Has a statement of adjustments of outgoings and a settlement statement prepared and ratified by the vendor.
 - Participates in settlement arrangements.
 - Inspects the property as close as possible to the settlement date.
 - Arranges for a final or check search on the title to the property being purchased.
 - Makes purchase funds available at settlement.
 - Has title documents stamped and lodged for registration.
 - Arranges for notices to be sent to statutory authorities advising them of change in ownership.

The aim is to ensure that the purchaser is registered as the proprietor on the title to the property, that the title is free from all encumbrances apart from those that the property is sold subject to and that the purchaser obtains possession of, or the income from, the property.

A flow chart for the purchaser appears in Appendix 4. A detailed checklist that could be useful when acting for a purchaser is set out in Appendix 5. In Appendix 6 is a sample of a letter that could be sent to purchaser making an initial enquiry about the conveyancing process.

The processes mentioned here are now mostly carried out electronically. This is dealt with in more detail later.

Representatives

Parties to a conveyancing transaction can either handle it themselves or appoint a representative to act on their behalf. The former is becoming less common as the move to 100 per cent digital progresses. More information about that can be found here – <https://www.land.vic.gov.au/land-registration/consultation-papers>. The representative will steer the client through the process and procedures involved. A representative acts on behalf of and in the best interests of the client.

It is necessary for the representative to take full and complete instructions as early as possible in the life of the transaction. This allows advice to be given in accordance with the client's individual needs.

As a practical measure, the representative should organise check lists for taking instructions from clients. This will ensure that all the necessary information is obtained when initial instructions are taken.

If it is obvious that the client needs advice of a kind which is outside the knowledge and expertise of the representative, the client should either be referred to an appropriate source or advised to seek their own source of advice. For example, the representative may not be fully conversant with financial planning. Therefore, when an issue arises which requires advice in this area, the client should be advised to consult a financial planner.

It is important for the representative to ensure that:

- the client receives legal advice and that advice is delivered to the client in a manner to ensure, so far as possible, the client's understanding of that advice;
- the client is kept fully advised of the legal effects of the transaction;
- the client is at all times kept informed of developments;
- the client is given sufficient and accurate information so as to be able to make informed decisions;
- the representative acts upon the client's instructions;
- all necessary searches and enquiries on the title and property are conducted and the results are conveyed to the client;
- the client is satisfied with all aspects of the title and property;
- all necessary documents are prepared accurately and in a timely manner;
- all necessary correspondence and communications with all parties to the transaction are attended to promptly and diligently;

- all reasonable endeavours are made to ensure that the steps required are taken in a timely and efficient manner.

A good representative ensures that deadlines are met or an extension obtained and that their client is kept fully informed of the progress of the transaction.

Deadlines

There are a number of deadlines in conveyancing, and it is essential that you develop a checklist or reminder system. You could use a manual or electronic diary. If you use a conveyancing software package there is usually an inbuilt diary system. The method is irrelevant so long as it suits your needs and you are comfortable with its use.

When you receive a new matter, you should enter in your tracking system pertinent dates such as the auction date, the date for loan approval and the settlement date. Then enter dates to remind you to check the progress of each of these events at an appropriate time prior to the event; for example, to check progress with your client a week before the date for loan approval.

If you can't meet a deadline, for whatever reason, it is important that you take steps to minimise any repercussions. Don't just put the matter aside – it won't go away, and delays in conveyancing can be costly. Wherever possible, negotiate for an extension of time to meet the deadline and always keep your client fully informed of the situation.

Contact with the client

It is important that your client is at all times aware of the progress of their transaction. Communicate with your client clearly and concisely. Don't be ambiguous or verbose.

If you need your client to do something, give them instructions, timelines and, wherever possible, reasons. When they communicate their decision to you, take note of their instructions and act accordingly.

After you have written to or telephoned your client with a specific request remember to diarise an appropriate date to check on the progress of that request. For example, you may telephone your client and ask them to confirm land measurements with you as soon as possible. Diarise a reminder to follow up on your request.

Keep records and maintain files

Keep records not only of the mail you send but also of the telephone conversations you have and emails and text communication. Always confirm significant telephone conversations in writing, giving the date and details of the call and the person with whom you spoke. Changes in staff or an employee failing to record the call on the appropriate file could cause problems at a later date.

Keep your filing system up to date. It is so easy when under pressure to put original and copy correspondence, file notes and records of telephone calls to one side to be filed later. Unfortunately, it is all too easy to forget what is not in the file. You may refer to your file and give information and advice based on its contents. However, there may be a pertinent piece of information sitting in the filing basket which hasn't been taken into account.

Conveyancing can be undertaken by legal practitioners ("lawyers") and licensed conveyancers ("conveyancers").

Lawyers

Lawyers can give advice about all elements in a conveyancing transaction. They are governed by the *Legal Profession Uniform Law* (Vic) which sets out the standards of conduct applicable to lawyers in Victoria.

Lawyers must hold a current practising certificate. The practising certificate allows the lawyer to engage in legal practice in Victoria and states whether or not that lawyer is authorised to hold trust money.

If a lawyer is authorised to hold trust money, a trust bank account must be opened for that purpose. There are strict rules and audit requirements governing the operation of trust accounts. A Fidelity Fund compensates clients who suffer loss as a result of a lawyer's dishonesty. The Legal Services Board handles Fidelity Fund claims. This Board is also responsible for the registration of lawyers and the monitoring of their trust accounts.

Lawyers must also carry professional indemnity insurance as consumer protection against negligence. The Legal Practitioners Liability Committee handles professional indemnity insurance.

The Legal Services Board investigates complaints against solicitors. Where appropriate, these complaints can be referred to the Legal Profession Tribunal for a formal hearing.

Conveyancers

Conveyancers handle the processes and procedures involved in conveyancing. The *Conveyancers Act 2006* establishes a regulatory regime for conveyancers. They are required to have professional indemnity and are bound by stringent conditions imposed by the *Conveyancing Act* which is administered by Consumer Affairs Victoria.

There are many highly skilled, experienced conveyancers in the marketplace. Most adhere to an additional level of self-regulation, setting benchmarks for education, training and professional development.

Getting paid

Usually a client will ask a representative for a quotation for services prior to retaining the representative. In all circumstances it is prudent to confirm this quotation in writing. It is also important to qualify what services are included in the fee you have quoted and whether or not it includes disbursements and GST. This will avoid potential disputes at a later date.

As a general rule, a representative is paid on the settlement of a conveyancing transaction. There are exceptions to this rule. For example, you may have a regular client and the terms of your retainer may be that you render periodic accounts for payment.

Keep a running total on your file of the disbursements you pay on behalf of the client. Don't just guess when costing the file. Disbursements are not always standard. Different certificates are applicable to different areas, charging structures can vary with different statutory authorities, and the number of title searches and check searches you apply for can vary with circumstances and timelines.

A client is often asked to pay an amount on account of disbursements when retaining a representative. This amount is used to offset such expenses as certificate costs, search fees, and settlement agency and should be accounted for in detail when rendering your final bill.

When acting for the purchaser, it is usual to cost your file and draw up your bill of costs prior to settlement. Deduct any amount received on account of disbursements and clearly show the balance owing. Once the balance owing to the vendor and any mortgage loan advance has been calculated you will need to write to your client and explain in detail:

- The statement of adjustments. This is a statement showing how rates, charges and other outgoings are to be apportioned between your client and the vendor at settlement.

- The settlement statement. This is a statement showing how the amount owing to the vendor is calculated.
- The net mortgage advance and, if necessary, how this is calculated. You will need to include a copy of any disbursement authority showing the deductions made from the mortgage advance and the reason they were made.
- If there is also to be a second mortgage this process is repeated for the second mortgagee.
- Your bill of costs and a clear itemisation of the disbursements and any GST charged.
- Any equity funds payable by your client and the source of these funds.
- Any amount you require direct from your client, including your fees, and how you require these funds to be paid. For example, by bank cheque or cheques payable to one or more parties, personal cheques payable to utilities or a mixture of these.

Equity funds are the balance owing to the vendor less any amount being contributed by an incoming mortgagee or mortgagees. Equity funds can be obtained from a number of sources, including:

- Being directed from the proceeds of a prior transaction. Your client may be selling their present property and using the proceeds to partly fund their new purchase.
- Handed over with the mortgage advance. Some financial institutions will hand over the balance owing to the vendor at settlement. They will then debit the amount over and above the net mortgage advance to an account in your client's account. It is important that your client be made aware of the total amount, including equity funding, advanced by their mortgagee and how it is calculated.
- Directly from the purchasers from their own personal source of funding.

When acting for a vendor, your fees are usually paid at settlement, often as part of the settlement proceeds. However, a bill of costs should be prepared prior to settlement and sent to your client.

Prior to settlement you will have ascertained any amounts necessary to discharge or remove outstanding encumbrances. You will have conveyed these figures, together with any daily rate of interest to your client for confirmation. You will also have obtained instructions regarding the disbursement of any surplus funds owing to your client.

The purchaser will send you a statement of adjustments and settlement statement. You will be asked to provide a breakdown of the funds transfers you require at settlement.

You should write to your client and explain in detail:

- the statement of adjustments;
- the settlement statement;
- the funds transfers you have requested at settlement and what these represent.

Estate agents

Vendors can elect to sell their own property but usually appoint a real estate agent to sell on their behalf. The agent is responsible for finding a purchaser to buy the property on terms suitable to the vendor.

A form of sale authority is drawn up by the agent and signed by the agent and the vendor. This agreement formally appoints the agent to market the property and sets out the terms and conditions negotiated between the agent and the vendor. Legislation prohibits an estate agent from under-quoting or over-quoting the selling price of real estate and requires the agent to disclose in their sale authority details of any rebates, commission or discount they may receive in relation to expenses and disbursements. An agent can market a property without being formally appointed, but cannot take commission without the vendor's permission.

Estate agents must be licensed. The licensing body is Consumer Affairs Victoria. It regulates the activities of estate agents and their trust accounts, administers the Victorian Property Fund (this fund compensates clients who suffer loss as a result of dishonesty by agents or their staff) and investigates complaints.

The representative body of estate agents is the Real Estate Institute of Victoria. Most practising agents are members of this Institute.

Estate agents are governed by the *Estate Agents Act* 1980. The Estate Agents Council has been established as an advisory body to the Minister for Consumer and Business Affairs. It makes recommendations to the Minister on policies relating to the *Estate Agents Act* and the industry in general.

The agent:

- inspects the vendor's property and gives a market appraisal;
- advises the vendor on the method of sale most suitable for the property type;

- discusses and/or negotiates with the vendor such things as—
 - ◊ settlement requirements and timelines
 - ◊ availability of vendor statement
 - ◊ details of the vendor’s representative
 - ◊ goods to be included in the sale
 - ◊ any fixtures to be excluded from the sale
 - ◊ method of inspection for prospective purchasers
 - ◊ availability of keys for inspections
 - ◊ suitable timeslots and notice required in relation to inspections
 - ◊ advertising campaign best suited to the property
 - ◊ commission and expenses payable to the agent
 - ◊ the type of sale authority form to be used;
- draws up an appropriate sale authority and has it signed;
- advertises the property for sale;
- answers all inquiries arising from the advertising;
- arranges for the property to be inspected by prospective purchasers;
- requires the vendor to provide a vendor’s disclosure statement and, if applicable, a formal contract of sale;
- conveys any offers made to the vendor;
- negotiates suitable terms of sale on behalf of the vendor;
- arranges for the vendor’s acceptance of a suitable offer;
- conveys acceptance to the purchaser;
- obtains a deposit;
- ensures a copy of the contract is given to the party signing it;
- if the contract is subject a condition – for example, if it is subject to the purchaser’s application for finance being approved – follows up with the purchaser or the purchaser’s representative to ensure the condition has been satisfied;
- where appropriate—
 - ◊ facilitates the early release of deposit money
 - ◊ arranges for a final inspection to be carried out by the purchaser
 - ◊ holds the keys in readiness for settlement
 - ◊ confirms settlement prior to handing over the keys to the purchaser;
- accounts for the deposit money received at the appropriate time.

The aim of the estate agent is to successfully market the property, negotiate a successful sale and facilitate the formalisation of a binding unconditional contract.

Lenders

When a purchaser requires additional funds to complete the purchase of the property, it is usual for the purchaser to apply for a mortgage loan. This is a loan secured against the property the purchaser is buying. The entity lending the funds is known as a mortgagee. A mortgage has to be registered to enable the mortgagee to exercise the power of sale contained in section 77 of the *Transfer of Land Act* 1958. A mortgage that is not registered is known as an equitable mortgage.

There are a number of different sources, including:

- banks;
- building societies;
- credit unions;
- mortgage originators;
- private finance;
- finance companies;
- lawyers;
- brokers.

The ratio between the amount of the loan and the value of the property differs with lending sources. For example, some lawyers can lend only 60 per cent whereas banks, building societies and other commercial lenders can lend between 75 per cent and 100 per cent.

For loans over 80 per cent of valuation, most commercial institutions will require the borrower to take out mortgage insurance. This should not be confused with personal mortgage insurance. Personal mortgage insurance protects the borrower's ability to repay the mortgage while unemployed. Mortgage insurance protects the lender against any loss sustained if the borrower defaults and the net proceeds from the eventual sale of the property are not sufficient to repay the mortgage loan. The insurance company will pay the lender any shortfall and then look to the borrower for recompense.

The borrower is required to pay the one-off insurance premium at the time the mortgage loan is made. The premium is usually between 0.1 per cent and 0.4 per cent of the mortgage loan.

The Consumer Credit Code applies to a mortgage if:

- the credit is wholly or predominantly for personal household or

domestic purposes; and

- a charge (interest or fees) is made for the provision of credit; and
- the borrower is a natural person or owners corporation created on a plan of subdivision; and
- the credit is provided in the course of the mortgagee's business.

The code does not apply where:

- the borrower is a company; or
- the loan is wholly for business purposes; or
- the mortgagee is not in the business of providing finance and it is not part of or incidental to the lender's business; or
- no charge is being made for credit.

The code will apply to a loan for the purchase of residential property to be used as a family home.

The documents to be prepared vary depending whether or not the code applies.

Each lender has its own form of loan agreement and ancillary documentation but they are required to complete an approved form of mortgage to enable registration of their interest on title.

The lender will:

- Make enquiries about the capacity of the borrower to repay the loan. A general rule of thumb is that the repayments do not exceed 30 per cent of the income of the borrower.
- Have a valuation done of the secured property. This is usually in the form of a sworn valuation.
- Arrange for credit checks to ensure that the borrower has a good credit rating.
- Send a letter of offer to the borrower.
- Arrange for searches and inquiries as to the title and the land. Usually a mortgagee will require a copy of the contract and vendor's disclosure statement as a starting point for inquiries.
- If a company is involved, arrange for a company search and where applicable check the company's trust deed.
- Confirm details of insurance and ensure the mortgagee's interest is noted on the policy of insurance.
- Have the necessary documents drawn and ensure they are correctly signed and completed by the borrower.
- Arrange for the service of notices and copy documentation on the borrower at the time the mortgage is signed.
- Calculate the amount to be advanced at settlement having

- regard for outgoings including stamp duty and registration fees.
- Participate in settlement arrangements.
- Arrange for the collection of title documentation at settlement.
- Have titles documents stamped and registered.

Methods of sale

Although anyone can sell their own property, most vendors employ an estate agent to act on their behalf. An estate agent is invariably used to conduct a formal auction. Properties are sold in many ways.

A private sale with no agent

This situation is the exception rather than the norm. The vendor advertises the property for sale, handles enquiries and shows prospective purchasers through the property.

The vendor prepares a vendor statement and form of contract, either personally or through a representative.

Once terms are negotiated, the vendor and purchaser make arrangements to formalise these terms.

A private sale through an agent

This is the most common way properties are sold. A vendor negotiates terms of engagement with an agent and signs either a general or exclusive sale authority. The vendor provides the agent with a vendor statement usually prepared by the vendor's representative. Sometimes, the representative also prepares either a contract or a set of special conditions to be attached to any contract prepared by the agent.

The agent arranges to advertise the property for sale, handles enquiries, and makes appointments with prospective purchasers to inspect the property. The agent negotiates the terms of sale with prospective purchasers on behalf of the vendor. If necessary the agent will draw up a contract that must be accompanied by a vendor statement.

Usually, prospective purchasers make an offer by signing a contract, paying a deposit and delivering the offer to the vendor through the agent. The prospective purchaser can also stipulate a time limit for acceptance or refusal of their offer. If the offer is refused, the deposit is returned. The vendor accepts an offer by countersigning and dating the contract. The agent then delivers a copy of the completed contract to the purchaser.

Sale by auction

Real estate auctions are popular in Victoria. There are advantages in selling at auction. These include:

- a possible escalation of the purchase price due to competition;
- a time limit placed on negotiations; and
- the sale is definite as it is not subject to finance, nor is any cooling-off period applicable.

As a general rule, properties with no particular or peculiar attraction are not well suited to auctions unless they are in an exclusive area or high demand price bracket.

Sometimes the vendor has a strong reason for requiring a sale by auction. The vendor may be an executor or mortgagee, or the sale may be necessary as a result of proceedings in the Family Court. In these circumstances it is important to establish the best price possible for the property has been obtained. A sale by auction, preceded by a well-organised marketing campaign, is the traditional way.

Market demand should also be considered as in quieter times a significant number of properties may be passed in on the auction day.

If a sale by auction is chosen, the vendor appoints an agent and signs an exclusive auction authority. In the majority of cases, the vendor instructs a representative to complete a vendor disclosure statement and prepare an auction contract. These documents are usually prepared in quadruplicate and all copies signed by the vendor prior to the auction. It is desirable for documents to be available for inspection by prospective purchasers as soon as possible, preferably at the start of an auction campaign.

Prospective bidders will require a copy of the contract and vendor statement prior to the auction. Most bidders will want see the conditions under which the property is offered for sale and check the house, boundaries and title before bidding. A prospective purchaser can make an offer to the agent to buy the property before auction. The agent will communicate that offer to the vendor. If the vendor accepts the offer the auction will be cancelled.

The conduct of an auction is governed by various Acts and Regulations, including the *Sale of Land Act* 1962, the *Sale of Land Act Regulations* 2005 and the *Estate Agents (Professional Conduct) Regulations* 2008. The *Sale of Land Act* prohibits a vendor from bidding at auction (a “dummy bid”) but allows the auctioneer to bid on the vendor’s behalf.

This is known as a “vendor bid”. Vendor bids are subject to certain requirements, including that:

- the auction conditions permit vendor bids to be made; and
- the auctioneer orally confirms, prior to commencement of bidding, that the auction conditions permit such bids; and
- the auctioneer clearly states, immediately before making a vendor bid that he or she is about to make a bid on behalf of the vendor.

The Sale of Land Act Regulations require certain rules and information to be displayed at the auction site. These auction rules and information are prescribed in Schedules 1 to 5. They also allow co-owners, who otherwise would have been prohibited from bidding at an auction, to do so in certain circumstances. The Estate Agents (Professional Conduct) Regulations prohibit an estate agent from accepting a bid after the property has been “knocked down”.

A purchaser adversely affected by non-compliance with these provisions has recourse to compensation but is not entitled to avoid the contract. Applications for compensation must be made to the Victorian Civil and Administrative Tribunal (VCAT) before the second anniversary of the auction.

Tender

This is a marketing strategy used by agents mainly to sell industrial, commercial or special interest properties. It can be loosely described as a “blind auction” because each offer is made confidentially and usually sealed. No bidder or tenderer is aware of the content of any other offer made.

The agent will require the vendor to sign a tender authority which enables the agent to act exclusively in marketing a property for sale in this manner.

Special documentation, including a vendor statement, a contract and a document setting out the rules of tender, are drawn up.

Copies are given to prospective tenderers who can then make an offer (submit a tender), and pay a deposit (tender fees). The most suitable offer acceptable to the vendor buys the property.

Tender fees are held in trust for the tenderer. All unsuccessful tenderers are refunded their tender fees. The tender fee paid by the successful bidder will become a part deposit.

Tender documents must be carefully drafted. They should be drawn in such a manner that, once a tender is submitted, it is irrevocable and needs only the vendor's acceptance for an enforceable contract to exist.

Option to purchase

An option to purchase is regarded as a document creating an interest in land. It must be evidenced in writing to be enforceable. Although it is intended that a future document may bring a contract of sale into existence, the option itself is not a contract of sale. It is best to attach a copy of the proposed contract of sale to the option agreement. This ensures certainty of the terms being offered and avoids potential disputes at a future date.

Section 2 of the *Sale of Land Act* defines "sale" as including "an agreement for sale an offer to sell and the giving of an option to purchase". It is, therefore, good conveyancing practice to attach a vendor's disclosure statement. This statement should be current at the date the option agreement was signed and can be updated if and when the option is exercised.

A notice of intention to exercise the option should also be attached to the option agreement. This can be completed and served if the option is to be exercised.

The option agreement usually sets out the details of the vendor (grantor) and the purchaser (grantee) and grants the grantee an option to purchase the land upon certain terms and conditions. Usually these terms and conditions are contained in the proposed contract of sale attached to the agreement. The agreement, amongst other things, stipulates the date before which the option must be exercised, the manner in which the option should be exercised, the procedure to be adopted if the option is exercised, and events which could lead to termination.

Once the notice of intention to exercise the option is served it is irrevocable. The notice should allow sufficient time to update the vendor statement, if necessary, prior to the contract being deemed to have been signed by the grantee.

Right of first refusal

A right of first refusal may be included in a lease, usually in favour of the lessee (the tenant). Except under special circumstances, this right can be exercised only if the tenant is not in breach of the lease.

This right of first refusal is regarded as different from an option to purchase. It is purely contractual, gives the lessee no additional interest in the leased property and is not protected by section 42 of the *Transfer of Land Act*.

The lessee is usually given the right to refuse to purchase the leased property, upon stipulated terms and conditions, prior to the land being offered for sale on the open market. The circumstances terminating these rights should be clearly stated. This will avoid continual referral to the lessee prior to offering the property to each prospective purchaser once it has been listed for sale.

8. The Online Process

The last chapter touched briefly on the move away from paper-based transactions to electronic settlement and lodgment. That is now the predominant method and will be dealt with in some detail in this chapter as will the process of online assessment and payment of stamp duty. This chapter has been prepared by Joan Lentini. Her valuable contribution to this book is greatly appreciated.

In the last five-year period, there have been significant changes in the way conveyancing is undertaken. Both State Revenue Office and Land Use Victoria require all Victorian transactions to be processed electronically through PEXA. Stamp duties and land taxes are paid through PEXA on the settlement date.

Stamp duty

Practitioners have been required to complete State Revenue Victoria Duties Online Forms which became mandatory for all property transactions entered since 1 July 2017. The information in the duties online form is also collected by State Revenue Office Victoria for the purposes of calculating and collecting duty payable on the transfer between the parties to the transaction.

Accessing the system

Practitioners must first register as a user with State Revenue Office Victoria. Upon approval pursuant to Section 39 of the *Taxation Administration Act 1997*, this registration will authorise the practitioner (the certifier) to use Duties Online (DOL).

It is the certifier's responsibility to ensure that the certifier and the certifier's users access and use DOL in accordance with the prescribed Terms and Conditions of Use. The certifier and its users must comply with all applicable legislation when accessing and using DOL and the handling of clients' personal information. The certifier is responsible for ensuring that DOL is only accessed and used on the certifier's behalf

by authorised individual users. Terms of use for the online systems are set out in the General and Additional Terms and are binding by virtue of Sections 41 and 43 of the *Taxation and Administration Act 1997*. A user is deemed to be a natural person who accesses or uses DOL under the certifiers registration.

Using it

General condition 10.2 of the standard contract requires the transferor's representative to initiate the DOL form. The information entered into the transferor DOL online form should be checked and confirmed as correct before an invitation is triggered for delivery via email to the transferee representative. As soon as possible after receipt, the transferee representative completes the transferee section of the DOL form and that includes making application for any Stamp Duty Exemption or Concessions applicable. A message is generated from the State Revenue Office to the respective practitioners advising "... Duties Form ... data is complete and ready for signing". The practitioner is requested to enter DOL to initiate the signing process.

The data collected by the State Revenue Office is substantial and it is advised that a checklist with all the required fields be completed on the Client's file before entering the DOL Workspace. The data collected includes transferor/transferee full name, current and future address, date of birth of the individual, company ACN/ABN, nationality, and immigration details. It also includes the collection of property address, title details and other property descriptors, monetary or other consideration, deposit, contract date and settlement date.

On the first page of the DOL form there is an acknowledgment which requires confirmation that "... *I acknowledge that the information and answers supplied by me in this form, on behalf of myself or as a representative of a third party, are complete and correct to the best of my knowledge*". It is imperative all information which is entered into the DOL is checked for its accuracy before confirming it. Any edits to the form after signing would unsign the DOL form. It would then be necessary for all parties to the transaction to re-sign their respective forms. If this should occur, the State Revenue Office will advise each practitioner that "... *Duties Form ... has been edited by ...*". The practitioner will also be asked to "... *Please log into duties online to review the form*".

Providing the particulars

The current DOL form seeks to ascertain the following:

1. Whether you the practitioner are
 - Acting for the transferor or
 - Representing both transferor and transferee
2. Whether the property is being transferred via a
 - transfer of land
 - Change in the beneficial ownership
 - transfer of land use entitlements
3. The type of property which is being transferred
 - Residential private dwelling
 - Residential vacant land
 - Commercial retail premises
 - Commercial vacant land
 - Residential and commercial mixed use
 - Industrial with a building
 - Industrial vacant land
 - Primary production which may include building, implements, stock or water entitlements
 - Primary production being vacant land with no implements, stock, or water entitlements
 - Other property entitlements with water entitlements
4. The particulars of the property being transferred
 - Its address
 - Title Volume and Folio numbers
 - Lot and plan numbers
 - Book/memorial numbers
 - Crown allotment number
 - The total interest in the property being transferred
5. How the beneficial interest is being transferred
 - Deed of disclaimer
 - Deed of transfer
 - Declaration of trust
 - Beneficial interest
 - Other

6. The type of structure
 - Fixed trust
 - Bare trust
 - Joint venture
 - Partnership
 - Other

- 7.(a) The transferor personal details
 - Individual – natural person
 - Individual – other
 - Company
 - Organisation
 - Association
 - ACN/ABN/ARBN

- (b) The individual who is a natural person
 - Current address and future address
 - Date of birth
 - Email address
 - Mobile number
 - Nationality/citizenship

- (c) The individual who is a foreigner
 - Country code of tax residence
 - Passport number
 - Visa number
 - Foreign Investment Review Board application number where applicable
 - Overseas tax identification number
 - ABN where applicable

- (d) Company/Organisation/Association
 - Registered Company/Organisation/Association name
 - ACN/ABN/ARBN
 - Authorised Officer, email address and mobile number
 - Current and future registered office
 - Country of incorporation
 - Overseas registration number
 - Foreign Investment Review Board application number where applicable

10. Index

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