

INTRODUCTION

TYPICAL TRANSACTION

1. General

- a. Usually no binding contract until parties' exchange signed standard form documents that are drafted by the NSW Law Society and the REI. They have gotten larger in size but no major changes since 2005.
- b. Typically, V will draw up the agreement, each sign, exchanged.
- c. **Contract for sale of land can be valid w/o writing but s 54A of CA means no action can be brought if not in writing** (i.e. unenforceable). However, it can be fixed by equitable part performance. This means signed standard contracts are preferred

2. Pre-Exchange

- a. **V prepares contract and then advertises the property.**
 - i. **Contract must be ready to sign b4 listed** for sale – offence since 1988 (different if someone approaches w/o advertising)
 1. *NSW Anti-gazumping legislation* → criminal offence
 2. Prior to 88, unusual to prepare contract before advertising as it costs \$ to prep docs & property may not be sold.
 - ii. **Gazumping (SEE BELOW) = V agrees to sell to P but accepts higher offer from TP** because they could get away with it as there is no enforceable contract until signing and exchange of contracts. This is a major problem in rising markets since buyers incur expenditure to inspect + pass up other buying opportunities.
 1. **UK** – 1970s report said it was market behaviour and there was no point in trying to stop it
 2. **NSW 1988** – did something about it. They **made it harder to gazump by attacking the cause of the problem.**
 - a. A cause of the problem was the 2-week delay between agreement and when P had an enforceable contract...because V would tell solicitor to draw up a contract.
 - b. By requiring the required documentation (+ annexures & certs P would want) to be prepared b4 advertising means this 2-week gap no longer exists. P can get V to sign/exchange quickly, & if V doesn't, V cannot be trusted → go elsewhere (V knows this)
 - c. The risk is that P may rush into signing a contract and lose their 10% deposit BUT there is now a cooling off period of 5 days where only 0.25% can be lost
 - d. **Summary → 2 planks (prepared contract + 5 day cooling off period, but this can be waived**
3. Purchasers can gazump but that is not usual
- b. **P inspects property, negotiates, orally agree on price etc.**
- c. **P makes pre-contract inquiries**
 - i. Structural defects (rather than title defects) in quality of property – i.e. house being not being as good as you thought
 1. Builders report and pest report (white ants)
 2. Concerns about the chance of exhaust pollution e.g. if the house is built on the m5 tunnel
 - ii. P needs finance approval. V usually does not agree to subject to satisfactory finance condition – depends on bargaining power (QLD different)

3. Signing and Exchange

- a. P gets V to **sign** the contract
- b. The parties **exchange** the contracts (executory C – promises yet to be done). Usually P to V with S's (many diff ways).
 - i. P gives a 10% deposit
 - ii. There are sometimes issues of amendments and exchanging copies which are not identical but assuming all goes well each side signs an identical counterpart and swap – each has the others signed copy.
- c. It is important that P has a **registrable document** at settlement for the protection of s 43A (P drafts, now the particulars for the title are part of the materials attached to the contract – P must supply a draft memo of transfer w/in 21 days)

4. 6 Week Period: Main promises must be done within 42 days (can be varied)

- a. **Vendor**
 - i. Bc agreed to give P title free from mortgage, V must get the mortgagee to give a discharge of mortgage at settlement
 - ii. Sign registrable dealing (i.e. give document to allow P to transfer title)
- b. **Purchaser**
 - i. 1. **Arrange insurance** except to extent to which statute relieves risk.
 1. Traditionally, when parties enter into SPC (normal for land) than equitable doctrine of **conversion** applies = equitable title passes to P (beneficial owner) = **risk of damage passes to P = must insure.**
 2. **s 66K(1) CA** – in sale of residential property, **risk of damage does not pass to P until completion.** CF other States.
 - a. Legislation allows this to be a time stipulated by the parties where express term says risk shifts to P, however it must be after P has possession (or entitled to enter) (can be before completion)

- ii. 2. Send **post-contract enquiries** (i.e. check there is compliance w non-excludable statutory warranties i.e. no undisclosed adverse affectations e.g. proposals by GOV departments, pipelines). Important to learn B4 completion = rescind
- iii. 3. Send out **requisitions on title** (standard questions and demands of V from P)
 - 1. V must answer truthfully (some argue w RC) – E.g. any structures on the land have been constructed without council approval. Standard answer – not to V's knowledge
- iv. 4. **Purchaser prepares instrument of assurance** – memo of transfer for V to execute
 - 1. Memorandum of Transfer is a document signed by V&P that is registered at the LPI to legally transfer the ownership of land at the agreed price. the Memorandum of Transfer is the official transfer form submitted to the land office to instruct them to transfer the property to the buyer
- v. 5. Pay **stamp duty and memo of transfer to mark duty paid** (so it can be registered at LPI)
 - 1. To fail to pay stamp duty w/in 2-3 months = offence + it increases
 - 2. Registrable = correctly entered + filled in by registered proprietor + marked stamp duty paid → benefit of **s 43A**
- vi. 6. **Mortgagee requisition** (incoming mortgagee)
 - 1. Purchaser must answer

5. Settlement or Completion

- a. P gives balance of the price + authorisation to release deposit from RE agent to V.
- b. V hands over signed transfer and executed discharge of mortgage + CoT and keys
- c. Actual transfer via LPI - incoming mortgagee attends – wants to see memo and transfer and CoT and keep CoT

ANTI-GAZUMPING (CA)

1. Rationale

- a. **Gazumping (SEE BELOW) = V agrees to sell to P but accepts higher offer from TP** because they could get away with it as there is no enforceable contract until signing and exchange of contracts. This is a major problem in rising markets since buyers incur expenditure to inspect + pass up other buying opportunities.
 - i. **UK – 1970s** report said it was market behaviour and there was no point in trying to stop it
 - ii. **NSW 1988** – did something about it. They **made it harder to gazump by attacking the cause of the problem**.
 1. A cause of the problem was the 2-week delay between agreement and when P had an enforceable contract...because V would tell solicitor to draw up a contract.
 2. By requiring the required documentation (+ annexures & certs P would want) to be prepared b4 advertising means this 2-week gap no longer exists. P can get V to sign/exchange quickly, & if V doesn't, V cannot be trusted → go elsewhere (V knows this)
 3. The risk is that P may rush into signing w/o proper legal advice(since Parl is encouraging quicker contracting) a contract and lose their 10% deposit BUT there is now a cooling off period of 5 days where only 0.25% can be lost
 4. **Summary → 2 planks (prepared contract + 5 day cooling off period, but this can be waived**
 - iii. Purchasers can gazump but that is unusual

2. Application to Residential Property s66Q

- a. Anti-gazumping legislation limited to residential property and land defined as:
- b. **(1) Residential property** means
 - i. **(a)** land with not more than 2 places of residence on it (and no other improvements); or
 - ii. **(b)** vacant land on which construction of a single place of residence is not prohibited by law; or
 - iii. **(c)** strata lots under the Strata Schemes Acts comprising not more than 1 place of residence
- c. **(2)(a)** does not include land used wholly for non-residential purposes or (b) land greater than 2.5ha
- d. **(3)** place of residence means a building used (or designed for use) as a single dwelling only (excludes outbuildings and other incidental appurtenances)

3. Two Planks

- a. **s66R requires the preparation of required documents before listing for sale** (contract + required **s52A** annexures | w certain blanks) so that they are available for inspection by any purchaser BEFORE advertising... criminal offence otherwise
 - i. **(1)** if V, by written or broadcast advertisement, **(a)** indicates that residential property (RPR) is for sale (or to be auctioned in future), or **(b)** offers to sell RPR, or **(c)** invites an offer to purchase RPR or **(d)** offers to grant an option to purchase RPR, or **(e)** invites and offer to take an option to purchase RPR...is guilty of an offence unless required documents are available for inspection at the same place by any purchaser. (10 PUs)
 - ii. **(2) required documents are**
 1. **(a)** proposed **contract** for sale [excluding particulars of the purchaser and purchase price]
 2. **(b) documents required by s52A** to be attached to contract B4 P signs
 3. **(c)** in case of offer or invitation relating to an option, a copy of proposed option doc [ex. P and consideration]
 - iii. **(3) 66R** applies to sales by way of treaty, auction or tender
 - iv. → IF V DOES NOT SIGN THEY CANNOT BE TRUSTED
- b. **s66S Cooling Off Period for Residential Property**
 - i. **P has a 5-business day cooling off period** (5pm on 5th business day after signing)
 - ii. **(1) cooling off period for RPR (2) starts when contract is made (3) ending 5pm on 5th business day after contract made**
 - iii. **Varying Period**
 1. **(4)** period may be **extended** by contract or by V in writing before end of cooling off period
 2. **(5)** period can be **shortened** by a provision or separate written/oral agreement but only effective when P gives V/VS/A a **s66W** certificate (see below)
 3. **(6)** extension or shortening may be effected before, at or after time contract is made
 - iv. **s66T No Cooling Off Period if**
 1. **(a)** at or before contract is made, P gives V/VS/A a **s66W certificate**; or
 - a. P knows what they are doing as they have received legal advice i.e. lose 10%. This is common practice now.
 - b. **s66W(1)** certificate must be **(a)** in writing **(b)** signed by a solicitor/barrister (independent of V) **(c)** indicates the certificates purpose **(d)** states that S/B explained the effect of the contract, nature of certificate and effect of giving certificate to V (i.e. (waiving or shortening cooling off period)
 - i. **(2)** if corporation, person = office

- ii. (3) DOC complying with (c) and (d) purporting to be signed by S/B may be relied on by V
 - iii. (4) facsimile or other means of transmission acceptable
- 2. (b) property **sold by public auction**; or
 - a. People going to an auction, prepared to bid, would normally check out contract beforehand + serious → not exactly rushing into it.
- 3. (c) contract made on same day as **auction but passed in**; or
- 4. (d) contract is made in consequence of an **option to purchase property** (other than those void under s66ZG)
- v. **s66U Cooling Off Rights (RESCISSION)**
 - 1. (1) P can give written **notice of rescission**. (2) **notice may only be served in cooling off period but is ineffective if served after completion**
 - a. (3)(a) notice must be signed by P/PS (b) or each P/PS if multiple
 - b. (4) notice served on (a) V/V/S or (b) any V/V/S if multiple or (c) agent of V/V's
 - c. Service may be effected in accordance w s170 or at address of V shown in contract
- vi. **s66V Consequences of Rescission**
 - 1. (1) **rescinded ab initio** but (2) **P forfeits 0.25% of the price to V**.
 - a. (3) amount forfeited can be recovered from deposit paid
 - i. (1) deposit = amount paid by P in relation to the purchase price
 - ii. (4) if deposit insufficient recover as a debt
 - iii. (5) balance of deposit after amount forfeited is given back to P
 - b. (6) no claim for damages/costs/expenses unless
 - i. (7)(a) compensation/adjustment is just and equitable where P received benefit of possession
 - ii. (b) payment of damages/costs arising out of a breach of any term, condition or warranty contained or implied in contract (other than those referred to in s52A)
 - c. (8) V can waive rights regarding forfeiture under this section
 - d. (9) Stamp duty refundable (or ceases to be payable)
- **s66X(1) A statement in form prescribed by regulations relating to cooling off period is included in every RPR contract**
 - (2) **if not, P may service rescission** under s66U except it can be done any time B4 completion regardless of cooling off period
 - (4) service of notice ineffective if after completion
 - (3) s66V applies except P not liable for forfeiture
 - (4) section does not apply if s66W certificate given