



Deposits on Purchase of Real Estate

An increasing issue confronting purchasers is a lack of understanding of their contractual obligations regarding the payment of the deposit and the possible consequences of a failure to meet those obligations.

The standard Contract of Sale of Real Estate in Victoria provides for the payment of a deposit of 10% of the purchase price on the signing of the Contract. It is common for the selling agent to accept a sum less than the full 10% from purchasers when signing contracts as a token of good faith. The Contract is then signed by the vendor and the purchaser and the fully signed copy forwarded to the purchaser's solicitor. Often this is the first time that the purchaser's lawyer has an opportunity of advising the purchaser about the Contract to which the purchaser is already committed.

Often the purchaser does not have sufficient funds to pay the full 10% deposit when the Contract is signed and expects the money required for the purchase from their financier. They are not aware that the deposit provision in the Contract of Sale is mandatory, that is, 10% of the purchase price is payable on the signing of the Contract, otherwise the purchaser is in breach of the Contract.

Generally purchasers are not aware that a failure to pay the full deposit required by the Contract exposes them to a claim for penalty interest on the balance of the deposit from the date of the Contract until settlement. Alternatively, the vendor may choose to rescind the Contract resulting in the purchaser being liable to pay the vendor 10% of the purchase price as a penalty (whether or not the 10% has actually been paid) together with other costs the vendor may incur as a result of the purchaser's default.

If a purchaser does not have sufficient funds to pay the full cash deposit, they may be able to arrange for a deposit bond or guarantee to cover the deposit. Note however, the provision of a deposit bond or guarantee must be specifically agreed to by the vendor who may not be happy to accept a non-cash deposit where the vendor is relying on the release of the full deposit before the settlement date. If a deposit bond is agreed then a provision to that effect must be included in the Contract, otherwise the cash deposit obligation prevails. Also, a deposit bond will not usually be issued until the purchaser's finance has been approved, so to protect the purchaser, the contract needs to take account of this.

A prospective purchaser can also seek to negotiate a lower deposit than 10% (assuming the vendor is agreeable).

If you have any queries in relation to this matter, please contact a member of our Property Law Workgroup.

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