



Richmond and Bennison

PROPERTY LAW - A GUIDE TO SELLING, BUYING AND LEASING PROPERTY

This guide includes the following:

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One of the most important purchases any person makes in their life is the purchase of property. This can be for occupation or investment. For more than thirty years Richmond & Bennison have been helping residents and business owners in Melbourne and its surrounding districts with legal services in the property law area.

Why see a lawyer?

Buying or selling property is one of the most financial decisions you will ever make. Many traps can exist in the process of buying or selling which can lead to you paying a very high price or being unable to use the property in the manner you had intended. While some of the documentation may appear simple it is therefore important that you understand what the information actually means. A lawyer can explain the Vendor's Statement to you, or ensure that the Vendor's Statement includes all the information required. A lawyer will also be aware when necessary information has not been disclosed and if false information is provided, a lawyer can explain to you what your rights are.

A lawyer can explain to you what any easements, encumbrances or covenants may mean for you and advise you if you can do with the land what you intend to do. A lawyer can also advise you on any contractual issues, including your rights and obligations and can also be used to negotiate terms in the contract that are favourable to you. If a dispute arises, a lawyer can represent your interests and ensure your compliance with legislation.

A lawyer can also advise you about the rules applicable to the body corporate of the property you are buying or have bought to ensure compliance with the rules. Sometimes additional rules are required by a body corporate, or assistance required to meet the requirements and legal assistance can also be obtained in this regard. A lawyer can also assist you if a dispute arises.

Conveyancers cannot offer the same protection as solicitors because they are unregulated, there is no training or education requirements and they are not required to hold professional indemnity or fidelity insurance. If you see a lawyer, you receive legal advice and solicitors have not only professional indemnity insurance but also have a fidelity fund that protects consumers against any theft or fraudulent activity. If your conveyance is handled by Richmond & Bennison you are fully protected.

Issues to consider before purchasing property

Before committing yourself to buying a property you should check to make sure that there are no hidden defects in the property. It is often hard to see if a property has defects such as rising damp, inadequate wiring, or structural defects. You may consider it a good idea to have the property inspected by a qualified expert before purchase.

You should also ensure that you can afford the total cost of the property rather than just the purchase price. As part of a purchase you may also be responsible for valuation fees charged by your lender, stamp duty, transfer registration fees, bank charges and mortgage insurance costs. You should also check, if buying as an investment, the real amount you are likely to receive in rental payments following purchase and any likely costs of repair and maintenance that may be required.

You should check, and we believe it is advisable to have a lawyer explain to you, the terms of the contract you propose signing and the Vendor's Statement that must be provided to you.

You should ensure that you obtain the best deal possible when borrowing money. Time, worry and money can be saved by asking Richmond & Bennison to organise your loan finance through LawFund. LawFund is a member of the Mortgage Industry Association of Australia and helps member solicitors (such as Richmond & Bennison) and accountants arrange finance for our clients.

LawFund has access to some of Australia's leading lending institutions including AMP, ANZ, Bank of Melbourne, Bank of Queensland, BankWest, Bluestone Mortgages, Challenge Bank, Citibank, CBA Colonial, Collins Securities, CBFC GE Mortgage Solutions, Heritage Building Society, Home Loan Limited, NAB, HSBC, Illawarra Mutual Building Society, ING, La Trobe Building Society, Pioneer Building Society, NMMC (Bendigo Bank), Pepper Home Loans, RAMS, Royal Sun Alliance, St George Bank, Suncorp Metway, The Rock Building Society and Westpac.

LawFund will assist you find the rate and loan that best suits your personal circumstances. This service will not cost you anything. You will pay the same rate and fees as if you went directly to the lender, but without the time and worry of finding the best one for you. The bank or lending institution will pay Richmond & Bennison to organise the loan finance on your behalf and we are then able to rebate a percentage of that fee back to you. If you wish further information regarding LawFund contact Richmond & Bennison.

Issues to consider before selling property

It is important to consider which items you may wish to be sold with your property and those that you wish to remove from the property. These should be specifically listed in the contract of sale.

Most properties in Victoria are sold through the use of real estate agents. Prior to engaging a real estate agent, you should make sure that you understand the basis of the agreement that you reach with the real estate agent including details such as the length of time the agent is given to try and sell the property, the amount that will be payable by you if the property is sold, including additional costs such as advertising. You should decide whether you want more than one agent to be allowed to sell your property and whether you wish to sell by auction or private sale. You are also able to negotiate the agent's commission and how it is to be calculated.

If you have a number of different agents trying to obtain your business you may also wish to check the estimates of the value of your property by engaging the services of an independent valuer. You may also wish to seek advice about any steps which could be taken to immediately improve the value of your property or to increase its marketability.

We can assist you with this process. We can refer you to Lawrealty who can help you select the best selling agent for your property and obtain the best possible price for your property at no extra cost to you.

What is Lawrealty and how can it help you?

When dealing with real estate agents, you can receive conflicting advice. Some agents will recommend that you go to auction, others recommend private sale. Their marketing plans will differ and their commission structures differ. Selling and buying property should be exciting and rewarding and not a time of frustration, stress and confusion.

Lawrealty can provide you with an in-depth report on the estate agents in your local area, detailing their strengths and weaknesses and how they perform particularly in relation to your property. They can provide you with a comprehensive, researched list of comparable sales in your area and give you professional advice on how your property should be presented to maximum advantage. Lawrealty can recommend to you the most beneficial way to sell your home; be it auction, private treaty, tender or set sale. It can also help you choose and appoint the right selling agent for your property and advise you on the best advertising and marketing strategies to achieve the best result. Lawrealty can also assist you by monitoring and managing the entire sales process for you from the start through to settlement, reporting to you and us every step of the way.

Lawrealty can also assist you during the auction process or in negotiations when selling your property by private treaty so that you can achieve the best possible price. This service is provided at no extra cost to you. There is no additional costs for you because the commission of the estate agent chosen by you in partnership with Lawrealty's is shared. Lawrealty is a highly specialised and licenced estate agency with a team of trusted and experienced professionals. It is a wholly independent agency with no affiliations to any other real estate organisation. If you wish further information about Lawrealty, contact Richmond & Bennison.

What is conveyancing?

Conveyancing is the process of transferring property (either land, or land and house/building) from one party to another party. There are rules governing the transfer of land and the procedural requirements that must be taken before land is transferred. In addition, your lender may have additional requirements that must be met.

What is a Certificate of Title?

The Land Titles Office of Victoria keeps a register of ownership of all land in Victoria. Each piece of land is registered on a document called a folio. The certificate of title records who owns a particular piece of land. Each title is identified by reference to the Volume within which it can be found and to find the page of the volume a reference called a Folio is recorded. So that you can prove ownership of your land, you can be provided with a copy of the certificate of title which shows your ownership.

This is known as the duplicate certificate of title and there is only one duplicate certificate of title. If you buy property, the duplicate certificate of title is lodged at the Titles Office and your name is then recorded on the duplicate certificate of title and then returned to you. All lenders retain possession of the title until you discharge your loan.

Listed on the title and the plan are details about the property such as its location and measurements and some restrictions of use of the property may be listed. These are known as encumbrances or covenants.

What is an encumbrance or covenant?

An encumbrance is a right that somebody may have over the land on the certificate of title. An encumbrance may be a debt, in which case the seller may not be able to sell the land without the approval of the person to whom the debt is owed. Sometimes an encumbrance can be a restriction of land use, or a granting of use of the land to another party. For example an encumbrance could be the right of the neighbours of an adjoining property to use a lane that crosses your property to reach their own property. Often statutory bodies may have pipes running under the property and there will be restrictions on building over the pipes.

A covenant controls the way in which you can use the land. Developers often place covenants on a property to preserve the value of the rest of the properties which form part of the development. For example, there may be a restriction upon quarrying, or the height of buildings, or type of material that can be used in building a property.

What is a Vendor's Statement?

A Vendor's Statement will also sometimes be called a "Section 32 Statement". It is a document provided by the seller of a property to someone who is intending to purchase the property. It must be provided to a purchaser before a contract of sale is signed. If the Vendor's Statement is not provided or is incorrect a purchaser may be able to cancel the contract. This is not however, always the case.

The Vendor's Statement must include certain information including:

- Any restrictions on the title
- The rates payable on the property
- The zoning of the area
- Any notices or orders placed on the property or received by the vendor
- Details of any building approvals during the past seven years
- The types of services connected or not connected to the property.

Some of this information can look to be easily understood and others can be quite difficult to understand. Even the easily understood information may have hidden ramifications. We strongly recommend that a lawyer prepare the vendor's statement for a vendor to ensure that all the right information required is included, and check the details contained on a Vendor's Statement prior to you purchasing a property.

Changing your mind after signing a Contract of Sale

If you have signed a contract of sale it is a legally binding document. However, the law allows the purchaser a three day cooling off period during which you can cancel the contract. This is calculated from the day YOU SIGN the contract. It is three clear business days, not including Saturday, Sunday or public holidays. If you cancel the contract, you will lose \$100.00 or 0.2% of the purchase price of the property, whichever is the greater.

If you have not received confirmation from your lender that it is prepared to lend you money that you need to purchase the property, you may in most cases, request that a clause be added to the contract of sale, making the sale conditional upon you obtaining finance within a specified number of days. You can request that other conditions be added to the contract, however the seller is not under any obligation to agree to any of these conditions.

When don't cooling off periods apply?

The cooling off period does not apply in the following circumstances:

1. If you purchase a property at an auction.
2. Where the land is used for industrial or commercial purposes.
3. Where the land is more than 20 hectares and used primarily for farming purposes.
4. Where the land is sold within 3 clear business days prior to or after a publicly advertised auction.
5. Where you have sought and received independent legal advice prior to signing the contract.
6. If you are an estate agent or body corporate.

There are also other less common exceptions.

What happens after a contract of sale has been signed?

The purchaser of the property is required to pay a deposit. Initially the real estate agent holds the deposit in their trust account until certain conditions are met. The deposit can only be released to the seller of the property after certain details are provided to the buyer about liabilities on the property. The buyer, if appropriate may then consent to the release of the deposit monies to the seller.

Following purchase of a property, checks should be made to ensure that the information contained in the Vendor's Statement is correct and that no additional relevant details can be found that affect the sale. You should ensure that the size of the land and location is the same as that detailed in the certificate of title. Details of rates and other outgoings relating to the property need to be ascertained and adjusted between the buyer and the seller. For example, if rates are outstanding at the date of settlement, the amount owed by the seller to the date of sale will be deducted from the purchase price.

Insurance cover of the property should be obtained by the purchaser to ensure they are protected in the event of destruction of the buildings on the property or any adverse effects upon the land.

All of these steps must be completed by the date specified in the contract. This is called the settlement date and is usually, 30, 60 90 or 120 days after the signing of the contract of sale. At settlement, title documents and purchase monies are exchanged. Settlement usually requires attendance by representatives of the lenders of the buyer. A time, date and place is usually nominated by the seller of the property and usually settlement takes place at your lawyer's office or the seller's lender's premises.

Following settlement, various authorities require notification of the sale.

Additional information if buying property that includes common land or property

If you buy a unit, flat or townhouse, there will usually be property that you share with other flat, unit or townhouses in the same subdivision. This is called common property. Common property can include driveways, gardens, storage areas, car parks, pools, stairs, lifts, entrance halls and tennis courts. As an owner of property that includes common property, you become a member of a body corporate which is responsible for the management of these areas on behalf of all the owners.

The body corporate is responsible for the management and administration of the common property, the repair and maintenance of common property and services provided to lots or units, the insurance of the lots or units or the common property and is responsible for ensuring that the body corporate and individual owner's complies with the rules of the body corporate and relevant legislation.

Individual owners will be required to pay funds for the above purposes, the amount of which is set by the body corporate. The constitution, duties, functions, powers, liabilities and rights of body corporates and the individual owners can be found in the Subdivision Act 1988 and the Subdivision (Body Corporate) Regulations 2001.

Sometimes disputes can occur between individual owners and the body corporate and legal advice should be sought to ascertain if application should be made to the Magistrate's Court for a declaration or order to resolve the dispute.

Leasing residential property

The rules that apply to most residential leases can be found in the Residential Tenancies Act 1997. A landlord is required to provide a tenant with documents at the beginning of a lease. These include a statement of rights and duties of a landlord and tenant, contact details of the landlord or the landlord's agent, a condition report of the property, unless the landlord does not require the tenant to pay a bond, a copy of the bond lodgment form (if a bond is paid) and a copy of the agreement (where it is in writing) and receipt of rent paid.

If a bond is paid it must be lodged with the Residential Tenancies Bond Authority within ten business days.

If a landlord wishes to increase a tenant's rent, usually at least sixty days notice must be provided and the correct form must be used. If a landlord wishes to have the tenant vacate the premises, one hundred and twenty days notice must be given if no reason is given. Again, the appropriate forms must be used. If this occurs, a tenant can give the landlord fourteen days notice that they will move out. There are different provisions for fixed term tenancies that will depend on the agreed terms of the tenancy agreement.

If a property is not fit to be inhabited or is unsafe, immediate notice can be given by a tenant that he or she is moving out. Generally a tenant must give twenty eight days notice of his or her intention to move out.

If a landlord wishes to evict a tenant the landlord can do so where there is malicious damage by the tenant, or if there is behaviour endangering the safety of neighbours and if the premises are unfit for habitation, destroyed or unsafe. If the tenant has failed to pay rent for fourteen days, or is using the premises for illegal activity then fourteen days notice must be given by which the tenant must leave.

Sixty days notice must be given in some circumstances including if the landlord wishes to demolish the premises, carry out substantial repairs, renovations or reconstruction which require vacant possession, if the premises are now to be used by the landlord, spouse or some other family members or the premises are to be used for business purposes at the end of the notice period.

Richmond & Bennison can assist you with advice about a lease, your rights and entitlements or if a dispute has arisen.

Retail Leases - Key changes arising from the Retail Leases Act 2003

Since 1 May 2003 the Retail Leases Act 2003 ("the Act") has been the main governing legislation for retail leasing in Victoria.

The Act applies to retail leases entered into from 1 May 2003 and to any renewals of leases under the previous Retail Tenancies Act 1986. A summary of key points arising from the new legislation are:

- The Act applies to a retail premises lease used for the sale or hire of goods by retail or the retail provision of services where the occupancy costs (combined costs of rent and outgoings) is less than \$1million per year.

- The Act will not apply to:
 - Tenants that are in the business of wholesaling, manufacturing or storage.
 - Tenants that are listed corporations or subsidiaries of listed corporations.
 - Leases for a term of less than one year, unless consecutively renewed.
 - Commercial premises for businesses that provide retail services that are located above the first three storeys of a building (excluding a basement). This exclusion does not apply to premises in a shopping centre.
- Disclosure - Where there is a new lease for retail premises, the Landlord must give the Tenant:
 - a Disclosure Statement; and
 - the completed proposed lease; and
 - an information brochure

A copy of the lease and the information brochure must be given by the Landlord or the Landlord's agent as soon as negotiations are commenced, and failure to do so will be an offence. Whenever the Landlord fails to provide a Disclosure Statement the Tenant may also withhold rent, and is not liable to pay rent until a Disclosure Statement is given, and terminate the lease. Tenants may only exercise the right to withhold rent after given the Landlord written notice to say that they have not received a Disclosure Statement.

- A minimum 5 year term (taking into account any options) is prescribed for any lease of retail premises.
- Franchises are no longer excluded so that the Act now includes leases to franchisees.
- Fit outs - a Tenant is not required to contribute to any fit out unless the amount of a contribution is specified in a Disclosure Statement.
- Costs - Landlords cannot pass on their land tax liability to Tenants or their legal costs associated with preparation of the lease. Costs incurred in relation to an assignment of the lease are recoverable from a Tenant.
- Renewal of leases - A landlord must give the Tenant a Disclosure Statement 21 days before the end of the current lease if a Tenant exercises an option to renew. A Landlord must give notice of the last date for exercise of an option to renew within 6-12 months before the last date for exercise.
- Notify Commissioner of Lease details - A Landlord must notify the Small Business Commissioner of specified lease details within fourteen days of the lease being signed by all parties.
- Disputes - Proceedings cannot be issued in the Victorian Civil & Administrative Tribunal unless the Small Business Commissioner certifies that mediation (or another form of alternative dispute resolution) has failed or is unlikely to resolve the dispute.
- A new part has been added dealing with unconscionable conduct. Landlords and Tenants must not engage in conduct that is unconscionable.

The Act details rights and obligations placed upon both landlords and tenants. We believe that it is important that you obtain assistance for a lawyer in negotiating a lease that is in your best interests and complies with the law.

You should ensure you are thoroughly aware of your rights and obligations under the legislation and the lease. Further, if a dispute arises between you and the other party to the lease, you should obtain advice regarding your dispute resolution options.

Should you require further information or any assistance in relation to the sale or purchase of property please ring Ken MacKinnon, of 495 Main Street, Mordialloc on (03) 9580 8311.

Should you require further information or any assistance in relation to the leasing of property please ring John Craw, of 495 Main Street, Mordialloc on (03) 9580 8311

Disclaimer: This information is of a general nature and should not be used to ascertain the entitlements of any particular individual. There can be exceptions to the above circumstances and individuals should obtain specific advice to address their circumstances. Further the law changes and information contained herein may no longer be accurate.