

Conveyancing Tips

Selling a Home

Selling your home can be a nail biting experience. It's a move most of us only make once or twice in a lifetime so it pays to do your homework before signing up with an agent. It can help you negotiate on an equal footing.

Topics covered in this section include finding the right agent, agency agreements, your cooling-off rights, the contract exchange process and selling at auction.

Agents and Agency Agreements

On 1 September 2003, important measures were introduced to ensure that consumers selling residential or rural property are fully informed about the relationship they enter into with real estate agents.

Agency agreements are legally binding contracts. To ensure consumers are informed about their rights and responsibilities under each type of agency agreements, real estate agents must provide consumers with a copy of the Office of Fair Trading fact sheet *Agency agreements*. The fact sheet must be given to consumers **before** they sign an agreement with the agent.

Choosing a Real Estate Agent

To sell a home in New South Wales, an agent must have a real estate agent's licence issued by the Office of Fair Trading. You should check on the licence details of all agents you are thinking of using before signing up with your preferred choice. Do a licence check by calling the Office of Fair Trading on 13 32 20.

To find the right agent for your needs, you should shop around. If possible, get the names of one or two agents from other home owners in your area who have recently sold. We suggest you talk to at least three agents and:

- make sure they have a valid licence
- get a list of all their fees
- find out if they have a good knowledge of your area
- ask if they adhere to a code of ethics.

Signing up with an agent

Before the agent can sell your property, they must sign a contract with you, called an agency agreement. An agency agreement is a legally binding contract and it is important that you read and understand it. If you are not sure about the agreement terms you should get legal advice.

Signing an agency agreement means that you authorise an agent to do certain things for you in relation to the sale of your property, such as arranging advertising and inspections and receiving deposits from buyers. The agreement must specify what the agent is authorised to do for you and must state all commissions and any other costs you may be liable to pay.

What is in the agency agreement

The agency agreement must state matters such as:

- the services the agent will provide for you
- the amounts of any fees or commission you agree to pay for those services
- the circumstances in which the agent is entitled to payment – for example, commission is usually payable only when the property is sold
- how and when payment is to be made – for example, whether the agent can deduct their commission from the deposit money paid by the buyer
- warnings about circumstances in which you might have to pay commission to more than one agent (see information on page 3 about the different types of agency agreement)
- the extent of the agent's authority to act for you – for example, whether the agent is permitted to exchange a sale contract on your behalf or make changes to the sale contract
- the agent's estimated selling price or price range for the property.

You have the right to negotiate with the agent about the terms and conditions of the agreement and to ask for any legally permitted changes to be made. Alterations made to the agreement need to be signed by all parties.

Commission, fees and expenses

The amounts charged by agents are not set by law. You can negotiate with the agent about the amounts of any commissions, fees or other expenses that you may be required to pay.

Before signing an agreement, it is a good idea to talk to a few agents and compare their prices. Ask each agent for a printed list of their fees and commission rates and the expenses they charge.

Disclosure of rebates and discounts

The agency agreement may require you to pay the agent for certain expenses in relation to the sale of your home, such as advertising, auctioneer's fee, or any other services the agent may arrange for you, such as cleaning, decorating or landscaping.

Sometimes the amount the agent has to pay for the service is less than what you are being asked to pay. This can occur if the agent receives a commission or discount from the provider of the service for being a regular customer – for example, some newspapers pay a commission to the agency at the end of the year based on how much advertising was placed.

The agency agreement must state the amounts or estimated amounts of any such commissions or discounts and from whom they are received. You can negotiate with the agent about whether you should pay the full amount.

Types of agency agreements

There are several different kinds of agency agreements for the sale of residential property. It is important to be aware of the kind of agreement you sign, because it affects your rights and the amount of commission you may have to pay. You should discuss the agreement with a legal adviser if you are not sure about your rights. The following is an overview of the different types of agreements.

Exclusive agency agreements

Exclusive agency agreements are commonly used for the sale of residential property. In this kind of agreement, you give exclusive rights to one agent to sell your property. This may entitle the agent to be paid commission if the property is sold during the fixed term of the agreement, even if the property is sold by you or by another agent. The agent may also be entitled to commission if the property later sells to a person who started negotiating for the property with the original agent.

Sole agency agreements

This is similar to an exclusive agency agreement. You give rights to one agent to sell the property but you may find a buyer yourself. If you find a buyer who has not been introduced by the agent, then no commission is payable to the agent.

General listing / Open agency agreement

This lets you list your property with a number of agents. You pay a commission to the agent who finds the buyer.

Multiple listing

This occurs when you deal with an agent who is part of a network of agents working together to sell your home. It covers both auction and private treaty. You pay a commission to the agent you signed up with.

Auction agency agreement

This is effectively an exclusive agency agreement where the property is listed for auction.

Ending the agreement

The agency agreement usually has a specified period (a 'fixed term') during which the agreement cannot be ended unless you and the agent both agree. If the agreement is open ended (that is, it does not have a fixed term) it must state how the agreement can be ended. The length of any fixed term is negotiated between you and the agent, there is no minimum or maximum set term. The fixed term will depend on how long you and the agent think it will take to sell the property.

If the fixed term is longer than 90 days, you can give the agent 30 days written notice to end the agreement after 90 days. Of course, if the fixed term has less than 30 days left to run, you can just give notice to end the agreement at the end of the fixed term - check your agreement to see how much notice you need to give. If you are not sure how to end the agreement, you should seek legal advice. If you are not happy with an agent's services, it is important to properly end your agreement with them before signing up with another agent. Otherwise both agents may charge you commission when the property is sold.

If you encounter problems

If an issue arises during the sale process that you are unhappy with, check your copy of the selling agency agreement to clarify your rights and obligations. Try to sort out the problem by talking to the agent.

Make certain that any instructions you give the agent are in writing, and keep a copy.

If you think the agent has charged a fee to which they are not entitled, or believe the fee charged is excessive, you can apply to the Consumer, Trader and Tenancy Tribunal to settle the matter.

Other tips

If you need further assistance to resolve a problem, consider the following:

- If your agent is a member of a professional association, contact that association. They can be helpful in resolving disputes.
- You can also seek legal advice from a solicitor or the Chamber Magistrate at your nearest Local Court.

If your complaint concerns your solicitor or licensed conveyancer, you can lodge a complaint with the Office of the Legal Services Commissioner.

Cooling-off period

The agency agreement becomes binding when the principal (that is, you as the owner/s of the property, or someone who is legally acting for you) and the agent have signed it. There is then a cooling-off period of one business day during which you can cancel (or 'rescind') the agreement. Saturday is included for the purposes of the cooling-off period, but public holidays are not.

The cooling-off period starts when you sign the agreement and ends at 5pm on the next business day or Saturday.

For example, if you sign the agreement on a Friday, the cooling-off period ends at 5pm on Saturday. If you sign up on Saturday, the cooling-off period would usually end at 5pm on Monday, unless that is a public holiday, in which case it will end at 5pm on Tuesday.

The cooling-off period gives you time to read the agreement, consider the terms you have agreed to, including the agent's fees, and get independent advice if you have concerns about any aspect of the agreement. Talk to the agent – they may be willing to change things in the agreement that you are not happy about.

Cancelling the agreement during the cooling-off period

If you decide to cancel (or 'rescind') the agreement during the cooling-off period, you need to deliver a 'notice of rescission' to the agent. This simply means giving the agent a written notice or letter which:

- is addressed to the agent (use their name as given in the agency agreement),
- states that you are rescinding the agreement, and
- is signed by you (and any other person named on the agreement as a principal) or by your solicitor/s.

You can hand the notice to the agent in person, deliver it to or leave it at the agent's office or the agent's address as given in the agency agreement, or fax it to the agent. Make sure to keep a copy for your records.

The agent cannot charge you any fees or costs in relation to an agreement that has been rescinded correctly. Any money you have already paid to the agent must be refunded to you.

Waiving your cooling-off rights

If you are sure that you wish to go ahead with the agency agreement, you can waive, or forego, your right to a cooling-off period by signing a separate waiver form when you sign the agreement.

The cooling-off period can be waived only if the agent gave you the following documents at least one business day before you signed the agency agreement:

- a copy of the proposed (unsigned) agency agreement, and
- a copy of the *Agency agreements* fact sheet.

For example, on Thursday morning the agent gives you a copy of the unsigned agreement and a copy of the fact sheet, which you read and consider carefully. On Friday afternoon you sign the agency agreement and the waiver form. The agency agreement immediately becomes binding and the agent can get to work on selling your home.

The Sale Process

The Contract of Sale

A residential property cannot be advertised for sale until a Contract of Sale has been prepared. The contract must contain a copy of the title documents, drainage diagram and the Zoning Certificate (s 149) issued by the local council. Property exclusions must also be included and a statement of the buyer's cooling off rights must be attached. The draft contract must be available for inspection at the agent's office. It is important that you consult your solicitor or conveyancer about preparing the contract to make sure that everything is in order.

Contract exchange

Exchanging sale contracts is the legal part of selling a home. There will be two copies of the sale contract: one for you and one for the buyer. You each sign one copy before they are swapped or 'exchanged'. This can be done by hand or post and is usually arranged by your solicitor, conveyancer or the agent. At the time of the exchange, the buyer will be required to pay a deposit, usually 10% of the purchase price.

The contract exchange is a critical point in the sale process:

- The buyer or seller is not legally bound until signed copies of the contract are exchanged.
- Buyers of residential property usually have a cooling off period of five working days following the exchange of contracts during which they can withdraw from the sale.

- If the agent arranges exchange of contracts, the agent must give copies of the signed contract to each party or their solicitor or conveyancer within 2 business days.
- The cooling off period can be waived, reduced or extended by negotiation.
- There is no cooling off period for sellers. Once contracts have been exchanged, sellers are generally bound to complete the agreement.
- There is no cooling off period when purchasing at auction.

Settlement

Settlement usually takes place about six weeks after contracts are exchanged.

Selling at auction

In recent years, auctions have become an increasingly popular way to sell or buy residential property. But before you decide to go down that path, do your homework and familiarise yourself with the process and what it involves.

The Right Agent

A key to successfully selling your home at auction is choosing the right agent - one with a proven track record in auctions and a sound knowledge of the geographical area in which you live. Before making your choice, we suggest you talk to three agents and:

- make sure they have valid licences
- get a list of all their fees
- find out if they have a good knowledge of your area
- ask if they adhere to a code of ethics
- get quotes from them regarding their commission, fees and charges
- ask them what their fees, charges and services cover - these usually cover the time they spend promoting and selling your home, advertising and promotion costs and administrative costs
- ask them how they plan to promote your home - newspaper advertisements, letterbox drops, open houses etc.

The law says that there must be a written contract between the seller and the agent, called an agency agreement.

Speak to your agent about choosing an auctioneer.

The Contract of Sale

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Setting a reserve price

The reserve price is the lowest amount you are willing to accept for your property. Before bidding begins, advise your agent what you nominate as the reserve price. This is usually not told to the prospective buyers.

If the highest bid is below the reserve price, the property will be 'passed in'. You will then either try and negotiate a price with interested bidders or put the property back on the market.

If the bidding continues beyond the reserve price, the property is sold at the fall of the auctioneer's hammer.

Successful bids

The successful bidder must sign the sale contract and pay you a deposit on the spot (usually 10%). There is no cooling-off period for anyone who buys a property at auction. If the property is passed in at auction but contracts are exchanged on that same day, the cooling-off period still does not apply.