



# Tips when Purchasing Property



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## WHAT NAME OR ENTITY SHOULD WE BUY THE PROPERTY IN?

### Buying your principal place of residence

It is very important that you establish exactly who the owners of the property are going to be **before you sign the Contract**. Most people buying their **principal place of residence** will usually buy the property in their **joint names**. You may need to reconsider this if one of you has a high risk occupation (e.g. lawyer, doctor, accountant or other professional) or one of you is the sole director of a company which operates a business. Sometimes it is better for asset protection purposes that the spouse or partner who is not engaged in any trade or profession that could put them at risk of being sued is the preferred owner of the property.

### Buying an investment property

If you are buying an **investment property**, most people buy this in their personal names in order to obtain the negative gearing tax deduction. Once again, if you are in a high risk profession or run your own business, you are putting your personal assets in the firing line of creditors in the event that you are successfully sued or you are made bankrupt. An alternative strategy may be to purchase the investment property in the name of your spouse or partner or create an investment trust. You should also be careful not to purchase any property in the name of your trading company or your trading trust as this could expose those assets in the event of the business being sued or being put into liquidation.

### *Consequences of putting the wrong parties on the Contract*

You cannot just add parties to a Contract after it has been signed or enter into a new Contract if you get the parties to the Contract wrong. There are stamp duty consequences of entering into the Contract and it could be that you are up for double stamp duty in the event that the matter is not handled correctly. For example, stamp duty payable on a \$500,000 purchase for an investment property is \$15,925.00 in QLD. If you entered into a Contract with incorrect details shown as the purchaser, you may have to pay that amount twice along with any penalties or fines imposed by the Office of State Revenue.

### *Things to do before you sign a Contract*

- check with your accountant that you have the correct entity as the Purchaser in the Contract;
- check with your lawyer that the proposed entity or person is consistent with your estate planning (e.g. your Will and Powers of Attorney etc.);
- **always have your lawyer check the Contract BEFORE YOU SIGN!**

## WHAT IS THE DIFFERENCE BETWEEN JOINT TENANTS AND TENANTS IN COMMON?

### *Joint Tenancy*

Most couples own their principal place of residence as **joint tenants**. This means that if one person dies, their notional half share of the property passes automatically to the surviving joint tenant **without reference to their Will**. All that is required to transfer the property into the name of the surviving partner or spouse is to lodge a Notice of Death and the Death Certificate with the Titles Office. The same applies to joint bank accounts, jointly owned shares and most other jointly owned assets.

### *Tenants In Common In Equal Shares*

If you own your home as tenants in common in equal shares, this allows you to deal with your half share of the property in accordance with your **Will** or transfer your half share of the property to whoever you wish (this would be subject to the consent of your bank if you have a mortgage and may not be completely practical with your joint co-owner). You can use your Will to leave your half share of the property to whoever you wish. Once again, leaving your half share to someone who does not get on with your existing co-owner may be completely impractical. A more common device is to leave your spouse or partner a life interest or life tenancy in the home until they pass away. This means that you can create a life interest in your half share of the property and leave this to your spouse or partner for their use during their life time and then it will pass to your children or whoever you wish to nominate as the designated beneficiary. Not only is this a good way to ensure that the asset passes on to who you want it to go to, it also protects your surviving spouse or partner from predators and creditors who may come out of the woodwork after you have died.

## ***Get advice on your Wills and Estate Planning before you decide on which tenancy to use***

You can save yourself a lot of time, effort and money by getting some advice before you nominate the type of tenancy that you wish to apply to the property that you own. A good example is a couple buying a house who both have children from previous marriages. Quite often they will wish their half share of the property to eventually go to their own children but they would also like their spouse or partner to be looked after during their lifetime. This would be a perfect case where they should own the property as tenants in common in equal shares and deal with their half share of their property in their Will.

Another good example is younger couples who are concerned that their surviving spouse or partner may re-marry or enter into another relationship if they die. Once again, holding the property as tenants in common in equal shares enables them to safeguard their half share of their home so that this can be kept in trust for their children and not be put at risk by someone's future spouse or partner.

## **CHOOSE THE RIGHT ENTITY TO PURCHASE YOUR INVESTMENT PROPERTY**

### **Company or Trusts**

There are many different entities that people use to own assets. When investing in property, it is possible that you could use a company, a discretionary trust, a unit trust, a hybrid trust or a self-managed superannuation fund (SMSF). These trusts could have a corporate trustee or trustees that are natural persons. All of these different entities have different repercussions in relation to capital gains tax considerations, stamp duty, land tax, and succession issues in relation to your estate planning.

### **Stamp duty and tax consequences**

The proliferation of companies, trusts and (SMSF's) has meant that purchasing property has become extremely complicated and you really need to speak to your accountant and your lawyer before making any decision to buy a property. There can be severe tax and stamp duty implications of purchasing a property in the incorrect entity and attempting to change this after the Contract has been signed.

### **Correct description of Entity**

It is also extremely important that the correct description of the entity be entered onto the Contract for this to be valid. For example, if you are buying property in the name of a trust with a corporate trustee, the correct description of the purchaser should be "ABC Pty Ltd as trustee for the John Smith Family Trust". Similarly, when a husband and wife are trustees for their (SMSF), the correct description of the purchaser should be "John Smith and Mary Smith as trustees for the Smith Superannuation Fund".

Sometimes the Contract for Sale is the only document which proves the entity that is actually purchasing the property. This is particularly so in NSW where the interests of trusts are not entered onto the title deed in the Titles Office. This issue could prove critical as to whether a (SMSF) owns a property or not in the eyes of the Australian Tax Office.

For enquiries regarding **buying or selling property** please contact **Christine Martin on (07) 5506 8245 or by email [cmartin@attwoodmarshall.com.au](mailto:cmartin@attwoodmarshall.com.au)**.

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