Do I Need A Solicitor To Sell My House in NSW?
Do I need a Solicitor to sell my house?

Your home is one of, if not your most, important asset. Making a mistake or misunderstanding your legal obligations could have a significant impact on your finances and lifestyle. Attwood Marshall has the expertise and experience to ensure that your sale goes the way you intend.

Once an offer is made on your home, it’s likely that any buyer will want to negotiate terms and conditions before they agree to buy. When that happens it’s important you have someone on your side advising you on what is in your best interests.

This short brochure answers common questions about the process of selling a property in New South Wales. If you have further questions in relation to any other aspect of your sale, please do not hesitate to contact us.

PART 1 – Before you sell

The Contract for Sale

The first thing that must be done when you are selling your house or apartment is to prepare a Contract for Sale (“Contract”). Putting your house on the market without having a proper contract is an offence under NSW law and could lead to you being fined.

What must be included in the Contract?

Under NSW law, all sellers must include certain information in the Contract and make certain promises (known legally as ‘warranties’) about the property they’re selling. These obligations are known as the
Vendor Disclosure Requirements.

The most common documents a seller must include with a Contract are:

- a Council zoning certificate, also known as a ‘section 149 certificate’;
- a drainage diagram to show the location of any sewer lines;
- a copy of the certificate of title confirming ownership of the property; and
- copies of any documents creating easements, rights of way, restrictions or covenants.

Attwood Marshall will also advise you whether the following documents should also be included:

- an identification survey;
- a certificate under the swimming pool register;
- a building certificate, and
- a home owners warranty insurance certificate.

Strata Title Property

Most apartments in NSW are strata title. If you’re selling a strata title property, in addition to the items set out above, you will also need to include:

- a copy of the Certificate of Title for the lot and common property;
- a copy of the strata plan showing the lot; and
- a copy of any change of by-law affecting the use of common property.
What are the Warranties you are deemed to have made about the property?

Unless the Contract includes specific information that says otherwise, by putting your property on the market you’re deemed to have made a number of Warranties, or promises about the property. These include promises that:

- the land isn’t subject to any ‘adverse affectation’ (essentially government proposals that might affect the land);
- all of the sewer is shown on the drainage diagram attached to the Contract; and
- the zoning certificate gives an accurate picture of the zoning of the land at the date of the Contract.

What happens if the contract does not comply with Vendor Disclosure Requirements?

If your Contract does not comply with Vendor Disclosure Requirements and a problem arises with the property, the buyer may be able to rescind, or cancel, the Contract before settlement. If this occurs you will be required to return the deposit. This could have serious consequences if you have already purchased another home.

Standard or tailored terms?

As the base of most Contracts in NSW are the Standard Terms issued by the Law Society of New South Wales. These terms have been in use for a long time and are generally considered to be fair to both the seller and the buyer. However, you don’t necessarily have to include all of these Standard Terms in your contract, especially if they don’t reflect your needs or the property you’re selling.

At Attwood Marshall, we will make sure that your Contract meets the legal requirements and is in your best interests. That said, it is very likely that any buyer will want to negotiate some of the terms on which they’re buying. For example, if they are also selling a home, they may want a longer or shorter settlement period than normal. Alternatively, they may want to make sure certain items, such as the blinds, are included as ‘fixtures’.

It is our job to negotiate with the buyer’s solicitor to make sure that you still sell on your terms. This will include working out a time to ‘settle’ the sale and collecting your sale funds.

What is the Cooling Off Period?

A cooling off period gives a buyer the chance to consider whether they really want to enter the Contract once the emotion of making an offer has subsided (it also gives them the chance to carry out any building and pest inspections before the contract is final). Keeping in mind the period is only 5 days from the date the Buyer or his lawyer received the contract.

Potential buyers will usually only forfeit 0.25% of the purchase price if they pull out of the Contract during the cooling off period.
In some circumstances you can ask the buyer to waive the cooling off period, especially if they have a solicitor acting for them and have done their searches and inspections.

Private Treaty v Auction

Most properties in NSW are sold by private treaty. This is where you advertise the amount you’d like to achieve for your property and then negotiate the final price individually with any prospective buyers.

If you choose to sell by auction, the Contract will not include a ‘cooling off’ period. Instead, if the property is ‘on the market’ (that is, your reserve has been met) and the hammer comes down, the winning bidder is bound to go through with their purchase, unless of course, there is a serious problem with the Contract.

What’s included in the sale?

Unless the contract specifically says otherwise the property is sold ‘in the state it’s found’. That also means any ‘fixtures’ are automatically included. A fixture is anything that can’t easily be taken away without doing damage to the property. For example, a stove is usually a fixture because it is wired in, whereas a fridge is not a fixture because it only needs to be unplugged.

Sometimes you may be able to exclude a fixture from the Contract. At other times, what constitutes a fixture isn’t as clear cut (for example, a removable floor coverings or an above-ground pool) and this can lead to a dispute between you and the buyer.

Where anything is in doubt, it should be expressly included in the contract for sale.

Agent’s fees

You should factor the cost of agent’s commission into your sale. It’s usually a good idea to shop around and compare commission rates of various agents as well as the services being provided. Agents are required by law to give you a written guide to their fees, commissions and expenses before you sign an agreement with them.
PART 2 – Exchanging contracts

What does Exchange mean?

A Contract becomes binding when the buyer and seller sign their respective counterpart copies of the Contract and then ‘exchange’ them. At exchange, the buyer also hands over a deposit (usually 10% unless agreed otherwise).

Stamp Duty, GST and Capital Gains Tax (CGT)

In NSW only buyers have to pay stamp duty on the sale of a property. However, there may be other taxes you’ll need to pay as a seller, particularly if you’re selling an investment property. As a general rule, GST does not apply to the sale of residential property. However, you will be liable for GST if the property that you are selling has a commercial use (and in some other limited circumstances).

Unless you purchased your property before 1985, the sale of an investment property will usually attract Capital Gains Tax (CGT). However, your principal place of residence usually attracts a CGT exemption.

What happens if a buyer wants to move in early?

Sometimes a buyer will want to occupy your property before settlement, especially if they have already sold their home. The standard Contract has a clause governing this scenario. It provides that the buyer will have to pay an occupation fee, creating a licence which runs until settlement date. The buyer must also take out insurance and cannot make structural changes. Any adjustments to utility bills and the like should also take into account the date of occupation.

Because risk ultimately rests with the seller, you should never let a potential buyer take possession of your house before settlement until you’ve consulted us. An alternative to early occupation may be to bring the settlement date forward.

PART 3 – Finalising the Sale

Buying and selling simultaneously

Often people look at buying a new house at the same time as selling their current one. In that case, it’s important that you try to make sure the settlement date in both contracts is the same. If the settlement date on the contract for the house you are buying falls before the settlement date on the contract for the house you are selling, you may need to take out expensive ‘bridging finance’. If it’s the other way around you may be forced to rent temporarily or live with friends or family until you can move in.

What happens at settlement?

When you sign the Contract you usually agree to a settlement day. Most commonly this will be either 30 days or 42 days after the date of exchange, however it can be any date the parties agree. At settlement the buyer pays you everything they owe you to ‘settle’ the purchase. This amount will take into account any utility bills you’ve already paid as well as any tax calculations that your solicitor makes.

If the buyer cannot settle by the date stipulated in the contract for sale, you’re often entitled to charge
interest. You may even be able to cancel the sale after you have gave notice to complete to the buyer and the buyer still cannot settle on the datee specified in the notice.

If you owe money on the home you’re selling, your solicitor will talk to your bank or building society to work out exactly how much you need to pay to ‘discharge’ the mortgage. They’ll let the buyer know this amount so that they can make out a bank cheque to your lender.

Do you need to be present at settlement?

You don’t usually need to attend settlement in person. Instead, your solicitor and the buyer’s solicitor will meet to make sure they have everything they need for the sale to go ahead. If you have a mortgage over the property you’re selling, a representative of your bank or building society will also attend settlement to receive any money owing on your loan.

For further information on selling your home, please contact 07 5536 9777 or email info@attwoodmarshall.com.au.