

YOUR DEPOSIT WHEN PURCHASING A PROPERTY

Why is a Deposit Paid – When a Purchaser buys a property a deposit is paid by the Purchaser as a part payment towards the purchase price and as a commitment to proceeding with a transaction. This is usually paid when the Contract is signed by both the Vendor and Purchaser.

Amount of Deposit - Although the deposit is usually 10% of the purchase price, the amount of deposit and the timing for the payment of the deposit is negotiable between the Vendor and Purchaser. There are some exceptions to this rule in various States. For instance, if you are buying off the plan, the deposit may be capped at 5% or 10% of the purchase price.

Where are Deposit Monies Held - Deposit monies are held by an Estate Agent or a Lawyer in a Trust Account as stakeholder. The money is held on behalf of the Vendor and the Purchaser. The agreement of both parties is required to deal with the deposit. The deposit remains in the Trust Account until the settlement date unless the Purchaser consents to the release of the deposit prior to settlement.

Deduction of Estate Agents Fees from Deposit – Generally, the agent may deduct agreed fees and expenses from the deposit. The agreed fees and expenses should be contained in the Agents Authority with the Vendor.

Losing Deposit – If a Purchaser fails to complete the Contract, the Purchaser may lose the deposit. If the Vendor fails to complete the Contract, the deposit will generally be returned to the Purchaser.

Release of Deposit – A deposit may be released early. For example, in Victoria, Section 27 of Sale of Land Act sets out the procedures for the early release of deposit monies to the Vendor.

Early Release of Deposit – A Vendor can seek the early release of the deposit. The most common reasons are where the Vendor wants to use the deposit to purchase a new home or for cash flow purposes. The Purchaser is under no immediate obligation to release the deposit and may choose to do so only in certain restricted circumstances.

Early release is possible where certain circumstances have been fulfilled. If the Purchaser is satisfied, they may consent to the early release. If the Purchaser does not consent, certain conditions may have to be met prior to release. This includes the Contract not being subject to any condition enduring for the benefit of the Purchaser, the Purchaser accepting title or being deemed to have accepted title, and the Vendor giving the Purchaser notice in writing.

The Vendor has to provide the Purchaser with details of any mortgages or caveats affecting the property in the form of a statement. A Purchaser can ask the Vendor to provide written proof that the mortgage (if there is one) will be paid out at settlement, so that the Purchaser is guaranteed possession of the property on that date.

In Victoria, for example, it is known as a Section 27 Deposit (Sale of Land Act) Release Statement. The Purchaser has to be satisfied that the amount owing against the property is low enough to be covered by the balance of purchase funds payable at settlement; that all conditions of the Contract have been fulfilled; and that the Purchaser has signed and returned the Section 27 Deposit Release Statement to the Vendor as confirmation that release has been approved. In Victoria, should the Purchaser fail to sign a Section 27 statement within twenty one (21) days of it being served on him, and has otherwise not objected to any aspect of the title or there Contract of Sale of Land, the Vendor may release the deposit.

Risks Associated with Early Release of Funds – The potential risks associated with consenting to an early release of the deposit include the sale not proceeding and the Purchaser not being able to recover the released deposit, perhaps to use as a deposit on an alternative property. Other potential risks include the

possibility of the Vendor's death, or a Corporate Vendor becoming unregistered. Also, the Vendor may be a Trustee acting outside the scope of its powers, or the Vendor may be made bankrupt and the property seized.

Settlement – If the deposit has not been previously released, it is ultimately paid out to the Vendor when settlement occurs.

Generally, most lawyers object to the release of the deposit as a matter of course on behalf of the Vendor. However, it is strongly recommended business advisers, including accountants and lawyers are involved in the process, to ensure rights and obligations are respectively protected and honoured.

DISCLAIMER

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