

Legal Guide to Buying a Commercial Property

Introduction

The purchase of a commercial property will usually require a more detailed investigation into the contract terms, the title and planning information, and the lease terms than may be the case for the purchase of a residential property.

A competent property lawyer should be able to assist you with understanding the principal terms of the contract, ensure that the terms reflect the agreement, assist you to undertake a legal due diligence, negotiate amendments (where necessary), and advise you in terms of structuring the transaction.

Contract

The contract will set out the terms and conditions of the sale.

Whilst most agents and lawyers in Victoria rely upon the standard form Contract of Sale, it is often the case that the general conditions will be varied by way of Special Conditions to suit the particular requirements of a transaction.

Aside from the main commercial terms in relation to the price, deposit and settlement date (which will be agreed by negotiation with the selling agent and the vendor), the sorts of issues which may arise in such transactions include:

(a) GST

The sale of commercial premises, such as a shop or a factory, will often (but not always) attract GST.

GST is imposed in circumstances where a vendor is registered or *required to be registered for GST* and is conducting an “enterprise”. This might apply if the

vendor is leasing or developing property and has a turnover of \$75,000 or more per annum.

If GST is applicable, then liability will typically be transferred to the purchaser under the terms of the Contract.

If the property is leased, the parties may be able to treat it as a GST-free sale of a going concern if all of the following conditions apply:

- the sale is for payment
- the purchaser is registered (or required to be registered) for GST
- the buyer and seller have agreed in writing that the sale is of a going concern
- the supplier sells all the things that are necessary for the continued operation of the business

In certain circumstances, a vendor may be able to use the margin scheme to work out the GST that applies to the sale. Using the margin scheme means the GST liability is equal to one eleventh of the margin for the sale of property, rather than one eleventh of the total sale price.

Suffice to say, it is important to determine at the outset if GST is payable as this will affect the amount required to be paid at settlement, and the stamp duty assessed on the transaction.

(b) Finance Approval

Once you sign the contract, you will be bound by the terms and conditions and required to pay the deposit.

Unless you anticipate having sufficient funds available by the settlement date, it's recommended that the contract be made subject to finance approval.

Provided you comply strictly with the finance conditions you will be able to withdraw from the contract without penalty if you can't obtain finance.

(c) Purchaser and Nomination

There is provision in most contracts to nominate a different entity after the contract is signed. This is important where the ultimate purchaser or nominee (ie. a corporation) is not in existence at the date of signing the contract.

It should be appreciated, however, that unless otherwise agreed, the original purchaser named in the contract will remain *personally liable* even if the contract is subsequently nominated.

(d) Plan subject to Registration

If the property is subject to registration of the plan (an "off the plan" sale), it's important to carefully scrutinize the contract to ensure that it meets the strict requirements of the *Sale of Land Act (Act)*.

Under the Act, there are numerous additional requirements that need to be met for off the plan sales in relation to the contract terms, the handling of the deposit, and the date for registration of the plan.

(e) FIRB Approval

The Foreign Investment Review Board (**FIRB**) examines proposals by foreign persons to invest in Australia and makes recommendations to the Treasurer.

Foreign persons need to apply to buy or take an interest in developed commercial real estate valued at \$54 million or more. This includes offices, factories, warehouses, hotels, restaurants and retail outlets.

If FIRB issues apply, then it will be necessary to ensure that a suitable special condition is negotiated which makes the sale subject to FIRB Approval.

(f) Fixtures and Fittings

If you have agreed that certain items are to form part of the sale, it's important to ensure that these items are accurately described in the Particulars of Sale.

However, it's also important to appreciate that, if the property is leased, there may be certain fixtures and improvements which belong to the tenant.

One of the aims of the legal due diligence is to help clarify such issues.

Vendor's Statement

The Vendor's Statement should provide disclosure in relation to the title, any encumbrances or restrictions on title, zoning and rating information. It will also generally contain a copy of any lease.

Your lawyer should be able to advise you on all matters contained in the statement and make recommendations, where necessary, for additional searches or to obtain further information.

(a) Title and Plan

The certificate of title and plan needs to be carefully scrutinized to ensure that the lot and/or proposed lot corresponds to the property being sold.

It is usually recommended that you engage a surveyor to ensure that the dimensions of the property are strictly in accordance with the title and plan.

The title will also provide information in relation to any registered mortgages, caveats, planning agreements, or restrictive covenants on title.

(b) Zoning and Rating Restrictions

You will purchase the property subject to all rating and zoning restrictions relating to the property.

Your lawyer should carefully review all certificates to check the underlying zoning and to determine if there are any orders, notifications or proposals which affect the property.

This is particularly the case if you intend to develop, alter or change the use of the property.

(c) Environmental Issues

If there is a risk that the property may be subject to contamination (ie. asbestos, toxic material in the soil), you should engage a suitably qualified environmental consultant to advise on the risks and costs associated with remediation.

You may also wish to negotiate a special condition to the effect that the sale should be made subject to a satisfactory environmental inspection report. Keep in mind that contamination issues will generally become your problem once the property is sold.

If the contamination issues are significant, a purchaser may seek to negotiate on the basis that the vendor should provide an indemnity in relation to any remediation costs. However, this would need to be specifically agreed and documented in the contract.

(d) Lease Documents

If the property is sold subject to a lease, its terms (including any deed of renewal, sub-lease or transfer of lease) should be carefully reviewed by your lawyer. There are a multitude of issues that can affect a lease, but it's important to determine the following:-

- What is the length of the current lease term and any remaining options?
- If applicable, has the tenant validly exercised any option?
- does the underlying zoning support the lease use?
- Do the commercial terms justify the level of investment in the property?
- Is the tenant in default of the lease and/or in arrears of rent or outgoings?
- Is there adequate security under the lease (bank or personal guarantees)?
- What is the type and frequency of rent reviews (CPI, fixed and market)?
- Any there any unusual lease terms or conditions?
- What are the "make good" obligations of the tenant at lease end?

If you are looking to purchase the property for potential redevelopment, you should also determine whether there are any demolition and/or relocation clauses.

If a tenant has not exercised its option, or is near or at the end of its term, you or your lawyer need to confirm whether the landlord has complied with its notice obligations, if applicable, under the *Retail Leases Act 2003*.

(e) Disclosure of Energy Efficiency Information

For buildings with a net lettable area of at least 2,000 square metres (except for buildings under a strata title system or if an Occupancy Permit was issued less than 2 years before the relevant date), a vendor is required to disclose a copy of a Building Energy Efficiency Certificate (BEEC).

(f) Building Works

Once you have signed the contract, you accept responsibility for all of the improvements on the property. If the Vendor has either built any structures without permits, or having obtained permits, not obtained final inspections, it will now be your responsibility.

If the Council inspects the property at any time and discovers an illegal structure, it will be your responsibility to rectify the problem at your expense. In the absence of any clear misrepresentation by the Vendor or the agent, you will have no entitlement to call upon the Vendor to rectify any such buildings.

Essential Safety Measures

The essential safety measures provisions of the Victorian *Building Act* 1993 and the *Building Regulations* 2006 have important application to commercial buildings and they should always be fully considered by a purchaser.

The lease may require the landlord to pay the cost of safety maintenance and repair or for safety inspections and services. These costs must generally be met by the landlord. However, different rules apply to different buildings.

If applicable, a purchaser should always ensure that they obtain a copy of the annual essential safety measures report.

Conclusion

A good property lawyer will be able to advise you regarding the terms of the contract, any unusual conditions, and help you to identify any relevant title and planning issues. If necessary, your lawyer will also be able to negotiate appropriate amendments on your behalf to ensure that your interests are properly protected.

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Matthew is an experienced property and commercial lawyer who regularly advises purchasers in relation to buying commercial property. He is a member of the Law Institute of Victoria (**LIV**) and an associate member of the Australian Institute of Business Brokers (**AIBB**).

Disclaimer:

The information contained in this article is intended to provide general information only and is not legal advice or a substitute for it. You should always consult your own legal advisors to discuss your particular circumstances.

