



The risks of rushing to unconditional exchange of contracts

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Date: Monday May 3, 2021

When [purchasing a property](#) by negotiation (also known as by private treaty), there can often be an urgency to exchange contracts quickly in order to secure the property at the price agreed and to lock out any other potential purchasers. In this rush to exchange contracts, it is common for the purchaser to be asked by the vendor or the agent, for a section 66W certificate, or to be told that the vendor will only agree to exchange contracts on an unconditional basis; that is, to sign an unconditional contract of sale. This can be fraught with risks for the purchaser.

A section 66W certificate is a certificate signed by your lawyer or conveyancer that will waive your right to a cooling off period on exchange (see below). Providing a section 66W certificate on exchange will make the exchange of contracts unconditional.

When exchanging with an unconditional contract, it is essential that you have your finance approved unconditionally and that you complete all of your inspections of the property.

What is an exchange of contracts?

An exchange of contracts is the time at which the contract for sale becomes binding on both parties, the agreed deposit is paid, and the cooling-off period (if applicable) commences.

After the exchange of contracts, the vendor is unable to sell the property to any other interested party and the purchaser is obliged to complete the contract (subject to any cooling-off rights).

Before the exchange of contracts occurs, the vendor could agree to sell the property to another purchaser.

Cooling off periods in NSW

In NSW, purchasers of residential property are entitled to a 5-day cooling off period from the date of exchange of contracts under the *Conveyancing Act 1919*, unless the property is purchased at an auction.

A cooling off period is a short period after agreeing to purchase a residential property, where the purchaser can change their mind.

During the cooling off period, the purchaser enjoys a statutory right enabling them to rescind (cancel) the contract, where they would forfeit only 0.25% of the purchase price, instead of the full 5% or 10% deposit.

There is no cooling off period if:

1. a s66W certificate is provided;
2. the purchaser is the successful bidder at an auction;
3. the contract is entered into on the same day that an auction was conducted for the property, but the property was passed in at auction;
4. the property is not residential; or
5. the contract is entered into upon the exercise of an option.

The cooling off period timeframe is 10 days for off-the-plan purchases.

Where there is no cooling off period

Where an exchange of contract occurs without a cooling off period or where the cooling off period has been waived with a s66W certificate, then if the purchaser changes their mind or is unable to complete the contract, they would risk losing their full deposit and the vendor could also sue for damages.

The benefits of a cooling off period for purchasers

The cooling off period provides purchasers with an opportunity to:

1. have the [contract reviewed by a lawyer or conveyancer](#) so they can proceed with certainty knowing that there are no traps included within the contract;
2. have the property inspected. If a house, then a pre-purchase pest and building inspection is a must. If a strata unit, then a strata inspection report should be obtained and reviewed;
3. obtain unconditional finance approval from their mortgagee to ensure that the mortgagee will provide sufficient funds on completion, to pay the balance of the purchase price; and

4. ensure that they are committed to proceeding with the purchase of the particular property.

Risks of rushing to exchange with an unconditional contract of sale

Some of the key risks to purchasers of rushing to exchange contracts before completing their due diligence are:

- 1. Finance application is rejected** – Your bank may discover an issue with the property that they are not satisfied with during their valuation of the property or assessment of the property. Alternately, they may decide that the loan does not suit their risk profile. Whatever the reason, if your finance application is rejected, you may need to commence a new application following exchange and hope that it is finalised or another lender can be located before completion of the contract is due. In a worst case scenario, if this application is not finalised before completion falls due, you could potentially lose your deposit and be exposed to further liability to the vendor.
- 2. Finance approved only up to a level** – Your bank may decide that instead of lending the full amount you require to complete the purchase, they will only lend a portion of the loan you require. In this situation, you would need to find a shortfall amount from another source (which may include selling other assets you own, borrowing from another short term lending institution at a high cost, or borrowing from friends or family) or seek alternate finance in a similar manner to above. Again, if this occurs after exchange, there will be a time pressure to finalise this before completion of the contract is due.
- 3. Legal issues in your contract** – If you exchange before you have had the opportunity to have the contract reviewed by your legal advisor, then there may be hidden issues that you were not aware of before exchanging. Depending on the severity of these issues, if you were aware of them before exchanging, it may have been a factor in the calculation of your offer, or something that would affect your decision to purchase altogether.
- 4. Further legal advice** – Before purchasing, consideration should be had to the tax implications of the purchase, or which entity you will purchase the property in. After exchanging contracts, there can be [significant stamp duty issues](#) (including the payment of double stamp duty) if the purchaser noted on the contract is not the ultimate purchaser on the transfer. Taking time to discuss this with your advisor prior to proceeding can save the costs of trying to fix the situation at a later date.
- 5. Building issues or pest infestation** – When purchasing a house, taking the time to have the property inspected will provide you with certainty as to the quality of the building that you are purchasing. If this pre-purchase inspection is skipped due to time pressures to exchange, then you could be inheriting costly expenses of addressing a building defect or having to manage pests.
- 6. Strata issues** – When purchasing a strata unit, if there is a rush to exchange contracts and you overlook obtaining a Strata Inspection Report, then you may not be aware of issues with the management of the strata scheme. This would include if the owners' corporation has been discussing the need for works that could require a special levy to fund, issues with the building that have been identified, disputes among lot owners, negative funds that will need to be replenished, or other issues with management of the strata scheme. Taking the time to know what you are purchasing into is necessary.
- 7. Change of mind/buyer's regret** – What seemed like a great fit at the time and during the excitement of bidding on the purchase can change for the worse when taking a step back and after the excitement has dissipated. There are no refunds following an unconditional exchange, and it could be one of the costliest forms of buyer's regret experienced if you change your mind after exchange.

Get help from a property lawyer

It is often necessary to act quickly in order to secure property that you want to purchase. However, in proceeding to an exchange of contracts, particularly if that exchange is expected to occur unconditionally, all necessary steps should be taken to ensure that your finance is approved, you are satisfied with the condition of the property, and you are certain that you want to proceed.

At E&A Lawyers, we have a [team of property lawyers](#) able to assist you and guide you through the most secure purchase process for your new property.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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