

# 5 Sooner or later you will have to sign a contract

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***Without a contract you will never acquire your dream home. The details of contracts may be tedious, tiresome and downright confusing, but they are the final protection in the struggle to get the standard of housing you expect. Take care, learn how to read the fine print.***

## CONTRACTS, CONTRACTS AND MORE CONTRACTS

This book is about getting the best value out of the largest investment most families ever make. That investment involves contracts. Sometimes several contracts. A contract to repay a loan, to purchase land, to engage a solicitor, to hire an architect, to obtain insurance cover, and to contract with a builder.

The law of contracts is sometimes mysterious. However, after finding out whether you can pay for it, it is essential to understand the procedures of contracting for it.

This chapter is divided into the following sections:

- Purchasing property
- Strata title
- Retirement housing contracts
- Construction contracts
- Contracts for professional services

'Purchasing property' applies to all housing choices, as does 'Contracts for professional services', unless you intend to transact your own legal affairs. The others are specific to particular housing choices. Pick and choose as suits your housing decisions.

## TRAVEL WITH AN EXPERT

The world of the law, contracts, courts, solicitors and barristers is as complex as any field outside our personal experience and expertise. Sometimes it can seem like travelling in a foreign country, with its different language, special rules and procedures before you can exchange money for property, and strange government taxes and regulations, which, if not abided by, can land you in difficulties, or even loss of rights.

This chapter is not an 'expert's legal travel guide' of the law of contracts as they apply to property and building. It is an architect's

advice on some of the issues facing those involved in property or building contracts, and how to go about becoming an informed consumer of the necessary legal services. Finding expert 'legal' advice can often be a challenge in itself.

The place to start, after reading this chapter, is with a solicitor experienced in the preparation and interpretation of the contracts you need to use. As in any profession there are solicitors who have specialised in these types of contracts; and those who have specialised in taxation law, family law, corporate law, criminal law. These are not the specialists you are seeking. You need a solicitor experienced in the law of property, the law of building contracts, the legal issues associated with retirement living.

*Travel with an expert when it comes to contracts for buying or building housing. The cost of doing otherwise can be enormous.*

## PURCHASING PROPERTY

Whether buying land, a detached house, a strata-titled unit or townhouse, or a retirement unit, it is the law of 'real property' or 'land law', that governs your purchase.

The variations of this law from State to State cannot be covered here. These variations cause differences in the forms of contracts, and the procedures adopted by solicitors or agents.

## ESSENTIAL ISSUES

The essential aspect of your property purchase is that it is an exchange of rights and duties, in return for money.

## RIGHTS

The right to use and enjoy the land, what is below the land (excluding mining rights), the airspace directly above the land, and the contents of the land such as buildings, landscape, fences, drives, etc.

## DUTIES

The duties to use the property only in accordance with the laws and regulations governing the type of property which have been devised by Federal, State and Local governments, and as they may be changed from time to time.

## TITLES, LEASES AND LICENCES

In exchange for the agreed purchase price you receive a 'title' which may come in a variety of forms:

- Torrens Title (invented by Robert Torrens, Collector of Customs in South Australia in 1858)

- Old System Title (derived from the Kings of England)
- Crown Land Title (bestowed by the Monarch through the State Governments)
- Strata Title
- Company Title
- Cluster Title

The last four titles are used in home unit apartments, townhouse and retirement housing developments. In addition, many charitable and religious organisations use a variety of leases and licences to govern the right to reside in their retirement housing in exchange for a payment of a premium or loan to the organisation.

### CONTRACT OF PURCHASE

The contract of purchase sets out to identify the property, (so there is no disagreement about what is being sold and bought) notes the price being paid, and sets certain conditions for the behaviour of the seller and buyer.

### CHECKING AND SEARCHING

The description of the property, and the conditions governing its use, must be carefully examined and checked prior to completion of the contract. These can decisively affect the rights and interests of the buyer. Depending on State and local conditions there is a need to obtain and check the following:

- The title to ensure it is in order.
- The valuation of the property which will affect financing.
- The land zoning governing use of the property.
- A survey setting out the shape, dimensions, buildings, easements on the land and other physical aspects.
- All rates certificates to ensure they have been paid to date.
- Sewerage and drainage diagrams to determine where the drains run, and if they are connected to the main sewer.
- An inspection report by an architect, builder or Builders Licensing Board inspector describing the physical condition of the property and its buildings.
- A pest inspection report describing any evidence of white ant or other insect infestation or damage.
- A land tax certificate to check the tax charged on the land.

- Statements and maps from government departments controlling main roads, electricity, health, railways, education, mines, mines subsidence, pipelines, historic conservation, national and state parks, coastal protection, water resources, agriculture, telecommunications, etc. to check whether they have plans, regulations or charges which may effect the use of the property.

These checks are essential, and should be carried out to the maximum extent possible before the buyer is bound by the contract, i.e. before contracts are exchanged. In some States it is now the responsibility of the vendor to present evidence of such searches.

## CONFLICTS OF INTEREST

The seller's and buyer's interests may not always coincide. Obviously the seller wants the highest price obtainable, the buyer the lowest, and the real estate agent the quickest sale possible.

The buyer's solicitor wants the fullest disclosure of the description of the property, and the conditions governing its use before agreeing to the buyer signing the contract. The seller's solicitor will want completion of the contract to satisfy the interests of the seller.

The five parties, seller, buyer, real estate agent, and seller's and buyer's solicitors all have interests that may conflict. The process of selling and buying is often filled with anxiety, at least for buyer and seller. Both or either may wonder:

- Am I getting the best price or is there another buyer just around the corner who would pay more?
- Have the real estate agents done their job properly or, for the purpose of getting a quick sale, failed to fully inform either the buyer or seller?
- Is the property worth what I'm paying, or are there some hidden defects I don't know about?
- Are the sellers fair dinkum, or are they also negotiating with two or three others for a higher price, or a quicker sale, and am I going to be gazumped, i.e. beaten by a higher bid after I thought an agreement had been reached on the price?
- Can I really finance this property purchase and will the banks, building societies, or whoever, approve the loan I want?
- Will I be able to sell my present property for the price I need in time to pay for this one without having to find bridging finance?

All these and other questions can make buying property an unpleasant experience. Some of the anxiety can be relieved if you do your homework, check

property values, finance, your housing needs and with your solicitor before deciding you want to buy this particular property.

The risk of being gazumped, where not illegal, can be reduced by being ready to move very quickly to complete the contract after initially agreeing to buy. This means having your finance and solicitor well organised. However, in complex property sales, the title, and need for searches and obtaining certificates from authorities, may cause legitimate delays. Being well-prepared does, however, help and is likely to place you in a stronger bargaining position.

## EASEMENTS, COVENANTS AND OTHER RIGHTS

Many properties have easements, covenants and other rights controlling use of the property.

Easements will be shown on the the title and the survey and give others right to use part of your property for such purposes as:

- Passage of persons or vehicles
- Passage of water, usually in pipes
- Obtaining light into portion of their building
- Obtaining air into portion of their building
- Supporting part of the adjoining property

Sometimes titles will be conditioned by covenants restricting the size of buildings and the materials out of which they can be built. The covenants may prevent you from building above a certain height or on certain parts of the land, so as to retain the rights of others to a view.

Certain parts of a property may be shared in common with adjoining owners such as fences, party walls, and in the case of Strata, Company, Cluster title, the building structure, services, common areas, land and fixtures.

The buyer should be aware of all such easements, covenants and common property to make certain they know the conditions that apply to their use of the property.

## STRATA TITLE

All home units, villa units, townhouses, apartments and many retirement units, will be sold under Strata, Cluster or Company titles. All these forms of title will require the checking and searches, and involve the same potential conflicts of interests mentioned above, as well as the need to consider the special factor of legal relations with your neighbours.

For the prospective buyer this means legal relations with all other title holders in the development. Title holders may be residents, absentee landlord investors renting the unit, the developer holding unsold units, and mortgagees with first

mortgagee's rights.

The legal relations are described in the title, the by-laws, and the minutes of the body corporate or the board of directors' meetings. These, along with the minutes and accounts of the body corporate or the company, the insurance policies, the Strata Plan and Unit Entitlement, property maintenance contracts, and performance of the managing agent, if one has been appointed, need to be examined thoroughly by both you, and your solicitor.

Property maintenance requires careful attention. Flats, home units, townhouses, high-rise apartments and retirement villages are more complex buildings than private homes. The property maintenance involves the grounds and gardens, as well as the buildings and their electrical, water, drainage, ventilation, security and lift services. Repairs can sometimes involve tens or hundreds of thousands of dollars.

In buying into this type of title it is important to chat to some of your future neighbours, as well as the secretary, treasurer, and managing agent, to get a feel for how well the property has been managed and maintained. You have interests, rights and duties in both your unit and in the total complex. It's important to get to know them before you make the final commitment.

## RETIREMENT HOUSING CONTRACTS

There is no uniform form of contracts for buying into retirement housing. Depending on the type of organisation owning the village, you may find any one of the following arrangements:

- Lifetime leases
- Interest-free loans and licences
- Donation contracts
- 99 or 199 year leaseholds
- Strata title
- Company title

You may not have a choice as to a form of contract. For those who have owned their own home, it is important to have the differences carefully explained to you, and to read the contract for yourself, even though they are often written in a style difficult for the layman to understand. The fine print may contain many different ways of arranging rights and duties with which you may be unfamiliar. Many of the rights enjoyed under freehold title common to suburban homes are significantly altered in these other forms of title.

## RETIREMENT HOUSING IS ALSO A SERVICE CONTRACT

Buying retirement housing not only includes purchasing the right to occupy property, but also the right to delivery of services. The title combines legal involvement with a corporate body, be it a church, trustee company or body corporate, as well as a contractual dependency on that body to deliver support services when you need them. Assessing your property investment requires understanding the legal rights and responsibilities of both the purchaser and management service, as well as assessment of the reliability, financial viability, and stability of the organisation providing the management and services.

The variety of legal arrangements, as well as the differing organisations involved in providing services, makes such assessment more difficult than other forms of property purchase. It requires careful consideration by your legal advisers.

Let's start with some simple definitions of the types of contracts you may encounter.

## TYPES OF CONTRACTS

### LIFETIME LEASES

Lifetime leases allow occupancy for life, or the life of the survivor of a couple. Payment is normally at the market value of the property and the lease provides you with a secure title. Lifetime leases provide a return on your investment, whether by sale or repayment by the organisation at the time you move out, less any agreed deductions for services. The State's Landlord and Tenancy Acts will also have an effect on the conditions of occupancy.

### INTEREST-FREE LOANS AND LICENCES

By lending the organisation owning the housing an agreed amount, interest-free loans provide you with a licence to occupy the residential unit. The organisation will generally repay all, or a proportion of the loan when you depart, subject to the terms of the agreement concerning payment for services.

### DONATION CONTRACTS

You donate an agreed sum of money in exchange for the right to occupy a residential unit and receive services, although there may also be service charges. You generally will not receive any repayment upon moving out.

## **99 OR 199 YEAR LEASEHOLDS**

Leaseholds are usually for 99 or 199 years, can be bought and sold, and provide you with a secure interest, subject to any Landlord and Tenants Acts. Service charges may be deducted from the sale price, charged for separately, or involve a combination of both methods.

## **STRATA TITLE**

In principle the same as strata title for home units, townhouses or apartments, except that the body corporate will also be responsible for organising the delivery of, and charging for, services.

## **COMPANY TITLE**

You become a shareholder with all other residents in owning a company that owns the buildings and provides the services. The legal documents describing these kinds of contracts are often more complex, and vary according to the type of organisation building the housing and providing the services. Service charges will be on top of purchase price.

## **ESSENTIAL DIFFERENCES**

The essential differences are between community, charitable and religious organisations (which generally retain ownership of the property and provide the organisation necessary for service delivery), and commercial organisations (which develop and sell the housing and service organisation to the residents, leaving it in the hands of the owners to run their own affairs).

Sometimes, in the latter case, a Trustee oversees certain legal, accounting and management services in addition to the Body Corporate or Company hiring its own management staff. In some cases the developer retains an ongoing interest in the management and services.

## **ADVANTAGES AND DISADVANTAGES**

### **SECURITY AND RETURN ON INVESTMENT**

Subject to reading the fine print, all but Interest-Free Loans and Licences, and Donation Contracts provide some form of security of tenure or title as part of the contract. These two exceptions rely more on the goodwill of the community, charitable or religious organisation to ensure your rights of residence. You generally have no legal influence over the management decisions of community,

charitable or religious organizations. Depending on the exact conditions of the title governing payment for services, Strata and Company Title, Lifetime Leases and 99 or 199 year Leasehold usually provide for a market return upon sale of the unit, less any deferred service charges or other agreed deductions.

The security of your investment is also dependent upon the financial viability and management expertise of the organisation owning or running the property and services. Should that organisation run into financial difficulties, your investment and the future availability of services could be at risk. Have your solicitor explore this issue.

## METHODS OF PAYING FOR SERVICES

These vary from monthly payments to deferred payments being subtracted from the resale price, and may include various combinations of the two methods. Such arrangements will depend partly on the title, lease or licence and partly on the financial management methods preferred by the organisation providing the services. The amount paid is also proportional to the services provided. The more services the higher the cost. (See also Chapter 18, 'Buying for Retirement'.)

## RESALE OF THE UNIT

When you bought your house or home unit your expectations of selling were governed only by the market conditions and the title of the property.

With retirement housing, your freedom to resell may be subject to further constraints such as:

- The interest the property and management organisation has in the resale;
- The payment of maintenance fees during the period while it is unsold;
- Repayment of any deferred service charges;
- Retention of an agreed percentage of capital gain or original purchase price by the developing organisation;
- The reputation in the market place of the organisation owning the housing and providing management and services.

Resale may be necessary to move into a hostel or nursing home, or in the event of you becoming dissatisfied with the situation in which you find yourself living. Selling a retirement living unit may not be as simple as the sale of your own house, and it may not return a full market value to you.

## REMAINING A RESIDENT

If you stay in your own home the fact that you 'go dotty', or 'can no longer look after yourself' usually doesn't affect your right to retain ownership of your property. This may not be the case in a retirement development. The title, lease, licence or contract may give the management organisation the right to move you on if you are assessed as of unsound mind or unable to look after yourself. Best to check this out carefully.

## A SAY IN RUNNING THINGS

At present only Strata and Company Titles provide for residents having a say in how the property and services are managed and run. Of course, you may not want that responsibility. It's a question of personal preference and self-interest. If you want someone else to worry about it all, then Leasehold, Donation Systems or Loan and Licence are the way to go. But remember, they don't have to ask your opinion on how well-run things are, and whether you agree with the increase in charges that are made from time to time.

## THE MANAGEMENT ORGANISATION

There are as many, if not more types of management organisations as types of contracts. They range from the Body Corporate or Board of Directors under Strata or Company Title who may hire their own manager, staff and contract services, through trustee organisations with boards of management and management companies for Leasehold, to a variety of organisations under Loan and Licence or Donation Systems depending upon the particular community, charitable or religious group involved. There is, as you may have gathered by now, nothing standard about how management of retirement housing is organised.

What matters is the financial stability, the quality of care, the range of services, the professionalism of the staff, the efficiency of the management, the long-term commitment of the organisation, and your rights to proper care and service in accordance with your title or contract.

Checking these out requires inspection of finances and legal agreements, talking to staff and residents, as well as comparing them with other organisations running retirement housing.

When it comes to the crunch will the organisation deliver? The history of its past performance, its finances, and/or the extent of the residents' control, satisfaction and influence may tell you more than the legal agreement. But check that the agreement also protects your interests.

## CONSTRUCTION CONTRACTS

### FORMS OF CONTRACT

The building professions have found it necessary to devise a number of types of contracts for construction. In addition, the various professional and industry bodies, either collectively or individually, have found it in the interests of their members or clients to develop variations of the main type of building contracts.

Such a situation leaves the proprietor, the person wishing to enter into a contract with a builder, in a confusing situation. Which contract best suits his/her interests, and represents a fair agreement with the builder.

The main types of building contracts are:

- **Lump sum contracts** which provide that the builder will under take the work for a fixed price subject to any agreements concerning 'rise and fall' or 'Variations' (more on these later).
- **Design and build contracts** sometimes used by project builders who may adapt a standard design to your particular requirements and land, or design you a 'one-off', and build the house, all for a 'lump sum' which is quoted to you before the house design is finalised. The quote will usually be conditioned by 'provisional sums' for footings, drainage, etc. (more on these later).
- **Cost plus contracts** where the builder is paid for the actual cost of materials and labour as the work proceeds plus an agreed fee or percentage of the cost.
- **Construction management contracts** are a recently developed form of contract where a builder or construction management company undertakes, for a fee, to manage trade suppliers and contractors, who are directly engaged by the proprietor to construct the building. The proprietor in effect becomes the general building contractor with an expert agent to advise and assist with the management of the building programme.
- **Schedule of rates contracts** are usually used where the quantities are difficult to accurately calculate, such as foundation works on a complex site, and rates are agreed for specific types of work with quantities being measured on the job.

## ROLE OF INDUSTRY ASSOCIATIONS

Such organisations as the Royal Australian Institute of Architects, the Master Builders Federation, the Housing Industry Association, the Building Owners and Managers Association, the Building Industry Specialist Contractors Organisation of Australia, The Standards Association of Australia, to mention some major professional associations, have developed their own versions of these contracts.

Whichever form of contract is proposed it is important to realise the essential advantages and disadvantages of each basic type.

## ADVANTAGES AND DISADVANTAGES OF VARIOUS CONTRACTS

**Lump sum contracts** have the advantage that the price is determined against a set of plans and specifications, which the builder takes to *accurately* represent the intentions of the proprietor, and consequently the price can be fixed subject to 'rise and fall', 'provisional sums' and 'variations'. It is the type of contract generally preferred, though not always attainable. In addition, there are a number of well-established forms that have stood the tests of time, arbitration and the courts.

**Design and build contracts** provide the advantage that they include the cost of design and preparation of plans and specifications, and the disadvantage that they may be conditioned by provisional sums or specific exclusions which could result in significant adjustments to the contract price before construction commences or is completed. There are also no standard forms of contract presently agreed by industry professional bodies. The contract forms have usually been prepared by individual companies to meet their own needs and suit their own interests.

**Cost plus contracts** contain many risks for the proprietor such as not knowing with reasonable certainty the final price, not placing any incentive on the builder, nor necessarily the owner, to limit the overall price, or construction time. They also involve difficulty in accurately defining the meaning of 'actual cost', and liability for defective work. Except where it is very difficult to define the extent of work at the beginning they should generally be avoided.

**Construction management contracts** arose during the 1970s in a period of very high inflation. They were designed to cope with building programmes which required construction to commence before design and documentation were completed. This usually applied to large buildings. Construction management contracts have been used in residential work either where proprietors want to do things in a hurry (as above), or the work does not constitute a full 'building job'

and it is difficult to find builders prepared to take it on.

The risk for the proprietor is finding themselves in the position of being an owner-builder, without the real expertise to know whether the work is satisfactory or not, and without the professional or building industry influence to have defective work repaired or redone. The role of the construction manager includes management of suppliers and subcontractors and inspection of the works. The construction manager is not the builder, in the traditional sense of the word, and therein lies the risk.

In addition, standard forms of the contract have only been recently agreed by the Royal Australian Institute of Architects and the Master Builders Federation of Australia, and have not stood the test of time and usage.

**Schedule of rates contracts** carry many of the risks associated with the Cost plus contract except they should attempt, as far as possible, to estimate the quantities, and thereby reduce the unknown final price to an area of probability.

#### ADVICE ON BUILDING CONTRACTS

As you may have gathered, building contracts are a specialised field, and even the various building industry professional bodies have not prepared standard forms for all types of contracts. Nor is every architect or solicitor equipped to advise you. An architect may have administered many lump sum contracts but had little experience with other types of contract. Neither is the architect a specialist in contract law. He may have read four or five books and the Royal Australian Institute of Architects' Practice Notes, be well versed in the procedures of administering a building contract as a result of years of practical experience, but he is no solicitor.

Yet, as noted earlier, your solicitor may not have specialised in building law and contracts, and consequently may not have the experience which will quickly pinpoint problems and difficulties in a particular building contract, or building project.

If you are concerned about the appropriateness of a particular contract, or contractual clause, it may be wise to seek the advice of both a solicitor and architect experienced in building contracts and their administration for the type of work you intend to undertake.

## PROPRIETOR/OWNER'S OBLIGATIONS

It may come as a surprise but the proprietor under a building contract has many obligations other than those of paying for the cost of the building. Some that can lead to difficulties are outlined below:

### NOT WITHHOLDING CERTIFIED PAYMENTS

Proprietors sometimes wrongly believe they have the right to withhold payments to the builder even after progress payment certificates have been issued. Failure to pay within the specified time after issuance of a certificate may result in breach of the contract, and entitle the builder to change interest on the amount certified as well as providing grounds for the builder stopping work.

### POSSESSION OF THE SITE

Should the proprietor delay the builder in starting work after the contract is signed it may result in both a claim for extension of time and extra cost.

### SETTING OUT THE BUILDING WORKS

Any errors in plans, including dimensions, prepared by or on behalf of the proprietor could involve a claim for extra cost.

### SITE CONDITIONS

Under some contracts the proprietor gives a guarantee that the site will satisfactorily support the works, i.e. the building and any drives, steps, retaining walls, etc. Should it not, this could constitute a claim for extra costs.

### VARIATIONS

Variations arising from errors in documents, unforeseen site or foundation conditions, changes in design or selection of items covered by provisional sums, delays, or instructions by the proprietor to change the design or construction methods will probably result in a claim for a change in the contract sum and possibly the time for completion.

### INSURANCE

The contract will describe the insurance requirements which apply to both the builder and the proprietor. It is important for the proprietor to realise that the builder's insurance stops at the date of practical completion; that for alterations and additions the proprietor is responsible for insuring the existing structure and contents; if they remain living in the residence then they are normally fully responsible for the section they occupy; if they occupy part of the building before completion they become responsible for its insurance; and that the builder is

entitled to receive evidence that the proprietor's insurance is adequate, and vice versa.

With insurance matters contact an expert.

## PRACTICAL COMPLETION AND DEFECTS

Practical completion is that date at which the building is agreed to be reasonably fit for use and occupation, and where any defects or omissions that exist do not prevent the building from being used for its intended purpose. It is also the date at which the defects period commences, and the owner becomes responsible for insurances. Agreeing that the job is 'practically complete' and that all the owner's defects claims are legitimate can sometimes cause difficulties.

## RETENTION FUND, BANK GUARANTEE OR MAINTENANCE CONTRACT

The retention fund, that sum of money, or the bank guarantee or maintenance contract offered as an alternative as security against failure of performance by the builder, does not belong to the proprietor. In the case of a retention sum it must be deposited into a bank, and any interest belongs to the builder. It only becomes payable to the builder upon satisfactory completion of the works, usually 50 per cent on practical completion and 50 per cent on satisfactory completion of the defects liability period. Should the builder fail to satisfactorily complete the works the proprietor may use the retention sum or bank guarantee to carry out the necessary repair or additional work, but must account for its use in the case of arbitration.

## TRAPS

Provisional sums, variations, rise and fall clauses, delays, non-compliance with instructions, poor quality workmanship and defects, are special little traps into which even the most experienced can, from time to time, fall.

**Provisional sums** are often a necessary part of a contract, but they should be kept to a minimum. They are sums of money set aside for items of work or materials to be supplied that cannot be accurately costed or selected at the time the contract is signed. They may cover such things as rock excavation, septic drainage, bricks, tiles, baths, etc. They are estimates which, when finally priced, may cost more or less than allowed. If they have been under-estimated, by error or intentionally, or because the proprietor went out and chose the most expensive floor tiles or stove, then expect your budget to be affected.

**Variations** are a pain in the neck for architects, a source of windfall profits for builders if they can get away with it, and a pit of anxiety for proprietors because they fear they're being ripped off. It is best to think through everything carefully before you sign the contract, and don't change your mind afterwards. Or if you have to, get the variation costed or carefully estimated before you agree to it, and put it down in writing signed by both the builder and yourself before work on the variation starts.

**Rise and fall** these days is invariably only 'rise' and 'no fall'. There are 'standard' procedures for calculating the rise over the period of the job of the cost of labour and materials. They are often complicated, and give credit only to the ingenuity of our labour award system, the statistical methods of the Australian Bureau of Statistics, and complications of the building industry.

Invariably proprietors feel hard done by, but inflation has been with us ever since trade and currency were invented. In times of high inflation, it is often difficult to obtain fixed price contracts, so 'rise and fall clauses' are something you may simply have to live with.

**Delays** can occur for all sorts of reasons such as rain, strikes, failure in performance of architects or engineers, tradesmen or suppliers nominated by the proprietor, failure of the proprietor to give instructions in time, pay progress payments on time, give access to the site, problems of an order from a Council, Water Board or County Council, or simply from poor organisation by the builder.

Delays are, in fact, unfortunately normal, and it is not unrealistic to expect a 10-20 per cent legitimate extension of time.

Of course builders often seek reasons for extensions of time to cover their own problems resulting from overcommitting themselves, or not being able to get subcontractors to perform on time. Proprietors are rightly suspicious of claims for extension of time and should seek documentary evidence, if completion by a certain date is important, or will affect costs, rent or finance charges. However, pushing the builder to build to unrealistic time schedules is also asking for trouble.

**Builder's non-compliance with instructions**, whether they are given by the proprietor or the architect, may be grounds for terminating the contract. This, however, is the last step, and should be taken only after all other reasonable methods to overcome the problems have been tried.

Certainly all instructions should be put in writing. By writing it down, keeping a copy, and having the builder or his foreman sign both his and your copy, most problems of non-compliance will not occur.

If they persist, you've got problems and need an architect, or if you have one, both of you need a solicitor, patience, perseverance, and, in the long run, probably a new builder.

**Poor quality workmanship and defects** are the perennial problems of the building industry. Every proprietor has his tale of woe, every architect his story of frustration.

The solution lies in a watchful and informed eye being on the site at the right time. But even this is no guarantee. Defective materials may not show their weakness until some time afterwards. New products in the market place may have been inadequately engineered or tested. Certain trades may have covered the work of other trades before you could inspect it.

The Australian building industry has its good builders, average builders and lousy builders. Proprietors also get what they pay for. Top quality construction invariably costs top quality prices.

Poor workmanship is, however, a trap that only the wary can avoid. If you have neither the time nor skills to be 'wary', it's best to hire the skills, and check your experts carry sufficient professional indemnity insurance to cover even the errors they may make from time to time.

The world of building contracts is full of pitfalls even for architects, engineers and builders. For the proprietor, the best advice is seek advice. It can be far less costly and painful than learning from the bottom of the 'pits and traps' along the way.

### LICENSING OF BUILDERS

In almost all States in Australia residential builders are required to be licensed under State law. The various Builders Licensing Authorities administer the State Act. It is important to check that your builder is licensed. Failure to do so may provide legal problems should a dispute arise.

### WHAT IF YOU GET INTO A FIGHT?

You can expect frustration, delay, extra expense and an outcome which may or may not be to your wishes and liking.

Contracts have clauses covering the circumstances by which either the proprietor or the builder may terminate the contract. They also have clauses setting down the procedures should the parties fall into dispute. Usually these procedures result in arbitration, with resultant expenditure by both parties for the arbitrator's fees, and if the parties so choose, solicitors, barristers and expert witnesses' costs. In all, it can result in thousands, tens of thousands, and even hundreds of thousands of dollars for the losing side. It can take months or years before the arbitration hearing commences, and days or weeks of hearing time.

And you may not win. It will depend on the evidence, the written and recollected evidence of conversations, instructions and decisions, on the quality of plans and specifications, on the testimony of expert witnesses, on the informed opinion of the arbitrators, and on the skill, tenacity and preparation of solicitors and barristers, if involved.

Which is all good reason for preparing designs carefully, thoroughly documenting intentions in the plans and specifications, carefully preparing and understanding your contract, ensuring written records are kept of all instructions and site meetings, carefully checking all variations and claims for extensions of time, keeping on good personal terms with your builder and his subcontractors, being fair and reasonable in all decisions, while expecting and insisting on the same in return, and taking good advice from your professional advisers, be they solicitors, architects or engineers.

If you do all that, have good weather, no strikes, a period of low inflation, a builder and subcontractors who know how to build well, and a little luck, you may actually enjoy the process of entering into, and completing a building contract for your house or alterations.

## CONTRACTS FOR PROFESSIONAL SERVICES

If, after all this, you feel it wise or necessary to engage an architect, solicitor or engineer, you will find yourself entering into a contract for professional services.

Your contract may be verbal, an exchange of letters, or the completion of a formal contract document. Preferably for anything other than a simple task, it will be the latter, completion of a formal contract. By now, the risk of not putting it down in writing should be self-evident.

Each of the professional institutes have devised standard forms of engagement procedures for their members to use in contracting with their clients. These generally describe the variety of services you can buy, and provide a guide to the recommended fees that may be charged. An approach to the local chapter or division of the Royal Australian Institute of Architects, Association of Consulting Engineers of Australia or Law Society will provide you with a copy of brochures describing services, contracts for engagement and recommended fee schedules.

Your contract for professional services is essentially different from a property purchase or building construction contract in that you are buying the time of professionals and their staff to provide you with expert advice, and the necessary documents, to enable your property objectives to be achieved. The result of your contract for professional services may be an opinion (given verbally or in writing), a title deed, a set of drawings, specifications and/or contracts—and negotiations, inspections and contract administration carried out on your behalf. The tangible result is expressed in your acquisition, either by purchase or construction, of the residential property of your choice or preference.

### WHAT YOU PAY FOR

You pay to obtain expert professional assistance to achieve your preferred property objectives. It is important that you check that your intended architect, solicitor or engineer has the necessary experience, expertise, will and commitment to help you achieve those objectives, and that the contract of engagement clearly expresses those objectives, and the methods to be used in achieving them.

### PROFESSIONAL ERROR AND PROFESSIONAL INDEMNITY INSURANCE

Everybody is fallible, clients, builders, architects, solicitors and engineers. The fallibility of clients results in them living with their mistakes. For builders they have to pay for unsatisfactory work to be rebuilt. For the professional who makes mistakes there is the cost of professional indemnity insurance premiums, and of redoing the plans and specifications if the mistake is discovered before the builder builds it.

Architects, solicitors and engineers can insure against the risks of such mistakes, and are foolish if they do not. The cost of repairing a mistake which arbitrators or the courts decide arises from errors by the professional can result in tens, hundreds of thousands, or millions of dollars in building and legal costs.

Clients are sensible if they enquire about both the extent of professional indemnity insurance their architect, solicitor or engineer carries, and the nature of the risks their type of project may entail. Should there be special risks it may be wise to consider paying the premium for additional insurance cover, although the additional cover may need to be maintained for five to ten years. Buildings often have a way of not showing problems until several years after construction.

Whichever way, it is well to be informed of your risks, and the insurance your professional advisers carry.