



Owner-builders

While most new homes and many renovations and extensions are built by registered builders, some are built by owner-builders. Owner-builders are people who own land and build a new home or extension on the land but are not in the building business. As many as 10 per cent of homes and 30 per cent of renovations and extensions are built by owner-builders.

All domestic builders must be registered with the Building Commission and carry insurance. If building work is incomplete or defective, owners and successive owners can have access to these insurance funds. This applies not only to the construction of a new home but to renovations and extensions. Building warranty insurance must be provided by a builder for any work in excess of \$12,000 completed for the owner. Building work is covered for a period of six and a half years from the date of completion.

As the owner-builder is the owner of the home or renovation there is no need for builders' warranty insurance. If however, the owner-builder decides to sell the property within a six and a half year period from completion of construction they must have building warranty insurance for the completed work. The *Building Act 1993* (Vic) requires the owner-builder selling the house to undertake certain steps before entering into a contract of sale of land, which includes the need for building warranty insurance. The Act also sets out the consequences of not doing so. The most serious of these is the purchaser's ability to terminate the contract of sale.

While there is a widely-held belief that it is the owner-builder's responsibility to actually transfer the insurance policy to the new owner, this is not the case. Owner-builders are under no obligation to disclose the existence of builder's warranty insurance, respond to requests about its existence or to facilitate its transfer. However, you will find most vendors will supply this information as part of marketing their property. The solicitor representing the purchaser of the property is expected to ascertain the details of any insurance policy and pass them on to his client.

The situation is different for commercial properties such as shops and small factories. Legislation does not place the same insurance requirement for domestic owner-builders on the sale of an owner-built commercial property. However, if the property is sold within 10 years of construction the vendor must warn prospective buyers of any defects in the property by attaching a condition report to the contract of sale. Before buying an owner-built commercial property, you should seek legal advice on the contract of sale and the information provided in the supporting documentation such as the condition report.

If you are buying an owner built property, a property with an extension or a recently renovated property, have your solicitor investigate whether building warranty insurance exists or is required. Do not wait until something goes wrong to find out.

More information
From the LIV Bookshop:
1001 Conveyancing Answers,
Cocks, \$195.

Useful Web links: Building commission
www.buildingcommission.com.au

Divorce and division of property

Separating married couples usually wish to become financially independent of each other even though the divorce has not been formalised. If the parties cannot agree on how their assets and liabilities should be divided, then either of them can apply to the Family Court or the Federal Magistrates Court for an order settling property issues.

An application for a court order to settle property issues can be made at any time after the marriage has broken down. However, once a divorce has been granted, the application must be made within 12 months of the date on which the *divorce decree* became final. If an application is made outside that time limit, the court has discretion on whether the matter proceeds.

Couples who agree on how their property should be divided can finalise their arrangements by consent order or by agreement. In some limited circumstances, an agreement may not be binding, for example, if someone has failed to disclose relevant information, or if there has been a material change in circumstances relating to a child.

There are advantages and disadvantages with consent orders and financial agreements. It's important that both parties seek independent legal advice on which method is preferable in their circumstances and how to meet the specific requirements for financial arrangements.

Court orders for property disputes

Every order made by the Court concerning the division of property must be just and equitable in the circumstances. The Court will consider each party's contribution to the assets of the marriage and the needs of each party. The Court considers the following:

- Contributions made by each party to the assets' purchase, maintenance and improvement over the history of the marriage. Factors such as whether the asset was inherited by one of the parties or was the result of a windfall will be considered. A party's contribution to the assets can be financial or non-financial (such as the contribution of a husband or wife as a home-maker or parent), direct or indirect (such as where one spouse's salary meets the running expenses of the household while the other salary is saved for some agreed improvement).
- The effect an order has on the future earning capacity of the parties. For example, if the main financial asset of the marriage is a farm or a business, the consequences of the sale of that asset will be considered.
- An assessment of the need of one party to be maintained by the other. The Court will consider a person's age, state of health, income-earning capacity, and which party is looking after the children of the marriage. For example, if one parent has custody of the children of the marriage, the Court may grant that parent an additional percentage of the matrimonial home to cover the need to house the children.

The Court can make a number of orders when settling property disputes, including a declaration specifying the particular interests of the husband and wife for the

assets of the marriage; an order for the property to be sold or for transfer of the registered ownership of property between the parties; an order for the sale of particular assets and a distribution of the proceeds; and/or an order for the payment of money by one party to the other.

Only a small proportion of cases concerning the division of property actually proceed to a final court hearing to be determined by a judge. Most cases are settled by agreement between the parties either through mediation or negotiations between solicitors. Settlement by agreement between the parties without the need to go to court has obvious benefits for all concerned.

More Information

From the LIV Bookshop
Divorce and division of property, information brochure. Available from the LIV or ask your solicitor.

Useful Web links

The LIV website has information on divorce, division of property and family law at www.liv.asn.au/public/legalinfo/family.

Buying or setting up a small business

Many people see a small business as the way to secure their financial independence and lifestyle. Running your own business can be very satisfying. However, it can be fraught with pitfalls for the unwary. Only a quarter of small businesspeople seek professional advice before starting their own business. This may explain why three-quarters of small businesses fail within the first five years.

Choice of business structure

There are four main business structures for a small business: sole trader, partnership, company or trust. Choosing the right operating structure before you start a business is critical. Get professional advice on which structure best suits

your needs. Each business structure has its own advantages and disadvantages which will affect your taxation position, personal legal liability, the life of your business, the availability of capital and the flexibility of your business operations. Similarly, there may be specific legislation relating to the type of business you wish to start that restricts the choice of structure to use. Your solicitor will consider the type of business you're starting together with your individual circumstances to help you weigh up factors such as the required capital, how much expertise you need and your business planning strategy.

Documentation

If you intend buying an existing business, you should receive the following documents from the seller:

- a form 19 *Estate Agents Act* 1990 (Vic) giving details of the financial position of the business;
- a s51 statement indicating whether or not the agent is going to help you find finance;
- a contract;
- a transfer of the registered business name (if applicable);
- a transfer of any permits or licences (if applicable); and
- a transfer of the lease of the premises and/ or any equipment.

Do not sign any documentation without first consulting your solicitor and only pay money to a solicitor or licensed real estate agent.

The contract

Do not sign a contract without first having it checked by your solicitor. Your solicitor will ensure the contract reflects your expectations and all legal requirements are met.

The contract should include:

- a full description of the business;
- the business name and whether or not it's registered;

- allocation of the sale price - how the price has been determined between goodwill, stock, plant and equipment and possibly restraint of trade requirements;
- provisions for the purchase of all the stock or the stock up to an agreed value. It is common practice to employ a professional valuer to fix a value;
- warranties regarding the sales performance of the business; and
- a provision that the sale is subject to you obtaining the necessary finance and assignment of any applicable lease.
- a provision in relation to a trial period and milestones to be achieved in that period.

It may be necessary to have special conditions inserted into the contract to assist your new business during the transition between owners. These can include:

- a restraint on the vendor to prevent him from opening a similar business in competition after finalisation of the sale to you;
- a requirement for the vendor to work in the business for a set period of time after settlement, to introduce you to suppliers and customers and assist in the day to day running of the business; and
- the method of adjusting the pay entitlements of continuing employees.

Starting a small business or buying an existing business is an important decision in your life. Do your homework and make sure you are a success statistic.

More Information

Useful Web links: Business in Victoria,
[http: www.business.vic.gov.au](http://www.business.vic.gov.au)
 The LIV has information on small businesses at
www.liv.asn.au/public/legalinfo/smallbus.

Proposed changes to land tax

A recent state government proposal to levy land tax on properties owned by trusts could see some land owners facing land tax increases of 600 - 800 per cent. The proposed tax levy on land held in trusts would be greater than land tax on land not held in trusts.

A trust is a form of property ownership where one person (the trustee) holds the property on behalf of the beneficiaries. The trust may earn income and the trustee may distribute income to the beneficiaries. One of the most common forms of trust is a family trust where the beneficiaries are family members. This is a common form of ownership for family businesses and for self funded retirees.

Owning a property in a trust is a way for small businesses and professionals to protect their asset, especially a business or property other than their residential home. If the person is personally sued then the property will not be classed as a personal asset

The proposed new tax would apply \$200 plus 1 per cent tax rate on all land properties held by trusts valued between \$20,000 and \$1.19 million. Land tax for land not held in trusts starts at 0.2 per cent on properties worth \$200,000. This would mean a property worth \$400,000 held in trust would pay \$4,000 in land tax compared to \$600 for property owned by an individual or company.

The Law Institute of Victoria (LIV), the Tax Institute of Australia and the Property Council of Australia and the Real Estate Institute of Australia have all been critical of the proposal. The current proposals penalise people for simply using a trust structure compared with using other forms of collective investment such as a company, partnership or unincorporated joint venture. There is also concern that the Government has assumed that the presence of a trust structure is simply a tax avoidance scheme and ignored the other benefits of trust structures.

The Law Institute of Victoria believes any reforms should not generate extra revenue. Measures should be put in place to allow people to rearrange their land tax affairs without penalty before the any new tax regime takes effect. Otherwise people will be retrospectively penalised for adopting investing structures that were and still are perfectly legal.

If you have property held in trust you should speak to your solicitor about the proposed changes and what it will mean for you. [n](#)

More Information

From the LIV Bookshop: Trust Structures Guide 2005, Harwood Andrews Lawyers and the taxation Institute of Australia, \$250