



# Can I lose my deposit if I can't settle on a property purchase in SA?

Just over a year ago, [Nine News](#) reported on a Queensland couple who lost their \$75,000 deposit when they could not complete settlement of their purchase of a property because their lender missed the settlement date.

Although there are important differences in the law between Queensland and South Australia, this unfortunate case provides a timely reminder to property purchasers to ensure that their contracts contain provisions to protect them in case of unforeseen delays and to act quickly to instruct their lenders to get ready for settlement.

## **Can I lose my deposit if I can't settle on a property purchase in SA?**

Yes, you can.

After the expiration of your statutory cooling off period provided by section 5 of the Land and Business (Sale and Conveyancing Act) 1994 (SA) if you do not complete settlement of the purchase of

the property on the date set out in your contract (Settlement Date), you are at risk of losing your deposit.

What happens if I miss the Settlement Date? Do I lose my deposit straight away?

In South Australia, if you are using an industry standard land sale contract (for example contracts prepared by the Law Society of South Australia, the Real Estate Institute of South Australia and the Society of Auctioneers and Appraisers), these contracts set out the process and time frames for what happens if you do not complete settlement on the Settlement Date.

Typically, if you miss the Settlement Date for any reason, your contract will entitle the vendor to serve you with a written notice specifying:

1. that you are in default or breach of the contract because you have not settled;
2. a new date for settlement; and
3. that if you don't complete settlement on the new date, that the contract will be terminated and that you will lose your deposit.

If you do not settle on the new date, your contract will usually give the vendor the right to terminate the contract and keep your deposit. The contract may also give the vendor the right to sue you for damages, interest and their legal costs.

You should seek specific legal advice about your contract as there are subtle but important differences between them.

## What can I do to avoid losing my deposit?

The key to protecting your rights and your deposit is to have appropriate terms set out in your contract before you sign it (we call these 'Special Conditions') and ensuring that your lender has enough time to prepare for settlement.

If you are borrowing money to finance your purchase of a property, then you should consider:

1. Including a Special Condition that makes your contract 'subject to finance'. This means that the contract is conditional on a lender approving the loans that you need to buy the property. If the lender does not approve your loans, then you can terminate the contract and get your deposit back.
2. Making sure that you give your lender enough time to get ready for settlement. It is no use having a 'subject to finance' clause and getting all of your finances organised only to find that your lender is not ready to settle. Even if you've done everything right, just like the couple in Queensland, you can lose your deposit if your lender is not ready to settle on the Settlement Date.

The industry standard for the Settlement Date is 30 days after the contract is signed. More and more we are seeing that lenders are so busy right now that 30 days is not enough time for the lender to get ready for settlement. As such, many contracts now extend the date to 45 days, 60 days or longer after signing the contract.

No matter what the Settlement Date is, you must always coordinate with your lender, mortgage

broker and conveyancer/solicitor immediately so that they can work on getting ready for settlement on time.

Most importantly, you need to keep communication lines open so that if there are going to be any settlement delays, the vendor is kept fully informed. We find that in most cases as long as you are open and honest with the vendor and explain why you can't settle and advise that you are working to get to settlement as quickly as possible, the vendor will be cooperative and work with you to complete settlement. After all, the vendor wants to sell their property to you.

## **What if I bought the property at auction?**

Auction purchases of properties are almost always 'cash unconditional' and cannot be 'subject to finance' or any other condition. You also do not have the protection of the statutory cooling off period.

As such, before you buy a property at auction, you need to be completely sure that your lender has approved your loans needed to buy the property. You should also find out how much time your lender will need to be ready for settlement so that this can be agreed with the vendor before the auction.

## **How can Andersons help?**

It is imperative that you seek specific legal advice when purchasing property. If you have purchased, or are thinking about purchasing a property, our experienced property law team at Andersons can provide you with accurate advice and assistance to make sure that your interests are protected.

[Contact us here.](#)