

It's Your Call to Enter Into an Option Agreement – Key Considerations for Put and Call Options

Option agreements are an increasingly common means by which developers secure development sites. There is good reason for that, as they provide developers with flexibility and assist with managing cash flow and liability. Option agreements typically involve a put option, being an option to require a purchasing party to purchase a property on specified terms and a call option, being an option to require a landowning party to sell the property on specified terms. Typically, there will be a call option on its own or a combined put and call option, a put option on its own being unusual.

Option agreements can cause a range of issues for developers and property owners dealing with them, ranging from failure to achieve commercial expectations to adverse tax and stamp duty consequences. These should be carefully considered before entering into option agreements.

Developers will be primarily concerned with maximising the flexibility of the arrangements, without causing adverse tax and stamp duty consequences. There is a tension between the two, as the wrong kind of flexibility can have adverse tax and stamp duty consequences. Developers need to be careful about how they structure such arrangements after amendments to the stamp duty legislation last year, which significantly undermine the benefit of previously common structures. Issues for developers to consider include:

- If one of my objectives is to manage liability, e.g. in relation to statutory warranties for residential building work, have I carefully thought through the functions of the various entities involved and how the provisions of the Home Building Act 1989 and other legislation will apply to them.
- If there may be an assignment or novation of my rights under the option arrangements, have I carefully thought through the taxation consequences, particularly in relation to CGT and stamp duty?

Assignment of rights under a call option or the call option component of a put and call option can result in my being liable as transferor for call option assignment duty under section 107 of dutiable property. The novation, assignment or nomination of an option will also attract stamp duty under section 9B of the Duties Act 1997. A credit for this may be made when assessing duty on the contract of sale, if the option is exercised, but a refund will not be available if the option is not exercised.

Property owners will be primarily concerned with commercial and practical matters, particularly achieving the intended commercial outcome and containing some of the associated risks. Issues for property owners to consider include:

- Does a put and call option arrangement meet my needs, if I expected a sale?
Bear in mind that an option arrangement and a sale are two different things and that an option arrangement may not lead to a sale.
- Am I receiving an appropriate price?
The price payable under an option agreement might be negotiated a year or more in advance of a sale and might fall well short of the actual value of the property when the sale occurs.
- Will the developer pay my costs of negotiating and entering into the option arrangement?
This is a common expectation of property owners, but developers can be reluctant to agree to this.
- Am I expecting to receive an option fee if the sale does not proceed?
It is common for developers' draft agreements to provide for the option fee to be refundable if the matter does not proceed, which most would regard as inappropriate.
- Who am I actually dealing with and who is liable to pay me?
This can be unclear, with option agreements commonly providing for the option holder to have the right to nominate another party to act as a purchaser if the option is exercised, often further complicated by assignment or novation of the option agreement. Scenarios can even arise in which a property owner is unsure whether a party claiming to be entitled to exercise the option actually is entitled.

These are complex issues and typically involve large amounts of money, with the potential for significant losses if approached incorrectly. We have dealt with many such matters and would be pleased to assist.

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