

A better deal for purchasers off-the-plan?

By Carolyn Middleton

New laws will come into effect on 1 December 2019 to better protect purchasers off-the-plan. These changes follow a spate of strata residential buildings found to have major defects and in two cases, necessitating the emergency evacuations of residents. The new laws aim to give better protection to purchasers of properties off-the-plan through greater transparency by imposing additional disclosure obligations on a vendor and the creation of new rights for a purchaser to rescind the contract or claim compensation in limited situations.

Off-the-Plan

“Off-the-plan” refers to the sale of a lot in a proposed strata plan, which is unregistered as at the date of the contract. Title to a strata lot is created upon registration of a strata plan. Typically, an off-the-plan contract favours a vendor by allowing an extended period for completion of the development and flexibility to make changes to plans, fixtures or fittings, and to register instruments against the title to the lot. The new laws temper the degree to which an off-the-plan contract may now favour a vendor.

Longer Cooling Off Period

Purchasers of residential properties have statutory cooling-off rights.¹ A purchaser may exercise the cooling off rights to rescind the contract within five business days of the date of the contract. The new laws have doubled the cooling off period from five business days to 10 business days.

The 10 business day cooling off period will apply to off-the-plan contracts from 1 December 2019 and all sale contracts for residential properties from 2 June 2020.

Disclosure Statement & Draft Documents

From 1 December 2019, a vendor will be required to provide a disclosure statement to a purchaser before contracts for sales off-the-plan are exchanged.² The disclosure statement summarises key aspects of the contract such as title structure, sunset date, development approval, appointment of a principal certifying authority or rights of the vendor to cancel the contract in certain situations.

A vendor must also attach to the disclosure statement a draft strata plan prepared by a registered surveyor as well as draft s88B instrument, proposed schedule of finishes, draft strata by-laws and draft strata development contract or management statements, if applicable.

Should a vendor not provide a disclosure statement, draft strata plan or other relevant documents before exchanging contracts, then a purchaser can rescind (or cancel) the contract within 14 days of the date of the contract. This is a new right of rescission.

New Contractual Clauses

The most significant changes concern the contract. The new laws prescribe terms which are implied in all off-the-plan contracts with the effect of tilting the balance back towards the purchaser.

¹ *Conveyancing Act* 1919, Part 4 Division 8

² **Subject to one exception:** where an option is exercised to enter into a contract off-the-plan and the option deed was signed before 1 December 2019

Change in a Material Particular

Until now, generally a purchaser had a right to rescind an off-the-plan contract if there was substantial difference between the draft strata plan and the registered strata plan which detrimentally affected the property. Usually a “*substantial difference having a detrimental effect on the lot*” was defined as a decrease in the area of that lot of 5% or more.

This is now altered to a change in a material particular. A “*material particular*” includes changes to management statements for strata, building, community precinct or neighbourhood schemes, strata development contract or development contract that will or likely to adversely affect the use or enjoyment of the lot. It does not include changes to the proposed lot number or street name, change to the specific location of parking space or storage area, or a change or inclusion of allocation of costs for shared expenses in a building management or strata management statement.

Notice of Change

A vendor must service a notice to the purchaser of any change to a material particular at least 21 days before the date for completion.

After receiving a notice of change, a purchaser may have rights to:

- (1) rescind the contract; or
- (2) claim compensation,

Rights to rescind or claim compensation must be exercised within 14 days of the receiving the notice.

Right to Rescind

A purchaser may rescind the contract provided the purchaser can show:

- (1) it would not have entered into the contract had it been aware of the change; and
- (2) it would be materially prejudiced by the change.

Claim for Compensation

Alternatively, a purchaser may decide to remain in the contract and make a claim compensation.

A claim for compensation must specify:

- (1) the amount claimed;
- (2) the relevant change or inaccuracy;
- (3) why the purchaser would not have entered into the contract if the change had been known; and
- (4) how the purchaser is materially prejudiced by the change.

Compensation is capped at 2% of the price.

A claim for compensation does not prevent completion of the contract. If a compensation claim is not finalised, then the amount claimed is not paid to the vendor on settlement but paid to the deposit-holder pending determination of that claim.

A compensation claim is finalised in one of the following ways:

- (1) if the vendor rectifies the relevant change or inaccuracy upon which the claim is brought;
- (2) the vendor agrees to pay the amount claimed; or
- (3) an arbitrator determines the claim.

In the case of disagreement, the parties must appoint an arbitrator within one month of the receipt of the notice or completion of the contract, whichever occurs first. If no arbitrator is appointed within 3 months of completion or 4 months of the receipt of the notice, whichever occurs first, then the compensation claim is deemed to be withdrawn.

A purchaser should be mindful of the time frames for the making or determination of a compensation claim to avoid the prospect of a deemed withdrawal of its compensation claim.

Notice of Registration of Strata Plan

Completion cannot take place until 21 days after the purchaser has received copies of the registered strata plan and associated documents. This change gives the purchaser an additional seven days on what has been the standard notice period of 14 days to complete.

After receiving the registered strata plan and associated documents, a purchaser may rescind the contract if the disclosure statement includes any inaccuracy in a material particular such that the purchaser would not have entered into the contract if it had been aware of the inaccuracy and is materially prejudiced as a result. The same criteria and procedure as set out above for a notice of change applies.

Sunset Clause

Traditionally a sunset clause nominated a date by which the strata plan would be registered with the vendor having the power to extend the sunset date because of construction delays or matters beyond its control. The number and length of the extensions was limited. If the matter did not complete by the sunset date then either party could rescind the contract.

No longer can a sunset clause give a right to automatically rescind the contract. A vendor's rights to rescind a contract under the sunset clause is limited to the following circumstances:

- (1) where each purchaser is given notice of the proposed rescission and consents in writing to rescind the contract;
- (2) where the vendor has obtained an order from the Supreme Court permitting rescission under the sunset clause;
- (3) in those circumstances permitted by the regulations.³

The vendor must satisfy the Court that it is just and equitable for an order for rescission to be made.

³ The regulations do not presently specify any additional circumstances.

Conclusion

Although the new laws are welcome, they are not the panacea for all risks associated with off-the-plan contracts. Purchasing a property off-the-plan is an inherently more risky and complex transaction compared to the purchase of an existing property. The complexity arises because the subject matter of the off-the-plan contract does not presently exist. The risks are many, ranging from the completion of the building, quality of construction, and movements in the property market.

When making an important decision about purchasing an existing property or property off-the-plan, a prospective purchaser should seek professional legal advice about the contract and the transaction.

Contact us at Middleton Gardiner & Associates on telephone 02 8005 4057 or by email carolyn@middletongardiner.com if you require advice or assistance regarding the sale or purchase of property.

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