

# Circular

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## Legal protections for off the plan property purchasers

On 17 November 2015 the NSW Government passed the *Conveyancing Amendment (Sunset Clauses) Act 2015* to provide further protections for purchasers in off the plan property contracts. This Act inserts a new Division 10 into the *Conveyancing Act 1919* entitled 'Off the plan contracts'.

The Act addresses concerns that some developers are using the 'sunset clause' as a way of terminating an off the plan contract specifically for financial gain. There have been reports of developers deliberately delaying a project so that the sunset clause can be activated. The purchaser receives their deposit back but will be out of pocket for their legal/conveyancing expenses and may be priced out of buying a replacement property.

### Off the plan contracts

An off the plan contract is a contract for the sale of a lot that does not have a separate title at the time the contract is entered into. Off the plan contracts are used by developers to presell vacant land lots or strata units before the necessary building and contract works have been finalised.

The purchaser pays a deposit and waits for the developer to obtain registration of a plan at LPI, which upon registration will create an individual title to the land or unit. Once the title for the lot has issued, the contract can be completed in the usual way.

### Sunset clauses

Off the plan sales are conditional contracts which require some mechanism to allow the contract to be terminated if the development is not finalised.

A sunset clause is a provision in an off the plan contract that provides for a contract to be rescinded if the lot is not created by the sunset date. The sunset date specified in the contract is the latest date by which the lot will be completed and will have a separate title issued for it. Most sunset clauses allow either the vendor or the purchaser to rescind if the development is not completed within time.

### Changes to the Conveyancing Act

The new Division 10 of the *Conveyancing Act 1919* aims to prevent developers from unreasonably rescinding off the plan contracts for residential property under a sunset clause. Residential property has the same meaning that it does in s 66Q of the Act. In summary this is:

- a parcel of land (less than 2.5 ha in area) on which no more than two dwellings exist (or are in the process of construction)

- vacant land on which construction of a single place of residence is not prohibited by law
- a lot or lots (including proposed lots) under the strata schemes development legislation intended to be used as a single place of residence.

### **The vendor's right to rescind**

Under the new protections, a vendor must give each purchaser notice in writing at least 28 days prior to rescission under a sunset clause. The notice must state why the vendor is proposing to rescind and give reasons for the delay.

If the lot has not been created before the sunset date, the vendor can only rescind under a sunset clause if:

- the purchasers give written consent to the vendor's proposed rescission; or
- the vendor obtains an order from the Supreme Court permitting the rescission; or
- the reason for the rescission comes within a category prescribed by the Regulations (no Regulations have yet been made).

### **Supreme Court considerations**

The factors the Supreme Court will consider when deciding whether to approve the vendor's proposed rescission will include:

- the terms of the contract
- whether the vendor has acted unreasonably or in bad faith
- the reason for the delay
- whether the subject lot has increased in value
- any other matter the court considers to be relevant.

The vendor is liable to pay the purchaser's costs of the application to the Supreme Court, unless it can be shown that the purchaser's refusal to consent to the rescission was unreasonable.

### **Commencement of the new provisions**

The new laws apply to any purported rescission that takes place on or after 2 November 2015, the date that the Minister for Better Regulation and Innovation announced that the legislation would be brought to Parliament. The reason for this retrospective application is to prevent a rush of rescissions prior to introduction of the legislation.

### **More information**

The full text of the Bill as presented to Parliament can be found on the [NSW Legislation website](#).

General information about off the plan sales contracts is available from the [Fair Trading website](#).