



# Discussion paper

## *Off-the-plan contracts*

## *Conveyancing (Sale of Land) Amendment Regulation 2019 A Regulation under the Conveyancing Act 1919*

**June 2019**

**Submissions accepted until Wednesday, 24 July 2019**

Forward all submissions to: [ORG-Admin@finance.nsw.gov.au](mailto:ORG-Admin@finance.nsw.gov.au)

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## Office of the Registrar General

### **Discussion paper – Off-the-plan contracts *Conveyancing (Sale of Land) Amendment Regulation 2019***

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# 1. Executive summary

In November 2018, the Government passed legislation to give stronger protections and greater transparency to purchasers of residential property under off-the-plan contracts. These changes were introduced by the *Conveyancing Legislation (Amendment) Act 2018*, which also made provision to clarify the role of electronic technology in land transaction documents.

Central to the reform is a new disclosure regime that requires developers of all off-the-plan properties to give a prescribed set of information documents to purchasers.

Before the off-the-plan protections can commence, regulations need to be made that set out the detailed requirements of the new regime.

We seek community feedback on the proposed Regulation before it is made and the legislation is commenced.

The proposed Regulation includes detail about:

- a new form of disclosure statement and additional disclosure documents to be attached to off-the-plan contracts;
- remedies where the vendor has not met new disclosure obligations;
- the alternative remedy of compensation where changes have rendered the disclosure statement inaccurate as to a material particular;
- guidance as to what constitutes a 'material particular';
- a new form of prescribed warning statement to reflect the extension of cooling off periods for off-the-plan contracts to 10 business days (from 5 business days, for other residential transactions).

The Regulation also makes minor amendments to prescribed warranties to update terminology and legislative references following changes introduced by the *Environmental Planning and Assessment Amendment Act 2017*.

More detailed information about the off-the-plan reforms and a summary of key legislative provisions is included in Appendix 3 to this discussion paper.



## 2. Legislative framework

### *Conveyancing Act 1919*

The *Conveyancing Legislation (Amendment) Act 2018* ('Amendment Act') inserts new provisions relating to off-the-plan contracts into the *Conveyancing Act 1919*. These are yet to commence.

The proposed Regulation is made under the Conveyancing Act and will amend the *Conveyancing (Sale of Land) Regulation 2017* ('Sale of Land Regulation') to make specific provisions for disclosure and remedies in off-the-plan contracts.

## 3. Discussion of the proposed Regulation

### 3.1 Preliminary Matters

#### Commencement

The proposed Regulation includes a potential commencement date of **1 September 2019** however this date may not allow the conveyancing and property development industry sufficient lead time to prepare for changes.

The Government recognises that contracts are often prepared for marketing purposes well in advance of any sale taking effect. In many cases it is likely that draft contracts will be held by real estate agents before commencement, but will be exchanged after the new legislation takes effect. The existing vendor disclosure provisions, and the proposed Regulation, permit a purchaser to rescind the contract within 14 days of exchange if the vendor has not met certain disclosure requirements. The agreed commencement date will need to allow sufficient lead time to update draft contracts for the sale of land, and reduce the risk that these will be invalidated by the change in law.

- 1. Should the Regulation (and the off-the-plan provisions under the Amendment Act) commence on 1 September 2019? If not, when should the reforms come into operation?**

### 3.2 New disclosure documents for off-the-plan contracts

Off-the-plan purchasers are essentially committing to buy property before it exists, and sometimes before development approval has been obtained. These purchasers need to have sufficient information about the final project to give confidence and certainty about the transaction. The Amendment Act provides this certainty through a new mandatory disclosure regime specific to off-the-plan.

#### Disclosure statement

New section 66ZM requires an approved form of disclosure statement to be attached to an off-the-plan contract before the purchaser signs it. The disclosure statement is intended to be a short document outlining key features of the development transaction. It is not intended to replace the contractual provisions, but to identify critical aspects and direct the purchaser to relevant clauses. If the disclosure statement is too comprehensive, purchasers may be tempted to rely only on the summary document without considering the contract as a whole.

A proposed form of disclosure statement appears at Appendix 1 to this discussion paper. It includes features such as key dates, whether development approval has been given, and whether the contract is conditional on other events. This statement must be available for inspection with the contract before the property can be advertised for sale.

There may be other matters that should be included in the disclosure statement. For example, concerns have been raised about the existence of embedded electricity networks in some strata schemes which may deliver competitive pricing but also limit the ability of owners to 'shop around' for alternative providers. These embedded networks involve installation during construction of infrastructure required for delivery of utilities and services creating a private network, with services on-sold to owners within the building. Commonly these arrangements relate to electricity networks, but can extend to a range of services including gas, heating, and internet access.

**2. The disclosure statement may be an appropriate place to alert purchasers to plans to utilise an embedded network in the proposed scheme.**

**3. Should any of the information in the draft disclosure statement be omitted from the approved form? If so, on what basis?**

**4. What other information that is likely to be known at the time contracts are signed should be included in the disclosure statement?**

**5. Should the disclosure statement require the developer to state whether the scheme will be subject to an embedded network or other agreement with third parties relating to the supply of utilities and services to the common property?**

**6. Does there need to be any guidance as to where the disclosure statement should appear in the contract? For example, should this be the first page of the contract?**

## Draft plans

The disclosure statement must include a copy of *'a draft plan, prepared by a registered surveyor, in the way and containing the information prescribed by the Regulations'* (s66ZM(2)). Clause 4A of the proposed Regulation sets out the information that the draft plan must contain.

The plan will need to include the proposed lot number and show sufficient information to identify the location of the lot being sold. The area (or size) of the lot must also be included.

Strata properties often comprise utility lots used for parking or storage, as well as the residential lot. For these properties, the precise area and location of the residential lot must be shown, but it is sufficient for this information to be approximate where it relates to lots to be used primarily for parking or storage.

The Government recognises that final positioning of utility lots is often not settled until later in the development process and that it is reasonable for developers to retain some flexibility around this aspect. Purchasers should, however, have an indication of where parking and storage will be located within the building. Where a purchaser has a particular need for parking and storage to be in a set location (perhaps for accessibility reasons), then this can be addressed via special condition in the contract.

The plan must also show the proposed location of any easement or other restriction affecting the subject lot.

Strata properties must include a proposed floor plan and location diagram. For community title, the draft plan must include a proposed location diagram, draft detail plan, and draft community, precinct or neighbourhood property plans.

The draft Regulation does not require that the schedule of unit entitlements be included. The strata legislation requires that the unit entitlements must be apportioned by a valuer on a market value basis no more than 2 months before application is made for the strata certificate. This timing prevents the unit entitlements being provided at the time an off-the-plan contract is exchanged.

**7. Is there any additional information that should be included in the draft plan to provide buyers with more certainty?**

**8. Should any of the prescribed information not be included? If not, why not?**

**9. Is there any other information that would not be known with certainty at the time contracts are prepared, and should not be included in the plan (or be noted only in approximate terms)?**

#### **Other documents to be included**

Clause 4A(2) prescribes additional documents to be included in the disclosure statement. These are:

- any s88B Instrument that is proposed to be lodged with the plan;
- any schedule of finishes;
- for strata properties, draft by-laws;
- a draft management statement, where the subject property comprises or includes a lot in a community, precinct or neighbourhood scheme;
- if a strata management statement or building management statement will be required for the registration of the plan, then a draft of that statement will need to be attached. This does not need to include a provision for the allocation of the costs of shared expenses, which may not be known until much later in the development;
- a draft strata development contract must also be included if the land comprises or includes a lot in a proposed development scheme.

**10. Are any of the required documents unable to be provided or would pose a significant cost to developers if required at the time contracts are prepared?**

**11. Is there any additional information that a purchaser should be aware of, and a developer is capable of disclosing early in the development, that should be included in the contract?**

#### **Consequences of non-disclosure**

A vendor's failure to comply with the new mandatory disclosure regime carries the same consequences as a breach of existing disclosure requirements. That is, the proposed Regulation amends clause 17 to allow a purchaser to rescind the contract within 14 days after exchange where the vendor has not attached the disclosure statement (and included documents) to the contract.

### **3.3 Notification of changes to 'material particulars'**

The Amendment Act requires vendors to notify purchasers of significant changes that occur to the property during the construction period. This reform is in response to consumer complaints that purchasers are often presented with a final product that differs from what was disclosed at the time they entered into the contract.

In the past, purchasers have also been left to review the final plan before settlement to decide for themselves whether any change has been made, without any explanation from the developer. Purchasers have also reported inspecting the constructed property only to discover changes to room sizes and dimensions, to the quality of finishes used and, in extreme cases, changes to the floor plan configuration so that the apartment contains fewer rooms than expected.

Not all changes must be notified. New section 66ZN requires the vendor to serve notice of changes which have resulted in the disclosure statement being inaccurate in relation to a 'material particular'. The notice can be served at any stage of the project, but at least 21 days before settlement.

A 'material particular' is defined in new s66L to include certain changes that affect the use and enjoyment of the subject lot, like changes to the draft plan, by-laws, schedule of finishes or easements that will adversely affect how the property can be used. The list is not exhaustive, and the proposed Regulation provides further guidance by prescribing additional matters and setting out changes that will not be 'material particulars'.

#### **Additional 'material particulars'**

Clause 21(2) provides that changes to the following documents that will, or are likely to, affect the use and enjoyment of the lot will be 'material particulars':

- a management statement for a community, precinct or neighbourhood scheme;
- a strata management statement or building management statement;
- a strata development contract.

#### **Matters which are not 'material particulars'**

The proposed Regulation recognises that developers will need to retain some flexibility during the construction period and some changes will not be 'material particulars' requiring notification and for which the purchaser will have a remedy. Presently, these matters are:

- a change to the proposed numbering of a lot; and
- a change in the location or area of the part of a strata lot used primarily for parking or storage (where the change is in accordance with the terms of the contract).

### **3.4 Changes to material particulars – compensation claims**

The new legislation provides for significant consequences where a disclosure statement has been rendered inaccurate as to a material particular. A purchaser may rescind the contract if they would not have entered into it had they been aware of the change, and the change would materially impact them. This right of rescission arises under new s66ZO after being served with a notification of changes, and under s66ZP if the registered plan reveals inaccuracies in relation to a material particular that had not been notified.

However, the legislation recognises that many off-the-plan purchasers do not want to rescind the contract because of a change to a material particular, especially when they have been out of the property market for several years waiting for completion. In many cases, purchasers want to settle so that they can move into the property, but be compensated for the change and later rectify the issue themselves.

The proposed Regulation provides an alternative remedy of compensation through new clause 19A. This clause permits a purchaser who is entitled to rescind the contract under sections 66ZO or 66ZP to instead claim compensation from the vendor up to 2% of the purchase price.

#### **Making the claim**

Clause 19A sets out the process for claiming compensation:

- The purchaser must make the claim within 14 days after receipt of the notice of changes or registered plan. This is the same time frame in which rescission rights may be exercised;
- The claim must be served in writing, signed by each of the purchasers (or the solicitor/conveyancer for each purchaser);
- The claim must be served on the vendor or the vendor's solicitor/conveyancer, and if more than one vendor then on any one of the vendors or vendors' solicitors/conveyancers.

Service of a claim for compensation does not prevent either party from issuing a notice to complete in accordance with the contract.



## Determining the claim – new clause 19B

New clause 19B sets out how a claim is finalised. This occurs if the vendor agrees to pay the amount claimed (or a lesser sum as agreed by the purchaser). Otherwise, the claim is to be determined by an arbitrator.

The Regulation sets out the time frame in which an arbitrator is to be appointed:

- If the parties have not agreed to resolve the claim within 1 month of serving the claim notice or by settlement (whichever occurs first), then they will need to appoint an arbitrator.
- If no arbitrator is appointed by the earlier of 2 months from service of the claim notice or 1 month after settlement, a party may request the assistance of the Secretary of the Department of Customer Service in appointing an arbitrator.
- A claim is taken to be withdrawn if an arbitrator has not been appointed within the earlier of 4 months after service of the claim notice, or 3 months of completion.

The parties may still complete the purchase while the claim is on foot. If the claim is resolved before settlement, the compensation amount is paid as an adjustment on completion.

Otherwise, the deposit-holder must hold the claim amount pending determination of the claim, or until the claim is withdrawn. Once the claim has been determined, the deposit holder must pay the amount due to the purchaser from the retained sum, with any balance payable to the vendor. If the claim is withdrawn, the retained sum is payable to the vendor.

**12. Should arbitration be the only method of resolving these claims? If not, what other methods should be considered?**

**13. Should the regulation make provision as to responsibility for costs of appointment of the arbitrator, or is it appropriate for this to be left to the parties to determine?**

## 3.5 Cooling off period

Currently, a 5 business day cooling off period applies to contracts for residential property, during which time purchasers are able to obtain legal advice, carry out searches and secure finance approval. The cooling off period may be shortened or waived, but only if the purchaser's solicitor or conveyancer provides a certificate under Section 66W of the Conveyancing Act. That certificate requires the practitioner to certify having explained the contract to the purchaser, as well as the consequences of giving the certificate, which is to make the contract unconditional.

Consultation feedback determined the standard cooling off period to be inadequate for off-the-plan buyers having regard to the size and complexity of the document. In response to this feedback, the Amendment Act extends the cooling off period for residential off-the-plan contracts to **10** business days.

New s66S(6) permits regulations to be made that limit the ability to waive cooling off periods for off-the-plan contracts. A regulation could permit the period to be shortened, but by a prescribed period. For example, the regulation may permit the reduction of the cooling off period, but by a maximum only of 5 days using a s66W Certificate, which may prevent misuse of the waiver process.

**14. Should the Regulation prevent waiver of cooling off periods for off the plan contracts by prescribing a maximum time period by which the cooling off period can be shortened? If so, what time period would be appropriate?**

### Prescribed warning statement

Section 66X of the Conveyancing Act requires contracts for the sale of residential property to include a warning statement alerting buyers to cooling off rights. Currently, the form of warning statement is prescribed

by clause 12 and Schedule 5 to the Sale of Land Regulation which is printed in the standard provision pages of the Contract for the Sale of Land issued by the Law Society of NSW and Real Estate Institute (NSW).

The proposed Regulation amends the prescribed form of warning notice to reflect the extension of the cooling off period for off-the-plan sales from 5 to 10 business days.

### **Transitional provision**

Where a contract does not include the prescribed form of warning statement, s66X(2) of the Conveyancing Act permits the purchaser to rescind the contract at any time before completion.

Contracts are often prepared weeks before exchange, so that the property can be marketed by a real estate agent. It is likely that some contracts will be prepared with the old form of warning statement, and be exchanged after the new laws take effect. While it is expected that off-the-plan contracts will be updated to reflect other changes introduced by the Amendment Act and proposed Regulation, there is a real risk that practitioners will not think to update warning statements in contracts that are not off-the-plan. Failure to include the statement in the appropriate form is a breach of s66X and will permit a purchaser to rescind.

This risk is addressed by transitional clause 22 of the proposed Regulation, which permits the old form of warning notice to be used in contracts for residential properties that are not being sold off-the-plan until 1 March 2020.

**15. Is 6 months an appropriate period in which the old form of warning statement may be used for contracts that are not off-the-plan?**

## 4. Consultation process

### **Making a submission**

Anyone wanting to comment on any matter relevant to the proposed Regulation, whether or not it is addressed in this discussion paper, is invited to make a written submission. However, matters covered by the *Conveyancing Legislation (Amendment) Act 2018* and the *Conveyancing Act 1919* are not the subject of the consultation process.

**All submissions must be received by 5pm on 24 July 2019.**

Please send all submissions to [ORG-Admin@finance.nsw.gov.au](mailto:ORG-Admin@finance.nsw.gov.au)

If you wish to submit your comments in paper, please forward these to:

*Conveyancing (Sale of Land) Amendment Regulation 2019*

Office of the Registrar General

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### **Important note: release of submissions**

All submissions will be made publicly available. If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission. Automatically generated confidentiality statements in emails are not sufficient. You should also be aware that, even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*).

### **Evaluation of submissions**

All submissions will be considered and assessed and the proposed Regulation will be amended, if necessary, to address issues identified in the consultation process. If further information is required, targeted consultation will be held before the proposed Regulation is finalised.

# Appendix 1

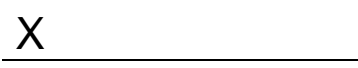
## Disclosure Statement – Off the Plan Contracts

This is the approved form for the purposes of s66ZM of the Conveyancing Act 1919.

<b>VENDOR</b>	
<b>PURCHASER</b>	
<b>PROPERTY</b>	

DETAILS	
<b>Completion Date (if known):</b>	_____ (DD/MM/YYYY)
<b>Sunset Date:</b>	_____ (DD/MM/YYYY)
<b>Can the Sunset Date be extended?</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No Refer to clause _____ of contract
<b>Has development approval been obtained?</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No Development Approval Number: _____
<b>Is the contract conditional on any event?</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No Provide details, including relevant clause/s of contract: _____ _____ _____

ATTACHMENTS (s66ZM(2) of the Conveyancing Act 1919)	
The following prescribed documents are attached to this disclosure statement ( <i>select all that apply</i> ).	
<input type="checkbox"/> Draft Plan <input type="checkbox"/> s88B Instrument proposed to be lodged with Draft Plan <input type="checkbox"/> Schedule of Finishes <input type="checkbox"/> Draft By-Laws <input type="checkbox"/> Other (please specify): _____	<input type="checkbox"/> Draft Precinct/Neighbourhood/Community Management Statement <input type="checkbox"/> Proposed Precinct/Neighbourhood/Community Development contract <input type="checkbox"/> Draft Strata Management Statement <input type="checkbox"/> Draft Building Management Statement

SIGNATURE	
<b>The Purchaser acknowledges receipt of this disclosure statement and attachments.</b>	
<b>Signature of Purchaser</b>	
	Print Name: _____
<b>Date:</b>	_____ (DD/MM/YYYY)

## Appendix 2

### Summary of the proposed Regulation

Clause 1	provides the name of the proposed Regulation
Clause 2	provides the date of commencement of the Regulation as 1 September 2019
<b>Schedule 1</b>	<b>Amendment of the <i>Conveyancing (Sale of Land) Regulation 2017</i></b>
Item [1]	– inserts definitions for ‘ <i>disclosure statement</i> ’ and ‘ <i>off the plan contract</i> ’ into Clause 3
Item [2]	– inserts new Clause 4A to prescribe additional documents to be attached to off-the-plan contracts and disclosure statement
Item [3]	– amends Clause 17 to provide that a purchaser may rescind the contract for the vendor’s failure to attach a disclosure statement to an off-the-plan contract
Item [4]	– inserts new Clause 19A to provide purchasers with an alternative remedy of compensation instead of rescission under s66ZO of the Act, where the vendor has failed to notify changes as required by s66ZN of the Act. This clause sets out the process for making a claim. – Inserts new Clause 19B setting out how a compensation claim under clause 19A is to be determined, including the time frame for appointing an arbitrator.
Item [5]	– removes previous Clause 21 relating to savings provisions which no longer apply. – inserts new clause 21 to provide a definition for ‘ <i>material particular</i> ’ for the purposes of s66ZL of the Act and gives guidance for matters which are not <i>material particulars</i> . – inserts new Clause 22 to create transitional arrangements for the use of cooling off period notices in contracts for the sale of residential land other than off-the-plan contracts.
Item [6]	– amends Item 15(2)(b) in Schedule 1 Prescribed Documents to refer to new Division 10 of Part 4 of the Act which now contains the definition of ‘off the plan contract’.
Item [7], [8]	– amends Schedule 3 Prescribed Warranties to reflect changes to terminology and legislative references for works orders arising from amendments to the <i>Environmental Planning and Assessment Act 1979</i> .
Item [9]	– amends Schedule 5 Forms to prescribe new Item 2 in <i>Form 1 Cooling off period (purchaser’s rights)</i> . This amendment changes the cooling off notice to reflect the extended cooling off period of 10 business days for off-the-plan contracts.



# Appendix 3

## New protections for off-the-plan buyers – summary of reforms

### Background

#### *Off-the-plan contracts*

An off-the-plan contract is used to sell a parcel of land or strata unit that does not have its own title at the time contracts are signed. These are a popular way for buyers to enter into the property market, as buyers can commit to purchasing a property that will not be settled for some time. A deposit (often 5 or 10% of the price) is paid on exchange of contracts, with the construction and settlement period (often several years) allowing buyers time to save additional funds required for settlement.

#### *The need for Government action*

Off-the-plan sales represent more than 11% of the residential sale market, with this percentage expected to grow as NSW moves to higher density housing and strata development increases in popularity.

Purchasers who buy off-the-plan are particularly vulnerable to the actions of the vendor/developer, yet regulation has not kept pace with changes in the residential property market.

NSW has a comprehensive vendor disclosure regime for the sale of residential property but there are no specific requirements for developments sold off-the-plan. Off-the-plan buyers are not generally able to physically inspect the property before purchase and will not have access to registered documents, like by-laws, that may restrict the way the land can be used. Contract terms and the level of disclosure vary widely. Reports have come to light of developers substantially altering development plans after contracts have been exchanged, to the detriment of purchasers.

#### *2015 sunset clause reforms*

In November 2015, the Government took urgent action to protect purchasers from having off-the-plan contracts rescinded by unscrupulous developers via sunset clauses. These are contractual terms that allow either party to terminate an off-the-plan contract should a certain event, like the registration of the plan, not occur by a specified date.

The Government responded to reports of developers using sunset clauses to rescind purchasers' contracts en masse, only to re-list the same apartments at higher prices, taking advantage of a rising property market. Emergency legislation tightened rules around sunset clauses and limited their use. The legislation was amended so that vendors can now only rescind contracts via sunset clauses with the approval of the Supreme Court, unless the purchaser agrees.

#### *Further reforms - Conveyancing Legislation (Amendment) Act 2018*

In November 2017, the then Minister for Finance, Services and Property announced a review of the laws surrounding off-the-plan contracts. This included the release of a discussion paper by the Office of the Registrar General, 'Off-the-plan contracts for residential property'.<sup>1</sup> Consultation feedback in response to this discussion paper revealed a strong community expectation for the Government to introduce legislation requiring vendors to:

- disclose certain standard information about the proposed property;
- notify purchasers of changes made during development;
- protect purchasers by putting safeguards on how the deposit is held;
- provide remedies for purchasers where delays occur or where the property is not delivered as the purchaser expected.

Legislation was developed in consultation with the conveyancing and development industries as well as consumer groups and, on 22 November 2018, the *Conveyancing Legislation (Amendment) Act 2018* received

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<sup>1</sup> <https://www.registrargeneral.nsw.gov.au/discussion-papers/discussion-paper-off-the-plan-contracts>

assent. The legislation aims to give off-the-plan purchasers greater certainty about what they are buying and builds on safeguards introduced by the Government in 2015, in response to community concerns.

The new laws address the vulnerability of off-the-plan buyers by creating a more transparent contractual process, setting minimum standards of disclosure and providing statutory remedies where the final property differs from what was promised.

The following table provides a summary of key changes introduced by the *Conveyancing Legislation (Amendment) Act 2018*.

<p><b>A new mandatory disclosure regime for off-the-plan contracts</b> (s66ZR(2), s66ZM)</p>	<p>Before the contract is signed, vendors must disclose crucial information about the development (including sunset dates) in a mandatory disclosure statement, and attach key documents prescribed by regulations. These matters are discussed in <b>Part 3.2</b> of this paper.</p>
<p><b>Notification of changes to what was disclosed</b> (s66ZO, s66ZP, s66ZQ)</p>	<p>Developers will have to notify purchasers of changes to a 'material particular' during the development. These are changes that will adversely affect the use or enjoyment of the lot being sold. Examples may include changes to the size of the lot or the internal configuration of a strata unit. These matters are discussed further in <b>Part 3.3</b> of this paper.</p>
<p><b>Statutory remedies where purchasers are materially prejudiced by changes</b> (s66ZO, s66ZP, s66ZQ)</p>	<p>If a purchaser is materially prejudiced by a change to a material particular, and would not have entered the contract had they known about the change, they will be able to rescind the contract. The proposed regulation also prescribes a mechanism for materially prejudiced purchasers to claim compensation (but remain in the contract). These matters are discussed further in <b>Part 3.4</b> of this paper.</p>
<p><b>Registered documents to be given to purchasers before settlement</b> (s66ZP)</p>	<p>Developers will need to provide the purchaser with a copy of the final registered plan at least 21 days before settlement.</p>
<p><b>Sunset clauses</b> (s66ZS)</p>	<p>The new legislation extends the definition of a sunset clause to capture other events that trigger termination of the contract, like the issue of an occupation certificate. The legislation also confirms that the Court can award damages if rescission is permitted.</p>
<p><b>Cooling off period</b> (s66ZS(3), (7))</p>	<p>The cooling off period for off-the-plan contracts is extended to 10 business days (from 5 business days for contracts relating to already constructed residential property). The prescribed form of warning notice about cooling off periods has been changed in the proposed regulation to reflect the extended cooling off period for off-the-plan contracts. This is discussed further at <b>Part 3.5</b> of this paper.</p>
<p><b>Deposits</b> (s66ZT)</p>	<p>Deposits must be held by the stakeholder on behalf of both parties in a controlled money or trust account.</p>

The full text of the *Conveyancing Legislation (Amendment) Act 2018* is available on the official NSW Government website for online publication of legislation at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)



New South Wales

# Conveyancing (Sale of Land) Amendment Regulation 2019

under the

Conveyancing Act 1919

[*The following enacting formula will be included if the Regulation is made:*]

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Conveyancing Act 1919*.

Minister for Customer Service

## **Explanatory note**

The object of this Regulation is to make further provision in relation to off the plan contracts for the sale of residential land as a consequence of the amendments made by the *Conveyancing Legislation Amendment Act 2018*.

The Regulation also makes minor amendments of a law revision nature consequent on the *Environmental Planning And Assessment Amendment Act 2017*.

This Regulation is made under the *Conveyancing Act 1919*, including sections 52A, 66X, 66ZL (1) (the definition of *material particular*), 66ZM (2) and 202 (the general regulation-making power) and clause 1 (1) of Schedule 9.

Conveyancing (Sale of Land) Amendment Regulation 2019 [NSW]

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## **Conveyancing (Sale of Land) Amendment Regulation 2019**

under the

Conveyancing Act 1919

### **1 Name of Regulation**

This Regulation is the *Conveyancing (Sale of Land) Amendment Regulation 2019*.

### **2 Commencement**

- (1) This Regulation commences on the day on which it is published on the NSW legislation website, except as provided by this clause.
- (2) Schedule 1 [1]–[6] and [9] commence on 1 September 2019.

## Schedule 1 Amendment of Conveyancing (Sale of Land) Regulation 2017

### [1] Clause 3 Definitions

Insert in alphabetical order in clause 3 (1):

*disclosure statement* has the same meaning as in Division 10 of Part 4 of the Act.

*off the plan contract* has the same meaning as in Division 10 of Part 4 of the Act.

### [2] Clause 4A

Insert after clause 4:

#### 4A Documents to be attached to off the plan contract and disclosure statement

- (1) For the purposes of section 66ZM (2) (a) of the Act, the following information must be included in a draft plan included in a disclosure statement attached to an off the plan contract:
  - (a) the proposed lot number of the subject lot,
  - (b) sufficient information to identify the location of the subject lot,
  - (c) the area of the subject lot,
  - (d) if the contract relates to land that comprises or includes a lot in a proposed strata scheme—the draft floor plan and draft location plan,
  - (e) if the contract relates to land that comprises or includes a lot in a proposed community, precinct or neighbourhood scheme—the draft location diagram, draft detail plan and draft community, precinct or neighbourhood property plan,
  - (f) the site of any proposed easement, profit à prendre, restriction on the use of the land or positive covenant affecting the subject lot.
- (2) If the contract relates to land that comprises or includes a lot in a proposed strata scheme, it is sufficient if the draft plan includes the approximate location and area of the parking and storage area.
- (3) For the purposes of section 66ZM (2) (b) of the Act, the following documents must be included in a disclosure statement attached to an off the plan contract:
  - (a) any proposed schedule of finishes,
  - (b) any instrument under section 88B of the Act that is proposed to be lodged with the draft plan,
  - (c) if the contract relates to land that comprises or includes a lot in a proposed strata scheme—the draft by-laws,
  - (d) if the contract relates to land that comprises or includes a lot in a proposed community, precinct or neighbourhood scheme—the draft management statement and the draft of any proposed development contract,
  - (e) if the contract relates to land that comprises or includes a lot in a proposed development scheme—the draft strata development contract,
  - (f) if the contract relates to land that comprises or includes a lot in a proposed strata scheme that relates to a part strata parcel and a strata management statement will be required under section 99 of the *Strata Schemes Development Act 2015* for the registration of the strata plan—the draft strata management statement,



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- (g) if the contract relates to land that will be subject to a building management statement under Division 3B of Part 23 of the *Conveyancing Act 1919*—the draft building management statement.
- (4) A draft strata management statement or draft building management statement required to be included in a disclosure statement under this clause is not required to include a provision for the allocation of the costs of shared expenses (as required under clause 2 (1) (e) of Schedule 4 to the *Strata Schemes Development Act 2015* or clause 2 (1) (e1) of Schedule 8A to the *Conveyancing Act 1919*).
- (5) It is not necessary for the draft plan, or any document included in a disclosure statement, to strictly comply with any applicable lodgment rules or regulations under the *Real Property Act 1900* or any other Act, but substantial compliance is sufficient.
- (6) In this clause:
  - community property plan, community scheme, detail plan, development contract, location diagram, management statement, neighbourhood property plan, neighbourhood scheme, precinct property plan* and *precinct scheme* have the same meaning as in the *Community Land Development Act 1989*.
  - development scheme, floor plan, location plan, part strata parcel, strata development contract* and *strata management statement* have the same meaning as in the *Strata Schemes Development Act 2015*.
  - parking and storage area*, in relation to a contract that relates to land that comprises or includes a lot in a proposed strata scheme, means the part of the subject lot that is to be used primarily for storage or parking (and not for residential purposes) and that is not contiguous to the main part of the subject lot.
  - strata scheme* has the same meaning as in the *Strata Schemes Management Act 2015*.

### [3] Clause 17 Purchaser may rescind contract or option

Insert after the note to clause 17 (1) (a):

- (a1) for the vendor's failure to attach a disclosure statement to an off the plan contract in accordance with section 66ZM of the Act and clause 4A, or  
**Note.** The documents required to be included in the disclosure statement and the information required to be included in the draft plan (which is to be included in the disclosure statement) are specified in clause 4A.

### [4] Clauses 19A and 19B

Insert after clause 19:

#### 19A Purchaser may claim compensation instead of rescission

- (1) A purchaser under an off the plan contract for the sale of land who has a right to rescind the contract under section 66ZO or 66ZP of the Act, may, instead of rescinding the contract, make a claim for compensation from the vendor of up to 2% of the purchase price of the property.
- (2) A claim for compensation must be made before completion of the contract and no later than:
  - (a) in the case of a right to rescind under section 66ZO of the Act—14 days after the purchaser receives the notice of changes in accordance with section 66ZN, or

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- (b) in the case of a right to rescind under section 66ZP of the Act—14 days after the purchaser receives the registered plan in accordance with that section.
- (3) A claim for compensation must be made by serving on the vendor a written notice that specifies the amount of compensation claimed by the purchaser (a **claim notice**).
- (4) A claim notice must be signed by:
  - (a) the purchaser or the purchaser's solicitor, or
  - (b) if there is more than one purchaser, each of the purchasers or their respective solicitors.
- (5) A claim notice must be served on:
  - (a) the vendor or the vendor's solicitor, or
  - (b) if there is more than one vendor, any one of the vendors or the solicitor of any of the vendors.
- (6) Service of a claim notice may be effected in accordance with section 170 of the Act or at the address of the vendor shown in the contract or in accordance with the service provisions in the contract.
- (7) Service of a claim notice under this clause does not prevent completion of the contract.

## **19B Determination of compensation claims**

- (1) A claim for compensation is finalised if:
  - (a) the vendor agrees to pay to the purchaser the amount of compensation claimed by the purchaser in the claim notice or a lesser amount agreed by the purchaser, or
  - (b) an arbitrator determines the claim under this clause.
- (2) The parties are to appoint an arbitrator to determine a claim for compensation if the claim has not been finalised by agreement between the parties within 1 month of service of a claim notice or by completion of the contract, whichever occurs first.
- (3) If the parties do not appoint an arbitrator in accordance with subclause (2) within 2 months of the service of a claim notice or 1 month of completion (whichever occurs first), an arbitrator is to be appointed by, or in a manner approved by, the Secretary of the Department of Customer Service at the request of a party.
- (4) The amount that an arbitrator may determine a purchaser is entitled to in respect of a claim for compensation is not to exceed the total of the amount specified by the purchaser in the claim notice and the costs to the purchaser of the claim.
- (5) If a claim for compensation is finalised before completion, the amount of compensation is to be paid to the purchaser as an adjustment on completion.
- (6) If a claim for compensation is not finalised before completion, the following applies:
  - (a) the amount of compensation claimed by the purchaser (the **claim amount**) is not to be paid to the vendor on completion,

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- (b) the holder of any deposit payable under the contract is to hold the claim amount until the claim is finalised or taken to be withdrawn under subclause (7), whichever occurs first,
  - (c) if the contract provides for the investment of any deposit payable under the contract:
    - (i) the holder of the claim amount may invest the amount in accordance with the relevant provisions of the contract, and
    - (ii) any interest earned on the claim amount is to be paid to the purchaser and vendor in the manner agreed between the purchaser and vendor or as determined by the arbitrator of the claim for compensation,
  - (d) when the claim for compensation is finalised—the holder of the claim amount is to pay:
    - (i) the amount of compensation agreed between the purchaser and vendor, or the amount determined by the arbitrator of the claim for compensation, to the purchaser, and
    - (ii) any amount remaining from the claim amount to the vendor,
  - (e) if the claim is taken to be withdrawn after completion—the claim amount is to be paid to the vendor.
- (7) A claim for compensation is taken to be withdrawn if an arbitrator has not been appointed to determine a claim for compensation within 4 months of the service of the claim notice or 3 months of completion, whichever occurs first.

**[5] Clauses 21 and 22**

Omit clause 21. Insert instead:

**21 Material particulars for off the plan contracts**

- (1) For the purposes of the definition of *material particular* in section 66ZL (1) of the Act, a provision of any of the following documents that will, or is likely to, adversely affect the use or enjoyment of the subject lot is a material particular:
  - (a) a strata management statement,
  - (b) a building management statement under Division 3B of Part 23 of the *Conveyancing Act 1919*,
  - (c) a management statement for a community, precinct or neighbourhood scheme,
  - (d) a strata development contract,
  - (e) a development contract.
- (2) For the purposes of the definition of *material particular* in section 66ZL (1) of the Act, the following are not material particulars:
  - (a) a change in the proposed lot number of the subject lot,
  - (b) if the contract relates to land that comprises or includes a lot in a proposed strata scheme—a change in the location or area of the parking and storage area, but only if the change is made in accordance with the terms of the contract.
- (3) Expressions used in this clause have the same meaning as in clause 4A.

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## 22 Transitional provision for cooling off period form

- (1) A contract for the sale of residential property (other than an off the plan contract) may, until 1 March 2020, include the existing item 2 or the amended item 2 in Form 1 in Schedule 5.
- (2) In this clause:  
*amended item 2* means item 2 of Form 1 in Schedule 5 to this Regulation as amended by Schedule 1 [9] of the *Conveyancing (Sale of Land) Amendment Regulation 2019*.  
*existing item 2* means item 2 of Form 1 in Schedule 5 to this Regulation as in force immediately before the commencement of Schedule 1 [9] of the *Conveyancing (Sale of Land) Amendment Regulation 2019*.

## [6] Schedule 1 Prescribed documents

Omit “section 66ZL” from item 15 (2) (b). Insert instead “Division 10 of Part 4”.

## [7] Schedule 3 Prescribed warranties

Omit item 2 (d) (i) and (ii). Insert instead:

- (i) a Demolish Works Order as referred to in item 3 of Part 1 of Schedule 5 to the *Environmental Planning and Assessment Act 1979*, in circumstances in which the building was erected without a required planning approval (within the meaning of that Schedule) or a required approval under the *Local Government Act 1993* or the building was erected in contravention of the *Environmental Planning and Assessment Act 1979*,
- (ii) a Restore Works Order, Compliance Order or Repair or Remove Works Order as referred to in items 10–12 of Part 1 of Schedule 5 to the *Environmental Planning and Assessment Act 1979*,

## [8] Schedule 3, item 4 (d) (i) and (ii)

Omit the subparagraphs. Insert instead:

- (i) a Demolish Works Order as referred to in item 3 of Part 1 of Schedule 5 to the *Environmental Planning and Assessment Act 1979*, in circumstances in which the building was erected without a required planning approval (within the meaning of that Schedule) or a required approval under the *Local Government Act 1993* or the building was erected in contravention of the *Environmental Planning and Assessment Act 1979*,
- (ii) a Restore Works Order, Compliance Order or Repair or Remove Works Order as referred to in items 10–12 of Part 1 of Schedule 5 to the *Environmental Planning and Assessment Act 1979*,

## [9] Schedule 5 Forms

Omit item 2 in Form 1. Insert instead:

- 2 EXCEPT in the circumstances listed in paragraph 3, the purchaser may rescind the contract at any time before 5 pm on:
  - (a) the tenth business day after the day on which the contract was made—in the case of an off the plan contract, or
  - (b) the fifth business day after the day on which the contract was made—in any other case.