New vendor disclosure requirements for off the plan purchases

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Summary

Solicitors and conveyancers for vendors and developers need to be aware of the additional vendor disclosure obligations in force since 1 December 2019.

The changes have come into effect following the commencement of the *Conveyancing Legislation Amendment Act* 2018 ('the Act') and the *Conveyancing (Sale of Land) Amendment Regulation* 2019 ('the Regulations').

The amendments attempt to protect purchasers against detrimental and unforeseen changes made to a property they are purchasing in what is often a long period between signing a contract for sale and settlement.

The new obligations require additional documents to be attached to a contract for sale, and create a continuing obligation on vendors to notify the purchaser of key changes to their lot before completion.

It is essential that these additional obligations are met as purchasers may otherwise be granted the right to rescind the contract, and in some instances be able to seek compensation from the vendor.

Off the plan contracts

The additional vendor obligations apply to 'off the plan contracts'.

The new disclosure obligations do not apply to contracts made prior to 1 December 2019 or to contracts arising from an option deed entered before this date. The new requirements are in addition to the existing disclosure requirements and warranties already prescribed by Part 2 of the *Conveyancing (Sale of Land) Regulation* 2017.

Disclosure Statement

The amendments provide that a disclosure statement must be prepared and a copy attached to the contract prior to marketing a property for sale.

The disclosure statement must:

1. be in the approved form;
2. include a copy of a draft plan prepared by a registered surveyor containing information required by the Regulations (i.e. lot number, area of lot, information to identify the lot and other details); and
3. attach a series of other documents as required under section 4A of the Regulations including any proposed schedule of finishes, proposed restrictive instruments and restrictions under s88B of the Act (e.g. easements and covenants).

The prescribed form of the disclosure statement and the additional documents required to be attached ensure that key information in respect of the title, building approvals and completion are available to the purchaser prior to entering into a contract.

Failure to attach

Purchasers are entitled to rescind the contract in the event that the disclosure statement and documents are not attached to the contract before it is signed.

Other new disclosure requirements post exchange – Notice of change to material particular

The amendments also place additional obligations on vendors post exchange. Vendors are now required to serve the purchaser with a notice of changes to a lot in the approved form at least 21 days before completion if they become aware that the disclosure statement:

1. is inaccurate in respect of a material particular at the time the contract was signed; or
2. has otherwise become inaccurate in relation to a material particular since signing due to a change.

Material particulars are changes that will or are likely to adversely affect the purchaser's use or enjoyment of the lot, and may include changes to draft plans, by laws, easements or covenants, changes to schedule of finishes, strata management statements and other matters.

Some changes are expressly excluded by the Regulations, such as changes to the proposed lot number and street name.

After being served with the notice, the purchaser may be able to rescind the contract if they can demonstrate that they would not have entered into it had they been aware of the change, and are materially prejudiced by the change.

Alternatively, the purchaser may remain in the contract but claim compensation for up to 2% of the purchase price.

Other new disclosure requirements post exchange – Copy of registered plan

Vendors must also serve the purchaser with a copy of the registered plan and any documents registered with the plan 21 days prior to completion. Purchasers are not required to settle until 21 days following receipt of a copy of the registered plan and related documents.

The purchaser may be able to rescind, if following service of the plan and related documents, there is an inaccuracy in the disclosure statement in relation to material particular where the purchaser would not have entered into the contract, and would be materially prejudiced by the inaccuracy.

Other general requirements - Cooling off statement

The cooling off period in respect of off the plan contracts has now also been extended from five to ten business days.

Contracts for sale must include an updated cooling off statement which outlines the ten business day period. Failure to include this may give the purchaser a right to rescind the contract.

What do these changes mean?

For Vendors

It is essential to ensure that vendors of off the plan lots meet the additional disclosure obligations and general requirements to avoid the situation where the purchaser may rescind or claim compensation.

For Purchasers

Purchasers of off the plan properties face greater uncertainties than other purchasers, as they are unable to see and inspect what they are purchasing, which may be subject to changes by the time of completion.

The amendments to the law have also arrived in the context of increased concerns across New South Wales following multiple instances of largescale residential developments which have been found inhabitable due to severe building defects post settlement.

The changes help address the concerns of purchasers in entering off the plan contracts, by placing a greater responsibility on vendors and developers to ensure that accurate information in respect of a property is provided at the beginning of a transaction, and significant changes are not made to avoid losing a sale.

The changes also work to comfort and protect purchasers by providing the ability to rescind in situations of changes to a property which are significant and disadvantageous.

While the changes do not necessarily alleviate the issues being faced in New South Wales in respect of the significant defects at Mascot Towers and the Opal Towers in Homebush, in our view the changes are welcomed. They represent a trend towards further protections for consumers and more responsibility and culpability of developers.

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