

“Off the Plan” Sales | What Vendors Need to do in the Current Market

Sale of strata apartments “off the plan”, i.e. before they are built, has long been common with new developments. Developers typically require pre sales to satisfy lending requirements. Purchasers have historically been keen not to miss out or to lock in a price which they expect to be less than the value of the apartment when completed. However, in the current market, purchasers may have lost that enthusiasm and be looking to a way out of the contract.

In this context, developers need to review their contracts and procedures to minimise the risk of unenforceable contracts, i.e. that they are not exposed to the risk of purchaser rescission and the need to resell at a reduced price. We are now seeing situations in which this has occurred.

The key areas requiring attention in relation to sale of residential strata apartments “off the plan” are:

- Compliance with Home Building Act 1989 requirements, which in most cases require a vendor to attach to the contract a certificate evidencing home building compensation insurance, failing which the purchaser will have a right of rescission or where the relevant work has not commenced, to include in the contract a provision disclosing specified matters and giving the purchaser a right of rescission if the certificate is not provided within 14 days of the insurance being effected.
- Accuracy of marketing materials and communications. It is not unusual for purchasers to claim that the vendor or its agent or other representatives have made misrepresentations or engaged in misleading conduct and a vendor needs not only to avoid doing this, but to create a paper trail demonstrating that it has not. This is complex, because it needs to be done in conjunction with agents and other third parties.
- Compliance with contractual requirements. Although “off the plan” contracts typically limit purchasers’ rights, even a well drafted contract will require a vendor to disclose and do many things, and it is easy for a vendor to overlook one or more of these, possibly giving the purchaser rescission or other rights.
- Compliance with Conveyancing Act 1919 requirements, which:
 - requires a vendor to attach a number of prescribed documents to a draft contract before it is executed by the purchaser, failing which the purchaser may have a right of rescission. In addition, a vendor is now required to prepare and sign off on a disclosure statement with certain information previously not required to be provided, e.g. whether development consent has been obtained for the development.
 - imposes a number of implied warranties in the sale contract, generally that a number of specified adverse matters do not apply to the apartment. A vendor must disclose any such matters, if applicable, as a purchaser may otherwise have a right of rescission.

- imposes additional disclosure requirements on vendors regarding material changes to the property. In the event that there has been a material change in the property, a vendor must notify the purchaser of the material change within 21 days before completion of the contract. Failure to do so may give the purchaser a right to rescission of contract if the purchaser can show that they would not have entered into the contract had they been aware of the changes and/or inaccuracies.
- imposes a restriction on a vendor from having the purchaser's deposit released prior to completion. The purchaser's deposit must now remain in a statutory controlled trust account until completion of the contract.

We have considerable experience in this area and can help developers address these complex issues and comply with their legal obligations under the Conveyancing Act 1919 and the Home Building Act 1989.

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