



# Power to the Purchaser. Vendors: Are You Ready? Part 2

12 November 2019

## Introduction

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On 4 February 2019, we published an article titled [Power to the Purchaser. Vendors: Are You Ready?](#) which provided preliminary commentary on the proposed amendments to the *Conveyancing Act 1919* (Act) as specified in the *Conveyancing Legislation Amendment Bill 2018* (Bill).

Since our article was published, the NSW Government has released the *Conveyancing (Sale of Land) Amendment Regulation 2019* (Regulations) which has provided clarity on the additional protections granted to purchasers buying off the plan (OTP).

The Bill and Regulations have a proposed commencement date of 1 December 2019.

## Disclosure Regime

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One of the key changes in the Act and the Regulations is the requirement to attach a Disclosure Statement to all OTP contracts.

### 1. What is a Disclosure Statement?

A Disclosure Statement is an approved form which summarises the particulars of the sale including details of any sunset dates, completion periods, development approval and the principal certifying authority.

The Disclosure Statement must attach the following “prescribed documents” (to the extent applicable):

- Strata Plan prepared by a registered surveyor which is required to show:
  - the proposed lot number and area of the subject lot, and sufficient information to identify its location. For proposed strata lots, it is not necessary to show the location or area of any parking or storage area
  - the site of any proposed easement or profit à prendre affecting the subject lot, and the site of any proposed restriction on the use of land or positive covenant affecting only part of the subject lot
  - for lots in proposed strata schemes - the draft floor plan and draft location plan
  - for lots in proposed community, precinct or neighbourhood schemes - the draft location diagram, draft detail plan and draft community, precinct or neighbourhood property plan.
- Schedule of finishes;
- s88B instrument proposed to be lodged with the draft plan;
- Strata by-laws;
- Strata development contract;
- Community/precinct/neighbourhood/management statement;
- Community/precinct/neighbourhood/development contract;
- Strata management statement; and
- Building management statement.



## 2. Changes to Disclosure Statement

The vendor is required to notify the purchaser of any changes to the Disclosure Statement if the change will or is likely to adversely affect the use or enjoyment of the lot (Material Particular). A Material Particular includes but is not limited to, changes in the draft strata plan, by-laws, schedule of finishes or the creation of easements or covenants that will affect the use or enjoyment of the purchaser's lot.

The notification is required to be in an approved form (which is yet to be released) known as a Notice of Change (Notice). The vendor must serve the Notice at least 21 days prior to completion and is otherwise not required to serve the Notice at the time that the vendor actually becomes aware of a Material Particular.

## 3. Consequences of a Material Particular

The consequences of a Material Particular arising from the registered documents or revised draft documents may trigger the purchaser's right to rescind the contract or make a claim for compensation.

In order to establish that a Material Particular has taken place, the purchaser must establish that they:

- (a) would not have entered into the contract had they been aware of the Material Particular; and
- (b) would be materially prejudiced by the Material Particular.

If satisfied, the purchaser will have a statutory right to rescind the contract or make a claim for compensation for an amount capped at 2% of the purchase price. A claim for compensation must be made by serving a written notice on the vendor within 14 days of the Notice. If the parties cannot agree to resolve the claim, it can be referred to arbitration, with the arbitrator's decision being final.

If the purchaser does not serve written notice on the vendor by the time specified, the Disclosure Statement is taken to be amended with the revised documents and the purchaser will no longer be entitled to claim compensation.

## Additional Amendments

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### 1. Completion Date

The Regulations have confirmed that the purchaser will not be required to complete an OTP contract earlier than 21 days after receiving copies of the registered strata plan and any other dealings registered with it (i.e. by-laws, s88B instrument) notwithstanding any other term in the contract to the contrary.

### 2. OTP Contract Cooling Off Period

The cooling off period for all OTP contracts will be extended from 5 business days to 10 business days. This change does not impact on the sale of established dwellings or the purchaser's right to waive the cooling-off period by providing a s66W certificate.

### 3. Stronger Sunset Date Provisions

The Act has been amended to include a broader definition of a Sunset Date to capture events which may trigger a right of rescission under an OTP contract (i.e. the issuance of an occupation certificate).

This will prevent the vendor from exercising a right to rescind under a sunset clause unless each purchaser consents in writing, an order is obtained from the Supreme Court or the Regulations permit it.





## Next Steps and our Recommendations

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All changes except for the stronger sunset date provisions are not retrospective and will apply to all OTP contracts entered into on and from 1 December 2019.

We recommend that vendors engage with their consultants to carefully review all attachments to the Disclosure Statement to ensure they are correct. This will prevent or minimise any potential changes and therefore limit any rescissions or claims for compensation.

If you would like to discuss the impact of these changes or for advice as to best manage these changes going forward, please contact Danny Arraj or a member of the Blackstone Waterhouse Lawyers Property team for a confidential discussion:

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