

Article Information

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Service: Property & Development

Sector: Real Estate

Amendments to the Conveyancing Act: Sunset Clauses

The Conveyancing Legislation Amendment Act 2018 (NSW) (Amending Act) has been passed by both houses of Parliament in a bid to improve the level of protection afforded to consumers who purchase residential property off the plan.

Sunset Clauses

There has been criticism that purchasers are not adequately protected from vendors who disingenuously fail to perform sunset events before sunset dates so that they can terminate the contract for sale and resell the property for a greater profit (in circumstances where the value of the property has increased).

The Amending Act provides that a vendor will no longer be able to rely on a sunset clause to automatically rescind a contract for sale for. Instead, the vendor will be required to serve a written notice on the purchaser at least 28 days before the purported rescission, which sets out why the vendor proposes to rescind the contract, and the reason for the sunset event not occurring by the sunset date (**notice**). The vendor will then need to either:

1. obtain written consent from the purchaser to rescind the contract under the sunset clause; or
2. obtain an order of the Supreme Court permitting the rescission under the sunset clause.

It will not be easy (or cheap) for a vendor to obtain a court order permitting the rescission, as the court may only make such an order if it would be **just and equitable** in all of the circumstances (considering, for example, whether the vendor acted unreasonably or in bad faith). Under this new regime, it is certainly possible that a vendor will be disentitled from relying on a sunset clause even when the vendor is genuinely unable to perform the sunset event in time.

There is also a presumption that the vendor will pay the purchaser's **legal costs**, unless the vendor can establish that the purchaser unreasonably withheld consent in the first instance. In addition, the Amending Act will also allow the court to award **damages** to the purchaser, even if it allows the rescission under the sunset clause.

In light of these changes it is now particularly important when entering into contracts for sale, that vendors are confident that they can achieve sunset events within the prescribed sunset date - otherwise, vendors are likely to face increased costs and delay in relying on sunset clauses.

Conclusion

These new limitations on vendors' rights to rescind a contract for sale under sunset clauses will undoubtedly improve the plight of purchasers who buy residential property off the plan. However, for many purchasers (including those in the Sydney market) the amendments are far too late - their contracts for sale have already been rescinded and their properties resold for an increased profit to the vendor.