

Better Regulation Statement

October 2019

Conveyancing (Sale of Land) Amendment Regulation 2019

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*.

Central to the reform is a new disclosure regime that requires developers to give a prescribed set of information documents to purchasers. The *Conveyancing (Sale of Land) Amendment Regulation 2019* ('proposed Regulation') sets out the detailed requirements of the new regime

The proposed Regulation provides for:

- 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 proposed 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*.

The proposed Regulation has been developed in accordance with the Better Regulation Principles, as set out below:

Need for government action (Principle 1)

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.

The Amendment Act bridges this gap by introducing a separate mandatory disclosure regime that will apply to residential off-the-plan contracts. Without the proposed Regulation, existing vendor disclosure provisions will continue to apply, but there will be no detail to support the new requirements imposed by the Amendment Act

Not making the proposed Regulation poses an unacceptable risk to the community as purchasers will commit to buy properties without adequate information about what is being sold, with few remedies where the property differs from that which was promised. The time between contract and settlement in off-the-plan contracts can be some years, meaning that these purchasers are removed from the property market during this time and may be faced with having to accept a property that differs from their expectations or face rescission. The proposed Regulation ensures there are remedies available to the purchaser, including statutory compensation, in these instances.

Objective of government action (Principle 2)

The proposed Regulation sets out the detail for the new disclosure regime introduced by the Amendment Act, which aims to provide greater certainty and transparency to purchasers who buy residential property off-the-plan by providing detailed information about the end product.

The proposed Regulation is necessary as it prescribes the information that must be disclosed, and consequences for non-disclosure. Without any Regulation, the changes introduced by the Amendment Act would have minimal effect and purchasers would still be vulnerable to the actions of developers.

Consideration of options (Principle 3 and 6)

Option 1 – Take no action

The existing provisions in the *Conveyancing (Sale of Land) Regulation 2017* provide a robust vendor disclosure regime that prescribes documents for inclusion in the contract and requires the vendor to make certain warranties about the property's title and use. Presently, there are no specific obligations to disclose information about a *proposed* development.

The Amendment Act bridges this gap by introducing a separate mandatory disclosure regime that will apply to off-the-plan contracts. Without the proposed Regulation, existing vendor disclosure provisions will continue to apply, but there will be no detail to support the new requirements imposed by the Amendment Act and off-the-plan buyers will remain vulnerable to the actions of the developer.

Not making the proposed Regulation will mean that the costs on industry, the community and the NSW Government will remain substantially the same. However, the current issues faced by off-the-plan purchasers will not be resolved.

Not making the proposed Regulation will pose an unacceptable risk to the community as purchasers will commit to buy properties without adequate information about what is being sold, with few remedies available if the final property differs from what was promised. The time between exchange and settlement in off-the-plan contracts can be some years. This means that purchasers are removed from the property market during this time and may be faced with having to accept a property that differs from their expectations or face rescission.

Conclusion

Taking no action will mean that the protections introduced by the Amending Act lack necessary detail to operate effectively. This option will fail off-the-plan purchasers of residential property by providing insufficient certainty and transparency and offering limited options for redress where the final property differs from what was promised. **This Option is not considered viable.**

Option 2 – Make the proposed Regulation

The proposed Regulation sets out the detail necessary for the protections introduced by the Amendment Act to be operative.

Commencement of the Act and the proposed Regulation may result in some implementation costs to the development industry, who will be required to update draft contracts to ensure compliance with new obligations.

The requirement for a new disclosure statement, draft plan and related documents to be attached to the contract will impose an added cost on some developers. The additional cost has been considered and has been determined not to be significant. The disclosure documents that have been mandated are routinely provided by many reputable developers, and the proposed regulatory requirement prescribes minimum standards, based on best practice.

The proposed Regulation also standardises remedies, providing purchasers with an alternative to rescission where changes have been made to what was disclosed. The regulatory impact of this change is not considered significant because, as a matter of contract, vendors should be required to deliver what they have promised. The new provisions represent a benefit to the community by providing an additional remedy where purchasers still want to settle the purchase. This proposal represents a significant consumer protection measure by ensuring consistency among contracts and providing a level playing field across the industry.

Conclusion

The proposed Regulation updates provisions to align with industry practices and to reflect how purchasers are now contracting to buy property. It will ensure robust protections continue to exist for all purchasers of residential property in NSW, not only for those who purchase already constructed properties. **Option 2 is the preferred option.**

Consultation (Principle 5)

ORG consulted heavily with industry and the community during the development of the Amendment Act, and that consultation has continued to inform the proposed Regulation. The ORG released a consultation draft of the proposed Regulation and a discussion paper in July 2019 seeking feedback on key issues.

ORG received 16 submissions, from key industry stakeholders like the Law Society of NSW, Owners Corporation Network, the Australian Institute of Conveyancers (NSW), UDIA, Property Council of Australia, as well as developers and legal practitioners.

Feedback centred on the following issues:

- **Disclosure information** – stakeholders identified information that would be difficult to disclose in a draft plan with any certainty at the time contracts are signed, like the precise location of parking and storage areas within basement levels. Purchasers can still ensure specific requirements are met by negotiating special conditions in contracts, but as a result of this feedback, the Regulation will not require the plan to contain this information.
- **Compensation claims** – the Regulation prescribes compensation as an alternative to rescission where purchasers are materially prejudiced by changes to what was disclosed. If the parties cannot agree, an arbitrator can resolve the claim. The proposed Regulation was revised to confirm that an arbitrator can make an award relating to costs of arbitration and that the decision of an arbitrator is final, in response to consultation feedback.
- **Exemptions** – the proposed Regulation excludes contracts arising from option deeds exchanged before commencement, which was an issue identified during consultation. This specific exclusion protects the enforceability of the contracts that come from these options.
- **Miscellaneous changes** – the proposed Regulation also removes the potential for duplication of disclosure documents included in the Contract and removes paper-specific requirements like font sizes in warning notices, replacing these with a media-neutral legibility requirement to align with 2018 electronic contract reforms.

Engagement with industry and the community will continue as ORG monitors the application of the proposed Regulation. ORG regularly meets with stakeholders, including holding regular liaison meetings with the Law Society of NSW and developer group, to keep informed of issues and changes in conveyancing practice. Regular discussion enables issues to be identified as they arise and resolved quickly. The Regulation will be continually reviewed to ensure its effectiveness.

Preferred option (Principle 3 and Principle 4)

The preferred option is to introduce the proposed Regulation to support the introduction of a specific vendor disclosure regime, and which provides remedies where errors in disclosure documents materially impact the purchaser.

Maintaining the status quo has been determined insufficient as buyers are presently exposed to risk and uncertainty that purchasers of already constructed homes do not face.

The disclosure regime will impose further regulatory requirements on developers of residential property. This is justified in view of the prevalence of off-the-plan contracts and the difference in bargaining position between developers and buyers.

Evaluation and review (Principle 7)

As noted above, there is ongoing consultation and discussion between ORG, the community and stakeholders to ensure that ORG keeps up an awareness of issues affecting conveyancing transactions, particularly off-the-plan. This discussion enables ORG to conduct an ongoing evaluation and review of the regulatory provisions to maintain currency with conveyancing practice and to ensure that an efficient, transparent, conveyancing process continues to apply in NSW for buyers of both already constructed properties and those which are sold off-the-plan.