

Passed by both Houses



New South Wales

Conveyancing Legislation Amendment Bill 2018

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE COUNCIL, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

Legislative Council
2018

Clerk of the Parliaments



New South Wales

Conveyancing Legislation Amendment Bill 2018

Act No , 2018

An Act to amend the *Conveyancing Act 1919* and the *Real Property Act 1900* to introduce vendor disclosure requirements in relation to off the plan contracts and to support the transition to paperless conveyancing; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Conveyancing Legislation Amendment Act 2018*.

2 Commencement

- (1) Subject to subsection (2), this Act commences on a day or days to be appointed by proclamation.
- (2) Schedule 1 [1]–[3], [6], [7], [12]–[14] and [16]–[18] and Schedule 2 commence on the date of assent to this Act.

Schedule 1 Amendment of Conveyancing Act 1919 No 6

[1] Section 6C

Insert after section 6B:

6C Electronic form documents and signatures

- (1) A reference in this Act to a contract or deed includes a reference to an electronic data file containing a contract or deed in an electronic form.
- (2) This Act applies to and in respect of contracts or deeds in an electronic form in the same way as it applies to other contracts or deeds, subject to any modifications prescribed by this Act or the regulations.
- (3) To avoid doubt, Division 2 of Part 2 of the *Electronic Transactions Act 2000* applies to a requirement or permission under this Act for a document to be verified, authenticated, attested or witnessed under the signature of a person other than the author of the document, subject to any regulations under this Act.
- (4) This section extends to contracts or deeds relating to land under the *Real Property Act 1900*.
- (5) The regulations may, for the purposes of this Act, prescribe:
 - (a) what does and does not constitute an electronic signature or attestation, and
 - (b) any further requirements in relation to electronic signatures and attestations.
- (6) If a contract is provided in electronic form, all other documents that are required to be attached to the contract, or provided before completion of the contract, may, despite any other provision in this Act or the regulations, also be provided in electronic form if the document is clearly legible in that form.

[2] Section 23C Instruments required to be in writing

Insert after section 23C (2):

- (3) For the purposes of this section, a requirement for writing may be satisfied in electronic form and a requirement for writing to be signed may be satisfied by electronic signature.

[3] Section 38A

Insert after section 38:

38A Electronic form deeds

A deed may be created in electronic form and electronically signed and attested in accordance with this Part.

[4] Section 52A Contracts for sale of land

Insert “, section 66ZM” after “this section” where firstly occurring in section 52A (6) (a).

[5] Section 52A (6) (a)

Omit “this section” where secondly occurring. Insert instead “either of those sections”.

[6] Section 54A Contracts for sale etc of land to be in writing

Insert after section 54A (3):

- (4) A contract referred to in subsection (1) is not invalidated or rendered unenforceable only because it has been created in electronic form and electronically signed or attested.

[7] Section 64 Satisfaction of covenants to produce deeds

Omit “28M (4)” from section 64 (2) (b). Insert instead “28MF”.

[8] Section 66P Definitions

Insert in alphabetical order in section 66P (1):

disclosure statement has the meaning given by section 66ZM.

off the plan contract has the same meaning as in Division 10.

[9] Section 66R Preparation of proposed contract for sale of land

Insert at the end of section 66R (2) (c):

, and

- (d) in the case of an off the plan contract—a copy of the proposed disclosure statement.

[10] Section 66S Cooling off period

Omit section 66S (3). Insert instead:

- (3) The cooling off period ends at 5 pm:
- (a) on the tenth business day after the day on which an off the plan contract was made, or
- (b) in any other case—on the fifth business day after the day on which the contract was made.

[11] Section 66S (7)

Insert after section 66S (6):

- (7) The regulations may prescribe the maximum length of time by which the cooling off period for an off the plan contract may be shortened under subsection (5).

[12] Sections 66U (5), 66ZD (5) and 66ZJ (6)

Omit “or (without affecting the foregoing) by facsimile transmission” wherever occurring.

[13] Sections 66W (4) and 66ZF (4)

Omit the subsections. Insert instead:

- (4) A certificate may be given in a way prescribed by section 170.

[14] Section 66ZG Option void in certain circumstances

Omit section 66ZG (1) (a) and (1A).

[15] Part 4, Division 10

Omit the Division. Insert instead:

Division 10 Off the plan contracts

66ZL Definitions

(1) In this Division:

deposit includes an amount paid by the purchaser in relation to the purchase price of a residential lot.

disclosure statement has the meaning given by section 66ZM.

material particular includes, but is not limited to, the following:

- (a) a change to the draft plan that will, or is likely to, adversely affect the use or enjoyment of the subject lot,
- (b) a provision of draft by-laws that will, or is likely to, adversely affect the use or enjoyment of the subject lot,
- (c) an easement or covenant that will, or is likely to, adversely affect the use or enjoyment of the subject lot,
- (d) changes to the schedule of finishes that will, or are likely to, adversely affect the use or enjoyment of the subject lot,
- (e) any other matter prescribed by the regulations,

but does not include matter excluded by the regulations.

off the plan contract means a contract for the sale of a residential lot (the *subject lot*) that has not been created at the time the contract is entered into.

purchaser, solicitor and *vendor* have the same meanings as in Division 8.

residential lot means a lot (whether a strata lot or otherwise) that is residential property within the meaning of section 66Q.

(2) For the purposes of the definition of *off the plan contract*, a lot is created when the plan creating the lot becomes a registered plan.

66ZM Documents to be attached to off the plan contract

- (1) In addition to, and without limiting, section 52A (2), a vendor under an off the plan contract must, before the contract is signed by or on behalf of the purchaser, attach to the contract a disclosure statement in the approved form.
- (2) For the purposes of subsection (1), the *disclosure statement* includes:
 - (a) a copy of a draft plan, prepared by a registered surveyor, in the way and containing the information prescribed by the regulations, and
 - (b) any other documents, or copies of documents, prescribed by the regulations.
- (3) The requirement in subsection (1) to attach a disclosure statement to an off the plan contract is not contravened only because there are inaccuracies in the disclosure statement at the time the statement is attached to the contract.
- (4) The regulations may make provision for or with respect to the remedies and relief available to a purchaser under a contract for the sale of land for failure or refusal to comply with any of the provisions of this section.
- (5) Without limiting subsection (4), the remedies and relief may include remedies and relief by way of rescission of the contract by the purchaser.

- (6) In this section, *registered surveyor* means a surveyor registered under the *Surveying and Spatial Information Act 2002*.

66ZN Service of notice of changes

- (1) The vendor must serve on the purchaser, at least 21 days before completion, a notice of changes in the approved form in relation to the subject lot if the vendor becomes aware the disclosure statement attached to the contract:
- (a) was inaccurate in relation to a material particular at the time the contract was signed, or
 - (b) has become inaccurate in relation to a material particular after the contract was signed.
- (2) Notice may be served on a purchaser by serving it on a person who is authorised under the off the plan contract as a representative of the purchaser.

66ZO Purchaser's right to rescind after service of notice of changes

- (1) The purchaser may, after receiving a notice of changes, rescind the contract if a change notified in the notice of changes is such that the purchaser:
- (a) would not have entered into the contract had the purchaser been aware of the change, and
 - (b) would be materially prejudiced by the change.
- (2) If a notice of rescission is not served by the purchaser in accordance with section 66ZQ, the disclosure statement is taken to be amended to include the information notified in the notice of changes.

66ZP Purchaser's right to rescind after service of registered plan

- (1) A vendor under an off the plan contract must, before completion, serve on the purchaser a copy of:
- (a) the registered plan, and
 - (b) any other document that was registered with the plan.
- (2) The purchaser is not required to complete the contract earlier than 21 days after receiving copies of the registered plan and other documents served in accordance with subsection (1).
- (3) The purchaser may, after receiving the registered plan and other documents, rescind the contract if the disclosure statement includes any inaccuracy in relation to a material particular such that the purchaser:
- (a) would not have entered into the contract had the purchaser been aware of the inaccuracy, and
 - (b) would be materially prejudiced by the inaccuracy.
- (4) If a notice of rescission is not served by the purchaser in accordance with section 66ZQ, the disclosure statement is taken to be amended to include the information in the registered plan and other documents.
- (5) In this section, *disclosure statement* means the disclosure statement that was attached to the contract under section 66ZM and, if relevant, as amended under section 66ZO (2).

66ZQ Notice of rescission

- (1) A notice of rescission must be in writing and served on the vendor no later than 14 days after receiving the notice of changes in accordance with section 66ZO or the registered plan in accordance with section 66ZP.

- (2) The notice of rescission must be signed by:
 - (a) the purchaser or the purchaser's solicitor, or
 - (b) if there is more than one purchaser, each of the purchasers or their respective solicitors.
- (3) The notice of rescission must be served on:
 - (a) the vendor or the vendor's solicitor, or
 - (b) if there is more than one vendor, any one of the vendors or the solicitor of any of the vendors.
- (4) Service of a notice under this section may be effected in accordance with section 170 or at the address of the vendor shown in the contract or in accordance with the service provisions in the contract.

66ZR Consequences of rescission after service of notice of changes

- (1) On service of an effective notice of rescission in accordance with section 66ZQ, the off the plan contract is taken to be rescinded ab initio.
- (2) The amount of the deposit paid under the contract is payable to the purchaser.

66ZS Rescission under sunset clauses

- (1) In this section:

subject lot means the residential lot being sold under an off the plan contract.

sunset clause means a provision of an off the plan contract that provides for the contract to be rescinded if the sunset event does not occur by the sunset date.

sunset date means the date set out in the off the plan contract as the latest date (subject to any extension provided for in the contract) by which the sunset event must occur.

sunset event means the creation of the subject lot, the issue of the occupation certificate in relation to the subject lot or another event prescribed by the regulations.
- (2) For the purposes of this section:
 - (a) *rescind* includes terminate or otherwise bring to an end, and
 - (b) a lot is created when the plan creating the lot becomes a registered plan.
- (3) A vendor may rescind an off the plan contract under a sunset clause, but only if:
 - (a) each purchaser under the contract, at any time after being served with the notice under subsection (4), consents in writing to the rescission, or
 - (b) the vendor has obtained an order of the Supreme Court under this section permitting the vendor to rescind the contract under the sunset clause, or
 - (c) the regulations otherwise permit the vendor to rescind the contract under the sunset clause.
- (4) It is a term of an off the plan contract that a vendor who is proposing to rescind the contract under a sunset clause must serve each purchaser under the contract notice in writing at least 28 days before the proposed rescission that specifies why the vendor is proposing to rescind the contract and the reason for the sunset event not occurring by the sunset date.

- (5) A sunset clause cannot automatically rescind an off the plan contract and, if it purports to do so, it is to be read as if it instead permits the contract to be rescinded on or after the sunset date in accordance with this section.
- (6) The Supreme Court may, on the application of a vendor under an off the plan contract, make an order permitting the vendor to rescind the contract under a sunset clause, but only if the vendor satisfies the Court that making the order is just and equitable in all the circumstances.
- (7) In determining whether it is just and equitable in all the circumstances, the Court is to take the following into account:
 - (a) the terms of the off the plan contract,
 - (b) whether the vendor has acted unreasonably or in bad faith,
 - (c) the reason for the sunset event not occurring by the sunset date,
 - (d) the likely date on which the sunset event will occur,
 - (e) whether the subject lot has increased in value,
 - (f) the effect of the rescission on each purchaser,
 - (g) any other matter the Court considers to be relevant,
 - (h) any other matter prescribed by the regulations.
- (8) The vendor is liable to pay the costs of a purchaser in relation to the proceedings for an order under this section unless the vendor satisfies the Court the purchaser unreasonably withheld consent to the rescission of the off the plan contract under the sunset clause.
- (9) Notice may be served on a purchaser by serving it on a person who is authorised under the off the plan contract as a representative of the purchaser.
- (10) A provision in an off the plan contract has no effect to the extent that it is inconsistent with this section.
- (11) Nothing in this section limits:
 - (a) the Court's power to award damages against the vendor if an order permitting the vendor to rescind the contract under a sunset clause is made under subsection (6), or
 - (b) any right that a purchaser may have to rescind an off the plan contract under a sunset clause.

66ZT Deposit and instalments to be held as trust or controlled money

- (1) Any money paid by the purchaser by way of deposit or instalment under an off the plan contract must be held:
 - (a) as trust money by a real estate agent in accordance with the *Property, Stock and Business Agents Act 2002*, or
 - (b) as trust money by a licensed conveyancer in accordance with the *Conveyancers Licensing Act 2003*, or
 - (c) as trust money or controlled money by a law practice in accordance with the *Legal Profession Uniform Law (NSW)*.
- (2) Any money held as trust money or controlled money in accordance with subsection (1) may be invested if:
 - (a) the investment is carried out in accordance with the relevant law under which the money is held, and
 - (b) the terms of the off the plan contract do not prevent the investment, and

- (c) any interest accrued from the investment is paid into the trust or controlled money account on maturity or otherwise.
- (3) Nothing in this section affects a deposit or instalment being paid by way of deposit bond, bank guarantee or other similar arrangement.

66ZU Operation of Division 10

- (1) This Division extends to residential property under the provisions of the *Crown Land Management Act 2016* or any other Act, whether or not it deals with the conveyance or transfer of land.
- (2) This Division (other than section 66ZR) does not apply to a contract made before the commencement of this Division (as substituted by the *Conveyancing Legislation Amendment Act 2018*).
- (3) Section 66ZR (as inserted by the *Conveyancing Legislation Amendment Act 2018*) applies to a contract, whether made before or after the substitution of this Division by the *Conveyancing Legislation Amendment Act 2018*.
- (4) This Division, or a provision of this Division prescribed by the regulations, does not apply to vendors, purchasers, contracts or land prescribed by the regulations or in circumstances prescribed by the regulations.
- (5) A provision of an off the plan contract or any other agreement or arrangement is void if it would, but for this subsection, have the effect of excluding, modifying or restricting the operation of this Division.
- (6) This Division does not affect any right or remedy available otherwise than under this Division.
- (7) This Division binds the Crown.

[16] Section 170 Service of notices

Insert at the end of section 170 (1) (d):

- , or
- (e) if emailed to an email address specified by the person to be served for the service of notices of that kind, or
- (f) if sent by facsimile transmission to a facsimile number specified by the person to be served for the service of notices of that kind, or
- (g) if served in any other manner authorised by the regulations for the service of notices of that kind.

[17] Section 205 Definitions

Omit the definition of *participating party*. Insert in alphabetical order:

participating party means a person on whose behalf information is recorded in the Central Register.

[18] Section 208 Access to information in the Central Register

Omit section 208 (2) and (3). Insert instead:

- (2) If an information agreement applies to information recorded in the Central Register on behalf of a participating party, that information must not be provided to a person under this section except as permitted by the information agreement.
- (3) If an information agreement applies to information recorded in the Central Register on behalf of a participating party, the Registrar-General must not use,

permit the use of or permit access to the information except as permitted by the information agreement.

Schedule 2 Amendment of Real Property Act 1900 No 25

[1] Sections 3 (1) (a) (definition of “Law practice”) and 107 (8)

Omit “*Legal Profession Act 2004*” wherever occurring.

Insert instead “*Legal Profession Uniform Law (NSW)*”.

[2] Section 33AA Non-issue and cancellation of certificates of title

Insert after section 33AA (2):

- (2A) The Registrar-General may cancel a certificate of title, or certificates of title issued to a class of persons, and make an entry in the Register in accordance with subsection (2) (as if a certificate of title had not been issued).

[3] Section 33AA (3A) and (3B)

Insert after section 33AA (3):

- (3A) On and from the day on which a certificate of title is cancelled:
- (a) the certificate of title has no force or effect for the purposes of a statutory requirement for the lodgment or production of a certificate of title imposed in connection with the registration of a matter, and
 - (b) a statutory requirement for the lodgment or production of a certificate of title imposed in connection with the registration of a matter is taken to be satisfied by the person recorded in the Register as the person having control of the right to deal in the land providing consent to the registration of the matter.
- (3B) Section 33AAA (4) and (5) apply to a consent referred to in subsection (3A) (b) in the same way as they apply to a consent referred to in section 33AAA (3) (d).

[4] Section 33AB Alternative to production of a certificate of title

Insert in alphabetical order in section 33AB (4):

register of plans has the same meaning as in the *Conveyancing (General) Regulation 2018*.

[5] Section 33AB (4), definition of “registration”

Insert “or the register of plans” after “Register” wherever occurring.

[6] Section 36 Lodgment and registration of documents

Insert after section 36 (1E):

- (1F) If a dealing, memorandum, caveat or priority notice is lodged, any other document that supports the lodgment of the dealing, memorandum, caveat or notice is not invalidated only because it has been executed electronically.

[7] Section 56 Lands under this Act: how mortgaged or encumbered

Insert after section 56 (1):

- (1A) The Registrar-General may register a mortgage if the Registrar-General is satisfied:
- (a) the mortgagee has signed the mortgage, and
 - (b) the mortgagee has certified (in words to the effect) that:
 - (i) the mortgagee holds a mortgage granted by the mortgagor, and

- (ii) the mortgage held by the mortgagee is on the same terms as the mortgage lodged for registration.

[8] Section 61 Application for foreclosure order

Omit section 61 (4). Insert instead:

- (4) The statements made in the application must be verified:
 - (a) by the statutory declaration of the applicant or other person applying on the applicant's behalf, or
 - (b) if the statements are lodged by means of an Electronic Lodgment Network, in a way approved by the Registrar-General.

[9] Section 74B Lodgment of caveats against primary applications

Insert "or, in the case of a caveat lodged by means of an Electronic Lodgment Network, be verified in a way approved by the Registrar-General" after "declaration" in section 74B (2) (c).

[10] Section 74C Caveats lodged under section 74B to lapse under certain circumstances

Insert "or, if the notice is lodged by means of an Electronic Lodgment Network, verified in a way approved by the Registrar-General" after "to that effect" in section 74C (1) (b) (ii).

[11] Section 74W Effect of priority notice

Insert "or record" after "register" in section 74W (1).

[12] Section 74W (1) (a)

Insert "or writ" after "dealing".

[13] Section 74W (2) (j)

Insert after section 74W (2) (i):

- (j) a transfer giving effect to a sale under a writ recorded under section 105 before the lodgment of the notice.

[14] Section 97 Severance of joint tenancy by unilateral action

Insert "or verified in a way approved by the Registrar-General" after "declaration" in section 97 (4).

[15] Sections 105 (2) (c) and 105D (1) (a) (ii)

Insert "or, if the application is lodged by means of an Electronic Lodgment Network, other evidence verified in a way approved by the Registrar-General," after "declaration" wherever occurring.

[16] Section 105A Effect of recording writ

Omit "or" from section 105A (1) (r).

[17] Section 105A (1) (s)

Omit the paragraph.

[18] Section 107 Client authorisations

Insert after section 107 (1):

- (1A) To avoid doubt, a client authorisation produced in electronic form may be electronically signed.