

Buying off the plan

New protections when buying off the plan property

Developers will need a buyer's consent before they end a contract using a sunset clause, otherwise the developer will need to apply to the Supreme Court to justify termination. For details, visit the NSW Land and Property (LPI) website at lpi.nsw.gov.au (see: 'Legal protections for off-the-plan purchases').

Sometimes properties are advertised for sale before they have been built. You may be able to inspect a demonstration property or show suite to get a sense of the final product.

Buying such property is known as 'buying off the plan'. This involves different risks and considerations compared with other property purchases. In some instances, the developer may be able to vary the design of the property without the buyer's approval. Sometimes buyers may need to pay more if the cost of construction varies. Construction setbacks (eg. due to poor weather or further planning approval required) may also delay completion of the property.

The contract

Potential buyers must review the contract carefully to understand exactly what they are buying. Generally, the buyer pays a deposit to secure the property with the balance payable upon settlement. The date for completing the contract is usually not until the building is finished.

Carefully check the conditions of the contract, and obtain legal advice on the terms of the contract and the benefits and restrictions they contain. Understand what you become liable for if you withdraw from the contract. Questions to consider also include:

- Can I make changes to the finishes (eg. in the kitchen and bathroom)?
- Can I select appliances, such as stoves and dishwashers, and items such as floor and wall tiles?
- Can I visit the site during construction?

- If the building is finished earlier or later than expected, can I still arrange finance?
- What are my rights if construction is delayed or the design is altered?
- Is my deposit secure if the building doesn't go ahead?
- Can I on-sell the property to someone else during the construction period?
- Can the developer make changes to the design of my property and is my consent required?

IMPORTANT: Always read your contract and get advice from a property lawyer or licensed conveyancer.

Making an offer or an expression of interest

The manner in which properties are offered for sale can vary by development. Also, the conditions attached to a contract for sale can also vary from property to property.

Generally, properties are sold either to the highest bidder (for instance, at auction) or for a fixed price. The method of sale for any particular property may change over time. So, a property not sold at auction may be withdrawn from sale, and later, offered for sale at a certain price (and vice versa).

Developers sometimes contract several real estate agencies to sell their properties. Agents may be marketing and selling properties at the same time as the developer's own marketing and sales activities are happening. Each agent may offer the property on slightly different terms and conditions.

An expression of interest payment **will not** secure the property for you. It signals your 'interest' only. When you make an expression of interest payment, the agent must give you a receipt and confirm in writing that:

- there is no obligation to sell the property to you
- you have no obligation to buy the property
- they will refund your deposit if you don't end up entering in a contract to buy the property.

Agents can take several deposits for the same property from other prospective buyers. However, agents must tell you if other offers are later made on the property, or if it is sold to someone else.

If several agents are selling the same property, there may be a delay for the specific agent you dealt with to become aware that the property has been sold to someone else.

Prohibited marketing tactics

Agents must not mislead or deceive any parties during a negotiation or transaction. When selling properties off the plan, sales agents are not allowed to:

- advertise a property for a lesser price than other similar properties, if the advertised property is no longer available
- indicate a price range for a property, where the lower end of the range is less than the agent's estimated selling price for the property
- hold on to your expression of interest payment or use high pressure tactics to get you to buy another property at a higher price if the property you made a payment for ends up being sold to someone else.

What to consider before you buy

Where there is high demand for housing in popular areas of NSW, it may be easy for developers to market such properties months before building work is complete. Consider the following before buying:

- **Are you paying too much?** Market prices can fluctuate and growth rates today may vary in the following years. The resale value of your property once it is completed may be less than you may predict.
- **Funding the purchase:** Does paying the balance owed upon settlement rely on you selling a property you currently own? If so, you will need to sell your property 'in time'.

- **Interim accommodation?** You may need temporary accommodation if you settle the sale of the property you currently live in too early. For example, if you are moving into a retirement village, you may wish to avoid having to relocate twice (while waiting for the property you plan to move into to be completed) by timing the sale or settlement of the sale of your current home closely with when you can occupy the new one.
- **Changes to plans:** Changes to the building plans are often needed during construction. The finished complex or unit may not be the same as in the original plan. Consider any terms in the contract that may allow these changes.
- **Quality of finish:** When signing the contract, you may not know exactly how your property will look when construction is finished. Sometimes, the fixtures and fittings are different from how the buyer imagined or what was in a demonstration display.
- **Management contracts in place:** In a strata scheme, the developer may have signed binding management contracts between the owners corporation and caretakers/building managers. Prospective buyers are entitled to know the details and see copies of any such contracts. Your lawyer or licensed conveyancer can arrange the necessary searches.
- **Exclusive use or special privilege by-laws:** The developer is not permitted to register by-laws which give exclusive use of desirable parts of the common property (eg. a roof garden or parking) to owners of certain lots. This type of by-law can only be made after the initial period (ie. after one-third of the lots have been sold).

- **Unit entitlement:** The unit entitlement of the various lots in a strata scheme (which determines voting power at meetings and the required levy contributions) may not be specified or even known when properties are advertised for sale. Voting rights and strata levies have ongoing impact on owners, so keep these issues in mind.
- **Payment of deposit:** When you pay a deposit, take note of where it is paid into. It can be held in a trust account (eg. the real estate agent's trust account), or paid directly to the developer. Some developers offer to hold the money themselves and offer a higher rate of interest. As some developments can take several years to complete, that extra interest can make a difference. However, your money will be at risk if the developer becomes insolvent.

Concessions for buying off the plan

The NSW Office of State Revenue provides certain concessions to people buying property off the plan. These include stamp duty exemption and grants. Check whether or not you are eligible at the NSW Office of State Revenue website at osr.nsw.gov.au or call 1300 130 624.

Home Building Compensation Fund

Builders carrying out residential building work (including the construction of strata units) valued over \$20,000 must take out insurance under the Home Building Compensation Fund.

The Fund may help compensate you for some losses if there is defective or incomplete work in the building, and the builder or developer has become insolvent, dies, disappears, or the builder's licence is suspended for failing to comply with certain Court or Tribunal orders.

The Fund covers new houses and multi-unit residential buildings up to three storeys high. There is no cover for multi-unit buildings that are more than three storeys high. Exemptions also apply to certain types of retirement villages.

When builders take out insurance under the Fund, they are issued with a certificate of insurance (see examples of a certificate of insurance and a certificate of eligibility

on our Home Building Compensation Fund web page for Tradespeople).

Attaching the insurance certificate to the contract of sale

If building work on the property has started, a copy of the builder's certificate of insurance must be attached to the contract of sale. The certificate shows that the necessary insurance has been taken out by the builder.

Insurance is required to protect the buyer against:

- the risk of non-completion of the work
- breach of statutory warranties relating to the work.

Check that your certificate is valid by using the Home Building Compensation Fund certificates register available through the icare website at icare.nsw.gov.au

Exemptions for attaching the insurance certificate to the contract of sale

Sometimes builders only take out insurance shortly before building commences. If the building work has not yet started, the developer is not required to provide the certificate of insurance. In this situation:

- the Home Building Compensation Fund insurance must be in place before any construction starts
- the developer must give the buyer a copy of the insurance certificate within 14 days of being insured. The buyer can cancel the contract if insurance is not provided within this time
- all these conditions must be included in the contract.

For more information visit our Home Building Compensation Fund claims web page

Cancellations

The legal right to cancel the contract under the *Home Building Act 1989* is limited to situations without insurance under the Home Building Compensation Fund at the arranged time. In this circumstance, the prospective buyer can only cancel before the contract has been completed (settlement).

Be warned: where a contract of sale is completed and settled, the legal right to cancel the contract no longer

applies. This is the case even if the builder has broken the law and not provided the necessary insurance.

Warning to buyers

When you buy off the plan, you are paying for a property where the end product may not only differ from your expectations, but be worth less than you have paid by the time it is finished.

If you are thinking of entering into a contract to buy premises not yet built, exercise caution and obtain appropriate legal and other advice before signing any documents or paying any money.