

# Legal Alert

Property & Development

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## Sale of Land Amendment Bill 2018 – Victoria – Sunset Clauses

The Sale of Land Amendment Bill 2018 introduces significant changes to the law governing the use of sunset clauses in residential off-the-plan contracts by vendors in Victoria. We summarise the key changes and discuss the potential implications for vendors in Victoria. Whilst the Bill does not directly affect South Australian legislation, it is an interesting development in a comparable jurisdiction.

### Introduction

Throughout 2016 and 2017, the *Sale of Land Act 1962* (Vic) (the **Act**) was scrutinized as part of the Daniel Andrews Labor Government's broader Consumer Property Law Review (the **Review**). As a result, the *Sale of Land Amendment Bill 2018* (the **Bill**) was introduced to the Victorian Lower House on the 21 August 2018.

One of the primary functions of the Bill is to introduce reforms to the Act which are designed to address what the Review identified as "*substantive consumer detriment*" within the Victorian property market.

One of the most significant of these reforms relates to the use of 'sunset clauses' by vendors in rescinding residential off-the-plan contracts and then selling at a higher price.

### Sunset clauses under the Act

In Victoria, a purchaser under a residential off-the-plan contract ('**ROTP Contract**') has the statutory right under the Act to rescind the contract if the plan of subdivision is not registered within 18 months of the contract being entered, or, if applicable, another period as stipulated. The purchaser is also conveyed the right under the Act to rescind a ROTP Contract where an occupancy permit has not been issued by the sunset date.

On the other hand, a vendor is not conveyed an express right by the Act to rescind a ROTP Contract. However, the Act does not expressly preclude a vendor from including a provision which empowers them to rescind the contract if the plan of subdivision has not been registered, or the occupancy permit has not been issued, by a specified date.

Following the Review, the Victorian Government became aware that some vendors were using, or attempting to use, these sunset clauses to rescind ROTP Contracts before re-selling the relevant lot at a higher price. It was alleged that the delays, which allowed the vendor to invoke the sunset clause and rescind the contract, were being deliberately engineered.

As such, the Bill has been introduced and aims to restrict the use of sunset clauses by vendors in certain ROTP Contracts.

### Overview of changes

The key reforms under the Bill are that a vendor will not be able to use a sunset clause in order to rescind a ROTP Contract unless they have obtained either:

- the written consent of the affected purchasers; or
- an order from the Supreme Court.

These changes can be seen throughout the new sections 10B and 10D which regulate the manner in which a ROTP Contract can be rescinded by a vendor under a sunset clause. These are discussed in more detail below.

Other relevant proposed reforms are:

- 10A - where a sunset clause in a ROTP Contract purports to automatically rescind the contract on the part of the vendor, the sunset clause gives the vendor the right to rescind the contract on or after the sunset date in accordance with proposed sections 10A-10D.
- 10C – where a provision that purports to set a sunset date in a ROTP Contract is inconsistent with sections 10A and 10B, the sunset clause will have no effect to the extent of the inconsistency.

- 10E - introduces penalties for vendors who fail to include certain statements in a sunset clause in a ROTP Contract. For example, the vendor is required to include, within a sunset clause in a ROTP Contract, a description of the vendor's obligations with regard to giving notification of a proposed rescission of an ROTP Contract under a sunset clause. Failure to adhere this obligation, and several others requirements, may attract a maximum of penalty of \$38,685.60 for individuals, or \$193,428 for a corporation.

## Key obligations / rights of vendors

### 1. Obtaining the written consent of purchaser – 10B

The newly proposed 10B will oblige the vendor to, before rescinding a ROTP Contract under a sunset clause, obtain written consent of each purchaser to the rescission. In addition, the vendor must give each purchaser written notice at least 28 days before the proposed rescission. Importantly, the written notice must include:

- why the vendor is proposing to rescind; and
- the reason for the delay in the registration of the plan of subdivision or the issuing of the occupancy permit; and
- that the purchaser is not obliged to consent to the proposed rescission.

### 2. Seeking order from Supreme Court – 10D

Alternatively, upon the application of the vendor, the Supreme Court may make an order allowing the rescission of a ROTP Contract if it is just and equitable in all the circumstances. The proposed section 10D lists a series of factors that the Court is to take into account in determining if such an order should be made, including:

- the terms of the residential off-the-plan contract; and
- whether the vendor has acted unreasonably or in bad faith; and
- the reason for the delay in registering the relevant plan of subdivision or in an occupancy permit being issued; and
- the likely date on which the relevant plan of subdivision will be registered or the occupancy permit will be issued; and
- whether the lot that is the subject of the ROTP Contract has increased in value; and
- the effect of the rescission on each purchaser.

If the Supreme Court makes an order permitting the vendor to rescind the ROTP Contract, then the Court may make any other order it deems just and equitable which may include reasonable compensation for the purchaser.

Further, the vendor is liable to pay the costs of a purchaser in relation to the application to the Supreme Court, unless

the vendor satisfies the Court that the purchaser unreasonably withheld consent to the proposed rescission.

### Implications for vendors

If the Bill is passed, vendors must be conscious that due to amending sections 54(1)-(2), the proposed sections 10A-10C will take effect from **23 August 2018**. This intends to prevent an attempted rescission of an existing contract under a sunset clause before the commencement of the amendments. It is important to note that the Bill has not yet been enacted, and therefore the proposed sections do not yet have effect. However if enacted, these sections will have retrospective effect from 23 August 2018 and apply to ROTP Contracts which were entered into before, and were in force before, that commencement date. As such, vendors seeking to rescind these ROTP Contracts will need to comply with proposed sections 10A-10C. This means that a sunset clause, in a ROTP Contract which was entered into and in force prior to 23 August 2018, purporting to enable the vendor to rescind the contract without the consent of all purchasers may not be valid.

Vendors should be aware that proposed section 10D will also apply retrospectively, however the day the section takes effect will be the day the Bill receives Royal Assent. Although this provision allows a vendor to apply for the Supreme Court to order a rescission of the ROTP Contract, the section adds another layer of protection for purchasers as it poses the risk to vendors that they may have to pay the purchaser's costs of the application or, and additionally, reasonable compensation in lieu of a Court ordered rescission.

Vendors of lots governed by off-the-plan contracts may also need to be prepared to amend their contracts' sunset clauses in order to comply with proposed section 10E. However, 10E will not operate retrospectively, and will only apply to ROTP Contracts entered into on or after the day 10E comes into operation.

Whilst the proposed reforms offer increased protections for purchasers, the provisions discussed above only relate to sunset clauses which deal with the either the date by which a plan of subdivision is registered, or the date an occupancy permit is issued. Therefore, other rights of termination, such as failure to obtain finance, are not affected.

### Contact details

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