



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

Buying land or property off-the-plan



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BUYING LAND OR PROPERTY OFF-THE-PLAN

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This brochure contains general information only and is not intended as a substitute for legal advice. If you have specific enquiries about the content of a contract, you should consider seeking independent legal advice. If you wish to lodge a complaint with the Department of Commerce in respect of any suspected improper conduct on the part of a developer or seller, please see the back page of this brochure for further information.

Introduction

Buying “off-the-plan” can mean many things but generally involves signing a contract with a developer before the developer has obtained final approval to subdivide land that is being purchased or, in the case of a building, before building has commenced or been completed.

Off-the-plan sales referred to in this brochure include the sale of vacant land, house and land packages and strata properties (such as units, townhouses or high rise apartments) that are yet to be built or are under construction. Completion of a development can take a long time. A one to two year timeframe would not be unusual for an off-the-plan development.

Off-the-plan sales contracts are agreements where a developer promises to deliver a parcel of land, a house and land package or a strata property to a buyer at an agreed price at a future date, subject to the developer obtaining all necessary approvals in respect of the development from the relevant authorities and satisfying any conditions necessary to finalise the development. In the case of land subdivisions, for example, this would include the construction of roads, and connection to services such as power, water and sewerage.

In most cases, the buyer must pay the developer a deposit upon signing the contract, with the balance of the purchase price due at settlement. Some developers may accept a deposit bond or bank guarantee in lieu of a cash deposit. Special laws apply to secure deposit monies paid for proposed strata developments (see page 9).

The availability of newly developed land with Certificates of Title already issued depends on the strength of the property market. In very slow times a developer may hold some titled lots, however normally the industry will sell "off the plan" lots. Most mainstream developers will not sell land off-the-plan before they have received Western Australian Planning Commission (WAPC) "conditional approval" of the subdivision.

The WAPC grants conditional approval only after it has consulted on subdivision proposals with the relevant local government and affected public utilities, such as the Water Corporation and Western Power. Having regard to any comments it receives, conditional approval of the subdivision can be granted which then allows the developer to carry out all works necessary to satisfy those conditions.

Buying land off-the-plan that does not have conditional approval can expose the buyer to significant risk that the development will not proceed or will not proceed as initially proposed.

Final settlement of an off-the-plan sale can only occur after a Certificate of Title for a property has been issued by Landgate. Generally, a purchaser will have no control over the progress of a development once they have entered into a contract and there is always the risk of a development not proceeding as planned, or perhaps ever being finalised.

Does the developer own the land or the strata lots?

A recent decision of the WA Court of Appeal has made it clear that the *Sale of Land Act 1970 (WA)* prevents a developer from individually selling five or more lots in a subdivision or proposed subdivision, or two or more strata lots in a strata development or proposed development, unless they are the registered owner of the land or strata lots.

If a developer does sell lots of land or strata lots contrary to the requirements of the *Sale of Land Act 1970 (WA)*, then the sale is unenforceable by the seller and the buyer cannot be required to continue with the purchase. The buyer can, however, require the sale to proceed.

Buyers can check who the registered owner of land or strata lots is by doing a title search at Landgate.

Advantages of buying off-the-plan

Perhaps the main attraction of buying off-the-plan is that it provides purchasers with an opportunity to obtain property at the current market price on payment of a deposit (generally no more than 10%), with the majority of the purchase price being payable at settlement at some future time.

This provides purchasers with time to organise their finances and, if required, sell their existing home, without the need for bridging finance. Developers may also sell some of the land or proposed building at a discount price if they need to meet sales targets or to get construction underway. If the real estate market is experiencing growth then the land or buildings purchased off-the-plan may also rise in value by the time the property is ready to settle.

Disadvantages of buying property off-the-plan

Development does not proceed

Perhaps the biggest disadvantage of buying off-the-plan is that a developer may be unable to proceed with the project within the time specified in the contract or at all. This may occur because the developer is unable to obtain final subdivision approval or is unable to secure sufficient investment funding to finance the project. If this happens the developer may choose to cancel the contract (should the contract provide for this).

Be aware of speculative developments where a developer seeks to use deposit monies to fund the development of the land or, in extreme instances, to fund the land purchase itself. In these cases the required deposit could be significantly higher than normal and could be lost altogether if the purchaser signs away their legal rights to it, lured by a purchase price that is considerably under current market value.

Although a contract would normally provide for the return of a buyer's deposit money in the event of a development not proceeding, a contract would not usually provide for payment of any other compensation. Importantly, even though a deposit may be refunded, the buyer will have lost the opportunity to purchase elsewhere in what may have been a rising real estate market.

Security of deposit money

Deposit money can be tied up for a very long time without any guarantee of a development ever being finalised. If the developer becomes insolvent, the buyer's deposit money may also be at risk unless steps are taken to secure the money.

If a contract is for the purchase of a strata title or survey strata property, the deposit is required, under the *Strata Titles Act 1985 (WA)*, to be held in the trust account of a solicitor, real estate agent or settlement agent until a strata/survey strata plan has been registered with Landgate. However, as there is no requirement for money to remain in a trust account after registration of a plan, a developer could still access deposit money unless there is a term in the contract to prevent this.

To protect a deposit, a contract should always include a condition requiring the deposit to be held in the trust account of a solicitor, real estate agent or settlement agent, and for it not to be accessible to the developer until settlement. If the developer does not agree to include this as a term of the contract the buyer should consider the risk before going ahead at all.

Depreciating market

Despite the widely held belief that real estate property values always rise, they may not appreciate in value during a development period or could even depreciate in value. There is always a risk that the contract price for a property will be more than the market value at the time of settlement.

Quality of construction

A builder's standard of work may not be as high as expected and a completed property may therefore fail to live up to a buyer's expectations. People who buy off-the-plan are often limited to viewing marketing material or a design concept provided by the developer, and may not get exactly what they expected.

Buyer's finance

Banks or financial institutions may be less willing to lend money for buildings that are yet to be constructed or, in the case of a strata property, are below a minimum threshold size (area). Developers may also not agree to a contract being subject to the buyer obtaining finance, as this may impact upon their own capacity to obtain investment funding.

Although a bank or other financial institution may, at the time of purchase, consider a buyer fully qualified to borrow the required amount, this may be different in the future when finance is actually needed due to changes in lending policy, changes in the borrower's own financial circumstances or even changes in prevailing interest rates. If finance is essential to complete a purchase but this is not included as a term of the contract, a buyer risks being in default if they cannot proceed and may be liable to compensate the developer.

Contracts for off-the-plan purchases

Standard contracts

Developers often have pre-prepared contracts prepared by lawyers on their behalf principally to protect their interests. In some cases, the developer may choose to use the Joint Form of General Conditions for the Sale of Land which is part of the standard offer and acceptance contract produced jointly by the Real Estate Institute of Western Australia and the Law Society of Western Australia.

With strata-titled properties, the developer is required by the *Strata Titles Act 1985 (WA)* to provide certain information about the scheme before the buyer signs the contract to buy the property. A developer must provide specific disclosure statements and information about the proposed strata/survey-strata plan and by-laws, amongst other things. Where a developer fails to comply with the *Strata Titles Act 1985 (WA)*, the buyer may have a right to void the contract by notice in writing given to the developer before settlement of the contract.

Landgate administers the *Strata Titles Act 1985* and has produced *A Guide to Strata Titles*. It is a good idea to read this guide before you enter into a contract if you have not lived in a strata-titled property before.

Contracts should always be clear about what has to be done, by whom and by when, and the consequences if any conditions are not met. It's a good idea to obtain legal advice about the meaning of any terms you do not understand and whether any terms can be inserted or modified before signing.

Ambiguous wording of clauses can cause serious problems, so it pays to be very careful. Buyers should be mindful that if the selling agent for the developer suggests the wording of clauses, their duty is to act for the developer, not the buyer.

As with any contract, you may want to seek legal advice about how it can be properly reworded to address any concerns you might have. As you would expect, however, a developer may be reluctant to vary a pre-prepared contract to avoid jeopardising their own interests. A buyer may encounter a 'take it or leave it' approach from a developer marketing an off-the-plan project.

Unfair contract terms and the Australian Consumer Law

A contract to purchase land or other property off-the-plan may be subject to the unfair contract terms provisions of the *Australian Consumer Law* if it is a "standard form consumer contract".

A standard form consumer contract is a contract for the supply of goods or services or the sale of land for personal use only, where the contract is typically prepared by one party to the contract and is not subject to negotiation – usually offered on a "take it or leave it" basis. The unfair contract terms provisions of the *Australian Consumer Law* will not apply if the off-the-plan purchase contract is made for business or investment purposes.

If a standard form consumer contract contains an unfair contract term, then that term may be void. A contract term is unfair when:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (financial or otherwise) to a party if it were to be applied or relied upon.

A contract would generally be able to proceed if an unfair term is struck out by a court. However, if the unfair clause is so central to the contract that it cannot be struck out, the contract may be unenforceable.

Only a court can decide if a term in a standard form consumer contract is unfair. However, the *Australian Consumer Law* makes it clear that terms that define the main subject matter of a contract or set the upfront price, or any term that is required or permitted by law, cannot be considered unfair.

Common terms in off-the-plan contracts

Off-the-plan contracts for house and land packages or strata developments typically include terms that address the following issues:

- Price
- Deposits
- Timetable for completion
- Specifications and features
- Variations by the developer
- Withdrawal from the contract
- Settlement
- Disclaimers
- Defects liability
- Rental guarantees
- Choice of property manager

Price

Some off-the-plan contracts have a fixed price clause where the price of the property will not change during the life of the project or for some other fixed period. However, some contracts may have terms that allow for increases in building costs. Potential buyers should consider what will happen if building costs increase and whether they are prepared to accept the risk of price increases.

Deposits

Although deposits are generally cash, an off-the-plan contract may provide for the payment of a deposit by deposit bond or bank guarantee. A deposit bond is an insurance policy that provides for the insurance company to pay the requisite deposit to the developer in any of the circumstances where the deposit would ordinarily be forfeited by the developer. Developers are under no obligation to accept deposit bonds or bank guarantees.

With a cash deposit, the buyer should ensure that the money is safeguarded by asking the developer to place their deposit in trust until settlement and for this requirement to be included in the contract.

Many developers engage a real estate agency and in these cases, the deposit money must be held in the real estate agent's trust account or in the trust account of the settlement agent or solicitor who is settling the transaction.

You can check www.commerce.wa.gov.au/ConsumerProtection/licencesearch to ensure your real estate and settlement agents are licensed (all agents displayed on the Department's website hold a valid Triennial Certificate). Your deposit should not be released until settlement occurs.

If your deposit is being held by a real estate agent or settlement agent, and settlement is more than 60 days away or your deposit is more than \$20,000, you can request (in writing) that the funds be placed in an interest-bearing trust account, with the interest payable to you.

This does not have to be part of the initial contract, but can occur at a later date. If your deposit is held with a solicitor, you would need to make it a condition of the contract that the money be held in an interest-bearing trust account.

Special laws for strata developments

With sales of proposed strata properties, the *Strata Titles Act 1985 (WA)* requires contracts to include provision for deposits, and any other money payable by a buyer prior to the registration of the strata or survey-strata plan, to be paid to a solicitor, real estate agent or settlement agent, who must also be named or specified in the contract. The money must be held in the trust account of the solicitor, real estate or settlement agent until the strata or survey-strata plan is registered with Landgate. It is a breach of the *Strata Titles Act 1985 (WA)* to release money before registration of the strata or survey-strata plan. The registration of a plan is the point at which separate lots are created for which individual certificates of title can be issued.

A developer can access deposit money after registration of a plan unless there is a term in the contract to preclude this. Buyers may wish to include an additional clause, specifying that the deposit and any other moneys held must remain with the deposit-holder until settlement.

An off-the-plan contract for a strata property that includes any term that allows the developer to access deposit monies prior to the registration of the strata or survey-strata scheme, would not comply with the *Strata Titles Act 1985 (WA)*.

If the person to hold the deposit is not named or specified, or the buyer is asked to pay the deposit to someone other than a solicitor, real-estate or settlement agent, they may cancel the contract and recover their deposit money, and any other monies paid, at any time prior to the strata or survey-strata plan being registered.

Timetable for completion

Developers use sunset clauses to set a contract's end date. In deciding whether the time frame is acceptable, buyers should consider how far advanced the development is when they sign the contract and what the required future steps are. Matters that should be considered include:

- whether the developer has obtained all the necessary approvals to commence and, if not, what still needs to be approved;
- whether the developer is required to secure a minimum number or proportion of unconditional contracts before they can obtain funding to allow the project to proceed and, if so, how many contracts have already been secured; and
- the extent of progress of the development made to date (to check on progress, a proposed buyer could ask their solicitor, the developer or the developers representative whether the milestones are being met within the necessary time frames under the contract.)

With strata-titled developments, an off-the-plan contract may provide for the developer to complete the 'common property' either before or after the settlement date. "Common property" is any space or feature used or shared between all of the owners, eg, driveways, visitor parking, landscaping, pools and fences.

As a buyer, it is important to consider what would happen if the common property is not completed within the agreed time frame and what recourse you would have. To avoid any doubt, a contract should clarify exactly what recourse the buyer has if time frames are not met. Importantly, if no time frame is specified a buyer could still have recourse under the *Australian Consumer Law* if common property is not completed within a reasonable time.

Specifications and features

When signing the contract, you may not know exactly how the property will look when construction is finished nor the precise quality or standard of fixtures and fittings. As a safeguard when purchasing off-the-plan, it is important to ensure the contract stipulates the required features of the property and check that there is sufficient detail of these specified in the contract, including timeframes for completion of any "packaged" inclusions, particularly with house and land packages.

Matters that may be of particular importance to buyers include:

- The elevation and orientation of the property.
- A description of any proposed major features, such as river views.
- A detailed floor plan, including measurements and total area.
- The capacity to modify building and room dimensions.
- A detailed list of surface finishes.
- The quality of construction materials to be used.
- The quality of fixtures and fittings, including the brand name of major products.
- Whether the buyer can choose appliances or items such as floor tiles.
- The availability of utilities.
- Specific timeframes for the supply or installation of fencing, landscaping or other packaged extras (where included).
- Location of the parking area, including parking allocated for guests (in the case of strata developments).
- The provision of additional services, such as a gym or caretaker (in the case of strata developments).

Developers are under no obligation to make any modifications that you might want to a contract. If the developer is not prepared to accept changes you should consider the risks of entering into a contract that does not provide an assurance that promised features will be delivered or retained or that goods and services of the standard promised will be provided. Although it would still be open to you to take legal action if a developer fails to deliver on a promise, it is always better to have things in writing.

Variations by the developer

Some contracts allow the developer to change specifications in a contract without getting the buyer's approval. Such changes may be required due to necessary architectural or engineering adjustments to meet local government requirements and to secure approval for a project. However, changes may also be made simply to cut costs.

Generally a contract will set limits on the extent of such changes. For example, the developer may include a term in the contract that allows for minor changes to be made within specific tolerances (eg a five percent increase or decrease in balcony area).

Changes made by a developer might reduce the property's market value. Buyers should therefore decide what types of changes, if any, would be acceptable to them; whether the process for consultation (if any) before changes are made is acceptable; and what will happen if they do not want the proposed changes.

If you agree to a variation clause it may prevent you from making any claim for compensation from the developer if variations are made.

Withdrawal from the contract

Generally, an off-the-plan contract will provide for the developer to carry out and complete a development in accordance with plans (that are usually annexed to the contract) within a defined period, unless the contract provides for the period to be extended – generally to meet particular conditions along the way.

Withdrawal clauses are those that allow either the developer or buyer to withdraw from the contract if particular conditions are not met. Potential buyers should consider whether a contract adequately covers the following matters:

- What are the obligations of the developer to progress the project within an agreed time frame?

- Does the contract require the developer to use their best endeavours to obtain the necessary approvals for the project to ensure timely completion? (Best endeavours means that the developer is taking all reasonable steps required to secure such approvals.)
- Does the contract include clear milestones/actions to ensure that the project progresses in a timely manner?
- What recourse do you have if the development does not progress within the agreed timeframe? Is there any difference between your rights to cancel the contract and the developer's? How soon will your deposit be returned to you?

Importantly, with strata title developments, buyers have a statutory right under the *Strata Titles Act 1985 (WA)* to cancel a contract if the deadline to register the strata/survey strata plan is not met. If you and the developer have agreed upon a date in writing when the strata/survey strata plan must be registered and it is not met, or you have not agreed upon a date but it is more than six months since the date of the contract and the plan is not yet registered, you have the right to cancel the sale at any time before the plan is registered.

Some contracts have a clause that prevents buyers from seeking damages from the developer if a contract is cancelled for any reason. Generally, such clauses provide only for the return of the deposit and they preclude buyers from seeking financial compensation for lost opportunities while their money was committed to the development. However, despite such clauses, buyers may still be able to seek a remedy under the *Australian Consumer Law*. Buyers should consider seeking independent legal advice if their contract includes a clause which limits their right to claim damages where a developer cancels a contract.

Settlement

Once a property is completed it is likely to proceed fairly quickly to settlement. You should be aware of the settlement clause and be following the progress of your property so that you are ready to finalise matters.

With freehold land, a developer will be in a position to settle as soon as a Certificate of Title has been issued by Landgate.

With strata developments, generally a contract will provide for settlement to take place at a specific time after the last of the following events occurs:

- the registration of the Strata/Survey Strata Plan;
- the issue of a separate Certificate of Title for the strata lot; or
- the certificate of occupation is issued by the local authority.

Disclaimers

Disclaimer clauses are sometimes included in an attempt to prevent a buyer from claiming in court that they were misled by the developer. For example, images from the marketing material that entice you to enter into a contract but do not accurately portray the finished product.

The *Australian Consumer Law* not only makes it an offence to engage in misleading or deceptive conduct, it also contains provisions that allow consumers to take action against traders (including developers) if they suffer loss as a result of a trader's conduct. The right to claim damages cannot be excluded by a term of a contract.

A term of a contract that attempts to restrict or modify a person's rights under the *Australian Consumer Law* may also be void if it is an "unfair contract term" (see section on unfair contract terms at pages 7-8).

Defects liability

Buyers should be aware of their rights if faults are identified after completion. Except for freehold land, an off-the-plan contract should include a 'defects liability' clause stating that it is the developer's responsibility to repair any major or minor defects. In addition to any rights you may have under a contract, there may also be remedies available to you under the consumer guarantee provisions of the *Australian Consumer Law*.

Rental guarantees

Some off-the-plan contracts aimed at investors have a 'rental guarantee' clause where the developer guarantees the property, when finished, will be tenanted for a set period of time, with the rent set at a particular level.

Buyers should understand that any of the developer's costs arising from this clause are likely to be factored into the purchase price of the property. Buyers also need to be aware that the tenancy rates and the rental amount could be set well above market levels and may not be sustainable after the rental guarantee period expires. The guarantee will also be dependent on the continuing financial viability of the developer.

Choice of property manager

With strata title developments, a developer may seek to include a term into the contract giving them the right to choose the property manager for the development. This removes the buyer's rights to nominate their own property manager to act on their behalf. The *Strata Titles Act 1985 (WA)* does, however, provide for management contracts to be shortened or terminated by order of the State Administrative Tribunal in certain circumstances.

Other laws regulating off-the-plan developments

Corporations Act

Managed investment schemes

In broad terms, a managed investment scheme (or "pooled investment") is a scheme where people pool their money together with other investors, to be used in a common enterprise where a "responsible entity" operates the scheme and investors have no day to day control over the operation. Managed investment schemes cover a range of investments, including property developments.

With pooled investments involving property, an investor acquires a share in a development. They are not purchasing an individual lot for which a separate title will be issued. It is very important to understand the type of investment being offered. Buyers should be particularly aware of schemes promoted at so called “investment seminars” which may involve high pressure selling techniques and offers of “once in a lifetime” opportunities.

Anyone considering investing in a pooled investment should carry out extensive research and seek advice from a source that is completely separate from the investment scheme. An independent adviser will provide an objective and unbiased view of the potential of the scheme and the risks associated with it.

As a general rule, investment schemes which appear to have high returns also have high risks. Potential investors need to be clear about what will happen if things go wrong with a company. If a company is wound up due to insolvency, the law gives preference to certain creditors and there may be little or no money left to distribute to investors who are unsecured creditors.

Managed investment schemes must be registered with the Australian Securities and Investments Commission (ASIC) before they can operate. A proposed “responsible entity” must be a registered Australian public company and hold an Australian Financial Services Licence authorising the entity to operate the scheme.

On its website, ASIC provides advice about investing in real estate schemes and about choosing a financial advisor. The key messages from ASIC are that the company managing the investment scheme must be licensed and must provide a Product Disclosure Statement (PDS). A PDS must provide enough information for potential investors to make informed decisions, including: features of the scheme; fees and commissions; and the benefits and risks of the scheme. The PDS should also include information about how complaints will be handled and about the investor’s right to a cooling off period.

More information on managed investment schemes can be found at www.asic.gov.au.

Australian Consumer Law (ACL)

The ACL came into effect on 1 January 2011, and applies to contracts between business and consumers for the supply of goods and services.

Consumer Guarantees

The statutory consumer guarantees provided for in the ACL apply to off-the-plan sales where goods or services form part the purchase.

Under the ACL, goods or services (such as landscaping or furniture) must be of “acceptable quality”. There are other consumer guarantees which may also be relevant to off-the-plan sales.

Goods are of acceptable quality if they are: fit for the purpose for which they are commonly supplied; acceptable in appearance and finish; free from defects; safe; and durable. The ACL provides consumers with a right of action against a trader where there is a failure to comply with a consumer guarantee, however the remedy will depend on whether the failure is considered major or minor and may allow a buyer to recover any reasonable costs incurred in fixing a problem.

The ACL also provides a consumer guarantee that requires goods or services to be supplied within a reasonable time, where a contract fails to stipulate a time for the supply of those goods or services. If a trader fails to comply with this consumer guarantee, the buyer may be able to terminate the contract, insofar as it applies to those goods or services, and recover damages for any loss or damage suffered because of the trader’s failure to comply. It is always better to have a date stipulated in the contract for the supply of any goods or services, as that may be useful if, at a later time, action is required to enforce an outcome.

Any term in a contract that attempts to exclude, restrict or modify a consumer guarantee is void. Terms that seek to exclude your right to seek a remedy for any failure to comply with any consumer guarantee in the ACL are also void.

Off-the-plan seminars

Property buyers should exercise caution when attending seminars designed to attract investors to an “off-the-plan” property development project.

If you are considering investing in one of these projects, you need to be clear about the risks involved. You should carry out extensive research and seek input from an expert who is not involved in the scheme.

Do not feel pressured to take advantage of “savings” if you sign up on the day of the seminar, as the scheme may ultimately cost you much more.

Need further advice?

For further information and/or advice, you can:

- call Consumer Protection on 1300 30 40 54; or
- email consumer@commerce.wa.gov.au

You can also send a formal complaint about the practices or conduct of a property developer to:

The Department of Commerce
Locked Bag 14 Cloisters Square
PERTH WA 6850

Complaint forms are available from the Consumer Protection website at:

<http://www.commerce.wa.gov.au/CP/complaints>