

Last updated 3 Dec 2020

Retrospective changes proposed for residential 'off the plan' sunset clauses back in parliament

Key risk alerts

- New bill proposes changes to the operation of sunset clauses in residential off the plan sales contracts.
- Proposed new requirements will prevent a vendor rescinding ROTP contracts based on a sunset clause without:
 - at least 28 days' written **notice** to purchaser
 - a purchaser's **consent**.
- The bill provides that the 'notice' and 'consent' provisions will apply to sunset clauses in **all** ROTP contracts with **retrospective** operation from **23 August 2018**.
- Sunset clauses in existing contracts purporting to provide for automatic rescission will be taken to be substituted by the new requirements.
- LPLC has established a **Sunset Clause Hotline (9672 3800)** with 30 minutes free legal advice available from external panel solicitors, on referral from LPLC, for insured practitioners to risk manage the chance of potential claim exposures arising from the proposed retrospective changes to sunset clauses.

The [Sale of Land Act Amendment Bill 2019](#) (Vic) (the bill) recently introduced into parliament contains several important consumer reforms to the *Sale of Land Act 1962* (Vic) (the SL Act). It is very similar to the bill of the same name that was

introduced in September 2018 that lapsed prior to the Victorian state election. The bill proposes amendments to the operation of sunset clauses in residential off the plan sales contracts (ROTP contracts).

While other important changes are proposed and mentioned below, this bulletin focuses on proposed amendments which may have a retrospective effect, to assist practitioners in dealing with the uncertainty of the law prior to any passage of the bill. This bulletin is an updated and re-published version of [last year's bulletin](#) (4 September 2018).

Sunset clauses – details of the proposed amendments

A **sunset clause** is a provision in a **ROTP contract** that provides for the contract to be rescinded if the relevant plan of subdivision has not been registered or occupancy permit has not been issued by the nominated sunset date.

The bill recently introduced into parliament proposes five new provisions for regulating sunset clauses in ROTP contracts to prevent a vendor from unjustly rescinding such contracts.

1. **Proposed new section 10A** - to commence retrospectively from 23 August 2018

A sunset clause in a ROTP contract on foot at 23 August 2018 that purports to automatically rescind the contract on the part of the vendor will be taken to permit the contract to be rescinded only in accordance with proposed new sections 10B – 10E.

2. **Proposed new section 10B** - to commence retrospectively from 23 August 2018

Section 10B will prohibit a vendor from rescinding a ROTP contract under a sunset clause unless the **written consent of each purchaser** to the rescission has been obtained **and** each purchaser has been given at least **28 days' written notice** before the proposed rescission.

The notice must specify:

- the reason why the vendor proposes to rescind the contract
- the reason for the delay in registering the plan of subdivision or the issuing of the occupancy permit
- that the purchaser is not obliged to consent to the proposed rescission.

3. **Proposed new section 10C** - to commence retrospectively from 23 August 2018

Any attempt to contract out of proposed new sections 10A and 10B will be of no effect.

4. **Proposed new section 10D** - to commence retrospectively from 23 August 2018

Any attempt to rescind an off the plan contract in contravention of the above provisions will be taken to be a breach of the contract. This would entitle the purchaser to take all contractual remedies available to them for a breach of

contract such as issue a default notice and rescind the contract and claim damages.

5. **Proposed new section 10E** - commenced 5 June 2019

A vendor can also apply to the Supreme Court for an order permitting rescission of a ROTP contract under a sunset clause if it is just and equitable in the circumstances. Section 10E details matters the court must take into account when determining whether it is just and equitable to order rescission of the contract.

6. **Proposed new section 10F** - commenced 30 March 2020. For more information see the LPLC Article [Retrospective changes to 'off the plan' sunset clauses now law](#).

All new ROTP contracts entered into after proclamation of the amending legislation **must include a statement** that:

- the vendor is required to give notice of a proposed rescission of the contract under the sunset clause
- the purchaser has the right to consent to the proposed rescission but is not obliged to consent
- the vendor has the right to apply to the Supreme Court for an order permitting the vendor to rescind the contract
- the Supreme Court may make an order permitting the rescission of the contract if satisfied that making the order is just and equitable in all the circumstances.

Failure to provide the statement in the contract will expose the vendor to a penalty under the SL Act.

Retrospectivity trap for practitioners

Proposed new sections 10A – 10C are expressed to be retrospective. If the bill is passed, new section 10B will be deemed to apply to sunset clauses in **all ROTP contracts in force as at 23 August 2018**¹ as well as any new ROTP contracts.

Practitioners could face the invidious position of being asked to advise vendors or purchasers about the operation of a contractual sunset clause in circumstances where there is a bill before parliament to make a new law that will retrospectively affect the contract, but that law is not yet in force and may be subject to amendment, delay or defeat in the parliament.

Until the fate of this bill is known, this will affect:

¹ Other than a contract where a proceeding is on foot in relation to the sunset clause as at 23 August 2018.

- practitioners acting for a vendor seeking advice about rescission rights under existing sunset clauses
- practitioners acting for a purchaser seeking advice about any rights to resist a sunset clause rescission.

What you should do now

Read the bill and study the proposed amendments to the SL Act.

Review precedent contract conditions and your firm's template letters to plan for the introduction of the changes if the bill comes into law – in particular the statement for inclusion in contracts to comply with the proposed section 10F.

Monitor [progress of the bill](#) through parliament so that you are ready for its introduction if (as appears likely) it passes into law.

If asked to advise a client about the exercise of a sunset clause you should consider seeking the client's instructions to brief counsel for advice on your client's particular circumstances.

Telephone LPLC's new **Sunset Clause Hotline 9672 3800** if you need advice to manage potential risk exposures arising from the proposed retrospective changes to sunset clauses. Heather Hibberd (heather.hibberd@lplc.com.au), Phil Nolan (phillip.nolan@lplc.com.au) and Jodie Potts (jodie.potts@lplc.com.au) can assist, or they can refer you through to one of LPLC's external panel solicitors for up to 30 minutes of free legal advice should that be required.

Other legislative changes proposed in the bill

The bill also contains other significant consumer reforms to come into operation on proclamation, including:

- the requirement that a vendor not fraudulently conceal material facts in relation to a sale of land² will be broadened to a requirement not to **knowingly** conceal material facts. Consumer Affairs Victoria will have the power to issue guidelines to assist vendors and agents to understand what a material fact is likely to be, and the court may take such guidelines into account when hearing a case.
- prohibiting certain terms contracts
- prohibiting certain rent-to-buy arrangements
- amendments concerning options to purchase under certain land banking schemes – requiring payment for the option to be paid to a legal practitioner, conveyancer or licenced estate agent acting for the vendor to hold on trust for the purchaser until registration of the plan of subdivision or expiry of date for exercise of the option.

² *Sale of Land Act 1962* section 12(d)



More information about these other amendments will be provided if the bill passes into law.