



## Checklist for advising purchasers when vendors default

This checklist outlines key considerations and discussions to have with your purchaser client when a vendor defaults under a contract of sale for real estate in Victoria. Each situation will vary based on the specific circumstances, contract terms, and your client's objectives.

### **Breach**

- Identify the breach and establish if it allows for rescission, monetary compensation, specific performance, or all of these, or other options (you may need to brief counsel or obtain specialist advice).
- Consider any required evidence or reports to evidence the breach.

### **Contract of Sale**

- Read the contract carefully and check the conditions in relation to the alleged breach, especially any preconditions and notice requirements.
- Advise the purchaser about the relevant breach clauses in the contract (such as the requirement to give 14 days' written notice)

### **Conduct of purchaser**

- Seek instructions from the purchaser and clarify that they are ready, willing and able to complete the contract before exercising any rights against the vendor.

### **Tender of purchase price**

- Advise the purchaser about the need to tender the balance due at settlement or obtain agreement in writing from the vendor that there is no need to formally tender. Show the



purchaser is ready willing and able to settle to restrict the vendors right to claim penalty interest.

## Penalty interest

- Advise the purchaser they cannot claim any penalty interest.

## Loss

- Advise the purchaser they may claim reasonably foreseeable expenses such as additional rent but must mitigate their loss.
- Explain what mitigation means and steps they may need to take to mitigate their losses.

## Default notice v rescission notice

- Advise the purchaser a default notice:
  - needs to specify the default and provide a time frame for the default to be rectified
  - should be issued if the purchaser wants to promptly enforce the contract.
- Advise the purchaser a rescission notice needs to:
  - specify the default and provide a time frame for the default to be rectified
  - be issued when time is still of the essence, and
  - be issued if the purchaser wants to rescind the contract if the vendor fails to comply with the contract.
- Advise the purchaser if they serve a rescission notice and the default is not remedied within the time specified, usually 14 days.
  - the contract is at an end.
  - the purchaser is entitled to receive their deposit back.
- Advise the purchaser:
  - in order to serve a notice they must be ready, willing and able to complete the contract
  - the vendor may issue proceedings to contest the notice.

# CHECKLIST



- Obtain written confirmation from the purchaser whether they want to enforce the contract by issuing a default notice or rescind it by issuing a rescission notice or do nothing and wait for the vendor to remedy the breach.

## The notice

- Ensure the vendor's default and the action required to be taken by the vendor to remedy the breach is clearly specified in the notice.
- Ensure the notice observes all requirements of the contract of sale.
- Because of the potentially litigious consequences associated with a disputed notice, it is advisable to have the notice peer reviewed by a colleague within your office, another firm that does this work or by a barrister for technical accuracy and compliance with the contract of sale.

## Costs and who should act

- Inform the purchaser as soon as possible after the breach occurs:
  - that your work associated with the vendors breach was not part of the original scope of work or fee estimate and this work will incur additional cost.
  - whether you will continue to act in relation to the breach or need to refer it to someone who has expertise in the area.
  - of an estimate of the costs of dealing with the breach.
  - that the vendor will be required to pay the costs of issuing a notice, but that recovery and the amount recovered may be disputed.
- Explain that the purchaser is primarily liable to pay your costs but there may be recovery of some costs (usually not all costs) from the vendor.

## Options

Explain the requirements (including cost and delay) of each option and potential consequences of the different proceedings, so the client can make an informed choice.

Retain detailed file notes and confirm advice and instructions received in writing.