



Buying a Property ‘Off the Plan’

In recent years particularly in a property boom, buying a property off the plan has become quite common place.

The term ‘buying off the plan’ usually refers to entering into a contract to purchase a property the construction of which has not yet started, or if started, hasn’t been completed and for which a separate title has yet to be created.

There are advantages and disadvantages to buying off the plan.

Some of the advantages are:

1. **Lock in a price:** You can lock in ownership of a property at the current market price without having to settle for an extended period of time.
2. **Increase in value:** The property you purchase off the plan today may increase in value when the building is finished if the market experiences growth.
3. **Time is on your side:** The long settlement period allows you to save money and reduce the amount you need to borrow.
4. **Brand new:** Because construction may not have started, or is not completed, your property will be new and reflect today’s tastes and preferences.
5. **Builder’s warranty:** For residential properties, the Home Building Act provides statutory warranties from the builder for a period of 6 years after the completion of the work for structural defects, or 2 years after completion of the work in any other case.
6. **Tax Advantages:** If the property is being purchased for investment purposes, you may be able to claim depreciation on the building cost and on the fixtures and fittings.
7. **Government Incentives:** For off the plan purchases, payment of stamp duty can be deferred for 12 months after the contract date, unless completion occurs first. If the purchaser is a first home buyer and the price is less than \$750,000.00, a first home owner grant of \$10,000.00 may be available, and if the price is less than \$550,000.00 there is a stamp duty exception and stamp duty concessions if the price is between \$550,000.00 and \$650,000.00. For buyers who do not qualify as first home purchasers, if the price does not exceed \$650,000.00, a stamp duty concession of \$5,000.00 may be available.



Some disadvantages are:

1. **Final Product is unknown:** The finished product may not live up to your expectations. Sometimes the fixtures and fittings and finishes are different to what you imagined and the quality of work may also not meet your standards.
2. **Falling property market:** There is a risk that you may pay too much for the property if the market falls between signing contracts and building completion. If this occurs, you may find it difficult to secure finance for the full amount you need.
3. **Securing finance:** Your bank may not be able to offer unconditional finance approval to you before exchange of contracts because the building has not been finished, and the bank cannot value the property, and also because your income and capacity to make repayments and interest rates may change by the time the building is completed. If these change, your bank may not be willing to lend the amount you need and you will need to provide the shortfall.
4. **Delays:** There can be unexpected delays in the developer obtaining approvals for the building and completion of the construction.
5. **Developer Liquidation:** There is always a risk that the developer could go into liquidation before the project is completed, making its completion uncertain.

What should you expect in an Off the Plan Contract?

There is no standard contract for buying off the plan. Each contract will be tailored to the particular project and the developer's needs. When buying off the plan, it is important to understand that because construction may not have started or has not been finished, both the developer and its financier will look to build in safeguards for themselves. Some of the issues buyers can expect in off the plan contracts are:

1. **Conditional Contract:** The Contract may be conditional upon the developer obtaining development approval from authorities on terms satisfactory to the developer, or the developer achieving a minimum number of pre-sales and finance for the construction. If either of these is not achieved, the developer may be able to rescind the Contract and refund your deposit.
2. **Changes to Plans:** Whilst the Contract will contain draft plans, the developer will usually reserve to itself the right to make changes to those plans. These changes can include changes to size and layout of the property, position of car spaces, etc. If changes are made that detrimentally affect the property you are purchasing, your rights are usually limited to a right to rescind the contract and to a refund of your deposit only, with no rights for price adjustment.
3. **Changes to Finishes:** Whilst the Contract will usually contain a schedule of the finishes and appliances you expect to receive in your property when finished, the developer will usually retain the right to substitute different finishes or appliances of equivalent quality.
4. **Sunset Date Extensions:** The Contract will usually nominate a date by which the developer must complete construction and obtain a separate title for the property you are purchasing ('Sunset Date'). This date is normally a date well beyond the date you are usually told is the expected date of completion. The developer usually retains a right to extend this Sunset Date if it experiences delays. If completion is not achieved by the Sunset Date (as extended) your only right will be rescind the contract and to obtain a refund of your deposit.
5. **Complete when an Interim Occupation Certificate issued:** the Contract will usually require you to complete your purchase once an interim occupation certificate issues. An interim occupation certificate can be issued once



your property is fit to occupy. This does not necessarily mean that all works about your property are fully finished and you will not be entitled to delay completion but must complete and rely on the developer to complete the remaining works after completion.

6. Defects. The developer will usually provide to you a 90 day defects warranty. Because of this, the contract may require you to complete notwithstanding that you have observed minor defects in workmanship during your inspection before completion.
7. On Sale before completion: Some Contracts require you to agree not to sell your property before the developer has sold all, or a certain percentage, of the properties in the development.

Recent protection for 'Off the Plan' purchasers:

There are 2 important recent protections for purchasers of 'off the plan' residential properties. They are namely:

1. As a result of developers utilising Sunset Date provisions to their benefit to rescind contracts with purchasers to resell the property at a higher price, the Conveyancing Act now prevents a developer from rescinding a Contract after the Sunset Date unless:
 - (a) The purchaser agrees to the rescission; or
 - (b) The developer obtains a Supreme Court Order authorising the rescission
 - (c) Regulations are brought into existence permitting a rescission in certain circumstances.

At present there are no such circumstances provided in the regulations. If the developer is to be successful in obtaining a Supreme Court Order, the developer must convince the Court that it is just and equitable to do so.

2. The benefit of the Home Building Compensation Fund does not apply to multi storey residential developments (more than 3 storeys). From 1 July 2017, developers entering Construction Contracts for multi storey residential strata developments will need to pay a Building Bond of 2% of the total Construction Cost to the Department of Fair Trading prior to the Occupation Certificate being issued for the development.

The developer must appoint an accredited independent building inspector (who is also approved by the owner's corporation) at its cost to prepare an interim report between 15 – 18 months after the building works are complete, as well as a final report 21 – 24 months after completion. The Department of Fair Trading will appoint an inspector if the developer fails to do so.

If any defects are identified in the report, and are not rectified by the time of the final report, the Owners Corporation can make a claim to the Department of Fair Trading for a release of all, or part of the bond to pay for the rectification works at any time up to the later of 2 years after the occupation certificate is issued, or 60 days after the final report is given.

Conclusion:

Because there is no standard contract for purchasing off the plan and because the contracts are lengthy and involved, getting the right advice before you enter into an 'off the plan' contract is vital. If you or someone you know would like more information about an off the plan purchase, please contact our [accredited property law specialists, Michael Battersby or John Bateman](mailto:property@batemanbattersby.com.au) on 02 4731 5899 or email us at property@batemanbattersby.com.au.