

PURCHASE OF RESIDENTIAL REAL ESTATE IN VICTORIA

COOLING-OFF RIGHTS

When you buy a real estate, a Contract of Sale is used to formally document the agreement between the buyer ("*purchaser*") and seller ("*vendor*") relating to the purchase.

Contract of sale, is a very important document in any real estate transactions. Once signed, it becomes legally binding and the parties to the Contract will be bound to the terms and conditions stipulated therein.

Generally speaking, once the Contract of Sale has been signed, it cannot just be cancelled by one party and the contracting parties are required to perform their respective obligations contained in the Contract of Sale.

A contracting party may not unilaterally terminate the Contract of Sale as they may risk being in breach of the Contract. When a contracting party breaches a Contract of Sale, the other party to the Contract may be entitled to relief or a remedy under the law.

However, having said all the above, in Victoria, there is a statutory protection conferred on purchasers of residential real estate, in certain circumstances, to terminate a signed and legally binding Contract of Sale with little financial consequence.

This statutory protection is called "*cooling off*" rights.

You must note that in Australia, the laws governing *cooling-off* rights vary in different industries and in different states and territories.

This article will focus only on the *cooling-off* provisions relating to residential lands that apply in the State of Victoria, pursuant to Section 31 of the *Sale of Land Act 1962* (Vic).

In essence, Section 31 of the *Sale of Land Act 1962* (Vic) provides as follows:

1. TYPES OF LAND

The *cooling-off* rights conferred upon purchasers of real estate pursuant to Section 31 applies to a Contract of Sale for purchase of land.

However, it does **not** apply to all types of land.

Section 31 specifically excludes the following types of lands:

- land used primarily for industrial or commercial purposes; and
- land which is more than 20 hectares and is used primarily for farming, together with any chattels.

The *cooling-off* rights extends to residential land.

However, in relation to lands which are “industrial”, “commercial”, or “farming lands in excess of 20 hectares”, there are no statutory *cooling-off* protections for the purchasers pursuant to Section 31.

The parties in this instance can negotiate the insertion of arms-length contractual conditions of similar effect in the Contract of Sale. Of course, any such conditions should be agreed upon by the parties before the Contract documents are signed and should furthermore be contained in writing and properly reflected in the Contract documents.

2. COOLING-OFF PERIOD

A purchaser under a Contract of Sale of a residential land may, at any time before the expiration of 3 clear business days after the purchaser has signed the Contract of Sale, give notice to the vendor that he wishes to terminate the Contract of Sale.

The 3 days period is calculated from the date that the purchaser signs the Contract of Sale (to be distinguished from the date of the Contract of Sale) and excludes days that are not “business days” (e.g. Saturday, Sunday and public holidays).

So, if a purchaser signs the Contract of Sale on a Sunday, then the *cooling-off* period will be calculated as follows:

Sunday – this is the day of signing and is not a business day – **not counted**

*Monday – Day # 1

*Tuesday – Day # 2

*Wednesday – Day #3

** assuming that none of these days are public holidays*

Therefore, based on the above scenario, the last date for the purchaser to exercise his/her *cooling-off* right will fall on Wednesday.

3. NOTICE MUST BE SIGNED

The notice to terminate must be signed and given to the vendor in accordance with the provisions of Section 31 of the *Sale of Land Act (Vic)*.

The notice must be in writing. However, an mobile SMS communication from the purchaser to the vendor to terminate the contract may not be sufficient.

4. DELIVERY

A Section 31 notice must be given to the vendor or his agent.

The notice can be left at the “*address for service*” of the vendor as specified in the Contract of Sale or the address of his agent.

The notice must be delivered as required within 3 clear business days after the purchaser has signed the Contract of Sale. This is a strict time frame.

5. EXCEPTIONS

There are, however exceptions that apply to the *cooling-off* rights.

A purchaser of a residential land does **not** have *cooling-off* rights in the following instances:

1. The sale is by publicly advertised auction.
2. The land is sold—
 - i. within 3 clear business days before the day on which a publicly advertised auction for the sale of that land is to be held;
 - ii. on the day on which a publicly advertised auction for the sale of that land is held;
or
 - iii. within 3 clear business days after the day on which a publicly advertised auction for the sale of that land was held;
3. the vendor and purchaser have previously entered into a Contract for the sale of the same land in substantially the same terms;
4. the purchaser is an estate agent within the meaning of the *Estate Agents Act 1980* or a corporate body.

There may be various considerations which need to be taken into account in determining the application of the exceptions. You should seek legal advice in relation to your specific circumstances.

COOLING-OFF FEE

Where a Contract for the Sale of land has been terminated in accordance with Section 31 of the Sale of Land Act (Vic), the purchaser shall be entitled to the return of all moneys paid by the purchaser under that Contract, **except for** the sum of \$100 or 0.2% of the purchase price (whichever is the greater).

The amount of the *cooling-off* fees will be determined based on the purchase price and the vendor will be entitled to this *cooling-off* fees.

NOTICE IN THE CONTRACT

A Contract of Sale to which section 31 of the Sale of Land Act (Vic) applies shall contain a conspicuous notice advising the purchaser that he may before the expiration of 3 clear business days after he signs the Contract give notice that he wishes to terminate the Contract of Sale.

Where a Contract of Sale to which this section applies does not contain such notice then the purchaser has the right to rescind that Contract of Sale at any time before he becomes entitled to possession of the property or to the receipt of "*rents and profits*".

Any provision in the Contract of Sale or in any other document whereby any right conferred by this section on the purchaser is excluded, modified or restricted shall be void and of no effect.

SUMMARY

Many purchasers of residential real estate are not aware of their rights to exercise *cooling-off* rights.

Cooling-off periods are an important protection tool for purchasers.

It allows purchasers time to reconsider their decision relating to acquisition of one of the most significant investments in their lives, particularly if the decision is made in under pressure or without all the necessary information for the purchasers to make an informed decision.

Whilst the requirements of a Section 31 notice may appear straight-forward, there has been recent legal developments in the interpretation of this section, which highlights the serious ramifications for purchasers who have not validly exercise their *cooling-off* rights.

There are some strict time frame and legal requirements relating to the *cooling-off* notice and the delivery of the notice.

In exercising the *cooling-off* rights, any failure by the purchasers to comply with the statutory requirements may result in the vendor denying that the Contract of Sale was validly terminated by the purchaser.

The ramification to the purchaser is serious, with the vendor possibly being entitled to various remedies including retention of the amount representing the deposit monies, in addition to the vendor having the right to claim any further losses suffered by the vendor from the purchaser.

It is prudent for a purchaser wishing to exercise a cooling-off right to seek legal advice appropriate for the purchaser's specific circumstance.

DISCLAIMER

This article is provided by way of general information only. It does not constitute, and must not be relied on as, legal advice. You should seek legal or other professional advice before acting or relying on any of the content and may contact **xx of xx** on P: **XX** or via email: **XX** who can assist you in various languages.