

LEVENTIS LAWYERS

COOLING OFF: HOW TO RESCIND A CONTRACT TO PURCHASE LAND

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Introduction

Purchasing land is a major decision that is practically and legally difficult, and sometimes impossible, to reverse.

Such transactions thus require extensive due diligence and care and in some instances professional advice.

Where a purchaser makes an offer to purchase land that is accepted by a vendor (forming a contract) (Contract), but the purchaser reconsiders their decision, the purchaser may be able to avoid proceeding with the Contract by "Cooling Off", provided that they act quickly.

What is Cooling Off?

"Cooling Off" is a right of a purchaser to give the vendor written notice of the purchaser's intention not to be bound by the Contract and rescind the Contract.

The right to "Cool Off" is provided by the *Land and Business (Sale and Conveyancing) Act 1994 (Conveyancing Act)*.

Are Cooling Off rights restricted?

Yes. The Conveyancing Act imposes restrictions viz:

The legal status of the purchaser.

The method by which the land is sold.

Whether the purchaser has waived the right.

Which purchasers cannot Cool Off?

A purchaser **cannot Cool Off where the purchaser is a "body corporate"**.¹

A "body corporate" is a purchaser other than a "natural person".

A "natural person" is a human being in their own personal capacity.

Generally speaking, body corporates are companies. Companies are very often used as:

- The structure, or part of a group of companies, to operate businesses, and hold land where the business operates.
- The structure to operate self-managed superannuation funds.
- The trustee of a discretionary family trust of which the family members are the directors, secretaries, and beneficiaries.

- Whilst there may be commercial reasons to purchase land in the name of body corporate, this should only occur if the purchaser is confident of proceeding.

Which sale methods preclude Cooling Off

A purchaser **cannot Cool Off where sale is by auction**.²

Although the land a purchaser wants may only be for sale by auction, a purchaser should only bid if the purchaser is confident of proceeding.

Alternatively, a purchaser may ask whether sale can proceed by treaty (preserving Cooling Off rights). A vendor may agree if the purchaser makes an offer that is within the expected bidding range/price guide.

How is the right to Cool Off waived?

A purchaser cannot Cool Off where that right is waived.

Under the Conveyancing Act, to waive the right to Cool Off a purchaser:

- Must have obtained legal advice about Cooling Off; and
- The legal practitioner that provided the advice must sign a certificate in approved form to attest such advice was given; and
- Must give notice to the vendor.

Unethical agents may try to deal with purchasers verbally and seek their agreement to waive Cooling Off as a tactic, e.g. by stating the vendor "requires" the Contract be signed before the prescribed time within which the purchaser is entitled to Cool Off (see below) so "*the next open inspection can be cancelled*".

Whilst purchasers can feel that verbal agreement to waive could be the end of the matter, and verbal agreement can give rise to argument "waiver" occurred, the Conveyancing Act requires adherence to the procedure above.

Alarm bells ought to be triggered if a vendor requests a purchaser "waive" Cooling Off. It may reflect a problem the vendor hopes the purchaser will not have time to find. Concerns are greater where the Contract is not subject to building/pest inspection and the purchaser being satisfied with the results.

¹ Section 5(7)(a), *Conveyancing Act*.

² Section 5(7)(c), *Conveyancing Act*.

When does the prescribed time to Cool Off start/end?

The start and end of the prescribed time within which the right must be exercised is critical. It varies viz:

- The order in which the Vendor's Statement/Form 1³ (VS) is served on the purchaser and the contract is made.
- The time settlement takes place.

What is the prescribed time?

The Conveyancing Act defines the prescribed time by reference to when it ends, as follows:

- Where the VS is served on the purchaser before the making of the contract – the end of the second business day after the day on which the contract was made; or
- Where the VS is served on the purchaser after the making of the contract – the end of the second clear business day from the day on which the VS was served; or
- The time that settlement takes place,

(whichever is the earlier).⁴

When does the prescribed time end?

The prescribed time within which a purchaser must exercise the right ends at the earlier of:

- Settlement; or
- 48 hours after the making of the contract, where the VS was served before the making of the contract; or
- 48 hours after service of the VS, where the contract was made before service of the VS.

When does the prescribed time start?

Although not as legally or practically significant as the end of the prescribed time within which to exercise the right to Cool Off has been is often said by agents to only commence from the start of the 48-hour windows within which to do so.

That view is incorrect. As the Full Court ruled in *Astill & Anor v South Esplanade Developments Pty Ltd* [2007] SASC 231:

- The start of the 48-hour windows triggers the end of the prescribed time, not the start.

Accordingly:

- There is no need for a purchaser to wait for the start of the 48 hour window; and
- A purchaser can Cool Off at any time prior to the end of the prescribed period.

Despite *Astill*, some vendors/agents represent that Cooling Off does not commence until the start of the 48-hour period because, if unchallenged, they may hold deposits paid under the Contract to assist them with their own finance with their bank in raising finance for building and development projects.

Arguing against such vendors/agents can be difficult where they hold some of the financial resources that belong to the purchaser to commence legal action, which makes seeking competent legal advice early on all the more important.

The bottom line

Given the complexities and strict timelines involved in Cooling Off (and risk being bound unless the Conveyancing Act is not strictly complied with), it is highly advisable to obtain legal advice prior to purchasing land, especially where there is any doubt about proceeding, from experienced practitioners.

Enforcing your rights

Leventis Lawyers is experienced in enforcing Cool Off rights in difficult and urgent circumstances, and has successfully obtained the return of monies paid as deposits, and ensured that the Contract has been rescinded, in a range of cases.

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³ The VS contains critical details about the land held by government instrumentalities and the local council. It deals with topics such as whether there are non-complying developments on the land, proposals for road-widening, and whether the land is a heritage place. Obtaining the VS is essential to understand the legal and practical risks associated with purchasing land. Agents often refuse to provide a VS prior to the making of the Contract. This is because the VS must be current at the time of making the

Contract, and, if a Contract is made after an initial VS, it is likely that the VS will need to be updated, which is an extra cost to the vendor.

⁴ Settlement is the moment that the Contract is performed by the parties, the land is conveyed, and the transaction registered at the Land Titles Office.

GET IN TOUCH



Louis Leventis
Principal

Level 1, 123 Wright St
Adelaide SA 5000
T: (08) 8410 0008
E: info@leventislawyers.com.au



David Kelly
Associate

Level 1, 123 Wright St
Adelaide SA 5000
T: (08) 8410 0008
E: info@leventislawyers.com.au

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