

Changes to the Regulations for off-the-plan sales in multi-storey, multi-unit developments

Introduction

Some changes have been made to the regulations that cover 'off-the-plan' sales in multi-unit, multi-storey developments, known as the *Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2002* (the Exemption Regulations). These changes to the Regulations affect the rights and obligations of purchasers, builders, developers and local government. **The changes to the Regulations will take effect from 16 November 2004.**

The Need for Change

Before the changes came into effect, when a purchaser was given a notice advising that a multi-storey, multi-unit building was not covered by home indemnity insurance (HII) after entering into a sale contract, the purchaser had a right to rescind the contract.

The purchaser's right to rescind the contract has in the past created difficulties for developers of multi-unit, multi-storey developments. It is common practice for developers to sell units off concept plans and to secure finance on the basis of those advance sales. A builder is often appointed later, after the developer has secured finance.

Prior to the changes to the Exemption Regulations, a developer could only advise the purchaser that the development would not have HII after the builder had been appointed. If the builder was not appointed until after the contract for sale had been entered into, the developer and financier were faced with the possibility of the purchaser being able to withdraw from the sale contract. Withdrawal by purchasers at this stage had the potential to jeopardize the finance for the development, which was sometimes obtained on the basis of a minimum amount of pre-sales.

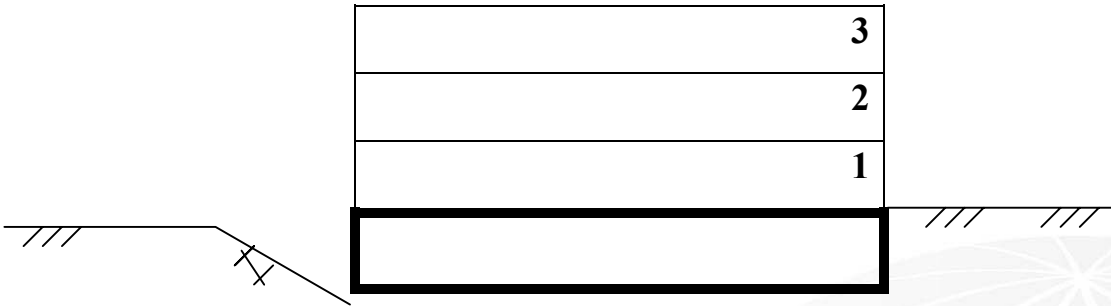
By introducing a Developer's Notice, the new regulations allow the developer to advise purchasers before any contract is signed, that the building is not covered by home indemnity insurance. Provided that the purchaser receives that Notice prior to signing a contract of sale, they no longer have the right to rescind the contract.

Multi-Storey, Multi-Unit

A multi-storey, multi-unit development is broadly defined as a building comprising two or more independent dwelling units, any part of which has a rise in storeys of more than three or has more than one basement storey. The exact definition and further details are contained in the Exemption Regulations.

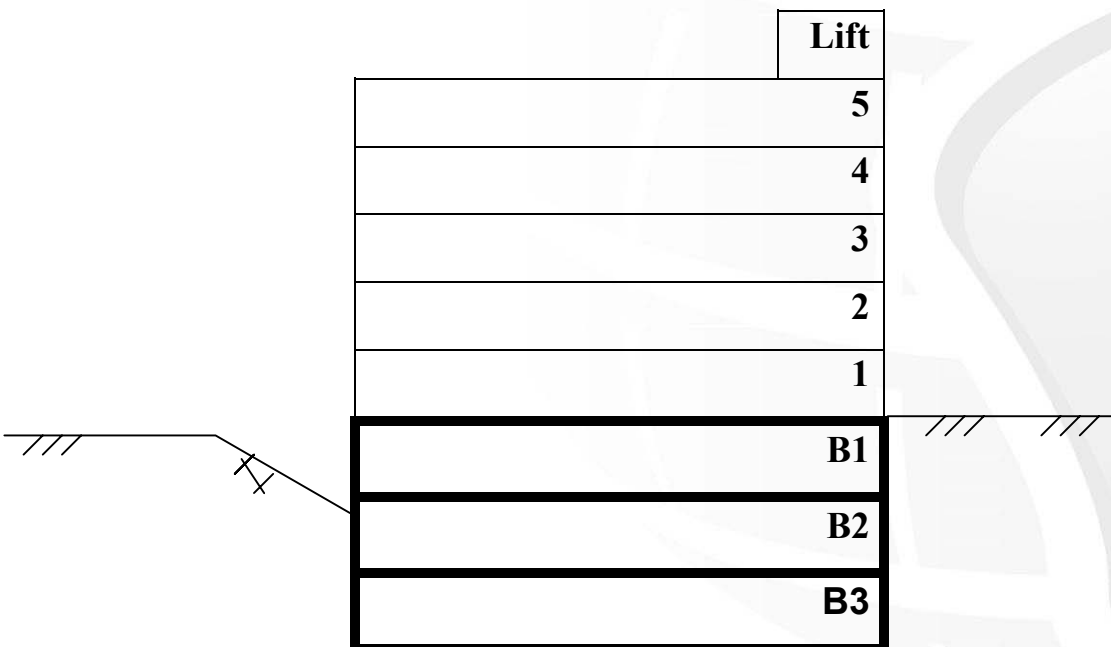
EXAMPLE 1

**Not a multi-storey multi unit development
Home indemnity insurance is required**



EXAMPLE 2

**Multi-storey multi-unit development
Home indemnity insurance is not required**



**Rise in storeys more than three, or
Basement storey more than one**

Exemption from Home Indemnity Insurance

Under the changes to the Exemption Regulations, building work on multi-storey, multi-unit development remains exempt from mandatory home indemnity insurance, subject to conditions. HII protects home owners against financial loss if a builder is unable to complete residential building work or meet a valid claim for faulty workmanship because of death, disappearance or insolvency (i.e. inability to meet outstanding debts).

Builder's Notice

Builders of multi-storey, multi-unit developments are required to provide a prescribed notice to the other parties to the building contract alerting them to the fact that the building is not covered by HII. This Notice of Exemption has been amended slightly and is now known as a Form 1 or Builder's Notice (sample at the end of this information sheet).

When a builder is appointed to a project, the builder must provide the Builder's Notice to the developer. The developer is then responsible for providing a copy to any purchaser.

Developer's Notice

Developers may sell units off-the-plan before a builder has been appointed. For this purpose a new Notice of Exemption, called a Form 2 or Developer's Notice (sample at the end of this information sheet), has been introduced. Developers can give the Developer's Notice to off-the-plan purchasers prior to the builder being appointed.

The Developer's Notice warns the potential purchaser that the developer has not yet engaged a builder to carry out the building work for the development. It also warns that it is likely that the builder will not take out HII for the building work and that the potential purchaser may not be in a position to fully assess any risk because of this.

The Developer's Notice alerts the potential purchaser that not having HII means that the developer and the purchaser are not insured against financial loss if the builder is unable to meet a valid claim for faulty workmanship because the builder has died, disappeared or become insolvent.

By providing a notice to potential purchasers before they enter into any contract of sale, purchasers can then decide whether they still wish to proceed in light of the information in the notice about the likely lack of HII cover.

When the Developer's Notice is provided before the sale contract is entered into, the purchaser has no right of rescission based on the notification of a home indemnity insurance exemption (ie Form 1 or the Builder's Notice).

The creation of the Developer's Notice addresses the problems previously faced by developers whilst still ensuring that consumers remain informed.

The Purchaser may not rescind the sale contract:

- if the purchaser has received a Developer's Notice before the sale contract was signed; or
- if the purchaser has received a Builder's Notice before the sale contract is signed.

The purchaser may choose to rescind the sale contract:

- if the Developer's Notice or the Builder's Notice is not given to the purchaser before the sale contract is signed.

Rights and Obligations of all Parties:

Builders

- The builder must ensure that the building work falls into the category of a multi-storey, multi-unit development.
- The builder must provide a Builder's Notice to the developer or purchaser, have it signed and retain copies.
- The builder is then exempt from mandatory home indemnity insurance for that building work.

Developers

- If the developer provides a copy of the Developer's Notice before the sale contract is signed, the purchaser's right to rescind based on notification of the home indemnity insurance exemption does not exist.
- Regardless of whether the developer has provided a Developer's Notice to the purchaser, the developer must give the purchaser a copy of the Builder's Notice within 10 days of having received it from the builder.
- If the developer sells units within six years of completion, the developer must provide all purchasers with a copy of the Builder's Notice. If either a Developer's Notice or a Builder's Notice is not provided before the sale contract is signed a purchaser has the right to rescind the contract.

Purchasers / Home Owners

- The purchaser can choose to rescind the sale contract if the purchaser did not receive a Developer's Notice or a Builder's Notice, prior to signing the sale contract.
- If the purchaser sells the unit within six years of completion, the purchaser must pass a copy of the Builder's Notice to the new owner.

Local Government Authorities

- Local Government must ensure that the building work falls into the category of a multi-storey, multi-unit development.
- If the building contract has been entered into prior to the granting of a building licence for the construction of a multi-storey, multi unit development, the local government authority must ensure that the builder has given a Builder's Notice to the owner before issuing a building licence. If no building contract is in existence, work is exempt and the building licence may be issued.

Copies of the Regulations

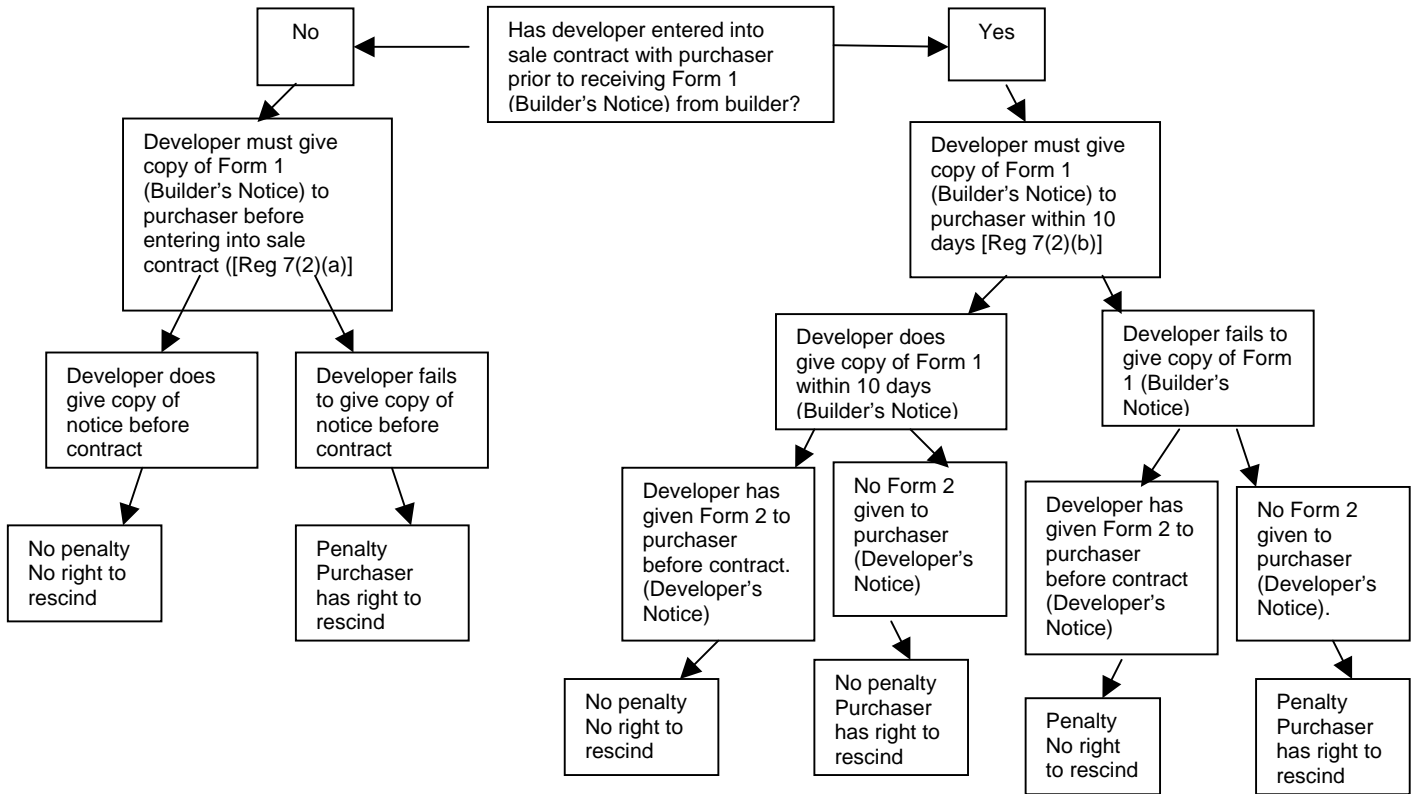
You can purchase copies of the *Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2002* by contacting the State Law Publisher, 10 William Street Perth, telephone (08) 9321 7688. You can also view them by accessing the State Law Publisher's web site at www.slp.wa.gov.au.

A developer could incur a penalty of \$5,000 if:

- the developer has received the Builder's Notice and fails to give it to each purchaser with whom the developer has already entered into a sale contract within 10 days of the developer receiving the Builder's Notice.
- the developer has received the Builder's Notice and fails before entering into a sale contract to give a copy of the Builder's Notice to each purchaser if settlement is to occur within 6 years of practical completion of the building work.

Separate regulations apply to leased retirement villages. The regulations enable an owner or developer of a retirement village in which all of the dwellings are leased to residents to make a commercial decision about whether or not to require their builder to take out home indemnity insurance. These regulations are also contained in *the Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2002*. For further information on the regulations concerning leased retirement villages see the fact sheet entitled '*Information for Builders, Owners and Developers: Home Indemnity Insurance Exemption for Leased Retirement Villages*'. Copies are available at www.docep.wa.gov.au.

How the new Home Indemnity Insurance Exemption Regulations will work



Examples of Different Scenarios Under the Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2002				Penalty?	Right to rescind?
Series of events →					
Developer enters into contract with builder	Builder gives Form 1 (Builder's Notice) to developer	Developer enters into sale contract with purchaser and provides copy of Builder's Notice before contract		No	No
Developer enters into contract with builder	Builder gives Form 1 (Builder's Notice) to developer	Developer enters into sale contract with purchaser.	Developer provides purchaser with a copy of the Builder's Notice <u>after</u> entering into the sale contract or does not provide a copy at all	Yes	Yes
Developer enters into sale contract with the purchaser (No Form 2 is provided)	Developer enters into contract with the builder	Builder gives Form 1 (Builder's Notice) to developer	Developer provides purchaser with a copy of the Builder's Notice within 10 days	No	Yes
Developer enters into sale contract with the purchaser (No Form 2 provided)	Developer enters into contract with the builder	Builder gives Form 1 (Builder's Notice) to developer	Developer fails to provide purchaser with a copy of the Builder's Notice within 10 days	Yes	Yes
Developer enters into sale contract with the purchaser and provides purchaser with Form 2 (Developer's Notice) before contract	Developer enters into contract with the builder	Builder gives Form 1 (Builder's Notice) to developer	Developer provides purchaser with a copy of the Builder's Notice within 10 days	No	No
Developer enters sale contract with the purchaser and provides purchaser with Form 2 (Developer's Notice) before contract	Developer enters into contract with the builder	Builder gives Form 1 (Builder's Notice) to developer	Developer fails to provide purchaser with a copy of the Builder's Notice within 10 days	Yes	No

■ Shaded areas indicate scenarios where the developer and the builder have complied with the Regulations

Form 1

Home Building Contracts Act 1991 *Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2002*

Builder's Notice

Important Notice about home indemnity insurance for multi-storey multi-unit developments

The development or dwelling unit concerned

1. This notice is about
-
[insert details of the development/dwelling unit]

Background to home indemnity insurance

2. The *Home Building Contracts Act 1991* requires that the builder take out home indemnity insurance for residential building work costing over \$12 000, unless there is an exemption.
3. Generally, home indemnity insurance covers the person for whom the builder is doing the work against financial loss if the builder is unable to complete the work or meet a valid claim for faulty workmanship because the builder has died, disappeared or become insolvent. The insurance also covers any other person obtaining the property from that person. In most cases the insurance policy must cover the construction period and the 6 years after practical completion of the building work.
4. Residential building work done under a cost plus contract is usually only insured for faulty workmanship.

Exemptions from the requirement to have insurance

5. Building work on multi-storey multi-unit development is exempt from the requirement for the builder to take out home indemnity insurance, provided that the builder gives this notice in accordance with the *Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2002*.
6. A person who receives this notice from the builder is required by the regulations to give a copy of it to any person who intends to purchase a unit in the development from that person, before they enter into a contract for the sale of the unit.

Why did you get this notice?

7. You have been given this notice, or a copy of it, because you may enter into a contract, or have a contract, with the person who gave you the notice. It is to notify you that the builder who is doing, or has done, the building work has not taken out home indemnity insurance for the building work.
8. That means that the person for whom the builder is doing, or had done, the building work (and any person obtaining the property from that person) is not insured against financial loss if the builder is unable to complete the work or meet a valid claim for faulty workmanship because the builder has died, disappeared or become insolvent.

You may have the right to rescind your contract to purchase a unit in the development

9. If you received this notice, or a copy of it, after you entered into the contract and you are not a developer of the development, you have a right to rescind the contract (in accordance with the regulations) unless you were given a developer's notice before you entered into the contract.

10. If you have a right to rescind the contract

- (a) you may end the contract;
- (b) you have a right to get your deposit and any other payments made to the builder or developer with whom you have the contract towards the construction, alteration or purchase of the dwelling unit back from the builder or developer; and
- (c) the builder or developer cannot recover from you any expenses incurred by them.

If you want to rescind the contract

11. If you want to rescind the contract you must give the builder or developer with whom you have the contract a "Notice of exercise of right to rescind" before –

- (a) the end of one month after the day on which you received this notice; or
- (b) settlement

whichever is earlier.

The "Notice of exercise of right to rescind" is set out below.

For example: you receive a copy of this notice on 21 June, the one month starts on 22 June and ends on 21 July. To exercise your right to rescind, the builder or developer must receive your Notice of exercise of right to rescind on or before 21 July, or before settlement if settlement is going to take place before the end of 21 July.

Other matters

- 12. Just because you have been given this notice, or a copy of it, does not necessarily mean that the person who gave it to you is at fault.
- 13. If you are in doubt about your rights, or you don't understand this notice, you should seek legal advice.

.....
Builder

Date
.....

I acknowledge that I have read this notice:

.....
Person to whom the builder had given this notice

Date
.....

* I acknowledge that I have read this notice:

.....
Person receiving this copy of the notice

Date
.....

* Complete or delete as necessary

Notice of exercise of right to rescind

To
[name of builder or developer]

*I/We

[insert name(s)] rescind the contract dated [insert date] for the

*construction/purchase of the

.....
[insert details of the development/unit(s)]

.....
Person rescinding the contract

Date
.....

NB: You should make sure that you have some evidence of the time and date on which you sent or gave this notice.

*Complete or delete as necessary

Form 2

Home Building Contracts Act 1991

Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2002

Developer's Notice

Important Notice about home indemnity insurance for multi-storey multi-unit developments where a developer sells off-the-plan to a purchaser before engaging a builder

The development or dwelling unit concerned

1. This notice is about

.....
[insert details of the development/dwelling unit]

Background to home indemnity insurance

2. The *Home Building Contracts Act 1991* requires that the builder take out home indemnity insurance for residential building work costing over \$12 000, unless there is an exemption.
3. Generally, home indemnity insurance covers the person for whom the builder is doing the work against financial loss if the builder is unable to complete the work or meet a valid claim for faulty workmanship because the builder has died, disappeared or become insolvent. The insurance also covers any other person (in this case, you) obtaining the property from that person. In most cases the insurance policy must cover the construction period and the 6 years after practical completion of the building work.

Exemption from the requirement to have insurance

4. Building work on multi-storey multi-unit development is exempt from the requirement for the builder to take out home indemnity insurance, provided that the builder of the development gives a notice (known as a builder's notice) to the person for whom the builder is doing the work. See the *Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2002*.
5. Once the developer engages a builder and the builder has given the developer the builder's notice, the developer must give you a copy of the builder's notice within 10 days after receiving the notice.

Why did you get this notice?

6. This notice is to warn you that –
- (a) the developer has not yet engaged a builder to carry out the building work for the development;
 - (b) it is likely that the builder will not take out home indemnity insurance for the building work; and
 - (c) you may not be in a position to assess the risk resulting from the builder not having home indemnity insurance for the building work (should that be the case).

7. If the builder does not have home indemnity insurance for the building development work it means that-
- (a) the developer; and
 - (b) you, as a person purchasing the property from the developer,
- are not insured against financial loss if the builder is unable to meet a valid claim for the faulty workmanship because the builder has died, disappeared or become insolvent.
8. If you are in doubt about your rights, or you don't understand this notice, you should seek legal advice or contact the Department or Consumer and Employment Protection Call Centre on 1300 30 40 54 (local call).

.....
Developer

Date
.....

I acknowledge that I have read this notice:

.....
Person to whom the developer has given this notice

Date
.....