



Property Development Update: Failed ‘Off-The-Plan’ Settlements

By ,

It has been recently reported that the Australian Tax Office (**ATO**) has adopted the position that if a binding Contract for an ‘off-the-plan’ dwelling is not able to be settled, that dwelling will be considered ‘second-hand’.

According to news.com.au, a spokeswoman for the ATO cited subsections 15(4) and (5) of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) in explaining that “a dwelling is considered to be sold when an agreement becomes binding.” She went on to state that “if a property is on-sold after the date on which the Contract becomes binding and prior to settlement, then this is considered to be an established dwelling.”

This view was not the ‘common sense’ approach that many had thought prevailed, i.e. if a property has just been built and the title has never changed hands then its status as a ‘new’ dwelling would not be affected by a failed settlement.

At present, the ability of foreigners to invest in Australian real estate extends to ‘new’ properties only. If the ATO’s position was maintained, then foreign buyers would be excluded from purchasing a property when it is on-sold after a failed settlement. According to news reports, this was thought to have the potential to lead to a weakening of prices, particularly in areas such as Brisbane in which development is active.

Last week however, the Treasurer of the Commonwealth of Australia Hon. Scott Morrison M.P released a statement announcing policy changes (full copy available [here](#)) to the effect that dwellings will still be considered ‘new’ in the event of a failed settlement, in order to avoid property developers being “left in the lurch when a foreign buyer pulls out of an off-the-plan purchase”.

The changes are designed to avoid relevant markets being negatively impacted by an expected increase in off-the-plan sales not being completed. We will see instant implementation for individual applications, closely followed by an allowance for ‘New Dwelling Exemption Certificates’ to capture acquisitions of property which are preceded by a failed settlement.

Should you wish to discuss any matters arising out of this article, please contact the author:

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