PROPERTY COUNCIL of Australia

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Australia's property industry
Creating for Generations

26 July 2019

Conveyancing (Sale of Land) Amendment Regulation 2019
Office of the Registrar General
McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

Email – ORG-Admin@finance.nsw.gov.au

Attention: Ms Leanne Hughes

Discussion Paper – Off-the-plan contracts & Conveyancing (Sale of Land) Amendment Regulation 2019

The Property Council welcomes the opportunity to provide comments on the off the plan contracts discussion paper (the discussion paper) and consultation draft regulation *Conveyancing (Sale of Land) Regulation 2017* (the draft regulation).

As Australia's peak representative body of the property and construction industry, the Property Council represents more than 2,200 members nationally, including investors, owners, managers and developers of property across all asset classes. Many of our members undertaking residential development will be affected by the proposed regulatory changes.
It is
The proposed regulatory changes outlined in the discussion paper support the recent legislative amendments that were considered and passed by the Parliament in 2018. The scope of the legislation span both off the plan contracts and digital conveyancing transactions. Whilst the majority of the amending Act commenced upon assent, the provisions relating to off the plan contract amendments are currently uncommenced.

We are pleased to provide the following comments regarding the public consultation draft regulation and the discussion paper for your consideration;

Public Consultation Draft Regulation

Clause 2 – Commencement.

The proposed commencement date of 1 September 2019 should be reviewed. The process of preparing contracts for the sale of residential apartments normally begins about 3 months before they are released for sale. There needs to be a longer period of time allowed for the industry to update their contracts to conform to the new requirements.

Clauses 19A and 19B – Compensation Claims

These clauses propose a new process (as opposed to a purchasers right to rescind the contract) to deal with claims for compensation arising out of sections 66ZO and 66ZP of the Conveyancing Act.

Based on the feedback from our members it is unclear whether the Act gives authority to the Regulations to establish an alternative remedy to the purchaser's rescission rights introduced in the amending Act. Should these clauses be valid, we do not consider a compensation mechanism to be appropriate. Purchasers are already afforded existing protections under Australian Consumer Law (ACL). It is our view that the ACL provides sufficient protection to consumers and adding a separate compensation claim regime is an "over-correction".

There is potential that the compensation mechanism provided within the Regulation could lead to a significant volume of nuisance and frivolous claims. As it stands, there is no disadvantage or consequences to a purchaser submitting an unmeritorious claim which could invite all purchasers submitting claims in the chance an arbitrator will determine the claim in their favour even it the claim does not have any reasonable prospect of success. This can lead to significant cost implications to the developer.

We request that the operation of the compensation mechanism be reviewed to mitigate adverse impacts arising from its abuse.

Clause 21 – Material Particular

This clause assists with understanding the definition of material particular in section 66ZL of the Act. The first part of the clause provides clarification regarding the types of matters that are material particulars and the second part of the clause provides clarification about those matters which are not material particulars.

Some of our members have indicated to us that they are concerned about the definition of material particular and how it could be interpreted in its application. The industry requires a clear and robust definition to protect itself from frivolous claims. It is the view of the Property Council that consumer protection needs to be balanced with the need to be able to enforce legally binding contracts. In the absence of legally enforceable contracts, developers will find it difficult to secure funding for new projects and enforce settlements on completion. The risks surrounding the definition of material particular need to be managed to avoid potential damage to the development industry.

We recommend the list of nominated exclusions to material particulars provided in clause 21(2) be reviewed and possibly broadened. In some cases, changes may arise to satisfy requirements of third parties such as State and local government authorities and utility service providers and changes arising from meeting these requirements could jeopardise the validity of contracts. These types of changes are likely to be out of the control of the developer but could have negative consequences on their developments.

Discussion Paper

It is understood that the Regulation will give further protections to consumers during off-the-plan contract property transactions by mandating best practice procedures for disclosure and complaint resolution.

Q1. Should the Regulation (and the off-the-plan provisions under the Amendment Act) commence on 1 September 2019? If not, when should the reforms come into operation?

The commencement date for the regulation and the provisions of the Amendment Act should be later than September 2019 to provide industry with more time to implement the changes. Industry groups such as developers, conveyancers and lawyers will need time to replace the contracts they currently use with an updated version to conform to the new regulations.

For the reason stated above the new Regulation (and the related provisions contained in the Amending Act) should commence in early 2020 to give the development industry adequate time to fully adopt the changes.

Q2. The disclosure statement may be an appropriate place to alert purchasers to plans to utilise an embedded network in the proposed scheme.

It is appropriate for the vendor disclosure statement to provide purchasers information about significant aspects of the development, such as the installation of embedded electricity networks.

Q3. Should any of the information in the draft disclosure statement be omitted from the approved form? If so, on what basis?

It is important that the information contained within the disclosure statement is short and simple. The contract will contain more detailed information regarding the transaction. On this basis, the information contained in the draft disclosure statement contained within the discussion paper should be reflected in the final version of the disclosure statement.

Q4. What other information that is likely to be known at the time contracts are signed should be included in the disclosure statement?

The information that a vendor would be required to provide to a purchaser set out in the proposed disclosure statement (Appendix 1 of the discussion paper) is adequate. It is important that the disclosure statement is kept as short and simple as possible. More detailed information regarding the transaction is provided within the contact.

Q5. Should the disclosure statement require the developer to state whether the scheme will be subject to an embedded network or other agreement with third parties relating to the supply of utilities and services to the common property?

Yes, where these matters are known at the time of the transaction they should be disclosed within the vendor disclosure statement.

Q6. Does there need to be any guidance as to where the disclosure statement should appear in the contract? For example, should this be the first page of the contract?

It is important that the vendor disclosure statement is readily identifiable within the contract document without the need for specifying its exact location within the contract itself.

Q7. Is there any additional information that should be included in the draft plan to provide buyers with more certainty?

The information required to be included in the draft plan by the vendor is prescribed at clause 4A(1) of the draft Regulation. The Property Council is of the view that no additional information is required.

Q8. Should any of the prescribed information not be included? If not, why not?

The information required to be included in the draft plan by the vendor is prescribed at clause 4A(1) of the draft Regulation. The Property Council would recommend that the requirement to show the approximate location and area of parking and storage areas on the draft plan should be omitted. The location of car parking spaces and storage spaces is highly uncertain at the time of marketing because the detailed design and location of services within the basement will not be known. Attempting to identify approximate locations will inevitably result in changes to the location.

Q9. Is there any other information that would not be known with certainty at the time contracts are prepared, and should not be included in the plan (or be noted only in approximate terms)?

The location of easements may not be known with any certainty when contracts are exchanged, particularly those relating to the location of certain services. The nature of easements may be identified but the sites of easements are too difficult to predict with any certainty as in many cases they are determined by utility service providers in later stages of the development. A requirement to disclose the site of easements may result in misleading information being provided to purchasers because of the requirement within the Regulation.

It has been noted that clause 4A(4) of the Regulation does not require a draft strata management statement or building management statement to include a provision for the allocation of costs of shared expenses. On this basis, clause 21(2) should provide the inclusion of the allocation of costs of shared expenses is not a material particular.

Q10. Are any of the required documents unable to be provided or would pose a significant cost to developers if required at the time contracts are prepared?

The Property Council generally supports the proposed reforms intended to improve the level of information disclosed by developers to purchasers of apartments off the plan. We are unaware of any issues regarding the provision of the required documents.

Q11. Is there any additional information that a purchaser should be aware of, and a developer is capable of disclosing early in the development, that should be included in the contract?

The Property Council generally supports the proposed reforms intended to improve the level of information disclosed by developers to purchasers of apartments off the plan. We are unaware of any information (beyond that prescribed in the Regulation) that a developer is capable of supplying to the purchaser with the contract.

Q12. Should arbitration be the only method of resolving these claims? If not, what other methods should be considered?

The Property Council generally supports the proposed reforms intended to improve the practices related to the use of off the plan contracts. Clause 19B of the Regulation indicates that a claim for compensation is finalised when either a vendor agrees to pay the purchaser an amount of compensation or if an arbitrator determines the claim. The Property Council is of the view that apart from negotiation between the parties, arbitration is the only appropriate method for resolving claims for compensation.

Q13. Should the regulation make provision as to the responsibility for costs of appointment of the arbitrator, or is it appropriate for this to be left to the parties to determine?

The Property Council is of the view that it is appropriate for the parties to make decisions regarding the costs of appointing an arbitrator to resolve compensation claims.

Q14. Should the Regulation prevent waiver of cooling off periods for off-the-plan contracts by prescribing a maximum time period by which the cooling off period can be shortened? If so, what time period would be appropriate?

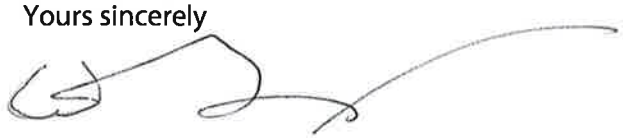
The Property Council generally supports the proposed reforms intended to improve the practices related to the use of off the plan contracts. If it is necessary to remove the option of waiving of the 10 day cooling off period, it is appropriate for the Regulation to specific the amount of time by which a cooling off period can be shortened.

Q15. Is 6 months an appropriate period in which the old form of warning statement may be used for contracts that are not off the plan?

The Property Council supports the introduction of a transition period of at least 6 months to capture the use of old contracts with the old form of warning statement for non-off the plan transactions.

Should you have any questions in respect to this matter, please contact Troy Loveday, Senior Policy Advisor, on (02) 9033 1907 or tloveday@propertycouncil.com.au

Yours sincerely



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