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Off-the-plan contracts review
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To whom it may concern

Off-the-plan contracts for residential property

Thank you for the opportunity to provide comments on a Discussion Paper outlining reforms for off-the-plan contracts aimed at strengthening protections for consumers and providing greater clarity for developers. As Australia's peak representative of the property and construction industry, the Property Council's members include investors, owners, managers, and developers of properties across all asset classes. We are pleased to provide the following comments for your consideration.

Proposals for Discussion

1. *Is a separate mandatory disclosure regime needed for off-the-plan contracts?*

A separate mandatory disclosure regime must maintain an appropriate balance between the developer's need to retain flexibility (particularly in the early stages of a development) and the purchaser's right to have an appropriate level of information disclosed.

2. *Is there a benefit in mandating a prescribed disclosure statement for all off-the-plan contracts?*

There is a benefit to purchasers in prescribing the terms of any disclosure statement, however, as acknowledged in the Discussion Paper, there is a risk that purchasers will rely on the statement alone and not inform themselves in relation to the broader contract provisions.

3. *If so, what should be included in the statement?*

The following items should be included:

- particulars of the deposit holder;
- particulars of whether or not the deposit is to be invested;
- sunset date (and maximum extensions);
- whether or not a development approval (DA) has been obtained but noting that if one had been obtained that DA may be the subject of modification by the developer.

4. *Would buyers have more certainty if the following documents were included as part of mandatory disclosure:*
   - *proposed plan showing the proposed lot;*
   - *proposed by-laws;*
   - *proposed schedule of unit entitlement;*
   - *estimate of proposed levy contributions?*

Draft subdivision plan – Yes, but should be limited to the habitable space. Details of the location of car parking space/s and storage space/s are often not available at the time contracts are entered into.

Proposed by-laws – No. While standard by-laws are often available at the time of entering into a contract, they are subject to change beyond a Developer's control, such as authority, service or infrastructure requirements or as part of development consent conditions. As the Developer will need significant rights to amend and develop the By-Laws the value in providing them as a mandatory disclosure is questionable. If there are particular items that purchasers frequently like to understand upfront (for example what sort of animal they can keep) that matter could be listed in the disclosure statement instead.

Schedule of unit entitlements – No, this matter is already adequately regulated in NSW. Unit entitlements are required to be determined by a valuer no earlier than two months prior to strata plan registration. Accordingly, the determination of unit entitlements in the early stages of a development is inappropriate and would add unnecessary cost.

Estimate of proposed levy contributions – No. Many factors are involved in estimating levy contributions, and the particulars of the building design and shared facilities often evolve and change, especially in complex mixed-use developments. Developers should not be held to a levy contribution estimate in a disclosure statement due to the difficulty in estimating and the often long time between that estimation and registration of the strata plan.

NSW already has a number of restrictions in place to protect purchasers against developers inflating strata levies in the form of initial period restrictions in the *Strata Schemes Management Act and Strata Schemes Development Act 2015.* The same restrictions are not present in Queensland.

5. *Are any of the documents unable to be provided or would impose significant cost on developers if required at the time contracts are prepared?*

See answer to Q4.

6. *Should developers be required to notify purchasers where a change is made to:*
   - *the proposed plan;*
   - *the schedule of unit entitlements (for strata and community schemes); and*
   - *the by-laws or management statement,*
   - *that is likely to have a material impact on the purchaser?*

Yes, but only in respect of the proposed plan. To avoid exploitation of this requirement, any test regarding 'material impact' should be objective. The notification requirement should only be triggered where there is a materially adverse impact with the onus of proof for the requirement on the purchaser. The test should be framed around set parameters (such as a reduction in size of the lot

being purchased, as a percentage). If the notification requirement is too broad Developers will simply notify everything which will place an unreasonable burden on Developers as well as purchasers in terms of having to absorb notified changes.

As outlined earlier, a schedule of unit entitlements should not be required to be made available to a purchaser. Similarly, by-laws and management statements are often only included in a contract in a very draft form and are necessarily subject to change, which can often be materially as in the case of pre- sales, construction has not even commenced and buildings are required to be built in order for those types of documents to be finalised.

7. *Are there any other changes to the scheme that developers should be required to notify purchasers of?*

No comment.

8. *Should notification of changes be required to be made at a set time before settlement can be enforced?*

Yes. Failure to notify should not automatically trigger a rescission right. Developers should have a reasonable period during which they can cure any failure to notify. Purchasers should have a limited window in which to exercise any such rescission right.

9. *What period of notice is appropriate; 14 or 21 days?*

14 days to coincide with the time period of issue of the occupation certificate.

10. *Should the developer be required to provide a copy of the registered plan to the purchaser before a notice to settle can be issued?*

This is not an onerous obligation for a Developer and is of assistance to a purchaser and should be required as a matter of course.

11. *Should the purchaser's ability to terminate a contract be based on a purchaser demonstrating "material prejudice"?*

No, a move away from a percentage affectation will increase uncertainty for Developers and is likely to increase litigation for all parties. A change in regime involving an assessment of impact on the purchaser invariably involves uncertainty and subjectivity. Furthermore, purchasers who simply wish to avoid specific performance of their contracts for other reasons will exploit this requirement.

12. *Should any statutory termination scheme include, as an alternative, a claim for compensation?*

No. If a statutory compensation scheme were to be introduced as an alternative to rescission, any claimant purchaser should still bear the onus of proof in relation to such compensation including demonstrating a causal nexus between the failure of the notification and the compensation claimed.

13. *Should the cooling off period be extended for off-the-plan contracts?*

No, 5 days is sufficient, it allows the purchaser's solicitor time to request and negotiate amendments to the contract but also balances a Developer's need for certainty of presales and re-engaging with any purchasers that missed out in the event of rescission.

Also note that with the commencement of electronic contracts, contracts will increasingly be emailed to solicitors in real time upon exchange rather than the usual lag time in couriering them.

14. *If so, should the cooling off period be 10 or 15 days?*

No, see response to Q13.

15. *Should legislation mandate that the deposit be held in the trust account of a stakeholder?*

The deposit should be held in a trust or controlled money account by a stakeholder. Consideration should also be given to allowing deposits of up to 20% for off the plan sales (as occurs in Queensland) in recognition that a Developer's losses may exceed 10% (for example where product has been customised to a purchaser specification etc.)

16. *Should NCAT be allowed to make orders as suggested?*

If NCAT's jurisdiction is to be enlarged to deal with these matters there would need to be a commensurate increase in resourcing of both the Tribunal members and the Registry staff to ensure matters are pleaded correctly and to reduce vexatious litigants.

17. *Should a condition be inserted in the contract for sale requiring parties to attempt to settle disputes through arbitration?*

No. Arbitration can be costly and time consuming. The courts (including an appropriately resourced NCAT) would provide cheaper and more efficient resolution of such matters.

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19. *Should the definition of sunset date be expanded so that is covers other termination events?*

The definition of sunset date in the s.66ZL should be clarified appropriately to accord with the original rationale for the inclusion of that section of the *Conveyancing Act*. However, other sunset dates (for example in respect of development consent or minimum lot sales) were not intended to be, and should not be, regulated by this section of the Act.

20. *Are there some termination points that a developer should be allowed to use to end a contract without seeking approval of the Court? If so, what are they?*

For a Developer to be able to enter into contracts prior to commencement as required to obtain finance, or in the early stages of a development, it may be necessary to include sunset dates of the nature set out above (for example making the contract subject to development consent or minimum lot sales). These rights are generally exercisable only relatively early in the project and relate to

matters outside of the Developer's control. Accordingly, the Developer needs to maintain the flexibility to terminate without the expense and time imposts of having to obtain a Court order.

The approval of the Court should only be required where the lot has not been created by the relevant sunset date for that event.

21. *Should s 66ZL be clarified or amended to allow the Court to make an award of damages to purchasers if the circumstances so require?*

No comment.

Thank you once again for the opportunity of providing feedback on the reforms explored in the Discussion Paper. We strongly urge that a balance is maintained between consumer protection and Developer certainty. Please do not hesitate the NSW Deputy Executive Director Cheryl Thomas on 9033 1907 or cthomas@propertycouncil.com.au, if you would like to discuss any aspect of this letter further.

Yours sincerely,

Jane Fitzgerald
NSW Executive Director
Property Council of Australia