

Victoria Thomson
Deputy-Director General
Liquor Gaming and Fair Trading
Department of Justice and Attorney-General

By Email: offtheplansales@justice.qld.gov.au

Dear Victoria

Thank you for the opportunity to inform the government's consideration of sunset clauses for 'off the plan' sales, and early release of deposits to developers. The Property Council is committed to ongoing, collaborative engagement with the Queensland Government on important regulatory issues affecting the property industry.

The Property Council of Australia is uniquely placed to comment on these matters, as we are the leading advocate for Australia's property industry. We are a national not-for-profit organisation established to promote the work of the property industry in delivering prosperity, jobs and strong communities to all Australians. Here in Queensland, the Property Council represents over 390 member companies across residential, commercial, retail, retirement living, industrial, tourism and education sectors.

Our responses to the questions you posed in your correspondence are set out below.

1. *What is the makeup of the Queensland development sector and its contribution to the Queensland economy and community?*

The development sector is made up of a multitude of professionals, who represent the full spectrum of the industry, including those who invest, own, manage and develop in all sectors of property, creating landmark projects and environments where people live, work, shop, and play.

Here in Queensland, the property industry (of which the development sector forms a major part), contributes \$41.6 billion in Gross State Product and comprises 11.8 percent of Queensland's economic activity. One in four Queenslanders draw a wage from the property sector, either directly or indirectly. It creates 298,000 direct jobs in Queensland and contributes 48.5% (\$13 billion) of state and local government taxes, charges, and rates.

2. *What are the current issues or concerns facing the Queensland property development sector?*

Currently, soaring construction costs, crippling supply chain challenges, natural disaster recovery and a well-documented skills shortage are culminating in a rare combination of circumstances set to impact the industry for the foreseeable future. As the industry navigates its way through a post-pandemic world, the full weight of these events is only now being realised, with the knock-on effects set to impact the broader economy.

3. Is there a standard approach to sunset clauses in 'off the plan' sales contracts in the Queensland property development sector and the type of factors or events that may result in termination of an 'off the plan' sales contract via a sunset clause by a property developer in Queensland?

Sunset clauses are conditions of a contract that allow for a party to withdraw from a contract on the basis that final settlement is not achieved within a given timeframe.

Separate from that, there are other conditions that require the developer to achieve certain milestones throughout the settlement period. If those milestones cannot be met, the developer may terminate the contract. These are referred to in this document as termination clauses.

It is important to understand the difference between these two types of clauses. They are discussed in more detail below

Termination clauses

For developers, delivering 'off the plan' built product involves far greater risk than projects contracted post completion. There is a myriad of hurdles to navigate, all of which can prevent the development from proceeding or result in delays. These scenarios, which are often outside the control of the developer, include inability to gain appropriate development approvals, insufficient pre-sales, which are required to secure finance, and intolerable cost escalations that render the project unviable etc.

To factor in these circumstances, 'off the plan' contracts include clauses that allow the developer to terminate a contract if circumstances such as those above arise and cannot be resolved appropriately. There are clear processes, specified in the contract, that the developer must go through before being able to terminate a contract under these contract conditions, as well as clear timeframes associated with the delivery of each condition. This is to ensure timely delivery of the contract.

Throughout the contract settlement period there is regular engagement between the buyers and their respective solicitors.

These termination clauses, drafted by legal professionals, are clear and very specific in nature. The specificity and clarity of these clauses is critical for them to be legally robust, as Australian consumer legislation protects buyers against unfair contract conditions. An overly ambiguous contract clause that gives the developer wide, unspecific discretion to exit a contract, may be considered unfair and therefore, unlawful.

It should be noted that these contract conditions are almost universally applied in various forms and are very well understood by legal practitioners.

The specific nature of 'off the plan' contracts, and the clauses outlining the requirements for terminating a contract, are absolutely essential to the functioning of the industry. Any fundamental change to this practice would have a significant impact on developers being

able to finance projects of this nature due to the well understood lending criteria. This in turn would impact housing supply acutely.

Sunset Clauses

Separate from the above, sunset clauses generally protect the buyer from being bound to a contract that has not been delivered in a reasonable amount of time. The main reason for a sunset clause is to allow buyers to be able to move on and buy elsewhere without being bound to an endless contract if there are unreasonable delays in a project.

Queensland law sets the maximum sunset date at 18 months for land, and 5½ years for units.

Queensland legislation guarantees the right of the buyer to withdraw from a contract if the contracted sunset date, or a legislated period (whichever is sooner), is reached. It provides no such protection for the seller.

Sellers and buyers may however, elect to include a contract condition that provides the seller the ability to withdraw from the contract, based only on a sunset date being reached. A clause such as this may be subject to successful legal challenge on the basis it is unfair under Australian consumer protection law. As such, the practice is not widely adopted.

4. Is your organisation aware of situations where an amount was released, from a trust account to a property developer prior to settlement, termination, or another contract finalisation event? If yes, what was the nature of the amount paid? (e.g. a deposit; an expression of interest payment; an option to purchase payment) and was the amount paid under a contract or another instrument?

This is understood to be an extremely rare occurrence in Queensland. The Property Council has been advised that this practice would likely breach Queensland law, as well as relevant professional standard and trust accounting requirements.

The Property Council understands that the Queensland Law Society has previously suggested the laws governing this could be revised to make it clearer when a trustee entity can properly dispose of the amount held in a prescribed trust account.

The Property Council would support appropriate clarification of these provisions, provided there was appropriate consultation.

5. Property Council's opinion of introducing legislated restrictions on developers' ability to terminate a contract under a sunset clause

The Property Council does not support introduction of new laws governing sunset clauses, such as those in place in New South Wales, the Australian Capital Territory and Victoria. We believe the current regulatory framework in Queensland adequately protects

buyers and there would be little, if any, additional protection afforded by introducing such laws.

Further it appears that many of the concerns about sunset clauses arise from the confusion mentioned above, between termination clauses (favouring the developer) and sunset clauses (which favour the buyer).

A number of media stories have reported on the inappropriate triggering of sunset clauses by developers. As previously stated, it is not common practice for a developer to use sunset clauses in their favour due to the legal ramifications of same.

The Property Council recognises the importance of property buyers being fully informed of the often-complex nature of buying “off the plan” and the specificity of the clauses outlining the various factors within such developments. It is critical that buyers seek independent and professional legal advice before entering a contract of sale, to fully understand the nature of the contract entered into.

Of paramount importance to our members is certainty and clarity for business continuity and delivery. At a time where the state is in the midst of a housing supply and affordability crisis, it appears counterintuitive to add unnecessary regulatory changes to a system that already provides appropriate consumer protection and where the substantive nature of the problem is not clearly established.

Thank you again for the opportunity to contribute to this matter. Should you have any questions in relation to the Property Council or this submission, please do not hesitate to contact me by email at jcaire@propertycouncil.com.au or by phone on 0499 181 366

Yours sincerely,

A handwritten signature in black ink that reads "Jess Caire". The script is fluid and cursive, with the first letters of each word being capitalized and prominent.

Jess Caire
Queensland Deputy Executive Director