Property Council of Australia ABN 13 00847 4422
A Level 7, 50 Carrington Street, Sydney NSW 2000
T +61 2 9033 1900
E info@propertycouncil.com.au
W propertycouncil.com.au
Property Council of Australia

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Contracts and Covenants Review
Office of the Registrar General
Level 7, McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

Via email: orgconsultations@customerservice.nsw.gov.au

Dear Contracts and Covenants Review team,

We welcome the opportunity to provide feedback on the Office of the Registrar General's discussion paper which considers options to reform the laws affecting off the plan contracts and covenants.

Our members include the nation's major investors, owners, managers, developers, designers and builders of property of all asset classes. They create landmark projects, environments, and communities where people can live, work, shop, and play. The property industry shapes the future of our cities and has a deep long-term interest in seeing them prosper as productive, sustainable, and safe places.

We acknowledge the importance of the legal framework surrounding off the plan contracts and covenants and recognises the need for it to remain flexible and adaptable to the changing nature of development. We also recognise the need for these reforms to promote certainty for developers, property owners and other stakeholders, while ensuring the delivery of high-quality urban environments.

The Property Council's responses to the questions posed in the discussion paper are provided in the attachment. We welcome the opportunity to be involved in future consultation on legislation and/or regulations arising from this review to ensure that reforms balance consumer protections with the commercial realities of property development.

We thank the Office of the Registrar General for the opportunity to provide a submission to this discussion paper. If you have any questions about this submission, please contact NSW Policy Manager, Emma Thompson at ethompson@propertycouncil.com.au or by phone on 0458 294 817.

Yours sincerely,

Katie Stevenson
NSW Executive Director
Property Council of Australia

Part A: Off the Plan Contracts	
Question	**Comments**
Question A1: Should the Disclosure Statement be expanded to require status information about development milestones? If so, what milestones should be disclosed?	The Property Council broadly supports the expansion of the Disclosure Statement to include status information about development milestones, as this will enhance transparency and provide buyers with realistic expectations. We believe obtaining a Subdivision Certificate, Section 68 Approval or a Section 73 Compliance Certificate should not be included as disclosures that would inform a purchaser about the status of the development. A more meaningful milestone would be whether a Construction Certificate has been obtained or whether construction has commenced on a site.
Question A2: Should the developer be required to provide updates as development milestones are met? If so, what time period for notification do you think would be appropriate?	The requirement to provide development updates will aid in transparency and open dialogue with purchasers. However, any requirements imposed on developers need to be done in a way that balances transparency with administrative efficiency. Updates on development milestones should also be a different regime to the Disclosure Statement. Updates should be limited to 'significant' milestones, acknowledging that each development is different and what is significant to one may differ to another. As such, it will be important to define the scope and parameters of a significant milestone. Care should be taken when drafting any future changes to the legislation/regulations to ensure that the milestones are not treated as sunset dates triggering recission rights. One alternative could be to simplify this to a 6-monthly progress update on say, 1 June and 1 December, annually. This can be a more generic update about specified milestones achieved during a 6-month period, which will

	also give developers greater incentive to have 'checked off' as much as possible during each 6-month period.
Question A3: Should the developer disclose their ownership status of the development site in the contract? If so, should the developer also be required to set out the basis upon which they expect to become owner?	The Property Council supports the ownership status being disclosed in the contract for sale, noting this is already market practice. A simple search by a lawyer that should always be done before a contract is entered into will reveal who owns the property. In relation to the second part of the question, a developer should only be required to state that they have a legally enforceable right to acquire the land and there should be no obligation to disclose the nature of that right (i.e., how the transaction has been documented and the structure that may have been used).
Question A4: How do you think the disclosure in Question 3 above could best be achieved? For example, in the Disclosure Statement, as a prescribed term of the contract, or in some other way?	The disclosure question could be included in the Disclosure Statement as a yes/no question, with a section to allow the vendor to add further details and reference relevant clause(s) of the contract as needed. It is important that the information contained within the Disclosure Statement is short and simple.
Question A5: If the developer has not provided a warning statement or disclosed that they do not own the land, what action should the buyer be able to take? For example, rescind within a certain time after exchange of contracts, at any time before completion, or at any time before the developer becomes the owner of the land, or some other remedy?	Like a failure to attach a prescribed document or warning statement, the remedy for the purchase should be a 14-day recission right. It should be immediately apparent to a purchaser whether the vendor owns the land, noting that a contract for sale will include a title search which notes the registered proprietor of the land.
Question A6: Should the definition of 'sunset event' be expanded to include other events, requiring Court approval to terminate contracts?	No. Imposing additional or specific sunset events could reduce sellers' flexibility in navigating market dynamics. The ability to manage risks and swiftly and respond to changing market conditions is paramount for the residential development industry. If any change to the definition of 'sunset event' is proposed, it should only be clarified to accord with the original rationale for the inclusion of section

	66ZL the *Conveyancing Act*. 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. Court proceedings are not necessarily the most efficient or best way to determine such matters, and consideration should be given to whether expanding NCAT's jurisdiction (with appropriate resourcing) will be more effective. Notwithstanding the above, failing to obtain finance approval and obtaining development approval by a certain date should be events that trigger the right for either the vendor or purchaser to terminate the contract without Supreme Court approval. We suggest such events are called 'condition precedent events' as they are conditions that need to be satisfied before the development can commence. If you cannot get finance or development approval, a development cannot proceed and having the Supreme Court decide this would be problematic for developers. Having these circumstances called something other than a 'sunset event' would be useful and by having them occur at an earlier point in time, it gives the purchaser the ability to not need to wait for the sunset event to terminate the contract.
Question A7: What events should be included in this definition?	Refer to above comments.
Question A8: Should there be a limit on the developer's ability to extend sunset dates? If so, would this be best achieved by a cap on the number of extensions or a maximum period for any extension?	This should remain a matter that is negotiated contractually between the vendor and purchaser. If a contract includes a cap on the number of extensions to sunset dates, this should be determined by the developer on a case-by-case basis rather than being prescribed.
Question A9: Should the legislation set a maximum period by which a developer must settle an off the plan contract? If so, what should the maximum period be - for strata plans and for land developments?	If a maximum settlement period were to be introduced, we recommend the maximum period for strata plans should be 6 years, and 2 years for land developments. The time period may need to be flexible as the delivery of a

	small apartment block with 20 units would have a different timeline to that of a multi-use tower with 300 units. Any changes to the legislation should make it clear whether a sunset date nominated in the contract can exceed the statutory timeframe.
Question A10: Should the legislation limit the developer's ability to extend a sunset clause to only specific circumstances (e.g. adverse weather)? If so, what should those circumstances be?	Sunset clause extensions should be allowed in circumstances beyond the developer's control. Limits on what constitutes a 'specific circumstance' could increase the risk of project cancellations, reducing housing supply. We note that if a maximum period is introduced as suggested in Question A9, this becomes less of an issue.
Question A11: If legislative caps are placed on the developer's ability to extend the sunset date, should the developer be able to seek approval of the Court to extend the sunset date? In what circumstances should this apply?	There should be no requirement to seek approval of the Court to extend the sunset date in circumstances where they can demonstrate that the delay was beyond their control and that they have taken reasonable steps to meet the original sunset date.
Question A12: Do you support a statutory requirement for developers to take reasonable steps to meet sunset dates, and to provide evidence of those steps to the buyer (and the Court) when seeking to extend sunset dates?	No. The commentary in the discussion paper on this issue is too simplistic as the purchaser generally has rights under the contract and at law. In the event that the vendor does nothing (i.e., if the vendor may be taken to have repudiated the contract), the purchaser is entitled to rescind.
Question A13: What mechanisms do you think could assist in compelling developers to perform obligations under the contract (e.g. penalty for non-compliance)?	No mechanism required. Developers are already incentivised to perform their obligations under the contract.
Question A14: Are there circumstances where it would be appropriate for the Court to make an order permitting the vendor to rescind under a sunset clause but where an award of damages should include a component for capital gain attributed to the vendor through rising land values?	We recommend that the current legislated position remains unchanged as the Act already provides that damages may be awarded in certain circumstances.

Question A15: Should s 66ZS be amended to allow the Court to consider capital gains as part of any claim for an award of damages?	No, further legislative changes should not be required.
Question A16: Do you support a statutory requirement for developers to request that an off the plan contract notification be recorded on the development site?	We would support a statutory requirement for a Registrar General's caveat upon the first off-the-plan sale, as this is an essential step from the purchaser's perspective. However, this process should be automated to prevent delays and should not hinder necessary financial dealings (including mortgages) or registration of plans and other instruments required to progress the development. The only restriction in respect of the Registrar General's caveat should be on the transfer of land, unless a new owner is taken to be automatically bund by any pre-existing off-the-plan contracts. We also suggest there should be a bespoke form of Registrar General's caveat for off-the-plan contracts rather than relying on the current regime.
Question A17: Would this requirement add unreasonable cost or delay to the development process?	Yes, if the process is not automated and the right to register dealings, plans and instruments other than a transfer of land are automatic and do not require consent.
Question A18: What types of dealings and instruments should be prevented from being registered while an off the plan contract notification is in place?	The caveat should only prevent the transfer of land where there is no recognition of purchaser interests as part of the transfer but should not block necessary dealings such as mortgages or infrastructure-related leases, plans, dealings and other instruments that are required for the development. Ensuring commercial flexibility is essential to maintaining project momentum.

Part B: Obsolete Restrictive Covenants	
Question	**Comments**
Question B1: Should section 81A be expanded to include additional types of old covenants that can be deemed obsolete after 12 years? If so, what types of covenants should be included?	Yes, section 81A should be expanded to include additional types of old covenants, noting that most local environmental plans provide for covenants to be overridden or suspended in any event if a development application is granted to that effect. These could include farming, minimum building setbacks, restrictions on advertising hoardings and height restrictions. We recommend that the expanded regime be forward-looking and only apply where no sunset date is included in the instrument creating the encumbrance.
Question B2: Is there some other way of identifying covenants that may have become obsolete (perhaps by differentiating between covenants created to benefit one of 2 specific parcels and those applying generally to an entire subdivision development)?	Covenants could be identified as obsolete by differentiating between those created to benefit specific parcels and those applying generally to an entire subdivision development. However, this should not limit their ability to be removed as part of the regime, as there are many old obsolete covenants that apply to one or two lots in a subdivision. Covenants that apply broadly and no longer serve their original purpose should be deemed obsolete.
Question B3: Should Part 4A be amended to remove the need for notice of an application by presuming extinguishment of a building materials, fencing or value of structures covenant after 12 years?	Yes, Part 4A should be amended to presume extinguishment of these covenants after 12 years, removing the need for notice of application. This should also apply to the old advertising, prescribed setbacks and other old covenants referenced in the Discussion Paper, as per Questions B1 and B2.
Question B4: If a requirement for notice is retained, should the class of persons required to be served be reduced? If so, to who?	Notice requirements should be removed entirely. If it must remain, it should be limited to the current registered proprietor only, given that many old restrictions refer to specific people who are deceased or companies that are no longer in existence.
Question B5: Should all new restrictive covenants be time limited? If so, what should that limit be?	Yes, all new restrictive covenants should be time limited. A maximum period of 20 years would be appropriate, aligning with recommendations from other jurisdictions to provide a balance between the interests of

	developers and future landowners. We encourage that shorter time periods are outlined in the instrument. There should be an option for an extension through an administrative process.
Question B6: Should there be any exceptions to the time limit or a process to allow for extension of the effect of a restrictive covenant?	Yes, there should be a process to allow for the extension of a restrictive covenant if it continues to serve a significant and valuable purpose.
Question B7: Should section 89 of the *Conveyancing Act* be expanded to specifically include consideration of planning schemes in the exercise of its powers? If so, should it be a factor to be considered by the court or a separate ground?	No comment.
Question B8: Should there be any limitations?	No comment.