



Title: Discussion Paper – Off-the-plan contracts for residential property

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## Minister's Foreword

The growth of the New South Wales economy in recent years has led to record increases in housing supply. Off-the-plan contracts have become a popular vehicle for developers looking to secure buyers early in the planning approval and project financing process. Over the last 10 years, off-the-plan contracts for sale have increased tenfold. They now represent around 11.5% of the residential sale market in NSW.

Off-the-plan contracts are critical for our housing construction industry to thrive and for our record housing starts to continue. They are necessary to accommodate our expanding population and to keep the economy generating jobs.

In mid-2015, as the Sydney property market was heating up, reports started to emerge of unscrupulous developers using sunset clauses to rescind purchasers' contracts en masse only to re-list the same apartments at higher prices.

In September 2015, the NSW Government launched an online survey on off-the-plan sales; 639 responses were received, more than 30 per day during the period the survey was open. This followed a number of high profile court cases, including a class action by a group of purchasers in Wolli Creek. It was apparent that urgent action was required to protect purchasers from having their contracts rescinded by unscrupulous developers via sunset clauses.

The Government then moved swiftly to introduce emergency legislation in November 2015, the Conveyancing Amendment (Sunset Clauses) Bill, which tightened the rules regarding sunset clauses and significantly restricted their use.

The NSW Government put developers on notice - if they use a sunset clause for no other reason than to reap a windfall profit at the expense of the purchaser, 'then they would do so at their own peril'.

It is fair to say that the laws had the desired effect. The media horror stories dried up and confidence was restored to the market, particularly among first-time buyers.

This discussion paper asks whether, two years on, there is a need to further strengthen protections for off-the-plan purchasers.

For example, reports have come to light of developers substantially altering development plans after contracts have been exchanged.

One-bedroom apartments have become studios, and lot sizes have been reduced substantially so that more units can be squeezed onto the site. There have also been complaints about the length of contracts and the one-sided terms that unfairly favour developers. In the rush to exchange contracts, there is often no time for a purchaser to consider the contract properly and negotiate more favourable terms.

This discussion paper considers these issues and possible reforms in relation to disclosure, standard terms and cooling-off periods to provide more clarity and certainty in the marketplace.

I welcome your feedback on the topics contained in this discussion paper.



The Hon. Victor Dominello MP  
**Minister for Finance, Services and Property**



## Purpose of this Paper

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This Paper identifies a set of reform proposals that the NSW Government is considering for off-the-plan contracts. The proposals are designed to strengthen protections for consumers buying property off-the-plan. At the same time, the reforms aim to provide greater clarity for developers, allowing sufficient flexibility to encourage innovation and investment in new homes.

Developers tackling large residential and mixed-use projects are vulnerable to significant risks during the development phase. Planning approvals, financier requirements, unforeseen delays and changing market conditions are just some of the factors that can have an impact on the form, expectations and viability of a proposal. To mitigate against these risks the developers need to retain some level of control over design, timing and staging.

The need for control should not come completely at the expense of purchasers. Many purchasers are unable to negotiate contract terms that fairly balance the rights of both parties.

This Paper canvases a range of measures that will help standardise practices within the industry and provide a better outcome for all sides. The mechanisms being considered include a combination of:

- Mandatory Disclosure;
- Implied contract terms
- Standardised notice periods where changes are needed
- Minimum requirements for the holding of deposits.

## How to make a submission

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Anyone wanting to comment on the proposals or the issues raised in this Paper is invited to make written submissions.

Please send all submissions to [ORG-admin@finance.nsw.gov.au](mailto:ORG-admin@finance.nsw.gov.au)

Alternatively, please send any paper submissions to:

Off-the-plan contracts review  
Office of the Registrar General  
McKell Building  
2-24 Rawson Place  
SYDNEY NSW 2000

**All submissions must be received by 5pm Tuesday 30 January 2018.**

All submissions may be made publicly available. Should you wish to have your personal details omitted in the course of publication, please clearly indicate this in your submission.

# Table of Contents

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<b>1. Background</b>	<b>6</b>
1.1 What is an off-the-plan contract?	6
1.2 Why are off-the-plan contracts used?	6
1.3 What are the attractions for purchasers?	6
1.4 The significance of off-the-plan sale in the residential property market	6
<b>2. Mandatory Disclosure</b>	<b>7</b>
2.1 A mandatory disclosure regime for off-the-plan contracts	7
2.2 The form of mandatory disclosure	7
2.3 Prescribed disclosure statement	8
2.4 Documents to be attached	8
<b>3. Variation of the Disclosure Statement</b>	<b>10</b>
3.1 Notification of changes to the disclosure statement	11
3.2 Purchaser's remedies for changes to the disclosure statement	12
<b>4. Cooling off period</b>	<b>13</b>
<b>5. Deposit</b>	<b>13</b>
<b>6. Jurisdiction</b>	<b>14</b>
<b>7. Sunset Clauses</b>	<b>15</b>
7.1 The definition of "sunset clause" – other termination triggers	16
7.2 Discretionary power of the Supreme Court to award damages	16

# 1. Background

## 1.1 What is an off-the-plan contract?

An off-the-plan contract is a contract for the sale of a lot that does not have its own title when the contract is exchanged. Essentially, it is the sale of real estate that does not exist when the contract is signed.

Off-the-plan contracts can be used for the sale of land;

- in a conventional subdivision; or
- in a proposed strata or community plan

## 1.2 Why are off-the-plan contracts used?

Property development relies on the forward selling of lots to make the project commercially viable. Finance is generally dependent on a percentage of the proposed lots being pre-sold. More housing is now being made available in strata and community schemes and this type of property has significant upfront development costs. The strata buildings must be completed before any lots can be transferred.

## 1.3 What are the attractions for purchasers?

Off-the-plan contracts can be an attractive way for buyers to enter the property market. A home can be bought at a price locked in at today's values, but with time to save and to shop around for the best mortgage deals. There are also stamp duty incentives, with stamp duty delayed until 15 months after contracts have been exchanged. At the end of the process the buyer will receive a modern, new property often customised to the purchaser's specifications.

## 1.4 The significance of off-the-plan sale in the residential property market

Over the last decade the number of residential properties purchased off-the-plan has risen dramatically. In the 2006/07 financial year there were 2,148 off-the-plan contracts, representing 1.25% of all residential property sales. Last year, 29,022 off-the-plan sales were entered into being around 11.5% of the residential sale market.

Over the past five years off the plan purchases have grown at around 20% per annum—and in some years more than 50%.

Financial Year	Number of off-the-plan contracts for sale
2006/07	2148
2007/08	2675
2008/09	2646
2009/10	3272
2010/11	5551
2011/12	3719
2012/13	6193
2013/14	13,237
2014/15	15,847
2015/16	23,919
2016/17	29,022

Financial Year	Number of residential contracts for sale
2006/07	168,340
2007/08	172,449
2008/09	165,096
2009/10	184,507
2010/11	157,925
2011/12	151,952
2012/13	169,943
2013/14	212,139
2014/15	220,874
2015/16	220,276
2016/17	224,707

The increased reliance on off-the-plan contracts in the residential property market highlights the need for a thorough review of the legislation.

## 2. Mandatory Disclosure

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### 2.1 A mandatory disclosure regime for off-the-plan contracts

New South Wales has a comprehensive Vendor Disclosure regime that is prescribed by the *Conveyancing (Sale of Land) Regulation 2017*. Residential property can only be marketed for sale if a contract is available for inspection. The contract must include a set of certificates and searches that disclose information about the property's title. Having a contract available early in the sale process allows the purchaser to exchange quickly, reducing the opportunity for gazumping<sup>1</sup>.

The existing vendor disclosure regime requires information to be given about the land in its current, un-subdivided form. One of the key objectives of the current regime is to speed up the conveyancing process for existing lots. Stakeholders generally agree that it meets this objective<sup>2</sup>.

Buyers under off-the-plan contracts have different needs and expectations than buyers of existing property. Off-the-plan buyers are not generally able to physically inspect the property before purchase and will not have access to registered documents, like by-laws, that may restrict the way the land can be used. There is a strong argument for an additional, separate mandatory disclosure regime that will apply to off-the-plan contracts.

All Australian States and Territories have some form of vendor disclosure requirement. Not all those requirements relate directly to off-the-plan contracts.

In Western Australia, the seller of a strata property must give the buyer certain information about the strata scheme. This requirement applies both to existing lots and to lots in a proposed strata plan.<sup>3</sup>

Queensland has extensive disclosure obligations that apply to sellers of proposed lots. For vacant land sold off the plan the seller must comply with the Land Sales Act 1984 (Qld). For the sale of strata, or community title lots, the Body Corporate and Community Management Act 1997 (Qld) applies. These disclosure obligations were reviewed by the Queensland Government in 2011-2013 and amendments were made in 2014. The Queensland regime seems to have been generally well accepted in that State<sup>4</sup> and may prove a useful precedent for a similar regime in New South Wales.

#### Proposals for Discussion

##### Q.1 Is a separate mandatory disclosure regime needed for off-the-plan contract?

### 2.2 The form of mandatory disclosure

Buyers who purchase off-the-plan commit to the sale before the property exists, sometimes even before planning approval has been given. Off-the-plan buyers therefore need sufficient information about the final project to give confidence and certainty about what it is they give agreed to buy. Mandatory

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<sup>1</sup> Gazumping occurs when a vendor has reached a verbal agreement with one buyer, but sells to another at a higher price before the first purchaser has exchanged contracts.

<sup>2</sup> Discussion Paper: Review of the Conveyancing (Sale of Land) Regulation 2010 and the Conveyancing Process in New South Wales; August 2016; NSW Office of the Registrar General

<sup>3</sup> Part V *Strata Titles Act 1985* (Western Australia)

<sup>4</sup> Final Report: Seller Disclosure in Queensland 2017; Commercial and Property Law Research Centre; Queensland University of Technology, p 25

disclosure is intended to encourage the giving of an accurate description of what is being promised.

In Queensland, mandatory disclosure for proposed lots includes a combination of:

- a prescribed disclosure statement; with
- mandatory documents attached

This combination of material provides a minimum set of information that is consistently available for all sales of proposed lots.

The components of a mandatory disclosure regime in NSW could include some or all of the following documents:

## 2.3 Prescribed disclosure statement

The purpose of a prescribed disclosure statement would be to provide purchasers with a simplified, easy to read document that summarises key aspects of the sale. There is research that suggests that simple, checklist style documents that are filled out by the seller are more likely to be read by purchasers.<sup>5</sup> On the downside, purchasers may be tempted to rely too heavily on the summary document without considering the contract as a whole.

A prescribed disclosure document should not be too comprehensive and should include a refined number of matters that will be important to most buyers. These could include:

- Whether or not planning approval has been obtained;
- Who will be holding the deposit;
- Proposed completion date;
- Details of any sunset clause (with a reference to the relevant provision in the contract).

### Proposals for Discussion

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

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

## 2.4 Documents to be attached

The documents required to be attached to the Disclosure Statement should be limited and should not duplicate those required to be attached to the contract as part of the Vendor Disclosure regime. The documents should include:

- **Proposed plan showing the proposed lot**

All buyers purchasing before the plan is registered will need to be given a proposed plan that shows the lot as precisely as possible. The plan should provide a similar level of detail as a registered plan would. An architectural plan would not be sufficient for the purpose (though architectural drawings could be attached to the contract to give an idea of what the finalised product will look like).

In Queensland, the proposed plan that is attached to the disclosure statement must be prepared by a surveyor and include relevant lot particulars, like the proposed lot number, the area of the lot and its

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<sup>5</sup> Final Report: Seller Disclosure in Queensland 2017; Commercial and Property Law Research Centre; Queensland University of Technology, page 29

dimensions<sup>6</sup>. The plan must be substantially complete, though the plan will be considered complete even though it includes inaccuracies<sup>7</sup>.

In Western Australia, the proposed strata plan that is required to be attached to the contract must be prepared to the standard required for lodgment under the Strata Titles Act<sup>8</sup>.

- **Proposed by-laws**

The by-laws of a strata scheme or the management statement of a community title development will have a significant impact on how an owner can use their lot. The by-laws may prohibit animals or impose restrictions on smoking. If there are shared facilities in the development, the by-laws may limit the hours when the facilities can be accessed or may impose additional payments for use. In many cases, some parts of the common property may be granted to specific lot owners for their exclusive use.

Under the NSW Vendor Disclosure regime, by-laws must be attached to the sale of strata lots in existing schemes. A similar requirement should be included for strata and community scheme lots in a proposed plan. Both Western Australia and Queensland require the proposed by-laws to be disclosed to purchasers<sup>9</sup>.

- **Schedule of unit entitlements**

The schedule of unit entitlements determines the amount each owner will pay in levies used for maintenance, insurance and upkeep of a strata or community scheme. A purchaser buying into a scheme needs some indication of what the levies will be so they can make an informed decision about the suitability of a property.

For a strata scheme, unit entitlement must be based on the comparative market value of each of the lots. Unless the schedule of unit entitlements is available for purchasers to review at the time of sale, purchasers may make unjustified assumptions about the proposed schedule. The purchaser may assume that all lots will have an equal unit entitlement or that some apparently larger lots will have a significantly higher allocation. These assumptions may prove to be mistaken, leading to dissatisfaction and a feeling of injustice that can linger well after settlement of the sale.

To avoid this area of potential dispute, the proposed schedule of unit entitlement should be included.

- **Estimate of proposed levy contributions**

In Queensland, the disclosure statement must “state the amount of annual contributions reasonably expected to be payable to the body corporate by the owner of the proposed lot”<sup>10</sup>. A similar requirement could be introduced in NSW. Obviously, before the building is complete it will be impossible to predict exact contributions but the developer will be in a position to make an informed estimate of what the contributions will be.

When contracts are prepared the developer will know the size of the scheme and the nature of the building. The extent of the shared facilities should also be known, like the number of lifts and the nature of any recreational facilities. This detail will allow an estimation of insurance, maintenance and sinking fund contributions that would be required.

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6 s 11 Land Sales Act 1984 (Queensland)

7 s 10 Land Sales Act 1984 (Queensland)

8 s 69A Strata Titles Act 1985 (Western Australia)

9 s 69A Strata Titles Act 1985 (Western Australia), s 213 Body Corporate and Community Management Act 1997 (Queensland)

10 s 213(2)(b) Body Corporate and Community Management Act (Queensland)

## Proposals for Discussion

**Q. 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

**Q. 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?**

## 3. Variation of the Disclosure Statement

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How will a disclosure statement affect the ability of the developer to control the project and make changes during the development phase? The purchasers need for clarity about the subject matter of the sale needs to be balanced against the developer's legitimate need for flexibility during construction.

At common law, a difference in what is described in the contract and what is to be transferred will constitute a breach of contract, which could allow a purchaser to rescind or claim compensation<sup>11</sup>. The common law position is altered by the 2017 Law Society/Real Estate Institute contract for sale, which gives a purchaser a right to claim compensation. Where there is an error or misdescription the purchaser can make a claim for compensation by serving the vendor with a statement of the amount claimed. If the amount of compensation claimed exceeds 5% of the purchase price the vendor can elect to rescind the contract.

This contractual procedure for dealing with error and misdescription has several shortcomings in the context of off-the-plan sales. There is no consistent set of rights and procedures that apply to all purchasers, as the standard Law Society/REI contract terms are not always offered. Generally, the developer will propose alternative special conditions that limit the purchaser's right to object to some level of variation in the property. The purchaser may be required to accept variations in a range from 2% to 5% of the total area of the lot without compensation. Sometimes the purchaser will be allowed to object to changes to the internal parts of an apartment but not to any changes to balconies, terraces or car parking spaces. The considerable variation between the terms in different off-the-plan contracts adds to uncertainty and cost for purchasers.

Another issue relates to notification of changes. There is no statutory requirement for the developer to notify purchasers of changes made during development. The purchaser is often left to review the final plans and decide for themselves whether any changes were made, without any explanation from the developer. It is important that the purchaser do this as, if there are rights to compensation for variations in the property's specifications, these are usually lost once the sale is complete. This puts the purchaser under considerable pressure as the settlement date draws near. Once the plan is registered the purchaser will have only a short time to settle, leaving little time to examine the plan and decide whether any claims for compensation have arisen.<sup>12</sup>

A statutory scheme for disclosure and variation should inform purchasers and allow them to identify whether the developed property will be provide substantially as promised. The scheme should focus on

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<sup>11</sup> *Flight v Booth*(1834) 131 ER 1160, *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1

<sup>12</sup> Sch 2 cl 4 Conveyancing (Sale of Land) Regulation 2017 provides that the purchaser cannot be required to settle an off-the-plan purchase of a strata lot unless the vendor has served, at least 14 days before completion, an occupation certificate within the meaning of the Environmental Planning and Assessment Act 1979 (being an interim occupation certificate or a final occupation certificate).

two things:

- A procedure for notifying purchasers of changes to the disclosure statement: and
- The purchaser's remedies where changes are made.

### 3.1 Notification of changes to the disclosure statement

In Western Australia sellers of a proposed lot must notify purchasers of certain "notifiable variations".<sup>13</sup> A notifiable variation occurs where:

- The proposed strata plan is varied "in a material particular";
- The schedule of unit entitlement changes;
- By-laws are made or amended;
- A lease or right is granted over common property;
- The owners corporation will enter into any agreements with third parties.

Notice is to be given as soon as the seller becomes aware of the change.

Western Australia is reviewing its buyer protection laws as part of reform to the Strata Titles Act. Under the reform proposals the seller will only have to tell the buyer of changes to the plan, unit entitlement or by-laws if the change will have a direct impact on the buyer's interest.

Queensland also requires the vendor to notify purchasers if information in the disclosure statement changes. Before the Queensland disclosure regime was revised in 2014, *the Body Corporate and Community Management Act 1997* provided for progressive updating of disclosure, with the developer required to notify purchasers within 14 days of becoming aware of inaccuracies in the statement. The notification requirements have now been streamlined and linked to settlement of the contract. The seller must, at least 21 days before the contract is settled, give the buyer a further statement rectifying inaccuracies in the disclosure statement.<sup>14</sup> If the contract is for the sale of a vacant land lot the changes to the disclosure statement must be given in plain English<sup>15</sup>.

For NSW, a process similar to the Queensland notification regime may be suitable. The developer's requirement to notify purchasers should be linked to the settlement date, with no purchaser being required to complete a contract where material changes have been made without being given notice. An appropriate notice period would be in the range of 14 or 21 days. Requiring notification at the time of settlement will satisfy the need for transparency but will resolve any uncertainty over when a notifiable change event has occurred and when notification must be made.

What type of changes should be notified to the purchaser? The NSW strata and community scheme legislation already limits the developer's ability to create leases over common property, either with the strata plan or during the initial period<sup>16</sup>. These issues probably do not need to be included in the notifiable change regime.

Notification should be required where material changes are made to the:

- The proposed plan;

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13 s 69C Strata Titles Act 1985 (Western Australia)

14 S 214 Body Corporate and Community Management Act 1997

15 S 13(2)(b) Land Sales Act 1984 (Queensland)

16 See for example s 24(2)(c) Strata Schemes Development Act 2015 (relating to leases) and s 26 Strata Schemes Management Act 2015 (restrictions during the initial period).

- The schedule of unit entitlements (for strata and community schemes) and
- The by-laws or management statement (for strata and community schemes).

Even where no changes are made to the contract the purchaser should have access to a copy of the final, registered plan before being required to settle. It may be appropriate for the legislation to require a vendor to provide a copy of the registered plan (either in paper or by electronic means) before settlement can be demanded.

#### Proposals for Discussion

**Q. 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?**

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

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

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

**Q. 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?**

### 3.2 Purchaser's remedies for changes to the disclosure statement

In Queensland, if a further disclosure statement is given rectifying errors the purchaser may terminate the contract if the following three circumstances are met:

- The contract has not already settled;
- The buyer will be "materially prejudiced"; and
- The buyer gives a written termination notice to the seller within 21 days from when the further disclosure statement was given<sup>17</sup>.

Material prejudice has not been defined in the legislation but the phrase has been considered extensively by the Queensland courts, which have decided that:

- the test is objective, having regards to the buyer's circumstances;
- there must be a causal relationship between the inaccuracy and the prejudice to the buyer;
- there must be proportionality between the inaccuracy and the prejudice;
- the legislation is consumer protection legislation so will be construed to assist the buyer<sup>18</sup>

<sup>17</sup> s 13 Land Sales Act 1984 (Queensland)

<sup>18</sup> *Wilson v Mirvac Queensland Pty Ltd* [2010] QSC 87

A similar approach may be appropriate for NSW. Rather than linking the right to terminate to a percentage affectation the test should be directed more to the impact on the purchaser. In off-the-plan contracts the purchaser has agreed to buy a property sight unseen, with all the obvious risks that involves. The purchaser should not be able to end the contract merely because the property offered is not as they imaged it would be. The test should be set at a higher level, with material prejudice demonstrated.

It may also be appropriate for any statutory termination scheme to allow the purchaser to claim compensation (between, say, 2% and 5%) as an alternative to termination.

#### Proposals for Discussion

**Q. 10 Should the purchaser's ability to terminate a contract be based on a the purchaser demonstrating "material prejudice"?**

**Q. 11 Should any statutory termination scheme include, as an alternative, a claim for compensation?**

## 4. Cooling off period

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The existing vendor disclosure regime gives buyers of residential property a 5 day cooling off period. Within the first 5 days from exchange a buyer can decide to rescind the contract for any reason, forfeiting only 0.25% of the purchase price. The cooling off period does not apply to contracts sold at auction and can be waived if the buyer provides a solicitor's certificate, under s 66W of the *Conveyancing Act 1919*.

A 5 day cooling off period may not be adequate for off-the-plan sales. Large developments are often marketed and sold on special "launch days", where purchasers sign contracts on weekends without the benefit of legal advice. Sometimes, contracts are available for review on site but are not available for to be taken away or emailed before exchange. The size of many off-the-plan contracts also poses a problem, with 5 days not being sufficient for proper consideration.

This issue was raised in the Discussion Paper released as part of the remake of the Conveyancing Sale of Land Regulation. It was generally accepted that the cooling off period should be extended for off-the-plan contracts.

#### Proposals for Discussion

**Q. 12 Should the cooling off period be extended for off-the-plan contracts?**

**Q. 13 If so, should the cooling off period be 10 or 15 days?**

## 5. Deposit

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A deposit is paid by the purchaser on or before exchange of contracts. The deposit acts as an assurance that the purchaser is serious about the transaction. If the purchaser fails to complete, the vendor will be entitled to keep the deposit by way of compensation.

No legislation regulates the amount of the deposit or how it is to be held. Usually, the deposit will;

- be 10% of the purchase price;
- held in a trust account by the vendor's agent or solicitor, with the interest shared equally between the parties.

Contracts prepared by developers for off-the-plan sales do not always adopt these usual deposit terms. The amount of the deposit can be negotiated and is sometimes as low as 5% or as high as 20%. Sometimes the developer may offer to hold the deposit instead of it being held by a stakeholder. In other cases, the contract may require that some or all of the deposit be released to the developer and used to raise finance for the project.

In these cases, the purchaser risks losing the deposit if the developer becomes insolvent.

Most complaints made to Fair Trading about off-the-plan sales involve the deposit.

Other States regulate some aspects of the deposit arrangements for off-the-plan contracts. In Queensland, the deposit must be held in the trust account of:

- a law practice;
- a real estate agent; or
- the public trustee<sup>19</sup>.

The deposit can be invested in an interest-bearing account if the contract authorises the investment<sup>20</sup>.

In Western Australia, if the seller sells a strata lot off-the-plan, the deposit must be paid to a solicitor, real estate agent or settlement agent and held in trust for the buyer.<sup>21</sup>

In Victoria, the deposit must be:

- paid to a legal practitioner, conveyancer or licensed estate agent acting for the vendor to be held on trust for the purchaser ; and
- must not exceed 10% Of the purchase price.<sup>22</sup>

Given the risk to purchasers it may be appropriate for similar provisions to be introduced in New South Wales The legislation should not restrict the ability of the parties to agree to:

- accept a deposit of less than 10%;
- allow the deposit to be secured by deposit bond instead of cash.<sup>23</sup>

### Proposals for Discussion

**Q.14 Should legislation mandate that the deposit be held in the trust account of a stakeholder?**

## 6. Jurisdiction

### Tribunal or Arbitration for hearing disputes

Disputes about contracts for sale of land are generally heard in the Supreme Court due to their complexity and the Supreme Court's unlimited jurisdiction.

With off-the-plan contracts there is potential for disputes to arise in the weeks before settlement, particularly

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19 s 218B Body Corporate and Community Management Act 1997, s 17 Land Sales Act 1984

20 s 218D Body Corporate and Community Management Act 1997, s 19 Land Sales Act 1984

21 s 70 Strata Titles Act 1985 (Western Australia)

22 s 9AA Sale of Land Act 1962

23 A deposit bond can be used as an alternative to paying the deposit in cash. A deposit bond is a type of insurance policy that acts as a guarantee to the vendor that the deposit will be paid on settlement or in the case of default by the purchaser.

over differences in what was promised in the contract and the property that will be transferred. Disputes may involve claims for compensation or rights to termination for changes to the size of lots or the reorganisation of car parking spaces. These disputes need a quick resolution. Rights should be exercised without delay so that the contract can be either settled or terminated.

It can take some months for parties to be allocated a hearing date in the Supreme Court. This is not ideal for disputes involving residential off-the-plan contracts. It may be appropriate for provisions to be introduced in New South Wales expanding NCAT's jurisdiction further to make orders on a limited range of complaints linked to the disclosure regime. These could include:

- failure to attach a completed disclosure statement;
- disputes over claims for compensation for changes to the disclosure statement; and/or
- declaratory relief associated with termination of contract.

Expanding NCAT's jurisdiction has the advantage of allowing matters to be listed for hearing quickly.<sup>24</sup> There is precedent for NCAT hearing matters of this kind. In its Consumer and Commercial Division, NCAT hears matters relating to residential building work, including the construction of new homes, with a jurisdictional limit of \$500,000,<sup>25</sup>

On the other hand, NCAT is not designed for lawyers. Parties wishing to be represented, must apply for leave.<sup>26</sup> This may be problematic for many who require representation due to the increased complexity of property transactions.

Another option may be to introduce requirements around arbitration. It may be more appropriate for:

- a condition to be introduced in the New South Wales contract for sale; or
- a statutory obligation to be introduced,
- requiring parties to attend and resolve issues through arbitration.

#### **Proposals for Discussion**

**Q.15 Should NCAT be allowed to make orders as suggested?**

**Q.16 Should a condition be inserted in the contract for sale requiring parties to attempt to settle disputes through arbitration?**

**Q.17 Should legislation be introduced requiring parties to attempt to settle disputes through arbitration?**

## **7. Sunset Clauses**

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In November 2017 an amendment was made to the Conveyancing Act 1919 to stop the misuse of sunset clauses in off-the-plan contracts. Section 66ZL requires a developer to get an order from the Supreme Court before a sunset clause can be triggered. The Court can only make an

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<sup>24</sup> For example, in homebuilding cases, within six weeks. Home Building, NCAT NSW Civil & Administrative Tribunal <[http://www.ncat.nsw.gov.au/Pages/cc/Divisions/Home\\_building/Home\\_building.page.aspx](http://www.ncat.nsw.gov.au/Pages/cc/Divisions/Home_building/Home_building.page.aspx)

<sup>25</sup> s 48K Home Building Act 1989.

<sup>26</sup> s 45 Civil and Administrative Tribunal Act 2013. This requirement can be overridden in limited cases see for example cl 7 of sch 4 to the Civil and Administrative Tribunal Act 2013.

order if it would be just and equitable to do so. The legislation has removed the incentive for developers to delay settlement in the hope of securing a financial gain.

Emerging trends highlight a need to review the sunset clause provisions to make sure they are providing sufficient protections for purchasers. Two particular issues need consideration:

- The definition of “sunset clause” and other termination triggers; and
- The Court’s discretionary power to award damages.

## 7.1 The definition of “sunset clause” – other termination triggers

A sunset clause is a provision in an off-the-plan contract that allows the contract to be rescinded if the lot is not created by a sunset date. The clause provides protections for both parties, allowing either party to end the contract if there are unforeseen delays. Section 66ZL(1) defines the sunset date as:

sunset date means the date set out in the off the plan contract as the latest date (subject to any extension provided for in the contract) by which the subject lot must be created.

The definition of sunset date focuses on registration of the plan and the issuing of titles.

Off-the-plan contracts often include other events that act as triggers for termination. Some trigger events are legitimate. Off-the-plan contracts are conditional and therefore involve some risk that the project will not be completed.

Some common triggers points make the contract:

- Subject to development approval being obtained by a specified date; or
- Conditional upon a specified number of pre-sale contracts being entered into by a set time.

Recently, developers have been making contracts conditional on other events, such as provision of an occupation certificate. This appears to be a clear attempt to get around s 66ZL as an occupation certificate is generally issued around the same time as the plan is registered and titles are issued.

It seems appropriate for the definition of sunset date to be expanded so that the intend of the legislation is maintained.

### Proposals for Discussion

**Q.18 Should the definition of sunset date be expanded so that it covers other termination events?**

**Q.19 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?**

## 7.2 Discretionary power of the Supreme Court to award damages

Section 66ZL gives the Supreme Court a limited set of powers within which any sunset clause rescission is to be reviewed. Limiting the scope of the Court’s discretionary powers was intended to reduce the cost of proceedings, considering that the section forces all developers to commence court proceedings before exercising a contractual right. Under the section, the Court can make an order permitting the vendor to rescind, but only if the Court is satisfied that making the order would be just and equitable in all the circumstances, according to a defined set of considerations listed in the legislation.

If an order is made terminating the contract, purchasers will be entitled to return of the deposit. However, the section makes no specific provision for compensation to be awarded. In most cases, compensation would be inappropriate. An order can only be made if it is just and equitable, considering the terms of the contract, nature of the delays and other similar matters. If the termination is equitable in all the circumstances why would damages be necessary?

In a recent case concerning a property in Surry Hills a developer sought to rescind contracts because of delays. The matter was settled before a decision was reached but it seems that during the proceedings, Emmett J made a comment about the need for discretion over compensation<sup>27</sup>.

Under general contract law, where a vendor repudiates a contract the purchaser may be entitled to damages for loss of bargain<sup>28</sup>. It is possible that on the facts of a matter brought under s 66ZL, the Court may find there is no likelihood of the development being completed. A termination order may be the only viable alternative but the developer may not have fulfilled the contractual obligation to complete the development in a proper and workmanlike manner.

It is proposed that s 66ZL be amended to clarify that the section does not prevent the Court from using other powers to award damages (such as s 68 of the *Supreme Court Act*<sup>29</sup>) where the circumstances warrant.

#### **Proposals for Discussion**

**Q.20 Should s 66ZL be clarified or amended to allow the Court to make an award of damages to purchasers if the circumstances so require?**

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<sup>27</sup> Marcus Andrews, Court questions the power to order compensation to purchasers of off-the plan contracts for recession under sunset clause (15 September 2017) McCabes Lawyers < <https://www.mccabes.com.au/court-questions-power-order-compensation-purchasers-off-plan-contracts-rescission-sunset-clauses/> >

<sup>28</sup> Tamanna v Zattere [2017] NSWSC 1388

<sup>29</sup> Section 68 Supreme Court Act 1970 gives the Court power to award damages instead of an order for specific performance