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

By email: ORG-admin@finance.nsw.gov.au

Dear Sir/Madam

DISCUSSION PAPER – OFF-THE-PLAN CONTRACTS FOR RESIDENTIAL PROPERTY

Mirvac has significant experience in the sale and development of "off-the-plan" lots in both the flat land (or Master Plan Communities) and apartment sector in New South Wales and around Australia. Our customers and ensuring we deliver in accordance with their expectations is our number one priority. For this reason we note that we frequently already disclosure to our customers many of matters and documents suggested in your discussion paper as we consider this best practice.

With that in mind we refer to the 'Off-the-plan contracts for residential property' Discussion Paper dated November 2017 (**Paper**) and wish to make the following submissions:

Proposal for Discussion		Response
1.	Is a separate mandatory disclosure regime needed for off-the-plan contracts?	While we understand the rationale behind the proposal for a mandatory disclosure regime, we note that any such 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 to it.
2.	Is there a benefit in mandating a prescribed disclosure statement for all off-the-plan contracts?	As stated above, we understand the benefit to purchasers in prescribing the terms of any disclosure statement. As suggested in the Paper however, there is a risk that purchasers will rely on the statement alone and not inform themselves in relation to the broader contract provisions.

Proposal for Discussion		Response
3.	If so, what should be included in the statement?	We consider that the following items may be appropriate for inclusion: - particulars of the depositholder; - 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 We do not consider that specific details of development approval/s are relevant at this stage, as they often have not been obtained or are subject to the developer's right to apply for modifications (which developers frequently do).
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, we believe that a draft subdivision plan would be appropriate to include as a part of a disclosure statement. However, we note that details of the location of car parking space/s and storage space/s are often not available at the time contracts are entered into, and are at a later stage of a development accordingly this should be limited to the habitable space. Proposed by-laws – No, while we commonly annex draft by-laws to our contracts we do not believe that by-laws should be included in a disclosure statement. While standard by-laws are often available at the time of entering into a contract, they are subject to change. There are various reasons why by-laws may change, including many outside of the Developer's control, such as authority, service or infrastructure requirements or as required by 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.

Proposal for Discussion		Response
		Schedule of unit entitlements – No, we do not believe that a schedule of unit entitlements should be included in a disclosure statement. Given recent strata reform, unit entitlements are required to be determined by a valuer no earlier than 2 months prior to strata plan registration. Accordingly, the determination of unit entitlements in the early stages of a development is inappropriate and would involve a significant cost to the developer. This matter is already adequately regulated in NSW. Estimate of proposed levy contributions – No, we do not believe that proposed levy contributions should be included in a disclosure statement. There are many factors involved in estimating levy contributions. While Mirvac endeavours to determine a levy range in the early stages of a development, particulars of the building design and shared facilities will necessarily evolve and change, this is more so the case with 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. We also note that NSW already has a number of restrictions in place to protect purchasers against developers inflating strata levies in the form of initial period restrictions etc in the Strata Schemes Management Act and Strata Schemes Development Act 2015. These 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 item 4 above.

Proposal for Discussion		Response
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 possibly exploitation of this requirement by purchasers who simply want an excuse to get out of their contracts, 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 discussed above, 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 provided.
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.

Proposal for Discussion		Response
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. Should be required as a matter of course.
10. (# repeated in paper)	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 concerned. 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 as a means to do so.
11.	Should any statutory termination scheme include, as an alternative, a claim for compensation?	No comment provided given response to item 10. 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.
12.	Should the cooling off period be extended for off-the-plan contracts?	No, in our experience 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 increasing be emailed to solicitors in real time upon exchange rather than the usual lag time in couriering them.
13.	If so, should the cooling off period be 10 or 15 days?	No comment provided given response to item 12.

Proposal for Discussion		Response
14.	Should legislation mandate that the deposit be held in the trust account of a stakeholder?	We agree that the deposit should be held in a trust or controlled money account, by the stakeholder. We also recommend that consideration be given to adopting the same position as Qld by allowing deposits of up to 20% for off the plan sales in recognition that a developer's losses may exceed 10% (for example where product has been customised to a purchaser specification etc.)
15.	Should NCAT be allowed to make orders as suggested?	We do not believe that is appropriate for matters of this nature to be heard by NCAT given the current resourcing of this jurisdiction. 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.
16.	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.
17.	Should legislation be introduced 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. .
18.	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.

Proposal for Discussion		Response
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?	For a developer to be able to enter into contracts prior to commencement as is 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 (eg, making the contract subject to development consent or minimum lot sales). These rights are generally exercisable only relatively early on 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.
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?	No comment provided.

Thank you for the opportunity of providing feedback on the discussion paper which aims to bolster home buyer protections for off the plan purchasers. We believe it is prudent to ensure a higher level of protection for purchasers, however this needs to be balanced with the practicalities and legalities of complicated development projects. Accordingly, we trust you will find this submission valuable.

Should you need any further information or like to discuss any items contained in this letter, we would be happy to meet to discuss further at your convenience.

Yours faithfully

TOBY LONG
General Manager, Residential Development NSW
Mirvac