LANDCOM

10 January 2018

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

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

Dear Office of the Registrar General,

RE: DISCUSSION PAPER: OFF- THE-PLAN CONTRACTS FOR RESIDENTIAL PROPERTY

We would like to take the opportunity to provide comments on the recommendations in the "Discussion Paper: Off- the-plan contracts for residential property" (Office of the Registrar General) released in November 2017.

Landcom is a State Owned Corporation that exists to help the NSW Government achieve its urban management objectives. We are not a conventional developer. We work across government and with the private sector to produce quality housing and communities that deliver social, environmental and economic benefits to the people of NSW. We specifically work on strategic and complex residential projects on vacant land and established sites.

This response has been compiled by the Legal division within Landcom who have substantial expertise and practice in this area of law over many years.

If you have any queries regarding the contents of this letter, please do not hesitate to contact, Annie Monticone, Junior Solicitor at: amonticone@landcom.nsw.gov.au

Yours sincerely

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Landcom's Submission responding to Proposals for Discussion in 'Discussion Paper: Off- the-plan contracts for residential property'

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

   Yes, we do not object to this regime being put in place to provide clarity to all parties.

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

   Yes, providing a disclosure statement listing all the relevant information in one place would be helpful to purchasers, especially unsophisticated purchasers.

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

   We agree with the suggestions in the discussion paper & make further suggestions as follows:
   - whether planning approval has been obtained,
   - who will be holding the deposit,
   - proposed completion date,
   - reference to any relevant sunset clauses and other vendor rights to terminate/rescind the contract (including brief a description of the right for either the vendor or purchaser to rescind),
   - The rights of the developer to vary the prescribed documents (ie. subdivision plan, instrument, by-laws, etc),
   - Purchaser rights to inspect the property,
   - The percentage of the variation allowable in the area of the lot being sold, and the Purchaser's right to terminate if the variation of the lot size exceeds the percentage stated in the disclosure statement and contract,
   - Any DA conditions that specifically impact the future landowner i.e. – restriction on vehicular access to corner lots, rainwater tanks etc,
   - Quality of finishes and rights to elect upgrades.

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

   We also suggest a draft section 88B Instrument should be mandatory, and a description of what services will be available should also be included.

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

   We suggest that geotech reports or lot classification reports should not be included in the contract as they are obtained externally at cost, which some developers may choose to pass on to purchasers.

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?

We make no comment in regards to whether notifications should be required for changes to the schedule of unit entitlements (for strata and community schemes) and the by-laws or management statement however, we will provide comment in regards to notifications to changes to a proposed plan.

We do not agree with the proposal that developers should have to provide notice to the purchaser whenever there is a change to the proposed plan. The developer is not going to know what will materially impact on the purchaser and so practically, the developer will then have to highlight all changes to the plan to the purchaser to comply with this obligation.

We suggest instead, that there should be a requirement for the purchaser to be given the registered plan and a minimum time period for the purchaser to raise objections to variations. The purchaser may then adequately (within this time period) seek independent legal advice in regards to the changes.

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

We suggest that developers should notify purchasers about substantial variations to restrictions, positive covenants or easements in the section 88B Instrument's as these changes can have a substantial impact on the purchasers' use and enjoyment of the land or property.

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

Yes, we are not opposed to this.

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

14 days gives a purchaser adequate time to seek advice or take action in regards to the change.

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

We do not oppose providing a registered plan and section 88B to the purchaser when it becomes available.

(b) Should the purchaser's liability to terminate a contract be based on the purchaser demonstrating 'material prejudice'?

Yes, we support this suggestion however, we suggest that a definition of 'material prejudice' is clearly defined in the legislation so that purchasers can easily understand the concept and not make frivolous attempts to terminate due to a change which is either a minor or inconsequential.

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

No.

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

Yes, we are not opposed to this.

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

Yes, we consider 10 days as sufficient time for a purchaser to instruct their solicitor and get their finances in order.

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

Yes, we do not oppose this applying to private developers, however there should be an exemption for a State Owned Corporation and other Government agencies.

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

We agree that expanding NCAT's jurisdiction to allow them to make the limited orders described in the Discussion Paper for frequently litigated issues would be an improvement on taking action in the Supreme Court. This would be a far better avenue for a purchaser than the Supreme Court, particularly in regards to the time and costs required to resolve those issues.

Applying to NCAT for leave to be represented is not a difficult process, however many purchasers do not have the same financial resources to engage legal representation as a developer does. NCAT's jurisdiction should be limited to procedural matters (such as orders relating to a failure to give a disclosure statement or amend a disclosure statement) rather than substantive matters of law (such as, whether a change represents a 'material impact' to a purchaser).

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

We do not oppose a condition in the contract and/or legislation being introduced requiring the parties to attempt to settle disputes. However, we note that arbitration is still quite a formal and costly process. We suggest that mediation would be a good alternative to expensive and time-consuming action through the courts or tribunals, providing that this alternative was adequately resourced to provide an efficient and cost effective alternative.

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

As above.

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

Yes, the definition of the sunset date should be expanded to ensure the intent of the legislation is maintained i.e. to stop the misuse of sunset clauses by developers.

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?

Other than termination for purchaser default, developers should not have unrestricted termination rights without Court approval.

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

Yes, we are not opposed to this. We note that a purchaser may have waited for a period of time with no satisfaction and in the meantime, the market has changed.