HOUSING INDUSTRY ASSOCIATION

Submission to the
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Off-the-plan contracts for residential property
Discussion Paper

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contents

Housing Industry Association contact:

David Bare
Executive Director – NSW

Housing Industry Association
4 Byfield Street,
NORTH RYDE NSW 2113
Phone: 02 9978 3333
Email: d.bare@hia.com.au

ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support, including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On 3 December 2017, the Minister for Finance, Services and Property, Victor Dominello announced a review of off-the-plan property contracts, releasing a Discussion Paper that canvasses a range of proposed options for changes to NSW's Conveyancing laws (**Discussion Paper**).

HIA welcomes the opportunity to provide feedback to the Discussion Paper.

Off-the-plan developments represent a significant portion of the residential property market in NSW. In recent years, almost half of all new dwellings constructed are units and apartments made available in strata and community schemes.

In the vast majority of cases, off the plan projects are completed without incident and the purchaser's expectations are met.

HIA notes that the Discussion Paper focuses on introducing a range of measures aimed at *'providing more clarity and certainty in the market place'*[1].

However prior to the release of this Discussion Paper, HIA notes that the NSW conveyancing process has already undergone 2 recent reviews and change, including:

- In November 2015, in response to reports of developers deliberately delaying projects and inappropriately using sunset clauses to terminate contracts and on-sell the property for a profit, changes were made to the sunset provisions of the NSW Conveyancing Act[2] to tighten rules regarding the use of sunset clauses and the addition of s 66ZL to the Conveyancing Act in 2015 has made an impact to the use of sunset clauses.
- In August 2016, the NSW Government released a Discussion Paper entitled *Review of the Conveyancing (Sale of Land) Regulation 2010* (**2016 Discussion Paper**) and subsequently made a number of changes that commenced in September last year. Of note, the current Discussion Paper raises a number of the same issues that were included in the 2016 Discussion Paper.

There are also already significant consumer protection measures embedded in the various legislation and regulations that apply to the residential construction industry and more broadly under the Australian Consumer Law (ACL).

Whilst improved clarity and certainty are laudable objectives, HIA is concerned if the Government as part of this further review simply continues a current approach which appears to be based on adhoc, piecemeal tinkering with the laws and regulations governing the conveyance process.

Any further change to conveyance laws should be based upon evidence and demonstrable market failure, with due consideration given to the impact or burden that any proposed changes place on businesses in terms of red tape and compliance costs.

[1] Discussion Paper pg.3
[2] *Conveyancing Amendment (Sunset Clauses) Bill 2015*

2. GENERAL COMMENTS

2.1 THE NATURE OF 'OFF THE PLAN' PURCHASE

Purchasing "off the plan" is by its very nature speculative and requires contracts with certain terms and conditions. There are many aspects of this type of purchase that contain uncertainty and risk; this is largely due to the lengthy timeframes involved in such developments. Whilst some purchasers may assume they have bought a block of land, they have not. They have acquired a conditional promise from a vendor to produce and deliver a block of land or a unit in a strata development.

As development approval, construction and the Certificate of Title has not yet been issued, contractual measures are required to protect the interests of both parties.

HIA submits that it is not possible to impose government regulation across all of those matters; hence the need for negotiated and transparent contractual arrangements. In that regard HIA submits that the notion that *'a party to a contract should bear the risk where that risk is within that party's control'*[3] is undermined when there is legislative interference within a contractual arrangement that distorts the contractual allocation of risk.

HIA submits that commonly most off the plan property contracts include clauses covering a variety of circumstances affecting timings of performance, cost variations and other matters raised in the Discussion Paper and in HIA's view these matters are most appropriately dealt with via contractual arrangements.

2.2 BREACH OF CONTRACT AND UNFAIR CONTRACT TERMS

In HIA's submission, the behaviours pointed to as the impetus of reform across the conveyancing regulations could be dealt with through the courts as a breach of contract. Equally, some circumstances described would be capable of review under the Australian Consumer Law (**ACL**).

Accordingly, in considering any changes to the NSW legislation, the existing protections that exist for purchasers via breach of contract and under the unfair contract provisions of the ACL that apply to "standard form consumer contracts" should be considered. Such standard form consumer contracts can include contracts for the sale of land, such as "off the plan" contracts.

The unfair contract laws also apply to off-the-plan purchase contract entered into by small businesses[4].

Under the unfair contract term laws, if a standard form consumer contract contains an unfair contract term, then that term may be void.

[3] Abrahamson Principle

[4] *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015*

A contract term is unfair when:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (financial or otherwise) to a party if it were to be applied or relied upon.

Adding further regulation under the Conveyancing Act will duplicate extensive protections already available to purchasers under other laws.

3. RESPONSE TO DISCUSSION PAPER

3.1 MANDATORY DISCLOSURE

Is a separate mandatory disclosure regime needed for off-the-plan contract?
Is there benefit in mandating a prescribed disclosure statement for all off-the-plan contracts?
If so, what should be included in the Statement?

HIA is concerned that adopting a separate mandatory disclosure regime that applies only to off the plan contracts could create:

- Unnecessary inconsistencies with contracts for the sale of existing properties.
- Complexities with existing requirements for sales off the plan, noting that the Regulations currently provide mechanisms to mitigate a purchasers risk when buying off the plan by preventing the completion of the contract earlier than 14 days after the service of the occupations certificate.
- Further inconsistences with mandatory requirements in NSW residential building contracts.
- Heavy reliance on the mandatory disclosure regime to the detriment of purchasers.
- Add unnecessary administrative cost on developers.
- Unduly affect the long standing contractual arrangements for off the plan purchases.

NSW already has a comprehensive Vendor Disclosure regime prescribed by the *Conveyancing (Sale of Land) Regulations 2017* which applies to off the plan contracts. Additionally, the industry is yet to see the effects of the new requirements introduced on 1 September 2017.

We suggest no further changes should be made until the effect of these new provisions can be evaluated.

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***

Are any of the documents unable to be provided or would impose significant cost on developers if required at the time contracts are prepared?

Whilst the provision of these documents, would assist buyers in their due diligence prior to entering into the contract, HIA understands in many instances these documents are included or provided to buyers.

HIA is unaware of the need to mandate them by law and is also unsure how this would necessarily increase "certainty".

3.2 VARIATION TO THE DISCLOSURE DOCUMENT

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?***

Are there any other changes to the scheme that developers should be required to notify purchasers of?
Should notification of changes be required to be made at a set time before settlement can be enforced?
What period of notice is appropriate; 14 or 21 days?
Should the developer be required to provide a copy of the registered plan to the purchaser before a notice to settle can be issued?

HIA does not support continuing disclosure obligations or the ability for buyers to terminate for mere technical inaccuracies that do not result in material disadvantage. They will adversely impact on transactional costs and create contractual uncertainty.

Should the purchaser's ability to terminate a contract be based on a purchaser demonstrating "material prejudice"?
Should any statutory termination scheme include, as an alternative, a claim for compensation?

See above.

HIA does not support the inclusion of the "material prejudice" test. The framework that applies in Queensland is flawed as to determine if the buyer is materially prejudiced a court must consider whether having regard to the personal circumstances of the buyer, they would be substantially disadvantaged by the inaccuracy.

This test leads to inevitable subjectivity and uncertainty.

Generally, the conveyance contract will provide mechanisms to deal with significant changes and will set out the consequences for both parties in relation to the termination of the contract, including any financial compensation on termination.

3.3 COOLING OFF PERIOD

Should the cooling off period be extended for off-the-plan contracts?
If so, should the cooling off period be 10 or 15 days?

Currently cooling off periods are consistent across contracts for sale and contracts for residential building work, specifically NSW residential building contracts require the inclusion of a 5 day cooling off period within which an owner is entitled to rescind the contract after signing.

HIA sees no reason to create an inconsistent approach. The parties are always at liberty to negotiate a longer cooling off period if required.

3.4 DEPOSIT

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

HIA understands that in most instances if there is a real estate agent, the agent will hold the deposit in their trust account. In the event that there is no real estate agent involved in the transaction, the solicitor for the vendor/ developer will hold the deposit in a solicitors trust account.

HIA does not consider that Discussion Paper sets out sufficient reasons to disturb this practice via legislation.

3.5 JURISDICTION

Should NCAT be allowed to make orders as suggested?

No. As noted in the Discussion Paper, matters arising from off the plan contracts are complex, requiring specialised legal expertise. As also noted, legal representation is often required in these transactions and a tribunal is an inherently more informal process where, for example, the rules of evidence don't apply.

NCAT's jurisdiction is already broad ranging. HIA has previously expressed concern with the lack of expertise when dealing with Home Building matters. HIA would also express similar concerns with tribunal members, who may have limited experience dealing with complex property transactions.

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

HIA would be concerned with the adoption of a mandatory arbitration clause in off the plan contracts for sale. Such an approach may simply unnecessarily further draw out the dispute resolution process. HIA notes that parties are at liberty to negotiate the inclusion of such clauses in their contract.

3.6 SUNSET CLAUSE

Should the definition of sunset date be expanded so that is covers other termination events?
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?

HIA does not condone behaviour that would see a Sunset Clause being used for inappropriate purposes and for the main, agrees that disputes arising out of the application of a Sunset Clause are best dealt with by the legal system.

However noting that s 66ZL of the Conveyancing Act in 2015 requires developers to seek Supreme Court approval before relying on a sunset clause to terminate the contract, HIA however does not necessarily agree that Supreme Court proceedings are the most efficient or best manner to determine such matters in first instance.

HIA would support consideration of an independent body (not NCAT) considering issues of whether the developer gave the purchaser sufficient details and reason why they were unable to complete construction or obtain registration on time. These would however require the amendment of the legislation to provide much more objective criteria for assessment rather than the current law which requires the Supreme Court to determine whether it is just and equitable in all the circumstances.

HIA is otherwise unaware of any need to change the current approach.

Should s66ZL be clarified or amended to allow the Court to make an award of damages to purchasers if the circumstances so require?

No. It is not necessary to add a specific statutory remedy. The courts are already empowered to award damages for breach of contract where the circumstances warrant.