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23 January 2018

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

Dear Sir

Thank you for the opportunity to comment on the discussion paper relating to off-the-plan contract sales.

Although I am a long-standing member of the Law Society of New South Wales Property Law Committee, which is making a submission, I make this submission as an individual accredited specialist in property law since 1993 with post qualification experience of some 45 years. A lot of my practice has been spent dealing with off-the-plan sales (for vendors and purchasers) and I have some personal experience of buying "off-the-plan". For your information, a copy of my CV is attached to this submission.

I agree with the Discussion Paper that a review of the relevant legislation around off-the-plan contracts is appropriate if it is not overdue.

I will make some observations in relation to the questions raised by the Discussion Paper.

Mandatory Disclosure

Question 1. Is a separate mandatory disclosure regime needed for off-the-plan contracts?

There is a clear need for mandatory disclosure, with sanctions for non-compliance, in relation to sales of lots *intended for residential use* in an unregistered plan, in addition to those required presently by Reg 4 of the *Conveyancing (Sale of Land) Regulation 2017.* (I do not here consider the need for such disclosure in relation to lots intended for commercial or industrial purposes). There are three main reasons for this: first, the growing complexity of strata schemes; secondly, the increase in the time taken to construct increasingly large schemes (with the consequent increase in risk of change to the proposed development) and thirdly, the sad fact that some developers cannot be trusted to act fairly, reasonably or honestly. At the same time, the increase in value of the average residential strata lot has been significant and the risks associated with a failed contract for acquisition of a lot have also increased. I therefore commend any proposal for a mandatory disclosure regime for sales of lots intended for residential purposes by way of off-the-plan contract.

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

Subject to my answer to Question 3, yes.

Question 3: If so, what should be included in the Statement?

I agree with the Discussion Paper that the documents should not duplicate the documents required by the existing disclosure regime.

Question 4. Would buyers have more certainty of the following documents were included as part of mandatory disclosure:

Draft proposed plan:

In New South Wales it would be very rare indeed to exchange an off-the-plan contract without a draft strata plan or plan of subdivision attached. There is no inconvenience or additional costs to developers if attaching such a draft strata plan or plan of subdivision is rendered mandatory.

Proposed by-laws:

If a developer proposes by-laws which are none of the Model by-laws, there should be a requirement that the proposed by-laws be attached to the contract. If the proposed strata scheme is to be a lot in a Community Plan, it should also be a

requirement that the proposed (or existing) Community Management Statement be attached to the contract. By-laws have a significant effect on the way in which residents, especially those in large strata schemes, live in the scheme, often restricting activities, or dictating the way the residents of a lot may use that lot or the common property. Some of these – the most notable being associated with the keeping of pets on a lot – may bear on the decision to purchase.

Schedule of Unit Entitlements:

This is a reasonable requirement for the reasons given in the Discussion Paper. However, some difficulties may arise because of the definition of the term "valuation day" in Schedule 2 *Strata Schemes Development Act 2015* and the fact that that day may be some time away at the time the developer is required to give an opinion of the likely unit entitlement of a lot the subject of an off-the-plan contract. Circumstances may operate in the intervening period to increase the value of one unit as against another. It may be that the estimate should be treated as accurate if the proportionate unit entitlement of lots to each other varies only to a minor degree following a valuation of the property for the purposes of fixing the final unit entitlement.

Estimate of proposed levies:

Likewise, for the reasons given in the Discussion Paper this is a sensible matter for disclosure. Many developers presently do this on a reasonably accurate basis; it is not going to provide either additional costs, inconvenience or unfairness on them for developers to be required to provide such an estimate. Those that do not may be assumed to act in their own interest and any concern about cost should not be a concern of the review.

Additional comments:

A purchase off-the-plan of a residential lot involves not just the lot and its legal title and boundaries. The lot is finished to the point where it is capable of occupation and it is a matter of record (there are a number of cases) that the fittings and fixtures, their quality and fitness for purpose, can be the subject of not insignificant dispute. Many apartments are sold "by sample" – that is, there is a display unit or similar and the standard of finishes, the prime cost items and fittings which the developer implies are to be found when the apartment is built are on display. But there is room for dispute if the standard and type of finishes and fittings is to be compared to a display suite most usually no longer in place at the time completion of the contract is required. For instance, the display unit could have a five-burner cooktop installed but the completed unit a four-burner one. There is considerable merit in requiring developers to specify closely, preferably by reference to brand and model, of all of the elements of the build from the included fixtures to the type of finishes. Most reputable developers do this already so, again, no inconvenience or cost is going to be unreasonably imposed by such a requirement. This could be the subject

of a disclosure as to representations made, which I discuss at the end of the submission.

Question 5 Are any of the documents unable to be provided or would impose significant cost on developers at the time contracts are prepared?

I have answered this above. A reputable developer will have to have all of the information required to provide these documents/information. The disadvantage to the purchaser of not having the information far outweighs any inconvenience to the developer of having to provide it.

Variations to the disclosure documents

Question 6 Should developers be required to notify purchasers where a change is made to

- **The proposed plan**
- **The schedule of unit entitlements; and**
- **The by-laws or management statement**

that is likely to have a material impact on the purchaser?

This question raises, as the Discussion Paper acknowledges, the rather difficult questions of whether the developer should be allowed to make changes to the plan, unit entitlement or by-laws which materially affect the purchaser.

I disagree entirely with the assertion in the discussion paper (at page 13) that *[i]n 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.* In my view, this assertion flies against long-established legal principle that any risk associated with the subject of the sale being bought sight unseen lies with the seller, not with the purchaser.

An off-the-plan contract is an opportunity not often given to traders in our society – to sell something that does not exist and that the trader may not even at the point of sale own. By extrapolation, if we look at the legal treatment of sales of goods: does the law require the vendor of a product that has yet to be delivered to be as described or in accordance with a sample? Consumer law has progressed significantly since that first consumer legislation – the *Sale of Goods Act* - but as long ago as the 19th Century, the law recognised that in circumstances analogous to an off-the-plan sale the goods as delivered had to fit the description given them. No Rolls-Royce dealer taking an order for a Silver Shadow would ever be permitted to deliver a Volkswagen. And so, in my view, it should be in the case of the off-the-plan residential lot. (For the current position, see s56 *Australian Consumer Law* "ACL").

Why, it has to be asked, should the sale of a lot in a proposed residential strata scheme be any different to the position with sales by description or sample of goods? Arguably, the transaction is very likely to be of great significance to a buyer.

There are existing protections for misleading and deceptive conduct in relation to the sale of land (s30 ACL). However, the circumstance of a variation to the contract (by a change to the shape or dimensions of a lot) may not arise from such conduct but from an intention or circumstance which arises sometime after the off-the-plan contract is entered into and despite the reversal of the onus of proof (s4 ACL) a vendor could easily establish a defence that it had reasonable grounds for making the representation.

Today, it is common in many contracts for developers to limit claims for compensation (Clauses 6 & 7 of the Standard Contract for Sale and Purchase of Land) and to prevent any claim of any kind where the amendment is "minor" (or some similar term or form of words is used). Such contracts then routinely go on to define "minor" in terms of a reduction in the area of the lot as being more than 5% (and sometimes greater, although I do not recall it ever being less). A purchaser buying a 70 square metre lot with a 10 square metre balcony (a pretty common size for a two bedroom unit) for $1,200,000 (a not uncommon consideration in the areas within 20 km of the CBD) is paying $15,000 a square metre and if deprived at settlement of 4 square metres has paid $63,000 including the stamp duty at 5% , for an area of lot in the scheme which the purchaser cannot receive. Why, it must be asked, should a purchaser assume a risk (over which that purchaser has no control) that he or she will be obliged to pay for something the vendor cannot ultimately deliver? The vendor on the other hand has control of the situation from the start. If the alteration arises because of some voluntary action by the vendor (an application for modification of the development consent, for instance, so as to increase the number of lots for sale, or for some other reason of benefit to the developer) there is no justification for allowing the vendor to refuse to compensate the purchaser (who may have been waiting a long time for completion) for the loss of the area or, in the alterative at the election of the purchaser, to give a right of rescission. On the other hand, if the alteration arises because the vendor did not have development consent at the time of the contract, then the gamble is the vendor's, but the risk as things stand, is the purchasers. This is simply unfair.

If vendors are to be allowed to amend contracts in this way (by reduction in the size of the lot), there should be a very strict limit on the degree to which it can be amended (not employing terms like "materially" or "substantially" affecting the use of the premises as these words have no obvious meaning in these circumstances and can lead purchasers into expensive and possibly ruinous litigation against a well-funded opponent with no happy end for them whether they win or lose). In my view, the proper approach is that no amendment be allowed to the dimensions of the lot unless the change to the area being sold is less than 1% of that promised in the contract and even then there is compensation for the change (based on the purchase price).

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

There are very many large strata schemes under development in New South Wales at the time of writing. Many of these are complex developments, some comprising community schemes with associated strata schemes, some with complex facilities provided within the scheme. These often provide for the availability, by the Community Association, of facilities to be shared by the lot owners of the individual schemes. Examples of such facilities are swimming pools and gymnasia. A change to the community scheme, or to the running of the scheme, by way of the community management statement, can have a significant effect on the enjoyment of individual lot owners in the scheme. A purchaser may have purchased in a scheme because, for instance, it has an indoor as well as an outdoor pool. A decision not to build one or the other may be critical to that purchaser. Similarly, changes to strata schemes varying such facilities can have an effect on the enjoyment of the long-tern use of a lot.

Developers should be required to notify purchasers of any changes made to a scheme. It would be preferable if this were done in accordance with a mandatory regime. I discuss this below.

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

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

Question 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??

My answer to Questions 9 – 10: It is clear that notice of any change should be given. If such a notice potentially carries with it the right to rescind or terminate the contract, there should be reasonable notice to enable legal advice to be sought and the financial considerations (alternative properties, the costs if the changes affect the costs of living in the apartment) to be considered. A fair period for such considerations is 21 days in my experience.

Clearly, if the proposed plan is to be a prescribed document, then the vendor should have an obligation to serve the plan as registered. The requirement in New South Wales for a developer to provide a copy of the Occupation Certificate to a purchaser 14 days before completion (Cl 4 Sch2 *Conveyancing (Sale of Land) Regulation 2017*) suggests that this is a reasonable (and would be a consistent) period for the vendor to give the purchaser to consider the plan as registered and whether it differs such that purchaser's rights arise.

Remedies for changes to disclosure documents

Question 10 (2) Should the purchaser's ability to terminate a contract be based on a the purchaser demonstrating "material prejudice""?

It will be clear from my observations above that I believe the answer to this to be "yes". The Queensland solution seems entirely appropriate. However, given the obvious difficulty with language such as "material prejudice" and the obvious tendency (Exhibit A: the many Queensland cases concerning the interpretation of the term) for its use to end in the tears of litigation, it is clearly better defined in any legislation, using the assistance provided by the Queensland courts. However, as discussed above, I am clearly of the view, for the reasons given, that any change in any dimension which has the effect of reducing the area of a lot by more than 1% should be also defined as a material prejudice.

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

For the reasons already advanced, yes, as an alternative to termination.

There is some merit in a proposal to allow purchasers to terminate *and* claim compensation, but this is akin to a claim as of right for a loss of bargain (and off-the-plan contracts very rarely contain a special condition allowing such a claim), and any extension of the law in this area is probably a matter for a separate discussion.

Cooling-off periods under off-the-plan sale

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

The Discussion Paper sets out the reasons why the cooling-off period should be extended as of right for off-the-plan contracts.

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

It is my experience that the cooling off period (of 5 business days) is very nearly at an end before the purchaser's legal representative receives the contract. Given this, and a combination of the complexity and size of the contract and the lack of availability of the contract to legal advisers before the contract is entered into, together with the need for some enquiry as to the likely availability of finance to settle the purchase (even if some time off, this is essential) 10 business days is a reasonable period for a cooling-off period for off-the-plan sales.

The deposit

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

There should be no occasion where a deposit is released to a vendor in an off-the-plan sale.

If that is legislated, then the deposit should be held in some form of trust account subject to legislated oversight. This might be the stakeholder, the vendor's solicitor or a trustee company as discussed. The parties should be able to agree that the deposit can be invested in a term deposit in the name of the trustee for the benefit of the purchaser (until completion, the vendor's interest in the deposit is solely as the beneficiary of an earnest).

Dispute resolution

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

Yes. I agree with the conclusion in the Discussion Paper. However, the *Civil and Administrative Tribunal Act 2013* should be amended to allow legal representation as of right in such matters.

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

I assume that this would be achieved by an amendment to the *Conveyancing (Sale of Land) Regulation 2017* using the power given in s 52A *Conveyancing Act 1919*. The Standard Form of Contract for the Sale and Purchase of Land is subject to copyright and I doubt that either the Law Society or the Real Estate Institute would welcome government intervention in the form of the contract itself.

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

The current contract (if left unamended) has such a provision. I have acted as an arbitrator and for parties in dispute resolution under the scheme. However, arbitration is costly (with the parties bearing all of the costs of resolution of the dispute and for this reason is often not the first choice of the parties. Better would be a compulsory referral to mediation before NCAT proceedings can be commenced (with the alternative of a certificate being provided by a mediator that the matter is not suitable for mediation).

The Law Society has an informal dispute resolution scheme, although that is limited in scope and is not particularly well-used.

Sunset Clauses

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

Yes. Anecdotally, some developers are endeavouring to subvert the operation of s 66ZL.

(In effect, because of the operation of the *Conveyancing (Sale of Land) Regulation* all contracts are subject to the provision of an occupation certificate whether the contract says so or not.)

Moreover, the period fixed under a sunset clause should be reasonable and capable of being supported by reasonable evidence. I have seen many examples of sunset clauses allowing periods of 4 and 5 years to finalise a development. This is an unconscionably long time to hold a purchaser to an off-the-plan contract. Perhaps consideration could be given to allowing the Supreme Court a discretion to vary the sunset clause (either to reduce or extend) if in the circumstances it is just and equitable for it to do so.

Question 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?

Developers should be discouraged from selling a scheme that has no development consent. This introduces significant uncertainty as to that which is being sold but worse as to whether it will ever be built. This can lead purchasers to commit to a purchase for lengthy periods during which they cannot consider possible alternatives in the event that the development does not proceed. This can be disastrous for people of limited means who have committed all of their available funds to the purchase. A failure to obtain development consent should not be a trigger for termination.

If developers are allowed to terminate for want of pre-sales, this right should be limited in time. I would suggest that a particular date be chosen rather than a period from the date of the contract to avoid the possibility that some purchasers may have the right to terminate and others do not. Such a date could be 12 months from the date on which the lots in the scheme are first offered for sale and would be the same date in each contract.

Question 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??

Whilst the jurisdiction of the Court to exercise its discretion is enlivened only if it is just and equitable to permit the termination of the contract, the facts and circumstances which give rise to a finding will never conclude that it is the fault of a purchaser that the scheme could not be completed in a timely fashion. Yet the purchaser has had money (possibly the only significant funds available to the

purchaser) locked-up for (almost by definition) a significant period. The Court should be given a discretion to award compensation if it is just and equitable for such compensation to be granted. Examples of circumstances where it is just and equitable could be provided in any legislation – the delay has been significant, the fact that property prices have gone against a purchaser requiring more capital to purchase a like property and the benefit likely to accrue to the developer as a result of making the order are such circumstances as me be given as examples.

Other matters not dealt with by the Discussion Paper

There are three other matters not dealt with the by the Discussion Paper that I believe also warrant consideration.

Defects liability period

The serious issue of defects is being given attention through the defects bond scheme which commenced on 1 January 2018. However, there is another aspect to the issue of defects which the defects bond will never cover: those minor but very annoying smaller defects to finishes or equipment within the lot, defects which do not render a lot uninhabitable but make life unpleasant or, at worst, very difficult. Most off-the-plan contracts contain a defects liability provision that requires the vendor to fix these sorts of minor defects most usually "within a reasonable time"; some require an exhaustive list of the defects complained of either before settlement or within a short period of settlement.

Most developers will attend to rectification of these minor defects. However, in my experience, there are many who do so at their own pace. This can often lead to great discomfort on the part of the occupier; in some cases it prevents occupation. In a recent matter, as an example, a lot bought for investment purposes could not be let because the developer was required to take out a bathroom door frame that had been damaged on installation and replace it. This was quite disruptive work and the property could not be let until it was done – something which took more than two weeks after completion, leading to the obvious loss of rent.

In my opinion, this quite prevalent problem could be solved by an implied term providing for an inspection at a time to suit the purchaser no later than 7 days before the day fixed for completion, the provision of a list of items requiring rectification and a warranty that the defects will be rectified, in the absence of circumstances beyond the control of the vendor, within 7 days of completion. Expressed as a warranty, this should give the lot owner the right to recover the costs of doing the work herself if the vendor does not do it in a timely way.

Representations

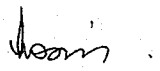
It is my experience that representations will be made to purchasers about a number of matters which, if not true, would lead a purchaser to re-consider their purchase. These can relate to important matters such as views (for which a premium, in my experience, is often made), ceiling height, noise attenuation measures, and the

availability of facilities. Most contracts have a "whole agreement" provision preventing (not necessarily successfully) a reference to any pre-contractual representation. As these representations may, in fact, be very important to the decision to purchase, perhaps a further disclosure document could (in the manner of a Lessee's Disclosure Statement under the *Retail Leases Act*) could be a statement of representations made by the vendor confirmed by the parties before the contract is entered into.

Liability under the contract

There are possibilities for one or more liabilities to arise under an off-the-plan contract by which a vendor is required to pay a purchaser or a lot owner an amount of money. At this time, this may occur when the Owners Corporation sues for major building defects as agent for the lot owners. This possibility will increase if the reforms currently under consideration become law. The problem is that, generally speaking, the vendor is a single-purpose company which, once the development is complete and all matters settled, will be quietly liquidated or de-registered. Whilst the deregistration may be able to be undone, the company will remain to be of straw. However, usually the vendor is a subsidiary of a larger group, with real assets against which a judgment can be realised. I am of the view that some structure should be created by which the ultimate holding company of any subsidiary which is a vendor of a lot in a residential strata scheme (whether by way of an off-the-plan contract or after registration of the plan) should be ultimately liable for any liabilities of the subsidiary. In that way, the limitation on liability which the present widely-used structure provides would be removed and the real beneficiary/ies of the proceeds of the development exposed to liability as they should. The proposed further disclosure regime could require a disclosure of the identity of the ultimate holding company for the purposes of a statutory warranty given that it will stand behind the liabilities of the vendor with penalties for a failure to nominate the true ultimate holding company.

Yours sincerely
Rosier Partners



Peter Rosier

Curriculum Vitae

Peter William Rosier

1. I am a solicitor of the Supreme Court of New South Wales. I was admitted to practice on 9 March 1973.

2. I practised as a solicitor from that date until 1979 when I was admitted as a barrister of the Supreme Court of New South Wales

3. I resumed practice as a solicitor in 1983 and have practised as a solicitor since that date holding a full practising certificate.

4. I graduated with the degree of Bachelor of Laws from the University of Canterbury in Christchurch New Zealand in 1967. I graduated with the degree of Master of Laws with Honours from that University in 1968. In 1970 and 1971 I was Associate to the then Chief Justice of the High Court of Australia, Sir Garfield Barwick.

5. I was accredited by the Law Society of New South Wales as a specialist in property law in 1994. Since then I have participated as a member of the Faculty of the College of Law in courses for candidates for accreditation by the Law Society as a property law specialist. I have also participated as a viva voce examiner of candidates for admission as a property law specialist. I am currently a member and Head Assessor of the Property Law Specialist Accreditation Advisory Committee which advises the Specialist Accreditation Board of the Law Society on matters relating to the content of the Property Law Specialist Accreditation program and the examination material and mock files and I am the Head Assessor of those examinations and files.

6. I have served for many years on the Property Law Committee of the Law Society of New South Wales. I am currently a member of that committee and participate actively in its activities. I am currently a member of the NECS subcommittee of

that committee - the subcommittee responsible for advising and providing briefings to the Committee on the introduction of the National Electronic Conveyancing Scheme (NECS) to NSW. I have written the Lexis/Nexis overview publication on NECS "Understanding National Electronic Conveyancing". I am a member of the Law Council of Australia's NECS Committee which is responsible for advising the Council on matters concerning electronic conveyancing. For five or so years until 2015 I was one of three appointees of the Law Society of New South Wales to the Joint Committee of the Law Society of New South Wales and the Real Estate Institute of New South Wales which is the copyright holder in relation to the standard form of contract for the sale and purchase of land in the State of New South Wales. I am the consulting editor for the new Lexis Nexis publication Conveyancing Precedents NSW. I am also a member of the subcommittee of the Property Law Committee charged with redrawing the Standard Form of Contract for Sale and Purchase when it requires a new edition.

7. I have given lectures to and participated in seminars to the profession on matters of property law, general practice and costs including seminars conducted for accredited specialists.

8. I have over many years frequently acted for parties (the number would be in the thousands) involved in conveyancing transactions including sales, purchases and mortgages of all kinds. I have acted for parties developing land by way of subdivision, including by way of subdivision by strata. I have acted for many parties involved in property development and joint ventures. I have acted for landlords and tenants of all kinds of premises including retail tenancies, commercial and industrial premises.

9. I am a member of the panel of arbitrators to be appointed by the President of the Law Society pursuant to Clause 7.2 of the standard contract for the sale and purchase of land to deal with disputes arising under that contract. I have dealt with many matters referred to me as arbitrator by the President of the Law Society. I have been referred by the President of the Law Society conveyancing matters as a solicitor independent of parties in dispute where those parties cannot agree on the identity of a solicitor to act for them jointly.

10. I have for many years have also had a broader general practice advising small businesses and undertaking transactional work on behalf of such businesses such as sales, purchases and financing. I also undertake work on behalf of clients in the area of wills, probate and family provision. In the course of my practice I have prepared a large number of wills, acted for parties disputing and propounding wills where capacity or duress were alleged, for parties in proceedings where informal wills were propounded and for both executors and eligible persons in applications for family provision. I have acted for the executors of very many estates in applications for grants of probate and letters of administration.

11. I undertake civil ligation on behalf of clients in most of the significant jurisdictions including the Supreme District Local and Federal Courts. Since 1997 I have been a costs assessor appointed by the Chief Justice of New South Wales and as a member of review panels which conduct reviews of the determination of individual costs assessors pursuant to the *Legal Profession Uniform Law (NSW).* In this time I have conducted hundreds of assessments and reviews of the determinations of other assessors in the time I have been an assessor. I am a member of the Law Society's Costs Committee and was on that committee's subcommittee responsible for drafting a response to the Chief Justice's Review of the costs assessment scheme. I was until it was reconstituted in 2016, a member of the Costs Assessor's Rules Committee. I have provided expert evidence on costs issues, as a party's expert and as a court-appointed expert, in a number of court matters.

12. I am an accredited mediator and have been a member of the New South Wales Chapter Committee of LEADR, the Association of Dispute Resolvers although I am no longer active in its work.

13. I have provided evidence for a number of parties to litigation in which the issue was whether there had been a departure from competent professional practice by a solicitor. In these matters I have provided opinions at the request of both solicitors and of their clients.