Off the plan contracts for residential properties

Discussion paper

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NSW GOVERNMENT

Discussion paper – Off the plan contracts for residential properties

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Minister's Foreword

In 2015 and 2019, the NSW Government introduced additional protections for purchasers entering into off the plan property contracts with developers.

The new laws increase disclosure requirements, give purchasers stronger protections throughout the contract period, provide them with more remedies in the event a developer seeks rescinds a contract or fails to deliver on material contract terms.

While we are seeing fluctuations in the property market as NSW emerges from the COVID-19 pandemic, off the plan contracts are still a popular vehicle for property sales, particularly in the apartment market.

Concerning cases of developers seeking to exploit the power imbalance between the parties to the contract continue to emerge. Reports of buyers missing out on their dream homes because developers are ending contracts before settlement, or where purchasers are still lacking information they need about their future property, like estimated levy contributions in strata buildings, need to be addressed.

This discussion paper considers these issues as well as the issues of land ownership and DA approval in the context of contract rescissions and 'sunset clauses'. More generally, the paper seeks feedback on the effectiveness of the current regime and opportunities that exist to bolster consumer protection in this important segment of the property market.

While we recognise the role of off the plan contracts in the market, the NSW Government wants to ensure that buyers are protected and confidence in the industry is maintained.

I welcome your feedback on the topics contained in this discussion paper, and any additional relevant matters.

The Hon. Victor Dominello MP
Minister for Customer Service and Digital Government
Minister for Small Business
Minister for Fair Trading

1. Introduction

The relevance of off the plan sales to the residential property market

Off the plan contracts have long been a feature of the property market, helping developers to secure the backing needed to commit to a project and providing purchasers with an alternative way to enter the market (see further background at Appendix 1).

Unlike conventional property sales, buying off the plan means purchasers commit to buy a property before it has been developed or built. Essentially, it is a contract for real estate that does not exist at the time the contract is signed.

Off the plan contracts can be used for the sale of land in a conventional subdivision, or for a lot in a proposed strata or community scheme.

Over the past 15 years, the number of residential properties purchased and sold off the plan has risen consistently (see statistics at Appendix 2). On average, off the plan sales represent around 6 per cent (and in some years, 10 per cent) of all residential property sales in NSW, with the average annual growth of off the plan sales being about 20 per cent each year. In some years, off the plan sales increased by more than 50 per cent, compared to the previous year.

What is the purpose of this paper?

Purchasers need adequate protections in off the plan contracts, and an appropriate balance must be maintained between the varying interests of developers, vendors and purchasers under these arrangements.

This area has seen considerable reform over the last 7 years, but as NSW emerges from the challenges imposed by the Covid-19 pandemic, it is timely to review those reforms and consider whether the current legislative framework for off the plan contracts continues to meet the needs of the community.

This paper considers the effectiveness of the current laws and asks whether appropriate controls are in place for both a rising and a falling market. It also outlines possible areas of improvement in response to emerging issues in off the plan transactions.

The Office of the Registrar General invites feedback on the issues discussed in this paper, and any other aspects of the off the plan contract process that could be improved. Consultation feedback will inform any proposed changes to the legislative framework.

Benefits and risks of off the plan contracts

For buyers, the off the plan process presents an opportunity to lock in a property at today's prices, with settlement to occur months or even years later – a benefit in a rising market or where the supply of new properties is constrained.

The extended contract period gives buyers time to save and to shop around for the best mortgage deals; buyers can secure a property on payment of a 5 or 10% deposit and use the construction period to save for settlement while the property is being built. Purchasers receive a brand-new property, often with the opportunity to negotiate customised features or changes to the interior design.

For developers, selling off the plan provides some certainty and assurance necessary to secure project finance. Having purchasers locked in to buy properties at an agreed price early in the project gives comfort to financiers who will often want to see a certain number of pre-sales before agreeing to funding.

Off the plan contracts are speculative, made in anticipation of a product yet to be created. For this reason, the process involves some risk, particularly for buyers who do not have the opportunity to inspect a property before committing to buy it:

- The decision to buy property is based on the developer's plans, designs and specifications, rather than a finished property capable of physical inspection. As the development evolves and plans change along the way, the final property might not meet the purchaser's expectations.
- Construction may be delayed, and settlement might not happen when the purchaser expects.
- If completion of the building cannot happen by a particular date, the developer may seek to end the contract under a 'sunset clause', or for another reason provided for in the contract.

Major reforms in 2015 and 2019 were intended to address these risks by strengthening buyer protections and providing transparency and certainty to the contract process. These laws introduced a robust disclosure regime and remedies where there are significant changes to what was disclosed in the contract.

2015 and 2019 reforms to off the plan contracts

In 2015, the Government introduced emergency laws preventing developers from using sunset clauses to end contracts without an order from the Supreme Court (unless the purchaser agrees). These changes responded to reports of unscrupulous developers using sunset clauses to get out of contracts, only to subsequently relist the same property at a higher price.[1]

More extensive changes were introduced in 2019[2] to address growing concerns about the lack of transparency in off the plan contracts, and that buyers were not getting what they were promised when they eventually settled the purchase of their new property. The changes built on the 2015 amendments, by introducing:

- a new disclosure regime, requiring developers of residential off the plan properties to give a prescribed set of information to purchasers in the contract (Disclosure Statement)[3]
- a requirement for vendors to notify purchasers of changes to what was disclosed, that are considered 'material particulars' (changes that will adversely affect the use or enjoyment of the lot being sold)
- new purchasers' remedies for changes to material particulars – including, in some cases, ending the contract or claiming compensation

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[1] *Conveyancing Amendment (Sunset Clauses) Act 2015* No 62.

[2] These changes were introduced by the *Conveyancing Legislation (Amendment) Act 2018*, which also made provision to clarify the role of electronic technology in land transaction documents. See also *Conveyancing (Sale of Land) Amendment Regulation 2019.*

[3] Section 66ZM *Conveyancing Act 1919* and then section 4A *Conveyancing (Sale of Land) Regulation 2017*.

- a longer cooling-off period for off the plan contracts, extended from 5 business days to 10 business days
- restrictions to protect the deposit from early release to the developer, which require this to be held in a trust or controlled money account during the contract period
- stronger sunset clause protections for purchasers, including to allow the Supreme Court to award damages to a purchaser even where the Court permits the vendor to rescind.

Emerging issues in off the plan – possible new protections

This discussion paper asks whether there is a need to further strengthen protections for off the plan purchasers or otherwise improve the legislative framework. Despite the 2015 and 2019 reforms, ongoing risks for buyers may need to be addressed or mitigated. Contracts are often long and complex documents, making it difficult for purchasers to properly weigh up the likelihood of the project proceeding within a realistic timeframe. This paper also considers whether there are preconditions that should be required before a developer can offer land for sale, or whether there are further required disclosures, to give purchasers more clarity about their purchase.

Box Hill case study[4]

DEP Box Hill Pty Ltd offered land for sale in the Futurity Rise Estate, at Box Hill. The land was offered for sale off the plan, so it was conditional on certain events taking place.

As with all off the plan contracts, the contract was conditional on a plan of subdivision for the land being registered before a certain date. But the contract was also conditional on other events, including –

- **the developer becoming owner of the land** – because the developer had not secured ownership of the land before offering to on-sell.
- **development approval from the local Council** – because the developer had not even lodged a development application.

Ten months or so after the contracts were exchanged the developer still did not own the land and still did not have development approval. Using the contract terms, the developer reportedly rescinded a number of contracts for sale. Acquiring the land and obtaining development approval are not 'sunset events' – so are not covered by the current sunset clause protections. The contracts were able to be brought to an end without the purchaser's consent and without an order of the Supreme Court.

The affected purchasers were able to recover their deposits and any stamp duty paid. However, they had lost the opportunity to buy an alternate property for a similar price - property prices had increased considerably between 2019 when buyers committed to purchase, and 2021 when the developer rescinded the contracts. Buyers also lost the benefit of having deposit monies in their own accounts, earning interest.

[4] See https://9now.nine.com.au/a-current-affair/sydney-property-developer-off-the-plan-dep-box-hill-futurity-rise-warnings/3ef4083d-fde4-46c2-b0a3-59cfee611523.

2. Pre-conditions to a sale

In NSW, a vendor can enter an off the plan contract very early in the development process[5] - before the plan is registered, before development approval has been granted, and even before the vendor becomes the registered owner of the land that is to be subdivided (as demonstrated by the Box Hill example).

There are many reasons why developers might sell off the plan before acquiring all the development lands. These include:

- where pre-sale contracts and debt funding are needed to acquire the land to be subdivided, which reduces commercial risks and is often a requirement for financiers
- where joint venture arrangements have not yet been finalised
- where a road closure or land swap needs to be finalised to consolidate the development site
- in the redevelopment of paper subdivisions[6] or in master-planned developments, where the development land is secured under long-term agreements with landowners.[7]

In many of these cases, the off the plan contracts are signed in advance of the underlying legal agreements being completed (and sometimes settlements occur simultaneously).

Securing pre-sales early in the development has advantages for developers and their financiers but purchasers face substantial risks, without any real way of assessing the level of that risk. The contract will include provisions making the sale conditional on the developer acquiring the development land or obtaining planning approval, providing notification (of sorts) to the buyer. But, with the length and complexity of many off the plan contracts, this level of notification is generally not effective disclosure.

As well as this, the purchaser has no way of knowing the likelihood of the developer's acquisition being successful or the proposed timing for submission of development approval.

All of this suggests a need for further protections for buyers, whether in the form of additional, more explicit disclosure, in clearer timeframes for pre-condition events or, potentially, a prohibition on sale before a minimum level of development readiness is achieved.

Question:

1. Are further protections required for off the plan contracts that are conditional on events, such as land acquisition or planning approval, that are not protected by the sunset clause provisions?

Potential options for additional protections are considered below.

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[5] Section 66ZL *Conveyancing Act 1919*.

[6] For example, see the Riverstone Scheduled Lands project https://www.landcom.com.au/places/riverstone-scheduled-lands/.

[7] This example does not apply to all developers, but in particular circumstances involving Landcom, the Planning Ministerial Corporation or other prescribed authority as the developing authority.

Limits around the sale

Owning land before selling off the plan

The Box Hill scenario could be addressed by preventing the sale of residential lots off the plan until the vendor owns all of the lands that will make up the development site. This requirement might better meet community expectations that a purchaser should not find themselves committed (and with a stamp duty obligation) to a contract that is so speculative that the vendor may never become the owner of the land that has been promised by sale.

The prohibition could be applied to all off the plan contracts for residential property or could be limited to developments of a particular category – perhaps to developments over a certain size, above a specified financial threshold or where the consumer risks may be greater. However, this option could have a significant impact on financing and staging new residential properties, risking further pressure on the property market and, potentially, driving up prices. Ultimately, this could negatively affect housing supply to the public.

To address some of these issues, certain exemptions could be catered for. For developers, exemptions could include:

- selling to another developer, to ensure completion of the development project
- novating a contract to transfer the development project to related companies or third parties
- entering a joint a venture with another entity
- negotiating to buy an area of closed road.

Separately, purchasers may also need flexibility to novate a contract for sale or on-sell an off the plan property before it is completed (and before the purchaser has become the owner of the land). This could be to:

- on-sell the property if they become unable to finance the purchase
- change the purchasing entity – for example, from an individual purchaser to a company, trust or partnership purchaser
- involve a family member as a co-purchaser
- amend the purchase price, following a renegotiation with the vendor (this could be due to a problem discovered at inspection or following an appraisal revealing a lower value).[8]

Evidence of agreement or legal right to own the land

An alternative to a complete prohibition could be to permit a developer to begin selling lots off the plan if agreements are in place that will allow the developer to become the future owner.

Generally, where developers currently sell off the plan before owning all the development lands, there will be an underlying legal agreement for the acquisition of that land, and a reasonable expectation that the developer will become the landholder. The developer will have secured an option agreement with the current landowner, or voluntary contribution agreements will have been signed for subdivision lands in a proposed redevelopment of a paper subdivision.

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[8] Revenue Ruling No. DUT 011: https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/duties/dut011.

To reflect current practice and give off the plan buyers more certainty, it may be appropriate to limit the developer's ability to sell land off the plan to situations where there is an underlying contract, agreement, or other legal right to acquire the property.

Owning land within a certain time period

Setting clear timeframes around the developer's acquisition could be an alternative to an outright prohibition of off the plan contracts before the development site has been acquired.

An example of this type of regime can be found in Western Australia. In 2015 and 2016, the Western Australian Government consulted widely to understand why developers might legitimately need to sell off the plan before obtaining title to all of the development land.[9] This led to the introduction of a new regime that permits off the plan sales before the developer has acquired all underlying land,[10] provided that the contract is conditional upon the vendor acquiring title within 6 months of exchange (or a later date as agreed).[11] If that vendor's condition is not included in the contract, the contract is illegal and void, entitling the purchaser to recover, from the deposit holder, the deposit paid.[12]

There are other protections as well: the contracts must include a warning statement advising that the developer is not the owner of the land, and a significant penalty applies for a failure to include the vendor's condition in the contract (that the vendor will become or will be entitled to become the owner of the lot(s)).[13]

Before imposing a requirement for a vendor to become the registered owner of the land in NSW within a prescribed period, the Government would have to be satisfied that the prescribed period would not impose any additional costs or barriers to development and would not create further uncertainty. Again, relevant exceptions or exemptions may need to apply.

Questions:

2. Should developers be required to own land intended to be subdivided for residential use before exchanging contracts for an off the plan sale, and why? If so, what exceptions should apply?

3. Would a 6 month, or other, prescribed period in which a vendor must become the registered owner of land intended to be subdivided for residential use (like in WA), be feasible and why? If so, what consequences should apply for failing to meet this requirement? What exceptions to this requirement should apply?

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[9] Landgate WA, 'Proposals for Changes to Section 13' Consultation Paper, March 2015.

[10] See the Sale of Land Amendment Bill 2016 (WA).

[11] See sections 13A to 13I *Sale of Land Act 1970* (WA). See also similar provisions in s9AE(2) *Sale of Land Act 1962* (VIC) where the relevant period is 18 months.

[12] Section 13B(3) *Sale of Land Act 1970* (WA).

[13] Failure to attach the vendor's condition to a future lot contract is an offence and a fine of $100,000 applies: s13B(6) *Sale of Land Act 1970* (WA).

Limits around development consent and lodging plans for registration

Most buyers would expect that if land in a proposed development is being offered for sale some level of planning approval would have been obtained. At the least, a development application would be expected to have been lodged, as a check that the development proposal is potentially achievable under the planning controls.

Development applications and development consent

To address issues like those which arose in the Box Hill scenario, developers could be required to have made a development application, or obtained development consent, before being permitted to sell the land. A development application can be made before the applicant owns the development lands, provided consent of the current owner is given. So, a precondition linked to a development application could be imposed whether or not the limits on the developer's ownership status, as suggested above, are also introduced.

Apart from the financing and staging issues mentioned earlier in the paper, a difficulty with this proposal is the type of development consent that would be required and the extent of the proposed development to which the consent would be required to apply.

The type of information that accompanies a development application will vary depending on the proposal and site.[14] This may include the owner's consent (if the developer is not the owner), a Statement of Environmental Effects, architectural plans and elevations, site survey and analysis, an energy efficiency report for a new home, other plans such as drainage plans, and specific specialist or technical reports required by State agencies.[15]

There could be a requirement that, before selling, consent for a concept development has been obtained (or an application lodged) for the overall development site. Obtaining development consent earlier in the transaction would mean earlier consideration by the relevant council and may raise issues that could delay or prevent registration of the plan(s) and, ultimately, completion.

A concept development application, formerly known as a 'staged' development application, sets out concept proposals for the development of a site. A concept development application may have one or more subsequent development applications and may set out concept proposals for the first stage of development with further detail to be submitted as part of any subsequent stage development application(s).[16]

A consent for a concept development application does not authorise development on the site unless details were provided in the development application and no further consent is required. Further, information about the various stages of development required to be included in a concept development application may be deferred to a subsequent development application, with the approval of the consent authority.[17] Anecdotal evidence

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[14] See https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Your-guide-to-the-DA-process/Development-assessment-and-construction-approval-processes/Stage-1-Pre-lodgement-Getting-it-right-at-the-start.

[15] As above. See also Part 3 *Environmental Planning and Assessment Regulation 2021*.

[16] Section 4.22 *Environmental Planning and Assessment Act 1979*.

[17] Section 33 *Environmental Planning and Assessment Regulation 2021*.

suggests that it is for this reason that many developers will not obtain consent for an overall concept development.

Even if consent for a concept development application is obtained, developers are not bound by the concept and are not required to complete the stages set out in the concept approval, as separate approval is required for those subsequent stages. Nevertheless, a requirement that a developer obtain consent for a concept development application before land is offered for sale, would result in some preparedness on the developer's part. The overall concept for the development will have been sufficiently advanced to give a purchaser some certainty as to what development is proposed.

Alternatively, there could be a requirement for a developer to, before selling land off the plan, obtain consent for development plans relating to the specific stage or part of the site relevant to the proposed lot(s) to be sold.[18]

However, considering the variation and complexity of staged developments, especially those involving mixed-uses, this could be difficult and possibly unfeasible.

Warning statements

Rather than requiring that development approval be obtained before a sale, more accountabilities could be required for off the plan contracts entered before planning approval. Specific warning statements could be required, the developer could be obliged to provide updates, with the purchaser able to rescind at set points if preidentified milestones have not been met.

Reasonable endeavours requirements for development consent and lodging plans

In Western Australia, developers can sell before obtaining development approval but must make all reasonable endeavours to obtain approvals (including development approval, and other regulatory approvals for the proposed subdivision), and create and lodge the necessary plan for the proposed subdivision before the expiry of a prescribed period.[19]

A similar approach could be adopted in NSW, with prescribed detail around what would be expected for a developer to meet the 'reasonable endeavours' requirement. This would ensure that the developer could not simply delay or refuse to take any action to obtain development approval simply as a way of avoiding the contract.

[18] See section 4.22 *Environmental Planning and Assessment Act 1979*.

[19] See section 13G *Sale of Land Act 1970* (WA).

Questions:

4. At what point in the development approval process should residential land be able to be offered for sale?

5. Is there a minimum level of development approval that should be obtained (for example, concept approval)?

6. If land is able to be sold before development approval, should a statutory requirement be imposed requiring a developer to make reasonable endeavours to obtain that approval?

7. What other measures should be considered to better protect purchasers, while providing flexibility for developers?

Additional disclosure obligations and penalties

Disclosure obligations

The *Conveyancing (Sale of Land) Regulation 2022* prescribes matters that must be disclosed, warranties that must be made and implied terms that must be included in a contract for sale. The Regulation could be amended to impose additional requirements for off the plan contracts that are more speculative. If the developer/vendor is not the registered owner at the time the contract for sale is entered into, the vendor could be required to disclose this fact to the purchaser and identify whether underlying agreements are in place to allow the vendor to acquire title. The vendor could also be required to disclose whether a development application has been lodged or consent obtained or an implied term to this effect could be required for all contracts. If disclosure is not made within a specified time the purchaser would be allowed to rescind the contract.

Alternatively, a statutory warning statement could be prescribed for inclusion in the contract, as in Western Australia[20] or Victoria. This could warn purchasers upfront that the vendor is not yet the registered proprietor of the land to be subdivided and emphasise the importance for purchasers to obtain independent legal advice on the risks of the purchase.[21] Further inclusions that could feature in the statutory warning statement are:

- that the purchaser may negotiate with the vendor about the amount of deposit monies payable (subject to restrictions)
- that a substantial amount of time may lapse between the day on which the purchaser signs and the day they become the registered proprietor of the lot
- that the value of the lot may change in that time.[22]

In Victoria, failure to comply with requirements for a warning statement allows a purchaser to rescind the contract at any time before the plan of subdivision is registered.[23] If adopted

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[20] Sections 13A to 13I *Sale of Land Act 1970* (WA).

[21] See other prescribed notices in Part 1, Schedule 1 *Conveyancing (Sale of Land) Regulation 2022.*

[22] Section 9AA(1A) *Sale of Land Act 1962* (Vic).

[23] Section 9AE(2) *Sale of Land Act 1962* (Vic).

in NSW, similar consequences could apply to a failure to include the statutory warning in the contract, allowing the purchaser to rescind the contract within a certain period, or another penalty might be imposed on the developer.

While purchasers can already determine whether a vendor is the registered proprietor by obtaining a title search and comparing that with the details noted on the contract, this warning could alert purchasers up front and in plain language to the risks associated with the vendor not owning land, so purchasers can make an informed decision about proceeding. However, a concern with prescribing any warning statement is whether purchasers will read it, and the effectiveness of the statement in an already oversized document.

Penalties

Penalties may be an appropriate way of enforcing compliance with any enhanced disclosure requirements. These penalties could be prescribed by the *Conveyancing (Sale of Land) Regulation 2022* - making it an offence for a vendor's failure to meet any conditional sale obligations.

Before the 2015 and 2016 Western Australia reforms in this space, a breach of the restrictions on the sale of subdivisional land attracted a penalty of $750. Landgate WA commented in its consultation paper that this low penalty had not prevented the breach of that requirement.[24] That consultation and reform led to the increase of that penalty to $100,000.[25]

If this penalty was adopted in NSW, it would still fall within the Local Court jurisdictional limit,[26] although some change to legislation or regulations may be necessary. However, the 2019 off the plan reforms are still relatively new, and the NSW Government has not received widespread requests to introduce such a penalty regime. If called for, this option would require further consultation with the NSW Department of Communities and Justice and the relevant court(s).

Questions:

8. What, if any, additional disclosure obligations should apply to off the plan contracts?

9. Should penalties apply for a vendor's failure to meet any conditional sale obligations? If so, what obligations should attract a penalty and what would be an appropriate maximum penalty amount?

[24] Landgate WA, 'Proposals for Changes to Section 13' Consultation Paper, March 2015, page 12.

[25] See section 13 *Sale of Land Act 1970* (WA).

[26] Section 29 of the *Local Court Act 2007*.

3. Additional sunset events

Sunset clauses are special conditions in contracts that impose a timeframe on the happening of a particular event, like registration of the plan or issuing of an occupation certificate. These clauses allow either party to terminate an off the plan contract, should the specified event not occur by a particular date. It is not only vendors who have the benefit of sunset clauses: purchasers can also rescind the contract if the sunset event does not occur, recovering the deposit paid.

However, sunset clauses can be misused. In 2015, the Government responded to reports of developers using sunset clauses to rescind purchasers' contracts *en masse*, only to re-list the same apartments at higher prices, taking advantage of a rising property market. Emergency legislation tightened rules around sunset clauses.

The legislation was amended so that vendors can now only rescind contracts via sunset clauses with the approval of the Supreme Court, unless the purchaser agrees.

The 2019 reforms strengthened these protections by extending the definition of a sunset event (which, if this does not occur, allows rescission) to include the issuing of an occupation certificate, additional to registration of the plan. Changes also confirm that the Court may award damages if the developer is permitted to rescind under a sunset clause, recognising that purchasers may suffer a loss, having been out of the property market during the term of the off the plan contract.

Sunset events

Section 66ZS of the *Conveyancing Act 1919* currently defines a sunset event as 'the creation of the subject lot, the issue of the occupation certificate in relation to the subject lot, or another event prescribed by the regulations'.

The Box Hill example above has highlighted other ways that developers are able to end contracts, without having to seek the Court's approval. It may be appropriate to expand the definition of 'sunset events' to capture other triggers for ending contracts, like:

- the vendor becoming the registered owner of the lot(s) within a certain prescribed period after the contract date
- the vendor having lodged a development application(s) and having obtained development consents
- the vendor having lodged the relevant plan(s) of subdivision for registration.

Questions:

10. Are the existing protections in the sunset provisions sufficient? What, if any, changes are required?

11. Should the definition of 'sunset event' be expanded to provide clarification and reduce the likelihood of delays in completing the contract? If so, what should that expansion encompass?

4. Estimates of owner contributions to common property expenses in strata schemes

An emerging issue for off the plan buyers in strata schemes and mixed-use complexes relates to the purchaser's liability for ongoing expenses after the purchase has been completed. Anecdotal reports suggest that purchasers of units in these schemes often do not fully appreciate that when buying a strata unit, they will also acquire an interest in the common property of the strata scheme. This comes with an obligation to contribute to the ongoing costs of maintaining and servicing the scheme. Costs can include building and grounds maintenance, repairs, supply contracts (such as for utilities), service contracts (such as for waste disposal, managing agents and building managers) and insurance costs.

This lack of awareness is especially pronounced in purchasers of units bought off the plan, as the likely extent of those contributions is often unknown at the point of sale.

For existing schemes, the strata records will generally provide a reasonable picture of the scheme's financial position. By obtaining a pre-contractual strata records search, purchasers can find out information about current levies, recent building expenses, the 10-year capital works fund plan and potential issues that may lead to an increase in levies, before they commit to buy.

Purchasers who buy off the plan generally do not have the benefit of this information when they enter into the contract, with new owners often only becoming aware of their actual contributions to common property expenses at the first annual general meeting of the owners corporation. By this time, the purchase contract will have completed, and any rescission rights will be lost.

If anticipated common property expenses could be prepared and disclosed earlier in the development process, potential purchasers may be given a better understanding of likely ongoing expenses once they own the property. However, any proposal to disclose estimated contributions should provide a remedy in the event those estimates are later found to be inadequate.

Disclosure of contribution estimates

The current disclosure regime requires that, before a contract is entered into, developers provide buyers with a Disclosure Statement that includes key information about the lot and building, including the plan, the site and terms of easements and other restrictions, proposed by-laws, and a draft management statement for schemes that contain a part strata parcel. Developers do not have to disclose financial information or estimates of contributions before buyers exchange contracts, or otherwise through the contract process.

In Queensland, vendors selling land off the plan (proposed lots) must provide the buyer with a pre-contract disclosure statement that includes “the amount of annual contributions reasonably expected to be payable to the body corporate by the owner of the proposed lot”.[27] Similar requirements exist in the ACT and WA.[28] This kind of requirement could be

[27] Section 213(2)(b) *Body Corporate and Community Management Act 1997* (Qld).

[28] Sections 260(i)-(k) *Civil Law (Property) Act 2006* (ACT) and sections 156(1)(c)(v) and (2) *Strata Titles Act 1985* (WA).

introduced in NSW, to assist off the plan buyers to understand the nature and likely extent of their ongoing costs.

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, and on what basis. When contracts are prepared, the development concept should be sufficiently advanced that 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 a reasonable estimation of insurance, maintenance and capital works fund contributions that would be required.

Remedy for inadequate estimates

As in NSW, remedies for incomplete or inaccurate disclosure statements in Qld, the ACT and WA are limited to the contract period – ordinarily a right to rescind or terminate the contract before completion.[29] After the contract period, there is no specific remedy for levy estimates disclosed at the point of sale, that are later found to be inadequate.

If the Disclosure Statement is to be expanded so that developers provide estimates of levies and contributions, the current disclosure regime may not provide sufficient purchaser remedies where estimates are found to be inadequate. This is because buyers will generally not become aware of the actual contributions until after the settlement of their purchase. Currently, developers must notify purchasers of any changes to what has been disclosed *before* settlement, and purchasers may rescind or, in some cases, claim compensation before the contract is completed.

Most contractual remedies 'merge on completion', meaning that the right to pursue a claim against the vendor is extinguished once the purchaser becomes the owner of the property on settlement.

One solution might be to link to existing protections in the *Strata Schemes Management Act 2015.* Under that Act, developers must prepare an initial maintenance schedule for the owners corporation during the initial period, which gives information about costs and obligations in maintaining the common property. The owners corporation must take that schedule into account[30] when estimating how much money it will need to credit to its administrative and capital works funds before the first and each subsequent annual general meeting.[31]

The owners corporation may, within 3 years of the initial period expiring, seek an order from the NSW Civil and Administrative Tribunal for compensation from the developer where those estimates are found to be inadequate to meet the actual or expected expenditures of the owners corporation.[32] However, the Tribunal must not make an order if the developer

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[29] Section 217 *Body Corporate and Community Management Act 1997* (Qld); sections 260A and 260(2)(b) *Civil Law (Property) Act 2006* (ACT); and section 159 *Strata Titles Act 1985* (WA).

[30] Section 79(4) *Strata Schemes Management Act 2015*.

[31] Section 79(1) and (2) *Strata Schemes Management Act 2015*.

[32] Section 89(1) *Strata Schemes Management Act 2015*.

satisfies the Tribunal that it used due care and diligence in determining the estimates and levies.[33]

If developers were required to prepare estimates earlier than during the initial period and attach these estimates to an off the plan Disclosure Statement, purchasers would be better informed about the likely expenses they would have to contribute to as an owner. The owners corporation's right to pursue a compensation order from the Tribunal could be expanded to encompass an unreasonable deviation from these estimates disclosed at the point of sale. This may be sufficient protection for potential owners against estimates that later need to be revised. This process may also provide a further incentive for developers to provide more accurate estimates earlier in the development process. However, this is not the only possible solution. There could be other remedies available to purchasers after settlement, where the estimated contributions are found to be inadequate.

Statutory review of strata laws

The initial maintenance schedule and accuracy of developer estimates has recently been considered as part of a broader review of the *Strata Schemes Management Act 2015* and *Strata Schemes Development Act 2015*. In November 2021, the Government published a Report[34] setting out 139 recommendations for improvements to the strata laws, including to:

- Introduce further specific requirements regarding the content of the initial maintenance schedule,[35] with consideration given to the development of a standard form in the legislation (Recommendation 109)
- Require that an independent review and certification of initial maintenance schedules and levy estimates set by developers is undertaken and provided to owners corporations at the first annual general meeting, with the qualifications of expert reviewers to be set following further sector consultation (Recommendation 110)
- Require that the first 10-year capital works fund plan must have regard to the initial maintenance schedule (Recommendation 111).

These recommendations respond to concerns in the strata industry and broader community about the varying quality of developer's initial maintenance schedules, and the impacts of under-estimating contributions. Consultation feedback suggests that inaccurate maintenance schedules has led to some initial levies being set too low, providing an unrealistic indication to potential purchasers about a lot-owner's likely ongoing costs. As a result, there is often the need to increase levies after the first annual general meeting to meet realistic maintenance costs, or a reluctance to properly fund those costs through levies. Over time, this increases the risk of disrepair of common property, costs, and erosion of asset value.

Currently requiring vital decisions to be decided at the first annual general meeting about budgets, maintenance schedules, capital works funds, levies etc, may be considered an overload for lot owners.

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[33] Section 89(2) *Strata Schemes Management Act 2015*.

[34] Report on the statutory review of the *Strata Schemes Management Act 2015* and *Strata Schemes Development Act 2015*: https://www.parliament.nsw.gov.au/tp/files/81193/DCS%20-%20Statutory%20Review%20on%20Strata%20Scheme%20Legislation.pdf.

[35] That is, additional to what is currently required in section 29 of the *Strata Schemes Management Regulation 2016*.

Questions:

12. Should the off the plan Disclosure Statement contain information about likely expenses and contributions that a lot owner will be required to make after settlement? If not, why not?

13. If the Disclosure Statement is to include information about likely expenses and contributions as set out in Question 12, what information is necessary to provide a reasonable estimate of those contributions?

14. In what circumstances might it be reasonable for an estimate of contributions given in the contract to be later revised?

15. What remedies should be available to purchasers after settlement where the estimated contributions are later found to be inadequate, and why?

5. Disclosure Statement - additional matters

Off the plan purchasers are essentially committing to buy property before it exists and, as we've seen, potentially before development approval has been obtained. Purchasers need to have sufficient information about the final project to give confidence and certainty about the transaction. To this end, the 2019 reforms introduced a prescribed form of Disclosure Statement for off the plan contracts, which sets out crucial information about the contract so purchasers are aware of issues when they commit to buy.

The matters currently required to be included in a Disclosure Statement (see Appendix 3) include a draft plan prepared by a registered surveyor showing detail prescribed by the Regulations,[36] such as:

- the proposed lot number and area of the subject lot, and sufficient information to identify its location
- the site of any proposed easement or profit a prendre affecting the subject lot, and the site of any proposed restriction on the use of land or positive covenant affecting only part of the subject lot
- for lots in proposed strata schemes – the draft floor plan and draft location plan.

Other draft documents must also be provided, being:

- any proposed schedule of finishes
- any instrument creating or releasing easements or restrictions on use of land (section 88B), proposed to be lodged with the plan
- for lots in a proposed strata scheme, the draft by-laws
- for lots in a proposed community, precinct or neighbourhood scheme, the draft management statement, and the draft of any proposed development contract
- for land that comprises or includes a lot in a proposed development scheme, the draft strata development contract
- for lots in a proposed strata scheme that relates to a part strata parcel, a draft strata management statement required under section 99 of the *Strata Schemes Development Act 2015* for the registration of the strata plan
- for land that will be subject to a building management statement under Division 3B of Part 23 of the *Conveyancing Act 1919*, the draft building management statement.

There may be other matters that should be included in the Disclosure Statement. Some examples are outlined below.

Shared facilities

As discussed in Part 7 above, when buyers agree to purchase a strata unit off the plan, they are also agreeing to buy into a building and contribute to expenses through payment of levies. For strata properties sold off the plan, the Disclosure Statement could set out details of estimates of contributions that owners would have to pay for common property expenses. Alternatively, the Disclosure Statement could be required to specify the common property or shared facilities of the scheme that will attract ongoing costs. This would indirectly provide purchasers with some indication of the relative costs for which the owners corporation will be responsible.

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[36] Outlined in section 66ZM *Conveyancing Act 1919* and Part 2, Schedule 1, *Conveyancing (Sale of Land) Regulation 2022*.

Embedded network contracts

Concerns have been raised about the existence of embedded electricity networks in some strata schemes due to the locked-in nature of embedded network contracts, and as embedded network providers can charge above-market rates.

Embedded networks involve installation, during construction, of infrastructure required for delivery of utilities and services creating a private network that is "off the grid", with services on-sold to owners within the building. An owners corporation, for a strata scheme that is serviced by an embedded network, can change embedded network providers (with difficulty in some instances), but an owners corporation cannot change the embedded network infrastructure. Commonly, these arrangements relate to electricity networks, but can extend to a range of services including gas, heating, and internet access.[37]

The Strata Review Report identified these issues, which are often not well understood or known by a buyer or new owner.[38.] The structuring of these arrangements and lack of disclosure means that, when offering or agreeing to a purchase price for a strata unit, buyers may not be factoring in the long-term additional costs that they will have to pay for the embedded network infrastructure.

The Report recommended the need to remove the ability of the owners corporation to renew an embedded network agreement after the current 3 year statutory limit on the duration of those contracts,[39] and the need for more general education about embedded networks.

The Report also recommended:

- A new disclosure obligation to require as a part of any sale of a strata scheme unit, including off the plan sales, a plain English statement of which services are provided as an embedded network and what this will mean for residents, including in relation to access to alternative providers, ownership of the infrastructure, and ongoing capital costs (Recommendation 122).[40]

There could be a requirement for these matters to be included in the Disclosure Statement, if these details are known and capable of disclosure, at the point of sale for land being sold off the plan.

While relating predominantly to pricing and safety concerns, the Legislative Assembly Committee on Law and Safety is separately currently inquiring into embedded networks in NSW, including the current legal framework regulating embedded networks.[41]

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[37] https://www.ewon.com.au/page/customer-resources/living-in-an-embedded-network.

[38] Review Report pages 93-94: https://www.parliament.nsw.gov.au/tp/files/81193/DCS%20-%20Statutory%20Review%20on%20Strata%20Scheme%20Legislation.pdf.

[39] See section 132A *Strata Schemes Management Act 2015*.

[40] Review Report, Recommendation 122, pages 93-94: https://www.parliament.nsw.gov.au/tp/files/81193/DCS%20-%20Statutory%20Review%20on%20Strata%20Scheme%20Legislation.pdf.

[41] See https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2873#tab-termsofreference.

Questions:

16. Is there any matter disclosed in the Disclosure Statement that shouldn't be, or any matter not yet disclosed that should be?

17. Are there any other improvements that could be made to the off the plan disclosure regime?

6. Size of the contract

There is growing concern about the increasing size of contracts for the sale of land, particularly off the plan contracts. Purchasers need to be informed about the property they are contracting to buy, but the volume of information included within the contract may be having a counter effect, making it difficult to identify the important information.

An off the plan lot sits within a proposed plan of subdivision. Disclosures need to be made not only about the land as it currently is, but also about proposed developments of that land. The multiple disclosure documents for the existing land can be hundreds of pages long. Added to that are lengthy off the plan special conditions, making a bulky contract that it can take considerable time for the lawyer or conveyancer to review.

It was partly for this reason that the cooling off period for off the plan contracts was extended from 5 to 10 business days[42] - to provide purchasers with more time to obtain independent legal advice and to undertake due diligence searches.

Appropriate disclosure of matters about title is critical, especially for real estate that does not yet exist at the contract date. Rather than buying an asset that can be seen and inspected, the purchaser of land off the plan is effectively buying an idea that relies on the terms of the contract, plus the goodwill and expertise of the developer to complete.

For this reason, there is limited scope to remove any of the documents that are currently required to be added to the contract by the *Conveyancing (Sale of Land) Regulation 2022.* Consequently, it may be more appropriate to address the contract size issue by making enhancements to the Disclosure Statement.

Questions:

18. Is the 10 business day cooling-off period adequate? Please explain your answer.

19. Should there be a mandatory requirement for electronic off the plan contracts to include a one-page summary or contents of the contract that is electronically searchable? Please explain your answer.

20. Are there any other improvements that could be made to off the plan contracts and transactions, or issues that require addressing, that have not been raised in this paper?

[42] Section 66S(3)(a) *Conveyancing Act 1919*.

7. How to make a submission

Making a submission

Anyone wanting to comment on any matter relevant to the off the plan legislative framework, whether or not it is addressed in this discussion paper, is invited to make a written submission.

All submissions must be received by 5pm on 23 December 2022.

Submissions may be sent via email to: ORG-Admin@customerservice.nsw.gov.au.

If you wish to submit your comments in paper, please forward these to:

Off the plan review

Office of the Registrar General

Level 7, McKell Building

2-24 Rawson Place

SYDNEY NSW 2000

Important note: release of submissions

All submissions will be made publicly available. If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission. Automatically generated confidentiality statements in emails are not sufficient. You should also be aware that, even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*).

Evaluation of submissions

All submissions will be considered and assessed and inform any future legislative change, if necessary, to address issues identified in the consultation process. If further information is required, targeted consultation will be held before a proposed legislative change is finalised.

Appendix 1 – Background information

What is an off the plan contract?

An off the plan contract is a contract for the sale of a residential lot that has not been created at the time the contract is entered into (signed and exchanged).[43] Essentially, it is the sale of real estate that does not yet exist or of a premises that is not yet built.

Off the plan contracts can be used for the sale of land in a conventional plan of subdivision or in a proposed strata or community plan.

Legislative framework

The off the plan contract provisions are embodied in the *Conveyancing Act 1919* and the *Conveyancing (Sale of Land) Regulation 2022*, both of which are administered by the Office of the Registrar General.

Other than the prescribed and implied terms in that legislation, the provisions of an off the plan contract are the subject of private negotiation between the parties to that contract. The legislation does not govern the conduct of those parties and any other stakeholders.

The *Property and Stock Agents Act 2002* and the *Australian Consumer Law*[44] may also have relevance to a property transaction. For example, a real estate agent who induces a person to enter a contract, or misrepresents the property or its features, whether by advertising or otherwise, could be subject to legal action for payment of a penalty or damages.[45] Although relevant, these matters are beyond the scope of this discussion paper.

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[43] Section 66ZL *Conveyancing Act 1919*.

[44] Schedule 2 *Competition and Consumer Act 2010* (Cth).

[45] See sections 52 and 53 *Property and Stock Agents Act 2002* and sections 18 and 30 Australian Consumer Law Schedule 2 *Competition and Consumer Act 2010* (Cth).

Appendix 2 – Number of off the plan and residential property sales by financial year

Financial Year	Number of off the plan contracts for sale*	Number of residential contracts for sale*
2021-23 June 2022	13,059	188,871
2020-2021	18,373	239,395
2019-2020	10,082	170,027
2018-2019	17,218	162,195
2017-2018	28,215	208,739
2016-2017	29,022	224,707
2015-2016	23,919	220,276
2014-2015	15,847	220,874
2013-2014	13,237	212,139
2012-2013	6,193	169,943
2011-2012	3,719	151,952
2010-2011	5,551	157,925
2009-2010	3,272	184,507
2008-2009	2,646	165,096
2007-2008	2,675	172,449
2006-2007	2,148	168,340

Note: These figures apply only to house and land packages and strata off the plan contracts. Some figures are lower than the actual number of off the plan contracts, as this data is sourced from the matters in which the purchaser seeks a 12-month extension to pay stamp duty. The more recent figures are also lower than the previous Financial Years, due to tightening of the rules around this extension.[46]

[46] See Schedule 3 *State Revenue and Other Legislation Amendment (Budget Measures) Act 2017 No 33*, which inserted sub-sections 49A(1A) to (1C) into the *Duties Act 1997* and limits a provision that defers liability for duty (up to 12 months) on an agreement for the sale off the plan of land on which a residence is to be erected.

Disclosure Statement – Off the Plan Contracts

This is the approved form for the purposes of s66ZM of the Conveyancing Act 1919.

VENDOR	Click or tap here to enter text:
PROPERTY	Click or tap here to enter text:

TITLE STRUCTURE	
Will the lot be a lot in a strata scheme?	☐ No ☐ Yes
Will the lot also be subject to a Strata Management Statement or Building Management Statement?	☐ No ☐ Yes
Will the lot form part of a community, precinct or neighbourhood scheme?	☐ No ☐ Yes **If Yes, please specify scheme type:**

DETAILS					
Completion	Click or tap here to enter text:		**Refer to clause(s):**	Click or tap here to enter text:	
Is there a sunset date?	☐ No ☐ Yes	**Can this date be extended?**	☐ No ☐ Yes	**Refer to clause(s):**	Click or tap here to enter text:
Does the purchaser pay anything more if they do not complete on time?	☐ No ☐ Yes	Provide details, including relevant clause(s) of contract:	Click or tap here to enter text:		
Has development approval been obtained?	☐ No ☐ Yes	Development Approval No:	Click or tap here to enter text:		
Has a principal certifying authority been appointed?	☐ No ☐ Yes	Provide details:	Click or tap here to enter text:		
Can the vendor cancel the contract if an event preventing or enabling the development does or does not occur?	☐ No ☐ Yes	Provide details, including relevant clause(s) of contract:	Click or tap here to enter text:		

ATTACHMENTS *(s66ZM(2) of the Conveyancing Act 1919)*

The following prescribed documents are included in this disclosure statement *(select all that apply)*.

- ☐ draft plan
- ☐ s88B instrument proposed to be lodged with draft plan
- ☐ proposed schedule of finishes
- ☐ draft strata by-laws
- ☐ draft strata development contract
- ☐ draft community/precinct/neighbourhood/ management statement
- ☐ draft community/precinct/neighbourhood/ development contract
- ☐ draft strata management statement
- ☐ draft building management statement

Appendix 4 – Notice of Changes (approved form)

Notice of Changes – Off the Plan Contracts

This is the approved form for the purposes of s66ZN of the *Conveyancing Act 1919*.

IMPORTANT NOTICE TO PURCHASER:

Information you have been provided about the off the plan property you are buying has changed. The changes may affect your use or enjoyment of the lot you are buying. If you are materially prejudiced by these changes and you would not have signed the contract if you knew about them, you may be able to end your contract or seek compensation.

You should discuss these changes and any actions available to you with your lawyer or conveyancer.

You have 14 days, from being given this notice, to consider the changes and take action.

DETAILS OF CONTRACT	
VENDOR	Click or tap here to enter text:
PURCHASER	
PROPERTY	Click or tap here to enter text:
DATE OF CONTRACT	
DATE OF NOTICE	Method delivered:

DETAILS OF CHANGE(S)

The vendor has become aware that the disclosure statement attached to the contract *(select which applies)*:

☐ Was inaccurate, in relation to a *material particular,* at the time the contract was signed; or

☐ Has become inaccurate, in relation to a *material particular,* after the contract was signed.

What has changed?

(Give details about what was disclosed, in what document it was disclosed, and what has changed. Attach the change that will amend the disclosure documents).

NOTE: A material particular includes a change to information in the disclosure statement and documents attached to that statement that will, or is likely to, adversely affect the use or enjoyment of the lot you are buying. See section 66ZL of the *Conveyancing Act 1919* and section 24 of the *Conveyancing (Sale of Land) Regulation 2022.*

The change(s) relate to a *material particular* in the following attached **document(s)** *(select which applies)*:

☐ Draft plan
☐ A provision of draft by-laws
☐ Easement or covenant
☐ Schedule of finishes
☐ Strata management statement
☐ Building management statement
☐ Management statement for a community, precinct or neighbourhood scheme
☐ Strata development contract
☐ Development contract
☐ Other (specify)

Appendix 5 – Consolidated list of questions

1. Are further protections required for off the plan contracts that are conditional on events, such as land acquisition or planning approval, that are not protected by the sunset clause provisions?
2. Should developers be required to own land intended to be subdivided for residential use before exchanging contracts for an off the plan sale, and why? If so, what exceptions should apply?
3. Would a 6 month, or other, prescribed period in which a vendor must become the registered owner of land intended to be subdivided for residential use (like in WA), be feasible and why? If so, what consequences should apply for failing to meet this requirement? What exceptions to this requirement should apply?
4. At what point in the development approval process should residential land be able to be offered for sale?
5. Is there a minimum level of development approval that should be obtained (for example, concept approval)?
6. If land is able to be sold before development approval, should a statutory requirement be imposed requiring a developer to make reasonable endeavours to obtain that approval?
7. What other measures should be considered to better protect purchasers, while providing flexibility for developers?
8. What, if any, additional disclosure obligations should apply to off the plan contracts?
9. Should penalties apply for a vendor's failure to meet any conditional sale obligations? If so, what obligations should attract a penalty and what would be an appropriate maximum penalty amount?
10. Are the existing protections in the sunset provisions sufficient? What, if any, changes are required?
11. Should the definition of 'sunset event' be expanded to provide clarification and reduce the likelihood of delays in completing the contract? If so, what should that expansion encompass?
12. Should the off the plan Disclosure Statement contain information about likely expenses and contributions that a lot owner will be required to make after settlement? If not, why not?
13. If the Disclosure Statement is to include information about likely expenses and contributions as set out in Question 12, what information is necessary to provide a reasonable estimate of those contributions?
14. In what circumstances might it be reasonable for an estimate of contributions given in the contract to be later revised?
15. What remedies should be available to purchasers after settlement where the estimated contributions are later found to be inadequate, and why?
16. Is there any matter disclosed in the Disclosure Statement that shouldn't be, or any matter not yet disclosed that should be?
17. Are there any other improvements that could be made to the off the plan disclosure regime?

18. Is the 10 business day cooling-off period adequate? Please explain your answer.
19. Should there be a mandatory requirement for electronic off the plan contracts to include a one-page summary or contents of the contract that is electronically searchable? Please explain your answer.
20. Are there any other improvements that could be made to off the plan contracts and transactions, or issues that require addressing, that have not been raised in this paper?