THE LAW SOCIETY
OF NEW SOUTH WALES

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8 February 2018

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

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

Dear Sir/Madam,

Off-the-plan contracts for residential property ("Discussion Paper")

The Law Society of NSW appreciates the opportunity to comment on the Discussion Paper. The Law Society's Property Law Committee has contributed to this submission.

Our responses to the questions raised in the Discussion Paper are set out in the attached table. We provide some general comments below.

1. Nature of off-the-plan contracts

We acknowledge the increase in the sale and purchase of residential properties off-the-plan in NSW over recent years. The nature of an off-the-plan purchase and the complexity of the documentation involved warrants that additional consideration be given to the protections provided to the purchaser. However it should also be acknowledged that off-the-plan contracts generally involve greater risks for both the purchaser and the vendor when compared to the sale of an existing property. Any reforms in this area must also take account of the risk profile for developers.

2. Approaches in other States

It is instructive to look at the approaches taken in other States in relation to off-the-plan contacts. Care must be taken, however, to ensure that any new remedies provided to the purchaser, particularly new rights of rescission or termination, accurately reflect and are consistent with the way in which those concepts have been judicially considered and applied in NSW.

3. Lead time

It is critical that the commencement date of any amending legislation allows all participants in the industry sufficient time to properly prepare for changes, including education. The implementation timeframes for any reforms must consider the need

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for the updating of documentation or creation of any new documentation that may be required, such as a disclosure statement. If any reforms require changes to be made to the Contract for the Sale and Purchase of Land 2017 edition[1], it will be critical that sufficient lead time is provided.

We would be pleased to meet with you to further discuss the matters raised in this submission. Any questions should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Doug Humphreys OAM
President

Encl.

[1] Copyright in the Contract for the Sale and Purchase of Land 2017 edition is held jointly by the Law Society of NSW and the Real Estate Institute of NSW.

Off-the-plan contracts for residential property

Submission of the Law Society of New South Wales

No.	Question	Comments
1.	Is there a separate mandatory disclosure regime needed for off-the-plan contracts?	• Yes, there is a need for an additional level of mandatory disclosure for an off-the-plan contract beyond what is already required under the *Conveyancing (Sale of Land) Regulation 2017* ("Regulation"). It would be appropriate for any new requirements to be added to the existing Regulation, rather than in a separate, new regulation. • As foreshadowed in the Discussion Paper, any law reform should extend beyond merely adding to the list of prescribed documents required by Schedule 1 of the Regulation. • Consideration needs to be given as to whether the purchaser should have a remedy in every case (as is currently the case for a breach of a Schedule 1 disclosure obligation) or only in those cases where the inaccuracy adversely affects the purchaser.
2.	Is there benefit in mandating a prescribed disclosure statement for all off-the-plan contracts?	• Whether a prescribed disclosure statement is beneficial depends in part on the level of additional disclosure required. If a minimalist approach to additional disclosure is adopted, there should be no need to develop a specific disclosure statement. On the other hand, if the list of additional disclosure requirements is very detailed, it would be useful to have that information gathered into a single document as a point of reference for purchasers. • The disclosure statement may be particularly beneficial for off-the-plan development launch days where the purchaser has a restricted amount of time to view the contract before the exchange of contracts.

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3.	If so, what should be included in the Statement?	If there is to be a Statement: • it should incorporate a checklist of the key off-the-plan disclosure documents (including but not limited to the first two documents mentioned in question 4 below); • it should include reference to any sunset date (and the latest date to which it can be extended, if any) and applicable rescission events (see the answers to 18 and 19 below). These references could direct intending purchasers to the relevant provision of the contract for sale, rather than repeating what the contract already provides or attempting to summarise it; and • a vendor should be taken to have complied if the Statement is "in, or to the effect of," the prescribed form.
4.	Would buyers have more certainty if the following documents were included as part of mandatory disclosure: • Proposed plan showing the proposed lot • Proposed by-laws • Proposed schedule of unit entitlement • Estimate of proposed levy contributions	• The first two listed items should be relatively easy for developers to provide at the contract preparation stage, and would provide greater certainty to purchasers. We assume that the first dot point refers to a draft strata plan. • Consideration could also be given to including a draft floor plan which depicts both the proposed configuration and dimensions of the land (or lot(s) the subject of the contract). Some developers already produce such a document as part of the marketing material. If inclusion of a floor plan in the contract is regarded as too onerous, a basic description of the subject property should be part of the disclosure statement eg. Two bedrooms, two bathrooms and one car space. • If a floor plan or basic description is to be included in the contract, the question then arises as to whether this should be part of the disclosure statement or a prescribed document under Schedule 1 of the Regulation. If this suggestion was adopted, we suggest the floor plan or basic description should be part of the disclosure statement, having regard to the remedies that follow. Perhaps for small developments, a basic description would be sufficient, but for larger developments, a floor plan would be appropriate.

No.	Question	Comments
		• In relation to unit entitlement, we suggest that the requirement for a valuer's certificate in relation to a proposed schedule of unit entitlement, under Schedule 2 of the *Strata Schemes Development Act 2015*, provides sufficient protection to the purchaser. • It would also provide greater certainty if the mode of measurement of the area of a lot was required to be as contemplated by the strata legislation rather than the "non-strata" method (an issue raised in *Kannane & Ors v Demian Developments Pty Ltd* [2005] NSWSC 1193). • The proposed schedule of unit entitlement and estimate of proposed levy contributions would create considerably more difficulty – see question 5 below. Although the inclusion of these documents would give a buyer more certainty, this must be balanced with the appropriateness of providing these documents at this early stage and the cost to the developer of preparing the documents.
5.	Are any of the documents unable to be provided or would impose significant cost on developers if required at the time contracts are prepared?	• Most off-the-plan contracts already include the proposed plan showing the proposed lot and proposed by-laws. The inclusion of these documents would not impose significant cost on developers if required at the time contracts are prepared. • We do not support requiring the provision of the proposed schedule of unit entitlement at the initial contract stage. This may be difficult to do with sufficient certainty at the early stages of the development. A prudent developer may wish to engage a qualified valuer to prepare the schedule and to certify that the proposed schedule of unit entitlement is apportioned as required under Schedule 2 of the *Strata Schemes Development Act 2015.* However if the qualified valuer is engaged too early in the development process, the valuer may need to be re-engaged later when the development has further progressed, adding to the developer's costs. • The estimate of proposed levy contributions would impose significant costs on developers as it would require a specialist consultant to provide a projected analysis of expenses and estimate of the likely levies that will apply in a future

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		time which is not certain – the timeframe could well be in a range between two to five years. • If the time of completion of the development was certain, the developer may be in a position to make an informed estimate of a range of what the contributions may be. • A requirement to state the amount of annual contributions reasonably expected to be payable in the future (somewhere between 2 to 5 years) may result in inaccurate estimates which may give rise to unnecessary claims against developers.
6.	Should developers be required to notify purchasers where a change is made to: • The proposed plan; • The schedule of unit entitlements (for strata and community schemes) and • The by-laws or management statement that is likely to have a material impact on the purchaser?	• Frequently developers do notify purchasers of changes throughout the course of the development. Often, there may be many changes before the final documents are registered. • It would be premature to notify purchasers every time there are changes to the draft documents that may have a material impact on a purchaser before the documents are in final form. • There needs to be some flexibility in approach. The purchaser does need to be kept reasonably informed of significant changes. The developer also needs to be able to notify the purchaser of changes which may have a material impact, to check whether the purchaser wishes to exercise any contractual right to rescind. • The Discussion Paper suggests that once the plan is registered the purchaser will have only a short time to settle, leaving little time to examine the plan and decide whether any claims for compensation have arisen (see page 10). It is suggested that the developer be required to provide a copy of the registered plan and by-laws or management statement after registration and a longer time to settle be provided to allow the purchaser further time to examine the plan. This is considered in the responses to questions 8, 9 and 10.

No.	Question	Comments
7.	Are there any other changes to the scheme that developers should be required to notify purchasers of?	Any changes to, or new easements, covenants or restrictions on use will be apparent when the plan is registered.
8.	Should notification of changes be required to be made at a set time before settlement can be enforced?	• Yes. Often, there is some delay between when the plan is registered and when the plan is available for purchase from NSW Land Registry Services ("NSW LRS") making it difficult for purchasers to obtain a copy of the final registered plan and other registered documents to examine any changes. • Accordingly, it would be appropriate for the legislation to require a vendor to provide copies of the following documents before settlement: o the registered plan; o the registered by-laws or management statement; o the common property folio; and o any dealings or instruments creating interests affecting the common property not already disclosed to the purchaser.
9.	What period of notice is appropriate; 14 or 21 days?	• In our view 21 days is preferable, following the Queensland approach. • A longer timeframe allows for the purchaser to prudently examine and ascertain the changes to the disclosure statement that may have been made to the plan, schedule of unit entitlements and by-laws or management statement, as applicable. The purchaser will need sufficient time to examine the impact of the changes, including whether the changes: o sufficiently warrant the making of a claim by the purchaser or o materially prejudice the purchaser, providing a right to terminate the contract within 21 days from when the further disclosure statement was served, following the Queensland approach. • A 14-day period may not be a sufficient time for the purchaser to attend to all of the above.

No.	Question	Comments
10. (pg 12)	Should the developer be required to provide a copy of the registered plan to the purchaser before a notice to settle can be issued?	• Yes, the developer should provide a copy of the registered plan (together with the other documents specified in our answer to question 8) not later than the date upon which notice of registration is given. • This will alleviate the situation where there are delays in the purchaser being able to obtain the registered strata plan from NSW LRS as noted in our response to question 8.
10. (pg 13)	Should the purchaser's ability to terminate a contract be based on the purchaser demonstrating "material prejudice"?	• The purchaser's ability to bring a contract to an end should not be absolute. • The factors taken into account when considering the purchaser's right to rescind for a breach of statutory warranty are relevant. In particular, the criterion that the purchaser would not have entered into the contract had he or she known of the matter relied on is well known and has been extensively considered by the NSW Courts.
11.	Should any statutory termination scheme include, as an alternative, a claim for compensation?	• The Law Society has some reservations about this proposal, but we agree that a compensation regime (for this and other material changes) that cannot be contractually excluded would represent a significant improvement to the current approach where a purchaser must either accept the changes or rescind the contract. • We note that under the terms of the 2017 edition (and earlier editions) of the Contract for the Sale and Purchase of Land, a claim by the purchaser may be made pursuant to clause 7, including a claim under clause 6 for an error or misdescription. As it is the practice of many vendors to amend this clause, there may be merit in prescribing a similar right to claim compensation. • The exact parameters of a statutory termination scheme which includes, as an alternative, a claim for compensation may be difficult to draft, particularly if the scheme was quite detailed. For example, we do not consider it appropriate that changes in the subject lot area be limited legislatively to 1% of the subject lot area as provided in the draft strata plan.

No.	Question	Comments
		• If such a right to claim compensation is prescribed, consideration should be given to whether such a right should be limited to off-the-plan contracts or should apply more widely for the purchase of all residential property.
12.	Should the cooling off period be extended for off-the-plan contracts?	Yes, one week is too short given the likely size and complexity of these contracts, and to allow a lawyer to be engaged and have adequate time to advise.
13.	If so, should the cooling off period be 10 or 15 days?	We consider that 10 business days is preferable. In our view 15 business days is too long a period for the vendor to wait for certainty of contract.
14.	Should legislation mandate that the deposit be held in the trust account of a stakeholder?	• Yes, provided this allows the use of a controlled money account which is a form of "trust money" but additionally allows interest to be earned. Use of a controlled money account would also cater for law practices that do not have a trust account. • If the proposal is adopted, care must be taken in drafting the legislation so as not to inadvertently prohibit the use of bank guarantees or deposit bonds to secure a deposit.
15.	Should NCAT be allowed to make orders as suggested?	• Most sale contracts will involve significantly greater sums of money than the current jurisdiction of NCAT will permit. The sums involved can amount to millions of dollars assuming that NCAT rules a purchaser can terminate a contract or is entitled to compensation and there are, say, a hundred other buyers with the same issue. • These matters are complex, involving contractual, statutory, consumer, property law issues and so it is appropriate that they are heard in the Supreme Court. • The Judges conducting the Real Property List of the Supreme Court of NSW are expert in matters involving real property disputes, including claims involving

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		off-the-plan contracts. NCAT may not necessarily have that same level of expertise to deal with such matters. Matters can be dealt with quickly in the Supreme Court Real Property List.
16.	Should a condition be inserted in the contract for sale requiring parties to attempt to settle disputes through arbitration?	Clause 7 of the Contract for the Sale and Purchase of Land already entitles the purchaser to have claims arbitrated and we suggest this is sufficient.
17.	Should legislation be introduced requiring parties to attempt to settle disputes through arbitration?	• The Law Society supports the appropriate use of alternate dispute resolution mechanisms. However we do not support mandatory arbitration as this may not always be appropriate in the particular circumstances. • Any requirement for the parties to arbitrate a dispute must address a number of practical matters, including: o which issues would be subject to arbitration - would it include complex legal issues, rights to terminate or rescind the contract, or claims of unconscionable conduct or misleading conduct? o who would pay the cost of arbitration? o who would appoint the arbitrator? o who could be appointed as an arbitrator? o what should the timetable be for the arbitration? o how would it be determined whether the parties could review or appeal the arbitration process or decision? o what will happen if completion is delayed i.e. does the vendor get compensated?
18.	Should the definition of sunset date be expanded so that it covers other termination events?	• The issuing of an occupation certificate is, in the case of most off-the-plan strata developments, closely temporally aligned with obtaining the strata certificate which enables registration of the strata plan and completion of an off-the-plan contract. In the case of some development consents, issuing of the occupation certificate is itself a precondition to the issuing of the strata

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		certificate. Similarly, for house and land projects, the development consent often links the issuing of both certificates. • As service of a copy of the occupation certificate is legislatively linked to the purchaser's obligation to complete (clause 4 of Schedule 2 of the Regulation), it appears inconsistent that the purchaser should have the protection of section 66ZL of the *Conveyancing Act 1919* in respect of only one of these preconditions to completion. The definition of sunset date to which section 66ZL applies should be expanded to include the issuing of the occupation certificate in the case of an off-the-plan sale.
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?	• The Discussion Paper recognises that entry into an off-the-plan contract necessarily involves the sharing of risk between the developer/vendor and the purchaser. As the Discussion Paper identifies, there are milestones during the course of implementing a development which, if not achieved satisfactorily, should enable either party to bring the contract to an end without penalty. • Failing to obtain the development consent and failing to achieve a specified pre-sales target are the most obvious. Others include: o acquiring the development site: o obtaining easements benefiting the development site needed for its intended use; o having extinguished covenants or easements which would hinder the intended development; and o terminating an existing strata scheme where one or more existing buildings are to be demolished or redeveloped. • Provided the concept of sunset date remains precisely defined (including the expansion discussed in our response to question 18), there is no need for the legislation to identify other rescission triggers which are 'permitted'.

No.	Question	Comments
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?	• As the Discussion Paper identifies, there is some logical difficulty with the proposition that a termination order can be made under section 66ZL only if it is just and equitable in all the circumstances, but that nevertheless the Court should award damages despite the termination being just and equitable. • The comments of Emmett AJ referred to in the Discussion Paper were presumably made in the absence of any cross-claims by the purchasers for common law damages for repudiation or equitable damages under section 68 of the *Supreme Court Act 1970*. A legislative statement that section 66ZL does not limit the Court's other existing powers may provide appropriate guidance both to the Court and to litigants.