



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: PLC:JvdPgl141222

14 December 2022

Off the plan contracts review  
Office of the Registrar General  
Level 7 McKell Building  
2-24 Rawson Place  
SYDNEY NSW 2000

By email: [ORG-Admin@customerservice.nsw.gov.au](mailto:ORG-Admin@customerservice.nsw.gov.au)

Dear Sir/Madam,

**Off the plan contracts for residential properties – Discussion paper**

Thank you for the opportunity to comment on the Off the plan contracts for residential properties 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 provided in the **attached** comments table.

Any questions in relation to this letter should be directed to Gabrielle Lea, Policy Lawyer on (02) 9926 0375 or email: [gabrielle.lea@lawsociety.com.au](mailto:gabrielle.lea@lawsociety.com.au).

Yours faithfully,

Joanne van der Plaats  
**President**

**Encl.**

## Off the plan contracts for residential properties – Discussion paper November 2022

### Law Society of NSW Comments

NO.	Question	Law Society comments
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?	<p>We support only limited changes to the current regulatory framework for off the plan contracts, noting that the significant reforms implemented in both 2015 and 2019 appear to be working well, in our members experience. We also note that the data regarding off the plan contracts specified in Appendix 2 of the Paper suggests that the number of contracts that have resulted in litigation is quite small.</p> <p>In our view, the current regime strikes the right balance between protecting purchasers under off the plan contracts, while not placing an undue regulatory burden on developers. We have concerns that imposing substantial additional regulations and requirements upon developers in the current economic circumstances may detrimentally impact the housing supply.</p> <p>The purchase of a residential property off the plan is significantly different from purchasing an existing residential property. In our view, the key approach adopted in the framework should foster a high level of awareness of the conditional nature of the purchase, rather than expanding the framework to include additional sunset events or other prescriptive measures such as stipulated timeframes. We therefore favour an expansion of the disclosure statement as a means of increasing awareness, as detailed in our later responses.</p>
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?	<p>No, there are a variety of legitimate commercial arrangements made between the parties involved in an off the plan development, and to require the developer to own the land intended to be subdivided for residential use before exchanging contracts would be unduly restrictive in our view. The critical aspect, in our view, is that where the vendor is not the owner of the land, the purchaser is aware of this and the consequences of the vendor not becoming the owner of the land under the terms of the contract, such as any rescission rights arising.</p> <p>We also note that under some tripartite contractual arrangements, the developer may not actually ever be the owner of the land.</p>
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?	<p>No, in our view a prescribed period in which a vendor must become the registered owner of land is not appropriate and would be too restrictive, given the variety of means by which the vendor may become the owner and the agreed timeframes for that to occur.</p>

NO.	Question	Law Society comments
4.	At what point in the development approval process should residential land be able to be offered for sale?	<p>In our view, it should be open to a vendor to offer the property for sale off the plan at any point in the development approval process. In our view, the existing regime provides sufficient protection for the purchaser. For example, the disclosure statement must contain the draft strata plan, and if the development consent requires significant change, it is likely to require mandatory disclosure by the vendor as a material change and will possibly enliven a purchaser's rights to rescind or obtain compensation under the existing regime.</p> <p>We considered whether a vendor should be required to <i>lodge</i> a development application prior to offering the properties for sale off the plan, but that may be open to abuse.</p> <p>We oppose requiring a vendor to have obtained development consent prior to offering the properties for sale off the plan as that would be unduly restrictive in our view.</p>
5.	Is there a minimum level of development approval that should be obtained (for example, concept approval)?	No, as follows from our answer to question 4.
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?	No, we do not support such a requirement as reasonable endeavours in this context would be difficult to prove or disprove. Additionally, the practical consequences that ought to flow from failing to meet such a requirement are not straight forward. For example, should such a failure give rise to a purchaser having a right to rescind? If so, it might be difficult for a purchaser to confidently reach a conclusion that the vendor had failed to use reasonable endeavours and exercise the right to rescind.
7.	What other measures should be considered to better protect purchasers, while providing flexibility for developers?	<p>We suggest purchasers could be better protected by several changes to the Disclosure Statement:</p> <ul style="list-style-type: none"> <li>• A new warning placed at the beginning of the Disclosure Statement about the general differences and potential dangers in purchasing a property off the plan, such as the conditional nature of the contract and the fluidity in the settlement date.</li> <li>• Expanding the questions “Is there a sunset date?” and “Can this date be extended” in the Disclosure Statement to also include a question about the length of any such extension.</li> <li>• Expanding the question “Can the vendor cancel the contract if an event preventing or enabling the development does or does not occur to specifically disclose and conditions relating to: <ul style="list-style-type: none"> <li>○ the vendor becoming the owner of the land;</li> <li>○ the obtaining of development approval;</li> <li>○ reaching a pre-sales threshold; or</li> <li>○ any other event.</li> </ul> </li> </ul>
8.	What, if any, additional disclosure obligations should apply to off the plan contracts?	See our answer to question 7.

NO.	Question	Law Society comments
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?	No, in our view penalties for the vendor are not required, the key factor is the purchaser's awareness of any pre-conditions in the contract.
10.	Are the existing protections in the sunset provisions sufficient? What, if any, changes are required?	Yes, the legislative changes in 2019 to include obtaining an occupation certificate as a sunset event, and the ability for the purchaser to obtain compensation rather than merely having a right to rescind, were welcome changes and we do not regard further changes as being necessary.
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?	<p>No, we do not support expanding sunset event to capture the three triggers set out on page 15 of the Paper:</p> <ul style="list-style-type: none"> <li>• The vendor becoming the registered owner is not appropriate as a sunset event given the variety of means by which the vendor may become the owner.</li> <li>• The vendor lodging a development application and obtaining development consent is not appropriate as a sunset event given the different stages of the development process across such contracts and it is also rare for a vendor to contract to obtain development approval by a certain date.</li> <li>• The vendor having lodged the plan for registration is of limited value since at that advanced stage, the registration of the plan is most likely imminent, and the fact of registration is far more relevant to the purchaser.</li> </ul>
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?	No, it would be too difficult to accurately estimate likely expenses. Additionally, we are concerned about the appropriateness of remedies for inadequate disclosure post settlement when generally the purchaser's rights merge on completion. The owners corporation also has a statutory remedy under section 89 of the <i>Strata Schemes Management Act 2015</i> in connection with inadequate initial budgeting and levies set by the original owner.
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?	We do not support expanding the Disclosure Statement to include information about likely expenses and 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?	

NO.	Question	Law Society comments
16.	Is there any matter disclosed in the Disclosure Statement that shouldn't be, or any matter not yet disclosed that should be?	See our response to question 7.
17.	Are there any other improvements that could be made to the off the plan disclosure regime?	See our response to question 7.
18.	Is the 10 business day cooling-off period adequate? Please explain your answer.	Yes, this change from 5 to 10 business days in 2019 was appropriate and we do not suggest any further change.
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	No, the matters contained in a contract are so complex and comprehensive that in our view they cannot be addressed in a single page summary. Such a summary in our view could also have the unintended consequence of overly simplifying the contract and giving a purchaser a false sense of security.
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?	No, not in our view, particularly given the comprehensive reviews that took place in 2015 and 2019.