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Conveyancing (Sale of Land) Amendment Regulation
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

Submissions on Discussion paper – Off-the-plan contracts, *Conveyancing (Sale of Land) Amendment Regulation 2019*

Introduction

The Owners Corporation Network of Australia Limited (**OCN**) is the peak independent consumer body representing residential strata and community title owners.

Strata is the fastest growing form of residential property ownership in Australia. Over half the new dwellings to be built in our metropolitan areas over the next decades will be strata titled. Many of these apartments, villas and townhouses are bought off the plan, and the ability of purchasers to understand what they are buying, and have transparency in the purchase process, is paramount.

The issues being dealt with in this discussion paper are especially relevant in the current circumstances where there are serious concerns in NSW about building defects in new strata schemes, and about transparency in purchases off-the-plan and consumer protection for purchasers.

As the key consumer voice in these reforms, OCN welcomes the opportunity to provide feedback and is happy to engage with department on any aspect of this submission, and to develop solutions to the issues identified.

Sincerely

K Stiles

Karen Stiles
Executive Officer

OCN Submission on the *Conveyancing (Sale of Land) Amendment Regulation 2019*

The consultation draft of the *Conveyancing (Sale of Land) Amendment Regulation 2019* deals with:

- a new form of disclosure statement and additional disclosure documents to be attached to off-the-plan contracts;
- remedies where the vendor has not met new disclosure obligations;
- the alternative remedy of compensation where changes have rendered the disclosure statement inaccurate as to a material particular;
- guidance as to what constitutes a 'material particular';
- a new form of prescribed warning statement to reflect the extension of cooling off periods for off-the-plan contracts to 10 business days (from 5 business days, for other residential transactions).

Documents to be attached to off the plan contract and disclosure statement

The proposed Clause 4A provides for:

- various information that must be included in a draft plan included in a disclosure statement attached to an off the plan contract;
- documents that must be included in a disclosure statement attached to an off the plan contract.

However, OCN submits that the purchaser needs to have more substantial documentation details of the work to be done, both for the lot to be bought and the building for the strata scheme the lot will be part of, for the purchaser to have a full and proper understanding of what is being bought, and to provide proper transparency and consumer protection for purchasers. An off the plan contract is in many ways an indirect building contract, where the developer is engaging the builder to deliver the building within which the lot is to be built. Disclosure of what is being done under that contract is more appropriate, including any changes that might occur to that work and building contract.

Those documents should include:

- the Development Approval/Consent for the construction of the relevant building(s), and any amendments to that approved by the relevant consent authority;
- any notice of appointment of certifying authority for the construction of the relevant building(s);
- any Construction Certificates issued for the construction of the relevant building(s) by the relevant certifying authority.

Purchaser may claim compensation instead of rescission

The proposed Clause 19A provides a right to claim damages up to 2% of the purchase price. This assumes the loss in value in relevant changes occurring would be no higher than 2%, seems to make no allowance for stamp duty or transaction costs beyond the contract price, and assumes that if the damages were more than 2% rescinding is preferable (or makes that

the only option). Such is no real disincentive for developers to engage in the behaviour being dealt with.
The damages should be allowed to be the reduction in value arising as the result of the changes involved or, if capped, then capped at 10%.

Allowing only 14 days to serve claim for notice signed as required including quantification of the amount of compensation is unreasonable, given the need to presumably obtain valuation evidence. It also makes no allowance for public holidays or a holiday period such as Easter or Christmas.

The proposed Clause 19B provides for arbitration as the avenue for dispute resolution, which is not appropriate and limits the ability of the purchaser to pursue such compensation. It provides no certainty as to what arbitration rules are to be used, or what bodies can accredit such arbitrators. How costs of the arbitration are to be dealt with is not made clear.
It would be more appropriate to provide, in addition to providing more guidance as to the relevant arbitration process and rules, the option to bring a claim in the Local Court or NSW Civil Administrative Tribunal (NCAT). It is worth noting that:

- The Local Court Small Claims Division dealing with claims under $10,000 can only award scale costs;
- If dealt with in the Consumer & Commercial Division, NCAT does not allow lawyers in claims worth under $10,000 and does not usually award costs in claims under $30,000;

both of which will ensure commerciality and cost effectiveness in such matters, which will not necessarily be the case in arbitration.

Clause 19B(7) simply encourages vendors to delay any agreement on an arbitrator, and punishes a purchaser if the Secretary of the Department of Customer Service fails to act within time.

Clause 19B(4) will simply encourage purchasers to claim the full 2% as an ambit claim, so as to maximise the amount an arbitrator can award.

Material particulars for off-the-plan contracts

The proposed Clause 21 provides for certain material particulars. Similarly for Clause 4A above, those documents should include:

- the Development Approval/Consent for the construction of the relevant building(s), and any amendments to that approved by the relevant consent authority;
- any notice of appointment of certifying authority for the construction of the relevant building(s);
- any Construction Certificates issued for the construction of the relevant building(s) by the relevant certifying authority;
- any changes to the plans detailed in the Development Approval/Consent or Construction Certificates.

These submissions now deal with the feedback questions put below.

Submissions to Feedback Questions

1. Should the Regulation (and the off-the-plan provisions under the Amendment Act) commence on 1 September 2019? If not, when should the reforms come into operation?

1 September 2019 is too soon to be prepared to deal with the changes. The changes should commence no sooner than 1 January 2020, and preferably 1 February 2020 given the holiday break.

2. The disclosure statement may be an appropriate place to alert purchasers to plans to utilise an embedded network in the proposed scheme.

Yes.

3. Should any of the information in the draft disclosure statement be omitted from the approved form? If so, on what basis?

No.

4. What other information that is likely to be known at the time contracts are signed should be included in the disclosure statement?

Any amendments to Development Approval/Consent made by that time, any appointment of certifying authority, any Construction Certificate(s) issued, and any changes to plans detailed in the Development Approval/Consent or Construction Certificate(s).

5. Should the disclosure statement require the developer to state whether the scheme will be subject to an embedded network or other agreement with third parties relating to the supply of utilities and services to the common property?

Yes. And it should clearly explain the ramifications of the embedded network or other agreement with third parties on purchasers.

OCN also submits that the Strata Schemes Development Act or Strata Schemes Management Act (whichever is more appropriate) should be amended to limit any contracts entered into by the developer prior to the first AGM of the owners corporation to one year, similar to the one year limit on strata management contracts, which can be up to three years after the first year. This will stop apartment purchasers being locked into complex and/or onerous contracts for long periods.

OCN provides as a separate document the letter from Green Strata to NSW Fair Trading of 27 May 2019, in response to their advice that they did not intend to limit these contracts under the 'Better Business Reforms'. This outlines the significant, long term impact embedded networks can have on unsuspecting purchasers.

6. Does there need to be any guidance as to where the disclosure statement should appear in the contract? For example, should this be the first page of the contract?

Yes, or the statement may be placed in a deliberately hard to find location and defeat the purpose of providing the disclosure.

7. Is there any additional information that should be included in the draft plan to provide buyers with more certainty?

See submissions above.

8. Should any of the prescribed information not be included? If not, why not?

See submissions above.

9. Is there any other information that would not be known with certainty at the time contracts are prepared, and should not be included in the plan (or be noted only in approximate terms)?

See submissions above.

10. Are any of the required documents unable to be provided or would pose a significant cost to developers if required at the time contracts are prepared?

No. Most document are now issued in electronic versions and easy to distribute. “significant cost” is also relative when measured against the profits to be made from the sale of property involved and the cost to purchasers of opaque contracts.

11.Is there any additional information that a purchaser should be aware of, and a developer is capable of disclosing early in the development, that should be included in the contract?

See submissions above.

12. Should arbitration be the only method of resolving these claims? If not, what other methods should be considered?

No. See submissions above.

13. Should the regulation make provision as to responsibility for costs of appointment of the arbitrator, or is it appropriate for this to be left to the parties to determine?

Yes, and the arbitrator should be able to deal with that issue as part of any determination. See submissions above.

14. Should the Regulation prevent waiver of cooling off periods for off the plan contracts by prescribing a maximum time period by which the cooling off period can be shortened? If so, what time period would be appropriate?

OCN defers to the Law Society on this point, assuming they provide submissions.

15. Is 6 months an appropriate period in which the old form of warning statement may be used for contracts that are not off-the-plan?

OCN defers to the Law Society on this point, assuming they provide submissions.