



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:EEgl1761946

22 July 2019

Conveyancing (Sale of Land) Amendment Regulation 2019
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,

Discussion Paper – Off-the-plan contracts – Conveyancing (Sale of Land) Amendment Regulation 2019 ("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 also set out below other comments on the Draft Conveyancing (Sale of Land) Amendment Regulation 2019 ("Draft Regulation"), and several suggestions for additional amendments to the *Conveyancing (Sale of Land) Regulation 2017*.

1. Other comments on the Draft Regulation

1.1. Clause 4A(1)

We note that clause 4A(1)(d) refers to the inclusion of a draft floor plan as part of the draft plan included in a disclosure statement. Clause 4A(6) clarifies that floor plan has the same meaning as in the *Strata Schemes Development Act 2015*. It may be useful to place a note at the end of clause 4A(1) that refers to the definition in clause 4A(6) to ensure that the requirement for a floor plan is interpreted correctly and not mistakenly read as the inclusion of the type of floor plan that is often used in marketing brochures.

1.2. Clause 4A(3)

Further to our answer to question 6 in the Discussion Paper, if it is sufficient that the prescribed documents that must be included in a disclosure statement can be attached either to the disclosure statement or the contract, references such as in clause 4A(3) that such documents "must be included in a disclosure statement" may need revision.

2. Additional amendments to the *Conveyancing (Sale of Land) Regulation 2017*

2.1. Implied term in relation to occupation certificates

We note that under clause 7 of the *Conveyancing (Sale of Land) Regulation 2017*, the following clause is an implied term in most of the plan contracts:

4 Strata units bought off the plan

- (1) The vendor must serve, at least 14 days before completion, an occupation certificate within the meaning of the *Environmental Planning and Assessment Act 1979* (being an interim occupation certificate or a final occupation certificate) in relation to the building (or part of the building) of which the lot, and any part of the building reasonably necessary for access to the lot, form part.

- (2) The purchaser does not have to complete earlier than 14 days after service of the certificate.

We suggest that for consistency with the timeframes under the Draft Regulation and the *Conveyancing Legislation Amendment Act 2018* in relation to matters such as the service of registered documents and periods for the exercise of rescission rights, the period of 14 days in the above implied term should be increased to 21 days.

2.2. Appearance of prescribed warnings and statements

We note that Item [9] of Schedule 1 to the Draft Regulation amends the prescribed cooling off notice. In our view, it is timely to review the existing requirements for prescribed warnings, such as font size. When drafted, the predecessor to the *Conveyancing (Sale of Land) Regulation 2017* would have assumed that the contract would issue in paper format. Provisions regarding requirements such as prescribed warnings and font size should be reviewed to ensure they operate appropriately in both paper and electronic environments.

We note the recent approach taken in relation to prescribed statements for promotional material about retirement villages in the *Retirement Villages Amendment (Rules of Conduct for Operators) Regulation 2019*. Under Rules 14 and 15 of the new Code of Conduct introduced by that amending regulation, certain marketing material must contain specified prescribed statements that must be "written in a size, style and format, and located in a position, that makes them clearly visible". Consideration could be given to adopting a similar approach in the *Conveyancing (Sale of Land) Regulation 2017* in relation to the prescribed warnings in Schedule 1 and the form of statement relating to the cooling off period in Schedule 5.

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,



Elizabeth Espinosa
President

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Discussion Paper – Conveyancing (Sale of Land) Amendment Regulation 2019

Submission by the Law Society of NSW – July 2019

NO.	QUESTIONS	COMMENTS
3. Discussion of the proposed Regulation		
3.1 Preliminary Matters		
Q.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?	<ul style="list-style-type: none"> • In our view 1 September 2019 will not provide a sufficient lead time for industry. Our strong preference is that the reforms commence no earlier than 1 November 2019. Apart from updating the contract for the sale and purchase of land: <ul style="list-style-type: none"> ○ developers and their legal representatives need time to prepare the new disclosure statements; ○ surveyors will need to review and potentially update draft plans to ensure the plans comply with the requirements of the Regulation; and ○ real estate agents and legal practitioners will need to be cognisant of the changes being made in relation to the cooling off period notice, including transitional arrangements. • We note that under clause 2(1) of the Draft Regulation, Schedule 1 [7]-[8] will commence on the day of publication. We would prefer these items commence 30 days from publication or alternatively, on the same date as the other clauses of the Draft Regulation.
3.2 New disclosure documents for off-the-plan contracts		
<i>Disclosure Statement</i>		
Q.2.	The disclosure statement may be an appropriate place to alert purchasers to plans to utilise an embedded network in the proposed scheme.	Please see our response to question 5.

NO.	QUESTIONS	COMMENTS
Q.3.	Should any of the information in the draft disclosure statement be omitted from the approved form? If so, on what basis?	<p>We suggest the following amendments to the “DETAILS” section of the disclosure statement:</p> <ul style="list-style-type: none"> • Replace the words “Completion Date (if known)” with the words “Date for Completion” as this better captures the concept of the date due for completion. • In relation to the Date for Completion, delete the prompt to insert an actual date and instead include a prompt for a clause reference in the contract, as has been done in relation to the extension of the Sunset Date. • In relation to the Sunset Date, delete the prompt to insert an actual date and leave the field blank allowing for either insertion of a date, if there is one, or a reference to the relevant clause number in the contract. • Add to “Is the contract conditional on any event” the words “other than a sunset event? (eg minimum pre-sales, vendor obtaining finance)”. <p>We suggest the following amendments to the “ATTACHMENTS” section of the disclosure statement:</p> <ul style="list-style-type: none"> • Add the word “Draft” before the reference to the s88B Instrument. • Change “Schedule of Finishes” to “Proposed schedule of finishes”. • Delete “Other (please specify)” as the attachments are specifically prescribed. If developers wish to provide additional information they will have the flexibility to provide it in the contract but there must be certainty as to which documents are regarded as forming part of the disclosure statement. • Amend to read “Draft Precinct/Neighbourhood/Community Development Contract”. <p>We submit that the signature panel included in the disclosure statement should be omitted as it is redundant. The disclosure statement forms part of the contract and the signing and exchange of contract with the disclosure statement attached evidences that the purchaser has been provided with the disclosure statement. The inclusion of this signature panel may be problematic. For example, if the contract has been signed and exchanged, yet the disclosure statement had not been signed by the purchaser.</p>

NO.	QUESTIONS	COMMENTS
Q.4.	What other information that is likely to be known at the time contracts are signed should be included in the disclosure statement?	<ul style="list-style-type: none"> • In our view the disclosure statement covers the appropriate level of information. • We note that a floor plan will not be a prescribed document for the disclosure statement and we support this approach.
Q.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, to the extent it is known at this time.
Q.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?	<ul style="list-style-type: none"> • No guidance should be provided, there should be flexibility. • We suggest there needs to be clarification that it is sufficient for both vendor disclosure requirements and the new disclosure statement that the prescribed documents are either attached to the disclosure statement or the contract. Without this clarification, it may be arguable that a document needs to be included twice in the contract. If that approach is adopted, the reference to documents being “attached” in the ATTACHMENTS section of the disclosure statement could be amended to refer to the listed prescribed documents forming part of the disclosure statement.
<i>Draft plans</i>		
Q.7.	Is there any additional information that should be included in the draft plan to provide buyers with more certainty?	No.
Q.8.	Should any of the prescribed information not be included? If not, why not?	Please see our suggested amendments in our response to question 3.

NO.	QUESTIONS	COMMENTS
Q.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)?	No.
<i>Other documents to be included</i>		
Q.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, in our view the required documentation strikes the right balance.
Q.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?	No, in our view the required information strikes the right balance.
3.4 Changes to material particulars – compensation claims		
<i>Determining the claim – new clause 19B</i>		
Q.12.	Should arbitration be the only method of resolving these claims? If not, what other methods should be considered?	In our view, arbitration is appropriate.
Q.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?	The regulation should make provision, and should also make provision for the parties' costs generally.

NO.	QUESTIONS	COMMENTS
3.5	Cooling off period	
Q.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?	<ul style="list-style-type: none"> • A vendor/ developer should not be able to shorten the new 10 day cooling off period for off the plan contracts as this would undermine the utility of the reforms. • The existing mechanism for the waiver of a cooling off period by the provision of a section 66W certificate should continue to apply for off the plan contracts.
<i>Transitional provision</i>		
Q.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?	Yes, a minimum of six months is appropriate.