THE LAW SOCIETY
OF NEW SOUTH WALES

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17 March 2025

Contracts and Covenants Review
Office of the Registrar General
Level 7, McKell Building
2024 Rawson Place
SYDNEY NSW 2000

By email: orgconsultations@customerservice.nsw.gov.au

Dear Sir/Madam,

CONTRACTS AND COVENANTS – DISCUSSION PAPER

Thank you for the opportunity to provide feedback on the Contracts and Covenants Discussion Paper. The Law Society's Property Law, Rural Issues and Environmental Planning and Development Committees contributed to this submission.

Our feedback on relevant questions in the Discussion Paper is provided in the attached comments table.

We look forward to further involvement in this consultation. Any questions in relation to this letter should be directed to Gabrielle Lea, Senior Policy Lawyer, at gabrielle.lea@lawsociety.com.au or on (02) 9926 0375.

Yours sincerely,

Jennifer Ball

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President

Attachment

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The Office of the Registrar General

Contracts and Covenants – January 2025

Law Society of NSW Feedback

No.	Question	Law Society comments
Part A: Off the plan contracts		
A1.	Should the Disclosure Statement be expanded to require status information about development milestones? If so, what milestones should be disclosed?	As we understand it, the original intention behind the Disclosure Statement was that it was to be a short, one page document which sets out the key items that are material to a purchaser buying off the plan. We note that on commencement of the *Strata Schemes Legislation Amendment Act 2024* (NSW), the Disclosure Statement will be expanded to disclose additional items addressing embedded networks. In our view, any further expansion of the Disclosure Statement must consider the likely additional value to the purchaser of that disclosure. Paragraph 4.1 of the Discussion Paper suggests four potential new key milestones, the status of which could be disclosed in the Disclosure Statement: • an approval under section 68 of the *Local Government Act 1993* (NSW); • a subdivision works certificate under section 6.4(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA**); • a compliance certificate under section 73 of the *Sydney Water Act 1994* (NSW) for properties serviced by Sydney Water; and • any modification applications used to change details of conditions, work or activity that was approved in the original development application. Generally, these matters are preliminary in nature and may not be meaningful to a prospective purchaser. Instead, we suggest that the more significant indication of progress, and therefore the most appropriate additional item for the Disclosure Statement, could be an item as to whether the vendor/developer has obtained a construction certificate under section 6.4(a) of the EPA. If a construction certificate has issued, the Disclosure Statement should also set out the certificate number so that the further details of the construction certificate can be searched on the relevant local council's website. Consideration could also be given to a generic warning to accompany this part of the Disclosure Statement to the effect that obtaining a construction certificate requires certain other steps to be completed before a construction certificate can be obtained. The Disclosure Statement already contains an item in relation to whether development approval has been obtained and the development approval number. We suggest that it would be helpful to expand this item to include the date of the development approval as this may be a further indication of the development timeframe.

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		We also suggest that consideration be given to the development of an off the plan brochure, with provision of the brochure to the purchaser being mandatory. As we understand it, a key motivation for the contemplated reforms is to increase a purchaser's understanding of the difference between buying an existing residence and purchasing off the plan, particularly the extended time frames that may apply and the conditional nature of the contract.
A2.	Should the developer be required to provide updates as development milestones are met? If so, what time period for notification do you think would be appropriate?	No. Given that the reaching of development milestones is generally a matter of public record, (for example, searchable on the relevant local council website), we do not regard it as necessary, particularly if failure to provide the update was accompanied by a statutory remedy. We understand from our members that it can be difficult to obtain project funding for developments. Financial institutions are already cautious in relation to any potential rights that a purchaser may have to rescind a pre-sale contract. Providing a legislative rescission right where a vendor fails to serve notice of a certain development milestone will cause substantial issues with project funding, and may result in financial institutions only being willing to provide funding once all legislated development milestones have been achieved. This is not practical given that many of the proposed milestones are not reached until later in the project. In our view, care must be taken to ensure the proposed reforms do not have an unintended consequence of reducing the feasibility of projects and negatively impacting the housing supply.
A3.	Should the developer disclose their ownership status of the development site in the contract? If so, should the developer also be required to set out the basis upon which they expect to become owner?	The developer should disclose the ownership status of the development site, and this is already best practice. In our view, the developer should not also be required to set out the basis upon which they expect to become owner, but it would be helpful if an indication was provided to the purchaser as to when the developer expects to become the owner of the land.
A4.	How do you think the disclosure in Question 3 above could best be achieved? For example, in the Disclosure Statement, as a prescribed term of the contract, or in some other way?	In our view, disclosure of the ownership status of the development site should be made in the Disclosure Statement. A question could be added as to whether the developer owns the development site, coupled with a box to provide details, which could include when the developer expects to become the owner of the development site.
A5.	If the developer has not provided a warning statement or disclosed that they do not own the land, what action should the buyer be able to take? For example, rescind within a certain time after exchange of contracts, at any time before completion, or at any time before the	We do not support any remedy for a purchaser based on the developer failing to disclose that it does not own the land. It should be immediately apparent to a purchaser and their legal advisor whether the vendor owns the land, noting that the contract for sale of land must include a title search which notes the current registered proprietor of the land.

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	developer becomes the owner of the land, or some other remedy?	If despite our view, it is thought that a remedy ought to be provided, we suggest that any rescission right of the purchaser arising due to the absence of such disclosure, should be exercised within 14 days of the date of the contract, consistent with the timeframe under section 22(1)(a)(i) of the *Conveyancing (Sale of Land) Regulation 2022* (NSW).
A6.	Should the definition of 'sunset event' be expanded to include other events, requiring Court approval to terminate contracts?	No, we do not support expanding the definition of 'sunset date' to include other events. In our view, it is appropriate to limit the current framework of requiring approval from the Supreme Court to terminate the contract (in the absence of purchaser approval) to the existing sunset events of registration of the plan of subdivision and issue of the occupation certificate. In the current market, developers are often required to commence selling before acquiring the land (as they may need to use those pre-sale contracts to acquire funding for the acquisition of the land) or before acquiring development consent. If the vendor cannot acquire the land (for example, because their vendor defaults), then the developer cannot undertake the development. The developer should not be required to apply to the Supreme Court to be released from its obligations in these situations in our view. Again, care needs to be taken that these reforms do not unintentionally reduce the feasibility of projects and negatively impact the housing supply. As the Discussion Paper mentions, events such as pre-sales or development approval typically occur early in the development process. The sunset dates that might be applied to these types of events are relatively short and will usually occur within 6-18 months of the purchaser entering into the pre-sale contract. Accordingly, these events do not have the same risk profile as the current sunset events which occur at the end of the off the plan process. <u>Alternative approach</u> We suggest consideration could be given to introducing implied terms under section 52A(2)(b) of the *Conveyancing Act 1919* (NSW) (**CA**) to the following effect. • Where a contract is conditional upon a specified number of **pre-sale contracts** being entered into by a specified date, any associated right of rescission to be implied in the contract must be exercisable by either the vendor or the purchaser, and the purchaser may exercise a right of rescission where the vendor has not provided written notice to the purchaser by that specified date, that either the vendor has achieved the required number of pre-sale contracts or that the vendor waives that condition/requirement. • Where a contract is conditional upon the developer **acquiring title to the land** by a specified date, any associated right of rescission to be implied in the contract must be exercisable by either the vendor or the purchaser. (We suggest there is no need for a notice to the purchaser about whether the developer has acquired the title as this may be established by a title search.)

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		• Where a contract is conditional upon the **developer obtaining a satisfactory development approval** by a specified date, any associated right of rescission to be implied in the contract must be exercisable by either the vendor or the purchaser, and the purchaser may exercise a right of rescission where the vendor has not provided written notice to the purchaser by that specified date, that either a satisfactory development approval has been obtained or that the vendor waives that condition/requirement. We also support the proposal in paragraph 5.1 of the Discussion Paper to mandate that all off the plan contracts be required to include a sunset clause that specifies a date by which the following events will occur: • registration of the plan of subdivision by NSW Land Registry Services; and • an occupation certificate issuing for the property. As noted in the Discussion Paper, it is important to provide a purchaser with a pathway to rescind the contract should there be protracted problems with an occupation certificate not issuing.
A8.	Should there be a limit on the developer's ability to extend sunset dates? If so, would this be best achieved by a cap on the number of extensions or a maximum period for any extension?	Yes, in our view a balance must be struck between providing a developer with sufficient flexibility to extend sunset dates, while ensuring that purchasers are not 'locked in' to an essentially open-ended contract. We prefer a maximum period for extensions rather than limiting the number of extensions as that seems a more appropriate and transparent approach. However, it is difficult to provide a single solution that is appropriate for all situations and scales of development. We suggest consideration could be given to an implied term to the effect that where the contract is silent as to the developer's ability to extend a sunset date, then an 18-month cap applies for the maximum period of extensions for any sunset date.
A9.	Should the legislation set a maximum period by which a developer must settle an off the plan contract? If so, what should the maximum period be - for strata plans and for land developments?	Yes, although we understand from our members that the legislation in Queensland which sets maximum periods by which a developer must settle (as referenced in the Discussion Paper in paragraph 5.3) does present some practical difficulties. We understand that the parties will often choose to enter into a deed to effectively preserve the transaction, at additional cost to the parties, particularly for land subdivisions where 18 months is a relatively short period of time. Again, we suggest a more nuanced approach. Consideration could be given to an implied term to the effect that where the contract is silent as to a final date by which the contract must be settled, or such date cannot be ascertained (for example, by looking at the maximum extension periods for sunset dates) the contract must be settled within five years of the date of the contract.

No.	Question	Law Society comments
		We suggest the period of five years should apply for both strata plans and land subdivisions. We also support the inclusion of a provision to the effect that any right of rescission can only be exercised by the purchaser if the purchaser is not in default. We note that section 14(5) of the *Land Sales Act 1984* (Qld) provides a similar qualification of the purchaser's right to terminate the contract.
A10.	Should the legislation limit the developer's ability to extend a sunset clause to only specific circumstances (e.g. adverse weather)? If so, what should those circumstances be?	No, trying to exhaustively provide for all potential grounds on which a developer would be permitted to extend a sunset date is too prescriptive and not sufficiently flexible to adapt to unforeseen events. (For example, the impact upon development timelines of the COVID-19 pandemic.)
A11.	If legislative caps are placed on the developer's ability to extend the sunset date, should the developer be able to seek approval of the Court to extend the sunset date? In what circumstances should this apply?	Yes, in these circumstances the developer should be able to seek the approval of the Supreme Court to further extend the sunset date. Such extension should only be available on 'just and equitable grounds', similar to the approach adopted in section 66ZS(7) of the CA but amended as appropriate.
A12.	Do you support a statutory requirement for developers to take reasonable steps to meet sunset dates, and to provide evidence of those steps to the buyer (and the Court) when seeking to extend sunset dates?	Yes generally, but the extent of the obligation to provide evidence to buyers may need to be limited. We suggest it should be sufficient for the developer to provide a reasonable explanation for the delay and substantiate the reason for the extension. However, if the matter becomes the subject of Court proceedings it would be appropriate for the developer to be required to provide evidence to the Court of its reasonable steps in seeking to meet the sunset date. This is consistent with the approach adopted in section 66ZS(7) of the CA.
A13.	What mechanisms do you think could assist in compelling developers to perform obligations under the contract (eg penalty for non-compliance)?	The regime under section 66ZS of the CA seeks to protect purchasers in situations where sunset dates are reached and developers seek to rescind. Presently it does not provide any remedy or outcome where the developer's application to rescind is refused. Nor does it offer any protection to purchasers where a developer does not seek to rescind but is not proceeding with its development. While the common law offers some remedies to purchasers facing such situations, they are mostly expensive and lengthy. We suggest consideration could be given to establishing a legislative regime to better protect purchasers where either the developer's application to rescind has been refused or the developer is simply not proceeding with its development. We would be happy to assist in considering how such a regime might be developed.
A14.	Are there circumstances where it would be appropriate for the Court to make an order permitting the vendor to	Yes, particularly when the contracts have been on foot for an extended period, in an area which has experienced significant increases in property values.

No.	Question	Law Society comments
	rescind under a sunset clause but where an award of damages should include a component for capital gain attributed to the vendor through rising land values?	
A15.	Should s 66ZS be amended to allow the Court to consider capital gains as part of any claim for an award of damages?	Arguably the Court already has this power under section 66ZS(11)(a) of the CA, but we support expressly clarifying the position in the legislation.
A16.	Do you support a statutory requirement for developers to request that an off the plan contract notification be recorded on the development site?	We support the proposal for a developer to request the recording of a Registrar General's caveat on the development site. In our view, this is an appropriate way of notifying third parties and protecting the purchaser's interest under the contract. If a developer fails to request the recording of a Registrar General's caveat within a stipulated timeframe, a purchaser should be entitled to make the same request, and should be able to recover their reasonable costs of doing so from the developer.
A17.	Would this requirement add unreasonable cost or delay to the development process?	In our view this requirement would not add unreasonable cost or delay to the development process given the additional protection afforded to the purchaser. We also suggest that any term in a sale contract which purports to limit a purchaser's ability to request the recording of a Registrar General's caveat should be void.
A18.	What types of dealings and instruments should be prevented from being registered while an off the plan contract notification is in place?	In our view, only transfers should be prevented from being registered. Where a transfer needs to be registered, the developer should be required to provide evidence to the Registrar General as to why the transfer must be registered, or provide the consent of all relevant purchasers.
Part B: Obsolete restrictive covenants		
B1.	Should section 81A be expanded to include additional types of old covenants that can be deemed obsolete after 12 years? If so, what types of covenants should be included?	Yes, the regime under section 81A of the *Real Property Act 1900* (NSW) (**RPA**) should be expanded to capture covenants in relation to minimum prescribed building setbacks, no advertising hoardings and no noxious trades. We agree that these types of activities are generally regulated through planning legislation.
B2.	Is there some other way of identifying covenants that may have become obsolete (perhaps by differentiating between covenants created to benefit one of 2 specific	In our view, Part 8A of the RPA recognises certain restrictive covenants lose any practical benefit after 12 years in existence, and so it is appropriate to focus on the type or subject matter of the covenant when considering the question of whether a covenant may have become obsolete.

No.	Question	Law Society comments
	parcels and those applying generally to an entire subdivision development)?	Approaching the issue by having regard to the number of parcels benefitted may, in our view, lead to unintended consequences as this may not be sufficiently nuanced.
B3.	Should Part 4A (sic) be amended to remove the need for notice of an application by presuming extinguishment of a building materials, fencing or value of structures covenant after 12 years?	Part 8A of the RPA should be amended, in our view, to remove the need for notice of an application by presuming extinguishment of a building materials, fencing or value of structures covenant after 12 years. The notice requirement should also be removed for covenants in relation to minimum prescribed building setbacks, no advertising hoardings and no noxious trades. In our members' experience, the costly and time-consuming process of verifying the persons to whom notice must be given is the main reason why developers do not apply for the extinguishment of obsolete covenants when developing the land. The requirement under section 81D of the RPA to give notice serves to identify potential objections from interested parties. However, this appears unnecessary where the Registrar-General is satisfied that the covenant falls within the scope of section 81 of the RPA and has been in existence for at least 12 years. These are factual determinations that are typically uncontentious. Moreover, as restrictive covenants are not recorded in the folio for the dominant tenement, the owners of that land are often unaware of the covenant's existence in the first place, further diminishing the practical value of the notice requirement.
B4.	If a requirement for notice is retained, should the class of persons required to be served be reduced? If so, to who?	The requirement for notice will continue to be retained for other types of covenants. To provide more flexibility and ease of process, consideration could be given to providing the Registrar General with a discretion to extinguish a restrictive covenant by application without complying with the existing notice requirements, or by the Registrar General allowing an alternative form of public notice. Section 142(2A)(b) of the *Strata Schemes Development Act 2015* (NSW) allows the Registrar General to determine a way in which public notice may be given in relation to an application to the Registrar General for the termination of a strata scheme, which may be an appropriate approach.
B5.	Should all new restrictive covenants be time limited? If so, what should that limit be?	No, in our view there are restrictive covenants that are created today which should run with the land for more than 20 years. For example, a restriction on use in relation to retaining walls, such as an obligation not to interfere with a retaining wall which is for the benefit of a neighbouring lot. We suggest that there should be the ability to create a restrictive covenant that will extend beyond 20 years. We suggest that all new restrictive covenants could be limited to operate for 20 years unless stated otherwise in the instrument. The period of 20 years is consistent with section 49 of the RPA for the cancellation of an abandoned easement, and the recommendation of the Victorian Law Reform Commission in 2010 as discussed in paragraph 3.5 of the Discussion Paper.

No.	Question	Law Society comments
		Alternatively, it could be a legislative requirement for creating a valid restrictive covenant that it includes a sunset date (for example, by inserting this requirement in section 88(1) of the CA).
B6.	Should there be any exceptions to the time limit or a process to allow for extension of the effect of a restrictive covenant?	In our view, there should be the ability to apply to the Registrar General for an extension of the operation of a restrictive covenant. It is important to provide for an alternative pathway to a costly application to the Supreme Court.
B7.	Should section 89 of the Conveyancing Act be expanded to specifically include consideration of planning schemes in the exercise of its powers? If so, should it be a factor to be considered by the court for a separate ground?	Yes, it is a relevant consideration for the exercise of the Supreme Court's power to extinguish covenants. In our view, it could be both a separate ground under section 89(1) of the CA and, more broadly, a factor to be considered in an application under section 89 of the CA. It would be useful if section 89 of the CA explicitly referred to section 3.16 of the EPA by way of cross-referencing. If a development approval is in force which has suspended the operation of the covenant due to the operation of section 3.16 of the EPA, the existence and length of time for which the approval has operated should also be matters to which the Court should have regard.
B8.	Should there be any limitations?	No, we do not think it necessary or appropriate to limit the Court in the application of such considerations.