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ATTENTION: Leanne Hughes
Director, Policy and Litigation
Office of the Registrar General
Email: leanne.hughes@customerservice.nsw.gov.au
orgconsultations@customerservice.nsw.gov.au

Amy Stiles
Managing Lawyer, Policy
Office of the Registrar General
Email: amy.stiles@customerservice.nsw.gov.au

RE: OFF THE PLAN CONTRACTS AND COVENANTS SUBMISSION

Urban Development Institute of Australia NSW (UDIA) is the state's leading development industry body. We represent the leading participants in the industry and have more than 450 members across the entire spectrum of the industry including developers, financiers, builders, suppliers, architects, contractors, engineers, consultants, academics and state and local government bodies.

UDIA invests in evidence-based research that informs our advocacy to state, federal and local government, so that development policies and critical investment are directed to where they are needed the most. Together with our members, we shape the places where people will live for generations to come and in doing so, we are city shapers.

In NSW alone, the property industry creates more than $581.4 billion in flow on activity, generates around 387,000 jobs, provides around $61.7 billion in wages and salaries to workers and their families, and contributes $22.3 billion through existing taxes to NSW State and Local Governments, making the property industry the state's largest paying taxpayer and accounting for 52.1% of total state and local government taxes and rates.

UDIA welcomes the opportunity to make a submission to the Office of the Registrar General regarding off the plan contracts and covenants. The proposed changes and considerations are crucial for ensuring that our property laws remain relevant and effective in addressing contemporary needs.

While UDIA understands that reform in respect to off the plan may be required, to deal with a small number of developers failing to deliver, it is concerned that the Discussion Paper fails to acknowledge the more widespread problems that the development industry has experienced over the last 4 years in completing projects in a timely matter, including:

- Covid related supply chain issues;
- Unprecedented construction cost escalation;
- Unprecedented Builder and subcontractor insolvency; and
- Rapid regulatory change through introduction of the D & BP Act, RAB Act and the Building Commissioner;

UDIA is particularly concerned that several of the proposed reforms outlined in the Discussion Paper, if adopted, will affect developers' ability to obtain project funding, will increase the cost and risk of developing housing stock in NSW which negatively affects project feasibility and hence prosperity. It will also impact the ability of the industry to respond to the current housing crisis by delivering homes and ultimately affect project feasibility.

The NSW Productivity and Equality Commission's recent report, *'Review of housing supply challenges and policy options for New South Wales'* noted the amount of regulation that had been imposed on the sector in recent years and its impact on delivery. The Commissioner recommended the Government *"Pause further building reforms that add to construction costs, unless they can demonstrate an overriding public interest such as addressing building defects or risks to public safety."*

In this context, we believe many of the proposed changes in this discussion paper are unnecessary and place disproportionate responsibility on the development sector, at a time where feasibility is already deeply constrained, and the State is falling desperately behind in delivery its share of dwellings required to meet the Housing Accord targets.

UDIA is particularly concerned that several of the proposed reforms outlined in the Paper, if adopted, will affect developers' ability to obtain project funding, will increase the cost and risk of developing housing stock in NSW, which negatively affects project feasibility and hence prosperity. It will also impact the ability of the industry to respond to the current housing crisis by delivering homes and ultimately affect project feasibility. From a consumer perspective the proposed additional disclosure requirements also have the potential to add unnecessary cost to purchasers, who are likely to require review and advice from their conveyancer/solicitor when notifications of milestones are made by a developer.

UDIA's fundamental concern is that requiring developers to disclose detailed milestone forecasts, while well-intentioned, could create significant risks for securing project financing. It is already difficult to obtain project funding for developments.

Banks and non-bank financiers are already cautious with many requiring an agreed level of off-the plan sale commitment before they will agree to development finance. These can range from 40-70%. This financing not only includes the cost of construction but for many projects, funding is also required to complete the purchase of the development site or to fund the cost of applying for development consents. Increasing the number of triggers that would allow a purchaser to rescind or "walk-away" from their pre-sale contract by providing a legislative rescission right because a vendor fails to serve notice within a prescribed time period, will likely result in banks only lending once all legislative milestones have been achieved.

Depending on what milestones are prescribed, this could have the effect of stopping the flow of finance to acquire sites and prepare development applications or stop the release of construction finance. Both these outcomes are undesirable when NSW is in the middle of a housing supply crisis. We urge the Government to be cautious before making any policy and legislative changes and to strike the appropriate balance to avoid unintended consequences that hinder development and financing.

In addition, the proposal to expand what triggers a sunset date in contracts could result in more developers being unwilling to proceed with projects. The paper includes potential new sunset events that could be triggered very early in a project and before development approval is granted. If a project is abandoned in this early stage the risk that falls on the purchaser is minimal as their deposit will be returned. However, requiring a developer to seek court approval adds significant risk to a developer who may be granted approval to rescind contracts and exit a project which is no longer viable. In doing so the Government runs the risk developers will no longer being prepared to take on the risk of developing off the plan. It is important to note purchasers often enter into contracts for off the plan purchases at significant discounts of up to 30% to market prices. In turn for taking some level of risk, they receive the benefit of a discounted purchase price. All of the risk in such a contractual arrangement cannot fall solely on the developer. Doing so will only result in developers not taking on these sorts of projects.

Unfortunately, there is often widespread misunderstanding amongst some lawyers and conveyancers within the current regime, particularly in relation to the developers' ability to rescind contracts. In practice, the clauses allowing developers to walk away are clear and easily identifiable. So, while it is important to get the balance right in terms of consumer protections, the best approach is to ensure purchasers fully understand these risks so they can make informed decisions, based

on the realities of the market and contract terms. Ensuring purchasers better understand these risks will help manage expectations and prevent disputes and

UDIA believes that there could be benefits in a greater up front disclosure about key elements of the projects including development consents and construction approvals. Developers are supportive of disclosure as it is better for all, but the purchaser must understand that the contract they are entering into isn't without its risks. You simply cannot eliminate all risk from off the plan for the purchaser and all risk cannot solely fall on the developer.

UDIA is generally supportive of the reforms of obsolete restrictive covenants, and we have set out more specific comments to the questions raised in the Discussion Paper via the table below.

Our detailed response to the consultation questions is included at Appendix A. We also note the Registrar has sought feedback via an online survey. While we support this method of consultation, we note that several of the questions asking for feedback on specific circumstances in which recission rights should be expanded, do not allow the respondent the option to enter a "nil" response. We are concerned that this could lead to incorrect conclusions being drawn about the level of support for changes being made.

UDIA's Director – Greater Wester Sydney, Charles Kekovich is available to work with your team should you have any additional queries regarding the above submission. Charles can be contacted on 0409 776 588 or ckekovich@udiansw.com.au.

Yours sincerely,

Hon Stuart Ayres
Chief Executive Officer
UDIA NSW

Appendix A

	Discussion Paper Questions	UDIA Responses & Recommendations
A1	Should the Disclosure Statement be expanded to require status information about development milestones? If so, what milestones should be disclosed?	The original intention behind the disclosure statement was that it was a "one pager" which set out the key items that were material to a purchaser buying off the plan. The Disclosure Statement will already be expanded to note additional items to deal with Embedded Networks on commencement of the *Strata Schemes Legislation Amendment Bill 2024.* Whilst UDIA is supportive of greater disclosure to purchasers, the inclusions of the number milestones suggested in the paper are burdensome and do not meaningfully give purchasers a view of where a development is at. UDIA would be supportive of expanding the Disclosure Statement to include the following: • a disclosure as to whether a Construction Certificate has been obtained. In UDIA's view, a Construction Certificate is an important milestone for both broad acre subdivision and built form product. • Status of planning approvals, whether the DA is lodged, consent has been issued, subdivision works certificate, subdivision certificate issued, occupation certificate and; • Status of environmental approvals for example, EPBC Approvals, Biodiversity Certification and other approvals or instruments that are required or might restrict or affect the future use of land.
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. The disclosure in the Disclosure Statement should be a "point in time" reference and the vendor should not be required to provide further updates to purchasers. This will provide an onerous obligation on the developer to update for minor development that do not necessarily reflect

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		ultimate timing of the registration of an ultimate lot. Modification applications do not necessarily reflect material changes to the proposal or timing of registration of final lots and settlement. From a consumer perspective the proposed additional disclosure requirements also have the potential to add unnecessary cost to purchasers, who are likely to require review and advice from their conveyancer/solicitor when notifications of milestones are made by a developer. Developers should be required to provide development milestone updates only if they are likely to cause a material change to the anticipated timing of the completion of sale. Some examples of this might be, refusal of a development application, the need to commence a Land and Environment Court appeal to obtain development approval, the commencement of an objector appeal in the Land and Environment Court, regulatory action being commenced by a public authority for example, a stop work order, the identification of an unexpected heritage item. UDIA and members note that several milestones are publicly available in any event including receipt of a development consent and construction certificate. Should the Government takes the view that vendors are required to update the purchaser on milestones then a reasonable time period should be given and the remedy available to a purchaser should align with a normal contractual breach for a non-essential term – i.e. the purchaser can claim damages and only be entitled to terminate the contract after serving a "notice to perform" and providing the vendor with a reasonable period to provide the update. It is already difficult to obtain project funding for developments. Banks are already cautious

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		regarding any potential right that a purchaser may have to rescind or "walk-away" from their pre-sale contract. Providing a legislative rescission right because a vendor fails to serve notice within a prescribed time period will cause substantial issues with project funding and will likely result in banks only lending once all legislative milestones have been achieved.
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?	Whether or not the vendor is the registered owner of the property being sold under a contract for sale of land is easily ascertainable by a purchaser's conveyancer by reviewing the title search (a prescribed document) included with the contract. This is one of the key issues a purchaser's conveyancer must consider when advising their client. Notwithstanding this, the UDIA has no objection to the Disclosure Statement noting whether the vendor is the owner of the land and if not when it expects to be the owner of the land. Any amendment should not assume that the developer will own 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?	As above, if any change is necessary, the UDIA's has no objection to a new statement to this effect being included in the Disclosure Statement.
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 developer becomes the owner of the land, or some other remedy?	If something in the disclosure statement is misleading, and this gives rise to a material change in timing for delivery of a lot or parcel of land and the completion of the contract or a material change in the lot, the purchaser should have the ability to rescind any time before completion. Similar to failure to attach a prescribed document or warning, the remedy for a purchaser should be a rescission right.

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A6	Should the definition of 'sunset event' be expanded to include other events, requiring Court approval to terminate contracts?	No. Developers are often required to commence marketing the apartments, land lots or other off the plan product before acquiring the development site and/or obtaining all development consents/modification of existing development consents. Frequently, the developer is required to sell a certain number of apartments, land lots etc before funding, or a tranche of funding, is available. This includes funding made available to complete the purchase of the development site or to fund the cost of applying for development consents etc. Regarding development consents/modifications, the lengthy delays suffered by applicants for consent are well known and the delay and overall risk of this aspect of a development is not within the developer's control to a large extent. If a developer cannot rescind the contract (without seeking a Supreme Court Order) due to a failure to obtain finance or receive the development consent(s) required to construct the development, then a rational developer is unlikely to sell the apartments, land lots etc until those issues are resolved. It is important to note that seeking the consent of the Supreme Court is not a trivial matter. To date, the Supreme Court has not allowed any developer to rescind contracts under a sunset clause. Therefore, the UDIA takes the view that expanding the number of events included in the legislation will lead to a delay or cancelation in some developments and reduction in housing supply, due to the increase in risk which is beyond the control of the developer to manage. As the paper mentions, the "sunset dates" 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, they do not have the same risk profile as sunset dates linked to registration of the plan and construction of the building.

	Discussion Paper Questions	UDIA Responses & Recommendations
A7	What events should be included in this definition?	For the reasons set out above, no further events should be included.
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?	No. UDIA is of the view that this should be a matter that is negotiated contractually between the vendor and purchaser. For example, if the purchaser is receiving a heavily discounted price, they may be more likely to entertain a more favourable extension regime proposed by the vendor. We note that banks require developers to have a minimum sunset date of 18 months plus practical completion and to have the ability to further extend the sunset date. Curtailing a developer's right to extend the sunset date will likely cause issues with a developer's ability to obtain project funding. Noting our view above, if the Government decides to limit extensions to the sunset date, UDIA's position is that: (a) the cap should be for a maximum of time not on a number of extensions; (b) at least 18 months should be provided; and (c) the parties should be able to "contract out" of this cap, provided that some form of time cap is included in the contract for sale.
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?	No. As set out above this should be a matter which is negotiated contractually between vendor and purchaser and which the vendor can ensure meets its banking covenants and obtain project finance. We note that the Queensland Regime has often proved problematic with developers requiring purchasers to enter into "termination and re-entry contracts" to restart the period of time as part of pre-conditions to project funding. The broad range of size and scale of developments in NSW ranging from subdivision of 10 lots through to long dated mixed use developments (including over station developments) makes "a one size fits all" period for

	Discussion Paper Questions	UDIA Responses & Recommendations
		delivery fraught. Accordingly the matter is in UDIA's view best left to the market to determine. Noting our view above, if the Government decides to impose a maximum period of time: (a) UDIA would suggest at least 6 years for built form product and 3 years for land subdivision; (b) the purchaser should only be able to rescind the contract if they have not delayed completion (we note that this is the approach taken in Queensland); (c) the parties should be able to "contract out" of this time period, provided that some form of maximum time is included in 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. As set out above this should be a matter which is negotiated contractually between vendor and purchaser. In addition, we note that it would be difficult to capture all the delays that may occur in a project, particularly in respect of built form product.
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, however as set out above, UDIA is not supportive of legislative caps being imposed.
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?	The case law already provides that a vendor must take reasonable steps to satisfy the condition precedents see for example Wang v Kaymet Corporation Pty Ltd [2015] NSWSC 1459. UDIA's view that further regulation in this area is not required. UDIA is not supportive of having to provide evidence to purchasers of the steps taken when exercising a right to extend the sunset date. This is an overly burdensome requirement and developers (and their financiers) would be concerned as to the extent of evidence that is required. Obviously, if the

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		matter went to Court, then the vendor would need to provide evidence in the usual course. Disclosure of expected timelines should be provided in the disclosure statement. If timing in the disclosure statement was misleading at the time of the disclosure or if the developer is acting in bad faith to delay delivery, and this gives rise to a material change in timing for delivery of a lot or parcel of land and the completion of the contract or a material change in the lot, the purchaser should be prevented from extending sunset dates beyond the initial extension period.
A13	What mechanisms do you think could assist in compelling developers to perform obligations under the contract (eg penalty for non-compliance)?	Developers are already incentivised to perform their obligations and to complete their off the plan contracts as soon as possible. Delays to the completion of a development materially impact the financial position of a developer, who incur substantial holding costs including land tax, council rates and finance costs. . There is also the opportunity cost of not having the capital returned within the expected timeframes ready to deploy on new projects. Noting that most delays are entirely outside of the developer's control (e.g. planning delays/statutory delays/material delays/weather delays) it will add additional cost and risk if developers are subject to further penalties because they are unable to complete developments by the sunset date.
A14	Are there circumstances where it would be appropriate for the Court to make an order permitting the vendor to 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?	The Court should have discretion to award damages to a purchaser for "loss of the bargain", and arguably already do have that power, however the ability to award damages should be dependent on the facts of the situation. If a development has become impossible for factors entirely outside of the control of the developer, then the Court should not automatically order damages to the purchaser simply because they have lost the capital gain that they may have realised on project completion.

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		Purchasers in off the plan often get a substantial discount on the price because there is an element of risk with purchasing off the plan. They also only put down a 5% or 10% deposit, not the entire purchase price. If the risk is entirely placed onto the developer, then developers will either cease selling off the plan or build in the additional risk into the purchase price. Neither of these outcomes are good for the consumer.
A15	Should s 66ZS be amended to allow the Court to consider capital gains as part of any claim for an award of damages?	The Court should be able to consider the "loss of the bargain" or where bad faith has been demonstrated however, this needs to be considered in the context of the scenario. There are already cases in this area and further legislative changes should not be required.
A16	Do you support a statutory requirement for developers to request that an off the plan contract notification be recorded on the development site?	No. This proposal seems unworkable in practice. For example, how does the Registrar General register a caveat over land the vendor does not yet own (noting that vendors do launch sales pre ownership)? How does a mortgagee enforce its security if a registrar general's caveat is in place? Fundamental to these projects is project finance. A financier will not lend on a project unless they can enforce their security and sell the site unencumbered in the event of an insolvency event of the vendor.
A17	Would this requirement add unreasonable cost or delay to the development process?	Yes, noting the UDIA's comments above.
A18	What types of dealings and instruments should be prevented from being registered while an off the plan contract notification is in place?	Practically all dealing types should be able to be undertaken for a development. For example, the developer may need to enter into a lease for part of the development site to enable a substation. They may be required to transfer part of the development site to a statutory authority to comply with the requirements of a planning agreement or development consent condition. They need to be able to be registered plans of subdivision or

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		consolidation, register easements and covenants, register and remove planning agreements etc.
B1	Should section 81A be expanded to include additional types of old covenants that can be deemed obsolete after 12 years? If so, what covenants should be included?	Yes, the regime should be expanded to capture minimum prescribed building setbacks, no advertising hoarding and no noxious trades. Covenants regarding views should not be captured by the reforms noting that often considerable value is paid for these covenants. Clear statement to intention to start construction and delivery dates. Section 81A should be expanded to incorporate restrictions that are controlled by planning legislation (eg- LEPs/DCPs). Planning legislation is updated to reflect changes in demand, development patterns, lot sizes, construction methods, materials, etc to meet the change in community needs making it crucial that property laws keep pace to ensure they are relevant and effective. Landowners who wish to carry out development on their land must comply with these instruments. If there is a covenant that contravenes the legislation, it becomes challenging for them to proceed with the development. The removal of outdated, unnecessary and unenforceable covenants can make it easier for landowners to develop their properties in accordance with current needs and legislated standards. Obsolete covenants that are no longer relevant due to significant changes in the character of the surrounding development pattern should Covenants that are redundant as they simply duplicate planning regulations making them unnecessary. Covenants that cannot be enforced due to changes in ownership and or lack of clarity. Covenants that plan unreasonable restriction on

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		property use that hinder the ability for a development meet current trends and standards. Archaic covenants that are old and reflect outdated conditions that no longer align with current standards and expectations.
B2	Is there some other way of identifying covenants that may become obsolete?	No. UDIA supports categorising covenants based on type of restriction rather than how many lots it burdens. Identifying covenants can be challenging to do generically. Each covenant needs to be evaluated, considering the specific context and changes in the surrounding area. Factors such as updates in planning legislation, shifts in community needs, and changes in property use and development trends all play a role in determining whether a covenant has become obsolete. Regarding the creation of new covenants, certain types can be identified as potentially becoming obsolete. For example, covenants may become obsolete once the developer no longer owns any of the land. Additionally, covenants that refer to a specific brand or type of material are likely to become outdated. Furthermore, developers placing covenants on land that contravene existing legislation would also render those covenants obsolete. There is no real requirement for anyone to review obsolete covenants unless they impact a development. However, it might be beneficial to establish a review process to identify and remove outdated covenants. For example, this could be done during further subdivision of the land, making it a requirement to address and remove obsolete covenants at that time.
B3	Should Part 4A be amended to remove the need for notice of an application by presuming extinguishment of a	Yes. Notice should be retained for adjoining landowners because changes to building materials, fencing, or the value of structures can significantly

	Discussion Paper Questions	UDIA Responses & Recommendations
	building materials, fencing or value of structures covenant after 12 years	impact them. For example, fencing changes can affect property boundaries, privacy, and the overall aesthetic of the neighbourhood
B4	If a requirement for notice is retained, should the class of persons required t be served by be reduced? If so, who?	Notice should only be required if there is one or two benefited parties. Where covenants benefit more than 2 lots (say because they are benefiting a whole housing estate) then there should be an ability to waive the notice requirement through application to the Registrar General.
B5	Should all restrictive covenants be time limited? If so, what should that limit be?	Yes, new restrictive covenants should be time limited. A specific term, such as 12 years, or linking the duration to ownership (e.g., expiring once the developer no longer owns the land) would ensure covenants are relevant to the existing development whilst not hindering future development. Thought should also be given to who is nominated as the authority to release, vary or modify the covenant on the original creating instrument.
B6	Should there be any exceptions to the time limit or process to allow for extension of the effect of a restrictive covenant?	As set out above, the instrument should be able to set out a longer period of time for "genuine" restrictive covenants that are created which should run with the land for more than 20 years. UDIA would be supportive of a "time limit" being imposed. However, if the covenant specifically states a longer period (including perpetuity) then that provision needs to be able to override the legislative time period. In UDIA's view, 20 years is reasonable (provided the covenant doesn't specify a longer time period). There are always other methods available to retain necessary restrictions on the land that are required for safety, ecological, maintenance, disaster protection, or other important reasons and Covenants is an important legal instrument used for this purpose.
B7	Should Section 89 of the Conveyancing Act be expanded to	Yes, section 89 of the Conveyancing Act should be expanded to specifically include consideration of

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	specifically include consideration of panning schemes in the exercise of its powers? If so, should It be a factor to be considered by the court or a separate ground?	planning schemes. Planning schemes are crucial as they reflect current trends and settlement patterns. Including planning schemes in the exercise of the court's powers would provide a more comprehensive framework for decision-making. It would be remiss to consider a covenant without taking into account the relevant legislation, as many landowners may not be aware of the specific covenants affecting their property but are familiar with the planning schemes. Therefore, planning schemes should be a factor considered by the court rather than a separate ground, ensuring that all relevant aspects of land use and development are integrated into the decision-making process.
B8	Should there be any limitations?	Yes, there should be limitations to ensure that the inclusion of planning schemes is balanced and fair. Planning schemes should be considered only to the extent that they directly impact the covenant in question, and only current and applicable schemes should be considered.