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Ms K Millard
Consumer Affairs Victoria

Dear Ms Millard

Review of Consumer Property Acts: Issues Paper No. 3

We make the following submissions in relation to the following questions:

Question 1: *"How could the current requirements for the disclosure of financial information before a contract of sale is signed be improved to take better account of property being sold 'off-the-plan'?"*

Consideration should be given to:

- outgoings estimate: providing meaningful details, or at least access to them, of how the estimate has been made. In this way purchasers would be better able to understand the key expenses and in particular those that go to operating and maintaining the building and some of its facilities. The approach to disclosure for retail leases under the *Retail Leases Act* may be a guide to one approach.

- Adjacent development: providing meaningful details of what is proposed on adjoining and nearby properties, including the impact of overshadowing and on privacy.

Question 29: *"Should the use of bank guarantees and deposit bonds in the sale of land process be regulated and, if yes, how?"*

Yes, but only to the extent to allow the bank guarantees to stand in favour of the vendor without risking breach of s. 9AA(1)(a) of the *Sale of Land Act*.

Question 33: *"What problems exist for sellers in setting a conservative purchase price for the purposes of calculating the deposit?*

Presently, section 9AA(1)(b) of the *Sale of Land Act* provides that the deposit money payable under the "off-the-plan" contract must not exceed 10% of the purchase price for the lot. Where the contract includes goods such as furniture, window coverings, refrigerator, washing machine or drying machine or other loose items, in our view their value needs to be separately determined and excluded from the calculation of the price for the lot on which the deposit is calculated and payable.

We see no purpose in this. Buyers typically are called upon to pay 10% of the purchase price. That is what they are familiar with and that is what the law ought to allow.

In our view the 10% rule should make it clear that the maximum limit for a deposit applies to the price to be paid under the sale contract inclusive of the price for the chattels to be sold with the lot.

Question 38: *"Is there a continuing rationale for treating deposit moneys for off-the-plan sales differently from other deposit moneys and not allowing those moneys to be transferred under any circumstances prior to the registration of the plan?"*

Section 9AE of the *Sale of* Land *Act* does not allow for deposits once paid to the vendors licensed real estate agent to be transferred to the vendor's legal practitioner.

Under most "off-the-plan" sales contracts, provision is made for the deposit to be placed in an interest bearing trust account, but this can only be done (as the law presently stands) where the deposit is paid to the vendor's lawyers. Under the present law once the deposit is paid to the vendor's real estate agent it cannot be transferred to the vendor's lawyers. There is no advantage or protection served by this.

Where the deposit is received by the agent the *Sale of Land Act* ought to allow the transfer of the deposit between the agent and the legal practitioner so that the deposit can be lodged in an interest bearing controlled money account.

Question 40: *"What are your views on the current disclosure requirements in relation to works affecting a lot for sale?"*

The disclosure rules which are in section 9AB are aimed at ensuring purchasers know how the natural surface level of the lot they are buying has been, or is to be affected by earth works or construction works. The vendor has an ongoing obligation to disclose works affecting the natural surface level of the lot sold and of the land abutting the lot sold. That disclosure needs to be made as soon as practicable after the vendor becomes aware of the details.

The current rules fail in that:

- the disclosure of surface level works for high rise apartments with basement parking (and therefore affected lots) serves no useful purpose; and
- the Act does not clearly identify:
    - what works need to be disclosed;
    - the extent of disclosure;
    - who is a "directing authority"; and
    - what are "directions".

The rules should limit the requirements so that disclosure:

- is limited to the filling and cutting of the lot and immediately adjoining lots;
- does not apply to apartment buildings having more than two storeys;
- is not required for trenching or attachments to land.

Question 42: *"Currently, the obligation sits with the buyer to determine what changes have occurred [to the plan] and whether they are detrimental. Do you believe that this is appropriate or should there be some responsibility on the seller to specify the changes to assist the buyer?"*

The seller ought to be required to:

- identify the material changes between the proposed plan and the plan to be lodged for registration;

- provide the plan which is to be submitted for registration in a timely way in advance of registration; and
- identify material changes in dimensions of the lot purchased and of the common property.

Question 46: *"What are your thoughts on the current timeframes available to a buyer to end an off-the-plan sale? Are they appropriate?"*

They are not appropriate.

The purchaser can terminate an "off the plan" sale contract if one or more of the following occur:

- the deposit exceeds 10% of the purchase price for the lot;
- the deposit (or any part of it) is paid to anyone other than the vendor's legal practitioner, Victorian real estate agent or conveyancer;
- inadequate disclosure is made about work affecting, or to affect the natural surface level of the land (and that is an ongoing obligation);
- where a bank guarantee is held in lieu of a deposit, it is drawn on before registration of the plan;
- changes are made to the plan of subdivision, Owners Corporation rules, or lot liability or entitlement which are material;
- changes are made to the plan of subdivision or the Owners Corporation rules which restrict or limit the purchaser's use of the lot in any way;
- the plan is not registered by the registration date set out in the sale contract (or if no date is set out, within 18 months of the day of sale);
- inadequate or misleading disclosure is made in the vendor's statement; or
- the unsolicited consumer agreement provisions of the *Australian Consumer Law* apply and they have not been complied with.

In most cases that right continues until the plan is registered.

For some of the listed events, consideration ought to be given to shortening the period in which the right to terminate can be exercised. And in some cases limited to up until the breach is remedied. For example, where the purchaser has been notified by the vendor of an event giving rise to the purchaser's right to terminate and there has been proper disclosure, the unexercised right to terminate should expire, say after 60 days. Presently a vendor which has contracts that are subject to the purchaser's right of termination has no certainty. It may be a number of years before the project is complete and the plan registered, with the purchaser waiting until close to the time of registration of the plan before deciding to exercise the right to terminate.

However, reform needs to be balanced so the expiry of the right to terminate is not abused. What we have in mind here is a vendor manufacturing an event which gives rise to the purchaser's right to terminate, for example a material alteration to the premises, with the intention of forcing the purchaser to terminate (as he or she is not getting what was bargained for) so that the vendor can then re-offer the altered property at a higher price to others. The potential for this type of abuse presently exists.

Yours faithfully

Norton Gledhill