

The Hon. Victor Dominello
Minister for Innovation and Better Regulation
Level 18, 52 Martin Place
Sydney NSW 2001

9 October 2015

Dear Minister,

RE: OFF-THE-PLAN SUNSET CLAUSES

The Real Estate Institute of New South Wales (the "Institute") congratulates you for addressing this issue and thanks you for the opportunity to provide this submission.

There are legitimate reasons for both parties to an off the plan contract desiring the inclusion of sunset clauses. The parties do not want the obligations under the contract to continue when the substance of the contract cannot be delivered or cannot be delivered in a reasonable time. For example, the developer/builder may encounter unforeseen construction issues or planning approvals that prevent the completion of the building. In these circumstances both parties will not want their respective contractual obligations to continue indefinitely.

The problem with sunset clauses is created when circumstances and/or events are manufactured by a party so they can avoid the contract. Typically one party will draft the sunset clauses in the contract to provide them with the option of manipulating the events of circumstances if a commercial gain occurs during the construction phase of the building. In the present Sydney market for example a developer would be aware that the market price of the property it sold the purchaser has substantially increased. Accordingly, being able to rescind the contract and then resell the same property in this market is very attractive.

It is of course very difficult to legislate to completely protect parties to a commercial negotiation. Inevitably in all contracts one party to the contract will do better than the other party. For example purchasers paying above market for a particular property or a vendor selling below market because of external pressures.

The Institute is of the view that any legislation designed to address sunset clause needs to have a light touch and respect the parties right to freely contract. That said, the Institute would support legislation that disentitles one party to benefit from the sunset clauses when that party has manufactured circumstances or events to deliberately trigger the clause. Clearly that places an evidentiary burden on the party who is disentitled. The legislation should therefore prescribe what evidence needs to be produced to satisfy the evidentiary burden.

The Institute thanks you again for the opportunity to provide this submission and is available to provide further input in the discussions if required.

Yours faithfully,



Tim McKibbin
Chief Executive Officer