## CONVEYANCING AMENDMENT (SUNSET CLAUSES) BILL 2015

**Bill introduced on motion by Mr Victor Dominello, read a first time and printed.**

### Second Reading

**Mr VICTOR DOMINELLO** (Ryde—Minister for Innovation and Better Regulation) [4.08 p.m.]: I move:

That this bill be now read a second time.

I am pleased to introduce the Conveyancing Amendment (Sunset Clauses) Bill 2015. This bill has been introduced on an urgent basis to counter the conduct of some developers using the sunset clause in off-the-plan contracts to disadvantage purchasers.

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The growth and strength of the New South Wales economy in the past four years has led to an increase in demand for housing, particularly in Sydney. This has caused a marked rise in the number of off the plan contracts. An off the plan contract is one where the parcel of land or the unit being sold does not exist at the time the contract is entered into. Land can be sold before the developer has finished constructing roads and installing services. Contracts for the sale of a strata unit can be exchanged before the building is completed, well before the strata plan is drawn, approved and registered. In these cases the purchaser is not buying an asset that can be seen and inspected. Instead, the purchaser is buying an idea that relies on the terms of the contract, and the goodwill and expertise of the developer to complete.

To guarantee the sale, the purchaser will pay a deposit, normally 10 per cent of the purchase price. The purchaser then waits for the unit to be constructed or the land to be developed. An important feature of most off the plan contracts is the sunset clause, which allows either the vendor or purchaser to rescind and terminate their contractual obligations if the development is not completed by a specified date. The sunset clause has important benefits for both parties. It prevents a purchaser being tied to the contract indefinitely and allows a developer to end the arrangement if they cannot proceed due to factors beyond their control. However, the rise in the property market has seen increased reports of developers using the clause to obtain an unjust enrichment at the expense of homebuyers.

There has been an increased incidence of developers delaying projects until the sunset date is reached. The developer can then rescind the contract and resell the property, sometimes for hundreds of thousands of dollars more. The purchaser will eventually have their deposit returned, but they lose any capital appreciation their lot has accrued. In addition, they are prevented from purchasing another property while their funds are tied up in the developer's hands. Whether a developer is entitled to rescind the contract will depend on the contract terms, the reason for the delay and the extent to which the developer has acted reasonably. But to test these factors the purchaser must take court action.

As well as being costly and time consuming, the purchaser must prove the delay was unreasonable based on facts they are not able to readily access. The prospect of protracted litigation is often too daunting for purchasers so the actions of the developer remain unchallenged. I have heard from many people affected by this practice whose dream of home ownership is now out of reach. The rise in property prices since their original purchase, combined with legal costs, has meant raising another deposit is no longer possible. I recently met with a group of purchasers of off the plan apartments in Wolli Creek who had their contracts rescinded. Many of these people were first home buyers who have spent more than five years waiting and fighting in court for their homes.

To fully understand the magnitude of this problem the Government launched an online survey on off the plan sales in September; 639 responses were received, which equated to more than 30 every day. That is a record for this type of survey. During this process it became clear that urgent action was required and that the solution must assist purchasers in current contracts under immediate threat of losing their home. Following this consultation I held a roundtable with industry and other

stakeholders to develop a solution. I thank all those involved in this process including: the Australian Bankers Association; the Estate Agents Co-operative; Housing Industry Association [HIA]; the Owners Corporation Network [OCN]; the Australian Institute of Conveyancers; the Property Council; the Real Estate Institute of NSW; the Law Society; the Urban Taskforce; and the Urban Development Institute of Australia [UDIA]. Their participation has allowed for the swift introduction of this bill, providing certainty and confidence to home buyers and the housing sector.

This bill will protect purchasers by allowing developers to rescind a contract only when the sunset date is reached and requiring the Supreme Court to review the circumstances to make sure the rescission is just and equitable in all the circumstances. The bill inserts a new provision in the Conveyancing Act 1919, which, with its attendant regulations, is the main piece of legislation governing conveyancing in New South Wales. "Off the plan contract" is defined as a contract for the sale of a residential lot that has not been created at the time the contract is entered into. A lot is created when the plan that defines the lot has been lodged and registered by the Registrar General.

A sunset clause is a provision in a contract that allows the contract to be rescinded if the lot being sold has not been created by a specified date. The legislation will apply to residential property only. It will be applicable to the sale of both strata units and lots in a proposed land subdivision. New section 66ZL lists the circumstances under which a vendor can use a sunset clause to rescind a contract and sets the procedure that must be followed. Before any proposed rescission the vendor must serve a notice on the purchaser that sets out the reasons and provides an explanation for the delay. The notice must be given at least 28 days before the proposed rescission. This notice period gives purchasers time to consider their position. It will provide information that will help them assess whether the vendor has acted reasonably or whether the vendor's actions have been arbitrary and capricious.

The vendor will only be entitled to rescind an off the plan contract under a sunset clause if the purchasers give their consent or if the rescission was required because of a reason set out in the regulations. In any other circumstance the vendor will have to approach the Supreme Court for an order that will be made only if the court is satisfied that the rescission is just and equitable in all the circumstances. What the court is to take into account when deciding if the rescission was just and equitable is set out in section 66ZL (7). These include: the terms of the contract; whether the vendor has acted unreasonably or in bad faith; the reason for the delay; the likely date that the plan will be registered and the lot created; whether the lot has increased in value—and I stress the importance of this feature in the legislation; the effect on the purchaser of the rescission; and any other matter that the court deems relevant or that may be prescribed by the regulations.

This new regime does not arbitrarily intrude into existing contractual arrangements or impose an unusual obligation on vendors. Rather, it reinforces existing consumer law as well as accepted common law and equitable principles. At the centre of this bill is our resolve to prevent a developer manufacturing delays to obtain an unjust benefit. This reform will ensure developers are unable to unjustly benefit at the expense of homebuyers through the use of a sunset clause. It is accepted that in seeking to rescind a contract a vendor must not act arbitrarily or capriciously or unreasonably. Section 66ZL supports these equitable principles by removing any incentive a vendor may have to manipulate the progress of a development, in a manner not available to the purchaser, to take advantage of windfall profits in a rising market.

Importantly, the court will consider any rise in value of the lot from the original purchase price. If the value of the lot has increased significantly, the exercise of the sunset clause is prima facie unfair. In these cases the developer has received an unjust benefit in the form of the lot's capital appreciation at the expense of the purchaser. This is an important measure to prevent developers using manufactured or false delays to justify an intention to rescind to the court. The notice provisions and the need to obtain a purchaser's consent will also encourage better communication between the parties. If it is clear that a development will not be finalised or will take significantly longer to complete than predicted, purchasers are unlikely to want to remain tied to the contract with their deposit lying dormant.

If the developer has acted reasonably, rescission of a contract in these circumstances should be in the interests of both parties. The consent of the purchaser should be obtained easily. It is only where the rescission is dubious that a need should arise for court action. Under this legislation, in these

questionable cases it is the vendor who will be required to go to court to justify their actions rather than the purchaser being forced to take action to prevent an injustice. To further even the balance of power between the parties, the vendor developer will be liable to pay the purchaser's costs of the proceedings, unless it can be shown that the purchaser's refusal to consent to the rescission was unreasonable.

It is important to note that this bill does not affect any rights of the purchaser. The purchaser will be able to exercise whatever rescission rights they had under their existing contract. One final important feature of the bill is the date on which it will take effect. The bill will apply to any rescission purported to have been made from the date that I announced this legislation would be brought before Parliament. That date was 2 November 2015. The effects of the bill's transitional provisions mean that no rescission made by a vendor on or after 2 November 2015 will have been made in accordance with the contract unless the required notice was served on the purchaser and the rescission otherwise complied with section 66ZL.

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This retrospective provision is the strongest protection the Government can provide for homebuyers. It prevents any developers from rushing to use a sunset clause on existing contracts to obtain an unjust benefit over purchasers. It is for this reason I bring this bill to the House as a matter of urgency. We have heard about the plight of homebuyers, consulted with industry and responded to this matter swiftly and strongly. This bill provides purchasers with the utmost confidence to buy land or property off the plan in New South Wales. It will also ensure developers doing the right thing can access the finance they need to get projects off the ground. The response I have received to this bill has been overwhelming. I recently met with Simon Hill, who, along with a group of other purchasers, had his contract for land package in Kellyville rescinded. Upon hearing the announcement, Mr Hill wrote to me and said:

> I cannot thank you enough for acting so quickly on this. My wife and I had resolved to the fact that we were going to lose our dream as we could not afford a lengthy court battle, you have given us hope.

The Owners Corporation Network, the peak body representing residential strata owners and residents have expressed its support, and said:

> The Owners Corporation Network is delighted that off-the-plan purchasers in NSW will soon be afforded protection against profiteering developers.

The broader development industry has also endorsed this important reform. Stephen Albin, Chief Executive Officer of the Urban Development Institute of Australia stated:

> We are pleased to see the Minister has been swift in his efforts to close this loophole as the behaviour of a few unethical developers needs to be stopped.

This bill is a strong first step in tackling the off the plan property market, but it is not the last. There have been reports of developers substantially altering a proposed development after contracts have been exchanged. One-bedroom apartments have become studios, and lot sizes have been reduced substantially so that more units can be squeezed onto the site. There have also been complaints about the length of contracts and the one-sided terms that unfairly favour developers. In the rush to exchange contracts, there is often no time for a purchaser to consider the contract properly and negotiate more favourable terms. The Government fully recognises these concerns. This bill does not end the Government's resolve to improve this important sector of the market.

Off the plan contracts are critical for our construction industry to thrive and for our record housing

starts to continue. They allow developers to commence projects and provide our State with the housing we need. It is the entrepreneurial developers that help to accommodate our expanding population and keep the economy generating jobs and opportunity. Therefore, next year the Government will look at issues like disclosure, standard terms and cooling-off periods to provide both clarity and certainty in the marketplace. This legislation will give certainty to the conveyancing process and operate as a consumer protection for purchasers in the increasingly crowded residential property market.

This bill is a great example of the Government, community and industry coming together to bring enduring benefits to New South Wales. I am confident this reform will protect homebuyers and deliver a stronger, more sustainable development industry. I thank the affected purchasers, industry members and other stakeholders for bringing this issue to the Government's attention and for working together to develop a solution. I also thank Leanne Hughes and Tony Booth from Land and Property Information, and Matt Dawson and Martin Gray from my office for their efforts in developing this bill. I commend the bill to the House.

**Debate adjourned on motion by Mr Guy Zangari and set down as an order of the day for a future day.**