

HIA Submission

Reforming off-the-plan residential land sales in South Australia Discussion Paper

Consumer and Business Services

30 October 2026

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Introduction

The Housing Industry Association (HIA) takes this opportunity to respond to the Discussion Paper on Reforming off-the-plan residential land sales in South Australia (Discussion Paper), which proposes reforms to strengthen purchaser protections in an off-the-plan residential land sales by amending the *Land and Business (Sale and Conveyancing) Act 1994* and associated laws.

The question of whether sunset clauses present a systemic issue requiring regulatory intervention was first examined as part of the Building and Construction Industry Review (BCI Review) in late 2024. HIA's submission to that review in January 2025 questioned the need for further regulation and cautioned against measures that would unnecessarily interfere with long standing contractual provisions, impacting project feasibility and housing affordability. Those questions have yet to be answered and we refer to and reiterate our original positions in response to the Discussion Paper.

Executive summary

The specific issues with the existing settings for off-the-plan land sales have not been clearly identified in the Discussion Paper and as such, the case for further regulation has not been demonstrated. The narrow focus and leading questions overlook key considerations such as the parties involved in land transactions and their relationship. As a result, the consultation is likely to yield biased and incomplete information, which could lead to ineffective or potentially damaging outcomes, including detrimental intervention into the parties' freedom to contract and business-to-business transactions.

Once the existing issues are analysed, statutory and non-statutory options are necessary, with a view to protecting housing affordability and supply, and industry productivity. Consumer and industry education, with or without regulatory reform, is both effective and imperative.

HIA opposes restrictions on vendors' use of sunset clauses, requirements for purchaser consent or court or tribunal approval, automatic payment of purchasers' legal costs, and mandatory notification to the Commissioner for Consumer Affairs. Rather than intervening in arrangements that can mutually benefit contracting parties, government should address the underlying causes of development delays and cost increases, including those caused or contributed to by government entities. If an approval pathway is nevertheless introduced, it should be efficient and cost-effective, with significant weight given to delays beyond vendors' control.

We support clear disclosure of information genuinely material to purchasing decisions, including key approvals and significant staging arrangements, however onerous and unnecessary notifications only serve to undermine the relationship between the parties and project viability. Existing remedies should address deliberate non-disclosure and misrepresentation, distinguishing misconduct from genuine errors.

While HIA sees no justification for the introduction of statutory purchaser rescission rights, if implemented, the onus should be on the purchaser to demonstrate material impacts that are objectively measurable and involve substantial detriment.

Summary of recommendations

1. Before analysing the issues and considering potential options, there must be proper consideration and absolute clarity on the nature of all parties, the relationship between them and the circumstances surrounding the transaction.

2. The differences between consumer and business-to-business transactions must be recognised and outcomes adjusted accordingly.

3. Additional caution must be taken to avoid undue influence over market conditions arising from intervention in business-to-business transactions.

4. Before progressing any reforms, government must demonstrate through objective evidence that there is a genuine need for a change.

5. Any proposed changes, including statutory and non-statutory options, must be properly interrogated and supported by a positive cost-benefit analysis, taking into account housing affordability and productivity.

6. Examine and address the underlying factors that prevent developments from being completed within the required timeframe.

7. Maintain the status quo with courts and tribunals to award costs at their discretion rather than a statutory right to costs on rescission.

8. Disclosure of information should be limited to high-priority matters that are likely to influence a purchaser's decision to enter into the contract rather than extending to commercially sensitive information.

9. A change should only be considered 'material' where it confers a clear benefit or advantage on one party while causing a corresponding and significant detriment to the other.

10. Any definition of materiality must include a clear and measurable threshold, capable of consistent application.

11. Proposals to unfairly or excessively penalise or disadvantage vendors when a contract is rescinded, such as the repayment of interest and other costs are contrary to the government's objective to advance the timely and affordable delivery of homes.

12. Include information regarding the nature of purchasing property in an off-the-plan development in the prescribed notice to purchaser.

The review process

The review and consultation process appears to have gotten ahead of itself, with the Discussion Paper in its current form overlooking a number of key issues and critical information that must be considered prior to progressing any reforms.

Industry productivity and housing affordability

The residential industry has been through significant changes and challenges over recent years. The impact of a continual cascade of new and amended regulations, complex building codes and work health and safety changes, employment rules and business compliance obligations are all acting as significant barriers to the delivery of more housing. Developers play an important role in increasing housing supply by developing land and creating opportunities for new housing construction.

Introducing any changes to current legislative frameworks at this stage has real potential to influence the industry's ability to respond to the current critical shortfall in housing and to push up the cost of delivering a home, including excessive taxation on housing as outlined in the March 2025 Centre for International Economics Report on Taxation of the housing sector. In Adelaide, 37% of the cost of a house and land package is attributable to statutory taxes and regulatory costs.

It is essential government takes into consideration the potential impact of any legislative amendments on housing affordability, weighed up against the benefit to stakeholders. The Productivity Commission's Interim report on creating a more dynamic and resilient economy backs HIA's calls for a pivot in government's current approach to regulation and the rate of regulatory change.

A balanced and unbiased approach

The Consultation Background acknowledges the benefits of off-the-plan sales to both purchasers and vendors, as well as the risks to purchasers. However, it wholly overlooks the inherent, multi-factorial risks in land and property development that must be carefully balanced and ultimately carried by vendors.

The Background goes on to say that the reforms aim to give purchasers greater certainty and fairer outcomes and preserve the important role off-the-plan sales play in financing new development and supporting housing supply across the state. Without consideration of certainty and fairness for the vendor, preservation of off-the-plan sales will be compromised, and the consequences are likely to include further erosion of industry productivity, housing affordability and a destabilisation of South Australia's historically steady housing supply.

Who is a 'purchaser'?

The residential building industry operates within complex contracting chains, which include a number of parties such as land developers, property developers, builders, trades and other subcontractors, suppliers, design and engineering consultants and more. The land sales contract also may be with various different parties, including between:

- a land developer and an individual consumer for the sale of a piece of land
- a land developer and a commercial entity, such as a specialist disability accommodation developer or provide
- a property developer and a consumer for an off the plan apartment

- a land developer and a builder, who plans to build on the lot and sell the house and land speculatively
- as a part of a house and land package, between the land developer and a consumer, involving a related or interlinked agreement with the builder.

The various parties involved in these arrangements do not appear to have been considered in the Discussion Paper, which lacks clarity as to whether the term 'purchaser' refers only to consumers or extends to business entities. Notwithstanding the current protections for both consumers and "small" businesses under the Australian Consumer Law and our position that duplication in regulation is not only unnecessary, but dangerously counter-productive, it must be acknowledged that business-to-consumer transactions are markedly different to business-to-business transactions and require different policy considerations and potential regulatory responses.

HIA's position will depend on the category of purchaser to which the proposals are intended to apply. It is likely that the position of other respondents will also be influenced by the scope of the proposal and this will influence the relevance, quality and comprehensiveness of the feedback overall, and the integrity of any ensuing reforms. We caution against attempting to progress reforms based on this consultation alone and implore government to continue engage on a more meaningful level before any decisions are made.

Recommendation 1

Before analysing the issues and considering potential options, there must be proper consideration and absolute clarity on the nature of all parties, the relationship between them and the circumstances surrounding the transaction.

Business to business transactions

Where the purchaser is a business, they should not be regarded as a consumer. Unlike individual consumers, businesses generally have the commercial experience, resources and understanding necessary to assess risk, negotiate contractual terms and make informed decisions. HIA opposes the use of consumer-oriented legislation to intervene in commercial arrangement, as parties to a business transaction should be free to negotiate terms that reflect their respective interest and risk appetites.

Businesses operate on the basis of due diligence and the principles of 'buyer beware', with risk being an inherent feature of business activity. Introducing a legislative measure that seek to protect one business at the expense of another is inconsistent with the operation of a competitive market, is counterproductive and will aggravate the difficulties faced by businesses. If reforms are to progress, they should be limited to contracts with individual homeowners and only extend to business-to-business transactions where there is a demonstrated need and strong evidence that a measurable benefit exists, with any measures ensuing from this narrowly tailored to the specific circumstances they are intended to address.

It is assumed in our responses to the Discussion Paper questions, that government's intention is to limit the definition of 'purchaser' to contracts involving individual consumers, however if this is not the case, we request the opportunity to provide further input on the significant impact of the proposed changes on business-to-business transactions.

Recommendation 2

The differences between consumer and business-to-business transactions must be recognised and outcomes adjusted accordingly.

Recommendation 3

Additional caution must be taken to avoid undue influence over market conditions arising from intervention in business-to-business transactions.

Reforms must be evidence based and backed

The problem and its causes must first be identified

The Discussion Paper currently suffers from a lack of evidence or data, such as case studies, recent incidents or decisions of the court involving the misuse of sunset clauses, to demonstrate a clear market failure and a genuine need for change. Absent this information, it is unclear exactly what problem the government is attempting to resolve with the outcomes postured by the questioning. Furthermore, there has been no information provided as to the likely causes or contributory factors, or any opportunity provided for respondents to consider the same, absent any identification of the issues. This is not conducive to proper consultation and robust feedback.

HIA is aware of a recent case involving the termination of land sales contracts, which was framed in the media as a misuse of sunset clauses. In fact, the contractual mechanism used to terminate those contracts was an entirely separate provision, and not a sunset clause at all. In light of the lack of detail in the Discussion Paper, this type of misleading public commentary is likely to have an adverse impact on any anecdotal accounts received in the consultation and will lead to misinformed government decisions.

We have also received various anecdotal accounts of cases where developments were unable to reach practical completion by the sunset date, but where the parties had been able to negotiate alternative arrangements that reflect their respective interests resulting in a mutually beneficial outcome. As these arrangements are agreed by deed of settlement and due to a lack of dispute there is no further need for legal scrutiny, there is limited publicly available data to demonstrate or quantify the scope, rate of occurrence and real impact of these arrangements. Despite the potentially widespread benefits, this approach is likely to be undermined by overly prescriptive or restrictive regulatory requirements.

Recommendation 4

Before progressing any reforms, government must demonstrate through objective evidence that there is a genuine need for a change.

Statutory and non-statutory options must be considered

As it stands, the Discussion Paper cuts straight to proposing a set of, what appears to be, pre-determined statutory changes under the guise of a series of questions. Alarmingly there appears to be no mention of way the existing framework can be better utilised to address any alleged issues, nor is there any mention of non-statutory options, such as education, information and training.

Greater emphasis must be placed on reviewing existing frameworks and exploring all options available to address the cause of issues, rather than assuming reforms will be suitable. For example, purchaser education and access to information that addresses the purchase of property in an off-the-plan development should reflect the inherently different circumstances from purchasing an existing dwelling. Ensuring

purchasers properly understand the variables and risks before entering into an off-the-plan contract would have a measurable impact on the scope for dissatisfaction and rate of disputation.

A RIS is necessary

Further, any proposed reform must be supported by a clear and demonstrated need for regulatory intervention in favour of alternative measures.

Regulatory responses should not be developed solely in response to isolated or infrequent instances of misconduct. Rather, they should be grounded in robust evidence demonstrating that the identified problem is widespread, significant and incapable for being adequately addressed through existing legal and regulatory frameworks.

Legislative changes affecting off-the-plan contracts have the potential to adversely impact housing affordability and supply which are a priority for both State and Federal Governments. To this end, regulatory intervention must balance the interests of both vendors and purchasers and avoid disproportionately shifting risk from one party to the other.

The preparation of a RIS is a fundamental part of the process to determine a comprehensive understanding and demonstrate the benefits of the proposed changes, in alignment with the principles on regulation setting as outlined in the Interim Productivity Report.

Recommendation 5

Any proposed changes, including statutory and non-statutory options, must be properly interrogated and supported by a positive cost-benefit analysis, taking into account housing affordability and productivity.

Education and information

Not only does education and information form an integral part of the options considered prior to progressing regulatory measures, it must also form part of the strategy when the framework is amended.

To support informed decision-making, the government should develop a centralised and readily accessible source of information for prospective purchasers, serving as a “one-stop shop” for consumer education across the home building continuum. With regard to off-the-plan land sales, resources could include practical guidance materials, fact sheets, explanatory videos and a short introductory fundamentals course that explains the features, risks and uncertainties inherent in such transactions.

Improving purchaser awareness at the outset of the purchasing process would help purchasers better understand the nature of these transactions, set realistic expectations regarding potential changes and delays. An easily accessible information hub would be a more balanced and effective approach to addressing consumer concerns while preserving the viability of off-the-plan developments.

Similarly, education, information and training for industry on their obligations to consumers with respect to off-the-plan land sales would be welcomed. HIA is well-positioned to support government in the delivery of educational resources to industry and we remain available to discuss these opportunities with government further.

Regulation of sunset clauses

The discussion paper wholly overlooks the bilateral operation of sunset clauses, and therefore the potential for bilateral benefits and appropriately shared risk. Instead, there is an assumption giving rise to a focus on regulation of the use of sunset clauses by vendors at the perceived disadvantage of the purchaser. This is not a genuine way to consult and will result in unbalanced feedback.

Question 1

Do you support introducing legislative restrictions on a vendor's ability to rescind an off-the-plan contract using a sunset clause?

No. we oppose legislative restrictions on vendors' ability to rescind off-the-plan contracts using sunset clauses and urge government to adopt a cautious approach to this level of intervention.

Purchasing "off-the-plan" is by its very nature speculative and requires contracts with certain terms and conditions. Rather than acquiring an existing block of land, purchasers are entering into an agreement under which the vendor undertakes to produce and deliver a block of land or a unit in a strata development. Where development approval, construction and the issuance of a Certificate of Title is still pending, contractual mechanisms are necessary to protect the interest of both parties. Accordingly, off-the-plan contracts typically include provisions addressing matters that may affect the timing of performance, changes in cost, and other contingencies that may arise throughout the development process.

Sunset clauses are often inserted with the insistence of the purchaser, as without such they could wait for years while the vendor tries to get a project started which could be delayed by planning, financial or a myriad of other reasons. For the purchaser, if the construction is delayed or late, the purchaser can have their deposit returned. This could be advantageous to the purchaser if they feel they originally paid too much.

While there are risks associated with either party invoking a sunset clause, the risks carried by vendors for these types of projects is significant and despite their best efforts, matters outside their contract can affect the progress of the project. For example, land developers are required to carry the risk of cost increases, delays and variations in the provision of essential services and infrastructure by government providers and contractors. While these circumstances are wholly outside of the control of land developers, there have been known and considerable issues with the provision of government services and infrastructure that have stymied the release of residential land subdivisions in South Australia for many years, yet this is not acknowledged in the Discussion Paper.

Rather than imposing legislative restrictions on vendors to rescind a contract under a sunset clause, attention should be directed towards understanding why development cannot be completed within the required timeframe. Examining and addressing these underlying causes would be a more effective and balanced approach to resolving the issue than focusing solely on regulating the consequences of project delays.

Recommendation 6

Examine and address the underlying factors that prevent developments from being completed within the required timeframe.

Approval to rescind

Question 2

Should a vendor be required to obtain either the purchaser's consent or approval from a court or tribunal before rescinding a contract under a sunset clause?

No. Vendors should maintain their right to rely on a sunset clause to rescind a contract without the imposition of purchaser's consent or approval from a court or tribunal, particularly where the contract already sets out the circumstances in which rescission may occur.

Requiring purchaser consent would be impractical and may prevent the operation of a sunset clause in circumstances where rescission is justified. In effect, this amounts to termination of a contract by mutual agreement, which is already an option available to contracting partes, yet the proposal solves none of the challenges inherent to that process. Purchasers would still have little incentive to provide consent, even where factors beyond the vendor's control have made completion of the development impossible or commercially unviable. As a result, the introduction of a statutory requirement for approval would only serve to create further uncertainty and undermine the purpose of the clause.

Similarly, a requirement to seek approval from a court or tribunal would introduce an additional layer of regulatory burden, significantly increasing costs, delays and administrative complexity for all parties. Vendors would incur legal and administrative expenses in pursuing approval, which may ultimately be reflected in the cost for future developments. Further, the rationale for requiring court approval is unclear. Existing legal avenues already allow parties to challenge conduct that is misleading, unconscionable, or inconsistent with contractual obligations.

If vendors are required to obtain purchaser consent or court approval before exercising a contractual right of rescission, equivalent requirements should be considered for purchasers seeking to terminate a contract under similar circumstances. Imposing additional procedural hurdles on one party only erodes contractual equity and further distorts the normal and appropriate allocation of risk, thereby impacting housing affordability.

While HIA does not support the introduction of an approval pathway for the exercise of a sunset clause, should such a framework be adopted preference should be given to the most cost-effective and efficient option available. In this regard, approval from a tribunal may represent the least onerous option. Importantly, the relevant decision-maker should recognise that delays to completion are often caused by factors outside the vendor's control, including government or authority infrastructure changes, SA Water and SAPN servicing delays, and planning authority timeframes. These matters should be afforded significant weight when determining whether rescission is appropriate.

Question 3

Do you support a model where a vendor who applies to a court or a tribunal to rescind a residential off-the-plan contract under a sunset clause must pay the purchaser's legal fees unless the purchaser refused agreement without a valid reason?

No. Notwithstanding our opposition to a requirement for approval as a pre-condition to reliance on a sunset clause, if such a process were introduced, HIA would not support a model that automatically requires a vendor to pay a purchaser's legal costs. The existing legal framework already provides courts and tribunals with broad discretion to make costs orders where the circumstances justify such an outcome.

Recommendation 7

Maintain the status quo with courts and tribunals to award costs at their discretion rather than a statutory right to costs on rescission.

Further contractual intervention

Question 4

Are there other contractual rescission rights, beyond sunset clauses, that should be regulated where they allow a vendor broad discretion to rescind a contract? If so, which types of clauses should be covered?

It is not possible to impose government regulation across all matters that enable a vendor to exercise its discretion to rescind a contract, hence, the need for negotiated and transparent contractual arrangements. The notion that *'a party to a contract should bear the risk where that risk is within that party's control'* [1] is undermined when there is legislative interference within a contractual agreement that distorts the contractual allocation of risk.

Assessing or regulating specific contractual provisions in isolation also fails to recognise that contractual terms are interconnected and often operate together to achieve a balanced allocation of risk between the parties. A contract should be considered holistically, taking into account how its provisions interact with the overall terms agreed by the parties.

Notification of recission

Question 5

Do you support requiring the Commissioner for Consumer Affairs to be notified when a vendor seeks to rescind off-the-plan residential land sale contracts or applies to rescind the contract under a regulated sunset clause?

No. HIA does not support a requirement for vendors to notify the Commissioner for Consumer Affairs every time they seek to rescind an off-the-plan contract or apply to rescind under a regulated sunset clause.

It is unclear what objective such a notification requirement is intended to achieve and how such a requirement would operate in practice. If rescission arises from the operation of a contractual right agreed between parties, the matter is fundamentally a private contractual issue.

Requiring the Commissioner to be notified would introduce additional administrative and compliance burden on vendors without delivering a corresponding consumer protection outcome. This administrative and compliance burden would extend to government and result in a resourcing and cost impost.

Further, if the Commissioner has no decision-making, approval or enforcement role in relation to the exercise of a contractual rescission right, there appears to be limited justification for requiring notification. In those circumstances, it risks creating an unnecessary and effectively useless level of regulatory involvement in a matter that is otherwise governed by the contractual arrangements between the parties.

[1] Abrahamson Principle

Enhance vendor disclosure requirements

Disclosure and notifications

Question 6

What information should vendors be required to disclose before a purchaser enters into an off-the-plan contract?

HIA supports the disclosure of clear and meaningful information that assists purchasers to make informed decisions before entering into an off-the-plan contract. Any disclosure requirements should focus on information that is likely to materially affect the purchaser's decision to proceed with the purchase and should avoid imposing obligations that are overly complex, speculative or commercially sensitive.

Planning and development approvals

We support disclosure of key planning and development approvals relevant to the project including any federal approvals where applicable. This is already common industry practice and provides purchasers with important information regarding the status of the development and any significant regulatory milestones that remain outstanding.

Financing dependencies

HIA does not support mandatory disclosure of project financing arrangements or financing dependencies. Financing arrangements are confidential commercial matters between vendors and financiers and are often complex, confidential and subject to change. Requiring disclosure of this information is unrealistic and only likely to create confusion.

Infrastructure servicing arrangements

We do not support disclosure of infrastructure servicing arrangements where those arrangements remain subject to design development, third-party requirements or change throughout the course of the project. Information relating to drainage, utilities, power, water and similar servicing matters often evolves as the development progresses and may not be sufficiently settled at the time of sale.

While purchasers may benefit from receiving general information regarding anticipated servicing arrangements, expected delivery timeframes and the potential for delays arising from infrastructure providers or government authorities, such matters will not necessarily be material to a purchaser's decision to proceed with the purchase. Infrastructure and servicing arrangements are frequently resolved throughout the development process and, where issues arise with a particular provider or solution, alternative arrangements may often be available.

Staging requirements

Disclosure of significant staging arrangements where they may affect the timing or delivery of the project is standard practice within the industry. It is generally well understood that this information may be relevant to a purchaser's expectations regarding construction timeframes and settlement.

Third-party approvals

HIA supports disclosure of significant approvals that have already been obtained and are relevant to the development proceeding, as this can provide purchasers with greater confidence regarding the status and

progress of the project. Examples may include planning approvals, community title or strata approvals, and other approvals that are fundamental to the development.

However, HIA does not support mandatory disclosure of every third-party approval, servicing arrangement or access-related approval required throughout the project lifecycle. Developments commonly require numerous approvals, certifications and signoffs from service providers, environmental authorities, health authorities and other regulatory bodies, many of which are administrative, subject to change, or capable of being addressed through alternative arrangements.

Requiring disclosure of all such matters may create unnecessary concern for purchasers and undermine confidence in a project, despite there being no material impact on the delivery of the development or the purchaser's rights. Any disclosure requirement should therefore be limited to approvals that are fundamental to the development proceeding and are material to a purchaser's decision to enter into the contract.

Other material project risks

We do not support broad obligations requiring vendors to disclose all potential project risks or aspects of their business model. Such requirements would be administratively onerous, difficult to define, contractually subjective, and may require the disclosure of commercially sensitive information. Purchasers should be provided with information relevant to the property and development they are considering purchasing, rather than detailed commercial information concerning the vendor's operations.

If additional disclosure requirements are pursued, they should be limited to high-priority matters that are genuinely material to a purchaser's decision to enter into the contract and are capable of being disclosed accurately at the time of sale. Any expansion of disclosure obligations should carefully balance consumer protection objectives against the need to maintain project certainty and feasibility.

Recommendation 8

Disclosure of information should be limited to high-priority matters that are likely to influence a purchaser’s decision to enter into a contract rather than extending to commercially sensitive information.

Question 7

Should vendors have an ongoing obligation to notify purchasers when material information changes after a contract has been signed? If so, which changes should trigger notification?

We acknowledge the importance of transparency and fairness in ensuring purchasers have access to relevant information throughout the development process. However, we are concerned that imposing an ongoing statutory obligation on vendors to notify purchasers of all material information changes after a contract is signed may create a significant administration burden on vendors, potentially leading to delays and increasing the risk of buyer hesitation or withdrawal which ultimately undermines feasibility for all prospective homeowners.

Mandating notification when material information changes in off-the-plan property developments would be resource-intensive, requiring vendors to systematically gather, verify and distribute accurate information to all stakeholders. This added complexity could create uncertainty within the development process, particularly as there are often changes to property developments that are outside the vendor’s control.

A key challenge is determining or defining a threshold for what constitutes a "material" change. What is considered “material” is often subjective and may differ depending on the purchaser's circumstances and expectations, or those of the vendor.

Attempting to define or prescribe what constitutes material information through legislation may be difficult, as it is unlikely that any prescribed list could capture all circumstances that may become relevant during a project's lifecycle. Conversely, a prescribed list can be rigid and may unintentionally create the perception that vendors are only required to disclose the matters expressly identified in the legislation, discouraging broader communication practices that may otherwise benefit purchasers.

Notably, some vendors have already adopted voluntary practices of notifying purchasers when material information changes, demonstrating that effective communication can be achieved without additional legislative requirements. Ultimately, clear and consistent communication between vendors and purchasers remains key. HIA supports a practical approach that enhances transparency without adding unnecessary regulatory burdens to the development process.

Failure to disclose

Question 8

What consequences should apply where a vendor fails to disclose or deliberately misrepresents, material information affecting a development?

HIA does not condone the deliberate withholding of, or intentional misrepresentation, of material information to purchasers. However, any regulatory framework must appropriately distinguish between deliberate misconduct and genuine errors, omissions or oversights that may arise in the course of complex development projects.

The existing statutory framework already provides appropriate mechanisms to address deliberate non-disclosure and misrepresentation. In South Australia, affected parties have access to remedies under common law and equity, as well as statutory protections contained in the *Misrepresentation Act 1972 (SA)* and Section 35 of the *Land and Business (Sale and Conveyancing) Act 1994 (SA)*. Accordingly, there appears to be no justification for introducing additional consequences where such conduct is already adequately addressed through established legal principles and existing legislative protections.

Impacts of disclosure

Question 9

What impacts would the proposed disclosure requirements have on vendors, including project financing and feasibility?

HIA is concerned that expanded disclosure requirements may have unintended consequences for the feasibility and delivery of off-the-plan developments. While transparency is important, any disclosure requirement must be carefully balanced against the commercial realities of delivering complex residential developments that are subject to numerous factors outside a vendor's control.

The more significant impact on project financing and feasibility arises where disclosure requirements are linked to expanded rights for purchasers to rescind contracts. Off-the-plan developments typically rely on achieving and maintaining a minimum level of pre-sales before project finance can be secured and construction can proceed. Where disclosure obligations create additional opportunities for purchasers to withdraw from contracts, vendors may face greater difficulty maintaining the pre-sale thresholds required by financiers.

A reduction in committed purchasers can place the viability of a project at risk and, in some cases, prevent the development from proceeding altogether. This may lead financiers to adopt a more conservative approach to lending, increase financing costs, or require higher pre-sale targets before funding is approved.

These impacts are likely to be felt most acutely by smaller developers and will ultimately lead to a reduction in the supply of new housing which contradicts the government's housing affordability and supply objective.

If the feasibility or financing of a development is compromised by one or several recissions, this may have flow-on impacts to all other purchasers, whose homes are further delayed or may no longer become a reality.

Statutory right for purchaser to rescind contracts

Question 10

Should a purchaser be entitled to rescind an off-the-plan contract where there is any material change to the lot or development, or should rescission only be available where the purchaser can demonstrate that:

- ***they would not have entered into the contract had they been aware of the change; and***
- ***the change materially and adversely affects them?***

Notwithstanding HIA's opposition to interference with contractual arrangements, if this proposal were implemented, it would be reasonable to require a purchaser to demonstrate that they would not have entered into the contract had they been aware of the change, and that the change materially and adversely affects them.

Not all material changes will justify rescission. Some changes may be material in a technical sense but have little or no practical impact on the purchaser's use, enjoyment or value of the property. Allowing rescission for any material change, regardless of its actual effect, risks creating uncertainty and instability in off-the-plan transactions. There must be an appropriate level of objectivity and rescission rights must be reserved for circumstances where the change is genuinely significant against set criteria.

Material changes

Question 11

What types of changes should be considered 'material' and give rise to a right to rescind?

We refer and reiterate our answer to Question 7.

A change should only be considered 'material' where it confers a clear benefit or advantage on one party while causing a corresponding and significant detriment to the other. In the context of a purchaser rescission right, the detriment to the purchaser must be substantial rather than merely technical or inconsequential.

Any definition provided must be clear, measurable and capable of consistent application. By contrast, broad or subjective criteria are likely to create uncertainty, increase disputes and undermine confidence in off-the-plan transactions. If progressed, it will be appropriate for government to provide supporting guidance material to expand on examples, case studies and provide other practical information to assist in the interpretation and application of the requirements.

Changes to lot size or dimensions

Changes to lot size or dimensions may justify a rescission right where they exceed a prescribed threshold. However, lot area and lot dimensions should be considered separately, as a change in dimensions may not necessarily result in a material reduction in the total lot area, or any other adverse impact. Any threshold should be clearly defined to provide certainty to both purchasers and vendors.

Changes to common property

Changes to common property may be material in certain circumstances, particularly where they substantially alter the nature, use or value of the development. However, not every change should be automatically deemed 'material'. Clear thresholds or criteria are required to distinguish between minor design modifications and fundamental changes that materially affect purchasers.

In the absence of specific examples or scenarios, HIA is unable to provide detailed comment on whether the change is considered 'material' at this stage.

Changes to easements or covenants

Whether a change to an easement or covenant is material will depend on the nature and impact of the change. A change may be considered material where it significantly restricts the purchaser's enjoyment and use of the lot or prevents development or use of the property in a manner that was reasonably contemplated at the time the contract was entered into.

However, not all changes to easements or covenants will be material. For example, a change affecting an area of the lot that is already subject to development constraints (such as a drainage reserve or street front setback area), would be immaterial to the purchaser's rights, use or enjoyment of the lot.

Significant amendments to plans

Further clarity is required regarding what constitutes a significant amendment to plans. Without a clear definition, or any examples, it is difficult to assess what circumstances this requirement seeks to address. In the absence of supporting examples, HIA is unable to provide further comment on this proposal at this time.

Changes affecting access, services or amenity

HIA has concerns with using concepts such as 'amenity' as a basis for rescission rights, as the term is inherently subjective and may be influenced by factors outside the vendor's control. For example, changes in surrounding development, neighbouring properties or local conditions may affect a purchaser's perception of amenity without altering the development itself. Any assessment should focus on objective and measurable impacts on access to the lot or the provision of essential services.

Notably, changes affecting access, services and amenities are common features of off-the-plan developments and often arise as a result of third-party requirements. In many cases, such changes primarily result in additional costs rather than altering the fundamental characteristics, use or value of the lot. To the extent that additional costs are incurred, these may be passed on to purchasers in accordance with the contractual arrangements between the parties.

Accordingly, we do not consider these types of changes to be material in themselves, nor should they automatically give rise to a purchaser's right to rescind; and the use of the term 'amenity' should be avoided unless clearly defined.

Recommendation 9

A change should only be considered 'material' where it confers a clear benefit or advantage on one party while causing a corresponding and significant detriment to the other.

Recommendation 10

Any definition of materiality must include a clear and measurable threshold, capable of consistent application.

Notifications

Question 12

Is a 21-day period to notify purchasers of a material change, and a further 21-day period for purchasers to exercise a rescission right, appropriate? If not, what timeframes would be preferable?

Any obligation to notify a purchaser of a material change should only arise on the basis that the vendor knows, or ought to reasonably know, of the relevant change. Vendors should not be exposed to penalties or other adverse consequences in circumstances where information is not available to them or where the change could not reasonably have been identified at the relevant time.

While the 21-day period for a vendor to notify purchasers may be appropriate in some circumstances, HIA is concerned that providing purchasers with a further 21-day period to exercise rescission right may be excessive. Once notified of a material change, purchasers are generally in a position to assess the information and determine whether they wish to proceed with the contract.

Consideration should therefore be given a shorter period for exercising any rescission right, with 'days' specified as business days or calendar days.

Payments

Question 13

If a vendor provides a purchaser with a notice of change that leads the purchaser to rescind the contract by notice in writing, should the vendor have to repay interest and other payments to the purchaser, in addition to a full refund of deposits paid?

Purchasers make an informed decision to purchase a property that is yet to be completed, with an understanding that certain aspects of the development may change over time. While purchasers should be appropriately protected from significant or unforeseen changes, it is not appropriate for the regulatory framework to operate on the basis that off-the-plan transactions are risk-free for any party.

Requiring a vendor to not only refund the purchaser's deposit in full but also pay interest and other payments or compensation whenever a purchaser elects to rescind following a notice of change, would be unduly onerous. Such a requirement would disproportionately penalise vendors, even where the change arose despite the vendor acting in good faith and complying with its contractual and statutory obligations. Under these conditions of trade, in order for a business to stay afloat, it is likely that the business would need to pass on these costs to all other purchases, pushing homeownership further out of reach.

The existence of a right to rescind already provides purchasers with a significant remedy where a notice of change affects their willingness to proceed with the purchase. Where a purchaser chooses to rescind, a full refund of deposits paid is generally sufficient to restore the parties to their pre-contract position. Imposing

an additional obligation on vendors to pay interest and other amounts risks unfairly shifting commercial risk onto vendors and may discourage development activity, and increase the cost and risk associated with bringing new housing supply to the market.

HIA strongly opposes this proposal.

Recommendation 11

Proposals to unfairly or excessively penalise or disadvantage vendors when a contract is rescinded, such as the repayment of interest and other costs are contrary to the government's objective to advance the timely and affordable delivery of homes.

Other considerations

Question 14

Are there any other elements relevant to the scope of this paper that should be considered?

Prescribed notice to purchaser

As identified earlier in this submission, consumer education is a more effective and balanced approach than imposing additional regulatory obligations on vendors. Providing purchasers with clear information about sunset clauses and their contractual rights would assist them to better understand the nature of off-the-plan transactions, which are inherently speculative and subject to a range of uncertainties not typically encountered in more conventional property transactions.

Considerations should be made in expanding the prescribed notice to purchasers to include information about the nature of purchasing property in an off-the-plan development. The notice should also provide clear and accessible information on the purpose, operation, and implications of sunset clauses, ensuring purchasers are better informed about the contractual arrangements they are entering into and can make more informed decisions before committing to the purchase without the need to impose unnecessary regulatory burden or additional red tape on vendors.

Recommendation 12

Include information regarding the nature of purchasing property in an off-the-plan development in the prescribed notice to purchaser.