



**Shane Rattenbury MLA**

Attorney-General

Minister for Consumer Affairs

Minister for Water, Energy and Emissions Reduction

Minister for Gaming

Member for Kurrajong

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Mr Jeremy Hanson MLA

Chair

Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

ACT Legislative Assembly

GPO Box 1020

CANBERRA ACT 2601

By email: [scrutiny@parliament.act.gov.au](mailto:scrutiny@parliament.act.gov.au)

Dear Mr Hanson

I refer to the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) Scrutiny Report 11 of 19 November 2021.

The Committee has made comments on the Civil Law (Sale of Residential Property) Amendment Bill 2021 (the Bill), which was introduced into the ACT Legislative Assembly on 9 November 2021. The comments relate to issues of retrospectivity and the characterisation of rescission provisions within the Bill. I address each of these issues below.

**Retrospectivity**

As the Committee notes, the Bill applies to an off-the-plan contract that is in force immediately before commencement. The Bill is taken to have commenced on the day that the Bill was presented to the Legislative Assembly, that is 9 November 2021.

I note the Committee's view that the application of the Bill to contracts that are in force immediately before commencement may extinguish an 'accrued right' of certain sellers to rescind in instances where a sunset event or delay event has occurred prior to 9 November 2021, but the seller has not acted to rescind the contract on that events' occurrence, or has acted to do so but the rescission has not come into effect by the time the Bill provisions commence.

The effect of the amendments on contracts currently on foot is to apply new requirements on the future operation of the contract. The Bill does not remove the right of the seller to rescind the

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contract under those provisions. What it does, is require the seller to undertake a number of actions prior to rescinding the contract under these clauses in order to ensure that a purchaser is not unreasonably disadvantaged by the actions of the seller.

One of the intentions of this reform is to allow the buyer to consider their options when a seller wants to rescind an off-the-plan contract and to assess the reasons for the seller's request to rescind. The amendments encourage the parties to discuss the status of the development, the relevant factors facing the developer and its likelihood of being completed on time or being subject to extensive delay. Where agreement can't be reached and the seller seeks an order from the Supreme Court, the factors that the Court must consider have been framed to reflect the considerations of both parties and costs may be awarded against a purchaser who unreasonably refuses consent to the rescission.

There has been wide-spread media coverage and constituent concern expressed in the 5 months leading up to the introduction of the Bill into the Legislative Assembly and the housing industry was put on notice in early October that the Government had serious concerns over recent rescissions and, as a result, was intending to introduce amendments to regulate the use of these clauses as soon as possible. The Government made clear that it was looking at reforms undertaken in other jurisdictions as possible options to introduce in the ACT context. Key industry stakeholders were notified of the proposed amendments during the consultation process, including the intention to capture contracts that were in force prior to commencement, and the intention to commence the amendments on introduction. I am also aware through stakeholder feedback that there were instances of what could be seen as opportunistic rescissions of off-the-plan contracts being undertaken in the week preceding the introduction of the Bill.

It is for these reasons that I was of the view that retrospective commencement from the Bill's introduction was justified and appropriate given the need for urgent consumer protections to be put in place to respond to real-time actions taking place in the property market. While there may be examples where conditions to which rescission under a relevant clause is contingent have been met prior to the Bill's commencement and the seller has not acted to rescind before 9 November 2021, I do not believe that there is sufficient reason for these circumstances to be treated differently to a situation where these factors occur after the Bill's introduction.

#### Rescission provisions

The Committee has sought clarification of how the amendments would apply to circumstances where a relevant rescission provision covered by the amendments includes additional conditions that may provide greater protections to a consumer. The question asked is whether these additional conditions will need to be met prior to seeking an order from the Supreme Court.

As detailed above, the amendments do not change the terms of a contract. Where a seller wants to rescind under a rescission clause in a contract and that clause requires certain conditions to be met, then the seller must act in accordance with the contract and meet those conditions.

The amendments affect how a seller might rescind the contract once the conditions required by the clause have been met. Where the relevant clause meets the definition of rescission clause under the Bill, it will be captured by the requirements contained in new Part 2A. Accordingly, the amendments will apply even if the relevant rescission clause includes other conditions that must be met prior to the contract being rescinded.

It should be noted that when considering whether to make an order allowing rescission of the contract, the ACT Supreme Court is required to consider the terms of the off-the-plan contract, this would include any additional requirements that the seller must meet prior to rescinding and will also include whether a term is intended to avoid the operation of the Bill. In doing so, the Court would look at the relevant terms as a whole. The Bill provisions also require the Court to consider any other matter that it considers relevant in deciding whether it is just and equitable to make an order.

Thank you for raising these matters with me. I hope that this information has been of assistance.

Yours sincerely

Shane Rattenbury MLA  
Attorney-General