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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

Civil Law (Sale of Residential Property) Amendment Bill 2021

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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Attorney-General**

CIVIL LAW (SALE OF RESIDENTIAL PROPERTY) AMENDMENT BILL 2021

The Bill is **not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

This explanatory statement relates to the Civil Law (Sale of Residential Property) Amendment Bill 2021 (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

OVERVIEW OF THE BILL

The Bill amends the *Civil Law (Sale of Residential Property) Act 2003* (the Act) to enhance consumer protections in the use of certain rescission clauses in off-the-plan residential property purchase contracts. The amendments are proposed to provide additional protection to buyers who purchase of residential property ‘off-the-plan,’ to safeguard against the inappropriate use of such clauses in a rising property market.

The Act does not currently limit the use of ‘sunset clauses’ and ‘delayed development clauses’, which are important features of most off-the-plan contracts. These clauses generally allow either party to the agreement to rescind the contract if the development, or an aspect of it, is not completed by the agreed date or if there have been significant delays related to the development of the residence.

There are risks associated with contracts to purchase off-the-plan properties for both purchasers and sellers, including delays and increased costs from building materials and labour shortages. Sunset and development delay clauses protect both sellers and buyers by providing a mechanism to terminate their contractual obligations where a development is taking too long, additionally these clauses allow a seller to terminate if they cannot proceed due to factors beyond their control. However, the substantial rise in the property market over a short period of time creates the risk that rescission clauses may be exercised in bad faith to take advantage of a rising property market.

There is nothing in ACT legislation which prevents the use of sunset clauses at present. This is because these sorts of contracts have historically been a matter for negotiation between the parties to the contract.

The Bill proposes to amend the Act to impose conditions on the use of certain rescission clauses in off-the-plan contracts. These conditions are similar to the requirements in the *Conveyancing Amendment (Sunset Clauses) Act 2015* (NSW) and

Sale of Land Amendment Act 2019 (Vic). The Bill also expands on the New South Wales and Victorian provisions, which limit the use of sunset clauses, by also limiting the use of development delay rescission provisions.

The Bill applies to all off-the-plan sales of residential property, including units, houses and vacant land.

The Bill amends the Act to provide that if a seller wishes to rescind a contract for the sale of property 'off-the-plan' due to a *delay event* or *sunset event*, they must provide the relevant buyer(s) with 28 days written notice of the proposed rescission and seek the buyers consent to the proposed rescission or, if consent is not given, seek an order from the ACT Supreme Court permitting the rescission of contract.

The notice to the buyer should specify why the seller wants to rescind the contract, the reasons for the delay and that there is no obligation to consent to the proposed rescission. However, the notice must also advise the buyer that if they refuse consent to the rescission the seller may apply to the Supreme Court for an order permitting rescission and that if the Supreme Court finds that their consent was withheld unreasonably, then the Supreme Court may order costs against the buyer.

A sunset event in relation to an off-the-plan contract includes:

- the registration of the units plan for a residential unit; or
- the registration of the Crown lease for land for residential use; or
- the issue of a certificate of occupancy in relation to the unit or land; or
- the issue of a certificate of compliance for the Crown lease for the unit or land; or
- and event prescribed by regulation.

A delay event is any event delaying or preventing completion of the contract, including:

- an event delaying or preventing the construction of a building or other related works; and
- a delay in obtaining any approval, permission, exemption, insurance or any other thing necessary for completion of the contract.

A delay event does not include an event delaying or preventing completion of the contract that the buyer has caused or substantially contributed to. The Bill also creates the ability for other events that are not included as a delay event to be prescribed by regulation

The Bill also amends the Act to provide that the seller may apply for an order from the ACT Supreme Court permitting the rescission of the contract due to a delay event or sunset event, and that to do so, the seller must satisfy the Court that the order sought is just and equitable in the circumstances. The Supreme Court must consider a range of factors, including the impacts on both the buyer and the seller when deciding an application from the seller for an order.

If a seller wants to pursue the matter in the Supreme Court, the seller will be liable to pay the costs of the buyer unless they are able to establish that the buyer has unreasonably withheld consent to the rescission of the off-the-plan contract.

The Bill also includes a regulation-making power to prescribe additional circumstances in which the rescission of an off-the-plan property purchase contract may occur. This provision creates the flexibility to provide additional opportunities for rescission if it becomes clear that certain aspects of the development process provide legitimate reasons for rescission that should not be covered by the legislative limitations on rescission. It would also allow for additional rescission clauses to be captured and subject to the requirement that buyer consent or Supreme Court order be obtained before rescission can proceed.

The proposed amendments are taken to have commenced on the day that the Bill was presented to the ACT Legislative Assembly. This commencement date means that the proposed amendments are taken to have effect before the Bill is passed and notified. Section 75A of the *Legislation Act 2001* states that an Act or legislative instrument commences retrospectively if it commences on a day or at a time earlier than the day after its notification day. Section 75B of the *Legislation Act* provides that an ACT law may operate retrospectively, provided that the law clearly articulates that intention.

The protection against retrospective criminal laws in s 25 of the *Human Rights Act 2004* is not engaged, as the relevant provisions are not criminal in nature.

The common law has a general protection against the retrospective application of law. The purpose of this protection includes fairness as it seeks to protect the expectations of those who assume that the quality of their past acts would be assessed on the basis of the law as it then stood. The retrospective commencement of the proposed amendments is justified on the basis of the need for urgent consumer protections to respond to real-time changes within the property market. The Government will ensure that industry notification is conducted so that stakeholders are aware of the commencement of the proposed reforms. The parties to off-the-plan contracts will be on notice of the reforms from the date of introduction of these changes. Commencement of the amendments from the date of introduction is necessary to protect buyers who are party to current off-the-plan contracts. Retrospective commencement will prevent rescissions under sunset and delay clauses from occurring during the period of time between introduction and notification of the amendments.

The proposed amendments will apply to an off-the-plan contract that are in force on commencement of the Bill. The proposed amendments do not change the rights and liabilities that the parties to the contract had prior to commencement of the amendments. The proposed amendments do not have retrospective operation, instead they change the legislative framework within which existing contractual rights operate. This is done in a prospective way that governs the future operation of the contract.

CONSULTATION ON THE PROPOSED APPROACH

In developing the Bill, the following external stakeholders were consulted: ACT Law Society, ACT Bar Association, Property Council of Australia, Housing Industry Association (HIA), Master Builders Association (MBA), Owners Corporation Network ACT, Planning Institute of Australia, Real Estate Institute of the ACT (REI ACT), Strata Communities Association ACT, Legal Aid ACT and Surveying and Spatial Sciences Institute.

CONSISTENCY WITH HUMAN RIGHTS

The Bill does not engage with any rights under the *Human Rights Act 2004*.

REGULATORY IMPACT

The amendments proposed by the Bill will enhance the regulatory framework for the use of certain rescission clauses in off-the-plan contracts. The Bill does not apply to all rescission clauses in off-the-plan contracts. This recognises that these clauses are an important protective mechanism for buyers and sellers in the property market. The Bill ensures that parties to an off-the-plan contract may still exercise the right to rescind under sunset and development delay clauses, subject to important consumer protections put in place by these amendments.

The amendments build in an opportunity for Supreme Court review of rescission clauses, enhancing transparency of off-the-plan contracts in the Territory. The amendments also enhance the consumer rights of buyers, who will have the ability to consent or not consent to the use of specified rescission clauses.

The Bill takes a balanced approach to the use of these rescission clauses. If the seller applies to the ACT Supreme Court for an order approving the use of a rescission clause, the Court is required to take into account the effect of the rescission on the buyer and the effect of completion on the seller and the particular circumstances of both parties. The seller is responsible for paying the costs of the buyer unless the Court finds that the buyer unreasonably withheld consent to the rescission. As discussed above, the Bill also includes a regulation-making power to allow the Government to expand or narrow the scope of rescission provisions which are captured by the requirement to obtain buyer consent or Supreme Court order allowing rescission. The proposed amendments will provide certainty and transparency for buyers and sellers who use off-the-plan contracts and thereby give buyers greater confidence in entering into off-the-plan property purchase contracts.

The Bill also includes a review provision which requires the Minister to review the operation of the proposed amendments as soon as practicable two years after commencement. The Minister must present a report on the review to the Legislative Assembly within six months after the day the review is started. This review provision will ensure that there is active monitoring of the effects of the proposed amendments on the ACT property market. The report to the Legislative Assembly will also provide a transparent account of the effects of the proposed amendments.

Civil Law (Sale of Residential Property) Amendment Bill 2021

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Civil Law (Sale of Residential Property) Amendment Bill 2021**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This clause is a formal provision setting out the name of the Act as the *Civil Law (Sale of Residential Property) Amendment Act 2021*.

Clause 2 Commencement

This clause provides for commencement on the day that the Bill for the Act was presented to the ACT Legislative Assembly.

Clause 3 Legislation amended

This clause is a formal provision identifying that the Act amends the *Civil Law (Sale of Residential Property) Act 2003*.

Clause 4 Definitions for pt 2

Section 7, definitions of *unit* and *units plan*

This clause removes the current definitions of ‘unit’ and ‘units plan’ from part 2 of the Civil Law (Sale of Residential Property) Act. Clauses 10 and 11 of the Bill (see below) re-introduce definitions of *unit* and *units plan* into the main Dictionary for the Act so that the definitions will apply throughout the Act.

Clause 5 Meaning of *required documents*

Section 9(2)(a)(iii)

This clause omits the phrase ‘an off-the-plan purchase’ from section 9 (2)(a) (iii) of the Civil Law (Sale of Residential Property) Act so as to reduce the risk of confusion between the term ***off-the-plan purchase*** and the newly introduced definition for *off-the-plan contract* in clause 7 below.

Clause 6 Section 9 (2) (b)

This clause omits the phrase ‘an off-the-plan purchase’ from section 9 (2) (b) of the *Civil Law (Sale of Residential Property) Act* and substitutes ‘a residence mentioned in subsection (2) (a) (iii)’ to align with other amendments in this Bill.

Clause 7 New Part 2A

This clause inserts new part 2A into the *Civil Law (Sale of Residential Property) Act*. New Part 2A regulates the exercise of a seller’s right to rescind an off-the-plan contract for the sale of residential property.

New section 19A Definitions – pt 2A

This new section provides definitions for key terms that are used in new part 2A.

A **‘delay event’** for an off-the-plan contract means any event delaying or preventing completion of the contract. This includes an event delaying or preventing the construction of a building or related works, and a delay in obtaining any approval, registration, permission, exemption, insurance or any other thing necessary for completion of the contract. A delay event does not include an event delaying or preventing completion of the contract that the buyer has caused or substantially contributed to or an event prescribed by regulation.

An **‘off-the-plan contract’** means a contract for the sale of the following: a unit for residential use in a units plan before the units plan is registered; a residence (other than a unit) on land identified in the contract before the certificate of occupancy for the residence is issued; or vacant land for residential use identified in the contract before the Crown lease for the land is registered.

A **‘rescission provision’** in an off-the-plan contract means a provision that allows the contract to be rescinded under the following circumstances: a sunset event stated in the contract does not happen before the sunset date for the event, a delay event stated in the contract happens or any other reason prescribed by regulation.

A **‘sunset date’** in relation to a sunset event in an off-the-plan contract, means a date, or period in which the sunset event must happen.

The following situations are **‘sunset events’** in relation to an off-the-plan contract: for the sale of a unit for residential use - the registration of the units plan for the unit; or for the sale of a residence – the certificate of occupancy for the residence; or for the sale of vacant land for residential use - the registration of the Crown lease for the land, the issue of the certificate of occupancy in relation to the unit or land; or the issue of a certificate of occupancy in relation to the unit; or the issue of a certificate of compliance for the Crown lease for the unit or land. A sunset event may also be prescribed by regulation.

This section also provides that **‘certificate of compliance’** has the definition from the Dictionary of the *Planning and Development Act 2007*, **‘certificate of occupancy’** has the definition from the Dictionary of the *Building Act 2004*, and that **‘registered’** means registered by the Registrar-General under the *Land Titles Act 1925* or *Land Titles (Unit Titles) Act 1970*.

New section 19B Rescission under rescission provision

This new section establishes conditions for rescission under a rescission provision. A seller may only rescind a contract under the relevant provision if, after being given a notice under section 19C, the buyer(s) under the contract consents in writing to the rescission, or the Supreme Court has made an order under section 19D which allows

the seller to rescind the contract under the provision, or in circumstances prescribed by regulation.

This section includes a regulation-making power to prescribe additional circumstances in which a seller's ability to rescind the contract under a rescission provision is regulated. This regulation-making power also allows the Government to narrow the requirements for buyer consent or Supreme Court order if it becomes clear that certain aspects of the development process provide legitimate reasons for rescission that should not be covered by the legislative provisions.

New section 19C Notice of intention to rescind under rescission provision

This new section places a requirement on a seller to give relevant buyer(s) notice of their intention to rescind the off-the-plan contract under a rescission provision.

Under the provision, the seller must give each buyer under the contract written notice at least 28 days before the day of the proposed rescission.

The written notice must state the reasons for the seller's proposed rescission of the contract and that the buyer may, but need not, consent to that rescission. The written notice must also include a statement explaining the effect of new sections 19B and 19D (4). New section 19B outlines the requirements for rescission under a rescission provision. Section 19D (4) provides that if the seller applies for an order from the ACT Supreme Court to rescind the contract, the seller must pay the costs of the buyer in the proceeding unless the seller satisfies the Supreme Court that the buyer unreasonably withheld consent to the rescission. This means that the buyer will be put on notice that they should carefully consider the seller's reasons for rescission when deciding whether to consent to the proposed rescission as they may face as costs order against them if they are found to have unreasonably withheld consent to the rescission.

New section 19D Supreme Court may allow rescission

This new section provides that the seller may apply to the Supreme Court for an order allowing the seller to rescind the contract under a rescission provision. The Supreme Court must not make the order unless the seller satisfies the Court that it is just and equitable to make the order.

When deciding an application from the seller for an order, the Supreme Court must consider the following:

- the terms of the off-the-plan contract including whether a term is intended to avoid the operation of this part
- whether the seller has acted unreasonably or in bad faith
- whether factors beyond the seller's reasonable control have affected the seller's ability to complete the contract or the viability of the seller's business e.g. disruption to supply of building materials, significant increase in cost of goods and services, inability to obtain or retain finance for the development, changes in the law affecting the development (such as changes to building standards),

imposition of conditions on development approval that require major changes to the development

- what reasonable actions the seller has taken to avoid a rescission event, or if the rescission event has happened, the steps taken to minimise the effect of the event on the seller's ability to complete the contract
- whether there is a reasonable prospect of the seller completing the contract e.g. the extent to which a development has been completed
- whether the unit or land the subject of the contract has increased in value
- the effect of the rescission on the buyer e.g. the ability of the buyer to enter the housing market after rescission of the contract
- whether the buyer has been performing their obligations under the contract
- the effect of completing the contract on the seller
- any other matter that the Court considers to be relevant
- any other matter prescribed by regulation.

If the seller applies for an order from the ACT Supreme Court to rescind the contract, the seller must pay the costs of the buyer in the proceeding unless the seller satisfies the Supreme Court that the buyer unreasonably withheld consent to the rescission of the contract.

When dealing with the application, the Supreme Court may make any order, including an order for damages, that the Court thinks fit. This means that even if the Supreme Court permits the seller to rescind the contract, the Court is not prevented from making other orders in relation to damages against the seller.

This section defines '**rescission event**' as a delay event or an event prescribed by regulation under paragraph (c) of the definition of 'rescission provision'.

New section 19E – No automatic rescission of off-the-plan contracts

This section provides that there is no automatic rescission of off-the-plan contracts under a rescission provision, as defined by part 2A. The section makes clear that a rescission provision will not act to automatically rescind the contract if an event occurs that allows the contract to be rescinded. A rescission provision only operates to allow the contract to be rescinded by the seller in accordance with the requirements set out in new part 2A of the *Civil Law (Sale of Residential Property) Act*.

This section does not affect any right that a buyer under an off-the-plan contract has to rescind the contract.

New section 19F – Review – pt 2

This section provides that the Minister must review the operation of new part 2A as soon as practicable two years after part 2A commences. The Minister must present a report of the review to the Legislative Assembly within six months after the day the review is started.

This section expires five (5) years after the day Part 2A commences.

Clause 8 New part 9

This clause inserts new part 9 into the *Civil Law (Sale of Residential Property) Act*. New part 9 is a transitional provision.

New section 50 – Existing off-the-plan contracts

This section provides that new part 2A of the *Civil Law (Sale of Residential Property) Act* applies to an off-the-plan contract that is in force immediately before the day that part 2A commences.

The proposed amendments do not change the rights and liabilities that the parties to the contract had prior to commencement of the amendments. Although the Act itself does have retrospective commencement, this transitional section is not a retrospective provision. The proposed amendments do not have retrospective operation, instead they change the legislative framework within existing contractual rights operate. This is done in a prospective way that governs the future operation of the contract.

New section 51 – Expiry – pt 9

This section provides that part 9 expires five (5) years after the day that it commences.

Clause 9 Dictionary, new definitions

This clause inserts new definitions into the Dictionary of the *Civil Law (Sale of Residential Property) Act*.

These new definitions refer to the definitions of '**delay event**', '**off-the-plan contract**', '**rescission provision**', '**sunset date**' and '**sunset event**' in new part 2A of the *Civil Law (Sale of Residential Property) Act*.

Clause 10 Dictionary, definition of *unit*

This new definition substitutes the definition of '**unit**,' and refers to definitions within the *Unit Titles Act 2001*, section 9.

Clause 11 Dictionary, new definition of *units plan*

This new definition substitutes the definition of '**units plan**,' and refers to definitions within the *Unit Titles Act 2001*, section 7.