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Quote in reply: Property and Development Law Section

21 July 2011

Ms Barbara Stone MP
Chair
Legal Affairs, Police, Corrective Services and Emergency Services Committee
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Dear Ms Stone MP

INQUIRY INTO BILLS TO DIVIDE THE PROPERTY AGENTS AND MOTOR DEALERS ACT 2000

Thank you for your letter of 4 July 2011 inviting the Queensland Law Society to make submissions to the Legal Affairs, Police, Corrective Services and Emergency Services Committee regarding the four bills referred by the Legislative Assembly on 17 June 2011 to your Committee which seek to divide the existing *Property Agents and Motor Dealers Act 2000* (PAMDA).

The Queensland Law Society was consulted by the relevant Minister and his Department during the development of the Bills and had the opportunity to raise a number of issues at that time. Some of those issues remain unaddressed.

The Service Delivery and Performance Commission (SDPC) made a number of recommendations in its 2008 Report relating to various aspects of PAMDA. The recommendation that it made in respect to Chapter 11 of PAMDA (relating to the formation of residential property sales contracts) was partially supported by Government. The *Property Agents and Motor Dealers and Other Legislation Amendment Act 2010* delivered the Government's reforms to PAMDA and the *Body Corporate and Community Management Act 1997* (BCCMA), giving a substantially different result to that proposed by the SDPC.

While the QLS is generally supportive of the splitting of the PAMDA, there are a number of important issues which have not been addressed and also issues with the drafting of the amended provisions.

QLS raised these concerns in consultation on the current Bills and saw these further amendments to PAMDA as opportune to remedy some of these issues.

Property Agents Bill 2010 Chapter 6 Issues

The residential contract formation provisions in Chapter 6 of Bill we believe will continue to give rise to unintended consequences.

The most serious of these concerns are:

- the provisions extend to a number of transactions between sophisticated parties where the consumer protection objects of PAB are not warranted;
- There is no positive obligation imposed on a seller to provide a buyer with a copy of the relevant contract once signed by the seller. A failure to give a copy of the contract to the buyer will affect a number of time periods triggered by such an action, including:
 - the cooling off period under section 172;
 - the 90 day limit for terminations under section 175(4);
 - the 90 day limit for terminations under section 206A(4) of BCCMA; and
 - the 90 day limit for terminations under section 213A(4) of BCCMA;
- there is still no certainty about the treatment of options to purchase property under Chapter 6 of PAB; and
- the section 14 definition in PAB of what is not residential property needs to be changed to prevent unintended consequences for mixed use developments.

1. Application of PAB to “Sophisticated Party” Transactions

Chapter 6 of the PAB applies to all contracts for the sale of residential property other than contracts formed by public auction (section 163). Residential property includes vacant land in a residential area (section 14).

Chapter 6 of PAB will therefore apply to a number of transactions between sophisticated parties such as large property developers and government entities. These parties are experienced in property transactions and do not require the benefit of the consumer protection provisions in PAMDA. Apart from the unnecessary administrative burden, experience with PAMDA shows that there is a significant amount of litigation between property developers seeking to avoid contracts for purely commercial reasons.

Whilst the QLS acknowledges that excluding transactions based on the intended use by the purchaser may be open to abuse, it is suggested that excluding the following transactions from the definition of “relevant contract” would largely overcome this issue:

- sales to publicly listed companies and their subsidiaries;
- sales to government entities;
- sales of multiple lots (see below); and
- sale of development sites (defined as the sale of a parcel of land with a current development permit or conditional upon the purchaser obtaining a development permit enabling that parcel of land to be developed into multiple residential lots).

2. Section 171 Warning statement must be attached to relevant contract

The section states:

“(1) This section applies **when** a seller gives a buyer a copy of the relevant contract.” [emphasis added]

On the current drafting there is no positive obligation imposed on the seller to give the relevant contract to the buyer. If the relevant contract is not given to the buyer a number of consequences will flow including that the cooling off period will not commence.

Under the amended provisions it is not necessary for a seller to give a copy of the relevant contract to the buyer for the contract to be binding. The amendments have reverted to the common law position and the contract will be binding on the parties once acceptance is communicated. This need not be by communication of a copy of the relevant contract.

Several issues may arise as a result of the drafting of this proposed section.

What if a copy of the contract is not given under section 171 at all?

A buyer may terminate the contract under section 176 during the cooling off period. If the period has not, or never commences the current wording of section 176 would suggest that the buyer does not have a right to terminate until the cooling off period does commence. A buyer who purports to terminate under section 176 when the cooling off period has not commenced will repudiate the contract.

There is no right for a buyer to terminate for a failure by the seller to comply with section 171 and the only impetus for a seller to comply is the threat of a penalty and the fact the 90 day time period under section 175 will not commence.

The ability of the buyer to terminate in the event of a relevant contract not being sent to the buyer needs to be clarified. A buyer should have the right to withdraw prior to the contract being received to create some impetus for the seller to comply, otherwise a seller can deliberately or inadvertently ensure that the cooling off period never commences and the rights under section 176 never arise.

In addition to the rights of termination under proposed section 176, the 90 day termination right sunset provisions contained in section 176(4) of PAB and sections 206A(4) and 213A(4) of BCCMA are also triggered by the passing of a copy of the relevant contract between the seller and the buyer. Should this not occur the termination rights a buyer has under these sections will become effective up until the day of settlement.

It was surely never the intention of the drafting of the provisions to permit a seller to frustrate the commencement of the cooling off provisions and also elongate the 90 day terminate window by merely not communicating a copy of the relevant contract to the buyer.

What if a copy of the contract is given under section 171 and the warning statement is not attached?

The definition of cooling off period in proposed section 172 requires that ‘a copy of the relevant contract’ be received from the seller to start the cooling off. There is no reference to the requirement for the

warning statement to be attached to the contract received from the seller in accordance with section 171 other than the offence provision. There are two potential issues:

1. it is not clear if the cooling off period will commence if the seller sends the contract but fails to comply with section 171; and
2. if the cooling off period can be started by receipt of the contract only, what is the point of the requirement in section 171 for the warning statement to be attached?

Uncertainty about what a buyer must receive to commence the cooling off period is not desirable. This provision should be amended to clarify that the cooling off period commences even if the warning statement is not attached.

3. Put and Call Options

There is no reference to “options to purchase” in the proposed Chapter 6 of PAB. Given the frequency of their use to sell residential property and the confusion surrounding the application of the previous Chapter 11 provisions to both put and call options and contracts formed on an exercise of the option the law in this regard needs to be clarified.

Case law is divided about the application of the previous Chapter 11 provisions to put and call options. While the Court of Appeal has only recently clarified the application of the provisions to options to an identified buyer and those where the buyer is a person and or nominee (*Vale 1 Pty Ltd a v Delorain Pty Ltd* [2010] QCA 259) there continues to be uncertainty as to whether the warning statement should be given both at the time the option comes into effect and again attached to the contract of sale executed once the option is exercised. The only court decision to touch on this issue is *Mark Bain Constructions Pty Ltd v Barling* [2006] QSC 48 and the comments of the judge were in dicta.

This matter can only be resolved by legislation.

It is an absurdity to give two warning statements and have two cooling off periods for the one transaction. It is suggested that there be only one cooling off period to commence when the proposed option is given to the buyer provided that it contains all the proposed terms of the contract of sale and that the contract of sale, once the option is exercised comes into immediate effect.

Clearly, some clarification is called for, the alternatives being:

- A. that all options (call and put and call only) and contracts entered into on exercise of such options are excluded from the Chapter 6 scheme; or
- B. specific provision is made (as in the *Conveyancing Act 1919* (NSW), sections 66Z – 66ZK and section 66T) for the application of cooling off periods to the option itself and not the contract formed on its exercise.

In our view alternative (b) is preferable and the definition of “relevant contract” should include:

“an option containing all the terms to which the buyer would be bound if the option were exercised”.

'Option' should include both put and call and call only options. An option that did not include a copy of the contract to be formed on exercise of the option would not be a relevant contract. In that case the contract formed upon exercise would be a relevant contract and subject to the provisions of Chapter 6.

Further if the cooling off period applies to the option the PAB should make it clear that:

"For the avoidance of doubt, a relevant contract:

- includes a contract of sale formed upon exercise of the option where the buyer under the contract of sale is not a party to the option; and
- does not include a contract of sale formed upon the exercise of an option where the buyer under the contract of sale is the grantee under the option."

It is important that if the buyer under the contract formed upon exercise of the option is not the grantee under the option, the provisions of Chapter 6 should apply to the contract of sale. This will usually be a situation where the option is entered between a developer and marketer. The marketer will be able to nominate buyers under the option usually making a significant commission in the process. The buyer nominated by the marketer under the option to enter a contract of sale with the developer should be entitled to a cooling off period and a warning statement.

If options to purchase are expressly included, and the grantee is to have the same rights as a buyer under a relevant contract not formed through the exercise of an option, if the seller does not comply with section 169(2)(c)(i) and has paid an option fee, then it should be recoverable in the same way as a deposit. Similarly, the option fee should be treated in the same way as the deposit where the buyer terminates during the cooling off period (section 175(3) and (4)) Thus, the expression "deposit" should be defined in section 163 "to include an option fee where the relevant contract is constituted by an option to purchase".

4. Changes needed to definition of residential property in PAB

There has been considerable litigation regarding the meaning of 'residential property' in PAMDA (reproduced in PAB, section 14). The main issues are:

- whether multiple lots can comprise a 'single parcel';
- what constitutes a 'residential area';
- the time at which the relevant provisions are to be applied (the time of formation of the contract or at completion); and
- the application of the exclusion for land used substantially for industry commerce or primary production where the use has temporarily ceased or has not commenced.

Contracts or options for the sale of multiple lots under one contract are generally commercial in nature. In *Cheree-Ann Property Developers Pty Ltd v East West International Development Pty Ltd* [2007]1 Qd R 132, Mullins J held that a put and call option for the sale of 8 lots by a property developer to a marketer was not a contract for the sale of residential property because it was not a contract for the sale of a 'single parcel'. However, a contract for the sale of 2 or more lots on which a residence is constructed was held by her Honour to fall within the provision. This later approach was applied more recently by her Honour in *Gallagher v Boylan* [2011] QSC 094. Until the matter is considered further by the Court of

Appeal many lawyers continue to place a warning statement on an option for the sale of multiple lots in what is essentially a commercial transaction.

Further, the existing definitions lead to a number of anomalies where a non-residential use has temporarily ceased or has not commenced. For example a proposed strata retail shop in a mixed use residential and retail development would be “residential property”.

This position needs to be clarified and we suggest that

- section 14(1) and (2) be replaced with:
 - (1) Property is **residential property** if, at the time a proposed contract for the sale of the property is to be entered into, the property is:
 - (a) a single parcel of land comprising one or more contiguous lots or proposed lots on which a place of residence is fully or partially constructed or, under the contract will be constructed by completion;
 - (b) a single lot or proposed lot of vacant land in a residential area;
 - (c) any of the following that, under the contract, is or will at the time of completion be a place of residence:
 - (i) a lot included in a community titles scheme, or proposed to be included in a community titles scheme, under the Body Corporate and Community Management Act 1997;
 - (ii) a lot or proposed lot under the *Building Units and Group Titles Act 1980*;
 - (iii) a lot or proposed lot shown on a leasehold building units plan registered or to be registered under the *South Bank Corporation Act 1989*;
 - (iv) a lot or proposed lot shown on a plan registered or to be registered under the *Land Act 1994*.
- a new section 14(3)(c) be added as follows:

If the improvements on the land are designed for use for industry commerce or primary production such that, if the improvements were in use, section 14(3)(iii) would apply.
- the definition of ‘residential area’ in section 14(4) be amended in line with the decision in *Arc Holdings Pty Ltd v Riana Pty Ltd* 2010 QCA 269 namely:

residential area means an area identified on a map in a planning scheme as an area in which residential use is the preferred primary use or one of the preferred dominant uses of the land.

Further, the definition of relevant contract should be amended to provide that one or more contracts between the same buyer and seller for the sale of 3 or more lots entered into contemporaneously are excluded.

If you require any further or additional information in regard to this submission please do not hesitate to contact our principal policy solicitor, Mr Matt Dunn, on 3842 5889 or via email on m.dunn@qls.com.au.

Yours faithfully

Bruce Doyle
President