

Our ref: Property and Development Law Committee

15 March 2013

Red Tape Reduction Review of Agents Bills
Office of Regulatory Policy
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Dear Review Officer

Draft Property Occupations Bill 2013

Thank you for providing the Queensland Law Society the opportunity to provide comments on the Draft Property Occupations Bill 2013 (the Bill). The Society notes this is a part of a suite of bills to split the *Property Agents and Motor Dealers Act 2000* (PAMDA) into its constituent parts.

The Queensland Law Society is strongly of the view that broad consultation on policy and legislation at an early stage is the key to good law and commends Government on providing that opportunity. The Society has found the consultation period to be a very valuable opportunity for its Property and Development Law Committee (the Committee) to look at various aspects of the Bill in a more considered and well-rounded way.

General Approach

The Committee commends the Government for undertaking this initiative to reduce red tape in residential contract formation. This has been needed for some time.

The Committee also notes that caution is required to ensure that an appropriate balance of the rights of buyers and sellers is struck.

Property Contracts

Section 167 – particular matters to be in proposed relevant contract

The Committee commends the approach adopted in s167 of removing the need for a warning statement to be attached to the proposed relevant contract and for particular matters to be incorporated within the body of the contract.

The particular matters to be included go to the heart of the consumer protection requirements of the Bill, advising purchasers of the existence of the cooling off period and also suggesting that purchasers obtain legal advice prior to binding themselves to the contract. This information is of crucial importance to an ill-informed buyer and is presented on the same

page as each place in the contract where the buyer signs to indicate the buyer's intention to be bound.

This obligation appears to be both effective at alerting a buyer to salient facts and efficient in terms of the low compliance burden placed upon sellers and their representatives. It is envisaged that the particular matters would be included in the standard form contracts and would be in place in 'regular' transactions automatically.

The Committee has considered the relevant provision in some detail and notes that there is no termination right to the buyer for not including the particular matters in the contract, in favour of an offence provision. The Committee has concluded that the preferable approach would be to provide a buyer with a time-limited termination right if the particular matters are not included within the contract.

The Committee saw the rationale for this approach in the fact that the new requirement is quite modest and would be included within the text of the standard conveyancing contracts and also within the standard developers' contracts. It was thought that this would cover almost all residential property transactions and would not enliven the termination right in those cases. The Committee was concerned, however, for those occasions where a shyster was intent upon deceiving and pressuring a buyer into a sales contract. In those cases it is likely that:

- the buyer would not have the existence of the cooling off period brought to their attention
- the buyer may not seek legal advice on the terms of the contract promptly
- the buyer may consequently not take action within the required timeframes to cool off.

The Committee considered that these were the cases where the consumer protection aspects of the Bill were most needed. However, as s167 currently stands, a deceived buyer has no remedy and is bound to the contract. The omission of the particular matters is a regulatory offence, which may or may not be prosecuted by the relevant regulatory authority depending on the evidence available to them. This is little comfort to a deceived buyer.

For these reasons the Committee was of the view that in order to ensure that the consumer protection elements of the Bill are still effective, while also reducing red tape and better facilitating residential property sales, a time-limited termination right to the buyer should apply if the particular matters are not included within the contract. The Committee was of the view that the current 90 day time limitation of termination rights may be appropriate so as not to frustrate long-term agreements where a buyer has not sought advice or has not taken any action on the sale contract within a three month period.

The Committee noted that the approach described above has been in place in New South Wales for some time¹ and has not lead to the technical terminations and disputes which the former versions of PAMDA engendered. Again in NSW the relevant wording is in place on

¹ S66X *Conveyancing Act 1919* (NSW)

the standard agreements and accordingly 'regular' transactions are excluded from the operation of the termination right.

Section 167 – 'each place'

The Committee noted that the current wording of the clause requires the particular matters to be displayed at 'each place' the buyer signs the contract to indicate their intention to be bound to the contract. The Committee had concern that this may be interpreted as a requirement that the particular matters must appear more than once in certain agreements.

It was thought that the consumer protection objective of the Bill would be met if the particular matters were stated once where the buyer executes the contract. The current wording is uncertain and it could be argued that it needs to be displayed on each page initialled by a buyer.

In the context of a termination right for non-compliance, the Committee was keen to ensure that the operative provisions were certain and promoted compliance.

As an alternative or complementary approach, certainty would also be improved in the drafting if a provision or a note was included in the text to clarify that the particular matters did not need to appear on any page of the contract where the buyer merely initials the page or initials alterations to the printed terms.

Transitional for s167

The Committee notes that clause 2 proposes the Bill to commence on a day to be proclaimed. The Bill as proposed makes significant changes to compliance elements of residential contract formation and as such will require:

- new versions of the QLS endorsed REIQ residential standard sales contracts to be produced
- guidance and insurance materials to be updated
- commercial workflow and legal practice management systems to be updated
- a comprehensive education program to be conducted for lawyers and real estate agents.

On account of this, the Committee recommends that as soon as is reasonably possible after the Bill passes in Parliament the commencement date is made known to the public.

The Committee acknowledges that Government will be intent on commencing this initiative as quickly as possible.

It is envisaged that there will be a period following commencement where parties may innocently adhere to the previous law. Therefore to ensure that parties are not unfairly prejudiced by the reforms and to provide a period of comfort for the work that is required to effect the cross-over to the new requirements, the Committee proposes that a period of three to six months is provided following commencement where attachment of a form 30c to a residential sales contract is deemed to be compliance with the inclusion of the particular

matters in the contract. It is expected that within that period the new version of the standard contract would be in wide circulation and usage.

Cooling off notices under s171

The Committee proposed that the requirement under s171(2) to state that the party is cooling off under the relevant section of the Bill is un-necessarily technical and is also unclear as to the wording that must be used.

The Committee was of the view that a layperson would often not quote the section number in an attempt to cool off and may therefore be repudiating the contract.

The Committee was of the view that it should be presumed that a simple termination by written notice during the cooling off period without reference to the section should be deemed to be an exercise of the cooling off rights by a buyer. The Committee also proposed that the notice should explicitly be able to be given the seller, seller's agent or solicitor by the buyer or their solicitor.

Put and call options

There is no reference to 'options to purchase' in the proposed Part 6 of the Bill. 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 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 Part 6 scheme; or
- B. specific provision is made (as in the *Conveyancing Act 1919* (NSW), ss66Z – 66ZK and s66T) 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 Part 6.

Further if the cooling off period applies to the option the Bill 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 Part 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 receive the benefit of the particular matters included in the contract and a cooling off period.

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 s167 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 (s171(3) and (4)) Thus, the expression “deposit” should be defined in s163 to include “a payment made upon entering into the relevant contract where the relevant contract is constituted by an option to purchase”.

Definitions

Section 6

The Committee noted that s6 does not extend to receivers appointed by a financier under its securities over the assets of individuals (as opposed to corporations) who own management rights. It was proposed that the exemption, should include an appointment under a mortgage, but be limited to a particular class of professional, such as registered liquidators.

Application of the Bill to “sophisticated party” transactions

Part 6 of the Bill applies to all contracts for the sale of residential property other than contracts formed by public auction (s 163). Residential property includes vacant land in a residential area (s 15).

Part 6 of the Bill 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);
- 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).

Changes needed to definition of residential property in the Bill

There has been considerable litigation regarding the meaning of ‘residential property’ in PAMDA (reproduced in the Bill, s15). 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)
- 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 marketeer 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

- s15(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 s15(3)(c) be added as follows:
 - c. If the improvements on the land are designed for use for industry commerce or primary production such that, if the improvements were in use, s15.3(b)(iii) would apply.
- the definition of 'residential area' in s15(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 for the sale of 3 or more lots entered into contemporaneously are excluded.

Red Tape Reductions

Section 97

The Committee questioned whether there was an ongoing need for s97 of the Bill (currently in ss149 and 226 of PAMDA) in its current form. The section requires a notice to be given to a buyer of vacant land which is unable to be lawfully used for residential purposes. If the agent or auctioneer fails to comply the buyer may terminate the contract or, if settlement has occurred, require a reconveyance of the property at the seller's expense.

The provision impacts on commercial contracts even though there is no expectation on the buyer's part that it will be able to build a house on the property. The terminology in s96 ("can not, at the date of sale, be lawfully used for residential purposes") is also out-dated as it is inconsistent with current planning laws (the wording dates back to a planning regime where

residential uses were generally permitted “as of right” or prohibited) and it is often difficult in practice to ascertain whether or not the section applies.

The Society believes this section needs to be urgently reviewed and should not be enacted in its present form.

Property developers’ licensing

The Committee questioned whether there was any continuing utility or public benefit in the licensing of property developers. It is proposed that consideration is given to these requirements being omitted from the Bill as a red tape reduction measure.

Real Estate and Letting Agents

Appointments of real estate agents

The Committee notes that s135 PAMDA, reproduced as s 81 of the Bill, provides:

135 Appointment of real estate agent—sole and exclusive agencies

(1) If the appointment is for a sole or exclusive agency, before the appointment is signed, the real estate agent must discuss with the client whether the appointment is to be for a sole agency or an exclusive agency and specifically bring to the client’s notice the information in the form of appointment about—

- (a) the proposed term of the appointment; and
- (b) if the appointment is for the sale of residential property, the client’s entitlement to negotiate the term of the appointment up to a maximum term of 60 days; and
- (c) the difference between sole agency and exclusive agency, unless the information has been brought to the client’s notice under section 134A; and
- (d) the consequences for the client if the property is sold by someone other than the agent during the term of the appointment.

Maximum penalty—200 penalty units.

Note—

The commission of an offence against this subsection also renders an appointment for the sale of a place of residence or land or an interest in a place of residence or land ineffective under section 137(3).

(2) The appointment may include provision that, at the end of the term of a sole or exclusive agency, the appointment of the agent continues under an open listing that may be ended at any time by the agent or the client.

(3) Subsection (1)(b) does not apply if the appointment—

- (a) is for the sale of 3 or more resident properties; or
- (b) is for the sale of a lot in a community titles scheme as part of the sale of management rights of the person who is to become the letting agent for the community titles scheme.**

(4) In this section—

community titles scheme has the meaning given by the [Body Corporate and Community Management Act 1997](#), section 10.

letting agent has the meaning given by the [Body Corporate and Community Management Act 1997](#), section 16.

management rights has the meaning given by the [Body Corporate and Community Management Act 1997](#), schedule 6.

The Committee notes that s135(3)(b) was added in 2006 by the *Property Agents and Other Acts Amendment Act 2006*. In the explanatory notes to the amendment it states:

"Clause 22 inserts an exception to section 135 for specific circumstances. The section imposes a 60 day limit on a sole or exclusive agency agreement for the sale of residential property. Where there is a sale of management rights by a resident letting agent, the unit in which the letting agent resides will also be sold. The sale of the management rights is a commercial transaction not caught by the 60 day rule while the sale of the unit is a residential property transaction which is caught. Section 135 is amended to remove the 60 day limit on a sole or exclusive agency agreement for the sale of the residential unit associated with the sale of management rights to recognise that this sale is part of a commercial transaction."

Despite the stated intention of removing the 60 day limit for these types of transactions, the amendment to s135(3) only results in the removal of an obligation by the real estate agent to bring this issue to the attention of the seller - note the opening words of s135(1).

The Committee has identified a problem in that s137 PAMDA - reproduced as s83 of the Bill - does not exclude this type of transaction from the operation of that section in the same way as sales of 3 or more resident properties are excluded in s137(2). The result is that although s135 does not require the agent to bring the term of the agreement to the seller's attention s137 continues to make an exclusive or sole appointment for more than 60 days for the sale of a unit with management rights ineffective.

Section 137 of PAMDA currently provides:

137 When appointments and reappointments are ineffective

- (1) The appointment of a real estate agent for the sale of residential property under a sole or exclusive agency is ineffective from the time it is made if the term of the appointment is more than 60 days.
- (2) Subsection (1) does not apply if the appointment is for the sale of 3 or more residential properties.
- (3) The appointment of a real estate agent for the sale of a place of residence or land or an interest in a place of residence or land is ineffective from the time it is made if the real estate agent commits an offence against section 134A or 135(1).
- (4) The reappointment of a real estate agent for a further term of sole or exclusive agency for the sale of residential property is ineffective from the time it is made if the real estate agent commits an offence against section 136(3) in relation to the reappointment.

The Committee proposes that a further exception needs to be included in s83 of the Bill for the sale of a lot in a community titles scheme as part of the sale of management rights of the person who is to become the letting agent for the community titles scheme in order to give effect to the stated intent of the previous amendments.

Minimal deposits and full commissions

Members of the Society have reported instances where:

- minimal deposits were taken at the time of contract formation by the seller's agent
- the contract was subsequently terminated by the seller for the buyers' default, or for some reason the seller releases the buyer from the contract as it is obvious they lack the capacity to complete the transaction
- the agent claims a full commission from the seller under the standard terms of appointment.

In these cases members have expressed some frustration that the minimal deposit taken by the seller's agent at the time of formation of contract does not cover the commission subsequently claimed by the agent. This places the seller in a position of some prejudice as they are obliged to pay a full commission without the benefit of possession of an adequate deposit or proceeds from a completed sale.

The Society proposes that some consideration should be given to this circumstance.

What a resident letting agent licence authorises

The Committee proposes that the concept of land being contiguous in s113(4) be reconsidered. Currently developers are using more complex and innovative titling structures in resorts and mixed use developments and this concept no longer works in some circumstances. For example, there are often retail or commercial or open space areas between "building complexes" which mean this requirement can't be satisfied, even though in effect there is only one resort or development. The Committee proposes that rather than being contiguous the chief executive should have to be satisfied they are part of a single resort or other type of complex.

Limitations on legal practice

The Committee proposes that a note should be inserted in a relevant section of the Bill which references s23(3A) of the Legal Profession Act 2007 and highlights the limitations on a licensee in the preparation of contracts.

Thank you again for providing the Society with the opportunity to comment on this Bill. Please contact our Principal Policy Solicitor, Mr Matt Dunn, on (07) 3842 5889 or m.dunn@qls.com.au for further information.

Yours faithfully

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