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Your Ref: Land Sales Act Review

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Land Sales Act 1984 Review
Fair Trading Policy Branch
Office of Regulatory Policy
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Dear Review Team

REVIEW OF THE LAND SALES ACT 1984

Thank you for providing the Queensland Law Society the opportunity to contribute to the Department's important review of the *Land Sales Act 1984* (the Act). As you would be aware the Queensland Law Society has called for a review of this legislation for some time and it is very pleasing to see a thorough examination of the legislation being conducted in the Discussion Paper.

The guiding principle for reviewing the Act should be striking an appropriate balance between consumer protection and providing certainty and efficiency for industry. The Society is cognisant that industry practice and the level of activity of fair trading regulators is significantly different now compared to when the Act was originally introduced. This context should also be reflected in the review outcomes.

General Scheme of Act

The Society submits that the Act should deal only with the sale of proposed allotments and disclosure of relevant information to prospective purchasers relating to them. It is important that purchasers of proposed allotments are provided with a fair description of the future property they have contracted to buy and the opportunity to terminate a contract for sale if that initial description is deceptive or the registered allotment is different from the proposed allotment as described in a way which materially prejudices them.

Part 3 of the Act, dealing with proposed lots, should be harmonised with the provisions of the *Body Corporate and Community Management Act 1997* (BCCM) to make one set of clear and definitive obligations for vendors of off-the-plan strata developments. In this regard the sale of proposed lots under either the *Building Units and Group Titles Act 1980* or the *South Bank Corporations Act 1989* should also be subject to the relevant provisions of the BCCM.

Proposed Allotments

Restriction on Selling

The Society can see little utility in the retention of the proscriptive restriction on the sale of proposed allotments until a development approval or compliance permit for operational work is obtained. Having said that, certain alternate safeguards should be a part of the scheme of the Act. It would seem appropriate that a removal of the restriction should be accompanied by provisions, which require:

- that any deposit monies must be held in trust and any interest accruing is also held in trust for the purchaser until being released to the vendor at settlement;
- that settlement may only be called for after registration of the relevant plan and issue of title for the relevant allotment, using a similar model to that which exists in section 212 of the BCCM; and
- an 18 month statutory time-limit for the creation of a separate title for the allotment, which can be extended by subsequent written agreement between the parties.

The current drafting of the restriction on selling lots is unclear with regard to when the requirement for operational work has been fulfilled under section 8(1)(b). Questions have been raised about whether all types of possible work must be completed before the requirement is fulfilled. Currently section 10(1) of the *Sustainable Planning Act 2009* includes within *operational work*:

(a) extracting gravel, rock, sand or soil from the place where it occurs naturally; or
(b) conducting a forest practice; or
(c) excavating or filling that materially affects premises or their use; or
(d) placing an advertising device on premises; or
(e) undertaking work in, on, over or under premises that materially affects premises or their use; or
(f) clearing vegetation, including vegetation to which the Vegetation Management Act applies; or
(g) undertaking operations of any kind and all things constructed or installed that allow taking or interfering with water, other than using a water truck to pump water, under the *Water Act 2000*; or
(h) undertaking—
  (i) tidal works; or
  (ii) work in a coastal management district; or
(i) constructing or raising waterway barrier works; or
(j) performing work in a declared fish habitat area; or
(k) removing, destroying or damaging a marine plant; or
(l) undertaking roadworks on a local government road.

Does the current prohibition cease to apply when one or all necessary compliance certificates are obtained?

Initial disclosure obligations for proposed allotments

A purchaser of a proposed allotment is at a significant disadvantage compared to a purchaser of an existing allotment when understanding the nature and extent of the land they are purchasing.

At the time of contract a purchaser of a proposed allotment will usually not be able to conduct independent searches with authorities with regard to the future allotment's characteristics and may not easily be able to identify whether issues affecting the un-subdivided allotment will pass to the proposed allotment. It may or may not be reasonably feasible to conduct an on the ground survey of the proposed allotment.

In our view real consumer protection is to be derived from having a purchaser of property entering into a contract for sale receiving the information that they need with respect to a property to make an informed choice. The QLS has long advocated for a comprehensive and coordinated approach to vendor disclosure with respect to real property as a way in which to address the information asymmetry which exists between vendors and purchasers. In the case of proposed allotments that information asymmetry is at its most profound and necessitates the disclosure of relevant information in order to permit a purchaser to make an informed decision to buy.

When disclosure should be given?

The only effective time for the provision of disclosure information is prior to a contract being formed. Ideally it needs to be provided sufficiently prior to the formation of contract to permit purchasers to make themselves informed about the proposed allotment and to seek legal advice with respect to the sale if they so desire.

As a statement of general principle a purchaser who is provided with all relevant information relating to a property and provided a reasonable time to consider it, and seek legal advice if they choose, should be at liberty to enter into a contract without a phalanx of further compliance obligations and corresponding termination rights.

In the circumstances of proposed allotments there should always be continuing disclosure obligations where the description of the proposed allotment is varied.

The current drafting of section 9 of the Act refers to when 'a purchaser enters upon a purchase of a proposed allotment'. This language should be brought into line with the current drafting used in the *Property Agents Bill 2010* Part 6 dealing with residential property sales or BCCM. Possibly the obligation should be couched in terms of being prior to when the purchaser signs a contract for sale of the proposed allotment.

What disclosure should comprise?

In short the disclosure should comprise information necessary for a purchaser to make an informed decision about buying a proposed allotment. This may include disclosure of what infrastructure will be available at the time of settlement. The Society is aware of instances where title to allotments has issued without services being available which precludes effective use of the allotment by the purchaser. This occurs where Councils allow bonding of uncompleted works or where services such as electricity and communications are not required to be in place before the reconfiguration plan is sealed.

The Society supports having a prescribed form of disclosure to be given by a vendor to a purchaser which incorporates all relevant information about a proposed allotment (including a description of the location of the boundaries and the size of the allotment) and has any available plans as an annexure. The use of a prescribed form of disclosure would bring benefits for both consumers and industry as it would permit a consumer to more easily compare various proposed allotments and it would provide certainty of compliance for vendors.

What should happen if disclosure is not given or if it is wrong or misleading?

Currently it is an offence not to give the required disclosure and this failure also provides a purchaser the right to avoid a contract for sale. The Society supports the continuation of this approach but calls for the addition of an over-riding material prejudice test to all contract termination rights in the Act.

The current termination rights for "significant variations" are too prescriptive and can lead to unfairness to both vendors and purchasers. It is not clear what constitutes a variation in "linear dimensions".

Consistent with the modern approach to consumer legislation, a purchaser should be at liberty to avoid a contract for sale if they will be materially prejudiced by non-compliance with the Act. The Society does not support a right to avoid a contract for trivial variations or technical non-compliance. It is important for these provisions to achieve a balance between protecting consumers and providing certainty for industry. Introducing a 'material prejudice' test for termination rights goes toward achieving this balance.

Should the disclosure information be deceptive or misleading about the property the purchaser is to buy we propose that a purchaser should also be at liberty to avoid a contract for sale provided they are material prejudiced by the misdescription. In this context it seems appropriate that if a purchaser is shown one property but is provided a contract for sale for a differing allotment that they should not be compelled to complete a sale.

Given the fundamental importance of this disclosure any termination rights for absent or materially misleading disclosures should run until settlement.

Variations of existing disclosure for proposed allotments

As stated above, the information asymmetry between a purchaser and vendor of a proposed allotment is such that careful disclosure of a description of the allotment is needed to permit a purchaser to make an informed decision to buy. A corollary to this is that a purchaser must be provided with updated disclosure should that description change in any material particular and must also be provided an opportunity to avoid the contract if they are materially prejudiced by the change.

When should there be an obligation to vary an existing disclosure?

Variation of existing disclosure should follow the mechanism provided for in section 214 of the BCCM and be provided within 14 days of the vendor becoming aware of a 'material variation' between the disclosure documents and the proposed allotment.

What disclosure should comprise and what rights should accrue?

An updated disclosure should be provided in a prescribed from and clearly set out the material factors in the original disclosure which have changed as well as providing an holistic view of the proposed allotment with the variation.

A purchaser who receives an updated disclosure should be able to avoid a contract for sale if they are materially prejudiced by the variation. The purchaser should, however, be obliged to exercise this right within a specified time period following disclosure of the variation. The time period should be long enough to permit any reasonable purchaser to obtain legal advice, consider it and act accordingly.

The fixed period in which to act should be clearly stated on the prescribed updated disclosure and is both a catalyst for the purchaser and also a point of certainty for the vendor.

What should happen if disclosure is not given or if it is wrong or misleading?

A failure to provide an updated disclosure or providing a materially deceptive update is a serious matter and one which should provide a purchaser with a right to avoid a contract up to the point of settlement, subject to the over-riding material prejudice requirement.

Time to provide registrable instrument

How long is needed to reasonably provide a registrable instrument?

Reference to a "registrable instrument" is unclear. The trigger should be registration of the survey plan which creates a separate indefeasible title for the proposed allotment.

The Society is content with the 18 month timeframe for registration of the relevant survey plan following a purchaser signing a contract for sale of the proposed allotment.

Should there be any extensions?

The Society is of the view that the 18 month time period should be capable of extension by written agreement between the parties subsequent to the contract for sale being formed, or only upon taking legal advice as is provided in the waiving of the cooling off period under the *Property Agents Bill 2010* for residential sales.

What should happen if a registrable instrument is not given within the timeframe

If a registrable instrument is not provided to a purchaser within the statutory timeframe – or any further agreed period –a purchaser should have a continuing right to avoid the contract for sale at any time before the vendor gives notice that the relevant survey plan has registered.

Deposits

The Society submits that deposits must be held in trust for a purchaser of a proposed allotment until the time of settlement and that any interest accruing on that money must also be for the benefit of the purchaser, including being taken account of in any property settlement.

A purchaser who exercises a right to terminate a contract for sale of a proposed allotment must be entitled to the return of their deposit money (and any interest) as soon as is practicable by the deposit holder and may sue for the money as a debt.

In this regard sections 12 and 17 of the Act should be redrafted to state this in more accessible language.

Proposed Lots

The Society submits that Part 3 of the Act should be harmonised with the provisions existing in the BCCM and should be located there. It would be of great assistance to industry if all relevant provisions for the sale of proposed lots were located in the one act. This will bring certainty of obligation and compliance to both purchasers and vendors.

The sale of proposed lots under either the *Building Units and Group Titles Act 1980* or the *South Bank Corporations Act 1989* should also be subject to the relevant provisions of the BCCM.

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Thank you again for the opportunity to make comments on these issues. If you require any further clarification or which to discuss these issues further please 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