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Office of the President

Your Ref:

Our Ref: Property and Development Law Committee 5 December 2012

Land Sales Act review
Office of Regulatory Policy
GPO Box 3111
BRISBANE QLD 4001

[redacted]

Dear Review Officer

PROPOSED AMENDMENTS TO THE LAND SALES ACT 1984

Thank you for the opportunity for the Queensland Law Society to provide its comments in response to the proposals in the Consultation Paper.

The Consultation Paper has been considered by the Society's Property and Development Law Committee, who have formulated this response.

Proposal 1

The restriction on selling proposed allotments in section 8 of the Act is removed so that a person may sell freehold unregistered land prior to receiving an effective development permit, compliance permit or UDA development permit for reconfiguring a lot for the allotment. This would apply regardless of whether or not there are operational works for the proposed allotment.

The Society supports removal of the restriction. The Society believes that the proposed disclosure obligations and associated rights in the event of a significant variation provide sufficient protection to buyers.

Proposal 2

Based upon the Queensland Government deciding to remove the restriction in section 8 (see Proposal 1), section 9(2)(a) of the Act is amended so that a disclosure plan must include a copy of any plan for reconfiguring a lot for the allotment forming part of a development permit, compliance permit or UDA development approval only if there is an effective development permit, compliance permit or UDA development approval for the proposed allotment.

The Society queries whether there is any benefit to buyers in the Act requiring a copy of a plan which forms part of a development permit to be provided. These plans are generally less detailed than a disclosure plan. The requirement would also be disruptive to a marketing campaign where a number of contracts may have been issued but remain unsigned at the date the development permit issues. There

may also be a time lag between the development permit taking effect and the developer becoming aware of this and being able to update its standard contract.

The consumer protection object of the Act is satisfied by the requirement to provide a disclosure plan and statement for the proposed allotment and a right of the buyer to terminate if there is a significant variation. This places the onus on the developer to ensure any discrepancy between an approved plan and a disclosure plan is rectified.

The Society therefore favours the removal of section 9(2)(a).

Proposal 3

The terminology in section 9(2)(b) of the Act is modernised so that the reference to 'metes and bounds' is replaced with the term 'dimensions'. The disclosure plan must therefore include the dimensions of the proposed allotment.

The Society agrees with this proposal.

Proposal 4

Section 9(2)(c) (i.e. disclosure of contours) is amended by replacing the term 'natural surface contours' with the term 'existing surface contours' and that this new term is defined (see Terminology Proposals page 20). The contour maps required to be included in the disclosure plan must therefore show existing surface contours, with appropriate contour intervals.

The Society agrees with this proposal but proposes that a specific definition of the term is introduced into the Act to provide clarity that the term is to mean those contours in existence at the time the contract was signed.

Proposal 5

The information required to be contained in a disclosure plan under section 9(2) of the Act must also include any proposed interests which will burden the proposed land, for example, easements and covenants and also any retaining walls to be built on the land as part of any operational works. The disclosure plan must also contain proposed infrastructure services, such as sewerage and water supply, drainage, roads, electricity, gas and communication services.
Note: If statutory easements are introduced for lots which are not part of a community title scheme then the existence of these statutory easements needs to be noted in the disclosure plan.
If the sale is allowed before a development permit is granted (see Proposal 1) then information about easements and proposed infrastructure services etc must be qualified.

The Society generally agrees with the proposal. The drafting of the requirement will need to be more specific. That is, the disclosure statement should include the location of the proposed easement as well as material terms and restrictions (for example, prohibitions on building over an easement). Consequential amendments will be required to the definition of "significant variation" to take into account the inclusion of an easement or covenant which is not disclosed or a variation in the location or terms of an easement or covenant which would materially prejudice a buyer.

Proposal 6

The phrase 'fill levels, and areas to be filled' contained in section 9(2)(d) of the Act is amended so it reads 'all discoverable fill levels, including those approved by the local authority, completed prior to commencement of operational works for the lot and areas to be filled at the completion of operational works for the lot.'

The Society agrees with this proposal, but proposes that the term 'discoverable fill levels' is defined for certainty of interpretation.

Proposal 7

The definition of 'appropriate contour levels' in section 9(7)(b) of the Act for a proposed allotment of more than 2000m2 is amended to mean contour intervals of 1m.

The Society supports greater certainty being introduced into the definition.

Proposal 8

The disclosure plan required to be given to a purchaser by the seller under section 9(1)(a) of the Act must be certified by a cadastral surveyor registered under the *Surveyors Act 2003*.

The Society agrees with this proposal.

Proposal 9

The definition of 'significant variation' in section 10(5)(a)(i) of the Act, relating to area, is amended so it provides for a variation of 2% in the area of the proposed land of less than 2000m2 or 5% for proposed land of more than 2000m2.
The definition of 'significant variation' in section 10(5)(a)(ii) of the Act is modified so that it means, (as an alternative to section 10(5)(a)(i)):
- a variation of more than 1% in the length of a boundary line of land where that boundary line is of five metres or more in length; and
- a variation of 5% in the length of the boundary line where that boundary line is less than five metres.
This would be instead of the current words 'a variation of more than 1% in details of linear dimensions.'

The Society generally supports the proposal to clarify the drafting of section 10(5)(a)(i), but prefers that a termination right should only arise where there is a reduction in the area of the lot or there is material prejudice to a buyer.

The Society believes the definition proposed for section 10(5)(a)(ii) will create practical problems as the resultant change may not be material. The proposed definition assumes all lots will be rectangular in shape. This is not the case: common examples are a curved corner or a small area removed for a substation. These lots would have 2 or more small "boundary lines" which could be eliminated or significantly reduced without affecting the use of the lot.

On this basis the Society's preference would be for the linear dimensions test to be removed and a significant variation to be defined as:

(a) a reduction in the area of the lot in excess of the specified percentage; or

(b) another change which would materially prejudice the buyer if compelled to complete.

As mentioned above, consequential amendments will be required to the definition of "significant variation" if the proposal to require disclosure of easements or restrictive covenants is adopted.

Proposal 10

Section 10(2) of the *Land Sales Act 1984* is amended so that the seller is required to give the buyer a significant variation notice within 14 days of the seller becoming aware of the significant variation. Feedback sought: What do you think should trigger the seller becoming aware of the significant variation? For example, should it be when the plan is lodged with a local governmental authority or another similar body?

The Society does not agree with the proposal to require notice to be given within 14 days of the seller becoming aware. This is uncertain and unnecessary. The Society believes the obligation should simply be on the seller to give the notice prior to settlement. The Society believes it would generally be in the interest of the developer to give the significant variation notice at the earliest possible date so that, if a buyer did elect to terminate the contract, it would have the maximum possible time to resell the lot to another buyer.

Proposal 11

Section 10(3) of the Act is amended so that a buyer must demonstrate 'material prejudice' as a result of the information contained in a significant variation notice given to the buyer.

The Society agrees with this proposal.

Proposal 12

The time period in which an application for exemption must be made, i.e. 'within 30 days after the event that marks the entry of a purchaser upon the purchase of the proposed allotment' will be amended so that the application must be made within 30 days after the contract has been entered into. That is, both parties have fully executed the contract.

The Society agrees with this proposal.

Proposal 13A

Part 3 of the Act (i.e. the provisions relating to proposed community title scheme lots) are removed and transferred to the BCCM Act, specifically Chapter 5, Part 2 (Proposed Lots).

The Society supports proposal 13A, namely the removal of Part 3 of the Act to the Body Corporate and Community Management Act 1997.

However, the Society also believes the requirements of part 2 should also apply to the sale of vacant proposed standard format lots within a community titles scheme.

Proposal 14

The requirement in section 21(1)(a) of the Act is modified so that the seller is required to clearly identify the lot to be purchased by providing a copy of the (pre-approved or approved) plan showing the proposed format plan. The proposed format plan must include, at a minimum and where applicable:
- proposed lot number
- proposed lot area
- plan number
- identify parts of the lot outside a building or structure (e.g. balconies, courtyards and carports)
- proposed building floor level on which the proposed lot will be located
- the other lots, proposed lots and common and proposed common property on that building level
- orientation of the proposed lot by reference to a north point.

These details would be in addition to the details currently required to be disclosed.

The Society supports the proposal. However it is noted that the requirements appear more suited to a developed lot (either an apartment complex or townhouse development). Separate requirements would be required for a vacant standard format lot.

The Society also proposes that disclosure of the elements of common property which form part of the access to the lot or general amenities of the development are considered.

Proposal 15

The requirement in section 22(1) of the Act is modified so if a change in addresses of either the seller or the buyer, (provided on the initial disclosure statement as required by section 21), arises during the period of development, it is not included in the particulars required for a rectification statement.

The Society supports the proposal.

Proposal 16

Section 21 is amended to require the seller to disclose the time in which a registrable instrument of transfer must be supplied and that there is a right to avoid the contract under section 27.

The Society supports the inclusion of this disclosure in the disclosure statement.

Proposal 17

Sections 11 and 23 of the Act provide for the holding of bank guarantees or performance bonds used for the purchase of a proposed allotment / lot to be held by a law practice at its office in Queensland or a real estate agent licensed under the *Property Agents and Motor Dealers Act 2000* (collectively the 'deposit holder'').

The deposit holder must hold the bank guarantee or performance bond pending the performance of both parties as required by their contract. The deposit holder should be the person who is authorised to make a demand for payment under the guarantee or bond and the money received must be paid into the deposit holder's trust account pending the outcome of the contract.

The Society agrees with this proposal.

Proposal 18

The obligation in sections 11 and 23 for the holding of money (e.g. a deposit) are extended to capture those situations where options, and any other instruments such as (binding and non-binding) expressions of interest, are used.

Subject to the drafting of the amended provisions, the Society generally supports the proposal.

Proposal 19

The remedy for exceeding the 10% maximum level for a deposit on the purchase of land to which Part 2 of the Act applies is removed. In other words section 11A is removed.

Further to Proposal 19, the Queensland Government invites comment in relation to Division 4 of Part 6 (Instalment Sales of Land) of the *Property Law Act 1974*, in particular:

- whether the Division should be removed entirely and the rights of an instalment purchaser be left to the general law;
- whether it should be amended to facilitate deposits of more than 10% of the purchase price for some or all land sales; and
- whether there is a better alternative for defining instalment contracts.

Respondents may wish to comment on issues such as:

- whether amendments should be considered to facilitate deposits of more than 10% of the purchase price and, if so, whether such amendments should be limited to off-the-plan unit sales or another class of real estate sales or be in respect of all real estate sales;
- whether any maximum level of deposit would be appropriate for the legislation to provide for – 20%, 30% etc;
- whether instalment contracts should be defined without reference to a particular level of deposit;
- the appropriateness of the doctrine of penalties, the equitable relief against forfeiture or a statutory remedy (for the return or part return of a deposit) being available to a purchaser who has paid a deposit higher than 10%;
- whether a seller should have the right to hold the deposit paid as security pending the assessment of damages against the buyer for actual loss suffered by the seller;
- if there is to be a legislative amendment to facilitate increased deposits, whether such increase should be offset by enhanced disclosure or requirements for the deposit to be held in a trust account in all cases and, if so, what enhanced disclosure and trust account provisions would be appropriate;
- if the Division is retained, how should instalment contracts be described (for example, by number of instalments, progressive percentage of payments, time period over which instalments are paid or a combination of these factors); and
- if the Division is retained, should any other policy changes, be considered.

The Society generally supports proposal to remove the restriction on deposits above 10% of the purchase price in relation to high rise apartments sales. It is apparent in the current economic environment that there have been a number of instances where purchasers of such apartments have defaulted and the loss suffered by the developer has exceeded 10%.

The Society also believes the current limit of 10% may be inhibiting the funding of proposed high rise apartment developments due to the additional risk of purchaser default faced by financiers. An increase

in the maximum allowable deposit would reduce default risk for developers and financiers and may encourage further activity.

The Society is of the view that 20% of the purchase price is a reasonable deposit provided that:

- There is a cap on deposit taking of 20% of the purchase price;
- The requirement that all deposit moneys be paid and retained in a trust account is retained; and
- The new deposit ceiling is applicable to high rise apartment sales only.

The Society is conscious that the 10% deposit is an established norm in this State's property conveyancing practice and believes that this maximum is appropriate for all sales other than sales of high rise apartments. However it appears that there is now a compelling need for the greater risk in high rise apartment developments to be recognised. Accordingly the Society proposes that the increase deposit cap should be limited to that kind of development only.

The Society is also conscious that there is no legislative cap on the size of deposits which may be taken in New South Wales, but is aware that traditionally the courts there have not sanctioned the forfeiture of an amount greater than 10% without actual loss being demonstrated. The Society's Property and Development Law Committee has debated at length whether there should be a right to forfeit an amount greater than 10% of the purchase price and if so on what basis. This has required a balancing of rights and interests to achieve a result which is equitable, efficient and sufficiently certain for the parties.

The Society's main concern is that:

- it is becoming increasingly difficult for buyers and their financiers to be ready to settle within the usual 14 day period (from notice of issue of title) allowed by these contracts; and

- in a flourishing property market developers may be tempted to terminate contracts in order to sell properties at higher prices, thus making a significant windfall.

The Society therefore proposes that a developer should not be entitled to forfeit a 20% deposit unless the buyer has been given a 21 day notice to complete upon failing to settle on the due date (typically on expiry of the statutory 14 day settlement period).

In order for such a change to be effective, further legislative changes will be required:

- section 71 of the *Property Law Act 1974* would need to be amended so that such contracts were not caught by the instalment contract provisions;

- the relevant legislation would need to make it clear that a developer was entitled to forfeit the 20% deposit upon satisfaction of the procedural requirements and that the equitable doctrine of relief against forfeiture would not be available to a buyer in the circumstances;

- to ensure certainty in operation, the relevant legislation would need to make it clear that the forfeiture of a 20% deposit upon satisfaction of the procedural requirements was not a contractual penalty; and

- greater clarity is required around the ability of a solicitor who holds any deposit in the solicitor's trust account to deal with the deposit in the event of default by the buyer. That is, a provision is

required in the *Legal Profession Act 2007* equivalent to sections 388 and 389 of the *Property Agents and Motor Dealers Act 2000* so, in the event of default, a solicitor may give a notice of its intention to pay the forfeited deposit to the seller unless the buyer institutes proceedings challenging the seller's right to forfeit the deposit within a specified time (the Society suggests 60 days would be appropriate). If the buyer failed to do so, the legislation should permit the stakeholder to account to the seller.

Proposals 20 to 26

In relation to Part 2 of the Act, the term 'allotment' is removed from the Act and is replaced with the specific term 'lot'. The definition will only apply to Part 2 (meaning it will not apply to community title scheme lots) and will be defined according to the definition of a 'lot' in the *Land Title Act 1994*.

Proposal 21A for the definition of the term 'lot' becomes part of Proposal 13A (preferred approach) to align with the BCCM Act (see page 12). That is, once Part 3 of the Act is contained with the BCCM Act the term lot accepts the BCCM Act definition.

The term 'existing surface contours' replaces the term 'natural surface contours'.

To put the meaning beyond doubt, and after a replacement of the term 'natural surface contours' with 'existing surface contours' (see Proposal above), the term 'final surface contours' used in section 9(2)(c)(ii) of the *Land Sales Act 1984* is defined to mean those contours immediately after the completion of operational works for the land.

The terms 'vendor' and 'purchaser' (and their derivatives) in the *Land Sales Act 1984* are respectively replaced with 'seller' and 'buyer' (and their derivatives).

The phrase 'enters upon a purchase' in the *Land Sales Act 1984* is replaced with the phrase 'enters into a contract'. This proposal is subject to the proposal to modify the definition of the term 'purchase' and is more likely to be superseded by that proposed definition.

The definitions of 'purchase' and 'sell' are modified so they reflect the definition of 'purchaser' in section 6A.

The Society agrees with the proposals.

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Thank you again for providing the Queensland Law Society the opportunity to provide these comments.

If you require any additional information or with to discuss any aspect of this submission, please contact our Principal Policy Solicitor, Mr Matt Dunn, on [redacted] or via email on [redacted] at first instance.

Yours faithfully

Dr John de Groot
President