Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

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Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [redacted]

Dear Committee Secretary

Property Law Bill 2023

The Queensland Law Society (**QLS**) welcomes the introduction of the Property Law Bill 2023 (the **Bill**) and recognises the achievement of this significant milestone in the review of the *Property Law Act 1974* (**PLA**).

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals and increase community understanding of the law. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

QLS has been an active participant in the review of the *Property Law Act 1974 (*Qld*)* since the first discussions papers were published by the Commercial and Property Law Research Centre of the Queensland University of Technology (**QUT**).

QLS recognises the significant consultation undertaken to date and the engagement of the QUT team and the Department of Justice and Attorney-General during the review process. Both have been consultative and responsive throughout the process.

We also recognise the work involved in preparing detailed exposure drafts for public consultation, assessing the feedback received and re-drafting where appropriate. This is an intensive task but it has produced a Bill which will modernise property law in Queensland for the benefit of Queensland consumers.

This response and previous responses have been prepared with the assistance of the QLS Property and Development Law Committee, Banking & Financial Services Law Committee, the Succession Law Committee, the Litigation Rules Committee, the Corporations Law Committee and the Family Law Committee. These committees have applied their expertise to the legal concepts addressed in the Bill and throughout earlier consultations, recommending improvements for the benefit of the community and the legal profession.

Executive summary

1. QLS welcomes the introduction of the Bill to modernise Queensland's property law statute book. QLS broadly supports the approach taken in the draft Bill to use plain English language in a way which facilitates understanding and interpretation and to remove outdated provisions.
2. QLS also welcomes the updated legal framework in the Bill to facilitate electronic transactions and dealings, some of which was introduced during the pandemic.
3. QLS members have expressed support for the introduction of a seller disclosure scheme and expect significant benefits for both sellers and buyers in clarifying and consolidating the current disparate seller disclosure obligations. It will empower prospective buyers to be better informed when making a decision to offer to purchase land.
4. QLS also acknowledges the decision to include in the disclosure statement a warning statement encouraging buyers to do their due diligence in relation to flood and natural hazard risk. As the Attorney-General recognised when introducing the Bill, "there are a range of practical and legal difficulties in mandating disclosure of this information, including that the level of information held by different councils can differ quite considerably."[1]
5. QLS acknowledges and supports the policy imperative for informing potential buyers about the flooding history of a property. The impact of flooding events is devastating for property owners. We have commented further below about the complexities associated with addressing these issues in the seller disclosure scheme.
6. We have commented on a number of specific provisions below to identify drafting improvements or concerns with policy aspects of some changes.

Part 7 – Contracts, sales of land, instalment contracts and seller disclosure for sales of lots

Clause 80 Effect of inoperative computers in particular entities on day of settlement

We support the inclusion of the new clause 80 in the Bill, which enables the day of settlement to be taken to be the next business day when, for a contract for the sale of land that is an e-conveyance, where time is of the essence, computers used by certain entities are inoperative.

This clause broadly reflects the approach taken in the sale of land contracts jointly endorsed and published by QLS and the Real Estate Institute of Queensland (**REIQ**).

We also welcome the inclusion of words in clause 80(1)(c) to clarify that the computers in question may be inoperative "including, for example, because the entity is closed for business."

This will cover situations where the Reserve Bank of Australia is closed on the Queen's Birthday holidays in June in New South Wales and Victoria but not in Queensland.

[1] Queensland Parliament, Record of Proceedings 23 Feb 2023 at page 277.

This is particularly helpful given the introduction of the eConveyancing mandate in Queensland, with the *Land Title Regulation 2022* (Qld) taking effect from 20 February 2023. This challenge arises in Queensland but not New South Wales and Victoria and a statutory solution will be beneficial when the parties have not used a REIQ/QLS contract.

However, **we recommend** adding the following underlined words to clause 80(5):

> (5) The parties must do everything required under the ELN to enable the contract to be settled on or before 4:00pm on the next business day.

It is not possible in Queensland to settle a transaction in an ELN after 4:00pm due to the parameters set by the land registry for ELNs in Queensland.

We recommend the drafting include 'on or before 4.00pm', so that the timeframe encompasses settlement both prior to 4pm and at 4pm.

We recognise there may be an argument that this addition is not necessary because of the practical outcome in Queensland, due to the need to settle at the latest by 4pm in an ELN in Queensland. However, clarifying the drafting as suggested will reduce arguments between the parties.

We also query whether the drafting needs further clarification, for the avoidance of doubt to ensure that if a system is not operative on the following business day, then the section can be used on a rolling basis to again shift settlement to the following business day.

Clause 81 – Effect of adverse event on day of settlement

We recommend the definition of "adverse event" include the concept of "imminent threat".

We note the Explanatory Notes include the following paragraph:

> "The imminent threat of a cyclone, fire, flood, storm or other seriously disruptive event, where it causes serious disruption to a community, such as via an evacuation, could satisfy the definition of an adverse event, if that threat causes serious disruption to the community, even if, for example, the cyclone does not ultimately pass through that community."

We appreciate this note is intended to clarify the scope of the definition of "adverse event", however, we consider the phrase 'an event that causes serious disruption' may be interpreted narrowly by reference to the list of matters and will not include an imminent threat. The concept of an imminent threat should be included in the primary legislation.

Even if the proposed wording covers an imminent threat, it may only apply if the adverse event, e.g. a cyclone, rather than the threat of a cyclone, actually eventuates.

For example, a city may close down as a cyclone heads towards it but if the cyclone changes direction and goes elsewhere (which is a common occurrence) the adverse event never occurs so the clause would not apply.

Similarly, the Brisbane CBD was not significantly affected by the 2022 flood event but everything was closed for several days due to flooding in several areas.

We consider the risk of arguments is much greater if the clause does not include imminent threat of an adverse event, than if it does.

Part 7 (cont) – Division 4 - Seller disclosure

As noted earlier, QLS members have expressed support for the introduction of a seller disclosure scheme and expect significant benefits for both sellers and buyers in clarifying and consolidating the current disparate seller disclosure obligations. It will empower prospective buyers to be better informed when making a decision to offer to purchase land.

Overwhelmingly members have requested that the new seller disclosure scheme must clearly delineate the disclosure obligations of the seller. Clarity benefits both sellers who know what information must be disclosed and in what form, and buyers who know what information to expect.

QLS also supports the conceptual approach taken to the scheme, under which:

- before a contract for the sale of a lot is signed by the buyer, the seller must give the buyer both a statement (a ***disclosure statement***) for the lot and each document prescribed by regulation (each a ***prescribed certificate***) applicable to the lot;
- the detail of the requirements for the disclosure statement and prescribed certificate are to be set out in the accompanying regulation;
- a prescribed certificate may be a document that is required to be given to the buyer under another Act;
- a disclosure statement may be an electronic document and may be electronically signed[2]; and
- the relevant documents may be delivered to an electronic address, defined as including an email address, internet protocol address, digital mailbox address and mobile telephone number.[3]

The documents described in clause 99 are defined as the ***disclosure documents*** for the purposes of the Bill (clause 95, Definitions for division).

However, we raise the following concerns and recommendations with some specific provisions in the Bill.

[2] Property Law Bill 2023 ('Bill') cl 99.
[3] Bill sch 2 Dictionary, definition of ***electronic address***.

Clause 100 – Exceptions to requirement – local government exercising power of sale

QLS recommends removing the exception in clause 100(c).

This clause has the effect that the seller disclosure obligations do not apply to a local government or the Brisbane City Council selling a lot under a power of sale to recover overdue rates or charges.[4]

There is no exemption for other mortgagees, such as the State or financial institutions selling as mortgagee. All of the information required to be disclosed can be obtained by a search for minimal cost.

In its *Final report: Seller Disclosure in Queensland*, QUT outlined the policy rationale for including mortgagee sales in the seller disclosure scheme:

> "Submissions to the Issues Paper and the Interim Report questioned whether a mortgagee exercising a power of sale should be excluded. The argument in favour of excluding mortgagee sales is that a mortgagee will have no personal knowledge of the property and should not be expected to undertake investigation prior to sale. In the Centre's view the arguments in favour of inclusion are stronger. First, a mortgagee exercising a power of sale is under a duty to take reasonable care to ensure the property is sold at market value.[17] As part of discharging this duty a mortgagee should undertake relevant due diligence, including ascertaining any defects in the property and in the case of residential property, a valuation, which is likely to bring to light relevant financial, title and other defects impacting on value. Secondly, the information recommended for disclosure is readily available at a reasonable cost and is information a mortgagee should already seek to obtain to fulfil their duty of care. Thirdly, no cogent reason was advanced as to why a buyer from a mortgagee exercising a power of sale should be at a disadvantage compared to other buyers."[5]

QLS considers the same rationale applies to local governments exercising a power of sale to sell land to recover overdue rates or charges.

However, if the exemption is retained, we recognise that the statement which the local government must provide will at least put potential buyers on notice that some additional due diligence will be required, because the local government seller is not required to comply with the usual seller disclosure obligations in clause 99 of the Bill.

Clause 103 - Giving of disclosure documents to buyer who is not registered as bidder until after start of auction

QLS is concerned that the approach proposed under clause 103 will be confusing for consumers.

Clause 101(2)(c) provides if the lot is sold by auction and:

> "(c) if the buyer of the lot was not registered as a bidder until after the start of the auction and was not given the disclosure documents under subsection (1), the seller of the lot is

[4] These entitles hold statutory powers of sale under the *City of Brisbane Act 2010* (Qld) or the *Local Government Act 2009* (Qld).
[5] QUT's Final report: Seller Disclosure in Queensland (2017).

> taken to have given the buyer the disclosure documents before the completion of the auction only if the seller complies with section 103."

The underlined words above are a reference to clause 101(1) which provides:

> (1) A seller of a lot may give a buyer of the lot the disclosure documents for the lot in a way mentioned in—
>
> (a) section 231(1)(a)(i) or (ii) or (b)(i); or
>
> (b) section 102.

QLS considers this approach is confusing. Clause 101(1) only concerns the method of giving and not the time of giving the statement. Does this mean if a buyer registers late but already has a copy of the disclosure statement then this is adequate disclosure under the Bill?

We recommend the better approach is to delete the highlighted part of clause 101(2)(c) and then clause 103 provides for how to comply with the seller disclosure obligations in this case – that is:

(A) Buyer had already received a copy of the disclosure documents prior to the start of auction, either physical or electronic;
(B) Buyer is given a copy of the disclosure documents at the time of registration; or
(C) The documents are displayed at the auction.

Alternatively the following should be added to clause 103(1):

> '(c) the disclosure statement was not previously given to the buyer under s 101.'

We understand the effect of section 103 is that if the disclosure documents are displayed (or available electronically) before and during the auction, this will be sufficient compliance by the seller in relation to any bidder at the auction, including one who registers during an auction.

The exposure draft of the Bill, released for public consultation in July 2022,[6] took a different approach under which a disclosure statement was taken to have been given if it was linked in advertising for the auction, displayed at the auction for a specified period of time and the statement or certificate was given to each registered bidder for the auction (clause 10 of the draft Bill).

The intent then seemed to be that the disclosure statement and certificates were only properly given if provided to a registered bidder (the subsequent buyer) before the start of the auction.

This meant that if a bidder registered during the auction and then bought the property, giving the disclosure at the time of registration is too late. Therefore, no disclosure statement was properly given and the right to terminate would arise.

Clause 103 will enable a process whereby a bidder can register mid-way through an auction with insufficient time to understand the disclosure documents, which seems contrary to the intent of a seller disclosure scheme.

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[6] Exposure draft of Property Law Bill (July 2022) available at https://www.justice.qld.gov.au/community-engagement/community-consultation/past/statutory-seller-disclosure-scheme-in-queensland.

On balance we consider the approach of requiring disclosure to all registered bidders before the auction starts is preferable, as this more closely aligns with the intent of the legislation to better inform buyers about the property being purchased before the offer is made.

A prospective bidder (and buyer) at an auction should have access to the documents before the auction commences.

Part 10 - Neighbouring Land

Clause 186 – Minimum compensation (encroachment)

QLS strongly disagrees with the approach taken in this section.

Subsection (1)(a) imposes the burden of proof on the encroaching owner, which may be difficult to discharge if the encroachment has existed for many years and was built by a predecessor.

This drafting reflects the existing s 186 of the PLA. However in QLS's view, the compensation should only be three times the market value if the encroaching owner does not satisfy the court that the encroaching owner (not a predecessor) did not encroach deliberately or was not negligent.

As the court may make an order providing for reasonable access to the encroachment or curtilage (cl 186(5)), we suggest that "land affected by the encroachment" should be amended to refer to "land the subject of the order"'.

Draft Property Law Regulation 2023 – tabled with the Bill

QLS welcomes the tabling of a draft Property Law Regulation 2023 with the Bill, which will enable stakeholders to consider the overarching statutory structure of the new seller disclosure scheme.

We recognise that the draft Regulation will be subject to further review and consultation. QLS looks forward to participating in the consultation process.

At this stage, we provide some preliminary comments to highlight areas for further consultation:

Prescribed certificates under the Regulation – body corporate certificate

Prescribed certificates will include a body corporate certificate for a lot included in a community titles scheme under the *Body Corporate and Community Management Act 1997* (Qld) (BCCM Act), or a lot included in a plan under the *Building Units and Group Titles Act 1980* (Qld) (BUGT Act).

The Regulation presently provides that the seller must provide a copy of the body corporate certificate for the lot, or:

> "if the seller has not been able to obtain a body corporate certificate for the lot—a statement that the body corporate certificate is not attached and the reasons why the seller has not been able to obtain the certificate."

QLS is concerned this provision is now too wide and will apply beyond the situation where the body corporate is inactive and does not have the relevant records.

As drafted, the seller could just state that they did not have time to obtain the certificate. This would defeat the whole purpose of the seller disclosure regime for units. This provision needs to be narrower and only apply if the body corporate does not have any records or does not levy owners.

Generally, bodies corporate which are not active or do not levy owners are established under the old Group Title Plans (GTPs). We suggest that this ability for a seller not to give a certificate should be limited to those plans and not a BCCM Act scheme. Alternatively, the reason should be more limited to where the body corporate does not have records or has not levied the owners.

Although at present, under the BCCM Act, there is no capacity for a body corporate to be inactive, there are a significant number of schemes, usually old GTPs, where no body corporate operates, because there is minimal common property, such as a driveway.

With the advent of seller disclosure, it is important to make provision for this in the Property Law Regulation.

QLS recommends reform in the Queensland legislative framework to recognise "inactive bodies corporate", similar to the approach in Victoria. Even though this is not recognised in the BCCM Act, there is no reason why a definition of an inactive body corporate could not be used for the PLA disclosure scheme.

Regulation 5(1)(e) - Prescribed information for disclosure statement for sale of lot — the details of each unregistered encumbrance on the lot

QLS recommends further consultation on the best way to express this obligation in the regulation.

The current drafting raises the question of what will amount to sufficient and adequate disclosure to satisfy the requirement to disclose 'details' of an unregistered encumbrance.

We suggest that if the policy intent is to alert a buyer to the encumbrance, there needs to be a requirement to provide sufficient details of:

- the nature of the encumbrance (e.g. lease, easement, access agreement, etc.);
- the names of parties to the encumbrance (if relevant); and
- in the case of a lease, easement, covenant, access agreement — a copy of the agreement.

Merely stating there is an unregistered lease or an unregistered easement does not provide the buyer with sufficient information to make inquiries independent of the seller.

We look forward to discussing the best way to achieve the policy intent of this provision, in order to provide a prospective buyer with the information it needs to decide whether or not to make an offer to purchase.

Regulation 5(1)(i) – Prescribed information for disclosure statement for sale of lot — transport infrastructure proposals

The current draft provides that the following information is prescribed for the sale of a lot:

> "(i) whether the lot is affected by a transport infrastructure proposal that will alter the dimensions of the lot to accommodate transport infrastructure or locate transport infrastructure on the lot;"

We recommend this be altered as outlined below. Otherwise, the disclosure obligation could be interpreted only to arise if the dimensions of the lot are to be altered to locate transport infrastructure on the lot, but would not apply if the proposal does not change the dimensions of the lot.

QLS recommends this be amended to:

> "(i) whether the lot is affected by a transport infrastructure proposal to locate transport infrastructure on the lot or ~~that will~~ to alter the dimensions of the lot to accommodate transport infrastructure ~~or locate transport infrastructure on the lot~~;"

Flooding and natural disaster history

QLS acknowledges and supports the policy imperative for informing potential buyers about the flooding history of a property. The impact of flooding events and other natural disasters is devastating for property owners.

We support the proposed approach of including a warning statement in the disclosure documents, encouraging buyers to do their due diligence in relation to flood and natural hazard risk.

However, we also acknowledge that the Attorney-General has committed to continuing to work with stakeholders to develop a mandatory scheme using uniform information.

There are significant complexities with developing an appropriate mechanism for achieving meaningful disclosure of this type of information about properties and we have highlighted some of these below.

As recognised by the Attorney-General when introducing the Bill, there is an inconsistent level of flooding information held by local governments. Some local governments provide detailed and accurate information about the flooding history of a property whereas others do not as they have insufficient records.

The inconsistency of records is further exacerbated by the potential search costs involved. Some governments provide detailed flooding information for free whereas other Councils charge a fee for a flood report.

Given the importance of this issue for property owners in Queensland, it is critical that urgent steps are taken to improve the data held by local governments, at the least for developed land in towns and cities.

We recommend the State Government make funding available to:

- all local governments to undertake appropriately detailed research of historical flood events and develop mapping to show the anticipated impact of flooding events for developed land, ideally to a "lot by lot" level of detail; and
- the Department of Justice and Attorney-General, in consultation with Department of Resources, to develop a standard property flood information form which can be used by all local governments to respond to flood inquiries from the public.

Only once this work is completed can further consideration be given to including these matters in a seller disclosure framework.

However, we also highlight the following complexities which need to be addressed before expanding the seller disclosure scheme to include these matters:

1. Many Councils provide flood modelling (based on various assumptions) rather than historical information. Where historical information is provided it is generally recent flood information. Records of flood affected property in the distant past are unlikely to be accurate. There are therefore some definitional issues to be considered if a consistent approach is considered desirable and achievable.
2. Flood searches are usually given with disclaimers (e.g. modelling only, should not be relied upon for purchasing or financing). If flood information is mandated in seller disclosure, this may potentially increase the risk of liability for councils.
3. Although it may be possible to achieve consistency of information across cities and towns, it will be difficult and potentially cost-prohibitive to carry out flood mapping for all rural land in remote Queensland. There will likely need to be some limitations set as to the information which is both possible and practical to gather.

QLS looks forward to participating in further consultations about the best way to achieve a practical and beneficial outcome for the Queensland community, which reflects the complexities of natural disasters in our geographically diverse State.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [redacted]

Yours faithfully

[redacted]

Chloé Kopilović
President