Land Sales & OLAB 2014
Submission 002

Urban Development Institute of Australia
QUEENSLAND

GPO Box 2279
Brisbane QLD 4001
Level 17, 141 Queen Street
Brisbane QLD 4000

T: 07 3229 1589
F: 07 3229 7857
E: udia@udiaqld.com.au

www.udiaqld.com.au

ACN 010 007 084
ABN 32 885 108 968

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The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

BY POST / EMAIL – lacsc@parliament.qld.gov.au

Dear Committee

Land Sales and Other Legislation Amendment Bill 2014

The Urban Development Institute of Australia (Queensland) (the Institute) appreciates the opportunity to make a submission on the Land Sales and Other Legislation Amendment Bill 2014 (LSOLA Bill). The Institute provided detailed feedback in late 2012 to a *Policy proposals consultation paper* issued by the Department of Justice and Attorney-General and we are pleased to see that a number of our concerns have been reflected in the LSOLA Bill.

The Institute is on the record as being concerned that the Land Sales Act 1984 (the Act) does not achieve the appropriate balance between the facilitation of development and the achievement of consumer protection through a disclosure regime. Reform of the Act is long overdue and the Institute congratulates the Government for preparing this package of amendments that we believe will go some way to facilitating development, reducing red tape and reducing costs for consumers and home buyers.

The Act was introduced in response to a number of significant incidents of consumer detriment in the 1960s and 1970s. At the time the Act was drafted, consumer law was in its relative infancy at both federal and state level in Australia. The Act was also developed prior to the profound changes that have occurred in respect of planning practice and planning law in Queensland today. It was also designed and drafted to address development practices that occurred at that time. Much has changed in respect of all three elements. Consumer protection law is less paternalistic and is able to rely to a greater extent on prohibitions and sanctions rather than becoming intensely involved in microscopic regulatory activity. The complexity of development in contemporary Queensland has been addressed by an assiduous attention to planning law by the Queensland Government and local authorities. Processes and practices have changed significantly. Moreover, the industry has changed substantially at the same time with international development corporations, and interstate and intrastate development corporations, many of which are publicly listed, operating in the Queensland environment. There are also numerous smaller developers operating throughout the state. Further profound changes have occurred as a result of the availability of finance for development projects since the Global Financial Crisis. As such finance for the vast majority of development projects will only be attainable where development approvals are in place and a large percentage of pre-sales have been attained.

In summary the Institute particularly welcomes the following proposed changes

- The ability to sell unregistered reconfigured land
- Exemptions from the Act for reconfiguring land into not more than five proposed allotments
- Increases in maximum allowable deposits
- Removal and streamlining of disclosure requirements without reducing consumer protections
- Alignment of termination rights with the Body Corporate and Community Management Act (BCCMA)

Each of these changes will, in our view, reduce risks and costs associated with the land sales process without reducing consumer protections.

The Institute supports in principle the legislative changes being proposed. We do, however, urge the Committee to consider the following:

Selling unregistered reconfigured land

The Institute supports the removal of the restriction on selling proposed allotments in section 8 of the Act so that a person may sell freehold unregistered land prior to receiving an effective development permit, compliance permit, PDA development permit or operational works approval.

Queensland is currently at odds with interstate practice as regards the selling of “off the plan” non-community titled lots (or ‘proposed allotments’). Given the extensive planning controls that are now in place under the Sustainable Planning Act 2009 (SPA), the reality is that it is unlikely that any developer would seek to achieve pre-sales for lots without having had extensive discussion and consultation with the relevant local authority and referral agencies.

The Institute is strongly of the view that there is no rational reason for developers in Queensland of proposed allotments to be prohibited from selling land prior to receiving an effective development permit, compliance permit or PDA development permit for reconfiguring a lot for the allotment (regardless of whether or not there are operational works for the proposed allotment).

The positives to the development industry in being able to commence pre-sales prior to development approval would be to shorten the development time frame which also brings significant benefits to consumers. Given pre-sales could commence earlier, the timing would then run simultaneously with finalisation of development approvals and projects should be able to be completed within shorter time frames. Addressing the enormous burden both on the industry and consumers of prolonged development time frames has for a long time been a goal of the Institute.

The Institute is of the view that consumers are adequately protected by provisions in the Act such as the right to terminate due to being materially prejudiced or when the titles for the allotment have not been provided to the buyer within 18 months of the buyer entering into a contract.

Exemptions from the Act for reconfiguring land into not more than five proposed allotments

In 2012 the Institute highlighted in its submission on a discussion paper the red tape and wasted resources associated with applications for exemptions under section 19 of the Act. The Institute could not identify a single instance of a situation where an application for exemption was refused. As such, we formed the view that Section 19 of the Act was a classic example of unnecessary regulatory burden that wastes both the resources and time of Industry and the Department. This

ultimately increases costs to home buyers. Clearly, the fact that applications are rarely refused indicates that the Registrar deems the risk to the consumer to be insignificant.

The Institute therefore welcomes the automatic exemption proposed in the LSOLA Bill.

Deposits for the purchase of unregistered reconfigured land

The Institute strongly supports the raising of the maximum deposit level to 20% (without triggering onerous instalment contract provisions) as an important means of de-risking projects, making them more attractive to financiers and providing consumers with an opportunity to commit to a development at an early stage and provide the funding for it on a staged basis.

Since the Global Financial Crisis financiers have adopted a more conservative approach to lending and it is a widely held view that this more conservative approach to lending will remain for the foreseeable future. Allowing for larger deposits will provide added comfort to financiers.

After a prolonged period of growth, the events of the past five years has served to remind us all that property values can fall and can fall to such a degree that buyers will attempt to walk away from a deposit of 10%. This is particularly so for overseas investors due to the costs and difficulties in enforcing a sale. Overseas investors can represent a significant proportion of sales in a development, however some financiers disqualify (or at least 'discount') sales to foreign investors when making lending decisions. Higher deposits will increase the prospect that foreign sales will be treated as a presale by financiers thereby increasing the prospect that a project can proceed.

While the Institute applauds and supports the proposal to allow increased deposits, we believe there is also scope for reviewing and reforming the instalment contract provisions of the Property Law Act and recommend this be looked at in detail as part of the ongoing Property Law Review.

Alignment of buyer termination rights

The Institute supports aligning buyer termination rights with the 'material prejudice' approach of the BCCMA. The significant variation test currently in the Act is unnecessarily stringent. For instance, in a typical 600m2 house allotment with dimensions 20m x 30m, a change of just 21cm width with no change in depth would be deemed a significant variation.

The Institute believes that the test is too black and white. In some cases a 1 per cent change in a linear dimension of a lot could have a significant impact on the buyer and in others it will not. It therefore seems logical that termination rights are based on whether a buyer is in fact materially prejudiced by any variation. Whilst the material prejudice test is not as black and white as the significant variation test, the Institute is of the view that case law will quickly be established in relation to the interpretation of material prejudice in a flat land context.

Removal of unnecessary disclosure requirements

The Institute supports the changes in the LSOLA Bill that align disclosure between flat land and units and regards the removal of units from the Act a beneficial simplification.

The integrity of contracts is essential to land transactions and markets. The efficiency and efficacy of the processes for the formation of binding contracts in respect of land has a significant impact on the viability of transactions and investment in development of land. Ultimately the efficiency of these regulations impacts on the affordability of residential product by adding to the cost and risks.

The Institute therefore strongly supports the removal of, for example, the requirement for a seller to provide further notice to update buyer and seller names and addresses. The removal of such requirements will reduce transaction costs and lower risks associated with contract enforceability. It is unacceptable that contract validity can currently be determined by matters that add nothing in terms of consumer protection.

Other disclosure provisions

The Institute is of the view that the disclosure changes in the LSOLA Bill require some refinement as follows:

- Clause 11 of Division 2 (Disclosure requirements):The disclosure requirements require as part of the definition of 'Relevant Lot Particulars' the location and height of any retaining walls forming part of the work. It is unclear as to what specificity is required for the height of any retaining wall given that a retaining wall changes over the length of a boundary. Is it just a cross section that is required to comply with this? The nature of any disclosures need to be made clear in the amendments to remove uncertainty. Similarly, the compaction rates referred to in that definition also need to be clarified. The Institute recommends that clarification of compaction rate disclosures be achieved by referencing an appropriate Australian Standard.
- Standard format lot particulars: In the definition of 'Standard Format Lot Particulars' in clause 14 of the LSOLA Bill, there is a reference to '*If the Seller of the Lot intends that a building be constructed on the Lot*'. This should be clarified to only apply if there is to be a dwelling constructed on the lot by the seller prior to the completion of the sale or where the contract prescribes the design and location of the building that can be constructed on the lot after completion.
- Volumetric lots: Disclosure provisions of the BCCMA will only apply if the volumetric lot is a lot in a scheme (or will be). This means that the sale of a volumetric lot not intended to be a proposed lot will attract regulation under the Act. Sections 11 and 12 of the Act as proposed would not be able to be met where, for example, the volumetric lot had no surface footprint or was in a building. This would mean that every transaction for the sale of a volumetric lot that was not part of a scheme would have to either involve a 5 lot or less subdivision or involve provision of a disclosure plan that could not potentially be prepared as required. The Institute sees no reason for volumetric subdivisions to be curtailed such that they can only be done as part of a scheme or a 5 lot or less subdivision from a disclosure viewpoint. The Institute doubts whether this was the intention of the amendments and recommends further amendments that give due consideration for volumetric lots.
- Disclosure plan regime for Volumetric Format Plan (VFP). It is becoming increasingly common for projects to be delivered with VFP lots and no body corporate (using a Building Management Statement for example instead of a Community Titles Scheme) and also for that to be done in large numbers such as an entire building or rows of town houses. The disclosure plan regime for VFP lots outside a Community Titles Scheme should not involve a plan requiring contours to be provided if there is no surface footprint but rather a draft survey plan – in similar format to the disclosure plan for a VFP lot in a scheme.

Further Exemptions

Clause 39 of the LSOLA Bill states that the Act doesn't apply in relation to large transactions or for a sale which arises from the reconfiguration of land into not more than five lots. The Institute supports this position.

The Institute recommends that exemptions be extended to a third category of transaction namely where the buyer is a corporation or where the transaction is valued at more than $2m. It is the Institute's view that buyers entering into transactions of over $2m or corporations can safely be assumed to be sophisticated buyers with access to good legal advice and not in need of the protections in the Act. Further, in high value and more complex transactions, the legislative requirement to settle within 18 months can be difficult to meet in practice.

Take for example a larger scale residential subdivision that contains a commercial component that is to be utilised for a shopping centre or a tavern. The exemption provisions may not apply because the base parcel of land from which the commercial lot is to be sold will be subdivided into more than 5 lots. Given that a shopping centre or tavern site is commonly optioned for more than 6 months in order to set up the Special Purpose Vehicle, the eventual timeframe from contract through to satisfying conditions such as relevant approvals and permits can take some time. This makes meeting the legislative requirement for settlement within 18 months extremely difficult. Parties entering contracts of this type could be safely assumed to be sophisticated parties and not in need of protections from provisions in the Act.

Transitional provisions

The transitional provisions noted in proposed new Section 37 of the Act state that an undecided application under old Section 19 lapses at commencement. This transitional provision is problematic because all the contracts that were subject to that exemption being granted will no longer be able to have their condition satisfied. Accordingly this condition prejudices existing contracts and necessary saving provisions to those contractual instruments will be required to be inserted.

Conclusion

Thank you again for the opportunity to comment on the LSOLA Bill. The Institute would welcome the opportunity to provide more detailed feedback to the Committee or the Department if required.

Yours sincerely

Urban Development Institute of Australia (Queensland)

Marina Vit

Chief Executive Officer