Queensland Law Society

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Office of the President

Land Sales & OLAB 2014
Submission 003

4 July 2014

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

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Dear Research Director

Land Sales and Other Legislation Amendment Bill 2014

Thank you for the opportunity to provide comments on the *Land Sales and Other Legislation Amendment Bill 2014* (the Bill) which amends a number of Acts, including:

- *Land Sales Act 1984* (LSA)
- *Body Corporate and Community Management Act 1997* (BCCMA)
- *Property Law Act 1971* (PLA)
- *Legal Profession Act 2007* (LPA).

The Society was consulted in the lengthy process of forming the Bill and acknowledges that a number of our suggested drafting changes were incorporated in the Bill. The Society is grateful to the Government for the opportunity to provide into the review process over its duration. The Society has long advocated that good stakeholder consultation is the key to good law.

The Bill has been reviewed by the Society's Property Development and Law Committee (the Committee) who were generally supportive of the rationale and proposed changes in the Bill. In particular the Society supports the reduction of red tape proposed in the Bill, the clarification of a number of the existing provisions which were difficult to implement in practice and the move towards standardisation of terminology and practice between community title and non-community title lots.

In previous submissions made to the Department, the Society supported allowing 20% deposits for large high rise developments as 10% deposits were in many instances inadequate to compensate developers where buyers failed to settle. However the Society did have some concerns about extending this to all off the plan sales as it was felt it may have an

adverse impact on first home buyers if it became common practice to require 20% deposits to buy land in housing estates. Whilst acknowledging that market forces will probably prevent sellers from demanding such high deposits, the Committee did not think there was the same level of risk to developers in small apartment and housing estate developments. It is understood this is something that could be addressed by further amendment if it proves to have this effect in practice.

Having said that, there remain some drafting issues in the Bill which the Committee feels need to be addressed.

Disclosure requirements for Options

The Committee has identified an issue in the drafting of new s212B of the BCCMA and its corresponding provision in new s9 of the LSA.

The Committee is concerned that present drafting creates a loophole which enables a seller to avoid the disclosure requirements to a prospective buyer.

It is generally thought by practitioners, although not entirely settled by the courts, that a put and call option is a contract of sale which is conditional upon exercise by one party. This would mean a disclosure statement must be given before an option, as well as a contract, is entered into.

Proposed s212B makes it clear an option is not a contract because it says a seller may give a disclosure statement before the option is entered into.

An option may be a call option (which means the buyer can exercise the option to proceed with a contract) or a put option (which means the seller can exercise the option to require the buyer to proceed with the contract) or a put and call option.

The loophole created by s212B is that it enables a seller to enter into a put and call option without complying with s213. It can then give the buyer the required disclosure statement and plan. This is a first statement for the purposes of the BCCMA, not a further statement, so the grantee would have no rights if (for example) the levies were very high or the by-laws or proposed service contracts were onerous or otherwise adversely impacted on the buyer. Having circumvented s213, the seller could then exercise the put option and compel the buyer to complete. Clearly this is not what was intended.

The Committee proposes that the relevant sections should model the treatment of options in the *Property Occupations Act* 2014, and say words to the effect that:

a) the seller must comply with s213 before entering into the option to purchase the proposed lot, and

b) the seller does not need to comply with s213 before entering into a contract (a ***later contract***) formed because of the exercise of an option granted under an earlier contract, if the parties to the later contract are the same as the parties to the earlier contract.

Sellers holding bank guarantees

The Committee has noted that proposed s218A of the BCCMA deals with amounts paid as deposit funds for the sale of a proposed lot. It is also noted that proposed s218E deals with

the situation where a law practice or real estate agency receives an instrument of security, such as a bank guarantee, instead of a deposit for a seller for a sale.

The Committee is concerned that the process in s218A and s218B would not apply to instruments of security and that s218E would not prohibit a seller from holding a bank guarantee and cashing it at will. Clearly this is not what was intended.

The Committee proposes that s218E be amended to provide an obligation for a person who receives an instrument from the buyer as security for the payment of an amount under a contract for sale of a proposed lot must provide it directly to a recognised entity.

The Committee also notes that the same issue exists with the corresponding proposed s21 of the LSA.

Surveyors certificate on sale of (non-CTS) land

The Committee noted that s14(3) LSA did not give the protection which it appears was intended to buyers where there are changes to the lot.

The sub-section requires the seller to give the buyer a surveyor's certificate stating that the registered survey plan is consistent with the original disclosure plan *if this is the case*. It is therefore assumed, if there is a discrepancy, the seller will provide a further statement as required under s13. However if the seller fails to do so:

- the buyer has no entitlement to refuse to settle merely because a further statement is not given;
- the buyer is left to ascertain for itself what the differences are and whether it is materially prejudiced by them.

A potentially greater issue arises if the seller makes changes after giving a further statement. In these circumstances the buyer would not be expecting a surveyors certificate and may not even be aware of the need to carefully check the registered plan for any discrepancy between it and the plan disclosed in the further statement.

The Committee proposes the following simple amendment to overcome this issue:

"The seller must give the buyer … at least 14 days before the contract is settled:

…

(b) a statement prepared by a cadastral surveyor stating that there are no discrepancies between the registered plan and the disclosure plan for the lot given to the buyer under section 10 as varied by any further statement given to the buyer under section 13."

This would give the buyer certainty as to what it was receiving without imposing any real burden on the seller (as the surveyor who prepared the disclosure plan would invariably be the surveyor who prepared the survey plan and would readily be able to identify any changes).

The Committee was also of the view that, continuing the theme of standardisation, a similar certification should be required under the BCCMA for CTS lots.

Standard format lot particulars

The Committee notes that the term 'standard format lot particulars' introduced into proposed s213AA of the BCCMA does not include the area of the proposed lot. It appears that this is an oversight given the area of the proposed lot is 'building or volumetric format lot particulars' in the same section and the 'relevant lot particulars' under proposed s11 of the LSA..

Compaction certificates

The Committee notes that it is common practice for compaction certificates to be obtained by developers in the process of conducting a sub-division of land. As a consumer protection measure the Committee favours requiring a copy of a compaction certificate be provided to a buyer at the same time as the items in s 14 are provided.

Force majeure events and sunset dates

The Committee notes that the definition of 'sunset date' in proposed s217B BCCMA arguably allows the sunset date to be a fixed date capable of being extended by the seller for delay events beyond its control (up to 5 ½ years). This creates uncertainty for buyers and the committee suggest the definition should be amended to make it clear that the sunset date must be a fixed date not capable of unilateral extension by a party.

'Give the buyer a registrable transfer'

The Committee notes that proposed s217B BCCMA and s14 LSA use the term giving 'the buyer a registrable transfer' to describe a conveyancing property settlement.

The use of this term is problematic in the context of electronic conveyancing, which is due to commence in Queensland next February. In the electronic system, parties do not give documents to others in the way that occurs in traditional paper-based settlements, rather the system lodges electronically signed data that forms a registrable transfer with the Titles Registry upon completion of financial settlement.

The Committee is concerned that the current drafting will prove significantly uncertain in this context.

On this basis, the Committee proposes that the more regular term 'settlement' is referenced to operate in the proposed sections in a technology-neutral way, by stating that "settlement must occur no later than …" or similar.

Paying funds from a trust account

The Committee has considered whether the drafting of proposed s262A(1)(b) is broad enough to cover the circumstance where a buyer of a proposed lot has apparently abandoned the contract prior to settlement. The Committee noted that Division 2A only applies where there is a dispute or the practitioner 'considers a dispute may arise'. There were some differing views amongst our Committee members about whether a law practice could reasonably apprehend that a dispute may arise where a party had appeared to abandon a contract for sale at the point of settlement.

The Explanatory Notes relevantly state at page 35:

> The reason new section 262A provides that division 2A applies if an agent considers a dispute may arise is to provide for situations where, for example, a person who is party to a contract for the sale of a lot does not take the required action to complete the contract and does not make contact with the other party or law practice to explicitly state a dispute has arisen. Depending on the circumstances, this type of situation may lead a law practice to believe a dispute may arise about entitlement to the amount held in the practice's trust account.

While the Explanatory Notes set out the intent of the drafting of the section, it is arguable that a dispute is unlikely to arise where a party has abandoned the contract and will not take any action to give effect to settlement. The qualification that there must be a dispute or likelihood of a dispute before the procedure can be followed seems unnecessary. The Division merely allows a process to notify a party that the stakeholder intends making a payment to the other party so they can have the opportunity to object (by commencing proceedings). This is beneficial to the affected party whether or not the stakeholder is aware of a dispute or facts which might give rise to one.

Transitional – proposed s37 LSA

The Committee notes that applications for exemption under the previous s19 LSA lapse at commencement of the Bill pursuant to new transitional s37 LSA.

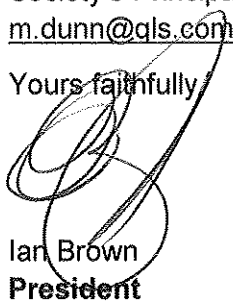
Previous s19 provided for applications for exemption in relation to land that is to be subdivided into not more than 5 allotments. Under the amendments proposed in the Bill, the LSA will no longer apply to sales of land where the sale arises from the reconfiguration of land into not more than 5 lots under new s3(3) LSA and no application will be required.

Members of the Society have advised that there are contracts on foot for the sale of sub-divided lots which are conditional on an LSA exemption being granted. The new provisions will no longer trigger that condition and the contract may sit in limbo if a buyer will not agree to waive that requirement.

In light of this, new s37 LSA should also deem that at commencement any contractual conditions relating to obtaining an LSA exemption under s19 are satisfied.

Thank you again for providing the Queensland Law Society with the opportunity to provide comments. If you wish to discuss any aspect of these submissions, please contact the Society's Principal Policy Solicitor, Mr Matt Dunn, on 3842 5889 or via email on m.dunn@qls.com.au.

Yours faithfully,



Ian Brown
President