Property Occupation Bill 2013
Submission 003

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The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
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BY POST / EMAIL - lacsc@parliament.qld.gov.au

Dear Committee

Property Occupations Bill 2013

This submission is made to you following an examination by the UDIA (Qld) of the contents of the Property Occupations Bill 2013 (PO Bill) and after consulting with our membership.

The Government is to be commended for demonstrating a strong commitment to remove red tape and reduce the regulatory burden associated with the property sales transaction process.

The Institute is on the record as being concerned that the Property Agents and Motor Dealers Act 2000 (PAMDA) does not achieve the appropriate balance between the facilitation of development and the achievement of consumer protection. Queensland's requirements for the issuing and securing of a compliant contract for the sale of a property are complex and costly relative to other jurisdiction but, in our view, with no added consumer protection advantage.

The Institute particularly welcomes the following red tape reduction proposals:

- The removal of licensing requirements for property developers and their employees.
- The removal of warning statement requirements: The integrity of contracts is essential to residential property transactions and markets. The efficiency and efficacy of the processes for the formation of binding contracts in respect of residential property has a significant impact on the viability of transactions and investment in development of residential property. Ultimately the efficiency of these regulations impacts on the affordability of residential product by adding to the cost and risks. The UDIA (Qld) therefore strongly supports the removal of the requirement to provide warning statements as a separate document attached to the contract. The removal of this requirement will reduce transaction costs and lower risks associated with contract enforceability. It was unacceptable that under PAMDA contract validity could be determined by reference to the concept of physical attachment to a contract of the statutory warning statement. The order in which pages appear or how they are bound adds nothing in terms on consumer protection.
- The removal of the requirement that licensees be in charge of an agent's sales office at each place of business when sales on behalf of a development occur: The PAMDA required that licensees be in charge of an agent's sales office at each place of business when sales on behalf of a development occur. The UDIA (Qld) has long been on the record

as deeming this requirement to be commercially impractical in most cases. The costs of employing a fully licensed person to supervise perhaps only one other person and only at one location is prohibitive. We therefore welcome the proposal to require only a principle licensee at the registered office and a registered salesperson in charge at a place of business.

- Provision of some exemptions for ´sophisticated´ parties

Each of these changes will, in our view, reduce risks and costs associated with the property 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:

Definition of residential property

The UDIA (Qld) is of the view that the definition of residential property in PAMDA and in section 15 of the exposure draft PO Bill released in early 2013 is too wide, unclear, and captures transactions that need not be the subject of regulation. The case of *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd [2008] QSC 261* involving two commercial parties served to highlight that the definition of residential property under PAMDA is incredibly difficult to interpret and, therefore, to comply with. In our submission on the exposure draft PO Bill, the Institute was concerned that proposed Section 15 would continue to provide significant headaches in the sale of 'off the plan' residential products and in particular multimillion dollar transactions. The Institute at the time recommended that section 15 of the draft PO Bill be amended to include an exhaustive list of what is not residential property (for example, where the primary use is industry, commerce or primary production), with anything that is not included in this exhaustive list deemed to be residential property for the purposes of the Act.

The Institute regards the simplified definition of residential property in section 21 of the PO Bill as an improvement and welcomes the exemptions from the residential sales contract provisions for contracts where the buyer is a publicly listed corporation (or subsidiary), a State or statutory body, or where the buyer is purchasing three or more lots at the same time.

The Institute does, however, still have concerns with the revised definition in section 21 of the PO Bill. Our concerns relate particularly to the words ‘intended to be used’. Take, for example, the sale of a property with a commercial use but in an area zoned residential. In this circumstance, is the seller expected to ascertain whether the intention of the buyer is to change the use to residential? Could the buyer terminate the contract if the seller didn’t ascertain the buyer’s intentions? A potential consequence of the use of the term ‘intended to be used’ is that sellers will take an overly cautious approach and include all transactions where there is any potential for that property to change it use to residential.

The Institute recommends including exemptions from the PO Bill for high value transactions to partially address the concerns raised above. Specifically it is recommended that transactions valued at over $2m should not be caught by the PO Bill. This will assist with the uncertainty regarding whether some properties are ‘residential’ or intended to be used as ‘residential’ for the purposes of the PO Bill such as mixed-use developments and commercial properties which are located in residential zoned areas. A further benefit of introducing a value threshold of $2m is that it will ensure sophisticated buyers are not unnecessarily caught up in the provisions of the PO Bill. It is the Institute’s view that buyers entering into transactions of over $2m can safely be assumed to be sophisticated buyers with access to good legal advice and not in need of the protections in the PO Bill.

Commissions and Form 27c disclosure requirements

The Institute welcomes the deregulation of commissions in the PO Bill and the removal of the requirement for developers engaging an agent to sell new residential property to disclose these commissions on the Form 27c. In a submission on the draft PO Bill in early 2013 the Institute highlighted the damaging effects on property valuations and sales of the Form 27c disclosure requirements (our comments are reproduced in Appendix 1 for the benefit of the Committee).

Whilst we acknowledge that some benefits will continue to be required to be disclosed and a Form 27c or similar will still exist, we are confident that a combination of the deregulation of commissions and the disclosure exemption for these commissions will sufficiently address the concerns outlined in Box 1.

Property Developer requirements in relation to marketing

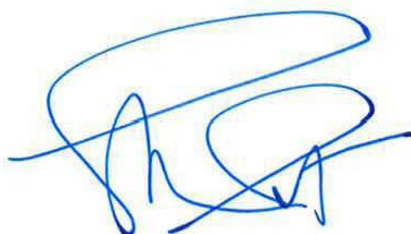
The PO Bill proposes to continue to regulate property developers in respect of activities they undertake to 'market' residential properties and in respect of receipt of payments. These provisions retain the notion that a property developer who 'markets' (i.e. promotes for sale other than by using an agent) residential property must "hold an interest of at least 15% in the property".
The Institute cannot see any sound policy reason to retain these provisions as there are other very broad provisions in the PO Bill and other legislation governing the activities of any entity or individual involved in making statements about land or promoting sales of residential property (in terms of misleading or deceptive conduct and unconscionable conduct). These other provisions are more than sufficient for the protection of consumers.

Ongoing Consultation

UDIA (Qld) appreciate the opportunity to comment on the Property Occupations Bill 2013 and would welcome the opportunity to comment on future amendments to Regulations and on other documents that give effect to the objectives of the Bill.

Yours sincerely

Urban Development Institute of Australia (Queensland)



Marina Vit

Chief Executive Officer

APPENDIX A - Extract from UDIA (Qld) draft PO Bill submission

Form 27c disclosure requirements were introduced at a time when there was concern that very large commissions were being paid to attract interstate investors to Queensland who subsequently paid in excess of fair market value for a property.

Since these requirements were introduced, the increased availability of market intelligence and online resources means that, in our opinion, a non-local buyer has a reasonable opportunity to inform themselves of the likely value of a property. It is therefore the view of UDIA (Qld) that in today's market place the consumer protection arguments for the disclosure of benefits in Form 27c are weak.

The greatest concern that the Institute has in regards to disclosures in Form 27c is the reported misuse of the information by Valuers and the subsequent damaging effects on property valuations and sales.

The Institute has been receiving widespread feedback from its members that valuations prepared for the purposes of a prospective buyer receiving finance are often inconsistent and do not reflect market value, particularly in relation to new developments.

With regards to marketing costs, the Australian Property Institute (API) in a guidance note to Valuers states that *"The valuation should have primary regard to comparable evidence that did not include any such non-standard marketing costs or inducements".* UDIA (Qld) is aware the it is standard practice for Valuer's to make the assumption that 2.5% is a 'standard marketing cost' and that any excess marketing costs beyond 2.5% that are reported in Form 27c are being used to adjust down the assessment of the value of a property. While 2.5% marketing costs may be appropriate for second hand property, a survey of our members indicates that marketing costs of approximately 5% are standard for new product.

In a recent survey of our members, 80% reported instances where the valuation of a new property was greater than 10% below the contracted price (out of a sample of 96) with the most common consequence being that the sale fell over. Feedback from UDIA (Qld) members and discussions with stakeholders in the valuation process indicate that disclosures of marketing costs in Form 27c are a significant contributing factor to these lost sales.

The reliance by Valuers on information contained in Form 27c is also resulting in inconsistences in the valuation process due to the fact that some developers outsource their marketing and others do not. Form 27c does not require internal marketing costs to be reported and therefore the developers who outsource marketing are being hurt in the valuation process. Smaller developers are particularly disadvantaged as they are most likely to engage external consultants.

In conclusion, the Institute recommends the abolition of Form 27c on the basis that –

1. The historical rationale for the introduction of Form 27c is weak in the modern market place.
2. The information is being misused for the purposes of conducting property valuations resulting in lost sales due to low and inconsistent valuations.
3. No other Australian jurisdiction imposes these disclosure requirements.