



LAPCSESC
Criminal & Other Legislation
Submission 003

Amanda Powell
Research Director
Legal Affairs, Police, Corrective Services and Emergency Services Committee
Parliament House
George Street
Brisbane Qld 4000

30 November 2011

Dear Ms Powell

Criminal and Other Legislation Amendment Bill – Amendment of Land Sales Act 1984

I am writing on behalf of the Australian College of Community Association Lawyers (ACCAL) with respect to the amendment of the Land Sales Act 1984 by this Bill. I understand that the above Bill has been referred to the Legal Affairs, Police, Corrective Services and Emergency Services Committee for scrutiny. ACCAL would like to make a submission.

The amendment proposes to change the current requirement for developers selling off the plan residential units from the current maximum period subject to a developer's ability to apply for an extension of time to a maximum of 5.5 years (fixed by regulation and not capable of extension by any means). This will allow a new statutory sunset date up to a maximum of 5.5 years, if specified in the contract, or if no date is specified, for a default maximum of 3.5 years. These changes are generally welcome but in the ACCAL's view, do not go far enough in circumstances which may be beyond the control of one of the parties, as the following examples demonstrate.

First example: while 5.5 years may be considered a long sunset period for a contract, if litigation is pursued by or against the vendor or purchaser (e.g., because of default by one of the parties to the contract), it may not be a sufficient period to enable the litigation to be finalised prior to expiry of the sunset date. Upon expiry of the sunset date, a purchaser will be entitled to terminate the contract and recover their deposit leaving the vendor developer without any remedy, regardless of whether the proceedings have been determined and the identity of the party in default.

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Second example: it may take 18 months or more after the first contract is signed for the developer to have sufficient qualifying contracts in place to satisfy a financier condition precedent allowing a draw down of funds to permit construction to commence. Construction may then take three to four years from the draw down date before the plan is registered and before the first settlements may occur. In some cases the 5.5 years may be very close to expiry or have expired.

Third example: if the purchaser does not complete the sales contract prior to expiry of the 5.5 year period and the vendor seeks specific performance of the contract, the action may take two to three years to run well and the period may expire in the interim. There is little doubt that a purchaser (who is in default in this case) could terminate the contract regardless of that default at the date of termination. In a recent Queensland Court of Appeal decision, *Dunworth v Mirvac Qld Pty Ltd* [2011] QCA 209, the court permitted the purchaser, who was subject to an order for specific performance due to their failure to settle, to terminate the contract under s 64 of the *Property Law Act 1974* (because the property suffered damaged in the intervening period and was unfit for occupation as a dwelling house). As a consequence, the purchaser escaped all liability for the default which had been found by the Court to have occurred. The same principle would apply to termination under s 27 of the *Land Sales Act 1984*, both as it exists and as it is proposed. This is a fundamentally unjust result not only for a vendor, but also for their financiers, both of whom have missed the opportunity to seek recompense for the default.

One suggestion for alleviating this position may be based upon s 128 of the *Property Law Act 1974* which deals with continuation of a lease after it has expired and litigation is on foot concerning the validity of the exercise of an option. The College suggests that in relation to contracts which are the subject of litigation at the sunset date, that these contracts remain valid or the buyer's right to terminate is suspended until the litigation is disposed of or the contract otherwise terminated whichever is the later.

A proviso to s 27 by analogy with s 128 may read:

- (1) *Where the instrument to purchase is the subject of litigation between the vendor and purchaser five and one half years after the date of contract, the instrument shall be deemed to continue in force until the expiration of the period in (2).*
- (2) *The contract shall continue in force until the subject proceedings are disposed of by the giving of effect to an order of a court as the case may be.*
- (3) *Should the vendor who has issued proceedings not take any step in the action for a period of six months, this section shall not apply.*

This solution will cover the circumstances outlined by examples 1 and 3 but not example 2. To cover the example 2 circumstances, an additional provision could be considered to allow a developer to extend the 5.5 year period for a maximum of 12 months if the developer suffers delay beyond its control in a specified number of

circumstances e.g., if there is a delay due to market conditions in achieving finance or a delay due to the developer being involved in proceedings relating to the development site with a party other than the purchaser and those proceedings have delayed the development. To ensure only the appropriate delay period is claimed and allowed, the legislation could require the period to be certified by a party independent of the developer.

Without such additional provisions (or something similar), it may be that these types of developments are unable to proceed given the more stringent conditions of obtaining finance. This would have a profoundly detrimental effect upon the construction industry.

On another point, it is difficult to comprehend why the amendment in s 27 as proposed refers to "*unqualified settlement time*" and "*unqualified settlement period*". In the College's view, the term *unqualified settlement period* is sufficient to convey the intended meaning in both cases.

I ask that you bring this submission to the notice of the Secretary of the Committee for consideration.

Yours faithfully



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President

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