Body Corporate and Community Management and Other Legislation Amendment Bill 2023

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

BY EMAIL – lasc@parliament.qld.gov.au

Dear Sir/Madam,

Body Corporate and Community Management and Other Legislation Amendment Bill 2023

The Urban Development Institute of Australia Queensland (the Institute) appreciates the opportunity to provide comment on the Body Corporate and Community Management and Other Legislation Amendment Bill 2023 (the Bill). The Institute is supportive of the State's progression of reforms in the property law and community titles area and its consultative engagement with the Institute. The Institute provides comment on Part 4 Amendment of the *Land Sales Act 1984* (Sunset Clauses) and Clause 7 referring to Termination of community titles schemes (Scheme Termination).

We strongly **recommend against** undertaking the proposed legislative change regarding sunset clauses. This area is complex, and changes would come at a time when the housing system can least afford additional uncertainty and instability. It would have a **retrospective and grossly unfair** effect on already contracted housing supply where contracting parties have established binding legal arrangements without the opportunity to have considered the impact of the Bill. As clearly articulated to the government over the past twelve months, the Institute reiterates that the present sunset clause arrangements have, in the whole, been working well. The Bill will create industry uncertain at a time when the housing market can least afford it and will have consequential and serious impacts on financing arrangements, adding to housing delivery uncertainty.

In regard to scheme termination, the Bill does not deliver on the policy intent, which was a commitment made by the government at the Housing Summit. The process created by the Bill is applicable to only a few Community Titles Schemes (CTS), paves an overly convoluted pathway to termination, and as drafted, represents a missed opportunity to deliver on the potential of policy change. If structured scheme termination has the potential to unlock housing supply, replace aged buildings with modern accommodation that complies with planning, building, and fire safety requirements, support *ShapingSEQ* consolidation goals by unlocking key land supply and support existing and emerging transport nodes such as the Metro, Gold Coast Light Rail and Cross River Rail, and enable additional Queenslanders to live near quality urban services and amenity.

Background

The property industry is a major contributor to the Queensland economy. As the second largest industry of employment within the state, it directly employs 10 percent of the Queensland workforce, and indirectly supports a further 12 percent. Underlining its importance to the state's

economy, the development industry directly contributed $31.7 billion to the Queensland economy in 2021, or 9 percent of Queensland's GSP, and a further $39.8 billion through indirect economic impacts (11 percent of GSP). [1]

Notwithstanding the industry's economic contribution, housing supply and affordability issues are presently acute and in order for the industry to play its role in solving the housing crisis, measures that provide greater industry certainty, boost supply, and a stable regulatory environment are urgently needed. The consequences of rising rents and house prices, coupled with reduced home ownership at retirement age, has ushered in the dawn of a new age of haves and have-nots in Australia based on home ownership. The situation of record low rental vacancy rates and rising rents adds to the crisis. The State's Housing Summit response acknowledges that additional housing supply can help with managing the cost of housing and rental supply, and places increased importance on the contribution of all levels of government and industry in delivering the housing summit response. The Institute acknowledges that reforms to the *Body Corporate and Community Management Act 1997* (BCCM Act) can contribute as part of the solution.

Sunset Clauses (Amendment of the *Land Sales Act 1984*)

We strongly recommend against undertaking this legislative change. The practical operation of sunset clauses is complex and changes would come at a time when the housing system can least afford additional uncertainty and instability.

The Institute has several concerns with altering the *Land Sales Act 1984* (LSA) arrangements for contracts. Changes to off the plan residential property contracts should not proceed as:

- it would contribute to housing supply constraints and thereby increase unaffordability
- the industry is faced with a precarious economic environment and any changes to current arrangements will cause disruption at a time when the industry can least afford it
- the current off the plan land sales system is functioning in a balanced way with due regard to the rights of both sellers and buyers
- the few issues that have arisen are more relevant to inadequate understanding or pre advice by purchasers and the Institute reiterates its calls for the government to play a proactive and responsible role in this issue by providing broadscale advice to purchasers about the importance of seeking independent legal advice, prior to signing a property contract
- buyers are currently well protected as:
    - they hold a statutory termination right outside the contract which cannot be modified, and where the market has deteriorated they can exit at the sunset date (where the developer cannot without a contractual term);
    - they can contest a termination where the seller has not used 'reasonable endeavours' to reach completion by the contractual sunset date – a seller cannot "sit on its hands" in this regard and still seek to rely on the contractual clause;
    - the Australian legal context protects buyers against:
        - overly wide, discretionary termination rights for matters that make the contract illusory at law; and
        - unfair contract terms (with such terms being void)

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[1] The Contribution of the Development Industry to Queensland, Urbis, November 2022

- sellers should not be compelled to complete a contract that would be unviable, cause financial default or the seller to become insolvent – the criteria the Bill presents are overly wide and weighted against a seller / developer in that they do not consider the specific project context (i.e. developers may be compelled to complete unviable projects if they do not on a stand-alone basis lead to insolvency of, or threaten the viability of, the developer's entire business)
- the risk in development is largely on the sellers' side and should not be exacerbated by having to continue development that has become (due to matters outside the seller's control) uneconomic
- contracts would be made more uncertain, threatening the ability for developers to attract financing for residential projects, at a time when the state needs urgent housing supply
- financiers for sellers / developers will be less willing to lend money to a developer who has an open ended obligation to proceed to develop no matter what occurs or how long it takes – and the structure of the proposed mechanism in the Bill compounds this risk (as we have outlined below)
- for both legal contractual certainty and contractual fairness, the seller must also have the capacity (as it does now) to include a right to terminate the contract if it cannot deliver title by a stated or otherwise prescribed date – the way the Bill constrains such rights effectively makes them inoperable (as we outline below) and this will be the view of financiers and investors in allocating funding to projects
- the complexity of land development such as around achieving tenure, obtaining approvals, titling, satisfactory building completion, and financing requires contractual options to ensure the industry can function. The many variables that affect delivery cannot be mitigated by one party and contractual flexibility is a reasonable and fair method of balancing rights, particularly given required pre-contractual disclosure. Indeed, disclosure requirements will be enhanced by the introduction of the seller's disclosure regime under the Property Law Bill.

In regard to reduction of the ability of the seller to exit the contract except with Supreme Court approval, the below issues have been identified:

- Seeking the buyer's consent to have a contract terminated is impractical, given the buyer is unlikely to understand the complexities of delivering product to market with sufficient depth to assess the reasonableness of the seller's actions. It follows that it is unfair to, in effect, force both parties to a court process to determine retrospectively whether the seller has acted with justification in exercising a contractual termination right
- If Court approval to terminate a contract is required, we estimate based on expert advice that the likely costs for an application (being the seller 's costs only) to the Supreme Court of Queensland for an order entitling a developer to terminate an off the plan contract would be:
  - $50,000 to $100,000 (exclusive of GST) for legal costs (inclusive of junior counsel's fees); and
  - $20,000 (exclusive of GST) for valuer's fees (as valuation evidence may be required, and valuation evidence was considered relevant by the Supreme Court of New South Wales in a case which considered the recently amended New South Wales equivalent)

- We estimate that the likely timing for such an application to be heard by the Supreme Court would be two to three months once the proceedings are commenced and this would be the minimum timeframe with potentially longer periods depending on court case loads. This would be onerous, costly, and cause delays for the buyer and seller
- The contractual position between the parties would be uncertain until the outcome of a Court application was known – the seller may be at risk of repudiating the relevant contract if the sunset date passes and it does not continue to progress development or seek title creation, even though termination may be sought to recognise the futility of such steps or the adverse compounding economic impacts of being forced to continue with development with fixed and diminishing returns.

Alternatives to the proposal are noted below, as are specific concerns with the wording of the Bill.

Retrospective provisions

The Institute strongly opposes the proposed retrospective operation of proposed Division 4A on existing contracts, as the parties to existing contracts have had no opportunity to consider the impacts when preparing or concluding the contract. The terms of existing, unsettled off the plan contracts should reasonably be accepted by Government to contain provisions, including about termination, which are acceptable to developers and the buyers and were negotiated in the context of the existing legislation and when the proposed new laws did not apply.

There will be a considerable additional cost impost on sellers under existing contracts which was not within their contemplation when contracting with buyers. This is fundamentally unfair. See further below as to our concerns about costs and other aspects of the Court assessment process generally. Those concerns, if carried through to contracts that could not have anticipated this regime, will be exacerbated by retrospective application because:

- A term that was legitimately drafted to give the seller the right to terminate if title is not created by the sunset date would be potentially rendered void by section 22 of the LSA if it does not acknowledge the limitations on the exercise of rights under the clause in the new provisions. Accordingly, retrospective application will involve the rewriting of the contract rather than the regulation of the exercise of rights under it – the seller will not even have the opportunity to seek the buyer's consent to termination under a "sunset clause" because that clause may be void from the moment the new provisions commence
- The seller will not have had an opportunity to frame the contract to account for factors the Court may assess in determining the equity in allowing termination – for example, the seller may have elected to make additional pre-contractual disclosures about the risks of the development to the buyer if it knows it must demonstrate the buyer was aware of those risks when the parties contracted; or the seller may wish to include specific termination rights that are tied to specific adverse impacts or events occurring (or occurring by a relevant time prior to the sunset date) rather than to rely on the sunset date as a trigger – and such inclusions would be a perfectly legitimate and transparent way for the seller to proceed.

Previous consultation materials suggest immediate and retrospective application to land subdivisions is appropriate because that form of development is not as adversely affected by costs and economic conditions as higher density development. This assertion is not made on empirical evidence. The cost escalation risk is, in a relative sense of impact on feasibility and viability, **just as significant to any land project** as while there may be different levels of materials required and

works to be completed, revenues on a per lot basis will be lower and the impact of time, contractor availability, and increased costs of materials and labour is just as material to land subdivision.

Retrospection provisions and existing contracts

The changes are retrospective in that they will apply to unsettled off the plan sales in the market when the Bill is passed. Realistically no buyer would be expected to consent to termination of the contract, no matter the circumstances for the seller, if the value of the land sold has increased materially. The seller's revenue is by contrast fixed while documented and demonstrable impacts of cost escalations and other changing economic conditions will have been borne by these projects that have been in the market in the last 18-24 months.

In this situation we would expect court applications would likely be needed to be sought by sellers to endorse contractual rights already agreed to. For these existing contracts great cost will be experienced in examining the range of clauses used.

We understand that there will be a review of the operation of the legislation. This review mechanism is an acknowledgement that the full impact of these changes is **not able to be properly assessed or known at the commencement date**. Accordingly, it is self-evidently prejudicial that existing contracts be subject to any as yet unidentified shortcomings and that the parties to them will not have the benefit of any review outcomes. The nature of these changes is fundamental to contracting freedoms in the market - such changes should not be introduced on a retrospective basis. This approach is contrary to sound presumptions against retrospective operation of legislation.

Lack of buyer requirement to respond to a sunset date notice

It is not mandatory to apply to the Court for an order terminating the contract. However, the seller is required to issue a sunset date notice because under section 19D(1)(a)(ii) it cannot terminate the contract without the buyer's consent. The failing of this section is that if the buyer fails to respond and notwithstanding that it has an obligation to do so under section 19E (2)(b)), it is not taken to have consented. The seller's only options are to decide to either settle the contract regardless of the economic impact of doing so or apply to the Court. This is highly prejudicial to the seller in that the buyer has no sanction for not responding and can effectively force the seller to go to court for an order through inaction. This is **not a fair balance between the parties**. The buyer must be required to give a response and failing that the seller should be entitled to proceed to terminate the contract. The buyer is given ample time (28 days minimum) to assess the seller's notice which must provide reasons for the proposed action.

Ongoing role for termination clauses for other purposes

The changes would create (prospectively) two types of sunset dates – settlement and non-settlement matters (both relevant events) and scope is left for the regulations to prescribe both additional relevant events and ways to terminate a contract. However, the seller's ability to get a court order could be affected or curtailed if the Court considered a clause giving the seller the right to terminate for economic impact reasons to be a clause intended to circumvent the sunset date prohibition. This could be argued where the termination clause referenced the ability to register plans being affected by other factors or events but even if not mentioning any settlement date or other date or condition relevant to title creation.

The Bill should make clear that specific termination triggers are not able to be treated as a "relevant event", such as: obtaining financing commitments, obtaining sufficient pre-sales on satisfactory

terms; obtaining satisfactory construction contracts; development meeting a defined feasibility benchmark; local government or other agency planning, engineering, infrastructure, easement, and plan sealing approvals being available. These types of factors are already the subject of clauses in many off the plan contracts and legitimately so. Developers recognise that such clauses cannot be so wide as to make the contract illusory, and they will be undone by the Australian Consumer Law (ACL) unfair contracts regime if they are too wide. For this reason, such clauses generally nominate set dates or benchmarks by which these types of conditions must be satisfied for transparency and balance. For other conditions it would be grossly unfair if the seller's right to terminate was constrained, when a factor actually prevents it creating or delivering title. For example, if a local authority refuses to seal a plan, making it impossible for the developer to register that plan, then there should never be a constraint on the developer's ability to terminate the contract for that refusal, regardless of whether that impacts on the ability to create title by the sunset date.

The Institute is concerned that the regulation making power to determine additional "relevant events" in the definition in section 19B will lead to situations where the scope of relevant events is expanded to encompass other discretionary rights to terminate which are not tied to the sunset date per se but which are related to factors that might otherwise ultimately prevent the developer creating title or which make the continuation of the contract economically unviable. For example, if a contract provides a right for the seller to terminate the contract where the occurrence of a force majeure event (say a flood) makes the project unviable, that right should not be subject to regulatory prescription beyond the existing legal principles that apply to such discretionary clauses (as noted above common law principles and the ACL unfair contracts regime). To ensure clarity for sellers and buyers, buyers should be required to acknowledge that these types of conditions can apply and the seller could be required to disclose that there may be terms of the contract other than sunset date clauses that give rise to termination rights.

The Institute is strongly of the view that the regulatory power to add "relevant events" should be excluded from the definition in section 19B. The prescription and limitation of contractual rights is a fundamental matter that should be the subject of legislative review and should not be a matter of delegated authority or discretion.

The Institute's concerns are magnified by the apparent perception (as evidenced by the changes in the Bill) that developers (as sellers) should have limited contractual freedom, irrespective of pre contractual disclosure and the clear imbalance in risk allocation inherently assumed by developers in funding and undertaking projects. As has been stated, developers do not control factors that can, and do change, post commencement of marketing of projects and which, with all the diligence in the world, cannot be fully mitigated or offset. It is not satisfactory to say that this is simply a cost of business that should be borne irrespective of the consequences (developers attempt to mitigate this risk by including appropriately balanced contract terms).

The Institute is also mindful that the factors the Court is obliged to account for in assessing a termination right for a sunset date are biased towards economic impacts being considered not in the scope of the particular affected project but in the scope of the developer's entire business undertaking. This suggests that the policy behind the Bill assumes that developers should "carry" unviable or economically prejudiced projects if they have offsetting business activities. Such assumptions are a fallacy – developers do not set out to undertake unviable projects but this underlying policy view makes it more likely that the regulatory power to prescribe other "relevant events" will be exercised with the same misconceptions being made.

Further, the Institute is concerned about the constriction of the actions of developers at both the front and back end of development activity. For example, the government-initiated review of the role of developers in the construction industry presented views that contractors should have greater pricing flexibility and construction contracts should move away from traditional design and construction models and risk allocations. In other words, developers are expected to accommodate pricing variability and a wider range of pricing increase risks with contractors but on the other hand are also to have limited rights to exit contracts that provide insufficient revenue to meet those increased costs. These factors further raise concerns about how the regulation making power may result in contractual rights designed to mitigate risk and cost variability being **sterilised** by the misconceived exercise of regulatory discretions motivated by political pressures rather than sound policy principles based on empirical evidence.

Sunset date and sunset clause

The Institute believes a better system would be to **allow an exception to the application of these provisions** where the seller discloses in pre-contractual disclosure not only the statutory sunset date (as is currently the case) but also a statement as to any sunset clause contained in the contract and its effect – the substance of such a statement could be prescribed. This would align with the prospective seller disclosure requirements to be enacted and afford the buyer a clear opportunity to undertake due diligence on the potential consequences of a sunset clause being included in the contract before entering the contract. If the seller fails to give disclosure then, without limiting the other consequences of deficient disclosure, the requirement for a seller's sunset clause notice or Court application would then be triggered. This would balance the parties' rights while encouraging more expansive disclosure by sellers of the matters that may give rise to the need to rely on a sunset clause and the consequences. It also provides an appropriate symmetry between the seller making disclosure prior to contract and the need for the buyer's consent to be obtained if it does not do so, but not otherwise.

The proposed wording of the definitions of sunset date and sunset clause means that a contractual clause that gives a seller a termination right with respect to any date earlier than the statutory maximum period to settle, would not be a sunset clause. The evident intention is to limit regulatory intervention to the exercise of rights that are directly connected to the statutory sunset date only, as a termination trigger. As noted, the Institute has concerns about misuse of the regulation making power to expand the categories of clauses considered to be sunset clauses, and additionally the Bill raises uncertainty about the validity of clauses that should reasonably be considered legitimate inclusions in a contract as they reflect risks assumed by developers appropriately or are able to be negotiated and / or are transparent.

Should a contract designate any earlier date than the statutory sunset date as a termination reference date, there would likely still be arguments that such a clause was an attempt to avoid the legislative prescription and be void. This would arise as a result of Section 22 of the LSA which says that a contract for the sale of a proposed lot is void to the extent to which it purports to exclude, restrict or otherwise change the effect of a provision of the Act. For example, a clause that gave a seller a right to terminate if title has not been created (for reasons outside the seller's control) by the date that is 30 days prior to the 18 month statutory sunset date may be attacked (despite not being a sunset clause as defined) on the grounds that it was an attempt to circumvent the legislation by choosing a date close to the sunset date.

The same clause that gave a seller a right to terminate if title is not created within say 12 months (for reasons outside the seller's control), could also be said to be restricting the operation of the prohibition or otherwise changing its effect, even if it clearly has little connection to the sunset date in a temporal sense. The closer the specified termination date is to the statutory date, the more likely such an argument is to be relevant.

This issue also potentially affects clauses that operate on events like force majeure events, obtaining satisfactory pre-commitments, obtaining satisfactory funding arrangements; or obtaining a satisfactory build contract.

While it can be argued that if the section itself excludes from its scope in the first place any clause that relies on an earlier date or a different trigger event, then adopting an earlier date or referring to a different trigger cannot be an attempt to avoid its operation. This ambiguity and the fact that any clause could be attacked using section 22 with varying likelihood of success is an unsatisfactory position in all respects.

At a minimum the legislation should state that for clarity, clauses in contracts allowing the seller or buyer to terminate a contract are not taken to contravene section 22 of the LSA as being "intended" to circumvent Division 4A by reason only of referring to earlier dates for matters identified in the definition of relevant event or different triggers (i.e. other than the creation of title).

The Institute recommends that the legislation be clearer about expressing an intent that only a clause tied to the statutory sunset date is a sunset clause by expressly excluding provisions that give a termination right for:

- title not being created by an earlier date; or
- the occurrence of any specified event or matter, other than title not being created prior to the statutory sunset date.

The operation of section 22 of the legislation also needs to be specifically addressed in this context. The provisions should state expressly that section 22 has no application to and will not render void any provision of a contract on the ground of excluding, restricting or otherwise changing the effect of the sunset clause terms if the relevant clause:

- is a sunset clause as defined but does not reference the limitations in Div 4A expressly
- includes a termination right for the seller's benefit that is tied to a date earlier than the sunset date regardless of the date's proximity to the statutory sunset date
- includes a termination right for the seller's benefit that is related to the occurrence of any specified event or matter, other than title not being created prior to the statutory sunset date.

As noted above the sunset clause notice requirement is deficient in the Institute's view because there is no obligation on the buyer to do anything having received a sunset clause notice from a seller. The buyer should be obliged to respond to the seller's notice within a specific period and either state that it accepts the seller's notice or that it does not and if not, it should be required to say why not. Given that the only option for a seller in the face of a lack of response from a buyer is to apply to the Court, there should be an onus on the buyer to disclose its reasons for rejecting the seller's sunset clause notice and those reasons should be open to scrutiny by the Court. A lack of response should be a deemed acceptance of the seller's right to proceed to exercise its rights under a sunset clause.

The legislation should also recognise that these processes do not occur in a vacuum. The contract remains on foot. It is not suspended while the sunset clause notice process occurs or where a Court application is made. There should be an express recognition that the seller may exercise any termination right it otherwise has under a contract and which it accrues regardless of the issue of a sunset clause notice or the making of an application to the Court – for example, if the buyer breaches or repudiates the contract or becomes insolvent or incapacitated.

Further, a seller should be expressly protected from any claim that it has repudiated the contract by not continuing to perform development obligations where it has given a sunset clause notice, the buyer has rejected that notice and the seller has applied to the Court. The very purpose of the application is to relieve the seller of the ongoing contractual obligation to continue to attempt to settle the contract where doing so would involve detriment or hardship to the seller.

The requirement to seek Court approval to exercise a permitted contractual right (the legislation does not prohibit sunset clauses) is an extraordinary imposition on the contractual framework and as such, the position that may otherwise apply at common law (i.e. repudiation from a failure to perform or evincing an intention not to perform) should be suspended until that process is completed. Otherwise, the seller will be compelled to continue with development for potentially many months and incur the costs of doing so when it should have been entitled to terminate as at the statutory sunset date.

As indicated below, the current 18 month sunset date maximum is regularly too short a timeframe for development. This timeframe cannot possibly accommodate the development process, the sunset clause notice process, and Court application timeframes, such that these matters can all be resolved prior to the statutory sunset date to avoid the need to suspend contractual performance.

Timing of the sunset date

If the government is genuinely committed to providing a greater level of certainty to buyers regarding the delivery of title to property, the Institute recommends that the sunset date be expanded from 18 to 24 months minimum and preferably to align with the default period for proposed CTS lots of three and a half years. Alternatively, specify 18 months as a default sunset date but allow developers to specify a later date (up to three and half years) contractually (as the *Body Corporate and Community Management Act 1997* (BCCM Act) does).

In the context of land sales, the timing issue raised above relating to sunset clauses and the proximity of trigger dates to the sunset date, could also be mitigated by recognising that 18 months is too short a statutory sunset date and all parties would benefit from having a longer period that would better accommodate development timeframes and avoid or allow mitigation of delay impacts that have led to the collapse of some contracts. The 18 month maximum timeframe in the current industry context of extreme challenges, including material supply delays, shortage of contractors and labour, places sellers into an unenviable position on sunset timing for settlements. Specifying a longer sunset date would also allow developers to set realistic dates for termination rights to be exercised before sunset dates and consequently aid in transparency for all parties.

The nature of land subdivisions has changed in scale and complexity since the 18 month timeframe was introduced. Developments are now often larger, multi staged and mixed use. Even relatively low lot number stages can take extended timeframes to be approved and brought to market where they are part of master planned communities with large infrastructure

requirements and complex internal and external planning frameworks. In other contexts, even stand alone or infill subdivisions face more complex environmental and other planning factors that make the 18 month maximum an unrealistic delivery timeframe for creation of titles.

Proposed section 19F Supreme Court Order to terminate under sunset clause

As noted, the imposition of a Court process to obtain approval to terminate will impose a considerable cost burden and one that is likely to be prohibitive for sellers; especially when such an application may be required for multiple contracts and there is no assurance that those matters would be joined or heard together, and even if they were, the costs would be considerably increased with additional parties. The Bill provides an exception for the buyer's costs being borne by the seller only if the seller can prove the buyer unreasonably refused to consent to termination under a sunset clause. The seller will have to engage in significant dealings to establish a threshold of "reasonableness" (for section 19E(2)(a)) when seeking the buyer's consent (including to state the reasons as required by section 19D) and without any certainty that having spent time validating the relevant factors that make progression untenable, the buyer will actually respond.

The Bill says nothing about the consequence of the buyer not discharging the buyer's onus to act reasonably in considering the content of a sunset clause notice and a buyer may simply ignore the notice. As noted above, the absence of any response from the buyer should be the trigger for the seller to be able to proceed to exercise the agreed contractual termination right. In effect the failure to make any response would not (and should not) be seen as being "acting reasonably in the circumstances".

It is not sufficient sanction that the buyer faces a prospect of having to carry its own costs should it act unreasonably. Firstly, the consumer protection focus of this legislation means a Court is unlikely to make orders for costs save in exceptional circumstances. Secondly, the seller will have to expend the money in both preparing and negotiating with a buyer on a sunset clause notice and then in pursuing the court application before there will be any scrutiny of the buyer's conduct. Thirdly, the factors the Court may consider in assessing the just and equitable grounds for termination do not reference the buyer's conduct in response to a sunset clause notice (whether 19F(3)(b) was intended to refer to both seller and buyer is unclear but as consideration of the reason for termination in a sunset clause notice is not "performance of their (sic) obligations" this will not be caught in any case). Nor is section 19F(3)(h) sufficient in this context (to catch a failure to comply with 19DE) and the catch all in section 19FD(3)(j) gives insufficient certainty that the buyer's response will be reviewed.

Reference should also be made to pre-contractual disclosure given by the seller (in section 19F(3)(a)), as the seller may disclose to the buyer before it enters into the contract a number of development risks it faces and the rationale for inclusion in the contract of specific discretionary rights terms to mitigate that risk – including the right to terminate the contact for stated reasons or under a sunset clause. The buyer's awareness of those rights and risk should be acknowledged in considering what it accepted may occur when it signed the contract with that disclosure having been made.

Section 19F(3) must also include the reasonableness of the buyer's conduct in the factors that are to be assessed by the Court. As noted above there should be a more formal response timing and process for the buyer, once the seller issues a sunset clause notice. If the buyer fails to respond (if not deemed to accept the right to terminate) then that should be a basis for the Court to determine that the buyer has raised no substantive reason not to allow the seller to terminate.

The factors referred to in section 19F(3) also speak in absolutes – i.e. that the seller "cannot complete" the contract. This is inconsistent with the basis for the sunset clause itself. The foundation of the right to terminate is not that the seller cannot complete the contract at all but rather that it cannot settle the contract "**by the specified sunset date**". It is therefore not appropriate for the Court to be considering whether the seller cannot complete the contract – it will nearly always be theoretically possible for the seller to complete the contract at some point if the expense and impacts of doing so are disregarded. The factors in section 19F(3) must therefore be drafted to refer to consideration of whether matters beyond the seller's control affect the sellers ability to settle **by the specified sunset date** (section 19F(3)(c)(i)) and the impact on the viability of the seller's business if it were to be compelled to take steps to settle **by the specified sunset date** (section 19FD(3)(c)(ii)).

In relation to section 19F(3)(c)(ii), the reference to the "seller's business" should be removed and replaced with reference to only matters affecting the "viability of the seller's development in which the lot is located". As noted above, the fact that the seller may have offsetting business activities or will not be made insolvent by one project being impaired does not change the fact that if the project is materially adversely affected the seller should not be seen to be acting unreasonably.

Given the Government sets the sunset date in the first place it is not reasonable to be making judgements on the basis of whether the seller could continue **on beyond the sunset date** and still complete the contract. At a minimum any such consideration of prospective action and impacts should be confined to a short subsequent timeframe of no more than six months - which is still a third of the total time the Government allows as sufficient to complete a subdivision of land, and which is, respectfully, an inappropriate timeframe as noted above. Section 19F(3)(e) also needs to refer to "if the seller cannot settle the contract by the specified sunset date" in each relevant use of the reference to "complete the contract".

Consumer education

We note the Bill does not address consumer understanding of off the plan sales. Many consumer concerns as to sunset clauses result from a lack of understanding in relation to development processes generally, or the terms contained in off the plan contracts (including a failure to seek appropriate legal advice as to those terms prior to entering into a contract). Unfortunately, a lack of consumer knowledge about planning and property matters is not uncommon.

Without adequate understanding and without independent advice, significant confusion on property matters arises for buyers. The Institute suggests that a succinct mandatory note be included in off the plan contracts, recommending that the buyer should seek advice as to the implications of the rights given to both parties under the contract in respect of the sunset date. As noted, if the seller's disclosure obligations are also expanded to address the substance of sunset clauses then that should relieve the seller of the need to seek a further consent to exercise the contractual rights it specifically disclosed at the outset. Also, the Department should design and invest in a public campaign to provide further information on the importance of seeking independent legal advice, prior to entering a property contract.

Scheme Termination (Clause 7 - Part 9 Termination of community titles schemes)

The Institute supports Scheme Termination (clause 7) our reasons for support of change in this area are:

- To provide genuine alternatives to owners in order to address existing CTS buildings that are in poor repair, outdated, and at their end of economic life
- To enable the redevelopment of key underutilised sites and in turn potentially increase the number of households that are close to facilities, public transport, retail, amenities, and social services
- Provide for additional diversity of housing to meet the changing housing needs of our community
- Provide a route to reduce disputation between lot holders over the future of their community titles scheme and the potential for unseemly or unfair financial outcomes between lot owners, noting that in many instances schemes nearing the end of their economic life need to pass resolutions to raise the necessary funds to maintain common property to a safe standard
- Meet the housing supply targets in *ShapingSEQ*.

The Institute, however, is concerned that the Bill does not deliver sufficiently on the benefits outlined above, nor the policy intent of the change. Our concerns are that the process created by the Bill is applicable to only a few CTS in extremis. The proposed process for those limited schemes is complex, costly, and will disincentivise many from even commencing discussions.

Reasons for termination

The changes included in the Bill largely follow the recommendations of the Commercial and Property Law Research Centre at the Queensland University of Technology review. However, the proposal is only relevant to assist buildings that are near their end of life or have significant and costly building issues. We point out that Professor Bill Duncan (an author of that mentioned review) has subsequently indicated in discussion forums his support for expansion of the scheme termination proposal for any CTS in which economics point to its desirability for redevelopment. The Institute supports that view.

In the progress of the proposal into the Bill, it has become clearer that the process has the potential to be complex and costly. It has been estimated that the minimum time required to progress a termination is seven months before a sales process could begin. There are at least three General Meetings with a collective notice period of approximately 231 days (seven months) required, and this excludes the time that may be required to complete actions between them. This of course assumes unflexing agreement of parties, limited additional consultation, no objections being lodged, and timely delivery of a pre termination report, termination plan, and facilitator. The cost of this process falls upon the body corporate, which of itself may raise concerns for lot holders.

Payment of all costs by the body corporate may also perversely incentivise some lot holders to make an objection as they would not be as directly responsible for the costs incurred. The costs and delays of dealing with objections, consultation to ensure understanding, and potential court costs would be considerable. The Institute estimates an effective and agreed process may cost many tens of thousands of dollars if contested. A motivated body corporate committee is also required to drive the process and support the costs for the plan and facilitator to be successful. In order to support the redevelopment of ageing CTS, arrangements should be pared back, result in lower costs for lot holders, and not incentivise objections.

The Institute is particularly concerned by the costs of the process for a small CTS. We note that CTSs under 10 lots are the most common types of scheme (especially in this context) and expect

these would also be the CTSs most likely in need of redevelopment. The Institute recommends the arrangements for small CTS be further considered. The Institute also recommends that a lower voting threshold be considered for smaller schemes. For example, a typical 'six pack' is somewhat disadvantaged in this proposal as five of six (or effectively 83 percent) lot holders would need to agree under the current proposal that requires the votes of 75 percent of all lot owners to succeed. This typology is prevalent throughout high-growth council areas and offers significant opportunity for redevelopment and better site utilisation.

In the New South Wales legislation, CTS scheme termination is not limited to economic reasons or other general limitations. The effect of this is that while termination arrangements are complex and costly, the breadth of coverage provides a relevance to lot holders to reach agreement around termination. Other experience from New South Wales had identified that many owners in CTS do not have the professional expertise to undertake major renovation projects to upgrade the CTS. This had left them in the difficult position of being unable to successfully resolve defects that the building may have had. The termination of the scheme is therefore often deemed to be a more approachable solution for an ageing scheme. In the New South Wales context, the effective incentive to reach agreement had benefits for resolving mixed use schemes of commercial, retail, and residential, as well as for multiple schemes that would be complex or unachievable in a formal process.

The Institute supports bringing in additional scheme termination arrangements. The key issue for the Institute is the narrow applicability of the provisions. Where there is a large discrepancy of the market value of the CTS site and its value as a sum of the present individual units, this discrepancy identifies the redevelopment demand and need for the property. If wider applicability were provided for scheme termination arrangements beyond 'economic reasons' it would:

- provide increased housing supply
- replace aged buildings with modern accommodation that complies with planning, building, and fire safety requirements
- support *ShapingSEQ* consolidation goals by unlocking key land supply in urban and developing urban areas
- support existing and emerging transport nodes such as the Metro and Cross River Rail in Brisbane or Light Rail on the Gold Coast
- enable additional Queenslanders to live near quality urban services and amenity.

It is recommended the Bill provide for all CTS (or say at least 30 year old plus buildings, as discussed in earlier QUT review deliberations) to avail themselves of the proposed scheme termination arrangements without economic reasons being the core pre-requisite to do so.

Some further detailed comments are provided below.

Interoperation with existing termination arrangements

There are existing provisions available in BCCM Act for the termination of a CTS. We note these do not require 'economic reasons' for the CTS to be terminated.

The Institute supports that Resolution Without Dissent and Court Order options also included in the Bill and that these are not complicated by necessitating a termination plan or other arrangement.

Application to other housing

The Institute recommends scheme termination provisions as finally resolved should also be available to other types of schemes to provide fairness of opportunity for these. Other relevant legislation includes:

- *Sanctuary Cove Resort Act 1985;*
- *Integrated Resort Development Act 1987;*
- *Building Units and Group Titles Act 1980;* and
- *Mixed Use Development Act 1993.*

With respect to retirement villages, it not recommended that the scheme termination arrangement apply. There are presently a limited number of retirement villages (generally self-managed) operating in Queensland under a CTS. Retirement villages are conceptually different in nature to a typical CTS and already have a statutory overlay of consumer protection.

Retirement villages are unique in their nature and have a mechanism for the 'closure' of a retirement village under the *Retirement Villages Act 1999 (RV Act)* – this process underwent public and industry consultation and was relatively recently implemented. This mechanism involves the retirement village operator preparing a 'closure plan' for the residents' approval and the residents having avenues with the Department or QCAT where they object to the closure plan.

The proposed new CTS termination arrangements also do not necessarily recognise that retirement villages are 'administered' by the scheme operator and that there is an underlying retirement village business (with resident fee structures in play) operating as part of the CTS. It would be uncommercial to allow the proposed CTS termination arrangements to take effect in this setting. It is specifically noted that the *RV Act* will prevail to the extent there is any inconsistency with BCCM Act (under section 24).

Other Scheme Termination issues

It is unclear what the term 'commercial purposes' in section 81A means, and whether or why this should exclude properties used for residential purposes from this Section. Also, this raises issues around uses such as hotels, tourist accommodation, short term accommodation, student accommodation, rooming accommodation, or an investor who is renting the lot out for an income, even though the lot is still be used by the tenant for residential purposes. These have a commercial aspect and indicate the relevance of broadening the utility of assistive scheme termination provisions. It is also not completely clear whether or not the economic reasons for termination defined in new section 81A are alternatives so that (b) is irrelevant in (a) is demonstrated.

It is likely but unclear that a General Meeting is required to confirm whether to seek a pre termination report. This is a mandatory requirement rather than optional step, adding to the cost, delay, and complexity of the process.

Under the new section 77, 'termination issues' (to be considered in the context of a termination resolution) include sharing of liabilities that immediately before termination are liabilities of the body corporate. There is no guidance about what those liabilities might be or how they are determined.

Under new section 78, in the context of consensual termination by resolution without dissent, there is to be an agreement about termination between the owners of the scheme land and lessees under registrable or short-term leases. The provision excludes by omission people who

have rights as licensees or under other agreements with the body corporate in relation to common property. It is recommended the concept in section 81R be included in words to the effect:

'*Each person who has a licence, contractual or other arrangement with the body corporate in respect of use for any purpose of any part of common property, which is not terminable at will by the body corporate and if not earlier terminated would end after termination of the scheme.*'

In addition, new section 79(2)(d)(iii) ought to be amended to match the new words proposed above or similar ones. A sympathetic alteration ought also be made by adding a new subparagraph (ii) between the current (ii) and (iii) of new section 79(3)(a). New section 81F and 81L should also expand the list of persons to be given notice.

In the context of termination by court order, the new sections 79(2)(c) and (d) require the Court to consider the economic and social effects of the termination on each lot owner and persons having various other interests. It will be difficult to determine the economic effects let alone social effects, and it is recommended these considerations be restricted to economic effects.

Section 79 of the Bill addresses court ordered terminations. It should expressly address insurance cover over scheme land until termination is effected (and afterwards until sold) and result in a clarifying direction as to the distribution of a body corporate's (administration and sinking) funds in this process (as part of the termination issues definition). The BCCM Act concept of body corporate assets is inclusive or real or personal property and legally personal property extends to non-physical assets and would include financial assets (i.e. amounts in bank accounts). However, the language of the definition of "termination issues" could contextually be seen to limit this defined concept which, in this concept should be clearly given its widest possible meaning – for example so as not to exclude all monetary amounts in accounts and all rights of a contractual nature that the body corporate holds for the scheme.

Currently s78(1)(b) of the BCCM Act permits for an agreement about termination issues and this is intended to address the distribution of funds held by the body corporate as well as realisation proceeds from the sale of real property. Funds in the form of levies will have been contributed to by the Lots in accordance with the Contribution Lot Entitlements. There should be clear direction as to the appropriate differentiation if equitable) between retuning those funds to owners in the same proportions and otherwise dealing with realisation proceeds from the sale of the scheme land on an interests schedule lot entitlement basis.

The Institute recommends that the proposed arrangements also allow for multiple schemes to be terminated.

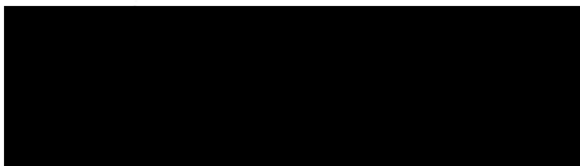
Conclusion

The proposed changes to the *Land Sales Act 1984* should not be undertaken at the risk of continuity of critical housing supply to meet the housing crisis when industry can least afford additional uncertainty and instability. It would have a retrospective and grossly unfair effect on already contracted housing supply under contracts that cannot be changed, whereas the present sunset clause arrangements have, in the whole, been working well. It will create uncertainties for contract operation around the sunset date and sunset clause, and termination process, and through impacts on financing arrangements would add to housing delivery uncertainty.

In regard to scheme termination, the Bill does not deliver sufficiently on the benefits of change to enhance scheme termination. Our fundamental concerns are that the process created by the Bill is only applicable to only a few CTS in extremis, whereas change could provide increased housing supply, replace aged buildings with modern accommodation that complies with planning, building, and fire safety requirements and further support government *ShapingSEQ* consolidation goals by unlocking key land supply and enable additional Queenslanders to live near quality urban services and amenity. The New South Wales experience suggests broadening the scope for termination would be beneficial and practical. There are other issues with the scope of definition of economic reasons and the potential for that uncertainty to be the subject of disputes which would undermine the process and make it unusable in practice.

Thank you for considering this submission. The Institute requests the opportunity to present and respond to questions from the Legal Affairs and Safety committee. Please contact Manager of Policy, Martin Zaltron on .

Yours sincerely,
Urban Development Institute of Australia Queensland



Kirsty Chessher-Brown
Chief Executive Officer

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