LEGAL AFFAIRS AND SAFETY COMMITTEE

Members present:
Mr PS Russo MP—Chair
Mrs LJ Gerber MP
Ms SL Bolton MP (virtual)
Ms JM Bush MP
Mr JE Hunt MP (virtual)
Mr JM Krause MP

Staff present:
Mrs K O'Sullivan—Committee Secretary
Mr B Smith—Assistant Committee Secretary

PUBLIC BRIEFING—INQUIRY INTO THE PROPERTY LAW BILL 2023

TRANSCRIPT OF PROCEEDINGS

Friday, 24 March 2023

Brisbane

FRIDAY, 24 MARCH 2023

The committee met at 1.00 pm.

CHAIR: Good afternoon. I declare open this public briefing for the committee's inquiry into the Property Law Bill 2023. My name is Peter Russo, member for Toohey and chair of the committee. I would like to respectfully acknowledge the traditional custodians of the land on which we meet today and pay our respects to elders past and present. We are very fortunate to live in a country with two of the oldest continuing cultures in Aboriginal and Torres Strait Islander peoples, whose land, winds and waters we all share. With me here today are: Laura Gerber, member for Currumbin and deputy chair; Sandy Bolton, member for Noosa, via video link; Jonty Bush, member for Cooper; Jason Hunt, member for Caloundra, via video link; and Jon Krause, member for Scenic Rim.

The purpose of today's briefing is to assist the committee with its examination of the bill, which was introduced into the Queensland parliament on 23 February 2023 and referred to the committee for consideration. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath, but I remind witnesses that intentionally misleading the committee is a serious offence. These proceedings are similar to parliament and are subject to the Legislative Assembly's standing rules and orders. In this regard I remind members of the public that under the standing orders the public may be admitted to or excluded from the briefing at the discretion of the committee. I also remind committee members that departmental officers are here to provide factual and technical information. Any questions seeking an opinion about policy should be directed to the Attorney-General or left to debate on the floor of the House.

These proceedings are being recorded by Hansard and broadcast live on the parliament's website. Media may be present and are subject to the committee's media rules and my direction at all times. You may be filmed or photographed during the proceedings and images may also appear on the parliament's website or social media pages. I ask everyone present to turn mobile phones off or to silent mode.

GUINEA, Ms Belinda, Manager, Office of Regulatory Policy—Liquor, Gaming and Fair Trading, Department of Justice and Attorney-General

KRAA, Mr Leighton, Principal Legal Officer, Strategic Policy and Legal Services, Department of Justice and Attorney-General

McKARZEL, Mr David, Executive Director, Office of Regulatory Policy—Liquor, Gaming and Fair Trading, Department of Justice and Attorney-General

RIVERA, Mr Riccardo, Principal Legal Officer, Strategic Policy and Legal Services, Department of Justice and Attorney-General

ROBERTSON, Mrs Leanne, Assistant Director-General, Strategic Policy and Legal Services, Department of Justice and Attorney-General

STARLING, Ms Nina, Director, Office of Regulatory Policy—Liquor, Gaming and Fair Trading, Department of Justice and Attorney-General

CHAIR: I now invite you to brief the committee, after which committee members will have some questions for you.

Mrs Robertson: Thank you, Chair. Thank you for the opportunity to brief the committee about the Property Law Bill 2023. The bill will replace the Property Law Act 1974 with a new act, drafted in line with modern practice and using plain English, to provide for a statutory seller disclosure scheme for sales of freehold land. The bill is broadly consistent with recommendations from the Commercial and Property Law Research Centre at the Queensland University of Technology as set out in the *final report on the Property Law Act 1974*, which I will refer to as the PLA report, and the *Final report: seller disclosure in Queensland*, which I will refer to as the seller disclosure report.

The drafting of the bill was informed by extensive, targeted stakeholder consultation during drafting as well as thorough public consultation on an exposure draft through the Department of Justice and Attorney-General and Get Involved websites. The department has provided the committee with a written briefing on the bill which outlines the bill's structure and gives an overview of the key changes. The department has also provided a response to issues raised in the written submissions to the committee.

While we are happy to obviously take questions about changes to property law in the bill, in these opening comments I thought I would focus on some of the key issues concerning the seller disclosure scheme raised during the committee's public briefing session on the bill. The seller disclosure scheme in the bill will apply, with some exceptions, to all sales of freehold land including sales by auction, sales by mortgagee or receiver and sales arising from the exercise of an option. Under the scheme, the seller must give the buyer a disclosure statement in the approved form and copies of any applicable prescribed certificates before a contract of sale is signed by the buyer. This allows the buyer to have relevant information about the property to inform their decision to enter into the contract. A draft Property Law Regulation was tabled with the bill. This indicates the type of information proposed to be included in the disclosure statement and the prescribed certificates that will apply. If the bill is passed, the department will work with key stakeholders to refine that regulation and to finalise the approved forms prior to commencement.

Where the sale is a lot in a community titles scheme under the Body Corporate and Community Management Act 1997 or a lot in a plan under the Building Units and Group Titles Act 1980, a body corporate certificate will be a prescribed certificate. This replaces existing requirements for disclosure under these acts. A draft Body Corporate and Community Management Legislation Amendment Regulation was also tabled with the bill to indicate again the type of information proposed to be included in the body corporate certificate. The Community Titles Legislation Working Group has been instrumental in refining the proposed contents of the body corporate certificate and the seller disclosure scheme as it relates to bodies corporate more broadly. The department thanks the members for their valuable contribution. This refinement has taken place over many meetings of the working group, with feedback evolving as members have seen how the certificate may look. The members have also provided valuable feedback on how the certificate will work in practice.

A seller may give the disclosure documents—that is, the disclosure statement and the prescribed certificates—to a buyer in physical form or by electronic communication if a buyer consents. The general service provisions in clause 231 or electronic service under clause 102 may be used. Electronic delivery can, with consent, be made to any electronic address of the buyer such as email or text message and may attach the disclosure documents, include the contents of the disclosure documents or provide an electronic link to access and obtain a copy of the disclosure documents. Additionally, electronic delivery can be achieved by giving or displaying a separate physical document that contains an electronic link to view the disclosure documents. An example of this would be a noticeboard with a QR code that the prospective buyer can then scan with their mobile phone in order to open up the disclosure documents.

The bill provides that the buyer is entitled to terminate the contract prior to settlement if the seller does not provide the disclosure documents to the buyer before the buyer signs the contract. Additionally, if the disclosure documents are inaccurate or incomplete, the buyer may also terminate the contract, provided that the inaccuracy or omission is in relation to a material matter affecting the lot at the time the statement is given to the buyer; and, at the time the contract is signed by the buyer, the buyer is not aware of the correct state of affairs concerning the matter; and, if the buyer had been made aware of the correct state of affairs concerning the matter, the buyer would not signed the contract. The only exception to this termination right is if the seller's failure to disclose or the inaccurate or incomplete disclosure is also a failure to comply with another act. In these circumstances, the consequence provided in the other act will apply instead. For example, failure to give a notice under section 47 of the Queensland Building and Construction Commission Act 1991 that work was carried out under an owner-builder permit will only give the buyer the remedy as set out in that act. This ensures that the consequences for current disclosure requirements under existing legislation continue to apply.

For sales by auction, the bill provides that the contract is signed by the buyer at the fall of the hammer. Accordingly, in order to ensure that the buyer is given the disclosure documents before then, the bill provides tailored methods for the seller to give the disclosure documents to the buyer. For a bidder who registers before the start of the auction, the seller must give the buyer the disclosure documents physically or electronically before the start of the auction. This is equivalent to a sale by private treaty. For a bidder who registers after the start of the auction, if that bidder was not already given the documents the seller can give the disclosure documents in one of the following ways: physically displaying the disclosure documents at the place of the auction where the auction is

conducted in person; electronically making available a copy of the disclosure documents where the auction is conducted electronically; or displaying an electronic link that can be used to view and obtain a copy of the disclosure documents for either an in-person or an electronic auction. The department is aware that both the Queensland Law Society and the Real Estate Institute of Queensland have made submissions to the committee that the provisions for giving the disclosure documents at auctions are complex. The department is obviously considering those submissions.

The draft Property Law Regulation at schedule 1, item 3(2), proposes to prescribe a warning statement that must be included in the disclosure statement advising the buyer to enquire with the relevant local government about whether the property is affected by flooding or another natural hazard or is within a natural hazard overlay. The warning statement also advises the buyer that flood information for the property may be available at the FloodCheck Queensland portal or the Australian Flood Risk information portal. The department is also aware that the Local Government Association of Queensland submitted that the seller disclosure scheme should be broadened to include flood and other natural hazard information, in line with requirements in other jurisdictions and in order to deliver on recommendation 19.1 of the Royal Commission into National Natural Disaster Arrangements.

As stated by the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence during the introduction of the bill, there are a range of practical and legal difficulties in mandating disclosure of this information including that the level of information held by different councils can differ quite considerably and that councils across Queensland charge vastly different fees for access to this kind of information. Again, I thank the committee for the opportunity for the department to brief the committee on the bill. Obviously I am happy to take questions on the bill itself.

Mrs GERBER: Thank you for the briefing. I want to get the department's rationale in relation to the community management statements. I note that the bill makes it mandatory that community management statements are part of the proposed prescribed certificates, but in 2013 the requirement was removed from the BCCM Act because it was considered unnecessary red tape by sellers and the real estate sector. I am just after the rationale for putting it back in.

Mr McKarzel: The reason for disclosure for the CMS is that it contains important information impacting on the title of the property or the ongoing financial liability of ownership. In particular, the by-laws in the CMS were considered important for buyers to be aware of as they will govern the buyer should they choose to live in the property or govern the relevant tenants. It is the case that from 2011 a CMS was required to be provided by a seller to a prospective buyer of an existing lot. This was removed in 2013 as the government at the time considered it to be unnecessary red tape.

The property law review, which commenced at that point and continued afterwards, did not specifically recommend the disclosure of the CMS, but it did recommend the disclosure of the exclusive use plan which is part of the CMS. The Community Titles Legislation Working Group, which I will refer to as the working group, then looked at it and they had mixed views. Some members considered it was absolutely crucial to have the statement because it contained by-laws—by-laws relating to pets, parking and alterations to lots. The CMS also contained information about the exclusive use of common areas allocated to particular lots, like car parks and courtyards, and it also contained lot entitlements. Entitlements are used for calculating levies and rates.

It was an issue of trying to balance whether you provide all of that information and have the body corporate pull that out somehow and then put it in as disclosure or whether the whole CMS is provided. In terms of the policy decision, the guiding principle for the seller disclosure scheme, which we have mentioned in the submission, is that it provides information of value to the buyer in making a decision to purchase that is readily available by search and at a reasonable cost.

There is obviously the alternative, which is that buyers instead be informed about the existence of the CMS and then they can choose to go and get their own copy. Because one of the principles is about receiving key information before you sign the contract, the balance in the mind of the government fell onto the notion of the CMS being key and directly relevant. One of the other considerations in that mix of trying to work out whether or not to have it in there is that you now have access electronically. Although some of them, admittedly, can be quite thick, there is that option for electronic access. Having said that, they can be a complex document so to assist a buyer the actual body corporate certificate will have information in it and alerts and signposts for buyers around the most important information in the CMS. We will still have that certificate.

Mrs GERBER: Will the certificate tell them that there is an exclusive use plan in the CMS and will the certificate point them to the by-laws that are important? The reason I raise the question is that other stakeholders have said that it could be counterproductive and that it was taken out of the act in

2013 because what ended up happening was that these CMSs are voluminous—sometimes over 100 pages—and it meant that the important parts that a buyer wants to be aware of do not get alerted to because they are effectively dumped with this huge document that they do not read, rather than being signposts directly to the parts that they should be alerted to, which are the exclusive use plan, any by-laws relating to use of common property or body corporate assets and lot entitlements. Is there a way that those could be incorporated in a certificate and then perhaps we do not have to go back to the CMS having red tape or repealing it again, like happened in 2013?

Mr McKarzel: The working group has been looking at the certificate and it is still a work in progress. I will ask my colleague Nina to give you a bit more detail about where we are with that. In summary, that would be the intention—that the certificate would signpost those key issues.

Mrs GERBER: Should the CMS then not have to be disclosed? Should it just have a warning and people can go and find it? If it signposted in the body corporate certificate, why do they have to give all that paperwork?

Mr McKarzel: I understand the point, and it is a very finely balanced decision about whether or not to have it disclosed fully. All I can say is that the policy decision has been that, on balance, it should be disclosed, but there are obviously reasonable arguments for both sides. A lot of the issues we have found with seller disclosure in the context particularly of body corporate is that there are rational, reasonable arguments on both sides but, in the end, a decision has to be made to go one way or the other.

Ms BOLTON: I want to ask about the body corporate certificate. During the previous hearings, the Unit Owners Association was basically seeking a statement of lawful use of land and building drawn from the development approval to be included in the body corporate certificate as part of the seller disclosure. I have not been able as yet to ascertain why this is not being looked to be included and the reasons?

Mr McKarzel: Just to clarify, are you talking about development approvals that allow for certain uses or not for certain uses?

Ms BOLTON: On the original development approval if it is for, for example, residential use, then the DA is outlined in simple English so that anyone purchasing into a body corporate situation can clearly understand whether they are going to be living amongst fellow residents or it is going to be used for STA. This has been an enormous problem for some time. I am not understanding why this is not being included.

Mr McKarzel: Thank you. The issue has turned on the principles that we have been following for seller disclosure: what is important for the buyer to know before they sign? Current usage is absolutely important. To get to the guts of it, we have considered seriously putting in what the development approval is, but there are two issues that have come up with that. The first is that it is not always clear in the development approval what it actually means. I know that there was a judgement that did explain a particular development approval. To ask a body corporate to put in what the development approval is and then say exactly what can and cannot happen is potentially problematic.

That is not the real policy reason. The real policy reason behind it is: if you are a buyer and you have a lot that you are looking at—a unit—if it is important to you that you can rent that unit out for short-term letting or if you are proposing to live in it and you do not want to be in a block of units where there is short-term rental going on because of all the amenity issues that the Unit Owners Association has mentioned and the cost to the building and all of that, what you would be after is the facts. The facts are—and the Unit Owners Association were very clear and correct on most of this when they gave evidence—that if there is short-term accommodation occurring in buildings that, probably not even contested, were definitely built subject to a development approval, that allows for short-term accommodation. There is also short-term accommodation that is contested because there are arguments that the relevant development approval does not allow for it. The reality is that it is happening despite the efforts of, say, the good people from the Unit Owners Association. They have not been able to get councils to enforce the law or there are arguments about enforceability—whatever the case is.

We went through the scenario like this. If you received seller disclosure that said, ‘This development approval equals no short-term accommodation’ and you say, ‘That’s great,’ and you sign up and then the first Saturday morning you have moved in there is a bus load of tourists coming into building, the reaction of the buyer is likely to be, ‘Hang on a second, I did not think that was happening in my building. That is not allowed.’ You (the seller) say to the buyer, ‘It isn’t allowed and we told you it’s not allowed, but you go off to the council and try to sort it out.’ It is about the buyer’s amenity.

The solution we have been looking at—remembering that the body corporate certificate is not finalised—is putting in the certificate itself along the lines of a general statement advising a prospective buyer that if short-term letting is an important issue for them in terms of whether or not they sign then they should seek advice about what the lawful use is. If it is important for them, they should go beyond that and actually explore whether or not short-term accommodation is occurring in that building. It might be an issue of logging on and looking at Airbnb and seeing that the unit next door to the one you are looking at buying—despite the fact that the development approval does not exist for that in that building—is up for rent on Airbnb. The issue for seller disclosure is: what are the facts?

The Unit Owners Association correctly talked about—I have forgotten the learned judge's name—the Spice Apartments case. He recognised that short-term accommodation was going on and he said in brackets 'apparently unlawfully'. That may very well be the fact. One of the things that contributed to the view on this was: ultimately, what does a buyer want to know? We think a buyer would want to know whether or not it is going on in that building based on the facts—that is, whether or not it is happening, not whether or not it is lawful. Having said that, the lawfulness is a planning issue. There are a bunch of laws and there is a reasonable degree of consensus—although not total—about what should or should not happen in certain buildings. There are enforcement provisions in place for councils to deal with that.

The difference in the argument in terms of what we have here is that the purpose under the bill is for seller disclosure. We are confined to saying to a seller, 'You must give this information to a buyer because it is important to them.' Putting the development approval in will not create a higher degree of enforceability—if somebody is in a unit and the neighbour starts renting it out or they arrive and there is short-term rental going on. That is the thinking behind why the draft body corporate certificate does not include directly the detail of the development approval but will definitely flag the importance of whether or not short-term accommodation is going on within the relevant building.

Ms BOLTON: Within the CTLWG, what was identified as to why councils are not enforcing? I suppose it appears that it is being made very difficult for anyone to get the surety when they purchase that they are purchasing for the reasons they want to. For somebody who wants to be in a residential development, that is what they want. It sounds like it is being made very difficult to find out. In terms of council enforceability, were there any investigations or any data collected as to why it is not being enforced?

Mr McKarzel: The short answer is no, because the terms of reference for the working group relate to the body corporate management space and community titles space which, if you look at the relevant acts for which the Attorney and we are responsible for, is all about governance; it is not about planning. What the government has done—and I have more detail on it—is, in the context of the Housing Strategy, announce a review of short-term accommodation and the related issues, but that will be handled by another department, the name of which I have now forgotten but I can get for you.

The CTL Working Group is focused on the governance issues around bodies corporate. It has been dealt with and is still being dealt with by the group in the context of amenity, but the solution is a planning solution. What we have done is then referred that. In fact, the Unit Owners Association, of their own volition, have also gone to the relevant areas that regulate planning including, as I understand it, at least three big councils, and unfortunately that is where it sits.

The legislative levers that we have relate to the governance of bodies corporate. It is about more of the detail of how a body corporate operates, what a committee can do and what it cannot do. It does not cover usage. The BCCM Act, for instance, does not allow for a by-law that would prohibit short-term accommodation. The by-laws are more to do with what people are allowed to do in terms of the way they are living—having pets, not having pets, parking and all of that sort of thing—whereas what you do with your freehold property—in terms of renting it out for two nights, renting it out for a year or living in it—is governed by the planning framework, and that sits outside of the BCCM Act.

Ms BOLTON: I believe the rest of the issues that have been brought up previously are being tackled in a second tranche of amendments to do with the BCCM Act and MUD Act. Do we have any expected time frames on those?

Mr McKarzel: In the public announcement by the Attorney for the first bill arising out of the working group's deliberations and the government's deliberations, based on government priorities, timetables and all the rest of it, we expect a bill in the middle of this year but that would be for that particular tranche. There is still more work being done on issues like management rights and bullying and harassment. At this point it is not intended that that will be in the bill I am talking about. The bill I am talking about will deal with issues like by-laws, the matter of termination of schemes and what the threshold vote for termination of schemes is.

Ms BUSH: David, I think you were about to refer to Nina about the content and format of the body corporate certificate. I am interested in understanding that a bit more. Are there some projected dates of finalisation and consultation around the development of the certificate?

Ms Starling: The Community Titles Legislation Working Group has been consulted on an initial body corporate certificate. That has been an iterative process. There have been many versions and many revisions, particularly as the group has seen how it has looked and then it has been revised. It was also released for public consultation. The intention is to take into consideration the most recent consultation that has occurred through that public consultation process, plus further feedback from the working group members, in further development of the certificate, along with further consultation with relevant people as it develops. In terms of time frames, there is intended to be quite a long lead time for the seller disclosure amendments generally in order to give time for these processes to happen, as well as for awareness and education—getting people ready, effectively. It will be linked with whatever decision is made in terms of the actual date of commencement of the broader seller disclosure regime.

Ms BUSH: Are you able to comment on that communications piece that will sit alongside that?

Ms Starling: In terms of the communications—I will speak from the body corporate perspective, and my colleagues may want to speak from the broader seller disclosure perspective—there will definitely be awareness and education activities undertaken. There is intended to be specific engagement with community titles sector stakeholders particularly, to ensure bodies corporate will be aware of the changes because the certificate will have a bearing on them. There will be information and educational materials targeted at the sector, but part of the process will actually be seeking feedback from key representatives as to the best channels to disseminate that awareness.

Ms BUSH: Do your colleagues have a comment as well?

Mr Kraa: In a similar vein, we note the submissions requiring and suggesting sufficient lead times to prepare education materials, update template contracts and processes and the like. It has been noted that stakeholders will continue to be engaged in finalising the regulations which set out the information to be included and also the forms. That process will continue to occur should the bill be passed, and the stakeholders will continue to be liaised with.

Mr HUNT: My question is in relation to auctions and bidding. With regard to the levels of disclosure before and after the auction starts, there is the single approach or that two-pronged approach. What advantages do we get from that two-pronged approach to disclosure, depending on whether you register before or after?

Mr Kraa: The intent of the disclosure scheme generally is to ensure that a buyer is informed prior to their decision to purchase. Ideally, this means that a buyer has the opportunity to receive the disclosure documents and review and digest them. Regardless of the amount of time that can occur in, there is a benefit for the buyer in seeing those disclosure documents before ultimately signing the contract.

When it comes to an auction, as was alluded to in the introductory speech, the bill provides that the contract will be signed at an auction on completion of the auction. What the bill also does then is provide tailored provisions for how the documents can be given in that auction context. Put simply, if a bidder registers prior to the auction then they need to be given the documents prior to the auction. In those rare or niche circumstances where there is a bidder who registers after the start of the auction and was not previously given the documents—such as through a previous interaction with the seller or agents—there are tailored provisions to ensure the documents can still be provided in the circumstances that they would be finding themselves, which is that the auction is already underway and being conducted.

In those circumstances, there is greater flexibility for the seller or the seller's agent in how the documents can be provided. Put simply, the requirement is just that the documents must be made available through either displaying the documents or displaying an electronic link to access the documents. That tailored approach ensures that, regardless of whether a bidder or the ultimate buyer registers prior to or after the start of the auction, there is an avenue for them to be provided the documents. That also balances the interests of the seller and the processes they find themselves in.

Mr KRAUSE: In relation to the seller disclosure scheme—and I do not think this has been touched on today—do you have an example of a material matter that a buyer could use as a grounds to terminate a contract based on a defective seller disclosure statement?

Mr McKarzel: In the context of body corporate?

Mr KRAUSE: No, in the context of broadly.

Mr Kraa: In terms of a material matter, that arises when there might be an inaccuracy or an omission in the disclosure documents and the buyer is asserting that that might give them a right to terminate the contract for sale. In that scenario, there are three elements that have to be met. One of those is that the inaccuracy or the omission relates to a material matter affecting the property. What can be thought of as material really will depend on the circumstances of the case. There is case law and legal theory that does exist about what might constitute 'material'. The use of that term is certainly intended to provide discretion for the parties to take into account all of the relevant circumstances of the case. It also signals to the buyer that a termination cannot be exercised where an inaccuracy or an omission is of a very minor or technical nature—that is, a matter that is not material to the lot. It is a test that is there to provide that discretion to take into account all circumstances.

Mr KRAUSE: I know that some years ago there were cases where contracts were able to be terminated based on extraordinarily minor formatting and formality issues under PAMDA disclosure documents. Can you tell the committee whether that is something that might be a material matter? REIQ touched on this in their submissions—and I think the Law Society may have as well. They were concerned that reintroducing all of these formal requirements in the disclosure documentation could lead to PAMDA type terminations. Can you give us some commentary on that? Has it been considered? Has it been worked through with the working group and internally to try to avoid those issues?

Mr Kraa: There are a few things we can say on those points. Firstly, in determining whether the disclosure documents have been validly given—so thinking about the disclosure statement itself—it is relevant to consider that the Acts Interpretation Act provides that strict compliance with the form is not necessary and substantial compliance is sufficient. That is one element that goes to an interpretive element about whether the form has been validly given. However, if there is an inaccuracy or an omission which might arise due to a formatting type issue, the test has three limbs to make sure it really has been an issue that has impacted on the buyer's decision to purchase. As you would know from the bill, the three limbs are: that the inaccuracy or omission related to a material matter affecting the property; that the buyer was not aware of the correct state of affairs when signing and had they been aware of the correct state of affairs they would not have signed the contract; and that each of those elements has to be met in order to satisfy a termination right in that respect.

A further point that might be relevant going to some of the background that you mentioned is that the bill explicitly provides that a seller may provide the disclosure documents through different communication methods or modes and at different times. It is not that everything has to be bundled together and given at a specific time or at the same time and attached in a certain manner. There is flexibility in the bill that a seller could foreseeably email the statement one day and provide a hard copy of a notice the next day. There is that level of flexibility built in.

Mr KRAUSE: Has the department scheduled a review of the seller disclosure scheme, assuming that the bill is passed as it is? Has there been consideration given as to when or if it may be reviewed in the future for its usefulness or how it is going so as to take stock of how it has been operating in the market?

Mrs Robertson: The bill does not actually have a sunset clause as such but I guess, as often happens in law reform, stakeholders will invariably raise with government concerns and obviously the department through the ministers would have to respond as such. There is no formal mechanism in the bill, if that is what you are getting at.

Mr KRAUSE: Okay. I want to touch on the body corporate certificates, Chair, as long as you are okay. I do not think it has been touched on by other questions. It is about indemnities being given to a body corporate when they are providing a body corporate certificate. The bill provides that if a certificate is defective a buyer's only remedy is against the seller, but section 263 says 'interested persons', which can include sellers, 'may rely on the certificate against the body corporate as conclusive evidence of matters'. What are a seller's options against a body corporate if there is a defective certificate provided which might lead to a sale falling over or a termination of contract? Are these remedies in the bill or do they have to be litigated?

Ms Starling: There are probably two distinct issues to unpack. As you mentioned, the buyer's sole remedy against the seller to provide accurate information is that provision around the termination. Then there is a separate provision around the body corporate certificate itself. That is an extension of a provision that already exists—that information provided in that certificate can be relied upon against the body corporate by the person who has obtained the certificate.

To give you a bit of context, typically that sort of body corporate provision is relied upon by buyers around things like levies. If the information certificate says that there are no overdue levies, the body corporate cannot then, post settlement, say, 'Sorry, we were incorrect. You need to pay this amount.'

The buyer can rely upon that, if the body corporate were to commence debt recovery proceedings, to say, 'No, I have conclusive evidence against the body corporate that no fees were owing because I have the certificate.' There are two separate issues. Can I clarify that you are talking about a situation where the contract falls over—

Mr KRAUSE: I could ask the question in a slightly different way. If a contract is terminated because of a body corporate certificate issue, does the seller have any recourse against the body corporate, or is it 'too bad, so sad'?

Ms Guinea: There is nothing in the seller disclosure scheme legislation dealing with that specifically.

Mr KRAUSE: No.

Ms Guinea: It would depend perhaps on the specific circumstances. We are aware that the Strata Community Association has said that their members have professional indemnity insurance that would protect them in the instance of preparing an inaccurate certificate, so there may be avenues available in that regard.

Mr KRAUSE: Thank you for that confirmation. To be clear, the body corporate certificate is a departure from the present laws relating to sales in bodies corporate?

Ms Guinea: Presently there is a disclosure statement under section 206 of the act that is given by the buyer. There is also a section 205 body corporate information certificate which is prepared by the body corporate. That is currently provided to buyers or any other interested party by the body corporate. The body corporate does currently prepare a certificate of a similar nature, but this seller disclosure scheme will combine those two documents into a single document which is now issued by the body corporate.

Mr KRAUSE: Do termination rights attach to the present document that is sent out by the body corporate?

Ms Guinea: No. That is a document with financial information in it. Termination rights do attach to the section 206 disclosure statement.

Mr KRAUSE: Which is the one given by the seller?

Ms Guinea: That is right.

Mr KRAUSE: I can understand why concerns have been raised about whether there would be liability issues arising if the body corporate issued the wrong certificate and a sale fell over, because that is a departure from the present regime. You have answered my question; I am just putting the present and the proposed together. If a certificate is defective or wrong and the contract proceeds, does the buyer have any options in relation to the body corporate?

Ms Guinea: Sorry, could you repeat the question?

Mr KRAUSE: If the body corporate certificate is wrong or contains false information for whatever reason and the contract proceeds, does the buyer have any recourse against the body corporate for that wrong certificate?

Ms Guinea: There is the provision that Nina mentioned in that anyone who receives the body corporate certificate can rely on it against the body corporate. With the example of levies, it would depend on what other information was in there that the buyer had issue with, yes.

Mr KRAUSE: I am not meant to ask hypothetical questions, Chair, but—

CHAIR: No, but you are doing a good job!

Mr KRAUSE: In this case, though, a hypothetical might be quite illustrative. If there was a special infrastructure levy or a special levy that had been authorised by the body corporate but it was not set out in the body corporate certificate and then a buyer settled and found, unbeknownst to them, that they had to pay thousands of dollars in a special levy, does the body corporate have to pay that or does the buyer have to pay that?

Ms Guinea: It would be a matter for initial discussions between the buyer and the body corporate for determination—

CHAIR: And their lawyers. It sounds like a lawyers' picnic.

Ms Guinea:—noting that the buyer becomes part of the body corporate once they have made their purchase.

Ms BOLTON: Does the information for councils on natural hazards include not only what is currently mapped but what is being mapped in Coastal Hazard Adaptation Strategy?

Mr Kraa: At the moment, the draft Property Law Regulation proposes to prescribe a warning that the buyer should enquire with their local government about whether the property is affected by a natural hazard or is within a natural hazard overlay. The warning is proposed to help direct buyers to where they can make those inquiries and presently includes references to the FloodCheck Queensland portal and the Australian Flood Risk Information Portal. There is some flooding information included there. As has been noted here and in the explanatory speech, stakeholders will continue to be further consulted on the wording to be used in the regulation and for that warning.

Ms BUSH: Brian Noble provided a written submission and appeared in front of us on Tuesday. I know that you have given a response, but I think we were all a bit intrigued by his submission. Can you explain your position on whether you think the bill covers off elements of that or could go further?

Mr Rivera: Certainly. The issue is about a covenant, which is an agreement in a deed or a promise that relates to land in a contract or other agreement related to land. The issue is about the enforceability of that against a successor in title. When two property owners make the first agreement that has a covenant in it, they have privity of contract between each other so it is enforceable against them. The issue arises when person A sells their property to party C. Can C enforce it against B? Then down the line it can keep going and going and the issue is when it is enforceable.

The current position in Queensland is that generally a negative covenant—so-called because you do not have to do anything; it is a do-nothing covenant—can be enforced against successors in title. A positive covenant—called ‘positive’ because it is to do something, like spend money or maintain something—is generally not enforceable against successors in title. What the bill proposes to do is provide that when a covenant is contained in a registered easement it can be enforceable against successors in title, whether it is positive or negative, provided that it relates to the use, maintenance or ownership of the land. That avoids a covenant that is completely unrelated to the use of the land being binding on a successor in title. An example would be if you have a driveway that is on easement and there is a covenant that the party that has the easement on their land has to maintain that road in a passable condition. Currently you might have difficulty enforcing that but, because that type of obligation—when it is registered as an easement—is searchable on title and you can get the terms of that easement and a subsequent owner should know about it, the bill will allow it to be enforced because it is related to that use, maintenance or ownership of the burdened land.

As I understand Mr Noble’s submission, he says that the words ‘use, ownership and maintenance’ are too restrictive and he just wants to say that any covenant in an easement is enforceable against successors in title and then we can have some exceptions of things that clearly would not be related to that. The problem is that defining those exceptions could be very difficult because covenants can be for all types of things. They can be restricting the height that you build your building to; they can be about maintaining the colour of a building at a particular site. Nobody regulates those when they are registered. If the covenant is registered in easement, nobody is looking through it and saying, ‘This is not going to be enforceable.’

I think the bill’s connection to use, ownership and maintenance is very broad. There is an example in the section about things that will be related to use, ownership and maintenance, and it is not limited. There can be other things. Mr Noble specifically mentioned indemnities and insurance obligations and whether those would be enforceable against successors in title. While there is a view that they might not be, I think there is also a view that they could be where it is related to the use, maintenance or ownership. An indemnity for a pipeline would likely be relevant to the use of the land. When somebody comes in with their trucks and they damage the land, they give an indemnity that they will remediate the land after they are gone. I think that would relate to it. The response is: how would we describe the exceptions? I think ‘use, ownership and maintenance’ is a good way of capturing it.

Ms BUSH: He did use the example of the pipeline. Would the wording of the current bill offer protection?

Mr Rivera: It would depend on what the easement says and what it is doing. There are some mechanisms that get around that unenforceability, like a chain of contracts. One party says, ‘If I sell the land to somebody else, I enter into a contract that says they will do this thing.’ If those types of things are in there, they might be enforceable.

Ms BUSH: That is certainly interesting.

CHAIR: Is the issue that legislation would not remedy the shortcomings that Mr Noble was talking about?

Mr Rivera: I am not sure that is how I would characterise it. I understand he is saying, 'There's a problem in the law. The clause addresses it. It's an improvement on what is there,' but he wants something different. I think the ways of getting that might create more problems than the approach that is in the bill.

Ms BUSH: Will there be a mechanism for monitoring the implementation of this bill to see if there are opportunities for future reform if it does not go far enough?

Mr Rivera: I suppose we will have to see. Leanne commented that there is not a statutory review but as these things are developed, given some of these changes are really big, we will continue to hear from people in the industry how they are operating.

Ms BUSH: Great, thank you.

Ms BUSH: There were some comments made by the strata search agents—you have touched on it already—in relation to what they perceive to be potentially reduced consumer vigilance under the bill in relation to the body corporate information certificates. I am after your views on whether you feel the bill in its current format achieves that balance of seller and buyer protections.

Mr McKarzel: One of the things we did turn our mind to was whether a move towards up-front disclosure might lead fewer people to do searches, for instance, as part of their own due diligence. Having said that, there is already an existing level of seller disclosure in the current act. While some buyers obtain a section 205 certificate or a search of body corporate records, others do not.

The intention behind the act is to provide a baseline of disclosure, but it is a baseline. If you want to do further due diligence and you want to go beyond that and use a search agent as a buyer or as the seller, it is open for you to do that. This was more about setting a minimum standard.

The other issue to point out is that there are also protections available in the contracts themselves in terms of putting in certain conditions. Building and pest is one. You can contract to be comfortable with certain issues as well. This is really about the minimum and the balancing act between that and putting too much information in.

Ms Starling: One thing we are looking at with the body corporate certificate is potentially including a statement encouraging people to do a search of the body corporate records because there is more information that they would be able to find through that sort of search—having a highlight or a flag for people to make clear the importance of that.

Mrs GERBER: I just wanted to go back to the member for Cooper's question and get some clarity around the bill. How I understood Mr Noble's submission was that, where he was concerned with the definition of 'use, ownership and maintenance', he specifically gave the example of indemnity or insurance potentially being ambiguous and potentially that the obligation to indemnify or the obligation to insure does not flow with the easement to the next purchaser. Is it ambiguous as to whether or not that obligation is covered by 'use, maintenance and ownership'?

Mr Rivera: There are some examples in there, but it is not saying '"use, maintenance and ownership' only means these things'. There are some examples in there. It is going to be a question of the facts and what the indemnity is for and what the insurance is for or what obligation is in the easement that is registered.

Mrs GERBER: So the parties would have to litigate it to work it out?

Mr Rivera: They would have to work out what it is about. With any type of legislative provision, if parties are in dispute as to what it means, ultimately a judgement will come along and give some clarity for parties. It is not clear-cut that it is excluded. I think there are arguments either way. This really depends on the exact purpose of that obligation that is in the easement.

Mrs GERBER: Would it not be better for the bill to take away that ambiguity and say that the obligation to indemnify or the obligation to insurance flows with the use, maintenance and ownership and put it in as one of the examples so it is there?

Mr Rivera: That is something the department could consider. The clause is based on the recommendations from QUT. In that report they specifically wanted to go further than an equivalent provision in New South Wales but not as far as an equivalent provision in the Northern Territory. I know that Mr Noble referred to the provision in the Northern Territory. The recommendation that that clause is based on is according to the recommendation of QUT.

CHAIR: I am conscious we have gone over time and I am sure everybody in this room has better things to do on a Friday afternoon.

Mrs Robertson: I wanted to clarify the question asked of me in relation to the review of seller disclosure. I used the term ‘sunset clause’. That is not the correct terminology. I should have said a statutory review clause because, of course, sunset clauses have a different operation. I apologise for the wrong use of the term. I think it is neither here nor there in the sense, but I wanted to clarify that. It is Friday afternoon.

CHAIR: It is. That brings to a conclusion this briefing. There were no questions taken on notice. I declare this public briefing closed. Thank you for your attendance and thank you for the work you do.

The committee adjourned at 2.05 pm.