Department of Justice and Attorney-General
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Proposed amendments to the *Land Sales Act 1984*

Office of Regulatory Policy

Policy proposals consultation paper
October 2012

Queensland Government

Table of contents

Introduction

Review of the *Land Sales Act 1984*

The *Land Sales Act 1984* (the Act) regulates the sale and purchase of proposed allotments (i.e. unregistered subdivided land) and proposed lots (i.e. unregistered building units). The Act was introduced in response to a number of significant incidents of consumer detriment in the 1960s and 1970s caused by the sale of misdescribed land. Prior to the introduction of the Act, the repealed *Auctioneers and Agents Act 1971* regulated aspects of the sale of unregistered land in Queensland.

The objects of the Act, as stated in section 2, are to:

- facilitate property development in Queensland,
- protect interests of consumers in relation to property development,
- ensure proposed allotments and proposed lots are clearly identified, and
- achieve these objects without imposing procedural obligations on local governments or the Urban Land Development Authority in addition to their obligations under the *Sustainable Planning Act 2009* or *Urban Land Development Authority Act 2007*.

In accordance with the Queensland Government's obligations under the National Competition Policy agreed to in 1995 by the Council of Australian Governments, the Act was reviewed in 2001 and a public benefit test was conducted. The final report of the public benefit test was released in November 2001 and concluded the restrictions on competition contained in the Act resulted in a net public benefit. It was also concluded the Act should be retained without amendment with a further review proposed after 10 years.

A review is also necessary as the *Land Sales Regulation 2000* (the Regulation) was due to expire on 1 September 2010 under the '10 year expiry rule' for subordinate legislation.[1] The expiration of subordinate legislation is designed to reduce the regulatory burden and to ensure that regulation is relevant and of the highest standard. However, subordinate legislation may be exempt from expiry if the empowering Act is subject to review.[2] The Regulation is therefore exempt from expiry as a result of this review.

In addition to the National Competition Policy and legislative review requirements, stakeholders from time to time have suggested amendments to the Act. The Act has in turn been amended over time on a piecemeal basis. It has become evident a complete review of the Act needs to be undertaken.

The review of the Act was initiated in 2010, with the establishment of a reference committee to provide expert advice to the former Government. The reference committee will continue to provide advice to the current

[1] See section 54 of the *Statutory Instruments Act 1992*.
[2] See section 56A of the *Statutory Instruments Act 1992*.

Government. The reference committee comprises members of the property industry, legal practitioners, academia and government. An Issues Discussion Paper was released in December 2010 for public consultation and 14 submissions were received.

This Policy Proposals Consultation Paper presents proposals for amending the Act based on the submissions received on the previous Issues Discussion Paper in addition to expert advice provided by the reference committee. As this Consultation Paper refers to the Issues Discussion Paper, it is recommended that readers first read the Issues Discussion Paper which provides detailed context for the review and a history of the Act.

Overall, the proposed amendments seek to modernise the Act and streamline processes involved in the sale of proposed allotments and proposed lots. This in turn will contribute to reducing the regulatory burden on business while maintaining consumer protection. The Act will therefore continue to impose some restrictions on competition; however such restrictions are necessary for the protection of consumers given the risks and amount of money involved in purchasing unregistered subdivided land or a building unit 'off-the-plan'.

How to provide feedback

All members of the community are invited to comment on the proposed amendments presented in this consultation paper. The closing date for submissions is **5pm, Friday, 30 November 2012**.

Written submissions can be posted, emailed or faxed to:

Mail: Land Sales Act review
Office of Regulatory Policy
GPO Box 3111
BRISBANE QLD 4001

Email: landsales@justice.qld.gov.au

Fax: (07) 3405 4059

Restriction on selling under Part 2 of the Act

Section 8 of the Act restricts the point at which a person may sell a proposed allotment (i.e. a lot to be defined and created by registration of a plan of subdivision) of freehold land. Such land may only be sold if, there is no operational work for the proposed allotment—there is an effective development permit, compliance permit or Urban Development Area (UDA) development permit for reconfiguring a lot for the allotment; or if there is no operational work—there is an effective development permit, compliance permit or UDA development approval for the operational work associated with reconfiguring a lot for the allotment.

Proposal 1

The restriction on selling proposed allotments in section 8 of the Act is removed so that a person may sell freehold unregistered land prior to receiving an effective development permit, compliance permit or UDA development permit for reconfiguring a lot for the allotment. This would apply regardless of whether or not there are operational works for the proposed allotment.

Respondents to the previous 2010/2011 Issues Discussion Paper generally supported the removal of the restriction on selling proposed allotments, indicating it is not warranted in today's market. Additionally, there is no similar restriction for selling proposed lots in Part 3 of the Act and other jurisdictions do not impose similar restrictions for either proposed allotments or proposed lots.

The removal of the restriction reduces the regulatory burden for developers by allowing proposed allotments to be sold prior to development approval being granted. The marketing of land prior to development approval allows the developer to obtain pre-sales which go towards securing finance and ensuring the viability of the project. On the other hand, the developer may face risks if development approval is not granted. However, this is ultimately a commercial risk developers would need to consider.

Consumers may benefit from the removal of the restriction as it would allow them to enter into contracts at an earlier stage. The risks are that development approval would not be granted, or that the actual allotment significantly varies from the proposed allotment contracted upon. These risks are not new and the Act already contains consumer protection measures which allow the buyer to avoid the contract if there is a significant variation or title has not been given within 18 months.[3]

[3] See sections 10 and 10A.

Amendments are also proposed to the seller disclosure obligations and buyer avoidance rights for a significant variation if the proposal is adopted. This is discussed later in this Consultation Paper (see page 8).

In providing feedback on the previous Issues Discussion Paper on whether the restriction on sale in section 8 should be removed, the Queensland Law Society raised a particular issue. That is, proposed and actual interests in the proposed allotment, such as the grant of easements, may affect the buyer's ability to use the proposed lot. It is proposed that these interests would also be captured in the disclosure regime in order to provide protection if the restriction in section 8 is removed (see Proposal 5).

Disclosure requirements under Part 2

Section 9 of the Act requires the seller to disclose certain information about the planned final form of the land prior to the buyer entering into a contract. The requirements serve to not only provide a buyer with the right to avoid the contract if the final product differs significantly to the product they contracted to buy, but also (ideally) contribute towards a more informed marketplace as a result. Section 9(2) and (3) prescribe the information that must be included in a disclosure plan and disclosure statement respectively.

Proposal 2

Based upon the Queensland Government deciding to remove the restriction in section 8 (see Proposal 1), section 9(2)(a) of the Act is amended so that a disclosure plan must include a copy of any plan for reconfiguring a lot for the allotment forming part of a development permit, compliance permit or UDA development approval only if there is an effective development permit, compliance permit or UDA development approval for the proposed allotment.

Proposal 3

The terminology in section 9(2)(b) of the Act is modernised so that the reference to 'metes and bounds' is replaced with the term 'dimensions'. The disclosure plan must therefore include the dimensions of the proposed allotment.

Proposal 4

Section 9(2)(c) (i.e. disclosure of contours) is amended by replacing the term 'natural surface contours' with the term 'existing surface contours' and that this new term is defined (see Terminology Proposals page 20). The contour maps required to be included in the disclosure plan must therefore show existing surface contours, with appropriate contour intervals.

Proposal 5

The information required to be contained in a disclosure plan under section 9(2) of the Act must also include any proposed interests which will burden the proposed land, for example, easements and covenants and also any retaining walls to be built on the land as part of any operational works. The disclosure plan must also contain proposed infrastructure services, such as sewerage and water supply, drainage, roads, electricity, gas and communication services.

Note: If statutory easements are introduced for lots which are not part of a community title scheme then the existence of these statutory easements needs to be noted in the disclosure plan.

If the sale is allowed before a development permit is granted (see Proposal 1) then information about easements and proposed infrastructure services etc must be qualified.

Proposal 6

The phrase 'fill levels, and areas to be filled' contained in section 9(2)(d) of the Act is amended so it reads 'all discoverable fill levels, including those approved by the local authority, completed prior to commencement of operational works for the lot and areas to be filled at the completion of operational works for the lot.'

Proposal 7

The definition of 'appropriate contour levels' in section 9(7)(b) of the Act for a proposed allotment of more than 2000m^2 is amended to mean contour intervals of 1m.

Proposal 8

The disclosure plan required to be given to a purchaser by the seller under section 9(1)(a) of the Act must be certified by a cadastral surveyor registered under the *Surveyors Act 2003*.

The proposals largely seek to modernise the provisions of the Act in accordance with feedback received from submissions on the previous Issues Discussion Paper.

Proposal 8 seeks to clarify that disclosure plans must be certified by a registered cadastral surveyor. Currently, section 10A(3)(c)(i) of the Act already requires the seller to give the buyer a certified statement from a registered cadastral surveyor:

- that there are no variations between the details of the area or linear dimensions contained in the disclosure plan given to the buyer under section 9(1) and the registered survey plan for the proposed allotment; or
- if there are variations, other than variations of which notice is required to be given under section 10—detailing the nature and extent of the variations.

This statement must be given no later than 18 months after the buyer enters into the contract for the land and in practice usually occurs at or just before settlement.

The rationale for requiring a registered cadastral surveyor to certify plans is to ensure that consumers are protected. Surveyors are governed by the *Surveyors Act 2003* and the *Survey and Mapping Infrastructure Act 2003*. The *Surveyors Act 2003* seeks to:

- protect consumers by ensuring surveys are carried out by registrants in a professional and competent way; and
- uphold the standards of practice within the profession; and
- maintain public confidence in the profession.

The *Survey and Mapping Infrastructure Act 2003* seeks to:

- develop, maintain and improve the State survey and mapping infrastructure;
- maintain and improve cadastral boundaries throughout the State and information held by the Department of Natural Resources and Mines about the boundaries;
- coordinate and integrate survey and mapping information;
- improve public access to survey and mapping information; and
- define administrative areas, and describe and work out administrative area boundaries.

It does this through, for example, the making of standards and guidelines for achieving an acceptable level of survey quality.

Anecdotal evidence from feedback to the previous Issues Discussion Paper suggests over 95% of disclosure plans are currently prepared by registered cadastral surveyors. There does not appear to be a substantial impost being placed on the industry by requiring disclosure plans to be prepared by registered surveyors.

For those arguably few circumstances where a disclosure plan is not prepared by a registered cadastral surveyor, there may be the possibility of increased cost. This may be because it may be difficult to determine the extent of variations because best practice survey principles were not originally followed. Therefore when a registered surveyor prepares a certified statement as required by section 10A, additional cost may be incurred to determine this.

Significant Variations under Part 2 of the Act

A significant variation is the threshold in section 10 of the Act which triggers the rights of a buyer to avoid the contract.

Definition

A significant variation is currently defined in section 10(5) as:

(a) in the details between a disclosure plan and a survey plan—
  (i) a variation of more than 2% in details of area
  (ii) a variation of more than 1% in details of linear dimensions

(b) in the details between a disclosure plan and an as constructed plan—a variation of more than 500mm in height in details of surface contours or fill levels.

Proposal 9

The definition of 'significant variation' in section 10(5)(a)(i) of the Act, relating to area, is amended so it provides for a variation of 2% in the area of the proposed land of less than 2000m^2 or 5% for proposed land of more than 2000m^2.

The definition of 'significant variation' in section 10(5)(a)(ii) of the Act is modified so that it means, (as an alternative to section 10(5)(a)(i)):

- a variation of more than 1% in the length of a boundary line of land where that boundary line is of five metres or more in length; and
- a variation of 5% in the length of the boundary line where that boundary line is less than five metres.

This would be instead of the current words 'a variation of more than 1% in details of linear dimensions.'

The proposal seeks to amend the current alternative paragraph (b) definition of 'significant variation' relating to surface contours or fill levels. It is proposed there must be two limits based upon the contour interval used as utilised in the definition of 'appropriate contour intervals' in section 9(7) of the Act.

The proposal also seeks to include changes to those proposed interests which will burden or affect the proposed land, for example, easements and covenants, any retaining walls to be built on the land as part of any operational works and proposed infrastructure, such as sewerage and water supply, drainage, roads, electricity, gas and communication services.

This will also include those conditions imposed upon an effective development permit, compliance permit or UDA approval not known at the time the disclosure plan and disclosure statement were given to the buyer.

Timing of giving a significant variation notice

Section 10(2) of the Act requires the seller to give a buyer a significant variation notice no later than 14 days after the seller has given the buyer the plan of survey, approved by a local government, which the seller proposes to register.

It is proposed the 'trigger' for giving a significant variation notice be the same as the 'trigger' in section 214 of the *Body Corporate and Community Management Act 1997* regarding disclosure of variations for proposed lots (i.e. proposed lots in community title scheme)..

Proposal 10

Section 10(2) of the *Land Sales Act 1984* is amended so that the seller is required to give the buyer a significant variation notice within 14 days of the seller becoming aware of the significant variation.

Feedback sought: What do you think should trigger the seller becoming aware of the significant variation? For example, should it be when the plan is lodged with a local governmental authority or another similar body?

Threshold for contract avoidance and significant variations

A body of case law has now developed to assist in determining when a buyer can avoid a contract, the subject of Part 3 of the Act and also the subject of Chapter 5, Part 2 (Proposed Lots) of the *Body Corporate and Community Management Act 1997*. That is, a buyer must demonstrate 'material prejudice' before exercising their right to terminate.

Additionally, section 25 (in Part 3) of the Act allows a buyer to avoid a contract if the buyer has been 'materially prejudiced' by the inaccuracy of any particular in the original disclosure statement. Section 214 (in Chapter 5, Part 2) of the *Body Corporate and Community Management Act 1997* similarly allows a buyer to avoid a contract if materially prejudiced if compelled to complete the contract, given the extent to which the original disclosure statement was, or has become inaccurate.

The Queensland Court of Appeal, in *Mirvac Queensland Pty. Ltd. v Wilson* (2010) QCA 322 opined on the meaning of 'material prejudice' providing further clarity. The Court of Appeal agreed with the Court 'at first instance' statement of principles to assist in a determination of material prejudice. This was in the context of section 214 of the *Body Corporate and Community Management Act 1997*. These principles are:

- the test is objective having regard to the particular buyer's circumstances, that is, would someone in those circumstances be materially prejudiced?
- material prejudice must be assessed in the light of the buyer's circumstances when a further statement is received
- there must be a causal relationship between the inaccuracy and the prejudice
- there must be proportionality between the inaccuracy and the prejudice
- as this is consumer protection legislation, it should be construed beneficially.

The Court of Appeal agreed with the Court 'at first instance' in its test to determine material prejudice. That is, the question of prejudice depends upon the information which has come to the buyer's actual knowledge and the information, on an objective basis, is inaccurate.

The Court of Appeal used the ordinary meaning of the term 'prejudice' (as provided by the Oxford English Dictionary) and stated it means to injure or to impair the validity (of a right, claim or interest) to damage. A person is 'prejudiced' when affected disadvantageously or detrimentally.

The Court of Appeal continued with the ordinary meaning of 'materially' by stating a person would be 'materially prejudiced' if disadvantaged substantially or to an important extent.

Proposal 11

Section 10(3) of the Act is amended so that a buyer must demonstrate 'material prejudice' as a result of the information contained in a significant variation notice given to the buyer.

This proposal will assist in consistency with contract avoidance thresholds for Part 2, and Part 3 of the Act and Chapter 5, Part 2 of the *Body Corporate and Community Management Act 1997*.

Exemptions from Part 2 of the Act

Section 19 of the Act allows applications to be made to the Registrar for exemption from all or part of the provisions in Part 2 in relation to a proposed allotment relating to land that is to be subdivided into not more than 5 allotments.

The Registrar essentially has discretionary powers under section 19 to consider the application for exemption. This was originally introduced by the Government in response to sellers who sell small numbers of allotments, often families rationalising their holdings (for example family farms).

It is current practice for contracts to be entered into, conditional upon granting of an exemption. However, in these circumstances section 19(7) requires the application for the exemption to be made within 30 days after the event that marks the entry of a purchaser upon the purchase of the proposed allotment.

In *Three Pty Ltd v Body Corporate for Savoir Faire Community Titles Scheme* (2008) QCA 167, the Court of Appeal interpreted the phrase 'the event that marks the entry of a purchaser upon the purchase' for the purposes of applying for an exemption from section 8(1) of the Act. In this case, the buyer had executed the contract before the seller.

The Court concluded an application for exemption from section 8(1) of the Act must be made within 30 days after the purchaser signs the contract, even if the seller has not signed, otherwise the contract is void. This has potential consequences for both sellers and buyers who wish contracts to remain valid.

Proposal 12

The time period in which an application for exemption must be made, i.e. 'within 30 days after the event that marks the entry of a purchaser upon the purchase of the proposed allotment' will be amended so that the application must be made within 30 days after the contract has been entered into. That is, both parties have fully executed the contract.

Alignment with the *Body Corporate and Community Management Act 1997* and restructure

The most significant set of proposals in this Paper relate to alignment of Part 3 of the Act with the *Body Corporate and Community Management Act 1997* (the BCCM Act). If accepted these would result in a restructuring of the Act. Currently, Part 2 of the Act deals with the sale of proposed allotments whereas Part 3 deals with the sale of proposed lots.

This Paper presents a preferred proposal with an alternative for comment.

Proposal 13A (Preferred Approach)

Part 3 of the Act (i.e. the provisions relating to proposed community title scheme lots) are removed and transferred to the BCCM Act, specifically Chapter 5, Part 2 (Proposed Lots).

This proposal envisages the existing disclosure regime contained in section 21 of the Act being included in section 213 of the BCCM Act. That is, section 213 of the BCCM Act would contain a disclosure regime for proposed lots covering:

- the body corporate and community management living aspects
- details concerning the construction of the proposed lot.

For example, the existing seller obligations and buyer rights for termination contained in section 214 of the BCCM Act would apply. That is, current the variation of disclosure statement (i.e. BCCM Act further statements) provisions would apply instead of the current rectification statement provisions contained in sections 22 and 25 of the Act.

In its essence, this approach would see the current disclosure regime for lots (contained in Part 3 of the Act) becoming part of the current law for the sale of proposed lots in the BCCM Act.

Alternative Proposal 13B

Part 2 of the Act will only apply to proposed non-BCCM Act (i.e. non-community title scheme) land. Part 3 will only apply to proposed BCCM (i.e. community title scheme) land.

The alternative proposal would envisage an express demarcation between Part 2 and Part 3 of the Act. At the moment it is not fully clear whether the both Parts apply to community title scheme land which is ‘subdivided land’.

Disclosure requirements for community title scheme land (currently in Part 3)

Section 21 of the Act currently requires the seller to give the buyer a statement identifying the proposed lot, and particulars of any representation, promise or term relating to the purchase before the buyer enters an agreement to purchase a lot under the BCCM Act, *Building Units and Group Titles Act 1980* or *South Bank Corporation Act 1989* 'off the plan' (i.e. a proposed lot).

The following proposal is complementary to Proposal 13A to align with the BCCM Act (see page 12). If both Proposal 13A on page 12 and the following proposal are accepted then these requirements would move into the BCCM Act.

If Alternative Proposal 13B to align with the BCCM Act (see page 13) is accepted then these requirements would reflect only community title scheme land (i.e. 'Part 3 of the Act land').

The information proposed below is similar to that shown on a registered format plan and will assist in reducing the potential for disputes concerning disclosure.

Proposal 14

The requirement in section 21(1)(a) of the Act is modified so that the seller is required to clearly identify the lot to be purchased by providing a copy of the (pre-approved or approved) plan showing the proposed format plan. The proposed format plan must include, at a minimum and where applicable:

- proposed lot number
- proposed lot area
- plan number
- identify parts of the lot outside a building or structure (e.g. balconies, courtyards and carports)
- proposed building floor level on which the proposed lot will be located
- the other lots, proposed lots and common and proposed common property on that building level
- orientation of the proposed lot by reference to a north point.

These details would be in addition to the details currently required to be disclosed.

Rectification statements for Part 3 of the Act

For proposed lots, section 22 of the Act requires a rectification statement to be given to the buyer if there is an inaccuracy in the disclosure statement given under section 21. The rectification statement must essentially update the original statement requirement under section 21 with the correct information.

The rectification statement must be given as soon as is reasonably practicable after the proposed lot has become a registered lot. A registrable instrument of transfer may not be given to the buyer, nor a contract settled and outstanding moneys paid, sooner than 30 days after the receipt of a rectification statement.

Proposal 15

The requirement in section 22(1) of the Act is modified so if a change in addresses of either the seller or the buyer, (provided on the initial disclosure statement as required by section 21), arises during the period of development, it is not included in the particulars required for a rectification statement.

This proposal envisages Part 3 of the Act being incorporated into the BCCM Act. Therefore the current rectification statement requirement in section 22 would be superseded by the requirements in section 214 of the BCCM Act.

The current 30 day exclusion period for giving a registrable instrument of transfer would be replaced by the existing section 214 of the BCCM Act requirement of giving a further statement (with the variation). Sellers would need to do this within 14 days of the seller becoming aware.

Disclosure of the time in which a transfer form for Community Title Scheme land must be supplied

Five respondents made submissions on this matter during feedback for the Issues Discussion Paper. Three respondents supported the Act requiring disclosure to be made about the time in which a registrable instrument of transfer must be supplied and the avoidance rights under the Act. One respondent did not object to the proposition while one respondent submitted that no changes were necessary.

Respondents submitted that the requirement could be appropriately contained in section 21 of the Act. In terms of consequences of a failure to comply with the disclosure requirement, it was submitted that there should not be a right to avoid the contract. Moreover, it was submitted that a failure should be non-consequential and the usual termination rights under section 27 would apply as usual.

In 2011, the former Attorney-General introduced the *Criminal and Other Legislation Amendment Bill 2011* which proposed to remove sections 27 and 28 of the Act. That is, the sections which provide the buyer with the right to avoid a contract (i.e. section 27) and permit a regulation to extend the time within which an instrument of transfer must be provided (i.e. section 28).

Clause 61 of the Bill then proposed to insert a new section 27 into the Act which would of allowed the seller and buyer to document, within their contract, the time within which a transfer form must be provided. Clause 61 proposed this time must be no later than 5½ years from the date of contract.

Proposal 16

Section 21 is amended to require the seller to disclose the time in which a registrable instrument of transfer must be supplied and that there is a right to avoid the contract under section 27.

This proposal would be incorporated into the Proposal to move all of Part 3 of the Act into the BCCM Act. Failure to disclose would be subject to section 214 of the BCCM Act.

Alternatively, if the Queensland Government decided to implement the alternative proposal for aligning the Act with the BCCM Act (see page 12) this proposal would be incorporated into Part 3.

Requirements for dealing with money

Sections 11 (for proposed allotments) and 23 (for proposed lots) require any deposit money to be placed in trust. For proposed allotments, section 11A also limits the amount of deposit payable to 10% of the purchase price.

Bank guarantees and deposit bonds

The concept of paying deposit money into trust is generally consistent with other fair trading-related legislation requiring the deposit money to be placed in trust (for example, transactions under the *Property Agents and Motor Dealers Act 2000)*.

The use of the term 'money' in sections 11 and 23 is not defined. As such it is not fully clear whether this term also includes bank 'guarantees' and insurance deposit bonds. This is supported from responses to the Issues Discussion Paper. Respondents also raised questions in relation to applying these trust account provisions to these financial 'deposit' products.

The justification for the proposal has its origins in the very nature of a performance bond (i.e. bank guarantee / deposit bond). That is, a contingent liability for the issuer arises from a performance bond rather than any credit being advanced to the buyer by the issuer. These bonds are issued by financiers with sufficient working capital to meet any demand and hence are viewed within the industry as equivalent to money.

The proposal recognises this and requires the stakeholder to hold the bank guarantee/deposit bond (as stakeholder for the parties). If contractual circumstances arise and the performance bond is called upon, the proposal then requires this money to be paid into the stakeholder's trust account.

Proposal 17

Sections 11 and 23 of the Act provide for the holding of bank guarantees or performance bonds used for the purchase of a proposed allotment / lot to be held by a law practice at its office in Queensland or a real estate agent licensed under the *Property Agents and Motor Dealers Act 2000* (collectively the 'deposit holder'').

The deposit holder must hold the bank guarantee or performance bond pending the performance of both parties as required by their contract. The deposit holder should be the person who is authorised to make a demand for payment under the guarantee or bond and the money received must be paid into the deposit holder's trust account pending the outcome of the contract.

Holding deposit moneys on trust

The following proposal would maintain consumer protection for those binding and non-binding 'transactions' which may occur to 'secure' unregistered land prior to entering into a formal contract. That is, the trust account provisions would extend to these circumstances.

Proposal 18

The obligation in sections 11 and 23 for the holding of money (e.g. a deposit) are extended to capture those situations where options, and any other instruments such as (binding and non-binding) expressions of interest, are used.

This proposal must be read in conjunction with the separate proposal to modify the definitions of 'purchase' and 'sell' (see page 23). That proposal would limit the application of the disclosure provisions and the commencement of the time within which a registrable transfer form must be given.

Contracts and deposits exceeding 10%

The Issues Discussion Paper considered the existing regulation for deposits on proposed lots (i.e. lots in a community titles scheme (off the plan units)) and proposed allotments. The Paper noted, for proposed allotments only, the Act (at section 11A) limits the amount of deposit payable to 10% of the purchase price. The Paper also noted that providing for deposits of more than 10% in respect of any property, including but not limited to proposed allotments, would need to consider the impact of the law governing instalment contracts in the *Property Law Act 1974*.

Under section 71 of the *Property Law Act 1974*, a contract for the sale of land which provides for a deposit of more than 10% of the purchase price, is deemed to be an instalment contract. This gives rise to significant consequences including that the contract cannot be terminated immediately if the buyer fails to make a payment under the contract, such as the balance purchase price, on time. Rather the seller must first give 30 days' notice that the payment is overdue and the seller intends to terminate the contract (see section 72(1) of the *Property Law Act 1974*).

Some legal stakeholders have also raised the following consequences for the seller as giving rise to difficulties:

1. For sales of unregistered allotments (flat land subdivisions) and units "off the plan", the seller is unable to give a subsequent mortgage or negotiate a further advance on an existing mortgage without the buyer's consent. If

the seller mortgages the land the subject of the contract without the buyer's consent, the buyer can terminate the contract. (see section 73 of the *Property Law Act 1974*). They state that:

- this creates significant problems in large long term developments where financial arrangements are required to be far more flexible and further advances need to be able to be negotiated without restriction

- experience has shown that lenders who place developers into receivership in the first instance attempt to settle on the original contracts which were signed by the seller

- the application of the 10% rule in these cases is simply an unintended by product of the definition of instalment contract and nothing to do with protecting the buyer as consumer.

2. Buyers can lodge a non lapsing caveat (see section 74 of the *Property Law Act 1974*), which if lodged over the whole of the land to be developed would cause difficulties in having new plans registered for no benefit to the caveator buyer or any other buyers.

Comments in response to the Issues Discussion Paper in relation to the current *Property Law Act 1974* provisions for instalment contracts stated, in particular, that the instalment contract provisions should not apply to 'off the plan' unit sales. Separately, the Government has received submissions arguing that the Government should facilitate deposits beyond 10% for any real estate sales. One stakeholder has asserted that a contract should be able to provide for a deposit as high as 30% without the contract being deemed an instalment contract.

It has been argued that section 11A of the Act should be removed and section 71 of the *Property Law Act 1974* should be amended to allow for deposits of up to 30% of the purchase price. In support of this position, it has been stated that the consumer protection intended by section 71 has been rendered obsolete by developments such as the *Property Agents and Motor Dealers Act 2000,* the *Land Sales Act* 1984 (which requires all money paid by a buyer of land under that Act to be deposited in a trust account until settlement) and the *Land Title Act 1994*. Proponents suggest such amendments would also boost development projects in Queensland by:

- facilitating developers' ability to obtain finance

- discouraging foreign buyers seeking to terminate contracts where the land value changes

- protecting developers in the event of a foreign buyer's default given it is not usually viable to litigate.

In Victoria, the *Sale of Land Act 1962* limits deposits relating to off the plan transactions to 10%. Most other states and territories in Australia do not expressly limit the size of deposits although 10% of the purchase price is usual. One of the reasons for sellers electing not to seek larger deposits may be the operation of the common law doctrine of penalties and the equitable remedy of relief against forfeiture.

Pursuant to the doctrine of penalties, a clause of a contract may be void and unenforceable if it provides for a party, upon breach of the contract, to suffer a penalty out of proportion to the damage likely to be suffered as a result of the breach. In determining whether a payment is a penalty rather than genuine pre-estimate of damages, the courts take into account all of the circumstances in existence at the time the contract was entered into. However, in the case of deposits, 10% is widely held as a reasonable pre-estimate of the damages that would likely be suffered by the seller. Above that threshold, there appears to be more scope for arguing application of the doctrine of penalties or for relief against forfeiture.

A Victorian bill was introduced in 2010 seeking to amend the *Sale of Land Act 1962* to allow for deposits of up to 20%. To offset the increase in limit on deposits from 10% to 20%, the proposal provided for enhanced disclosure requirements including:

- disclosures advising that the amount of deposit is negotiable
- disclosures warning that a significant period of time may elapse between the day a contract is signed and when a person becomes the registered proprietor
- disclosures warning that the value of the property may change between the day a contract if signed and when a person becomes the registered proprietor.

Concerns were raised about the 20% deposit permitted under the amendments becoming the norm and making it difficult for first home buyers to enter the market and the Victorian proposal was not adopted by the Victorian Parliament.

Proposal 19

The remedy for exceeding the 10% maximum level for a deposit on the purchase of land to which Part 2 of the Act applies is removed. In other words section 11A is removed.

In itself, removal of the limit on deposit amount in section 11A would have limited effect. It would simply leave regulation of this area to the provisions – in particular, the instalment contract provisions – contained in the *Property Law Act 1974*. The common law doctrine of penalties and equitable relief against forfeiture would also be relevant. As noted above, on one view, they

could each operate to void any contractual provision which allowed for deposit of more than 10% to be forfeited to a seller.

Consultation question

Further to Proposal 19, the Queensland Government invites comment in relation to Division 4 of Part 6 (Instalment Sales of Land) of the *Property Law Act 1974*, in particular:

- whether the Division should be removed entirely and the rights of an instalment purchaser be left to the general law;
- whether it should be amended to facilitate deposits of more than 10% of the purchase price for some or all land sales; and
- whether there is a better alternative for defining instalment contracts.

Respondents may wish to comment on issues such as:

- whether amendments should be considered to facilitate deposits of more than 10% of the purchase price and, if so, whether such amendments should be limited to off-the-plan unit sales or another class of real estate sales or be in respect of all real estate sales;
- whether any maximum level of deposit would be appropriate for the legislation to provide for – 20%, 30% etc;
- whether instalment contracts should be defined without reference to a particular level of deposit;
- the appropriateness of the doctrine of penalties, the equitable relief against forfeiture or a statutory remedy (for the return or part return of a deposit) being available to a purchaser who has paid a deposit higher than 10%;
- whether a seller should have the right to hold the deposit paid as security pending the assessment of damages against the buyer for actual loss suffered by the seller;
- if there is to be a legislative amendment to facilitate increased deposits, whether such increase should be offset by enhanced disclosure or requirements for the deposit to be held in a trust account in all cases and, if so, what enhanced disclosure and trust account provisions would be appropriate;
- if the Division is retained, how should instalment contracts be described (for example, by number of instalments, progressive percentage of payments, time period over which instalments are paid or a combination of these factors); and
- if the Division is retained, should any other policy changes, be considered.

Terminology

Respondents to the Issues Discussion Paper have almost uniformly stated that some of the existing terminology used in the *Land Sales Act 1984* is not current and needs refinement to better align with contemporary practice. The following terms are proposed to be amended to take into account, language in contemporary practice and procedure and ambiguities in some of the terms.

Allotment

Several respondents to the Issues Discussion Paper advocated replacing the term 'allotment' with its equivalent term in the *Land Title Act 1994*. As the intention of Part 2 of the Act is to regulate the sales of 'subdivided land' and that the use of the term 'allotment' is not contemporary, it would appear appropriate to re-construct how 'subdivided land' fits into this regime.

The following proposal reflects the preferred approach in Proposal 13A to align with the BCCM Act (see page 12)

Proposal 20

In relation to Part 2 of the Act, the term 'allotment' is removed from the Act and is replaced with the specific term 'lot'. The definition will only apply to Part 2 (meaning it will not apply to community title scheme lots) and will be defined according to the definition of a 'lot' in the *Land Title Act 1994*.

Lot

'Subdivided land' may be community titles scheme land and also non-community titles scheme land. In relation to the existing definitions in the *Land Title Act 1994,* the Department of Natural Resources and Mines has advised only a building format plan cannot be used outside of community titles scheme (bearing in mind these can be also used for subdivided land). That is, 'subdivided land' can be involved in standard format plans, volumetric format plans and building format plans. If 'subdivided land' is not part of a community titles scheme it may only involve standard format plans and volumetric plans.

Part 2 should only apply to 'subdivided land' where it is proposed, as one option, that Part 3 will be transferred to the BCCM Act. The definition of 'lot' will be defined according to the definition of 'lot' in the *Land Title Act 1994*. However, Part 2 will also need to apply to subdivided land that will become CTS land that is not described in a building format plan.

All three types of plans available under the *Land Title Act 1994* will be applicable to lots for the purpose of Part 3 of the *Land Sales Act 1984*. That is, standard format plans, volumetric format plans and building format plans.

However, lots on building format plan cannot be outside of a community title scheme. That is, Part 2 of the *Land Sales Act 1984* cannot apply to a proposed lot in a building format plan. This fact has been used as a method to assist with the application of Part 2 and Part 3 to CTS land.

Proposal 21A (preferred approach)

Proposal 21A for the definition of the term 'lot' becomes part of Proposal 13A (preferred approach) to align with the BCCM Act (see page 12). That is, once Part 3 of the Act is contained with the BCCM Act the term lot accepts the BCCM Act definition.

Alternative Proposal 21B

If the Queensland Government decides upon Alternative Proposal 13B to align with the BCCM Act (see page 13) then Alternative Proposal 21B for the definition of the term 'lot' will be as follows.

The term lot will take the meaning in the *Land Title Act 1984* for both Part 2 and Part 3 with Part 2 only applying to non-community title scheme land.

Surface contours

Respondents to the Issues Discussion Paper raised the ambiguity surrounding the term 'natural surface contours' contained in section 9(2)(c)(i) of the Act. That is, the disclosure plan must include, amongst other things, contours maps of the proposed allotment showing 'natural surface contours', with appropriate intervals and final surface contours as specified in the engineering drawings for the proposed allotment.

A recent example of the confusion amongst practitioners may be found in the Supreme Court case of *Treton P/L v HM Australia Holdings P/L and Lei Lei Lu*.[4] The seller in this case sought and achieved an order for specific performance of contracts for the sale of two proposed allotments after the buyer attempted to exercise its statutory right to avoid the contracts under section 10(4) of the *Land Sales Act 1984*.

The primary basis of the avoidance relied upon the purported failure of the seller to provide a disclosure plan as required by section 9(2) of Act. The relevant earthworks for these proposed allotments had been carried out by the time the contracts had been entered into, which the seller claimed relieved it from the requirement to provide a contour map showing natural surface contours. The seller argued the term 'natural surface contours' should be interpreted to mean existing surface contours (as existed at the time of the contract).

This argument was rejected by the Court. The Court ordered specific performance for the contracts. Evidence from surveyors for the seller and the buyer was accepted by the Court which led it to conclude the maps unambiguously disclosed information from which the levels and intervals of the natural surface contours can be deduced, albeit that that would require a

[4] [2011] QSC 38.

careful analysis by someone familiar with contour plans, therefore requiring these to be disclosed. Essentially a usual buyer would not be able to do so.
In discussing its reasons for its judgment the Court noted a map showing the contours of the land as at the date of the contract could be relevant to the identification of the land. The Court further noted this might assist a buyer to understand what is the proposed 'finished' landscape by being able to relate those levels to the existing levels (at the time of contract). This may also assist in identifying the boundaries of the proposed allotment.

The Court stated section 9(2) requires a map of the 'natural surface contours', the levels of the land before any human disturbance, rather than the then existing surface contours. For particular importance to the proposal, the Court noted it is not easy to understand a requirement for the provision of natural surface contours, having regard to the purposes of the Act and specifically its requirement for a disclosure plan. The Court noted the drafting of section 9 gives the impression the difference between natural surface contours and existing surface contours (at the time of contract) was overlooked.

Proposal 22

The term 'existing surface contours' replaces the term 'natural surface contours'.

Proposal 23

To put the meaning beyond doubt, and after a replacement of the term 'natural surface contours' with 'existing surface contours' (see Proposal above), the term 'final surface contours' used in section 9(2)(c)(ii) of the *Land Sales Act 1984* is defined to mean those contours immediately after the completion of operational works for the land.

Vendor and purchaser

To improve consistency with other related legislation (e.g. the *Body Corporate and Community Management Act 1997* and the *Property Agents and Motor Dealers Act 2000*) and contemporary practice, stakeholders have raised whether the terms 'vendor' and purchaser' can be replaced with their contemporary equivalents of 'seller' and 'buyer'.

Proposal 24

The terms 'vendor' and 'purchaser' (and their derivatives) in the *Land Sales Act 1984* are respectively replaced with 'seller' and 'buyer' (and their derivatives).

Enter upon a purchase

The phrase 'enters upon a purchase' is an outdated expression and its contemporary expression, which occurs in associated legislation (e.g. the *Property Agents and Motor Dealers Act 2000*), is 'enters into a contract'. This expression is also more technically accurate.

Proposal 25

The phrase 'enters upon a purchase' in the *Land Sales Act 1984* is replaced with the phrase 'enters into a contract'. This proposal is subject to the proposal to modify the definition of the term 'purchase' and is more likely to be superseded by that proposed definition.

Purchase

The term 'purchase' is defined (non-exhaustively) in section 6 of the Act to include:

(a) agree to purchase

(b) acquire an option to purchase

(c) enter upon a transaction that has as its object the acquisition of a right (not immediately exercisable) to purchase or to be given an option to purchase

(d) sign an instrument that is intended to legally bind a signatory to purchase

(e) enter upon a transaction or sign an instrument with a view to any person securing or attempting to secure another's agreement to sell.

This is not consistent with the definition of the term 'purchaser' provided in section 6A of the Act. Section 6A provides a 'purchaser' is a person:

- who signs (personally or by an agent) an instrument that is intended to bind the person (absolutely or conditionally) to purchase a proposed allotment or a proposed lot and shall be taken to have entered upon a purchase of the allotment or lot.

Section 6A then defines a 'vendor' as:

- a person who signs (personally or by an agent) an instrument that is intended to bind the person (absolutely or conditionally) to sell a proposed allotment or a proposed lot and shall be taken to have entered upon a sale of the allotment or lot.

It is also not consistent with the proposal to modify the term 'enter upon a purchase' with the term 'enter a contract' (see page 22).

The following proposal must be read in conjunction with the separate proposal to extend the obligations in section 11 and 23 of the Act for the holding of money to capture those situations where options, and any other instruments such as (binding and non-binding) expressions of interest, are used (see page 16).

Proposal 26

The definitions of ‘purchase’ and ‘sell’ are modified so they reflect the definition of ‘purchaser’ in section 6A.

Conclusion

The proposed policy changes to the Act seek to modernise it and streamline processes involved in the sale of proposed allotments and proposed lots. This is turn will contribute to reducing the regulatory burden on business while maintaining consumer protection.

The Act will therefore continue to impose some restrictions on competition; however such restrictions are necessary for the protection of consumers given the risks and amount of money involved in purchasing unregistered subdivided land or a building unit off-the-plan.

This Policy Proposals Consultation Paper seeks community feedback on proposed changes to the Act. These proposals are the result of earlier consultation with the community in the form of the Issues Discussion Paper.

Once the community's feedback is collated the Queensland Government will be in a position to decide upon the best outcome for possible amendments to the Act. Therefore you comments and feedback are important to assist the Queensland