Department of **Employment, Economic Development and Innovation**

Discussion Paper

Review of *The Land Sales Act 1974*

Toward Q Tomorrow's Queensland

Queensland Government

Contents

Message from the Minister

The *Land Sales Act 1984* regulates the sale of proposed subdivisions of land and proposed lots in a community titles scheme. Its objects are to:

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

The Act is due for review as it is nearing the end of a ten year period since its introduction. During this period the industry and community have seen rapid advances in commercial planning law and practice

The Queensland Government is committed to providing a quality legislative framework by addressing contemporary issues faced by the community and industry. In continuing this commitment I am pleased to announce the Act is undergoing a review and the Government is now seeking your comments through the release of this Issues Discussion Paper.

I would also like to take the opportunity to thank those stakeholders who have already contributed to the review of the Act, including the Queensland Law Society, Property Council of Australia, Urban Development Institute of Australia (Queensland), Allens Arthur Robinson and Professors Bill Duncan and Sharon Christensen.

I encourage you to take the time to consider the Paper and respond to the questions posed within it. This will assist us in ensuring the laws regulating the sale of proposed subdivisions of land and proposed lots in a community titles scheme are relevant, user friendly and meet the interests of all those affected by their operation.

Peter Lawlor

Minister for Tourism and Fair Trading

How can I have my say?

You are invited to comment on any subject in this Paper. You are encouraged to respond to the specific questions posed in each section highlighted in blue. You are also welcome to raise any issues which you consider are relevant to the review.

This Paper is available from the Office of Fair Trading's website.

Submissions are required in writing no later than **24 December 2010** and may be forwarded either by:

- **Email** to:

  Land Sales Act 1984 Review at landsales@deedi.qld.gov.au;

- **Post** to:

  Land Sales Act 1984 Review
  Fair Trading Policy Branch
  Office of Regulatory Policy
  Department of Employment, Economic Development and Innovation
  GPO Box 3111
  BRISBANE QLD 4001

- **Fax** to:

  Land Sales Act 1984 Review
  Fair Trading Policy Branch
  Office of Regulatory Policy
  Department of Employment, Economic Development and Innovation

  Facsimile number: 07 3405 4059.

Any telephone enquires may be made on 13 QGOV (13 74 68).

Disclaimer

This is a Discussion Paper only – it does not represent the policy of any State, Territory or the Australian Government. The Paper seeks public comment on the operation of the *Land Sales Act 1984*.

While every effort has been made to ensure the accuracy of the information contained in this Paper, no responsibility is taken for reliance on any aspect of it and it should not be used as a substitute for legal advice.

1.0 Introduction

The *Land Sales Act 1984* (the Act) was passed by Parliament in 1984 and came into effective operation on 1 July 1985. It was introduced as a response to a number of significant incidents of consumer detriment in the 1970s and 1980s caused by misdescribed land. The objectives of the Act are:

- facilitating land development in Queensland;
- protecting the interests of consumers in relation to property development;
- ensuring that land is accurately described; and
- achieving these objectives without placing additional burdens on local governments in addition to their obligations under the *Sustainable Planning Act 2009.*

The Act regulates the sale of flat land ('proposed allotments') and building units purchased off the plan ('proposed lots') including restricting the point at which allotments and lots may be sold in the registration of title process and imposing disclosure obligations on the seller.

The Act provides a level of protection for purchasers when real property is sold at a relatively early stage of development. The Act restricts the sale of proposed allotments unless there is a development permit or compliance permit for reconfiguring a lot for the allotment or for operational works associated with reconfiguring the lot for the allotment. In other words a development approval for the subdivision process.

The Act also promotes accurate descriptions of the property for sale through requirements for disclosure of information on the detail of the property and the rights of the purchaser. If there are significant variations between the descriptions on a disclosure statement and the property after development, the purchaser may be able to vary the terms of the contract, or avoid the contract.

The intention of the Act has been to adequately protect consumers in the purchase of land or a unit off the plan, without unduly restricting the development of raw land or construction of unit developments.

1.1 Nature of the market

The Act applies to both commercial and residential conveyancing transactions involving real property (both freehold and leasehold land) sold off the plan. The relevant markets draw purchasers from various areas of the community, including both sophisticated and unsophisticated investors who may on-sell or lease the property, as well as those who plan to become an owner occupier of a property being developed.

Marketing and sales are commonly undertaken before the land being developed is readily identifiable or before construction starts. Consequently, the purchaser is usually unable to inspect the final product until some months or years after entering the purchase agreement. Features may change during development and no longer reflect the purchaser's understanding or expectations. This includes the position, contour, shape, or size of a parcel of land or the size or format of rooms and balconies or the inclusion of fittings and fixtures in a building unit.

2.0 The Act, its history and its context in planning and development

The Act applies to two main areas of the property development market. Part 2 of the Act regulates the sale of flat land sold off the plan and Part 3 regulates lots sold off the plan forming part of a community titles scheme (e.g. units in a high rise development).

2.1 Part 2 of the Act - Flat land (proposed allotments)

Part 2 of the Act regulates situations where a parcel of flat land is being developed in preparation for sub-division and the proposed subdivisions are being marketed before completion of the improvement and / or subdivision process. Subdivision can be subject to the developer meeting various local authority approvals, including for any works to be undertaken. Once the development is completed and approved, each subdivision will be registered under the *Land Act 1994* or the *Land Title Act 1994*. A summary of the subdivision process is at section 2.5.

At the time a purchaser enters a purchase agreement, the development of subdivisions may be subject to the vendor undertaking works, meeting conditions and obtaining approval from the local authority. This includes the vendor submitting engineering drawings of any operational works to the local authority for approval prior to their commencement. The completed work requires engineering certification before approval of the survey plan may be granted.

Prior to completion of the subdivision works and in particular, registration of title, an individual subdivision of land being marketed is referred to under Part 2 of the Act, as a 'proposed allotment'.

Part 2 of the Act does not apply to large transactions. That is, the sale or purchase of six or more proposed subdivisions (proposed allotments), where the seller and purchaser of the subdivisions are the same persons and there is a single agreement covering all or two or more agreements entered into within 24 hours.

2.2 Part 3 of the Act - Building units off the plan (proposed lots)

Part 3 of the Act regulates situations where lots that will form part of a community titles scheme (or the equivalent under the *South Bank Corporation Act 1989* and the *Building Units and Group Titles Act 1980*) are sold 'off the plan' (prior to construction). For example, commercial and residential units may be sold off the plan in the planned development of a resort, high rise tower or mixed use complex near a transport hub. Part 3 of the Act refers to such units as 'proposed lots'. The Act does not apply to registered lots in community titles schemes.

For proposed lots, at the time a purchaser enters a contract the actual lot does not exist and is merely a portion of airspace. In other words, the agreement is formed at a point before the construction and registration of individual lots. Amongst other things, settlement of a sale contract for a proposed lot is usually conditional upon both the creation of the community titles scheme and transfer of title. Therefore, purchasers are wholly reliant on representations made in marketing information, such as brochures, plans, models and scale drawings, to ascertain exactly what they have agreed to buy.

Due to the complexity of larger developments and longer project timeframes, off the plan contracts for the purchase of proposed lots generally provide a greater degree of flexibility. They commonly include clauses covering varying circumstances affecting timings of performance and cost variations together with sunset clauses for withdrawing from an agreement.

In practice, the exact contract completion date may be uncertain due to unavoidable construction delays, for example, due to bad weather or problems with supply of materials or council approvals. Also, while a developer may have progressed a project to the point of receiving development approval by the local authority and started marketing, project finance for commencing construction of a large development is often only available to the developer subject to meeting a particular presales target.

Therefore, clauses in off the plan sales contracts for units in larger developments may provide for the vendor to cancel sales agreements without a penalty if a presales target is not achieved. Contract clauses may also address price increases in building materials and utility services before completion.

2.3 Overview of requirements in other related legislation

In addition to the Act, a number of other pieces of legislation affect this area of the property development market, including the *Sustainable Planning Act 2009*, *Land Title Act 1994*; *Fair*

Trading Act 1989; *Body Corporate and Community Management Act 1997*; and *Property Agents and Motor Dealers Act 2000*.

- *Sustainable Planning Act 2009* (which repealed the *Integrated Planning Act 1997*)

This Act outlines local government authorities' approval process for land development. Local government authorities consider development applications and compliance requests to subdivide land, taking into account such things as the proposed use, drainage, and access issues. Approval may be conditional on the submission of an amended plan meeting additional requirements. Engineering plans for operational works must be submitted for further approval before works can start. After approval of the subdivision or the operational works and within a specified period, an accurate survey plan must be submitted to the authority for approval under its seal and then registered with the Titles Office.

- *Land Title Act 1994*

This Act provides for the registration of plans of subdivision to define separate parcels of land (referred to as 'allotments' or 'lots' in the Land Sales Act). Upon registration of a plan of subdivision, a separate indefeasible title is created for each new parcel, allowing ownership to be transferred by registering an instrument of transfer.

- *Fair Trading Act 1989* (FTA)

Section 40A of this Act regulates false and misleading representations in relation to land. This includes the way in which land is advertised or marketed

- *Body Corporate and Community Management Act 1997* (the BCCM Act)

This Act regulates the establishment, operation and management of community titles schemes, including those incorporated in property developments.

- *Property Agents and Motor Dealers Act 2000* (the PAMD Act)

The PAMD Act regulates the conduct of licensed real estate agents and auctioneers with respect to the sale of land. It also regulates property developers, including a requirement to hold a licence to sell development properties if they sell six or more residential properties in a 12 month period and have a 15% or higher stake in the sale. The Government proposes to remove this requirement in the near future so that unless a property developer also sells a property on behalf of another party, they will no longer require a licence. Currently, Bills are being developed to split the PAMD Act into occupational specific Acts. This is in line with the Government response to the 2008 regulation reduction review by the former Service Delivery and Performance

Commission. Property developers will no longer be licensed under the new framework, but will be subject to conduct requirements. Real estate agents and auctioneers of real property will be regulated under the proposed Property Agents Act. It is expected that the new legislative framework will commence in mid 2011.

2.4 History on the regulation of unregistered land and lots in Queensland

Prior to the Act, regulation of the sale of unregistered land was in the *Auctioneers and Agents Act 1971*. Prior to the enactment of the *Auctioneers and Agents Act 1971*, the sale of unregistered land was not restricted in Queensland and recipients of money in respect of such transactions were not required to place those moneys into trust accounts.

The decision to regulate the sale of unregistered land seems to have been precipitated by a number of land scandals in the 1960s and early 1970s related to the sale of unregistered land for residential development. The main problems seem to have been:

- consumers purchasing island land which was below the high water mark and therefore subject to tidal flooding;
- consumers purchasing land subject to inundation, subsidence, slip, erosion, drainage problems etc;
- consumers being shown one block, but being sold another without them realising it; and
- consumers purchasing land not yet properly surveyed (i.e. from mud maps) and subsequently finding out their blocks did not reflect vendor representations.

2.4.1 Auctioneers and Agents Act 1971

On 1 February 1973, amendments to the *Auctioneers and Agents Act 1971* came into effect. The new section 67 continued to allow the sale of unregistered land, but required all moneys received by the auctioneer or real estate agent for the transaction to be placed into a trust account. The moneys were to be held on trust until:

- the plans, instruments and other documents required to be lodged and registered precedent to the taking out of a separate certificate of title had been lodged with and registered by the Registrar of Titles; or
- the purchaser became entitled to a refund under the section.

The new section 67 reduced the time within which purchasers could avoid contracts. Purchasers could only avoid contracts by written notice up to the time when the plans, instruments and other documents referred to above were registered. Presumably this amendment was made as a result of the delays then being experienced by developers

in obtaining separate certificates of title from the Titles Office and because of the incidence of prospective purchasers electing to avoid contracts as a result of these delays.

Once a contract had been avoided, any person holding money in respect of that transaction was required to immediately refund the money to the purchaser. The new section 67A imposed similar trust accounting requirements and applied to the sale of proposed strata title building units. Moneys were to be held on trust until:

- the building units plan in which the unit was incorporated as a unit was registered by the Registrar of Titles; or
- the purchaser became entitled to a refund under the section.

Section 67A also required the auctioneer or real estate agent to give the purchaser a disclosure statement clearly identifying, among other things, the unit to be sold. This statement was required to be given before the purchaser signed the contract. Purchasers could only avoid contracts by written notice up to the time when the building units plan was registered.

In 1975, amendments were made to section 67 of the *Auctioneers and Agents Act* to prohibit the sale or offering for sale of land which was subdivided into more than five allotments until the plans, instruments and other documents had been lodged and registered by the Registrar of Titles.

2.4.2 The Land Sales Act 1984

The Act commenced on 1 July 1985 and repealed section 67 and 67A of the *Auctioneers and Agents Act 1971*. Parliament considered it necessary that the law dealing with the sale of proposed subdivisions of land and proposed lots be contained in a separate Act.[1] In the second reading speech for the Land Sales Bill, the then Minister for Justice and Attorney-General cited various problems with section 67 of the *Auctioneers and Agents Act* as justification for the Bill. Such problems were[2]—

- the wording of the section was such that it did not in fact apply to proposed subdivisions of land;
- developers attempted to circumvent the section by submitting multiple plans

[1] Queensland Parliament (1984) *Parliamentary debates (Hansard)* 27 March 1984, 2108 (Hon N J Harper, Minister for Justice and Attorney-General).
[2] Queensland Parliament (1984) *Parliamentary debates (Hansard)* 27 March, pp.2108-09 (Hon N J Harper, Minister for Justice and Attorney-General).

relating to the same subdivision, but containing not more than five allotments;[3]

- there was no trust accounting requirement for deposits received for a subdivision of five allotments or fewer;
- purchasers who were eager to enter into contracts at the earliest possible time attempted to circumvent the section by submitting offers to purchase or letters of intent on the understanding they will enter into firm contracts when the developer was permitted to sell the allotments, and tendered sums of money to demonstrate their good faith (i.e. pre-emptive rights);
- there was no justification for the disparity between off the plan unit sales which were allowed by section 67A;
- developers continued to meet financing costs during the 10 to 14 week period between the local authority sealing the final plan of subdivision and registration; and
- the proposed allotments were readily identifiable at the time when the local authority sealed the final plan of subdivision.

The Act was passed on April 4 1984 but did not commence until 1 July 1985. Amendments were made prior to its commencement by the *Land Sales Act Amendment Act 1985* and the *Land Sales Act Amendment Act (No 2) 1985*. In relation to the sale of flat land, the Act as it stood at 1 February 1986:

- prohibited the sale of freehold land until the local authority had sealed the subdivisional plan of survey;[4]
- prohibited the sale of leasehold land until Ministerial approval to the subdivision had been granted;[5]
- required the vendor or the vendor's agent to give to the purchaser a copy of the sealed or Ministerially approved subdivisional plan of survey prior to entering into the purchase;[6]
- required the vendor or the vendor's agent to give to the purchaser a copy of the plan of the survey as soon as is reasonably practicable after registration of the plan of survey is varied;[7]

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[3] Trusts were also used to circumvent the Auctioneers and Agents Act. See *Anantamul Pty Limited v Innes-Irons* [1984] 2 Qd R 180.
[4] Section 8(1)(a).
[5] Section 8(1)(b).
[6] Section 9.
[7] Section 10.

- required deposit moneys to be held in trust accounts;[8]
- allowed contracts to be avoided if the vendor or the vendor's agent's failed to provide a copy of the subdivisional plan of survey;[9]
- allowed contracts to be avoided if deposit moneys were not paid directly to the Public Trustee, a solicitor's or licensed real estate agent's trust account;[10] and
- allowed contracts to be avoided if after nine months (or the extended period granted by the Minister) has lapsed and no registrable instrument of transfer had been delivered to the purchaser or the purchaser's agent.[11]

In relation to the sale of proposed lots, the Act as it stood at 1 February 1986:

- did not prohibit the sale of proposed lots prior to registration of the plan, provided other provisions of the Act were complied with;
- required the vendor or the vendor's agent to give to the purchaser a statement clearly identifying the proposed lot prior to entering into the purchase;[12]
- required the vendor or the vendor's agent to give to the purchaser or the purchaser's agent a rectification statement as soon as reasonably practicable after the lot was registered if the initial disclosure statement was not accurate or subsequently became inaccurate;[13]
- required deposit moneys to be held in trust accounts;[14]
- allowed contracts to be avoided if the vendor or the vendor's agent failed to provide a disclosure statement or rectification statement and the purchaser was materially prejudiced;[15]
- allowed contracts to be avoided if deposit moneys were not paid directly to the Public Trustee, a solicitor's or licensed real estate agent's trust account;[16] and
- allowed contracts to be avoided if after 36 months (or the extended period granted by the Minister) has lapsed and no registrable instrument of transfer had been delivered to the purchaser or the purchaser's agent.[17]

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[8] Sections 11 and 12.
[9] Section 13.
[10] Section 14.
[11] Section 15.
[12] Section 21.
[13] Section 22.
[14] Sections 23 and 24.
[15] Section 25.
[16] Section 26.
[17] Section 27.

The rationale for the restrictions on the pre-selling of land, both before 1984 and since, was to minimise as far as possible the deliberate or inadvertent misdescription of land. However, the removal of the prohibition on selling proposed lots prior to registration was justified on the basis that misdescription of proposed lots had never been an issue.

The Government also recognised where vendors were selling small allotments, or families were rationalising their holdings, the danger of misdescription was minimal. Section 19 of the Act therefore allowed a person proposing to subdivide land into not more than five subdivisional portions to apply for an exemption from compliance with all or any of the provisions of Part 2, including section 8.

There was no longer any 'as of right' exemption for subdivisions of five or less in section 19 of the Act. The stated reason was to prevent schemes involving developers submitting multiple plans, each containing not more than 5 allotments but all relating to the same subdivision, to the Registrar of Titles for registration and thereby avoiding the operation of section 8 of the Act.

Since section 7A became operative on 2 July 1993, Part 2 (including section 8) of the Act does not apply to a 'large transaction'. That is, a transaction for:

- the sale of land comprising six or more subdivisional portions, or proposed subdivisional portions, to a single person; or
- the purchase of land comprising six or more subdivisional portions, or proposed subdivisional portions, by a single person.

In his second reading speech on 17 June 1992, the Honourable the Minister for Justice and Corrective Services said that section 7A will:

> *"….ensure that there is greater flexibility between commercial operators selling land to one another, which will facilitate more orderly marketing of real property. The amendment will not directly affect consumers, and is intended purely to deal with inter-developer transactions".*[18]

2.4.3 Lessening the restrictions on the sale of unregistered land -1997

For several years, the real estate and development industries had been lobbying the government to amend the Act to remove or lessen the restrictions on pre-registration selling of allotments. There was agreement the inability of developers to sell proposed allotments at the pre-registration stage, when engineering drawings (if required) have

[18] Queensland Parliament (1992) *Parliamentary debates (Hansard)* 17 June 1992, p.5839.

been approved, was hindering development in that sector because developers had difficulty in obtaining finance on satisfactory terms in the absence of concluded contracts for sale. By contrast, provision already existed to sell building units and group titles ('proposed lots') 'off the plan' at the pre-registration stage, and this, it was argued, conferred an unfair commercial advantage on developers in that sector.

The *Land Sales and Land Title Amendment Act 1997* introduced the most significant amendments to the Act since its commencement including relaxing of restrictions on the sale of flat land and enhancement of disclosure requirements. The explanatory notes for the Bill of this Act stated that there was no longer any compelling reason to limit the pre-registration sale of allotments at the point where subdivision has been approved, provided that certainty of identification of the land purchased is assured.

The explanatory notes stated that the amendments to the Act will not infringe its original policy objectives of minimising as far as possible the deliberate or inadvertent misdescription of land; and providing readily available remedies to consumers who are nevertheless adversely affected.

The Act was amended to provide that:

- pre-registration sales of proposed allotments at the engineering drawings stage be permitted under the Act (if the local authority does not require approval of engineering works then selling was allowed following the approval of the application for subdivision);
- provisions, including the supply of a disclosure statement and disclosure plan to a purchaser, ensure that a proposed allotment is substantially identical to that which was originally purchased;
- if the allotment is not substantially identical, i.e. there is a significant variation between the disclosure plan and either the plan showing the constructed works or the plan proposed to be registered, the purchaser have an automatic right to avoid the contract of sale;
- where the allotments are substantially identical, developers and purchasers be able to enforce their contracts against each other at all times to allow commercial certainty to developers and financiers;
- the existing consumer protection mechanisms concerning retention of deposit monies in trust accounts be retained for all unregistered land, and deposits not exceed 10 per cent of the purchase price for proposed allotments;
- there be no additional certification requirements imposed on local authorities to avoid increasing their financial or administrative burden;

- if there is a delay of more than 18 months between the date of the contract and the date of delivery of a registrable instrument of transfer for a proposed allotment, the purchaser have a right under the Act to avoid the contract (replacing the prescribed period of nine months);
- if there is a delay of more than 42 months between the date of the contract and the date of delivery of a registrable instrument of transfer for a proposed lot, the purchaser have a right under the Act to avoid the contract (replacing the prescribed period of 36 months);
- the Ministerial discretions to extend the periods of automatic avoidance be removed.

These amendments brought Queensland into line with other States and Territories that did not restrict the pre-registration selling of flat land.

2.4.4 Time in which to provide a registrable transfer – proposed lots

This particular provision of the Act has been most impacted upon as the size and scale of residential unit development has increased in Queensland. The Act originally allowed the vendor 18 months to provide the purchaser of a proposed lot with a registrable instrument of transfer to that lot. This period has been gradually increased to 24 months in 1985, to 36 months in 1995, and to 3.5 years in 1997.

Prior to the 1997 amendments to the Act a Ministerial discretion existed to allow a case-by-case extension of the period. This discretion was removed "to promote greater commercial certainty and safeguard the interests of consumers investing in unit developments".[19]

In 2001, the ability for a regulation to prescribe a longer period was again introduced in response to a particular development. The Sunland Group Limited ("the Sunland Group") planned to develop a 78-storey residential unit development on the Gold Coast. The scope of this project meant it would be impossible for the vendor to provide potential purchasers with a registrable instrument of transfer within the 3.5 year timeframe.

It was argued this made it difficult for the Sunland Group to secure the necessary funding for the development. While it was thought a further across-the-board increase of the period would not be justified on the strength of the Sunland Group development

[19] The Land Sales and Land Title Amendment Act 1997

alone, the development illustrated the need to revisit the period allowed by the Act for a registrable instrument of transfer to be provided to purchasers of proposed lots.

Therefore the Act was again amended to allow the period to only be extended in exceptional circumstances, upon the approval of the Minister. The extension was by way of amendment to the *Land Sales Regulation 2000* and limited to a maximum of 12 months beyond the existing three and a half year period. There is a requirement to advise in writing persons investing in proposed lots, before paying any money, that an extension to the period has been granted.

In 2005, in response to a further development, whose size and complexity meant that the existing one year extension would not be sufficient, (i.e. a proposed 72 story building by Vision (Brisbane) Pty Ltd, a wholly owned subsidiary of the Austcorp Group), the *Land Sales Regulation 2000* extension period was lengthened from four and a half years to five and a half years.

2.5 Overview of the subdivision process in Queensland

Provisions in the Act operate in the context of the subdivision approval process. A brief overview of the subdivision process in Queensland is outlined in Appendix 1.

Before a new lot can be sold, an indefeasible title has to be created for it. A registered owner makes an application or request to subdivide (reconfigure a lot) to the local authority. The *Sustainable Planning Act 2009* defines reconfiguration as:

a) creating lots by subdividing another lot; or
b) amalgamating two or more lots; or
c) rearranging the boundaries of a lot by registering a plan of subdivision; or
d) dividing land into parts by agreement rendering different parts of a lot immediately available for separate disposition or separate occupation, other than by an agreement that is —
    (i) a lease for a term, including renewal options, not exceeding 10 years; or
    (ii) an agreement for the exclusive use of part of the common property for a community titles scheme under the BCCM Act; or
    (iii) creating an easement giving access to a lot from a constructed road.

Reconfiguring a lot requires a development permit for assessable development or a compliance permit if the reconfiguration requires compliance assessment. Development for which compliance assessment is required is prescribed in the *Sustainable Planning Regulation 2009*, schedule 18, and is for simple subdivisions of one lot into two that meet the prescribed criteria. The following steps are involved.

2.5.1 Application or Request

Under the *Sustainable Planning Act 2009*, an application (for assessable development) or a request (for development requiring compliance assessment) is made to the local authority in accordance with the processes under the Integrated Development Assessment System (IDAS). The application or request must be accompanied by a proposed plan of subdivision and the relevant fee. The proposal plans submitted with the application for approval to subdivide are almost always prepared by a surveyor.

2.5.2 Assessment

For an assessable reconfiguration application, the local authority considers the application against criteria in the relevant planning instruments, including State planning instruments, the planning scheme and Local or Neighbourhood plans. A range of factors will be considered as outlined in Chapter 6, Part 5, Division 2 of the *Sustainable Planning Act 2009*. A development permit is issued if the application is approved, and conditions may require a subsequent operational work application for the engineering works be submitted to support the earlier approval.

For subdivision proposals subject to compliance assessment, a simpler and faster process applies. The local authority, as the compliance assessor, assesses the request against either the code in the planning scheme (adopted from the Queensland Planning Provisions), or in the State planning policy for Acceleration of compliance assessment. It is a technical assessment and the proposed reconfiguration or operational work must comply with the code. If the request is approved, a compliance permit, with or without conditions, is issued.

2.5.3 Approval

If the local authority approves the application or request it may impose conditions on the approval. These conditions may relate to the further approval, provision or completion of road works, stormwater management, earthworks, landscaping or easements and services.

Consequently, a further development permit, compliance permit or compliance certificate is likely to be required for subsequent operational work or documentation once the earlier 'reconfiguring a lot' application or request has been approved. However, any outstanding conditions of the reconfiguring a lot approval are required to be fulfilled prior to the granting of the operational work approval.

Where an operational works permit or certificate is required, the applicant must submit engineering drawings and specifications for the works with the application or request for approval. The local authority must examine the engineering drawings and

specifications and ensure they conform to the earlier approval. The proposal must also comply with relevant codes, town planning policies and responsible engineering practice. Approval of engineering drawings and specification may also be subject to the fulfilment of conditions relating to the creation of land for road widening purposes, drainage reserves etc. Issues such as water supply, sewerage, storm water management and road design must be addressed before the approval will be given.

An applicant may apply to a local authority for approval to subdivide and for approval for its engineering drawings and specifications related to required operational works at the same time, depending on the complexity of the proposal.

Under section 341 of the *Sustainable Planning Act 2009*, where a local authority has issued a development permit for the reconfiguration, the approval lapses if a plan for reconfiguration is not lodged within two years of the approval where operational works are not required, or within four years of the approval where operational works are required. If a compliance permit is issued for the reconfiguration, the plan for reconfiguration must be lodged with the local authority within 2 years of the permit (or other period stated in the conditions).

The relevant period for the approval can be extended however, if a development permit or compliance permit for a related approval is issued within 2 years of the earlier approval, such as operational work related to the reconfiguration. If this occurs the relevant period for the approval starts again from the date the latest related approval takes effect.

2.5.4 Plan sealing and registration of plan

Upon completion of works, “as-constructed plans” are submitted to the local authority. The applicant must submit a final plan of survey for the subdivision to the local authority which may note its approval under its seal.

2.5.5 Registration of title

The plan of survey may then be lodged with the Registrar of titles under the *Land Title Act 1994*. A lot is created when the plan is registered.

3.0 Pre-registration – An interstate comparison

It is difficult to make direct comparisons with other jurisdictions given that planning legislation, planning practice and regulatory frameworks in relation to land transactions are not directly comparable. The following is a brief summary of relevant legislative provisions.

The Act is distinct from most other Acts regulating the sale of land in Australia, in that it regulates a particular phase in the sale of land process (i.e. the sale of land prior to registration). Acts in other jurisdictions tend to regulate particular types of contracts (i.e. instalment/terms contracts) or the types of property being sold (e.g. residential property only). Victoria is the only other jurisdiction that specifically regulates the sale of unregistered land.

A table can be found in Appendix 2 detailing the similarities and differences within Australian regulation the sale of unregistered land and lots.

3.1 Restriction on the sale of proposed allotments

Unlike the Act, other Australian jurisdictions do not require a vendor to obtain development approval prior to contract for the sale of unregistered vacant land (i.e. proposed allotments). In Queensland, and all other jurisdictions, there is no such legislative restriction on the sale of proposed lots. However, in the Northern Territory, the *Unit Titles Schemes Act* which regulates unit titles schemes provides that a party (i.e. seller or buyer) must not compel another party to complete the contract before the end of 10 working days after the seller notifies the buyer by writing that the unit has come into existence.[20]

3.2 Disclosure of information

Legislation in all State and Territories, except Western Australia, sets out vendor disclosure requirements in relation to the sale of land.[21] However, only Victoria sets out specific disclosure requirements for the sale of land prior to registration. Under the *Sale of Land Act 1962* (Vic), the vendor must disclose in any sale of a lot details of any works affecting the natural surface level of the land which to the vendor's knowledge have been or are to be carried out after the contract and before the registration of the plan of subdivision.[22] Where a vendor fails to comply with these disclosures, the purchaser can rescind contract at any time before the registration of the plan of subdivision.[23]

Interestingly, in terms of disclosure requirements for the sale of land generally, as opposed to the sale of land prior to registration, Queensland legislation does not impose obligations on vendors to disclose any particular information relating to the nature of the land. However, the Real Estate Institute of Queensland (REIQ)'s standard form contract does include seller's warranties in relation to certain matters affecting the property. Other jurisdictions require

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[20] Section 44 *Unit Titles Scheme Act 2009* (NT)

[21] However, in Tasmania the Part in the *Property Agents and Land Transactions Act 2005* relating to compulsory disclosures has not yet commenced.

[22] Section 9AB *Sale of Land Act 1962* (Vic)

[23] Section 9AE *Sale of Land Act 1962* (Vic)

vendors to either attach a number of prescribed documents (NSW[24]), provide a statement setting out a number of prescribed matters (SA[25], WA[26] and Victoria[27]) or make prescribed documents available for inspection by prospective purchasers (ACT[28], Tasmania[29], NT[30]). The prescribed documents tend to include any planning certificates, copy of title registration, copy of any registered plan, copies of any deeds or encumbrances.

3.3 Variations after entering an agreement

As is the case in Queensland, Victoria, Tasmania, Western Australia and the Northern Territory have legislation that sets out requirements for vendors to provide notification where there is variation between the description of the land in the disclosures made at the time of contract and the land. Victoria is the only jurisdiction, other than Queensland, to set out specific requirements where there is a variation relating to unregistered land.

Under the *Sale of Land Act 1962* (Vic), if, after a contract has been entered into and before the registration of the relevant plan of subdivision, an amendment to the plan is required by the Registrar or requested by the vendor, the vendor shall within 14 days advise the purchaser in writing of the proposed amendment. The purchaser may rescind the contract within 14 days after being advised of an amendment to the plan of subdivision which will materially affect the lot to which the plan relates. "Materially affect" is not defined in the legislation.[31]

It should be noted that a failure by a vendor to inform the purchaser of the amendment does not give rise to the right to rescind the contract. However, another section of the Act provides that a contract may also be avoided by the purchaser at any time prior to registration of the plan of subdivision if *any* amendment to a plan of subdivision is made after the contract is entered into and the amendment restricts the use of the lot.[32]

Under the *Sale of Land Act 1962* (Vic), a contract for sale of land may be avoided by the purchaser if the contract has not been completed, the purchaser has not disposed of the land, and after the date the contract is entered into, the Council receives advice under section 20A

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[24] Section 52A *Conveyancing Act 1919* (NSW)
[25] Section 7 *Land Sales and Business (Sale and Conveyancing) Act 1994* (SA)
[26] Section 69 *Strata Titles Act 1985* (WA) – in relation to the sale of proposed lots
[27] Section 32 *Sale of Land Act 1962* (Vic)
[28] Section 10 *Civil Law (Sale of Residential Property) Act 2003* (ACT)
[29] Section 186 *Property Agents and Land Transactions Act 2005* (Tas)
[30] Section 12 *Sale of Land (Rights and Duties of Parties) Act 2010* (NT) - in relation to sales of land excluding sales of units off the plan and sales of land in a proposed subdivision and section 45 *Unit Titles Schemes Act* (NT) - for the sale of units
[31] Section 9AC *Sale of Land Act 1962* (Vic)
[32] Section 10 *Sale of Land Act 1962* (Vic)

of the *Subdivision Act 1988* that there is a substantial discrepancy between any boundary of the land and the boundary as shown on the plan and not more than 18 months have passed since the contract was entered into.[33]

Section 20A of the *Subdivision Act 1988* provides that, before the Council gives its statement of compliance, a seller of land must submit to the Council advice of a licensed surveyor stating that roads, reserves and boundaries are marked out, that supporting documentation is in place, and notifying any substantial discrepancy between a boundary of the land and a boundary on the plan. Section 20A is usually complied with close to the time of registration of the plan. Like the provisions above, it allows a purchaser to avoid the contract for a discrepancy but only in relation to the boundaries of the land.

The *Property Agents and Land Transactions Act 2005* (Tas) provides that where there is a material change in the particulars contained in the disclosure documents in the period between the signing of the contract and the completion of the contract, the details of the change must be notified to the buyer no later than 5 days after the change or no later than settlement, which ever occurs first. A breach of this provision attracts a fine of up to 50 penalty units.[34]

The *Strata Titles Act 1985* (WA), (which regulates the sale of lots in strata titles schemes), provides that the vendor under a contract to sell a lot or proposed lot must inform the purchaser of any notifiable variation as soon as the vendor becomes aware of the variation. A notifiable variation includes the variation of any existing agreement entered into by the developer where the rights of the purchaser are likely to be affected, where a by-law is amended, and where the strata plan is varied in a material particular.[35]

If the purchaser has been materially prejudiced by the notifiable variation and has not agreed to be bound by that matter, the purchaser has a right to avoid the contract by notice in writing given to the vendor within 7 working days after that information is given." Further, if a vendor has failed to give to a purchaser information that substantially complies with requirements to provide information of a notifiable variation, the purchaser has a right to avoid the contract by notice in writing given to the vendor before the settlement of the contract.[36]

Under the *Unit Titles Schemes Act* (NT) (regulates the sale of lots in unit titles schemes) if, before the contract is completed, the seller becomes aware the disclosure statement in force for the unit contains inaccurate or incomplete information, within 20 working days after the

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[33] Section 9AH *Sale of Land Act 1962* (Vic)
[34] Section 194 *Property Agents and Land Transactions Act 2005* (Tas)
[35] Section 69C *Strata Titles Act 1985* (WA)
[36] Section 69D *Strata Titles Act 1985* (WA)

seller becomes aware, or a longer period agreed between the buyer and seller, the seller must give the buyer a replacement scheme disclosure statement in force that corrects the information. The seller must not compel the buyer to complete the contract before the end of 10 working days after giving the replacement statement.[37]

3.4 Supply of a registrable instrument of transfer

Victoria is the only other jurisdiction to specify a period for the provision of a registrable instrument of transfer for the sale of unregistered land.

Under the *Sale of Land Act 1962* (Vic), if the plan of subdivision is not registered within 18 months after the date of the prescribed contract of sale of a lot on that plan of subdivision, or if the contract specifies another period, the purchaser may, at the time before the end of that specified period but before the plan is registered, rescind the contract.[38]

3.5 Deposit money

Victoria and Western Australia provide for deposit money for the sale of unregistered land to be held in trust. The *Sale of Land Act 1962* (Vic) provides that a contract for the sale of land prior to registration of a plan must provide that the deposit payable for the land cannot exceed 10%, and that deposit money is to be held in trust. A purchaser can rescind the contract at any time before the registration of the plan of subdivision if these requirements are not complied with.[39] (*Although note there is a proposal to extend this to 20%[40])* The *Strata Titles Act 1985* (WA) requires the contract of sale for a proposed lot to provide that a deposit or other purchase money to be held in trust.[41]

3.6 Implied terms and warranty

Legislation in New South Wales,[42] Tasmania,[43] Northern Territory,[44] and the Australian Capital Territory[45] sets out terms/conditions and warranties to be implied into contracts for the sale of land. It should be noted that the Act does not provide for any terms or warranties to be implied into contracts for the sale of unregistered land. However, the BCCM Act does provide

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[37] Section 46 *Unit Titles Schemes Act* (NT)
[38] Section 9AE(2) *Sale of Land Act* (Vic)
[39] Section 9AA(1)(b) *Sale of Land Act* (Vic)
[40] See the *Consumer Affairs Legislation Amendment (Reform) Bill 2010*.
[41] Section 70 *Strata Titles Act 1985* (WA)
[42] Section 52A *Conveyancing Act 1919* (NSW) and Section 8/Schedule 3 *Conveyancing (Sale of Land) Regulation 2005* (NSW)
[43] Section 197 *Property Agents and Land Transactions Act 2005* (Tas)
[44] Section 47*Unit Titles Schemes Act* (NT)
[45] Section 11 *Civil Law (Sale of Residential Property) Act 2003* (ACT)

that the seller of a proposed lot warrants particular matters at the date of contract,[46] and the REIQ standard form contract provides sellers warranties in relation to certain matters affecting the property (e.g. seller is not aware of any circumstance that would result in the land being classified as contaminated land).

3.7 Arbitration

Victoria also provides an arbitration system to resolve disputes between vendors and purchasers arising out of the regulation of the sale of unregistered land.

The *Sale of Land Act 1962* also provides for the appointment of arbitrators by the Governor in Council.[47] An arbitrator has the power to decide any dispute arising between the vendor and the purchaser with respect to compliance by either party with any of the provisions relating to the sale of unregistered land.[48] Either party may refer the difference or dispute to an arbitrator for determination.[49]

The arbitrator may make an order requiring the vendor to pay compensation to the purchaser in respect of any loss suffered by the purchaser arising out of the contract.[50]

A decision of an arbitrator is enforceable as if it is a judgement or an order of the Supreme Court and shall be final and without appeal.[51] An arbitrator must be a judge of the county court or a person qualified to be a judge of the county court.[52] An arbitrator may if he thinks fit call in the aid of one or more assessors to assist him in determining any matter under this Act. An arbitrator shall not be bound by the opinion or finding of any such assessor.[53]

4.0 The framework for Review and Issues

4.1 Policy framework for the review of the Act

4.1.1 National Competition Policy

In April 1995, all Australian Governments endorsed a package of legislative and administrative arrangements that underpin National Competition Policy (NCP). The

[46] Section 223 *Body Corporate and Community Management Act 1997* (QLD)
[47] Section 18 *Sale of Land Act 1962* (Vic)
[48] Section 14B *Sale of Land Act 1962* (Vic)
[49] Section 14B *Sale of Land Act 1962* (Vic)
[50] Section 14B *Sale of Land Act 1962* (Vic)
[51] Section 21 *Sale of Land Act 1962* (Vic)

[52] Section 18 *Sale of Land Act 1962* (Vic)
[53] Section 19 *Sale of Land Act 1962* (Vic)

key objective of NCP was to develop a more open and integrated Australian market that limits anti-competitive conduct and removes the special advantages previously enjoyed by government business activities, where it is in the public interest to do so.

The guiding principle under NCP is that regulation should not restrict competition unless it can be demonstrated that-

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the regulation can only be achieved by restricting competition. [54]

Each Australian government has committed to reviewing legislation that potentially restricts competition every 10 years. A public benefit test was conducted on the Act in line with NCP guidelines and a report published in November 2001.

The report concluded that the restrictions on competition contained in the Act resulted in a net public benefit and it was recommended that the Act be retained without amendment. A further review was proposed for 10 years time.

Commercial practice and planning law in relation to property development has progressed significantly in the last decade. Stakeholders have also raised a number of issues regarding the Act, including its lack of alignment with associated legislation (such as the BCCM Act) and contend that its provisions are out of date in the context of current commercial practices.

These factors, combined with the Queensland Government's obligations under NCP, are the impetus for the review of the Act. The aims of NCP legislative reviews are:

- to remove or improve regulatory restrictions to competition which harbour inefficiencies and unnecessary costs to the economy; and
- to ensure that competitive pressures in the economy are as strong as possible to provide a spur to innovation, lower costs and higher incomes for Australians.

4.1.2 Consumer Policy Framework

The regulation of land transactions within a modern consumer policy framework presents a number of challenges.

[54] Clause 5. Competition Principles Agreement (As amended 13 April 2007).

While the objects of the Act (as described in section 1) will be assessed to determine their continuing relevancy as part of this review, they reflect the dual objectives of both facilitating competition and reducing the regulatory burden for the market place while ensuring the interests of consumers are protected. These objectives are not mutually exclusive within a modern consumer policy framework.

Governments have a responsibility to ensure NCP reforms are only implemented where it is demonstrated that such reforms are clearly in the public interest, that is, there is a clear demonstration that competitive reform will yield a net benefit, and no significant detriment, to the community.

The principal objective of the *Fair Trading Act 1989* (FTA) is to provide for an equitable, competitive, informed and safe marketplace. The object of the *Trade Practices Act 1974* (TPA) is to enhance the welfare of Australians through promotion of competition, fair trading and the provision for consumer protection. To achieve the stated objectives in the TPA and FTA, both consumer protection and efficiency need to be considered. However in practice, strong tensions can arise in balancing efficiency goals against consumer protection goals in policy assessment. This is because consumer and community costs, including social impacts, are sometimes difficult to quantify and weigh against more immediately quantifiable costs. There is now, however, a greater emphasis on evidenced based consumer policy, with regulatory intervention in markets grounded in a thorough analysis of the operation of markets, and the behaviour of modern market participants. [55]

It should also be noted the CoAG national Australian Consumer Law (ACL) is scheduled to commence on 1 January 2011. The ACL is a single, national consumer law for Australia based on the consumer provisions of the TPA and drawing on best practice in State and Territory consumer laws (i.e. from a Queensland perspective, the FTA).

To achieve acceptable market outcomes consumer policy recognises that both the supply and demand side must be analysed and addressed. While the supply side (i.e. competition and market structure) should always be in the regulator's calculations, it is crucial that that demand side (i.e. consumer) issues are also recognised and taken into account. Effective and well-functioning markets cannot exist without informed consumers who are willing to participate in markets and able to make beneficial

[55] I McAuly, Roundtable on Economics for Consumer Behaviour: Summary Report (OECD, 2007); and Productivity Commission report (quoted in Christensen, Duncan and Stickley)

consumption choices. [56] Even where there are competitive markets there is potential for transaction failures. It cannot be taken for granted that competition will automatically deliver benefits to consumers. Importantly, while competition policy may have the consumer interest at heart and has recognised an informed marketplace is a pre-requisite for competition, fair trading and consumer protection policy has a broader ambit.

Land transactions carry more risk than many other types of consumer transactions, due to the cost of market failure for both the supply and demand side. There are different perspectives on the role consumer policy and government should play in dealing with the distribution of risk in markets. In particular, questions surround the level of acceptable risk and to what extent 'beneficial risk' is appropriate in markets.[57] One of the assertions that has been made is that consumers are more risk averse than ever before, and that consumers appear to be over-protected through regulation. The removal of regulation is seen as a way of empowering consumers to take responsibility for their own actions.

There is a continuing role for government through consumer policy to provide protections when market complexity, market dysfunction or product / service risks require more interventionist strategies than consumer education and information. The role of government is to utilise consumer policy objectives to complement competition policy. Any proposed regulation requires good assessment and evaluation prior to implementation. A consumer policy framework that truly joins both consumer protection and efficiency considerations is best placed to undertake this assessment and ultimately achieve good market outcomes. One of the biggest challenges facing consumer policy is the integration of supply and demand side issues to address this balance. This is the balance that is sought in the review of the Act.

4.2 The current market

Stakeholders contend the outdated nature of the provisions in the Act, combined with its lack of alignment with other legislation has led to a greater degree of uncertainty and complexity for those on both the demand and supply side of the market.

In the context of the recent economic climate, stakeholders contend that purchasers are looking for and finding 'loopholes' in outdated statutory regimes (such as the Act), to avoid

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[56] Khuddos, A (2006) "Competition and the Consumer, Consumer Policy Review", 16 (5) 170.

[57] Better Regulation Commission (2006) *Risk, Responsibility and Regulation: Whose risk is it anyway?*; Banerjee, Subho and Ewing, Robert. *Risk, Wellbeing and Public Policy*.

contracts entered into when economic times were more favourable. Within this context it also becomes more important for developers to ensure purchasers are not avoiding their obligations for reasons that are not validly related to the nature of the product they are purchasing. In this climate regulatory certainty becomes even more important.

The pressure on the regulatory regime is likely to increase. The introduction of the *South East Queensland Regional Plan* (SEQ Regional Plan) with its focus on encouraging higher density development is likely to contribute to this. The SEQ Regional Plan states that South East Queensland is Australia's fastest growing metropolitan region. From 2006 to 2031, its population is expected to grow from 2.8 million to 4.4 million people. The region covers 22,890 square kilometres, stretching 240 kilometres from Noosa in the north to the Queensland-New South Wales border in the south, and 160 kilometres west to Toowoomba. Under the SEQ Regional Plan, an additional 156 000 dwellings will be required to house Brisbane's expected regional growth and demographic change. Most will be delivered in existing urban areas. Redevelopment and infill will need to deliver at least 138 000 of these additional dwellings.[58]

Clearly, the market has evolved in many ways since the 1970s when the sale of unregistered land was subject to numerous unscrupulous practices. Nevertheless, unregistered land remains at risk of misdescription between the time the purchaser enters the contract and settlement (when title passes). As discussed below, at common law, consumers are particularly vulnerable in this type of transaction.

4.2.1 Consumer policy and disclosure to buyers

The key provisions of the Act are focused on disclosure to buyers. Disclosure regimes to buyers form an important regulatory strategy of current consumer policy, both in Queensland, other States and internationally.

In the real estate market, mandatory disclosure can be seen as a panacea to the perceived imbalance between sellers and buyers, largely attributable to the doctrine of caveat emptor. "Under the common law principle of *caveat emptor, qui ignorare non debuit quod jus alienum emi*' (Let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution) there is a long recognised duty upon a buyer of land to be satisfied as to what he or

[58] South East Queensland Regional Plan 2009-2031.

she is to purchase".[59] Consumer policy information disclosure regimes counter this doctrine in its current form, by reversing the onus to an extent onto sellers. However, as discussed by Christensen et al, the doctrine has become perceived as more and more outdated within the modern context of land usage and building and planning regulation. The doctrine evolved at a time when it was considered relatively easy for buyers to inspect goods they wished to purchase, and in relation to land, particularly agricultural land, the quality and defects of the land were also easily assessable. This is not so in the modern era of extensive government regulation in relation to planning and development.

In the context of the Act, consumers are at a particular disadvantage, as the lot they are intending to purchase has not yet been created. Purchasers are, in many cases (particularly in the case of proposed lots), relying on artist's impressions of what the finished product will be.

In contrast to the sale of registered land, the Act regulates the sale of unregistered land – where the nature of the interest is equitable, rather than a proprietary interest in land that would pass on sale (as title has been registered). [60] It is generally accepted that these equitable or unregistered interests are far more vulnerable under the Torrens system where the main feature of the system is indefeasibility of title (i.e. a system of title by registration – which can only be challenged in very limited circumstances). Until land is registered, title cannot pass. Remedies for purchasers in the period between contract and settlement under usual circumstances are difficult, but where land is unregistered, and title cannot pass, these difficulties are greatly enhanced.

Therefore the risks for consumers are particularly high. Further there is a greater potential for information problems to arise as much of the information required by consumers to make a choice (particularly at the outset when the contract is entered into but there is no finished product) is peculiarly in the hands of the seller.

Targeting disclosure regimes for consumers

The disclosure regime, and remedies for consumers need to be targeted, the least restrictive possible, while also producing demonstrable outcomes for both the supply

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[59] Christensen, S, Duncan, WD and Stickley, A. (2007) "Evaluating Information Disclosure to Buyers of Real Estate –Useful or Merely Adding to the Confusion and Expense" Queensland University of Technology Law JJ??) Vol 7, No 2, p. 150.

[60] Bradbook, MacCallum, Moore (2002) Australian Real Property Law. Lawbook. ; and Duncan, WD (1983) "Off the Plan Purchasing –the Registrar's Tail Wagging the Chancery Dog" Queensland Law Society Journal, 249-250

and the demand side of the market. In its review of Australia's Consumer Policy Framework the Productivity Commission reaffirmed the value of information disclosure requirements for consumer protection but emphasised the importance of these requirements being carefully designed.[61] Further, emergent research in the field of behavioural economics, provides important insights into designing disclosure strategies, and emphasises the importance of taking into account consumer characteristics when designing information disclosure strategies.[62] Any mandatory disclosure regime needs to take into account the complexity of the information and various behavioural biases in relation to the timing, design and content of the information.[63]

Gathering and disclosing information can also be costly, burdensome and time consuming and ultimately the resulting costs can be passed onto consumers. While recognising the needs on the demand side for consumers to be well informed at strategic points in the transaction, it is also important to ensure the supply side of the market is not overburdened with disclosure requirements that serve minimal to no purpose. The focus in this review will be to ensure that any disclosure requirements:

- are well timed;
- prescribe relevant information;
- are not duplicating other requirements;
- use concepts consistent with other legislation (e.g. lots described according to the type/format of the relevant plan under the *Land Title Act 1994*);
- are not unduly burdensome; and
- provide real benefits to purchasers.

5.0 Issues for consideration

5.1 Issues for both Parts 2 and 3 of the Act

[61] Productivity Commission Report into Australia's Consumer Policy Framework. (2007)

[62] Christensen, S; Duncan, W.D. and Stickley, A (2009) "Behavioural Biases and Information Disclosure Laws Relating to Residential Property Sales: Narrowing the Gap Between Existing Laws and Calls for Future Reforms" Vol 9, N 2 QUT LJJ

[63] Christensen, S; Duncan, W.D. and Stickley, A (2009) "Behavioural Biases and Information Disclosure Laws Relating to Residential Property Sales: Narrowing the Gap Between Existing Laws and Calls for Future Reforms" Vol 9, N 2 QUT LJJ

5.1.1 Objects of the Act

The current objects of the Act are:

- facilitating land development in Queensland;
- protecting the interests of consumers in relation to property development;
- ensuring that land is accurately described; and
- achieving these objectives without placing additional burdens on local governments in addition to their obligations under the *Sustainable Planning Act 2009*.[64]

These objects have remained unchanged since the commencement of the Act and the question arises as to whether they remain relevant.

Focus Question – Objects of the Act

5.1A Are the objects of the Act still relevant? If not, please provide your reasons.

5.1.2 Terminology – currency of terms

Stakeholders have confirmed that much of the terminology in the Act is out of date and archaic. Nevertheless it is important to carefully consider any updating of terminology, in the light of the objectives of the legislation, particularly where this terminology has been judicially defined.

Some of the terms currently used in the Act for which consideration may be given to updating include:

- lot, allotment
- effective development permit or compliance permit;
- give a registrable instrument of transfer;
- enter upon a purchase;
- purchase, purchaser;
- sale, sellor; and
- capable of being staked by a cadastral surveyor.

The following is an example of judicial consideration of current Act terminology.

"enter upon a purchase"

The Act provides for an application to be made for exemption from provisions of Part 2, and that a person may agree to sell a proposed allotment, conditional upon the grant of an exemption. However, section 19 also requires that "the application for the

[64] Section 2 *Land Sales Act 1984*.

exemption shall 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*,[65] the determinative issue was a construction of the phrase, "the event that marks the entry of a purchaser upon the purchase". In this case, the purchaser had signed the contract before it was executed by the vendor.

The Court determined that 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 vendor has not signed, otherwise the contract is void. Fraser J acknowledged that various provisions in the Act operate with reference to the time when the purchaser enters upon the purchase.

Feedback from stakeholders and commentary on the judicial definition of this phrase in the Three Body Corporate case has indicated that a time frame for commencement of numerous provisions (including exemptions and the time in which to supply a registrable instrument of transfer) should run from when the contract is binding on both parties.

Focus Question – terminology

5.1B Which terms do you feel are not up to date or not consistent with other land use legislation? If you nominate a term please provide your reasons.

5.2 Part 2 – Flat Land

5.2.1 Restriction on Selling

Current provisions: The prohibition on sale

Part 2 (section 8) allows the sale of proposed allotments only if, when the purchaser enters upon the purchase of the allotment:

- for freehold land: there is an effective development permit for reconfiguring a lot or compliance permit for reconfiguring a lot for the allotment; or where operational works associated with reconfiguring a lot for the allotment are yet to be undertaken, there is a development permit or compliance permit for the

[65] *Three Pty Ltd v Body Corporate for Savoir Faire Community Titles Scheme* [2008] QCA 167

operational work.

- for state leasehold land: the lessee has the Minister's approval under the *Land Act 1994* to subdivide the land.

Any agreement made contrary to these provisions is void and any moneys paid recoverable (with interest) as a debt.

5.2.2 Issue

The issue to be considered is whether this current restriction on the sale of proposed allotments remains justified. There remains no such restriction on the sale of proposed lots (building units) under Part 3 of the Act. Other jurisdictions do not impose similar restrictions for either proposed allotments or proposed lots. Northern Territory legislation provides that for unit titles schemes a party (seller or buyer) must not compel another party to complete the contract before the end of 10 working days after the seller notifies the buyer by writing that the unit has come into existence.[66]

Alternative regulatory models

An alternative to restricting the time at which a contract for the sale of unregistered land may be entered could be to:

- provide a restriction on the amount of deposit that may be paid and how the deposit money must be held; and
- provide a restriction on settlement until the plan of subdivision is registered.

In Victoria, the *Sale of Land Act 1962*, does not prohibit the sale of unregistered land but it does regulate it. It requires that any contract for the sale of unregistered land provides that the deposit is to be limited to 10% and for the money to be held in trust or as otherwise specified under the Act. [67] Further, while contracts can be entered into for the sale of unregistered land, a vendor cannot require the purchaser to take possession of the land prior to the registration of the plan. [68]

Focus Questions – Restriction on selling under Part 2

5.2A Is the current restriction prohibiting the sale of land under Part 2 prior to development approval warranted? If not, please provide your reasons.

5.2B What are the negative and positive impacts of this restriction on developers and consumers?

[66] Section 44 *Unit Titles Scheme Act 2009* (NT)
[67] Section 9AA *Sale of Land Act 1962* (Vic)
[68] Section 9AD *Sale of Land Act 1962* (Vic)

5.2C	What risks would be presented for both consumers and developers if the restriction was not present and sales of proposed allotments were allowed prior to development applications?
5.2D	If the restriction on the sale of land was not present, what regulatory requirements should remain for the sale of unregistered land?

5.3 Disclosure Requirements

5.3.1 Current provisions

Key provisions of the Act promote accurate description of what is being promised when property is being marketed and agreements are formed. Under Part 2 section 9 (for proposed allotments), disclosure is required of certain information about the planned final form of the property at the point of entry into an agreement. These provisions serve to not only provide a purchaser with the right to avoid the agreement if a final product differs to the product they contracted to buy, but also (ideally) contribute towards a more informed marketplace as a result.

If a development has not reached the final stage where a plan of survey (i.e.. plan of subdivision) has been approved by the local authority, section 9 requires that before a purchaser enters an agreement to purchase a proposed subdivided parcel off the plan (i.e. a proposed allotment), the purchaser must receive a disclosure statement and a disclosure plan.

The *disclosure plan* must include:

(a) a copy of any plan for reconfiguring a lot for the allotment forming part of a development permit or compliance permit mentioned in section 8(1)(a);

(b) the metes and bounds description of the proposed allotment;

(c) contour maps of the proposed allotment showing the following contours—

  (i) natural surface contours, with appropriate contour intervals;

  (ii) final surface contours as specified in the engineering drawings;

(d) fill levels, and areas to be filled, as specified in the engineering drawings for the proposed allotment.

The *disclosure statement* must include:

(a) the purchaser's full name and address;

(b) the vendor's full name and address;

(c) that the vendor or vendor's agent has given the purchaser the disclosure plan for the proposed allotment;

(d) if a development permit or compliance permit mentioned in section 8(1)(a) is subject to conditions—the conditions;

(e) that the purchaser has

(i) for an allotment capable of being staked by a cadastral surveyor—inspected the proposed allotment after it has been staked by the surveyor; or

(ii) for an allotment that is not capable of being staked by a cadastral surveyor—inspected the proposed allotment; or

(iii) been given the opportunity, and declined, to do an inspection mentioned in subparagraph (i) or (ii);

(f) that the vendor must give the purchaser the registrable instrument of transfer for the allotment, together with the other documents mentioned in section 10A(3), not later than 18 months after the purchaser enters upon the purchase of the allotment;

(g) that if the vendor or vendor's agent contravenes this section, other than subsection (3)(a), (b) or (h), the purchaser may avoid the instrument relating to the sale by written notice given to the vendor or vendor's agent before the vendor gives the purchaser the registrable instrument of transfer for the allotment;

(h) the day the statement is signed.

If the development is at a later stage, the alternative is to provide a copy of the plan of survey for the proposed allotment approved by the local authority under the *Sustainable Planning Act 2009*.

A further illustration of disclosure requirements under the Act is section 10A. This provision requires the vendor to provide the purchaser with the following key final documents including:

- a copy of the registered plan of survey;
- if there has been operational work, a copy of the 'as constructed plan'; and
- a statement by a surveyor that there are no variations between the physical size of the proposed subdivision in the disclosure plan and the registered

These documents must be provided to the purchaser if the vendor has not given the purchaser a copy of the plan of survey approved by the relevant local government before the purchaser enters upon the purchase of the proposed allotment.

5.3.2 Issues

Currency and clarity of disclosure requirements

Numerous stakeholders have called into question the currency of these disclosure requirements, including raising issues about the clarity of terminology and requirements.

These requirements were formulated prior to the *Land Title Act 1994* and when there were significant differences in the plan process.

Relevance of the disclosure requirements to later stage developments

Some stakeholders have questioned whether the disclosure requirements contemplate the sale of land for which civil work is complete at the time of the contract, but for which there is not yet a sealed plan of survey. For example in some cases, the contract may be entered into when works are completed but for one reason or another the plan of subdivision has not yet been approved / sealed by the local authority. In this context, it is contended it is difficult to apply the section 9(2) requirements. For example section 9 provides that either a copy of the local government approved plan of subdivision be provided, or if the development has not reached that stage the disclosure plan and disclosure statement. The requirements for the disclosure statement include, for example, a requirement to include a contour map to show "natural surface contours".[69] Stakeholders argue it is not clear where a proposed allotment is complete, whether this would mean the contours of the allotment:

- at the time of contract formation;
- at the time the seller purchased the lot; or
- before the works required under the approval mentioned in section 8(1).

An apparent further difficulty arises in relation to the requirement in section 9(2)(d) of the Act to disclose the 'fill levels, and areas to be filled'. If works on the allotment are complete at the date of contract formation, there would be no remaining areas to be filled capable of disclosure.

[69] Section 9(2)(c)(i) *Land Sales Act 1984* (Qld)

It has been suggested that another alternative should be provided for when civil works are complete, but the plan of subdivision not registered, so that an 'as constructed plan' (as set out in section 10A(3)(b)) be prescribed for disclosure. Currently, an 'as constructed plan' is required to be provided to the purchaser when the vendor has not given the purchaser a copy of the plan of subdivision prior to the purchaser initially entering the agreement. Prior to settlement the vendor must provide both a copy of the registered plan of survey, and where the operational work has been completed since the original entering of the contract, a copy of the plan that shows the constructed works as completed (i.e. the 'as constructed plan').

Alternative regulatory models

The only other jurisdiction to specifically prescribe disclosure requirements for unregistered land is Victoria where the vendor must disclose in any sale of a lot details of any works affecting the natural surface level of the land which to the vendor's knowledge have been or are to be carried out after the contract and before the registration of the plan of subdivision.[70]

Alternatively, it has been suggested that should the development not be at the stage when the sealed plan of survey is available, then the copy of any plan for reconfiguring of a lot forming part of a development permit or compliance permit should be provided.

A prescribed form for disclosure

Some stakeholders have considered that a prescribed form for disclosure statements would provide greater clarity for sellers in relation to the requirements and certainty around compliance.

Focus Questions – Disclosure requirements under Part 2

5.3A What are considered the relevant requirements for a disclosure statement?

5.3B Are there any other alternatives for disclosure with developments at a later stage where all works are complete but the plan has not been approved? If so please provide details on these alternatives.

5.3C What do you think about the currency of the disclosure terminology under Part 2?

5.3D Should the terminology align with the *Land Title Act?* Why?

[70] Section 9AB *Sale of Land Act 1962* (Vic)

5.3E	What do you think about a prescribed form for disclosure in relation to clarity of requirements and certainty of compliance for sellers?

5.4 Variations after entering an agreement - disclosure

As indicated earlier, in reality the finished product may, to some extent, differ from representations such as in brochures, illustrations and drawings, provided during marketing. While the Act seeks to recognise that off the plan contracts for real property need to allow the developer some degree of flexibility in making changes to the plans, works, construction, layout or fixtures and fittings during development, essentially the legislation ensures the purchaser has rights to redress if the finished product is not substantially the same as what was promised. Such provisions are generally consistent with other fair trading-related legislation, in which a difference between the promised product and the finished product provide grounds for the consumer (purchaser) to achieve redress.

Generally, both parts of the Act require a vendor to tell a purchaser about any significant variations that have occurred after they have entered an agreement. [71] If the vendor fails to provide the information or there are substantial differences between a description in the original disclosure document/s and the actual property being developed, the purchaser may be able to avoid the contract (or in practice choose to negotiate a variation of the terms of the contract).

For the sub-division of flat land (i.e. a proposed allotment), Part 2, section 10 requires a 'significant variation notice' to be given is there is a 'significant variation' either in the details between the disclosure plan and a survey plan or the details between a disclosure plan and an as constructed plan. Section 10(5) defines 'significant variation' to mean—

(a) in the details between a disclosure plan and a survey plan—

  (i) a variation of more than 2% in details of area; or

  (ii) a variation of more than 1% in details of linear dimensions; or

(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."

The significant variation notice must be given no more than 14 days after the vendor is given the plan of survey to register, but before the vendor has given the purchaser a registrable instrument of transfer. If the vendor provides a significant variation notice under section 10

[71] Section 10, Part 2 *Land Sales Act 1984* ; section 22, Part 3 *Land Sales Act 1984*.

the purchaser has the right to avoid the agreement and the vendor is prohibited (until after 30 days from giving the purchaser the variation notice or an period agreed to by both parties) from asking the purchaser to pay the balance of the purchase price or giving the purchaser a registrable instrument of transfer. The Act also provides the purchaser with the right to avoid the agreement if the vendor does not comply with its obligations under section 10 regarding the giving of the variation notice.

The disclosure and variation provisions in the Act are intended to ensure a means of identifying and ensuring the supply of developed property, substantially as promised.

5.4.1 Timing of disclosure for variations

It has been suggested that section 10 should provide for giving an updated disclosure notice at any time. At present the significant variation notice must be given after the vendor receives the plan of survey the vendor proposes to register. In other jurisdictions the following requirements apply:

- the *Sale of Land Act* 1962 (Vic) requires a vendor to advise a purchaser in writing ***within 14 days if an amendment to the plan is required*** by the Registrar or requested by the vendor.
- the *Strata Titles Act 1985* (WA) (regulates the sale of lots in strata titles schemes) provides that the vendor under a contract to sell a lot or proposed lot must inform the purchaser of any notifiable variation ***as soon as the vendor becomes aware of the variation.***

The Act also does not distinguish between when a variation is the result of modifications directed to be carried out by the local authority or not.

The BCCM Act (s214) provides for progressive updated disclosure which requires developers to notify purchasers within 14 days of developers becoming aware of any inaccuracy in disclosure documents.

Focus Question – significant variations under Part 2

5.4A What do you think of the disclosure requirements for significant variations currently under the Act?

5.5 Remedies under Part 2

5.5.1 Right of avoidance

Part 2 provides the purchaser with a right of avoidance in a number of circumstances including:

(a) *Contravention of section 8 the restriction on selling*

If an agreement is made in contravention of this section that prohibits the sale of freehold land prior to the conditions set out in subsection (1) i.e. prior to development approval – the agreement is void and there is a right to recover any money paid.

(b) *Contravention of section 9 the identification of land*

If a vendor or vendor's agent contravenes the disclosure requirements in this section – the purchaser may avoid the instrument relating to the sale.

(c) *Significant Variations:*

If the vendor does not provide a ***significant variation*** notice in compliance with the Act, or a significant variation notice is provided – the purchaser may avoid the instrument relating to the sale.

(d) *Contravention of time period in which to supply registrable instrument of transfer*:

If the vendor does not provide a registrable instrument of transfer for an allotment within 18 months after the purchaser enters upon the purchase of the allotment – the purchaser may avoid the instrument relating to the sale.

(e) *Contravention of the contractual requirement re holding of money in section 11*

If an instrument of purchase provides for the payment of money contrary to that section – that provision of the instrument is void.

Significant variations

Under Part 2, the purchaser has either 30 days, or a period agreed to between the vendor and purchaser, to consider their rights.

5.5.2 Issues

Test for avoidance in the case of a significant variation

A significant variation is the threshold in Part 2 of the Act which triggers the rights of a purchaser to avoid the contract. A significant variation is defined as:

(a) in the details between a disclosure plan and a survey plan—

(i) a variation of more than 2% in details of area; or

(ii) a variation of more than 1% in details of linear dimensions; or

(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.[72]

The issue arises as to whether this is an appropriate test. Under Part 3 (for proposed lots) the purchaser must be '***materially prejudiced'***. Under the Victorian *Sale of Land Act 1962,* the purchaser has a right to terminate the contract when the change of the plan ***materially affects*** the lot to which the contract relates. Although "materially prejudiced" is not defined in the legislation, it has been commonly considered judicially (most recently in *Wilson v Mirvac* (Supreme Court 26 March 2010) in the context of the BCCM Act.

It has been suggested that the test of substantial variation should be formulated with reference to the format of the plan, for example there would be different tests for a proposed lot on a standard format plan and a proposed lot on a building format plan

Other remedies

The only available remedy under the Act for a dispute or a contravention is that the purchaser may avoid the contract or in the case of contractual requirements relating to the holding of money contrary to the Act, avoid that provision of the contract. Under the Victorian *Sale of Land Act 1962*, either party may refer a dispute to an arbitrator for determination.[73] An arbitrator has the power to decide any dispute arising between the vendor and the purchaser with respect to compliance by either party with any of the provisions relating to the sale of unregistered land.[74] The arbitrator may make an order requiring the vendor to pay compensation to the purchaser in respect of any loss suffered by the purchaser arising out of the contract.

Focus Questions – remedies part 2

5.5A What do you think about the test of being 'materially prejudiced' by a substantial variation?

5.5B If you consider an alternative test appropriate please provide your reasons.

5.5C What do you think of the principal remedy of contract avoidance?

5.5D Please provide any other alternative remedies you feel appropriate (e.g. alternative dispute resolution processes such as mediation / arbitration).

[72] Section 10(5) *Land Sales Act 1985*
[73] Section 14B *Sale of Land Act 1962* (Vic)
[74] Section 14B *Sale of Land Act 1962* (Vic)

5.6 Exemptions

A person by or for whom land is to be subdivided or a vendor or purchaser of a proposed lot relating to land that is to be subdivided into not more than 5 allotments may apply to the registrar for exemption from all or part of the provisions in Part 2. (There are no exemptions under Part 3 for proposed lots).

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

Contracts can be entered into, conditional upon granting of an exemption. However, the application for the exemption must be made within 30 days after the event that marks the entry of a purchaser upon the purchase of the proposed allotment.

Section 19 requires "the application for the exemption shall 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*[75] the determinative issue was a construction of the phrase, "the event that marks the entry of a purchaser upon the purchase". In this case, the purchaser had signed the contract before it was executed by the vendor.

The Court determined that 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 vendor has not signed, otherwise the contract is void. In reaching a decision Fraser J made numerous comments on the terminology in the Act.

5.6.1 Issues

The decision making process

The process for granting an exemption is an administrative one, with little or no guidance in the Act in relation to the decision. The original policy rationale for the introduction of the threshold (a subdivision of not more than five allotments) may need to be re-examined. The original policy rationale recognised where vendors were selling small allotments, or families were rationalising their land holdings, the danger of misdescription was minimal. Stakeholders perceive that the current administrative process for granting exemptions is inefficient for industry and government.

[75] *Three Pty Ltd v Body Corporate for Savoir Faire Community Titles Scheme* [2008] QCA 167

Focus Questions – exemptions from Part 2

5.6A What do you think of the current exemption process?

5.6B In particular, what are your views in relation to the current commencement of the 30 days period (i.e. from when the purchaser enters upon the purchase)?

5.6C What are your views on permanent exclusions applying? When providing your answer please advise what you believe they should be (if you nominate some suggested permanent exclusions)?

5.7 Time in which to provide a registrable instrument of transfer

The Act specifies a default period after the purchaser enters a purchase agreement within which the vendor must supply a registrable instrument of transfer. Otherwise the contract may be avoided.

In respect of a proposed allotment, Part 2 (section 10A) provides the purchaser must receive a registrable instrument of transfer within 18 months after entering a purchase agreement. As the Three Body Corporate case has clarified, this time is not from when the contract is binding on both parties (the purchaser and the seller) but from when the purchaser signs the contract.

Where a purchaser has exercised a right under the Act to avoid an agreement to purchase a property, the legislation also entitles the purchaser to receive a refund of their payment and if necessary, to recover it by action as for a debt.[76]

Focus Question – time in which to provide a registrable instrument of transfer

5.7A What do you think of the 18 months time frame within which the vendor must provide a registrable instrument of transfer?

5.8 Exclusion of large transactions

5.8.1 Current provisions

Part 2 excludes large transactions. Large transactions are defined as: the sale or purchase of six or more proposed allotments if –

(a) the vendor of each proposed allotment is the same person; and

[76] Section 17 Land Sales Act 1984 (Qld)

(b) the purchaser of each proposed allotment is the same person; and

(c) the sale or purchase is the subject of –

(i) a single agreement; or

(ii) two or more agreements entered into within 24 hours.[77]

Focus Questions – Large Transactions

5.8A What do you think of the current exclusion of large transactions (including the threshold of six or more proposed allotments)?

5.9 Part 3 – Units 'off the plan'

5.9.1 Disclosure Requirements

Current provisions

Like Part 2, there are also disclosure requirements in Part 3 of the Act in relation to proposed lots. Part 3 (Section 21) requires that before entering 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 purchaser must receive a statement identifying the proposed lot, and particulars of any representation, promise or term relating to the purchase. The ***statement*** must:

(a) clearly identify the lot to be purchased; and

(b) state the names and addresses of the prospective vendor and the prospective purchaser; and

(c) clearly state whether the prospective vendor or the prospective vendor's agent (whether personally or by any employee) has made or offered to the prospective purchaser or the prospective purchaser's agent any representation, promise or term with respect to the provision to the purchaser of a certificate of title that relates to the lot in question only; and

(d) if any representation, promise or term, such as is referred to in paragraph (c) has been made or offered, clearly state the particulars thereof; and

(e) state the date on which it is signed.

Part 3 also provides for the possibility of combining statements into the one statement, if the vendor is also required to give a disclosure statement under section

[77] Section 7A *Land Sales Act 1984 (*Qld)

213 the BCCM Act. As long as the statement given under the BCCM Act incorporates the requirements set out in the Act,[78] one statement can be provided. The BCCM Act requires the following to be included in the disclosure statement:

(a) the amount of annual contributions reasonably expected to be payable to the body corporate by the owner of the proposed lot; and

(b) for any engagement of a person as a body corporate manager or service contractor for the scheme proposed to be entered into after the establishment of the scheme, or proposed to be continued or entered into after the scheme is changed— (i) the terms of the engagement, other than any provisions of the code of conduct that are taken to be included in the terms under section 118; and (ii) the estimated cost of the engagement to the body corporate; and (iii) the proportion of the cost to be borne by the owner of the proposed lot; and

(c) for any authorisation of a person as a letting agent for the scheme proposed to be given after the establishment of the scheme, or proposed to be continued or given after the scheme is changed, the terms of the authorisation; and

(d) details of all body corporate assets proposed to be acquired by the body corporate after the establishment or change of the scheme; and

it must be accompanied by:

- the proposed community management statement; and
- if the scheme to be established or changed is proposed to be established as a subsidiary scheme—the existing or proposed co subsidiary the proposed subsidiary scheme is proposed to be a subsidiary; and

it must also identify the regulation module proposed to apply to the scheme and include other matters prescribed under the regulation module.[79]

The possibility of combining statements is also contemplated for disclosure requirements under the *Building Units and Group Titles Act 1980* (BUGTA).[80]

[78] That is the requirements set out in section 21(1)(a) to (d) *Land Sales Act 1984* (Qld)
[79] Section 213 *Body Corporate and Community Management Act 2003*
[80] Section 21(4) *Land Sales Act 1984*(Qld).

5.9.2 Issues

Nature of disclosure

Advice received during the preparation of this Paper from stakeholders is that the Act does not clarify what is meant by a statement that "clearly identifies a lot to be purchased".[81]

For example in the case of *Mirvac Queensland Pty Ltd v Horne &Ors*[82] an interesting point raised by the defendants, but not decided by Applegarth J for the purpose of this application, was whether section 21 of the Act even required the floor plan / size of the lot to be disclosed. Their argument was that although sheet 10, in the plans attached to the disclosure statement, identified the floor area of the lot, it did not necessarily form part of the disclosure statement, and further that section 21 only requires the statement to "clearly identify the lot to be purchased". However, Applegarth J contended that a better view was that the description of a lots' floor area does serve to clearly identify a lot.

As a certificate of title is no longer automatically created for each new lot under the *Land Title Act 1994*, the content of section 21(1)(c) may need to be revised.

Combining disclosures

The capacity to have combined disclosure statements with the BUGTA was originally provided for with the commencement of the Act. The capacity to have combined disclosure statements with the BCCM Act in particular was inserted in 1997 with the commencement of the BCCM Act.[83] While the objective of the BCCM Act was to bring all building units plans and group titles plans registered under the BUGTA under the new BCCM Act by making all those plans community titles schemes under the BCCM Act, the BUGTA continued to have limited application where Acts such as the *Mixed Use Development Act 1993* and the *Integrated Resort Development Act 1997* continued to require the application of the BUGTA. Therefore both the BCCM and the BUGTA are contemplated under the Act, but it is overwhelmingly the BCCM Act that has the most application to the majority of proposed lots.

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[81] Section 21(1)(a) *Land Sales Act 1984* (Qld)

[82] *Mirvac Queensland Pty Ltd v Horne & Ors* [2009] QSC 269

[83] Amended in 2003 and re titled as the *Body Corporate and Community Management Act 2003*.

A prescribed form for disclosure

Some stakeholders have considered that a prescribed form for disclosure statements would provide greater clarity for sellers in relation to the requirements and certainty around compliance.

Focus Questions – Disclosure requirements

5.9A What do you think of the clarity of the disclosure requirements contained in the Act?

5.9B In particular, what do you think of the statement "…clearly identifies a lot to be purchased" contained in section 21(1)(a)?

5.9C What do you think of combining the disclosures for proposed lots under the Act and the BCCM Act?

5.9D Would a prescribed form be beneficial?

5.9E Do you have any alternative suggestions to reconcile to the two disclosure regimes for proposed lots (e.g. having the one regime in one piece of legislation)?

5.10 Variation from disclosure - Rectification statements

5.10.1 Current provisions

For proposed lots, Part 3 (section 22) requires a ***rectification statement*** to be given to the purchaser 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 purchaser, nor a contract settled and outstanding moneys paid, sooner than 30 days after the receipt of a rectification statement.

5.10.2 Issues

What triggers a rectification statement?

Currently, any change in the section 21 disclosure statement can trigger the need for a rectification statement. Some stakeholders have contended that this should be limited to issues in relation to the legal description of the lot. For example section 21 (1) (b) requires the residential address of the prospective purchaser and vendor to be

included in the disclosure statement. Ostensibly should these details change before settlement, the Act would require a rectification statement. Failure to provide such a statement could then provide the prospective purchasers with the opportunity to avoid the contract.

In the case of *Mirvac Queensland Pty Ltd v Horne &Ors*[84] for example, it was contended that any information in the disclosure statement that becomes inaccurate in any respect triggers the operation of s 22 of the Act. The result is that information which the seller chooses to include in a disclosure statement, whether in compliance with its obligations under s 21 of the Act, its obligations under s 213 of the BCCM Act or otherwise is covered by the section. Applegarth J did not accept this interpretation:

> *"A broad interpretation of s 22 is not necessary to protect the interests of consumers in relation to property development, since other consumer protection legislation exists to protect consumers from statements that are misleading or deceptive or likely to mislead or deceive.*
>
> *"The wide interpretation of s 22 contended for by the defendants might frustrate the timely settlement of contracts and generate substantial costs through the provision of rectification statements that are not necessary to correct a statement of the particulars referred to in s 21(1).*
>
> *"Such an interpretation is inconsistent with facilitating property development in Queensland and is not necessary to protect the interests of consumers in relation to property development or to ensure that proposed lots are clearly identified."*[85]

Issues in relation to timing of the notice are discussed below in conjunction with consideration of alignment of processes with the BCCM Act.

Focus Questions – Rectification Statement

5.10A Which information (contained in the original disclosure that subsequently becomes inaccurate) do you think should trigger the need for a rectification statement? Why?

[84] *Mirvac Queensland Pty Ltd v Horne & Ors* [2009] QSC 269

[85] Per Applegarth J *Mirvac Queensland Pty Ltd v Horne & Ors* [2009] QSC 269

5.10B What are your views on section 21 requiring only substantial or material inaccuracies for subsequent disclosure to put the interpretation of this provision beyond any doubt?

5.10C Alternatively what are your views on whether the current provision provides sufficient protection for purchasers?

5.11 Alignment with the BCCM Act

5.11.1 Current provisions

While alignment with the BCCM Act is contemplated in the Act for the original disclosure, this is not so for any rectification statements.

The BCCM Act and the Act provide for the disclosure of information by a seller to a buyer of a lot that is to be created in a community titles scheme. Both Acts require disclosure statements be given to consumers about the nature of the lot (i.e. the Act) and the community titles scheme (i.e. the BCCM Act). Both also provide for *rectification statements* (i.e. the Act) or a *further statement* (i.e. the BCCM Act) to be issued if there are changes to the lots. The Act requires a *rectification statement* to be given under section 22. The BCCM Act requires a further statement to be given under section 214.

The issue arises with the different timing for when the *rectification notice* / *further statement* must be given under each Act and the time in which the purchaser has to consider them before deciding whether to avoid the contract. The BCCM Act provides that the *further statement* must be given within 14 days of the seller becoming aware of the change, while the Act provides that the *rectification statement* must be given after the proposed lot has become a registered lot.

Timing

The time frame of 30 days in which the notice of avoidance must be given has been consistent since the commencement of these provisions with the commencement of the Act. When the Act was amended in 2003 to allow disclosure statements under the Act and the BCCM Act to be combined, the rectification statement requirements were not amended to allow the rectification statement and further statement to be combined and neither was the time frame of 30 days changed in which to give notice of avoidance in the case of inaccuracies. A graphical representation of this process is at Appendix 3.

5.11.2 Issues

Case law- judicial determination

A relatively recent Supreme Court case has drawn attention to the lack of alignment between the Act and the BCCM Act. In *Hudpac Corporation Pty Ltd v Voros Investments*[86] the applicant sought, amongst other orders, a declaration that it validly terminated a contract of sale and that it was entitled to forfeit a deposit for a unit sold 'off the plan'. The respondent and the applicant entered into a contract for the purchase of a unit. At the time the parties executed the contract the relevant lot was not registered, but it was intended to become part of a community titles scheme under the BCCM Act. Prior to the respondent entering the contract, the applicant provided a statement under both section 213 BCCM Act and section 21 of the Act. A further statement was then provided under section 214 of the BCCM Act, concerning the size of the unit and the size of the balcony. However, no rectification statement was provided under the Act. The proposed lot was created and title issued and the applicant called for settlement. When settlement did not occur, the applicant purported to terminate the contract and to forfeit the deposit, and then subsequently resold the property. The issue in dispute was whether the applicant was obliged to give a notice under section 22 of the Act and whether or not the notice given under section 214 of the BCCM Act adequately addressed the inaccuracy.

Applegarth J dismissed the application and held that the provision of the further statement under section 214 of the BCCM Act, did not relieve the applicant's obligation to provide a rectification statement under section 22 of the Act. While there was provision for the initial disclosure statements to be combined, there was no such provision for the rectification statement and further statement. The principal reason for found was that section 22 of the Act and section 214 of the BCCM Act, confer different rights in different circumstances and the obligation may arise in some cases at different times.

While Applegarth J did comment that it might have been better for the legislation to be aligned, he did highlight the differences between the Act and the BCCM Act.

The principal difference is that section 22 of the Act, gives the purchaser 30 days after receipt of the rectification statement to consider his / her rights to avoid the contract (i.e. to check the title as registered and to consider whether the changes have

[86] *Hudpac Corporation Pty Ltd v Voros Investments* [2009] QSC 275

materially prejudiced the purchaser), while section 214 of the BCCM Act provides the purchaser with the opportunity to cancel within 14 days if the buyer would be materially prejudiced if compelled to complete the contract. Applegarth J also considered the specific objectives of the Act as consumer protection legislation:

> *"It might have been possible for the legislation to be better aligned so as to avoid the unnecessary provision of rectification statements pursuant to both s 22 of the Act and s 214 of the BCCM Act. However s 22 gives important rights to a purchaser. One right is to consider their position.*
>
> *"It is a right which is conferred by statute, being a statute that has the purpose of protecting the interests of consumers in relation to property development and I do not consider that, in those circumstances, the Act can be construed so as to make it apply on a basis identical to that provided in s 214 of the BCCM Act. In essence, s 22(4) of the Act gives important rights conferred by statute to an extension of time to settle".*[87]

Issues raised by stakeholders

Numerous stakeholders contend the lack of alignment between the Act and the BCCM Act effectively delays the settlement of contracts, costing many thousands of dollars. They draw attention to the age of the Act and contend its provisions have not kept up with commercial practice. The following issues have been raised in relation to the lack of alignment:

(a) Current industry practice

It is currently industry practice to align the disclosure statements under the BCCM Act and the Act, so aligning the variation statement / further statement would also be appropriate.

(b) Duplication

In practice, the purchaser receives a further statement under the BCCM Act and has 14 days to consider their rights. If they determine that they have not been materially prejudiced, they decide to continue with the contract. However it is contended, the Act then provides a *further opportunity* for the purchaser to consider their rights. This is seen as some stakeholders as unnecessary duplication and importantly leads to a significant delay for when settlement can occur. In particular, it is contended sellers should not have to give a further

[87] Per Applegarth J, *Hudpac Corporation Pty Ltd v Voros Investments* [2009] QSC 275

statement under the BCCM Act and a variation notice under the Act about the same matter (for example a change in the area of the lot).

(c) Timing

The *further statement* under the BCCM Act can be given as and when changes occur but the *rectification statement* cannot be given until after the survey plan creating the lot has been registered. The obligation to give a further statement under the BCCM Act may arise prior to the obligation to give a rectification statement under the Act. Because of the different timing, the Act rectification statement effectively extends settlement for a further 16 days (assuming the relevant off the plan contract provides for a 14 day settlement period).

Other issues to consider – placement of provisions

Stakeholders have also contended these provisions would be better placed in the BCCM Act.

Focus Questions – Alignment with BCCM

5.11A What are your views on the provisions in relation to disclosure under Part 3 being contained in the BCCM Act?

5.11B Alternatively, what do you think about the time in which to provide a further statement under the BCCM Act and a rectification statement under the Act being aligned?

5.12 Remedies under Part 3

Part 3 provides the purchaser with certain rights including:

(a) *Breach of section 21(1) (disclosure statement*)

If a purchaser is materially prejudiced if they have not received a disclosure statement in accordance with section 21(1) they may avoid the contract.[88]

(b) *Breach of section 22(1) (rectification statement)*

If a purchaser is materially prejudiced if they have not received a rectification statement in accordance with section 22 they may avoid the contract.[89]

[88] See section 25 of the Act.

(c) *An inaccuracy identified in the rectification statement*

If a purchaser is materially prejudiced by an inaccuracy identified in the rectification statement required to be given under section 22(1) they may avoid the contract.[90]

Where the purchaser seeks to avoid the contract in the above circumstances, such notice must be given within 30 days of receiving the rectification statement under section 22 or before the delivery of registrable instrument of transfer to the purchaser, whichever occurs sooner.

(d) *Contravention of the contractual requirement re holding of money in section 23*

If an instrument of purchase provides for the payment of money contrary to that section – that provision of the instrument is void.

5.12.1 Issues

Test for avoidance following rectification statement – materially prejudiced

Part 3 (i.e. the sale of proposed lots) requires the purchaser to have been materially prejudiced by an inaccuracy in the original disclosure. This is similar to the test in Victoria's *Sale of Land Act 1962*. While it is not defined, stakeholders contend it is a well understood term in case law.

Other remedies

As discussed above in relation to remedies under Part 2 the question arises as to whether other remedies may also be appropriate.

Focus Questions – Remedies Part 3
5.12A What do you think of the current test for material prejudice?
5.12B If possible can you describe an alternative test??
5.12C What do you think of the main remedy for the purchaser of contract avoidance?
5.12D Can you describe any other remedies you feel would be appropriate (e.g. alternative dispute resolution processes such as mediation / arbitration)?

[89] ibid.
[90] ibid.

5.13 Time in which to provide a registrable instrument of transfer

5.13.1 Current provisions

For a proposed lot, Part 3 (section 27) provides a purchaser has the right to avoid a contract if a registrable instrument of transfer is not received within 3 ½ years after entering a purchase agreement. The Act also allows a regulation to prescribe a longer period, up to 5 ½ years.

Currently, applications for an extension of time for developments must be individually considered by the Minister. An amendment to the *Land Sales Regulation 2000* must be drafted and approval is only given effect after the Governor-in-Council approves the amendment. The approved development extension is then gazetted and listed in Schedule 2 of the *Land Sales Regulation 2000*.

If the vendor does not provide a registrable instrument of transfer for an allotment within three and a half years after the purchaser enters upon the purchase of the lot[91] (or the prescribed period under section 28) – the purchaser may avoid the instrument relating to the sale.

Proposed reforms

This section is again currently the subject of proposed reforms which are being considered.

The application and extension process can be cumbersome and time consuming for both industry and government; often taking three months or more per application. Developers often need to have approval of the extension in place before attempting to secure project finance to provide more certainty in contractual arrangements. Representations have been made to the Department of Employment, Economic Development and Innovation that the extension process can cause unnecessary delays and stresses on the industry. This can then put into jeopardy large development projects, often valued at hundreds of millions of dollars and providing significant employment opportunities.

Fair Trading Policy is receiving an increasing number of applications from developers for extensions of time. Limits on building heights are being relaxed, along with new trends in town planning and mixed use developments. With trends toward taller and

[91] See section 27 of the Act.

more complex developments, most applications are now requiring the maximum extension period of five and a half years.

Comparable jurisdictions such as New South Wales and Victoria have no legislative provisions prescribing a particular time period for a purchaser to receive a registrable instrument of transfer. Those jurisdictions leave it to the parties to contractually agree on the time period. However, the Victorian *Sale of Land Act 1962* does provide a statutory right to rescind a contract if a plan of subdivision is not registered either within the time specified in a contract, or if no time is specified, within 18 months after the date of a prescribed contract is entered into.

The Queensland Government is currently considering proposed amendments which will remove the existing extension process.

It is proposed that a purchaser will have the right to avoid a contract if a registrable instrument of transfer is not received by a date specified in the contract. If a date is not specified in the contract, then the default statutory period of three and a half years will apply.

5.13.2 Issue

Disclosure

There are currently no statutory disclosure obligations in relation to either the obligation to supply a registrable instrument of transfer within a prescribed time, or the right to avoid the contract.

Focus questions – time in which to provide a registrable instrument of transfer

5.13A What do you think about the Act not presently requiring disclosure in relation to:

- the obligation to supply a registrable instrument of transfer within either a statutory default period, or a period specified in the contract; and
- the right to avoid the contract.

5.1.3B If you feel a disclosure requirement is appropriate, where do you think the disclosure should occur (e.g. in the section 21 disclosure statement)?

5.1.3C If you feel disclosure is appropriate, do you have any suggested consequences (e.g. remedies for the purchaser) if the vendor does not comply?

5.14 Parts 2 and 3: Requirements for dealing with money

Provisions of the Act require any deposit money to be placed in trust (Part 2, section 11 for proposed allotments and Part 3, section 23 for proposed lots). For proposed allotments only, the provisions also limit the amount of deposit payable to 10% of the purchase price (Part 2, section 11A). Again, these provisions generally are consistent with other fair trading-related legislation providing for the deposit money to be placed in trust (for example, transactions under the PAMD Act).

Deposit restrictions – Part 2

There is current restriction of 10% placed on a deposit.

A bill has been introduced into the Victorian Parliament to amend the *Sale of Land Act 1962* (Vic) to extend the current limit on a deposit relating to off the plan transactions from 10% to 20%.[92] The second reading speech states that these proposed amendments are in response to representations from industry concerned about the constraints place on transactions by the current limit. However to offset the increased limit there are also enhanced disclosure requirements proposed. All contracts for off the plan sales of land will have disclosures advising that the amount of deposit is negotiable, warning that a significant period of time may elapse between the day a contract is signed and when a person becomes the registered proprietor, and warning that the value of the property may change between the day a contract is signed and when a person becomes the registered proprietor.

In Queensland this proposed Victorian change would have an effect on the law of instalment contracts contained in Part 6, Division 4 of the *Property Law Act 1974*.

5.14.1 Issues

Trust requirements – definition of money

It has been contended that there is currently a lack of clarity in relation to whether bank guarantees and insurance bonds are included in the term “moneys” in sections 11 and 23 (containing the contractual requirements for the holding on money in trust) or an amount in section 11A (containing the current 10% limit on deposits).[93] Currently, the Act does not specifically address this.

As this is a common form of deposit it is contended this needs to be specifically considered. The use of bank guarantees and insurance bonds is growing in

[92] *Consumer Affairs Legislation Amendment (Reform) Bill 2010* - Introduced into the Assembly 28 July 2010.

[93] Section 11 and Section 11A *Land Sales Act 1985* (Qld)

popularity, particularly in circumstances where purchasers do not want to have cash tied up for extended periods.

The common practice is for the guarantee to be in the name of the stakeholder and held by the stakeholder (i.e. a real estate agent or solicitor). Advice from some development practitioners is certain banks are refusing to issue a guarantee in the name of a solicitor's firm which causes potential problems for compliance with the Act. It is not clear who the guarantee should be made out to (i.e. seller or stakeholder) and who can hold the guarantee pending settlement (stakeholder or seller). It may also be difficult or impossible to comply with the requirement that they be held in trust.

If it is not clear whether the term money for section 11 requirements include guarantees/ bonds, then it is also not clear whether they are restricted by the 10% limit.

Focus Questions – requirements for dealing with money

5.14A What do you think about the how the term “moneys” is referred to in the Act and current commercial practices (e.g. the use of back guarantees for deposits)?

6.0 Conclusion

The Act regulates the sale of unregistered flat land ('proposed allotments') and land sold off the plan forming part of a community titles scheme ('proposed lots') (e.g. building units). The Act was introduced in response to a number of significant incidents of consumer detriment in the 1970s and 80s caused by misdescribed land. Prior to the introduction of the Act, the *Auctioneers and Agents Act 1971* regulated aspects of unregistered land sales in Queensland.

The Act restricts the point at which proposed allotments may be sold in the registration of title process and imposes disclosure obligations on sellers of unregistered land. If there are variations between the descriptions on the disclosure statements and the actual allotment / lot, consumers may then be able to vary the terms of the contract, or avoid the contract. The Act also provides a right of avoidance for consumers if the seller does not provide the registrable instrument of transfer within the prescribed timeframe (18 months for proposed allotments and three-and-a-half years for proposed lots).

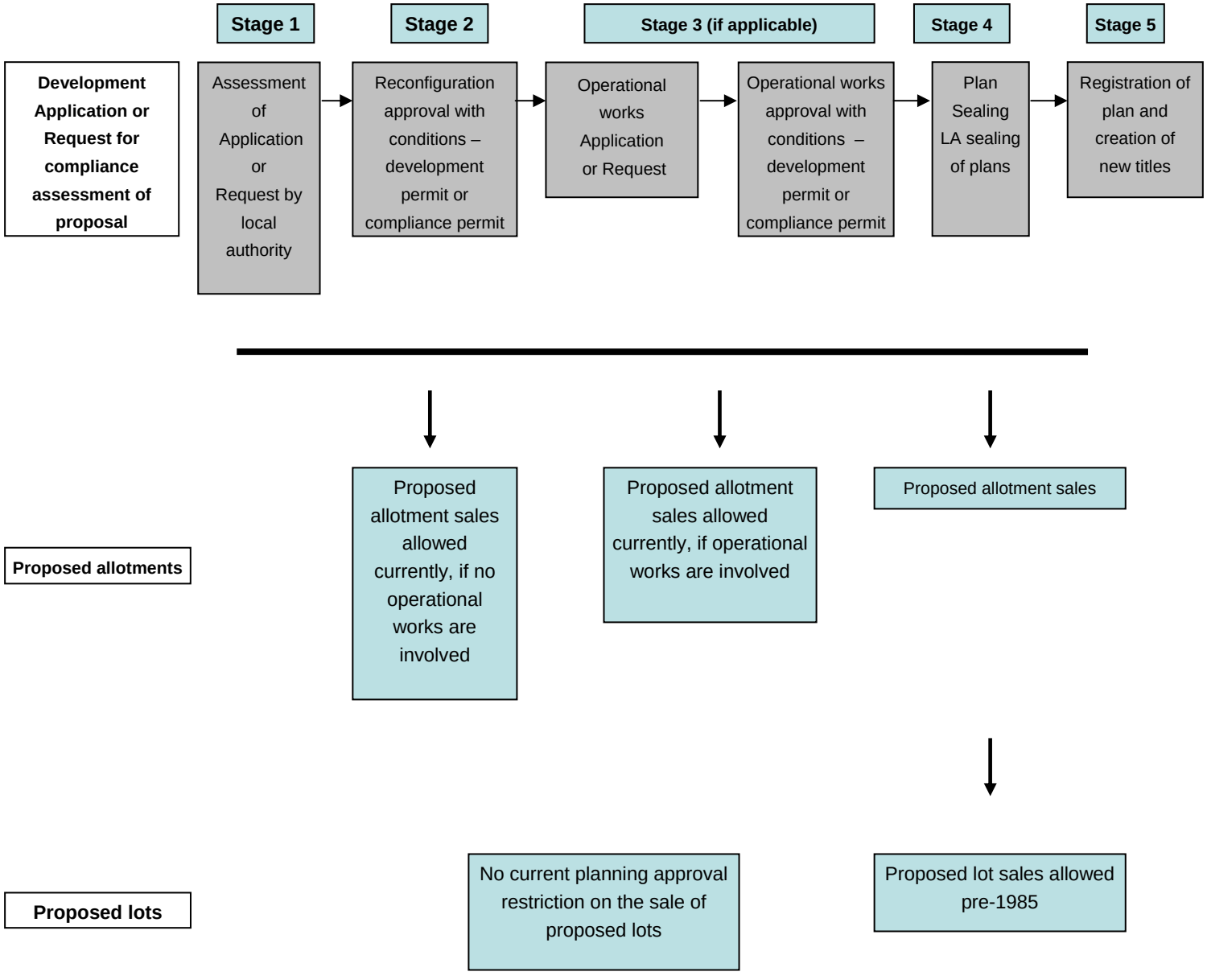
The purpose of this Paper is to assist in:

- clarifying the objectives of the legislation;
- identifying and analysing the competition impacts of restrictions;
- assessing the costs and benefits of the restrictions; and
- considering alternatives for achieving the same result using non-legislative means.

The Paper forms part of the review of the Act which aims to examine existing mechanisms and alternative means for ensuring the legislation achieves its objectives. Provisions of the Act should meet the dual objectives of facilitating property development by not imposing any unnecessary regulatory burden. They should also ensure the interests of consumers are adequately protected in transactions that carry more risk for purchasers than most other consumer transactions.

Appendix 1

Pre-selling stages – *Land Sales Act 1984*



Appendix 2

Table: Jurisdictional Comparison

	QLD	Vic	NSW	WA	SA	TAS	NT	ACT
Proposed allotments								
Restriction of the sale of proposed allotments	☒	☐	☐	☐	☐	☐	☐	☐
Specific vendor disclosure for proposed allotments	☒	☒	☐	☐	☐	☐	☐	☐
Variation after entering contract	☒	☒	☐	☐	☐	☒	☐	☐
Supply of registrable instrument of transfer	☒	☒	☐	☐	☐	☐	☐	☐
Money held in trust	☒	☒	☐	☐	☐	☐	☐	☐
Deposit limit	☒	☒	☐	☐	☐	☐	☐	☐
Implied terms and warranties	☐	☐	☒	☐	☐	☒	☒	☒
Proposed lots								
Restriction of the sale of proposed lots	☐	☐	☐	☐	☐	☐	☐	☐
Specific vendor disclosure for proposed lots	☒	☒	☐	☐	☐	☐	☐	☐
Variation after entering contract	☒	☒	☐	☒	☐	☐	☒	☐
Supply of registrable instrument of transfer	☒	☒	☐	☐	☐	☐	☐	☐
Money held in trust	☒	☒	☐	☒	☐	☐	☐	☐
Deposit limit	☐	☒	☐	☐	☐	☐	☐	☐
Implied terms and warranties	☒	☐	☒	☐	☐	☒	☒	☒
Vendor disclosure for sale of land generally								
	☐	☒	☒	☐	☒	☒	☒	☒

Appendix 3

Timeline