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Property Law Act Review
Strategic Policy and Legal Services
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Draft *Property Law Bill 2022* Comments

Thank you for the opportunity to provide additional input into the Government's draft *Property Law Bill 2022* (Draft Bill). The Property Council is committed to ongoing, collaborative engagement with the Queensland Government on important regulatory issues affecting the property industry. Whilst the Property Council supports the introduction of a Statutory Seller Disclosure Scheme, we have some concerns which we outline below.

Compliance

The Property Council's members place a high value on certainty and simplicity in regulation. We agree that the existing disclosure regime in Queensland is complex and spans several pieces of legislation and that this creates a likelihood of confusion and inadvertent non-compliance. The Property Council supports a simplified disclosure regime, as it would aid compliance and improve outcomes for both seller and buyer.

Disclosure requirements

Whilst the Property Council supports a robust disclosure regime, the provisions relating to disclosure in the Draft Bill, in their current form, arguably do not assist buyers and sellers in complying with such a regime. With regards to disclosure for existing lots under the *Body Corporate and Community Management Act 1997* (Qld) (BCCMA), in removing the chapter dealing with disclosure for existing lots, the Property Council understands it is intended that the existing section 206 disclosure regime will be replaced by requiring a 'body corporate certificate' prepared under new section 205AAA of the BCCMA to be given to a buyer. Although this is satisfied by the new form of disclosure statement, there are concerns about the changes to the remedies available to sellers. In addition, it may not be possible to

comply with this requirement for 'non-functioning' body corporates where there is a single owner of all lots in the scheme.

With regards to the disclosure of building management statements, with the changes within the Bill, section 213 disclosure requires disclosure of the proposed Community Management Statement (CMS) and proposed Building Management Statement (BMS). However, under the new *Property Law Act* disclosure, the body corporate information certificate must include a copy of the CMS but not a BMS. The BMS is equally important in understanding the structure and operation of the Scheme. This, therefore, needs to be corrected for consistency across these two disclosure regimes.

It should also be noted that the Bill provides no opportunity to remedy failure to provide a disclosure statement. By way of example, section 408 of the *Environmental Protection Act* requires sellers to give a disclosure statement to a buyer before agreeing to sell the land if the land is on the environmental management register or contaminated land register. If the seller does not do this, section 408(5) gives the seller a right to give the notice later and requires the buyer to make its election to terminate within 21 business days after receiving the notice. If this was replicated in the Bill, it would provide assurance to sellers where the notice was initially overlooked. Further to this, the seller's statement refers to section 408 and it is not clear whether a separate notice will still be required or if it will be incorporated into this notice. Having two notice regimes concerning the same legislation would be undesirable, and it would arguably be better to combine the two into a single disclosure. These provisions can mirror the existing rights to make further statements under section 13 of the *Land Sales Act* and section 214 of the BCCMA.

In respect of auction contracts, the Property Council queries the need for every advertisement to include a link to the disclosure statement (section 10(3) of the Bill). As the purpose of the disclosure regime is to disclose the relevant information to the actual buyer, and a disclosure statement is required to be given to each registered bidder, a buyer should not have the right to terminate the contract on a technical breach in relation to earlier advertising (which the buyer may not have seen). Furthermore, the test in relation to disclosure should arguably only apply to the actual buyer, as opposed to all unsuccessful bidders.

Certainty around what is required to be disclosed is of the utmost importance. The Property Council would support the disclosure requirements (including any 'prescribed certificate') being detailed in the legislation not simply by way of a 'form' which could be amended from time to time, and which could potentially result in costly technical non-compliance, similar to what occurred in the 'PAMDA' warning statement regime. The test of whether sellers have disclosed the necessary information should be based on substance and not form. If a form is to be prescribed, it needs to be meaningful to a buyer and provide useful information. In its current draft form, there is concern that it may not be easily understood by buyers, for example, 'Seller Statements' may be contradicted by searches that are attached to the form. Additionally, reference in section 8 to disclosing matters 'about' the listed items is arguably

ambiguous and could cause confusion with regards to complex items e.g. planning and overlays.

Clarity and consistency

The Property Council recognises the importance of property buyers being fully informed of the matters that may impact their purchase. There are several terms within the Draft Bill which require further clarification so as to minimise uncertainty:

'Entered into'

To avoid uncertainty as to when a contract is 'entered into', it would be preferable to simplify the disclosure obligation so that it exists only at the time a buyer has signed a contract.

This removes any ambiguity as to when the disclosure statement must be provided. That said, there are clearly issues with that approach. For example, where a buyer prepares and signs a contract without having provided the required disclosure statement, the seller will be unable to remedy that breach so a new, second contract will need to be prepared and then signed by the buyer.

An alternative is to more accurately define the point in time at which a person 'enters into' a contract. This could be, by way of example, the time 'a contract is legally binding on' that person.

In any case, the time at which an accurate disclosure statement must be given should be clearly defined to avoid any ambiguity or risk of termination rights accruing because of a technicality where no harm has been done.

'Prescribed certificate'

To limit confusion, it is critical that all the 'prescribed certificates' are referred to in one Regulation. As such, our members would prefer language to be used that makes it clear that the items referred to in the Regulation are the only items required to be given in order to comply with the disclosure obligations under the Act. This would assist sellers, real estate agents and solicitors to ensure all relevant disclosures and certificates are provided and avoid any unintended breaches.

'Call option' and 'put option'

The definitions of 'call option' and 'put option' appear to be the opposite to which they should be. This should be amended for clarity.

\$5 million threshold

The Property Council is supportive of a financial threshold as an exception to disclosure requirements, in recognition of the varying needs of the diverse range of property buyers and sellers in Queensland. However, there should be provision for this amount to be indexed so that the benchmark remains a suitable amount. In addition, as it is sometimes not immediately clear whether the sale of a property will attract GST or the amount of GST that would be applicable, we suggest the \$5 million threshold be inclusive of GST.

Transitional provisions

The proposed transitional provisions under the Bill make it clear that if a contract was entered into before the Bill takes legal effect, the updated disclosure regime does not apply. However, these transitional provisions need to be expanded to capture option agreements entered into before the Bill takes legal effect otherwise there is a risk that the disclosure given prior to entry into the option agreement will be deemed non-compliant when the parties enter into a contract pursuant to the exercise of a call or put option. The Bill clarifies that the new disclosure regime applies equally to option agreements so the missing piece in the transitional provisions appears to have been excluded in error.

Disclosure of registered encumbrances

The updated disclosure regime requires disclosure of a title search and registered survey plan. A contract must disclose the existence of encumbrances on the title so it would be logical (for completeness) for copies of those registered encumbrances to be disclosed as well. This is consistent with the position adopted in NSW and Victoria.

Currency of searches

Whilst the Bill makes clear that the rates notice must be current, it does not address when the other documentation, such as title searches are deemed no longer current. For consistency, it is recommended that an across-the-board approach is adopted to time frames for searches required to satisfy the disclosure statement criteria.

If you would like to discuss these comments further, please don't hesitate to contact Jess Caire Queensland Deputy Executive Director on 0499 181 366 or at jcaire@propertycouncil.com.au.

Yours sincerely



Jess Caire

Queensland Deputy Executive Director