

LAND SALES AND LAND TITLE AMENDMENT BILL 1997

EXPLANATORY NOTES

GENERAL OUTLINE

Objective of the Legislation

The objective of the Bill is to amend the *Land Sales Act 1984* to remove the constraints on the pre-registration selling of all freehold and leasehold land ('proposed allotments') and in doing so, provide adequate consumer protection measures.

Reasons for the Bill

The *Land Sales Act 1984* (the Act) places restrictions on selling proposed allotments before the plan of subdivision is sealed by the local government ('pre-registration selling') and provides certain consumer protection measures for purchasers entering into such sales. By this stage, the allotments are readily identifiable and either the developer has completed the work necessary for the purpose of the subdivision to the satisfaction of the local government, or the local government has bonded the developer. In the latter case, if the developer fails to complete the work to the local government's satisfaction, the local government would have the work completed.

The Act also provides that, if the final size and topography of the allotment differ from that originally expected by the purchaser, the purchaser may avoid the contract if he or she is materially prejudiced by the difference. In these cases the purchaser will receive a refund of deposit monies which have been held in trust. Section 19 of the Act allows a person, proposing to subdivide allotments into not more than five proposed allotments, to apply for an exemption from compliance with all or any of the restrictions on contracts of sale. Section 7A provides that the

prohibition on pre-registration selling of allotments does not apply to large transactions, that is, transactions in which six or more allotments are sold by the one vendor to the one purchaser. This provision does not directly affect consumers, and was intended purely to deal with inter-developer transactions.

For several years, the real estate and development industries have been lobbying the government to amend the Act to remove or lessen the restrictions on pre-registration selling of allotments. There is agreement that the inability of developers to sell proposed allotments at the pre-registration stage, when engineering drawings (if required) have been approved, is hindering development in that sector because developers have had difficulty in obtaining finance on satisfactory terms in the absence of concluded contracts for sale. By contrast, provision already exists to sell building units and group titles ('proposed lots') 'off the plan' at the pre-registration stage, and this confers an unfair commercial advantage on developers in that sector.

There is no 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 proposed 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.

Ways in which the objective is to be achieved

The *Land Sales Act 1984* is being amended so that:

- pre-registration sales of proposed allotments at the engineering drawings stage be permitted under the Act;
- there be provisions, including the supply of a disclosure statement and disclosure plan to a purchaser, to ensure that a proposed allotment, in relation to which a registrable instrument of title is ultimately delivered to the purchaser, is substantially identical to that which was originally purchased by him or her;
- if the allotment is not substantially identical, but 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, and deposits not exceed 10 per cent of the purchase price;
- there be no additional certification requirements imposed on local governments so as to avoid any increased financial or administrative burden on them;
- 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 present 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 present period of 36 months);
- the Ministerial discretions to extend the periods of automatic avoidance be removed.

Administrative Cost to Government

The proposed amendments will not result in any significant costs to Government. The only costs will be those consequent upon the preparation and dissemination of information to vendors and purchasers on their rights and obligations (which attend any legislation the responsibility of the Office of Consumer Affairs).

Consistency with fundamental legislative principles

The Bill is consistent with fundamental legislative principles.

Consultation

A discussion paper was prepared and was forwarded for consultation to a large number of stakeholders in July 1996. Submissions were received from the legal profession, surveyors, financiers, developers and industry groups, local governments, Queensland Government Departments and consumers. A draft Bill was circulated widely in early 1997. The Bill develops many of the proposals contained in the discussion paper as the result of submissions received.

NOTES ON CLAUSES**PART 1—PRELIMINARY****Short title**

Clause 1 provides the short title of the Bill.

Schedule

Clause 2 refers to the schedule of consequential amendments.

PART 2—AMENDMENT OF LAND SALES ACT 1984**Act amended in pt 2**

Clause 3 states that the purpose of the Part is to amend the *Land Sales Act 1984*.

Insertion of new s 2**Objects of Act**

Clause 4 inserts a new section 2 in the Act which sets out the objects of the Act, including a provision that the objects of the Act are to be achieved without imposing any additional obligations on local governments as the result of the amendments.

Amendment of s 5 (Application of Act)

Clause 5 replaces the term ‘relevant land’ with ‘proposed allotment’ in section 5 of the Act.

Amendment of s 6 (Interpretation)

Clause 6(1) removes the definitions ‘land held from the Crown for an estate of leasehold’, ‘relevant freehold land’ and ‘relevant leasehold land’ as they have been replaced with the term ‘proposed allotment’.

Clause 6(2) inserts definitions for a number of new terms consequent upon the amendments to sections 8 to 10.

Clause 6(3) replaces the term ‘relevant land’ with ‘proposed allotment’ in the definition of registrable instrument of transfer.

Clause 6(4) replaces the term ‘leasehold land’ with ‘State leasehold land’ in the definition of registrable instrument of transfer.

Clause 6(5) removes ‘sale or’ from the definition of ‘sell’ as it is unnecessary (see section 32 *Acts Interpretation Act 1954*).

Clause 6(6) replaces the term ‘relevant land’ with ‘proposed allotment’ in the definition of ‘vendor’s agent’.

Clause 6(7)-(12) replaces the term ‘relevant land’ with ‘proposed allotment’ in section 6(2).

Clause 6(13) removes ‘sale or’ from the reference to ‘sell’ as it is unnecessary (see section 32 *Acts Interpretation Act 1954*).

Amendment of pt 2 (sale of relevant land)

Clause 7 replaces the term ‘relevant land’ with ‘proposed allotments’ in the Part 2 Heading.

Omission of s 7 (Construction of certain provisions)

Clause 8 removes section 7 as it is unnecessary.

Amendment of s 7A (Part not to apply to large transactions)

Clause 9 replaces the terms ‘portion’, ‘subdivisional portion’ and ‘proposed subdivisional portion’ of relevant land with ‘proposed allotment’ in section 7A.

Amendment of s 8 (Restriction on selling and purchasing)

Clause 10(1) removes the reference to purchasing in the heading to section 8, to make it clear that section 8 provides that it is only possible to sell a proposed allotment upon certain conditions.

Clause 10(2) removes section 8(1), which provided that relevant land could not be sold prior to the subdivisional plan of survey being sealed, and replaces it with firstly, a provision allowing a proposed allotment of freehold land to be sold after approval of the subdivision application and secondly, a provision allowing a proposed allotment of State leasehold land to be sold after approval by the Minister under the *Land Act 1994*. Section 8 has been amended on the basis that it is possible to describe adequately the land the subject of a contract of sale at the engineering drawings stage.

Clause 10(2) also removes the relevant penalty provision from section 32 and places it in section 8, and *Clause 10(3)* removes section 8(3) as it is unnecessary.

Amendment of s 9 (Identification of land)

Clause 11 removes the existing section 9(1) and replaces it with requirements for the provision by the vendor of a disclosure statement and disclosure plan, or a copy of the approved plan of survey sealed under the *Local Government (Planning and Environment) Act 1990* (the ‘sealed plan’) to the purchaser at the time of entering into the contract. Those

vendors who choose not to sell until the point at which they have a sealed plan (for which the Act currently provides), are not required to give the purchaser a disclosure statement or plan.

Clause 11 also provides that a purchaser may avoid the contract prior to being given the registrable instrument of transfer if the vendor contravenes this section, with the exception of the requirement to state, in the disclosure statement, the purchaser's and vendor's full names and addresses and the day the statement is signed: breach of these requirements will not provide the purchaser with an opportunity to avoid the contract. This provision recognises that only substantive rather than technical breaches will provide the purchaser with such a remedy. *Clause 11* removes the relevant penalty provision from section 32 and places it in section 9 and renumbers the existing section 9(2) as section 9(4).

The disclosure statement is to be signed by the vendor and purchaser and state the full name and address of both the purchaser and the vendor; state that the purchaser has been provided with the disclosure plan; state that the purchaser has been given the opportunity to inspect the allotment as pegged (or not pegged if it is impossible to do so); state the purchaser's rights and state the day the statement is signed. It is important that a purchaser has the opportunity to inspect a proposed allotment as pegged because it would be very easy for a purchaser to be confused about the precise location and extent of the land being purchased.

The disclosure plan includes the details shown on the proposal plan which accompanies the subdivision application for the land (the term 'land' is used to maintain consistency with the *Local Government (Planning and Environment) Act 1990*); the metes and bounds description of the proposed allotment; a contour plan showing the natural surface of the land with a contour interval of 500 mm for zones other than rural or rural residential; and for rural and rural residential zones a contour plan with intervals appropriate to the area; and final surface contours as specified in the engineering drawings. The requirements relating to contour plans for urban development are different from rural development, due to the different requirements of both and the availability of mapping in rural areas.

Replacement of s 10 (Delivery of registered plan)

Clause 12 replaces the existing section 10 with requirements for the provision by the vendor of notice about significant variations between the

plan of survey which the vendor proposes to register and the disclosure plan, or the plan showing the works as constructed and the disclosure plan. *Clause 12* also provides that a purchaser may avoid the contract prior to being given the registrable instrument of transfer if the vendor contravenes this section. Where the vendor has given notice of a significant variation, the vendor may not deliver a registrable instrument of transfer to the purchaser and the purchaser may not be required to pay the outstanding purchase monies for 30 days after receipt of the notice. This time frame is considered necessary to allow consumers scope to exercise their right to avoid, while providing developers with a cut off point at which they can proceed to completion of the contract. The 30-day period can be reduced by written agreement between the parties.

Clause 12 imposes a penalty for breach of section 10 and defines a 'significant variation' to be:

- (a) a variation of more than 1% in the details of any linear dimension, or 2% in the area of the allotment between the survey plan and the disclosure plan; or
- (b) a variation of more than 500 mm in height in details of surface contours or fill levels between the plan showing the works as constructed and the disclosure plan.

'Purchaser must be given registrable instrument of transfer and other documents'

Clause 12 also inserts a new s 10A 'Purchaser must be given registrable instrument of transfer and other documents', which provides that a purchaser must be given within 18 months of entering into the contract, a registrable instrument of transfer, a copy of the registered plan of survey, a copy of the plan showing the constructed works and a statement regarding any variations between the registered plan of survey and the disclosure plan or the plan showing the constructed works and the disclosure plan. The statement as to the nature and extent of variations under this provision is to be certified by a licensed surveyor. The surveyor is responsible for the preparation of plans as well as checking all constructed works and is therefore in the best position to certify any variation between the plans at minimal cost to the purchaser.

Clause 12 provides that a purchaser may avoid the contract prior to being given the registrable instrument of transfer if the vendor contravenes this

section, and the clause removes the relevant penalty provision from section 32 and places it in section 10A.

The purpose of a requirement to provide the plans and statement is that if purchasers are simply supplied with a copy of the registered plan and a copy of the “as constructed plan”, most purchasers will not be able to evaluate for themselves if the “as constructed plan” of their proposed allotment corresponds with that showed on the disclosure plan.

Amendment of s 11 (Contractual requirement re holding of money)

Clause 13 replaces the term ‘relevant land’ with ‘proposed allotment’ in section 11 of the Act and removes the relevant penalty provision from section 32 and places it in section 11. *Clause 13* also removes subsections 11(3) and (3A) because they are unnecessary.

Insertion of new s 11A

Section 11A: Limit on deposit amount

Clause 14 inserts a new provision which sets a ten percent limit on the amount of deposit payable by the purchaser and provides that the purchaser may avoid the contract if the amount payable by the purchaser exceeds that amount.

Amendment of s 12 (Trustee’s duty)

Clause 15 removes the relevant penalty provision from section 32 and places it in section 12.

Omission of ss 13-15

Clause 16 removes sections 13 (Avoidance of instrument for breach of section 9) and 15 (Avoidance of instrument upon ground of lapse of time) because they have been placed in the relevant sections (see clauses 10 and 11). *Clause 16* removes section 14 (Avoidance of instrument for breach of section 11) because it is unnecessary, as section 11(2) itself provides that an instrument or provision of an instrument which provides for money to be paid contrary to section 11(1) is void.

Amendment of s 18 (Declaration of non-application of part in respect of certain relevant leasehold land)

Clause 17 replaces the terms ‘relevant’ with ‘State’ and ‘subdivisional portion’ and ‘proposed subdivisional portion’ with ‘proposed allotment’ in section 18.

Amendment of s 19 (Exemption from part)

Clause 18 replaces the terms ‘relevant land’ and ‘subdivisional portion’ with ‘proposed allotment’ in section 19. *Clause 18* also removes the reference to purchasing relevant land (see *Clause 10*).

Amendment of s 21 (Statement identifying proposed lot etc)

Clause 19 removes the relevant penalty provision from section 32 and places it in section 21.

Amendment of s 23 (Contractual requirement re holding of money)

Clause 20 amends section 23 to make it clear that monies payable under this section may be paid to a firm of solicitors or a real estate agency. *Clause 20* removes the relevant penalty provision from section 32 and places it in section 23. *Clause 20* also removes subsections 23(3) and (3A) because they are unnecessary.

The existing holding of trust monies provisions relating to proposed allotments are retained, while the equivalent provisions relating to proposed lots have been brought into line with recent amendments to the holding of trust monies provisions relating to proposed allotments.

Amendment of s 24 (Trustee’s duty)

Clause 21 redrafts the section and makes consequential amendment to the amendment contained in *Clause 20*. The section has also been amended to make it clear that a trustee must retain all monies paid under a contract (including deposits, option fees, instalment payments etc.) in a trust account until the purchaser or vendor ultimately becomes entitled to the monies as a result of either non-performance or completion of the sale.

The existing provisions relating to holding of trust monies for the sale of proposed allotments are retained, while the equivalent provisions relating to proposed lots have been brought into line with recent amendments to the holding of trust monies provisions relating to proposed allotments.

Omission of s 26 (Avoidance of Instrument for breach of s 23)

Clause 22 removes section 26 (Avoidance of instrument for breach of section 23) because it is unnecessary, as section 23(2) itself provides that an instrument or provision of an instrument which provides for money to be paid contrary to section 23(1) is void.

Replacement of s 27 (Avoidance of instrument upon ground of lapse of time)

Clause 23 replaces the existing provision dealing with avoidance of instrument upon ground of lapse of time, by removing reference to section 31B. *Clause 23* provides that if there is a delay of more than 3¹/₂ years between the date of the contract and the date of delivery of a registrable instrument of transfer in relation to proposed lots, the purchaser will have a right under the Act to avoid the contract.

Amendment of s 31 (Contracting out of Act void)

Clause 24 replaces the term ‘relevant land’ with ‘proposed allotment’ in section 31.

Omission of s 31B (Extension of period specified in s 15 or 27)

Clause 25 removes section 31B, that is that while the period of 3¹/₂ years for avoidance of contracts in relation to proposed lots (section 27 of the Act) has replaced 36 months, and the period of 18 months for avoidance of contracts in relation to proposed allotments has replaced 9 months (the proposed section 10A of the Act) the discretion in the Minister under the Act to extend either period is removed.

Amendment of s 32 (Offences against Act)

Clause 26 replaces section 32 heading ‘Offences Against Act’ with ‘Penalties under this Act are in addition to other penalties etc’ and removes section 32(1) and (2) because the penalty provisions have been placed in the sections to which they apply.

Penalties for breaches of the Act are increased, in order to provide a more realistic deterrent and to bring them into line with those under the *Fair Trading Act 1989*. The main objective of these amendments is to remove the restrictions on pre-registration selling of land without disadvantaging consumers. Purchasers likely to be most affected by these amendments are first home buyers, who represent a relatively vulnerable class of consumers. It is important that, in providing for consumer protection measures in the amending Bill, adequate enforcement measures are also provided for.

Insertion of new ss 32A and 32B**Section 32A: Responsibility for acts or omissions of representatives****Section 32B: Executive officers must ensure corporation complies with Act**

Clause 27 inserts new sections 32A and 32B which provide respectively for representatives of corporations or representatives of individuals or executive officers of corporations to have responsibility for acts or omissions and to ensure compliance with the Act.

For the same reason as set out above in relation to penalties, provisions are included which provide that if a body corporate commits an offence against the Act, each director of the body corporate will be taken to have committed the offence.

Amendment of s 34 (Evidentiary provision)

Clause 28 replaces the term ‘relevant land’ with ‘proposed allotment’ in section 34.

PART 3—AMENDMENT OF LAND TITLE ACT 1994**Act amended in pt 3**

Clause 29 states that the purpose of the Part is to amend the *Land Title Act 1994*.

Amendment of s 122 (Lodging a caveat)

Clause 30 amends section 122 to provide that an agreement to purchase a proposed allotment under the *Land Sales Act 1984* does not amount to a registrable interest under the *Land Title Act 1994*. This clause was inserted to make it clear that purchasers do not have title to their land before registration and therefore do not have an interest which would enable them to lodge a caveat.

SCHEDULE**CONSEQUENTIAL AMENDMENTS****AUCTIONEERS AND AGENTS ACT 1971****Amendment of s 75(1)(b)**

This Clause replaces the term ‘relevant land’ with ‘a proposed allotment’ in section 75(1)(b).

CANALS ACT 1958**Amendment of s 8A**

This Clause replaces the term ‘relevant land’ with ‘proposed allotments’ in section 8A.