Covenants / Building and Other Legislation Amendment Act Concerns

The Property Council of Australia has major concerns with parts of the Building and Other Legislation Amendment Act where it refers to covenants, popularly referred to as the ‘ban the banners’ legislation, which has passed Parliament on 12 November 2009.

The Government has described its ‘ban the banners’ policy aims to stop bodies corporate and developers from restricting the use of sustainable building elements and features, which, in itself, is a laudable aim. The Property Council of Australia is, in fact, a great proponent of a sustainable society. However, it is very disappointing to see a Bill passed by Parliament that – however admirable its intentions – has been poorly thought out, rushed through, and littered with unintended consequences.

The voiding of virtually all covenants is an extreme approach to what should have been a directly focused response to the issue of solar PV cells and solar hot water systems being precluded by some (not all) covenants.

It is important to note that covenants are voluntarily entered into between a willing buyer and a willing seller. However, these arrangements are now being voided by a third party – the Government – which is looking to frustrate one of the main aims of that contract, to provide a security of investment for the buyer about the design and siting of homes in their street and neighbourhood. There is a strong (and legitimate) consumer demand for this type of covenant protection (evidenced by resident demands for action by the developer against buyers who do not comply with them).

Only a relatively small proportion of new homes occur within master planned communities, that is, if prospective purchasers do not wish to buy in a community due to covenants, there are plenty of other opportunities (both new and existing) that they can choose from.

The covenants represent only a small cost impost, compared with, for instance, the 25-30% of cost of a new home represented by government taxes and charges. The change will therefore result in only a marginal impact on new home prices, compared with the substantial savings that could be made from changes to other government policy.
The voiding of covenants will result in severe discontinuities within estates, with previous purchasers having bought with the expectation that all subsequent purchasers would be subject to the same requirements as them, and new purchasers not being required to meet those same standards. The provisions contained within in the Act will no doubt have a negative impact on these communities, and will create a degree of friction between neighbours previously unencountered in master planned communities.

The change will result in reduced demand for new homes in master planned communities, which generally provide a broader range of product including in more affordable price brackets, as well as promoting improved urban outcomes generally. This is a form of development that government policy should promote, not undermine.

There are implications flowing from the timely and efficient completion of homes within neighbourhoods and the demand for age-specific infrastructure such as child care centres and schools. The change will now introduce uncertainty (including for Government) in the take-up of investment on schools, shops, etc. as population forecasts will be more uncertain, based on haphazard completion of homes.

The change will now permit speculation in vacant land within new neighbourhoods, and introduce additional price pressure in the serviced land market. The provisions contained in this Act treat the market with obvious contempt – developers have responded to market demands when developing a covenant protected product.

The likely response by developers will be to seek equivalent provisions by way of development conditions attaching to planning approvals that run with the land (i.e. more local government regulation), or convoluted legal arrangements that achieve the object of ensuring compliance with design and siting requirements but without offending the new legislation (e.g. along the lines of ‘poison pill’ provisions in sales contracts).

I further note with concern that the Bill was introduced on 29 October, and rushed through Parliament on 12 November. It is unfortunate that the Property Council of Australia was not consulted on the draft Bill as a key industry stakeholder, as many of the unintended consequences detailed above could have been brought to the Government’s attention before the legislation was introduced into Parliament.

I very much would welcome an opportunity to meet with you on these topics, at you earliest convenience, and invite your staff to contact my office on 3225 3000 to arrange for a suitable meeting time.

Yours sincerely

[Signature]

Steve Greenwood
EXECUTIVE DIRECTOR