27 October 2010

The Manager
Unit Titles Operational Review
Legislation and Policy Branch
GPO Box 158
CANBERRA ACT 2601

Dear Sir

Unit Titles Act 2001 (“Act”)
Submission on review of the 2008 amendments to the Act (“Amendments”)

Thank you for affording us the opportunity to make submissions on the Amendments.

Our concerns

According to the original consultation arrangements for the Amendments a key point of the Amendments was to address a range of consumer protection issues.

The Amendments however have had a detrimental effect on the policy of housing affordability. In particular, as a result of the onerous provisions;

1. development is more difficult;
2. satisfying financiers that developers have unconditional contracts is more onerous;
3. obtaining approval for finance to proceed is much slower;
4. supply is reduced; and
5. in circumstances where a development does proceed, these developments are more expensive.

The Amendments, while seeking to resolve unit title consumer protection issues have caused unreasonable expense for the unit plan developers and unit seller.

The critical headline issues arising from the Amendments are:

1. the developer disclosure requirements;
2. the restriction on the Owners Corporation during the developer control period; and
In addition to our concerns about the Amendments we submit that this provides an ideal opportunity to consider other provisions of the Act that should be reviewed.

**Developer Disclosure Requirements**

Section 31A of the Act, which was introduced as part of the Amendments, provides that a contract for the sale of a unit in a units plan that is not yet registered must include certain disclosure material.

Given the penalty provided in the Act for a disclosure that is incomplete or inaccurate, we have concerns with the following disclosure obligations:

- **Section 31A(b)(i)** - the amount of the buyer’s contribution to the corporations general funds that will be used to service a contract that the developer intends the owners corporation to enter into.

- **Section 31A(2)(c)** - estimate of the buyer’s contribution to the corporations general funds for 2 years after the units plan is registered.

Given the requirement in Section 31A(3) that the developer warrants the information disclosed is accurate, these provisions are very difficult for a developer to comply with. The detailed costing required to prepare the owners corporation budget for 2 years after the registration of the units plan is not available at such an early stage of the development. Costs for many items of the body corporate budget will change due to factors beyond the control of the developer.

The effect of these requirements has been for developers to make very broad estimates that are subject to significant assumptions and qualifications. There should be no right to cancel the contract if the developer provides a reasonable estimate based on reasonable assumptions.

As in other consumer protection legislation where costs which may arise in the future must be disclosed, our submission is that the information that is required to be disclosed at the time the contract is entered into should be, if reasonable estimates based on reasonable assumptions are not acceptable, the amounts that would be payable at the date of the contract if the units plan was registered.

**Recommendation**: the disclosure obligation contained in sections 31A(2)(b)(i) and (c) should either be removed from the Act, limited to disclosure of the amounts that would be payable by the Buyer, as their contribution, if the units plan was registered as at the date of the contract or permit disclosure of a reasonable estimate based on reasonable assumptions.

- **Section 31A(2)(e)** - staged development
Section 31A(2)(e) provides that if a staged development of a units plan is proposed, the contract must include the proposed development statement and any amendments to the statement.

It is common for developers, as a result of a change in commercial factors, to elect to stage a development during the development process and long after contracts for each unit sale have exchanged. Following the Amendments, such an election is not possible for the developer as it would be in breach of its disclosure requirements. There will be situations that arise during the course of a development, which are not apparent at the contract date and which may be out of the control of the developer, which require the development to be staged or for amendments to be made to a staged development. The inability to legitimately manage the developer’s asset considerably increases a developers commercial risk in an environment that is subject to changes beyond their control.

It also makes seeking finance for proposals almost unobtainable if the lender is unable to obtain sufficient flexibility with the delivery model.

The Act needs to recognise the commercial reality that factors which are outside the developer’s control can arise that will require a change to the development. Our view is that the Act does not achieve a proper balance between the buyer’s rights and the commercial position of the developer. There is no point in a developer being forced to complete a development for which there is no market. The developer and financier will not complete the development in those circumstances.

**Recommendation:** the disclosure obligation contained in section 31A(2)(e) should be limited to circumstances where the developer intends to stage the unit plan as at the contract date and should also enable the developer to give notice of any amendment to the proposed staging.

- **Section 31A(4) - cancellation of contract**

Under section 31A(4), the buyer of a unit may, by written notice given to the developer, cancel the contract of sale before the contract is completed if:

1. the developer’s disclosure under section 31A(2) is incomplete or inaccurate; and
2. the buyer is significantly prejudiced because the disclosure is incomplete or inaccurate.

This remedy is far more than required to adequately protect a buyer.

This section is substantially detrimental to a development proceeding. In the financial arrangements for a development it is common for a lender to require that all contracts for sale
be unconditional. A developer is unable to warrant that requirement to their lender. This makes it difficult for a developer to secure finance at all to ensure the development can proceed.

Given the time frame for the completion of the development from the date of issue of contracts there will be changes that affect the information that is disclosed. The right to cancel a contract is a severe penalty which could jeopardise the viability of the development. A more equitable result would be for the buyer to be entitled to damages equivalent to the loss that they might suffer.

The ability for the buyer to cancel the contract may also provide a buyer who has simply changed their mind with the ability to avoid a contract on grounds that are better dealt with by a right to damages.

**Recommendation:** Section 31A(4) should either be removed from the Act and the existing provisions of the Sale of Property Act should be relied on or the remedy for the breach of warranty should be limited to damages.

In any event it is unclear what “cancel” a contract means and what flows from the effect of the cancellation. This is not satisfactory. This uncertainty should be resolved.

**Recommendation:** The ability to cancel a contract should be deleted and replaced with the terminology that is consistent with the usual contracts for the sale of property.

### Restriction on owners corporation during developer control period.

Section 46A of the Act provides that an owners corporation for a units plan must not, during the developer control period, enter into a contract unless:

1. the contract is disclosed in each sale contract for the units in the units plan; and
2. the ACAT authorises the owners corporation entering into the contract.

“Developer Control Period” is defined in the Dictionary in the Act to mean the period that:

1. starts on the day the owners corporation for the units plan is established; and
2. ends on the day people other than the developer hold one third (1/3) or more of the unit entitlements for the units plan.

It is general practice for the owners corporation to enter into contracts for the maintenance and management of the units plan immediately following registration of the units plan. We consider it is reasonable for any such contract to be disclosed in the sale contracts for the units. However, it is not reasonable that such contracts must also be approved by the ACAT.
The effect of the new arrangement is that in the owners corporation is unable to effectively and efficiently manage the units plan and this impacts on unit settlements. For example, on the registration of the units plan, the owners corporation would not be able to contract with an owners corporation manager to prepare a budget and section 75 certificates until the contract had been approved by the ACAT. That approval process can take a significant amount of time. This can substantially delay settlements of the unit sales, which ordinarily cannot take place until the date 7 days after the developer has supplied the section 75 certificates to the buyers. It also leads to greater cost to the unit owners through larger owners corporation levies as a result of having to make applications to the ACAT. This impacts on disclosures the developer is required to make as to a buyer’s contribution to the owners corporation.

There may be circumstances where the “Developer Control Period” may continue for extended periods due to the developer retaining units as investments or because they are not able to sell those units. There should be a time limit on the Developer Control Period.

Recommendation: The requirement on an owners corporation to obtain the approval of the ACAT for each contract it enters into during the developer control period should be removed from section 46A(1)(a) where the contract is disclosed in each sale contract.

The “Developer Control Period” should be limited in time.

The requirement for all contracts to be submitted to ACAT should be limited to those not disclosed in each sale contract and that have a term of greater than 3 years.

Implied warranties

Section 130D of the Act sets out a series of warranties that are taken to form part of a contract for the sale of a unit.

- **Section 130D - Implied Warranties**

Under section 130D(2)(a), the seller warrants that, to the seller’s knowledge, there are no unfunded latent or patent defects in the common property or owner’s corporation assets (other than those arising from fair wear and tear or that are disclosed in the contract).

This warranty is reasonable because it is confined to defects which the seller has (or ought reasonably to have) knowledge of at the date of the contract.

By contrast, under section 130D(2)(b) the seller warrants that the owners corporation records do not disclose any defects to which the warranty in section 130D(2)(a) would apply. This warranty applies irrespective of whether the seller has (or ought reasonably to have) knowledge of those defects. This warranty is not reasonable. The seller has no control over the records of the owners corporation and should not be obliged to warrant that those records are up to date, complete or accurate.
The same issue arises with section 130D(2)(c) and (d). Under section 130D(2)(c), the seller warrants that, to the seller’s knowledge there are no actual, contingent or expected unfunded liabilities of the owners corporation that are not part of the corporation’s normal operating expenses, other than those disclosed in the contract.

This warranty is reasonable because it is confined to defects which the seller has (or ought reasonably to have) knowledge of at the date of the contract.

By contrast, under section 130D(2)(d), the seller warrants that the owners corporation records do not disclose any liabilities of the owners corporation to which the warranty in section 130D(2)(c) applies. Again, the seller is obliged to warrant that the owners corporation records represent a certain state of affairs. Because the seller has no control over the owners corporation records, this warranty is not reasonable.

It is unreasonable to impose these blanket obligations when some units plans may have been in existence for periods in excess of 20 years and the buyer may not have owned the unit for that entire time. The Civil Law (Sale of Residential Property) Act 2003 (Sale of Property Act) requires that a contract for the sale of a unit must include, currently, a S75 certificate which sets out the owners corporations compliance with the Unit Titles Act 2001 and the position in respect to the levies for the unit, and if the unit is a Class A Unit, the contract must include minutes of meetings of the owners corporation and the executive committee held in the 2 years before the day the unit was first advertised.

The buyer of a unit has the opportunity to satisfy themselves prior to entering into the contract in respect of the owners corporation and the common property through its own inspection of these books and records.

**Recommendation:** All of the implied warranties contained in section 130D should be limited to those matters which the seller has or ought reasonably to have knowledge of and be limited in time. Preferably, also, if the section 75 Certificate could be standardised to include statements from the owner’s corporation about the matters covered by the implied warranties then that would negate the need for the warranties

- **Section 130E - Cancellation of Contract**

Under section 130E(1), a buyer may, by written notice to the seller, cancel the contract for the sale of a unit if there would be a breach of an implied warranty were the contract completed at the time it is cancelled.

Affording the buyer the right to cancel the contract for sale in the event that an implied warranty is found to be breached is unreasonable, unnecessary and inequitable. It is also uncertain as to what will flow from the cancellation of the contract.

This provision is substantially detrimental to developments. In the financial arrangements of a developer, it is common for a lender to require that all contracts for sale are unconditional. A developer is unable to warrant that requirement to their lender. As detailed earlier, this makes
it difficult for a developer to secure finance at all or finance which is subject to reasonable conditions and can jeopardise the viability of the development proceeding at all.

This remedy also goes substantially further than the remedies that apply to the sale of residential property (including units) under the Sale of Property Act.

As detailed above, the Sale of Property Act requires the buyer to include certain disclosure documents. A buyer may always choose to make their own enquiry of the books and records of the owners corporation prior to entering into the contract.

**Recommendation:** Section 130E should be removed from the Act and the existing provisions of the Sale of Property Act should be relied on or the remedy for a breach of warranty should be limited to damages.

**Other matters for review**

As our City grows there is a need for developments with a better sustainable urban model which will promote more innovative and creative thinking by developers. This requires a Unit Title Act that will give flexibility for ACT Land and Planning (“ACTPLA”) and ACAT to approve more effective and sophisticated developments. The following matters should also be considered while the review of the Amendments is being undertaken.

**Encroachments on Public Places**

Currently, the only permitted ‘encroachment’ on a public place by a unit titled building are ‘attachments’.

An ‘attachment’ is defined by the Act to mean:

- (a) an eave, gutter or downpipe; or
- (b) an awning; or
- (c) anything attached to the building prescribed by regulation.

Currently, the Regulations have not been utilised to expand the definition of what might be an ‘attachment’.

The definition of ‘attachment’ is unnecessarily prescriptive for modern purposes and does not reflect the nature of encroachments that have arisen on more recent developments. The Act should provide ACTPLA with greater flexibility to approve a wider variety of attachment. Essentially, if ACTPLA believes that an encroachment is acceptable (whatever it happens to be) then the Act should allow it.
Section 303 of the Planning and Development Act 2007 provides that ACTPLA may grant an applicant a licence, where there is an encroachment on public places, to occupy or use the land, and any building or structure on the land. (There is no restriction on the type of encroachment).

Given the permissive approach to the types of encroachment for which a section 303 licence can be granted in respect of non-unit titled buildings which encroach on public places similar flexibility should be provided for encroachments by unit titled buildings.

**Recommendation:** The definition of attachment in the Act should be amended to permit any encroachment on to public places which is acceptable to ACTPLA or the National Capital Authority (where applicable).

**Default Articles**

Section 126 of the Act provides that the articles of an owners corporation consist of the default articles (provided under the Regulations to the Act) as amended by the corporation under s.128.

Section 128 provides for amendment of the default articles via a special resolution of a general meeting of the owners corporation.

A ‘special resolution’ requires:

(i) in the case of a vote - that the number votes cast in favour of the resolution exceed those against and that the number of votes against the resolution are less than 1/3 of the votes that can be cast on the resolution by those present at the meeting; or

(ii) in the case of a poll - that the voting value of votes cast in favour of the resolution exceed the voting value of the votes cast against and that the voting value of votes cast against the resolution are less than 1/3 of the voting value of the total number of votes that can be cast on the resolution by people present at the meeting.

Currently, section 46A(1)(b) of the Act provides that an owners corporation must not, during the ‘developer control period’ change the articles of the corporation.

Section 46A(2) provides that a developer or an owners corporation may apply to ACAT for the authority to enter a contract during the developer control period.

Section 31A(2)(a) of the Act provides that a contract for the sale of a unit in a units plan must include the proposed articles of the owners corporation of the units plan.

The current provisions of the Act mean that a developer that proposes to have ‘tailored’ articles for the relevant owners corporation to ensure standards, amenity and quality are maintained and to ensure there is a more detailed regime for unit owners and discloses these in the contract for the sale of a unit (as required to do) needs to wait until the ‘developer’ control period has expired until the ‘tailored’ articles can be adopted. The default articles may not be sufficient to
deal with the different permitted uses for the units, ie a mixture of residential and commercial units, or where the articles are intended to preserve the quality, amenity and intent of the development or to cover use of common property by unit owners.

Moreover, given that a special resolution is required to adopt the ‘tailored’ articles and that (by definition) at the end of the developer control period - the developer owns less than 2/3 of the vote at an owners corporation, there may be a situation where the disclosed ‘tailored’ articles are not able to be adopted at all, notwithstanding they were disclosed in the contracts for sale and that some buyers may have ‘bought in’ on the basis of them.

**Recommendation:** The Act should be amended to enable the articles that are disclosed in the contract for sale to be adopted at the initial annual general meeting of the owners corporation or that from registration of the units plan the articles are those disclosed in the contract for sale.

Yours sincerely

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