13 June 2008

Leasing Team
Development Services Branch
ACT Planning and Land Authority
16 Challis Street
Dickson ACT 2602

Dear Team Members

Unit Titles Amendment Bill 2008 (Bill)
Exposure draft submission

Thank you for affording us the opportunity to comment on the Bill.

Our concerns

According to the consultation arrangements a key point of the Bill is to address a range of consumer protection issues.

The Property Council is concerned that the Bill as currently drafted will impede and work against the Government’s stated policy of improving housing affordability. The Bill contains a number of proposed onerous provisions that are likely to actually retard development, reduce supply and in circumstances where a development does proceed, make those developments more expensive.

The Bill, as currently drafted, seeks to resolve unit title consumer protection issues at the unreasonable expense of the unit plan developers or the unit seller.

The critical issues we see with the Bill are:

1. the developer disclosure requirements;
2. the restriction on the Owners Corporation during the developer control period; and
3. the implied warranties on a contract for the sale of a unit.
Developer Disclosure Requirements

Section 31A of the Bill 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 Bill 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(2)(f) 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 will be for developers to make very broad estimates that will be 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 Bill, 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. Under the Bill, such an election would not be 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, which require the development to be staged or for amendments to be made to a staged development. This considerably increases a developer’s commercial risk in an environment that is subject to changes beyond their control.

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

**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(3) - cancellation of contract**

Under section 31A(3), 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 provision will be 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 would be unable to warrant that requirement to their lender. This will make it difficult for a developer to secure finance 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. We also assume that by the term 'cancel' they mean to afford the ability of the buyer to rescind the contract.
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(3) should either be removed from the Bill and the existing provisions of the Civil Law (Sale of Residential Property) Act 2003 (*Sale of Property Act*) should be relied on or the remedy for the breach of warranty that is to be give by virtue of the proposed section 31A(2)(f) should be limited to damages.

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

Section 46A of the Bill 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 section 52 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.

Such an arrangement will result in the owners corporation being unable to effectively and efficiently manage the units plan and could impact 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 may take a significant amount of time. This could 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 may lead to greater cost to the unit owners through larger owners corporation levies as a result of having to make applications to the ACAT. This may also impact 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 56A(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 Bill 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 sections 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 Sale of Property Act requires that a contract for the sale of a unit must include, currently, a section 75 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.

- 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 rescind the contract for sale in the event that an implied warranty is found to be breached is unreasonable, unnecessary and inequitable.

This provision will be 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 would be unable to warrant that requirement to their lender. As detailed earlier, this would make it difficult for a developer to secure finance and may 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 Bill 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.

Yours sincerely

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