



Local Government Association Tasmania

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The Honourable Nick McKim, MHA
Minister for Consumer Affairs
Department of Justice
GPO Box 1244
Hobart 7001

Dear Minister

Residential Property Transactions Bill 2012

Thank you for the opportunity to provide comment on the draft Residential Property Transactions Bill 2012. The Local Government Association of Tasmania (LGAT) represents all Tasmanian Councils, as the voice of Local Government to other governments, interested stakeholders and the wider community.

While we are pleased to provide comment on this issue, it is regretful that LGAT was not formally advised of the draft legislation, as is required under the *Second State-wide Partnership Agreement on Communication and Consultation between the State Government and the Local Government Association of Tasmania, 2008* (The Partnership Agreement).

The Partnership Agreement clearly states:

“The State Government will consult with LGAT on legislative proposals that would have an’ impact on or implications for local government”.

Further, Appendix 1B of the Partnership Agreement states:

“There must be enough time and information for a considered response to be formulated, taking into account council and other meeting schedules. Specifically, wherever possible:

- where there has been prior consultation, eg on draft legislation or through a discussion paper, five weeks should be given for a response.
- where there has been no prior consultation, 10 weeks should be given for a response”.

Despite the draft legislation having a clear impact on Local Government, LGAT was not informed about the consultation process by the State Government. This has impacted on the time available for LGAT to consult members, seek advice and develop a submission.

Please find below comments in regards to draft Residential Property Transactions Bill 2012.

Comments:

1. Whilst the LGAT and its members are generally accepting of the policy reasons for requiring better vendor disclosure in residential conveyancing transactions, it does not consider that certain parts of the Bill will deliver full protection for potential purchasers of residential properties.

In addition, the Bill does not take into account the extra impact that some of its provisions will have on local government operations or the fact that the proposed legislation brings the council very much into the conveyancing process and contractual relations between a vendor and purchaser.

It is the position of the LGAT and its members that conveyancing is primarily a contractual relationship matter between a vendor and a purchaser.

Recommendation

The Act needs to recognise that the sale of a residential property is a matter of contract law between a vendor and purchaser.

2. These comments relate primarily to the involvement or interaction of councils in the conveyancing process which will be made mandatory by certain parts of the proposed legislation (section 7 primarily) and voluntary under other parts of the legislation (section 15 primarily). LGAT is primarily concerned that the introduction of councils into the conveyancing process has not been properly thought through and that there are implications for the way in which information may be relied upon by purchasers and vendors that may allow them to rely too much on the weight of information provided by a council.

Recommendation

While Councils would strongly prefer that s337 certificates are not mandated as disclosure documents, they acknowledge that there is a strong argument for information provided by these certificates to be made available to purchasers of residential property. If s337 certificates must be provided as disclosure documents, the potential limitations of those certificates need to be made clearer to potential purchasers, either through the legislation itself or through contractual warnings (for example under section 8).

3. The particular disclosures required by section 7 of the Bill are more substantial than the proposed disclosures under Part 10 of the Property Agents and Land Transactions Act 2005 ("Act"), which has never commenced. This Act did not require production of a s337 certificate or a building certificate by council as part of the disclosure process by a vendor in respect of a residential conveyancing transaction. As such, the transaction remained one of normal contract law under which a vendor makes disclosure to a purchaser within the context of a conveyancing transaction and those matters are dealt with within the context of the legislation and the contract between the parties. This is not the case in the current legislation.

Recommendation

The Act should promote the natural role of contract law in conveyancing transactions. The Act will place an over-reliance on Councils (as well as water and sewerage corporations) in respect of the information they provide. A general limitation or protection to Councils (such as that in section 12(1)(c)) should apply to information provided by Councils.

4. A section 337 certificate is a mandatory disclosure document under section 7 in respect of a contract for the sale of residential property registered under the Land Titles Act and a contract for sale of residential property that is General Law land. LGAT and its council members are primarily concerned that a certificate issued under section 337 of the Local Government Act 1993 will be relied upon by a purchaser, even though that document may be up to 6 months old. The fact that a certificate may be up to 6 months does not allow for the fact that council may have issued notices within its powers after the date of issue of the certificate, or the vendor may have taken other actions in respect of the property that may be a breach of certain provisions and of which the council is not aware.

Recommendation

An appropriate mechanism or warning should be incorporated through the legislation advising potential purchasers that:

- (a) *Council records may be incomplete or not available;*
 - (b) *information supplied in the certificate is based only on information within the Council's control; and*
 - (c) *circumstances may change between the date of the certificate and the completion of the sale of the property;*
 - (d) *Council is under no obligation to provide continuous disclosure in relation to any certificate it issues under s337 of the Local Government Act;*
 - (e) *Council is no responsible for any documentation it provides in a s337 certificate where that documentation or information is provided to Council by a third party.*
5. The fact that each vendor will have to obtain a section 337 certificate will increase the work load of councils and its officers within the areas of planning, building, health and plumbing. The issue of these certificates already takes anywhere between 14 to 28 days depending on the council and its internal processes. The fact that every vendor must disclose a certificate, means that there will be many certificates sought and issued than currently occurs. At present, the vendors will rarely obtain a section 337 certificate between placing a property on the market. These certificates are normally only obtained by purchasers after a contract for sale has been entered into. In addition, the fact that certificates cannot be any more than 6 months old means that new certificates will need to be obtained if a property remains on the market for more than 6 months.

Further, due to the fact that circumstances may have changed before the issue of the original 337 certificate included in the disclosure documents under the Act and the date of the contract, it is more than likely that most solicitors or conveyancers will be seeking a further 337 certificate on behalf of purchasers of properties in order to ensure that there have been no changes in respect of matters set out in the section 337 certificate since the date of the issue of the one included in the disclosure document. This will clearly have an impact on council's resourcing in this area. The LGAT and its members are particularly concerned that the government has not consulted with the LGAT and its members regarding the operational impacts of this particular provision.

Recommendation

LGAT recommends that a warning be included in the Act or contractual documentation advising that circumstances may change between the date of a certificate and that Councils are under no obligation to provide updated information unless an application is made for a further certificate.

6. Records held by councils are known to be, in a number of respects, deficient. Council records have been accumulated over a long period of time. Different storage methods have applied to records within different municipalities. Some records of some councils have been lost over time, whether by accidental destruction or otherwise. As a result, not all council records are complete in respect of an individual property. In addition, plans regarding council's infrastructure that may be located on properties is also not complete in all areas. As a result, drainage and other plans than may be provided by councils in certain areas may be inaccurate or incomplete as the drains were never properly survey mapped or recorded when they were installed. As a result of these matters, councils will no doubt seek to protect their position by making it clear where they are unable to provide answers to certain questions within their records.

There is a possible perception amongst purchasers of property that the failure of a 337 certificate to outline any potential issues problems or outstanding certificates or documentation in respect of a property means that there are no issues in respect of the property or any dwellings on it. That is far from the case. The information provided in the certificate is only as good as the information council holds. For example, if illegal works have been undertaken at a property and council is not aware of them, then council cannot be held to account for these matters. At present, whilst the Act would not make councils responsible for these matters, the Act promotes a potential reliance on the disclosure information, without acknowledging the fact that the information supplied may not be complete, accurate or up-to-date on the basis that the council may not have all relevant information within its control or possession.

In our view, these are matters that go back to the nature of the contractual relationship between a vendor and purchaser and are not matters that relate to locate government. If local government has information within its possession and it fails to disclose that information, then that is a separate issue, which councils are not seeking to be immuned from any liability in respect of.

Recommendation

Purchasers must be made aware that information provided in a s337 certificate will not disclose matters that are not known to the Council concerning the relevant property and that, in certain circumstances, answers to questions in the certificate may be incomplete due to a lack of information in Council's records.

7. Councils do not enjoy any general immunity in respect of any information provided in a 337 certificate, which is fair and reasonable. However, section 337(6) of the Local Government Act 1993 provides that "a council does not incur any liability in respect of any information provided in good faith from sources external to the council."

Under the current building and plumbing regulations, substantial information in relation to the building and plumbing processes is provided by persons and sources external to the council. When a council issues a certificate of completion in respect of building works on a property, it does so on the basis of certification provided by a building surveyor in accordance with the requirements of the Building Act, not on the basis of any personal inspection undertaken by council or an officer of the council. Accordingly, the inclusion of a 337 certificate and the potential reliance by purchasers on that information, may result in councils being involved in an increased amount of litigation regarding building works that may not have been completed properly or other related matters. Whilst in some circumstances there may be some potential liability for councils in this area, the potential over reliance on the information that 337 certificate will distraught the nature of the relations between a vendor and purchaser. The nature of the building issues may also relate to building works that are quite old and dating back to the 1990s or even earlier. There have been substantial changes in the building codes since that time and as a result, the manner in which councils would deal with these matters is different now from what it would be today.

Recommendation

If full disclosure is to be made to purchasers, then they should be made aware of Councils' immunity under section 337(6) of the Local Government Act 1993.

8. The Bill includes an obligation for a vendor of property that is being auctioned to provide either:
 - (a) a copy of a building certificate in respect of the residential property, being a certificate dated not more than 6 months before the date of the contract; or
 - (b) if a building certificate is not available in respect of the residential property because the general manager for the council for the municipal area where the residential property is located has refused to issue a building certificate, a copy of the notice under regulation 49(6) of the Building Regulations 2004 in respect of that refusal.

Building certificates are rarely sought by either vendors or purchasers in a normal conveyancing transaction. The number of building certificates issued by councils is generally very small. LGAT and its members are concerned that the government has not adequately consulted with councils regarding the introduction of this proposed new measure, as it will have an impact on councils' resources and its abilities to provide these certificates in a reasonable time frame.

It is clear that the requirement to include a building certificate or details of its refusal within disclosure documents for a public auction will result in a significant increase in the number of building certificates being requested of councils.

The inclusion of the right of a purchaser under an ordinary contract for sale of a residential property to seek a building certificate will also increase the number of requests councils receive for this certificate.

Recommendation

The requirement of a vendor to obtain a building certificate for a public auction will potentially lengthen the auction process as an auction cannot be scheduled until the certificate (or reasons for its refusal) are obtained. It is the view of LGAT and its members that the requirement of a building certificate is a matter between the parties and the provision of a certificate does not necessarily provide the protection to a potential purchaser that the Act appears to give it. As a result LGAT recommends that this requirement be removed from the Act.

9. Councils believe that the Act will create a heightened awareness of risk involved in residential conveyancing transactions and, as a result, councils believe that many solicitors and conveyancers will recommend to ordinary conveyancing contract clients to obtain a building certificate as part of their own due diligence enquiries for acting on behalf of a purchaser.

As a result of all of these matters, there is likely to be a considerable increase in the number of requests for councils to provide building certificates. This will increase the workload of councils in an area which is not currently resourced for that level of activity.

The building certificate is another document, similar to a 337 certificate, which could, in a sense, be over-relied upon by potential purchasers of residential properties.

The granting of a building certificate under Regulation 49 of the Building Regulations 2004, only certifies that the council or its general manager is not entitled to do any of the acts referred in sub-regulation (2) or that he or she is entitled to any such act but does not intend to do so and provides reasons for not doing so. The certificate does not serve as a certification that every aspect of a property is either approved properly by council or complies with all relevant building codes.

The imposition of an obligation on a vendor to obtain this certificate in the context of a public auction, and the likelihood that most solicitors and conveyancers will be recommending to purchasers to obtain such a certificate, will significantly increase the workload of councils in this area. This will in turn put increased pressure on time frames, which are not adequately dealt with under the proposed legislation.

Recommendation

The building certificate has a limited operation in terms of consumer protection. The potential for over-reliance on this certificate, as well as the increased costs to parties and increased timeframes for Councils complying with these requests, will have a disproportionate affect on the conveyancing process. LGAT considers the question of a party applying for a building certificate is a matter of negotiation between the parties, not a matter that should be mandated (or effectively mandated) under legislation.

10. Whilst a public auction can be held off until all various certificates have been obtained so they can be included in the contract documentation, in the context of section 15, there may be an impact in respect of the time frames involved, not only in respect of the time frame for completion of the contract but the time frame in respect of which the council must provide the certificate. In this respect we note the vendor's rights under section 15(10).

We also note that the Act appears to be deficient in relation to the purchaser's rights or obligations once a building certificate or its refusal is provided by the general manager of the council.

Recommendation

LGAT and its members recommend to the Minister that the right to apply for a building certificate is a matter that is properly dealt with in the context of the contractual documentation between the parties and not in the context of a legislated provision. As a result, we strongly recommend that section 15 be deleted.

We are happy to discuss any of these matters further with you and any representatives from the department.

Yours sincerely



Allan Garcia
CHIEF EXECUTIVE OFFICER