BODY CORPORATE AND COMMUNITY MANAGEMENT AMENDMENT BILL 2009

# BILL BOOK

BODY CORPORATE AND COMMUNITY MANAGEMENT AMENDMENT BILL 2009

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## BODY CORPORATE AND COMMUNITY MANAGEMENT AMENDMENT BILL

### First Reading

**Hon. PJ LAWLOR** (Southport—ALP) (Minister for Tourism and Fair Trading) (2.30 pm): I present a bill for an act to amend the Body Corporate and Community Management Act 1997. I present the explanatory notes, and I move—

That the bill be now read a first time.

Question put—That the bill be now read a first time.

Motion agreed to.
Bill read a first time.

*Tabled paper:* Body Corporate and Community Management Amendment Bill.
*Tabled paper:* Body Corporate and Community Management Amendment Bill, explanatory notes.

### Second Reading

**Hon. PJ LAWLOR** (Southport—ALP) (Minister for Tourism and Fair Trading) (2.30 pm): I move— That the bill be now read a second time.

This bill makes an amendment to the Body Corporate and Community Management Act 1997 as a result of recent decisions of the Supreme Court and the Court of Appeal. The purpose of the bill is to clarify the intention of section 212 of the act.

On 12 November 2008 the Supreme Court gave judgement in Bossichix Pty Ltd v Martinek Holdings Pty Ltd, finding that the applicant had validly cancelled, pursuant to section 212 of the Body Corporate and Community Management Act, the contract between the applicant and the respondent.

The respondent, Martinek Holdings Pty Ltd, appealed the Supreme Court decision and on 5 June 2009 the Court of Appeal ordered the appeal dismissed. Section 212 provides that a buyer can cancel a contract for the purchase of a proposed lot in a community titles scheme if the contract does not provide that settlement must not take place earlier than 14 days after the seller gives notice to the buyer that the scheme has been established or changed. The Supreme Court and Court of Appeal decisions found that the contract between Bossichix Pty Ltd and Martinek Holdings Pty Ltd was deficient because a key clause omits any reference to the community management statement, the recording of which is an essential element of establishing a new community titles scheme. A community titles scheme is established by the registration under the Land Title Act 1994 of a plan of subdivision for identifying the scheme land for the scheme and, secondly, the recording by the Registrar of Titles of the first community management statement for the scheme.

Typically this occurs simultaneously, although a scheme is not established until the community management statement is recorded. It is not possible to record a first community management statement in the absence of a survey plan that creates or identifies at least two lots and common property.

However, the Supreme Court and the Court of Appeal stated that the registration of a plan and the establishment of a community titles scheme are not the same thing and that the contract did not adequately convey to the buyer that more than registering a survey plan is necessary to establish the scheme. The respective decisions of the Supreme Court and the Court of Appeal revealed that the wording of section 212 of the Body Corporate and Community Management Act does not clarify the policy intent which seeks to balance the interests of consumers and developers/vendors. Consequently, these decisions have highlighted the potential for hundreds, if not thousands, of off-the-plan contracts to be at risk.

This is because the provisions of the contract subject to legal action have potentially been replicated in contracts industry-wide.

It is estimated that up to 14,000 contracts on foot will be affected by the court decisions and, as off-the-plan contracts of sale provide a basis for property developers to obtain financing for many residential developments, the recent decisions could have serious implications for the property development sector and the wider Queensland economy if not remedied. Therefore, the Body Corporate and Community Management Act 1997 will be amended to provide clarification to the requirements of a contract subject to section 212 of the act.

Contracts entered into before or after 5 June 2009, excluding contracts already settled, will be deemed to contain the term ‘providing that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed’, even if the contract does not do so. This provision will ensure contracts cannot be cancelled based on a mere omission of a reference to the establishment of the community titles scheme on the condition that the building plan and community management statement have been lodged with the Register of Titles and settlement does not take place earlier than 14 days after the seller notifies the buyer that this process has been completed.

This amendment will clarify the intent of the legislation and ensure that there is no diminution of consumer protection. In effect, it will return both buyer and seller to the position they believed they were in—and both accepted—at the time of the signing of the contract. I commend the bill to the House. Debate, on motion of Mr Stevens, adjourned.

# Body Corporate and Community Management Amendment Bill 2009

## Explanatory Notes

### Short Title

The short title of the Bill is the Body Corporate and Community Management Amendment Bill 2009

### Objective of the Bill

The objective of the Bill is to amend the *Body Corporate and Community Management Act 1997* to clarify the intent of the legislation and to ensure that there is no diminution of consumer protection while providing for certainty of contract.

### Reasons for the Bill

Recent decisions of the Supreme Court and the Court of Appeal have highlighted the potential for many pending off-the-plan contracts to be at risk of cancellation due to a strict interpretation of section 212 of the *Body Corporate and Community Management Act 1997*.

Section 212(3) of the Act provides that a buyer can cancel a contract for the purchase of a proposed lot in a community titles scheme if the contract does not provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed. The Supreme Court and Court of Appeal decisions found that a particular contract was deficient because a key clause omits any reference to the Community Management Statement, the recording of which is an essential element of establishing a new community titles scheme.

A community titles scheme is established by the registration under the *Land Title Act 1994* of a plan of subdivision for identifying the scheme land for the scheme and secondly, the recording by the Registrar of Titles of the first community management statement for the scheme. Typically, this occurs simultaneously although a scheme is not established until the community management statement is recorded. It is not possible to record a first community management statement in the absence of a survey plan that creates or identifies at least two lots and common property.

However, the Supreme Court and the Court of Appeal stated that the registration of a plan and the establishment of a community titles scheme are not the same thing, and that the contract does not adequately convey to the buyer that more than registering a survey plan is necessary to establish the scheme.

As off-the-plan contracts of sale provide a basis for property developers to obtain financing for many residential developments, the recent decisions could have serious implications for the property development sector and the wider Queensland economy.

The respective decisions of the Supreme Court and the Court of Appeal revealed that the framing of section 212 of the *Body Corporate and Community Management Act 1997* did not adequately clarify the policy intent which sought to balance the interests of consumers and developers/vendors. The amendment will rebalance the respective interests of consumers with the need for certainty of contract as originally intended.

**Achievement of the Objective**

The *Body Corporate and Community Management Act 1997* will be amended to provide clarification to the requirements of a contract. Contracts entered into before or after 5 June 2009, but excluding contracts already settled or already cancelled before 5 June 2009 pursuant to the previous section 212(1), will be deemed to contain the term, 'providing that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed', even if the contract does not do so. The amendment also excludes legal proceedings decided before the commencement of the amendments.

This provision will ensure contracts cannot be cancelled based on a mere omission of reference (a technical breach) to the establishment of the community titles scheme on the condition that the building plan and community management statement has been lodged with the Registrar of Titles and settlement does not take place earlier than 14 days after the seller notifies the buyer that this process has been completed.

**Estimated Cost for Government Implementation**

The Bill will not bear any financial consequences for Government.

**Consistency with Fundamental Legislative Principles**

Section 212 of the *Body Corporate and Community Management Act 1997* provides for consumer protection by setting out the pre-contract disclosure requirements for buyers of proposed lots in a community titles scheme. The amendments to the *Body Corporate and Community Management Act 1997* will have retrospective affect except as provided for contracts settled before 5 June 2009 or a contract that has, before 5 June 2009, been lawfully cancelled because the contract failed to make provision as required by the existing section 212.

Section 4(3)(g) of the *Legislative Standards Act 1992* provides that one of the fundamental legislative principles is whether legislation adversely affects rights and liberties, or imposes obligations, retrospectively. Retrospective laws are generally passed to validate past actions, correct defects in legislation or confer benefits retrospectively. This Bill restores the law to the position that was commonly accepted as applying in Queensland before the recent court decisions relating to section 212 of the Act were handed down.

There is no like complementary Commonwealth legislation impacted by these amendments.

**Consultation**

Community

As the amendments to the *Body Corporate and Community Management Act 1997* are simply clarifying the intent of the existing provisions in the legislation, it is not considered necessary in this instance to widely consult with the community.

However, there have been calls from a number of community groups, such as the Queensland Law Society and the Property Council of Australia (Queensland Division), requesting legislation be introduced to remedy the effects of the Supreme Court and Court of Appeal decisions relating to section 212 of the Act.

Government

Consultation on the draft Bill occurred with the Department of the Premier and Cabinet and the Department of Justice and Attorney-General.

**Notes on Provisions**

Clause 1 provides that the short title is the *Body Corporate and Community Management Amendment Act 2009*.

Clause 2 provides that this Act amends the *Body Corporate and Community Management Act 1997*.

Clause 3 replaces section 212. The new section 212 provides further clarification to the requirements of a contract for settlement to take place by deeming the contract to contain the term, 'providing that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed', even if it does not do so.

Clause 4 inserts a new section 362A to provide for the new section 212 to have retrospective affect to a contract whether entered into before or after 5 June 2009. This provision provides for the exclusion of contracts already settled, contracts already cancelled before 5 June 2009 pursuant to the previous section 212(1) and legal proceedings decided before the commencement of the amendments.

## ACT BEING AMENDED

## BODY CORPORATE AND COMMUNITY MANAGEMENT AMENDMENT BILL 2009

- *Body Corporate and Community Management Act 1997*

## Body Corporate and Community Management Amendment Bill 2009

## Amendment of Body Corporate and Community Management Act 1997

## Clause by Clause

| Clause | Amendment | Old Provision | Explanation | Question |
|---|---|---|---|---|
| **Clause 1** | **Short title**<br>This Act may be cited as the *Body Corporate and Community Management Amendment Act 2009* | | | **1** |
| **Clause 2** | **Act amended**<br>This Act amends the *Body Corporate And Community Management Act 1997*. | | Clause 2 provides that this Act amends the *Body Corporate and Community Management Act 1997*. | **2** |
| **Clause 3** | **Replacement of s 212 (Cancellation for not complying with basic requirements)**<br>Section 212—<br>*omit, insert—*<br>**'212 Provision about settlement taken to be included in contract**<br>'(1) This section applies to a contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is | **212 Cancellation for not complying with basic requirements**<br>(1) A contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed. | Clause 3 replaces section 212.<br><br>The new section 212 provides further clarification to the requirements of a contract for settlement to take place by deeming the contract to contain the term, 'providing that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed', even if it does not do so. | **3 and 7** |

| Clause | Amendment | Old Provision | Explanation | Question |
|---|---|---|---|---|
| | established or changed.<br>‘(2) The contract is taken to include a term (the ***deemed term***) providing that, despite any other term of the contract, settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.<br>‘(3) The deemed term has priority over any other term of the contract relating to settlement.<br>‘(4) Without limiting subsection (3), any notice the seller gives to the buyer is void to the extent it is inconsistent with the deemed term.<br><br>**‘212A Buyer may cancel if there is no proposed community management statement**<br>‘(1) This section applies to a contract entered into by a person with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed.<br>‘(2) When the contract is entered into there must be a proposed community management statement for the scheme as established or | (2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.<br>(3) The buyer may cancel the contract if—<br>(a) there has been a contravention of subsection (1) or (2); and<br>(b) the contract has not already been settled. | | |

| Clause | Amendment | Old Provision | Explanation | Question |
|---|---|---|---|---|
| | changed.<br>'(3) The buyer may cancel the contract if—<br>(a) there has been a contravention of subsection (2); and<br>(b) the contract has not already been settled.'. | | | |
| **Clause 4** | **Insertion of new ch 8, pt 6A**<br>Chapter 8—<br>*insert—*<br>**'Part 6A Transitional provision for Sustainable Planning Act 2009, chapter 11, part 1**<br>**'362A Section 212 to have retrospective affect**<br>'(1) Section 212, as inserted by the *Sustainable Planning Act 2009*, (the ***inserted section***) applies, to the exclusion of existing section 212(1), to a contract mentioned in the inserted section whether entered into before or after the commencement.<br>'(2) Subject to subsection (3), subsection (1) applies for all purposes (including a legal proceeding started but not decided before the commencement).<br>'(3) Subsection (1)—<br>(a) does not apply for the purpose of a contract settled | | Clause 4 inserts a new section 362A to provide for the new section 212 to have retrospective affect to a contract whether entered into before or after 5 June 2009.<br><br>This provision provides for the exclusion of contracts already settled, contracts already cancelled before 5 June 2009 pursuant to the previous section 212(1) and legal proceedings decided before the commencement of the amendments. | **4 and 5** |

| Clause | Amendment | Old Provision | Explanation | Question |
|---|---|---|---|---|
| | before 5 June 2009; and<br>(b) does not apply for the purpose of—<br>(i) a contract that has, before 5 June 2009, been<br>lawfully cancelled because the contract failed to<br>make provision as required by existing section<br>212(1); or<br>(ii) a legal proceeding relating to the lawfulness of the<br>cancellation; and<br>(c) does not apply for the purpose of a legal proceeding decided before the commencement.<br>'(4) In this section—<br>***commencement*** means the commencement of this section.<br>***existing section 212(1)*** means section 212(1) as in force before the commencement.<br>***legal proceeding***, in subsection (2), includes an appeal from a legal proceeding mentioned in subsection (3)(c).'. | | | |

## INDEX TO QUESTIONS AND ANSWERS

## BODY CORPORATE AND COMMUNITY MANAGEMENT AMENDMENT BILL 2009

| No. | Question | Clause |
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| **1** | What is the short title of the Bill? | **1** |
| **2** | What Act does the Bill amend? | **2** |
| **3** | Why is section 212 of the *Body Corporate and Community Management Act 1997* being amended? | **3** |
| **4** | The amendment to the *Body Corporate and Community Management Act 1997* takes affect from 5 June 2009. Why is it being applied retrospectively? | **4** |
| **5** | How will this amendment affect applications currently before the court or contracts 'on foot'? | **4** |
| **6** | Section 212 of the *Body Corporate and Community Management Act 1997* is essentially a consumer protection provision. Will consumer protection be weakened or strengthened by the amendment to section 212 of the Act? | |
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| No. | Question | Clause |
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| | lawyers affected by the Bossichix decision? | |
| **13** | Why should the Government fix what is fundamentally an industry problem error? | |
| **14** | What happens to buyers who have proceeded to enter into a new contract with the belief they have settled their previous contract pursuant to the existing section 212? | |

## QUESTIONS AND ANSWERS

### Question 1

***What is the short title of the Bill?***

### Response

The short title of the Bill is the Body Corporate and Community Management Amendment Bill 2009.

## QUESTIONS AND ANSWERS

### Question 2

***What Act does the Bill amend?***

### Response

This Bill amends the *Body Corporate and Community Management Act 1997.*

## QUESTIONS AND ANSWERS

### Question 3

***Why is section 212 of the Body Corporate and Community Management Act 1997 being amended?***

### Response

The Supreme Court decision of 12 November 2008 and the subsequent Court of Appeal decision of 5 June 2009 in Bossichix Pty Ltd v Martinek Pty Ltd revealed that the framing of section 212 of the Body Corporate and Community Management Act does not adequately clarify the policy intent which seeks to balance the interests of consumers and developers/vendors.

The respective court decisions saw a strict interpretation of existing section 212. They found that the applicant, a buyer of a unit in a community titles scheme, had validly terminated the contract for the purchase of the unit because a key clause of the contract omitted a reference to the establishment of the community titles scheme, which is a requirement of existing section 212.

Consequently, these decisions have highlighted the potential for hundreds, if not thousands, of off-the-plan contracts to be at risk. This is because the provisions of the contract may have been replicated in contracts industry-wide.

It is estimated that up to 14,000 contracts on foot will be affected by the court decisions, and as off-the-plan contracts of sale provide a basis for property developers to obtain financing for many residential developments, the recent decisions could have serious implications for the property development sector and the wider Queensland economy if not remedied.

Therefore, section 212 of the Body Corporate and Community Management Act is being amended to provide clarification to the requirements of a contract subject to this section of the Act.

This provision will ensure contracts cannot be cancelled based on a mere omission of a reference to the establishment of the community titles scheme on the condition that the building plan and community management statement have been lodged with the Registrar of Titles and that settlement does not take place earlier than 14 days

after the seller notifies the buyer that this process has been completed.

This amendment will clarify the intent of the legislation and ensure that there is no diminution of consumer protection.

## QUESTIONS AND ANSWERS

### Question 4

***The amendment to the Body Corporate and Community Management Act 1997 takes affect from 5 June 2009. Why is it being applied retrospectively?***

### Response

The amendment to section 212 of the Body Corporate and Community Management Act will have retrospective affect and will include all contracts on foot on 5 June 2009. However, the provision will exclude contracts already settled, contracts already cancelled before 5 June 2009 pursuant to the previous section 212(1) and legal proceedings decided before the commencement of the amendments.

As the recent Supreme Court and Court of Appeal decisions relating to section 212 of the Act could affect an estimated 14,000 contracts on foot, that is, up to 90 percent of such contracts, the decisions could have serious implications for the property development sector and the wider Queensland economy.

Therefore it is appropriate and, unfortunately, necessary to apply the amendment retrospectively to ensure certainty of contract is provided while preserving existing consumer protection under the legislation.

## QUESTIONS AND ANSWERS

### Question 5

***How will this amendment affect applications currently before the court or contracts 'on foot'?***

### Response

The amendment to the Body Corporate and Community Management Act provides for the new section 212 to have retrospective affect to a contract whether entered into before of after 5 June 2009. Contracts entered into before or after 5 June 2009 will be deemed to contain the term 'providing that settlement must not take place earlier than 14 days after the seller gives the advice to the buyer that the scheme has been established or changed', even if it does not do so.

Whilst the provision will apply to legal proceedings currently before the court, the provision provides for the exclusion of legal proceedings decided before the commencement of the amendments, including appeals made from a legal proceeding decided before the commencement of the amendment.

## QUESTIONS AND ANSWERS

### Question 6

***Section 212 of the Body Corporate and Community Management Act 1997 is essentially a consumer protection provision. Will consumer protection be weakened or strengthened by the amendment to section 212 of the Act?***

### Response

A secondary objective of the Body Corporate and Community Management Act is to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes. Section 212 of the Act provides for consumer protection by setting out the pre-contract disclosure requirements for buyers of proposed lots in a community titles scheme.

The amendment to section 212 of the Act restores the law to the position that was commonly accepted as applying in Queensland before the recent court decisions relating to section 212 were handed down and ensures certainty of contract while preserving consumer protection.

The existing protections of the legislation will remain, and the amendment of the Body Corporate and Community Management Act will not lead to any diminution of consumer protections.

## QUESTIONS AND ANSWERS

### Question 7

How will buyers know that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed if it is not written in the contract?

### Response

As consistently advised by the Government and as advised on the mandatory warning statement attached to a property transaction contract, PAMD Form 30c, buyers are strongly encouraged to obtain independent legal advice prior to entering the contract or within the 5-day cooling-off period.

Property lawyers have been made aware of the new provisions taking affect from 5 June 2009 by means of consultation and media statements. Therefore, property lawyers should be able to advise buyers accordingly.

Buyers who do not take the advice of Government to obtain competent legal advice leave themselves potentially exposed to the risk of any number of contractual flaws. Persons who wish to do their own conveyancing should be aware of relevant Acts pertaining to their contract. In these circumstances, it is a case of 'buy at your own risk'.

Buyers who do not seek legal advice should note that a contract which displays oppressive or unconscionable conduct may be remedied through provisions in the *Trade Practices Act 1974*.

## QUESTIONS AND ANSWERS

### Question 8

***Will Chapter 11 of the Property Agents and Motor Dealers Act 2000 be amended to bring it in line with the amendment to section 212 of the Body Corporate and Community Management Act?***

### Response

The existing section 212 and the proposed amendments to section 212 have no relevance or implications for the *Property Agents and Motor Dealers Act 2000*.

## QUESTIONS AND ANSWERS

### Question 9

***The amendment to the Body Corporate and Community Management Act 1997 was pushed through very quickly. Why?***

### Response

The amendment to section 212 of the Body Corporate and Community Management Act needed to be made urgently to clarify the policy intent and ensure certainty of contract while preserving consumer protection, to prevent a possible serious situation for the Queensland economy.

Recent court decisions revealed that the framing of section 212 of the Body Corporate and Community Management Act does not adequately clarify the policy intent which seeks to balance the interests of consumers and developers/vendors.

The Supreme Court decision of 12 November 2008 and subsequent Court of Appeal decision of 5 June 2009 in Bossichix Pty Ltd v Martinek Pty Ltd saw a strict interpretation of existing section 212. The court found that the applicant, a buyer of a unit in a community titles scheme, had validly terminated the contract for the purchase of the unit because a key clause of the contract omitted a reference to the establishment of the community titles scheme, which is a requirement of existing section 212.

Consequently, these decisions have highlighted the potential for hundreds, if not thousands, of off-the-plan contracts to be at risk. This is because the provisions of the contract subject to legal action have potentially been replicated in contracts industry-wide.

It is estimated that up to 14,000 contracts on foot, that is, up to 90 percent of such contracts, will be affected by the court decisions, and as off-the-plan contracts of sale provide a basis for property developers to obtain financing for many residential developments, the recent decisions could have serious implications for the property development sector and therefore the wider Queensland economy if not remedied. There could also be implications for hundreds of jobs across the service and construction sector. We can not afford this uncertainty in the current economic climate.

## Question 10

***What consultation has been undertaken on the amendment to the Body Corporate and Community Management Act 1997?***

## Response

The consultation undertaken on the amendment to section 212 of the Body Corporate and Community Management Act occurred with the Department of the Premier and Cabinet and the Department of Justice and Attorney-General.

As the amendment to the Act is simply clarifying the intent of the existing provision in the legislation, it was not considered necessary in this instance to widely consult with the community.

However, there have been calls from a number of community groups, such as the Queensland Law Society and the Property Council of Australia (Queensland Division), requesting legislation be introduced to remedy the effects of the Supreme Court and Court of Appeal decisions relating to section 212 of the Act. There was also discussion with these peak bodies.

May be an inadvisable observation

The Queensland Consumer Association did not return the action officer's calls.

## QUESTIONS AND ANSWERS

### Question 11

***Are the decisions made in the Bossichix P/L v Martinek Holdings P/L case based on a mere technical breach?***

### Response

The respective decisions of the Supreme Court and the Court of Appeal in the Bossichix Pty Ltd v Martinek Holdings Pty Ltd case were based on a breach of existing section 212 of the Body Corporate and Community Management Act. The respective decisions of the Supreme Court and the Court of Appeal found the contract to be deficient in that the contract did not provide the necessary reference to the establishment of a community titles scheme as required by section 212 of the Act.

The amendment to section 212 of the Body Corporate and Community Management Act will clarify the intent of the legislation and ensure that there is no diminution of consumer protection.

Some parties may suggest that the Court's findings were more than a technical breach. Unfortunately, whether it was a technical breach or something more, the Government cannot afford to sit on its hands. Policy is always about balancing competing interests and, while consumer protection is vital, so is certainty of contract. The Court's decision puts up to 14,000 pending off-the-plan contracts at risk of cancellation, this has serious implications for the property development sector and the wider Queensland economy if not remedied immediately. We can not afford this uncertainty in the current economic climate and the Government has made the hard decision, which we were elected to do. We have acted in the larger interests of the State's economic interests.

## Question 12

***Is the amendment to section 212 of the Body Corporate and Community Management Act 1997 in response to requests from developers and lawyers affected by the Bossichix decision?***

## Response

The Supreme Court decision of 12 November 2008 and subsequent Court of Appeal decision of 5 June 2009 in Bossichix Pty Ltd v Martinek Pty Ltd revealed that the framing of section 212 of the Body Corporate and Community Management Act does not adequately clarify the policy intent which seeks to balance the interests of consumers and developers/vendors.

Furthermore, it is estimated that up to 14,000 contracts on foot, that is up to 90 per cent of such contracts, will be affected by the court decisions and as off-the-plan contracts of sale provide a basis for property developers to obtain financing for many residential developments, the recent decisions could have serious implications for the property development sector and therefore the wider Queensland economy. There could also be implications for hundreds, if not thousands, of jobs across the service and construction sector. We can't afford this uncertainty in the current economic climate.

The amendment to section 212 of the Body Corporate and Community Management Act will provide clarification of the requirements of a contract subject to section 212 of the Act, to rebalance the respective interests of consumers with the need for certainty of contract, as originally intended.

## QUESTIONS AND ANSWERS

### Question 13

***Why should the Government fix what is fundamentally an industry problem error?***

### Response

The intention of the amendment to section 212 of the Body Corporate and Community Management Act is to restore the law to the position that was commonly accepted as applying in Queensland before the recent Supreme Court and Court of Appeal decisions relating to section 212 were handed down. The amendment will ensure certainty of contract while preserving existing consumer protection, not to fix an industry problem error.

It is pertinent the Government make the amendment to section 212 of the Body Corporate and Community Management Act to remedy what could potentially be a serious situation for the Queensland economy due to a strict interpretation of existing section 212 of the Act in the Supreme Court decision of 12 November 2008 and subsequent Court of Appeal decision of 5 June 2009 in Bossichix Pty Ltd v Martinek Pty Ltd.

The respective court decisions revealed that the wording of existing section 212 of the Body Corporate and Community Management Act does not adequately clarify the policy intent which seeks to balance the interests of consumers and developers/vendors. They also highlighted the potential for many off-the-plan contracts to be at risk.

it is estimated that up to 14,000 contracts on foot, that is up to 90 per cent of such contracts, will be affected by the court decisions and as off-the-plan contracts of sale provide a basis for property developers to obtain financing for many residential developments, the recent decisions could have serious implications for the property development sector and therefore the wider Queensland economy. There could also be implications for hundreds of jobs across the service and construction sector. We can't afford this uncertainty in the current economic climate.

## QUESTIONS AND ANSWERS

### Question 14

***What happens to buyers who have proceeded to enter into a new contract with the belief they have settled their previous contract pursuant to the existing section 212?***

### Response

The likelihood of a buyer cancelling one contract dependent on the court decision of 5 June 2009 and entering a new contract within the given timeframe is low. However, if this is the case and the developer/vendor wishes to reinstate the contract as it was prior to cancellation, the buyer should seek independent legal advice urgently. The requirement to comply with section 212 should only be one element of any given contract. Contracts may be cancelled for a range of reasons. This case has had significant coverage in the legal arena and, one would hope that buyers would have sought competent legal advice and acted prudently. At the end of the day, a buyer who rushes from one contract to another is assuming imprudent risk, especially as a reasonable observer would have appreciated that a government that leads would move quickly to restore certainty of contract which is a fundamental principle underpinning economic success.

**2009**

**THE PARLIAMENT OF QUEENSLAND**

# BODY CORPORATE AND COMMUNITY MANAGEMENT BILL 2009

**SUMMING UP SPEECH**

**(Circulated by Authority of the Minister for Tourism and Fair Trading,
the Honourable Peter Lawlor, MP)**

 

**SUMMING UP SPEECH**

**BODY CORPORATE AND COMMUNITY MANAGEMENT BILL 2009**

I would like to thank all members who have participated in the debate of this bill which amends the *Body Corporate and Community Management Act 1997*, administered by the Department of Employment, Economic Development and Innovation for me in my capacity as Minister for Tourism and Fair Trading.

As a result of recent decisions of the Supreme Court and Court of Appeal, it was clear that the framing of section 212 of the Body Corporate and Community Management Act did not sufficiently clarify the policy intent underpinning the requirements for cancelling a contract on the sale of a proposed lot. The Act has therefore been amended to provide clarification as to the requirements of a contract subject to sections 212, 212A and 362A of the Act.

Contracts entered into before or after 5 June 2009, but excluding contracts already settled or cancelled pursuant to the existing section 212, are deemed to contain the term, 'providing that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed', even if the contract does not do so. Also, legal proceedings decided before the commencement of the amendments will rightly be excluded.

This provision ensures contracts cannot be cancelled based on a mere omission of a reference to the establishment of the community titles scheme on the condition that the building plan and community management statement have been lodged with the Register of Titles and settlement does not take place earlier than 14 days after the seller notifies the buyer that this process has been completed.

This amendment clarifies the intent of the legislation, ensures that there is no diminution of consumer protection and, provides for the necessary certainty of contract. In effect, it returns both buyer and seller to the position they believed they were in - and both accepted – prior to the Supreme Court and Court of Appeal decisions.

I commend the Bill to the house.

# Body Corporate and Community Management Bill 2009
# Backbench Brief

## 1. Issues

- sch 3/2(1)(a) and sch 3/2(3)

## 2. Background

- On 12 November 2008 the Supreme Court gave judgement in Bossichix Pty Ltd v Martinek Holdings Pty Ltd [2008] QSC278, finding that the applicant had validly cancelled, pursuant to section 212 of the *Body Corporate and Community Management Act 1997*, the contract between the applicant and the respondent headed 'Rivage Sales Contract' entered into on or about 22 July 2005.
- The respondent (Martinek Holdings Pty Ltd) appealed the Supreme Court decision, and on 5 June 2009 the Court of Appeal ordered the appeal dismissed.
- Section 212(3) of the *Body Corporate and Community Management Act 1997* provides that a buyer can cancel a contract for the purchase of a proposed lot in a community titles scheme if

the contract does not provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.

- The Supreme Court and Court of Appeal decisions found that the contract between Bossichix Pty Ltd and Martinek Holdings Pty Ltd was deficient because a key clause omits any reference to the Community Management Statement, the recording of which is an essential element of establishing a new community titles scheme.
- A community titles scheme is established by the registration under the *Land Title Act 1994* of a plan of subdivision for identifying the scheme land for the scheme and secondly, the recording by the Registrar of Titles of the first community management statement for the scheme. Typically, this occurs simultaneously although a scheme is not established until the community management statement is recorded. It is not possible to record a first community management statement in the absence of a survey plan that creates or identifies at least two lots and common property.
- However, the Supreme Court and the Court of Appeal stated that the registration of a plan and the establishment of a community titles scheme are not the same thing, and that the contract does not adequately convey to the buyer that more than registering a survey plan is necessary to establish the scheme.
- As off-the-plan contracts of sale provide a basis for property developers to obtain financing for many residential developments, the recent decisions could have serious implications for the property development sector and the wider Queensland economy.

**BODY CORPORATE AND COMMUNITY MANAGEMENT AMENDMENT BILL 2009**

**BACKBENCH BRIEF SPEAKING POINTS**

- The Body Corporate and Community Management Amendment Bill 2009 will amend the *Body Corporate and Community Management Act 1997* to clarify the intent of the legislation, ensure that there is no diminution of consumer protection and, provide for the necessary certainty of contract.
- Recent decisions of the Supreme Court and Court of Appeal have highlighted the potential for many pending off-the-plan contracts to be at risk of cancellation due to a strict interpretation of section 212 of the Body Corporate and Community Management Act.
- As off-the-plan contracts of sale provide a basis for property developers to obtain financing for many residential developments, these court decisions could have serious implications for the property development sector and the wider Queensland economy.
- The amendment to section 212 of the Body Corporate and Community Management Act will provide clarification of the requirements of a contract.
- The provision will ensure that contracts cannot be cancelled based on a mere omission of reference (a technical breach) to the establishment of the community titles scheme on the condition that the building plan and community management statement have been lodged with the Registrar of Titles and the

settlement does not take place earlier than 14 days after the seller notifies the buyer that this process has been completed.

- The amendment will have retrospective effect and will include all contracts on foot on 5 June 2009. It will exclude contracts already settled and contracts already cancelled before 5 June 2009 pursuant to the previous section 212(1) and legal proceedings decided before the commencement of the amendment.

Queensland Government

Department of
Employment, Economic
Development and Innovation

Mr N Laurie
Clerk of the Parliament
Parliament House
Cnr George and Alice Streets
BRISBANE QLD 4000

Dear Mr Laurie Neil

The *Body Corporate and Community Management Amendment Bill 2009* ("the Bill") is currently before Parliament awaiting passage.

The Bill corrects a defect in the *Body Corporate and Community Management Act 1997* (the Act) and restores the law to the position that was commonly accepted as applying in Queensland before the recent court decisions relating to section 212 of the Act were handed down.

Legal precedent has emerged through recent court decisions which highlight the complex and prescriptive nature of the Act, in particular section 212. The Supreme Court recently dismissed an appeal where, in the first instance, the buyer of a unit in a community titles scheme was held to have validly terminated the contract based on a technical breach of the Act.

A key issue is that the contract which was the subject of the court action was the industry standard contract and advice has been received from industry that up to 14,000 contracts may be affected as a result of the respective court decisions.

Accordingly, your assistance in obtaining urgent Royal Assent to the *Body Corporate and Community Management Amendment Bill 2009* is requested.

Yours sincerely

Peter Henneken
Acting Director General
12.6.09

# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Bossichix Pty Ltd v Martinek Holdings Pty Ltd* [2008] QSC 278 |
| PARTIES: | **BOSSICHIX PTY LTD** ACN 096 494 683 (applicant)<br>v<br>**MARTINEK HOLDINGS PTY LTD** ACN 106 533 242 (respondent) |
| FILE NO/S: | SC No 9872 of 2008 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating Application |
| DELIVERED ON: | 12 November 2008 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 13 October 2008 |
| JUDGE: | Mackenzie J |
| ORDERS: | **1. It is declared that the applicant has validly cancelled, pursuant to s 212 of the *Body Corporate and Community Management Act* 1997 (Qld), the contract between the applicant and the respondent headed "Rivage Sales Contract" entered into on or about 22 July, 2005;**<br>**2. It is declared that the respondent must repay to the applicant, pursuant to s 218 of the *Body Corporate and Community Management Act* 1997 (Qld), the sum of $99,500 paid to the respondent's agent towards the purchase of the proposed lot the subject of the Contract;**<br>**3. The respondent pay the applicant's costs of and incidental to the originating application to be assessed.** |
| CATCHWORDS: | STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – where s 212 of the *Body Corporate and Community Management Act* 1997 (Qld) provides that a contract for the sale of a lot intended to come into existence as a lot in a community titles scheme *must* provide that settlement must not take place earlier than 14 days after the seller advises the buyer that the scheme has been established – where the contract provided that the settlement date was 14 days after notification of registration of the Building Format Plan – where the contract did not contain a statement in the terms specified in s 212 – whether the contract complied with |

s 212 – whether strict or substantial compliance with s 212 is required – whether the buyer was entitled to cancel the contract under s 212(3)

*Building Act* 1975 (Qld)
*Body Corporate and Community Management Act* 1997 (Qld), s 2, s 4(f), s 24, s 212
*Land Titles Act* 1994 (Qld), s 9A, s 115L

*Boheto Pty Ltd v Sunbird Plaza Pty Ltd* [1984] 2 Qd R 9, cited
*Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129; [1983] HCA 44, considered
*Hall v Jones* (1942) 42 SR (NSW) 203, cited
*MNM Developments Pty Ltd v Gerrard* [2005] 2 Qd R 515, cited
*Petranker v Brown* [1984] 2 NSWLR 177, cited

COUNSEL: S R Lumb for the applicant
R C Schulte for the respondent

SOLICITORS: McKays Solicitors for the applicant
Griffin Solicitors for the respondent

[1] **MACKENZIE J:** This application is concerned with whether clause 14.1 of a contract for the sale of a building unit in a building called "Rivage" between the applicant purchaser and the respondent developer complies with s 212 of the *Body Corporate and Community Management Act* 1997 (Qld) ("BCCM"). According to it, settlement of the contract was subject to the registration of both the Building Format Plan by which the relevant lot would be created and the Certificate of Classification for the building, within three years of the date of the contract.

[2] The contractual clause under consideration is as follows:

> "The settlement date is the later of-
>
> (a) 14 days after the Seller notifies the Buyer that the Building Format Plan is registered; and
>
> (b) Three days after the Seller notifies the Buyer that a Certificate of Classification is issued for the building."

[3] The term "Building Format Plan" is defined by clause 2.1 of the contract as meaning the Building Format Plan that is registered to create the lot. "Community Management Statement" is defined as meaning the Community Management Statement to be registered with the building format plan. The draft Community Management Statement, according to the definition, formed part of the Disclosure Statement. The term "lot" was defined as meaning a lot within the Scheme. "Scheme" was defined as meaning the community title scheme that would be created on registration of the building format plan.

[4] "Certificate of Classification" is defined in clause 2.1 as the Certificate of Classification issued by the Authority (i.e. a body or person authorised by law to give an approval or certificate the seller must obtain to perform its obligations under the contract) that permits lawful occupation of the building for residential and/or other lawful purposes as contained in the Development Approval for Rivage. Although it is referred to in clause 14.1, this has no impact on the issues argued.

[5] It is convenient to mention that there are proceedings (SC No 113/08) in the Mackay Registry of this court, commenced by the respondent against the applicant and Bonnie Dean claiming damages and declarations which, it is common ground, this application will resolve in some respects. Ms Dean is a director of the applicant and a guarantor of its obligations under the contract. She has agreed to be bound by the determination of these proceedings insofar as they are relevant to the Mackay proceedings.

[6] By way of further background, the full deposit was eventually paid, but on 13 November 2007 the solicitors for the applicant wrote a letter to the respondent containing the following:

> "We note that the contract provides for settlement 14 days after registration of the plan but does not state 'settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed' in accordance with s 212(1) of the *Body Corporate and Community Management Act* 1997.
>
> We further note that s 212(3) states that where there has been a breach of s 212(1) the buyer may cancel the contract.
>
> Our client elects to cancel the contract pursuant to s 212 and requests that your client authorise the agent to release the deposit to our client."

[7] On 23 November 2007 the respondent rejected the contention that the contract failed to comply with s 212 and elected to affirm the contract. On 31 March 2008 the respondent's solicitors wrote to the solicitors for the applicant enclosing copies of the Certificate of Classification and a registration confirmation statement confirming that the building format plan had registered, and fixed the settlement date as 14 April 2008. The applicant did not complete the contract on that date. The respondent's solicitors wrote to confirm that fact and terminated the contract on that basis.

[8] It is said that there are three issues requiring analysis. The first is what s 212(1) BCCM requires. The second is whether the contract contravened that requirement. The third was whether the respondent was entitled to cancel the contract in reliance on s 212 (3) of the Act.

[9] Section 212 provides as follows:

> **212 Cancellation for not complying with basic requirements**
> (1) A contract entered into by a person (the seller) with another person (the buyer) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when

> the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
> (2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.
> (3) The buyer may cancel the contract if—
> (a) there has been a contravention of subsection (1) or (2); and
> (b) the contract has not already been settled.

[10] Clause 14.1 fixes one of the possible triggering events of the obligation to settle the contract as notification by the seller to the buyer that the Building Format Plan has registered. The meaning of "Building Format Plan" for the purposes of the contract is set out in paragraph [3] above. There is evidence in exhibit JM5 to Mr Martinek's affidavit that notification of the registration of the Building Format Plan and the issue of the certificate of classification under the *Building Act* 1975 (Qld) was sent to the applicant's solicitors at 4:55pm on 31 March 2008. A copy of the registration confirmation statement extracted from the records of the Registrar of Titles earlier that afternoon was also sent at the same time. It contains a reference to the Community Management Statement relating to the lot.

[11] Section 24 BCCM provides that the community titles scheme is established by:

> (a) Registration under the Land Titles Act 1994 ("LTA") of the plan of survey for identifying the scheme land; and
>
> (b) Recording by the Registrar of the first community management statement for the scheme.

[12] By s 115L LTA, a community management statement takes effect when recorded by the Registrar as a community management statement for the scheme (s 115L(3)). It is part of the recording process that the Registrar records a community management statement by recording a reference to it on the indefeasible title for each lot in the scheme and for the common property (s 115L(1)(b)). Complementary to that, s 59 BCCM says that a Community Management Statement takes effect under s 115L(3) LTA. For the purposes of LTA a "Building Format Plan" is one species of survey plans. As the name implies, it defines land by reference to structural elements of a building.

[13] Section 9A LTA authorises the Registrar of Titles to keep a Manual of Land Title Practice. Amongst other things, it may include practices developed in the Land Registry before or after the commencement of s 9A for the depositing and lodging of instruments. Extracts from the Land Title Practice Manual (Queensland) were made available to me. Of most relevance for present purposes is a paragraph headed "Recording a First CMS Lodged with the Plan establishing a Community Titles Scheme". Since a Community Management Statement is not an instrument in its own right, it enters the registration system by means of a Form 14 – General Request. The Community Management Statement "must be lodged with every plan of subdivision that establishes a community titles scheme." It is said that the request and the plan are registered on the existing indefeasible title and the Community Management Statement is brought forward to the indefeasible title created for the scheme common property. The titles created for the lots in the

scheme are noted with a reference to the Community Management Statement (which includes a unique identifying number). No separate notation as to a first or subsequent Community Management Statement is made on the indefeasible titles for the lots in the scheme.

[14] The applicant's case is that there was a failure in two respects to comply with the requirements of s 212. The first was that the contract did not expressly state that "settlement must not take place earlier than" 14 days after the vendor gave notice to the purchaser that, relevantly, the scheme had been established. The unambiguous grammatical meaning of s 212 was that the contract had to expressly so provide. Merely providing that settlement date was 14 days after the giving of advice that the scheme has been established was not sufficient compliance.

[15] The second was that fixing a possible settlement date as 14 days after the date the vendor notified the purchaser that the Building Format Plan had been registered did not comply with s 212. The establishment of the Community Title Scheme required more than registration of the Building Format Plan. What was required by s 212 was that the plan of subdivision be registered under LTA and also that the first Community Management Statement be recorded by the Registrar of Titles. By setting the date for settlement in the terms used, clause 14.1 of the contract made no reference to the establishment of the Community Title Scheme or to the recording of the Community Management Statement.

[16] The strict approach to provisions with evident consumer protection functions was emphasised by the applicant. The consequence that the protection may extend to giving the purchaser a right to terminate even for quite technical reasons and whether or not the purchaser has suffered any material disadvantage, was, it was said, well established. The applicant relied on a recent example of this approach in *MNM Developments Pty Ltd v Gerrard* [2005] 2 Qd R 515 in which the *Property Agents and Motor Dealers Act* 2000 (Qld) was the relevant legislation (and the provision under consideration more directly prescriptive). This is not a novel proposition.

[17] As evidence that history tends to repeat itself, *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 is an earlier example of the proposition that where there is a provision requiring a document or warning to be given in the interests of consumer protection, there is a tendency to adopt a "lowest common denominator" approach. The relevant provision in s 49 of the *Building Units and Group Titles Act* 1980 had not been complied with in the way required by the Act but had substantially been complied with elsewhere in the contractual documents. Failure to give the statement required triggered a right to terminate the contract within thirty days after the purchaser became aware of the failure if his rights had been materially affected thereby. The fact of non-compliance with the precise requirements of the Act was held to be critical by the majority in the High Court. The substantial issue upon which the case turned was when the reluctant purchaser had knowledge of the failure to comply with the requirements.

[18] In a later case, *Boheto Pty Ltd v Sunbird Plaza Pty Ltd* [1984] 2 Qd R 9 at 13, the "surprising construction" by the High Court of the concept of when knowledge of the non-compliance was gained was commented on by Lord Templeman, delivering the opinion of the Privy Council. But the underlying approach to the effect and consequences of a provision requiring a consumer to be given notice of a matter

pertaining to the consumer's rights remains operative. There is a premise that, at least in a case where the requirement is not patently and directly complied with elsewhere, it is not sufficient compliance with a statutory requirement of the kind in s 212 BCCM even if a consumer might, by a process of interpretation of the contract as a whole, and perhaps with knowledge the Registrar of Titles' practice, be able to discern what rights he, she or it had.

[19] That is the kind of argument which the respondent seeks to rebut. The argument was prefaced by the observation that form had to prevail over substance for the applicant to succeed. It is said that, construing clause 14.1 in light of the definitions in clause 2.1, there was substantial compliance with the requirements of s 212(1). Reading the contract as a whole, the creation of the "scheme" and the registration of the Building Format Plan were inextricably linked. By notifying the buyer of the registration of the Building Format Plan, the seller was notifying the buyer that the scheme had been created. The philosophy in s 14A(1) of the *Acts Interpretation Act* 1954 (Qld) that the Act should be given an interpretation that best achieves its purpose was also prayed in aid. Attention was drawn to s 2 BCCM which says that the primary object of the Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land having regard to the secondary objects.

[20] A secondary object in s 4(f) BCCM of providing an appropriate level of consumer protection for owners and intending buyers of lots included in Community Title Schemes was relied on. Its relevance was said to lie in the concept that the "consumer protection" referred to reflected a balance between the rights of owners and intending buyers. It is not immediately obvious that the object is directed at some sort of relativity between sellers and intending buyers *inter se,* but in any event it is more an aspirational statement than a statement governing or shedding light on the issues to be decided. Reference was also made to s 4(c) BCCM which seems to have marginal relevance.

[21] The respondent also relied on the inclusion of the term "basic limitation" in the heading to Division 1 Part 2 BCCM of which s 212 is the first section for the purpose of arguing that it was a mandatory minimum requirement that the contact "provide that" settlement not take place until 14 days after the seller advised that the scheme had been established. It was submitted that the contract did this, by referring to the registration of the Building Format Plan. Some stress was placed on the requirement that the contract "provide" that information. This was contrasted with what were, implicitly, more prescriptive formulations, not used, to convey what the requirement was, such as "a contract … must state" or "a contract … must express …".

[22] It may be interpolated that although clause 14.1 refers to the Building Format Plan (defined in clause 2), there is no reference in clause 14.1 to the Community Management Statement, the recording of which is one of the essential elements of establishing a scheme. The definition refers to it being "registered" with the Building Format Plan, but it was not suggested that there was any statement elsewhere in the contract referring to its recording as one element of establishing the scheme. In that sense, clause 14.1 omits to mention it. Clause 14.1 fixes the date of settlement by reference to three events, the registration of the Building Format Plan, the issue of the Certificate of Classification and the elapsing of a relevant time calculated by reference to clause 14.1. The event that would trigger the obligation

to settle does not equate to advice that, in all respects, the scheme has been established. Without determining at what point it is relevantly "recorded", it must be acknowledged that because of Registrar of Titles' practice, the Community Management Statement will have been recorded, at worst, virtually contemporaneously with registration of the plan of subdivision (which fits the description of Building Format Plan as defined in clause 2). However, there is no guarantee that that would be known to an average buyer and if it is accepted that the requirement in s 212 is essentially a consumer protection provision, it has not been complied with. It is not the fact that contemporaneous recording may occur that is decisive. It is the fact that clause 14(1) does not adequately convey to the buyer that more than registration of the Building Format Plan is necessary to establish the Community Title Scheme and trigger the fixing of a time for settlement.

[23] With regard to an argument that the provision in s 212 is intended to achieve a balance between the seller and the buyer of a unit, principally because the obligation under s 212 is not placed on any particular person, the practical reality is that, because all the detriment that might flow from non-compliance lies with the seller, it would be imprudent for a seller to fail to ensure that the contract complies with any prescriptive requirements. If they are not complied with, it is difficult to see that the objective of s 212, of ensuring that a buyer is made aware of being protected against being forced to settle a unit sale before the scheme is fully established or at short notice once it is, is promoted by the kind of construction proposed by the respondent.

[24] It is unnecessary to express any view on the question posed by the respondent as to what might or might not invalidate a contract which is subject to s 212 BCCM in the variant circumstances posed in argument. Nor is it necessary to express a conclusion on the applicant's argument summarised in paragraph [14] above. Each case will depend on its own facts. Nor is it necessary to say more about the issue of some sort of comity between the courts and Parliament raised in paragraph [39] of the respondent's written submissions, except to say that there may be different approaches to it (see eg. *Hall v Jones* (1942) 42 SR (NSW) 203 at 208 (Jordan CJ); *Petranker v Brown* [1984] 2 NSWLR 177 at 179 (Samuels JA)).

[25] It follows from what has been said that the applicant is entitled to the relief sought. The formal orders are as follows:

1. It is declared that the applicant has validly cancelled, pursuant to s 212 of the *Body Corporate and Community Management Act* 1997 (Qld), the contract between the applicant and the respondent headed "Rivage Sales Contract" entered into on or about 22 July, 2005;

2. It is declared that the respondent must repay to the applicant, pursuant to s 218 of the *Body Corporate and Community Management Act* 1997, the sum of $99,500 paid to the respondent's agent towards the purchase of the proposed lot the subject of the contract;

3. The respondent pay the applicant's costs of and incidental to the originating application to be assessed.

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[redacted]

**Attention:** [redacted]

**MEMORANDUM OF ADVICE**

[redacted]

My instructing solicitors act for [redacted]. That company is developing an apartment complex named [redacted] [redacted] has entered into [redacted] contracts with purchasers for units in [redacted] the development.

In November 2008 Mackenzie J gave judgment in *Bossichix Pty Ltd v. Martinek Holdings Pty Ltd* [2008] QSC 278. The decision concerned the effect of s.212 of the *Body Corporate and Community Management Act* 1997 ("BCCM Act").

I am requested to advise regarding the following matters:

1. How that decision affects the contract which [redacted] currently has on foot with buyers, and in particular the prospect of buyers validly terminating those contracts in reliance on *Bossichix*
2. What risk minimising or remedial actions, if any, should be taken as result of that decision.
3. Whether amendments suggested by my instructing solicitors are appropriate to deal with the effect

of the decision.

Section 212 of the BCCM Act is in the following terms:

> **"212 Cancellation for not complying with basic requirements**
>
> (1) A contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
>
> (2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.
>
> (3) The buyer may cancel the contract if -
>
> (a) there has been a contravention of subsection (1) or (2); and
>
> (b) the contract has not already been settled."

No question arose regarding s.212(2) in *Bossichix*. No such question arises in this case because there was in existence at the time of the entry into each of the contracts a proposed Community Management Statement. That proposed statement was contained in Chapter 2 of the Disclosure Statement provided with the contract.

*Bossichix* was concerned with a clause in the following form:

> "The Settlement Date is the later of -
>
> (a) 14 days after the seller notifies the buyer that the Building Format Plan is registered; and
>
> (b) 3 days after the seller notifies the buyer that a Certificate of Classification is issued for the building."

The applicant purchaser applied for a declaration that it had validly cancelled the contract pursuant to s.212(3) because the contract contravened the requirements of s.212(1). The applicant advanced two arguments. The first, referred to in the judgment at [14] was that:

> "the contract did not expressly state that "settlement must not take place earlier than" 14 days after the vendor gave notice to the purchaser that, relevantly, the scheme had been established...merely providing that settlement date was 14 days after the giving of advice that the scheme has been established was not sufficient compliance."

At [24], Mackenzie J stated that it was not necessary to express a conclusion on that argument.

That argument does not arise in the present case because clause 3.2 of the contract provides:

> "In compliance with s.212(1) of the [BCCM Act] it is agreed that settlement must not take place earlier than the Settlement Date."

If the settlement date is defined so as to comply with the requirements of the Act, then the express reference to s.212 (1) and the provisions of clause 3.2 meet the requirement that the contract "must provide" that settlement must not take place earlier than 14 days after the prescribed event.

The applicant's second argument in *Bossichix* was that recorded in the Reasons for Judgment at [15] in the following terms:

> "[15] The second was that fixing a possible settlement date as 14 days after the date the vendor notified the purchaser that the Building Format Plan had been registered did not comply with s.212. The establishment of the Community Title Scheme required more than registration of the Building Format Plan. What was required by s.212 was that the plan of subdivision be registered under the LTA and also that the first Community Management Statement be recorded by the Registrar of Titles. By setting the date for settlement in the

terms used, c. 14.1 of the contract made no reference to the establishment of the Community Title Scheme or to the recording of the Community Management Statement."

The respondent's argument, the substance of which is recorded at [19] of the judgment, was to the following effect. Clause 2.1 of the contract there in question defined "Building Format Plan" as the Building Format Plan that is registered to create the lot. "Community Management Statement" was defined as meaning the Community Management Statement to register with the Building Format Plan. "Scheme" was defined as meaning the Community Titles Scheme that would be created on registration of the Building Format Plan.

The Manual of Land Title Practice kept by the Registrar of Titles as authorised by s.9A of the *Land Title Act* 1994 provided that a community management statement must be lodged with every plan of subdivision that establishes a Community Titles Scheme.

The argument then proceeded that reading the contract as a whole, including the definitions in clause 2.1, the creation of the scheme and the registration of the Building Format Plan were inextricably linked. It was said that by notifying the buyer of the registration of the Building Format Plan, the seller was notifying the buyer that the scheme had been created.

At [22] Mackenzie J said: "It must be acknowledged that because of Registrar of Titles practice, the Community Management Statement will have been recorded, at worst, virtually contemporaneously with registration of a plan of subdivision (which fits the description of Building Format Plan as defined in clause 2)."

However, his Honour held that clause 14.1 made no express reference to advice that the scheme had been established. After the passage just quoted, his Honour went on to say:

> "However, there is no guarantee that that would be known to an average buyer and if it is accepted that the requirement of s.212 is essentially a consumer protection provision, it has not been complied with. It is not the fact that contemporaneous recording may occur that is decisive. It is the fact that clause 14.1(1) does not adequately convey to the buyer that more than registration of the building format plan is necessary to establish the Community Titles Scheme and trigger the fixing of a time for settlement."

On this basis Mackenzie J made the declaration which the purchaser sought.

The effect of the decision is that it is not enough to comply practically with the requirement by giving notice of an event (namely registration of the plan) which inevitably means that the scheme has been established. What is required is express notice that the scheme has been established. Unless the contract provides that settlement must not take place earlier than 14 days after the express notice is given, s.212(1) is not satisfied.

I think on balance that the decision is correct because s.212 is intended as part of a scheme which includes s.217, which provides for a purchaser's right to cancel a contract in certain circumstances. The matters which give rise to such a right of cancellation include that the Community Management Statement recorded for the scheme is different from the proposed Community Management Statement and that the information disclosed in the disclosure statement is inaccurate and that in either case the difference or inaccuracy materially prejudices the buyer. Section 217(d) materially provides:

> "The buyer may cancel the contract if -
>
> ...
>
> (d) the cancellation is effected by written notice given to the seller by the buyer not later than the latest of the following -

(i) 3 days before the buyer is otherwise required to complete the contract;

(ii) 14 days after the buyer is given notice that the scheme is established or changed;

(iii) another day agreed between the buyer and the seller."

Section 217(a) provides that the cancellation may occur only if the contract has not already been settled.

The apparent intent of s.212(1) is to match up the 14 day period after notice of establishment of the scheme before settlement can be required with the 14 day period which the purchaser has to decide whether to cancel the contract under s.217.

Although none of this articulated in the Reasons for Judgment in *Bossichix*, Mackenzie J was entitled legitimately to take the view that in order for a purchaser to know that the 14 day time period under s.217(d)(ii) was running, the purchaser was entitled to have explicit notice that the scheme had been established.

If the same explicit notice was not required under s.212(1) the buyer's rights might be placed in jeopardy.

All this is somewhat artificial but there is abundant authority that provisions of this sort will be construed strictly in favour of the party whom the courts think the legislation is designed to protect.

**The contract**

The contract has the following relevant provisions.

"Settlement date" is defined as follows:

"The settlement date is the later of:

(a) 14 days after the seller notifies the buyer that the Plan has registered; and
(b) 3 days after the date the seller notifies the buyer that a Certificate of Classification has issued for the building."

Clauses 3.1 and 3.2 are in the following terms:

"3.1 Settlement must take place between 9.00am and 5.0-0pm on the Settlement Date at a place and time in Brisbane nominated by the Seller or the Seller's Solicitors.

3.2 In compliance with Section 212(1) of the Body Corporate and Community Management Act it is agreed that settlement must not take place earlier than the Settlement Date."

"Plan" is defined to mean:

"The Plan containing the lot to be registered under the *Land Title Act* 1994 in respect of the building a draft of which is contained in the disclosure statement."

"Scheme" is defined to mean:

"The Community Titles Scheme established on registration of the plan creating the Scheme Land."

Subject to one specific matter, the contract here is in terms which would make the decision in *Bossichix* applicable. The definition of Settlement Date, read with clause 3 has the effect of providing that settlement must not take place earlier than 14 days after the seller notifies the buyer that the plan has registered. On the authority of *Bossichix*, this is not the same as providing that settlement must not take place earlier than 14 days after the seller advises the buyer that the scheme has been established.

This point is, if anything, is more clear cut in the present case because the Plan referred to in the definition of Settlement Date is not identified in the definitions in the contract as being the same as the plan referred

to in the definition of Scheme.

There is an argument that the reference in clause 3.2 of the contract to compliance with s.212(1) of the BCCM Act should lead the court to treat the definition of Settlement Date as if it referred to a period of 14 days after the seller notifies the buyer that the scheme has been established.

In my view such an argument is likely to be rejected by a court. If *Bossichix* is correctly decided (as I think it is), a statement to the effect that the contract complies with s.212(1) is incorrect. A court is unlikely to proceed on the basis that the existence of clause 3.2 would cause a purchaser to go and read s.212 of the Act and then decide that when speaking of registration of the plan the seller is in fact talking about establishment of the scheme. That is, the reference to s.212(1) does not mean that the seller will give notice of the establishment of the scheme.

Therefore in answer to the first question, I think it likely that a buyer would succeed in an argument that the buyer may validly terminate the contract for non-compliance with s.212(1).

**Amendments**

It is appropriate to address the third question next. What is required are provisions which expressly meet the requirements of s.212(1).

The appropriate amendments would be as follows. In the definition of "settlement date", paragraph (a) should read as follows:

> "14 days after the Seller notifies the Buyer that the Scheme has been established".

The change proposed by my instructing solicitors to clause 8.1 can be made, but it is not essential. If clause 8.1 is to be changed in accordance with the proposed draft, then for consistency, clause 8.2(a) probably should also be changed.

The definition of "Scheme" should be amended as my instructing solicitors suggest.

Those amendments should be made in any future contracts.

**Risk minimisation**

If it is intended to vary existing agreements, then that could be achieved by a Variation Agreement which amends the clauses referred to above. If, as could be expressly made clear by the amending agreement, the parties do not intend to terminate the existing contract and enter into a new contract by the amendments, then the effect of the amendments is that the existing contract remains in force but is varied. (See *FCT v. Sara Lee Household and Body Care* (2000) 201 CLR 520 at 533, 534.) There will not then be any requirement for notices under the *Property Agents and Motor Dealers Act* 2000 and disclosures under the BCCM Act which would arise if the amendments had the effect of creating a new contract.

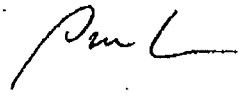
The practical difficulty will be that the contracts cannot be varied except by an amending agreement. If purchasers are asked to agree to amendments, one expects they will have a natural inclination to ask their solicitors why the amendments are necessary. Purchasers, who were not previously aware of the *Bossichix* problem, may become aware that they have a potential right to terminate their contracts. They could be placed on enquiry by a request to agree to amendments.

It follows that whether it is desirable to request the execution of amending agreements by purchasers

depends on a commercial judgment by [redacted] whether a substantial number of purchasers are likely to seek to terminate the contracts if the issue of amendment is raised. The commercial judgment will involve what is probably a difficult and hypothetical comparison between the likely termination rate if amendments are requested and the likely termination rate when, in September, contracts fall due for settlement. Purchasers may at that later time be casting around for a reason not to settle and obtain advice about the *Bossichix* decision and its effect.

If the starting point is that the *Bossichix* decision is correct and that as a consequence the contracts here in question contravene s.212(1) of the BCCM Act, any decision to seek agreement to amendments to overcome the problem is not a legal decision but one which must be based upon assessment of commercial risk.

With compliments



**Simon Couper QC**

Chambers
16 March 2009

# BRIEFING PAPER

## CONCERNING –

## Section 212 of the *BODY CORPORATE & COMMUNITY MANAGEMENT ACT* 1997

## And

## The recent Supreme Court decision of *Bossichix Pty Ltd v. Martinek Holdings Pty Ltd* [2008] QSC 278

**RECIPTIENT: Steve Greenwood, Property Council of Australia (Qld)**

**BRIEF TO STEVE GREENWOOD** **01.04.09**

The present issue arises because of the recent Supreme Court decision in *Bossichix Pty Ltd v. Martinek Holdings Pty Ltd* [2008] QSC 278. The decision concerned s.212 of the *Body Corporate and Community Management Act* 1997 ("BCCM Act").

The effect of the case is that it places at risk hundreds if not thousands of similar off-the-plan contracts in Queensland: Meaning that buyers all over the state now have a new basis to terminate contracts of sale that are currently on foot.

s.212 of the BCCM Act in essence states that a buyer can terminate a contract of sale for a lot in a community titles scheme if the contract does not provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established.

Many contracts in Queensland have a clause in terms stating that – 'settlement will occur 14 days after the seller notifies the buyer that the building format plan is registered…'. The Manual of Land Title Practice kept by the Registrar of Titles in essence provides that the building format plan is lodged at the same time as the scheme is established. The practical effect being that the building format plan and the scheme were inextricably linked and that contracts therefore complied with s.212 of the BCCM Act.

The current situation created by the decision in *Bossichix Pty Ltd v. Martinek Holdings Pty Ltd*, means that due to a very technical reading of s.212 of the BCCM Act, if a particular phrase in the contract has not been worded exactly as required by s.212, then the whole contract is now deemed to be in breach of the BCCM Act, giving the buyer the right to terminate (at its election) any time up until the day of settlement.

As you are aware, off-the-plan contracts of sale are the basis for most developers to obtain finance for residential projects. Settlement of those contracts is essential to ensure the financial success of any residential project and the continued solvency of most developers.

In any financial climate it is of paramount importance for off-the-plan contracts to settle. Given the current global financial crisis, it now is even more important that off-the-plan contracts continue to settle, residential projects continue to be financially successful, the

developers of those residential projects stay in business, and their employees, contractors and subcontractors stay employed.

Alarmingly, if an off-the-plan contract falls into the situation of the *Bossichix* decision, then there is nothing that a seller can do to remedy the contract, other than asking the buyer to amend the contract to make it strictly compliant with the BCCM Act. Obviously asking buyers to amend their contracts to make them compliant would place all buyers on notice that they have the right to immediately terminate their contracts. In this economic climate, that is not a commercially sound option.

I have **attached** an advice from a barrister, Mr Simon Couper QC about this decision and its effect on off-the-plan contracts of sale (references to the parties have been removed to protect confidentiality).

I have spoken with numerous property law partners in Brisbane who inform me that 90% of off-the-plan residential contracts throughout Queensland are affected by this decision and are now at risk of buyers terminating their contracts.

## Need for Immediate Legislative Intervention

The *Bossichix* decision is currently on appeal. It is unlikely that the hearing of the appeal will occur before November 2009. Any decision from that appeal may not be handed down for between 12 – 18 months. This means that any decision on the appeal may not be handed down until as late as May 2011.

It is necessary to immediately restore certainty to the industry.
It is necessary to immediately restore certainty to off-the-plan contracts for residential apartments.

The Department that currently administers the BCCM Act is the **Department of Justice and Attorney General**. The Minister responsible is Mr Cameron Dick. Before entering parliament Minister Dick was a barrister. Minister Dick is the minister responsible for making any amendments to the BCCM Act.



There exists an 'Office of the Commissioner for Body Corporate and Community Management': Its purpose however, is principally for dispute resolution and public information on body corporate matters. **Any lobbying should be directed primarily at the Minister for Attorney General and Justice.**

A coordinated approach should be made immediately to lobby the Minister for Attorney General and Justice and the Treasurer. Parties to such an approach may include:

- The Property Council of Australia.
- The Urban Development Institute of Australia.
- The Queensland Law Society.

Regards,

Daniel Goodwin.

**INDEX OF DOCUMENTS ENCLOSED WITH THIS BRIEF**

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| 2. | File Summary of Appeal Listing of *Bossichix Pty Ltd v. Martinek Holdings Pty Ltd* | Supreme Court | 31.03.09 | 1 |
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QUEENSLAND COURTS

# File summary

*Supreme and District Court - Search civil files*

Electronic records commenced in different centres at different times. Please check the available files to ensure your search is effective.

## 12763/08 BOSSICHIX PTY LTD -V- MARTINEK HOLDINGS PTY LTD — Supreme

| Originated in | Currently in | File type | File nature | Date filed | Next listing |
|---|---|---|---|---|---|
| Brisbane | Brisbane | Appeal | Civil - Supreme Court | 09/12/2008 | (none) - (none) |

**Parties**

| Last/Company name | First name | ACN | Party role | Representative |
|---|---|---|---|---|
| BOSSICHIX PTY LTD | | 096494683 | Respondent | MCKAYS SOLICITORS |
| MARTINEK HOLDINGS PTY LTD | | 106533242 | Appellant | BRIAN BARTLEY & ASSOCIATES |

*There are no events on this file*

**Documents**

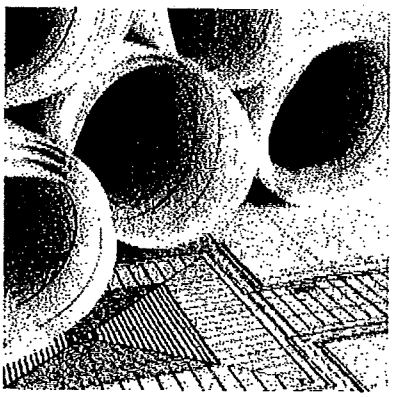
| Doc. no. | Date filed | Document type | Document description | Filed on behalf of | Pages |
|---|---|---|---|---|---|
| 1 | 09/12/2008 | Notice of Appeal | | Appellant | |
| 2 | 25/02/2009 | Record of Proceedings | Record Books 2 Volumes | Appellant | |
| 3 | 09/12/2008 | Notice of Change of Solicitors | | Appellant | |
| 4 | 16/12/2008 | Notice of Contention | | Respondent | |

# Off-The-Plan Unit Contracts At Risk

**OPINION**
**by Tim O'Dwyer M.A., LL.B**
**Solicitor**
**Consumer Advocate**
**watchdog@argonautlegal.com.au**



**Conveyancing solicitors across Queensland have been anxiously scurrying to their filing cabinets to check settled and unsettled off-the-plan unit contracts following a surprise court decision. Serious repercussions could flow far and wide from this decision - not only for the state's legal profession, but also for the local property development industry and the government.**



Supreme Court Justice Kenneth Mackenzie's decision in *Bossichix v Martinek Holdings* turned on whether the off-the-plan contract in question was fatally flawed.

The buyer's solicitors relied on a technicality to cancel their client's $995,000.00 purchase contract. The developer not unexpectedly rejected the cancellation, then affirmed the contract and ultimately forfeited the buyer's deposit. The critical question in the ensuing court case was whether or not all off-the-plan contracts had to comply strictly with Section 212 of Queensland's *Body Corporate and Community Management Act 1997*.

This Section requires such contracts to provide for settlement to be no sooner than 14 days after notice of the establishment of a development's Community Management Scheme, otherwise buyers can cancel.

Although the developer's legal team argued that this contract – read as a whole - substantially complied with the Section, the Court found that strict compliance was necessary. Therefore the contract had been validly cancelled.

After describing Section 212 as "essentially a consumer protection provision," Justice Mackenzie observed: "It would be imprudent for a seller to fail to ensure that the contract complies with any prescriptive requirements." It was well-established, he added, that a statutory protection may extend to giving a purchaser a right to terminate "even for quite technical reasons" regardless of whether the purchaser had suffered any "material disadvantage".

Queensland University of Technology Property Law Professor Sharon Christensen said she had seen other developers' off-the-plan contracts which did not follow the precise formula prescribed in Section 212. "I certainly think that there are a number of contracts that are going to be affected by this decision," she said.

In fact thousands of similar unsettled contracts, similarly not strictly complying with Section 212, could be at risk of cancellation by buyers unnerved by falling property values. Yet-to-be-completed units and townhouses may, on completion, prove to be worth less than prices negotiated years earlier. Meanwhile, buyers who previously settled such contracts may first ask why their solicitors missed this loophole, then seek advice elsewhere on suing for negligence. Ditto for developers who stand to lose vital sales on the basis of this decision.

Interestingly, the buyer in *Bossichix v Martinek* did not want to crash their two-year old deal because of any market slump. The cancellation and resultant litigation were precipitated by a not uncommon change of circumstances: this 5th floor penthouse in Mackay, North Queensland, would lose its million-dollar views because another building was going up next door.

The developer has now appealed, so this decision may yet be reversed.

A member of the Queensland Law Society's Property and Development Law Committee speculated that before then, the State Government may be lobbied to change the law retrospectively so unsettled off-the-plan contracts need not comply strictly with Section 212. "Substantial compliance should be sufficient," he said.

A precedent in this regard was set four years ago in Victoria when legislation was backdated to close a loophole which could have allowed off-the-plan unit buyers there to escape their contracts. Such a reprieve for developers (and their lawyers) would ensure in Queensland, as it did in Victoria, not only continued viability of the property investment market but also the government's ongoing stamp duty

revenue.

Even if the decision in *Bossichix v Martinek Holdings* should be upheld on appeal, and the *Body Corporate and Community Management Act 1997* amended as suggested, buyers' conveyancing solicitors who have already settled non-compliant contracts should not rest easy. The government may not view the retrospective protection of legal practitioners as favourably as that of property developers.

To post your comment on this item, please return to




## Off-the-Plan Contracts - Termination rights and risks

Buying units off the plan is still a popular investment option for many people. It is not, however, uncommon for buyers, for a variety of reasons, to wish to terminate the contract before settlement. What you may not be aware of is that there is consumer protection legislation in place which, if the seller does not strictly comply with, the buyer might have rights to terminate the contract and recover the deposit.

The principal consumer protection legislation is the *Body Corporate and Community Management Act* 1997 (Qld) ("**BCCM Act**"). The recent case of *Bossichix Pty Ltd* -v- *Martinek Holdings Pty Ltd* [2008] QSC 278 is an example of a case where a buyer was able to terminate a contract and recover its deposit because the seller did not strictly comply with the provisions of the BCCM Act.

**Facts of the Case**

The Buyer (Applicant) entered into a contract to purchase a unit off-the-plan from the Seller (Respondent).

The relevant clause of the contract provided that the settlement date is the later of:

(a) 14 days after the seller notifies the buyer that the building format plan is registered; and

(b) 3 days after the seller notifies the buyer that a Certificate of Classification is issued for the building.

Prior to settlement of an off-the-plan unit, the Buyer sent a letter to the Seller purporting to cancel the contract pursuant to section 212 of the BCCM Act.

Section 212 of the BCCM Act provides as follows:

> ***212 Cancellation for not complying with basic requirements***
>
> *(1) A contract entered into by a person (the seller) with another person (the buyer) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.*
>
> *(2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.*
>
> *(3) The buyer may cancel the contract if -*
>
> *(a) there has been a contravention of subsection (1) or (2); and*
>
> *(b) the contract has not already been settled.*

The Seller disputed that it had breached Section 212 of the BCCM Act.

**The Issues**

The Buyer argued that the relevant clause of the contract failed to comply with s 212 of the BCCM Act in two respects:

(1) Section 212 requires the adoption of the specific words "*settlement must not take place earlier than 14 days after the vendor gives notice to the purchaser that the scheme has been established*"; and

(2) That the date of settlement was fixed by reference to the date 14 days after registration of the building unit plan and not the establishment of the community titles scheme.

**The Decision of the Court**

The Court accepted that s 212 of the BCCM Act provides that settlement of an off-the-plan unit contract cannot occur prior to the establishment of the relevant community titles scheme. (Note: a community titles scheme essentially deals with the ownership of and management by a body corporate of common property in a unit development.)

Section 24 of the BCCM Act provides that a community titles scheme is established by:

(a) registration of the plan of survey identifying the scheme land (Note: a building format plan is a type of survey plan); and

(b) the recording of the first community management statement for the scheme (Note: a community management statement essentially records the entitlements, rights and responsibilities of owners of individual units in a unit development).

The Court also accepted that, from a practical perspective, registration of the survey plan and recording of the community management statement would occur "*virtually contemporaneously*". This means, there could be no registration of the survey plan without the recording of the community management statement, and therefore the establishment of the scheme.

Despite that, the Court held that because the contract only required notice to be given in relation to the registration of the survey plan (i.e. the Building Format Plan) and not the establishment of the community titles scheme, section 212 of the BCCM Act had been breached by the Seller. The Buyer was entitled to terminate the contract.

**Observations**

The Court took a very literal approach to the wording of section 212 of the BCCM Act and in doing so has opened the door to buyers of units off-the-plan to cancel the contract for, what the writer views as, essentially technical reasons.

This decision is a sober reminder to Sellers that they need to ensure their contracts for sale of units off-the-plan comply with BCCM Act.

If you have entered into a contract to purchase a unit off-the-plan and wish to cancel the contract, please give Corney & Lind a call or talk with your lawyer about whether the decision in *Bossichix Pty Ltd* -v- *Martinek Holdings Pty Ltd* might offer a lawful basis for termination.

* The decision in *Bossichix Pty Ltd* -v- *Martinek Holdings Pty Ltd* is currently under appeal.

**Author**

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Ph (07) 3252 0011

http://www.corneyandlind.com.au/resource-centre/property/buying_and_selling_units_off_the_plan

ClarkeKann

**March 2009**

# NEAR ENOUGH IS NOT GOOD ENOUGH WHEN SELLING LOTS IN A COMMUNITY TITLES SCHEME

A recent decision of the Queensland Supreme Court has emphasized the need for developers to strictly comply with the consumer protection provisions contained in the *Body Corporate and Community Management Act* 1997 ("BCCMA").

Section 212 of the BCCMA deals with the buyer's right to cancel a contract before settlement if a seller does not comply with the following requirements:

> *"212(1) A contract entered into by a person (the seller) with another person (the buyer) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.*
>
> *(2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed."*

## THE FACTS

In *Bossichix Pty Ltd v Martinek Holdings Pty Ltd*[1], the developer simply ignored the buyer's contention that the contract failed to comply with section 212(1) of the BCCMA and proceeded to fix a settlement date for the contract. The wording of the contract was deficient as it did not follow the specific wording of section 212. Essentially, the contract did not state that settlement would occur after the seller advises the buyer that the community titles scheme has been established or changed. The buyer did not complete the contract and wrote to the developer's solicitors to terminate the contract on the basis of non-compliance with section 212.

The Judge stated that in an off-the-plan contract, it is not sufficient for the developer to merely include a clause in a contract stating that the settlement date will be 14 days after the developer notifies the buyer that a plan is registered, the developer must also refer to the establishment or modification of the community titles scheme.

[1] [2008] QSC 278

## CONSEQUENCES

This decision confirms the Court's strict approach to consumer protection provisions followed in earlier cases[2]. This protection may extend to giving the purchaser a right to terminate for quite technical reasons, irrespective of whether the purchaser has suffered any material disadvantage. Accordingly, any detriment flowing from non-compliance with section 212 of the BCCMA lies with the developer.

This decision is presently the subject of an appeal. Failing a successful appeal by the developer, it is likely that buyers have obtained a termination right similar to the existing rights under the cooling off and warning statement provisions of the *Property Agents and Motor Dealers Act* 2000 (Qld).

## THE SHORT POINTS

1. The message by the Courts is quite clear. Strict compliance with the wording of s212 is mandatory. Near enough will not be good enough!
2. To avoid giving buyers a "free hit" and the ability to terminate for such simple mistakes, make sure your contracts are checked to ensure they comply with the BCCMA provisions.

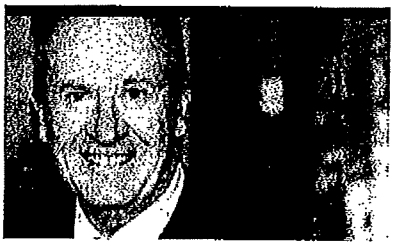
**Agrita O'Mahony**
**Senior Associate, Litigation & Insolvency**
**Ph: 07 3001 9242**
**a.omahony@clarkekann.com.au**

[2] *MNM Developments Pty Ltd v Gerrard* [2005] 2 Qd R 515

# Developers beware – strict compliance with Strata legislation for 'Off the Plan' contracts

**Written on the 12th of February 2009 by Cooper Grace Ward Lawyers**

In a recent decision of the Supreme Court of Queensland it was held that the settlement mechanism in an off the plan contract between two parties did not comply with the particular section of the *Body Corporate and Community Management Act 1997* ("Act") which governs how developers can call for settlement to occur.



Richard Seymour, Partner

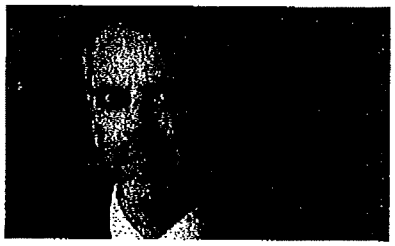
The case is known as *Bossichix**.

This case highlights that the Court will take a strict approach to interpreting how certain sections of the Act will apply to off the plan contracts. It is essential that parties who are contemplating buying or selling "off the plan" are aware of the implications of this decision.

Kevin Bartlett, Partner

**The Relevant Section**

The relevant section is section 212 of the Act. It provides that settlement of an off the plan contract must not take place earlier than 14 days after the seller advises the buyer that the scheme has been established. It also provides that there must be a proposed community management statement for the scheme. If settlement has not occurred and section 212 of the Act has not been complied with, a buyer may have the right to terminate the contract.



Neil Hawthorne, Partner

**Facts of the case**

The off the plan contract between these parties contained a clause which read as follows:

Lara Dawson, Senior Associate

*'The settlement date is the later of:*

- *14 days after the Seller notifies the Buyer that the Building Format Plan is registered; and*
- *Three days after the Seller notifies the Buyer that a Certificate of Classification is issued for the building.'*

This type of clause was used in off the plan contracts under legislation which predated the Act.

**The Court's Decision**

The Court held that the wording used in the clause detailing how settlement could be called failed to comply with section 212 as it did not strictly follow the wording in the relevant section.

The Court was motivated by the notion of consumer protection in requiring strict compliance with the wording used in the relevant section.

The Court acknowledged that there may have been little practical difference between the sequence of events which the seller was relying upon to call for settlement to occur and those mentioned in section 212. However, the Court took the view that section 212 is "essentially a consumer protection provision", and the seller's failure to comply with the section meant that the seller had not and could not appropriately fix the time for settlement.

Substantial compliance and the fact that the events leading up to settlement did not disadvantage the buyer were insufficient to assist the seller.

We understand that the decision is currently the subject of an appeal by the seller which may or may not be successful. At this juncture, it is wise to proceed on the basis that the appeal will not be successful and that strict compliance with section 212 is a necessity.

**Conclusion**

It is clear that the Courts will look for strict compliance with particular sections of the Act where consumer protection is being provided. Substantial compliance may not be sufficient.

**Cooper Grace Ward Lawyers can assist you with any questions you may have regarding any of the matters in this Alert. For more information, please contact Richard Seymour, Partner (07) 3231 2423 or Kara Pennisi, Solicitor (07) 3231 2915.**

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*Bossichix Pty Ltd v Martanek Holdings Pty Ltd [2008] QSC 278.

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# Wriggling out of an off-the-plan contract

By Tim O'Dwyer
Posted Tuesday, 10 February 2009

Conveyancing solicitors across Queensland have been anxiously scurrying to their filing cabinets to check settled and unsettled off-the-plan unit contracts following a surprise court decision last November. Serious repercussions could flow from this decision not only for the state's legal profession, but also for the local property development industry and the Queensland government.

Supreme Court Justice Kenneth Mackenzie's decision in *Bossichix v Martinek Holdings* turned or whether the contract in question was fatally flawed.

Twelve months earlier, the buyer's solicitors relied on a technicality to cancel their client's $995,000 purchase contract. The developer not unexpectedly rejected the cancellation, then affirmed the contract and ultimately forfeited the buyer's deposit. The critical question in the ensuing court case was whether or not off-the-plan contracts had to comply strictly with Section 212 of the *Body Corporate and Community Management Act* 1997.

This Section requires such contracts to provide for settlement to be no sooner than 14 days after notice of the establishment of a development's Community Management Scheme, otherwise buyers can cancel.

Although the developer's legal team argued that this contract - read as a whole - substantially complied with the Section, the Court found that strict compliance was necessary. Therefore the contract had been validly cancelled.

After describing Section 212 as "essentially a consumer protection provision," Justice Mackenzie observed: "It would be imprudent for a seller to fail to ensure that the contract complies with any prescriptive requirements." It was well-established, he added, that a statutory protection may extend to giving a purchaser a right to terminate "even for quite technical reasons" regardless of whether the purchaser had suffered any "material disadvantage".

Queensland University of Technology Property Law Professor Sharon Christensen said she had seen other developers' contracts which did not follow the precise formula prescribed in Section 212. "I certainly think that there are a number of contracts that are going to be affected by this decision," she said.

In fact thousands of similar unsettled contracts, not strictly complying with Section 212, could be at risk of cancellation by buyers unnerved by falling property values. Yet-to-be-completed units and townhouses may, on completion, be worth less than prices negotiated years earlier. Meanwhile, buyers who previously settled such contracts may first ask why their solicitors missed this loophole, then seek advice elsewhere on suing for negligence. Ditto for developers who stand to lose sales on the basis of this decision.

Interestingly, the buyer in *Bossichix v Martinek* did not want to crash the two-year old deal because of any market slump. The cancellation and resultant litigation were precipitated by a very particular change of circumstances. The problem was, in fact, that this 5th floor penthouse in Mackay, North Queensland, would lose its million-dollar views because another building was going up next door.

The developer has now appealed, so this decision may yet be reversed.

A member of the Law Society's Property and Development Law Committee speculated that before then, the State Government may be lobbied to change the law retrospectively so unsettled and extant contracts need not comply strictly with Section 212. "Substantial compliance should be sufficient," he said.

A precedent in this regard was set four years ago in Victoria when legislation was backdated to close a loophole which could have allowed off-the-plan unit buyers to escape their contracts. Such a reprieve for developers (and their lawyers) would ensure in Queensland, as it did in Victoria, not only continued viability of the property investment market but also the government's ongoing stamp duty revenue.

Even if the decision in *Bossichix v Martinek Holdings* should be upheld on appeal, and the *Body Corporate and Community Management Act* 1997 amended as suggested, conveyancing solicitors for buyers who settled non-compliant contracts should not rest easy. The government may not view the retrospective protection of legal practitioners as favourably as that of property developers.

Tim O'Dwyer is a Queensland Solicitor. See Tim's real estate writings at: www.australianrealestateblog.com.au.

bulletin

SPARKE HELMORE

# s.212 *Body Corporate and Community Management Act 1997* (Qld) – make a mistake and the buyer can walk!

Yet another opportunity for buyer's to terminate a Contract any time up to settlement has arisen in the case of *Bossichix Pty Ltd v Martinek Holdings Pty Ltd*[1]. Relevantly, section 212(1) of the *Body Corporate and Community Management Act 1997* (Qld) provides that:

*A contract entered into by a person (the seller) with another person (the buyer) for the sale...of a lot intended to come into existence as a lot...in a community titles scheme...must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.*

In an off-the-plan contract, it is not sufficient for the developer to merely include a clause in a contract stating that the settlement date will be 14 days after the developer notifies the buyer that a plan is registered. The Supreme Court found that a reference to a plan (in this case, it was a Building Format Plan) was something different to a reference to a community titles scheme being established or changed. In the court's view, this amounted to a failure to comply with section 212.

The Supreme Court did not go so far as to mandate that an off-the-plan contract must contain a provision warning the buyer that settlement must not take place earlier than 14 days after the developer gives advice to the buyer that the scheme has been established or changed. This was an interpretation of section 212 requested by the buyer however the Supreme Court did not deal with this argument as it found in favour of the buyer on the grounds that mere reference to a plan did not translate to the establishment or change of a community titles scheme. On the court's reasoning in this case, there is some likelihood that a future case could find void an off-the-plan contract which does not specifically point out the statutory imposition of a minimum timeframe for settlement following a community titles scheme being established or changed.

## Implications for Developers

This decision reiterates the courts approach to consumer protection provisions as evidenced in *MNM Developments Pty Ltd v Gerrard* [2005][2]. The consequence of this is that the protection 'may extend to giving the purchaser a right to terminate even for quite technical reasons and whether or not the purchaser has suffered any material disadvantage'[3].

As section 212 forms a protection for consumers, the practical reality is that the detriment flowing from non-compliance with this section lies with the developer. Accordingly, any perceived failure to comply with section 212 will be determined in favour of the buyer. This case is presently being appealed to the Supreme Court of Appeal but failing a successful appeal by the developer, it is likely that buyers have obtained a termination right similar to the existing rights under the cooling off and warning statement provisions of the *Property Agents and Motor Dealers Act 2000* (Qld).

## Implications for all

This is a decision which not only affects developers but also those who are real estate agents and buyers. If you have any contracts which need looking at, don't hesitate to contact us. In the interim, we will be conducting a thorough review of all contracts held by this firm to ascertain the implications of this decision for our clients.

[1] [2008] QSC 278.
[2] 2 Qd R 515
[3] Bossichix Pty Ltd v Martinek Holdings Pty Ltd [2008] QSC 278.

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**Contact Sparke Helmore**
Phone: (02) 9373 3555 | Fax: (02) 9373 3599 | Email: info@sparke.com.au

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NEWS

23 January 2009

CONTENT



# Are Your Off-The-Plan Contracts Compliant

Do your off-the-plan contracts under the Body Corporate and Community Management Act 1997 (Act) state that settlement occurs 14 days after notification of the registration of title? If so, that contract may be cancelled or open to challenge by a buyer if a recent Supreme Court decision is correct.

The judge in Bossichix Pty Ltd v Martinek Holdings Pty Ltd discussed s212 of the Act. That section states:

**212 Cancellation for not complying with basic requirements**

1. A contract entered into by a person (the seller) with another person (the buyer) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.

2. Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.

3. The buyer may cancel the contract if—
(a) there has been a contravention of subsection (1) or (2); and
(b) the contract has not already been settled.

MacKenzie J held that where a contract noted that settlement was 14 days after notification of "registration of the plan", that contract did not comply with s212. Consequently, the buyer was entitled to cancel the contract. He argued that s212 was a consumer protection provision and setting up the Body Corporate scheme required more than registering the title. Therefore, the reference in the contract to registration of the plan did not trigger the fixing of a time for settlement.

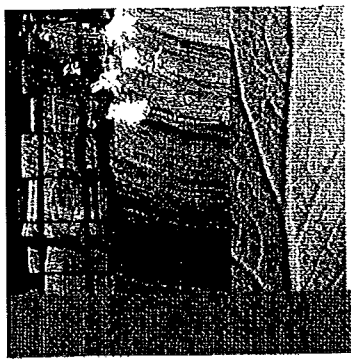
His honour did not consider the buyer's other argument in this case, namely that the clause should have provided expressly that "settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established".

The decision is being appealed. We will advise you of the appeal decision when we receive it.

Until the appeal is decided, any off-the-plan contract under the Act that determines the settlement date as 14 days after registration of the plan only, then the contract is open to challenge by the buyer. Existing contracts with type of clause should be referred to your lawyer for review and action now.

If you need any further information or advice about this topic please contact:

**Matthew Yates**
Senior Associate
Telephone: 07 5479 6036
Email: **myates@mcw.com.au**



holding redlich lawyers

# Property & Projects Update

21 January 2009

## Warning Property Developers

## Be careful when calling for settlement of off the plan sales

On 12 November 2008 a decision was handed down by the Supreme Court of Queensland in the case of Bossichix Pty Ltd v Martinek Holdings Pty Ltd [2008] QSC 278 (**Bossichix**). The Court took a firm position as to the requirements under the Body Corporate and Community Management Act 1997 (QLD) (**Act**) in respect of timing of settlements for strata lots sold off the plan. This decision bears significant importance for both sellers and buyers!

**Summary of case**

In Bossichix clause 14(1) of the contract of sale in question stated:

"The settlement date is the later of-

- 14 days after the Seller notifies the Buyer that the Building Format Plan (creating the lot) is registered; and
- Three days after the Seller notifies the Buyer that a Certificate of Classification is issued for the building."

Section 212(1) of the Body Corporate and Community Management Act 1997 (QLD) (**Act**) requires that contracts for the sale of a lot(s) that will be created upon registration of a subdivision plan (ie. "off-the-plan") must provide that **"settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed"**.

**WARNING!** If Section 212(1) is not complied with, the buyer may terminate the contract at any time up until settlement.

**The Court's Decision**

- **Strict Compliance Is Required**

  The Court in Bossichix held that contracts of sale for off-the-plan strata lot(s) must strictly comply with section 212 and as clause 14(1) of the contract did not adequately convey to the buyer that more than registration of the Building Format Plan is necessary to establish the Community Titles Scheme and trigger the fixing of time for settlement, the buyer was entitled to terminate the contract and obtain a refund of its deposit.

- **Substantial compliance is not sufficient.**

  It did not matter that the contract provided that settlement was not to occur earlier than 14 days after registration of the plan and that practically speaking, creation of the 'scheme' and the registration of the Plan would occur contemporaneously. Nor did it matter whether the buyer had suffered any material disadvantage from the exact wording under Section 212 not being used.

  The Court was of the view that Section 212 is focused at consumer protection to ensure the buyer is made aware that it is not required to settle before the Community Titles Scheme is fully established. To ensure compliance with

the Section the Court stated it is best to use the express wording provided in Section 212 and not just wording that *gives effect to* that Section.

**Conclusion**

Strict compliance with Section 212 of the Act is required in order to ensure that a buyer is not entitled to terminate a contract of sale for a strata lot sold off-the-plan. To ensure the contract of sale is drafted in accordance with Section 212, when stating timing for settlement the contract should use the exact wording of that Section being: **"settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed".**

Please note that this decision was determined in the Supreme Court of Queensland and may be overturned if appealed.

**Want to know more?**

Whether you are a Seller or Buyer, if you have any questions regarding any of the matters outlined above we would be happy to assist.

We can:

- provide you with advice on how to ensure your sale and purchase contract complies with the Act and the existing law; and
- handle the drafting and conveyancing process under the contract of sale to ensure these processes run smoothly.

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For further information, please contact:


Andrew Johnson
Partner
t: +61 (0)7 3135 0615
e: andrew.johnson@holdingredlich.com.au

Emily Hughes-Johnson
Lawyer
t: +61 (0)7 3135 0653
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The amendment will ensure that contracts cannot be cancelled based on a mere omission of reference (a technical breach) to the establishment of the community titles scheme on the condition that the building plan and community management statement have been lodged with the Registrar of Titles and settlement does not take place earlier than 14 days after the seller notifies the buyer that this process has been completed. In effect, the amendments will return both buyer and seller to the position they believed they were in - and both accepted - at the time of the signing of the contract.

I note you raise concerns about the possible effect of an amendment to section 212 of the Body Corporate and Community Management Act for consumer protection. The amendment the Government has made to section 212 does not diminish consumer protection; the existing protections of the legislation remain. The amendment restores the law to the position that was commonly accepted as applying in Queensland before the recent court decisions relating to section 212 were handed down and ensures certainty of contract while preserving consumer protection.

I trust this information is of assistance.

Yours sincerely

Peter Lawlor

**Peter Lawlor MP**
Minister for Tourism and Fair Trading

Our reference: 1090062 514347/1
Your reference:
Contact name: Imelda Bradley
Contact phone: 07 3239 3299
Facsimile: 07 3239 3046
E-mail: imelda.bradley@justice.qld.gov.au

Queensland Government

Office of the
**Director-General**

Department of
**Justice and Attorney-General**

- 1 MAY 2009

Senator the Hon Ian Macdonald
Opposition Spokesman on Northern Australia
Shadow Parliamentary Secretary for the North
PO Box 2185
TOWNSVILLE QLD 4810

Dear Senator

Thank you for your letter dated 6 March 2009 regarding changes to the design of apartments that you and a number of your constituents have contracted to purchase 'off the plan'; and the operation of section 212 of the *Body Corporate and Community Management Act 1997.*

Following the recent State Election, the provisions of the BCCM Act that your letter relates to now fall within the portfolio responsibilities of the Honourable Peter Lawlor MP, Minister for Tourism and Fair Trading.

I have referred your letter to the Office of the Minister for Tourism and Fair Trading for direct reply to you.

I trust this information is of assistance.

Yours sincerely

Rachel Hunter
**Director-General**

State Law Building
50 Ann Street Brisbane
GPO Box 149 Brisbane
Queensland 4001 Australia
**Telephone** (07) 3239 3520
**Facsimile** (07) 3239 3474
**Website** www.justice.qld.gov.au
ABN 13 846 673 994

**Senator the Hon. Ian Macdonald** Liberal - Queensland

131 Denham St (PO Box 2185) Townsville QLD 4810 Ph: 07 4771 3066 Fax: 07 4771 3411
Suite S1 38 Parliament House Canberra ACT 2600 Ph: 02 6277 3722 Fax: 07 6277 5914

Opposition Spokesman on Northern Australia - Shadow Parliamentary Secretary for the North

ldm.mjm

The Director General
Department of Justice and Attorney General
GPO Box 149
BRISBANE QLD 4001



Dear Director General,

I write to you in this caretaker period of Government in the absence of a Minister.

I, and a number of my constituents, have contracted to purchase *off the plan* for an apartment building in Townsville, presently under construction.

Without reference to other parties, the developer has substantially altered the design of the building so that it is now not what the parties contracted to purchase.

Expensive and lengthy litigation will follow as a result of this material change in the design of the complex.

A recent Supreme Court decision of Justice Kenneth Mackenzie in *Bossichix v Martinek Holdings* determined that contracts of the type my constituents have entered into were fatally flawed because they breached *Section 212 of The Body Corporate and Community Management Act*.

This ruling will allow an easy and inexpensive way for wronged purchasers to avoid the contract or to negotiate with the developer without having to go to the expense and time of a court case based on the question of material change of design.

However, in an article in the Townsville Bulletin on Wednesday 3rd December, 2008, it was reported that the Government may retrospectively change the law so that currently unsettled contracts need not comply strictly with *Section 212*.

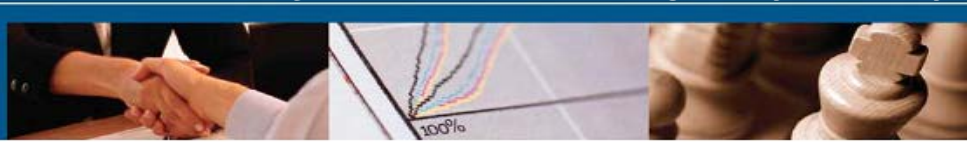
I seek your advice on whether or not it is contemplated that a change might be made to *Section 212*. Would this change be retrospective? Why would the Government retreat from what was clearly a consumer protection provision of the *Corporate and Community Management Act* intended to provide every protection to buyers of *off the Plan* units.

Your assurance of the permanency of the current law would help to avoid expensive and lengthy legal processes.

I, and my constituents, would appreciate your advices.

Yours sincerely,

Ian Macdonald
6th March, 2009



| QORE Use Only | |
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| File Ref: | |
| Due date | |
| Assessing Officer | |
| | |
| Approved | ☐ |
| Not approved | ☐ |
| Date | |
| Sign off | |

## Important Information for Departments

Section 43 of the *Statutory Instruments Act 1992* (SIA) provides that if proposed subordinate legislation is likely to impose an appreciable cost on the community or a part of the community, then, before the legislation is made, a regulatory impact statement (RIS) must be prepared.

The purpose of this form is to enable officers undertaking regulatory development activities to self assess the need for undertaking a RIS process in line with requirements of Part 5 of the SIA. A copy of the Act can be viewed at http://www.legislation.qld.gov.au.

Consideration of the need for a RIS should generally be commenced when the preferred policy option has been confirmed and identified as involving subordinate legislation. Guidelines with respect to processes and procedures associated with RIS requirements can be found at http://www.sd.qld.gov.au/dsdweb/v3/guis/templates/content/gui_cue_doc.cfm?id=5495. This form assists in the application of section 2.1 of the guidelines regarding seeking advice from the Queensland Office for Regulatory Efficiency (QORE) on whether proposed subordinate legislation requires a RIS.

Once completed, please forward the form to QORE at **ris.enquiries@sd.qld.gov.au** for evaluation. Clarification will be provided in writing from QORE, based on the information provided, on whether or not QORE considers that a RIS is required. A period of up to 15 working days should be allowed for QORE to provide written advice.

Please be aware that if the proposal assessed under this form changes prior to introduction, further consultation will be required with QORE.

**If you have queries about how to complete this form or need further guidance, please contact QORE on 322 44229**.

| **Form tips** | **1 Contact Details** |
|---|---|
| *Please provide an alternative contact if you will be unavailable during the assessment period.* | **Lisa Sarquis, A/Principal Policy Officer, Marketplace Strategy**<br>Phone: 3234 0179 Fax: 3405 4059 E-mail: lisa.sarquis@justice.qld.gov.au<br><br>**Ivan Catlin, Executive Manager, Marketplace Strategy**<br>Phone: 3239 6274 Facsimile: 3405 4059 E-mail: ivan.catlin@justice.qld.gov.au |
| | **2 Proposal Details** |
| | **Name of proposal:**<br>Amendment of the *Body Corporate and Community Management Act 1997*. |
| *Briefly describe the proposal, including any options being considered.* | **Objectives:**<br>To amend the *Body Corporate and Community Management Act 1997* provide for the purchaser of a lot in a community titles scheme to cancel a contract under section 212 of the Act if the contract the seller is required to give to the purchaser does not satisfy sections 212(3)(a) and 212(3)(b) and the purchaser would be materially prejudiced if compelled to complete the contract given the contract's inaccuracy. |
| | **Overview:**<br>The *Body Corporate and Community Management Act 1997* provides for flexible and contemporary communally based arrangements for the use of freehold land. |
| | **Legislative intent:**<br>The proposal will meet the objective by amending the *Body Corporate and Community Management Act 1997*. |

*What subordinate legislation is being amended or to be made by this proposal?*

**Proposed subordinate legislation:**
The *Body Corporate and Community Management Act 1997* is to be amended.

## 3 Stakeholder Identification

**List of stakeholders:**

- Solicitors
- Developers of community titles schemes
- Real estate agents
- Buyers of lots in community titles schemes

*Have stakeholders been consulted?*
*What was the nature of the consultation? Eg. targeted.*
*What feedback has been provided on the proposal (support/not support/partial support)?*

**Consultation undertaken with stakeholders.**
**Previous consultation:**
Nil

**Proposed consultation:**
Nil

## 4 Assessment of Proposal

***Guidance on the term 'Appreciable Cost' and examples of matters you should consider are provided in the attached guide.***

*Referring to analysis undertaken as part of your policy development process, please provide details of the likely impacts of your proposal for each identified stakeholder group in the categories identified below.*

*Eg. new fees, fee increases, increased costs of products and services*

*If your proposal includes a new or increased fee, have you consulted with Queensland Treasury?*

**a) Economic impacts:**

| Stakeholders | Impacts: |
|---|---|
| • Buyers of lots in community titles schemes | Purchasers of a lot in a community titles scheme will no longer be able to cancel a contract on the grounds of a technicality of wording (as demonstrated in Bossichix Pty Ltd v Martinek Holdings Pty Ltd [2008] QSC 278) subject to section 212 of the *Body Corporate and Community Management Act*. |

*Eg. employment, housing costs/availability, loss of community services*

**b) Social impacts:**

| Stakeholders | Impacts: |
|---|---|
| N/A | N/A |

*Eg. pollution (air, land, water & noise), habitat loss, watershed management, soil protection, vegetation management.*

**c) Environmental impacts:**

| Stakeholders | Impacts: |
|---|---|
| N/A | N/A |

*Guidance on fundamental legislative principles is provided in Section 7.2 of the Queensland Legislation Handbook (http://www.premiers.qld.gov.au.*

**d) Legal rights:**
N/A

## 5 Sensitive Policy Issues

**Is there any potential sensitivity associated with the proposal?**

☒ **Yes**
See proposed drafting instructions (attached).

☐ **No**

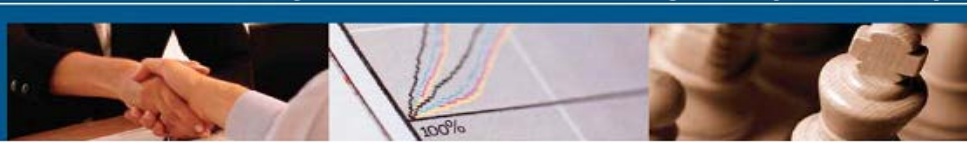
***Guidance on frequently***

## 6 Exemptions Under Sections 42 and 46 of the SIA

| | |
|---|---|
| ***identified provisions:***<br><br>*For s42 to apply, consultation on your proposed subordinate legislation must include requirements of a comparable level to the publication and consultation requirements under the SIA.*<br><br>*s46(1)(a) Eg. a matter of a machinery, administrative, drafting or formal nature.*<br><br>*s46(1)(g) A copy of any regulatory impact statement prepared for the legislation for national scheme purposes in the other jurisdiction will need to be tabled in Parliament along with the proposed regulation. (Section 6.11.1 of the Queensland Legislation Handbook - Uniform legislation http://www.premiers.qld.gov.au)*<br><br>*s46 (1)(j) The amendment to increase fees in line with the consumer price index is an example of this exemption. Documentary evidence of any other announced policy for the amendment of a fee, charge or tax should be provided to QORE in claiming this exemption.*<br><br>*s46(2) Eg. the subordinate legislation may need to be made urgently for controlling the spread of a disease or dealing with another urgent situation.* | **Do any of the following exemptions apply to your proposal?**<br><br>**Exemption under section 42 of the SIA**<br>☐ comparable consultation requirement<br><br>**Exemption under section 46(1) of the SIA**<br>☐ (a) not of a legislative character<br>☐ (b) does not operate to the disadvantage of any person<br>☒ (c) takes account of current legislative drafting practice<br>☐ (d) commencement of an Act or SL<br>☐ (e) does not fundamentally affect the legislation's application or operation<br>☐ (f) of a savings or transitional character<br>☐ (g) is substantially uniform or complementary with Cth/State legislation<br>☐ (h) adoption of an Australian or international protocol, standard, code or agreement where costs/benefits (relevant to Qld) have already been assessed<br>☐ (i) advance notice would enable someone to gain unfair advantage<br>☐ (j) amendment of a fee, charge or tax consistent with announced govt policy<br>☐ (k,l,m) a notice about a code under section 41 of the *Workplace Health and Safety Act 1995*, under section 44 of the *Electricity Safety Act 2002*; or under section 486A of the *Workers' Compensation and Rehabilitation Act 2003*.<br><br>**Exemption under section 46(2)of the SIA**<br>☐ against the public interest because of nature of the legislation or the circumstances in which it is made.<br><br>**If an exemption has been identified as applying, please provide the rationale.**<br><br>Due to a technical reading of section 212 of the *Body Corporate and Community Management Act*, if a particular phrase in a contract has not been worded exactly as required by section 212, then the whole contract is deemed to be in breach of the Act, giving the buyer the right to terminate (at its election) any time up until the day of settlement.<br><br>These proposed amendments will ensure purchasers of a lot in a community titles scheme will no longer be able to cancel a contract on the grounds of a technicality of wording subject to section 212 of the Body Corporate and Community Management Act. |
| | **7 Is a RIS Required?**<br><br>**If you have identified that your proposal is likely to impose appreciable costs and/or is sensitive in nature, and no exemptions apply, a RIS may be required (refer to s43 of the SIA).**<br><br>Do you believe the proposal imposes an appreciable cost on the community or a part of the community, therefore requiring a RIS?<br>☐ Yes ☒ No |

| | |
|---|---|
| | **Regulatory Savings**<br><br>**Does your proposal include initiatives that reduce the regulatory burden on business or other parts of the community?**<br>No |

| | |
|---|---|
| | **Please include any other relevant information, such as:**<br>• Drafting instructions;<br>• Publicly announced policy; or<br>• Media releases. |



# Guide to Completing Section 4 of this RIS Assessment Form

Section 43 of the *Statutory Instruments Act 1992* provides that if proposed subordinate legislation is likely to impose an appreciable cost on the community or part of the community, then, before the legislation is made, a RIS must be prepared.

*Without limiting its scope, the term 'appreciable cost' generally applies where proposals are likely to have a substantial negative impact, either directly or indirectly, on:*

- *individuals within the community;*
- *businesses and/or industry sustainability; and/or*
- *the community as a whole*

*from a social, economic and/or environmental perspective, taking into account the particular circumstances of stakeholder(s) concerned, and any negative public perceptions and sensitivities likely to be associated with a proposal.*

## Matters to be considered when assessing the impact of a proposal to identify appreciable costs

(referring to analysis undertaken as part of your policy development process)

The following provides a guide on examples of issues to be considered regarding potential impacts of a proposal. Whether or not the proposal imposes an appreciable cost on the community or a part of the community is not dependent on the number of yes's or no's to each of the points below. It is not intended to be a comprehensive list but rather a guide on potential issues to be considered.

**Extent of any impacts**

- Does the proposed regulatory change affect the Queensland community, or part thereof, uniformly or does it impact on different parts of the population in different ways?
- Is the proposal contentious or involve a sensitive policy matter?

## Economic Burdens

**Initial considerations**

- What is the 'total' financial cost of the change?
- What is the estimated financial cost of the change per affected stakeholder?
- Will the proposal involve financial impacts that may flow on as indirect costs to the community?

**Impacts**

- What are the impacts of the proposed changes (including duration, scope and intensity)?

| | |
|---|---|
| Business/industry sector | Examples of matters to consider include the following. Will the proposal:<br>• affect the viability of businesses?<br>• have a disproportionate affect on small business? If so what is the extent?<br>• have a negative impact on competition?<br>• impede the growth of a business/industry sector?<br>• limit business opportunities or innovation?<br>• reduce business access to skilled labor?<br>• make doing business in Queensland different from doing the same business in other states?<br>• lead to a loss of sales/revenue? |
| Community stakeholders | Examples of matters to consider include the following. Will the proposal:<br>• impose cost on business leading to a potential reduction of the work force?<br>• have a negative impact on the working conditions of workers (including safety, wages and entitlements)?<br>• have a negative impact on regional communities?<br>• generate a flow on cost to customers/consumers? |

| | |
|---|---|
| Community as a whole | Examples of matters to consider include the following. Will the proposal:<br>• impede investment attraction for Queensland?<br>• impact on Queensland's business competitiveness?<br>• affect Queensland's economic growth? |

## Social/Environmental Burdens

Determining the *social impact* to the community, or part of a community, of a proposed regulatory change requires working out if the proposal will have a negative effect on the social values of the community or on the way the community carries out their daily activities.

*Environmental harm* is any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.

**Impacts**

- What are the impacts of the proposed changes (including duration, scope and intensity)?
- Will the proposal involve impacts that may flow on as indirect social or environmental burdens to the community?

| | |
|---|---|
| Business/industry sector | The following are examples of issues to consider which, whilst some are directly linked to economic impacts, may also lead to an indirect social or environmental impact. For example, will the proposal lead to:<br>• a loss of development opportunity?<br>• displacement of business or industry?<br>• a decrease in business competitiveness?<br>• reduced on innovation in business? |
| Community stakeholders | Examples of matters to consider include the following. Will the proposal:<br>• lead to a displacement of the community, or part of a community?<br>• impact on residential amenity and/or quality of life?<br>impact on community resource use or availability (e.g. water and energy)?<br>• have negative impacts on particular groups within the community?<br>• affect the legal rights of any particular part of the community?<br>• impact on the affordability and/or availability of housing?<br>• lead to an increase in pollution (including water, air, land and noise pollution)?<br>• affect key processes for structuring of, or the maintenance of, biological diversity?<br>• have impacts on the hydrology/watershed management of an area?<br>• lead to a perceived increase of risk of crime?<br>• lead to a reduction in health and safety of the community?<br>• impact on religious/cultural sensitivities?<br>• impact more adversely on rural/remote residents? |
| Community as a whole | Examples of matters to consider include the following. Will the proposal affect:<br>• the future population growth of a community?<br>• sustainability of the community?<br>• an environmentally or culturally significant area or site? |

**BRIEF TO HONOURABLE CAMERON DICK, ATTORNEY GENERAL AND MINISTER FOR JUSTICE**

**BOSSICHIX PTY LTD V MARTINEK HOLDINGS HOLDINGS PTY LTD**

1) The present issue arises because of the recent Supreme Court decision in *Bossichix Pty Ltd v. Martinek Holdings Pty Ltd* [2008] QSC 278.

2) The decision concerned s.212 of the *Body Corporate and Community Management Act* 1997 ("BCCM Act").

3) The result of this case places at risk, hundreds if not thousands of similar off-the-plan contracts in Queensland: meaning that buyers throughout Queensland now have a new basis to terminate contracts of sale that are currently on foot.

4) The industry understands the importance of employment generation to the State. In any financial climate it is of paramount importance for off-the-plan contracts to settle. Given the current global financial crisis, it now is even more important that residential projects continue to be financially successful, the developers of those residential projects stay in business, and their employees, contractors and subcontractors stay employed and new job opportunities be opened up.

5) During this time of economic uncertainty, it is imperative that the lending institutions do not lose confidence to fund developments. It is simple: if there is no certainty around settlements this will lead to lending institutions declining applications for funding to developers for specific projects.

6) This issue also brings into play the issue of stamp duty revenue, something the State relies on to fund key projects and services.

7) s.212 of the BCCM Act in essence states that a buyer can terminate a contract of sale for a lot in a community titles scheme if the contract does not provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established.

8) Many contracts in Queensland have a clause in terms stating that – 'settlement will occur 14 days after the seller notifies the buyer that the building format plan is registered...'. The Manual of Land Title Practice kept by the Registrar of Titles in essence provides that the building format plan is lodged at the same time as the scheme is established. The practical effect being that the building format plan and the scheme were inextricably linked and that contracts therefore complied with s.212 of the BCCM Act.

9) The current situation created by the decision in *Bossichix Pty Ltd v. Martinek Holdings Pty Ltd,* means that due to a very technical reading of s.212 of the BCCM Act, if a particular phrase in the contract has not been worded exactly as required by s.212, then

the whole contract is now deemed to be in breach of the BCCM Act, giving the buyer the right to terminate (at its election) any time up until the day of settlement.

10) Off-the-plan contracts of sale are the basis for most developers to obtain finance for residential projects. Settlement of those contracts is essential to ensure the financial success of any residential project and the continued solvency of most developers.

11) Alarmingly, if an off-the-plan contract falls into the situation of the *Bossichix* decision, then there is nothing that a seller can do to remedy the contract, other than asking the buyer to amend the contract to make it strictly compliant with the BCCM Act. Obviously asking buyers to amend their contracts to make them compliant would place all buyers on notice that they have the right to immediately terminate their contracts. In this economic climate, that is not a commercially sound option.

12) Attached is advice from Barrister-At-Law, Mr Simon Couper QC about this decision and its effect on off-the-plan contracts of sale (references to the parties have been removed to protect confidentiality).

13) 90% of off-the-plan residential contracts throughout Queensland are affected by this decision and are now at risk of buyers terminating their contracts.

**Need for Immediate Legislative Intervention**

14) The *Bossichix* decision is currently on appeal. It is unlikely that the hearing of the appeal will occur before November 2009. Any decision from that appeal may not be handed down for between 12 - 18 months. This means that any decision on the appeal may not be handed down until as late as May 2011.

15) It is necessary to immediately restore certainty to the industry.

16) It is necessary to immediately restore certainty to off-the-plan contracts for residential apartments.

17) The amendments that would be required to satisfy a more stable legal position are not complicated.