

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 effect 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.