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A step by step guide to drafting off-the-plan contracts

Including an examination of a range of issues associated with off-the-plan contracts

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A step by step guide to drafting off-the-plan contracts

The following are the principal steps in the process and some of the issues that may be encountered along the way

1. Taking instructions

Many developer clients have unrealistic expectations about the time it takes to prepare a quality off-the-plan contract. In addition, they often fail to appreciate the extent of the information that will be required by their lawyer in order to prepare such a contract.

Therefore, the first thing a lawyer needs to do is to manage the expectations of the client. This is best done by clearly indicating what the client must produce in order to facilitate completion of the contract. This can be done in one of 2 ways –

- Produce a draft contract that clearly shows the missing information
- Provide a detailed check-list of the required information.

Appendix A is an example of such a check-list.

At the same time a realistic timetable should be prepared taking into account the likely timing of the provision of information required from the client. This approach will often alert the client to the fact that the contract will not be available until "next month" rather than "next week". However, it is best that the client comes to that realization earlier rather than later so that necessary adjustments can be made to the marketing program in a timely manner.

2. Description of the lot

If the lot being sold is not described with sufficient certainty the contract may be void. Because the lot and the plan that will define it are not in existence, the starting point for the description is the land on which the project is being developed. This land (the "Parcel") must be precisely defined with reference to its title description.

> *"**Parcel**" means lot 100 on SP 1234 and lot 101 on SP 4321*

If only part of the land is to be used for the project, then a draft of the plan to subdivide that part should be used.

> *"**Parcel**" means the proposed lot 1on the draft survey plan in annexure A, being part of lot 100 on SP 1234 and lot 101 on SP 4321*

Once the Parcel has been defined it is then necessary to define the lot ("Property") being purchased. This requires reference to a draft survey plan or building format plan. Ideally, the entire plan should be included so that the buyer can identify both the lot and the common property. If the building is too large, then selective pages of the plan can be used, but it is important that the level, shape and orientation of the lot are clearly discernable from the pages used.

Where possible, car spaces and storage areas should be part of the lot and not allocated by means of an exclusive use by-law. Although this makes it difficult for lot owners to subsequently "swap" these areas, it does ensure a much more secure system of title and as time progresses I believe that this will be reflected in the valuation process for residential property.

Including these areas as part of the lot does not mean that the developer looses flexibility in the allocation of these areas during the marketing process. This flexibility can be preserved by identifying the spaces as separate areas on the draft building format plan (e.g. by reference to "A", "B", etc.). All that is required is to ensure that allocations made during the sales process are carefully tracked to ensure that a particular space is not allocated more than once.

In summary, the Property can include a lot and an exclusive use space –

> *"**Property**" means the proposed community title lot 5 shown on the Building Format Plan and the right to exclusive use of car space 11 shown on the Exclusive Use Plan, to be known as unit 5 "Ocean View", 7 Smith Street, Manly.*
>
> *"**Building Format Plan**" means the draft building format plan proposed to be registered in respect of the Parcel, being the plan in annexure B.*

Alternatively, Property can be confined to the lot –

> *"**Property**" means the proposed community title lot 5 shown on the Building Format Plan, to be known as unit 5 "Ocean View", 7 Smith Street, Manly.*

> *"**Building Format Plan**" means the draft building format plan proposed to be registered in respect of the Parcel, being the plan in annexure B.*

Technically, the approaches discussed so far may be adequate to ensure that the contract is not void for uncertainty. However, in a commercial sense, they may not give the buyer sufficient comfort as to what is actually being purchased. Buyers will often require a floor plan so that they can be certain of the room layouts and fit-out items (such as cupboards, benches, etc.). Including a floor plan and possibly an elevation showing the location of the unit will usually make the contract more "buyer friendly" and reduce the time taken to obtain the buyer's signature. The important thing from a developer's point of view is not to include too much detail on these plans. This detail will restrict those inevitable adjustments that will need to be made because of the contingencies of construction. For example, it is not a good idea to include dimensions of rooms.

The definitions can easily be modified to accommodate this additional plan –

> *"**Property**" means the proposed community title lot 5 shown on the Building Format Plan, to be known as unit 5 "Ocean View", 7 Smith Street, Manly, and approximating the unit shown on the Building Plans.*
>
> *"**Building Plans**" means the proposed plans of the building intended to be subdivided by the Building Format Plan, being the plans in annexure C.*

These building plans are often copies of the floor plans used for marketing purposes. Where units follow a pattern on the different levels of the building, the unit can often be identified with reference to a unit type (e.g. "Unit type B on level 5"). This reduces the number of pages in the Building Plans.

> ***The following cases can be referred to as a guide to the type of detail required when describing proposed lots –***

> - *Williams & Anor v. King & Anor (1995) ANZ ConvR 104*
> - *Lanlex No 29 Pty Ltd v. Leach (1997) NSW ConvR ¶55-808*
> - *Wait & Anor v. Reed & Anor (1997) ANZ ConvR 455*

3. Stakeholders and deposits

Deposits are usually paid or secured in one of 3 ways –

- In money

- By bank guarantee
- By deposit bond.

If deposits are paid in money, then, according to section 23 of the *Land Sales Act 1984* ("**Land Sales Act**"), the money must be paid to any of the following to be held in a trust account –

- The Public Trustee
- A law practice
- A real estate agent licensed under the *Property Agents and Motor Dealers Act 2000* ("**PAMDA**")
- A real estate agency in which a real estate agent carries on business.

A decision needs to be made as to who is to be the stakeholder. The stakeholder is usually required to invest the deposit on the basis of agreed arrangements about payment of interest.

Developers and their lawyers need to keep the following in mind –

1. If the developer's lawyer is the nominated stakeholder, then in the event of the buyer defaulting the lawyer will most likely have to cease acting for the developer on that particular sale. This is because, as stakeholder, the lawyer will at that point owe a duty to both the seller and the buyer in relation to the deposit and this conflict can usually only be resolved by the lawyer ceasing to act for the seller.
2. If during the course of the transaction it was necessary or desirable to call on a bank guarantee or deposit bond the funds should be payable to the stakeholder and not the seller, otherwise section 23 of the Land Sales Act may be breached. Therefore, bank guarantees and deposit bonds should be made in favor of a stakeholder and not the seller.

> ***Practice Pointer***
> *The marketing agent is usually the best person to hold cash deposits, bank guarantees or deposit bonds unless the developer has a particular reason not to use the marketing agent in this way.*

4. Drafting the Contract

Contract v. Disclosure Statement

It is preferable to keep the Contract and Disclosure Statement as separate documents because–

- The Contract (commonly regarded as the "serious" document) looks less formidable
- The Disclosure Statement (being substantially the larger of the two) is regarded as an information document and less threatening.

Section 215 of the *Body Corporate and Community Management Act 1997* ("**BCCM Act**") says that the disclosure statement and any re-disclosure statement, including accompanying materials, form part of the contract. However, it is suggested that the contract should expressly incorporate the disclosure statement into the contract, notwithstanding that statutory provision. This is because these days disclosure statements contain vastly more information than that required by the BCCM Act and it is best to avoid any argument that the statutory provision only incorporates the contents relevant to the statutory disclosure items.

Sunset date

There must be a time (sunset date) at which the parties are discharged from the contract. Section 27 of the Land Sales Act gives the buyer the right to cancel the contract if a registrable instrument of transfer is not given to them within 3½ years after the making of the contract. This time can be extended to not more than 4½ years in respect of a particular project by regulation (vide section 28 of the Land Sales Act). A special notice must be given under that Act where an extension has been gazetted.

These provisions should be kept in mind when deciding on the sunset date. They are particularly relevant where:

- Delay in commencement of construction is anticipated
- The building is exceptionally large, necessitating a long construction period
- The project is being developed in stages and lots in later stages are being sold well in advance of those stages being commenced.

Time for settlement

Settlement is usually triggered by a notice from the seller to the buyer advising that the building format plan has been registered. It usually follows 14 days after that notice is given. It is important to note that section 212(1) of the BCCM Act requires the contract to "*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*". This raises the question whether it is sufficient for the contract to provide that settlement will take place 14 days after the notice is given or whether there should be an actual prohibition against settlement taking place before the 14 day period expires. Given that failure to comply with section 212(1) gives the buyer the right to cancel the contract any time before settlement, it is suggested that the provision should incorporate a prohibition.

> ***Normal provision:***
>
> *"Settlement of this contract is required 14 days after the day on which the Seller gives the Buyer notice that the Building Format Plan has been registered."*
>
> ***Recommended provision:***
>
> *"Settlement of this contract is required 14 days after the day on which the Seller gives the Buyer notice that the Building Format Plan has been registered and must not occur before expiry of those 14 days."*

Re-disclosure time limit

If it is necessary to give a further statement to rectify inaccuracies in an earlier disclosure statement, then section 214(2) of the BUGT Act requires the further statement to be given "*within 14 days (or a longer period agreed between the buyer and seller) after subsection (1) starts to apply*". In turn, sub-section (1) starts to apply when the seller becomes aware that the information in the earlier statement is inaccurate.

In practice it is difficult to meet the 14 day time requirement, so it is recommended that the contract incorporate an agreement between the seller and buyer extending that period.

Implied warranties

Section 223 of the BUGT Act contains a number of implied warranties that are potentially of concern to developers and their financiers.

Section 223(2) implies in every contract for sale of community title lots (which includes "proposed lots"), the following warranties which must be satisfied **as at the date of the contract**:

1. To the seller's knowledge, there are no latent or patent defects in the common property or body corporate assets, other than the following –

   (a) defects arising through fair wear and tear;

   (b) defects disclosed in the contract.

2. The body corporate records do not disclose any defects to which the warranty in 1 above applies.

3. To the seller's knowledge, there are no actual, contingent or expected liabilities of the body corporate that are not part of the body corporate's normal operating expenses, other than liabilities disclosed in the contract.

4. The body corporate records do not disclose any defects to which the warranty in 3 above applies.

In addition to these warranties, section 223(3) of the BCCM Act implies a warranty by the seller that, as at the completion of the contract, to the seller's knowledge, there are no circumstances (other than circumstances disclosed in the contract) in relation to the affairs of the body corporate likely to materially prejudice the buyer.

While some comfort can be taken from the limitation of some warranties to "*the seller's knowledge*", that comfort is eroded somewhat by section 223(4) that says a seller is taken to have knowledge of a matter if the seller had actual knowledge "*or ought reasonably to have had knowledge of the matter*".

Clearly, there is an issue in relation to the 4 warranties that apply as at the date of the contract in respect of proposed lots. As at that date there is no body corporate and therefore the warranties cannot operate, unless a court is prepared to depart from the literal interpretation of the section. In *Gelski v. Dainford Limited* (1985) NSW Title Cases ¶30-061 the NSW Supreme Court held that similar warranties in a sale contract could not operate in respect of a proposed lot.

It is therefore likely that the warranty in section 222(3) is the only one that can apply in the case of proposed lots. If there are likely to be any circumstances arising out of the development or the establishment of the body corporate that might materially prejudice the buyer at settlement, then those circumstances should be disclosed in the contract. Otherwise, care needs to be taken by the developer to establish the body corporate in a proper manner so as to ensure that no such circumstances come into existence.

Discounts, rebates and penalties

Contracts sometimes provide for discounts, rebates or penalties in certain circumstances.

> *If the buyer settles on time the price will be reduced by 5%*
>
> *If the buyer does not settle on time the buyer must pay interest on the balance of the price*
>
> *The seller will pay the buyer's stamp duty*
>
> *The seller agrees to rebate the amount of $30,000 upon settlement*

Occasionally, after the contract is signed the seller will agree (usually by letter) to compensate the buyer for something by reducing the price by a specified amount.

If the deposit paid is 10% of the gross contract price (i.e. the contract price before any reduction or rebate), then the question arises whether the "*purchase price payable*" (within the meaning of the definition of "deposit" in section 71 of the *Property Law Act 1974*) is the gross price or the discounted price. If it is the discounted price, the deposit exceeds 10% of the price, arguably making the contract an instalment contract for the purposes of Part 6 Division 4 of that Act.[1] An instalment contract –

- Imposes restrictions on the right of the seller to rescind[2]
- Attracts a restriction on the seller mortgaging the land[3]
- Gives the buyer the right to lodge a caveat[4]
- Gives the buyer the right, in certain circumstances, to require a conveyance of the property[5]
- Gives the buyer the right to require the seller to deposit the title deeds and an instrument of transfer with a prescribed authority[6]

There are a number of cases that assist in deciding how to deal with discounts, rebates and penalties. In the *Starco Developments Pty Ltd –v- Ladd* [1998] QCA 344 a contract was varied by the parties (as to the date for settlement) in consideration of the purchaser paying interest on the unpaid price at 22% per annum from a specified date and also

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[1] It may be argued that Part 6 Division 4 of the *Property Law Act 1974* does not apply to off-the-plan contracts, but in my opinion this would be a difficult argument to sustain.
[2] Section 72
[3] Section 73, which also give the buyer the right to void the contract at any time before completion if this restriction is breached by the seller.
[4] Section 74
[5] Section 75
[6] Section 76

agreeing to "bear outgoings" from the same date. The Court held that the requirement to pay interest resulted in the contract becoming an instalment contract. Although the Court did not have to decide the consequences of the outgoings obligation, *de Jersey CJ* said (at par 10 of his judgment):

> *"Because of my view expressed earlier, it is also not necessary to deal with the respondents' separate contention that their becoming obliged to bear additional outgoings brought the case within s.71, although I may say that I did not find that particularly meritorious. I would not be inclined to interpret clause 6 of the addendum as requiring payment of outgoings prior to settlement as they fell due. I would tend to prefer the construction adopted by the learned judge, which left the position as established in the usual way by the original agreements, with the requisite apportionment being made at settlement. But as I have said, it is not necessary for me to express a concluded view on that matter."*

This suggests that His Honor would have concluded that moneys to be paid on completion of the contract do not constitute payments within the meaning of the definition of "installment contract".

In the same case, Thomas JA held that a clause (35) requiring payment of interest "upon demand" and if not demanded "upon settlement" did not make the contract an installment contract. He said at par 24 of his judgment:

> *"The respondent also referred to cl. 35 of the contract as a basis for concluding that the contract was an installment contract. I would reject that submission. Clause 35 did not bind the purchaser to pay any money unless a demand were made. The vendor at no stage made a demand under that clause. In the absence of such a demand, in the event that the vendor kept the contract alive beyond the initial settlement date, money would be payable thereunder only upon settlement. In the event, the parties proceeded not under cl. 35 but by means of the addendum agreement."*

In *Moor v. BHW Projects Pty Ltd* [2004] QSC 60 Mackenzie J held that a contract provision giving a rebate against the price that was effective upon payment of the deposit (being 10% of the un-rebated price) had the effect of making the contract an instalment contract. He said at paragraphs [31] and [36] of his reasons:

> *"It appears to be settled law that if a deposit required in the case of an executory contract is greater than 10% and the purchaser does not have an entitlement to receive a conveyance in exchange for the payment, the contract is caught by the definition of "instalment contract" in s 71 (Emlen Pty Ltd v Cabbala Pty Ltd [1989] 1 Qd R 620, where Ryan J cited earlier authority where the principle was discussed if not authoritatively decided). The issue in this case is one of construction of the contract in light of that principle."*
>
> .....
>
> *"The case is not one where the problem of whether a variation of the contract has the consequence that there is an instalment contract. It is a case where the issue is construction of the contract as entered into. As a matter of construction of the contract, provided the purchaser carries out the obligation to which she is bound under it to pay the deposit, the price she will have to pay at the time of settlement will be $242,500, not the "purchase price" of $247,500. The obligation to pay $24,750 deposit is a contractual term. There is an executory contract for the sale of land in terms of which the purchaser is bound to make payment which exceeds the criteria of "deposit" as defined by the Act without being entitled to receive a conveyance in exchange for payment. There is therefore an instalment contract. It is unnecessary to consider the applicant's other argument in the circumstances, since it is designed only to reach the same conclusion by a indirect route."*

Using the reasoning in *Starco Developments* and *Moor*, any rebate of the gross price upon settlement of a contract only takes effect at that time. The gross price remains the same until settlement and at the time of settlement the seller accepts the balance of the gross price less the rebate. This would mean that the "purchase price" referred to in the definition of "deposit" is the gross price because this is the price payable at all times until settlement. Therefore, at no point in time before settlement does the deposit exceed 10% of the gross price.

If the reduction in price is agreed between the parties after the contract has been entered into, then slightly different principles may apply. If the reduction only takes effect as at settlement, then the above principles apply. If it takes effect between the date of the contract and settlement, then the position may be different depending upon whether the arrangement is a "side agreement" independent of the contract or a variation of the contract. If the former, then the contract is arguably unaffected (see *Kaneko –v- Crawford* [1995] QCA 384 and *Starco Developments*). If it is the latter, then the contract is likely to be an installment contract.

What does this mean to developer's lawyers and marketing agents who are asked to insert provisions in contracts giving discounts or rebates or imposing penalties?

> ***Practice Pointer***
> *These types of provisions must be carefully drafted to ensure that they do not take effect until the point of settlement of the contract.*

Powers of attorney

Section 219 of the BCCM Act provides that a power of attorney given by a buyer to a seller of a proposed lot may only be exercised in the ways and for the purposes disclosed in a written statement given to the buyer before the power is given. The statement must include a detailed description of the circumstances in which the power can be exercised. Any such power of attorney, unless it expires sooner, expires 1 year after the community titles scheme is established.

Care should be taken to comply with these provisions if a power of attorney is to be incorporated in a contract. The statement may form part of the disclosure statement under section 213 of the BCCM Act.

Foreign interests

Developers of 10 or more residential lots may apply to the Foreign Investment Review Board ("**FIRB**") for advance approval to sell up to 50 per cent of new residences to foreign interests. Developers are required to provide a copy of their approval letter to each prospective purchaser and to report all sales (Australian and foreign) to FIRB on an annual basis until all lots have been sold or occupied.

Where such approval has been granted, it is not necessary for individuals to apply for FIRB approval. If the developer has not sought advance approval, then the individual investor must seek approval.

For reporting purposes the contract should enable the seller to determine the residential status of the buyer and whether there was any need for FIRB approval before the contract is entered into.

Information Sheet and Warning Statement

Section 366(1) of PAMDA requires residential Contracts to have as their first or top sheet an approved form of warning statement containing the information required by section 366(3). The warning statement must be signed and dated by the buyer under the contract before the contract is signed.[7]

Section 213(5) of the BCCM Act provides:

[7] Vide section 366(5) of PAMDA

> *"(5) The seller must attach an information sheet (the **information sheet**) in the approved form to the contract—*
> *(a) as the first or top sheet; or*
> *(b) if the proposed lot is residential property under the Property Agents and Motor Dealers Act 2000—immediately beneath the warning statement that must be attached as the first or top sheet of the contract under section 366 of that Act."*

In the case of off-the-plan contracts for the sale of residential lots the **information sheet** should be assembled as the second page of the Contract. If this is not done section 213(6) of the BCCM Act comes into play, which provides:

> *"(6) The buyer may cancel the contract if—*
> *(a) the seller has not complied with subsections (1) and (5); and*
> *(b) the contract has not already been settled."*

Sub-section (1) is the subsection requiring the issue of a disclosure statement complying with sub-sections (2) to (4). (Disclosure statements are discussed at paragraph 5.)

It is unlikely that the legislature intended non-compliance with both sub-sections 213(1) **and** (5). It is more likely that the intention was that **either** sub-section is not complied with **and** the contract has not yet settled. However, use of the words "subsections (1) **and** (5)" [emphasis added] in section 213(6) will preclude that intention unless the Court is satisfied that "and" should be read as "or". This raises the question of "purposeful interpretation".

Under the principles of purposeful interpretation Courts may have regard to the purpose of a particular legislative provision and not give the words being interpreted a meaning that would defeat that purpose. A Court may prefer a construction that achieves the legislative purpose rather than one that frustrates that purpose. *New South Wales –v- Macquarie Bank Limited* (1992) 30 NSWLR 307 (CA); *Nokes –v- Doncaster Amalgamated Collieries Ltd* [1940] AC 1014.

To some extent this is given statutory sanction in Queensland by section 14A of the *Acts Interpretation Act 1954*. Despite this, the Courts will still apply the ordinary and grammatical meaning of words unless to do so would give them a meaning that was clearly not intended. *Kingston –v- Keprose Pty Ltd* (1987) 11 NSWLR 404; *Mills –v- Meeking* (1990) 169 CLR 214; *Cooper Brookes (Wollongong) Pty Ltd –v- Commissioner of Taxation (Cth)* (1981) 147 CLR 297 and *Cattow –v- Accident Compensation Commission* (1989) 167 CLR 543.

So far as reading "or" for "and" is concerned, there have been occasions where a Court has been prepared to do this. See *Re the Licensing Ordinance* (1968) 13 FLR 143 at pp.

146-7 for an examination of the authorities. However, generally speaking, it is clear from the authorities that the Court would need to be satisfied that the legislature had made a mistake and the result would be absurd or unintelligible if "and" was given its natural meaning. See *R. –v- Oakes* [1959] 2 QB 350; *Barker –v- Barker* (1976) 13 ALR 123 and *Re Trade Practices Tribunal; Ex parte Tooheys Ltd* (1977) 16 ALR 609.

It is possible that the Court would give the word "and" in section 213(6) its ordinary and grammatical meaning. This is because there is no need to give it another meaning to ensure the provision is not absurd or unintelligible. In that event, the Buyers would not have a right to cancel the subject Contract because only one of sub-sections 213(1) and (5) was not complied with by the Seller.

However, the position is arguable and it is an argument that should be avoided by ensuring that both the warning statement and information sheet are correctly placed on the contract.

> ***Practice Pointer***
> *To avoid movement and uncertainty, the pages of the contract (including the warning statement and information sheet) should be bound. Care should also be taken to ensure that the latest versions of both those forms are used. The forms must be the correct versions at the time the contract is signed by the buyer (see Divine Limited v. Timbs [2004] QSC 24).*

5. Disclosure statement

Section 213(2) of the BCCM Act lists the information that must be disclosed to buyers of "proposed lots". While the requirements look simple enough there are a number of difficult issues arising out of the wording of section 213. It is important to be aware of these because failure to comply with the requirements may give the buyer the right to cancel the contract.

Annual contributions

The statement must set out the amount of annual contributions "reasonably expected" to be payable to the body corporate by the owner of the proposed lot. The following should be noted about this requirement:

- During a body corporate's first year its operating expenses are much lower than in subsequent years because plant and equipment (and to some extent the common property generally) is covered by various warranties. For example, there are no lift maintenance costs during that year.

- It is common practice for developers to only disclose the annual contributions for the first year.

- Developers almost invariably ensure that the body corporate budget is kept artificially low for the first year so as to keep the contributions low and thereby facilitate marketing. This applies particularly to the sinking fund. For example, it is not uncommon for contributions for years 2 and 3 to be twice or more than the disclosed contributions for year one.

- It is not clear whether the disclosure should be restricted to annual contributions for the first year or whether it should include 2 or more years. Given that the intent of the disclosure is to ensure that the buyer is aware of what they will have to pay for contributions, it is clearly arguable that it is misleading to confine the disclosure to the first year and the disclosure should at least extend to the second year.

This raises the question whether the current practice of developers disclosing low contributions for only the first year can be said to satisfy the "reasonably expected" test. I suspect that it does not. This would make the disclosure statement "inaccurate". I also suspect that, in many cases, buyers may be able to then establish "material prejudice" and cancel their contracts. (However, see the discussion below about "substantially complete" and "inaccuracies".)

Leaving aside the risk of cancellation, there is also a risk of the seller being liable for damages for breach of warranty. Section 216 says the buyer may rely on the information in the disclosure statement "*as if the seller had warranted its accuracy*". Also, there is nothing to restrict that provision from surviving settlement of the contract and there is no need to establish "material prejudice".

> ***Practice pointer***
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> *Developer clients should be made aware of the risks involved in disclosing low contributions and encouraged to insist on proper longer term budgeting, including 10 year sinking fund analysis.*

Service contractors

Certain information must be disclosed in relation to "service contractors" where they are to be engaged after the scheme is registered. Building managers are universally identified as service contractors and developers always disclose information relevant to them. However, the definition of service contractors is very wide and care needs to be exercised to ensure that disclosure is made in respect of all of them.

A "service contractor" is described as a person engaged by the body corporate (other than as an employee) for a term of at least one year to supply services (other than administrative services) to the body corporate for the benefit of the common property or the lots.[8] Potentially this includes such things as lift maintenance, cable television supply, fire safety or security monitoring and garbage removal.

> ***Practice pointer***
>
> *Ensure that all contracts proposed to be entered into by the body corporate after its establishment but before settlement are properly disclosed OR that entry into the contracts is delayed until such time as the owners can make their own decision in relation to them. In the case of the latter, the decision will need to be made at a general meeting and competitive quotes will be needed.*

Disclosing the "terms" of contracts

Apart from contracts with service contractors, contracts with a body corporate manager and authorizations of a letting agent must also be disclosed. The obligation is to disclose, inter alia, the "terms" of the engagement or authorization. However, the provisions of any Code of Conduct that are implied in a service contract or body corporate manager's agreement need not be disclosed.[9]

It is suggested that this effectively requires disclosure of a copy of the proposed contract or authorization. That copy should incorporate all of the proposed terms, not just the main terms. However, it would not necessarily require the disclosure of the contractor or appointee because this is not a "term" of the document. This means that a seller can reserve the right to choose the contractor or appointee in the usual way.[10] This reservation is commonly done in the disclosure statement.

Body corporate assets

We often see sales brochures telling buyers that the building will have a fully equipped gymnasium or an eloquently decorated and furnished foyer, yet when we look at the

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[8] Section 15 of the BCCM Act.

[9] See sections 118 and 213(2)(b)(i) of the BCCM Act.

[10] In *Gold Coast Carlton Pty Ltd –v- Wilson & Ors* (Qld Titles Cases ¶30-072) a requirement in section 49(2)(d) of the Building Units and Group Titles Act 1980 to disclose "details" of any management agreement was held by the Full Court of the Supreme Court of Queensland to require inclusion of the name of the contracting party. (See the comments of Andrews SPJ at page 50,532 and G.N. Williams J. at page 50,536.) Paragraph (e) of the same subsection of that Act required the "proposed by-laws" to be disclosed and a mere disclosure of the variations between the statutory by-laws, without setting out the statutory by-laws, was held not to constitute compliance. (See the decision of the Full Court of the Supreme Court of Queensland in *Silverton Limited –v- Shearer & Anor* (Qld Titles Cases ¶30-062) and the decision of the High Court in *Deming No 456 Pty Ltd & Ors v. Brisbane Unit Development Corporation Ltd* (Qld Titles Cases ¶30-061).

disclosure statement it does not refer to any body corporate assets or shows them as "Nil" or "Not Applicable". Does this mean that the disclosure is inadequate?

Section 213(2)(d) requires the statement to disclose "*details of all body corporate assets proposed to be acquired by the body corporate after the establishment… of the scheme*". Body corporate assets can be acquired by purchase or gift.[11] The critical issue is when the assets are acquired. In practice most building format plans are registered before any furniture or gym equipment are put in place. Even where the items are in place at the time of establishment of the scheme they would be acquired by the body corporate momentarily after the scheme was established on the principal that they could not have been acquired by the body corporate before it came into existence. Therefore it seems reasonably clear that such items must be disclosed in the disclosure statement.

Authorized signatory

The disclosure statement must be signed by the seller or a person authorized by the seller. It is suggested that an authorization should be in writing and any authorization by a company should be supported by a resolution of its Board or the act of a director acting within authority.[12]

Cancellation

Because of a difference between a disclosed community management statement and a registered community management statement, or because of an inaccuracy in the disclosure statement, a buyer, if materially prejudiced, can cancel the contract. Time limits apply to the cancellation.

The following should be noted about these provisions:

- This right of cancellation is independent of the right of cancellation for the seller's failure to provide the statement in accordance with section 213 of the BCCM Act. Therefore this right of cancellation does not suffer from the "and/or" problem identified above.[13]

- The right of cancellation can survive for up to 3 days before the settlement date.

[11] This is clear from section 144 of the Standard Module which requires the body corporate to maintain a register of body corporate assets and to record in that register, inter alia, "*whether the asset was purchased or was a gift*".
[12] See *Sunbird Plaza Pty Ltd v. Boheto Pty Ltd* (¶30-042 Qld Titles Cases) and *Sunbird Plaza Pty Ltd v. Beattie & Anor* (¶30-043 Qld Titles Cases).
[13] See paragraph 4 under the heading "Information Sheet and Warning Statement".

6. Community management statement

A disclosure statement must be accompanied by the proposed community management statement for the scheme and, if the scheme will be a subsidiary scheme, the community management statements or proposed community management statements for the higher schemes.[14] Sometimes it will be difficult to anticipate exactly what will be in the first community management statement (e.g. the service location diagram will be difficult to prepare accurately off-the-plan). So how complete and accurate does the draft statement have to be?

Two provisions are relevant:

- Section 213(4) – the disclosure statement must be "substantially complete".
- Section 213(7) – the disclosure requirements are satisfied if the disclosure statement, although substantially complete as at the day the contract is entered into, contains inaccuracies.

While the words "substantially complete" have been considered in a number of contexts, no definite meaning is clear. However, a number of principles emerge from the cases. First, to talk about something being "substantially complete" implies that something is outstanding. *Bowery –v- Babbitt* 99 Fla. 1151. The term "substantially" connotes "in the main" or "essentially". Per Ambrose J. in *Re Bonny* [1986] 2 Qld R 80 at 82. Substantial completion would also involve completion to an extent necessary to achieve the purpose of the legislative provision. *Aetna Cas. And Sur. Co. –v- Butte-Meade Sanitary Water District* 500 F.Supp 193.

A requirement for there to be "substantial" compliance with legislative formalities indicates an intention to allow a degree of discretion. When the term is used in a quantitative sense it does not necessarily mean "most", but may mean only "much" or "some". *Terry's Motors Ltd –v- Rinder* [1948] SASR 167 at 180. See also *Re Cashin* [1992] 2 Qld R 63. Dean J. in *Tillmanns Butcheries Pty Ltd –v- Australasian Meat Industry Employees Union* (1979) 42 FLR 331 at p.348 observed that "substantial is a word calculated to conceal a lack of precision". In a relative sense substantial means considerable. *Radio 2UE Sydney Pty Ltd –v- Stereo FM Pty Ltd* (1982) 44 ALR 557.

This suggests that completeness will be a question of degree, although the addition of "substantial" suggests that any missing material would be comparatively small and minor. Then there is the question of "inaccuracy". Is an incomplete disclosure statement inaccurate? Arguably, incompleteness is simply a factor or circumstance that gives rise to inaccuracy. To be accurate a thing must be "conforming exactly with the truth or with a

[14] Section 213(2)(e) of the BCCM Act.

given standard" (*The Australian Concise Oxford Dictionary*, 3rd Edition). If it fails to conform because something is missing, then it is inaccurate.

There is nothing in Chapter 5, Part 2, Division 2 of the BCCM Act (which is the Division in which section 213 is situated) that would suggest that anything other than the ordinary meaning of "inaccurate" should apply. Indeed, the contrary is arguable. Sections 213, 214 and 217 in particular have been included to protect buyers by ensuring that they are given accurate information relevant to their purchase. If they are given inaccurate information and they are materially prejudiced, then they can cancel their contracts.[15] If the information they are given is incomplete and they are materially prejudiced as a result, it is entirely consistent with the intention of the legislative provisions that the incompleteness be regarded as an inaccuracy, with the resulting consequences for the seller.

All this suggests that any leeway available as a result of these provisions is very difficult to quantify and cautious sellers will be concerned to ensure that a draft community management statement forming part of a disclosure statement is as complete as it can possibly be at the time it is prepared. Indeed, it would be best for it to contain some item of information rather than it being left blank, because then there will be the opportunity to re-disclose when the position becomes clearer.

The buyer's right of cancellation arises if the registered statement is "different" from the proposed statement most recently advised to the buyer and the buyer is materially prejudiced.[16] No question of materiality arises.

> ***Practice pointer***
>
> *Where material changes are proposed to a disclosed community management statement it is important to ensure that the final form of statement is re-disclosed to the buyer so that there will be no "difference" between that form and the registered form that can trigger a right of cancellation.*

The final point relates to the allocation of lot entitlements. Interest schedule lot entitlements must be allocated according to the respective values of the lots unless it is just and equitable for them to be allocated on a different basis.[17] This does not usually present a problem because the allocations can be made on the basis of the list prices of the units.

Unfortunately, the position in relation to contribution schedule lot entitlements is not so clear. The BCCM Act originally had no special requirement about how these entitlements

[15] Section 217 of the BCCM Act.
[16] Section 217 of the BCCM Act.
[17] Section 46(7) of the BCCM Act.

were to be allocated. However, it did provide for them to be adjusted by the District Court on application by a lot owner.[18] In considering that application the Court was bound by the principal that the contribution schedule lot entitlements were to be equal "*except to the extent to which it is just and equitable in the circumstances for them not to be equal*".[19] The BCCM Act was amended (effective 4 March 2003) by the *Body Corporate and Community Management and Other Legislation Amendment Act 2003*. Those amendments introduced the same principle for the original allocation of contribution schedule lot entitlements as previously applied to a court adjustment, namely, they must be equal except to the extent to which it is just and equitable in the circumstances for them not to be equal.[20] The amendments also introduced guidelines as to how the "just and equitable" principle should be applied.[21] The explanatory notes to the Bill for that Act made it fairly clear that inequality will be the exception rather than the rule. In particular, clause 10 of the Bill, which dealt with the amendment of section 44 (now section 46) of the BCCM Act said:

> *"Clause 10 amends section 44 to change the requirements for the number that is allocated for the contribution schedule lot entitlement.*
>
> *The change is intended to reinforce the concept that usually all lot owners are equally responsible for the cost of upkeep of common property and for the running costs of the community titles scheme. However, it is recognised that there are many valid instances where the contribution schedules do not have to be equal. The amendment provides that usually the numbers in this schedule are equal, unless it can be demonstrated that it is just and equitable for there to be inequality.*
>
> *The need for difference is best shown by examples.*
>
> *Example 1 Where a basic community titles scheme contains lots having different uses, for example a combination of residential and business lots (restaurants, small shops and the like) the contribution schedule can be different to reflect the higher maintenance and utilities use of the shops in comparison to lower requirements for the residential lots.*

[18] Section 46 of the BCCM Act as it was prior to 4 March 2003.
[19] Section 46(1) of the BCCM Act.
[20] Section 46(7) of the BCCM Act, post 4 March 2003. However, note that this requirement only applies where development approval was obtained after 3 March 2003.
[21] Section 49 BCCM Act.

Example 2 In a layered scheme there may be a difference in the contribution schedule of each basic scheme in the layered arrangement depending on the nature of each of the basic schemes. If the layered scheme was a building that comprised a number of basic schemes including a car park, shopping centre, hotel and residential schemes, the contribution schedule would be different between, for example, the car park and the shopping centre to reflect the different service needs, the different levels of consumption of utilities and the different maintenance and refurbishment costs. A similar difference would exist between the hotel and the residential schemes.

Example 3 In a basic scheme, if all the lots are residential lots ranging in size from a small lot to a penthouse, the contribution schedule lot entitlements generally would be equal. However, the contribution schedule may be different if the penthouse has its own swimming pool and private lift. The contribution schedule should recognise this type of difference. The other lots in the scheme despite being of differing size or aspect would be expected to have equal contribution schedule lot entitlements.

The clause also includes basic principles to be applied by the developer when first determining the lot entitlements for the community titles scheme.

For example it is not uncommon for a developer to assign a high contribution schedule lot entitlement to a small lot in comparison to that for a larger lot in the scheme. The contribution should not be based on lot size or value. The developer must consider all the factors included in section 44."

Example 3 is particularly relevant. It suggests:

- In the absence of significant difference (e.g. a private swimming pool **and** private lift) the entitlement for a penthouse would generally be the same as the entitlements for the other residential units in the building. In other words, size of the unit in itself is not the deciding factor. (This is confirmed by the two last sentences in the above quotation.)

- Even if the entitlement for the penthouse is different, the entitlements for the other lots would be expected to be equal, notwithstanding they are of different size and value.

In addition, the provisions of section 46(7) and (8) of the BCCM Act are also indicative of that approach. They provide:

> ***"(7)*** *For the contribution schedule for a scheme for which development approval is given after the commencement of this subsection, the respective lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.*
>
> *Examples for subsection (7) of circumstances in which it may be just and equitable for lot entitlements not to be equal—*
>
> *1. A layered arrangement of community titles schemes, the lots of which have different uses (including, for example, car parking, commercial, hotel and residential uses) and different requirements for public access, maintenance or insurance.*
>
> *2. A commercial community titles scheme in which the owner of 1 lot uses a larger volume of water or conducts a more dangerous or a higher risk industry than the owners of the other lots."*
>
> ***(8)*** *In deciding the contribution schedule lot entitlements and interest schedule lot entitlements for a scheme mentioned in subsection (7), regard must be had to—*
>
> *(a) how the scheme is structured; and*
>
> *(b) the nature, features and characteristics of the lots included in the scheme; and*
>
> *(c) the purposes for which the lots are used."*

Section 47(2) of the BCCM Act is also relevant. It provides:

> ***"(2)*** *The contribution schedule lot entitlement for a lot is the basis for calculating—*
>
> *(a) the lot owner's share of amounts levied by the body corporate, unless the extent of the lot owner's obligation to contribute to a levy for a particular purpose is specifically otherwise provided for in this Act;[12] and*
>
> *(b) the value of the lot owner's vote for voting on an ordinary resolution if a poll is conducted for voting on the resolution."*

> The footnote reads:

> *"12 The regulation module applying to a community titles scheme might provide that a lot owner's contribution to some or all of the insurance required to be put in place by the body corporate is to be calculated on the basis of the lot's interest schedule lot entitlement."*

Unfortunately, the Courts and specialist adjudicators have not consistently interpreted these provisions and there has been a willingness to explore the just and equitable principles in circumstances that often appear to be contrary to what the legislature intended. In addition, body corporate managers have actively encouraged a case by case analysis of what is just and equitable for new schemes. Developers appear to have accepted this approach without question.

To add to the uncertainty, the Queensland Government is currently reviewing the above provisions of the BCCM Act. In my view there is a strong case for unequal contribution schedule lot entitlements to be the exception rather than the rule until such time as the Government gives further guidance. This approach also has the benefit of saving developer clients the cost of the complex analysis and calculations that body corporate managers undertake to arrive at justification for unequal entitlements.

> ***Practice Pointer***
>
> *If in a case where development approval was granted after 3 March 2003 the contribution schedule lot entitlements are not equal, then the reasons why they are not equal must be set out in the first community management statement. The reasons should appear in detail rather than being a simple statement to the effect that it is "just and equitable that they not be equal".*

7. Staged developments

Staged development within the same community titles scheme presents a new set of problems. I will deal very briefly with some of the more obvious ones.

Exclusive use by-laws

Where areas of future common property are to be allocated to future lots, the exclusive use by-law will need to be changed as each stage progresses. The allocations cannot be made in the first community management statement because neither the common property nor the lots are in existence at that time. The problem for the developer is how to ensure that the change is made to the by-law, particularly if the change is to occur outside the 12 month period of any power of attorney or authorized allocation period in the by-law. Ordinarily, a change to an exclusive use by-law in a first community management

statement would require a resolution without dissent.[22] However, if the first statement sets out the proposed new allocations, then the body corporate consent can be given by the committee, unless a body corporate manager with the functions of the committee has been appointed. In the latter case, the consent must be by ordinary resolution of a general meeting.[23]

Another alternative may be to make the exclusive use areas part of the lot rather than common property. This does not limit flexibility in the allocation of areas such as car parks if the allocation is done separately in the various sale contracts (e.g. "proposed lot 12 and car park D").

Flexibility for future lots

Sometimes it is necessary to preserve flexibility over the size, shape and location of future lots. This applies particularly to business and industrial parks where the lot is subdivided out to suit the particular use once a buyer has been found. For example, a 3ha parcel of land may end up as 15 separate lots or as 5 separate lots. This type of flexibility can only be achieved by using formulas and parameters for future subdivision rather than the normal prescriptive descriptions in the first community management statement. A good example of this approach is the *Metroplex on Gateway* development next to the southern approach to the Gateway Bridge.

Expandable and contractible schemes

On the subject of flexibility, the developers of some projects being developed in stages require the flexibility to discontinue future stages of the project. This may be driven by marketing concerns or by the need to obtain development consent for one or more of the future stages. Such flexibility can be achieved by reserving the right in the first community management statement to either:

- Expand the development by adding one or more future identified stages.
- Excising one or more of the proposed future stages from the development.

Both these options require some fancy drafting in the first community management statement, but it is possible to achieve them under the BCCM Act. Again, the *Metroplex on Gateway* development incorporated this type of flexibility.

Uniformity of regulation module

Where a development is being staged within the same body corporate there will never be a problem of multiple regulation modules. However, if the development is being staged

[22] Section 62(2) of the BCCM Act.
[23] See section 62(4)(e), (6) and (7) of the BCCM Act.

with separate bodies corporate (e.g. linked together by means of a building management statement) there is a potential problem. The problem arises where:

- One stage of the project adopts the standard regulation module and another stage adopts the accommodation module.
- The manager's accommodation is in the stage regulated by the standard module.

In those circumstances, a management agreement under the accommodation module (where agreements for up to 20 years are permitted) for more than 10 years will present a problem. This is because the agreement under the standard module must expire after 10 years, along with any occupation licenses, and the manager may have difficulty continuing to operate the remaining management business from the unit in the standard module scheme.

> ***Practice pointer***
>
> *The solution is to be very careful when choosing different modules and consider how the manager should be resourced from the point of view of office and storage accommodation.*

Appendix A

Check List for Taking Instructions

1. Has development approval been obtained? If so, please provide a copy.
2. Has Building Approval been obtained? If so, please provide a copy.
3. What are the title particulars for the development site?
4. Is the development site to be subdivided to create the community title parcel? If so, please provide details and a draft plan.
5. Who owns the development site? (Name, ACN or ABN, address.)
6. Who is the development manager or our contact person with the developer? (Name, address, contact person, telephone number, facsimile number and e-mail address.)
7. How is the project to be financed? Will the financier have any special requirements? (e.g. qualifying contracts, deposit bonds, pre-commitments, etc.)
8. Provide details of the marketing agent to be shown on the contract. (Name, ACN or ABN, real estate agent license number, address, contact person, telephone number, facsimile number and e-mail address.)
9. Who is to be the stakeholder? (Name, ACN or ABN, address, contact person, telephone number, facsimile number and e-mail address.)
10. Who is to be proposed as the body corporate manager? (Name, ACN or ABN, address, contact person, telephone number, facsimile number and e-mail address.) Please provide the terms of their engagement.
11. Is there to be a building manager? If known at this stage please provide the terms of their engagement, including name, ACN or ABN, address, contact person, telephone number, facsimile number and e-mail address.
12. Is there to be a letting agent? If known at this stage please provide name, ACN or ABN, real estate license number, address, contact person, telephone number, facsimile number and e-mail address. Also provide terms of their engagement.
13. Are there to be any other service contractors? If so please provide the terms of their engagement, including name, ACN or ABN, address, contact person, telephone number, facsimile number and e-mail address.
14. Will deposit bonds and bank guarantees be accepted in lieu of cash deposits? Are any deposit bond companies or banks unacceptable?

15. Are cash deposits to be invested? If so, how is the interest to be dealt with?

16. Are corporate buyers to be supported by personal guarantees? What are the guarantor requirements? (e.g. all directors, parent companies, etc.)

17. Are finance clauses to be offered to buyers? If so, on what terms?

18. What regulation module is to apply to the community titles scheme?

19. Are any special rights to be included in the power of attorney reserved in favor of the developer?

20. Please provide the following:

    (a) copy of concept drawings (i.e. development approval standard drawings);

    (b) copy of draft building format (standard format) plan;

    (c) schedule of finishes;

    (d) schedule of contribution schedule lot entitlements and schedule of interest schedule lot entitlements;

    (e) the amount of maintenance contributions reasonably expected to be payable to the body corporate by the various lot owners;

    (f) the estimated cost (if any) to the body corporate of the engagement of –

        (i) a body corporate manager;

        (ii) a building manager (caretaker);

        (iii) any other service contractor,

        as well as the estimated cost to the various lot owners for each of those engagements;

    (g) a list of body corporate assets proposed to be acquired by the body corporate; and

    (h) proposed services location diagram.

21. What is the final date for the developer to elect to buyers whether or not to proceed with the development (e.g. because finance is not available or any pre-commitment target is not reached)?

22. What is the final date (i.e. sunset date) for completion of the building, registrations and settlements?

23. Have you obtained or are you planning to obtain FIRB approval to sell up to 50% of the units to foreign persons? If obtained, please provide a copy of the approval.

24. Do you propose to adopt the margin scheme for GST purposes?

25. Are any special by-laws required to regulate use of lots or common property?

26. Are there to be any rights of exclusive use over the common property? If so, please provide plans of the areas and details of how they are to be allocated.