



**North Queensland Law Association Annual Conference**

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# Impact of Recent Amendments on the Preparation of Community Title Sale Contracts

Gary Bugden

# Topics

## GENERAL

- Body corporate membership
- Information sheets
- Warning statements

## EXISTING LOT CONTRACTS

- Disclosure statements
- Seller's contractual disclosure
- Warranties implied by the BCCM Act
- Body corporate due diligence
- Conclusions so far

# Topics (continued)

## PROPOSED LOT CONTRACTS

- Disclosure statement
- Contractual warranties
- Implied warranties
- Cost recovery clauses
- Conclusions

# Body corporate membership

- Arises automatically
- Body corporate is effectively an unlimited liability company
- Owners underwrite unfunded liabilities
- Today's topics require an understanding of this

# How unlimited liability arises?

- Owners hold common property
- Body corporate owns body corporate assets
- Body corporate must administer the common property and assets
- Body corporate can enter contracts, deal with property and employ staff
- Body corporate can sue and be sued as if owner and occupier
- Body corporate can be subject to Ch 6 order

# How unlimited liability arises?

(Continued)

- Body corporate financed by lot owners
- Budget is prepared
- Contributions are fixed, then levied (usually equally)
- Contributions (penalties + interest) are recoverable
- Levy process continues until sufficient funds
- Creditor can apply to the Court for an administrator
- Lot owners ultimately discharge body corporate's liabilities

# Avoidance of liability

- Sell the lot (joint and several liability with buyer)
- Influence the body corporate to do nothing (Administrator will eventually be appointed)
- Procure termination of the scheme and dissolution of body corporate (liabilities vest jointly and severally in former owners)

# Information Sheet

- PAMDA *Warning Statement* to be first or top sheet of a “relevant contract”
- BCCM Act *Information Sheet* to be first or top sheet of c/t contracts (sec 206(5))
- Sec 206(5) is complied with if –
  - Lot is residential property
  - *Information Sheet* is immediately beneath *Warning Statement*



# Relevant contract

A contract for the sale of residential property, other than an auction contract.

***Note:***

Contracts for non-residential lots and auction contracts must not have a *Warning Statement – Information Sheet* must be first or top sheet

# Disclosure Statement

- Two additional items require disclosure
- “Body corporate Assets” are those required to be recorded, not those actually recorded
- Cancellation rights are not clear

## Disclosure Statement – cancellation rights

- Section 206(7)
- Buyer may cancel if –
  - Seller has not complied with sec 206(1) *and* (5); and
  - Contract has not yet settled
- “and” most likely means “and” (not “or”)

# Disclosure Statement – cancellation rights

(continued)

- Non-compliance itself is an issue –
  - Statement must be “substantially complete” (s. 206(4))
  - May contain “inaccuracies” (s. 206(8))
  - Minor omissions or minor errors may not result in non-compliance

# Contractual disclosure

(Back page of Contract)

- Body corporate related warranties
- Includes “additional body corporate information”
- Buyer can terminate the contract if “materially prejudiced”
- Buyer cannot claim compensation

# STOCKTAKE

- *Information Sheet + Warning Statement* – risk is manageable
- *Disclosure Statement* – low risk of cancellation
- Contractual disclosure – low risk of cancellation
- Buyer's position is not ideal

# Implied warranties - Importance

- Substantially strengthened by the amendments
- Difficult to prepare a contract that cannot be cancelled
- These warranties are of critical importance for both sellers and buyers

# Implied warranties - List

1. No latent or patent defects in the common property or body corporate assets (ex wear and tear)
2. Body corporate records do not disclose such defects
3. No actual, contingent or expected liabilities of body corporate (ex normal operating expenses)
4. Body corporate records do not disclose such defects

**Note: 1 and 3 only apply to extent of seller's knowledge**



# Implied warranties (continued)

- Imputed knowledge provision
- Defects or liabilities disclosed in the contract are excluded
- No longer a limitation to available funds + 1% of price
- “Undisclosed circumstances” warranty remains, but now limited to seller’s knowledge (ex imputed knowledge)
- Said to apply to a proposed lot

# Implied warranties – Buyer's remedy

- Cancel the contract within 14 days after the later of –
  - Receipt of contract by the buyer
  - Other agreed period
- Action for breach of warranty

# About disclosure!

- Essential to protect the seller
- Requires seller's due diligence exercise
- Deciding what to disclose is the challenge
- One approach – annex an inspection report

# Conclusions

- Unlimited liability company
- Legislative reaction – extensive warranties and opportunity for buyer due diligence
- Seller is protected by disclosure
- Contract preparation is more complex and time consuming
- Buyer needs to test the seller's warranties
- Real issue about agents preparing contracts

PROPOSED LOTS

# Disclosure Statement

4 changes –

- Codes of Conduct need not be disclosed
- Proposed regulation module must be identified
- Proposed CMS must contain explanation for unequal contribution schedule lot entitlements
- When buyer can cancel

# Contractual warranties

Nothing impacts on warranties a seller or buyer may wish to include in the contract

# Implied warranties

- Purportedly implied for proposed lots
- Those about defects and liabilities probably do not apply
- Those about B/C circumstances likely to materially prejudice the buyer do apply

# Cost recovery clauses

Limitation on cost recovery from buyer for costs of entering into BCM contract, service contract or letting authority during *original owner control period*



# Proposed lot contract - summary

- Care to pick up changes to First Disclosure Statement
- Implied warranties have little practical impact
- No other significant changes



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