

Property Law Bill 2023

Submission No: 21
Submitted by: HWL Ebsworth Lawyers
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See attached:

**SUBMISSIONS BY HWL EBSWORTH TO
PROPERTY LAW BILL 2023, PROPERTY LAW
REGULATION 2023 AND BODY CORPORATE
AND COMMUNITY MANAGEMENT AND OTHER
LEGISLATION AMENDMENT
REGULATION 2023**

Property Law Bill	
Section Number	Submission & Comments
Section 52(7)(b)	<p>This provision deals with signing of a deed for a corporation by an authorised agent or attorney.</p> <p>Section 52(7)(b) requires a person who is an individual to sign the document under section 51.</p> <p>There is ambiguity as to whether a person is required to reference that a document is being signed under section 51 as part of the execution. For example:</p> <p style="text-align: center;"><i>signed as a deed by Corporation Pty Ltd by its lawfully authorised attorney, Joe Bloggs, under sections 51 and 52 of the Property Law Act.</i></p> <p>We submit that:</p> <ol style="list-style-type: none"> 1. a provision be added to section 52 to make it clear that it is not necessary to refer to the sections as part of any attestation provision in order for the signature to be effective; and 2. section 52 is amended to state an attorney and authorised signatory are taken to have signed under section 51.
Part 6 Division 2 Covenants	<p>We submit that amendment is required to clarify that this part only relates to covenants in registered documents. For instance, covenants may exist contractually, such as covenants concerning design or quality of improvements (building covenants).</p>
Section 77	<p>The provision has the effect of enabling the Buyer to rescind the contract before the Seller is even given an opportunity to restore the dwelling. We submit that the Buyer should:</p> <ol style="list-style-type: none"> 1. only have the right to rescind the contract if the Seller does not restore the dwelling by settlement; and

	<p>2. not have the right to rescind once taking possession of the land whether or not restoration has occurred.</p> <p>Additionally, we submit that the Buyer should lose the right to rescind the contract if the Seller gives notice to the Buyer that the Seller does not intend to restore the residential dwelling and the Buyer has not terminated the contract within a specified period, say 30 days of the notice being given by the Seller. This will give the Seller the right to also bring the matter to conclusion, and is especially relevant for longer term contract.</p>
<p>Section 79</p>	<p>We consider the provision to be unnecessarily complicated and may have the effect of a Buyer unilaterally extending the settlement date by a period of up to 7 Business Days, merely because of the computers at the land registry being temporarily inoperative.</p> <p>We submit that settlement should be the next business day, similar to section 80(4), with time remaining of the essence and there being no need for a notice to complete process adopted.</p> <p>If on that next business day the computers are inoperative, then the date will roll over again.</p>
<p>Section 80(2)</p>	<p>We can envisage circumstances where one party (first party) is unable to effect settlement because of the circumstances set out in section 81, but the other party (second party) is unaware of the inability of the first party to settle.</p> <p>The second party may then purport to terminate the contract and will have done so wrongfully due to the operation of section 80(2).</p> <p>We submit that if the second party terminates in the circumstances where section 80(2) applies, then such termination should be of no effect and not repudiatory conduct. In this manner, neither party will be disadvantaged as a result of the circumstances set out in section 80(1).</p>
<p>Section 81</p>	<p>Our concern is that a non attending party may not act in good faith and continue to assert that the adverse event is preventing completion in circumstances where that may no longer be the case.</p> <p>Covid is a typical example where the adverse event lasted for a significant period. During that period, circumstances changed and whilst the adverse event continued, Buyers were able to effect settlement.</p> <p>We submit that:</p> <ol style="list-style-type: none"> 1. the attending party ought to have the ability to require the non-attending party to, periodically, demonstrate how the adverse event continues to cause the non attending party to fail to complete settlement of the contract;

	<ol style="list-style-type: none"> 2. a maximum period should be inserted for an extension due to an adverse event; and 3. the notice of the adverse event should be required to be given before settlement.
<p>Part 7 Division 3 instalment contracts</p>	<p><u>Overall Submission</u></p> <p>The instalment contract provisions are problematic for sale of proposed lots.</p> <p>We submit that the provisions in sections 92 (Seller cannot sell or mortgage land), 93 (Buyer may lodge caveat) and 94 (Buyer not in default may require seller to transfer land) should not apply to sale of proposed lots. The Buyer is adequately protected by virtue of its contractual interest and the strict requirements for deposits to be held in a trust account.</p> <p><u>Option Fees</u></p> <p>The Bill clarifies the ambiguity presently surrounding the position concerning option fees and instalment contracts. Given the clear statement of policy included in the Bill clarifying the position, namely that option fees are not be considered instalment payments, we submit that this position ought to have retrospective operation to resolve the ambiguity in all instances.</p> <p><u>Section 87</u></p> <p>By virtue of the definition of Deposit, a non-refundable Deposit under an agreement will always create an instalment contract. Is this the intention? For example, there could a \$5,000 non-refundable deposit for a transaction triggering an instalment contract.</p> <p>We submit that the definition of <i>instalment</i> should be amended to include payments:</p> <ol style="list-style-type: none"> 1. to extend due dates, for example, payment to extend a subject to development approval date or finance date, not just completion; and 2. towards works carried out to the land at the request of the Buyer. <p><u>Section 92</u></p> <p>The "terms" of the mortgage which are required to be disclosed is problematic as, at the time the instalment contract is entered into, the terms may not be known. Accordingly, we submit that indicative terms only should be sufficient.</p>

	<p>We note that for off the plan sales, the funding amounts and mortgage conditions are not usually known at the time of entry into the early stage pre-sale Contracts.</p> <p>We submit that the references to terms needs to be limited to disclosing the maximum amount to be secured against the mortgaged property (which is in accordance with the current court position).</p> <p>Alternatively, there should be a right to subsequently disclose terms, with the Buyer having a right to terminate within a specified period (ie 21 days) if they are materially prejudiced, similar to the provisions of section 214 of the <i>Body Corporate and Community Management Act</i>.</p> <p><u>Section 93</u></p> <p>The right to caveat should not apply to instalment contracts for proposed lots until title has been created.</p> <p>Otherwise, in respect of a caveat, one Buyer may be able to prevent registration of a whole development.</p> <p><u>Section 94</u></p> <p>The right to call for a transfer of title should not apply to instalment contracts for proposed lots until title has been created.</p> <p>The right to call for title may inadvertently push out settlement. For example, if the settlement date fixed under the contract is in 1 month, but a notice is given, is the settlement date extended to 3 months? We query if that is the intention.</p> <p>We submit that the Settlement Date must be the earlier of the Settlement Date under the contract and the day of settlement specified in the notice.</p>
<p>Section 99(1)</p>	<p>We submit the timing for giving the documents is amended to "<i>before a contract is entered into by a person (the seller) with another person (the buyer)</i>", as opposed to before the contract is signed by the Buyer as currently proposed. This wording has been taken from section 213 of the <i>Body Corporate and Community Management Act</i>.</p> <p>This will enable a Seller to rectify a failure to give the Disclosure Documents before the contract is formed, but after the Buyer has signed.</p>
<p>Section 99(2)</p>	<p>The Buyer should not have a termination right where information produced by a Governmental body is inaccurate (for example, if Council give incorrect information, the Buyer should not have a termination right).</p>
<p>Section 99(2)</p>	<p>We submit that:</p>

	<ol style="list-style-type: none"> 1. the requirement for the information to be "true" should be deleted; 2. the relevant test should be if there is an inaccuracy, the Buyer has a right to terminate if they are materially prejudiced; and 3. the requirement for the statement to be signed by the Seller should be deleted - The signing does not add to the content of the statement and the Buyer has the benefit of the operation of Section 104. Requiring the Seller to sign only creates additional administrative burden, usually on the part of the sales agent to ensure compliance, for no material benefit.
<p>Section 100(k)(i)(B)</p>	<p>We submit that the threshold should be reduced to \$2m including GST, or if not acceptable, \$5m including GST.</p> <p>We submit that these are acceptable levels for sophisticated Buyers.</p>
<p>Section 104 and Section 106</p>	<p>These sections are incredibly harsh. It is easy to see disputes ending up in court due to administrative errors, that have no material impact on the Buyer or their decision to purchase the Property. Not all sales of registered lots are short term 30 day contracts. Many can extend for years.</p> <p>Accordingly, the Seller ought to be given the opportunity to rectify a failure to give the Disclose Statement and correct inaccuracies thereby establishing contractual certainty.</p> <p>We submit that if the Seller fails to give a Disclosure Statement (ie does not give the Disclosure Statement at all):</p> <ol style="list-style-type: none"> 1. the Seller ought to have the ability to give the compliant Disclosure Statement after the Contract is formed; and 2. the Buyer's right to terminate should then be extinguished on expiry of a period following receipt of the Disclosure Statement - say 5 Business Days. <p>Further, we submit that if the Seller gives a Disclosure Statement, but that Disclosure Statement is inaccurate or is incomplete in a material mater affecting the lot at the time it was given:</p> <ol style="list-style-type: none"> 1. the Seller ought to have the ability to give a further statement rectifying the inaccuracies or omissions; and 2. the Buyer should then have a right to terminate within say 5 Business Days, if materially prejudiced (by a material matter affecting the lot).

	<p>All other relevant pieces of legislation contain similar rights to rectify, ie section 214 of the <i>Body Corporate and Community Management Act</i>, section 408 of the <i>Environmental Protection Act</i>, section 13 of the <i>Land Sales Act</i>, etc.</p> <p>In respect of section 106, a Seller should not be penalised for a statutory body providing inaccurate information. With respect, it is unreasonable that a contract entered into at arms length between parties can be terminated by one of those parties in reliance on a statute due to the failure of a governmental body to provide correct information mandated to be given by that same statute.</p>
Section 118(2)	<p>We submit that the use of the words "held by the mortgagee in trust" is unnecessary and does not reflect commercial practice.</p> <p>We submit that the obligation to distribute proceeds should require the mortgagee to do so promptly.</p> <p>The use of the wording "in order of priority of the amounts" is unnecessarily unclear, it should reflect the order of priority on title subject to any other agreement by the mortgagees.</p>
Section 142(7)	<p>As the period for delivery of the decision notice can only be extended with approval of both parties (i.e. including the tenant), the requirement to agree within the 1 month period in subsection (5) may cause unintended consequences (for example, where there is no agreement about when "full particulars" have been received. We submit the parties should be able to agree to extend the period for giving the notice, "at any time after a proposal notice has been given".</p>
Property Law Regulation	
Section 4	<p>References to documents "given" - We submit that it be amended to provide "given to and received by the Seller".</p> <p>Otherwise, documents not received by the Seller have to be disclosed.</p> <p>We submit that that any notice or order required to be given must be "unperformed" or "remain in effect".</p>
Section 4(f)	<p>There is potential for the documents to be numerous, lengthy and detailed.</p> <p>We submit that rather than requiring documents to be provided, if the matters concerning these sections apply, it is sufficient that the Seller gives the Buyer a statement that the Lot is affected and the Buyer should make enquiries.</p> <p>Otherwise, there is potential for argument concerning technical compliance only, if some but not all of the documents are given.</p>

Section 5

Set out below is section 5 and our submission on each sub-section.

We submit that the requirements are overly onerous. Producing the information will be, by its very nature, prone to mistake in obtaining the information and its compilation.

It will be the responsibility of agents and lawyers to compile the information who will then have to carry the professional risk associated with the production of the materials.

In plain language, people will get sued, the courts will be unnecessarily clogged up with compliance based litigation, insurance premiums will increase and the cost of services to the consumers will invariably escalate significantly. A similar situation arose due to the unnecessary compliance regime under the repealed *Property Agents and Motor Dealers Act* which was resolved by the *Property Occupations Act*.

Alternatively, the status-quo may be maintained, with the giving of a limited information certificate and the Buyer having the ability to satisfy itself concerning these matters.

Sub-Section	Submission
<i>(a) the name of the seller of the lot</i>	This is not necessary, the name of the Seller will form part of the contract.
<i>(b) the address of the lot;</i>	This is not necessary, the address will form part of the contract.
<i>(c) the lot-on-plan description of the lot</i>	This is not necessary, the lot-on-plan will form part of the contract.
<i>(d) whether the lot is— (i) included in a community titles scheme; or (ii) subject to a plan under the Building Units and Group Titles Act 1980;</i>	This is not necessary, as a Body Corporate Certificate will need to be given if the lot is included in a community title scheme.
<i>(e) the details of each unregistered encumbrance on the lot;</i>	We submit that this requirement will potentially cause significant issues and is overly onerous.

		<p>It places an onus on the Seller to investigate potentially all and every basis for a statutory charge, restriction, or burden that might possibly affect the Lot. This is an unreasonable burden to impose on the Seller. It imposes an unreasonable risk of termination for matters of general and broad application.</p> <p>It requires that "details of each" unregistered encumbrance are included - which suggests a greater level of specificity is required.</p> <p>Sellers should not be obliged to notify or advise Buyers of the effect of statutory provisions that apply to all or most properties in the same manner.</p> <p>Our concern is that this disclosure requirement will lead to comprehensive, generic statements being included in this disclosure instrument in order to cover all bases.</p> <p>We submit that this be deleted.</p> <p>Maybe include a generic statement that governmental instrumentalities and utility providers may have statutory interests in the land and that the Buyer should take independent advice.</p>
	<p><i>(f) the zoning of the lot as published by a local government in a local planning scheme on its website;</i></p>	<p>This requires zoning of the lot "as published by a local government on its website". Not all Councils produce a concise instrument making this readily ascertainable.</p> <p>This may not be readily ascertainable as planning schemes, as published may not show the zoning for the specific lot. The zoning may need to be transposed from various instruments to determine details applicable to the lot.</p>

		<p>This may be a complex exercise and may require engagement of a town planner.</p> <p>We submit that this requirement be deleted. It forces a potentially detailed analysis onto a Seller to include information which is unlikely to be relevant to most Buyers and may be ascertained by Buyers if required.</p>
	<p><i>(g) the following information relating to contamination and environmental protection—</i></p> <p><i>(i) whether the property is recorded on the environmental management register under the Environmental Protection Act 1994;</i></p> <p><i>(ii) whether the property is recorded on the contaminated land register under the Environmental Protection Act 1994;</i></p> <p><i>(iii) whether the seller is required to give the buyer a notice under the Environmental Protection Act 1994, section 408;</i></p> <p><i>(iv) whether the lot is subject to an environmental protection order under the Environmental Protection Act 1994, section 362</i></p> <p><i>(v) whether the lot is subject to a transitional environmental program under the Environmental Protection Act 1994, section 347;</i></p>	<p>No comment.</p>

	<p><i>(h) the following information relating to trees—</i></p> <p><i>(i) whether an application in relation to a tree on the lot has been made under the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011;</i></p> <p><i>(ii) whether a tree on the lot is subject to an order under the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011;</i></p>	<p>We submit that this is amendment should only apply to active applications and orders not already complied with.</p>
	<p><i>(i) whether the lot is affected by a transport infrastructure proposal that will alter the dimensions of the lot to accommodate transport infrastructure or locate transport infrastructure on the lot;</i></p>	<p>Sellers cannot be expected to consider all proposals and their future impact.</p> <p>We submit that this be deleted.</p> <p>Alternatively, amend to limit to notices received from an Authority by the Seller concerning the Lot.</p> <p>Alternatively, the State will need to have available a search across all relevant bodies that can be performed to satisfy this requirement.</p>
	<p><i>(j) whether the lot is affected by the Queensland Heritage Act 1992 or is included in the World Heritage List under the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth);</i></p>	<p>No comment.</p>
	<p><i>(k) whether the Commonwealth or the State has issued a notice of intention to resume the lot or any part of the lot;</i></p>	<p>No comment.</p>
	<p><i>(l) whether there is a relevant pool for the lot;</i></p>	<p>No comment.</p>

	<p><i>(m) whether there is a commercial office building of more than 1,000m2 on the lot;</i></p>	<p>No comment.</p>
	<p><i>(n) the following information relating to rates for the lot—</i></p> <p><i>(i) if rates are payable for the lot—the amount payable as rates for the lot;</i></p> <p><i>(ii) if rates are not payable for the lot—</i></p> <p><i>(A) a statement that the lot is a rates exempt lot; or</i></p> <p><i>(B) a statement that the lot is not a rates exempt lot but no separate assessment of rates is issued by a local government for the lot</i></p>	<p>This information is discoverable by search.</p> <p>We submit that this is unnecessarily onerous and will require the Seller, who may be engaged in a prolonged sale cycle to frequently update materials comprising the disclosure.</p> <p>We submit that a statement to the Buyer that these particulars may be obtained from the relevant authority be included instead.</p>
	<p><i>(o) the following information relating to water services for the lot—</i></p> <p><i>(i) if a water services notice is issued for the lot—the amount payable as charges for water services under the most recent notice;</i></p> <p><i>(ii) if no separate water services notice is issued for the lot—an estimate of the amount payable for water services for the most recent stated period.</i></p>	<p>This information is discoverable by search.</p> <p>We submit that this is unnecessarily onerous and will require the Seller, who may be engaged in a prolonged sale cycle to frequently update materials comprising the disclosure.</p> <p>We submit that a statement to the Buyer that these particulars may be obtained from the relevant authority be included instead.</p>

Body Corporate and Community Management and Other Legislation Amendment Regulation 2023

5

Set out below is the proposed new section 222A of the *Body Corporate and Community Management Act* and our submission on each item.

We submit that the requirements are overly onerous. Producing the Body Corporate Certificate will be, by its very nature, prone to mistake in obtaining the information and its compilation.

It will be the responsibility of Body Corporate managers, agents and lawyers to compile the information who will then have to carry the professional risk associated with the production of the materials.

In plain language, people will get sued, the courts will be unnecessarily clogged up with compliance based litigation, insurance premiums will increase and the cost of services to the consumers will invariably escalate significantly. A similar situation arose due to the unnecessary compliance regime under the repealed *Property Agents and Motor Dealers Act* which was resolved by the *Property Occupations Act*.

Alternatively, the status-quo may be maintained, with the giving of a limited information certificate and the Buyer having the ability to inspect the Body Corporate records to satisfy itself concerning these matters.

Sub-Section	Submission
<p>(a) details of the lot, including—</p> <p>(i) whether the lot is a standard format lot, building format lot or volumetric format lot; and</p> <p>(ii) the lot number and plan number;</p>	<p>This is not necessary, the lot number will form part of the contract.</p> <p>The balance information is contained in the plan which is required to be provided.</p> <p>(Also not required if already included in the Disclosure Statement)</p>
<p>(b) details of the scheme, including—</p> <p>(i) the name of the scheme; and</p> <p>(ii) the regulation module applying to the scheme; and</p>	<p>This is not necessary, the lot number will form part of the contract.</p> <p>The balance information is contained in the community management statement which is required to be provided.</p>

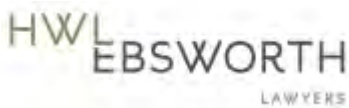
	<p><i>(iii) the name and contact details of each person who is responsible for keeping body corporate records; and</i></p> <p><i>(iv) the name and contact details of any body corporate manager for the scheme;</i></p>	<p><i>The name and contact details of each person who is responsible for keeping body corporate records - This is not necessary and it does not matter who is responsible. The Buyer merely requires contact details as to how information can be obtained. Also, there may be a number of people responsible for keeping the Body Corporate records, such as administration staff at the Body Corporate manager, and it is inappropriate for there details to be disclosed.</i></p> <p>The name and contact details of any body corporate manager for the scheme are sufficient.</p>
	<p><i>(c) annual contributions fixed by the body corporate as payable by the owner of the lot;</i></p>	<p>No comment.</p>
	<p><i>(d) special contributions fixed by the body corporate as payable by the owner of the lot</i></p>	<p>No comment.</p>
	<p><i>(e) discounts that apply to the payment of contributions;</i></p>	<p>We submit that this is unnecessary and, if of particular interest to the Buyer, may be discoverable by search.</p>
	<p><i>(f) penalties that apply to the payment of contributions;</i></p>	<p>We submit that this is unnecessary and an overly complex disclosure requirement.</p> <p>Any arrangements that the Body Corporate has in terms of interest and debt recovery, if of particular interest to the Buyer, may be discoverable by search.</p> <p>Alternatively, a generic statement may be included to inform the Buyer that penalties may apply for late payment.</p>

	<p><i>(g) other amounts associated with ownership of the lot that are payable to the body corporate;</i></p>	<p>We submit that this be deleted as it is unclear as to what extent of disclosure is required. For example, is it intended that this includes disclosure that a Buyer is responsible for costs of maintenance of an exclusive use courtyard? What if the amount is not known?</p> <p>Alternatively, a generic statement may be included to inform the Buyer that there may be other amounts associated with ownership of the lot that are payable to the body corporate, including under exclusive use by-laws which will be the majority of instances where other amounts might be payable.</p>
	<p><i>(h) the interest schedule lot entitlement for the lot;</i></p>	<p>This is not necessary, as the information is contained in the community management statement which is required to be provided.</p>
	<p><i>(i) the contribution schedule lot entitlement for the lot;</i></p>	<p>This is not necessary, as the information is contained in the community management statement which is required to be provided.</p>
	<p><i>(j) any of the following amounts owed to the body corporate by the owner of the lot—</i></p> <p><i>(i) a contribution or an instalment of a contribution;</i></p> <p><i>(ii) a penalty for not paying a contribution or an instalment of a contribution by the date for payment;</i></p> <p><i>(iii) another amount associated with ownership of the lot</i></p>	<p>It is common for levies to be struck but yet due and payable.</p> <p>It is also part of the conveyance process that outstanding levies, penalties and other amounts are paid at settlement by the Seller and adjusted between the parties.</p> <p>We submit that this disclosure is not necessary as outstanding levies will be dealt with as part of the conveyance process and is accounted for in REIQ Contract Terms.</p>

	<p><i>(k) the body corporate's sinking fund</i></p>	<p>We submit that this is unnecessary and, if of particular interest to the Buyer, may be discoverable by search.</p> <p>Additionally, there is ambiguity as to what is required - a copy of the financial statements, bank balances, total funds held, amounts payable but not paid?</p> <p>Depending on the size of the scheme, the amount in the Body Corporate sinking fund may change daily depending on payment of contributions by owners and payment of expenses.</p>
	<p><i>(l) the insurance held by the body corporate;</i></p>	<p>We submit that this is too broad and ambiguous - what is required to be disclosed, the complete policy which includes a product disclosure statement, certificate of currency and the like?</p> <p>We submit that this is unnecessary and, if of particular interest to the Buyer, may be discoverable by search.</p>
	<p><i>(m) any engagement by the body corporate of a person as a caretaking service contractor for the scheme;</i></p>	<p>We submit that this is unnecessary and will make the volume of materials to be give to the Buyer excessive and take away focus from other more important disclosure components.</p> <p>If of particular interest to the Buyer, the caretaking agreement may be discoverable by search.</p> <p>Alternatively, a generic statement may be included to inform the Buyer that there is an engagement in place and which is discoverable by search of the Body Corporate records.</p>
	<p><i>(n) any authorisation by the body corporate of a person to conduct a letting agent business for the scheme;</i></p>	<p>Same comments apply as above for caretaking service contract.</p>

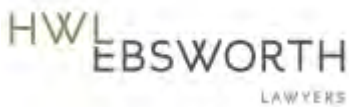
	<i>(o) whether a building management statement under the Land Title Act 1994 applies to the lot;</i>	Not comment.
	<i>(p) improvements on common property for which a person will become responsible if the person becomes the owner of the lot;</i>	Not comment.
	<i>(q) each body corporate asset that is required to be recorded on a register the body corporate keeps.</i>	Not comment.
Same submissions are made in respect of sections 8, 11, 14, 17 and 19.		

Melinda Leacy
Partner



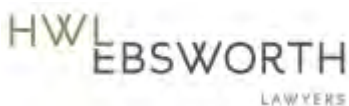
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