

3 September 2021

Our ref: WD:PD

The Hon. Shannon Fentiman MP
Attorney-General and Minister for Justice
Minister for Women and
Minister for the Prevention of Domestic and Family Violence
GPO Box 149
Brisbane Qld 7400

By email: [REDACTED]

Dear Attorney

Body Corporate and Community Management Act 1997 – release of deposits

I write at the request of the members of the Queensland Law Society (QLS) Property and Development Law Committee.

The Committee wishes to raise concerns around the practice of deposits under "off the plan" sale contracts being released to the seller as a means of assisting in the funding of developments.

Whilst the Committee believes the intent of the relevant legislation is that deposits under such contracts should be retained in a solicitor's or real estate agent's trust account until settlement of the transaction or any earlier termination of the contract, the present drafting potentially creates a loophole permitting deposits to be released to the developer or related party prior to settlement where the buyer agrees to this (including where the contract itself contains a provision authorising the deposit to be released).

The Committee believes this practice is not consistent with the consumer protection aims of the legislation or reflective of Parliament's intention and that it would be appropriate to amend the legislation to make it clear that this practice is not permitted.

The committee is aware that the Office of Fair Trading has investigated at least one scheme involving this approach with the development of the Brookwater Resort near Ipswich, where the developer ultimately failed and investors were unable to recover their deposits.

However, media coverage at the time¹ indicated that OFT concluded: "After an extensive review of the investigation material it was determined that Fair Trading does not have standing to seek orders for the return of deposits. Matters relating to contracts such as these for the purchase of an off the plan development are civil matters and parties to the contract are required to take their own private legal action."

¹ ["Fair Trading drops Brookwater resort probe after two years"](#) Brisbane Times (4 Dec 2019)

Legislative Provisions

The *Body Corporate and Community Management Act 1997* (**BCCM Act**) includes a legislative framework² regulating amounts held in trust accounts (generally referred to as 'deposits'). The effect of section 218B of the BCCM Act is essentially that deposits must be paid to a law practice or a real estate agent (or in limited circumstances, the public trustee) and the amounts must then be held in a prescribed trust account.

The issue requiring clarification is when an entity holding an amount under section 218B can properly dispose of the amount held in a prescribed trust account.

Section 218C(1) of the BCCM Act provides that:

- (1) "A recognised entity that is paid an amount under [section 218B](#)(1) must hold the amount in the entity's prescribed trust account until a party to the contract or instrument becomes entitled, under this part or otherwise according to law, to a repayment or payment of the amount.

Maximum penalty—200 penalty units or 1 year's imprisonment."

(emphasis added)

By way of contrast, we note that section 22(3) of the *Agents Financial Administration Act 2014* only permits funds held in an agent's trust account to be paid when the transaction is finalised.

Whilst section 218C(3) of the BCCM Act provides that "Subsections (1) and (2) apply despite anything in the contract or instrument under which the amount was paid to the recognised entity," the phrase "or otherwise according to law" has been interpreted by some to mean that the deposit can be released to the developer or seller *prior to settlement* if the contract between buyer and seller provides for the release of the deposit or the buyer otherwise agrees.

Section 249(1)(b) of the *Legal Profession Act 2007* authorises a legal practitioner to disburse trust funds in accordance with the direction of the person on whose behalf the funds are received. This is arguably a law for the purpose of section 218C.

While this uncertainty continues, the risk posed by instances such as the Brookwater Resort will affect confidence in the legal profession and the property industry generally.

Proposed change

QLS recommends that the intent of the legislation be clarified so that deposit holders can be certain of their obligations and the circumstances in which a deposit can be released.

This could be achieved by amending section 218C(1) of the BCCM Act to read:

- (1) A recognised entity that is paid an amount under [section 218B](#)(1) must hold the amount in the entity's prescribed trust account until:
 - (a) a party to the contract or instrument becomes entitled upon settlement or earlier termination of the contract or instrument to a repayment or payment of the amount; or

² Chapter 5, Part 2, Division 5, Subdivision 2 – Amounts held in trust accounts

Body Corporate and Community Management Act 1997 – release of deposits

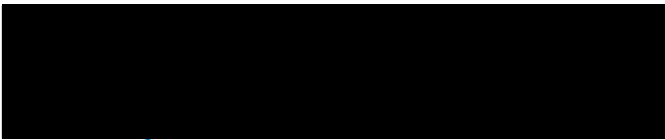
- (b) the amount is paid to another recognised entity, to be held under this subdivision, in accordance with the contract or instrument or at the direction of the parties to the contract or instrument.

Maximum penalty—200 penalty units or 1 year's imprisonment.

Similar comments apply in relation to section 18(1) of the *Land Sales Act 1984* and section 163(2) of the *Property Occupations Act 2014* and whilst the Committee is not aware of any specific instances of the potential loophole being utilised in these instances, similar amendments are recommended.

If you have any queries regarding the contents of this letter, please contact our Legal Policy team at policy@qls.com.au or by telephone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer
President