

# **‘WHAT ABOUT ME? IT ISN’T FAIR’: THE MANTRA OF QUEENSLAND BODIES CORPORATE IN THE MANAGEMENT AND LETTING RIGHTS SPHERE – AN INVESTIGATION INTO THE LIMITED STATUTORY TERMINATION RIGHTS**

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*Multi-owned properties are an increasingly popular housing product in Australia. With the growth, a supporting industry has flourished, particularly in Queensland. Management and letting rights (‘MLR’), as the arrangement is colloquially known, facilitates the provision of caretaking services to the community titles scheme (‘CTS’) and letting services for investment owners. With the growth of MLR, the Body Corporate and Community Management Act 1997 (Qld) (‘BCCM Act’) and regulation modules have been progressively amended to increase protections for MLR contractors and their financiers. This article reviews the MLR-related literature and concludes that the interests of both lot owners and the CTS governing body (the body corporate) have been subjugated to the commercial imperatives of the original owner, the MLR contractor and financiers. Key court and tribunal decisions are analysed to demonstrate a high threshold before the body corporate may validly terminate MLR arrangements. Consequently, the embedded statutory protections may trap a body corporate into inappropriate or undesirable contractual arrangements created and sold by the original owner before its establishment. Arguably, the BCCM Act has failed in its secondary consumer protection objective when bodies corporate are bound in the long-term by a statutory system designed to protect others.*

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## I INTRODUCTION

Across Australia, approximately 9% of the total population reside in apartment-style dwellings,<sup>1</sup> and the broader forms of multi-owned properties<sup>2</sup> now account for 26% of all Australian housing.<sup>3</sup> The level of investment into this asset class is significant; its insurance coverage is estimated to exceed \$995 billion.<sup>4</sup> The figure is also expected to rise; multi-owned properties are an increasingly popular way of structuring real property developments in Australia.<sup>5</sup> In Queensland, approximately 7% of the State's population reside in apartments and 43% of the 48,083 schemes have been registered since 2000.<sup>6</sup>

In Queensland, structuring of a community titles scheme ('CTS') requires a minimum of two fee simple lots and additional common-use property held in shared ownership and managed by a separate legal entity (a body corporate).<sup>7</sup> The body corporate is established with registration of the plan of survey, and recording of the community management statement with the Titles Registry.<sup>8</sup> The developer, or original owner, obtains surveys of the lots and common property and procures preparation and lodgement of the plans of survey and the community management statement with the Titles Registry.

A supporting industry has also flourished in Queensland in concert with the continued growth of the CTS sector, which is now estimated to be valued at more than \$15 billion.<sup>9</sup> Management and letting rights ('MLR'), as it is colloquially known, is a contractual arrangement by which the physical maintenance and management of common property for the CTS is undertaken by a caretaker. Further, a letting agent facilitates, through an onsite presence, the leasing of lots to long-term and potentially short-term tenants. This onsite presence commonly includes ownership or exclusive use of the front desk area in the foyer of the building, or an office at the entrance of the CTS. The MLR contractor will also

1 Hazel Easthope, Caitlin Buckle and Vandana Mann, 'Australian National Strata Data 2018' (Report, City Futures Research Centre, May 2018) 5.

2 Broader forms of multi-owned properties include for example, duplexes, townhouses, detached and low-density housing within a strata-titling arrangement.

3 Australian Bureau of Statistics, *Census of Population and Housing: Australia Revealed, 2016* (Catalogue No 2024.0, 27 June 2017).

4 Ibid 6.

5 In this respect, in 2015, the number of dwelling starts for attached properties exceeded the number of detached houses in Australia: *ibid* 24–5. Further, for the first time since this data has been collected, April 2016 saw the number of approvals for the construction of multi-owned property lots exceed those of detached dwellings in Australia: Australian Bureau of Statistics, *Building Approvals, Australia, Apr 2016* (Catalogue 8731.0, 31 May 2016).

6 Easthope, Buckle and Mann (n 1) 11.

7 *Body Corporate and Community Management Act 1997* (Qld) s 10 ('BCCM Act').

8 Ibid s 24.

9 Australian Resident Accommodation Managers Association, 'Queensland Short-Stay Cowboys Get Silver Bullet through Stringent RLA Licensing' (Media Release, 12 January 2018).

commonly own a lot in the CTS in which they reside.

The unique position that has developed in Queensland has resulted from the statutory protections implemented for MLR contractors and their financiers. These statutory protections have disadvantaged bodies corporate. The inequity has prompted this article. In this regard, a major concern that has plagued the CTS sector for years is the role of the original owner in establishing MLR for a CTS. Johnston argues that the original owner may embed conflict and dysfunctionality into the scheme in undertaking this step.<sup>10</sup> The *Body Corporate and Community Management Act 1997* (Qld) (*BCCM Act*) and regulation module provisions dealing with the creation and termination of MLR are extensive and complex. In essence, however, the provisions authorise the original owner to enter into long-term arrangements with MLR providers and bind the body corporate to those agreements. In addition, statutory protections against termination exist for the benefit of both MLR contractors and their financiers.<sup>11</sup> The opening line of the chorus from Moving Pictures' hit song, 'What about me? It isn't fair', seems a fitting description of the process for terminating agreements that were, in many instances, entered into on behalf of the body corporate before it was even established.

Criticisms of the MLR system have been raised by different stakeholder groups and MLR generally has been the subject of comment by well-respected researchers.<sup>12</sup> This article seeks to contribute to the existing body of literature by investigating, in particular, the legal requirements for termination of MLR contracts in Queensland. In turn, it considers the practical impact of actions by original owners which may cause conflict and ongoing dissent. The article's objective is to highlight the need for re-evaluation of how the consumer protection focus of the *BCCM Act* and regulation modules is executed in respect of the MLR industry, to ensure protection of the most vulnerable stakeholder — the body

10 Nicole Renae Johnston, 'An Examination of How Conflicts of Interest Detract from Developers Upholding Governance Responsibilities in the Transition Phase of Multi-Owned Developments: A Grounded Theory Approach' (PhD Thesis, Griffith University, 2017) 190. See also Nicole Johnston, Chris Guilding and Sacha Reid, 'Examining Developer Actions that Embed Protracted Conflict and Dysfunctionality in Staged Multi-Owned Residential Schemes' (Conference Paper, Pacific Rim Real Estate Society Conference, 15–18 January 2012).

11 *BCCM Act* (n 7) ss 112, 123–6; *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) regs 129–31 (*'Standard Module'*).

12 See, eg, Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (Routledge, 2017) (*'Strata Title Property Rights'*); Cathy Sherry, 'Long-Term Management Contracts and Developer Abuse in New South Wales' in Sarah Blandy, Ann Dupuis and Jennifer Dixon (eds), *Multi-Owned Housing: Law, Power and Practice* (Ashgate, 2010) 159; Sarah Blandy, Jennifer Dixon and Ann Dupuis, 'Theorising Power Relationships in Multi-Owned Residential Developments: Unpacking the Bundle of Rights' (2006) 43(13) *Urban Studies* 2365; Hazel Easthope, Bill Randolph and Sarah Judd, 'The Impact of Developer Actions on the On-Going Management of Multi-Unit Developments' (Conference Paper, Strata and Community Title in Australia for the 21<sup>st</sup> Century Conference, 4–6 September 2013); Paul Burton, 'A Critical Review of Current Debates on Long Term Service, Utility and Management Contracts in Strata Schemes' (Conference Paper, Strata and Community Title in Australia for the 21<sup>st</sup> Century Conference, 9 September 2011). Much of this criticism has been captured in conference papers by industry experts presenting at the Strata and Community Title in Australia for the 21<sup>st</sup> Century Conferences in 2005, 2007, 2009, 2011, 2013 and 2015.

corporate and its members. Through the review of both literature and cases on MLR terminations, the article demonstrates a level of dysfunctionality and the capacity for conflicts of interest to arise. It is argued that these governance issues are relevant to policy makers and government regulators both in Queensland and other jurisdictions when examining MLR, the disclosure of such arrangements to potential buyers and the discretion of original owners in binding the body corporate to long-term contracts.

The article is divided into five parts. Part II contains an overview of the Queensland system and a discussion of some of the key criticisms aimed at original owners in respect of MLR contracts. Part III contains an overview of the legal requirements in the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) ch 6 pt 5 ('Standard Module') relating to termination. Part IV considers the impact of the statutory obligation under the *BCCM Act* s 94 for the body corporate to act reasonably when exercising its powers and carrying out its statutory functions.<sup>13</sup> Part V discusses the protections for financiers and how these protections further impact on the body corporate's ability to determine contractual arrangements that the original owner negotiated on its behalf and procured entry into. Part VI contains recommendations for areas of further research and reform. The article concludes with an acknowledgement of the importance of achieving a balance between competing stakeholder interests in the context of an industry that makes a significant contribution to Queensland's tourism industry but reasserts the importance of protecting vulnerable owners.<sup>14</sup>

Given the impact that both implementation and termination of MLR have on all affected stakeholders, in-depth academic research on Queensland termination requirements is essential for operators, affected bodies corporate, and relevant policymakers. This article is an important contribution to strata law in that it demonstrates that the difficulties are much more systemic than merely the termination provisions; however, those provisions contribute significantly to the inequality faced by bodies corporate and their members.

## II OVERVIEW OF MLR AND CRITICISMS OF THE QUEENSLAND SYSTEM

As noted above, the creation, management and winding up of Queensland CTS is predominantly regulated by the *BCCM Act*. The Act is designed to 'suit modern schemes' complex nature within contemporary society. ... [Its] consumer protection emphasis seeks to achieve a workable balance between competing

13 See also *BCCM Act* (n 7) s 94 for a definition of the functions of a body corporate.

14 Australian Bureau of Statistics, *Tourist Accommodation, Australia, 2015–16* (Catalogue No 8635.0, 25 November 2016).

stakeholders' rights'.<sup>15</sup> The *BCCM Act* also seeks to encourage tourism uses within CTS 'without diminishing the rights and responsibilities of owners, and intending buyers, of lots'.<sup>16</sup> An objective of the legislation is to provide flexibility to the body corporate in its 'operations and dealings' to manage the common property and body corporate assets,<sup>17</sup> and in administration and management arrangements.<sup>18</sup> Arguably, however, the progressive amendment of the *BCCM Act* and regulation modules to increase protections for MLR contractors and their financiers have detracted from the ability of the body corporate, as it is constituted after the original owner exits the scheme, to control its affairs. This is largely because of the broad discretion held by the original owner to establish and sell long-term MLR arrangements which bind the body corporate. In this regard, the criticisms levelled at MLR arrangements demonstrate that, at least in respect of MLR, the balance favours the commercial interests of the original owner, and subsequently the MLR contractor and its financier over the rights of lot owners in respect of their own land. Stewart, a body corporate manager, refers to the creation of MLR as a 'crock of gold' for original owners,<sup>19</sup> and Hunt argues that anything more than a cursory glance at the objectives of the *BCCM Act*<sup>20</sup> reveals that the legislation 'affords protection to holders of management rights and does not adequately address the interests of bodies corporate'.<sup>21</sup> Sherry succinctly explains the difficulty with original owner facilitated MLR contracts with respect to the impact on owners:

[I]f you sell people property, they quite reasonably expect property rights. ... [T]he power to control your own property and not be controlled by decisions of a predecessor in title, is a long-standing and legitimate expectation of freehold owners which the sale of management rights flouts.<sup>22</sup>

The opportunity for an original owner to embed 'dysfunctionalism'<sup>23</sup> into a scheme causing long-term negative impacts for lot owners arises from the manner in which a CTS is created, and the responsibilities and entitlements granted to the original owner. When the original owner procures registration of the plan of survey creating the scheme, it also seeks to record the community management statement it has drafted, which contemporaneously establishes the

15 Melissa Pocock, 'Discovering Common Ground: Appropriation of Common Property for Exclusive Use and Scheme Terminations' (2016) 35(2) *University of Queensland Law Journal* 393, 393.

16 *BCCM Act* (n 7) s 4(c).

17 *Ibid* s 4(f).

18 *Ibid* s 4(b).

19 Howard Stewart, 'Ensuring Correct Deployment of Management Agreements' (Conference Paper, Strata and Community Title in Australia for the 21<sup>st</sup> Century Conference, 2–4 September 2009) 4.

20 The objectives of the *BCCM Act* (n 7) are contained in s 4.

21 Peter Hunt, 'What Issues Are Giving Rise to Criticisms of the Basic Management Rights Model?' (Conference Paper, Strata and Community Title in Australia for the 21<sup>st</sup> Century Conference, 4 September 2015) 1.

22 Sherry, *Strata Title Property Rights* (n 12) 133.

23 Johnston, Guilding and Reid (n 10).

body corporate.<sup>24</sup> The fee simple lots are individually owned properties, while the common property is held by the collective of owners as tenants in common in the shares specified in the community management statement.<sup>25</sup> The community management statement also nominates the applicable regulation module for the CTS<sup>26</sup> and sets out its by-laws, all of which have been prepared by the original owner to suit its planned vision for the CTS. The original owner also has the discretion to establish MLR for the CTS.

Depending on the regulation module selected by the original owner, MLR contracts may range in length from between one year (for service contractors for small schemes of up to six lots)<sup>27</sup> to 25 years for MLR contracts where the CTS is registered under the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) ('*Accommodation Module*').<sup>28</sup> Table 1 depicts the significant increase in the number of schemes registered under the *Accommodation Module* over an 11-year period.<sup>29</sup>

**Table 1: Accommodation Module CTS**

	As at 30 September 2007 <sup>30</sup>		As at 31 December 2018 <sup>31</sup>	
	Number	Percentage of total Queensland CTS	Number	Percentage of total Queensland CTS
CTS registered under the <i>Accommodation Module</i>	2,408	6.9%	4,128	8.43%

In addition to the discretion on whether or not to establish MLR for a CTS, the ability to procure a 25-year contract under the *Accommodation Module*, rather than a 10-year term under the *Standard Module*, is largely at the original owner's discretion. An original owner may nominate the *Accommodation*

24 *BCCM Act* (n 7) s 24.

25 *Ibid* s 35(1).

26 Item 2 of the First Community Management Statement prescribed by the *Land Title Act 1994* (Qld).

27 *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) reg 63(1) ('*Small Schemes Module*'); *Body Corporate and Community Management (Specified Two-Lot Schemes Module) Regulation 2011* (Qld) reg 13(1) ('*Two-Lot Schemes Module*'). Note, letting rights contracts are prohibited in both the *Small Schemes Module* (n 27) and *Two-Lot Schemes Module* (n 27): *Small Schemes Module* (n 27) reg 3(2)(b); *BCCM Act* (n 7) s 111C(1) respectively.

28 *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) regs 117–18 ('*Accommodation Module*').

29 By way of contrast, those CTS registered under the *Body Corporate and Community Management (Standard Module) Regulation 1997* (Qld) totalled 25,945, or 73.9% as at 30 September 2007 compared with 29,576 on 30 December 2018: Regulatory Impact Statement, *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) 5; Department of Justice and Attorney-General (Qld), 'BCCM Update' (February 2019) *Common Ground* 6 <publications.qld.gov.au/dataset/5530e3a9-a16f-4ad2-b1c7-7f5ed9bce762/resource/181aa8cc-0924-4093-9e09-9e3866c0c5d8/download/common-ground-issue-20.pdf>. As a percentage of total schemes, this represented a decrease to 60.39%.

30 Regulatory Impact Statement, *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) 5. As at 30 September 2007, the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (Qld) was in effect, not the 2008 legislation.

31 Department of Justice and Attorney-General (Qld) (n 29) 6.

*Module* as applying to a CTS when that original owner evinces an ‘intention’ upon registration of the CTS that the lots will be predominantly ‘accommodation lots’ used for short or long-term rentals, or as part of a hotel.<sup>32</sup> The difficulty with basing the choice of regulation module on the original owner’s intention, rather than for example, approved use, is that it acts as a self-fulfilling prophecy. By announcing in its advertising and/or disclosure materials that the original owner is selling MLR for the CTS, the original owner is creating evidence of its intention that the lots are suitable for investors to purchase. The original owner, therefore, justifies the adoption of the *Accommodation Module* and 25-year MLR contract by forming an intention that the lots are anticipated to be rented, through the act of disclosing that the lots may be let. It is a convoluted, self-benefiting justification enabling original owners to receive the benefit of a premium sale price calculated with reference to the additional 15-year MLR contract term.

### **A What Is an MLR Contractor and What Do They Do?**

A service contractor is defined in the *BCCM Act* as a subcontractor engaged by the body corporate to supply services to it, other than administrative services, for the benefit of lots or common property in the CTS.<sup>33</sup> The specific duties to be performed by MLR contractors are dictated by the terms of appointment, which the original owner arranges so that they may be incorporated into the off-the-plan disclosure statement pursuant to the *BCCM Act* s 213. The MLR contractor will generally be paid a salary agreed with the original owner when purchasing the MLR. In exchange, the caretaker will typically perform duties such as cleaning of common property, maintenance not requiring the skills of qualified tradespeople, landscaping upkeep, monitoring of common property use and reporting to the body corporate on compliance with the CTS by-laws.

Often, the caretaking service contractor will also be appointed as a letting agent for the CTS, entitling the letting agent to exclusively operate the letting agent business from the common property. The ‘letting agent business’ authorises the letting agent to be appointed by owners in ‘securing, negotiating or enforcing (including collecting rents or tariffs for) leases or other occupancies of lots included in the scheme’.<sup>34</sup> In undertaking the letting agent business, the letting agent must also comply with the licensing requirements contained in the *Property Occupations Act 2014* (Qld). The MLR contractor will often purchase a lot in the CTS and reside onsite; many MLR contracts still require this.

32 *Accommodation Module* (n 28) reg 3(2). A hotel is broadly defined to include accommodation, food and drink, and potentially includes restaurants, function rooms, nightclubs, retail and recreation facilities: at reg 3(3) (definition of ‘hotel’).

33 *BCCM Act* (n 7) s 15.

34 *Ibid* s 16(2).

It is the original owner who establishes the MLR arrangements for a CTS and its broad discretion entitles the original owner to dictate the terms of the MLR contracts, and the salary payable, together with what areas of the common property the MLR contractor has the exclusive use of.

## **B The Original Owner, Conflicts of Interest and Fiduciary Duties**

Once the MLR contracts are drafted, and providing they are disclosed to buyers of future lots in the CTS,<sup>35</sup> the original owner may sell the MLR. The original owner sets its sale price based on industry accepted multipliers which factor in income generated from both the caretaking service contractor's salary, which the original owner sets, and the potential commissions generated by the exclusive appointment as letting agent.<sup>36</sup> As seller of the assets, the original owner retains the sale price of both the lot in which the MLR contractor will reside and the MLR business, in exchange for procuring the body corporate's seal on the agreements. Approval of the agreement by the body corporate and affixation of its seal occurs at a general meeting of its members. At the time the meeting is held, membership consists only of the original owner. In this regard, there is a window of time between registration of the CTS and the transfer of titles to buyers, for the original owner to procure execution of agreements.<sup>37</sup> If the MLR is not sold at that point, the original owner utilises the power of attorney or proxy granted to it by buyers, to execute the agreements at a later stage.<sup>38</sup> The effect is to remove the process entirely from the hands of the CTS's new members.

Arguments as to the appropriateness or otherwise of the original owner retaining the sale price of the MLR contract are twofold. On the one hand,

the developer is the one taking the development risk. The developer has to take his product to the market ... not just the units on offer but also the community property, the facilities as well as the manner in which the property will be managed and operate.<sup>39</sup>

Sherry disagrees with this sentiment, arguing that the original owner makes the initial investment in construction of the scheme; however, ultimately it is

35 Ibid s 213.

36 Stewart (n 19) 4. Stewart notes that as at 2009, the multiplier was 4.5 to 5 times income. FNX Finance Group reports that in August 2018, multipliers had decreased to an average of 4.1 for agreements over schemes regulated by the *Standard Module* (n 11) and 4.3 for agreements for schemes regulated by the *Accommodation Module* (n 28): FNX Finance Group, 'Management and Letting Rights Quarterly Pulse: September 18', *TheOnsiteManager.com.au* (Blog Post, 9 October 2018) <[theonsitemanager.com.au/news/management-and-letting-rights-quarterly-pulse-september-18-fifth-series/](https://theonsitemanager.com.au/news/management-and-letting-rights-quarterly-pulse-september-18-fifth-series/)>.

37 The *BCCM Act* (n 7) prohibits settlements earlier than 14 days after registration of titles to the lots: at s 212.

38 Ibid ss 211, 108 respectively.

39 Stewart (n 19) 2.

the buyers of lots who fund the original owner through their purchases.<sup>40</sup> While this is true, it overlooks the developer's contractual and legal liability for the development during the construction period, including the risk of insolvency for unsuccessful projects, and commercial risk such as market changes affecting the feasibility of the project up until sales of all lots within the CTS are finalised, and after for the extent of the defects liability period. Original owners have argued that to offset these risks, they create and sell MLR for the CTS so as to generate another income stream.<sup>41</sup> However, this argument must fail. MLR arrangements are not unique to Queensland, but Queensland does have the largest MLR industry in Australia.<sup>42</sup> It flourished as a result of the statutory system enacted in the *BCCM Act*, not because original owners were subjected to additional risks not present when developing in any other Australian state or territory. So, while original owners do take development risks, the justification that MLR must be sold to ensure the profitability of a project is unsubstantiated. The short-term cash injection that the original owner receives from selling the MLR has the effect of binding the body corporate to potentially decades-long and financially significant obligations. For that reason alone, we must consider the broader implications rather than merely the original owner's bottom line.

The original owner's role in the creation of a CTS, preparation of the governing documents and negotiation of preliminary agreements is comparable to a promoter.<sup>43</sup> In this regard, a promoter owes a fiduciary duty to an entity when they 'get up and form' it.<sup>44</sup> Preparation of a company's memorandum of association<sup>45</sup> and negotiation of preliminary contracts<sup>46</sup> were sufficient to classify the relevant parties as promoters, giving rise to fiduciary duties. In *Re Steel and the Conveyancing (Strata Titles) Act*,<sup>47</sup> Else-Mitchell J in the New South Wales Supreme Court extended the role of a promoter to a company that procured registration of a strata title scheme. This was reaffirmed in 2007 in *Community Association DP No 270180 v Arrow Asset Management Pty Ltd ('Arrow Asset Management')*,<sup>48</sup> where McDougall J determined that the developer was akin to the promoter of a company and, therefore, it owed a fiduciary duty to the owners' corporation.

40 Sherry, *Strata Title Property Rights* (n 12) 133.

41 Stewart (n 19) 2.

42 This is based on anecdotal evidence; however, see, eg, Kieran Clair, 'Buying Management Rights', *Australian Property Investor* (Blog Post) <[www.apimagazine.com.au/property-investment/buying-management-rights](http://www.apimagazine.com.au/property-investment/buying-management-rights)>.

43 David Bugden, 'Management Rights: Are Developers Promoters?' [1996] (June) *Queensland Law Society Journal* 281, 283–4.

44 *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215, 242 (Dixon CJ, Williams and Taylor JJ) ('*Tracy*').

45 *Ibid.*

46 *Re Leeds & Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809 ('*Re Leeds*').

47 [1968] 2 NSW 796.

48 [2007] NSWSC 527 ('*Arrow Asset Management*').

The question of whether an original owner is a promoter has not been definitively answered in Queensland.<sup>49</sup> Proponents argue that common law principles defining promoters and the fiduciary obligations they owe mean that the principles apply more broadly than merely the jurisdictions in which the obligation has been accepted.<sup>50</sup> By way of contrast, Ardill et al relied on three main arguments when questioning whether the fiduciary duty applied to original owners in Queensland. First, they considered that the courts are reluctant to impose a fiduciary duty where an arm's-length contract governs the arrangement, such as the off-the-plan contract entered into between original owners and buyers.<sup>51</sup> While there is an arm's-length contract in place between the parties, relying on it as evidence that a fiduciary relationship does not exist is problematic. The contracts and disclosure statements are, most often, a 'take it or leave it' type of arrangement. Buyers can rarely negotiate the contractual provisions in the same way that, for example, may occur in other sales arrangements. Secondly, Ardill et al highlighted that original owners 'risk considerably more personal capital' than promoters of corporations.<sup>52</sup> This point is acknowledged and as noted above has, in fact, been used as a justification for the establishment and sale of MLR in CTS by original owners. Finally, the relationship between original owner and buyers of lots is regulated by statute which defines the scope of that relationship,<sup>53</sup> and permits the original owner to profit from the sale of the MLR.<sup>54</sup> In this regard, the *BCCM Act* s 112 obliges the original owner to 'exercise reasonable skill, care and diligence and act in the best interests of the body corporate', as it is constituted after the original owner exits the CTS in respect of the following issues:

1. Ensuring that the terms of engagements or authorisations fairly and reasonably balance the interests of both the contractor and the body corporate;
2. The terms are appropriate for the CTS; and
3. The powers and functions the contractor must perform under the agreements are appropriate for the CTS, and do not adversely impact on the ability of the

49 See Francesco Andreone, 'The Implications of the Arrow Asset Management Case' (Conference Paper, Strata and Community Title in Australia for the 21<sup>st</sup> Century Conference, 2–4 September 2009); David Bugden (n 43) 283–4; Johnston (n 10) 137–8; *Tracy* (n 44); *Re Leeds* (n 46), all of which indicate that developers are classified as promoters. Cf A Ardill et al, 'Community Titles Reforms in Queensland: A Regulatory Panacea for Commercial, Residential and Tourism Stakeholders' (2004) 25 *Queensland Lawyer* 13, 20.

50 New South Wales through *Arrow Asset Management* (n 48) and Western Australia from *Radford v The Owners of Miami Apartments, Kings Park Strata Plan 45236* [2007] WASC 250.

51 Ardill et al (n 49) 20, citing *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 99–100 (Mason J).

52 Ardill et al (n 49) 20.

53 *Ibid*, citing *Body Corporate for Noosa on the Beach CTS 6417 v Hollis Partners Pty Ltd* [2002] QDC 86, [15] (Dodds DCJ) and *Humphries v The Proprietors 'Surfers Palms North' Group Titles Plan 1955* (1994) 179 CLR 597.

54 *BCCM Act* (n 7) s 115; Michael Kleinschmidt, 'Falling Short of the Target: Some Implications of Fiduciary Duties for Developer Practice in Queensland and New South Wales' (2011) 19(3) *Australian Property Law Journal* 262, 269.

body corporate to carry out its functions.

This article makes no conclusion on whether or not an original owner is a promoter and owes a fiduciary duty towards the body corporate and future owners of lots. It is, however, an area which would benefit from further in-depth analysis to add to the paucity of research on the issue.

Assuming, for the moment, that original owners in Queensland are regarded as promoters, it is likely that these common law duties will apply in addition to the statutory duty in the *BCCM Act* s 112. Fiduciaries owe a proscriptive duty. They must ‘act with the utmost candour and honesty’.<sup>55</sup> ‘[A] promoter must act in good faith and for the benefit of the company they promote.’<sup>56</sup> In *Arrow Asset Management* the developer’s fiduciary duties extended to an obligation not to place itself in a position of conflict, and not to profit from its position without the beneficiaries’ fully informed consent.<sup>57</sup>

There are, arguably, two critical points at which the original owner may place itself in a position of conflict in relation to MLR, and potentially breach its fiduciary obligation, or the lesser standard of reasonable skill, care and diligence in the *BCCM Act* s 112. First, the original owner may be seen to act contrary to the body corporate’s interests if it incorporates inappropriate contractual terms into the MLR agreements. The original owner is incentivised to adopt terms that benefit the MLR contractor and are, consequently, at the expense of the body corporate to ensure the best possible sale price for the agreements.<sup>58</sup> In this regard, long-term contracts and high salaries will result in a better sale price for the MLR contract. This ties in with the second possible area of conflict: favouring one regulation module for the CTS over another, more appropriate one. This might occur in circumstances where selection of the *Accommodation Module* would permit adoption of the longer 25-year term for the MLR agreement, but it would otherwise be inappropriate for the CTS. Of course, as noted above, the discretion given to the original owner to choose the regulation module is broad, and justifiable merely through a statement in the marketing materials. Despite this, conflicts arising from the broad discretion held by the original owner in respect of the establishment of MLR have continued unchecked.

It is noteworthy that a breach of its obligations under the *BCCM Act* s 112 exposes the original owner to liability for a civil penalty, capped at a low 300 penalty

55 Kleinschmidt (n 54) 272.

56 Ibid, citing *Tracy* (n 44) 241–2 (Dixon CJ, Williams and Taylor JJ).

57 Kleinschmidt (n 54) 272.

58 Chris Guilding et al, ‘An Agency Theory Perspective on the Owner/Manager Relationship in Tourism-Based Condominiums’ (2005) 26(3) *Tourism Management* 409, 416.

units.<sup>59</sup> Recognition of the original owner as promoter in Queensland would extend that liability to include an account of profits made in breach of the original owner's fiduciary duty,<sup>60</sup> but would not limit its ability to enter into the contracts.<sup>61</sup>

The conflict of interest between original owners and bodies corporate in respect of the creation and sale of long-term MLR for CTS has been a contentious issue for over a decade.<sup>62</sup> The original owner may have obligations in its role as promoter and fiduciary of the CTS, but enforcing breaches of these obligations is costly. The legislative structure which provides original owners with the exclusive right to profit from the sale of MLR<sup>63</sup> has resulted in these arrangements becoming commonplace. In circumstances where the original owner controls the votes of the body corporate through the use of proxies and powers of attorney post-creation and transfer of titles to buyers,<sup>64</sup> the ability of those buyers, and later owners, to action any such breaches may also be impeded. This leaves the body corporate with little option but to comply with the ongoing contractual obligations with the MLR contractor. Nevertheless, while it is recognised that there are flaws in the system, it is the system that we must work within the boundaries of. As Burton indicated, "[l]ong term management rights need to be preserved for those situations where they are appropriate." However the question of which situations are appropriate remains vexed.<sup>65</sup> This article proposes a number of changes to the system which may have a significant effect on the way MLR are conceived by the sector. A reconsideration of the original owner's level of responsibility to bodies corporate, its role in creating MLR for a CTS, and especially in respect of disclosure to buyers must be undertaken.

### **C Disclosure and Its Limitations**

In Queensland, it is typical for original owners to enter into sales contracts prior to creating titles to the individual lots and the body corporate structure; the *BCCM Act* contains pre-registration disclosure requirements to facilitate this. Section 213(2) requires that the proposed terms of appointment for the MLR contractor, the estimated cost of that appointment to the body corporate and the proportion of the cost to be borne by the individual buyer be disclosed. Following

59 As at 1 July 2019, the value per civil penalty unit under the *Penalties and Sentences Act 1992* (Qld) s 5 was \$133.45, meaning that any civil penalty applied for a breach of the section is capped at \$40,035.00, an insignificant amount given the high sale prices of MLR contracts in Queensland.

60 However, note that the original owner is granted the exclusive right to sell the MLR for a scheme. The body corporate cannot profit from a sale of the MLR: *BCCM Act* (n 7) s 115.

61 The scope of an original owner's fiduciary duty is limited by the *BCCM Act* (n 7) as it sets out the standard for behaviour for the original owner. See Sherry, 'Long-Term Management Contracts and Developer Abuse in New South Wales' (n 12) 169.

62 Johnston (n 10) 155–6; Johnston, Guilding and Reid (n 10) 9.

63 *BCCM Act* (n 7) s 115.

64 *Ibid* s 211.

65 Burton (n 12) 7.

the decision in *Arrow Asset Management*, many original owners also disclose the anticipated sale price of the MLR business. While provision of information to buyers is as a general principle good, disclosure itself creates another area of concern. Disclosure materials are drafted on behalf of the original owner by their lawyers and many of the documents making up those materials, including the MLR agreements, are boilerplate documents created by the law firm. Generic to a degree, these boilerplate documents are commonly utilised across all developments the firm is instructed on, and are not necessarily tailored to the specific needs of the CTS.<sup>66</sup> This use of generic agreements only heightens the potential risk of long-term conflict and dysfunctionality as Johnston identified.<sup>67</sup>

The *BCCM Act* ch 5 pt 2 div 3 disclosure requirements are designed as a list. Original owners must disclose the items in the manner required in the division. Provided this is done, valid disclosure has been given. There is an assumption made with disclosure that as long as notice is given, buyers are bound.<sup>68</sup> While this is certainly the case in respect of the *BCCM Act* s 213(2), as Sherry notes ‘notice has never been a cure-all in property because giving purchasers notice of burdens that are, or transpire to be, inefficient or unfair, does not make them any less inefficient or unfair’.<sup>69</sup> This observation builds upon the work of Blandy, Dixon and Dupuis who indicated that buyers may rely on other professionals to explain documents to them because of a level of confusion with the multi-owned property model.<sup>70</sup> In this regard, buyers may not read, but if they do are unlikely to understand the full extent of disclosure materials provided by the original owner, and the lasting impact that those arrangements will have on them.<sup>71</sup> While the *BCCM Act* s 4(g) seeks to protect owners and intending buyers, the Act’s focus in respect of pre-contractual disclosure is for original owners to tick a series of boxes. No obligations exist around ensuring comprehension of those materials, a significant shortcoming of the *BCCM Act*.<sup>72</sup>

Even if buyers do understand, there is no real opportunity for them to renegotiate the terms of a proposed appointment. The original owner is unlikely to agree to the amendment of MLR agreements at the behest of a buyer who is not also purchasing those rights.<sup>73</sup> Any change to the agreements would require the

66 Stewart (n 19) 7.

67 Johnston (n 10) 190.

68 Sherry, *Strata Title Property Rights* (n 12) 136.

69 Ibid.

70 Blandy, Dixon and Dupuis (n 12) 2376.

71 Ibid. The author’s own experience in practice also suggests that buyers do not always read and/or understand the extensive disclosure materials provided as part of off-the-plan disclosure.

72 See, eg, the recommendations in Lauren Solomon and Ben Martin-Hobbs, *Five Preconditions of Effective Consumer Engagement: A Conceptual Framework* (Report, Consumer Policy Research Centre, 16 April 2018) <cprc.org.au/projects/five-preconditions-of-effective-consumer-engagement/>.

73 Cathy Sherry, ‘Conflict between Private and Public Restrictions’ in Erika Altmann and Michelle Gabriel (eds), *Multi-Owned Property in the Asia-Pacific Region: Rights, Restrictions and Responsibilities* (Palgrave Macmillan, 2018) 105.

original owner to disclose the variation to all other buyers,<sup>74</sup> in turn giving rise to the potential for each contracted party to terminate the purchase contract under the *BCCM Act* s 214(6).

The issue facing the body corporate, however, may not be limited to the MLR agreements. The purchaser of the MLR arrangements may also not be appropriately qualified or experienced to effectively maintain millions of dollars of common property facilities.

## **D Assessing the Competency of MLR Contractors**

In addition to being unable to negotiate the terms of MLR contracts, buyers have no legislatively granted opportunity to vet proposed purchasers of the MLR to assess their competency or fitness to carry out the duties under the agreements for the CTS as it will be constituted after the original owner exits. This is not a question of whether the contractual terms are acceptable, or the regulation module selected appropriate for the CTS. That is, it does not relate to an actual or perceived breach of fiduciary or statutory obligation by the original owner. Rather, the concern relates to the body corporate being able to assess the competency of the MLR contractor to complete their contractual duties. Once the original owner procures the entry by the body corporate into the agreements, the only means of determining the contracts, where incompetency or an inability to carry out the contract exists, are the termination or transfer provisions under the *BCCM Act*.

There is no obligation on original owners to assess the competency of contractors when selling the MLR business to them. Assessing capacity to pay the purchase price is relevant to the MLR contractor's ability to complete its purchase contract with the original owner; however, it is not an indicator of future performance. It could be argued that it is not necessary to vet MLR purchasers; however, if the body corporate is bound to an agreement with that MLR contractor for a significant timeframe without any cooling off or probationary period, there are sound arguments to suggest that it should have input into the contractor chosen and that contractor should demonstrate their capacity to perform satisfactorily in such a business role. The difficulty with this assertion, however, is that the buyers, and as such the body corporate (as it will potentially be constituted after the original owner exits the CTS), are not necessarily qualified to make this assessment either, especially in circumstances where they are unfamiliar with the precise functionality or maintenance requirements of the common property facilities and body corporate assets. This is, perhaps, an area for possible reform; however, its implementation is likely to be problematic. Questions relating to who is responsible for the assessment, and upon what criteria an assessment

<sup>74</sup> *BCCM Act* (n 7) s 214(2).

would occur are relevant. If the original owner is tasked with this responsibility, there must be some accountability, or the amendments would merely result in a throwaway line in a disclosure document confirming that the original owner will assess the capacity of the MLR contractor to perform its duties with no effective recourse by the body corporate. Removal of the original owners' power to appoint an MLR contractor would place responsibility for appointment of any contractors in the hands of the body corporate after its creation, potentially allowing the body corporate to familiarise itself with the minimum duties and maximum payment amount and timeframe it is prepared to agree to.

## **E Reviewing MLR Contracts**

One potentially impactful protection for lot owners in the MLR context is the ability for the body corporate to request a one-off,<sup>75</sup> independent review<sup>76</sup> of the terms of the MLR service contract. These review provisions are contained in the *BCCM Act* ch 3 pt 2 div 7 and provide that a review of the functions, powers and remuneration of a service contractor may occur where entry into the agreement occurred during the original owner control period,<sup>77</sup> and that period has expired.<sup>78</sup> While there is no maximum timeframe within which the review must be commenced, it may only be brought about by passage of an ordinary resolution by the body corporate.<sup>79</sup> In addition, such a review may only be conducted once in the lifetime of the scheme.<sup>80</sup>

In Fisher and McPhail's study,<sup>81</sup> owners raised concerns with the MLR contractor's influence in connection with voting on motions for the annual general meeting and, in particular, selection of committee members.<sup>82</sup> There, the MLR contractor issued to owners, who had appointed them as letting agent, a 'Motions voting guide'. That guide recommended voting in favour or against motions in the annual

75 *Ibid* s 130(6).

76 *Ibid* s 132(1).

77 *Ibid* sch 6 defines the original owner control period as:

- original owner control period** means the period in which —
- (a) the body corporate is constituted solely by the original owner; or
  - (b) the original owner owns, or has an interest in, the majority of lots in the scheme or, in any other way, controls the voting of the body corporate.

The original owner may control the voting of the body corporate through the use of powers of attorney. *Ibid* s 211(3) provides that a power of attorney granted in favour of the original owner expires one year after it is given. Typically, commencement of the power of attorney is triggered by registration of the CTS. Proxies may also be used to extend the original owner's control over voting of the body corporate for a maximum period of one year after creation of the CTS: *Standard Module* (n 11) reg 110(3)(a).

78 *BCCM Act* (n 7) s 130(1).

79 *Ibid* s 130(3).

80 *Ibid* s 130(6).

81 Ron Fisher and Ruth McPhail, 'Residents' Experiences in Condominiums: A Case Study of Australian Apartment Living' (2014) 29(6) *Housing Studies* 781.

82 *Ibid* 793.

general meeting agenda. Further, the MLR contractor provided a 'Residents voting guide' that suggested which potential committee members owners should vote for. The resident owners who participated in the Fisher and McPhail study were of the view that the MLR contractor had 'totally corrupted the whole system'.<sup>83</sup> The MLR contractor was a person who 'should not be able to influence the selection of the committee', but 'goes out of his way to explain how to vote'.<sup>84</sup> It would not be inconceivable for an MLR contractor to use its influence within a CTS to sway votes in favour of friendly committee members and recommend that owners vote against certain motions. This would be particularly relevant where one of those motions could initiate a review of the MLR contract. The impact on a body corporate of persons with vested interests influencing the votes in the manner identified by Fisher and McPhail could be significant, and certainly capable of detrimentally impacting upon a body corporate's ability to self-govern using the democratic voting processes set out in the *BCCM Act*.

It is a positive feature of the *BCCM Act* ch 3 pt 2 div 7, that it mandates the involvement of an independent assessor in undertaking a review,<sup>85</sup> as is the direction given to those assessors in determining whether the terms of the MLR appointment are fair and reasonable.<sup>86</sup> The criteria set out in the *BCCM Act* s 134 provide that the review of the service contractor's agreement may extend to the contractor's 'functions and powers', or the 'remuneration payable'<sup>87</sup> to determine whether the terms are fair and reasonable.<sup>88</sup> It is interesting to note, however, that while the *BCCM Act* s 134 enables the reviewer to consider 'the term of the engagement as service contractor and the period of the term remaining', the *BCCM Act* s 135(2) prohibits the alteration of the MLR contractor's term of engagement as an outcome of the review. This is one of the protections implemented for the benefit of both MLR contractors and their financiers, which arguably, has a negative impact on the body corporate's freedom to contract.

If upon a review being undertaken, the independent reviewer concludes that the functions and powers or remuneration under the MLR contract are not fair and reasonable, the *BCCM Act* s 133 deems the existence of a dispute. This, in turn, entitles the parties to seek an order by either a specialist adjudicator under the *BCCM Act* ch 6, or the Queensland Civil and Administrative Tribunal ('QCAT') under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) to resolve that dispute. The use of administrative dispute resolution forums in the context of MLR disputes has been criticised as expensive, slow and subject to

83 Ibid.

84 Ibid.

85 *BCCM Act* (n 7) s 132(1)(a).

86 Ibid ss 131(a), 134.

87 Ibid s 130(2).

88 Ibid s 131.

abuse.<sup>89</sup> The substantial value of the MLR contracts has caused decision-makers in this forum to be ‘extremely hesitant’ to order a termination.<sup>90</sup> In fact, in *J Patterson Holdings Pty Ltd v Body Corporate for Palm Springs Residences Community Titles Scheme 29467*, the specialist adjudicator expressed the opinion that they will effectively ‘with the stroke of a pen wip[e] away this valuable asset’, and suggested that ‘such an order cannot be made lightly’.<sup>91</sup> In overturning the specialist adjudicator’s decision, McGill DCJ criticised that approach. His Honour commented that the decision ‘appears to amount to an admission on the part of the adjudicator that he approached the resolution of the matters in issue between the parties with a preconceived sympathy for the respondent’.<sup>92</sup> Later in his Honour’s decision, McGill DCJ suggested that the specialist adjudicator had demonstrated ‘a strong predisposition in favour of the respondent [the MLR contractor]’.<sup>93</sup> For a reportedly impartial system, this is a problem which goes to the core of its effectiveness. When recourse to the courts is limited to appeals on errors of law made by administrative decision-makers, access to fair and impartial decision-makers at first instance is critical. Questioning the objectivity with which decisions are made at first instance undermines the entire system.

Sherry criticises administrative tribunals as the dispute resolution forum for multi-owned property disputes for a different reason. She argues that the lack of case law encourages an ‘arguable assumption’ being made by stakeholders that the *BCCM Act* and regulation modules contains the panacea to all dilemmas arising in multi-owned properties.<sup>94</sup> This then discourages the appointment of lawyers to aid with the drafting of pleadings and further, the exploration of the applicability and scope of protections offered by centuries-old common law principles to limit abuses of power. These principles, which are extensively used in agency, corporate law, contracts and equity, among other disciplines, have not been fully explored in the context of CTS disputes, nor MLR contracts.<sup>95</sup> The point of promoting the involvement of lawyers is not to generate fees for the profession, although undoubtedly that would occur. Rather, on an individual matter level, legal counsel may act to preserve the rights of parties using established laws that are contained outside the terms of the *BCCM Act* and regulations, but are nevertheless relevant. Secondly, on a broader basis, the specific application of laws such as fiduciary obligations and unconscionable conduct, to name but two, would continue to hold parties responsible for conduct which may not be obviously problematic having regard to the *BCCM Act*, but in breach of long-established legal principles with

89 Hunt (n 21).

90 Ibid 3.

91 [2007] QBCCMCmr 381, [36] (Specialist Adjudicator Bugden) (*Palm Springs (Adjudication)*).

92 *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300, [17] (McGill DCJ) (*Palm Springs (QDC)*).

93 Ibid [38].

94 Sherry, ‘Long-Term Management Contracts and Developer Abuse in New South Wales’ (n 12) 161.

95 Ibid.

the effect of protecting consumers in accordance with the secondary objectives of the *BCCM Act*.<sup>96</sup>

Upon analysis of the *BCCM Act* provisions for the creation, operation and termination of MLR, Burton concludes that there appear to be 'systemic flaws' with the legislative and policy frameworks contained in them.<sup>97</sup> The piecemeal regulatory approach adopted by the Queensland government in adding layers of protections by patching up gaps in the legislation 'often create more problems than they solve'.<sup>98</sup> Further to Sherry's argument raised above, he also recognised that the provisions regulating both the protection of original owners and financiers, together with the limited termination rights 'deprives unit owners [of] access to tried and proven contract law'.<sup>99</sup> The author agrees. The system itself is flawed. It is designed to profit original owners, while providing limited protections to owners. It maximises protections for MLR contractors and financiers at the expense of bodies corporate, and at the same time enforces a dispute resolution process that discourages representation and has, in the past, demonstrated a bias against the body corporate. These factors coalesce to result in a body corporate facing difficult odds (at best) in removing a non-performing MLR contractor, in circumstances where the odds might be balanced more appropriately if ordinary principles of contract law were relied upon.

Stewart has experienced the deficiencies in the system and in the MLR contracts operating under them as causing 'seething discontent' on the parts of bodies corporate.<sup>100</sup> While Bugden agrees that 'abuses and excesses' have caused bodies corporate to '[suffer] under arrangements that should never have been made',<sup>101</sup> he also cautions that it is essential to protect contracts entered into under existing statutory arrangements.<sup>102</sup> Easthope, Randolph and Judd echo the sentiment that there are flaws in the system, recommending that a more effective integration of long-term management considerations is necessary at the design and build phase so that future management costs are minimised.<sup>103</sup> Until original owners no longer regard MLR contracts as an income stream from the development of a CTS, but rather recognise the contracts as binding future lot owners to expensive arrangements for decades to come, we are unlikely to see MLR as a long-term management consideration on original owners' radars. Nevertheless,

96 *BCCM Act* (n 7) s 4(g).

97 Burton (n 12) 9.

98 *Ibid.*

99 *Ibid* 6.

100 Stewart (n 19) 8.

101 Gary Bugden, 'What Are the Practical Options to Regulate Long Term Contracts?' (Conference Paper, Strata and Community Title in Australia for the 21<sup>st</sup> Century Conference, 9 September 2011) 3.

102 *Ibid* 16.

103 Easthope, Randolph and Judd (n 12) 20; Hazel Easthope and Bill Randolph, 'Principal-Agent Problems in Multi-Unit Developments: The Impact of Developer Actions on the On-Going Management of Strata Titled Properties' (2016) 48(9) *Environment and Planning A* 1829, 1843.

as rightly noted, care must be taken in changing legislative systems from which a multi-billion dollar industry has developed. It may be inequitable to impose negative impacts on MLR contractors and financiers where legislative changes are retrospective. However, that provides little reassurance to bodies corporate which are trapped in an MLR arrangement that is not functioning, whether as a result of an inappropriate contract being procured by the original owner on its behalf, or non-performance by the MLR contractor.

While extensive research has been conducted on the creation of MLR, the conflicts and issues arising, little has been written about their termination under the *BCCM Act*. As a result, Parts III and IV now examine the termination of MLR agreements under the *Standard Module* ch 6 pt 5.

### III TERMINATION OF MLR AGREEMENTS

This Part demonstrates the difficulties around a body corporate terminating an MLR agreement. The provisions in the *BCCM Act* and regulation modules are intended to protect MLR contractors and their financiers by ensuring bodies corporate only terminate agreements where certain criteria are met. Overarching the provisions is the responsibility for the body corporate to act reasonably. While existing contractors argue they have invested significant funds in the purchase of their MLR contracts and as a result the protections are necessary, the provisions leave bodies corporate in a precarious position in circumstances where MLR should never have been established. The alternatives in place to termination — formal review of the provisions under the *BCCM Act* ch 3 pt 2 div 7 and a required transfer of the agreement under the *BCCM Act* ch 3 pt 2 div 8 — will not overcome the dysfunctionality imposed by the original owner's actions.<sup>104</sup> As such, this Part considers the legal framework established to regulate termination of MLR agreements.

The termination framework is contained within each of the regulation modules. The provisions of the *Standard Module* are the focus of this article. Equivalent provisions may be found within the *Accommodation Module* and the *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld).<sup>105</sup> Given that it is not possible to appoint a letting agent under the *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) ('*Small Schemes Module*'),<sup>106</sup> the provisions in the *Small Schemes Module* ch 6 pt 4 are restricted to termination of body corporate manager and other

104 Johnston (n 10).

105 *Accommodation Module* (n 28) ch 6 pt 5; *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) ch 6 pt 4.

106 *Small Schemes Module* (n 27) reg 3.

service contractor agreements such as caretakers.<sup>107</sup> Similarly, the *BCCM Act* s 111C(1)(c) provides that no letting agent may be appointed for a specified two-lot scheme under the *Body Corporate and Community Management (Specified Two-Lot Schemes Module) Regulation 2011* (Qld).

The common law contracts system, established over centuries of incremental developments of precedent, has been largely overlaid by the detailed *BCCM Act* provisions.<sup>108</sup> The disadvantages of the legislative requirement that disputes be resolved via administrative avenues such as the QCAT, rather than the courts, was highlighted above. Nevertheless, while the QCAT decisions are administrative in nature and not binding precedent, it is helpful to consider them, because in many cases they are the only interpretations of the *BCCM Act* available.

As noted above, the *BCCM Act* and regulation modules create a framework for MLR arrangements. The *Standard Module* reg 129(1) provides that an MLR agreement may be terminated:

1. Pursuant to the procedures set out in the *BCCM Act*, in particular ss 130 and 131, after appropriate motions are passed by an ordinary resolution of the body corporate;
2. By mutual agreement of the parties; or
3. Under the engagement or authorisation itself. Notably, if the body corporate seeks termination because of a contractor's non-performance under the engagement or authorisation, or through misconduct or gross negligence, a remedial action notice must be issued pursuant to the *Standard Module* reg 131(3).

Each of the limbs under which an MLR agreement may be terminated are discussed below.

### **A Standard Module reg 130: Termination for Conviction of Particular Offences Etc**

The *Standard Module* reg 130 contains four limbs upon which an MLR contract may be terminated by the body corporate. The provisions establish the right of termination in circumstances where a contractor, or its director, commits certain fraud, dishonesty or assault offences, carries on an illegal business or transfers an interest in the engagement without consent.<sup>109</sup> A decision to terminate the MLR contract may only be effected by way of an ordinary resolution of the body

<sup>107</sup> Ibid reg 65.

<sup>108</sup> Sherry, *Strata Title Property Rights* (n 12).

<sup>109</sup> *Standard Module* (n 11) reg 130(1).

corporate decided by secret ballot.<sup>110</sup>

In *Trojan Resorts Pty Ltd v Body Corporate for the Reserve* ('*The Reserve* (QCAT)'),<sup>111</sup> Member Browne of the QCAT concluded that a breach of the MLR contract must be more than a mere technical breach for a right of termination to arise in respect of *Standard Module* reg 130. In that case, the directors of the caretaker company consisted of three people — Ms Cole, Ms Knipe and Mr Knipe. Ms Cole was not involved in the day-to-day caretaking or letting duties for the CTS. On 27 December 2012, Ms Cole resigned as managing partner of the company and resignation of her directorship was noted on the company register. The MLR agreements provided that any alterations to the caretaker's board of directors was a deemed assignment requiring the prior consent of the body corporate, which was not obtained. The body corporate reserved its rights as a result of the breach and Ms Cole was subsequently reappointed as a director of the company in July 2014. In September 2014, the body corporate passed a resolution terminating the MLR agreements based on the change in directorship, and the caretaker sought an order from the QCAT staying the termination.

Member Browne confirmed that the change of directorship was a breach of the MLR agreements.<sup>112</sup> However, Ms Cole's reinstatement as a director in July 2014 restored the prior state of affairs.<sup>113</sup> Further, the body corporate could not establish that it had suffered loss or damage from the breach.<sup>114</sup> Therefore, despite the breach occurring, it was not sufficiently substantive to reasonably support the body corporate's decision to terminate the agreement.<sup>115</sup> The requirement for reasonableness in the body corporate's actions is discussed below in Part IV. Undoubtedly, the body corporate taking steps towards termination in such a case would have the effect of 'wiping away this valuable asset'<sup>116</sup> but the 'strong predisposition' and 'preconceived sympathy' towards the MLR contractor is an error of law.<sup>117</sup> The *Standard Module* reg 130(1) and the MLR contract were clear. The MLR contractor contravened them twice. The author questions how the consumer protection and self-governance objects in the *BCCM Act* could possibly be achieved if termination in these circumstances was prohibited.

110 Ibid reg 130(2).

111 [2015] QCAT 337 (*The Reserve* (QCAT)).

112 Ibid [41].

113 Ibid [50].

114 Ibid [51].

115 Ibid [48]–[54]; *BCCM Act* (n 7) s 94.

116 *Palm Springs* (Adjudication) (n 91) [36] (Specialist Adjudicator Bugden).

117 *Palm Springs* (QDC) (n 92) [17] (McGill DCJ).

## **B Standard Module reg 131: Termination for Failure to Comply with Remedial Action Notice**

The *Standard Module* reg 131(1) contains the operative terms for terminating a contract where a breach of the engagement or code of conduct has allegedly occurred. That regulation provides:

- (1) The body corporate may terminate a person's engagement as a ... service contractor if the person (including, if the person is a corporation, a director of the corporation) —
  - (a) engages in misconduct, or is grossly negligent, in carrying out functions required under the engagement; or
  - (b) fails to carry out duties under the engagement; or
  - (c) contravenes —  
...
    - (ii) for a ... caretaking service contractor — the code of conduct for body corporate managers and caretaking service contractors or the code of conduct for letting agents; or
  - (d) fails to comply with section 133(2), ... or 135(2) ...<sup>118</sup>

Given that the parties cannot contract out of these provisions, any steps set out in the MLR agreements to effect the termination must be complied with in addition to the statutory provisions.

As noted above, the *Standard Module* regs 131(1)(c) and (2)(c) deal with breaches by the MLR contractor of either or both the codes of conduct contained in the *BCCM Act* schs 2 and 3 respectively. Those codes are taken to be incorporated into MLR agreements by the *BCCM Act* s 118(2). The obligations imposed relate predominantly to the manner in which duties are carried out, compliance with statutory requirements and engaging in appropriate standards of ethical behaviour. Duties are broadly framed so are no real substitute for precisely drafted contractual obligations.<sup>119</sup> This is problematic in circumstances where lawyers for the original owner do not sufficiently tailor their boilerplate MLR contract to the CTS when preparing documents for disclosure to buyers, and that generic agreement is later accepted by the purchaser of the MLR. The void between the broad standards set out in the codes of conduct and those equally vague MLR

<sup>118</sup> The obligations in *Standard Module* (n 11) reg 131(1) are replicated in *Standard Module* (n 11) reg 131(2) in respect of letting agents.

<sup>119</sup> If there is an inconsistency between the provisions of the code and the MLR agreement, the code will prevail: *BCCM Act* (n 7) s 118(3).

contracts affects bodies corporate to the greatest degree. MLR contractors need only perform the duties set out in their agreements. However, that does not discharge the body corporate's obligation to maintain the common property in a good condition.<sup>120</sup> The body corporate must still provide those additional maintenance services. While this is not the fault of the MLR contractor, and that contractor should not face termination of their contract for such a reason, it does demonstrate the difficulties for a body corporate in this situation when the original owner and their solicitors do not develop an MLR contract which deals appropriately with extensive common property facilities in modern CTS. The best approach in this case would be to vary the contract provisions, whether through the formal process in the *BCCM Act* ch 3 pt 2 div 7 or by mutual agreement. But that obligation to rectify any shortcomings in the agreements is placed squarely on the body corporate, while the original owner, who negotiated the agreement, is likely to avoid any further involvement in the matter.

*Henderson v The Body Corporate for Merrimac Heights* ('*Merrimac Heights*') did not involve a situation where the MLR agreement was insufficient or inappropriate.<sup>121</sup> Rather, the body corporate sought to rely on purported breaches of the code of conduct to terminate caretaking and landscaping services contracts it had entered into with Henderson. Four separate breaches of the code of conduct were alleged, but the body corporate only relied upon three grounds in the appeal.

First, the landscaping contract entitled Henderson to payment of a salary equating to approximately \$43,000 per annum.<sup>122</sup> Henderson sought an increase in their remuneration, but the discussions were misinterpreted by the body corporate as a repudiation of Henderson's agreement. The body corporate sought to replace the contractor, appointing another landscaper to carry out the agreed services. The new appointee charged less than \$12,000 per annum, a significant annual saving for the body corporate compared to the contract with Henderson.<sup>123</sup> Over the 12 remaining years of the contract, the saving would have equated to nearly \$400,000.<sup>124</sup>

The code provisions in the *BCCM Act* sch 2 item 10 require the caretaker to 'take reasonable steps to ensure goods and services the person obtains for or supplies to the body corporate are obtained or supplied at competitive prices'.<sup>125</sup> The body corporate argued that this item required Henderson to provide services to the body corporate at competitive prices and, given the agreed salary was four times

120 *Standard Module* (n 11) reg 159(1).

121 [2011] QSC 336 ('*Merrimac Heights*').

122 *Ibid* [86] (McMurdo J).

123 *Ibid*.

124 *Ibid*.

125 *BCCM Act* (n 7) sch 2 item 10.

the price of the other contractor, Henderson had failed to comply with the code.<sup>126</sup> McMurdo J disagreed, her Honour concluding that

the suggestion that cl 10 obliged the plaintiffs to surrender their contractual rights under the LMA [landscaping agreement] cannot be accepted. ... The taking of reasonable steps according to cl 10 did not require the plaintiffs to surrender an existing contract. The general obligation under cl 10 of the Code was subject to the specific agreement constituted by the LMA.<sup>127</sup>

The second ground related to another alleged breach of the code of conduct arising from the obligation in the landscaping agreement to mow areas that were contained within the boundaries of lots, not just common property.<sup>128</sup> The solicitors for the body corporate advised '[i]f it is not possible to separate the remuneration for services to lot owners and services to the body corporate, then the landscape maintenance agreement may be invalid in its entirety'.<sup>129</sup> This letter was tabled at a committee meeting in February 2009 and Henderson responded by suggesting amendments to the contract, including the increase in remuneration payable.<sup>130</sup> In terminating the agreement, the body corporate alleged a breach of duties in *BCCM Act* sch 2 item 1, which provides that the caretaker must 'have a good working knowledge and understanding of this Act'.<sup>131</sup> The body corporate argued that Henderson provided services within the boundaries of lots 'without knowing or understanding that the body corporate could not pay for work within the lots of individual members of the body corporate' and, therefore, a breach of item 1 had occurred.<sup>132</sup> McMurdo J again disagreed, holding that in order to fulfil this obligation as interpreted by the body corporate, Henderson would have had to act as legal adviser to the body corporate. Item 1 only required Henderson to have sufficient knowledge of the *BCCM Act* and *Accommodation Module* to fulfil its duties as a service contractor.<sup>133</sup>

The third breach alleged by the body corporate related to the second. While the landscaping maintenance agreement required landscaping within the boundaries of lots, some owners had withdrawn their consent for the contractor to enter and carry out that work. Others had fenced their lots.<sup>134</sup> The body corporate argued that Henderson did not adjust the amounts invoiced to take into account the work that could not be performed. Once again McMurdo J disagreed with the

126 *Merrimac Heights* (n 121) [86] (McMurdo J).

127 *Ibid* [87] (emphasis omitted).

128 *Ibid* [66].

129 *Ibid* [12].

130 *Ibid* [29].

131 *Ibid* [88].

132 *Ibid*.

133 *Ibid* [93].

134 *Ibid* [95]–[96].

interpretation adopted by the body corporate. In this regard, her Honour held:

The consideration under the LMA [landscaping agreement] was a fixed sum, rather than an amount per lot. It was not dishonest, unfair or unprofessional to charge and receive the agreed monthly consideration under the LMA although some owners or occupiers had refused access, or not to ‘alert’ the defendant that the plaintiffs were being denied access to some lots.<sup>135</sup>

The alleged breaches in *Merrimac Heights* were set out in a remedial action notice. McMurdo J dismissed each of the substantive grounds in that notice, meaning that the body corporate did not have valid grounds to terminate the agreement. By appointing the other contractor, the body corporate had prevented Henderson from carrying out its contractual obligations and was liable for damages for its breach of the contract. This decision demonstrates a considered and logical interpretation of the *BCCM Act* provisions in the context of an MLR contract dispute. It is neither reasonable nor fair to expect the MLR contractor to surrender contractual rights and act in a manner akin to a legal advisor for the body corporate, but once again, it demonstrates the direct impact on levies imposed on owners when the original owner negotiated the MLR contract on behalf of the body corporate, trapping it into a significantly overpriced long-term contract when having regard to the duties being performed. The author questions whether the original owner can genuinely be said to have discharged its duties under the *BCCM Act* s 112 in this case when there is clear evidence that the body corporate could obtain equivalent services at a fraction of the price negotiated by the original owner.

As noted above, when seeking to terminate an MLR contract under the *Standard Module* reg 131(1) a remedial action notice must be issued pursuant to the *Standard Module* reg 131(3). The notices must comply with the requirements in the *Standard Module* regs 131(3)–(4), which provide:

- (3) The body corporate may act under subsection (1) or (2) only if —
  - (a) the body corporate has given the person a remedial action notice in accordance with subsection (4); and
  - (b) the person fails to comply with the remedial action notice within the period stated in the notice; and
  - (c) the termination is approved by ordinary resolution of the body corporate; and
  - (d) for the termination of a person’s engagement as a service contractor if the person is a caretaking service contractor, or the termination of a

<sup>135</sup> Ibid [96].

person's authorisation as a letting agent — the motion to approve the termination is decided by secret ballot.

- (4) For subsection (3), a remedial action notice is a written notice stating each of the following —
- (a) that the body corporate believes the person has acted —
    - (i) for a ... service contractor — in a way mentioned in subsection (1)(a) to (e); or
    - (ii) for a letting agent — in a way mentioned in subsection (2)(a) to (d);
  - (b) details of the action sufficient to identify —
    - (i) the misconduct or gross negligence the body corporate believes has happened; or
    - (ii) the duties the body corporate believes have not been carried out; or
    - (iii) the provision of the code of conduct of this regulation the body corporate believes has been contravened;
  - (c) that the person must, within the period stated in the notice but not less than 14 days after the notice is given to the person —
    - (i) remedy the misconduct or gross negligence; or
    - (ii) carry out the duties; or
    - (iii) remedy the contravention;
  - (d) that if the person does not comply with the notice in the period stated, the body corporate may terminate the engagement or authorisation.

In *Merrimac Heights* the body corporate alleged that Henderson had purportedly breached the code of conduct. By way of contrast, the body corporate in *Peterson Management Services Pty Ltd v Body Corporate for The Rocks Resort* ('*Rocks Resort*') argued that the MLR contractor had engaged in misconduct and gross negligence.<sup>136</sup> The case itself illustrates how relationships between bodies corporate and MLR contractors may deteriorate. Eight remedial action notices were issued between 18 June and 7 October 2010, one of which had 21, and another 33, alleged breaches. All of those notices, however, were held to be invalid and of no effect as they required the caretaker to rectify the alleged breaches 'within 14

136 [2015] QCAT 255, [11] (Member Favell) ('*Rocks Resort*').

days of being served with a copy of this Notice'.<sup>137</sup> The *Accommodation Module* reg 129(4)(c) mandates that 'not less than 14 days' notice be given. Based on the *Acts Interpretation Act 1954* (Qld) s 38, the time requirement in reg 129(4)(c) meant that the recipient of the remedial action notice was not required to comply with the notice until *after* the 14 days had expired.<sup>138</sup> As the remedial action notices issued to the MLR contractor required compliance *within* 14 days, they breached the *Accommodation Module* reg 129(4)(c), rendering them invalid.

In *Rocks Resort*, the body corporate had not terminated the MLR contract in reliance on the eight remedial action notices. Rather, it reserved its rights to terminate the agreements at a later date.<sup>139</sup> Ultimately, this restraint benefited the body corporate. The parties in *Rocks Resort* sought costs orders from the Tribunal; however, no claim for compensation was made.<sup>140</sup> By way of contrast, the body corporate's purported termination of the agreements and appointment of replacement contractors in *Merrimac Heights* resulted in the body corporate being ordered to pay Henderson \$59,200 in damages.<sup>141</sup>

While on the face of it, the requirements in the provisions are straightforward, it is the facts of each case and the background to the disputes between the parties that will dictate the success or otherwise of a termination. It is essential that the body corporate not only comply with the statutory obligations under the *Standard Module* ch 6 pt 5, but also that it act reasonably when carrying out its duties and functions, pursuant to the obligations in the *BCCM Act* s 94. Part IV of this article considers the obligation on the part of the body corporate in this regard.

#### IV REASONABLENESS IN DECISION-MAKING

The *BCCM Act* s 94 obliges the body corporate to act reasonably when carrying out its functions under the Act and the community management statement.<sup>142</sup>

In *The Reserve* (QCAT), Member Browne agreed that the change of directorship of the MLR contractor was a breach of the agreement.<sup>143</sup> Given that the *BCCM Act* s 94 requires the body corporate to act reasonably, Member Browne also asked whether this obligation had been met when the body corporate acted to terminate the MLR agreements. He followed Bowen CJ and Gummow J's determination in *Secretary, Department of Foreign Affairs and Trade v Styles* in which their Honours concluded that

137 Ibid [69] (emphasis added).

138 Ibid [83].

139 Ibid [5].

140 Ibid [8], [88].

141 See *Merrimac Heights* (n 121) [71]–[74] (McMurdo J) for a discussion on the calculation of this amount.

142 *BCCM Act* (n 7) s 94.

143 *The Reserve* (QCAT) (n 111) [46]–[48].

the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. ... The criterion is an objective one, which requires the court to weigh the nature and extent of the ... effect [of the relevant conduct], on the one hand, against the reasons advanced in favour of [it]. All the circumstances of the case must be taken into account.<sup>144</sup>

Member Browne considered that the body corporate in *The Reserve* (QCAT) had not acted reasonably.<sup>145</sup> There appear to be two reasons justifying this conclusion. First, the director was reappointed to the MLR contractor company so the prior arrangement was effectively reinstated, and secondly, the body corporate did not present any evidence that the resulting breach caused it to suffer any loss or damage.<sup>146</sup> Ms Cole's continued involvement in the MLR contractor's meetings and her lack of involvement in the day-to-day operations of the MLR for the CTS meant that the body corporate experienced no real change in its dealings with the MLR contractor.<sup>147</sup>

Member Browne also considered whether, if the MLR contractor had complied with the agreement and sought the body corporate's consent, the body corporate could have reasonably objected to the change. In this regard, consent pursuant to cl 9 of the MLR agreement 'must not be unreasonably withheld' if the proposed transferee 'is a respectable, responsible and financially sound person' who was capable of carrying out the obligations under the agreement.<sup>148</sup> Member Browne concluded that it would have been unreasonable for the body corporate to have refused consent to the transfer in circumstances where Ms Cole was not directly involved with the MLR for that CTS prior to the change, and she maintained a management position in the organisation after.<sup>149</sup>

The body corporate appealed Member Browne's decision in *The Reserve* (QCAT) to the QCAT Appeals Division.<sup>150</sup> The appeal proceeded on the grounds that the Tribunal had erred in its decision that, first, the *BCCM Act* s 94(2) applied to require the body corporate to act reasonably when making its decision to terminate the agreement and, secondly, that the body corporate had not acted reasonably in making that decision.<sup>151</sup>

In reaching their conclusion, Senior Member Stilgoe and Member Collins referred to *McColl v Body Corporate for Lakeview Park Community Titles Scheme*

144 (1989) 23 FCR 251, 263, quoted in *ibid* [45].

145 *The Reserve* (QCAT) (n 111) [46]–[48].

146 *Ibid* [50]–[51].

147 *Ibid* [52].

148 *Ibid* [26].

149 *Ibid* [53].

150 *Body Corporate for the Reserve CTS 31561 v Trojan Resorts Pty Ltd* [2017] QCATA 53 ('*The Reserve* (QCATA)').

151 *Ibid* [10] (Senior Member Stilgoe and Member Collins).

20751.<sup>152</sup> In that case, Davies JA held that the predecessor to the *BCCM Act* s 94(2) was ‘concerned with the body corporate’s general management functions. It is not, it seems ... concerned to regulate decisions made at meetings of the body corporate’.<sup>153</sup> Senior Member Stilgoe and Member Collins then considered the High Court’s decision in *Ainsworth v Albrecht* in which their Honours addressed the question of whether individual owners were required to act reasonably in voting at meetings of the body corporate.<sup>154</sup> Their Honours concluded that it was not unreasonable for owners to act in a self-interested manner to oppose a motion in circumstances where those owners had a ‘reasonable apprehension’ that their rights, or the use and enjoyment of common property, could be adversely affected by the proposal contained in the motion.<sup>155</sup> Individual owners casting a vote at a general meeting of the body corporate may act in a self-interested manner. They are not required to act ‘sympathetically or altruistically’ towards another owner,<sup>156</sup> but they must act without ‘spite, or ill-will, or a desire for attention’.<sup>157</sup> While this was the case with individual members voting at the general meeting, Senior Member Stilgoe and Member Collins affirmed that the *BCCM Act* s 94(2) required the body corporate to act reasonably when later implementing the resolution.<sup>158</sup> The Members concluded that

[t]he question of reasonable extends beyond whether or not Reserve was entitled to terminate. It extends beyond the bargain that was struck. It requires the body corporate to look at whether taking the action was in the interests of the lot owners.<sup>159</sup>

This requirement went beyond compliance with the mechanical termination provisions in the *Standard Module* ch 6 pt 5 and somewhat ironically, requires the body corporate to refuse to implement a validly made decision of the members made pursuant to the democratic process set out in the *BCCM Act*. The body corporate argued that losing the prospect to negotiate with an alternative service provider was enough to establish reasonableness; however, the body corporate had not initiated discussions. The QCAT deemed this purported loss by the body corporate insufficient to render its decision reasonable.<sup>160</sup> The author submits that this is another clear example of the requirements in the *BCCM Act* being interpreted with a ‘preconceived sympathy’ toward the MLR contractor and

152 [2004] 2 Qd R 401.

153 *Ibid* 407 [25].

154 (2016) 261 CLR 167 (*Ainsworth*’).

155 *Ibid* 187 [64] (French CJ, Bell, Keane and Gordon JJ). For a discussion on the case, refer to Pocock (n 15).

156 *Ainsworth* (n 154) 185 [57] (French CJ, Bell, Keane and Gordon JJ).

157 *Ibid* 187 [63].

158 *The Reserve* (QCATA) (n 150) [22], [37].

159 *Ibid* [51] (Senior Member Stilgoe and Member Collins).

160 *Ibid* [52].

in turn a 'strong predisposition' against the body corporate.<sup>161</sup> The decision has broader implications for bodies corporate. *The Reserve* (QCAT) and *Body Corporate for the Reserve CTS 31561 v Trojan Resorts Pty Ltd* involved an acknowledged breach of an agreement in which the MLR contractor agreed not to change its corporate control without the body corporate's consent.<sup>162</sup> Presumably, the interests of the lot owners would be best served by a contractor who knew and complied with the terms of its appointment, and the body corporate in carrying out the properly made determination of its members. The change of corporate control provision in cl 9 of the agreement was not difficult to comply with, nor was it an unusual term for these kinds of commercial agreements. Yet, the MLR contractor was entitled to make the change, then reverse it seven months later and it was deemed unreasonable for the body corporate to seek recourse. Again, this kind of interpretation renders the body corporate powerless to insist on compliance with contractual terms the contractor has freely agreed to because of an overly narrow interpretation adopted by the QCAT. The original owner procured entry into an MLR agreement and inserted terms into that agreement. The body corporate will have, as a result of that agreement, spent hundreds of thousands of dollars more than what it would have if an alternative arrangement was sourced. Yet, when the MLR contractor breached a requirement that was both simple to comply with and commonly found in commercial arrangements, the body corporate was prevented from taking action to protect its interests on the grounds that it was unreasonable to do so. The obvious bias against the body corporate, justifiable on the basis that it is to protect the original owner's exclusive right to an income stream and the MLR contractors' and financiers' investments, is astounding.

When the original owner establishes MLR, it must act in the best interests of the CTS as it is constituted after the original owner exits the scheme. If an original owner is found to have breached this obligation, a small fine may be imposed under the *BCCM Act*. This is the only deterrent. Contracts cannot be overturned. The body corporate has no remedy other than requesting a review under the *BCCM Act* ch 3 pt 2 div 7. However, a body corporate's ability to seek a review may be limited, especially in circumstances where the MLR contractor exercises its influence in the CTS by recommending the appointment of friendly committee members and encouraging the voting on motions in a particular manner.<sup>163</sup> Further, the body corporate cannot seek an adjustment of the term of appointment.<sup>164</sup> Even if the body corporate changes the regulation module applicable to it,<sup>165</sup> the *BCCM Act* s 128(2) prohibits reduction of the MLR contract term in accordance with the regulation module until expiry of the agreement term, together with any

161 *Palm Springs* (QDC) (n 92) [17], [38] (McGill DCJ).

162 *The Reserve* (QCATA) (n 150).

163 Fisher and McPhail (n 81) 793.

164 *BCCM Act* (n 7) s 135(2).

165 *Ibid* s 62(3)(b).

renewals or extension. The body corporate must also, arguably, adopt a narrow interpretation of what breaches of the MLR agreements it may action. Exercising its legal right to enforce the agreement terms may, nevertheless, be considered unreasonable. If the MLR contractor, who the body corporate had no involvement in selecting and whose only qualification is the ability to pay the purchase price to the original owner, is the problem, the only other recourse the body corporate has is the mandatory transfer provisions in *BCCM Act* ch 3 pt 2 div 8. It is no wonder Johnston identified that original owners may embed dysfunctionality in CTS and Hunt believed the *BCCM Act* did not ‘adequately address the interests of bodies corporate’.<sup>166</sup>

## V PROTECTIONS FOR FINANCIERS

In addition to the obligations on the body corporate with respect to MLR contractors under the *Standard Module* ch 6 pt 5, financiers of MLR contracts are also given protection arguably, once again, to the detriment of the body corporate’s freedom to contract and enforce its rights under such contracts. A financier is entitled to the protections under the *BCCM Act* ss 125 and 126 where it has provided notice to the body corporate that it is the financier for the MLR.<sup>167</sup> Financiers include financial institutions or persons who, in the ordinary course of their business, provide or might reasonably be expected to supply business acquisition finance secured by charges over contracts.<sup>168</sup>

The protections granted to financiers include an entitlement to be notified in writing of any changes to the MLR contract,<sup>169</sup> and a prohibition on the body corporate from terminating the MLR contract for a minimum of 21 days after it provides written notice to the financier of an entitlement to terminate.<sup>170</sup> In addition, where the financier is acting in place of the MLR contractor, or has appointed a receiver and manager to act on behalf of the MLR contractor, the body corporate is prohibited from terminating an MLR contract.<sup>171</sup> This restriction is, however, balanced by the ability of the body corporate to terminate the MLR contract ‘for something done or not done after the financier started to act under the subsection’.<sup>172</sup> Prior to *Vie Management Pty Ltd (rec and mgr apptd) (in liq) v Body Corporate for Gallery Vie CTS 37760* (*‘Gallery Vie’*),<sup>173</sup> the generally accepted position in industry was that once a financier began acting on behalf of

166 Johnston (n 10); Hunt (n 21) 1.

167 *BCCM Act* (n 7) s 123(1).

168 *Ibid* s 123(4).

169 *Ibid* s 125.

170 *Ibid* s 126(1)(c).

171 *Ibid* s 126(2).

172 *Ibid* s 126(7).

173 [2015] QCAT 164 (*‘Gallery Vie’*).

the MLR contractor, or receivers and managers were appointed, the agreements could not be terminated for third party actions such as a court ordering the winding up of the MLR contractor. *Gallery Vie* overturned that position.<sup>174</sup>

In that case, a receiver and manager were appointed to the MLR contractor on 16 December 2014.<sup>175</sup> Three days later, the Supreme Court ordered that the MLR contractor be wound up.<sup>176</sup> The body corporate asserted that the *BCCM Act* s 126(7) allowed it to terminate the agreement. In this regard, Member Lumb of the QCAT held that the Supreme Court order gave rise to a termination event under the MLR agreement. The Supreme Court order fell within the exception (in the *BCCM Act* s 126(7)) to the protection granted by the *BCCM Act* s 126(2).<sup>177</sup>

While *Gallery Vie* is an example of a reading down of the protections afforded to financiers, the result of the case was to prompt many MLR contractors to seek amendments of their agreements to ensure that their financiers were not caught by a 'Gallery Vie clause'.<sup>178</sup> While regarded as a loophole in the legislation requiring correction by some,<sup>179</sup> these types of amendments further limited the rights of a body corporate to self-determine a contract it is bound by in circumstances where the other party is already likely in breach of the terms.

Some argue that the protections are warranted. The value of MLR contracts are calculated using a multiplier of profitability and contract term. There is a significant marketplace for MLR in Queensland and financiers' continued involvement in providing acquisition finance is a necessary criterion for the continued existence of the market. In this regard, the purchase of MLR for a CTS is generally funded by banks and other financial institutions. Phipps, the National Business Development Manager for Management Rights at one of Australia's largest banks, justified protections for MLR contractors and their financiers thus:

For the vast majority [of MLR borrowers] the major portion of the purchase price is borrowed from their friendly bank manager ... It seems to me that the major risk taker in the deal is the lender. With gearing margins as high as 75% of the asset value I believe the lender has a right to expect reliability in respect of the security being taken. If the asset cannot be relied upon to generate an acceptable income from the borrower, and to remain saleable in an open market, then any

174 Michael Kleinschmidt, *Gallery Vie Decision: How to Keep Your Management Rights Financier Happy ...* (April 2018) <[stratumlegal.leapwp.com.au/wp-content/uploads/sites/455/2018/04/Article-Gallery-Vie-Apr18.pdf](http://stratumlegal.leapwp.com.au/wp-content/uploads/sites/455/2018/04/Article-Gallery-Vie-Apr18.pdf)>.

175 *Gallery Vie* (n 173) [11] (Member Lumb).

176 *Ibid* [12].

177 *Ibid* [90].

178 Bugden Allen Lawyers, *Management Rights 'Top-Up' Tool Kit* (2019) 4 (emphasis omitted) <[www.bugdenallenlawyers.com.au/wp-content/uploads/2019/07/Bugden-Allen-Lawyers-Tool-Kit-2-Management-Rights-top-up.pdf](http://www.bugdenallenlawyers.com.au/wp-content/uploads/2019/07/Bugden-Allen-Lawyers-Tool-Kit-2-Management-Rights-top-up.pdf)>.

179 Trent Pevy, 'Gallery Vie: Still Relevant Two Years On' (June 2017) *Resort Brokers Australia* 2 <[www.resortbrokers.com.au/assets/GlennMillar\\_Newsletter\\_June2017.pdf](http://www.resortbrokers.com.au/assets/GlennMillar_Newsletter_June2017.pdf)>.

diligent lender will opt not to provide finance secured by the asset.<sup>180</sup>

With respect, this is an issue for banks when determining whether the borrower should qualify for a loan, not a matter for statutory protection. Ordinary business finance is assessed on the credit risk of an applicant and the security able to be provided. Statutory protections are not needed for other business contracts; if there is insufficient security around income generation of a business, the financier will merely discount it as an option for security for the loan. A borrower is then required to provide an alternative source of collateral in support of their promise to repay the loan. Why is MLR protected in comparison to the majority of the rest of corporate Australia, especially when the implications of those protections for the body corporate and its members are so dramatic?

There is no doubt, in the author's opinion, that the interests of bodies corporate in enforcing MLR agreements and terminating them for breaches have been subjugated to the commercial interests of original owners in setting the original contract terms, MLR contractors who purchase the agreements and third-party financiers, rather than the collective of the owners. The party who is responsible for payment of the services, which were negotiated and sold on its behalf before it even came into existence, has the least power of any of the stakeholders, despite being bound for anywhere up to a quarter of a century. When renewals to the agreements are considered, which MLR contractors insist on to maintain the value of their asset, this timeframe becomes far longer.

## VI WHERE TO FROM HERE?

This article has identified a number of flaws in the system which, together, render MLR a minefield of competing interests where the body corporate's contractual rights are undoubtedly subrogated to the other stakeholders: original owners, MLR contractors and financiers. None of the contractual issues surrounding MLR can be considered in isolation, and many have a broader impact on CTS, their development, value, management and eventual termination. However, from this article, a number of recommendations for further research may be taken to provide an informed and empirical basis for reform.

First, the types of CTS that the regulation modules may apply to and the original owner's discretion around choice of regulation module must be reconsidered. It appears, on the face of it, that mandating more select criteria around the original owner's choice of regulation module may reduce instances of the *Accommodation Module* being chosen for the sake of achieving a 25-year term. Limiting the

<sup>180</sup> Mike Phipps, 'Banks and Management Rights: Why the Industry Needs to Pay More Attention to the Lenders' in John Anderson, 'Management Rights Public v Private Ownership: What is Sustainable? Schemes' (Conference Paper, Strata and Community Title in Australia for the 21<sup>st</sup> Century Conference, 5-7 September 2007) 13.

application of the *Accommodation Module* to holiday let CTS, however, could have broader implications for valuation of lots in existing schemes and their ability to be permanently occupied by owners and long-term tenants. Perhaps the same outcome could be achieved merely by reducing the maximum term for MLR under the *Accommodation Module*. A retrospective application of this requirement would negatively impact MLR contractors and their financiers, but restricting the term prospectively would not aid bodies corporate currently impacted by MLR difficulties. Strengthening the ability for the body corporate to terminate an agreement and removing protections for financiers may go some way towards assisting bodies corporate experiencing breaches by MLR contractors.

Strengthening the original owners' obligations around establishment, required terms and limiting, or ideally preventing, their ability to profit from the sale of MLR would appear to provide a deterrent to original owners who are taking advantage of the lax penalties for breaches of the *BCCM Act* s 112. Further, updated research should be conducted around fiduciary duties and their application to original owners in order to support calls for legislative reform. Prohibiting original owners from profiting from the sale of MLR would overcome the issue for future schemes; however, if mere disclosure of the sale price is required to fulfil the original owner's fiduciary duty as occurred in *Arrow Asset Management*, this is unlikely to make any real impact. It will simply become another throwaway line in an already complex disclosure document. Similarly, mandating that the duties be set out in an agreement or placing an obligation on an original owner to vet the qualifications and experience of the MLR contractor to determine their suitability to operate the MLR for the CTS in question would also likely have little or no practical impact. Research on the application of a fiduciary duty to original owners in respect of the body corporate and its members should also consider the benefits of, and options for, an oversight role to an independent body such as the Body Corporate Commissioner being implemented. This could monitor compliance by original owners in respect of their exercise of reasonable skill, care and diligence in setting agreement terms and whether it has acted in the interests of the body corporate by adopting the MLR agreement terms as disclosed.

Disclosure is another area that has been identified as problematic. Significant work must be undertaken to achieve a system that strives for comprehension, rather than mere provision of documents, because current anecdotal evidence suggests that buyers do not truly engage with the materials disclosed to them. As a result, there is a lack of understanding of important facets of the CTS which impact on buyers' future management of the common property and body corporate assets through the body corporate, levies payable and contractual obligations they are indirectly entering into as members of the body corporate. Further research in respect of the disclosure systems, particularly in relation to off-the-plan sales, would highlight the strengths and weaknesses of those systems and areas where reform is necessary in order to enhance the value of the disclosures being made

to buyers, and to truly achieve consumer protection as the *BCCM Act* aspires to.

The administrative nature of the dispute resolution system in the *BCCM Act*, and the view that body corporate disputes do not involve complex questions of property rights where legal representation is desirable, was also criticised. An effective dispute resolution system would ideally render recourse to the courts unnecessary. At its heart, the tribunal system seeks to provide a more cost-effective and timely forum to resolve disputes than our current court system does.<sup>181</sup> The favouring of MLR contractors, at the expense of bodies corporate, strikes at the heart of the system. Legislative standards mandating adjudicators and tribunal members not favour the position of the MLR contractor over the body corporate in disputes is necessary. Specifically addressing the bias in favour of MLR contractors in the dispute resolution system because of their investment in the CTS must be addressed. After all, the collective of owners would invariably have invested far more into the CTS than the MLR contractor. Further, clarification that the body corporate may still be regarded as acting reasonably pursuant to the *BCCM Act* s 94 when seeking to terminate an MLR contract, despite the consequent impact on the value of the MLR contractor's business, would be beneficial. Providing certainty around the legitimacy of a body corporate expecting compliance and being able to pursue an action for termination where there is no compliance, would seem self-explanatory; however, given the obvious limited rights attributed to bodies corporate in the past, would aid them.

As with the issue of disclosure, further research on how effective the provisions around the independent review of MLR agreements are, and whether they are accessible to owners, would be an important contribution to our understanding of the barriers to a body corporate exercising its statutory rights. This is particularly relevant in circumstances where there is an influential MLR contractor who may sway committee selection and voting on motions at general meetings. If there is merely a lack of knowledge or understanding around the availability of the review to bodies corporate, education options may be investigated. However, if there are practical limitations on the body corporate accessing those provisions, legislative amendment to strengthen those rights will be necessary.

Finally and perhaps most controversially, the protections around financiers must be wound back. MLR should not be regarded as a protected species deserving of statutory guarantees around continuity of income to protect third parties over and above those provided to broader commercial sectors. This is particularly the case where banks and other finance providers, who are properly qualified to assess borrower risk and demand collateral to secure debt obligations, are involved. The interests of third parties are being preferred to the body corporate as a contracting party, in circumstances where the long-term impacts on that contracting party

181 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3.

are significant. A retrospective application of these provisions would need long lead times to allow for alternate security to be sourced if possible. It is likely to impact upon the market for the MLR industry moving forward; however, to reverse the bias against owners and restore some balance in the interests of the body corporate as a party to the MLR contract, this is necessary.

## VII CONCLUDING REMARKS

Queensland's MLR system is far from perfect. The creation of MLR hands original owners significant powers with little recourse for bodies corporate if those powers are misused or the resulting outcome is unfavourable.

This article demonstrated how far, in some respects, the level of control has been stripped from the body corporate. Establishment of the MLR arrangement is placed in the hands of the original owner, a party who benefits financially from choosing terms that favour the opposing party to the body corporate, a clear conflict of interest and potential breach of both the *BCCM Act* s 112 and fiduciary duty, if one is found to apply to original owners in Queensland.

The body corporate's rights in enforcing those agreements against MLR contractors are limited by a system that requires the body corporate to take into account the impact of its decisions on the MLR contractor prior to exercising long established contractual rights lest it be considered to act unreasonably. It must also ensure protection of that MLR contractor's financier. MLR are regarded as a protected species under law for all parties except the one who is left paying for the contract. From the perspective of the MLR contractor and their financier, protections for these parties are more than justified. Contractors pay fair market value for an asset from an original owner, which in Queensland is substantial. Financiers bear considerable risk in funding the purchase of these business assets. Both parties expect that the contracts will be preserved, and the body corporate will not be able to act improperly and terminate the arrangement. The commercial imperative for protecting these interests is obvious, as is the desire for a streamlined system that allows the objects of the *BCCM Act* — to encourage the tourism potential within CTS among other objects — to be achieved.<sup>182</sup> However, these protections are coming at a cost to lot owners and bodies corporate who are experiencing 'seething discontent',<sup>183</sup> as the other stakeholders in the MLR industry search for their 'crock of gold'.<sup>184</sup> These combined factors all leave the body corporate pondering: 'What about me? It isn't fair.'

Legislative change is necessary. Numerous amendments to the *BCCM Act*

<sup>182</sup> The objects are contained in *BCCM Act* (n 7) s 4.

<sup>183</sup> Stewart (n 19) 8.

<sup>184</sup> *Ibid* 4.

and regulation modules have acted as stopgaps and MLR lawyers work to fill so-called legislative loopholes through contract variations. However, these actions may only perpetuate the dysfunctionality experienced by many bodies corporate. This article has identified areas of further research and amendments to wind back original owners' rights and certain protections granted to others which render determination of an MLR agreement for breach more difficult. It has also recommended research be conducted in relation to the disclosure arrangements to prospective buyers.

The rights and often conflicting interests of the other stakeholders to the MLR industry are deserving of protection, but not at the expense of owners and the body corporate. Those commercial interests held by original owners, MLR contractors and financiers as against the fundamental underlying property rights of lot owners will prompt robust debate as to which should prevail. As Burton noted, it is a vexing question and one that Queensland will likely be grappling with for many more years.<sup>185</sup>

185 Burton (n 12) 7.