

## Article Information

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# Amalgamation through termination: what a recent decision means for Bodies Corporate and Developers

**On 20 November 2013, the Body Corporate for Nobbys Outlook CTS 14822 successfully acquired a termination order. This termination order was made pursuant to section 78(2) of the Body Corporate and Community Management Act 1997 and was the first of its kind made in Body Corporate history.**

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### *Background*

Bodies Corporate have been in existence in one form or another in Australia for upwards of 50 years. Increasingly, Bodies Corporate in Queensland and across the country face the prospect of buildings that have reached the end of their design life and in need of significant repairs. Unfortunately, repairs alone are sometimes not enough to realise the potential of site, particularly when its basic design and construction is outdated and no longer represents an effective use of a site. As a result, redevelopment is becoming an increasingly attractive alternative for Bodies Corporate and developers alike. Before any redevelopment can occur, however, it is often necessary to terminate the existing Body Corporate.

Such a situation arose recently for Nobbys Outlook. Located at the southern end of the Gold Coast, Queensland, Nobbys Outlook boasts a fantastic location and ocean views (**Site**). However, the buildings that comprise Nobbys Outlook were constructed in 1967 and required significant repairs costing in excess of A\$3.8m.

Rather than carry out the repairs, Nobbys Outlook sought to redevelop the Site with the assistance of developers and, in January 2010, received a development proposal a majority of lot owners wished to pursue (**Development Proposal**). A condition precedent of the Development Proposal was that Nobbys Outlook be terminated.

*The Body Corporate and Community Management Act 1997 (Act)* provides two methods by which a community titles scheme may be terminated - namely:

- carrying a motion without dissent at a general meeting that approves termination
- acquiring a Termination Order from District Court upon the basis that it is "*just and equitable*" for the scheme to be terminated.

In 2012, the Body Corporate convened a general meeting with the objective of carrying a motion to terminate Nobbys Outlook (**Motion**). Of the 45 votes cast, 44 were in favour of the Motion and one lot owner dissented. Due to the one dissenting vote, the Motion failed, meaning that the only alternative was to apply to the District Court for a Termination Order.

On 31 May 2013, the Body Corporate applied to the District Court at Brisbane for a Termination Order (**Application**). The lot owner who dissented to the Motion was the Respondent to the Application. On 20 November 2013, Her Honour Judge Kingham made a Termination Order.

### *Comments*

This was the first time the District Court had considered its powers to make a Termination Order. Understandably Her Honour took a cautious approach to the Application and, in particular, whether she considered it was "*just and equitable*" to terminate Nobbys Outlook.

Regrettably, the Act provides no guidance as to what constitutes "*just and equitable*" or what criteria the Court should consider when deciding whether to make a Termination Order. Ultimately, Her Honour did not make a finding on whether it was "*just and equitable*" terminate Nobbys Outlook upon the basis that the Respondent consented to the Termination

Order being made. However, the terms of the Termination Order clearly carried some weight with Her Honour. Her Honour was particularly concerned that the Termination Order provide a detailed process for resolving any final termination issues and, in default of a final Development Proposal, that statutory trustees be appointed to give effect to the sale of the Site.

#### *Lessons for Future Applications*

The Court will likely take a generous view as to what considerations are “*just and equitable*” for the purpose of terminating a Body Corporate – including but not limited to:

- the informed wishes of lot owners – including all likely scenarios that may flow from termination (e.g. redevelopment, sale of the site etc.)
- the consequences for lot owners if the Body Corporate is or is not terminated (e.g. the cost of special levies required to cover anticipated repair costs)
- expert evidence as to the state of the common property and the financial circumstances of the Body Corporate (e.g. sinking fund balance, the Body Corporate’s assets and liabilities etc.)
- the scope and particulars of the Termination Order being sought – including the appointment of some independent controlling body (such as statutory trustees), if necessary to give effect to the orders.