

BUILDING COVENANTS

DECEMBER 2009

Background

With effect from 1 January 2010 the Building and Other Legislation Act 2009 introduces provisions to support sustainable housing by imposing limitations on various restrictions/prohibitions imposed by developers on what owners of a house or townhouse can construct.

Relevant Instruments

Most developers of broad acre land will have building covenants that home owners must abide by. However, the legislation also affects the following documents (referred to as a relevant instrument):-

- (a) Community Management Statement under the Body Corporate and Community Management Act 1997 and any architectural and landscape code adopted by it.

A by-law for a building units or group titles plan under the Building Units and Group Titles Act 1980.

- (c) A building management statement under the Land Act 1994 or Land Title Act 1994.

- (d) A sublease of a lease held under the Land Act 1994.

- (e) Other specific development legislation (e.g. South Bank and Sanctuary Cove).

- (f) Any other contract or agreement imposing a prohibition or restriction prohibited by the Act which is enforceable by someone other than the owner of occupier of the building.

The Act applies to a relevant instrument even if it was made or entered into before 1 January 2010. However the Act then states that it does not apply to a relevant instrument described in (f) above that was entered into before 1 January 2010. This is somewhat curious.

Prohibitions in Relevant Instruments

The Act deals with the provisions of a relevant instrument that have the effect of:-

1. Prohibiting the use of a colour for the roof if using the colour would achieve a solar absorptance value of not more than 0.55.
2. Prohibiting the use of a window that is energy efficient.
3. Prohibiting the treatment of a window to ensure the window is energy efficient.
4. Prohibiting a person from occupying the property before particular landscaping, fencing, driveways or similar work associated with the construction of the building is completed.
5. Requiring a minimum floor area.
6. Requiring a minimum number of bathrooms or bedrooms.

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7. Requiring the construction of the house or townhouse or any landscaping, fencing, driveways or similar work associated with the construction of the house or townhouse within stated period.
8. Requiring more than one garage ancillary to the house or townhouse.
9. Requiring a minimum pitch for the roof of a house or townhouse.
10. Requiring a house or townhouse to be orientated on the land in a particular way.
11. Prohibiting the issue of a specific material or type of finish for the roof or external walls.
12. Prohibiting the installation of a solar hot water system or photovoltaic cells on the roof or other external surface.

The Acts states that the provisions numbered 1 to 8 will have no force and effect and the provisions numbered 9 to 12 will have no force or effect to the extent that the prohibition applies merely to enhance or preserve the external appearance of the building.

Restrictions in Relevant Instruments Regarding Roof Colours and Windows

Where a relevant instrument has the effect of-

1. Restricting the use of a colour for the roof if using the colour would achieve a solar absorbance value of not more than 0.55.
2. Restricting the use of a window that is energy efficient.
3. Restricting the treatment of a window to ensure the window is energy efficient.

Then as regards provision 1, the restriction is of no effect to the extent that the use of the colour or the installation or treatment of an energy efficient window :-

Minimises potential adverse effects on the external appearance of the building; and

- (b) Does not unreasonably prevent or interfere with a person's use and enjoyment of the building or another building

Other Restrictions in Relevant Instruments

Where a relevant instrument has the effect of:-

1. Restricting a person from occupying the building before particular landscaping, fencing, driveways or similar work associated with the construction of the house is completed.
2. Restricting the use of a specific material or type of surface finish for the roof or external walls.
3. Restricting the location on the roof or other external surface where photovoltaic cells or a solar hot system can be installed

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Requirement to Obtain Consent – Roof Colours and Windows

Where consent is required to install a roof of a particular colour, the consent cannot be withheld where the roof

- (a) Achieves a solar absorptance value for the upper surface of the roof of not more than 0.55; and
- (b) Minimise potential adverse effects on the external appearance of the building; and
- (c) Does not unreasonably prevent or interfere with a person's use of the building or another building.

Where consent is required for the installation or treatment of an energy efficient window, consent cannot be withheld where the window:-

- (a) Minimises potential adverse effects on the external appearance of the building; and
- (b) Does not unreasonably prevent or interfere with a person's use of the building or another building.

Requirement to Obtain Consent – Other Matters

Where a relevant instrument has the effect of requiring consent for:-

1. Occupying the building before particular landscaping, fencing, driveways or similar work associated with the construction of the house is completed.
2. The use of a specific material or type of surface finish for the roof or external walls.
3. Where photovoltaic cells or a solar hot system can be installed on the roof or other external system

as regards provisions 1 and 2, consent cannot be withheld merely to enhance or preserve the external appearance of the building and as regards provision 3 consent cannot be withheld merely to preserve or enhance the external appearance of the building if the effect is to prevent the person from installing a solar hot water system or photovoltaic cells.

No compensation

The Act provides that no compensation is payable by the State or another person for any loss or expense arising out of the above provisions of the Act.

Conclusion

It is recommended that all relevant instruments (as defined) are reviewed to check compliance with the new legislation.

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This update is for your information and interest only. It is not intended to be comprehensive, and it **does not constitute and must not be relied on as legal advice**. You must seek specific advice tailored to your circumstances.

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