The Competition Act 2010 [Act 712] (“the Act”), which came into force on 1 January 2012, aims to provide a comprehensive legal framework to curb and restrict anti-competitive practices and to promote a competitive market environment in Malaysia.

Prior to the implementation of the Act, there have been attempts to regulate anti-competitive behaviour, but these were confined to specific industries, namely communications and multimedia (via the Communications and Multimedia Act 1998 [Act 588]) and energy (via the Energy Commission Act 2001 [Act 610]). These laws contain specific provisions regulating competition, though it should be noted that the provisions on competition therein are less extensive than those in the Act.

Together with the enactment of the Act, the Malaysia Competition Commission, or MyCC, was formed to regulate competition matters in the country and is actively involved in the process of implementing a competition regime. To date, MyCC has issued three guidelines (on anti-competitive agreements, market definition and complaints procedure).

MyCC has also recently released draft guidelines on abuse of dominance, which are currently open to public comments.
Key provisions of the Act

The Act regulates anti-competitive agreements and abuse of dominance. Unlike many other jurisdictions, it does not currently have merger and acquisition control provisions, though this may change in the future.

The Act applies to any commercial activity, both within and outside Malaysia, that has an effect on competition in any market in the country. As the communications and multimedia and energy sectors already have their own competition regime, the Act will not apply to any commercial activity regulated under Acts 588 and 610.

The following matters are excluded from the application of the Act:

• an agreement or conduct engaged in, in order to comply with a legislative requirement;
• collective conduct relating to negotiating and concluding employment terms and conditions; and
• conduct of enterprises entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly.

Anti-competitive agreements

Agreements prohibited by the Act are horizontal and vertical agreements between enterprises that have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

Note that the Act does not only apply to formal agreements or written contracts. Any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises (including a decision by an association or concerted practices) will fall under the scope of the Act. Therefore, two competitors who get together to discuss pricing strategies over a game of golf will be caught under the Act in the same way a formal agreement would. More often than not, verbal agreements are harder to uncover.

Horizontal agreements are agreements between enterprises each of which operate at the same level in the production or distribution chain (for example, agreement between manufacturer and manufacturer). These agreements are typically entered into between competitors. Vertical agreements, on the other hand, are agreements between enterprises each of which operate at a different level in the production or distribution chain (for example, agreement between manufacturer and distributor or supplier and retailer).

For horizontal agreements that have the following objects:

• to fix, directly or indirectly, a purchase or selling price or any other trading conditions;
• to share market or sources of supply;
• to limit or control production, market outlets, market access, technical or technological development or investment; or
• to perform an act of bid rigging,

such agreements are deemed to have the object of significantly preventing, restricting or distorting competition, and would infringe the Act.

In respect of horizontal agreements that do not contain the above per se prohibitions, or vertical agreements in general, MyCC will, inter alia, determine if such agreements significantly prevent, restrict or distort competition, before a finding of infringement is made. MyCC’s guidelines on anti-competitive agreements provide the following ‘safe harbour’ approach:

“... anti-competitive agreements will not be considered ‘significant’ if:

• the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%;
• the parties to the agreement are not competitors and all the parties individually has less than 25% in any relevant market..."
Enterprises that find themselves involved in agreements that are prohibited under the Act may apply for either an individual exemption for a particular agreement, or a block exemption for a particular category of agreements, provided that they are able to establish and satisfy all of the following:

- there are significant and identifiable technological, efficiency and social benefits arising from the agreement;
- the benefits could not reasonably be achieved without the agreement having the effect of preventing, restricting or distorting competition;
- the detrimental effect of the agreement on competition is proportionate to the benefits; and
- the agreement does not completely eliminate competition in respect of a substantial part of goods or services.

Exemptions may be granted subject to conditions or obligations and on payment of prescribed fees, as MyCC considers appropriate.

**Abuse of dominant position**

MyCC has indicated in its draft guidelines on abuse of dominance that it will take a two-stage approach in examining whether or not there is abuse:

- it will ask whether the enterprise is dominant in a relevant market in Malaysia; and
- if so, it will assess whether the enterprise is abusing that dominant position.

Dominance in itself would not be an infringement of the Act. It is the abuse of an enterprise’s dominant position that is prohibited, and conduct amounting to abuse would include:

- imposing an unfair purchase or selling price or other unfair trading conditions on a supplier or customer;
- limiting or controlling production, market outlets/access, technical or technological development or investment to the prejudice of consumers;
- refusing to supply; or
- engaging in predatory behaviour towards competitors.

Other abusive behaviour may include applying discriminatory conditions, forcing conditions or buying up scarce supply.

However, a conduct would not be prohibited if the dominant enterprise has a reasonable commercial justification for the conduct, or the conduct is a reasonable commercial response to market entry or competitive conduct.

**Powers of MyCC**

(i) **Investigation**

Under the Act, MyCC has wide powers, including the power to conduct investigations. The Act grants MyCC and its officers the same investigatory powers as those of a police officer in relation to corresponding police investigations, including the power to require the provision of information from any person, or to retain documents and have access to records, books and accounts.

Anyone who fails to cooperate in an investigation (for example, not responding to a notice or refusing to provide requested information or documents), obstructs MyCC officials or hides, destroys or falsifies relevant documents may be guilty of a criminal offence punishable by a fine and/or imprisonment.
In the course of an investigation, MyCC may also impose “interim measures” if it reasonably believes that there is an infringement and the measures are necessary as a matter of urgency to prevent serious and irreparable damage or to protect public interest. Such interim measures may involve requiring or causing any person to:

- suspend the effect of and desist from acting in accordance with an agreement which may be an infringement of the Act;
- desist from any conduct which may be an infringement of the Act; or
- do or refrain from doing any act (but excluding the payment of money).

In addition, MyCC may require that the infringement cease immediately and may specify steps to be taken by the infringing enterprise to bring the infringement to an end.

(ii) Market review
MyCC can also conduct market reviews to determine whether any feature or combination of features of a market prevents, restricts or distorts competition in a market. On completion of a market review, MyCC must publish a report of its findings and recommendations, which must be made available to the public.

Consequences of infringement
An infringement of the Act would attract financial penalty of up to 10% of the worldwide turnover of the enterprise over the period during which the infringement occurred.

In keeping with a proven method in other jurisdictions, a leniency regime is established under the Act. A maximum reduction of 100% of the penalty may be granted if an enterprise has admitted its involvement in any of the per se prohibitions under the Act, and provides significant information or other form of cooperation to MyCC.

The requirement to be the first creates a powerful incentive among parties to a cartel to inform the regulator about its existence. One example of the effectiveness of a leniency regime occurred in 2010, when the Royal Bank of Scotland was fined £28.6 million for breaching competition laws after sharing confidential information about the pricing of its commercial loans with rival staff at Barclays Bank. Barclays voluntarily notified the UK Office of Fair Trading and co-operated with the latter throughout the entire investigation. By being a whistleblower, Barclays escaped penalty.

Conclusion
As the consequences of an infringement of the Act are severe, precautions must be taken. Companies should implement an effective compliance programme so as to ensure that all their business practices, whether within or beyond Malaysia, are in line with the Act.

An effective compliance programme would include a review of a company’s dealings, business strategies and arrangements, to ensure that such activities comply with the Act. In addition, training and awareness programmes should also be conducted so that employees, in particular those who meet competitors, understand the dos and don’ts involved in dealing and communicating with competitors. Finally, employees at all levels of a business, from the top down, need to demonstrate a commitment to complying with the law.

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Managing Systemic Risk in Malaysia
by Sharanya Premanathan

What is “systemic risk”? The term is, and has been, a difficult one to define. Traditionally, companies looked to banks and other financial institutions as the principal source of capital. Due to increased interdependence between these institutions, a failure among any one of them could cause a domino effect within the financial industry, resulting in significant systemic failure. Today, such institutions are no longer the most accessible avenues to raise funds, as capital markets have become a viable alternative for fundraising.

For the purposes of this article, the writer will adopt a working definition of “systemic risk” proposed by US academic Steven L Schwarcz:

“…. the risk that (i) an economic shock such as market or institutional failure triggers (through a panic or otherwise) either (X) the failure of a chain of markets or institutions or (Y) a chain of significant losses to financial institutions, (ii) resulting in increases in the cost of capital or decreases in its availability, often evidenced by substantial financial-market price volatility.”

Notably, a distinction has been drawn between market failure and institutional failure. When assessing the causes of systemic risk in the capital markets, it is not possible to view it in isolation from institutional systemic risk. Schwarcz suggests adopting an integrated perspective as a chain of failures of critical financial intermediaries would significantly affect the availability and cost of capital. This in turn would contract credit and liquidity and heighten the risk of a contraction in the real economy.

Typically, when a financial crisis occurs, governments focus on reducing risk, raising capital and building liquidity. An important point to consider is that since risk is an inherent part of the financial system, the focus should not be on reducing risk but on its sound management. On the other hand, systemic risk is something that ought to be prevented altogether. Therefore, all current efforts to monitor, mitigate and manage systemic risk mark a step in the right direction. The difficulty in preventing systemic risk in today’s world lies with the exposure and linkages of markets and institutions worldwide and the unpredictability of market forces.

From the above definition of systemic risk, we need look no further than the Asian financial crisis of the late 1990s to see the relevance of the integration of institutional systemic risk and market systemic risk. Although the Asian financial crisis was triggered by a currency crisis and its contagion effect on ASEAN countries, lending institutions and to some extent, the equity market, played a significant part in the collapse of the Malaysian economy.

Wide impact
As explained in one study, during the equity boom that began in 1992, banks approved substantial loans while actively raising funds in the equity market, which increased their capital base. Some corporate entities also actively tapped funds in the equity market and, at the same time, took out large loans to optimise their financial assets. However, when the boom was over, market participants went bankrupt and many banks were left with large non-performing loans.

Loans for share purchases formed a part of these non-performing loans, and stockbrokers had also been providing credit facilities for share trading that could not be repaid. Stockbrokers who became distressed following the loss of their capital base were suspended from what was then the Kuala Lumpur Stock Exchange (“KLSE”). This example serves to illustrate that systemic risk in the capital market has a much wider impact on the economy due to the linkage and exposure of institutions to markets, and vice versa.

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2 Ibid
Pursuant to strategies outlined in the Capital Market Masterplan 2, the Securities Commission Malaysia ("SC") has enhanced development of our capital market with regulatory amendments to widen its supervisory reach. One of these measures was the amendment of the Capital Markets and Services Act 2007 [Act 671] ("CMSA") in 2011. Among other changes, a new Part IXA (comprising sections 346A-D) to provide for the management of systemic risk in the capital market was introduced. For the purposes of Part IXA, "systemic risk in the capital market" refers to one or more of the following situations:7

(a) financial distress in a significant market participant or in a number of market participants;

(b) an impairment in the orderly functioning of the capital markets; or

(c) an erosion of public confidence in the integrity of the capital market.

"Market participant" includes an investor, issuer, intermediary, capital market service provider, exchange holding company, stock exchange, derivatives exchange, central depository and clearing facility.8

Under Part IXA, the SC may obtain information9 and issue a directive to anyone to take appropriate action to monitor, mitigate and manage systemic risk in the capital market of Malaysia.10 Any person who is required to submit any information or document under this section shall do so notwithstanding any obligation under any contract, agreement or arrangement whether express or implied to the contrary.11 Failure to comply with the SC notice for information or directive is an offence and, upon conviction, the offender shall be liable to a fine not exceeding RM10 million or imprisonment for a term not exceeding 10 years or to both.12

The events set out in the CMSA13 as possible triggers for a systemic risk situation to occur could come about most significantly when a particular market participant is exposed to other issuers and market participants to a considerably large extent, increasing the likelihood of (a), (b) and (c) above14 occurring, almost sequentially.

As an illustration, when a significant market participant — for instance, a hedge fund — is affected by market irrationality and approaches default, its counterparties may attempt to minimise the risk they are exposed to by "closing out" their position at existing market prices. If many or all of its counterparties "closed out" simultaneously, then the initial hedge fund would not be able to liquidate collateral or establish off-setting at previously-existing market prices, as losses would have been exaggerated with the sharp downward move in markets. This scenario in turn could affect the credit and interest rate markets, causing a vicious cycle of loss of investor confidence, an outflow of private credits, leading to further widening of credit spreads, and further liquidation of positions by market participants resulting in systemic risk in the markets.15

**Disclosure obligations fall short**

It appears that in its bid to monitor, mitigate and manage systemic risk in the capital market, the SC considers further information to be the key element that will help it achieve this end. This element suggests that the disclosure obligations (prior to the coming into force of this section16) were not sufficient to address the concerns of the SC. Shimomoto had observed, "The market infrastructure for the equity market might be developed, but transparency, disclosure and corporate governance need to be improved. In particular, speedy and frequent disclosure of appropriate information is essential."17

7 Section 346A of the Capital Markets and Services Act 2007 [Act 671] ("the CMSA")
8 Ibid
9 Ibid, s 346B(1)
10 Ibid, s 346C(1)
11 Ibid, s 346B(3)
12 Ibid, s 346C(8)
13 Ibid, s 346A
14 Ibid
16 This section came into force on 4 October 2011
17 Supra, n 5, at p 81
In 1999, the KLSE announced new disclosure rules to facilitate the move towards disclosure-based regulation, including quarterly reporting of financial statements for all public listed companies (“PLCs”) and that financial reports must be filed with the KLSE for public release within two months from the end of every financial quarter. Today, the importance of corporate disclosure is reflected in the corporate disclosure framework under the Bursa Malaysia Securities Berhad (“Bursa Securities”) Main Market Listing Requirements and ACE Market Listing Requirements, which include immediate disclosure of material information, development and implementation of effective disclosure policies and procedures for PLCs and guidance on the quality of financial disclosures.

However, these disclosures are specific to listed issuers only. As market participants include varied entities such as traders, clearinghouses, underwriters and brokers, the complexity of the financial system may require further reach by the SC to obtain information that can help it manage systemic risk.

The SC could also use its enhanced powers to cooperate with other regulators. The amendments to the CMSA empower the SC to share information and cooperate with other supervisory authorities both domestic and foreign, which manage systemic risk in the capital market. This power will be a useful tool for the SC to work with regional regulators once the plans to integrate ASEAN capital markets are underway and implemented from 2015. The Implementation Plan recognises the importance for ASEAN securities regulators to collaborate more closely to enable effective and timely regulation of cross-border transactions through enhanced information-sharing and regulatory coordination. However, these information-sharing powers of the SC can only be exercised in the management of systemic risk. Regulators may have a vastly different approach to amending the regulatory framework in order to maintain its competitive edge through sequenced liberalisation and integration when the ASEAN capital markets integration takes place.

What would the SC’s consideration be in exercising its power to issue a directive requiring any person to take such measures as the SC deems necessary or for the purposes of monitoring, mitigating and managing systemic risks in the capital market? According to s 346C(2) of the CMSA, the SC shall take into consideration the interest of financial stability. Under these provisions, the SC could potentially stop any person from carrying out its contractual obligations, without being given the opportunity to be heard, if any delay in issuing the directive would aggravate systemic risk in the capital market. It appears that notwithstanding current securities laws, the intention of this legislation is to provide the SC with an avenue to act without delay or encumbrance. In the ever-changing, random and uncertain nature of the capital markets, how would the SC even know where to look, what to ask for and when would they do this?

Approaches elsewhere
In the US, the Dodd-Frank Act imposes provisions that enhance disclosure among market participants; however, commentators have questioned the efficacy of disclosure obligations due to the high complexity of some financial structures and suggest that regulators simply may not have the staffing or capabilities to fully appreciate the risk of any given strategy. This view is held notwithstanding the fact that the Dodd-Frank Act established the Financial Stability Oversight Council (FSOC) to monitor large risks to the economy.

18 On 11 March 1999, the KLSE had introduced various amendments to the listing requirements concerning quarterly reporting in the prescribed format by listed companies, in place of the previous half-yearly reporting. Listed companies were also required to file with the KLSE, for public release, annual audited accounts, auditor’s reports and directors’ reports within four months of the close of the financial year, as opposed to six months previously.
19 Corporate Disclosure Guide issued by Bursa Malaysia (2011)
20 Section 346D of the CMSA
23 Section 346C(1) of the CMSA
24 Ibid, s 346C(3)
25 Section 346C(4) allows for the person to be heard prior to issuing a directive but this right is waived if any delay in issuing such directive would aggravate systemic risk in the capital market according to s 364C(5)
29 Supra, n 25
US Securities and Exchange Commission (SEC) Republican Commissioner Daniel Gallagher has been quoted as saying, “Contrary to the perceptions of some, we are not systemic risk regulators… Given the SEC’s mission and the nature of investing in securities, the commission cannot — and should not — endeavour to eliminate risk-taking.” In order to manage systemic risk in the European Union, the European Council established the European Systemic Risk Board (ESRB), which is responsible for macro prudential oversight and is supported by the European Central Bank.

These examples show how other jurisdictions have set up separate councils, boards and committees to oversee management of systemic risk, reflecting the mammoth task that it is and the unsuitability of the capital market regulator to take on this role. Although the Malaysian economy is not close in size and exposure to that of the US or Europe, the same question will be relevant in the Malaysian context: Is the SC equipped to regulate systemic risk in our capital markets? Implementing a comprehensive systemic risk programme would demand a great deal of supervisory authority in terms of market and institutional knowledge, analytical sophistication, capacity to process large amounts of disparate information and supervisory expertise. At this juncture, there appears to be no move or discussion of a separate body equivalent to the FSOC or ESRB being set up in Malaysia.

While the Malaysian economy has been relatively cushioned from drastic financial instability since the Asian financial crisis, the ongoing financial crisis sweeping the US and Europe (and which, to a large extent, has had a global spill-over effect on those regions exposed to these economies) shows that sometimes it may be too late to regulate and the damage may already be done or can no longer be prevented. Some prominent policymakers and analysts argue that oversight aimed at identifying and stemming systemic risk is futile. With incomplete models of risk dynamics and a complex and constantly changing global financial system, detection is, they argue, either impossible or so prone to error that the effort would be counter-productive. These perspectives beg the question: Are regulators ever going to be in the right position to issue directives at the right time and to obtain the right information to manage systemic risk? On a practical note, the answer is no. In any case, do complexity and imperfect information make intelligent regulation impossible? The answer is also no, as it would be a major mistake to conclude that just because market discipline and sound regulation have failed to prevent the current financial crisis, all regulatory efforts should be jettisoned.

**Market discipline needs reinforcement**

The discussions on what went wrong during the Asian financial crisis and the current financial crisis make a clear case that market discipline alone in stemming systemic risk does not work. Former Fed chairman Alan Greenspan had stated that, “Regulation of derivatives transactions that are privately negotiated by professionals is unnecessary”. As it turned out, these very complex derivatives he referred to in 1998 have been identified, in hindsight, as one of the causes of the US subprime mortgage crisis in 2008. It is the authorities’ duty to guard against weak market discipline that leaves market participants overly vulnerable to market shocks. This can be facilitated by ensuring market participants have access to adequate information about risks and by aligning incentives so those who have influence over an institution or significant market presence will suffer if that

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33 Michael Spence, ‘Can We Regulate Systemic Risk?’, Project Syndicate (2010), <http://www.project-syndicate.org/commentary/can-we-regulate-systemic-risk->


behaviour generates losses. 38 Market discipline requires rules, and these rules must be enforced. 39

Finally, the main reason regulation may be the only adequate way to manage systemic risk in the capital market is the lack of incentive for market participants to limit risk taking in order to reduce the contagion for other market participants:

"Even if market participants had better information and more fully understood the risks of their investments, their motivation is to protect themselves but not the system as a whole. Every firm has an incentive to restrain its risk taking in order to protect its capital, and firm managers have an incentive to protect their own investments in the firm. No firm, however, has an incentive to limit its risk taking in order to reduce the danger of contagion for other firms." 40

Herein lies some of the challenges faced by regulators. The SC’s mission is to promote and maintain fair, efficient, secure and transparent securities and futures markets and to facilitate the orderly development of an innovative and competitive capital market. 41 This is by no means an easy task as regulation can sometimes be seen as a hindrance to the growth of new and innovative financial instruments.

The key to realising this mission when managing systemic risk in the Malaysian capital market would be to ensure that an environment of promoting full disclosure to all market participants is fostered with proper monitoring and increasing investor education so that market forces demand higher governance and transparency from providers of capital market products and services. The optimal regulatory framework to manage systemic risk should be built and enforced, taking into consideration the sophistication and complexity of our capital market and financial products, our corporate governance practices, our supervisory objectives, corporate culture and political traditions.

In keeping up with regional developments, Malaysia should look to global practices as regulatory alignment and harmonisation are a key strategy to the ASEAN capital markets integration efforts for 2015. 42 Although Malaysia may be on the right track in terms of our regulatory approach to managing systemic risk, regulation without proper enforcement could distort efficiency and impede growth in our capital market. Since the coming into effect of the regulations, we have yet to see the SC enforce its powers under the new amendments. It remains to be seen what effect these laws will have on market growth and how workable it is to achieving the SC’s goal of managing systemic risk in the capital market of Malaysia.

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38 Supra, n 1
39 Supra, n 34
40 Supra, n 3 at p 31
Interest Against the Revenue: An Analysis of Pelangi’s case
by Datuk D P Naban and S Saravana Kumar

In the recent landmark decision of Ketua Pengarah Hasil Dalam Negeri v Pelangi Sdn Bhd,¹ the Court of Appeal unanimously affirmed the decision of the High Court, which, among others, ordered the Inland Revenue Board (“IRB”) to refund tax unlawfully collected and retained, with interest accruing at 4% per annum from the date of the IRB’s decision to retain the tax.

Facts of the case
Pelangi revolved around a taxpayer whose principal activities were property development and investment holding. Among others, it owned 19 parcels of land in Johor Bahru, which were its stock in trade.

In 2008, all 19 parcels were compulsorily acquired by the state authority for which the taxpayer was paid compensation. The taxpayer did not subject the gains from the compensation to income tax following the decision of the Court of Appeal in Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd.²

The IRB disagreed with the taxpayer’s stance and adjusted its tax liability for the year of assessment 2008 by subjecting the gains arising from the compensation to income tax following the decision of the Court of Appeal in Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd.²

The IRB disagreed with the taxpayer’s stance and adjusted its tax liability for the year of assessment 2008 by subjecting the gains arising from the compensation to income tax following the decision of the Court of Appeal in Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd.²

The IRB disagreed with the taxpayer’s stance and adjusted its tax liability for the year of assessment 2008 by subjecting the gains arising from the compensation to income tax following the decision of the Court of Appeal in Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd.²

This prompted the taxpayer to challenge the decision of the IRB in the High Court by way of judicial review. Upon obtaining the requisite leave from the High Court, the taxpayer sought, among others, an order quashing the decision of the IRB and the tax retained to be refunded with interest. The High Court, following Penang Realty and the recent Court of Appeal decision of Ketua Pengarah Hasil Dalam Negeri v Metacorp Development Sdn Bhd³ held that the gains arising from the compensation for compulsory acquisition of land were not subject to income tax. It held that the element of compulsion vitiated the intention to trade and thus, the gains could not be treated as taxpayer’s income from an ordinary course of business. The High Court also held that the taxpayer was entitled to interest accruing from the date of the IRB’s decision to subject the said gains to income tax.

Section 11 of the Civil Law Act 1956
The crux of the matter in Pelangi was whether the High Court may award interest as compensation to make good the unlawful deprivation of use of the taxpayer’s money. The legal position is that the High Court has the discretion to award interest, be it pre-judgment or post-judgment interest. Section 11 of the Civil Law Act 1956 [Act 67] (“the CLA”) reads:

“In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment…”

Interest as compensation
On several occasions, the Federal Court has observed that an award of interest serves as compensation. Interest is a remedy available to the aggrieved party when the use of his money has been unlawfully deprived by the other party. In Lim Eng Kay v Jaafar bin Mohamed Said,⁴ it was held that:

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¹ The authors successfully represented Pelangi before the Court of Appeal (No W-01(1M)-585-09/2011) and the High Court (No R2-25-39-2011). The Court of Appeal’s decision was delivered on 29 March 2012.

² [2006] 2 CLJ 835

³ (No W-01-239-11). Subsequently, the Federal Court dismissed the IRB’s leave application to challenge the decision of the Court of Appeal. The authors represented Metacorp Development Sdn Bhd at the High Court, Court of Appeal and Federal Court.

⁴ [1982] 2 MLJ 156 (FC) at p 161
"... the court had always had discretion to award interest as a compensation for a party who has been deprived of the use of its money to which it is legally entitled...

...

Interest is not awarded as a compensation on account of inflation, but awarded because an injured plaintiff has been deprived of the use of money to which he is entitled."

Our courts have also commented that interest is a sum of money representing the return for the use or the compensation for the retention by one person of a sum of money belonging to or owed to another. In essence, it is regarded as representing a profit which the other person might have made if he had the use of the money or conversely the loss which he had suffered because he had not that use. In other words, interest is a compensation for the deprivation of the use of money which he is lawfully entitled to.

**Pelangi’s position**

In Pelangi’s situation, the IRB had subjected the gains arising from the compulsory land acquisition to income tax despite the decisions of the superior courts ruling that such gains are not taxable. Consequently, the IRB retained the taxpayer’s tax refund, which the taxpayer argued was its rightful money at all material times. The taxpayer further argued that the IRB subjected the said gains to income tax despite the decisions in *Penang Realty and Metacorp Development* being brought to its attention. Therefore, the IRB’s action was inappropriate as it continued to ignore the decision of the superior courts.

The taxpayer contended the IRB had clearly acted *ultra vires* and arbitrarily as it had kept the taxpayer out of the money amounting to RM2,360,723.82, which ought to have been refunded to the taxpayer. Therefore, since the IRB had had the use of the money, it ought to compensate the taxpayer accordingly. The taxpayer relied on *Woolwich Equitable Building Society v Inland Revenue Commissioners* (which is discussed on the following page) and the following instructive passages from *Mangalore Chemicals & Fertilisers Ltd v Deputy Commissioner of Commercial Taxes*:

"... ‘It must be emphasized that these amounts which we are directing to be refunded, were collected by the excise authorities without the authority of law and were illegal levies. The Central Government had use of these amounts during this period of three years and correspondingly the petitioner concerned was kept out of the use of these amounts during the said period. It is therefore just and proper that the respondents should pay interest at 12 per cent per annum (which is the proper rate looking to the conditions in the money market) from the dates of the collection of the said amount directed to be refunded till the date of actual repayment.

... Duty collected in disregard of the exemption was held to be an unauthorised collection of duty and that “interest is return or compensation for the use or retention of another’s money”; since the Revenue had retained and enjoyed the benefit of such money petitioners were held to be entitled to interest; interest at the rate of 12 per cent per annum was directed to be paid from the date of collection till the date of repayment”..."
Meanwhile, according to the IRB, there was no written law that requires it to pay interest to the taxpayer. The IRB further contended that the taxpayer was not entitled to a refund as under s 111(3)(b) of the Income Tax Act 1967 [Act 53] (“ITA”), the Board cannot be compelled to refund the tax until the assessment is finally determined. The IRB further contended that it had never made tax refunds with interest, thus, admitting that the government has for years had free use of taxpayer’s monies including those extracted from taxpayers unlawfully.

**Woolwich’s case: Restitution and unjust enrichment**

The IRB’s contentions did not persuade the High Court and the Court of Appeal, where the learned judges correctly observed that its reliance of s 111(3)(b) of the ITA was misplaced as the said provision specifically deals with an overpayment.

*Pelangi* is not a case of overpayment as there was no basis in law for the payment made by the taxpayer in the first place. The courts agreed with the taxpayer’s submission that the IRB’s action was inappropriate in light of the decisions of the superior court that gains arising from compulsory acquisition of land are not subject to income tax.

The courts in *Pelangi* considered the cases highlighted above and relied on the landmark ruling of the House of Lords in *Woolwich Equitable Building Society*, which upheld on appeal that a taxpayer was entitled to interest on the sums repaid to it by the Revenue, running from the dates when those sums were paid to the Revenue by the taxpayer.

As the High Court’s decision in *Pelangi* is premised on *Woolwich Equitable Building Society*, it is worth considering the illuminating comments of the law Lords. In this regard, the following extracts from Lord Goff’s judgment in *Woolwich Equitable Building Society* (at p 172), which expands the scope of law of restitution to tax matters, are instructive:

> “Stated in this stark form, the Revenue’s position appears to me, as a matter of common justice, to be unsustainable; and the injustice is rendered worse by the fact that it involves, as Nolan J pointed out... the Revenue having the benefit of a massive interest-free loan as the fruit of its unlawful action. I turn then from the particular to the general. Take any tax or duty paid by the citizen pursuant to an unlawful demand. **Common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; prima facie, the taxpayer should be entitled to repayment as of right.**

... The first is that the retention by the state of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law — enshrined in a famous constitutional document, the Bill of Rights 1688 — that taxes should not be levied without the authority of Parliament; and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right. The second is that, when the Revenue makes a demand for tax, that demand is implicitly backed by the coercive powers of the state and may well entail (as in the present case) unpleasant economic and social consequences if the taxpayer does not pay. In any event, it seems strange to penalise the good citizen, whose natural instinct is to trust the Revenue and pay taxes when they are demanded of him...”

And at p 177:

> “I would therefore hold that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right. As at present advised, I incline to the opinion that this principle should extend to embrace cases in which the tax or other levy has been wrongly exacted by the public authority not because the demand was ultra vires but for other reasons, for example because the authority has misconstrued a relevant statute or regulation.”
Similarly, Lord Browne-Wilkinson in *Woolwich Equitable Building Society* also found in favour of the taxpayer and relied on the concept of unjust enrichment. His Lordship had the occasion to state that the concept of unjust enrichment suggests that the taxpayer should have a remedy. According to his Lordship, the Revenue had demanded and received payment of the sum by way of tax alleged to be due under regulations that were subsequently held to be ultra vires. If the Revenue’s position that it was under no legal obligation to repay the wrongly extracted tax and in consequence, was not liable to pay interest on the same was accepted, then the Revenue is enriched by the interest on money to which it had no right during that period. This was aptly described as the paradigm of a case of unjust enrichment.

Lord Slynn in the same case observed that it is unacceptable in principle that the common law should have no remedy for a taxpayer who has paid large sums or any sum of money to the Revenue when those sums have been demanded pursuant to an invalid regulation and retained free of interest pending a decision of the courts.

As such, the High Court and the Court of Appeal’s unprecedented approach in *Pelangi* is applauded. This is because in the circumstances of the case, it was only fair, reasonable and appropriate that the High Court exercised its discretion under s 11 of the CLA to award interest from the date when the tax was unlawfully exacted on the taxpayer.

**Conclusion**

*Pelangi’s* case illustrates that the High Court has jurisdiction to award interest in tax cases and that the ITA and the CLA do not in any manner restrict this. The IRB’s decision to subject the gains from the compensation to income tax, despite the decisions of the superior courts being brought to its attention, was inappropriate. As held by the High Court, the IRB’s actions had kept the taxpayer out of the money amounting to RM2,360,723.82, which ought to have been refunded. Since the IRB has had use of the money, which at all material times rightfully belonged to the taxpayer, the authors applauded the decision of the High Court holding that the IRB ought to compensate the taxpayer accordingly.

The case also embodies the principle that public interest demands that the IRB exercise its statutory power reasonably and with due consideration. After all, as our courts have held, matters of this nature involve, inter alia, balancing the needs of the government to realise taxes and that of the taxpayer to be protected against arbitrary or incorrect assessments. Hopefully, following this decision, the authorities and their officers will exercise their statutory obligations responsibly and pay greater respect to the decisions of our courts.

**About the authors**

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Some Practical Considerations on the Building and Common Property (Maintenance & Management) Act 2007 [Act 663]

1. In Malaysia, the housing industry has evolved in such a way that the purchaser of an apartment gets a hard deal in many ways:

   (a) he pays for a house as it is being built with no guarantee that it will be completed;

   (b) when the apartment gets built and he has paid in full, he still has to wait for the title to his apartment;

   (c) meanwhile, the maintenance and management of the common property is left more to chance than to the system.

2. From the developer’s point of view, the maintenance and management of the common property is a thankless job requiring time and attention that could be employed more profitably elsewhere.

3. Under the law governing the issue of strata titles to individual apartment units, owners of apartments become members of a management corporation which comes into existence by operation of law when the titles are issued. It is through the management corporation that an apartment owner can have his rights enforced, his views heard and any differences within the community in the apartment block resolved.

4. In reality, however, it can take years before strata titles are issued. Apart from the administrative tasks involved, measurements must be taken of the apartment units and the common property and a final survey of the land on which the apartment block is built completed. The time taken has only grown longer in recent years as the industry continues to race ahead of the administration and the legal system.

5. During this period of limbo between the delivery of the apartment to the new owner and the formation of the management corporation, the maintenance and management of the common property can fall into disarray. Even among the better advised developers, who have obtained signed “deeds of mutual covenants” and the like, enforcing the payment of contributions from the apartment owners and the abatement of nuisance present a nightmare of prohibitive legal costs and crippling delays in court.

6. On the other side, there have been those developers who, having received payment in full, and having no reputation to preserve, have abandoned all social responsibility and left the apartment owners to fend for themselves.

7. It is against this background that the Building and Common Property (Maintenance & Management) Act 2007 (“the Act”) was enacted as Act 663 and brought into force on 12 April 2007.

Scope of application

8. In terms of geography, the Act applies only to Peninsular Malaysia and the Federal Territory of Labuan. Due to historical reasons and the distribution of legislative competence under the

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1 This article is written in the context of the purchase and ownership of an apartment, but is nevertheless relevant to purchase and ownership of houses in gated communities or wherever there is common property under shared use. This article should also be read in conjunction with the contemporaneous Strata Titles (Amendment) Act 2007 [Act A1290], which seeks to manage the rights of purchasers of houses in gated communities under the same regime.

2 The Strata Titles Act 1985 [Act 318]


4 The Act received the Royal Assent on 12 February 2007, was gazetted on 13 February 2007 and brought into force pursuant to s 2(3) on the date appointed by the Minister after consultation with the various governments of the States by notification in the Gazette as follows: Johore, PU(B)137/2007; Kedah, PU(B) 138/2007; Kelantan, PU(B) 139/2007; Malacca, PU(B) 140/2007; Negeri Sembilan, PU(B) 141/2007; Pahang, PU(B) 142/2007; Penang, PU(B) 143/2007; Perak, PU(B) 144/2007; Perlis, PU(B) 145/2007; Terengganu, PU(B) 146/2007; Selangor, PU(B) 147/2007; Federal Territory of Kuala Lumpur and Federal Territory of Putrajaya, PU(B) 151/2007

5 Section 1(2)
Federal Constitution, the land law and systems that govern matters relating to land and housing in Sabah and Sarawak have evolved separately and have different needs.

9. Politically, it was a Federal initiative, but the law created will be administered, outside of the Federal Territories, by each State in the Peninsula.

10. The Act applies to any “building or land intended for subdivision into parcels”, an expression that refers to any development area where, in effect, there are:

(a) one or more multi-storey buildings intended to be subdivided into parcels, with or without any land on the same lot intended also to be subdivided into parcels, and

(b) one or more buildings intended to be subdivided into land parcels.

11. The Act does not restrict itself to any particular type of buildings or land development, and this is brought out in the definition of “developer”, which is couched in terms much wider than in current legislation governing housing development:

“… any person or body of persons (by whatever name described), who develops any land for the purpose of accommodation including accommodation for commercial and industrial use and includes the executors, administrators and successors in title or permitted assigns of such person or body of persons”.

12. The scope of the Act appears thereby to take into account what has come to be known as “mixed developments” and “gated communities”.

13. Our first difficulty with the application of the Act arises from the definition of “development area”, namely:

“… any alienated land held as one lot under final title (whether Registry or Land Office title) on which building or land intended for subdivision into parcels is constructed or in the course of construction”. [Emphasis added]

14. A substantial proportion of existing development projects are built either on land that is held under several lots or on land held under qualified title, or both. With such developments, it is often the case that vacant possession of parcels is delivered to purchasers before any final title to the land is issued. Consequently, difficulties may arise in such cases with the application of the provisions of the Act in which the term “development area” is used.

15. That difficulty aside, the Act addresses itself to the period between:

(a) the completion of the building or land intended for subdivision into parcels, and

(b) three months after the first meeting of the management corporation.

16. In effect, the Act, among other things:

(a) creates the office of a Commissioner of Buildings for the administration and carrying into effect of the Act

(b) imposes various duties and obligations on the developer

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6 By Article 74 (and the Second List in the Ninth Schedule) of the Federal Constitution, land tenure and the registration of titles and deeds relating to land are among the matters in respect of which the States have legislative power. Similarly, the National Land Code 1965 which was enacted by Parliament, under powers conferred by Article 76(4) on Parliament to make laws with respect to land tenure, etc, for the purpose only of ensuring uniformity of law and policy, extends only to the States in Peninsular Malaysia.

7 Section 2, definition of “building or land intended for subdivision into parcels”. This definition reflects contemporaneous changes to the Strata Titles Act 1985 [Act 318], which now applies to vertical divisions of land as well as horizontal divisions in buildings.

8 Section 2, definition of “developer”

9 Section 2, definition of “development area”

10 The first duty of the developer in point of time appears in s 16(1) of the Act

11 This is when the Joint Management Body is deemed dissolved under s 15(1)

12 Defined in s 2, Interpretation, as the “Commissioner”
(c) provides for the establishment of a Joint Management Body\(^\text{13}\) and a Joint Management Committee\(^\text{14}\) with statutory duties and powers

(d) provides mechanisms and sanctions in connection with *collection and recovery of maintenance and management charges*

(e) empowers the Commissioner and provides mechanisms for the appointment of a *managing agent* to take over maintenance and management.

**The Commissioner**

17. The State Authority\(^\text{15}\) is empowered to appoint, in respect of each local authority or other area, an officer called the Commissioner of Buildings\(^\text{16}\) (and such other officers as may be necessary) for the purpose of administering and carrying out the provisions of the Act.\(^\text{17}\)

18. The Commissioner is to have charge of the administration of the Act and Part VI, *Rights and Obligations Attaching to Individual Parcels and Provisional Blocks*, and Part VII, *Management of Subdivided Building*, of the Strata Titles Act 1985 and perform such other duties and exercise such powers as are conferred by the Strata Titles Act 1985\(^\text{18}\) and, subject to his direction, his powers and duties may be exercised or performed by the other officers appointed.

19. The powers and duties of the Commissioner under the Act include:

(a) powers to appoint a new date for the first meeting of purchasers where no members turn up\(^\text{19}\)

(b) power to appoint a managing agent \(^\text{20}\)

(c) power to compound offences committed against the Act, \(^\text{21}\) for which regulations will prescribe the offences and the forms and procedure for compounding \(^\text{22}\)

(d) power to enter any building, land or premises for investigation into offences and carrying out works pursuant to local authority notices not complied with\(^\text{23}\)

(e) power to examine any person supposed to be acquainted with facts and circumstances of any case under investigation\(^\text{24}\)

(f) power to issue warrants of attachment for recovery of unpaid charges, \(^\text{25}\) in respect of which regulations may be made for collection of charges.\(^\text{26}\)

20. An appeal lies to the State Authority against any action or decision taken by the Commissioner.\(^\text{27}\)

21. Acts, neglect or defaults or omissions done or committed in good faith by the Commissioner or any of his officers or agents will be covered by the Public Authorities Protection Act 1948 [Act 198].\(^\text{28}\)

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13 Defined in s 2 as the “Body”
14 Defined in s 2 as the “Committee”
15 By s 1(8), references to State Authority in relation to the Federal Territory of Kuala Lumpur, of Labuan and of Putrajaya are to be construed as referring to the Minister responsible for such Federal Territory
16 Supra, n 12
17 Section 3(1)
18 Section 3(2)
19 Section 6(7)(a)
20 Section 25, Appointment of managing agent
21 Section 40, Power to compound
22 Section 42(2)(e)
23 Section 38, Power of entry
24 Section 39, Examination of person acquainted with case
25 Section 33, Recovery of arrears of charges
26 Section 42(2)(d)
27 Section 41, Appeals to the State Authority
28 Section 46 of the Public Authorities Protection Act 1948
Duties of the developer

22. The developer is defined as:

“... any person or body of persons (by whatever name described), who develops any land for the purpose of accommodation including accommodation for commercial and industrial use and includes the executors, administrators and successors in title or permitted assigns of such person or body of persons.”

23. As soon as the developer is ready to deliver vacant possession of completed apartment units, duties and obligations imposed by the Act arise, including:

(a) Opening and maintaining a Building Maintenance Account

(b) Maintaining a register of purchasers

(c) Insurance of buildings

(d) Submission of returns and reports on activities

(e) Payment of deposit to rectify defects on common property

(f) Convening of first meeting of purchasers

(g) Participation in the Committee.

Maintenance and management

24. Until it is handed over to the Body, the developer is responsible for the maintenance and management of the “property”, defined as:

“... any land on the development area, and includes any building or part of a building that has been erected or is being erected on the land, and also includes a building or land intended for subdivision into parcels.”

25. It is clear that the Act imposes a duty on the developer, but apart from this simple statement, it offers no definition of what “maintenance and management” of the property would entail and will, presumably be more clearly set out in subsidiary legislation. Regulations may be made prescribing the proper standards of maintenance and management in respect of buildings and common property.

26. The duties of the Body with respect to maintenance and management are more specifically defined.

Building Maintenance Account

27. Before delivery of vacant possession of any apartment in a building, the developer must first open a Building Maintenance Account with a bank or regulated financial institution for the development area in which the building stands. A separate Building Maintenance Account must be opened for each development area and no Building Maintenance Account can be opened or maintained together with any other building outside the development area.

28. As alluded to in paragraph 13 above, the definition of the term “development area” by reference to a single lot held under final title can give rise to difficulties in implementation:

(a) No Building Maintenance Account can be opened for development projects which are built on land without final title or which straddle more than one lot, at least not until the final title is issued or the lots amalgamated

(b) The developer may be forced to manage in separate accounts what may have been built as a single project straddling more than one lot and title

29 Supra, n 8
30 Ibid
31 Section 42(2)(b)
32 Section 8, Duties and powers of Joint Management Body
33 Section 16(1)
34 Section 16(2)
35 Section 16(4)
(c) There is likely to be some confusion for both developer and purchasers and financial institutions in their attempt to give effect to the Act.

29. Basically, the Act draws lines which can be incongruous with the communities which come into existence in each development project without regard or knowledge of land survey lines and other legal niceties. It would have been more appropriate for the Act to have addressed matters in terms of the phases and projects which form the basis of the licensing legislation.

30. The Commissioner has power to resolve any dispute in respect of a Building Maintenance Account as he deems fit and just, but it is doubtful whether he has power to resolve it in a way which departs from the express provisions requiring one account exclusively for one development area.

31. It is likely, however, that developers will find ways to work around any such irregularities, perhaps not so much to be seen to be in compliance with the Act, but principally because they are highly motivated to pass the burden of maintenance and management to the Body at the earliest opportunity.

32. In maintaining the Building Maintenance Account, the developer must:

(a) deposit in the Building Maintenance Account:

(i) all charges received from purchasers and

(ii) all charges to be paid by the developer in respect of unsold units within two working days of receipt.

(b) cause proper accounts to be kept of all moneys received or paid out

(c) appoint a professional auditor to audit the account

(d) file a statement of accounts certified by the auditors and the auditor’s report

(e) permit access to accounting and other records by the Commissioner or, otherwise, commit an offence and be subject to a fine between RM10,000 to RM100,000 plus a daily fine of RM1,000 for continued non-compliance after conviction.

33. The Commissioner has power to appoint an auditor to investigate the books, accounts and transactions of any Building Maintenance Account.

34. All moneys in the Building Maintenance Account “shall not be deemed to be part of the property of the developer” and provision is made in case of any composition or arrangement or liquidation for the moneys, in the hands of any administrator, the official receiver, trustee in bankruptcy or liquidator, to be applied as authorised by the Act and the balance transferred to an account in the name of the Body.

35. The developer should anticipate transferring the Building Maintenance Account to the Body, when it is established, at which point in time it will become the Building Maintenance Fund, to be governed by a separate set of provisions.

36 Section 16(5)
37 Section 16(2) requires a single account for each development area and s 16(4) requires that it be exclusive to one development area
38 Section 17(1)
39 Section 18, Moneys to be deposited into Building Maintenance Account. The Body does not appear to be under a similar duty with respect to the Building Maintenance Fund, although, under s 28(3), a managing agent is.
40 Section 17(2)
41 Section 17(7)
42 Section 17(3)
43 Section 19, Moneys not to form part of the property of developer
44 Section 22(1)
45 Section 22, Building Maintenance Fund
Register of purchasers

36. The developer must maintain, in such form as the Commissioner may require, a register containing the following particulars in respect of all the parcels in each development area:

(a) allocated share unit assigned to each parcel
(b) floor area of parcel
(c) name and address of purchaser
(d) name and address of solicitor for purchaser
(e) number of parcels unsold.

37. The register should eventually be taken over by the Body, but there is no provision in the Act specifically discharging the developer’s duty to maintain the register, only the general provision suggesting that the developer’s responsibility for maintenance and management will end when the Body is established.

Enquiries by the purchasers and any prospective purchasers as to the state of accounts in respect of any unit can be made of the Body, which is under a duty to issue a certificate in the prescribed manner, but this does not, it appears, involve the developer at all. The Act does not appear to impose any corresponding duty on the developer, even prior to the Body being established.

Insurance of building

39. The developer is under a duty to insure and keep each building insured, as soon as it is completed, against “any loss of the building and against fire and other risks.”

40. When established, the Body will be under a duty “to insure and keep insured the building to the replacement value of the building against fire and such other risks as may be determined by the Body” and to apply any insurance moneys for rebuilding and reinstatement. For this purpose, the Act provides that the Body is to be deemed to have an insurable interest in the building equal to its replacement value “or any value as determined by the Body.”

41. The Act also imposes a duty on the Body relating to the application of insurance moneys received and then provides, quite irrelevantly, that the Body is deemed to have an insurable interest in the subject matter of the insurance.

42. It should be noted that:

(a) the scope of the insurance is described differently for the developer and for the Body
(b) the reference to the insurable interest of the Body to any value as determined by the Body cannot be read as giving the right to specify a value greater than the maximum potential loss, insurance being a contract of indemnity which will compensate only for actual loss suffered
(c) the reference to “the building” will have to be read as referring to each building in respect of which the Body is established, although here, as in many other places in the Act, all reference to land intended for subdivision has been omitted.

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<th>Section</th>
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<td>12</td>
<td>Register of purchasers</td>
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<td>5(4)</td>
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<td>13</td>
<td>Right of purchaser</td>
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<td>17(4)</td>
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<td>8(1)(c)</td>
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<tr>
<td>8(3)(a)</td>
<td>Paragraph (3)(b) refers to “insurable interest in the subject matter of the insurance” under paragraph (1)(d) which deals only with the proceeds of insurance and does not allude to any subject matter for insurance in addition to paragraph (1)(c).</td>
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<td>Supra, n 51</td>
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<td>8(3)(b)</td>
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<td>Except in the case of life and personal accident insurance</td>
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Returns and reports
43. Provision is made for the Minister or the Commissioner to require the developer to submit such returns, reports, accounts and information with respect to the developer’s activities and finances as may be specified by the Minister.56

44. The returns and reports which can be required here can clearly go beyond a mere accounting for the operation of the Building Maintenance Account.

45. It is not clear how such returns and reports can be relevant for the administration of the Act. For example, even the power of the Commissioner to appoint a managing agent to take over the maintenance and management of any building57 is exercisable only where the maintenance and management is not carried out satisfactorily by the developer as a matter of fact58 and there is no power to make the appointment in a pre-emptive manner in respect of which the reported financial state or activities of the developer might possibly be relevant.

Deposit
46. The developer can be required to deposit with the Commissioner, in cash or by bank guarantee, such sum of money as may be prescribed by the State Authority “for the purpose of carrying out any work to rectify any defects in the common property of the development area after its completion”.59

47. Notwithstanding the amount prescribed by the State Authority, the Commissioner may require deposit of additional sums if he has determined that the deposit made is insufficient.60 It is thought that this power to require deposit of additional sums is exercisable only in particular cases and does not authorise the Commissioner to ask for a greater sum across the board.

48. Contrary to what is suggested by the wording of the marginal note to the relevant section61 and the words quoted above, the deposit is meant to be a security generally and not an ad hoc payment to meet the expenses of specific rectification works:

(a) the deposit is to be paid upon handing over of possession62

(b) the Commissioner may use the deposit for carrying out any necessary work to rectify defects in the common property,63 and

(c) the unexpended balance is to be returned to the developer on the expiry of the defects liability period for the development area.64

49. The Act assumes the existence of an obligation on the part of the developer to rectify defects in the common property. This may be possible for developments governed by the Housing Development (Control & Licensing) Act 1966,65 where the form and content of the developer’s agreement with the purchaser are prescribed by regulations,66 but even there, the defects liability obligation of the developer is in respect of the individual parcels and does not concern the common property.

56 Section 17(5), The form and content of the returns, reports, etc, may be specified by regulations made under s 42
57 Section 25, Appointment of managing agent
58 Section 25(1)(b)
59 Section 31(1)
60 Section 31(4)
61 Section 31, Developer to pay deposit to rectify defects on common property
62 Section 31(2)
63 Section 31(3)
64 Section 31(5)
65 Act 118, previously the Housing Developers (Control & Licensing) Act 1966
66 See, cl 30 in Schedule H to the Housing Development (Control & Licensing) Regulations 1989 [PU(A) 58/1989]
50. It is difficult to read the Act as imposing such an obligation on the developer. Reference is made to "defects liability period" without defining the term, which can only imply a reference to the standard form of sale and purchase agreement prescribed by the housing development regulations, as the term is not known to occur in any other legislation. In any case, it is not possible to construe any such liability just from the wording of the Act without more.

51. It is not clear how a deposit amount can be prescribed where the obligation it is meant to secure does not exist, the penalty of a substantial fine and a daily penalty notwithstanding.

52. The Act does confer an express power on the Minister to make regulations for the purpose of:

"... providing for the payment of deposit by any person erecting or constructing a building to ensure its proper maintenance and management and for the forfeiture of the deposit" but maintenance and management is a matter quite distinct from defects liability.

First meeting of purchasers

53. The Act provides for the establishment of the Body upon a meeting being convened of the developer and the purchasers of a building or land intended for subdivision into parcels that has been completed.

54. The Act imposes on the developer a duty to convene what is called the first meeting of all purchasers by giving at least 14 days' written notice of the meeting to all purchasers.

55. If the developer does not convene the first meeting of all purchasers within the "specified period", the Commissioner may appoint a person to convene the first meeting of the Body within a time specified by him. The Act appears to treat the terms "first meeting of all purchasers" and "first meeting of the Body" as interchangeable although the Body is not established until the convening of the first meeting of [the] purchasers.

56. There is some difficulty with the term "specified period" which is not defined, but can only be read as referring to the 12-month period from:

(a) the commencement of the Act, where vacant possession of the parcels has been delivered by the developer to purchasers before the commencement of the Act, or

(b) the date of delivery of vacant possession of the parcels to the purchasers, where completion occurs on or after the commencement of the Act.

57. There are also other difficulties with the construction of section 4(1).

58. Unfortunately, the point in time for computation of the 12-month period is ambiguous when it refers, in two different ways, to the delivery of vacant possession:

(a) "to purchasers", which could mean delivery to the first purchaser and

67 Section 31(5)
68 See n 66
69 Section 31(6)
70 Section 42(2)(c)
71 Section 4, Establishment of a Joint Management Body
72 Section 5(1)
73 Section 5(2)
74 Section 5(3)
75 Section 5(1)
76 Section 5(3)
77 Section 4(1)
78 Section 4(1). In the language of this subsection, the 12-month period appears as part of the description of the Body and, if intended as a period specified for compliance, should have been placed in a separate provision.
79 See the interpretation of paragraphs 4(1)(a) and (b) in Debir Desa Development Sdn Bhd v Pesuruhjaya Bangunan, Kuala Lumpur & Ors [2009] 5 CLJ 563 (HC), per Abdul Kadir Musa J at 575G-577H
80 Section 4(1)(a)
(b) “to the purchasers”\(^{81}\) (emphasis added), which could mean delivery to all the purchasers

and the difficulty is further compounded by references made, in various places, but in the same context, to:

- the Body as consisting of “the developer and the purchasers”\(^{82}\)
- “the first meeting of all purchasers”\(^{83}\) (emphasis added), and
- “the first meeting of the Body.”\(^{84}\)

59. It is unclear, therefore, whether the duty to convene the first meeting arises:

(a) once delivery of vacant possession to purchasers generally has commenced, namely, on the delivery to the first purchaser,\(^{85}\) or

(b) only when vacant possession has been delivered to all purchasers, which, in turn, could mean:

i. delivery of vacant possession of all such parcels as have been sold to purchasers, or

ii. delivery of vacant possession after all parcels have been sold to purchasers.

60. Although in one case, the court appears to have assumed that the duty arises only upon delivery to all purchasers,\(^{86}\) the better view is that the duty arises when the development has been completed and delivery of vacant possession of at least one parcel has been made. References to “the purchasers” and “all purchasers” should be construed as referring to the purchasers of all such parcels as have been sold for the time being.

61. There is no basis for reading into the Act any implication that all the parcels in the development must have been sold before the first meeting can be convened. The Act in fact anticipates that some parcels may not have been sold and requires that charges in respect of such parcels are to be paid for by the developer.\(^{87}\)

62. On the first meeting being convened and the Body being established, the general responsibility for the maintenance and management of the property imposed on the developer by the Act ends,\(^{88}\) a result which developers will seek to bring about, notwithstanding any technical difficulties with the language of the Act.

The Body

63. The Act provides for a Joint Management Body\(^{89}\) to be established for each development area as a body corporate having perpetual succession and a common seal and capable of suing and being sued in its own name.\(^{90}\) The Body comprises the developer and the purchasers\(^{91}\) and can be represented in civil proceedings by any person authorised by it.\(^{92}\)

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\(^{81}\) Section 4(1)(b)
\(^{82}\) Section 4(1)
\(^{83}\) Section 5(1)
\(^{84}\) Section 5(3)
\(^{85}\) The provision in s 6 as to the quorum for the first meeting can, arguably, be met by a single purchaser attending, provided maintenance charges in respect of his parcel have been paid
\(^{86}\) Debrir Deis Development Sdn Bhd v Pesuruhjaya Bangunan, Kuala Lumpur & Ors, supra n 79, at 575G
\(^{87}\) Section 17(1)(b)
\(^{88}\) Section 5(4)
\(^{89}\) Defined in s 2 as the “Body”
\(^{90}\) Section 4, Establishment of a Joint Management Body
\(^{91}\) Section 4(4)
\(^{92}\) Section 35, Representation in civil proceedings
64. The Body is established by operation of law "upon the convening of the first meeting". This could be construed to mean that the Body is established at:

a. the time when the developer has given written notice of the first meeting to all purchasers, or

b. the time appointed for the meeting,

but neither construction of what is meant by "convening" will reconcile the use in the Act of the terms “first meeting of all purchasers” and “first meeting of the Body” interchangeably.

65. The quorum for the first meeting of the Body is one-quarter of “members entitled to vote”, namely, the purchasers who “have paid maintenance charges” in respect of their parcels to the Building Maintenance Account of the developer. If no such quorum is present half an hour after the time appointed for the meeting, the members entitled to vote who are present will constitute a quorum. All resolutions at the first meeting are to be decided by a show of hands (joint purchasers by a jointly appointed proxy), with the chairman having a casting vote.

66. It is not clear from the Act:

(a) whether the developer, qua developer, not falling within the definition of “member entitled to vote”, has any right to vote or to chair the meeting

(b) whether the developer is entitled to vote by right of any unsold parcel retained and for which it is paying maintenance charges

(c) whether and if so how owners of multiple parcels can have more than a single vote in a show of hands.

67. The Act sets an agenda for the first meeting of the Body including the following matters:

(a) the election of the office bearers of the Committee

(b) the taking over of insurances effected by the developer

(c) the amount to be paid by purchasers for maintenance and management

(d) the rate of interest for late payment of charges by purchasers.

68. Although it is not specified in the agenda, the Body will also have to decide on a name for itself which it is required to inform and register with the Commissioner within 28 days of the first meeting and the Commissioner may issue a certificate to the effect that the Body has been duly constituted under the Act on the day stated in the certificate.

69. It will be in the interest of the developer to procure the issuance of the certificate as it signifies not only the establishment of the Body but also the end of the developer’s obligation to maintain and manage the property.
70. The constitution of the Body will not be affected even if the first meeting is subsequently invalidated or if the prescribed agenda is not followed or if no members appear or the office bearers of the Committee are not appointed at the first meeting.\(^\text{106}\)

71. Provision is made for an annual general meeting\(^\text{107}\) and extraordinary general meetings\(^\text{108}\) of the Body to be convened. It has been held in a recent case that office bearers of the Body have no power to hold office or to function as such if they fail to convene the annual general meeting within the time specified in the Act and the Body can be compelled by injunction to convene the meeting.\(^\text{109}\)

### Duties and powers of the Body

72. The Act imposes a list of duties on the Body and, in addition, a general duty “to do such other things as may be expedient or necessary for the proper maintenance and management of the building” and confers on the Body a list of powers and, in addition, a general power “to do all things reasonably necessary for the performance of its duties under the Act.”\(^\text{110}\)

73. It may be useful to consider the duties of the Body\(^\text{111}\) in comparison\(^\text{112}\) with the duties imposed on the management corporation for which the duties of the Body is a temporary measure (material differences are highlighted in the column on the right):

<table>
<thead>
<tr>
<th>Body</th>
<th>Management Corporation</th>
</tr>
</thead>
<tbody>
<tr>
<td>to properly maintain the common property and keep it in a state of good and serviceable repair</td>
<td>to manage and properly maintain the common property and keep it in a state of good and serviceable repair</td>
</tr>
<tr>
<td>to determine and impose charges that are necessary for the repair and proper maintenance of the common property</td>
<td>[similar provisions are made for determination of the amount of contributions to be paid]</td>
</tr>
<tr>
<td>to insure and keep insured the building to the replacement value of the building against fire and such other risks as may be determined by the Body</td>
<td>to insure and keep insured the subdivided building or land to the replacement value thereof against fire and such other risks as may be prescribed under this Act</td>
</tr>
<tr>
<td>to apply insurance moneys received by the Body in respect of damage to the building for its rebuilding and reinstatement</td>
<td>to apply insurance moneys received by it in respect of damage to the subdivided building or land in rebuilding and reinstating it in so far as it may be lawful to do so, subject to any order made by the court ...</td>
</tr>
<tr>
<td></td>
<td>to pay premiums on any insurance effected by it</td>
</tr>
</tbody>
</table>

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106 Section 7(3)

107 Section 9, Annual general meeting. However, no particular person is charged with the duty of ensuring that the meeting is held and no sanction is imposed on any person for any default in holding it

108 Section 10, Extraordinary general meeting


110 Section 8(1)

111 The duties of the Body are set out in s 8(1) of the Act

112 The duties of the management corporation are set out in s 43(1) of the Strata Titles Act 1985
74. It appears from the above that, generally, the duties of the Body bear a logical relation with the duties of the management corporation and allowances are made for the fact that the establishment of the Body is an interim measure.

75. In addition to the general list of duties, specific provision is made requiring the Body:

(a) to maintain a register of purchasers in such form as the Commissioner may require

(b) to issue to purchasers on demand a certificate of the state of accounts between the purchaser and the Body

(c) to keep a record of house-rules, supply copies on payment, make available for inspection and lodge copies with the Commissioner

(d) to administer and control the Building Management Fund

(e) to open and maintain a sinking fund.

76. Regulations may be made by the Minister for the purposes of:

(a) providing for proper standards of maintenance and management in respect of buildings and common property,

(b) providing generally for the performance of the functions, the exercise of the powers and the discharge of the duties of the Body under the provisions of the Act.

77. The powers conferred on the Body by the Act bear a close resemblance to the powers conferred on the management body, except for:

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113 Section 12, Register of purchasers
114 Section 13, Right of purchaser
115 Section 14, House rules
116 Section 22, Building Maintenance Fund
117 Section 24, Joint Management Body to open and maintain sinking fund
118 Section 42(2)(b)
119 Section 42(2)(f)
120 Section 8(2)
(a) the omission of any power to borrow or create security over property.\(^{121}\)

(b) an express power to make house rules for the proper maintenance and management of the building.\(^{122}\)

78. There are, however, some internal discrepancies in the Act.\(^{123}\)

(a) The Act imposes a duty on the Body to comply with notices served requiring abatement of nuisance or ordering repairs in respect of the common property\(^{124}\) (but not individual parcels), but confers a power to recover any sum expended in complying with such notices from a purchaser “in respect of that parcel”.\(^{125}\)

(b) Another discrepancy is with regard to the insurable interest of the Body — see paragraph 41.

79. Within one month from the date of the first meeting of the management corporation, the Body is to hand over to the management corporation the house rules, the accounts of the Building Management Fund, all its assets and liabilities and records relating to and necessary for the maintenance of the building and its common property;\(^{126}\) otherwise, every member of the Body will have committed an offence\(^{127}\) unless such member proves it was committed without his knowledge and he had taken all reasonable precautions and exercised all due diligence to prevent its commission.\(^{128}\)

80. The Body will continue in existence until its dissolution by operation of law three months from the date of the first meeting of the management corporation for the building.\(^{129}\)

81. Notwithstanding this, it appears that the Body may be validly established even on a date after the coming into existence of the management corporation.\(^{130}\)

The Committee

82. The Act provides\(^{131}\) for a Joint Management Committee\(^{132}\) to be elected by the Body and empowered to perform the duties and conduct the business of the Body, subject to any restriction or direction which may be imposed or given by the Body.\(^{133}\)

83. The Committee will consist of the developer and from five to 12 purchasers who are elected at the annual general meeting of the Body and who will hold office for a maximum of three years or until earlier dissolution of the Body.\(^{134}\) A chairman, secretary and treasurer are to be elected from among the members of the Committee.\(^{135}\)

84. The First Schedule to the Act, which may be amended by the State Authority by order published in the Gazette,\(^{136}\) provides a set of rules and procedures applicable to the Committee\(^{137}\) which dictate, among other things:

(a) the chairman and at least half the members form a quorum for meetings of the Committee.\(^{138}\)

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121 The power of the management corporation to borrow and create security for repayment appear in s 43(2) of Act 318
122 Section 8(2)(f)
123 One surmises, from a comparison of the two enactments, that some provisions in the Act were adapted from the Strata Titles Act 1985, but with a loss of context due to inconsistencies in the adoption of terminology
124 Section 8(1)(e)
125 Section 8(2)(c)
126 Section 15(2)
127 Section 15(3)
128 Section 15(4)
129 Section 15, Dissolution of Joint Management Body
130 Debir Desa Development Sdn Bhd v Pesuruhjaya Bangunan, Kuala Lumpur & Ors, supra n 79, where the Body was established on the initiative of the Commissioner
131 Section 11, Joint Management Committee
132 Defined in s 2 as the “Committee”
133 Section 11(1)
134 Section 11(2)
135 Section 11(3)
136 Section 11(5)
137 Section 11(4)
138 First Schedule, para 3, Quorum
(b) in case of an equality of votes, the Chairman has a casting vote.

(c) resolutions signed by all the members (“paper meetings”) are taken to have been passed at a meeting.

85. Unless in a particular case the purchasers in a general meeting of the Body impose some restriction or direction, it is envisaged that the purchasers will look to the Committee to handle all matters relating to compliance with the Act.

86. As a member of the Committee, the developer must be taken to have a right to vote and to chair meetings of the Committee.

Building Maintenance Fund

87. Within one month of the establishment of the Body, the Developer must transfer the net balance in the Building Maintenance Account to the Body and such moneys shall constitute the “Building Maintenance Fund”, thereafter to be maintained by the Body.

88. The Act prescribes what is to be part of the Building Maintenance Fund and a list of purposes for which it may be used.

89. Quite inconsistently with the definition of the Building Maintenance Fund (which is dependent on the Body first being established), the Act provides that, if the Body has not been established, references to the “Body” are to be construed as references to the “developer”. This provision is difficult to reconcile. It may be that the original intention was to define a common set of powers and duties in relation to the administration and control of moneys collected which would apply to the developer pending the establishment of the Body. As it stands, however, this is not the approach reflected in the wording of the Act.

Sinking fund

90. The Body must also open and maintain a sinking fund into which a portion of the contribution to the Building Maintenance Fund which it determines, will be paid to cover matters such as:

a. painting of the common property
b. acquisition of movable property for use in relation to the common property
c. replacement of fixtures and fittings in the common property.

Maintenance and management charges

91. The amount payable by the purchaser for maintenance and management of a building or land intended for subdivision into parcels and common property, called “charges”, are determined by:

(a) contract between the purchaser and the developer, before the establishment of the Body
(b) the Body, which determines the apportionment of the charges in proportion to the allocated share units, or
(c) the managing agent, if any, appointed to perform the duties and exercise the powers of the Body.

92. The obligation of the purchaser to pay charges arises either by contract, in the period before the commencement of the Act or by legislation. It is also an offence to fail or refuse to pay maintenance and management charges without any reasonable excuse.

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139 First Schedule, para 4, Casting vote
140 First Schedule, para 6, Resolutions of the Committee
141 Section 22, Building Maintenance Fund
142 Section 22(2)
143 Section 22(3)
144 Section 22(4)
145 Section 24, Joint Management Body to open and maintain sinking fund
146 Defined in s 2 as “charges”
147 Section 23(1)
148 Section 28(2)
149 Section 23, Purchaser to pay maintenance charges
150 Section 34, Failure or refusal to pay charges
93. The simple definition of a purchaser as “the purchaser of a parcel” does not take into account parcels being sold on by the original purchasers and vendors of parcels may find it necessary to include clauses in their sale agreements requiring purchasers to indemnify them against obligations under the Act, such as payment of maintenance charges. This is highly unsatisfactory as indemnities may not cover the criminal liability for non-payment of charges.

94. Another consequence is that the developer is unable to recover from an assignee of the purchaser any unpaid maintenance charges incurred before the date of the assignment, on the principle that only benefits can be assigned but not obligations and the developer will not be able to invoke the provisions of the Act regarding non-payment of charges against the assignee.

95. Charges for maintenance or management of any building or land intended for subdivision into parcels and common property cannot be collected from any purchaser unless:

(a) the Building Maintenance Account has been opened in the name of the development area, and

(b) vacant possession of the parcel purchased by the purchaser has been delivered to the purchaser.

96. A developer of a development area who has, immediately prior to the commencement of the Act, been collecting charges for maintenance and management, may continue to do so until the Body is established. The opening words of this provision suggest that the developer in such a case is not required to open a Building Maintenance Account, but:

(a) when the Body is established, the transfer of surplus moneys to the Body presumes the existence of a Building Maintenance Account,

(b) the Act requires the developer to submit audited accounts of moneys collected and expended only in respect of the period before the commencement of the Act, and

(c) other provisions, such as that requiring the developer to deposit money collected within 2 working days, or that which distinguishes such money from the property of the developer, also presume the existence of the Building Maintenance Account.

97. There is no provision for a Building Maintenance Account to be opened by a developer who has already delivered vacant possession before the commencement of the Act, but such an account must be opened if the provisions of the Act are to be given effect to. Developers have an interest in compliance, notwithstanding the inconsistency in the language of the Act, if only to divest themselves of the responsibility for maintenance and management of the property when the Body is formed.

151 Section 2, definition of “purchaser”
152 See n 150
153 Hong Leong Bank Bhd v Sum-Projects (Brothers) Sdn Bhd [2010] 7 CLJ 1010 (HC), per Vernon Ong JC at 1031G
154 Ibid at 1030D-1031A
155 Section 20(1)
156 Section 20(2)
157 The provision begins with “Notwithstanding subsection (1),…”
158 Section 22(1)
159 Section 21, Duty of developer in respect of charges for building completed before commencement of this Part
160 Section 18, Moneys to be deposited into Building Maintenance Account
161 Section 19, Moneys not to form part of the property of developer
162 See s 16, Developer to open and maintain Building Maintenance Account
98. To aid recovery of unpaid charges, the Act provides for the following:

(a) Interest on unpaid charges, not exceeding 10 percent per annum, may be imposed by the Body.\(^{163}\)

(b) Failure of refusal to pay without reasonable excuse is an offence.\(^{164}\)

(c) A warrant of attachment against purchasers in arrears of payment may be issued by the Commissioner at the request of the developer or the Body.\(^{165}\)

99. The Act also provides a special procedure for notices to be issued by the Body in a prescribed manner and allowing the Body thereafter to institute proceedings in court or to resort to recovery by warrant of attachment,\(^{166}\) but the provision is ambiguous in that:

(a) it is not clear whether the sending of the notices is a necessary pre-requisite to any right of action in court or pre-requisite only to recover by warrant of execution.\(^{167}\)

(b) it is not clear whether the procedure applies to the developer although the provision for the contingency of a managing agent being appointed assumes the possibility of such notices being sent by the developer.\(^{168}\)

### Managing agent

100. A managing agent may be appointed by the Commissioner to maintain and manage a building where:

- the Committee is not constituted, or
- the Commissioner is satisfied that the maintenance & management by the developer or the Body is not satisfactory.\(^{169}\)

101. Any person aggrieved by a decision by the Commissioner to appoint a managing agent may appeal to the State Authority whose decision shall be final and shall not be questioned in any court.\(^{170}\)

102. The managing agent must enter into a management agreement with the developer or the Body to carry out the duties and powers of the developer or Body under the Act,\(^{171}\) and will be entitled to such remuneration or fees as may be agreed between the managing agent and the developer or the Body with the concurrence of the Commissioner and such remuneration or fees are chargeable to the Building Maintenance Account or the Building Maintenance Fund.\(^{172}\)

103. The person to be appointed as a managing agent cannot have any professional or pecuniary interest in any building or land intended for subdivision into parcels.\(^{173}\)

104. The managing agent must lodge a bond with the Commissioner\(^{174}\) and has such powers and duties as:

(a) control over the moneys in the Building Maintenance Account and Building Maintenance Fund

(b) performance of duties and exercise of powers with regard to maintenance and management of the building as if acting as the developer or the Body

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163 Section 23(5). The rate of interest to be determined by the Body must not exceed 10 percent per annum
164 Section 34, Failure or refusal to pay charges
165 Section 33, Recovery of arrears of charges. Regulations may be made for this purpose under s 42(2)(d)
166 Section 32, Recovery of charges by Joint Management Body
167 Section 33(2)
168 Section 32(2)
169 Section 25, Appointment of managing agent
170 Section 41, Appeals to the State Authority
171 Section 25(2)
172 Section 25(3)
173 Section 26, Independence of managing agent
174 Section 27, Managing agent to lodge bond
(c) duty to pay moneys received into the Building Maintenance Account or Fund within two working days (or otherwise be guilty of an offence)

(d) submission of accounts as prescribed by the Act (or otherwise be guilty of an offence)\(^7\)

105. The appointment of a managing agent does not relieve the developer of obligations to carry out repairs and to make good any defects, shrinkage or other faults in the common property during the defects liability period and to carry out works to ensure compliance with approved specifications and plans.\(^7\)

106. On termination of the management agreement, the managing agent must submit unaudited accounts within one month and then within three months the audited accounts of the Building Maintenance Account or Fund and hand over to the Commissioner all related records and lists of assets and liabilities.

Enforcement of the Act

107. Although prosecutions for offences under the Act require the written consent of the Public Prosecutor,\(^7\) the Commissioner, a State-level appointee, is given extensive powers of entry\(^7\) and interrogation.\(^7\) In addition, the Commissioner and his officers and agents come under legislative protection for acts and omissions committed in good faith.\(^7\)

108. Against the exercise of such powers, as against any act or decision of the Commissioner, the Act provides for a statutory right of appeal to the State Authority whose decision is “final and shall not be questioned in any court”.\(^7\) This does not, however, exclude the powers of the court in judicial review.\(^7\)

109. The Minister is empowered to make regulations, with the concurrence of the State Authority, for the better carrying out of the provisions of the Act,\(^3\) but this power may not be adequate to make up for shortcomings in the Act.

Anti-avoidance

110. The provisions of any written law, contract or deed relating to the maintenance and management of buildings and common property, in as far as they are contrary to the provisions of the Act, shall cease to have effect within the local authority area or other area in which the Act comes into operation.\(^4\)

111. The operative phrase, “cease to have effect”, used to exclude the operation of other legislation and private obligations when read with the qualification “in as far as” is inappropriate. It excludes, unnecessarily, the operation of such legislation and obligations in situations where they do not contradict, or are no longer contradictory of, the provisions of the Act. With respect to other legislation, the phrase can be construed as a repeal.

112. The provisions of the Act have effect notwithstanding any stipulation to the contrary in any agreement, contract or arrangement entered into and no such agreement, contract or arrangement shall operate to annul, vary or exclude any provision of the Act.\(^5\)

Conclusions

113. The Act presents some challenges:

(a) The definition of “development area” in terms of development on single lots held under final title may exclude the application of the Act in the case of some development projects on the ground — see para 13 et seq and paragraph 28 et seq

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\(^7\) Section 28, Powers and duties of managing agent
\(^7\) Section 29, Developer not to be relieved of his obligations to carry out repairs, etc
\(^7\) Section 38, Power of entry
\(^7\) Section 39, Examination of person acquainted with case
\(^3\) Section 40, Public Authorities Protection Act 1948
\(^4\) Section 41, Appeals to the State Authority
\(^5\) It is conceded by the Government in the Hansard that this ouster clause does not exclude judicial review of the decisions of the State Authority by the courts, but a proposal to amend the Act to expressly allow judicial review was rejected by the House
\(^4\) Section 42, Regulations
\(^5\) Section 44, Non-application of other written laws, contracts and deeds
\(^6\) Section 45, Contracting out prohibited
(b) There is a provision relating to the insurable interest of the Body which appears to be flawed — see paragraph 41

(c) The Act requires the developer to provide a deposit of money as security for an obligation with respect to a defects liability period that may not exist — see paragraph 49 et seq

(d) Inconsistent use of the terms “first meeting of purchasers” and “first meeting of the Body ”— see paragraph 64

(e) There is ambiguity and uncertainty over the right to vote in meetings of the Body by the developer and by owners of multiple parcels — see paragraph 66

(f) There are internal inconsistencies in the provisions relating to the duties and powers of the Body — see paragraph 78

(g) The definition of the respective roles of the developer and the Body in relation to the Building Maintenance Fund is ambiguous — see paragraph 89

(h) The simplistic definition of “purchaser” not taking into account assignees and other successors in title — see paragraph 93 et seq

(i) There is no clear provision for a Building Maintenance Account to be opened in respect of a development which has been completed and vacant possession delivered before the commencement of the Act — see paragraph 97

(j) The Act provides for notices in the prescribed form to be sent by the Body prior to recovery of unpaid charges, but it is not clear whether the procedure is:

(i) a necessary pre-requisite to the right of action or merely a pre-requisite to the request for a warrant of attachment

(ii) applicable only to the developer as well as the Body — see paragraph 99

(k) Unaccountable departures from definitions in other legislation of terms such as “common property” are distracting. 186

(l) Inconsistent references and use throughout the Act of such terms as “property”, “land”, “building” and “common property”, individually and in various combinations and contexts, are difficult to reconcile.

114. In all likelihood, despite the irregularities and inconsistencies and other flaws in the Act, developers will be diligent in giving effect to the Act. Unfortunately, working around the shortcomings of the Act is not a real substitute for what could have been a better composed set of provisions.

115. Purchasers, however, must be realistic in their expectations that any legislation could possibly address adequately the challenge of living cheek by jowl in housing and commercial communities plagued by the apathy and lack of civic mindedness at large in Malaysian society.

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186 The definition of “common property” in s 2 appears clumsy when compared with the cleaner definition in s 4 of the Strata Titles Act 1985, and does not take into account car parks as accessory parcels

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