What's New — Queensland Community Schemes Law & Practice Commentary

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See also the What's New for Cases.

The What's New section lists updates to Queensland Community Schemes Law & Practice commentary since the last update (in order, by paragraph number).

Commentary

• to include the decision of *4 Parkland Boulevard* [2015] QBCCMCmr 110 [July 2015]. ¶36-150 — Commentary updated to reflect the *Drift Palm Cove* [2015] QBCCMCmr 503 (26 October 2015) decision which discusses the power of a Committee to expend the body corporate's money
• ¶36-413 — Commentary updated to reflect the body corporate's obligations to maintain the common property as discussed in *Hibertia* [2014] QBCCMCmr 455 (17 December 2014), *Magog (No 15) Pty Ltd* v *The Body Corporate for the Moroccan* [2010] QDC 70 at paragraph 85, *Klinger & Anor* v *Body Corporate for Costa D'Ora Apartments* [2007] QDC 300 at 67, *Seiwa Pty Ltd* v *Owners Strata Plan 35042* [2006] NSWSC
• ¶39-100 — Commentary updated under the heading "Building Manager's transfer entitlements" to reflect the outcome of *Pulse* [2016] QBCCMCmr 43 (5 February 2016)
• 43-145 — By law enforcement cases commentary updated for the by-law enforcements cases to include a reference to *Kooba Court* [2016] QBCCMCmr 47 (9 February 2016)
• ¶43-170 — Commentary updated to show the options open to a body corporate when dealing with the long standing, informal use of common property spaces by occupiers as a result of *Anna Palms* [2016] QBCCMCmr 1 (6 January 2016)
• ¶45-040 — Commentary updated to reflect recent comments made by an adjudicator regarding the ability of an owner to challenge the sufficiency of sinking fund budget set for a scheme as discussed in *Valley View* [2016] QBMCCMCmr 22 (22 January 2016)
• ¶46-920 — Commentary updated to confirm the ownership of excess insurance proceeds as a result of *79 The Esplanade* [2015] QBCCMCmr 586 (15 December 2015)
• ¶56-020 — Commentary updated to reflect the powers of an adjudicator to investigate and dismiss claims as a result of the QCATA case of *Walden* v *Broadwater Tower Body Corporate* [2015] QCATA 28 (23 February 2015)
• ¶56-260 — Commentary updated to include a new section covering costs awarded by QCAT as a result of the appeal case of *Alex & Gail Douglas as Trustee for Kingfisher Super Fund* v *Pegasus Equity Pty Ltd as Trustee for Pegasus Property Trust* [2015] QCATA 182 (10 December 2015)
• A new version of the Contract for Residential Lots in a Community Titles Scheme has been included at ¶70-300. The new version has been released due to the commencement on 1 July 2016 of the foreign resident capital gains withholding tax regime.
• New ¶60-950 has been included to explain the impact of the foreign resident capital gains tax withholding regime.

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[¶5-001] About the Authors

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Joanne Bennett

Joanne Bennett has enjoyed a varied career catering to the needs of the commercial property market since her admission to the Supreme Court of Queensland in 2003.

The author has been fortunate enough to work with clients on a number of major and minor property development projects throughout regional and South East Queensland. She has assisted developers to refine their projects through the use of a body corporate while ensuring disclosure meets the ever-changing legislative requirements.

Aside from property development, the author has provided assistance to bodies corporate in enforcing by-laws, managing the change and considerations involved in an assignment of management rights and understanding the law as it relates to their scheme. She has also assisted bodies corporate to traverse complex litigation arising from lot owner disputes.

Having tried her hand as an owner of management rights for five years, the author brings a keen interest to the business of managing a scheme for the benefit of all with a view to profit.

Gary F Bugden

Gary F Bugden is a partner with the national law firm, Mallesons Stephen Jacques. He is recognised throughout Australia as the country's leading authority on strata titles law. As a result, he was appointed External Consultant to the Department of Natural Resources to advise on the formulation of the Body Corporate and Community Management Act and regulations.

He has commentated extensively on strata and community legislation both in Australia and overseas and has written a number of publications. He lectured part time in strata titles law for ten years at the University of Technology, Sydney.

He has practised extensively in all areas of strata titles law in NSW and Queensland and has 15 years experience in the development of strata, airspace and planned community projects.

Last reviewed: 17 July 2013

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[¶5-100] Origin of the home unit

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Whether they are called flats, maisonettes, semi-detached dwellings or condominiums, in one form or another people in various parts of the world for many hundreds of years have lived in units within communal developments. Indeed, it may even be more accurate to speak in terms of thousands of years, because papyrus in the Brooklyn Museum demonstrates that a type of condominium was used by the ancient Hebrews as far back as 2,500 years ago (150 NYLJ (26 July 1963), p 4 colt 3). It is therefore not entirely surprising that some of these people should have tried to develop a system of ownership of their flats. These efforts were apparently not confined to recent times because there is said to be a record of a sale of part of a building in ancient Babylon during the first dynasty over 2,000 years ago. Indeed, researchers say that there is evidence of use and possibly sale of maisonettes by the early Greeks, the Muslims and the Egyptians. Reference is also made to separate ownership of parts of buildings in early writings by Homer.

Last reviewed: 30 August 2012

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[¶5-150] Early European statutes

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In more recent times, flat ownership appeared in Germany as far back as the Twelfth Century. It apparently created many problems and resulted in a basic conflict with the principles of early Roman law which did not accept the division of ownership in the horizontal plane. This eventually led to the objection in principle to net ownership in many European countries. Nowhere was this more profound than in Germany where the objection culminated in a prohibition of separate flat ownership in the period between 1900 and 1951. It was not until 1951 that an Act was passed approving such ownership.

In France there is a condominium statute dating back to 1561 and other legislation dealing with the rights and obligations of flat owners was passed in 1672. It was not until 1804 that the first major condominium code was introduced, Article 664 of the Code Napoleon of France. In 1938 a further comprehensive statute replaced this Article.

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[¶5-200] Other countries

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Brazil introduced a condominium code in 1928. Canada, through the province of Quebec, was introduced to condominiums by Article 521 of its Civil Code of 1866. Not surprisingly, this article closely follows Article 664 of the Code Napoleon mentioned earlier. Italy enacted legislation in 1934 and 1935 which was included in the Italian Civil Code of 1942. The Netherlands enacted detailed condominium laws in 1951, and Cuba passed its Horizontal Property Act of 1952. The American condominium statutes (which are different from the European breed and heavily oriented towards financing) had their origin in the housing shortage which appeared in the United States following World War 1. Subsequent American legislation closely followed the concepts of the Cuban legislation of 1952. However, in the past two decades a number of American States substantially adopted uniform Federal condominium and planned communities laws. Many other countries have also introduced legislation relating to flat ownership: Austria in 1948, Spain in 1939 (reviewed in 1960), Puerto Rico in 1951 (reviewed in 1958), and Japan in 1963.

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[¶5-250] English law

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The first systems of flat ownership under English law (which appear to be of Scottish origin, dating back some three to four hundred years) bore little resemblance to the present-day system of flat ownership; but they were in many respects part of the evolutionary process that led to our present day strata title system. In England flat ownership did not reach a significant stage of development until the early 1950's when the volume of flat sales began to increase appreciably. Despite this increase in volume and the intensely urban style of living in that country, the system of flat ownership there has been confined to lease, company and joint ownership type schemes. This is attributed to the fact that the British legislature has done little to facilitate flat ownership, and indeed, in some instances it has positively hindered the system, particularly in its application to ``town house'' schemes.

During the past decade there has been much debate in the United Kingdom about plans to introduce a statutory form of flat ownership referred to as ``commonhold''. The commonhold system is based on the Australian strata titles system, but its introduction in the United Kingdom has been a very political issue, mainly centered around proposals to convert existing flat titles to the new system.

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[¶5-400] Conveyancing (Strata Titles) Act 1961 (NSW)

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In Australia, and particularly in New South Wales, the rise in popularity of flat ownership followed shortly after the same trend emerged in England. By the late 1950s a number of flat ownership schemes were being implemented, usually based on leases, proprietary companies or joint ownership. It soon became apparent that these schemes could not fulfil the needs created by the dynamic growth of Sydney and the ever-increasing demand for residential and commercial accommodation. Demand increased for a form of flat title that represented good security for housing and small business financiers.

The solution to these problems came with the introduction of the *Conveyancing (Strata Titles) Act 1961*. That Act was introduced ``to facilitate the subdivision of land into strata and the disposition of titles thereto''. It was said to be a world's first, without precedent, but an examination of some of the European condominium legislation suggests that it may have borrowed heavily from them. Nevertheless, since its introduction in New South Wales all other Australian jurisdictions, as well as some overseas jurisdictions (eg in Canada, Singapore, Malaysia, Fiji and the Philippines), have adopted the strata titles system.

After the Act had been operating for about ten years (during which nearly 100,000 strata titles were issued) a number of problems became apparent, particularly in relation to title, management and disputes. It has been said that this was only to be expected in the case of such novel legislation. Accordingly, the government of the day sought the views of various industry and community organisations and evaluated public complaints and suggestions in relation to the 1961 legislation, with the objective of introducing a new, more comprehensive piece of strata title legislation. The rules of internal management of strata schemes and the enforcement of those rules became the principal concern.

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[¶5-450] Early Queensland legislation

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In 1964 Queensland decided to follow New South Wales and introduce strata titles. This was achieved the following year with the introduction of the *Building Units Titles Act 1965*, which substantially followed the New South Wales legislation. It soon became apparent that although the 1965 Act worked well for multi-storey flat development it had its limitations when it came to town house and villa home developments which had open space common areas. At this point Queensland took the lead and passed the *Group Titles Act 1973*. This Act allowed for surface land subdivision into lots and common property and it opened the way for the American style ``cluster housing''. Victoria followed suit in 1974 with the passing of its *Cluster Titles Act 1974*.

Both the *Queensland Group Titles Act* and the *Victorian Cluster Titles Act* substantially followed their home unit legislation which, in turn, substantially followed the 1961 New South Wales legislation.

[¶5-500] Strata Titles Act 1973 (NSW)

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The second generation New South Wales legislation was also the subject of much consultation and public debate. An exposure draft of a proposed Bill was widely circulated and spirited public comment ensued. Eventually, the *Strata Titles Bill, 1973* was introduced into the New South Wales Parliament by the then Minister of Justice, the Honourable J.C. Maddison, B.A., LL.B., M.L.A. After some amendment the Bill was passed and it was assented to on 18 October 1973, to commence upon a date to be proclaimed. Before it was proclaimed it underwent significant amendment by the *Strata Titles (Amendment) Act, 1974* which was primarily aimed at applying the provisions of the 1973 Act,with appropriate modifications, to strata schemes already in existence. On 1 July 1974 the *Strata Titles Act 1973* commenced and upon its commencement the 1961 NSW Act was repealed. On the same date the *Strata Titles Act Regulations, 1974* commenced.

After commencement, the 1973 Act was amended on numerous occasions. The Regulations were also amended on numerous occasions. The legislation was kept under constant review because of its complexity and because of its direct bearing on the lives of so many people. This review was the responsibility of the Strata Titles Act Review Committee which was sponsored by the Department of Consumer Affairs and which functioned continuously between about 1976 and 1987.

Law References: *Conveyancing (Strata Titles) Act, 1961*

Law References: *Strata Titles Act, 1973*

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[¶5-550] The 1980 Queensland legislation

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In 1979 the Queensland Government considered the possibility of combining their 1965 Building Unit Titles legislation with their 1973 Group Titles legislation. The Government was particularly organised in its approach, which included the preparation and distribution of two~ ``Discussion Papers''. The Government's approach was probably best described by the Minister responsible for introducing the legislation, the Hon. W.D. Lickiss, Q.G.M., M.L.A., Minister for Justice and Attorney-General, in his second reading speech on the Bill for the *Building Units and Group Titles Act 1980* (the ``BUGTA'') when he said:

> ``This legislation has been compiled as an exercise in co-operation. Initially, a skeleton of proposals was prepared and step by step this skeleton has been covered and clad, as it were. Members of my parliamentary Bills Committee and I visited Sydney and Melbourne to examine relative legislation applying in New South Wales and Victoria. Next, a discussion paper was prepared and circulated to the individuals and organisations known to be interested in the proposed legislation. The discussion paper was then the subject of seminars held in Brisbane, Surfers Paradise and Cairns.
>
> It was then that it was fully realised how different were the various concepts that had to be accommodated by this legislation, which will apply to the whole of Queensland. How different, for instance, were the needs of a six-unit, owner-occupied building in a Brisbane suburb from those of a 100 or more investment unit block on the Gold Coast. Out of these seminars and subsequent comment a further discussion paper was prepared. This paper was laid on the table of this House and, again, public opinion was invited. The response has been most rewarding and to those who made submissions I offer my most sincere thanks. The constructive criticism received has, I am sure all will agree, resulted in a most acceptable piece of legislation.''
>
> (Hansard 25 March 1980.)

The BUGTA was assented to on 6 June 1980. It came into operation on 3 November 1980. After that date the Act was amended on a number of occasions and underwent a major review in 1988. It applied in Queensland until 13 July 1997 when it was substantially replaced (although not entirely repealed) by the *Body Corporate and Community Management Act 1997*.

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[¶5-600] Leasehold strata titles

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In the early 1980s plans for redevelopment of Darling Harbour near the central business district of Sydney were advanced. The scheme involved the consolidation of a large area of land that was to be vested in the Darling Harbour Authority, developed by the private sector and disposed of by the Authority by long term leases. Because the redevelopment plan involved a number of residential home units the need for a form of strata titles for these units soon became apparent.

In 1984 the then Registrar-General's Office established a *Committee on Leasehold Strata Titles* to develop legislative proposals which would enable strata title projects to be undertaken in respect of land or airspace leased from the Crown, a statutory body or local council. The Committee comprised representatives of both the Government and private sectors.

Following the recommendations of that Committee the *Strata Titles (Leasehold) Act 1986* was passed by the Parliament. The Act was assented to on 23 December 1986 but was not proclaimed to commence until 1 March 1989. Like its freehold counterpart it was amended on numerous occasions, mainly because it was drafted in substantially the same terms as the freehold Act and it was the objective of the Government to keep the two pieces of legislation in similar terms, so far as possible.

Law: *Strata Titles (Leasehold) Act 1986*

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[¶5-650] Related Queensland legislation

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Unlike the other Australian states, Queensland was prepared to pass project specific legislation to facilitate complex real estate projects. The first major example of such legislation related to the Paradise Centre development on the Gold Coast. It was a large mixed use project comprising a multi-level shopping centre with a podium above and two residential home unit towers and a hotel rising above the podium. The home unit towers were to be ``airspace'' building unit schemes, except that the new BUGTA was not able to cope with such a complex concept. The project was built in two stages and was facilitated by the *Registration of Plans (HSP (Nominees) Pty Limited) Enabling Act 1980* and the *Registration of Plans (Stage 2) (HSP (Nominees) Pty Limited) Enabling Act 1984*.

The next complex project requiring legislative assistance was the Sanctuary Cove Resort on the Gold Coast. It was a large scale integrated resort that required a range of subdivision and management mechanisms, all of which were beyond the scope of the BUGTA. The assistance came in the form of the *Sanctuary Cove Resort Act 1985*. The Act was amended on a number of occasion, with major amendments in 1989 to substantially increase the size of the resort.

At about the time Sanctuary Cove was being developed a number of other resort projects were in their early stages of development. They too required special legislation to facilitate their subdivision and management. Rather than continue to pass project specific legislation the new labour government of the day passed the *Integrated Resort Development Act 1993*. That Act followed in the same mould as the Sanctuary Cove legislation and allowed the development of integrated resort projects throughout the whole of Queensland. Because of the tight project qualifications that applied to the use of the 1993 legislation, a number of mixed use non-resort projects needed similar legislation but did not qualify to use that 1993 legislation. As a result, the labour government of the day passed the *Mixed Use Development Act 1993*. That Act was in a similar mould to the Sanctuary Cove and integrated resort legislation, although it did contain a number of additional mechanisms, such as provision for airspace subdivisions and management statements.

Meanwhile, the government had been proceeding with plans for development of the old Expo '88 site at South Bank in Brisbane. Having decided to dispose of leasehold title on the site rather than freehold, the government was confronted with the need to provide a form of leasehold title suitable for residential home units. This came in the form of leasehold building units titles, which were added as a schedule (Schedule 7) to the *South Bank Corporation Act 1989*. Provision for airspace subdivisions and management statements were also included in this legislation, making them a first for Queensland.

Law: *Registration of Plans (HSP (Nominees) Pty Limited) Enabling Act 1980*

Law: *Registration of Plans (Stage 2) (HSP (Nominees) Pty Limited) Enabling Act 1984*

Law: *Sanctuary Cove Resort Act 1985*

Law: *Integrated Resort Development Act 1993*

Law: *Mixed Use Development Act 1993*

Law: *South Bank Corporation Act 1989*

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[¶5-700] Planned communities legislation (NSW)

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The origin of the package of New South Wales legislation known as the community titles legislation dates back to 1984 to a working party established by the Department of Planning and Environment in that State to investigate cluster housing and theme development. That working party concluded that the *Strata Titles Act* was inappropriate for cluster type subdivisions and recommended that new legislation be created for cluster and theme developments (such as resorts, retirement villages and rural hamlets). That recommendation resulted in a commission to the Registrar-General's Department to prepare proposals for the legislation.

Following years of research and consultations that Department put forward proposals that resulted in the passing of the community titles package in 1989. That package comprised:

- *Community Land Development Act 1989*;
- *Community Land Management Act 1989*;
- *Strata Titles (Community Land) Amendment Act 1989*; and
- *Miscellaneous Acts (Community Land) Amendment Act 1989*.

With the exception of several minor sections, the legislation became operative on 1 August 1990.

Law: *Community Land Development Act 1989*

Law: *Community Land Management Act 1989*

Law: *Strata Titles (Community Land) Amendment Act 1989*

Law: *Miscellaneous Acts (Community Land) Amendment Act 1989*

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[¶5-750] Strata Schemes Management Act 1996

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In 1994 the then New South Wales government re-established the *Strata Titles Act Review Committee* in an expanded form to consider the need for further amendments to the *Strata Titles Act 1973*. The plan was to re-write the Act in plain English after incorporating any changes that were considered appropriate having regard to further experience with the Act during the preceding 4 or 5 years. Following a change in government in 1995, the committee was retained but a decision was taken to replace the 1973 Act with an entirely new Act. The final legislative program involved:

- repeal of the management and dispute provisions of the *Strata Titles Act 1973*;
- repeal of the management and dispute provisions of the *Strata Titles (Leasehold) Act 1986*;
- re-enactment of all of those freehold and leasehold provisions in a new plain English Act, the *Strata Schemes Management Act 1996*;
- enactment of a cognate Act, *the Strata Schemes Management (Miscellaneous Amendments) Act* 1996;
- renaming the 1973 Act, the *Strata Schemes (Freehold Development) Act 1973*; and
- renaming the 1986 Act, the *Strata Schemes (Leasehold Development) Act 1986*.

The new legislative package commenced on 1 July 1997 and since that date the development of strata schemes in New South Wales has been regulated by the renamed 1973 and 1986 Acts, while the management and dispute aspects of strata schemes have been regulated by the *Strata Schemes Management Act 1976*. The former Acts are administered by the Department of Lands while the latter is administered by the Department of Fair Trading.

Law: *Strata Schemes Management Act 1996*

Law: *Strata Schemes (Freehold Development) Act 1993*

Law: *Strata Schemes (Leasehold Development) Act*

[¶5-800] Queensland's 1990s review

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In June 1991 the then Queensland Government issued a ``green paper'' outlining a range of problems confronting the home unit community. That paper dealt with proposals to reform the law relating to building units and group titles, with particular emphasis on management contracts and staged development. The Green Paper and the debate which ensued was very controversial. The management rights industry were clearly set against the representatives of home unit owners, with a range of organisations (including the Queensland Law Society, Inc) taking the middle ground. At one stage it appeared that the very future of the management rights industry was at risk. Despite a change of Minister, the debate continued and, eventually, Cabinet approval was obtained for a new *Building Units and Group Titles Act* to replace the BUGTA. One of the features of the new Act was to limit the length of management agreements to 10 years. Another feature was the introduction of a system of staged development for group title plans.

In December 1993 a draft bill for the *Building Units and Group Titles Act 1994* (``the 1994 Act'') was released. After a short period for public comment, the Bill was to be revised and prepared for early introduction to Parliament. However, the Bill generated continuing opposition from almost every sector of the community. The Minister of the day attempted to deal with the criticisms by making a number of amendments, but he eventually took the Bill to Cabinet and then to the Parliament. It was passed in November 1994 after further amendments were made in Committee.

The main features of the 1994 Act were:

- a maximum term of 10 years for body corporate letting and service contracts;
- that term restriction was to apply to contracts entered into from 24 October 1994;
- an automatic ``without cause'' review of body corporate service contracts after 3 years;
- retrospective validation of body corporate letting contracts effective from the date of the High Court decision in *Humphries & Anor v The Proprietors — ``Surfers Palms North'' Group Titles Plan No 1955*, namely 4 May 1994;
- proxy voting was retained but restrictions were applied;
- cancellation of building manager's rights in respect of common property office-reception areas once their management contracts terminated;
- introduction of staged development of group title plans using multiple bodies corporate or a single body corporate with separate funding for each stage;
- a lease-back scheme for strata title hotel developments;
- clearer definition of meeting and other management procedures;
- reform of the dispute resolution provisions.

Technical flaws and adverse economic impacts were soon detected in relation to the 1994 Act. Opposition to its commencement intensified. In an attempt to address a number of serious issues the Government said it would amend the Act before it was commenced. Then came the 1995 election, and although there was no change of government at that stage, there was yet another change of Minister.

The new Minister inherited a very unpopular 1994 Act that was awaiting commencement. Before it could be commenced the Minister had to amend it. When the extent of the amendments was appreciated the government sought outside advice on the Act. Following that advice an announcement was made in a Ministerial Statement to the Parliament on 15 November 1995 that:

- a new legislative package for community titles would be produced;
- this package would replace the BUGTA and the 1994 Act;
- planning matters would be transferred to the *Local Government (Planning and Environment) Act 1990* or the then proposed Environment and Development Assessment legislation (PEDA);
- titling matters would go to the *Land Title Act 1994*;
- management and dispute resolution matters would go to a new *Community Land Management Act*;
- the 10-year limit on body corporate management contracts would still apply;
- the validation of letting agreements entered into post-4 May 1994 would be retained.

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The Department of Lands was well under way with the development of this new legislative package when the Mundingburra by-election was held in early 1996, as a result of which the Goss Labor Government was replaced by the Borbidge Coalition Government. Mr Howard Hobbs was then appointed as Minister responsible for the new Department of Natural Resources, and hence the Minister responsible for the BUGTA.

The new coalition Government reviewed the initiatives of the previous Labor Government and decided to proceed with its own reform process for building units and group titles. That process involved repeal of the BUGTA (the 1994 Act already having been repealed), transfer of its various provisions into the *Local Government (Planning and Environment) Act 1990* (P & E Act), the *Land Title Act 1974* (Titles Act) and a new Act to be known as the *Body Corporate and Community Management Act 1997* (BCCM Act). In addition, specialist regulatory systems for bodies corporate were to be included to provide developers with a choice of management structures for their projects.

The legislative package to achieve this initiative was developed by a Departmental Project Group (differently constituted from the Group that developed the 1994 Act) with the assistance of an external legal consultant. A draft of this legislative package was released, on a confidential basis, to industry groups (including home unit owner associations) in December 1996 as part of a comprehensive public consultation process. Following input from these groups the package was further reviewed. In February 1997 a further draft of the package was released for public comment. This public consultation process was designed to comprehensively canvass the views of all sections of the community that would be affected by the legislation. After these views were obtained, the legislative package was further reviewed and the final product was introduced into the Parliament and passed in May 1997. The BCCM Act was assented to on 22 May 1997 and proclaimed to commence on 13 July 1997. It is the BCCM Act and its associated legislation that is the subject of this publication.

The BCCM Act was reviewed in 2002, and as a result of that review was amended by the *Body Corporate and Community Management and Other Legislation Amendment Act 2003*. The regulations under the BCCM Act were subsequently reviewed in 2004.

Law: *Building Units and Group Titles Act 1994* (Repealed)

Law: *Local Government (Planning and Environment) Act 1990*

Law: *Land Title Act 1994*

Law: *Body Corporate and Community Management Act 1997*

Case Reference: *Humphries & Anor v The Proprietors — ``Surfers Palms North'' Group Titles Plan No 1955* (1994) 179 CLR 597.

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[¶6-000] Introduction

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The sociology of home unit living is an immense subject involving many specialised areas. But it is an important topic, and lawyers and real estate managers should have some knowledge of the social aspects of their clients' purchase if they are going to adequately serve the interests of those clients.

This part will present an overview of the issues and problems involved in the hope that the reader will be motivated to develop a better understanding of this important subject. Such an understanding will result in more informed decisions on the part of lawyers, managers, unit purchasers and residents.

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[¶6-050] Forms of housing and development

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Housing needs are very individual. The needs of a single person will usually be different from those of a young married couple without children, whose needs will in turn be different from those of a family. Even the needs of individual families differ and as people progress through life their needs change. For example, a one bedroom home unit may be adequate for single people. After they marry a two bedroom home unit may be required, while the appearance of a young family may demand the traditional detached cottage with a backyard. Once the children grow older a town house may be called for, and after the children leave home and make their own way in life a home unit may again be the answer. Then there are the grandchildren to consider-and so on!

Before examining the social effects of unit and communal living it is useful to consider the various types of housing that may exist under the strata title umbrella.

The home unit

The first housing type is the "home unit". This type has the following characteristics:

- It is a multi-storey development.
- It falls within the category of a "high density" development.
- It involves maximum use of communal facilities with little or no open space being owned by individuals.
- It has a greater effect on the environment than other forms of residential development.
- It may mean your client or client's tenant ends up living with neighbours above, below and on both sides of the home unit.

Since the introduction of the first strata title legislation in 1961, home unit or residential flat development has expanded rapidly. For at least a decade after such introduction new housing development took the form of either detached dwelling houses or residential flat buildings. Towards the end of the 1960s the other forms of strata development began to appear but it was not until the 1970s that they appeared in any numbers.

Duplex and triplex

This type of strata development is a medium-density type of home unit building. The duplex consists of two units, one on top of or beside the other, while the triplex consists of three. These developments are usually associated with family arrangements rather than commercial enterprises.

Triplexes in the larger backyards of an older home have recently become quite sought after for investment purposes with the intention that those home units be subdivided and individually sold off. This is certainly possible with the right planning and budgetary considerations.

Villa homes

This is really a misnomer. A villa is traditionally a detached dwelling in the suburbs or country and is usually surrounded by spacious gardens and outdoor facilities. In the strata title context, a villa is a medium-density attached single-storey dwelling having little or no common facilities, with its own area of open space. They usually look like a row of single-storey cottages joined one to the other by garages. Before 1976 in New South Wales they were commonly subdivided into strata by means of an artificial overlap. In 1976 the then New South Wales legislation was amended to remove the need for a strata overlap. Since the introduction of community titles, it has become common for this type of development to be subdivided by means of a community or neighbourhood plan. In Queensland the *Group Titles Act 1973* provided a common interest subdivision facility suitable for this housing type and removed the need for a strata overlap in that state.

Town houses

Town houses are similar to villa homes but they are multi-storey, usually two but sometimes three. They are sometimes built down a sloped block of land in such a way that the higher town houses have an outlook over the roofs of the lower ones. The town house is categorised as a medium-density form of housing, having

some open space with its own entrance and service facilities. Depending upon the design and layout of the project they may be subdivided in New South Wales by either a strata plan or a community or neighbourhood plan. In Queensland before the BCCM Act commenced they were usually subdivided by a group titles plan.

Detached dwellings

By way of contrast with the various forms of strata title housing, the detached dwelling is free standing on a larger parcel of land with no common facilities. It is a low-density form of development which is becoming expensive to construct and provide with community services such as water, electricity and transport. In recent years planning controls have been relaxed to permit a higher density development of detached dwellings. Indeed, some of these dwellings are constructed on very small allotments. Often the council will be pleased to see these communities created as “gated” communities due to the fact that the public access restriction means the council can pass the responsibility for the upkeep of internal roads and street lights to the body corporate together with all associated costs, while the gated estate itself creates a feeling of exclusivity for the intended buyers.

Community plans and neighbourhood plans are very suitable for subdividing these types of developments in New South Wales. In Queensland, the standard format plan under the *Land Titles Act 1994* is suitable. They allow a developer to provide swimming pools, open space and other facilities for communal use at relatively little additional cost (capital and maintenance) to individual owners.

Flat land development with the use of the community titles scheme

While most practitioners may consider a purchase of land to fall within the generally understood concept of pure subdivision by way of plan, the use of the community titles scheme incorporating a community management statement (with or without the use of an architectural code) has recently become a popular way for developers to protect the value of their development while attracting buyers who may want to enjoy a resort-like lifestyle without having to live in a “cookie-cutter” development.

Last reviewed: 30 August 2012

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[¶6-100] Housing growth

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For the purpose of this work the history of the growth of housing facilities can be simplified to a brief summary. Ever since the early days of the first settlement in New South Wales, terrace or row houses began to appear, mainly because of difficulties with transport and public utilities. Towards the end of the nineteenth century a building boom occurred during which the popularity of the terrace house increased. This popularity may well have been influenced by then current trends in Britain and Europe. However, in the early part of the twentieth century the detached dwelling with its private gardens regained popularity. Improved transport no doubt contributed to this change.

By the end of World War II, residential flat buildings had made their mark on the metropolitan landscape — high-density living had been well and truly born. This trend continued until the 1960s when Paddington was rediscovered. Then developers began to present a new style terrace which was to become known as a villa home or town house. The 1970s saw an increase in the popularity of these villa homes and town houses, and the emergence of mixed developments comprising partly residential flats and partly villas or town houses.

The 1980s and 1990s were the years of the large high-rise and mixed use projects. They were much larger and considerably more complex than the earlier developments. Some of them were also undertaken in stages resulting in the introduction of staged development facilities in the New South Wales legislation. Also during those years the number of smaller buildings increased as Sydney began to consolidate. In outer city areas larger communities were developed (eg Raleigh Park at Randwick) and community titles facilitated this trend. Resort and serviced apartments also appeared during this period and in the early to mid 1990s the strata title hotel project became more common. In Queensland the trends were similar, although a little behind and considerably less extensive than in New South Wales. The Gold Coast was certainly the trend setter in terms of large high rise and holiday letting structures.

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[¶6-150] Medium and high density living — advantages and disadvantages

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Purchaser expectations

When a person decides to buy into a strata or community title complex, whether it is a home unit, town house or free standing home development, they may be motivated by various expectation, including one or more of the following:

- a reduction in personal maintenance obligations (e.g. gardening or building maintenance);
- access to spacious well-kept grounds and sporting or recreational facilities (eg waterfront facilities);
- the status of a fashionable address;
- the company of other people;
- the plush appearance of a building entrance or common facilities;
- a lifestyle which is inexpensive both in initial cost and continuing expenses;
- close proximity to the city or public facilities (eg the racecourse, transport or an ocean beach); and
- the social status of owners already established.

Disadvantages of high density: the unit dweller

High density generally involves residential flat type developments, either low rise (three storeys and less) or high rise (above three storeys). These developments involve a density of about 55 to 220 dwellings per hectare of site. This compares with a density range of about 5 to 20 dwellings per site hectare in the Brisbane Metropolitan Area for detached houses. This illustrates a clear contrast between the two density extremes and it is not surprising that the residential flat developments have marked disadvantages. Some examples are:

- lack of privacy
- frequent personal contact, with resultant likelihood of more frequent personal conflicts
- limitations on light and air
- noise problems
- lifestyle problems — eg exposure to passive smoke
- confined living conditions with no private open space, and
- design and construction problems.

Disadvantages of high density: the neighbourhood

So far the disadvantages considered have been related to the unit dweller. There are also disadvantages to the neighbourhood and the community generally. Some examples are:

- Environmental factors such as appearance.
- Interruption of views or outlook.
- Interference with light or air.
- Interference with backyard privacy.
- The population balance and family unit distribution is often interfered with, and this may lead to uneconomic use of existing public facilities.
- There may be a greater risk of the buildings falling into disrepair because of socio-economic factors or poor management skills on the part of the members of bodies corporate.

Advantages of medium density

It is generally accepted that town houses and villa homes, and also free standing homes in planned communities, (which are classified as medium density housing) have fewer disadvantages, both from the point of view of the unit and the general community. Their limited height has less effect on the environment

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and the resultant lower population density (about 20 to 75 dwellings per site hectare), combined with less interference with the overall distribution of family units, causes less strain on existing public services such as hospitals and transport. The provision of new or improved services, where necessary, can usually be achieved at less cost to the general community than for a residential development of detached dwellings.

From the individual's point of view the town house or villa home offers a less confined form of living than high density, yet provides open space and limited communal involvement at less cost than conventional detached housing. Therefore problems associated with privacy, noise, light or air are less prevalent than might otherwise be found in a residential flat development. Consequently, communal tensions and disputes are less likely to occur.

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[¶6-200] Social interaction

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Sociologists have not yet fully researched the effect of the construction design of privately owned flats on social interaction of residents; but there is no evidence to support any theory that close-quarter living promotes social interaction. Indeed, there is some evidence to suggest that the opposite is the case. In his book *The Architecture of Happiness* (Pantheon Books, 2006), Alain de Botton examines the question of what makes a building beautiful and to what extent the walls around us impact on our happiness and desire to succeed in life.

In high-density areas, problems of noise, privacy, and space lead to strained family relationships, particularly where young children are involved. Disputes are more prevalent and management can be difficult and ineffective, particularly in gated estates where the common driveways and communal parks are treated by some parents as a free creche. On the other hand, in medium-density areas these problems are reduced and families with young children are more readily accepted.

Effects of management

This is another area concerning privately-owned home units and medium density housing which has not been adequately researched. However, it is reasonable to suppose that the effectiveness of social interaction within a particular home unit or housing community will depend, at least to some degree, on the competence of the management. The preconceived views of residents will also impact on the successful social interaction of the community as a whole. For example, do new residents expect to have a resort-type facility with 24-hour on site service when neither the caretaking agreement nor the budget supports this ability?

The management of expectations is the key. Poor management often leads to problems and resultant disputes. Disputes in turn affect social interaction. Poor management may also affect maintenance standards which in the longer term may upset the social or economic status of the residents, and this may eventually lead to more serious social problems, both on an individual and community level.

Poor management can, to an extent, be attributed to the different spending styles of committee members. A good example of poor management is the way that changes to the committee members will impact on the ways in which the yearly budgets are spent. For example, a committee of young professional residents may look at an established sinking and administrative fund with a view to spending that money on major capital improvements all within the one year to greatly enhance the complex, while a committee full of members on fixed incomes may look at spending only minimum amounts each year in order to conserve funds. Another example of poor management occurs when committee members take action to obtain quotes from tradespeople for work that they believe needs to be done, but are later overruled by other more financially conservative lot owners. A history of this kind of scenario may result in tradespeople being unwilling to provide their services to bodies corporate.

Tips for caretakers to avoid alienating tradespeople and deal with different spending styles of committee members:

- Tell tradespeople upfront that the proposed work is for a body corporate (so they know in advance there is a chance of delay before they are given the job)
- Follow up with committee members and body corporate manager to ensure that tradespeople are paid promptly
- When the committee changes its mind, remind the committee members of the risk that alienated tradespeople may be unwilling to provide their services in the future.

If committee members are too conservative, major projects may wait years to be undertaken, and by the time they are undertaken the cost may be twice as high (for example, because timber slats that are not repainted at the appropriate time continue to be exposed to the weather and later need replacing).

Certain committee members may have their own particular bugbear or special project which they want approved but which is against the prevailing views of the other lot owners, often due in part to cost. Friction may be caused between lot owners as a result, with the only real option for some lot owners being to sell up and/or move off site.

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[¶6-250] Specific social problems

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Monash University study

Research has been undertaken in the 1970s by W.H. Foddy and B. Reid of the Department of Anthropology and Sociology at Monash University. Called ``Multi-own-your-own Unit Residential Complexes'' (1976), this study investigated the use of common facilities and the functioning of bodies corporate as well as design, renting and social interaction issues. It highlighted a number of problem areas, which include:

- The problems encountered when people of different social or economic groups are mixed; for example, young people with old people, or high income residents with low income residents, such as pensioners and people with fixed incomes.
- The ineffectiveness of bodies corporate that do not have the benefit of adequate management skills, by-laws or financial resources. The long-term implications of poor management are often overlooked, and there is evidence in New South Wales to link poor management with specific problem areas, particularly disputes and deterioration of building maintenance.
- The problems encountered when attempts are made to add to or improve communal facilities, such as the difficulty of obtaining owners corporation approval for the expenditure of larger sums of money. Adequate facilities must be provided in the original development.
- The difficulty of providing adequate privacy (though against this must be weighed the need to promote greater social interaction).
- Difficulties caused by restrictions on the use of open space. This may be combined with a lack of understanding of the value and function of open space in a home unit community.

Reduction in rental housing

During the period from 1968-1983 excessively large numbers of residential flat buildings in the Sydney metropolitan area were converted to strata titles. To achieve this, existing tenants were usually required to vacate their flats while renovations were carried out. Some of the flats in the refurbished building then found their way back onto the rental market at somewhat higher rents while some ended up as privately owned residences. Towards the end of this period this conversion trend increased further as the cost of conversion proved much cheaper than the cost of building new buildings. The end result was a drying up of rental accommodation for lower and middle income people, particularly in the inner city areas.

In response to this problem the N.S.W. Labor Government in 1984 introduced *State Environmental Planning Policy No. 10 - Strata Subdivision of Buildings Used for Residential Purposes*. The aim of this Policy was to facilitate the conservation of rental stock by requiring Local Council consent to the strata subdivision of buildings used as residential flat buildings or as boarding houses. It required Councils, as part of the approval process, to assess the impact of any subdivision on the supply of, and demand for, rental accommodation in the Council's area.

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[¶6-300] Children in home units

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Although there is material available on the subject of children in flats, there is little material available on the more restricted subject of children in home units. Many of the problems are common to the two types of housing, in spite of the basic difference that a home unit is usually owner-occupied. It is a common belief that "some but not many" children live in flats in New South Wales. Census figures show that this is not correct.

Most flat complexes (particularly owner-occupied home unit buildings) have rules to regulate the play and behaviour of children. Not surprisingly, these are afforded little or no respect by the children and sometimes the parents. Similar issues arise in gated communities where children are left to ride bikes, play sport and otherwise congregate on the communal roads and common areas much like a creche. The usual consequence is a dispute involving not only the children and the complainant but also the parents of the children and the body corporate. This adds to the other tensions of unit or community living and interferes with the general social interaction within the home unit community.

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[¶6-350] Points to watch when purchasing

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General locality

When purchasing a home unit, town house, villa home or community house the choice of the right dwelling in the right complex is the key to success. What may be right for one person may be wrong for another (see ¶6-050), so purchasing this type of home must be a very personal thing. The following checklist will indicate the various matters that may have to be considered.

The general locality may be assessed on these points:

- adequate shopping facilities;
- public transport;
- schools;
- police and fire protection;
- hospital or medical facilities;
- existence of hazards (eg local flooding);
- recreation facilities;
- churches;
- garbage disposal;
- community facilities (eg public library or old persons' centre);
- traffic problems;
- compatibility of tastes and lifestyle with likely neighbours;
- availability of sewerage;
- privacy;
- nuisances (eg noise, smoke or odours from local industries);
- on-street parking problems; and
- lay of the land (eg presence of a view or perhaps absence of hills).

Home unit or housing complex

The unit or housing complex itself may be assessed on these points:

- parking facilities and their accessibility;
- building access (eg older persons would prefer absence of hills or steps);
- landscaping;
- first impressions of foyers and entrance;
- cleanliness;
- air and light;
- standard of finish and construction;
- thickness and soundproofing of walls, floors and ceilings;
- internal and external artificial lighting;
- size of rooms (particularly their suitability for furniture the prospective buyer already owns);
- layout of floor plan;
- adequate facilities (e.g. number of bedrooms);
- adequate storage facilities;
- state of repair and maintenance;
- standard of management;
- financial standing of the body corporate;
- building defects discoverable in body corporate's records;
- security;
- reputation of the builder;
- adequate electrical facilities;
- ventilation and heating;
- sun and shade patterns;

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- view, and the likelihood that it will be built-out;
- likely re-development in the neighbourhood;
- health or recreational facilities;
- likely maintenance contributions;
- by-laws in force (particularly where animals are involved);
- open space;
- extent of communal facilities (eg common laundries);
- allocation of unit entitlements; and
- standard of management.

The checklist above included the following points:

- standard of management;
- building defects discoverable in owners corporation records;
- likely maintenance contributions; and
- by-laws in force.

These matters may best be investigated by inspecting the books and records of the owners corporation before contracting to buy. Otherwise, a casual conversation with the managing agent or an office bearer of the owners corporation may be useful. In any event, it is important for a prospective purchaser to make some enquiries as to these matters independently of the usual legal conveyancing procedures. A diligent practitioner will ask questions to understand the motivations behind a move into a scheme to understand the preconceived ideas which the purchaser may bring with them. For example, if the purchase is for investment purposes then the intended purchaser may not mind the by-laws which prevent them from storing their car in front of their garage as opposed to inside of it. A purchaser intending to live on site may have a different opinion.

It is only by making enquiries that the purchaser will be able to assess the qualities of the community in which they are about to live and find out what particular problems have been manifested in that community in the recent past.

One of the better places to find out about the complex and any previous disputes is: www.qcat.qld.gov.au/qcat-decisions/published-decisions.

“Uncommon” facilities

The common property or common facilities in a strata title or planned community complex are intended for use by all owners and occupiers, unless such use is restricted by means of an exclusive use or special privilege by-law. However, as developments become more complex more and more problems arise as regards “uncommon” facilities. In essence, a facility (such as air conditioning or display lighting) is installed within the common property but its use is confined to a few of the lots (eg commercial lots). Because the facility is part of the common property its repair and maintenance is the responsibility of the owners corporation. Funds for such repair and maintenance must be contributed by owners generally notwithstanding that they are unable to use the facility. Purchasers should be alert to ensure that any strata or community scheme under consideration by them (particularly a mixed use scheme) does not involve this inherently unfair situation.

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[¶6-500] Introduction

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The *Body Corporate and Community Management Act 1997* (``BCCM Act'') introduced a range of new concepts and legal mechanisms to Queensland's ``home units'' law. The objective in this part of the publication is to provide the reader with a general overview of the Act so that terminology and concepts which are developed elsewhere in the publication are understood. This approach is intended to make it easier for the reader to follow the more detailed commentary on the Act and other associated legislation.

Because the BCCM Act did not finally repeal the *Building Units and Group Titles Act 1980* (``BUGTA'') it is first necessary to understand the ongoing role of BUGTA and the likely future objectives in relation to that Act.

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[¶6-550] The BCCM Act and BUGTA

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Chapter 8 Part 1 of the BCCM Act (along with the other provisions of that Act) were proclaimed to commence on 13 July 1997. At that time:

- community titles schemes were established in place of building units plans and group titles plans under BUGTA
- building units plans and group titles plans were no longer to be registered under BUGTA (other than for transitional purposes)
- future projects wishing to use building units plans or group titles plans must use the appropriate plan format under the *Land Title Act 1994* and thus become community titles schemes under the BCCM Act.

However, the following pieces of legislation (each of which is referred to in this commentary as a **"specified Act"**) have always had a close relationship to BUGTA and have depended upon BUGTA for their operation:

- the *Integrated Resort Development Act 1987*
- the *Mixed Use Development Act 1993*
- the *Registration of Plans (HSP (Nominees) Pty Limited) Enabling Act 1980*
- the *Registration of Plans (Stage 2) (HSP (Nominees) Pty Limited) Enabling Act 1984*
- the *Sanctuary Cove Resort Act 1985*.

Because of this dependence, they cannot continue to operate in the absence of BUGTA. For this and other transitional reasons BUGTA has been continued in operation in a very limited way. This was achieved by inserting into BUGTA s 5A which continues to apply BUGTA only for:

- the operation of a specified Act
- the registration of a "future 1980 Act plan" under the transitional provisions of the BCCM Act
- any other matter under the transitional provisions of the BCCM Act required to be effected under BUGTA.

A **"future 1980 Act plan"** is defined in s 326 of the BCCM Act as "a building units plan or group titles plan registered under the 1980 Act [ie BUGTA] after the commencement, other than a building units plan or group titles plan brought into existence for a specified Act." Apart from the above matters, s 19, 20 and 20A of the *Acts Interpretation Act 1954* apply to BUGTA as if it had been repealed by the BCCM Act.

As part of the above arrangements, BUGTA continues in force for:

- building units plans and group titles plans registered under BUGTA, if their registration under BUGTA was for a specified Act
- building units plans and group titles plans registered after commencement of the BCCM Act, if their registration is for a specified Act
- the registration of building units plans and group titles plans (unrelated to a specified Act) lodged for registration before commencement of the BCCM Act, or within a limited time after that commencement, except that, once registered, community title schemes are established in place of the building units plans and group titles plans.

Ultimately, the government is likely to repeal all of the specified Acts and bring all the plans registered under them within the operation of the BCCM Act. At that time BUGTA will be finally repealed.

Last reviewed: 31 July 2006

[¶6-600] Structure of BCCM Act

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The BCCM Act provides for the title and subdivision provisions in the BUGTA to be transferred to the *Land Title Act 1994* (Titles Act). However, the detailed provisions of BUGTA and its regulations dealing with survey matters are not included in legislation. Instead, they are contained in a new departmental format known generally as the Directions of the Registrar of Titles (Registrar's Directions). At the same time the following changes were made:

- a new type of survey plan was introduced — based on a common plan form
- the plan itself is able to be drawn in any of three "formats"
- a "`management statement" must be lodged with certain survey plans
- a "title" has been established for the common property created upon a subdivision, mainly for the purpose of removing recordings from plans (although the concept of ownership of common property by proprietors, as tenants in common, was retained).

The Titles Act and the Registrar's Directions are effectively a comprehensive code for land title and subdivision in Queensland.

Reconfiguration of a lot (ie subdivision) is now regulated by Ch 3 Pt 7 of the *Integrated Planning Act 1997*. Reconfiguration of a lot is "development" for the purposes of that Act, and unless the plan is exempt development, it will require a development permit. If the reconfiguration occurs on a building format plan of subdivision, then it will be exempt development. As such, the local government must approve the plan if:

(a) the plan is consistent with any development permit relevant to the plan, and
(b) there are no outstanding rates or charges, or expenses, that are a charge over the subject land.

Sometimes the reconfiguration is authorised by a development permit or the plan is submitted under a condition of a development permit. In those circumstances the local government approval process is regulated by s 3.7.2 and s 3.7.3 respectively of the *Integrated Planning Act*. (See ¶23-100 for further discussion.)

The management and dispute provisions of BUGTA are re-enacted in the new BCCM Act. These dispute provisions have been modernised to ensure that they are more effective to cope with present day problems and also to equip them to cope with a range of new issues that are likely to occur under the new legislative arrangements. There is also a new approach to dividing management content between the Act and Regulations. Plus, there are a number of different management structures, each intended for a specific type of development. This will provide the opportunity for developers to apply a management structure to their project which meets its specific requirements.

The *Integrated Resort Development Act 1987* and the *Mixed Use Development Act 1993* both provide specialised subdivision mechanisms. While those Acts have not been repealed at this stage, further applications for approval under them has been banned on and from the commencement of the BCCM Act. The *Sanctuary Cove Resort Act 1985*, the "Paradise Centre" legislation (HSP Nominees enabling Acts of 1980 and 1984) and the subdivision provisions in the *South Bank Corporation Act 1989* have not been touched at this stage.

In the light of all these changes, the BCCM Act is structured as follows:

Chapter 1 — Preliminary

- Introduction
- Object and achievement of object
- Interpretation
- Key terms and concepts

Chapter 2 — Basic operation of community titles schemes

- Establishment of community titles schemes
- Bodies corporate
- Common property

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- Body corporate assets
- Lot entitlements
- Community management statements
- Statutory easements
- Reinstatement
- Termination of community titles schemes
- Amalgamation of community titles schemes
- Creation of a layered arrangement from existing basic schemes

Chapter 3 — Management of community titles schemes

- Management structures and arrangements
- Body corporate managers, service contractors and letting agents
- Financial and property management
- Conduct of occupiers
- By-laws
- Insurance

Chapter 4 — Administrative matters

- Valuation, rating and taxation
- Records

Chapter 5 — Sale of lots

- Preliminary
- Existing lots
- Proposed lots
- Implied warranties
- Costs not recoverable by original owner on the sale of a lot

Chapter 6 — Dispute resolution

- Introduction
- Commissioner for Body Corporate and Community Management
- Dispute resolution officers
- Applications
- Dispute resolution recommendations
- Dispute Resolution Centre mediation
- Specialist mediation and conciliation
- Specialist adjudication
- Adjudication generally
- Enforcement of adjudicator's orders
- Appeals from adjudicator on question of law
- Miscellaneous

Chapter 7 — Miscellaneous

- Appeals
- Other matters

Chapter 8 — Transitional provisions

- Transition from 1980 Act
- Transitional provision for *Tourism, Racing and Fair Trading (Miscellaneous Provisions) Act 2002*
- Transitional provisions for *Body Corporate and Community Management and Other Legislation Amendment Act 2003*
- Transitional provision for *Property Agents and Motor Dealers and Other Acts Amendment Act 2006*
- Transitional provision for *Audit Legislation Amendment Act 2006*

Schedule 1 — Illustrations

Schedule 2 — Code of Conduct for Body Corporate Managers and Caretaking Service Contractors
Schedule 3 — Code of Conduct for Letting Agents
Schedule 4 — By-laws
Schedule 5 — Adjudicator's orders
Schedule 6 — Dictionary

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[¶6-650] Community titles scheme

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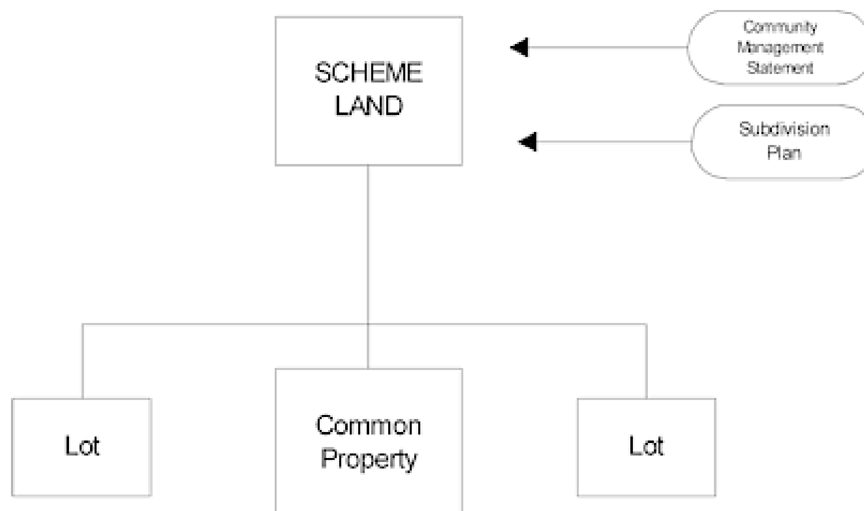
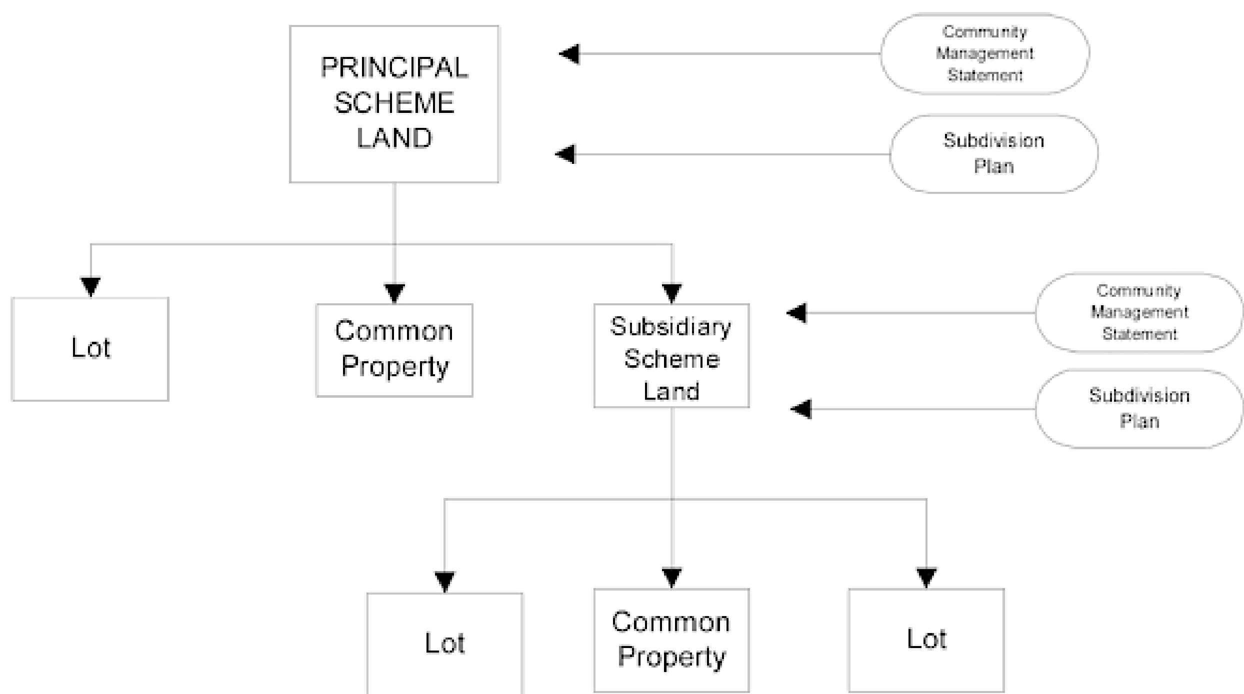
The *community titles scheme* is the basic concept for the BCCM Act and it can only relate to freehold land. A community titles scheme effectively comprises a *community management statement* and the *scheme land* to which it relates. The community management statement identifies the scheme land and this statement or document is filed in the office of the registrar of titles along with a plan subdividing all or part of the scheme land. The scheme land must comprise—

- 2 or more lots, and
- land other than that contained in those lots (which is called *common property*).

The following diagram illustrates a simple community titles scheme which is called a basic scheme:



But so far we have described a community titles scheme in its simplest form. It is possible for such a scheme to be related to one or more other community titles schemes. This is achieved by further subdividing one of the lots (not the common property) in a way that creates a second or subsequent community titles scheme. To do this, there would need to be another 2 or more lots in the new scheme, as well as common property in the new scheme. This second or subsequent community titles scheme is known as a *subsidiary scheme*, while the first scheme in the hierarchy is known as the *principal scheme*. This results in layers of community titles schemes which are referred to in the BCCM Act as a *layered arrangement of community titles scheme*. The following diagram illustrates a simple layered arrangement, although it should be appreciated that many layered arrangements are much more complex:



Each community titles scheme has a *body corporate* which is given responsibility for control and maintenance of the common property of the particular scheme.

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[¶6-700] Lots and common property

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In a basic scheme a *lot* is a lot under the *Land Title Act*. A lot is a separate distinct parcel of land to the common property created for the scheme. The common property is owned by the owners of the lots included in the scheme, as tenants in common, in shares proportionate to the *interest schedule lot entitlements* of their respective lots. An owner's interest in a lot is inseparable from the owner's interest in the common property. This means that when a person acquires an interest in a lot, that person, by virtue of the acquired interest, also holds a prescribed interest in the common property. However the significant difference is, although an owner's interest in a lot is capable of being sold and purchased, common property cannot be dealt with in this manner.

In a scheme other than a basic scheme a lot can be another community titles scheme. In that event, the lot is effectively the scheme land for the subsidiary scheme (ie it forms the basis of the lots and common property for the subsidiary scheme). The common property effectively consists of all of the scheme land that is not comprised in the lots for the particular scheme. However, part of the scheme land in a subsidiary scheme may comprise common property for another community titles scheme higher in the hierarchy, in which event it effectively becomes part of the scheme land of the higher scheme and ceases to be part of the scheme land of the subsidiary scheme. This is because land cannot be common property for more than one community titles scheme.

In the case of a building subdivision, the common property typically includes the land above, below and surrounding the building, the main entrance, stairs, elevators, landings and other areas intended to be used in common by the lot owners and occupiers. In the case of a flat land subdivision, the common property typically includes the roads, open space, recreational, parking and other areas intended to be used in common.

Law: *Body Corporate and Community Management Act 1997*, s 35.

.40 Case reference: *Harris & Anor* v *Prigg* (2009) LQCS ¶90-148; [2009] QCA 47.

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[¶6-750] Owners and occupiers

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In general terms, the person who owns a lot (other than a lot that is a community titles scheme) is called an *owner*. The person who is in possession of it (by means of a lease or otherwise) is called an *occupier*. However, the BCCM Act applies a more technical meaning to these terms. They are defined as follows:

> ```**owner'**, of a lot (other than a lot that is a community titles scheme) included in a community titles scheme, means the person who is, or is entitled to be, the registered owner of the lot, and includes —
>
> > (a) a mortgagee in possession of the lot; and
> > (b) if, under the *Land Title Act 1994*, 2 or more persons are the registered owners, or are entitled to be the registered owners, of the lot — each of the persons.
>
> `**occupier'**, of a lot included in a community titles scheme, means —
>
> > (a) a resident owner or resident lessee of the lot, or someone else who lives on the lot; or
> > (b) a person who occupies the lot for business purposes or works on the lot in carrying on a business from the lot."

[¶6-800] Original owner

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In general terms, the original owner for a community titles scheme is the developer. However, the technical definition of original owner is each person who, immediately before the establishment of the scheme, is a registered owner of a lot that becomes scheme land. If, immediately before establishment of the scheme, the land is in possession of a person acting under authority of a mortgage or an order of a court, that person is also included within the meaning of the term. The original owner is made responsible for a number of matters under the BCCM Act.

[¶6-850] Body corporate

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When a community titles scheme is established under the BCCM Act a body corporate is automatically created. The owners of all the lots are members of the body corporate by virtue of receiving an interest in the scheme by way of the allocation to them of their interest schedule lot entitlement and contribution schedule lot entitlement. All bodies corporate have the same style of name, the distinguishing features being the name of the project and the number of the scheme (which is based on the number of the *community management statement*). An example of a body corporate name is:

Body corporate for Seaview Towers community titles scheme 1234

The body corporate does not own the common property but it can sue and be sued for rights and liabilities related to the common property as if it were the owner. Also, if the body corporate is authorised under the BCCM Act to enter into a transaction affecting the common property, it may enter into the transaction and execute the necessary documents in its own name as if it were the owner of an estate in fee simple in the common property. The body corporate is also given a range of responsibilities relating to the common property, particularly in relation to its maintenance. In most community titles schemes, the body corporate is assisted in discharging these responsibilities by an executive committee, which is elected by the owners each year and functions like the Board of Directors of a company. If the community titles scheme comprises 6 lots or less and is a basic scheme, then it may be regulated by the *small schemes module*, in which event it will not normally have an executive committee.

Last reviewed: 30 August 2012

[¶6-900] Body corporate assets

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A body corporate may own assets. Common examples would include washing machines, a lawn mower, cleaning equipment and furniture. However, a body corporate asset may include a parcel of land (such as a beach house at the coast). These assets are not common property. They are owned beneficially by the body corporate and are not owned directly by the lot owners, as is the case with common property.

[¶6-950] Community management statement

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Each time a body corporate is created there must be a community management statement. This statement will have a unique number that will be used to identify the community titles scheme and the body corporate. This number will replace the plan number under BUGTA as the identifier of the body corporate. If a community management statement is amended, then an entirely new statement must be substituted and the original number retained.

The community management statement does a number of things, including:

- indicates whether or not the subdivision is part of a staged development and, if it is part of such a development, outlines the way in which the staging is to occur
- provides for the incorporation of one or more bodies corporate (either in line or, where there are to be subsequent plans lodged, in two or more tiers)
- adopts one of four available management structures for each body corporate to be constituted on the subdivision
- records the by-laws and other special arrangements to apply to the bodies corporate
- may, in a flat land development, refer to an architectural and landscape code relevant to the development
- sets out the lot entitlements in two schedules, the *contribution schedule* and the *interest schedule*.

The existence of these community management statements is noted on the titles of all lots, the owners of which are to be bound by them. As circumstances change (particularly upon a resubdivision) new community management statements will be lodged incorporating appropriate amendments. Existing bodies corporate, upon commencement of the BCCM Act, inherited a generic community management statement with a number allocated by the registrar of titles. These bodies corporate are now able to amend their generic statements to bring them into line with the particular requirements of their scheme. This is particularly relevant in older commercial schemes where the owner may want to allocate exclusive use car parking for a new tenant which does not exist under the generic statement. Whenever such generic statements are being reviewed, a copy of the original development approval should be sought to ensure any changes to the community management statement comply with council requirements, prior to council approval and sealing being sought on the statement as a precursor to it being lodged with the Titles Office.

Last reviewed: 30 August 2012

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[¶7-000] Lot entitlements

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On every community management statement there are two schedules of *lot entitlements*. One is called the *interest schedule*, which sets out the *interest schedule lot entitlements*. The other is called the *contribution schedule*, which sets out the *contribution schedule lot entitlements*. The interest schedule lot entitlement is the basis for calculating the —

- lot owner's share of common property
- lot owner's interest on termination of the scheme
- unimproved value of the lot for rate and tax purposes
- liability to contribute to insurance premiums.

The contribution schedule lot entitlement is the basis for calculating:

- lot owner's liabilities for levies (other than levies for insurance premiums)
- lot owner's voting entitlement on a poll.

The BCCM Act does not expressly require the lot entitlements to be allocated in a particular way. However, it makes it clear that, prima facie, interest schedule lot entitlements should reflect the respective market values of the lots and contribution schedule lot entitlements should be equal. These principles should not be departed from unless it is just and equitable in the circumstances for this to occur. This intent is reflected in s 48 of the BCCM Act, which empowers the Queensland Civil and Administrative Tribunal (QCAT) to reallocate the lot entitlements in certain circumstances. The lot entitlements can also be adjusted by the owners.

Last reviewed: 19 March 2010

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[¶7-050] By-laws

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One of the mechanisms to assist the body corporate to control, manage and administer the common property is the ability to make by-laws. The initial by-laws will usually be set out in the community management statement. If not, the standard by-laws in Sch 4 of the BCCM Act will apply. Whatever by-laws apply they can be amended or repealed. A special type of by-law (an *exclusive use by-law*) may be made in certain circumstances to confer rights of exclusive use and enjoyment over, or special privileges in respect of, the whole or part of the common property. Prior to adjusting any exclusive use by-laws, attention should be paid to the original development approval to ensure compliance with council requirements. Owners and occupiers must comply with the by-laws and if they fail to do this they can be given a notice requiring compliance, following the committee's agreement to take such action in a general meeting. Continuing failure to comply results in an offence, which can be the subject of a prosecution in the Magistrates Court or the BCCM Office.

Last reviewed: 30 August 2012

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[¶7-100] Body corporate manager

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A body corporate may engage a person under a contractual arrangement to provide administrative services (which may include the exercise of certain powers and functions of the body corporate and its executive committee) to the body corporate. This person is called a *body corporate manager*. They are effectively the clerical assistant of the body corporate, although their duties often involve aspects of repair and maintenance of the common property and body corporate assets.

Body corporate managers are also called "community managers" and may be involved in the initial set up of a community titles scheme by calculating the anticipated budgets and lot entitlements to be published in the disclosure statement for intended buyers. They are normally one of the first specialists called upon by a developer in anticipation of the development.

More often than not, a body corporate manager is required to become an expert counselor and communicator when dealing with established communities, especially in those developments where lot owners and committee members may have fallen out with each other over previous issues. A body corporate manager, aside from undertaking day-to-day secretarial duties, must facilitate meetings between lot owners and committee members by managing the various personalities and competing interests. Given that a lot of the body corporate manager's work involves background telephone calls and correspondence, lot owners may not appreciate the extent of the behind the scenes work which goes into keeping a community titles scheme running. Unfortunately they are often overworked and underpaid.

The BCCM Act contains strict rules relating to the appointment of these people and the way they must operate.

Last reviewed: 30 August 2012

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[¶7-150] Service contractors

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The BCCM Act expressly recognises ``service contractors'' in relation to community titles schemes. For a person to be a service contractor within the meaning of the Act:

- they must be engaged by the body corporate (other than as an employee)
- the engagement must be for a term of at least one year
- the engagement must be to provide services (other than administrative services) to the body corporate, and
- the services must be for the benefit of the common property or lots in the community titles scheme.

The typical service contractor is the building manager or caretaker, but an elevator maintenance contractor or pool cleaning company may equally qualify as a service contractor. A body corporate manager would not qualify as a service contractor. The BCCM Act prescribes certain requirements for and restrictions on the appointment of service contractors. The contents of service contracts are also regulated to some extent in the interests of consumer protection. The level of regulation varies from module to module.

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[¶7-200] Letting agent

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A person authorised by a body corporate to conduct a ``letting agent business'' for its community titles scheme is regarded by the BCCM Act as a ``letting agent''. A person conducts a letting agent business if they act, pursuant to the appropriate real estate agents licence, as the agent of owners of lots to secure, negotiate or enforce (including rent or tariff collections) leases or other occupancies of lots. The person may also conduct ancillary business or other activities within the scheme. A typical letting agent is a building manager or caretaker who also operates a voluntary rental pool within the scheme.

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[¶7-250] Body corporate management

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The body corporate, like any corporation, needs to be administered. While the owners in general meeting may make decisions relating to its management, this is not a satisfactory way in which to administer the body corporate. The BCCM Act provides for an elected committee for most bodies corporate which can meet and make a range of routine decisions which are deemed to be the decisions of the body corporate. There are also 3 executive members of the committee — a chairperson, secretary and treasurer, all of whom have specified functions. Finally, there is the body corporate manager, who may be authorised in writing to perform the functions of executive members of the committee (ie the chairperson, secretary or treasurer). If there is no body corporate committee, the body corporate manager may be authorised to perform the functions of the committee itself. A body corporate usually uses a combination of these to operate on a day-to-day basis.

The BCCM Act and the relevant module impose a range of management requirements on a body corporate. For example —

- to hold meetings and keep minutes of those meetings
- to budget for, determine and impose levies on owners
- to keep certain accounting records
- to prepare statements of account
- to administer the common property and body corporate assets
- to maintain the common property and body corporate assets in good order and condition
- to enforce the community management statement (including by-laws)
- not to carry on a business (except in very limited circumstances)
- to keep various ``registers'' relating to aspects of its administration.

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[¶7-300] Insurance

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A body corporate is required by the BCCM Act to effect certain insurance (eg building, public liability, workers compensation, voluntary workers). Premiums are generally paid from the body corporate funds, although in limited circumstances individual owners may be required to make an additional contribution towards the premium. In the case of some community titles schemes the body corporate is not obliged to insure the buildings (because they do not contain any common property). However, the body corporate may establish a ``voluntary insurance scheme'' under which owners have the option to include their properties in a ``blanket'' policy in the name of the body corporate, thus giving them the opportunity to minimise their premium costs. In all cases, owners are responsible for insuring the contents of their units or houses. This contents insurance usually includes a public liability cover that operates Australia-wide.

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[¶7-350] Sale of lots

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The BCCM Act contains a number of consumer protection provisions aimed at buyers of lots in a community titles scheme (which include the old building unit or group title lots). Before the seller of such a lot enters into a contract to sell the lot they must give a disclosure statement to the buyer. The statement must be signed by the seller or a person authorised by the seller and the information in the statement is warranted by the seller to the buyer. In the case of existing lots where the contract has not been settled, if the statement was inaccurate when the contract was entered into and the buyer would be materially prejudiced if compelled to complete, then the buyer may by written notice cancel the contract. Alternatively, a buyer may cancel the contract if they have not been able to verify the information contained in the statement, the onus of proof being on the buyer. Similar disclosure requirements apply to proposed lots and similar rights to cancel the contract are given to buyers of proposed lots.

In the case of both existing and proposed lots, the seller must attach to the contract, as a first or top sheet (or the next sheet if a ``warning statement'' under the *Property Agents and Motor Dealers Act 2000* is required), an information sheet in the approved form. This information sheet serves to:

- alert the buyer to carry out certain searches and inquiries before they sign the contract
- inform the buyer about basic facts of communal ownership and living.

If this is not done, then there is an absolute right for the buyer to cancel the contract at any time before settlement.

For contracts for sale of both existing and proposed lots the Act implies certain warranties on the part of the seller that cannot be excluded. The buyer may, by written notice given to the seller, cancel the contract if there would be a breach of any of these warranties were the contract to be completed at the time it is in fact cancelled.

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[¶7-400] Disputes

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The BUGTA dispute mechanisms had their origin in the New South Wales legislation which dates back to 1973. Subsequent years have seen fundamental changes in communal living, project complexity and dispute resolution processes. It was therefore appropriate that the BUGTA provisions be reviewed and modernised. This has been achieved in the BCCM Act where the dispute resolution mechanisms have been changed substantially. The administrative arrangements have also been changed. The main areas of change are:

- the new dispute resolution process is an exclusive code for resolution of disputes within a community titles scheme
- a consumer information and education service is available to assist purchasers, owners, residents and bodies corporate
- there is a Commissioner for Body Corporate and Community Management whose function is to administer the information and education service, as well as the dispute resolution process
- a case management process has been introduced for community titles scheme disputes
- in most cases mediation will be the first step in the dispute resolution process
- a public service adjudicator (independent of the Commissioner) has been appointed to adjudicate on disputes that are not resolved by mediation
- specialist adjudicators are available (usually at the cost of the parties) to determine more difficult disputes
- the jurisdiction of these adjudicators has been expanded beyond the current jurisdiction of the BUGTA Referee and Tribunals
- appeals are to the District Court on questions of law.

As part of the case management process the Commissioner may recommend mediation of a dispute. This may be either:

- Dispute Resolution Centre mediation (ie where the referral is to the local Dispute Resolution Centre), or
- specialist mediation (ie where the referral is to a specialist mediator agreed to by the parties and the Commissioner).

It is envisaged that more serious disputes will be referred to specialist mediation. The parties must agree to the process and bear the costs involved. Subject to the consent of the mediator, the parties may be represented at the mediation by an agent.

Again, as part of the case management process, the Commissioner may, before or after mediation, order that an adjudicator decide a dispute. References are usually to departmental adjudicators, but if the parties agree, the reference can be to a specialist adjudicator. Certain types of disputes (eg variation of lot entitlements and contractual disputes involving service contractors) must be referred to specialist adjudication by the Commissioner.

Unlike Part 5 of BUGTA, the BCCM Act does not specify the jurisdiction of an adjudicator in any detail. Instead, it says that an adjudicator may make an order (including a declaratory order) to resolve a dispute or complaint, in the context of a community titles scheme, about:

- a claimed or anticipated contravention of the Act or a community management statement, or
- the exercise of rights or powers, or the performance of duties, under the Act or the community management statement.

An order may require a person to act, or prohibit a person from acting, in a particular way. Section 276 and Schedule 5 set out a comprehensive range of examples of orders that may be made by an adjudicator. However, it should be noted that the list is not exhaustive.

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[¶7-500] Introduction

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The transitional and savings provisions to regulate the change from the *Building Units and Group Titles Act 1980* (the 1980 Act) to the *Body Corporate and Community Management Act 1997* (the Act) appear in Ch 8 of the Act. A provision in that Chapter authorised the making of regulations in certain circumstances to assist the transition from the operation of the 1980 Act as it applied to certain plans. The section (s 294 as it then was) expired on 13 July 2000, but transitional regulations were made under that section and reference must also be made to these regulations when trying to determine transitional issues. The provisions of the *Acts Interpretation Act 1954* may also be relevant.

This part of the commentary will examine a range of issues associated with the transition from the 1980 Act to the 1997 Act. In this part, where the word *commencement* is used it refers to the date of commencement of the Act, namely, 13 July 1997.

A new set of transitional provisions applies to the BCCM Act after its revision by the *Body Corporate and Community Management and Other Legislation Amendment Act*, No 6 of 2003, and its subsequent renumbering. Further transitional provisions have been added to Ch 8 for subsequent amendments by other legislation.

Last reviewed: 31 July 2006

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[¶7-525] General approach

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The general approach adopted by the transitional provisions of the Act is to:

• replace building units plans and group titles plans under the 1980 Act with community titles schemes
• continue the 1980 Act in operation for very limited purposes, and
• prevent (subject to a few exceptions) building units plans and group titles plans from being registered under the 1980 Act, thus requiring instead community titles schemes to be established under the Act.

One of the reasons for continuing the 1980 Act in operation and allowing that Act to be used for future plan registrations involves what is referred to in the Act as a **specified Act**. A specified Act is defined in s 326 to mean:

(a) the *Integrated Resort Development Act 1987*, or
(b) the *Mixed Use Development Act 1993*, or
(c) the *Registration of Plans (H.S.P. (Nominees) Pty Limited) Enabling Act 1980*, or
(d) the *Registration of Plans (Stage 2) (H.S.P. (Nominees) Pty Limited) Enabling Act 1984*, or
(e) the *Sanctuary Cove Resort Act 1985*.

The intention is to continue the 1980 Act in force for:

• building units plans and group titles plans registered under the 1980 Act, if their registration was for a specified Act
• building units plans and group titles plans registered after commencement, if their registration is for a specified Act, and
• the registration of building units plans and group titles plans lodged for registration before commencement, or within a limited time after commencement.

In the case of the plans referred to in the last dot point, once registered, community titles schemes are established in place of the plans.

The provisions relating to specified Acts are necessary because, at this stage, the specified Acts have not been repealed. Nor have the plans registered under the specified Acts been brought under the provisions of the Act. Until this occurs it will be necessary for the 1980 Act to continue in operation for the limited purpose of supporting the specified Acts. However, it should be noted that on and from commencement further applications for scheme approval under the *Integrated Resort Development Act 1987* and the *Mixed Use Development Act 1993* have been barred. It is likely that plans and bodies corporate under all or some of the specified Acts will eventually be converted to ``community titles'' and the relevant Acts repealed. This will then allow final repeal of the 1980 Act.

Law: s 325

Law: s 326

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[¶7-550] The 1980 Act

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In continuing to apply the 1980 Act, regard has to be had to two types of plans:

- plans relating to a specified Act, and
- other plans.

Specified Act plans

These are building units or group titles plans (within the meaning of the 1980 Act) that are plans for a specified Act. The position relating to these plans can be summarised as follows:

- If the plan was registered before commencement, the 1980 Act continues to apply to the plan subject to the specified Act.
- If the plan was lodged for registration under the 1980 Act before commencement, then it is registered under the 1980 Act and that Act continues to apply to the plan on and from commencement subject to the specified Act.
- If the plan is lodged for registration under the 1980 Act after commencement, then it is registered under the 1980 Act and that Act applies to the plan on and from its registration subject to the specified Act.

An instrument executed for the purposes of the plan, whether before or after commencement, may be registered under the 1980 Act.

The question may arise whether a plan can be registered under the Act where it relates to land in a plan under a specified Act. (For example, can a parcel of land at Sanctuary Cove be subdivided by a building format plan under the Act?) Although there is no express prohibition against such a registration, the nature of the relationship between the *Sanctuary Cove Resort Act 1985* and the 1980 Act, combined with what appears to be a clear intent of the Act, is such that one must conclude that this is not possible.

Plans other than specified Act plans

These are a building units plan or group titles plan (within the meaning of the 1980 Act) that are not a plan for a specified Act. The position relating to these plans can be summarised as follows:

- If the plan was lodged for registration under the 1980 Act before commencement, it may be registered under the 1980 Act after commencement.
- If the plan is lodged for registration within six months after commencement (or a longer period allowed by the Registrar) it may be registered under the 1980 Act.

The maximum longer period that the Registrar can allow is 2 1/2 years, because if the plan is not registered within three years from commencement the Registrar must reject the plan. The Registrar's discretion is a critical matter for buildings containing pre-sold lots that are under construction at commencement but which are unlikely to be completed within six months of commencement (see ¶7-500).

An instrument executed for the purpose of the plan before commencement may be registered under the 1980 Act.

Law: s 327

Law: s 328

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[¶7-575] Existing 1980 Act plans

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An **existing 1980 Act plan** is defined in s 326 to mean —

> (a) a former building units plan or former group titles plan within the meaning of s 5(1) of the 1980 Act; or
> (b) a building units plan or group titles plan registered under the 1980 Act,

to which, immediately before the commencement, the 1980 Act applied, other than a plan registered under the 1980 Act but brought into existence for a specified Act. An **existing 1980 Act** plan is referred to in the relevant transitional provisions as an **existing plan**.

Plans covered by category (a) are:

- all building units plans and building units plans of resubdivision registered under the *Building Units Titles Act 1965-1972* (which was repealed by the 1980 Act); and
- all group titles plans and group titles plans of resubdivision registered under the *Group Titles Act 1973* (which was also repealed by the 1980 Act).

Plans covered by category (b) are all building units plans and group titles plans (including plans of resubdivision) registered under the 1980 Act before commencement, other than ones brought into existence for the purpose of a specified Act.

From a title perspective, existing plans are dealt with in the following manner:

- On commencement a **new scheme** (ie a community titles scheme) is established for the existing plan.
- The new scheme is a basic scheme (ie it is not part of any tiered management structure).
- Each lot in the existing plan becomes a lot included in the new scheme.
- The scheme land for the new scheme is all the land included in the parcel for the existing plan.
- Each item of additional common property under Division 2 of Part 2 of the 1980 Act (other than that which was incorporated into the parcel as a result of the provisions of that Division) becomes a body corporate asset for the new scheme.
- An exclusive use by-law applying to an item referred to in the last dot point and having continuing effect under the transitional provisions (see ¶7-725) is taken to apply to the item as a body corporate asset.
- The body corporate under the 1980 Act for the existing plan is taken to be, without change to its corporate identity, the body corporate for the new scheme.

There is one problem about these provisions. This arises from inclusion of plans of resubdivision within the definition of **existing 1980 Act plan** (and therefore the term **existing plan**). This gives rise to an argument that a new scheme is established for *every existing plan*, including plans of resubdivision. If that were the case, then projects under the 1980 Act (or the 1965 and 1973 Acts) that were achieved by one or more resubdivisions under a single body corporate (eg a limited staged development of a group titles plan) would be split into a number of bodies corporate, depending upon the number of stages. The transitional provisions do not make it clear that a new scheme is not established for *every* existing plan, but only for building units plans and group titles plans. The fact that under the earlier legislation there was no body corporate created upon registration of resubdivision plans and there was no *parcel* for a resubdivision plan allows a fairly convincing rebuttal argument. The intention is that lots and common property created upon registration of an existing resubdivision plan become part of the community titles scheme for the relevant building units plan or group titles plan in the same way that they were previously part of that plan. It seems likely that a Court would give effect to this intention. To do otherwise would deprive the transitional provisions from operating effectively.

The transitional provisions also address a number of management issues associated with existing plans. Provision is made for:

- A person holding office as chairperson, secretary, treasurer or committee member immediately before commencement continues in office as if elected or appointed under the Act. However, this

provision is expressed to be ``subject to this Act'', giving rise to a conflict between the eligibility provisions under the 1980 Act and the eligibility provisions under a regulation module of the Act. The conflict is resolved by s 10 of the Body Corporate and Community Management (Transitional) Regulation 1997 which ensures that the provisions of a regulation module about eligibility for committee membership or eligibility to vote at committee meetings do not apply until the annual general meeting for the new scheme first held after commencement.

• Any action validly taken under the 1980 Act to call a general meeting or committee meeting is regarded as validly taken under the Act.

• Until 3 months after commencement, a general meeting for a new scheme for an existing plan may be convened under the 1980 Act rather than the Act. (See s 8 of the Body Corporate and Community Management (Transitional) Regulation 1997).

• If a first annual general meeting has not been held, then, for the purpose only of calculating when the meeting is to be held, and for determining the new scheme's financial year, the establishment of the scheme is taken to have happened when the existing plan was registered.

• The original proprietor for the existing plan becomes the original owner for the new plan.

• The obligations imposed by the Act on the original owner when a scheme is established apply only to the extent that equivalent obligations under the 1980 Act have not been complied with.

Provision is also made for determining the financial year for the new scheme where the first annual general meeting has been held for that scheme. The financial year is:

• each year ending on the last day of the month containing the anniversary of the first annual general meeting held for the existing plan; or

• if a date was fixed by a referee under the 1980 Act to be taken to be such anniversary — each year ending on the last day of the month containing the date fixed by the referee.

Under the 1980 Act the body corporate had to account in respect of a period **ending** on the last day of the month that precedes by 3 months the month in which each anniversary of the first annual general meeting occurs. (The commencement date was related to the registration of the plan or the last day of the previous financial statement.) The referee could make an order under s 94A of the 1980 Act nominating, for the purpose of the 1980 Act, another date to be taken as the anniversary of the first annual general meeting.

If another date has not been nominated under the 1980 Act and the body corporate wishes to change its financial year, then an application can be made to an Adjudicator under s 283 of the BCCM Act for an order including a change of the body corporate's financial year and of the dates when the later financial years begin.

The transitional provisions also provide for ``conversion'' of existing plans. If the existing plan is a building units plan, it is taken to be a building format plan under the *Land Title Act 1994*. If the existing plan is a group titles plan it is taken to be a standard format plan under that Act. In addition, in the case of a group titles plan, easements that applied under the 1980 Act immediately before commencement continue to apply after commencement. The easement provision is particularly important because there are no implied easements in favour of lots on a standard format plan under the Act. In the absence of the transitional provisions there would be no ongoing implied easements for support or services under s 15 and 17 of the 1980 Act.

The following administrative matters relating to existing plans are also dealt with:

• Except where the Act expressly provides otherwise, valid management acts under the 1980 Act before the commencement continue to have effect as if taken under the Act. (This would include the making of levies, giving of consents and most other day to day administrative matters.)

• Until the annual general meeting first happening after commencement, a body corporate manager may continue to use the seal in the way they could use it immediately before commencement. However, this only applies if the body corporate does not otherwise determine in accordance with the appropriate regulation module.

• Until one year after commencement or until the seal of the body corporate is changed, the old seal is regarded as the seal of the body corporate.

Law: s 283,

326,

329,

330,

331,

332

Law: 1980 Act s 5(1), 15, 17

Law: Body Corporate and Community Management (Transitional) Regulation 1997 s 8, 9, 10.

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[¶7-600] Future 1980 Act plans

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A **future 1980 Act plan** is defined in s 326 of the Act as a building units plan or group titles plan registered under the 1980 Act after the commencement, other than a plan brought into existence for a specified Act. (See ¶7-525 for the meaning of a specified Act.) One needs to keep in mind that in the transitional provisions:

- the term **1980 Act plan** is used and a **future 1980 Act plan** is included in that term; and
- the term **future plan** is used in place of a **future 1980 Act plan**.

It will have been noted from ¶7-550 that one of the limited purposes for which the 1980 Act has been continued in operation is to permit a plan to be registered under the 1980 Act even though the plan is lodged after commencement. However, the plan must be lodged within 6 months of commencement or within such longer period as the Registrar allows. In any event the plan must be registered within 3 years of commencement. (See s 327.) Plans that are lodged in this way and plans intended to be lodged in this way are **future 1980 Act plans**.

The transitional provisions treat future plans in the following manner:

- Immediately after the future plan is registered under the 1980 Act a community titles scheme (``**new scheme"**) is established for the future plan.
- The new scheme is a basic scheme (ie it is not part of any tiered management structure).
- Each lot in the future plan becomes a lot included in the new scheme.
- The scheme land for the new scheme is all the land included in the parcel for the future plan.
- The body corporate formed under the 1980 Act for the future plan is taken to be, without change to its corporate identity, the body corporate for the new scheme.
- The original proprietor for the future plan becomes the original owner for the new scheme.

When the new scheme is established, if the future plan is a building units plan, it is taken to be a building format plan of subdivision under the *Land Title Act 1994*. If the plan is a group titles plan, it is taken to be a standard format plan of subdivision under that Act. It is important to note that, unlike the case with existing 1980 Act plans, the implied easements under the 1980 Act are not preserved where the future plan is a group titles plan. This means that easements for support and services will need to be created in conjunction with the registration of a future plan that is a group titles plan (see ¶7-575).

Law: s 326,

327,

334,

335.

[¶7-625] Community management statements

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On its establishment, a new scheme for a 1980 Act plan (ie an **existing 1980 Act plan** or a **future 1980 Act plan**) was taken to have a community management statement. The statement was referred to as an **interim statement**. The interim statement was not an actual document but was simply taken to exist and contain certain statements and information. It served as the community management statement for the new scheme until:

(a) a new community management statement was recorded for the scheme in accordance with the provisions of the Act, or
(b) if a new statement was not recorded, the end of 3 years after the commencement.

This effectively gave all bodies corporate existing at the time of commencement, plus all bodies corporate that came into existence under the 1980 Act after commencement (other than bodies corporate for a specified Act), 3 years in which to adopt and record their own community management statements. If they did not do this, then the Registrar was under a duty to actually record a new community management statement (known as a **standard statement**) for the new scheme as soon as practicable after the 3 years. Until the Registrar did this, another community management statement could not be recorded for the scheme. When the Registrar recorded a standard statement for the new scheme, the standard statement was taken to be the community management statement for the scheme immediately after the interim statement ceased to have effect. Upon expiry of the 3 years, the Registrar issued standard statements for all schemes that had not recorded new statements.

Law: s 336, 337, 339.

[¶7-650] Content of interim statement

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An interim statement was taken:

- to state the name for the scheme (based on the name from the 1980 Act plan)
- to state the name of the body corporate (based on the name from the 1980 Act plan and a number allocated by the Registrar)
- to state the address for service on the body corporate (as endorsed on the 1980 Act plan)
- to state as the name and address of the original owner, the original proprietor's name and address (if any) under the 1980 Act
- to identify the standard module as the regulation module applying to the scheme
- to include a contribution schedule showing lot entitlements identical to those in the schedule on the 1980 Act plan
- to include an interest schedule showing lot entitlements identical to those in the schedule on the 1980 Act plan
- if the scheme was established for an existing 1980 Act plan — to include by-laws (including common property allocations under an exclusive use by-law) identical to the by-laws in force for the plan immediately before commencement
- if the scheme was established for a future 1980 Act plan — not to include any by-laws (the effect being to invoke the by-laws in Schedule 2 of the Act).

Law: s 337.

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[¶7-675] Contents of standard statements

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When the Registrar prepared a standard statement for community title schemes that failed to register their own statements within 3 years of commencement, the statement was required:

- to state the name for the scheme (based on the name from the 1980 Act plan)
- to state the name of the body corporate (based on the name from the 1980 Act plan and a number allocated by the Registrar)
- to state the address for service on the body corporate (as endorsed on the 1980 Act plan)
- to state as the name and address of the original owner, the original proprietor's name and address (if any) under the 1980 Act
- to identify the standard module as the regulation module applying to the scheme
- to include a contribution schedule showing lot entitlements identical to those in the schedule on the 1980 Act plan
- to include an interest schedule showing lot entitlements identical to those in the schedule on the 1980 Act plan
- not to include any by-laws (although this did not necessarily mean that the Schedule 2 by-laws in the Act would apply — see ¶7-725 for detailed discussion).

Law: s 339.

[¶7-700] Statements for future 1980 Act plans

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The introduction of an interim community management statement for a future 1980 Act plan could have been avoided by lodging an actual statement for registration at the same time that the plan was lodged for registration. Upon registration of the future 1980 Act plan and statement (which effectively happened at the same time), the statement became the **first statement** for the scheme. This first statement was taken to have effect immediately the new scheme was established. However, there was one important restriction relating to the contents of a statement lodged in this manner — it could not name a regulation module other than the standard regulation module. For example, it was not possible to lodge a community management statement for registration with a 1980 Act plan that specified the accommodation module as the module that applied to the scheme. This was because there was no requirement under the 1980 Act (which was the Act regulating disclosure to purchasers) for disclosure of the regulation module to be applied. If there was voluntary disclosure that the accommodation module was intended, then the original owner could change the module before settlement of the initial lot sales. If there was no voluntary disclosure, then any such change may have put the initial lot sale contracts at risk.

Where a community management statement was lodged in this way, then the 1980 Act plan did not need to have endorsed on it the following:

- the schedule of lot entitlements
- the name of the building
- the address for service of notices.

Law: s 338

Law: Body Corporate and Community Management (Transitional) Regulation 1997, s 6.

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[¶7-725] By-laws

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The transitional provisions make every effort to preserve by-laws (and allocations of common property under exclusive use by-laws) existing at commencement for existing plans. It can be seen from ¶7-650 that an interim community management statement (**interim statement**) is taken to include such by-laws and allocations. Furthermore, if there was an amendment of the by-laws or an allocation of common property before 13 April 1997 which was not recorded, then it could still be recorded if deposited with the Registrar within 18 months of commencement. Recording was under the 1980 Act. Even if a new community management statement was recorded at the request of the body corporate to replace the interim statement and the new statement did not include any by-laws, s 337(6) of the Act provides that the by-laws and allocations for the new scheme are taken to be the by-laws and allocations that applied at commencement, subject to any changes recorded pursuant to the 18-month transitional provision mentioned above. Furthermore, by-laws validly made before commencement are preserved, and may be included in a community management statement, even though they may not be capable of being made under the Act.

From ¶7-675 it will be noted that a standard community management statement recorded by the Registrar 3 years after commencement was required not to include any by-laws. Despite this, if the new scheme related to an existing 1980 Act plan, then the by-laws and common property allocations for the new scheme were taken to be the by-laws and allocations that applied at commencement, subject to any changes recorded pursuant to the 18-month transitional provision mentioned above.

The problem with this approach was its failure to ensure that current by-laws and common property allocations are eventually recorded on the community management statement. This will give rise to uncertainty because of the need to ``investigate'' what by-laws and allocations were either in existence or in train at the commencement. In turn, for older plans, it may even be necessary to ``investigate'' what by-laws and allocations were in existence at the time of commencement of the 1980 Act. This is because the 1980 Act itself preserved existing by-laws and rights without requiring them to be recorded.

Finally, under the *Building Units Titles Act 1965-1972* and the *Group Titles Act 1973* it was possible for a body corporate to allocate rights of exclusive use or special privileges in respect of common property by means of a resolution. The only record of this was usually a minute of the resolution in the minute book. When the 1980 Act commenced, it preserved rights created in this way. In turn, when the Act commenced it also preserved those rights. It did this by providing (in s 341(2)) that a by-law giving effect to the resolution is taken to have been agreed to by the body corporate under the 1980 Act before commencement. Because that by-law was not recorded at commencement, there was a period of 18 months in which the body corporate could have recorded the by-law under the 1980 Act. However, the body corporate was precluded from depositing the by-law for recording without a request from the lot owner. The request had to have been made within a reasonable time before the 18 months expired. If, despite such a request, the body corporate did not deposit the by-law for recording, then an adjudicator could examine all the circumstances and determine whether the by-law should be deposited (in its original or modified terms) for recording. This effectively provided the body corporate with the opportunity to test the fairness of the right or privilege.

.01 Law: s 337, 339, 340, 341.

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[¶7-750] Body corporate contracts

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The Act imposes a number of restrictions on certain contracts that may be entered into by the body corporate. The transitional provisions seek to relax these restrictions as regards a range of contracts that were either in existence or contemplated before commencement. In doing this the transitional provisions refer to a **body corporate contract** and **exempted provisions**. It is important to understand the meaning of these terms.

A ``body corporate contract'' for a community titles scheme means a contract or other arrangement entered into by the body corporate that is, or is in the nature of, one or a combination of 2 or all of the following:

- the engagement of a person as a body corporate manager for the scheme (see s 14 for meaning)
- the engagement of a person as a service contractor for the scheme (see s 15 for meaning)
- the authorisation of a person as a letting agent for the scheme (see s 16 for meaning).

The ``exempted provisions'' for a body corporate contract for a community titles scheme means the provisions of the Act and regulation module applying to the scheme, providing for one or more of the following:

- the transfer of the interest of a body corporate manager, service contractor or letting agent in a body corporate contract
- termination of a body corporate contract by the body corporate
- the required form of a body corporate contract
- limitation of the term of a body corporate contract (which is referred to in the transitional provisions as a **term limitation provision**)
- a requirement about the consideration for a body corporate contract
- a prohibition on the existence of consideration for entering into, extending the term of, replacing or renewing a body corporate contract
- requirements about giving authority to a service contractor or letting agent for the use of common property.

The body corporate for an existing 1980 Act plan is taken to have had power on and from 4 May 1994 to give an authorisation to a person as a letting agent. This effectively overcomes the decision of the High Court in *Humphries & Anor* v *The Proprietors — ``Surfers Palms North'' Group Titles Plan No 1955* which was handed down on 4 May 1994. In that case the Court held that there was no statutory power authorising, and there was no by-law which might have authorised, the body corporate to conduct a letting agency for the benefit of those owners of lots who might require that service or to procure another person to conduct such a letting agency. This ensures the validity of any letting agency agreement entered into by a body corporate on and from 4 May 1994 even if there was no empowering by-law in place.

The exempted provisions for a body corporate contract do not apply to the contract if it was entered into before 24 October 1994. The date is significant because it was on that date that the then Minister for Lands announced on behalf of the then government that certain restrictions on the terms of body corporate contracts would be applied, effective from that date. The coalition government subsequently decided to retain the date to keep faith with the earlier ministerial announcement. However, a problem arose when a number of bodies corporate attempted after 24 October 1994 to ``regularise'' letting agency agreements entered into before 4 May 1994 without empowering by-laws. They did this by making an empowering by-law and ratifying the agreement. But this gave rise to the likelihood that the ratification effectively brought a new agreement into existence. Because the new agreement came into existence post 24 October 1994 it was caught by the proposed government restrictions on body corporate contracts. It was not ``a contract entered into before 24 October 1994'' even though the parties attempted to enter into it even before 4 May 1994. To overcome this problem, s 343(2) and (3) provide that a body corporate contract is taken to have been entered into before 24 October 1994 if:

- it was purportedly entered into before that date, and
- it included the authorisation of a person as a letting agent, and

• the body corporate subsequently took or takes action (whether before or after 24 October 1994) that established or establishes the validity of the contract (including the authorisation).

The transitional provisions also address the problem presented by ``off the plan'' sale contracts signed before 24 October 1994 that anticipated body corporate contracts being entered into where the contents of those contracts would be at odds with the subsequently proposed government restrictions. Section 344(2) of the Act says the exempted provisions do not apply to a body corporate contract if:

(a) the contract was entered into on or after 24 October 1994, and
(b) the original owner disclosed an intention for the body corporate to enter into the contract (whether or not the contractor was identified) in a disclosure statement given under s 49(1) of the 1980 Act to each buyer under a purchase agreement with the original owner, and
(c) when the statement was given, the buyer was not a person who would have been, had the Act been in force, an associate of the original owner, and
(d) the purchase agreement was for the purchase of a lot (whether or not a proposed lot) —

(i) that on commencement becomes a lot included in the scheme, or
(ii) that becomes a lot included in the scheme immediately after the registration of a future 1980 Act plan, and

(e) the purchase agreement was entered into before 24 October 1994, and
(f) the body corporate contract took effect before commencement, or takes effect within one year after commencement.

The following should be noted about the above provision:

• Paragraph (b) requires the disclosure to be given to *each buyer*. This appears to mean each and every buyer. If so, then no buyer can be an ``associate'' of the original owner (vide paragraph (c)) and all agreements must be entered into before 24 October 1994 (vide paragraph (e)). This interpretation would render the subsection virtually useless. (See below for further discussion on this point.)
• The ``associate'' test can be a difficult one (see the meaning of ``associate'' in s 309 of the Act). However, if the intention is that only one ``off the plan'' contract need satisfy all of the above paragraphs, then this is not likely to be a serious issue.
• At first sight the one-year requirement in paragraph (f) looks tight. However, at least one purchase agreement must have been entered into before 24 October 1994 before the subsection can apply. Hence, a total construction period of at least 3 years 9 months would be involved, which is outside the maximum time permitted under the *Land Sales Act* in any event.

The interpretation of s 344(2)(b) may not be as difficult as it first appears. The words ``each buyer under a purchase agreement with the original owner'' are open to two interpretations:

• they mean **each buyer under each purchase agreement with the original owner** — which would require the contracts for sale of all the lots in the scheme to contain the s 49(1) disclosure and otherwise qualify (eg by not being to an ``associate''), or
• they mean **each buyer under at least one purchase agreement with the original owner** — which would require only one qualifying contract.

The likelihood is that the second interpretation was intended, despite:

• the provisions of s 32C(a) of the *Interpretation Act 1954* which says that ``words in the singular include the plural''
• the fact that s 344(2)(b) does not use terms such as ``a buyer'' or ``the buyer'' but instead uses ``each buyer''.

The intention of the legislature is principally discovered by an examination of the Act itself. If the legislature intended the tests to be so difficult that every purchase agreement would have to be entered into before the notification day, then surely it would have used clearer language to achieve this result. This is particularly so having regard to the fact that this provision is retrospective legislation and as such would have been especially sensitive. To my mind the position is somewhat analogous to the position in *Blue Metal Industries Ltd v Dilley*. In that case the Privy Council, in the context of takeover legislation, interpreted ``company''

in the singular. The Privy Council took the view that if the legislature intended the provision to apply to the takeover of more than one company, then it would not have relied solely on a rule of interpretation, but would have made its intention clear.

In this case secondary materials are comforting but not conclusive. First, there is nothing in the Explanatory Notes to the Bill for the Act that touches on the interpretation of clause 289 (as s 344 then was). However, the Minister, The Hon Howard Hobbs, when he presented the Bill to the Parliament, said:

> ``While the Government generally resists introducing retrospective legislation, in the case of two provisions in the Body Corporate and Community Management Bill there are very strong reasons why they are included.
>
> The first deals with term limitation provisions applying to the body corporate management agreements, letting authorisations and service contracts. The maximum terms which are to apply, the details of which are set out in the various regulatory modules, will be retrospective to 24 October 1994.
>
> For example, for agreements regulated by the Standard Module, a 10 year maximum term applies to all letting authorisations and service contracts entered into from 24 October 1994.
>
> The provision will not affect agreements which were clearly on foot prior to 24 October 1994.''

The answer most likely lies in the various paragraphs of the subsection itself. Paragraph (b) refers to ``a statement'' and ``a purchase agreement''; paragraph (c) refers to ``the buyer'', and paragraph (d) refers to ``the purchase agreement'' (ie the purchase agreement referred to in paragraph (b)). These are all clear references to the singular. While one might mount an argument in the context of paragraph (b) alone that ``each buyer'' points to multiple purchase agreements, this argument pales substantially when the use of the singular in the other paragraphs is taken into account. It is also significant that under s 49(1) of the 1980 Act every person who entered into a purchase agreement with an original proprietor (including multiple persons under the one purchase contract) had to be given a statement in accordance with that subsection.

It follows that the second alternative interpretation is to be preferred.

The transitional provisions also deal with body corporate contracts that do not qualify for exemption under s 344(2) but which were entered into by the body corporate on or after 24 October 1994 but before commencement. With the exception of a **term limitation provision**, the exempted provisions do not apply to such contracts.

Where a body corporate contract (**original contract**) gets the benefit of any of the above transitional provisions, then a subsequent transfer or amendment of the contract (whether before or after commencement) does not interfere with that benefit — the original contract still has the benefit of the transitional provisions. Also, if an original contract was amended before 24 October 1994, then a new contract entered into after that day (whether before or after commencement) on the basis of the amendment gets the benefit of the same transitional provisions as the original contract, but only if the term of the new contract runs from the expiry of the term of —

- the original contract, or
- a contract entered into because of a right or option for one or more renewals already provided for in the original contract before the original contract was amended.

Finally, a new contract entered into because of a right or option for one or more renewals in the original contract also gets the benefit of the same transitional provisions as the original contract until 14 July 2022. However, if that new contract is entered into on the basis of an amendment of the original contract after the notification day:

(a) To the extent that the new contract is, or is in the nature of, a body corporate management contract — the exempted provisions only have effect for the new contract until the end of the shorter of the following:

- the maximum term for a body corporate management contract provided for in the relevant regulation module, and
- the term mentioned in the new contract.

(b) To the extent that the new contract is, or is in the nature of, a service contract — the exempted provisions only have effect for the new contract until the end of the shorter of the following:

- the maximum term for a service contract provided for in the relevant regulation module, and
- the term mentioned in the new contract.

(c) To the extent that the new contract is, or is in the nature of, a letting authority — the exempted provisions only have effect for the new contract until the end of the shorter of the following:

- the maximum term for a letting authority provided for in the relevant regulation module, and
- the term mentioned in the new contract.

This last provision needs to be carefully considered in the light of current practice about options in management and letting contracts. The terms of these contracts can be ``extended'' in one of three ways:

- by conventional option to renew (where the existing contract comes to an end and the parties enter into an entirely new contract)
- by option to extend (where the manager has a right in the existing contract to elect to extend the term of the contract for an agreed period, the existing contract simply continuing to apply for the period of the extension)
- by amendment extending the term (where the parties agree on an extension and then enter into a deed or agreement which effectively amends the existing contract to extend its term).

The first two techniques fit in with the transitional provisions which ensure that the full ``additional'' term is preserved against the maximum term regulation. However, the third technique is clearly an ``amendment'' which brings about an automatic reduction of the term of a service contract to 10 years if the amendment occurred after 24 October 1994.

.01 Law: s 14, 15, 16, 309, 342, 343, 344.

Case references: *Humphries & Anor* v *The Proprietors — ``Surfers Palms North'' Group Titles Plan No 1955* (1994) 179 CLR 597.

Blue Metal Industries Ltd v *Dilley* (1969) 117 CLR 651.

Last reviewed: 18 October 2013

[¶7-775] ``Developer'' sale contracts

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The transitional provisions attempt to preserve ``developer contracts'' that were entered into under the 1980 Act at any time before commencement. Two types of contracts need to be considered:

- contracts for the sale of existing lots
- contracts for the sale of proposed lots.

Existing lot contracts

Under the 1980 Act the original proprietor had to comply with the disclosure requirements in s 49 and 49A when selling an existing lot in a building units titles plan or a group titles plan. Where the contract did not settle until after commencement, the provisions of s 49 and 49A continued to apply to the contract. So far as ``levy certificates'' were concerned, s 40 of the 1980 Act continued to apply, although a body corporate could, at its option, have given a body corporate information certificate under s 205(3) of the Act. If the original proprietor (re-named the ``original owner'') sold an existing lot in a 1980 Act plan after commencement, then disclosure had to be made under s 206 of the Act and the levy certificate had to be issued under s 205(3) of the Act.

Proposed lot contracts

Again, under the 1980 Act the original proprietor had to comply with the disclosure requirements in s 49 and 49A when selling a proposed lot on a building units titles plan or a group titles plan. Where the contract did not settle until after commencement, the provisions of s 49 and 49A continued to apply to the contract. Likewise, so far as ``levy certificates'' were concerned, s 40 of the 1980 Act continued to apply, although a body corporate could, at its option, have given a body corporate information certificate under s 205(3) of the Act. Where the original owner entered into a contract after commencement for sale of a proposed lot on a future 1980 Act plan, then s 49 and 49A of the 1980 Act applied to the contract provided at least one contract for the sale of a proposed lot in that plan was entered into before commencement.

Example:

Where a building was proposed or under construction as at 13 July 1997 and one or more of the proposed lots in that building had been sold, then the sale of any remaining lots after that date was regulated by s 49 and 49A of the 1980 Act, provided that the plan was registered under the 1980 Act. The disclosure requirements in Chapter 5 Part 2 of the Act did not apply to such sale.

Similarly, where a person (other than the original owner) entered into a contract after commencement for the sale of a proposed lot on a future 1980 Act plan, then Chapter 5 Part 2 of the Act did not apply to the contract provided at least one contract for the sale of a proposed lot in that plan was entered into before commencement.

Example:

A building was proposed or under construction as at 13 July 1997 and a number of the proposed lots in that building had been sold. If the purchaser of one of those lots re-sold the lot after commencement but before the plan was registered, then Chapter 5 Part 2 of the Act did not apply to the sale, provided the plan was registered under the 1980 Act.

These contract transitional provisions partly depend upon s 7 of the Body Corporate and Community Management (Transitional) Regulation 1997 (s 7(3) and (4) of which were added by the Body Corporate and Community Management (Transitional) Amendment Regulation (No 1) 1997). This regulation was made under s 348 of the Act, which means that it expired one year after it commenced (ie 12 July 1998). Because there were a number of buildings in the early stages of construction as at 13 July 1997 it was necessary to re-make this regulation before 12 July 1998. Unfortunately this proved not to be possible, with the result that a number of buildings proceeding under the old BUGTA provisions could no longer simply comply with the BUGTA provisions. Instead, any proposed lots in those buildings marketed after 12 July 1998 had to be made subject to disclosure under s 213 of the Act. This required a community management statement to be prepared, along with a new form of disclosure statement.

While the change to s 213 disclosure did not present any real problems for original owners (ie developers), it did present a problem for buyers of these proposed lots who wished to re-sell them before the plan was registered. They too had to comply with the s 213 disclosure requirements, but they had no control over the proposed community management statement, and without the co-operation of the original owner they were unable to disclose that statement with any degree of accuracy.

Future 1980 Act plans presented one further difficulty for developers. Clearly, under the contract transitional provisions they were intended to be registered under the 1980 Act. However, the other transitional provision allowing for registration of 1980 Act plans after commencement required those plans to be lodged for registration within 6 months after commencement, or a longer period that the registrar considered reasonable. Therefore, in the case of many buildings under construction, the 1980 Act plan was not ready for lodgment within the 6 months and the developer was dependent upon the registrar exercising that discretion. The Department of Natural Resources indicated unofficially that the discretion would be exercised in circumstances where the plan could not be lodged within time because the building had not been completed. However, it should be noted that any plan not registered within 3 years after commencement had to be rejected by the registrar (see s 327(4)). Despite the disclosure problems caused by the expiry of the transitional regulations, it was still possible to take advantage of the delayed plan registration procedures where disclosure was changed to s 213 of the Act.

Finally, the mere fact that proposed lots were sold before commencement in accordance with the disclosure requirements of s 49 and 49A of the 1980 Act did not prevent a developer from registering the plan under the Act in preference to registering it under the 1980 Act. Clearly, to do that took the proposed plan outside the definition of a ``future 1980 Act plan'' and thus had an effect on how original proprietor disclosure had to occur after commencement. The position would appear to be as follows:

- The contracts entered into before commencement and based on disclosure under the 1980 Act would have been in compliance with the law in force at the time. No express provision is made in the Act in respect of plans other than ``proposed 1980 Act plans''. Accordingly, rights and obligations under those contracts would be preserved by virtue of s 20 (b) and (c) of the *Acts Interpretation Act 1954*.
- Provided contracts entered into after commencement were based on disclosure under the Act (and therefore based on the proposition that the plan itself would be registered directly under the Act and not registered as a ``future 1980 Act plan''), then those contracts would be valid and effective.
- When the building or project had been completed, the plan was then registered under the Act. It would not fall within the definition of a ``future 1980 Act plan'', with the result that the transitional provisions relating to those plans would not apply.
- The ``second notice'' provisions under s 49A of the 1980 Act may not apply to contracts entered into before commencement, because that Act would no longer apply to those contracts. The Act may also not apply because no ``first notice'' would have been given under it in respect of those contracts. However, in practice, as a precautionary measure, one would comply with both second notice provisions in respect of such contracts.

Law: s 205, 206, 213, 216, 345, 348, Ch 5 Pt 2

Law: *Building Units and Group Titles Act 1980*, s 40, 49, 49A

Law: Body Corporate and Community Management (Transitional) Regulation 1997, s 7

Law: *Acts Interpretation Act 1954*, s 20 (b) and (c).

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[¶7-800] Disputes

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If an application was made to the referee under Pt 5 of the 1980 Act before commencement, then that Part continued to apply for the completion of all matters relating to the application. Also, an order made under Pt 5 of the 1980 Act had effect for the new scheme.

Law: s 346.

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[¶7-825] References in other Acts

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In all Acts enacted before commencement, other than a specified Act or another Act that was amended in the original Sch 3 of the Act (No 28 of 1997) as passed, a reference to any of the following Acts is taken to be a reference to the Act:

- *Building Units and Group Titles Act 1980*
- *Building Units Titles Act 1965*
- *Group Titles Act 1973*.

(Schedule 3 was omitted from reprints after 13 July 1997 once its amending provisions had come into force: see *Reprints Act 1922* s 40.)

Law: s 347.

Last reviewed: 31 July 2006

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[¶7-850] Changes of name

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Where an application had been made to the registrar under the 1980 Act for a consent to change the name of a body corporate and the application had not been dealt with at commencement, then the application had to be dealt with under the 1980 Act. The name took effect for the new scheme.

Law: Body Corporate and Community Management (Transitional) Regulation 1997, s 4.

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[¶7-875] Insurance

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Insurance in place at commencement to comply with the 1980 Act requirements was able to be continued in place for not longer than one year after commencement. While such insurance was in place the body corporate did not have to comply with the insurance provisions of the relevant regulation module. No transitional provision was made for insurance that was not ``required to be put in place under the 1980 Act''.

Law: Body Corporate and Community Management (Transitional) Regulation 1997, s 5.

[¶7-900] General meetings

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Until the annual general meeting first held after commencement, a pre-existing body corporate that had commenced the process to convene a general meeting before commencement could choose to use the old meeting procedures in preference to the procedures in the relevant regulation module, provided the meeting was held within 3 months after commencement.

Law: Body Corporate and Community Management (Transitional) Regulation 1997, s 8.

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[¶7-925] Consequential and other amendments

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When the BCCM Act was originally introduced in 1997, it contained a Sch 3 which set out a number of consequential and other amendments to other Acts. (Schedule 3 was omitted as from 13 July 1997 once its amending provisions had come into effect.) Very briefly:

1. The *Acquisition of Land Act 1967* was amended to:

   - authorise the registrar to make certain recordings
   - deal with compensation payments where common property is compulsorily acquired
   - allow a scheme to be dealt with as a terminated scheme where the whole of the scheme land is acquired.

2. The *Auctioneers and Agents Act 1971* was amended to recognise letting agents and to facilitate certain proceedings. (Note, however, that the *Auctioneers and Agents Act 1971* was later repealed by the *Property Agents and Motor Dealers Act 2000*.)
3. The *Building Act 1975* was amended to allow for notices to be given to bodies corporate in layered arrangements.
4. The *Building Units and Group Titles Act 1980* was amended to limit its application.
5. The *Credit Act 1987* was amended to include reference to a community titles scheme.
6. The *Dispute Resolution Centres Act 1990* was amended to allow a body corporate to be represented by one of its members.
7. The definition of "lot" in the *Financial Intermediaries Act 1996* was amended introduce the concept that a lot under the Act is a lot under the *Land Title Act 1994*.
8. The *Fire and Rescue Authority Act 1990* was amended to ensure a lot is caught by the definition of "parcel of land".
9. The *Gas Act 1965* was amended to include reference to the members of a body corporate.
10. The *Integrated Resort Development Act 1987* was amended to prohibit further new applications.
11. The *Land Act 1994* was amended to:

   - adjust certain terms
   - include another class of persons who may hold the benefit of public utility easements to accommodate the privatisation of public utility services
   - regulate certain aspects of public utility easements
   - introduce covenants (for use by state and local governments) to tie non-freehold land to other non-freehold land or non-freehold land to freehold land
   - deal with certain aspects of trusts.

12. The *Land Sales Act 1984* was amended to include a reference to a community titles scheme.
13. The *Land Tax Act 1915* was amended to say how lots are to be dealt with for the calculation of land tax, including deductions and trusts.
14. The *Land Title Act 1994* was amended to:

   - include provisions about caveats and interests that are unrelated to community titles
   - provide for creation of an indefeasible title for common property for a community titles scheme
   - extend the indefeasibility provisions to leases and mortgages of leases over common property
   - provide generally for application of that Act to common property provide for the 3 new plan formats
   - introduce a new generic definition of plan of subdivision
   - exempt plans of amalgamation and plans of redefinition from local government approval
   - require the format of survey plans to comply with the registrar's requirements
   - make special provision relating to volumetric plans of survey
   - provide for the recording of common property in the freehold land register

- provide for and regulate building management statements for use with a volumetric plan of survey
- provide for another class of persons who may hold the benefit of public utility easements (to accommodate the privatisation of public utility services)
- provide for covenants (for use by state and local governments) to tie non-freehold land to other non-freehold land or non-freehold land to freehold land
- introduce and regulate profits à prendre for purposes unrelated to community titles
- introduce new trustee provisions unrelated to community titles
- make extra provisions about powers of attorney unrelated to community titles
- introduce new rules about compensation unrelated to community titles.

15. The *Local Government Act 1993* was amended to allow differential rating to apply to a lot in a community titles scheme and to make certain provisions about notices.
16. The *Local Government (Planning and Environment) Act 1993* was amended to make allowance for community titles schemes, including new procedures for the approval and noting of plans.
17. The *Magistrates Courts Act 1921* was amended to allow magistrates courts to enforce orders made under the Act.
18. The *Mixed Use Development Act 1993* was amended to prohibit further new applications.
19. The *Property Law Act 1974* was amended to bring a definition into line with the Act.
20. The *Residential Tenancies Act 1994* was amended to incorporate reference to the Act.
21. The *Retirement Villages Act 1988* was amended to recognise that the *Building Units and Group Titles Act 1980* will continue to have limited application and to allow the application of that 1988 Act to a community titles scheme.
22. The *Stamp Act 1894* was amended to include the transferring of a lot under the Act within the application of the 1894 Act.
23. The *State Housing Act 1945* was amended to:

- apply that Act to scheme land under the Act
- provide for the registration of a plan under the *Land Title Act 1994* in respect of a community titles scheme
- accommodate continuing limited application of the *Building Units and Group Titles Act 1980*
- generally adjust the provisions of the 1945 Act to community titles schemes.

24. The *Valuation of Land Act 1944* was amended to accommodate continuing limited application of the *Building Units and Group Titles Act 1980* and to make adjustments for community titles schemes.

Last reviewed: 31 July 2006

[¶20-100] Generally

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One of the objectives behind the *Body Corporate and Community Management Act 1997* (“BCCM Act”) was to improve the subdivision and management mechanisms available to developers in Queensland. The BCCM Act proved innovative in this regard. Because it departed from the approach previously adopted in other Australian jurisdictions, it introduced a number of “ground breaking” concepts. Although some of these concepts (eg the separate regulation modules) were designed to address problems that existed in Queensland at the time, they are nevertheless suitable for more general application in other jurisdictions. Indeed, it is now generally accepted that the Queensland legislation is the benchmark for other jurisdictions to follow.

Last reviewed: 6 April 2013

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[¶20-150] New features

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New development features introduced by the *Body Corporate and Community Management Act 1997* include:

- A common plan form for land subdivision.
- New and innovative ways in which plans can be drawn (ie three new plan formats).
- Volumetric or “airspace” titles.
- Staged development (without the unworkable restrictions that are common in other jurisdictions).
- Building management statements for use with volumetric subdivisions.
- Community management statements.
- Body corporate assets (including “off site” real estate assets).
- Regulation modules (for management purposes).
- Inter-scheme contractual arrangements.
- A more flexible system of registrar’s directions for plan preparation in place of the old prescriptive Act provisions and supporting regulations.
- Simpler approval processes for the new equivalent of the old building units plan.
- A split system of lot entitlements and the ability to re-arrange them.

These features will be discussed in detail in ¶20-500ff.

Last reviewed: 6 April 2013

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[¶20-500] Scope of the legislation

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The *Body Corporate and Community Management Act 1997* (BCCM Act) applies to all projects in which there is common property vested in a body corporate (ie "common interest" subdivisions). This includes projects created by building units plans and group titles plans registered under the *Building Units and Group Titles Act 1980* (BUGTA), except where those projects rely upon other legislation (such as the *Sanctuary Cove Resort Act 1985* and the *Integrated Resort Development Act 1987*). For an example of the complexity involved in determining voting entitlements under a partly completed development using the *Integrated Resort Development Act 1987*, see *Laguna Quays Resort Principal Body Corporate* v *Laguna Quays Resort Primary Thoroughfare Body Corporate & Ors* [2013] QSC 303.

The BCCM Act has been applied to existing BUGTA projects by virtue of a range of transitional provisions. The BCCM Act therefore applies to projects that would previously have used a building units plan or a group titles plan. Although it introduced the concept of volumetric subdivision, it did this by amending the *Land Title Act 1994*; hence that Act regulates the new plan formats and the new system of volumetric subdivision. Conventional subdivisions (ie those without common property) are also regulated by the Land Title Act.

It is important to note that the legislation is capable of applying to all types of "common interest" subdivisions, from the simplest to the most complex mixed use project. The commentary in ¶20-550 to ¶20-900 will briefly outline the range of projects that can be accommodated by the legislation.

Last reviewed: 4 March 2014

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[¶20-550] Simple building subdivisions

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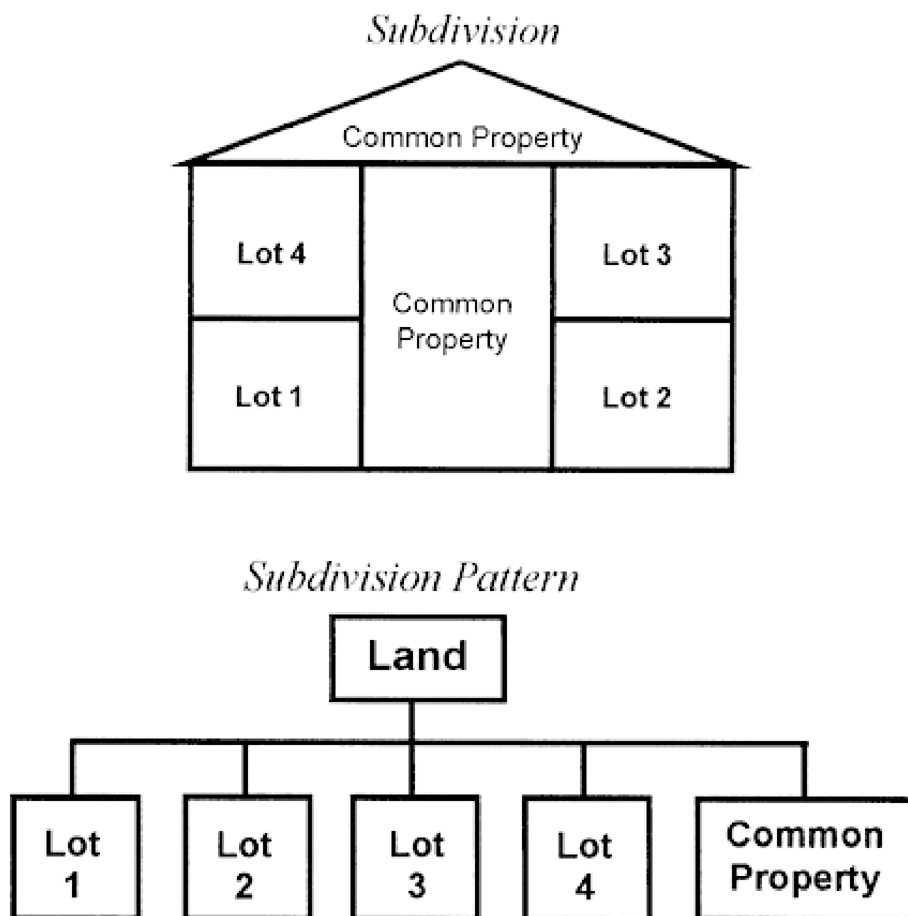
The best example of a simple building subdivision is the suburban "walk-up", also known as "six-packs" and "four-packs". The buildings are usually two or three storeys built on the larger suburban allotments. They house between two to six units with a foyer and staircase. They also have a common driveway and off-street parking, either beside or under the building. The units (sometimes combined with the car parking spaces) comprise the lots and the remainder of the land and improvements (including the foyers, driveways, lawns and gardens) comprise the common property. Before July 1997 they were subdivided by a building units plan under *Building Units and Group Titles Act 1980*. They are now subdivided by a building format plan (see ¶21-850) under the *Land Title Act 1994* and then subjected to the management and dispute provisions of the *Body Corporate and Community Management Act 1997* (BCCM Act). While the subdivision process is not radically different, there is now the opportunity to apply a more informal management regime to these smaller buildings. This is achieved by applying the Body Corporate and Community Management (Small Schemes Module) Regulation 2008 (Qld) to the body corporate (see ¶25-300). If anything, the BCCM Act makes this type of subdivision easier to achieve and more effective. The following illustrates the type of project and the subdivision pattern involved.



Last reviewed: 6 April 2013

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[¶20-600] Simple land subdivisions

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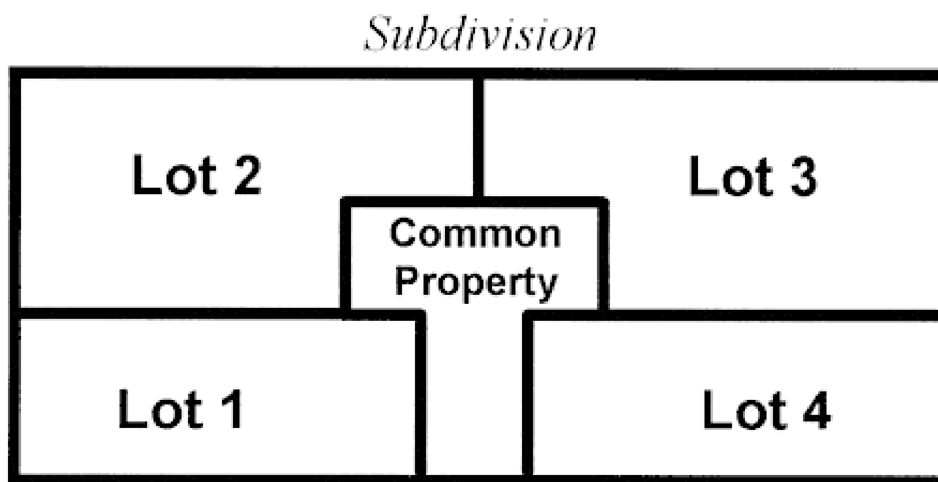
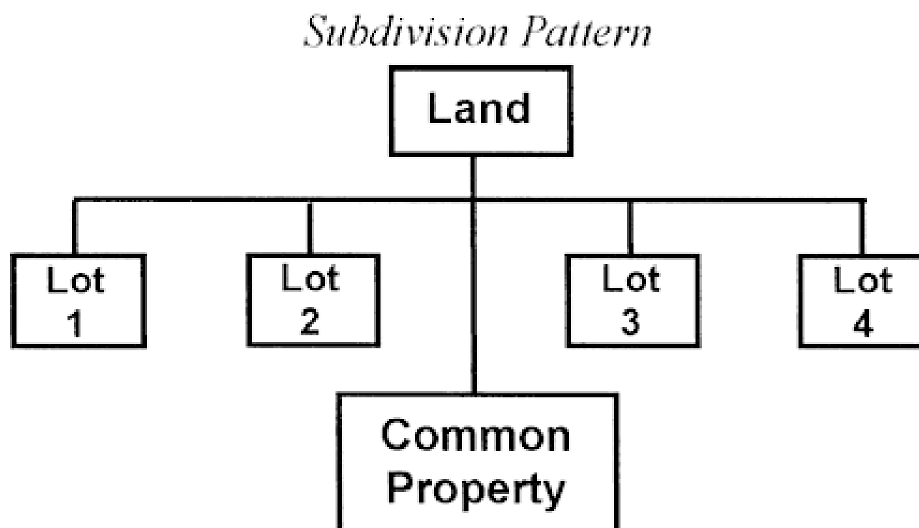
An example of a simple land subdivision is a suburban land project where an allotment is subdivided into a number of lots and common property. At the time of subdivision the lots may have houses built on them, or the land may be vacant to allow buyers to build their own houses. The common property may simply comprise an access road and open space areas. However, it may also include recreational facilities, such as a tennis court and swimming pool. Before July 1997, these projects were subdivided by means of a group titles plan under *Building Units and Group Titles Act 1980*. They are now subdivided by a standard format plan (see ¶21-850) under the *Land Title Act 1994* and then subjected to the management and dispute provisions of the *Body Corporate and Community Management Act 1997* (BCCM Act). Where the lots are to be sold as vacant land there is now the ability to apply an architectural and landscape code to the community titles scheme, thus ensuring that the houses and other improvements conform to a specified standard. Again, this type of subdivision is easy to achieve under the BCCM Act. The following illustrates the type of project and the subdivision pattern involved.





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[¶20-650] Layered arrangements

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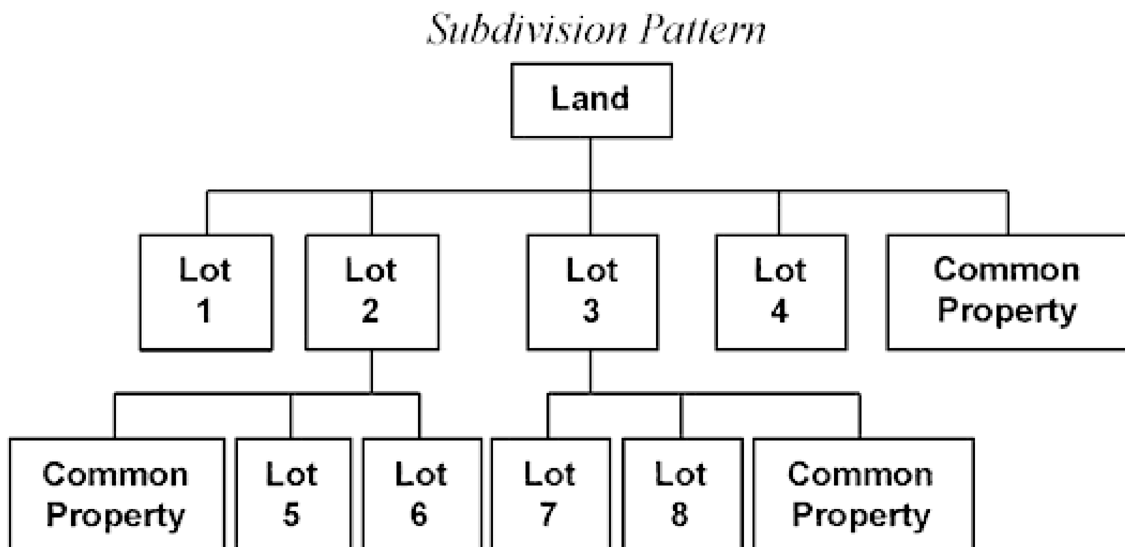
The *Body Corporate and Community Management Act 1997* (BCCM Act) introduced the concept of a "layered arrangement" of community titles schemes. Previously, layered arrangements were possible under the *Integrated Resort Development Act 1987* and the *Mixed Use Development Act 1993* but they were pre-determined mechanisms under which a developer had little or no choice about how to structure the management arrangements. In contrast, the BCCM Act allows almost unrestricted flexibility for the structuring of management arrangements.

Put simply, a layered arrangement exists where one or more community titles schemes (**subsidiary scheme**) is a "member" of another scheme (**principal scheme**). In its more complex form, one subsidiary scheme can be a "member" of another subsidiary scheme, which is in turn a "member" of the principal scheme. This is a 3-tiered management structure. Each community titles scheme has its own body corporate and common property. In a 3-tier structure, this means there are 3 bodies corporate and 3 sets of common property. Special arrangements can be made about use of common property, but in the absence of these, the common property within a particular community titles scheme can only be used by the owners of lots within that scheme. Where one of the lots forms the basis of another community titles scheme (ie a subsidiary scheme), then the owners of lots in the subsidiary scheme would normally be entitled to use the common property in the higher scheme in the hierarchy. The body corporate for the subsidiary scheme is a member of the next body corporate up in the hierarchy. The rights obtained by the body corporate in the subsidiary scheme to use common property in the higher scheme pass directly onto the owners of lots in the subsidiary scheme. The same principles apply to community titles schemes further up in the hierarchy.

Layered arrangements are intended for larger projects. They allow management separation of different parts of a project, usually based on factors such as housing types, land use (eg residential v commercial), common facilities, privacy or socio-economic differences. Care needs to be exercised when applying layered arrangements to a development. Such arrangements have the potential to substantially enhance the day to day operation of a community. However, if not properly chosen they also have the potential to be very troublesome on an ongoing basis.

The following illustrates the land subdivision pattern in a 2-tiered layered arrangement:



The following illustrates the 2-tiered management structure that follows as a consequence of that land subdivision pattern.

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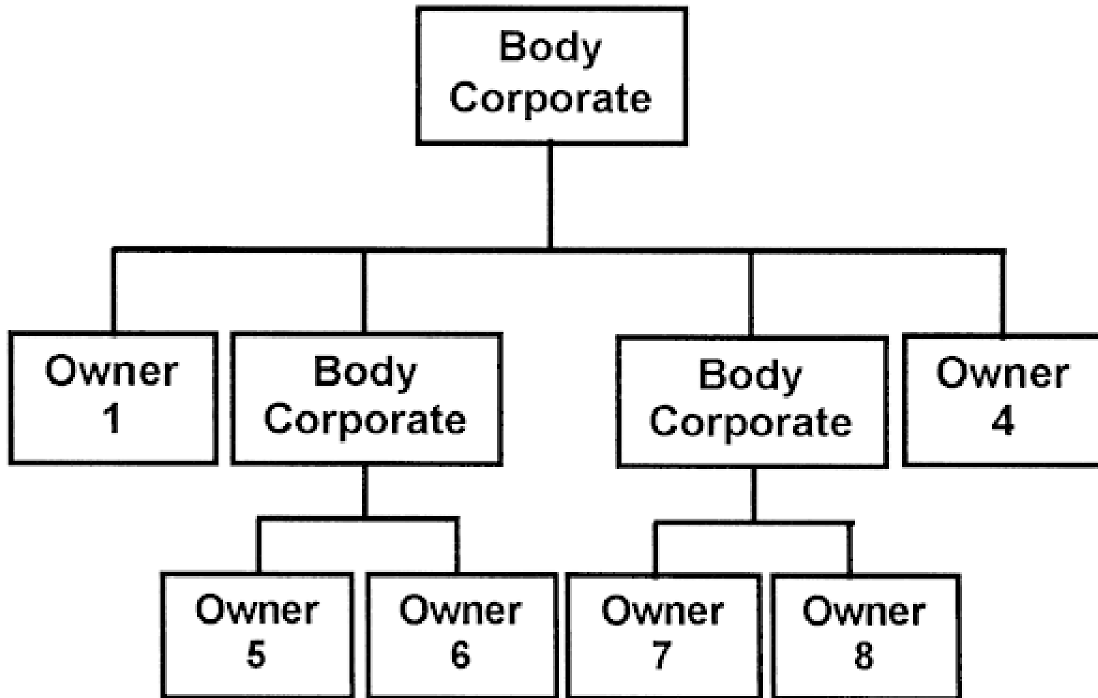
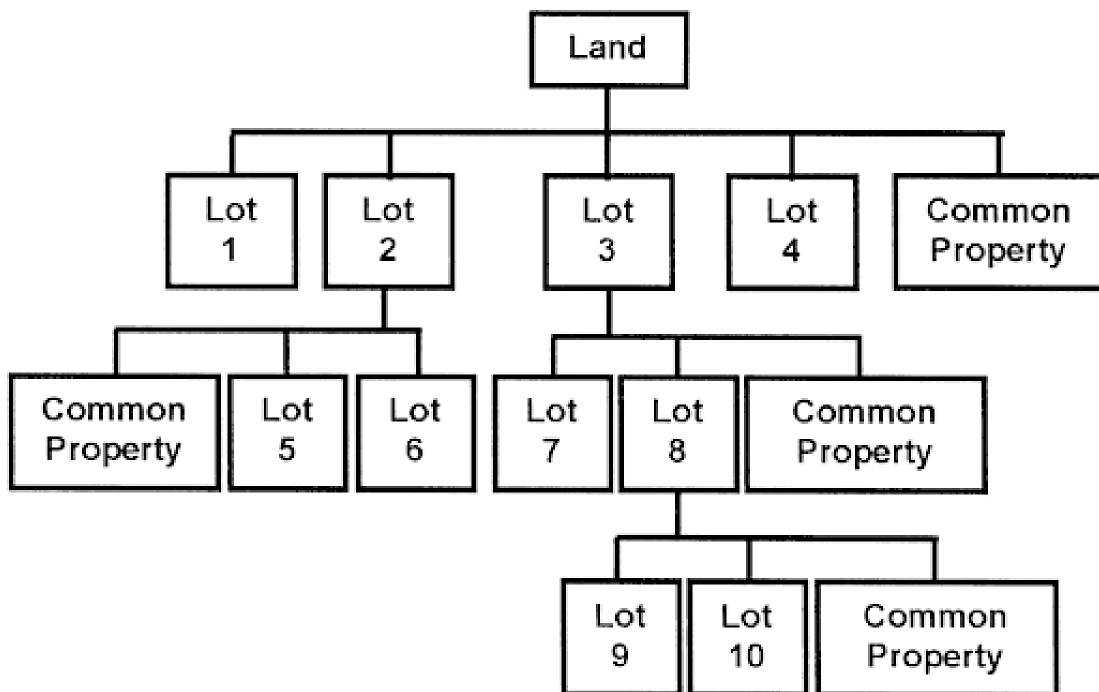


The following illustrates the land subdivision pattern in 3-tiered layered arrangement:



The following illustrates the 3-tiered management structure that follows as a consequence of that land subdivision pattern:

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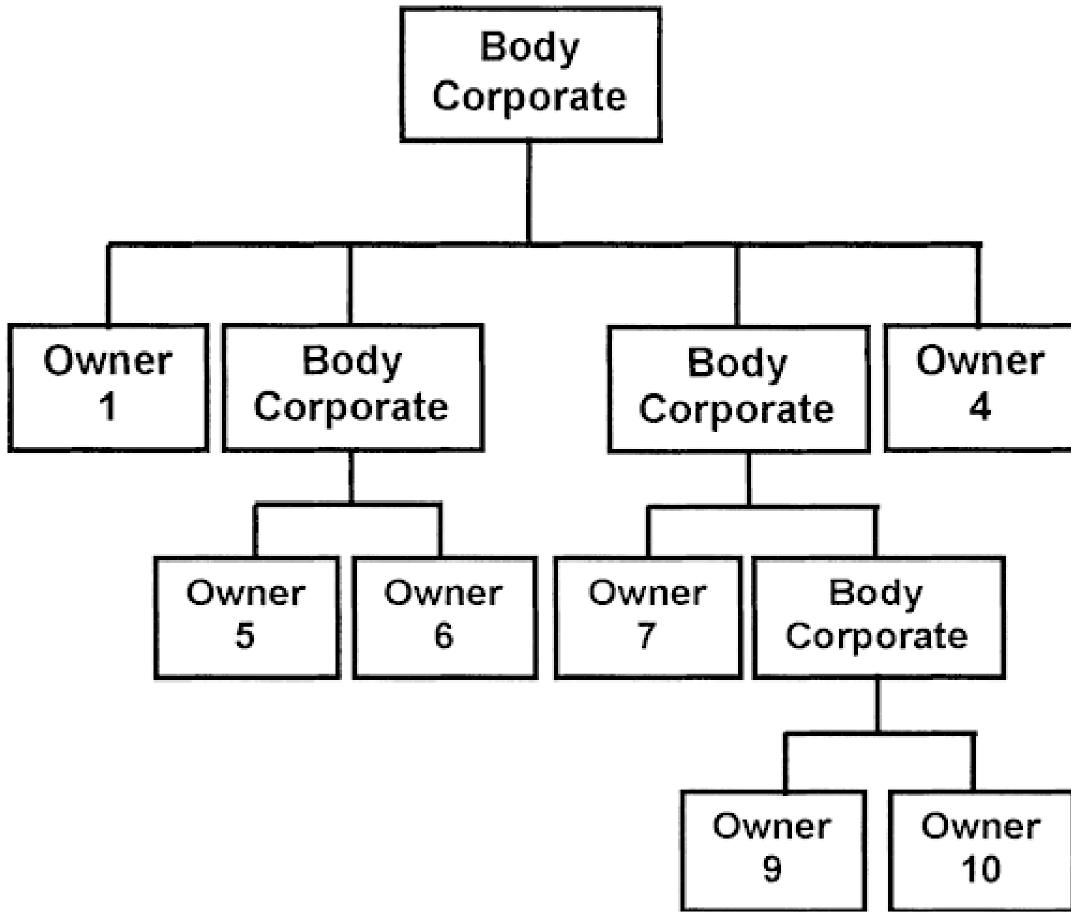

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[¶20-700] Staged development

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While it was possible, by improvisation and compromise, to build a group title project in stages under *Building Units and Group Titles Act 1980*, the required approach did not amount to a proper system of staged development. The *Body Corporate and Community Management Act 1997* (BCCM Act) changed that by not only introducing mechanisms for staged development, but also by providing a range of options, all of which when compared with the mechanisms in other states are relatively unrestrictive. The BCCM Act mechanisms are also capable of being used for the staged development of a "building", as opposed to a flat land staged development. In this respect they are unique in Australia.

Staged development is fully discussed at ¶22-250. At this point it is sufficient to note that there are two main ways in which a staged development can occur under the BCCM Act:

- by progressive subdivision of a parcel of land so that all of the lots and common property are within the same body corporate structure, or
- by progressive subdivision of a parcel of land in a way that there are two or more bodies corporate in either a single-tier or multiple-tier body corporate structure, with each body corporate having its own lots and common property.

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[¶20-750] Mixed-use projects

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Mixed-use projects usually fall under one of two broad categories, “broad acre” mixed use and urban mixed use. A large scale planned community is a good example of a broad acre mixed use project and an inner city building housing shops, offices and home units is a good example of an urban mixed use project. The *Body Corporate and Community Management Act 1997* provides a range of options for both projects. The broad acre options would most likely involve a 2 or 3-tiered management structure achieved by means of staged development. The exact configuration of the management structure would depend upon the requirements of the particular project and the objectives of the developer. The urban options would most likely involve a combination of volumetric subdivision and building format plan subdivision. In particularly complex projects a 2-tiered management structure may also be involved. Again, the final choice depends upon the project and the developer’s objectives.

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[¶20-800] Resort projects

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Large scale resort projects are a form of planned community. Therefore, they too are likely to involve a 2 or 3-tiered management structure achieved by means of staged development. It is also likely that the Accommodation Regulatory Module would be applied to one or more of the bodies corporate under the principal scheme. Again, the general approach and final management structure depends upon the type of project and the plans of the developer. The BCCM Act is suitable for these projects. However, with very large projects it can be difficult to achieve the level of flexibility often required by developers. The legal structuring must be undertaken with great care to preserve as much flexibility as possible.

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[¶20-850] Theme projects

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Theme projects are many and varied. They are usually based on a type of use or lifestyle. Examples include:

- hotels
- serviced apartments
- shopping centres
- business parks
- rural retreats
- viticulture enterprises
- golf communities
- marinas
- eco-projects.

Again, there is a range of options for structuring the projects under the BCCM Act, including the ability, in the community management statement, to establish and preserve the theme of the project. Hotels and serviced apartment complexes may make use of the Accommodation Regulatory Module.

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[¶20-900] Airspace projects

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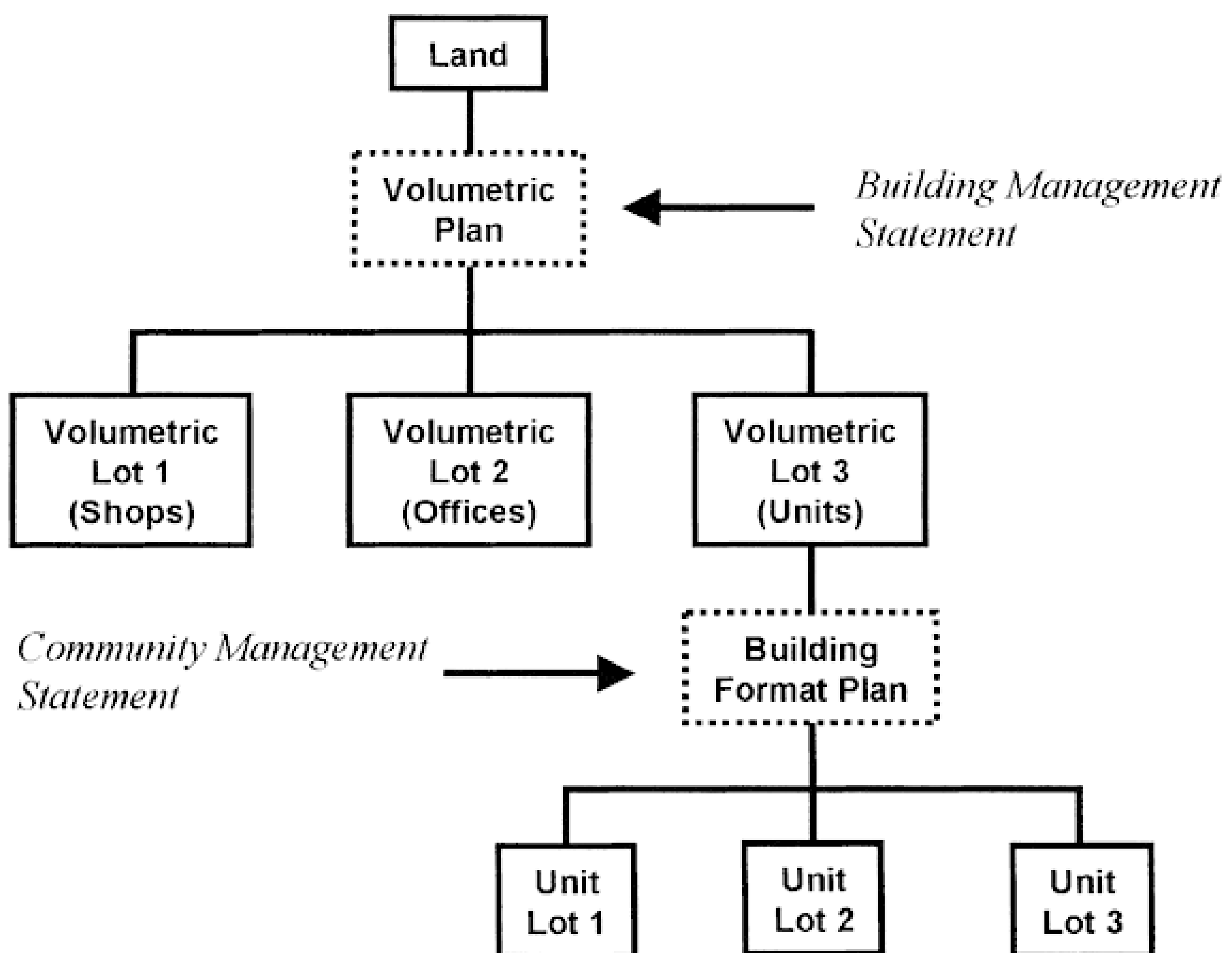
Airspace (or volumetric) projects usually involve the subdivision of a building by means of a volumetric plan of subdivision. The subdivision occurs under the Land Title Act and has no relationship to the BCCM Act, unless one or more of the lots in the volumetric plan become subject to a community titles scheme. The relationships among the owners of lots in a volumetric plan are regulated by a building management statement and not by a body corporate. However, a body corporate may well be the "owner" of one of those lots and is therefore a party to the building management statement. Where this is the case, the owners of the lots the subject of the body corporate are regulated by a community management statement in the normal way.

Until work commenced on the BCCM Act, freehold airspace subdivisions were not permitted in Queensland (except, in more recent times, under the *Mixed Use Development Act 1993*). Leasehold airspace subdivisions, combined with leasehold building units subdivisions, were also permitted by special legislation applying to land at South Bank in Brisbane City — the *South Bank Corporation Act 1989*. The Department of Natural Resources moved in early 1997 to permit airspace subdivision based on plans for the new statutory form of volumetric title. Those subdivisions are now expressly accommodated by the Land Title Act.

The following diagram illustrates the structure that has just been described:



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[¶21-300] Availability

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The name of a community titles scheme is made up of:

- an identifying name for the land or building (ie the development), which is shown in the community management statement
- the words "community titles scheme", and
- a unique identifying number, which the registrar of titles allocates when the first community management statement is recorded.

Example: *Seaview* Community Titles Scheme 1234.

In that example, "*Seaview*" and "1234" are unique to the particular scheme. There is no problem about allocating the number when the community management statement is recorded, because it is not required before then. However, the name is usually an integral part of the project and its marketing and it needs to be chosen and used from the time of initial launch of the project. This is usually before construction commences. A developer therefore needs to "secure" a name for a project for a substantial period before lodgment of a plan and community management statement for registration.

Section 23 of the *Body Corporate and Community Management Act 1997* allows for the reservation of a name for a proposed project. Once reserved, a developer can proceed to promote the project under that name knowing that the name will be available when the plan is lodged for registration and there will be no competing development with the same name. The registrar can only reserve the name if satisfied that a community management statement would be recorded showing the name. On that point, the registrar can refuse to record a community management statement if the identifying name shown in the statement is:

- the identifying name in the community management statement for another community titles scheme
- a name already reserved (other than one reserved by the person seeking to record the community management statement)
- a name reserved under *Building Units and Group Titles Act 1980*
- a name reserved under the *South Bank Corporation Act 1989* (which sets up a project-specific leasehold strata title system for land on the south bank of Brisbane City), or
- in the registrar's opinion formed on reasonable grounds, undesirable.

In practice, the registrar will be inclined to approve a name if there is no name the same or similar within the immediate geographic area. For example, a name may be approved in Cairns even though the same name is used on the Gold Coast. A name in Brisbane which is the same as a name on the Gold Coast may be approved, whereas a name at Surfers Paradise the same as a name at Southport may not be approved. The registrar will also approve a similar name in the same geographic area as an existing name if the existing name holder (ie body corporate or holder of a reserved name) consents. As regards undesirable names, good commercial practice and current community standards will usually guide the registrar.

Law: *Land Title Act 1994*, s 115E and 115G.

Last reviewed: 6 April 2013

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[¶21-350] Application

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Application to reserve a name for a proposed community titles scheme must be made by or on behalf of the owner of the land that will become the scheme land. Application is made by request using the general request form (Land Registry Form 14) or accessing this form at www.nrm.qld.gov.au/property/titles/pdf/form_14.pdf. That form clearly requires the proposed scheme land to be identified. The whole of the land should be identified.

The form is available for completion online at www.nrm.qld.gov.au/property/.

It has long been the practice of the registrar to reserve only one name for each parcel of proposed scheme land. Since the introduction of tiered schemes by the *Body Corporate and Community Management Act 1997* (BCCM Act), the registrar will reserve more than one name for a parcel of proposed scheme land if satisfied that a tiered scheme is proposed. Either the request should state that a tiered scheme is proposed, or a letter should accompany it to the registrar confirming that is the case.

Law: *Land Title Act 1994*, s 115F.

Last reviewed: 6 April 2013

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[¶21-400] Period of reservation

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An initial reservation lasts for two years. It can be extended, once only, for a further period of one year. Application for extension is made by request using a general request form (Land Registry Form 14 (see above link)). The application must be made within the initial period by the person for whom the name is reserved. The reservation ends if:

- the person withdraws the reservation, or
- a community titles scheme is established using the reserved name.

Law: *Land Title Act 1994*, s 115G.

Last reviewed: 6 April 2013

[¶21-750] Scheme land

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Scheme land is the land comprised in a community titles scheme, as identified in the community management statement that relates to the scheme. Generally, scheme land must be made up of a single, continuous area of land. However, the mere fact that a road or watercourse is within the external boundaries of the land does not preclude that land from becoming scheme land. This is because, in those circumstances, the land is taken to be made up of a single, continuous area of land. Also, a community titles scheme may be established with scheme land not being made up of a single, continuous area of land if all lots that become the scheme land are:

- created under a single plan of subdivision under the *Land Title Act 1994*, or
- in the opinion of the registrar formed on reasonable grounds, located within an area that is sufficiently limited to ensure that the scheme can be administered under the *Body Corporate and Community Management Act 1997* efficiently and effectively as a single parcel.

The effect of these provisions is to allow some flexibility to the general rule that scheme land must be made up of a single, continuous area of land. Where it is possible to draw a plan showing all of the lots that are to comprise the scheme land, even though those lots may not be adjoining, then those combined lots can comprise the scheme land. This would only be possible where the lots are all within the same proximity. It may not be possible to draw the plan in this way (eg because of technical limitations), but the lots intended to comprise the scheme land may be within a limited area. In those circumstances, an application can be made to the registrar for what is effectively discretionary permission to incorporate all of the lots in the scheme. Where this occurs, the lots are likely to be on different plans.

Where a community titles scheme has been established on lots that are not made up of a single, continuous area of land, that scheme may subsequently be changed to include additional lots or common property. However, each of those additional lots or common property must form a single continuous area of land with a part of the scheme land as it existed immediately before the inclusion of the additional land.

Where land is owned by a body corporate as an "asset" (eg a beach house situated 15 km from the address of the community titles scheme), that land is not part of the scheme land. It is treated in the same way as other body corporate assets are treated and it is subjected to rates and taxes in exactly the same way as other land. The body corporate is treated as the owner.

Law: *Land Title Act 1994*, s 115H.

Last reviewed: 6 April 2013

[¶21-800] Plans of subdivision

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A **plan of subdivision** is defined in a somewhat unconventional way in the *Land Title Act 1994*. It is a plan of survey providing for one or more of the following:

- division of one or more lots (ie a subdivision in the conventional sense)
- amalgamation of two or more lots to create a smaller number of lots
- dedication of land to public use, and/or
- redefinition of a lot on a resurvey.

The Land Title Act authorises registration of plans of subdivision and provides for lots defined in the plans to be created as “lots” when the plan is registered. All plans of subdivision are drawn on a common plan form and are referred to as a “survey plan”. The old terminology, “registered plan”, and the different types of plans for different types of subdivisions ceased to be used when the *Body Corporate and Community Management Act 1997* commenced on 13 July 1997.

Law: *Land Title Act 1994*, s 49, 49A.

Last reviewed: 6 April 2013

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[¶21-850] Plan formats

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Although there is only one plan form, the plan on that form may be drawn by the surveyor in one of three ways. To this extent the *format* of plans may be different. The three available formats are:

- standard, or
- building, or
- volumetric.

A *standard format* plan of survey defines land using a horizontal plane and references to marks on the ground (such as posts in the ground). A *building format* plan of survey defines land using the structural elements of a building, including, for example, floors, walls and ceilings. Those "structural elements" may include projections of, and references to, structural elements of the building. In this way, a balcony, courtyard, roof garden or other "outdoor" area may be defined for inclusion in a lot. Finally, a *volumetric format* plan of survey defines land using three dimensionally located points to identify the position, shape and dimensions of each bounding surface. A volumetric format plan can be used to achieve the same boundaries as a building format plan, but using a much more complex means of defining the boundaries.

Standard format plans and volumetric format plans will not be associated with the *Body Corporate and Community Management Act 1997* (BCCM Act) if they do not create common property. Building format plans must create common property and will always be associated with the BCCM Act. The following table (in which "c/p" means "common property") summarises the position:

Plan Type	Can c/p be created?	Must c/p be created?	Can a lot be created from c/p?
Standard format	Yes (but only if two or more lots are created **or** the c/p is additional c/p for an existing scheme)	No	Yes (but not from c/p outside a building in a building format plan or from c/p in a volumetric format plan)
Building format	Yes	Yes (unless the plan divides a lot or amalgamates two or more lots on an existing building format plan)	Yes
Volumetric format	Yes (but only if two or more lots are created **or** the c/p is additional c/p for an existing scheme)	No	*Land Title Act 1994* is not clear, but the registrar allows

It is also important to note that a building format plan must create two or more lots unless it amalgamates two or more lots on an existing building format plan or additional common property for an existing scheme is created.

On a building format plan, the boundary of a lot which is separated from another lot or common property by a floor, wall or ceiling, must be located at the centre of the floor, wall or ceiling, except as otherwise permitted under the registrar's directions. This is the same boundary position that was fixed under *Building Units and Group Titles Act 1980* (BUGTA), except that there was no scope under BUGTA to vary the position of the boundary in any circumstances. There is no general provision in the registrar's directions that indicates the circumstances in which this preferred boundary position could be varied. Instead, the directions deal in detail with specific situations, such as courtyards, roof gardens, verandahs, etc, which by their very nature require variation.

The type of plan used to create a scheme will determine ownership, for example, of external walls, and while the nature of the plan may not seem relevant at the time of development, it is quite relevant to the once-established body corporate, which may need to sue its insurance company for replacement costs.

Practitioners should be aware that costs levied by the council on a development vary according to the type of plan used by a developer client. This impacts on the choice of plan.

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Law: *Land Title Act 1994*, s 48A–49D, inclusive.

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[¶21-900] Dedications

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A plan of subdivision may dedicate a lot shown on the plan to public use. The dedication must be of the registered proprietor's whole interest in the lot, other than for any part of the lot reserved to the registered proprietor.

If the dedication is for a road, the registration of the plan operates, without anything further, to open the road for the *Land Act 1994*. If the dedication is for a public use other than a road, on registration of the plan, without anything further, the lot becomes unallocated state land under the *Land Act 1994*.

Where there is an easement over a lot providing access or a right of way, including a public thoroughfare easement, and the lot or part of the lot is dedicated for a road, the easement is extinguished to the extent it is over the lot or over the part of the lot dedicated for the road.

A plan of subdivision providing for dedication of a lot to public use, other than as a road, may be registered only if —

(a) on registration, access to the lot will be available through a road or a public thoroughfare easement, or
(b) the Minister has approved registration of the plan without that access being available.

Law: *Land Title Act 1994*, s 51, 51A.

Last reviewed: 6 April 2013

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[¶21-950] Original owner

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The *Body Corporate and Community Management Act 1997* (BCCM Act) places special obligations on the "original owner" in a community titles scheme (see ¶27-200ff). It is therefore important to have a clear understanding of who is the original owner. The original owner means each person who, immediately before the establishment of the scheme, is a registered owner of a lot that, on establishment of the scheme, becomes scheme land. A person in possession of the land acting under authority of a mortgage or court order immediately before the establishment of the scheme is "included" as an original owner. It follows from all this that there may be a number of original owners in respect of a community titles scheme. They are likely to be jointly and severally responsible for performing the obligations placed on them by the BCCM Act.

In the case of a staged development where the future stages form part of the original community titles scheme (ie there is only one body corporate), if a future stage is disposed of to a "sub-developer", then, upon registration of the plan for that future stage, the sub-developer does not become the original owner for that stage. This is because the community titles scheme is not "established" upon registration of that plan. It was established when the first plan was registered. However, where the staged development involves multiple bodies corporate (either in line or tiered), then upon establishment of each community titles scheme there will be separate "original owners". Of course, depending upon land ownership and possession, they may be the same in each case.

Law: *Body Corporate and Community Management Act 1997*, s 13.

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[¶22-000] Lots

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When land subdivision results in the establishment of a community titles scheme (ie when a body corporate is constituted upon registration of the plan) there are "lots" and "common property". It is important to clearly understand the difference between the two "parts" of the scheme, because the BCCM Act will constantly distinguish between the two. A lot is essentially a lot under the *Land Title Act 1994* because the plan is registered under that Act and from a title perspective is regulated under that Act. However, a lot in a community titles scheme may itself be the subject of a community titles scheme (this being the layered (or "tiered") arrangements permitted by the BCCM Act). Where this occurs, the lot is still a lot under the *Land Title Act 1994*. The boundaries of the lot are determined with reference to the plan. In the case of a standard format plan and volumetric format plan, these boundaries will usually be defined by conventional survey means. In the case of a building format plan the boundaries will usually be related to walls, floors and ceilings of a building (eg a high-rise residential apartment complex). Where a boundary separates one lot from another lot, or a lot from common property, it will usually be located at the centre line of the floor, wall or ceiling. The location of the boundary is relevant to the question of ownership in cases where a pipe within the wall burst or water seep through the roof damaging the internal walls.

Where it is necessary to determine the exact location of the boundary of a lot, reference must be made to the plan or plans of subdivision on which the community titles scheme is based. Sometimes it may even be necessary to refer to the registrar's directions to assist in interpreting the plan.

For a visual representation see www.justice.qld.gov.au/justice-services/body-corporate-and-community-management/maintenance-of-common-property-and-lots.

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[¶22-050] Common property

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To determine what is common property, you must first determine what parts of the scheme land are lots. This is because the common property consists of all those parts of the scheme land that are not included in the lots. But even this is overly simplistic, because in some circumstances parts of lots can effectively be common property where they “house” *utility infrastructure* (see ¶22-100). Care also needs to be taken where there are multiple schemes, because each will have its own common property. Common property for one scheme cannot also be common property for another scheme. That is not to say that common property cannot be shared between two schemes, but that is a “use” arrangement that does not affect ownership of the common property.

Law: *Body Corporate and Community Management Act 1997*, s 10(3).

.40 Identification of boundaries of strata lot. For a NSW authority on this topic, see *The Owners SP 35042* v *Seiwa Australia Pty Ltd* (2008) LQCS ¶90-146.

Last reviewed: 6 April 2013

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[¶22-100] Utility infrastructure

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"Utility infrastructure" is defined to mean cables, wires, pipes, sewers, drains, ducts, plant and equipment by which lots or common property are supplied with services. Utility infrastructure is part of the common property unless it:

- solely relates to supplying utility services to a lot, and
- is within the boundaries of the lot, and
- is located other than within a boundary structure for the lot (ie a floor, wall or ceiling in which a boundary is located).

However, utility infrastructure is not part of the common property if:

- its positioning is the subject of an agreement to which the original owner or the body corporate is a party, and
- under the agreement, ownership of the utility infrastructure does not pass to the original owner or body corporate.

This exception is intended to cover such things as the laying of cable by cable television companies. It can also be useful to enable an original owner to pass ownership of a PABX system to a building manager for valuable consideration. The building manager could then charge a fee to lot owners for the use of that system. To do this, the original owner would contract with the telephone supplier to cable the building and install the equipment on the basis that ownership of the cable and equipment stays with the telephone supplier. Subsequently, the telephone supplier assigns ownership of the cable and equipment to the building manager. The agreement between the original owner and the telephone supplier ensures that ownership stays with the telephone supplier. That ownership is subsequently transferred to the building manager and stays with the manager until further assigned. This approach overcomes the difficulty that existed under BUGTA in assuring ownership of PABX systems by building managers. It also establishes a clear asset over which a financier of management rights can take security. Issues can arise if, for example, lot owners wish to subsequently challenge the original owner's ability to lock them into contracts with service providers years after the original owner has sold off the last lot in the development.

Law: *Body Corporate and Community Management Act 1997*, s 20.

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[¶22-150] Body corporate assets

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Body corporate assets are defined as items of real or personal property acquired by the body corporate, other than property that is incorporated into and becomes part of the common property. In most cases, body corporate assets will comprise chattels, such as lawn mower, outdoor furniture, pot plants, etc. However, a parcel of real estate could equally be a body corporate asset. A classic example would be an "inland" community titles scheme that has a Beach Club at the coast or a city-based community titles scheme that has a mountain retreat. Indeed, a body corporate asset may consist of any property an individual is capable of acquiring. These assets, including the real estate assets, are not common property, but are separate assets. However, in some circumstances the affixing of a chattel to the common property may result in that chattel becoming part of the common property (eg ducted air conditioning system). A developer may choose, as part of the development process, to "gift" certain assets to the development. Two examples of this may be the pool equipment necessary to run the pool featuring as part of the common property or outdoor tables and chairs to make use of the barbeque area. These assets need to be disclosed to would-be buyers and should be noted by the body corporate manager in the original budget.

Law: *Body Corporate and Community Management Act 1997*, s 11.

Last reviewed: 6 April 2013

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[¶22-200] Layered arrangements

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The *Body Corporate and Community Management Act 1997* refers to "layered arrangement of community titles schemes". Put simply, these exist where one community titles scheme is based on a lot in another community titles scheme. There must be at least two community titles schemes and two layers (or "tiers") of schemes, although there may be many schemes and a greater number of layers. In practice three layers of schemes will be about the limit, because there would rarely be circumstances that would justify use of more layers. The following should be noted about these layered arrangements:

- A community titles scheme that stands alone and is not involved in any layered arrangement of community titles schemes is called a **basic scheme**.
- The first (or top) scheme in a layered arrangement of community titles schemes (ie the one that is not based on a lot in another scheme) is called the **principal scheme**.
- A scheme that forms part of a layered arrangement, but which is not the principal scheme, is called a **subsidiary scheme**.
- The principal scheme is made up of the scheme land for its own scheme and for all its subsidiary schemes.
- A community titles scheme at the bottom of a layered arrangement (ie where there is no subsidiary scheme based on any of its lots) is also called a basic scheme. It is therefore both a basic scheme and a subsidiary scheme.

Figure 1 illustrates the land structure for a basic scheme. Figure 2 illustrates the management structure for that basic scheme. Figure 3 illustrates the land structure for a simple layered arrangement. Figure 4 illustrates the management structure for that simple layered arrangement.

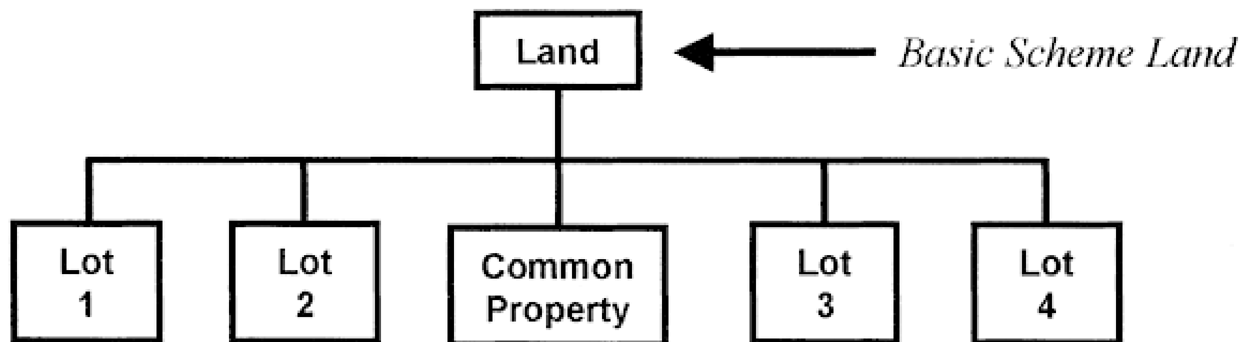

Figure 1

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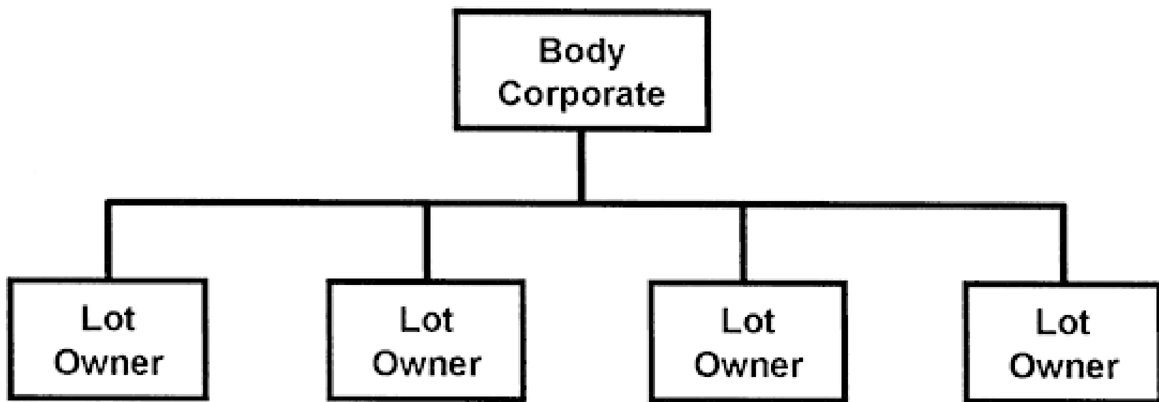

Figure 2

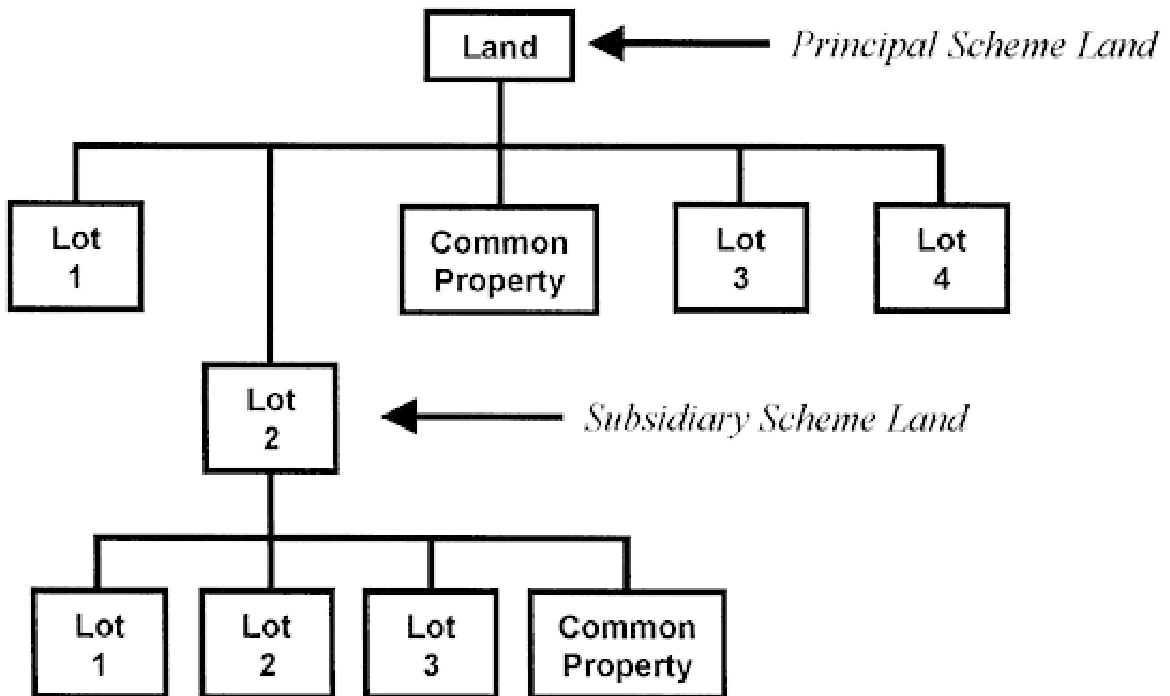

Figure 3

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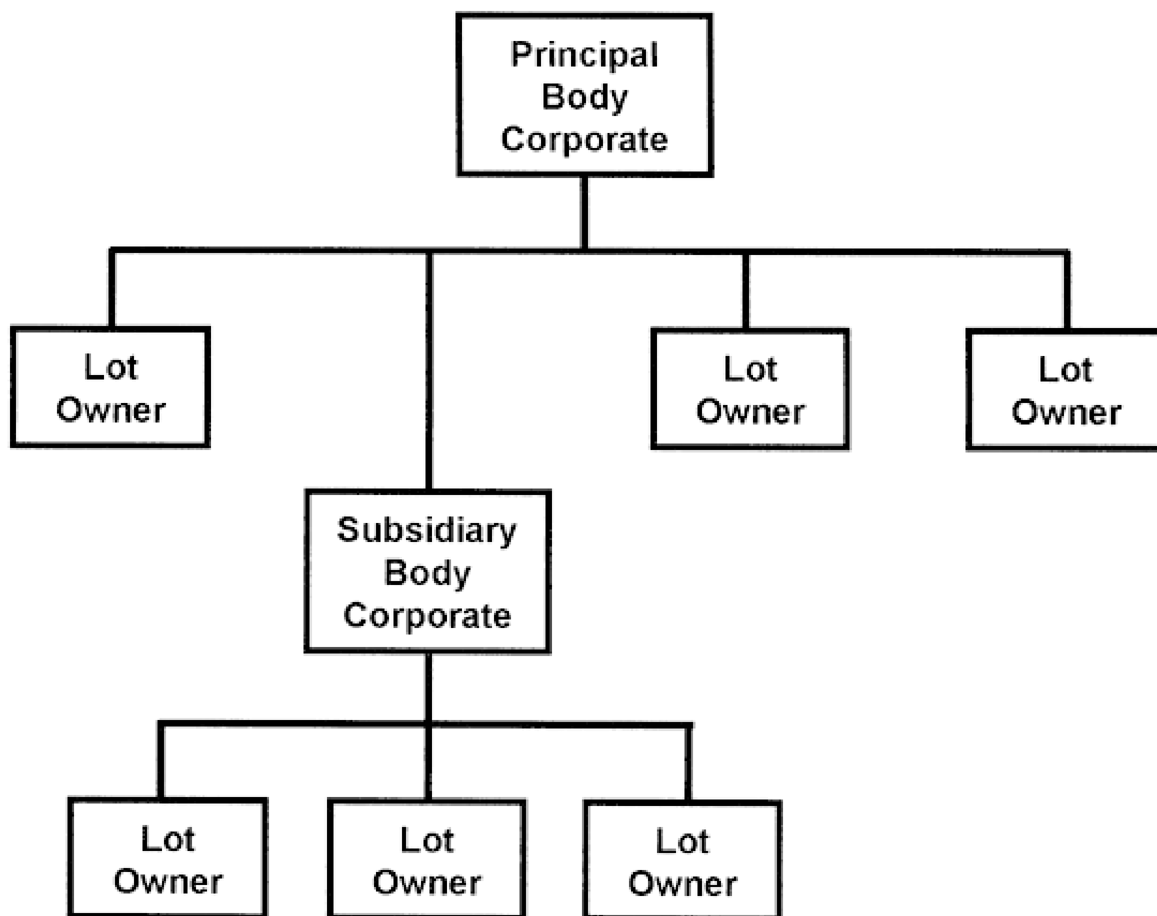

Figure 4

With reference to the above figures, the following should be noted:

- The scheme in Figure 1 is a basic scheme. Indeed, it is the most basic of all schemes. Its management structure is illustrated in Figure 2.
- The subsidiary scheme based on Lot 2 in Figure 3 is a basic scheme, because no other scheme is based on any of its lots. It is the last scheme in the layered arrangement, but it is also a subsidiary scheme.
- The layered arrangement in Figure 3 is called a **two tier scheme**.
- In Figure 3 the common property in the principal scheme is available for use by owners and occupiers of lots 1, 3 and 4 in the principal scheme and owners and occupiers of lots 1, 2 and 3 in the subsidiary scheme. However, the common property in the subsidiary scheme is only available for use by owners and occupiers of lots 1, 2 and 3 in the subsidiary scheme. (These entitlements can be varied if rights of exclusive use and enjoyment or special privileges are granted over any of the common property.)

It is also important to understand that a subsidiary scheme to a principal scheme may also be a subsidiary scheme to another subsidiary scheme. Figure 5 illustrates a land structure where this occurs and Figure 6 illustrates the corresponding management structure.

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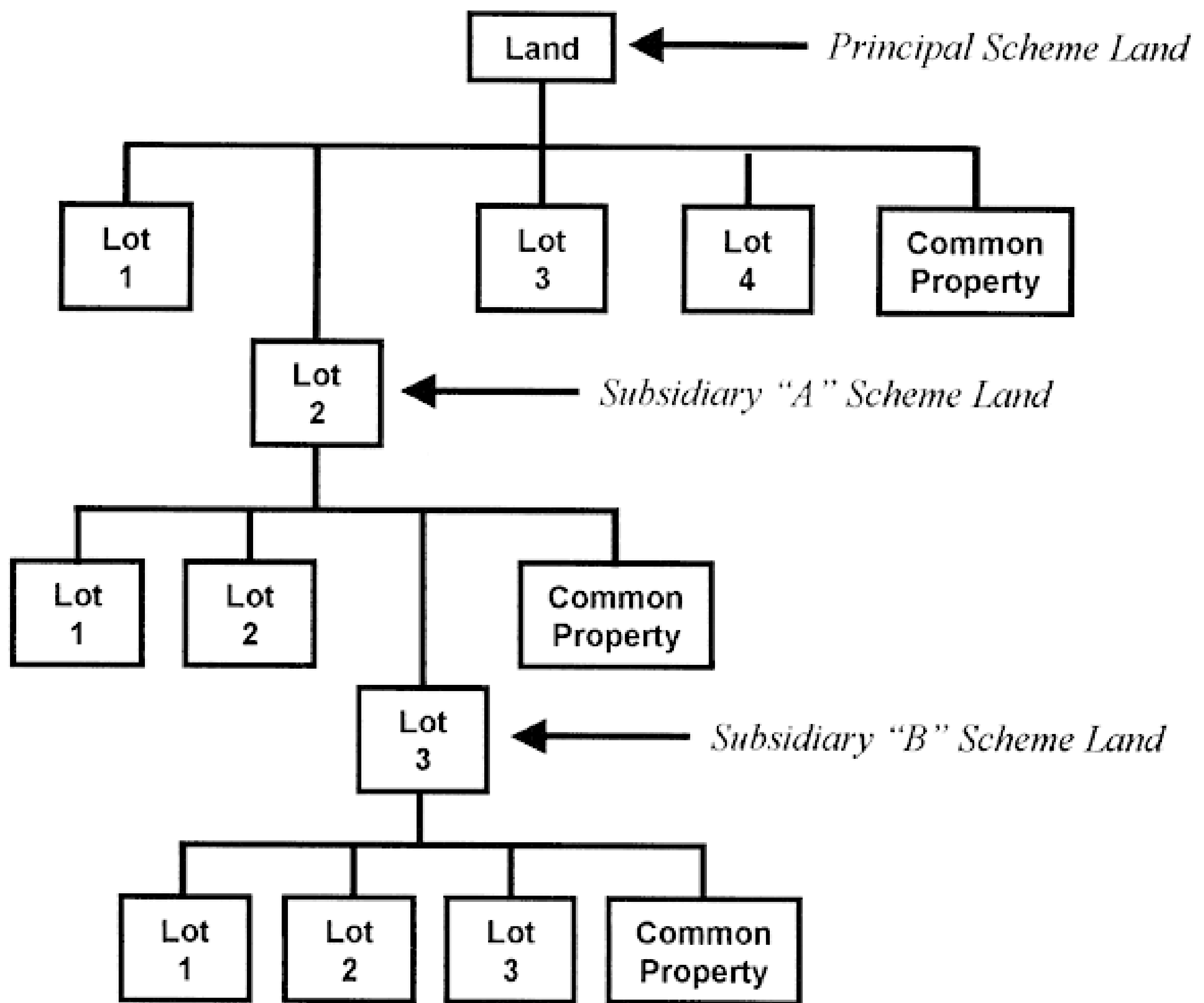

Figure 5

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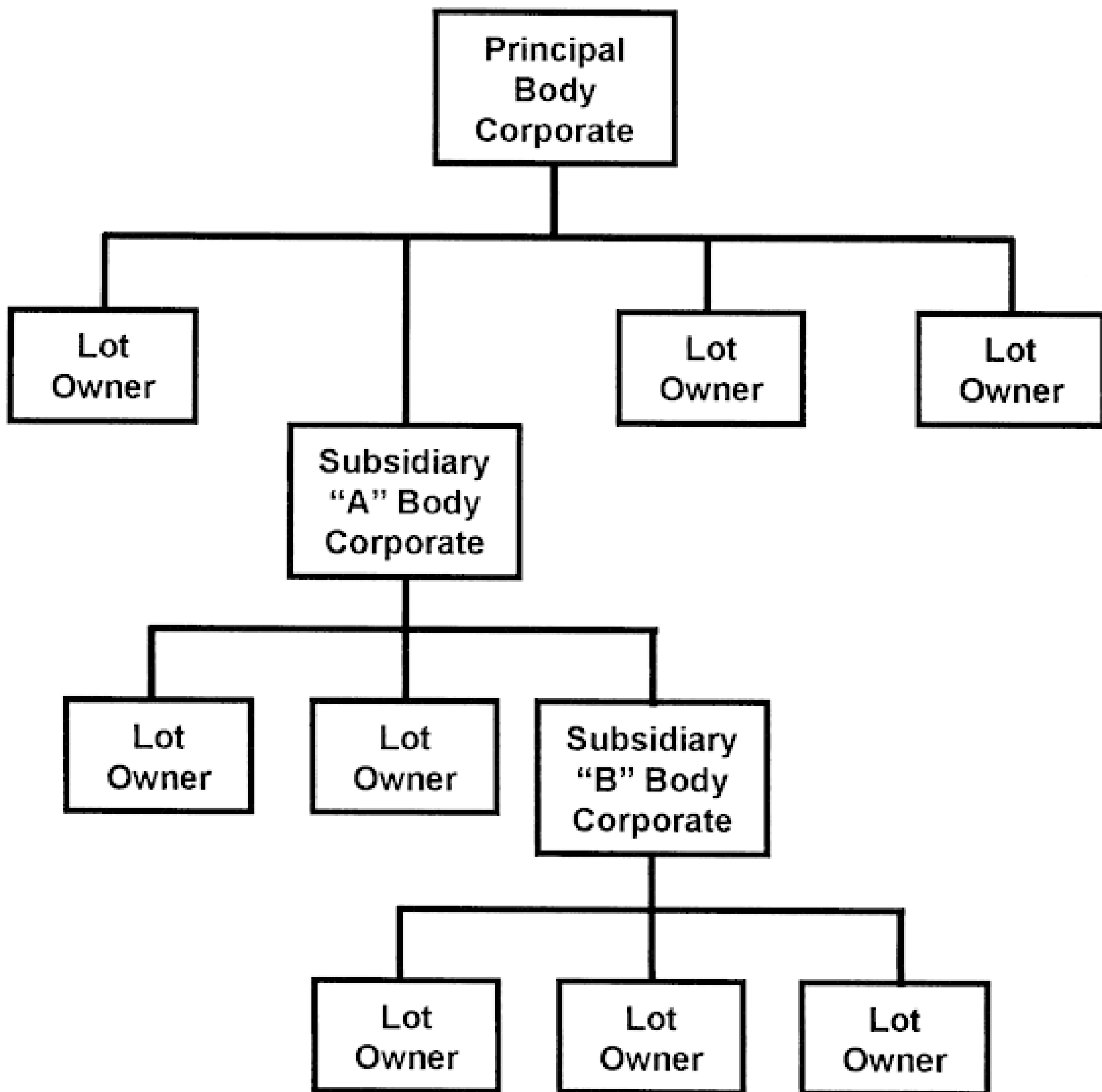

Figure 6

Last reviewed: 6 April 2013

[¶22-250] Staged development

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Staged development is an important feature of the *Body Corporate and Community Management Act 1997* (BCCM Act). It enables a developer to undertake larger projects in stages so that lots are released onto the market according to demand. Staged development is also a convenient way to minimise financing costs of a project — the profit from one stage being used to fund the construction of the next stage. Staging can be achieved in a number of ways, but the two main approaches (apart from creating a "stand alone" body corporate for each stage) are:

- Progressive subdivision within a single body corporate structure.
- Progressive subdivision involving two or more layers (or tiers) of bodies corporate.

Single body corporate

This approach involves the progressive subdivision of a parcel of land into lots and common property within a single body corporate structure. It is best illustrated by the following example. Twenty town houses are to be constructed on a parcel of land in 3 stages:

- Stage 1 — 4 townhouses
- Stage 2 — 8 townhouses
- Stage 3 — 8 townhouses

The stage 1 townhouses are to be sold, built and settled before the stage 2 townhouses are built. In turn, the stage 2 townhouses are to be sold, built and settled before the stage 3 townhouses are built. All the townhouse lots are to be in the same community titles scheme and within the same body corporate. The common property in the community titles scheme is to be created progressively with each stage.

The first step is to build the 4 townhouses in stage 1. The entire parcel of land (ie the land relating to all 3 stages) is then subdivided by means of a standard format plan into 6 lots and common property. Four of these lots comprise the townhouses and the other 2 lots comprise the land for stages 2 and 3. Those 2 lots are commonly called "reserved lots" or "development lots". The common property is usually restricted to that relating to the lots in the first stage. This is to avoid the need for the developer to use common property for construction purposes during the development of subsequent stages. The body corporate is constituted when that plan is registered. The community management statement is in Form C1. The following diagram shows how the subdivision looks after stage 1.

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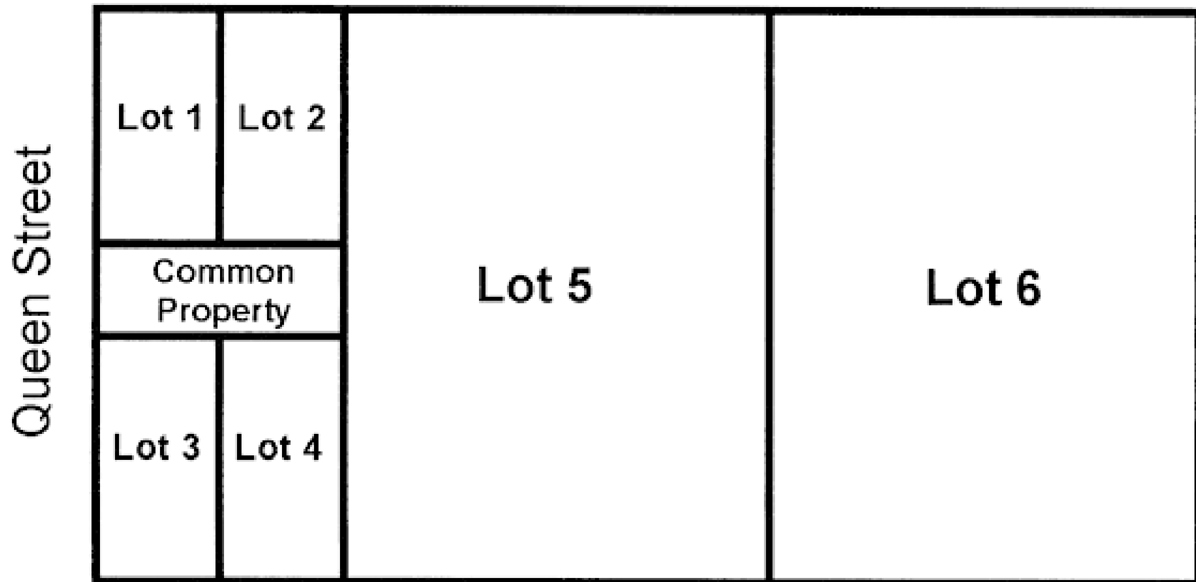
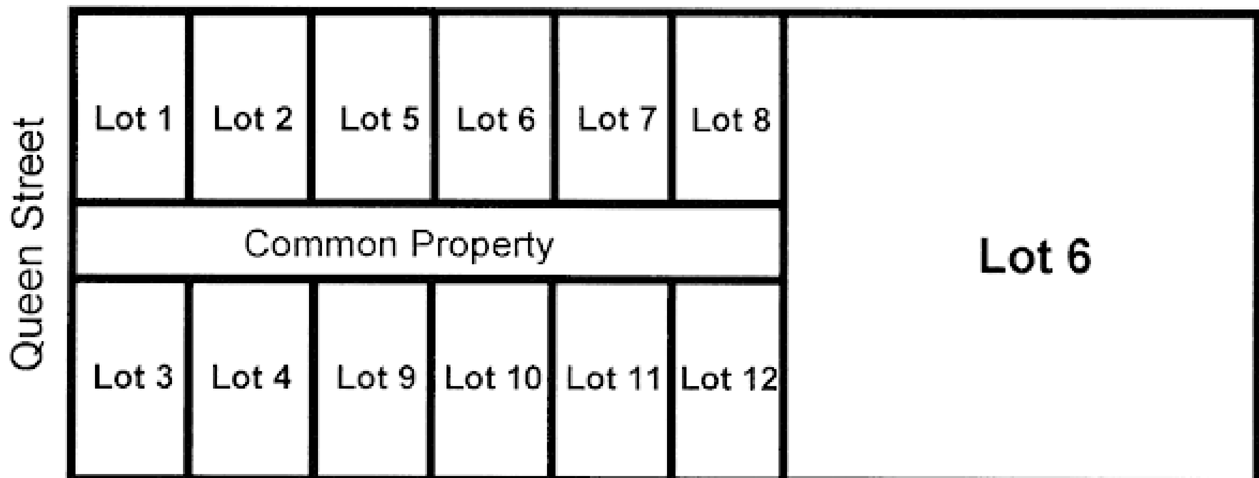


The next step is to build the 8 townhouses in stage 2 within lot 5. When the townhouses are completed, lot 5 is then further subdivided by a standard format plan into 8 lots and common property. The 8 lots comprise the townhouses and the common property is that relating to stage 2. The community management statement lodged with the stage 2 plan is in Form C2. It should be noted that no body corporate is created when the stage 2 plan is registered. Also, because stage 2 involves a new plan, the lot numbering can be maintained in consecutive order. The following diagram shows how the subdivision looks after stage 2.



The final step is to build the 8 townhouses in stage 3 within lot 6. When the townhouses are completed, lot 6 is then further subdivided by a standard format plan into 8 lots and common property. The 8 lots comprise the townhouses and the common property is that relating to stage 3. The community management statement lodged with the stage 3 plan is in Form C3. It should again be noted that no body corporate is created when the stage 3 plan is registered. The following diagram shows how the subdivision looks after stage 3.

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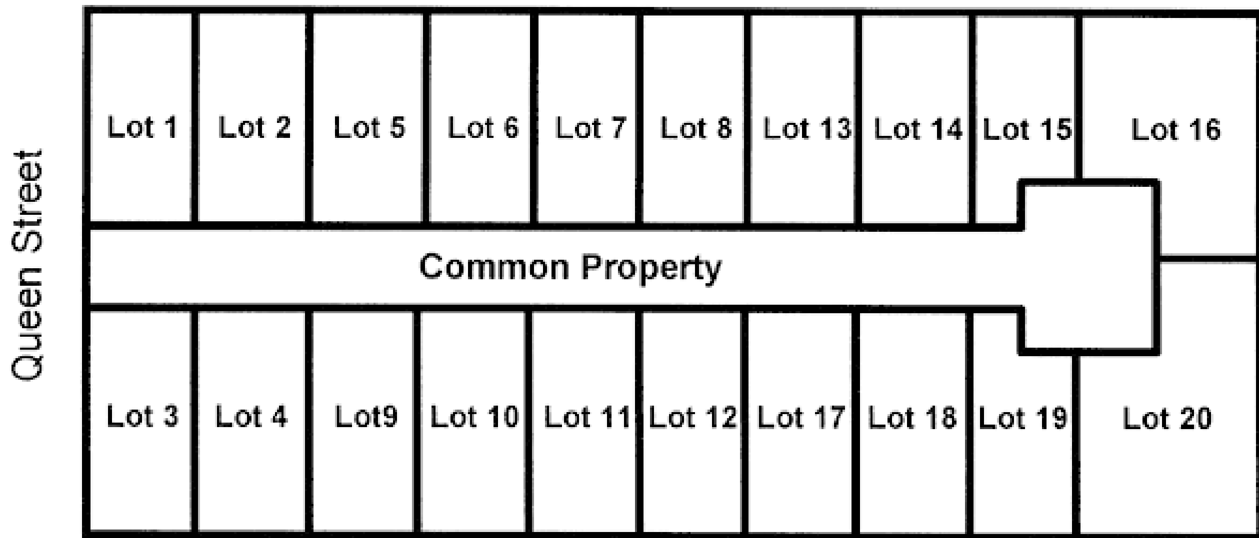
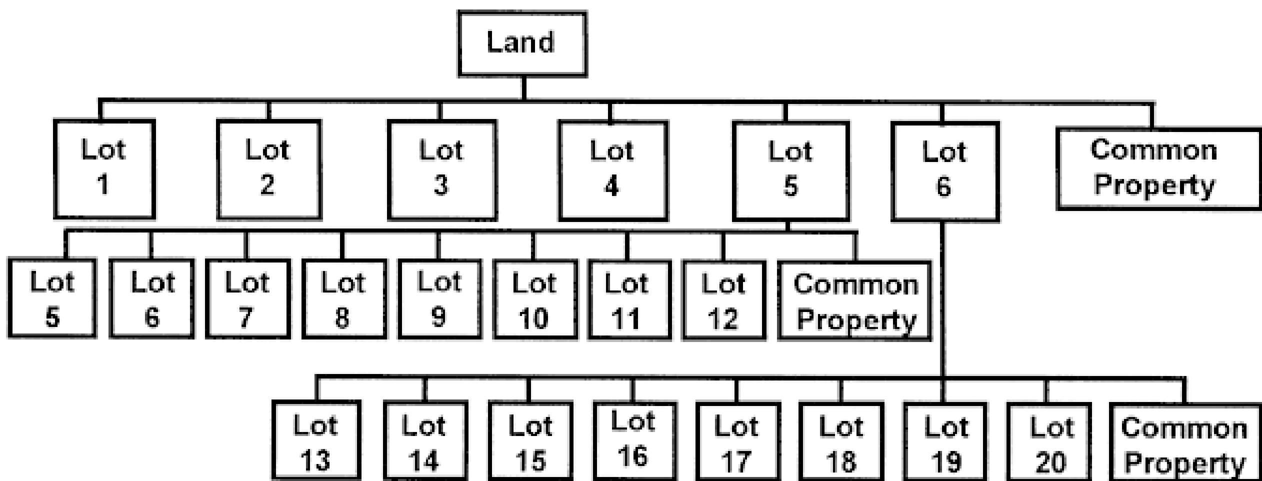
Subdivision - Stage 3



The subdivision pattern involved in this process is illustrated in the following chart.

Subdivision Pattern



The management structure resulting from this process is illustrated in the following chart.

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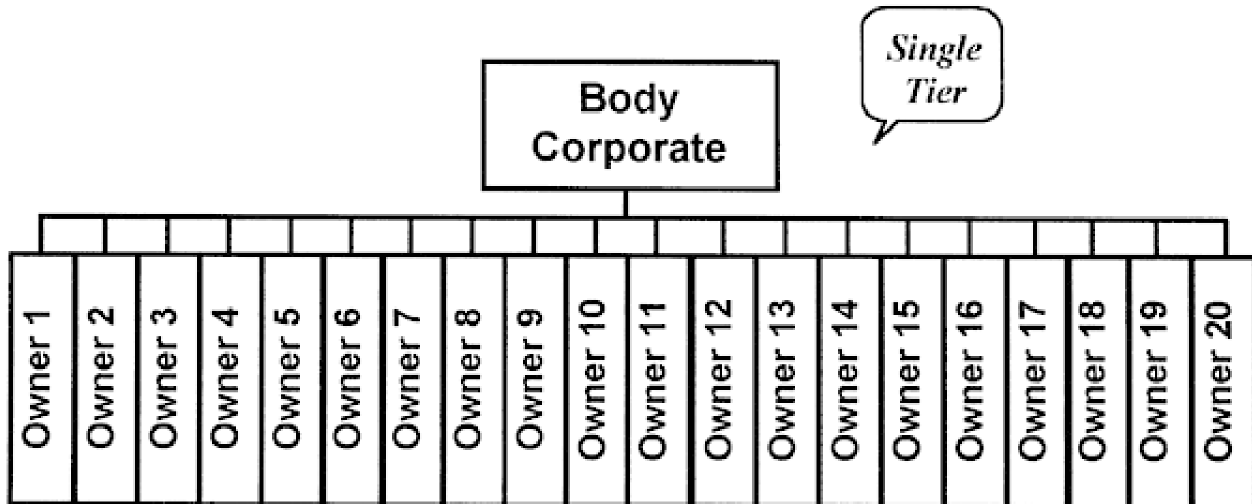

It is also worth noting the following points about the process so far:

- The approach to lot numbering adopted above is not the only approach. As an alternative, instead of numbering the reserved lots 5 and 6, they could have been numbered 21 and 22, thus resulting in all 20 townhouse lots being consecutively numbered.
- It is not necessary to have a separate reserved lot for each stage. Instead, in the above example there could be one reserved lot that is subdivided in 2 progressions.
- All of the common property can be created on registration of the stage 1 plan. However, this has the potential to allow owners within stages 1 or 2 to interfere with the developer's construction activities where they involve use of common property.
- If, instead of townhouses, 3 detached home unit buildings are to be built in 3 stages, then a slightly different approach is necessary. First, the parcel of land is subdivided into the 3 staged lots by a standard format plan. The first building is then built on the stage 1 lot. After completion, that building is subdivided by a building format plan that also includes the 2 reserved or "development" lots. In other words, all 3 stages are included within the one community titles scheme, although, only stage 1 has been completed.

An important aspect of staged development is the way in which lot entitlements are allocated. An excessive allocation to the reserved lots can impose a significant liability on the developer for maintenance contributions, rates and taxes, while a low allocation to the reserved lots can deprive the developer of votes and reduce their equity in the common property and body corporate assets. Care should also be taken to ensure that an unreasonable level of maintenance contributions is not imposed on the owners in stages 1 and 2. This can have a negative impact on marketing. Another option may be to show, as part of the disclosure process, that the caretaking (for example) is charged at X per lot until the completion of the common property resort facilities at the end of stage 3 (for example) so that potential buyers are not concerned about paying for the maintenance of, as yet, unconstructed facilities.

Each project must be examined in the light of potential impact on the developer and initial residents. A body corporate manager with staged development experience should be able to assist the developer in selecting the right allocation of lot entitlements. In the case of the above example, the lot entitlements would normally be allocated as follows. However, there may be good reasons for a particular project to decide on an alternative allocation.

Lot Entitlements

Stage 1

Contribution Schedule	**Interest Schedule**

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Lot	Plan	Entitlement	Lot	Plan	Entitlement
1	1	20	1	1	3
2	1	20	2	1	3
3	1	20	3	1	3
4	1	20	4	1	3
5	1	1	5	1	24
6	1	1	6	1	26
Aggregate		**82**	**Aggregate**		**62**

Lot Entitlements

Stage 2

Contribution Schedule			Interest Schedule		
Lot	**Plan**	**Entitlement**	**Lot**	**Plan**	**Entitlement**
1	1	10	1	1	3
2	1	10	2	1	3
3	1	10	3	1	3
4	1	10	4	1	3
6	1	3	6	1	26
5	2	10	5	2	3
6	2	10	6	2	3
7	2	10	7	2	3
8	2	10	8	2	3
9	2	10	9	2	3
10	2	10	10	2	3
11	2	10	11	2	3
12	2	10	12	2	3
Aggregate		**123**	**Aggregate**		**62**

Lot Entitlements

Stage 3

Contribution Schedule			Interest Schedule		
Lot	**Plan**	**Entitlement**	**Lot**	**Plan**	**Entitlement**
1	1	1	1	1	3
2	1	1	2	1	3
3	1	1	3	1	3
4	1	1	4	1	3
5	2	1	5	2	3
6	2	1	6	2	3
7	2	1	7	2	3
8	2	1	8	2	3
9	2	1	9	2	3
10	2	1	10	2	3
11	2	1	11	2	3
12	2	1	12	2	3
13	3	1	13	3	3
14	3	1	14	3	3
15	3	1	15	3	3
16	3	1	16	3	4
17	3	1	17	3	3
18	3	1	18	3	3
19	3	1	19	3	3

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20	3	1
Aggregate		**20**

20	3	4
Aggregate		**62**

This approach has the benefit of:

- Protecting the developer's interest in the common property and body corporate assets. This is because the allocation of interest schedule lot entitlements is based on respective values of the lots (which is the approach envisaged by the BCCM Act).
- Moving responsibility for maintenance contributions onto the townhouse owners rather than the developer, as owner of the reserved lots. While this departs from the principal of equal contribution schedule lot entitlements, it can be justified on the basis that the approach is equitable. This is because the reserved lots would not make use of most of the "benefits" flowing from the maintenance contributions (eg insurance, lighting, cleaning, gardening, etc).

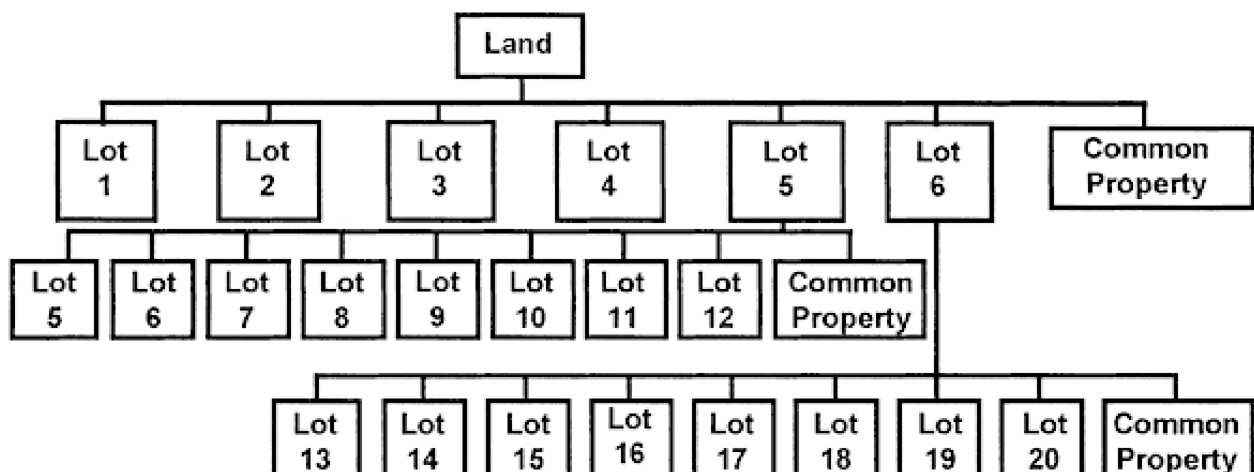
However, this approach has the disadvantage of attracting a higher rate and land tax liability.

Layered bodies corporate

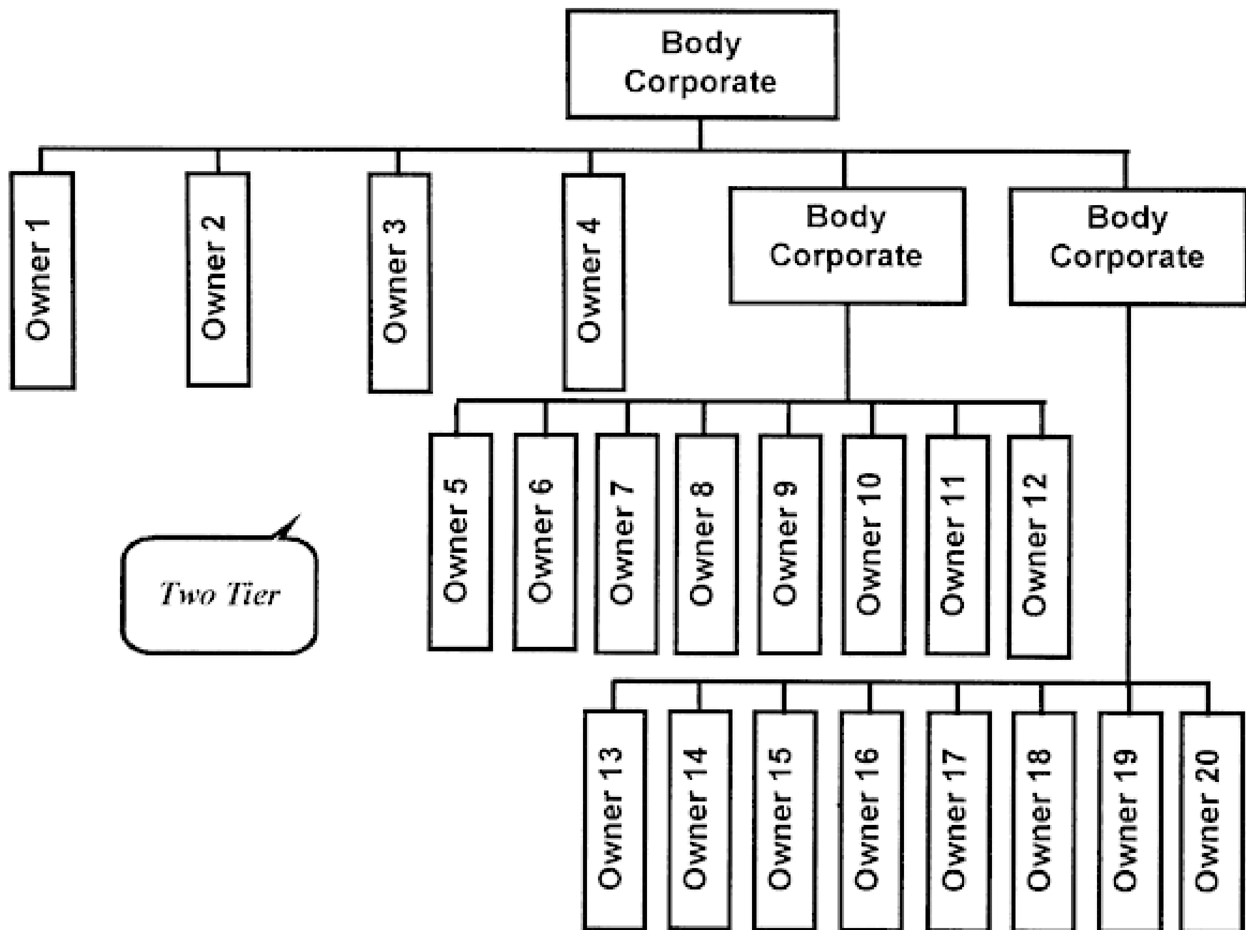
This approach involves the progressive subdivision of a parcel of land into lots and common property with 2 or more new bodies corporate being created when the plans are registered for a second and subsequent stages. Again, taking the same example as before. Twenty town houses are to be constructed on a parcel of land in 3 stages:

- Stage 1 — 4 townhouses
- Stage 2 — 8 townhouses
- Stage 3 — 8 townhouses

The stage 1 townhouses are to be sold, built and settled before the stage 2 townhouses are built. In turn, the stage 2 townhouses are to be sold, built and settled before the stage 3 townhouses are built. A body corporate is constituted for each stage. The bodies corporate for stages 2 and 3 are part of the stage 1 body corporate structure. Each body corporate is to have its own common property. The subdivision process is the same as before, except that a body corporate is to be created when each of the 3 standard format plans are registered. This would result in the following subdivision pattern:



The management structure resulting from this process is illustrated in the following chart:



An alternative would be to subdivide the parcel into 3 reserved or "development" lots and some common property by a standard format plan that creates a body corporate. Each of the 3 reserved lots would be further subdivided by a standard format plan (when the various townhouses are built). Each of these further standard format plans would create common property and a body corporate. The result would be a 2-tier body corporate structure involving 4 bodies corporate. The original (or first) body corporate would be the principal scheme body corporate while the other 3 bodies corporate would be subsidiary scheme bodies corporate. Each body corporate would have its own common property. The subdivision involved in this process is illustrated in the following chart:

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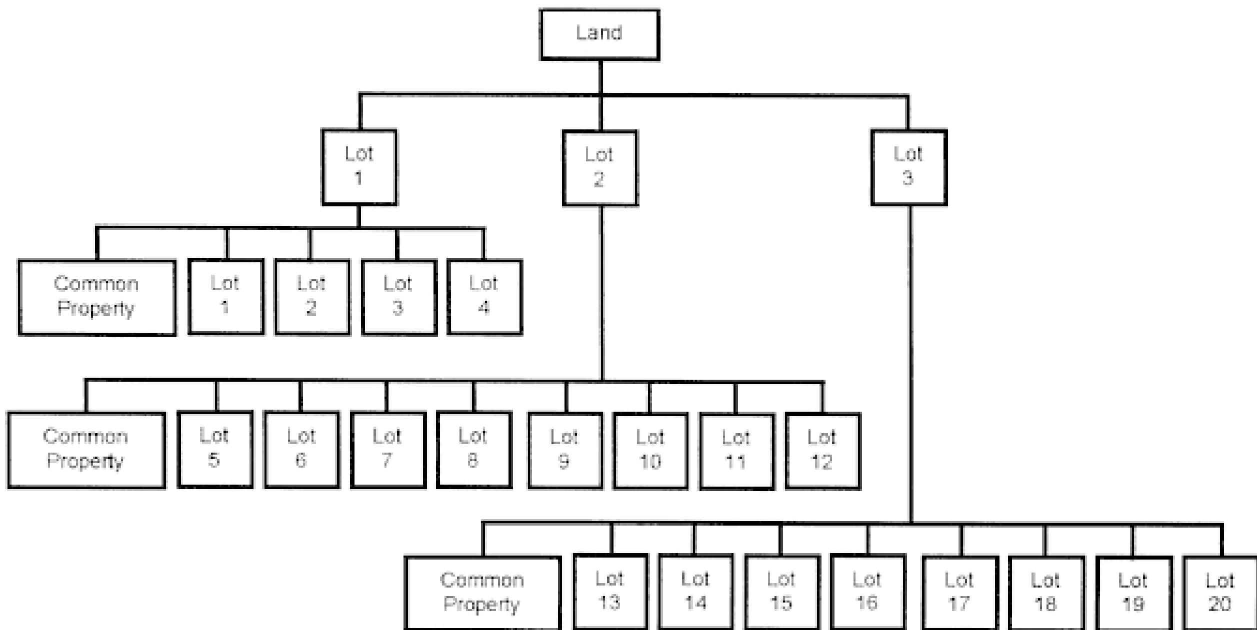
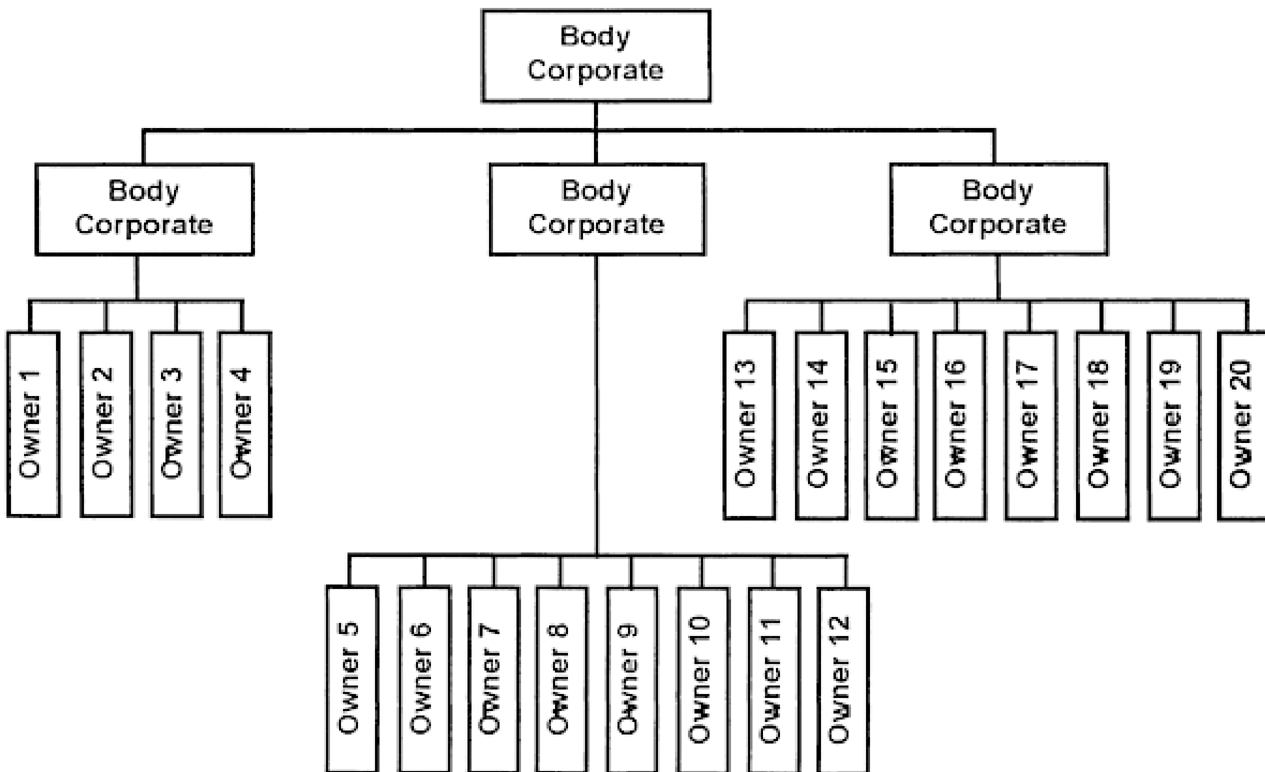


The management structure resulting from this process is illustrated in the following chart:



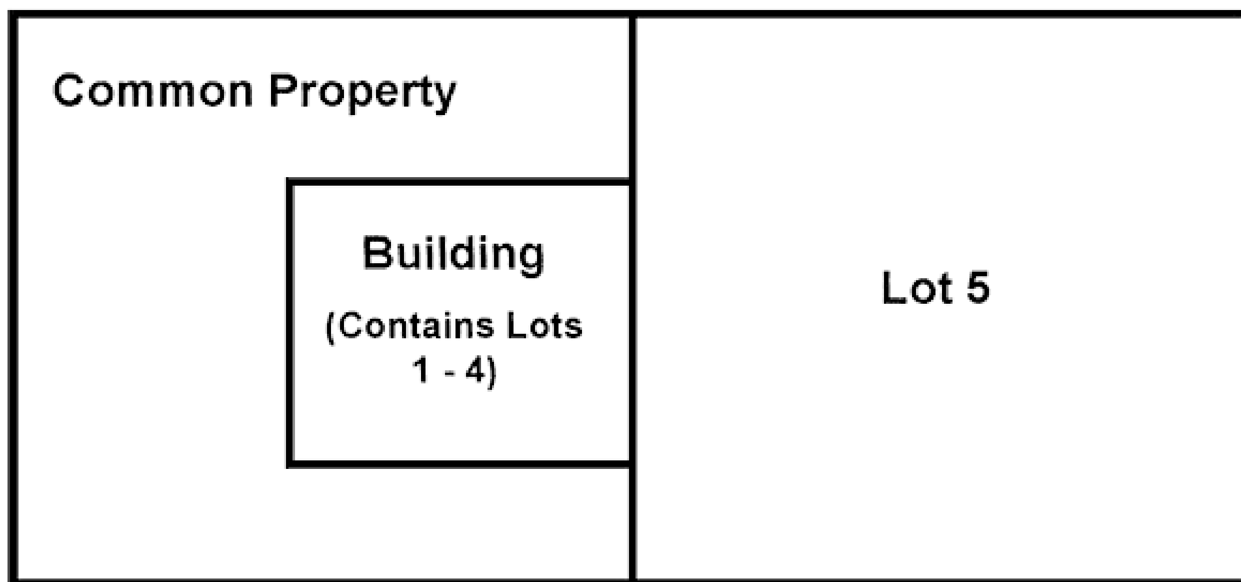
These structures are too complex for the simple project taken for our example. However, they serve to illustrate how different approaches can be taken. The choice of an approach depends upon the objectives of

the developer and the features of the particular project. A proper analysis of the project must be undertaken before any approach is decided upon, otherwise the project may carry the burden of an inappropriate subdivision pattern and consequential management structure. (See ¶27-800ff).

Staged development of buildings

So far we have dealt with staged development using a standard format plan. It is also possible to stage develop certain buildings, such as an apartment building. Take the following example. An apartment building containing 8 lots is to be constructed on a single parcel of land in 2 stages. All of the lots are to be in the same strata scheme and to share the same common property. First, the developer builds the first stage (comprising 4 apartments). The parcel of land is then subdivided by a building format plan into 5 lots and common property. Lots 1 to 4, inclusive, comprise the 4 apartments and lot 5 is a reserved lot. The following diagram shows how the subdivision looks for stage 1.

Subdivision - Stage 1



The developer then builds the remaining part of the building on lot 5. When the building is completed lot 5 is subdivided by a building format plan into 4 lots which comprise the remaining 4 apartments. The following diagram shows how the subdivision looks for stage 2. Because lots 5–8 are on a separate plan, it is acceptable to have two lots 5's within the project.

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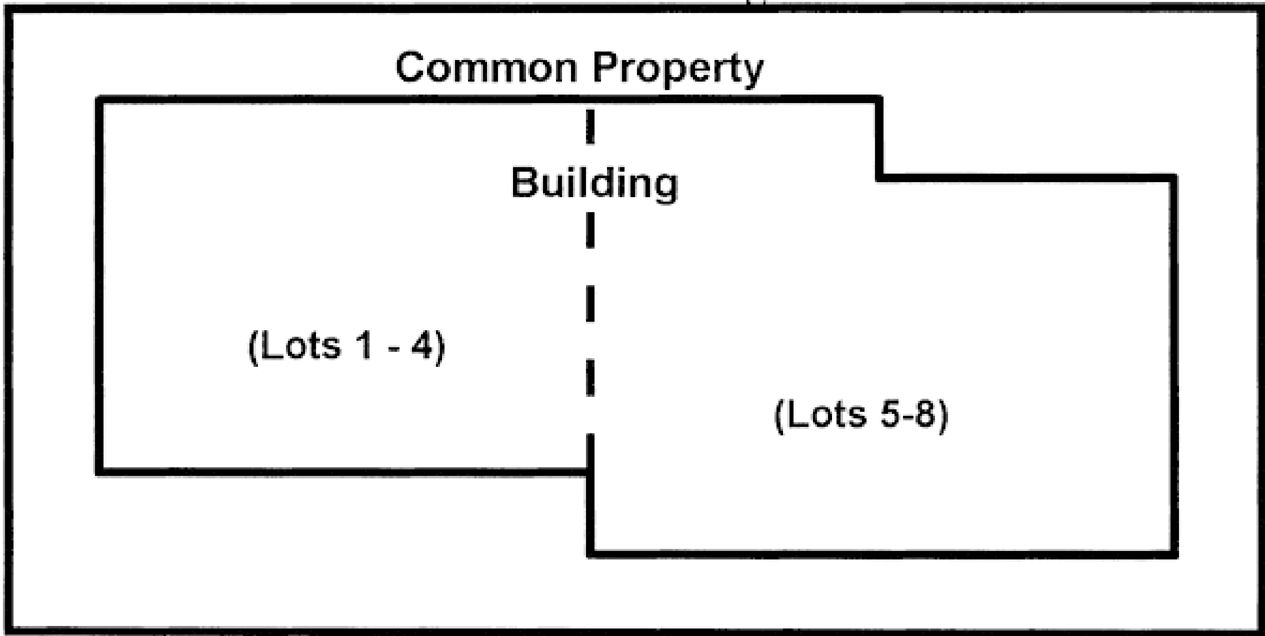
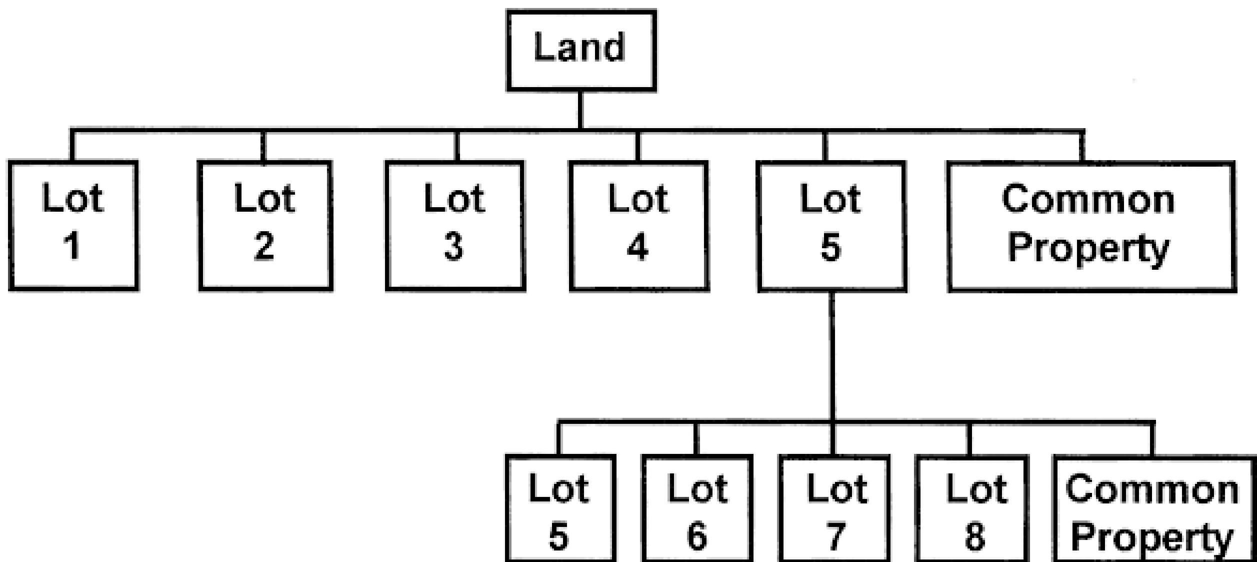


The subdivision pattern involved in this process is illustrated in the following chart.



The management structure resulting from this process is illustrated in the following chart.

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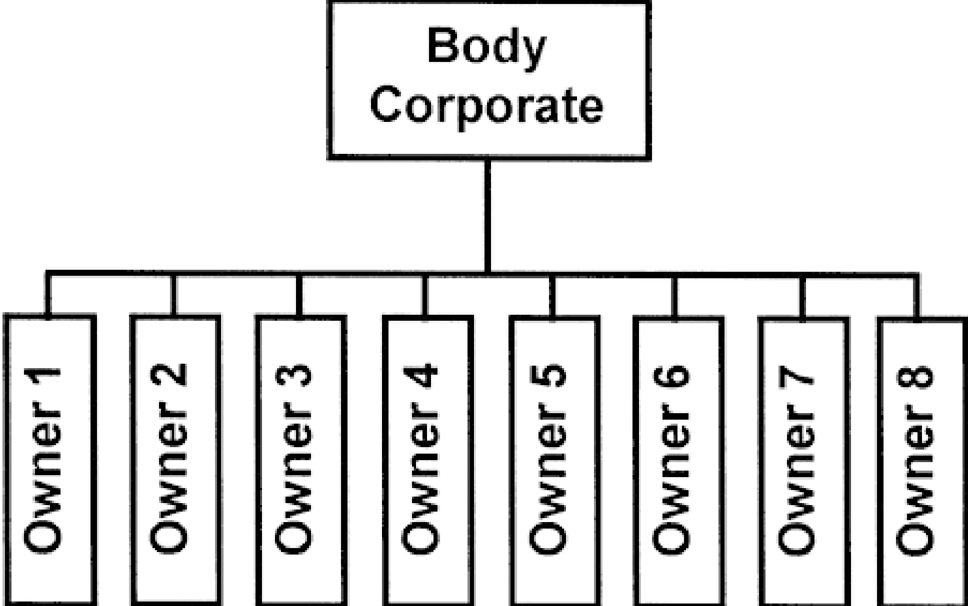
Management Structure



The community management statements and the approach to allocation of lot entitlements are the same as for a surface land based staged development (ie one using a standard format plan).

Last reviewed: 6 April 2013

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[¶22-500] What are volumetric subdivisions?

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Volumetric subdivisions are known in other Australian jurisdictions as "airspace" subdivisions and "stratum" subdivisions, although there is a subtle difference between those types of subdivisions and a volumetric subdivision. In Queensland volumetric format plans of survey are used to achieve a volumetric subdivision. These surveys define land using three dimensionally located points to identify the position, shape and dimensions of each bounding surface. They may divide a lot on a standard, building or volumetric format plan of subdivision and, like all plans, they must comply with directions of the registrar about the required format. They define parcels that are:

- fully enclosed by bounding surfaces, which may be other than vertical or horizontal, and
- above or below, or partly above or below the surface of the ground.

Volumetric format plans create parcels or lots by reference to levels related to a fixed datum. They differ from building format plans that create parcels or lots defined with reference to floors, walls and ceilings. The registrar's directions require the whole of the base parcel being subdivided to be dealt with in the volumetric format plan. In a practical sense, this means that in addition to the volumetric lots (ie those above or below or partly above and partly below the ground surface) there will always be a remainder lot or "base" lot remaining. This remainder lot contains those parts of the original lot that remain after the volumetric lot or lots have been excised. Paragraph 10.14 of the registrar's directions shows how a volumetric lot and a remainder lot are defined in practice. The registrar's directions can be accessed here: www.nrm.qld.gov.au/property/titles/rdpp/pdf/rdpp.pdf.

It is this requirement for a remainder lot, as well as the requirement for volumetric lots to be "fully enclosed", that distinguishes the Queensland approach from that in other Australian jurisdictions. Also, the Queensland volumetric system is "statutory" based, whereas in New South Wales "stratum subdivisions" have always been effected in reliance upon common law principles that "land" included the airspace above the surface. In Victoria "stratum subdivisions" have been recognised by statute for over 30 years.

Law: *Land Title Act 1994*, s 49D.

Last reviewed: 6 April 2013

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[¶22-550] Practical applications

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In practice, the volumetric subdivision is a very useful project structuring mechanism. In its simplest application, it allows a building to be subdivided into lots (without common property and without a body corporate) which can be disposed of independently. This enables the creation of separate lots for separate component use areas of the building (eg retail, hotel and residential), thus separating the different uses without involving a body corporate. In the case of the residential component (ie a volumetric lot comprising residential apartments), this can be further subdivided into lots and common property (with a body corporate) by means of a building format plan of subdivision. However, the other components (eg the retail and hotel components) are not involved in the body corporate. Common services and common use areas are dealt with by means of a building management statement (see ¶22-650). This type of subdivision would usually occur after the building has been completed, because the definition of lot boundaries would be easier at that time. However, it is possible to use a volumetric subdivision to define airspace that has no relationship to a building. Sometimes a lot within a proposed building is defined with the intention that the building will be constructed in the future to correspond with the lot boundaries. Generally speaking, this approach should be avoided because of difficulty in building the structures precisely in line with the boundaries.

Volumetric subdivisions, or volumetric boundary definitions, can also be used in the following circumstances:

- to dedicate a road limited in height and depth (eg a road passing through a building)
- to define an ``airspace'' easement
- to exclude a parcel of airspace from a title (eg where a covered bridge connects two buildings by passing above the surface of a parcel of land separating the two buildings)
- to define a volumetric parcel for leases
- to define airspace above railway facilities for disposal in leasehold or freehold
- to define a ``tunnel'' under a road connecting two shopping centres or two parts of a golf course
- to connect and consolidate two parcels of land (separated by a middle parcel) by incorporating a layer of airspace — this can be useful for rating or land tax purposes.

Last reviewed: 6 April 2013

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[¶22-600] Registrar's directions

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These directions are currently contained in a document entitled ***Registrar of Titles Directions for the Preparation of Plans*** (see tab at ¶65-100). They deal with:

- Plan forms
- How plans intended for registration must be drawn
- Requirements for sketch plans
- Easements
- Plan formats
- Requirements for standard format plans
- Requirements for building format plans
- Requirements for volumetric format plans
- Common property
- Transferring lots into or out of a community titles scheme
- Staged subdivisions
- Reservation of names
- Termination of community titles schemes
- *Mixed Use Development Act 1993*
- Diagrams
- Specimen plans
- Profits à prendre
- Explanatory plans
- Covenants
- Allocations
- Amendments to plans.

In addition, the directions contain a large number of illustrations and a number of specimen plans. They must be carefully observed when preparing survey plans. However, it is important to note that the directions may change at any time. For this reason, before relying on a print of the directions, a check should be made with the Titles Office to ensure that the particular print is not out of date.

Last reviewed: 6 April 2013

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[¶22-650] Building management statements

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Purpose of a building management statement (BMS)

When the whole or part of a building is subdivided by a volumetric format plan a ***building management statement*** may be registered in respect of that plan. A building management statement is defined as an instrument that:

- identifies lots to which it applies (which must be two or more volumetric lots or one or more volumetric lots and one or more standard lots)
- contains provisions benefiting and burdening those lots, and
- otherwise complies with the requirements of the relevant division of the *Land Title Act 1994* for a building management statement.

A volumetric lot is a lot on a volumetric format plan of subdivision and a standard lot is a lot on a standard format plan of subdivision.

There is a requirement that at least one of the lots to which a building management statement applies must be a lot entirely or partly contained in, or entirely or partly containing, one or more buildings. The lot or lots may be the subject of a building development approval (ie a development approval for a proposed building or buildings). Where, a lot, the subject of a building management statement, is further subdivided, the building management statement applies to each lot created by registration of that plan.

The lots to which a building management statement applies must form a single, continuous area of land, although this is taken to be the case even if there is a road or watercourse within the external boundaries of the area comprising the lots. Furthermore, the registrar can waive this requirement if satisfied, on reasonable grounds, that all the lots are located within an area that is sufficiently limited to ensure the effective and efficient application of the building management statement provisions of the Land Title Act. This requirement applies to the combination of lots (ie the whole of the land in the plan to which the building management statement applies). In itself, it does not prevent a lot within the plan having a number of parts.

It does not matter if all the lots the subject of a building management statement are owned by the same person or subsequently become owned by the same person.

The statement is only extinguished if the registered owner asks the registrar to extinguish it.

Registration of BMS requirements

Before the building management statement can be registered, it must be signed by the registered owners or lessees of all the lots to which the statement applies.

In addition, a Form 18 General Consent (mortgagee consent) from each registered owner's mortgagees will be required to be submitted to Department of Environment and Resource Management (DERM) at the time.

There are currently no detailed requirements in the registrar's directions relating to the format for a building management statement.

There are things that a building management statement ***must*** contain and things that it ***may*** contain. It **must** contain provisions about:

- the supply of services to lots
- rights of access to lots
- rights of support and shelter
- insurance arrangements.

It **may** contain provisions about:

- establishment and operation of a management group
- imposition and recovery of levies, how levy amounts are to be kept and how levy amounts are to be spent
- property maintenance

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- architectural and landscaping standards
- dispute resolution
- rules for common services and facilities
- administrative arrangements
- arrangements for accomplishing the extinguishment of the statement
- proposed future development.

The *Body Corporate and Community Management Act 1997* (BCCM Act) makes it clear that a right of access, support or shelter, or other right in the nature of an easement, under a building management statement may operate according to its terms, and may be effective, despite the absence of a formal registered easement establishing the right. This removes the need to create a wide range of easements throughout the building to cater for shared equipment, services or facilities, or where a piece of equipment or facility is situated outside the user's title boundaries. However, the right and relevant conditions must be clearly specified in the building management statement. Finally, a dispute resolution provision in a building management statement may operate to require the referral of a dispute arising under the statement other than to a court. However, the provision is ineffective to the extent that it purports to operate to stop final determination of the dispute in a court of competent jurisdiction.

Example form of BMS

The Queensland Department of Natural Resources and Mines has prepared a generic form of building management statement for use in relation to volumetric format plans. This form can be obtained from their website at www.nrm.qld.gov.au.

Notes to providing a BMS

The following should also be noted about building management statements:

- A reference to the statement is recorded on the indefeasible title for each lot to which it relates.
- The registrar is not obliged to examine, but may examine, a building management statement for its validity, including, in particular, its consistency with any plan of subdivision, or its compliance with the requirements for a building management statement.
- A statement may be amended by registering an instrument of amendment, but an amendment cannot change the lots to which it applies. The owners of all the lots to which the statement applies must sign the instrument.
- A statement may be extinguished in whole or in part by registering an instrument of extinguishment or instrument of part extinguishment. The owners of all the lots to which the statement applies must sign the instrument and all registered mortgagees must consent in writing by way of a Form 18 General Consent.
- A statement may apply to a lot that comprises scheme land for a community titles scheme. In this event the original statement and any instruments are signed by the relevant body corporate.
- If a building management statement applies to scheme land for a community titles scheme:
    – the building management statement is binding on the community titles scheme, and
    – registration of the statement does not, and can not, give the body corporate of the scheme an interest in any particular lot in the scheme.
- If the building management statement provides for the establishment and operation of a building management group, a decision made by the management group under the statement is binding on the community titles scheme.
- A registered building management statement is taken not to be registered under the BCCM Act to the extent it includes a prohibition, requirement or restriction that, under the *Building Act 1975*, Ch 8A, Pt 2, has no force or effect (ie prohibitions on supporting sustainable housing).
- A building management statement may be poorly drafted by, for example, leaving out a payment trigger to allow for the efficient collection of levies from owners.
- A building management statement created at the start of the development under the original owner may not contain the clauses necessary to provide for a harmonious enjoyment of common property between, for example, commercial lot owners. An example being where each commercial

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lot has access to a grease trap and pays for it to be cleaned while only one out of five lots actually uses the grease trap.
• A building management statement is amended much like a registered lease in that successive Form 13 Amendments documents must be drafted, executed by the parties and registered at the Titles Office. Essentially, this means that a practitioner wishing to find the most current building management statement will need firstly to search the common property title, then search the building management statement and each amendment before reading those documents together.
• It is possible to amend a building management statement by lodging a Form 13 Amendment which effectively wipes out clauses 1 to x and replaces those with the new clauses contained within the amendment form itself. Clean and DERM-compliant updated plans would feature at the back of the statement as needed.

Law: *Land Title Act 1994*, s 54A to 54J. Note new s 54AA and 54DA.

Last reviewed: 26 September 2013

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[¶22-700] Further subdivisions

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The *Land Title Act* allows for a range of further subdivisions to occur. The different plan formats impose practical limitations, but generally speaking, the range is extensive and there is a high degree of flexibility. Unfortunately, the various options are not all obvious from the wording of the legislation. According to the registrar's directions, a standard format plan may subdivide:

- a lot or lots and/or common property created on a standard format plan
- that part of common property created on a building format plan which is located outside the building, and
- the remainder lot or lots that are described on a volumetric format plan.

However, s 49B(3) of the *Land Title Act* says a standard format plan cannot create a lot from common property that was created under a volumetric format plan of subdivision. The directions also say that a building format plan may subdivide:

- a lot or lots and/or common property created on a standard format plan
- a lot or lots and/or common property created on another building format plan, and
- a lot or lots and/or common property created on a volumetric format plan.

Generally speaking, a building format plan cannot be used to subdivide a base parcel that consists of both standard and volumetric lots. The exception relates to certain circumstances involving volumetric lots that were created to cover certain encroachments. (For further information about these exceptions, see cl 9.20.5 (which refers back to cl 9.16) of the registrar's directions. A volumetric format plan may subdivide:

- a lot or lots and/or common property created on a standard format plan
- a lot or lots and/or common property created on a building format plan, and
- a lot or lots and/or common property created on another volumetric format plan.

Law: *Land Title Act 1994*, s 49B, 49C, 49D.

Last reviewed: 6 April 2013

[¶22-750] Current problems

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While volumetric subdivisions are common in New South Wales and Victoria, they are relatively uncommon in Queensland. As a consequence, experience with these types of subdivisions is limited. This has resulted in local government and other public authorities being ultra cautious when considering these types of subdivisions. Their approach has not been helped by a failure of the *Land Title Act* to address four important issues:

1. Fire safety concerns that arise when a ``boundary'' is drawn through a building. In particular, whether a fire rated wall is required along the boundary line. The futility of this can be demonstrated by the fact that an otherwise safe building is not made less safe because someone draws a line through a plan at the titles office. Also, the same building can be subdivided by a building format plan of subdivision by drawing exactly the same line, but without compromising fire safety.
2. Fire safety concerns about emergency egress where the egress path from one part of the building is through another part of the building in different ownership.
3. Access concerns where, for example, a volumetric lot 20 storeys up in the air has no direct street access. Is access to the street via rights conferred in a building management statement sufficient for approval purposes?
4. Town planning concerns arising from the fact that subdivision of the building may result in part of the building being below the permitted FSR and thus having further development potential, while the other part of the building is well above the permitted FSR. To approve the subdivision may open up the opportunity for further development that will bring the entire site above the permitted FSR. This same issue does not arise with a subdivision under a building format plan, because the underlying parcel (the scheme land) remains intact for town planning purposes.

It is interesting to note that the fire safety issues were addressed in both the *South Bank Corporation Act 1989* and the *Mixed Use Development Act 1993*, which are the other two pieces of Queensland legislation which expressly allow airspace subdivisions. They are not addressed in the *Land Title Act*. However, as more experience is gained and minor adjustments are made to the legislation these problems are likely to disappear and the full potential of airspace subdivision will be available in Queensland.

Law: *South Bank Corporation Act 1989*, s 39A *Mixed Use Development Act 1993*, s 214.

Last reviewed: 6 April 2013

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[¶23-100] Development permit

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The first step in planning for a project is to determine whether a development permit is required to undertake the project. Because of the wide definition of "development" in the *Sustainable Planning Act 2009* (SPA), it is safe to assume that all projects will be development within the meaning of SPA. Under SPA, all development is ***exempt development*** unless it is ***assessable development*** or ***self-assessable development***. If the development is exempt development, then no permit is needed and the development need not comply with any particular rules. If the development is assessable development, then there are requirements under the SPA that a developer must comply with. A development permit is obtained by making application to an assessment manager. The assessment manager will carry out the assessment process called IDAS (Integrated Development Assessment System).

In the case of large staged projects a "preliminary approval" will be useful because it effectively maps out the stages and approvals required at various times. To determine what is assessable development, self-assessable development and exempt development reference should be made to the Sustainable Planning Act and Sustainable Planning Regulation 2009.

Law: *Sustainable Planning Act 2009*, Ch 6 Integrated Development Assessment System (IDAS).

Sustainable Planning Regulation 2009.

Last reviewed: 6 April 2013

[¶23-150] Building approval

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Building work is now development under the *Sustainable Planning Act 2009* (SPA). Building work is also widely defined in s 10 of SPA. A development permit is therefore required to carry out building work. Assessment of an application to carry out building work is done using the Integrated Development Assessment System (IDAS) under Ch 6 of the SPA. When a development permit is obtained the *Building Act 1975*, the Building Regulation 2006 and the *Building Code of Australia* apply to the work.

Law: *Sustainable Planning Act 2009*, s 10.

Last reviewed: 6 April 2013

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[¶23-200] Plan approval

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Under the *Land Title Act 1994*, s 50(i), a plan of subdivision providing for the division of one or more lots, or the dedication of land for public use, must have been approved by the relevant planning body concerned before it can be registered. A plan of subdivision involving the reconfiguring of a lot will most likely fall within the definition of “development” under the *Sustainable Planning Act 2009*. The application for a development permit will be assessed using the Integrated Development Assessment System (IDAS) under Ch 6 of the SPA. Reconfiguring a lot under the Land Title Act will be exempt development if the plan of subdivision necessary for the reconfiguration:

- is a building format plan of subdivision, or
- does not require the approval of a relevant planning body under s 50(h) of the Land Title Act.

Although the building format plan of subdivision does not need a development permit, this does not overcome the need for the relevant planning body (ie the local government or urban land development authority) approval to be endorsed on the plan (and in the case of a community titles scheme, the community management statement) before it can be registered. The plan can be given to the relevant planning body for endorsement of this approval at any time. The plan must be consistent with any development permit relevant to the plan. The plan must then be lodged for registration within six months after the approval is given.

Law: *Land Title Act 1994*, s 50 *Sustainable Planning Act 2009*, Ch 6.

Last reviewed: 6 April 2013

[¶23-500] Property Occupation Act 2014

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The *Property Occupations Act 2014* was passed by the Qld Parliament on 7 May 2014 and came into effect on 1 December 2014.

Contracts formed prior to the commencement of the Act will continue to be dealt with under the PAMDA provisions while a contract formed on or after the commencement date will be subject to the new Act.

The transitional provisions can be found in Pt 14 of the Act.

Under the new Act, the PAMDA Form 30c no longer exists but rather a statement in the form set out at ¶61-230 will need to be incorporated into the contract above the buyer's signature. The correct wording is incorporated in the REIQ contracts available on the QLS website.

The new Act removes the requirement for a BCCM Form 14 to be attached to a relevant contract.

Last reviewed: 11 February 2015

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[¶23-510] Land Sales Act

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One of the things that the *Land Sales Act 1984* (LS Act) seeks to achieve is to restrict sellers of freehold land from selling a **proposed allotment** unless certain conditions are satisfied regarding approval of the subdivision that will create the proposed allotment. An agreement made in contravention of this provision is void and the seller may be liable to a criminal penalty. However, a **lot** within the meaning of the Land Sales Act is excluded from the definition of **proposed allotment**. In turn **lot** is defined as including a **proposed lot**, which is defined in the following terms:

"proposed lot" means that, which will become a registered lot upon —

(a) …
(b) registration of a plan and recording of a community management statement for a community titles scheme under the *Body Corporate and Community Management Act 1997*.

This effectively means that the Land Sales Act does not restrict the sale of a proposed community titles lot. It follows that a seller can enter into an off-the-plan contract at any time during the development process, even before the necessary consents are obtained. However, it should be noted that entry into the contract too early may be risky in that the anticipated approvals may not be obtained and aspects of the project may have to be varied to achieve the approvals. These variations may then have contractual implications such as the triggering of a requirement to issue a further statement to all current buyers. For some, but not all developers, the rewards are worth the risk. Naturally if your developer client has received approval, always ask for a copy of that approval as part of the drafting process for the community management statement and caretaking agreement if applicable for the development.

Another thing that the Land Sales Act seeks to achieve is a degree of disclosure to buyers where a **proposed lot** is involved. Clearly, this applies to a proposed community titles lot. This obligation to disclose is in s 21 of the Land Sales Act, which requires a statement in writing to be given to a buyer which:

- clearly identifies the lot being purchased
- states the names and addresses of the prospective seller and the prospective buyer
- states whether any representation, promise or term has been made or offered by the prospective seller or their agent relating to the provision of a certificate of title for the lot
- clearly states the particulars of any such representation, promise or term, and
- states the date on which it was signed.

This statement is normally required to be separate from the contract. However, if the seller is also required to give a **disclosure statement** under s 213 of the BCCM Act and the above information is incorporated in that disclosure statement, then that is sufficient to satisfy the Land Sales Act disclosure requirement **and** the obligation to have a separate statement does not apply. Failure to comply with the Land Sales Act disclosure requirements entitles the buyer to avoid the contract. There is also an obligation under the Land Sales Act to give a rectification statement in certain circumstances.

Finally, the Land Sales Act also seeks to protect a buyer's deposit money. Section 23 requires all money paid pursuant to a contract for sale of a proposed lot to be paid to the Public Trustee unless the parties agree to the money being paid directly to:

- a law practice
- a real estate agent licensed under the *Property Agents and Motor Dealers Act 2000*, or
- a real estate agency in which a real estate agent carries on business.

A contrary provision in the contract is void and failure to comply with this requirement is an offence.

Law: BCCM Act, s 213

Land Sales Act 1984, s 6(1), 21, 22, 23, 25(1)

Last reviewed: 23 July 2014

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[¶23-525] Deposits

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Deposits under off-the-plan contracts are usually paid or secured in one of three ways:

- in money
- by bank guarantee
- by deposit bond.

If deposits are paid in money, then they must be held by a qualified stakeholder (see ¶23-510). A decision needs to be made as to who is to be the stakeholder. The stakeholder is usually required to invest the deposit on the basis of agreed arrangements about payment of interest.

Developers and their lawyers need to keep the following in mind:

- If the developer's lawyer is the nominated stakeholder, then if the buyer defaults the lawyer will most likely have to cease acting for the developer on that particular sale. This is because, as stakeholder, the lawyer will at that point owe a duty to both the seller and the buyer in relation to the deposit, and this conflict can usually only be resolved by the lawyer ceasing to act for the seller.
- If during the course of the transaction it were to be necessary or desirable to call on a bank guarantee or deposit bond, the funds should be payable to the stakeholder and not the seller, otherwise s 23 of the *Land Sales Act 1984* may be breached. Therefore, bank guarantees and deposit bonds should be made in favour of a stakeholder and not the seller.

Contracts sometimes provide for discounts, rebates or penalties in certain circumstances. For example:

- "If the buyer settles on time the price will be reduced by 5%."
- "If the buyer does not settle on time the buyer must pay interest on the balance of the price."
- "The seller will pay the buyer's stamp duty."
- "The seller agrees to rebate the amount of $30,000 upon settlement."

Occasionally, after the contract is signed the seller will agree (usually by letter) to compensate the buyer for something by reducing the price by a specified amount.

If the deposit paid is 10% of the gross contract price (ie the contract price before any reduction or rebate), then the question arises whether the "purchase price payable" (within the meaning of the definition of "deposit" in s 71 of the *Property Law Act 1974*) is the gross price or the discounted price. If it is the discounted price, the deposit exceeds 10% of the price, arguably making the contract an instalment contract for the purposes of Pt 6 Div 4 of that Act. An instalment contract—

- imposes restrictions on the right of the seller to rescind
- attracts a restriction on the seller mortgaging the land
- gives the buyer the right to lodge a caveat, which may impede the seller's ability to further finance the development
- gives the buyer the right, in certain circumstances, to require a conveyance of the property
- gives the buyer the right to require the seller to deposit the title deeds and an instrument of transfer with a prescribed authority.

There are a number of cases that assist in deciding how to deal with discounts, rebates and penalties. In *Starco Developments Pty Ltd* v *Ladd* a contract was varied by the parties (as to the date for settlement) in consideration of the purchaser paying interest on the unpaid price at 22% per annum from a specified date and also agreeing to "bear outgoings" from the same date. The court held that the requirement to pay interest resulted in the contract becoming an instalment contract. Although the court did not have to decide the consequences of the outgoings obligation, de Jersey CJ said (at para 10 of his judgment):

> "Because of my view expressed earlier, it is also not necessary to deal with the respondents' separate contention that their becoming obliged to bear additional outgoings brought the case within s 71, although I may say that I did not find that particularly meritorious. I would not be inclined to interpret clause 6 of the addendum as requiring payment of outgoings prior to settlement as they fell due. I would tend to prefer the construction adopted by the learned judge, which left the position as

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> established in the usual way by the original agreements, with the requisite apportionment being made at settlement. But as I have said, it is not necessary for me to express a concluded view on that matter."

This suggests that his Honour would have concluded that moneys to be paid on completion of the contract do not constitute payments within the meaning of the definition of "instalment contract".

In the same case, Thomas JA held that a clause (35) requiring payment of interest "upon demand", and, if not demanded, "upon settlement", did not make the contract an instalment contract. He said at para 24 of his judgment:

> "The respondent also referred to cl. 35 of the contract as a basis for concluding that the contract was an instalment contract. I would reject that submission. Clause 35 did not bind the purchaser to pay any money unless a demand were made. The vendor at no stage made a demand under that clause. In the absence of such a demand, in the event that the vendor kept the contract alive beyond the initial settlement date, money would be payable thereunder only upon settlement. In the event, the parties proceeded not under cl. 35 but by means of the addendum agreement."

In *Moor* v *BHW Projects Pty Ltd*, Mackenzie J held that a contract provision giving a rebate against the price that was effective upon payment of the deposit (being 10% of the unrebated price) had the effect of making the contract an instalment contract. He said at para [31] and [36] of his reasons:

> "It appears to be settled law that if a deposit required in the case of an executory contract is greater than 10% and the purchaser does not have an entitlement to receive a conveyance in exchange for the payment, the contract is caught by the definition of 'instalment contract' in s 71 (*Emlen Pty Ltd v Cabbala Pty Ltd* [1989] 1 Qd R 620, where Ryan J cited earlier authority where the principle was discussed if not authoritatively decided). The issue in this case is one of construction of the contract in light of that principle."

> "The case is not one where the problem [is] whether a variation of the contract has the consequence that there is an instalment contract. It is a case where the issue is construction of the contract as entered into. As a matter of construction of the contract, provided the purchaser carries out the obligation to which she is bound under it to pay the deposit, the price she will have to pay at the time of settlement will be $242,500, not the 'purchase price' of $247,500. The obligation to pay $24,750 deposit is a contractual term. There is an executory contract for the sale of land in terms of which the purchaser is bound to make payment which exceeds the criteria of 'deposit' as defined by the Act without being entitled to receive a conveyance in exchange for payment. There is therefore an instalment contract. It is unnecessary to consider the applicant's other argument in the circumstances, since it is designed only to reach the same conclusion by an indirect route."

Using the reasoning in *Starco Developments* and *Moor*, any rebate of the gross price upon settlement of a contract only takes effect at that time. The gross price remains the same until settlement and at the time of settlement the seller accepts the balance of the gross price less the rebate. This would mean that the "purchase price" referred to in the definition of "deposit" is the gross price because this is the price payable at all times until settlement. Therefore, at no point in time before settlement does the deposit exceed 10% of the gross price.

If the reduction in price is agreed between the parties after the contract has been entered into, then slightly different principles may apply. If the reduction only takes effect as at settlement, then the above principles apply. If it takes effect between the date of the contract and settlement, then the position may be different depending upon whether the arrangement is a "side agreement" independent of the contract or a variation of the contract. If the former, then the contract is arguably unaffected (see *Kaneko* v *Crawford* and *Starco Developments Pty Ltd* v *Ladd*). If it is the latter, then the contract is likely to be an instalment contract.

Law: *Land Sales Act 1984*, s 23

Property Law Act 1974, s 71–76.

.40 Case references: *Starco Developments Pty Ltd* v *Ladd* [1998] QCA 344.

Moor v *BHW Projects Pty Ltd* [2004] QSC 60.

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Kaneko v *Crawford* [1995] QCA 384.

Last reviewed: 6 April 2013

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[¶23-550] Disclosure under BCCM Act

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A seller's disclosure under s 213 of the BCCM Act is an important aspect of off-the-plan sales. It is clearly additional to disclosure under the *Land Sales Act 1984*, although there is a degree of overlap between the two. Section 213 disclosure is dealt with in detail in ¶61-280, so it is not intended to repeat the discussion under this heading. However, one important matter flows from the discussion about disclosure under the Land Sales Act — namely, whether a disclosure statement under s 213 of the BCCM Act needs to be separate from the contract, or whether it can be incorporated as part of the contract. This was not a difficult question under BUGTA, because s 49(3)(b) of that Act clearly allowed the equivalent disclosure statement under that Act to form part of the contract. Furthermore, that was the normal practice under BUGTA. However, there is no corresponding provision in the BCCM Act which allows a s 213 statement to be incorporated in the contract.

An examination of Div 2 Pt 2 Ch 5 of the BCCM Act (being the part in which s 213 appears) suggests that there may be an intention on the part of the legislature that the statement should be separate from the contract. The fact that no provision has been made in the BCCM Act similar to the old BUGTA s 49(3) provision adds some strength to the argument. If one relied entirely on the provisions of the BCCM Act, then, at least as a precautionary measure, one would keep the disclosure statement separate from the contract. However, regard must be had to s 21(3), (5) and (6) of the Land Sales Act, which effectively allow a disclosure statement under that Act to be incorporated in a BCCM Act s 213 disclosure statement that is **not** separate from the contract. This, combined with the fact that s 21(5) and (6) of the Land Sales Act were added to that Act by the consequential amendments in Sch 3 of the BCCM Act as it was originally enacted, makes for a strong argument that a s 213 disclosure statement can be incorporated in an off-the-plan contract.

In practice, s 213 disclosure statements are usually separate from off-the-plan contracts, but they incorporate the s 21 Land Sales Act disclosure statement. In addition, the statements usually contain a range of information additional to that required by s 213 of the BCCM Act to be disclosed. This raises the question whether all of the information in the disclosure statement constitutes the "disclosure statement" within the meaning of s 213(1). If it does, then all of that information will be:

- subject to re-disclosure if it is subsequently found to be inaccurate or it changes
- subject to a warranty in favour of the buyer (see s 216 of the BCCM Act).

It is suggested that a provision be included in the off-the-plan contract to limit the disclosure statement to the material required by the BCCM Act to be disclosed.

For re-disclosure purposes, in *Mirvac Queensland Pty Ltd* v *Horne & Ors* (2009) LQCS ¶90-155, the Supreme Court found that if the vendor or vendor's agent chooses to provide a single disclosure statement to the purchaser in compliance with both the vendor disclosure requirements of s 21 of the Land Sales Act and s 213 of the BCCM Act, then any "further statements" provided to the purchaser pursuant to s 214 of the BCCM Act will not trigger the requirement that the vendor has to provide a further "rectification statement" under s 22 of the Land Sales Act, except in the circumstance where those inaccuracies concern the particulars listed under s 21 of the Land Sales Act.

Law: BCCM Act, s 213

Land Sales Act 1984, s 21.

Last reviewed: 6 April 2013

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[¶23-600] Form of contract

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Because there is no standard or commercial form of contract for off-the-plan sales in Queensland, these types of contracts are usually project-specific. However, most off-the-plan contracts tend to rely heavily on the clauses in the REIQ standard community titles contract (see ¶70-300 and ¶70-305). The contract documentation can be approached in one of two ways:

- a single document covering both the contract conditions and a disclosure statement, or
- a two-document package — one comprising the contract conditions and the other the disclosure statement.

(A sample version of the REIQ form for the disclosure statement is reproduced at ¶70-320.)

In ¶23-550 there is discussion about the need for a disclosure statement to be separate from the contract. Although there is a strong argument that this is not necessary, many practitioners are, as a precautionary measure, keeping the disclosure statement separate until a Court has ruled on the point. Others are keeping the disclosure statement separate because the documentation can be made to look more “user friendly”. This is because the contract conditions can be reduced to a small easily-read document which buyers feel relaxed about signing, while the disclosure statement can be presented more as an “information package”. If carefully prepared the disclosure statement can serve as a useful marketing tool.

Checklist of contractual matters

A well drafted contract for the sale of a **proposed lot** should deal with the following matters:

Payment and handling of the deposit. (The REIQ standard contract conditions are a good guide to the drafting of the deposit provisions. However, protection should be included to deal with discounts.)
The time and place for settlement and what the parties must do at the time of settlement. This clause will also deal with the preparation and stamping of the transfer. (Again, the REIQ standard contract conditions are a good guide to the drafting of the settlement clause.) It is important to note the “deemed term” as prescribed by s 212 of the *Body Corporate and Community Management Act 1997* (BCCM Act) which provides that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed. The deemed term has priority over any other term of the contract relating to settlement.
Time being of the essence and payment of interest in the event that the seller agrees to an extension of time for settlement.
Adjustment of outgoings, including body corporate insurance premiums (which must be paid in the first instance by the developer), land tax and body corporate levies. Retentions are normally prohibited and provision for re-adjustment is common. (Again, the REIQ standard contract conditions are a good guide to the drafting of the adjustment clause.)
Requisitions or objections to title are usually prohibited.
Lot entitlements are disclosed and the buyer is usually precluded from objecting to a variation of plus or minus 5%.
The right to change the building name is usually reserved.
The lot is expressed to be sold subject to the BCCM Act, the by-laws, encumbrances involving a local authority or service authority and other encumbrances disclosed either in the contract or the disclosure statement.
A disclosure statement under the BCCM Act. In some circumstances, disclosure under s 157 of the *Property Occupations Act 2014* may also be required.
A representation exclusion provision.
The obligation of the seller to construct the building (or subdivision infrastructure) in a good and tradesman-like manner, in accordance with identified plans and schedule of finishes. (However, it is common for the seller to reserve the right to make certain changes to the building and/or lot (within specified parameters) and to give a buyer compensation rights if they are materially prejudiced.)

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The entitlement of the seller to cancel the contract in certain circumstances (eg if a buyer insists on compensation, if insufficient pre-sales are effected or if approvals on satisfactory conditions are not forthcoming.)
Passing of risk.
The seller's obligations in relation to defects.
Assignment of manufacturer's warranties (ie in relation to appliances and equipment).
The contract being conditional on registration of the plan within a specified time. Sometimes provision is made for an extension in specified circumstances.
Remedies in the event of breach by the buyer or seller. (The REIQ standard contract conditions are a good guide to the drafting of the default provisions.)
A clause to allow for mutual delay in the event of a natural disaster.
A requirement that a due date must be a business day and, if not, it is moved to the next business day.
The buyer's liability for stamp duty and their own costs, including a stamp duty indemnity in favour of the seller.
Provisions ensuring that contract terms intended to survive settlement continue in force.
Reservation of sale, signage and display unit rights in favour of the seller/developer.
Prohibition against lodgment of caveats, including the grant of a power of attorney to allow the seller to remove any caveat.
A prohibition against assignment by the buyer. (Any on-sale should only be by sub-contract so the seller is not left to deal with a third party.)
A general consent clause to ensure that the contract is conditional on any necessary consent. (The REIQ standard contract conditions are a good guide to the drafting of this consent clause.)
A severance clause.
Provisions dealing with service of notices. (Again, the REIQ standard contract conditions are a good guide to the drafting of the notices provisions.)
A jurisdiction clause.
A warranty from the buyer about being a "foreign person" under the *Foreign Acquisitions and Takeovers Act 1975*, together with an obligation on the buyer to provide information necessary for the purposes of that Act.
A trustee clause (in case the buyer is a trustee).
A guarantee clause (or separate form of guarantee) in case the buyer is a company.
Interpretation provisions.
The incorporation of special conditions.

The contract will also have a Schedule containing variable information about the seller's agent, seller, seller's solicitor, buyer, buyer's solicitor, lot sold, purchase price, deposit, settlement date, guarantors and the "foreign person" status of the buyer.

As regards the disclosure statement requirements, these are fully dealt with in ¶61-280. Form B165 (¶74-560) is a checklist for a seller's solicitor taking instructions from a seller for an off-the-plan contract.

Law: *Body Corporate and Community Management Act 1997*, s 212, 213, 218.

Property Occupations Act 2014, s 157.

Last reviewed: 6 April 2013

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[¶23-625] Information sheet and warning statement

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Warning statement to be attached to contract for proposed lot

The *Property Agents and Motor Dealers Act 2000* (PAMDA) requires a warning statement to be given to a buyer under a "relevant contract". Exactly which contracts will be "relevant contracts" for the purposes of PAMDA was tested in *Vale 1 P/L as Trustee for the Vale 1 Trust* v *Delorain P/L as Trustee for the Delorain Trust* [2010] QCA 259 which found that a contract between two commercial parties was a "relevant contract" attracting PAMDA. However, the case of *Ross Nielson Properties Pty Ltd* v *Orchard Capital Investments Ltd* (2011) LQCS ¶90-168; [2011] QCA 49 together with changes made to the PAMDA in late 2010 in light of *Delorain* has shown the court will draw a distinction as required.

An off the plan sale of a proposed lot within a scheme to come into existence would be a relevant contract requiring a warning statement to be attached to the contract before it is given to the buyer for signing (s 368A). A relevant contract is a contract for the sale of Queensland residential property (see ¶61-235), other than a contract formed on a sale by auction. To be "formed on a sale by auction" the property must be sold by outcry on fall of the hammer or directly at the end of another similar type of competition for purchase.

What is meant by "attached" to the relevant contract

Pursuant to the definition in s 205A of the *Body Corporate and Community Management Act 1997* (BCCM Act), the definition of attached in relation to an information sheet and a contract means attached in a secure way so that the information sheet and the contract appear to be a single document (for example, binding or stapling the information sheet to the contract). If the documents are given by way of electronic communication, then "attached" will mean the information sheet and contract are given at the same time (for example in a single email). If the information sheet and contract are being faxed to the buyer then both the documents should be faxed as near as possible to the same time having regard to the normal operation of fax machines. Care must be taken to ensure that the parties adhere to the requirements set out in the *Electronic Transactions (Queensland) Act 2001*.

Information sheet to be attached to contract for proposed lot

As well as the seller's obligation to provide a warning statement to the relevant contract, the seller must also attach an information sheet that is in the approved form to the contract prior to giving the contract to the buyer. This information sheet is given because the property the subject of the contract is a unit sale. This requirement is prescribed under the Property Agents and Motor Dealers Act s 368A(2)(b). Consideration should also be made to providing the information sheet on the front of an option agreement.

The same requirement (to attach an information sheet to the contract) relating to a proposed lot that is non-residential property can be found under s 213(5) and (5A) of the BCCM Act. Further, the seller must give the proposed buyer a clear statement directing the proposed buyer's attention to the warning statement and proposed relevant contract and the information sheet (s 368A(2)(c)(ii) PAMDA).

Disclosure statement to be provided for proposed lot

The BCCM Act also requires the seller, prior to the buyer signing the contract for a proposed lot, to provide a disclosure statement in accordance with s 213(1) to (4) disclosing important information about the proposed lot and scheme to come into existence to the buyer. All these requirements on the seller are to ensure that the buyer is given relevant information about the property before it enters into a binding contract with the seller to purchase the property. If the proposed lot forms part of an option, a disclosure statement should be provided.

Buyer's right to terminate for non-compliance

The contract, if not settled, is subject to termination by the buyer in any of the following circumstances:

- If the disclosure statement requirements in s 213(1), which includes s 213(2), 213(3) and 213(4) by virtue of the definition in s 205A, are not complied with.
- If the contract does not relate to residential property and s 213(5) of the BCCM Act has not been complied with.
- If the contract is a relevant contract and an information sheet and warning statement are not given in accordance with s 368A and s 368A(2)(b) of PAMDA.
- If the contract is a relevant contract and a clear statement directing the buyer's attention is not given in accordance with s 368(2)(c)(ii) of PAMDA.

Express requirements relating to termination

The BCCM Act was amended on 1 October 2010 to incorporate a new s 213A which provides express provisions relating to termination rights of the buyer for contraventions of s 368A(2)(c)(ii) of the *Property Agents and Motor Dealers Act 2000* (ie failure to direct the buyer's attention to the warning statement, contract and information sheet).

It is suggested under s 368A(2)(c)(ii) of PAMDA that if the relevant contract with the disclosure statement was enclosed by a covering letter, the letter could include a clear statement as follows:

> "Your attention is drawn to the warning statement, information sheet and proposed relevant contract accompanying this letter."

A secondary way of ensuring that the documents are received and executed in the correct order may be to have the buyer sign a buyer's acknowledgement which lists the documents as follows:

(a) agent's disclosure (PAMD Form 27c)
(b) disclosure statement
(c) PAMD Form 30c
(d) BCCM Form 14

and acknowledge that the documents were received in that order.

Under s 213A of the BCCM Act, if the seller or its agent fails to give a clear statement relating to an information sheet in the approved form, the buyer may terminate the contract at any time before it settles by giving a signed and dated notice of termination to the seller. The notice must state that the contract is terminated under this section.

Termination is subject to 90 days time limit

The termination must happen not later than 90 days after the day the buyer receives a copy of the contract from the seller. Further, interestingly the buyer may not terminate the contract if the buyer signed the information sheet attached to the contract before the buyer signed the contract (by signing the information sheet it is implied that the buyer was aware of the information sheet before the buyer signed the contract).

If the contract is terminated, the seller must within 14 days after the termination, repay the buyer any amount paid to the seller towards the purchase of the proposed lot. Failure by the seller to repay the buyer will attract a penalty. If the contract is terminated, the seller or the seller's agent is liable to the buyer for the buyer's reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract. The amount owed to the buyer are recoverable as a debt.

The most up-to-date version of the approved forms

A failure to attach the most up-to-date version of the information sheet to the contract of sale will not necessarily constitute a breach of s 213(5), entitling the buyer to cancel the contract. If the differences between the attached version and the latest version of the sheet are inconsequential, such that the vendor has substantially complied with its obligations under the subsection, then that will be sufficient (*Bluestone Holdings Pty Ltd v Juniper Property Holdings No 14 Pty Ltd*). However, a prudent practitioner would avoid the potential breach by obtaining the most up-to-date approved version of the information sheet and warning statement.

Historical interpretation of BCCM Act provisions (some provisions have been repealed since)

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Before the 2005 amendments to the BCCM Act, there was some doubt as to whether a buyer had to establish **both** failure to give the disclosure statement and failure to properly attach the information sheet and disclosure statement. This arose because of use of the word “and” rather than the word “or” in the old s 213(6) of the BCCM Act. While the decision of White J in *Celik Developments Pty Ltd v Mayes* clarified the position, the problem was entirely resolved with the introduction of the current wording of s 213(6) by the 2005 amendments. These 2005 amendments also resolved the problem highlighted by the Queensland Court of Appeal decision in *MNM Developments Pty Ltd v Gerrard*, where the court held that a warning statement sent as part of a continuous facsimile was not “attached” to the contract as required by the then s 213(5) of the BCCM Act, and the buyer had the right to cancel the contract.

Law: BCCM Act, s 205A, 213, 213A

Property Agents and Motor Dealers Act 2000, s 368A, 368A(2)(b), 368A(2)(c)(ii).

.40 Case references: *Celik Developments Pty Ltd* v *Mayes* [2005] QSC 224 (Qld Supreme Court, White J, 19 August 2005)

MNM Developments Pty Ltd v *Gerrard* (2006) LQCS ¶90-130; [2005] QCA 230 (Qld Court of Appeal, 24 June 2005); *Bluestone Holdings Pty Ltd* v *Juniper Property Holdings No 14 Pty Ltd* (2008) LQCS ¶90-135; [2006] QSC 219.

Last reviewed: 6 April 2013

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[¶23-630] Non-residential property transactions

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For all non-residential property transactions, the seller must have an information sheet in the approved form attached to the contract when the contract is given to the buyer in accordance with s 213(5) of the BCCM Act. Depending on how the seller intends to provide the contract to the buyer, the word "attached" to the contract has a few meanings under s 205A of the Act.

By facsimile

If the seller intends to fax the contract and the information sheet to the buyer, then in order to comply with s 213(5) by attaching the information sheet to the contract, the seller must ensure that the documents are faxed as near as possible to the same time having regard to the normal operation of fax machines.

By electronic communication, other than facsimile

The information sheet and contract must be given at the same time, for example by including both documents in a single email. The use of electronic communication under this section of the Act is subject to the *Electronic Transactions (Queensland) Act 2001*.

Any other way

If the seller gives the buyer the information sheet with the contract in a way other than by electronic communication, the seller must attach the information sheet to the contract. To "attach" means to attach in a secure way so that the information sheet and contract appear to be a single document (eg by stapling or binding). The use of a paper clip that can be easily removed would not be adequate because it is not secure enough.

Law: BCCM Act, s 205A, 213(5)

Last reviewed: 6 April 2013

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[¶23-635] Residential transactions

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Where a "relevant contract" (ie most residential contract transactions) is involved, then the seller must provide both an information sheet and a warning statement attached to the contract to the buyer (see ¶23-625 for the meaning of "relevant contract"). The meaning of "attached" is also explained at ¶23-625.

Directing the buyer's attention to the warning statement & information sheet

If the contract is given to the proposed buyer for signing, the person giving it must direct the proposed buyer's attention to both the warning statement and the information sheet. If the contract is given by way of electronic communication or faxed, then there must be included with the proposed relevant contract a statement directing the proposed buyer's attention to the warning statement and information sheet, as well as to the proposed relevant contract. It is suggested under s 368A(2)(c)(ii) of PAMDA that the following wording may be used in a covering letter to the enclosed documents:

> "Your attention is drawn to the warning statement, information sheet and proposed relevant contract accompanying this letter."

Case example — not necessary that the actual words "direct attention" be used

In the case of *Collis* v *Currumbin Investments Pty Ltd* (2009) LQCS ¶90-154, the Supreme Court determined that it is not necessary in order to comply with the PAMDA that the actual words "direct attention" be used to draw a purchaser's attention to the Form 30c Warning Statement. By including a covering letter as the first page of enclosed documents, and the letter prominently referring to the enclosed Warning Statement as one of importance, it was determined in this case that the seller did in fact draw the purchaser's attention to the Warning Statement.

Case example — insufficient to say that "Contract of Sale" was enclosed

In *SDW Projects Pty Ltd* v *Modi & Ors* (2012) LQCS ¶90-182; [2012] QSC 400, Lyons J commented on the correspondence used by Modi and later Clements by way of cover letter to the buyers. Both Modi and Clements noted in their correspondence that the "Contract of Sale and Disclosure Statement" were enclosed. At no time was the buyer's attention directed to the warning statement (PAMD Form 30c) or the information sheet (BCCM Form 14).

In fact, the warning statement, the information sheet and the contract were all contained in a booklet, as a composite document. However, the letters referred specifically to the "Contract of Sale", rather than the booklet as a whole: [38]–[39].

No "clear statement" directing the buyer's attention was made. The letters enclosing the PAMD Form 30c, BCCM Form 14 and relevant contract drew attention to the enclosures (by saying "for your attention" or by implication) to the buyer and/or the buyer's solicitor; however, this was held by Lyons J to fall short of the necessary requirements.

His Honour stated at [35] that:

> "the parties are not bound until the buyers receives … a copy of the contract, the warning statement and the information sheet in a way which satisfied two conditions. One is a condition containing several elements, they being that the warning statement and information sheet are attached to the contract; and that the warning statement must be the first or top page of the document created by the attachment with the information sheet appearing immediately after it …. The second condition is that the seller directs the attention of the buyer to the warning statement, the information sheet and the contract. In my view both conditions must be satisfied before the parties are bound by the contract."

Correction of errors

Provision is made in s 368B of PAMDA for the correction of errors before the proposed relevant contract becomes a relevant contract. The seller or its agent may notify the proposed buyer of the failure to comply

and state that the proposed relevant contract is withdrawn. The seller or its agent must then advise whether new documents complying with the requirements of s 368A(2) will be given to the proposed buyer.

Consequences of non-compliance

Failure to comply with the requirements of s 368A(2) is an offence under PAMDA that carries a maximum penalty of 200 penalty units. It is a defence to prosecution for such an offence if the seller or the seller's agent proves that they gave a notice under s 368B of PAMDA.

Failure to direct the buyer's attention to the warning statement and information sheet before the buyer signs the contract is not only an offence under PAMDA but also allows the buyer the opportunity to terminate the contract subject to certain circumstances and within a limited time period under BCCM Act. For details of the buyer's termination rights, refer to ¶23-625.

In *SDW Projects Pty Ltd* v *Modi & Ors* (2012) LQCS ¶90-182; [2012] QSC 400, the consequences were difficult for the practitioners involved. Lyons J gave the declarations sought by the plaintiff that the letters enclosing the contracts did not direct the buyer's attention as required and accordingly the plaintiff developer was unable to take issue when the contracts were terminated by the buyers. The plaintiff developer elected to sue the solicitors who had acted on its behalf in preparing and forwarding the contracts to the buyers. The outcome of this case impacted negatively on the negligence cases against the practitioners pursued by the plaintiff developer.

Law: *Property Agents and Motor Dealers Act 2000*, s 368A, 368A(2), 368A(2)(c)(ii), 368B,

Body Corporate and Community Management Act 1997, s 213A.

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[¶23-650] Describing the proposed lot

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In the case of most off-the-plan sales, at the time contracts are signed the survey plan is not available in its final form. Sometimes a draft survey plan is available, but in many cases draft floor plans are all that are available. This raises the questions:

- How thoroughly does the lot being sold need to be described?
- To what extent can the completed lot differ from the lot described in the contract?

To a large degree the answers to these questions will be determined by the provisions of the contract. Where the contract does not deal with these matters, or it does not deal sufficiently with them, then the general law will need to be applied. This starts with the principles laid down in *Flight* v *Booth*. In that case the court held that an innocent misdescription on a material and substantial point will void the contract (as opposed to merely giving a right to damages) if it may reasonably be supposed that, but for the misdescription, the buyer might never have entered into the contract.

Although there is clear authority for enforcement of contracts for the sale of "proposed" lots, an understanding of the relevant cases and the principles that flow from them is important before any attempt is made to draft an off-the-plan contract.

The pro-enforcement cases start with *Imamovic* v *Kalamalka Constructions Pty Ltd*, where there was a contract for the sale of lots in an unregistered plan of subdivision of land. These lots were identified by reference to a "proposed plan", a copy of which was annexed to the contract. The plan as subsequently registered showed the lots slightly reduced in size; the boundaries of one had also been altered. The buyer did not object to these variations and wanted to complete the contract, but the seller maintained that the land in the lots as registered was not the same as the land in the lots described in the contract. The buyer therefore sought specific performance. The trial judge in the Supreme Court of Queensland granted specific performance and this was affirmed by the Full Court. On appeal to the High Court the decision of the Full Court was affirmed. In a joint judgment of Barwick CJ and Gibbs J (with which the other three judges agreed) it was said (at p 246):

> "On the proper construction of the contract, in our opinion, the purchaser agreed to buy lots bearing the numbers of the lots in the contract as those lots would appear in the approved plan of subdivision, subject to their being of substantially the same dimensions and substantially in the same position on the land, and the vendor was bound thereby to sell the lots of those numbers on the approved plan. It must have been apparent to both parties that the proposed plan could not fix the position or the dimensions of the lots and that it was inevitable that until the plan had been approved and registered the certainty of the dimensions and of the specific locations of the lots could not be finally determined. But it is, in our opinion, clear that the purchaser intended to buy allotments in an approved plan of subdivision, for the contract could not otherwise have been completed. It therefore seems to us that any disparity between the dimensions and position of the lots on the proposed plan and the dimensions and position of those on the registered plan will not be material if the purchaser is willing to accept them. Indeed, even if he were not, unless there was such a substantial difference either in dimensions or in location as would warrant the conclusion that the subject matter of the contract was not being fulfilled, the vendor could in our opinion enforce specific performance compelling the purchaser to accept the lots as on the approved plan."

The same appellant at about the same time suffered the same fate in another High Court appeal, *Imamovic v Exton*. The facts were substantially the same as those in the other appeal, except that one of the lots was repositioned some 25.35 links from its location on the proposed plan. This constituted a more substantial variation than those involved in the other appeal and the Full Court of the Supreme Court of Queensland refused specific performance as to this lot because of the extent of the variation. But the High Court, constituted by the same judges, reversed this decision. The reasons were the same as those in the other appeal.

Even where a matter of substantial variation is involved, the courts will not always allow a buyer to rescind. In *Liverpool Holdings Ltd* v *Gordon Lynton Car Sales Pty Ltd*, a buyer, although entitled to damages in respect

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of a defect in title, was not entitled to rescind where a proposed lot in a land subdivision ended up with a 3m wide easement over it. Also, in *D.T.R. Nominees Pty Ltd* v *Mona Homes Pty Ltd* a buyer had no right to rescind (but merely a right to damages) where the size of the subdivision, in terms of the number of lots, had been reduced considerably from that shown in the proposed plan — this having arisen out of a decision by the seller to proceed with the subdivision in stages. Yet in *Canon & Anor* v *Mid-Coast Holdings Pty Ltd* a discrepancy between the area of the lot disclosed in the contract and the area shown on the registered plan amounting to 67.9 square metres or 8.53% was held to be "other than a minor" variation and the buyer was entitled to rescind. However, *Canon's case* must be viewed in a slightly different light as it involved construction of a clause in the contract giving a buyer the right to rescind if the variation or discrepancy between the plan as disclosed and the plan as registered was other than minor. A right to rescind and even a right to damages may also be negated by an "exclusion of warranty" clause in the contract. See *Silverton Ltd* v *FS Carroll Pty Ltd* and *Brisbane Unit Development Corporation Pty Ltd* v *Robertson & Anor (FC)*. Also see *Colemma Pty Ltd* v *Hurley*.

In *Dainford Ltd* v *Tari Nominees Pty Ltd & Anor* the Queensland Full Court held that a misdescription of the level on which the unit was situated did not give the buyer the right to rescind where the only possible conclusion was that in numbering the levels from 2 onwards, level 1 had been omitted but the description of the lot was otherwise precise.

In *Tarling* v *Mogdon Investments Pty Ltd*, a reduction in area from 7.38 m^2 to 6.48 m^2 did not amount to a "substantial" departure from the plans within the meaning of the contract, thus entitling the buyer to damages rather than rescission. See also *Sivakriskul* v *Vynotas Pty Ltd*, where "gross floor area" was held to include the space occupied by the base of walls, thus precluding the buyer from maintaining that the "usable area" of 112 m^2 was substantially different from the area of 123.7 m^2 that included the area occupied by the base of the walls.

Even resort to the *Trade Practices Act 1974* may not assist a buyer. In *H W Thompson Investments Pty Ltd* v *Allen Property Services Pty Ltd* a buyer was not successful in voiding contracts where the lot being sold was in one of three proposed tower buildings but only the building in which the lot was situated was finally built. Also, in *Wait & Anor* v *Reed & Anor* buyers were unsuccessful in recovering damages where access to the pool was altered and the general standard of finishes was below what was allegedly promised to them.

Not all decisions were in favour of sellers. In *Leighton Properties Pty Ltd* v *Hurley* the buyer contracted to purchase a lot which was to have included a guest suite, with sink and stove, on the upper level. They were induced by this facility because of its potential for use in accommodating visiting relatives. The Queensland Full Court held that although the problem could have been rectified for around $1,000, what was tendered was not substantially what the buyers had contracted to purchase, so they were entitled to rescind. A buyer was also entitled to rescind where the area of common property was increased by the size of a strip of right of way which carried with it fencing obligations as well as responsibility for half the cost of repairs and maintenance: *Pansdowne Properties Pty Ltd* v *Kerswell & Anor*. In *Williams & Anor* v *King & Anor* a contract was held to be void for uncertainty because of a number of factors including no definition of location, finishes, positioning in the building and generally what a "two bedroom unit" would look like. Also, in *Gold Coast Carlton Pty Ltd* v *Kamalesvaran* it was held that a penthouse with shared lift access was substantially different from a penthouse with private lift access as had been proposed in the contract. See also *Lanlex No 29 Pty Ltd* v *Leach*. For the effect of a reduction in area of the lot being delivered, see Re: *Tiplady* and *Gold Coast Carlton Pty Ltd*.

These cases demonstrate that the identity of the proposed lot is always a question of construction of the contract combined with an assessment as to the substance of any variation between the lot as proposed and the lot as registered. This clearly points to the need for careful drafting of contracts for the sale of "proposed" lots.

Any description in an off-the-plan contract of the layout of the lot and its contents must also be accurate, otherwise the buyer may have the right to rescind for misrepresentation. This will usually depend upon whether the misrepresentation was an inducing factor (as opposed to a deciding factor) which persuaded the buyer to purchase (see *Leighton Properties Pty Ltd* v *Hurley*).

The importance of the common property in the description of the subject matter of the contract has not yet been fully explored by the courts. When a person buys a lot in a community titles scheme the person also

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buys an interest as tenant in common in the common property in proportion to their interest schedule lot entitlement. However, off-the-plan contracts often pay little or no attention to the definition of the common property. Where the common property is extensive and will contain material facilities (such as gym, private theatre, pool and meeting room) then, arguably, the common property itself should be defined with certainty in the contract. This would require a draft of the full survey plan, prepared from the proposed building plans. Failure to define the common property in this way may leave the seller exposed to a claim that the contract is void for uncertainty, or a claim for damages.

Having a clear understanding of the principles involved, it is now necessary to look at the way in which the unit to be sold should be described so as to:

- minimise the risk of rescission or a claim for damages
- maximise the comfort level of the buyer so as to facilitate early signing of the contract.

The starting point for the description is the land on which the project is being developed. This land ("the Parcel") must be precisely defined with reference to its title description.

> "'**Parcel**' means lot 100 on SP 1234 and lot 101 on SP 4321."

If only part of the land is to be used for the project, then a draft of the plan to subdivide that part should be used.

> "'**Parcel**' means the proposed lot 1 on the draft survey plan in annexure A, being part of lot 100 on SP 1234 and lot 101 on SP 4321."

Once the Parcel has been defined, it is then necessary to define the lot or unit ("Property") being purchased. This requires reference to a draft survey plan (which will usually be a building format plan). Ideally, the entire plan should be included so that the buyer can identify both the lot and the common property. If the building is too large, then selective "typical" pages of the plan can be used, but it is important that the level, shape and orientation of the lot, as well as the common property, are clearly discernible from the pages used.

Where possible, car spaces and storage areas should be part of the lot and not allocated by means of an exclusive use by-law. Although this makes it difficult for lot owners to subsequently "swap" these areas, it does ensure a much more secure system of title, and as time progresses it is likely that this will be reflected in the valuation process for residential property.

Including these areas as part of the lot does not mean that the developer loses flexibility in the allocation of these areas during the marketing process. This flexibility can be preserved by identifying the spaces as separate areas on the draft building format plan (eg by reference to "A", "B", etc). These areas are then combined with the respective unit components of the lot when the final plan is prepared. All that is required is to ensure that allocations made during the sales process are carefully tracked to ensure that a particular space is not allocated more than once. This same process would be necessary for exclusive use areas in any event.

In summary, the Property can include a lot and an exclusive use space —

> "'**Property**' means the proposed community title lot 5 shown on the Building Format Plan and the right to exclusive use of car space 11 shown on the Exclusive Use Plan, to be known as Unit 5 'Ocean View', 7 Smith Street, Manly.
>
> '**Building Format Plan**' means the draft building format plan proposed to be registered in respect of the Parcel, being the plan in annexure B.
>
> '**Exclusive Use Plan**' means the draft exclusive use plan annexed to the Community Management Statement."

Alternatively, Property can be confined to the lot —

> "'**Property**' means the proposed community title lot 5 shown on the Building Format Plan, to be known as Unit 5 'Ocean View', 7 Smith Street, Manly.
>
> '**Building Format Plan**' means the draft building format plan proposed to be registered in respect of the Parcel, being the plan in annexure B."

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Technically, the approaches discussed so far may be adequate to ensure that the contract is not void for uncertainty. However, in a commercial sense, they may not give the buyer sufficient comfort as to what is actually being purchased. Buyers will often require a floor plan so that they can be certain of the room layouts and fit-out items (such as cupboards, benches, etc). This type of detail does not appear on the draft building format plan. Including a floor plan and possibly an elevation showing the location of the unit will usually make the contract more "buyer friendly" and reduce the time taken to obtain the buyer's signature. The important thing from a developer's point of view is not to include too much detail on these plans. This detail will restrict those inevitable adjustments that will need to be made because of the contingencies of construction. For example, it is not a good idea to include dimensions of rooms.

The definitions can easily be modified to accommodate this additional plan —

> "'**Property**' means the proposed community title lot 5 shown on the Building Format Plan, to be known as Unit 5 'Ocean View', 7 Smith Street, Manly, and approximating Unit 5 shown on the Building Plans.
>
> '**Building Plans**' means the proposed plans of the building intended to be subdivided by the Building Format Plan, being the plans in annexure C."

These building plans are often copies of the floor plans used for marketing purposes. Where units follow a pattern on the different levels of the building, the unit can often be identified with reference to a unit type (eg "Unit type B on level 5"). This reduces the number of pages in the Building Plans.

Where the Property is described in the above way it will be important to include appropriate clauses in the contract to cover minor variations to the building, the Property and the community titles scheme generally (eg lot entitlements).

.40 Case references: *Flight* v *Booth* (1834) 131 ER 1160.

Imamovic v *Kalamalka Constructions Pty Ltd* (1975) 49 ALJR 244.

Imamovic v *Exton* (1975) 49 ALJR 246.

Liverpool Holdings Ltd v *Gordon Lynton Car Sales Pty Ltd* (1979) Qd R 103 (FC); (1979) ANZCR 61.

D.T.R. Nominees Pty Ltd v *Mona Homes Pty Ltd* (1978) 52 ALJR 360.

Canon & Anor v *Mid-Coast Holdings Pty Ltd* NSW Supreme Court, Holland J, 28 October 1983. (See (1983) NSW ConvR ¶55-156 for full text of judgment.)

Silverton Ltd v *FS Carroll Pty Ltd* Qld Supreme Court, Shepherdson J, 28 October 1982.

Brisbane Unit Development Corporation Pty Ltd v *Robertson & Anor* Qld Supreme Court (Full Court), 19 May 1983.

Colemma Pty Ltd v *Hurley* Qld Supreme Court, *Vasta* J, 25 September 1983.

Dainford Ltd v *Tari Nominees Pty Ltd & Anor* Qld Supreme Court (Full Court), 24 October 1984.

Tarling v *Mogdon Investments Pty Ltd* (1991) ANZ ConvR 425.

Sivakriskul v *Vynotas Pty Ltd* V ConvR ¶54-556.

H W Thompson Investments Pty Ltd v *Allen Property Services Pty Ltd* (1983) 77 FLR 254.

Wait & Anor v *Reed & Anor* (1997) ANZ ConvR 455.

Leighton Properties Pty Ltd v *Hurley* Qld Supreme Court (Full Court), 23 May 1984.

Pansdowne Properties Pty Ltd v *Kerswell & Anor* NSW Supreme Court, Waddell J, 22 November 1983.

Williams & Anor v *King & Anor* (1995) ANZ ConvR 104.

Gold Coast Carlton Pty Ltd v *Kamalesvaran* (1984) ANZ ConvR ¶54-144.

Lanlex No 29 Pty Ltd v *Leach* (1997) NSW ConvR ¶55-808.

Re: *Tiplady* and *Gold Coast Carlton Pty Ltd* (1984) ATPR ¶40-472; 54 ALR 337 (Federal Court, Fitzgerald J, QLD G94 of 1983).

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[¶23-655] Settlement date

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The Queensland Parliament passed the *Body Corporate and Community Management Amendment Act 2009*, which commenced 22 June 2009, to address a loophole in the interpretation of the previous s 212 of the *Body Corporate and Community Management Act 1997* (BCCM Act) relating to settlement of off-the-plan contracts. This loophole was highlighted by the decision of *Bossichix Pty Ltd v Martinek Holdings Pty Ltd* as reported at (2008) LQCS ¶90-147, and its subsequent Court of Appeal decision reported at (2009) LQCS ¶90-152.

In summary, the decisions held that the common practice (as prescribed under most standard off-the-plan contracts in Queensland) of issuing a notice informing a buyer that the building format plan has been registered and settlement to take place within 14 days, failed to comply with s 212 of the BCCM Act (as previously drafted). The previous s 212 required that settlement must not take place earlier than 14 days after the seller notifies the buyer that the scheme had been established. Essentially the courts held in the case that the seller had failed to inform buyers that the scheme had been established and, as such, settlement could not take place. The court's interpretation of the previous s 212 required not only notification to the buyers that registration of the plan had occurred but also the recording of the community management statement, as they are two separate events, both required in order to establish the scheme. Accordingly, failure to comply with s 212 allowed a buyer to cancel the contract prior to settlement under s 212(1) (as previously drafted).

To address the precedent set by the decisions, the Body Corporate and Community Management Amendment Act was introduced to retrospectively imply as a term ("***deemed term***") of all off-the-plan contracts in Queensland that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed. The deemed term has priority over any other term of the contract relating to settlement. Further a buyer cannot terminate the contract based on the loophole of the previously drafted s 212 and s 212(1) as the amending provisions (now s 212A) provide that a buyer's right to cancel the contract prior to settlement is limited to the seller's failure to provide the buyer with a copy of the proposed community management statement for the scheme as established or changed.

The amending provisions have retrospective effect to a contract whether entered into before or after 22 June 2009. They also apply to legal proceedings started but not decided before 22 June 2009 (including an appeal proceeding). The provisions however do not apply to a contract which has already been settled or cancelled before 5 June 2009, or a legal proceeding relating to the lawfulness of the cancellation or proceedings decided before 22 June 2009.

Law: *Body Corporate and Community Management Act 1997*, s 212(1).

Last reviewed: 6 April 2013

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[¶23-660] Sunset date

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There must be a time (**sunset date**) at which the parties are discharged from the contract. Section 27 of the *Land Sales Act 1984* gives the buyer the right to cancel the contract if a registrable instrument of transfer is not given to the buyer within 3½ years after the making of the contract. This time can be extended to not more than 5½ years in respect of a particular project by regulation (s 28).

These provisions should be kept in mind when deciding on the sunset date. They are particularly relevant where:

- delay in commencement of construction is anticipated
- the building is exceptionally large, necessitating a long construction period
- the project is being developed in stages and lots in later stages are being sold well before those stages are commenced.

Where no time is specified, a default period of 3½ years will apply.

Law: *Land Sales Act 1984*, s 27, 28.

Last reviewed: 6 April 2013

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[¶23-665] Re-disclosure time limit

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Section 214(1) of the *Body Corporate and Community Management Act 1997* (BCCM Act) requires a re-disclosure (by **further statement**) if a contract has not been settled and —

(a) the seller becomes aware that information in the **disclosure statement** under s 213 was inaccurate as at the day the contract was entered into, or
(b) the disclosure statement would not be accurate if now given as a disclosure statement.

If it is necessary to give a further statement, then s 214(2) of the BCCM Act requires the further statement to be given "within 14 days (or a longer period agreed between the buyer and seller) after subsection (1) starts to apply".

In practice, it is difficult to meet the 14-day time requirement, especially in circumstances where the changes to the development may take place at the whim of the council, so it is recommended that the contract incorporate an agreement between the seller and buyer extending that period.

Law: *Body Corporate and Community Management Act 1997*, s 213, 214.

Last reviewed: 6 April 2013

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[¶23-670] Implied warranties

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Section 223 of the *Body Corporate and Community Management Act 1997* (BCCM Act) contains a number of implied warranties that are potentially of concern to developers and their financiers.

Section 223(2) implies, in every contract for sale of community title lots (which includes "proposed lots"), the following seller warranties, which must be satisfied **as at the date of the contract**:

(1) To the seller's knowledge, there are no latent or patent defects in the common property or body corporate assets, other than the following —

(a) defects arising through fair wear and tear
(b) defects disclosed in the contract.

(2) The body corporate records do not disclose any defects to which the warranty in (1) above applies.
(3) To the seller's knowledge, there are no actual, contingent or expected liabilities of the body corporate that are not part of the body corporate's normal operating expenses, other than liabilities disclosed in the contract.
(4) The body corporate records do not disclose any defects to which the warranty in (3) above applies.

In addition to these warranties, s 223(3) of the BCCM Act implies a warranty by the seller that, as at the completion of the contract, to the seller's knowledge, there are no circumstances (other than circumstances disclosed in the contract) in relation to the affairs of the body corporate likely to materially prejudice the buyer.

In addition, the contract may itself contain terms requiring the seller to complete the lot in a "proper and tradesmanlike manner".

Difficulties can arise between the seller and the seller's builder, and those contracts should be addressed to ensure that the seller's interests are protected.

What the seller ought reasonably to have knowledge

While some comfort can be taken from the limitation of some warranties to "the seller's knowledge", that comfort is eroded somewhat by s 223(4), which says a seller is taken to have knowledge of a matter if the seller had actual knowledge "or ought reasonably to have had knowledge of the matter". This is difficult in circumstances where the seller is not the builder.

Buyer's termination rights for breach of warranty

A buyer can terminate the contract if there would be a breach of one of these warranties were the contract to be completed at the time it is in fact terminated (s 224). The written notice must be given no later than three days before the buyer is otherwise required to complete the contract. If the buyer terminates the contract, the seller must repay to the buyer any amount paid to the seller (including the seller's agent) towards the purchase of the lot the subject of the contract within 14 days after the termination. An alternative to this right of termination would be a right to damages.

Some difficulties with implied warranties

Clearly, there is an issue in relation to the four warranties that apply as at the date of the contract in respect of proposed lots. As at that date there is no body corporate and therefore the warranties cannot operate, unless a court is prepared to depart from the literal interpretation of the section. In *Gelski* v *Dainford Limited* the NSW Supreme Court held that similar warranties in a sale contract could not operate in respect of a proposed lot.

It is therefore likely that the warranty in s 223(3) is the only one that can apply in the case of proposed lots. If there are likely to be any circumstances arising out of the development or the establishment of the body corporate that might materially prejudice the buyer at settlement, then those circumstances should be

disclosed in the contract. Otherwise, care needs to be taken by the developer to establish the body corporate in a proper manner so as to ensure that no such circumstances come into existence.

Law: *Body Corporate and Community Management Act 1997*, s 223, 224.

.40 Case references: *Gelski* v *Dainford Limited* (1985) NSW Title Cases ¶30-061.

Last reviewed: 6 April 2013

[¶23-675] Powers of attorney

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Section 219 of the BCCM Act provides that a power of attorney given by a buyer to a seller of a proposed lot may only be exercised in the ways and for the purposes disclosed in a written statement given to the buyer before the power is given. The statement must include a detailed description of the circumstances in which the power can be exercised. Any such power of attorney, unless it expires sooner, expires one year after the community titles scheme is established.

Care should be taken to comply with these provisions if a power of attorney is to be incorporated in a contract. The statement may form part of the disclosure statement under s 213 of the BCCM Act.

A practitioner providing advice to an off-the-plan buyer may advise them not to sign and provide the attorney document until such time as the lot is created by way of registration.

Law: s 213, 219.

Last reviewed: 6 April 2013

[¶23-680] Foreign interests

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Developers of 10 or more residential lots may apply to the Foreign Investment Review Board (FIRB) for advance approval to sell up to 50 per cent of new residences to foreign interests. Developers are required to provide a copy of their approval letter to each prospective purchaser and to report all sales (Australian and foreign) to FIRB on an annual basis until all lots have been sold or occupied.

Where such approval has been granted, it is not necessary for individuals to apply for FIRB approval. If the developer has not sought advance approval, then the individual investor must seek approval.

For reporting purposes the contract should enable the seller to determine the residential status of the buyer and whether there is any need for FIRB approval before the contract is entered into.

Last reviewed: 6 April 2013

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[¶23-685] Staged developments

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There are a number of matters that need to be taken into account when preparing off-the-plan contracts for staged developments.

Exclusive use by-laws

Where areas of future common property are to be allocated to future lots, the exclusive use by-law will need to be changed as each stage progresses. The allocations cannot be made in the first community management statement because neither the common property nor the lots are in existence at that time. The problem for the developer is how to ensure that the change is made to the by-law, particularly if the change is to occur outside the 12-month period of any power of attorney or authorised allocation period in the by-law. Ordinarily, under s 62(2) of the BCCM Act, a change to an exclusive use by-law in a first community management statement would require a resolution without dissent. However, if the first community management statement sets out the proposed new allocations, then the body corporate consent can be given by the committee, unless a body corporate manager with the functions of the committee has been appointed. In the latter case, the consent must be by ordinary resolution of a general meeting (see s 62(4)(e), (6) and (7) of the BCCM Act).

Another alternative would be to make the exclusive use areas part of the lot rather than common property. This does not limit flexibility in the allocation of areas such as car parks if the allocation is done separately in the various sale contracts (eg "proposed lot 12 and car park D").

Flexibility for future lots

Sometimes it is necessary to preserve flexibility over the size, shape and location of future lots. This applies particularly to business and industrial parks where the lot is subdivided out to suit the particular use once a buyer has been found. For example, a three-hectare parcel of land may end up as 15 separate lots or as 5 separate lots. This type of flexibility can only be achieved by using formulas and parameters for future subdivision rather than the normal prescriptive descriptions in the first community management statement. A good example of this approach is the *Metroplex on Gateway* development next to the southern approach to the Gateway Bridge in Brisbane.

Expandable and contractable schemes

On the subject of flexibility, the developers of some projects being developed in stages require the flexibility to discontinue future stages of the project. This may be driven by marketing concerns or by the need to obtain development consent for one or more of the future stages. Such flexibility can be achieved by reserving the right in the first community management statement to either:

- expand the development by adding one or more future identified stages, or
- excise one or more of the proposed future stages from the development.

Both these options require some fancy drafting in the first community management statement, but it is possible to achieve them under the BCCM Act. Again, the *Metroplex on Gateway* development incorporated this type of flexibility.

Uniformity of regulation module

Where a development is being staged within the same body corporate there will never be a problem of multiple regulation modules. However, if the development is being staged with separate bodies corporate (eg linked together by means of a building management statement) there is a potential problem. The problem arises where:

- one stage of the project adopts the standard regulation module and another stage adopts the accommodation module
- the manager's accommodation is in the stage regulated by the standard module.

In those circumstances, a management agreement under the accommodation module (where agreements for up to 25 years are permitted) for more than 10 years will present a problem. This is because the agreement under the standard module must expire after 10 years, along with any occupation licences, and the manager may have difficulty continuing to operate the remaining management business from the unit in the standard module scheme.

Law: BCCM Act, s 62.

Last reviewed: 6 April 2013

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[¶23-690] Off-the-plan sale contract — Conditions of use and recommended special condition for natural disasters

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Form C4 (Community Title Off-the-plan Contract, ¶75-160) (Contract) is a version of an off-the-plan contract for Queensland, that is copyrighted to Gary F Bugden (2004), and that was previously used by members of the Community Title Off-the-plan Contract Forum (Forum). The former author of *Queensland Community Schemes Law and Practice*, Gary F Bugden, was the convenor of the Forum.

Conditions of use — Form C4

Subscribers to *Queensland Community Schemes Law and Practice* have a non-exclusive, revocable and non-assignable licence to use the Contract on the following conditions:

(1) The copyright endorsement will remain on the Contract at all times.
(2) Subscribers must not change the wording of the standard provisions or format of the Contract, except by reference in its Special Conditions section.
(3) Subscribers must satisfy themselves that the Contract is legally adequate for the purpose for which they use it. While every care has been taken in drafting the Contract, it must be used on the strict understanding that the author, the publisher of this publication and any other person contributing to its content do not accept any responsibility for any inadequacy or defect it may contain.
(4) The disclosure statements under s 213 of the *Body Corporate and Community Management Act 1997* (BCCM Act) and s 21 of the *Land Sales Act 1984* must be drafted to complement the Contract.
(5) Subscribers are responsible for ensuring that the "warning statement" under s 368–368C of the *Property Agents and Motor Dealers Act 2000* (PAMDA) and the "information sheet" under s 213(5) of the BCCM Act are properly attached to the Contract.
(6) Subscribers are responsible for ensuring that disclosure is made under s 138 of PAMDA.

Conditions of use — Form C5

Subscribers are also entitled to use, without any restriction on alteration, a Pro-forma Off-the-plan Disclosure Statement that is reproduced as Form C5 (¶75-165).

Special condition for natural disasters

The current author of *Queensland Community Schemes Law and Practice*, Joanne Bennett, suggests that the following special condition be inserted into Part C of Form C4 (Community Title Off-the-plan Contract, ¶75-160):

X. Suspension of time and settlement
X.1 If either party is unable to perform all of its obligations under this Contract due to a natural disaster, then:

(a) time, as it relates to the performance of this Contract, is suspended. Neither party will be in breach of its obligations as a result of the suspension of time;
(b) a party which is unable to perform its obligations must take all reasonable steps to minimise the effect of the natural disaster on its ability to perform this Contract;
(c) once the party that was unable to perform its obligations due to the natural disaster is able to perform those obligations, then that party must:

(i) provide written notice to the other party of its ability to perform its obligations under the Contract;
(ii) ensure that the notice under X.1(c)(i) includes a date which shall then become the Settlement Date; and
(iii) ensure that the notice under X.1(c)(i) states that time is of the essence

(d) once the party that was not affected by the natural disaster receives the notice under clause X.1(c), then time is again of the essence and the parties must take all reasonable steps to allow settlement to occur on the date set out in the notice under clause X.1(c).

X.2 In clause X.1 – “**Natural Disaster**” includes flood, tsunami, earthquake, cyclone, twister, bushfire and volcanic eruption.

Last reviewed: 6 April 2013

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[¶23-750] Pre-July 1998 position

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``Prescribed interests'' have been subject to regulation under Australian companies legislation for over 30 years. Until 1 July 1998, Chapter 7 Part 7.12 Division 5 of the Corporations Law regulated those interests. Section 1064(1) provided that a ``person, other than a public corporation, must not make available, offer for subscription or purchase, or issue an invitation to subscribe for or buy, any prescribed interest''. While there were some exceptions to that prohibition, they were not generally relevant to the sale of an interest in a lot in a community titles scheme. The prohibition was relevant where the off-the-plan contract provided for the establishment of certain structured management arrangements. To understand this relevance one had to understand how broadly the words ***prescribed interest*** were defined. These words were defined in s 9 of the law to mean:

> (a) a participation interest, or
> (b) a right, whether enforceable or not, whether actual, prospective or contingent and whether or not evidenced by a formal document, to participate in a time-sharing scheme.

There were exemptions to those two categories of interests, but again, they were not generally relevant to the sale of an interest in a lot in a community titles scheme. Also, the terms ***participation interest*** and ***time-sharing scheme*** were themselves widely defined. A ``participation interest'' was defined to mean ``any right to participate, or any interest:

> (a) in any profits, assets or realisation of any financial or business undertaking or scheme whether in Australia or elsewhere;
> (b) in any common enterprise, whether in Australia or elsewhere, in relation to which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or
> (c) in any investment contract;

whether or not the right or interest is enforceable, whether the right or interest is actual, prospective or contingent, whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset''.

Again, there were a number of exceptions that were not generally relevant to the sale of an interest in a lot in a community titles scheme. Also the term ***investment contract*** was defined.

A ``time sharing scheme'' was defined to mean ``a scheme, undertaking or enterprise, whether in Australia or elsewhere:

> (a) participants in which are, or may become, entitled to use, occupy or possess, for two or more periods during the period for which the scheme, undertaking or enterprise is to operate, property to which the scheme, undertaking or enterprise relates; and
> (b) that is to operate for a period of not less than 3 years''.

Finally, an ``investment contract'' was defined to mean ``any contract scheme or arrangement that, in substance and irrespective of its form, involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in, or right in respect of, property, whether in this jurisdiction or elsewhere, that, under, or in accordance with, the terms of the investment will, or may at the option of the investor, be used or employed in common with any other interest in, or right in respect of, property, whether in this jurisdiction or elsewhere, acquired in or under like circumstances''.

Section 1073 of the Corporations Law then made contracts entered into in contravention of the above provisions ``voidable at the option'' of the buyer.

With the exception of the definition of ``time sharing scheme'', these provisions were repealed by the *Managed Investments Act 1998* (MI Act), which commenced on 1 July 1998. The MI Act inserted a new Chapter 5C into the Corporations Law dealing with ``managed investment schemes'' (MIS). The Corporations Law was repealed by the *Corporations Act 2001* (Cth) (Corporations Act), which commenced on 15 July 2001.

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The next major change came with the introduction of the *Financial Services Reform Act 2001*. That Act introduced a new regulatory framework for the financial services industry by substantially amending the *Corporations Act 2001*.

The following paragraphs (¶23-800 to ¶23-925) provide an outline of how these provisions operate, plus a discussion on their relevance to sales of lots in a community titles scheme.

Last reviewed: 6 April 2013

[¶23-800] Managed investment scheme

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A managed investment scheme is now defined to mean:

``(a) a scheme that has the following features:

(i) people contribute money or money's worth as consideration to acquire rights (***interests***) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not)
(ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the ***members***) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders)
(iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or give directions); or

(b) a time-sharing scheme;

but does not include...''

None of the exemptions are relevant to the sale of a lot in a community titles scheme. However, one of the exemptions relates to schemes declared by the regulations not to be an MIS. While there are no relevant declarations at present, the possibility of future declarations should be kept in mind.

The following must be satisfied before there is an MIS:

1. There must be a ***scheme***. (Scheme is not defined, but its ordinary meaning is a ``systematic arrangement proposed or in operation''.)
2. People ***contribute*** money or money's worth (ie consideration).
3. The consideration results in the ***acquisition of rights*** (interests) to benefits produced by the scheme. (It does not matter whether these rights are actual, prospective or contingent, or whether or not they are enforceable.)
4. Some of the contributions are to be:

(a) ***pooled***; or
(b) used in a ***common enterprise***,

to produce financial benefits or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme.

(It does not matter whether these members are original members or members who have subsequently acquired their interests.)

5. The members must not have ***day-to-day control*** over the operation of the scheme. (It does not matter that they have the right to be consulted or give directions.)

To determine whether the sale of a particular lot in a community titles scheme is capable of being an MIC it is necessary to determine whether the above elements are satisfied by the structure of the ``transaction''. Take the following example:

A developer is selling lots in a proposed community titles scheme ``off the plan''. The contract provides:

- The sale is subject to a lease to a ``manager'' for 3 years. Under the lease the manager will pay a fixed rent based on a percentage of the sale price of the lot.
- The developer guarantees payment of the rent under the lease.
- The developer will procure the body corporate to enter into a management agreement and a letting authority (in the forms disclosed) with the manager.

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Under the terms of the management agreement and letting authority (which last for ten years), the manager must conduct a holiday letting business from the building, using the leased lots and must promote the building for this purpose. Control of the holiday letting business is given to the manager.

The following table examines this transaction in the light of the various elements of the definition of an MIC. The ``Item No'' corresponds with the numbering above.

Item No	Element	Satisfied?	Reasoning
1	There must be a scheme.	Yes	The scheme is made up of the proposal to lease the lot and include it in a holiday letting operation that will rely on promotion of the building in which the lot is situated.
2	People must contribute money or money's worth.	Yes	The buyer of the lot contributes the lot by leasing it to the manager. This is money's worth.
3	This contribution must be paid as consideration for the acquisition of rights to benefits produced by the scheme.	Yes	The ``rights'' consist of the rights to receive the rent for the lot. The ``benefits'' produced by the scheme comprise the rent.
4	Some of the contributions are to be: (a) pooled; or (b) used in a common enterprise, to produce financial benefits or rights or interests in property for the ***members***.	Yes	Both elements are probably satisfied. (a) the lots (ie the contributions) are ``pooled'' for the purpose of operating the holiday letting operation; and (b) the lots are used in the common enterprise of the holiday letting operation which produces the benefit of the rent for the lot owner (member).
5	Members must not have day-to-day control.	Yes	Under the terms of the lease, management agreement and letting authority the manager has virtually total control of the holiday letting operation.

While the reasoning for some items may be arguable (as is the case with most legal reasoning), there is clearly a substantial risk that the example transaction is an MIC. Furthermore, this is not illogical when one considers that the success of the lot buyer's ``investment'' depends upon:

- The success of the holiday letting business. If it is not successful the manager will not be able to pay the rent.
- The opportunities (if any) available to the lot owner to receive the same rate of return (or any return) on their investment after the 3 year fixed rent period expires.
- The capacity of the developer to meet the rent guarantee. (Some development companies are `` $2 companies''.)

In the absence of a prospectus or disclosure statement disclosing all relevant information, the lot buyer may not be able to make a fully informed decision about the investment. A key function of the MI Act is to ensure where the above uncertainties exist relevant information is made available to intending investors. This makes it difficult to argue that it is an unintended effect for the MI Act to ``catch'' the above example transaction.

The difficulty with the definition is knowing where to draw the line between an arrangement that falls within the definition and one that does not. For example, does a contract for the sale of a lot in a community titles scheme (without any holiday letting or other special arrangements) fall within the definition? If the same analysis as that above is applied, the result is as follows:

Item No	Element	Satisfied?	Reasoning
1	There must be a scheme.	Yes	The scheme could be said to be the community titles scheme itself (as organised and operated by the BCCM Act).
2	People must contribute money or money's worth.	Possibly Yes	It might be argued that the maintenance levies contributed to the body corporate satisfy the contribution test.

3	This contribution must be paid as consideration for the acquisition of rights to benefits produced by the scheme.	Possibly Yes, but probably No.	It might be argued that the ``rights" consist of the rights to receive the co-operative benefit (ie reduced costs) of joint maintenance, joint services and global insurance. Alternatively, the benefit may be the shared facilities (eg swimming pool).
4	Some of the contributions are to be: (a) pooled; or (b) used in a common enterprise, to produce financial benefits or rights or interests in property for the ***members.***	Possibly Yes, but probably No.	If the levies qualify as the contributions, then they are clearly ``pooled". Item (b) would appear not to be satisfied, because it is probably not possible to establish a ``common enterprise".
5	Members must not have day-to-day control.	Difficult to say.	While the BCCM Act vests many powers in the committee, the body corporate in general meeting is still able to exercise those powers. Also, the owners can veto decisions of the committee and remove members of the committee. On balance, it can probably be said that the members do have day to day control.

It will be seen from the above analysis that even the most basic community titles transaction goes close to falling within the definition. The further one moves away from this basic form the more likely the transaction is to fall within the definition.

These results are not dissimilar to the results produced under the former prescribed interest provisions. An examination of the provisions (which are outlined above in ¶23-750) shows that the test under the definition of ``participation interest" is at least as extensive as the test under the definition of ``managed investment scheme". One may even argue that the tests under the former definition are more extensive. The question then arises as to why the above ``holiday letting" example (which was relatively common before 1 July 1998) did not fall within the former definition of prescribed interest. The answer is that it probably did fall within the earlier definition. However, it escaped the attention of the Australian Securities Commission, probably because that type of transaction was not a priority target for them at the time. Furthermore, because of relatively good market conditions, buyers of lots were not motivated to attack the validity of individual contracts on the basis that they were avoidable because a prescribed interest was involved.

The attitude of the new (renamed) Australian Securities and Investment Commission (ASIC) appears to be different. On 21 July 1998, ASIC issued a press release warning real estate investment scheme promoters that they must comply with the MI Act or face ASIC enforcement action. In that press release the ASIC Chairman gave the following example of a scheme caught by the new laws:

> ``An example of these schemes is where promoters invite people to buy a strata title in a room or apartment on condition that it be put back into a pool to be run as part of a hotel or serviced apartment complex."

The Chairman also said in that press release:

> ``ASIC has noticed some scheme promoters have introduced artificial structures into their offers in an attempt to avoid investment regulation, but in reality the schemes have the character of a managed investment and are subject to the law."

It is significant that the focus of the legislation and the public statements of the ASIC was on ``managed investments" rather than schemes that did not involve investment as such. The standard sale of a lot in a community titles scheme can hardly be described as a ``managed investment". Hence, the result of the analysis undertaken above for such a ``standard sale" is not unexpected. Also, it is not inconsistent with the position under the old prescribed interest provisions, as was demonstrated by a number of cases under the old Queensland *Companies Act 1961*. Section 76 of that Act dealt with prescribed interests while s 81 dealt with investment contracts. The prohibitions were similar to those in pre-July 1998 s 1064 of the Corporations Law, although the prohibition was against offerings to the ``public" rather than offerings generally. In *Brisbane Unit Development Corporation Pty Ltd* v *Deming No 456 Pty Ltd & Ors* and *Brisbane*

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Unit Development Corporation Pty Ltd v *Sokola Pty Ltd & Anor* it was held that contracts for the sale of home units were not illegal on the grounds that the sales resulted in invitations to the public by a non-public company to purchase an ``interest'' within the meaning of s 76 of the *Companies Act 1961* (Qld). Also, in *Munna Beach Apartments Pty Ltd* v *Kennedy & Ors*, a similar contract was held not to be an ``investment contract'' which was prohibited by s 81 of the *Companies Act 1961* (Qld).

.40 Case references: *Brisbane Unit Development Corporation Pty Ltd* v *Deming No 456 Pty Ltd & Ors*, Qld Supreme Court, *McPherson* J, 5 November 1982, Full Court on appeal, 24 March 1983.

Brisbane Unit Development Corporation Pty Ltd v *Sokola Pty Ltd & Anor*, Qld Supreme Court, *McPherson* J, 8 November 1982.

Munna Beach Apartments Pty Ltd v *Kennedy & Ors*, Qld Supreme Court, *McPherson* J, 3 November 1982.

Last reviewed: 6 April 2013

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[¶23-825] Policy Statement 140

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ASIC's views became clearer when on 5 May 1999 it issued Policy Statement 140 — Serviced Strata Schemes (PS 140). PS 140 was reviewed on a number of occasions, was re-issued on 13 November 2000, and further reviewed to allow for the *Corporations Act 2001* and the *Financial Services Reform Act 2001*. A number of Class Orders have also been made over the years that are relevant to PS 140.

PS 140 makes it clear that, in ASIC's view, not all serviced strata arrangements have to comply with the *Corporations Act 2001* but only those that are *serviced strata schemes*. As to what arrangements constitute a serviced strata scheme, the following paragraphs of PS 140 explain ASIC's view:

> ``**Interdependency between owners**
>
> **[PS 140.16]** We consider that there is likely to be a serviced strata scheme when an investor in a strata unit has a right (including by agreement or an understanding with the promoter) to a return which depends, in whole or in part, on the use of other investors' strata units (as opposed to common property). For example, the investor's return depends on an arrangement for pooling income or for fairly allocating tenants.
>
> *See [PS 140.24] — [PS 140.27].*
>
> **Dependency on the serviced strata arrangement**
>
> **[PS 140.17]** We consider that there is likely to be a serviced strata scheme when an investor in a strata unit has a right (including by agreement or an understanding with the promoter) to a return which depends, in whole or in part, on an investor's strata unit being used as part of a serviced strata arrangement. For example, the investor depends on the serviced strata arrangement to receive some kind of fixed or indexed return.
>
> *See [PS 140.28] — [PS 140.32].*
>
> **Deferred pool or common enterprise**
>
> **[PS 140.18]** A serviced strata arrangement is likely to be a managed investment scheme even if one of the situations discussed at [PS 140.16] and [PS 140.17] exists only after some period during which investors derive returns in some other way, such as, fixed or indexed rent is paid regardless of the success of the operation of a serviced strata arrangement.
>
> *See [PS 140.33].*
>
> **Pre-packaged sale of interests**
>
> **[PS 140.19]** A serviced strata scheme may exist although the interests in the scheme are sold as part of a pre-packaged resale of interests. For example, interests initially issued to a promoter or its associate are resold.
>
> *See [PS 140.35]."*

ASIC is also of the view that managed investment schemes do not exist where there is an ordinary sale of a completed unit or where there is an off-the-plan sale that only involves payment of a deposit to a stakeholder and the balance of the price on settlement. (See [PS 140.23].)

Last reviewed: 6 April 2013

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[¶23-850] Consequences of being a ``managed investment scheme''

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Having determined that there is a managed investment scheme, what are the consequences? The main consequence under the Law is the possible need for the ``scheme'' to be registered. If the scheme has to be registered, then the following are the main things resulting:

- There is a prohibition against operating the scheme while it is unregistered.
- There must be a prospectus.
- There must be a ``responsible entity''.
- The scheme must have a ``constitution''.
- The scheme must have a ``compliance plan''.
- There must be an ``audit'' of the compliance plan.
- In some circumstances, a ``compliance committee'' will be required.
- Certain contracts relating to the scheme are voidable.

Unless all of the issues of interests in a managed investment scheme are excluded issues, the scheme must be registered with the ASIC if:

- it has more than 20 members
- it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes, or
- it is one of a number of managed investment schemes that the ASIC has determined as being closely related and the total number of members of all the related schemes exceeds 20.

In turn, s 601ED(5) of the Law prohibits a person from operating a managed investment scheme that must be registered, unless the scheme is registered.

A responsible entity must be a public company (with certain minimum capitalisation) that holds a licence authorising it to operate a managed investment scheme. The responsible entity effectively replaces the management company and trustee under the old prescribed interest regime. It operates the scheme and performs the functions conferred on it by the scheme's constitution (which is the rough equivalent of the old approved deed) and the Law. It must adhere to a compliance plan that is put in place for the scheme. If less than half of the directors of the responsible entity are ``external directors'', then the responsible entity must establish a compliance committee. The compliance committee must have at least three members and a majority of them must be external members. Finally, there must be an auditor to audit compliance with the compliance plan.

Last reviewed: 6 April 2013

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[¶23-900] Avoiding contracts

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Contracts involving offers to subscribe for an interest in a managed investment scheme are voidable at the option of the offeree if:

- the scheme is being **operated** in **contravention** of the prohibition against operating an unregistered scheme; or
- the offer (or invitation to subscribe) relates to an interest in a registered scheme and is made in contravention of the prospectus provisions of the Law.

The problem is determining whether the scheme is being operated at a particular point in time. For example, is the scheme being operated when an off-the-plan contract is entered into or does it not operate until the contract is settled and a lease-back arrangement commences? There is also the difficulty in determining whether at the time of the offer there is a contravention of the prohibition against offering interests in an unregistered scheme. For example, if less than 20 interests have been ``sold'' there may be no obligation to register and therefore no contravention. This could mean that the first 20 contracts are not voidable but any further contracts are avoidable. These and other issues associated with the new managed investment legislation will ultimately need to be resolved by the courts. The likelihood is that the next significant downturn in the real estate market will see sufficient cases coming before the courts to resolve many of the outstanding issues.

Law: *Corporations Act 2001*, Chapter 5C *Companies Act 1961* (Qld), s 76, 81.

Last reviewed: 6 April 2013

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[¶23-925] Class order exemptions

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A range of class order relief has been granted in relation to serviced strata schemes. In paragraph PS 140.8 there is a useful table that sets out the range of exemptions or relief from the *Corporations Act 2001* granted by ASIC. The most commonly used class order is CO 02/305 — Management Rights Schemes.

However, it should be noted that PS 140 and the various class orders are badly in need of updating to allow for the changes introduced by the *Financial Services Reform Act 2001*.

Last reviewed: 6 April 2013

[¶24-250] Purpose

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The community management statement is a new instrument introduced in Queensland for the first time by the BCCM Act. It acts as a repository for information about the community titles scheme and in this respect replaces the old practice under BUGTA of placing endorsements on the plan. However, it is more than a mere repository because the contents of the community management statement are contractually binding on a range of people connected with the community titles scheme. The BCCM Act itself says a “community management statement is basic to the identification of a community titles scheme” (s 12(1)). It identifies the land the subject of the scheme and otherwise complies with the provisions of the BCCM Act that deal with these statements.

Law: s 12.

Last reviewed: 6 April 2013

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[¶24-300] Pre-requisites for recording

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The registrar can only record a community management statement if:

(a) there is a request to record the statement
(b) the statement is deposited with the request
(c) the statement complies with the registrar's directions about the format for the statement
(d) the requirements for the scheme land to comprise a single area (see s 115H) are met, and
(e) the statement otherwise complies with the *Body Corporate and Community Management Act 1997* (BCCM Act).

The request must be on Land Registry Form 14, "General Request". The registrar's directions relevant to a community management statement are found on the information sheet, headed "Format Required for Community Management Statements", designed to accompany the approved form of statement (Form CMS Version 2).

A community management statement is not an instrument under the *Land Title Act 1994*, although the request accompanying the statement is an instrument. Also, an interest created under a community management statement recorded under the BCCM Act does not have effect as a registered interest under the Land Title Act.

Law: *Land Title Act 1994*, s 115H, 115K.

Last reviewed: 31 July 2006

[¶24-350] First and subsequent statements

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A ***first community management statement*** is recorded when the plan that establishes the community titles scheme and constitutes the body corporate is registered. The person who, on establishment of the scheme, becomes the original owner must sign it. This category of statement only applies to plans registered after 13 July 1997. A plan prepared under *Building Units and Group Titles Act 1980* but registered under the transitional provisions of the *Body Corporate and Community Management Act 1997* may, but need not, have a first community management statement. If it does not have one, the new scheme is treated as a scheme that was in existence on 13 July 1997 for the purposes of community management statements.

Once registered a community management statement cannot be amended. Instead a new community management statement can be recorded in substitution for the old one. This and all subsequent statements are referred to as a ***new community management statement***. This is why the approved form of statement is headed “First/New Community Management Statement”. It can be used in either case.

Law: *Body Corporate and Community Management Act 1997*, s 53, 54(1), 338.

Last reviewed: 6 April 2013

[¶24-400] New statements and subsequent plans

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When a new plan of subdivision affecting a community titles scheme (including a lot or common property) is lodged, it must be accompanied by a new community management statement and a request to lodge that statement. In other words, a plan of subdivision relating to a community titles scheme cannot be registered unless a new community management statement is also registered. However, a new statement can be registered without a plan (as stated in ¶24-350) provided all plans of subdivision relating to the scheme, and the new statement, will still be consistent after the new statement is recorded.

Two sample new community management statements for a staged development are reproduced as Form C2 and Form C3 respectively.

Law: *Body Corporate and Community Management Act 1997*, s 54.

Last reviewed: 31 July 2006

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[¶24-450] Tiered schemes

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The community management statement for a subsidiary scheme has effect subject to the community management statement for each community titles scheme for which it is a subsidiary scheme. The statement for the principal scheme is paramount and subsidiary schemes must be consistent with that statement, as well as the statements of any other subsidiary schemes above in the hierarchy. However, there are two exceptions to this:

- the lot entitlement schedules in a subsidiary scheme's community management statement
- any provisions of the subsidiary scheme's community management statement that are prescribed as an exception by a regulation.

No general exceptions have been prescribed at this stage.

Law: s 58.

Last reviewed: 6 April 2013

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[¶24-500] Taking effect

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A community management statement takes effect when it is recorded by the registrar. It then binds:

(a) the body corporate
(b) each member of the body corporate, and
(c) to the extent that (a) and (b) do not apply to bind a person:

(i) each person who is a registered proprietor of a lot included in the scheme, and
(ii) each person who is a registered proprietor of common property, and

(d) to the extent that (b) and (c) do not apply to bind a person:

(i) each person who is the occupier of a lot in the scheme, and
(ii) each person who is an occupier of common property.

At first sight paragraph (c) above looks a little puzzling. One would expect that a registered proprietor of a lot would normally be a member of the body corporate. Also, the lot owners are registered proprietors of the common property. So how can (c) ever apply? It applies to interests in a lot or the common property other than outright ownership (eg leasehold and mortgage interests). This is because under the *Land Title Act 1994*, a "registered proprietor" of a lot is defined as a person recorded in the freehold land register as a proprietor of the lot. In turn, "proprietor" of a lot is defined to mean a person entitled to an interest in a lot, whether or not the person is in possession.

All this takes effect as if:

• the community management statement included mutual covenants to observe its provisions entered into by each person bound by it, and
• each person bound had signed the community management statement under seal.

Therefore, although an interest created under the community management statement is not a registered interest under the *Land Title Act 1994*, it has contractual effect and can be enforced in the same way as any other contract.

Law: s 52, 59 *Land Title Act 1994*, s 4.

Last reviewed: 6 April 2013

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[¶24-550] Community Management Statement Notation

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Subject to one exception, a community management statement proposed to be recorded for a community titles scheme may be recorded only if each relevant planning body for the scheme has endorsed on the statement a certificate (a community management statement notation). The Registrar can only record a community management statement if the relevant planning body (usually a council) has noted it. If the scheme land is situated in more than one local government area, then the statement must be noted by each relevant planning body in which the scheme land is or is proposed to be located. The notation is simply to the effect that the relevant planning body has noted the community management statement. Usually, the community management statement is compared to the development approval(s) issued, to ensure that any planning requirements (eg to deal with visitor parking) is provided for under the community management statement and can therefore be enforced by the body corporate.

A relevant planning body can either note or refuse to note the community management statement. It cannot note subject to conditions and it cannot impose conditions as a requirement for notation. See *Granville Developments Pty Ltd* v *Holroyd Municipal Council*.

Refusal to note community management statement

A relevant planning body can refuse to note a proposed community management statement if there is an inconsistency between the provisions of the statement and —

• a lawful requirement of, or an approval given by, the local government under the *Sustainable Planning Act 2009*
• if the relevant planning body is the urban development authority, a lawful requirement of, or an approval given by the *Urban Land Development Authority Act 2007*
• the planning instrument of the relevant planning body, or
• a lawful requirement of, or an approval given by, the relevant planning body under the planning instrument of the relevant planning body.

These circumstances are quite restrictive. They mean, in effect, that a relevant planning body cannot refuse to note a community management statement unless the contents of the statement are in actual conflict with the Act, the planning instrument or other approval. A clear example would be a community management statement that purports to allow or require a particular use of a lot where such use is contrary to the planning instrument.

The *Body Corporate and Community Management Act 1997* (BCCM Act) itself gives the example of a statement that envisages development of part of the scheme land in a way prohibited under the planning instrument. In these circumstances the relevant planning body would be expected to refuse to note the statement. However, if the statement acknowledged that such development would only proceed if and when a suitable amendment of the planning instrument is made, then the relevant planning body would be expected to note the statement.

When notation is not required

In accordance with s 60(6) of the Act, a new community management statement may be recorded by the Registrar without the endorsement on it of any community management statement notation that is otherwise necessary, if there is no difference between the existing statement for the scheme and the new statement for any issue that a relevant planning body for the scheme could have regard to for identifying an inconsistency mentioned above.

For example, a change to the schedules of lot entitlements would not necessitate the notation of the statement by the relevant planning body.

What about a change in by-law or regulation module?

The position is not as clear as regards a change of regulation module and change of by-laws. In the case of the regulation module, the choice of module may appear to have no relationship to town planning.

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However, under a planning instrument or approval, use of a building for holiday letting may not be permitted. Therefore, any attempt to apply the accommodation module (which requires the lots in the scheme to be predominantly "accommodation lots") may be in conflict with the planning instrument or approval. It is therefore not inconceivable that a relevant planning body, in some circumstances, could have regard to the choice of management module.

In the case of by-laws, there are two points of view. On one view, as a matter of common law, a by-law that is in conflict with the general law is void. Therefore, a planning body has no concern to ensure that there is no conflict between the by-laws and the planning legislation, planning instrument or approval. In effect, there can be no conflict because there is no effective by-law to bring about the conflict. The other view is that the "invalid" by-law would be present in the community management statement and would be relied upon by owners and occupiers. In some cases there may even be a genuine argument about the validity of the by-law. Because this is undesirable, the relevant planning body should check the by-laws to ensure that they are consistent with the planning matters.

In the absence of judicial authority, the final word rests with the Registrar because it is the Registrar who must decide whether the exception applies. It has been the practice of the Registrar to record community management statements without them being noted by the relevant planning body where the only difference between the existing and new statements is the regulation module or by-laws. This appears a sensible approach given the time and cost involved in having new community management statements noted by relevant planning bodies. However, time will tell whether this approach is legally correct.

Appeals

If a relevant planning body does not endorse a community management statement notation within 40 days after the statement is submitted, or if it refuses to endorse the notation —

- the person who submitted the statement may appeal to the Planning and Environment Court under the Sustainable Planning Act, and
- the court is required to hear and determine the appeal.

The applicant must give the relevant planning body the written notice of the appeal within 10 business days after starting the appeal.

The BCCM Act is silent about any remedy for appeal against a relevant planning body that insists upon conditions. This is because the BCCM Act does not envisage the imposition of conditions. However, where a planning body does attempt to impose conditions, either the time will expire or there will effectively be a refusal to endorse the notation. In either event the normal appeal to the Land and Environment Court could be made.

Definition of planning instrument

A planning instrument for the purposes of s 60 means:

• if the relevant planning body is a local government — its planning scheme under the Sustainable Planning Act

• if the relevant body is the urban land development authority — an interim land use plan or development scheme under the Urban Land Development Authority Act.

Law: *Body Corporate and Community Management Act 1997*, s 60.

.40 Case references: *Granville Developments Pty Ltd* v *Holroyd Municipal Council* (1961) 91 WN (NSW) 17 and *Crowbay P/L & Anor* v *Body Corporate for "Southbank Chambers"* (2008) LQCS ¶90-143.

Last reviewed: 6 April 2013

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[¶24-600] Body corporate consent

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A body corporate must consent to the recording of a new community management statement. The statement must then be lodged for recording within three months of the consent being endorsed. The type of resolution required to support the body corporate consent depends upon the type of changes being made to the existing community management statement. An ordinary resolution of the body corporate, or a resolution of its committee (provided the matter is not a "restricted issue" for the committee under the relevant management module), will be sufficient to support a body corporate consent where the new statement is different from the existing statement only to the extent necessary for one or more of the following:

(1) Compliance with a provision of the BCCM Act requiring the body corporate to record a new statement. (Section 50(2), relating to owners agreeing to a limited change in lot entitlements, is an example of such a provision.)
(2) Compliance with an order of an adjudicator or a District Court.
(3) Changing the community titles scheme to give effect to an approved reinstatement process.
(4) Changing the scheme to reflect a formal acquisition affecting the scheme.
(5) Recording the details of allocations of common property or body corporate assets made under an exclusive use by-law. (See s 174 and 175 of the BCCM Act.)
(6) Implementation of development proposed under the existing statement or under the provisions of a community management statement to which the existing statement is subject.
(7) Showing the location of a service easement for the scheme by including a services location diagram.
(8) Amalgamating or subdividing lots in the scheme.
(9) Reproducing the existing statement without any change of substance.

Also, where a scheme is being developed in stages in accordance with an existing community management statement and s 57 applies to that scheme, a new statement need not be consented to by a resolution without dissent or special resolution.

In the above circumstances the consent can usually be given by the committee of the body corporate. There are only two exceptions to this:

- if the giving of the consent is a restricted matter for the committee (see ¶36-100)
- if the body corporate has engaged a body corporate manager to carry out the functions of the committee and its office bearers (ie there is no body corporate committee).

If either of the above exceptions applies, then the decision must be made by ordinary resolution of a general meeting.

In relation to (8) above, the exception only applies if the associated plan of subdivision:

(a) does not affect the common property, and
(b) does not change any lot entitlements (other than for the lots being amalgamated or subdivided) or either of the aggregate lot entitlements.

A special resolution of a body corporate will be sufficient to support a body corporate consent if the difference between the existing statement and the new statement is limited to the following:

- differences in the by-laws (other than a difference in exclusive use by-laws)
- the identification of a different regulation module to apply to the scheme.

In all other cases (eg changes to exclusive use by-laws, undisclosed changes to development plans, changes to an architectural and landscape code) a resolution without dissent is necessary to support the consent of the body corporate. If a body corporate constituted under BUGTA wants to lodge a new community management statement in substitution for an "interim statement" or a "standard statement" under the transitional provisions (see ¶7-625), then it will be necessary to examine the difference between the interim or standard statement (depending upon which one applies) and the proposed new statement to determine the type of resolution required. The principles outlined above have to be applied in the process.

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Law: s 50(2), 57, 62, 63, 174, 175.

Last reviewed: 6 April 2013

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[¶24-650] Requirements for statements

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What must be included in a CMS?

A community management statement can only include the things that are required or permitted to be included by the BCCM Act or the regulation module applying to the scheme. Section 66(1) of the BCCM Act requires a community management statement to:

• identify the scheme land
• state the identifying name for the scheme
• state the name of the body corporate and (other than for the first statement) the unique identifying number for the scheme
• state for the first statement for the scheme — the name and address for service of the original owner
• identify the regulation module applying to the scheme
• include a contribution schedule and an interest schedule
• for a scheme (other than a scheme being created by layering existing schemes) for which development approval is given after 14 April 2011 —

– include one or more services location diagrams for all service easements for —

(i) the standard format lots included in the scheme, and
(ii) common property for the standard format lots, and

– identify the lots affected, or proposed to be affected, by a statutory easement, and state the type of statutory easement

• for a scheme (other than a scheme being created by layering existing schemes) for which development approval is given after 14 April 2011 —

– if the contribution schedule lot entitlements for each lot included in the scheme are not equal — explain why they are not equal

• for a scheme established after 14 April 2011 or an adjusted scheme, in relation to contribution schedule lot entitlements for the lots included in the scheme —

– state the contribution schedule principle under s 46(7) on which the contribution schedule lot entitlements have been decided
– if the contribution schedule lot entitlements have been decided in accordance with the equality principle and are not equal — explain why they are not equal
– if the contribution schedule lot entitlements have been decided in accordance with the relativity principle — include sufficient details about the principle to show how individual contribution schedule lot entitlements for the lots were decided by using it

• for a scheme established after 14 April 2011 or an adjusted scheme, in relation to interest schedule lot entitlements for the lots included in the scheme —

– if the interest schedule lot entitlements reflect the respective market values of the lots — state that the interest schedule lot entitlements reflect the respective market values of the lots
– if the interest schedule lot entitlements do not reflect the respective market values of the lots — explain why the interest schedule lot entitlements do not reflect the respective market values of the lots

• include the by-laws (unless they are to be the by-laws in Sch 4 of the BCCM Act)
• if the scheme is intended to be developed progressively (for example, subdivision of scheme land to create further lots for the scheme or to establish a subsidiary scheme, or excision of a lot from, or addition of a lot to scheme land) and the development is not complete:

– explain the proposed development and illustrate it by concept drawings, and

– state the purpose of any future allocations for the scheme and the stages in which the future allocations are to be made

- if the scheme is involved in a layered arrangement of community titles schemes — explain the structure, or proposed structure, of the layered arrangement.

Explanation must be in plain English

It is a requirement under the Act that the explanations given regarding equality and relativity principles above be written in plain English and simple enough for an ordinary person to understand the explanation or details. This requirement introduced by the *Body Corporate and Community Management and Other Legislation Amendment Act 2011* on 14 April 2011 is yet to be tested or interpreted by the courts.

What is an adjusted scheme?

For the purposes of contribution lot entitlement (s 66(1)(db)), an adjusted scheme is a scheme that was:

- established before 14 April 2011 but subsequently the contribution schedule for the scheme was adjusted after 14 April 2011, and
- after the adjustment, the deciding principle for the contribution schedule lot entitlements for the lots included in the scheme is an equality or relativity principle.

For the purposes of interest lot entitlement (s 66(1)(dc)), an adjusted scheme is a scheme that was established before 14 April 2011 but subsequently the interest schedule for the scheme was adjusted after 14 April 2011.

By-laws

The by-laws selection for a new community management statement should be undertaken with an understanding of the type of development and the plan type applicable to the scheme.

Also, the by-laws applicable to the scheme at its commencement may not reflect the changing needs of the scheme over time.

For example, often a unit development first community management statement will contain a "boiler plate" by-law allowing the developer to keep a display unit for either as long as the developer is the owner or until such time as that by-law is removed from the community management statement.

In addition, the vehicular access by-laws for a gated town-house development will be different to the vehicular access by-laws for a unit development with basement parking.

In the first example, owners may pass through gates and drive along internal streets to reach the internal garage attached to their lot, necessitating a by-law regarding speed limits and the types of vehicles which may or should be brought onto the scheme land.

In the second example, however, the speed limit by-law may not be required if occupiers do not have to drive a great distance to their exclusive use basement car park.

The sample community management statement attached at ¶75-100 contains by-laws for a town-house style development upon which occupiers may drive their vehicles, together with a commonly used hard flooring by-law and swimming pool use by-law.

Service easements for standard format lots

The wording of the Act appears to require services location diagrams only where there are standard format lots included in the scheme. A "standard format lot" is a lot on a standard format plan of survey (see definition of "standard format lot" in the Dictionary in the *Land Title Act*). A lot on a building format plan cannot therefore be a standard format lot within the meaning of the definition. The parcel on which a community titles scheme is based may well be a standard format lot, but once that lot has been subdivided by a building format plan it is effectively replaced by further lots and common property. Those further lots are not standard format lots and the common property (being defined with reference to the new building format plan) cannot be a standard format lot. It should follow that, in the case of a building format plan, no services location diagrams will be required to be included in the community management statement. However, it should

be noted that the Registrar, as a matter of practice, is insisting on services location diagrams in all cases. Please also refer to s 66(4) and (5) regarding the time period for satisfying the requirement to provide service location diagrams.

What a CMS must not include

The community management statement must not include anything other than the things that this Act, or the regulation module applying to the scheme, says the statement must or may include. It must also not include provision adopting, under a regulation module, an architectural and landscape code or a provision of an architectural and landscape code that has no force or effect under the *Building Act 1975*, Ch 8A, Pt 2 (ie provisions prohibiting sustainable housing activities).

Regulation module requirements to be included in a CMS

In addition to the above, a community management statement must include anything that the regulation module applying to the scheme says it must include. At this stage none of the regulation modules require anything additional to be included in a community management statement.

A statement may also include anything that the regulation module applying to the scheme says it may include. The following table shows what additional matters may be included because of the provisions of the regulation modules:

Standard Module	Accommodation Module	Commercial Module	Small Schemes Module
Utility infrastructure connection arrangements for staged development.	Utility infrastructure connection arrangements for staged development.	Utility infrastructure connection arrangements for staged development.	An architectural and landscape code.
An architectural and landscape code.	An architectural and landscape code.	An architectural and landscape code.	Fair and reasonable meeting rules.
For principal schemes, arrangements or proposed arrangements for use of common property or assets.	For principal schemes, arrangements or proposed arrangements for use of common property or assets.	A promotion fund for the scheme.	

Some unrelated provisions of the BCCM Act expand the possible content of a community management statement. For example, s 69(2) authorises a community management statement to establish rights and obligations ancillary to the statutory easements implied under Pt 7 Ch 2 of the BCCM Act (see ¶26-550).

An example of an approved CMS

The registrar's requirements for completing the approved form of community management statement appear on an information sheet accompanying the form. These requirements must also be observed before the statement is acceptable for recording.

A sample community management statement is set out in ¶75-100 of the "Forms • Precedents" tab.

Law: *Body Corporate and Community Management Act 1997*, s 46(7), s 66 and s 69

Standard Module, s 6

Accommodation Module, s 7

Commercial Module, s 7

Small Schemes Module, s 7.

Last reviewed: 4 March 2014

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[¶24-700] Recording the statement

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When recording a community management statement, the registrar must give the statement a unique identifying number and then record a reference to the statement, including its number, on the indefeasible title for each lot and the common property that is scheme land. The registrar adds the number to the first statement (because when it is lodged the number is blank). However, the number should be included on all subsequent statements. The number always remains the same for a community titles scheme. Indeed, it forms part of the name of the body corporate and is the distinguishing feature of the community titles scheme.

The following should be noted about the recording of a community management statement:

- The statement is not an instrument under the *Land Title Act*.
- The registrar is not obliged to (but may) examine a statement for its validity, including, in particular, its consistency with any plan of subdivision, or its compliance with technical requirements.
- The validity or enforceability of a statement cannot be presumed simply because the registrar records the statement. This applies particularly to by-laws.
- Neither the validity nor the enforceability of a statement, as recorded by the registrar, is guaranteed by the state.

Law: *Land Title Act, 1994*, s 115K, 115L.

Last reviewed: 6 April 2013

[¶24-750] Transitional arrangements

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A body corporate continued in operation under the BCCM Act transitional provisions became the subject of a new scheme. The registrar allocated its unique identifying number as at 13 July 1997. As a new scheme under the transitional provisions it automatically ``inherited'' a community management statement. The statement was referred to as an ***interim statement***. The interim statement was not an actual document but was simply taken to exist and contain certain statements and information. It served as the community management statement for the new scheme until:

(a) a new community management statement was recorded for the scheme in accordance with the provisions of the Act, or
(b) if a new statement was not recorded, the end of three years after the commencement.

This effectively gave all bodies corporate existing at the time of commencement, plus all bodies corporate that came into existence under the 1980 Act after commencement pursuant to the transitional provisions (other than bodies corporate for a specified Act), three years in which to adopt and record their own community management statements. If they did not do this, then the Registrar was under a duty to actually record a new community management statement (known as a ***standard statement***) for the new scheme as soon as practicable after the three years. Until the Registrar did this, another community management statement could not be recorded for the scheme. In accordance with those requirements, the Registrar recorded standard statements in substitution for any remaining interim statements.

These transitional provisions are fully discussed at ¶7-625ff.

Law: s 336, 337, 339.

Last reviewed: 6 April 2013

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[¶25-250] Purpose

Click to open document in a browser

The concept of regulation modules is new to Australia. A regulation module is a set of regulations under the BCCM Act that establishes a particular management regime for a body corporate. There are a number of modules to choose from. They were introduced by the BCCM Act to allow the application of the most appropriate management regime to a project. They represent a compromise between the inflexible system in other Australian jurisdictions (under which a generic system is applied to every project irrespective of its nature) and the totally flexible North American system (under which the management regime is virtually project specific). Each regulation module is designed to cater for particular types of projects. The developer initially chooses the most appropriate module and that module can subsequently be changed by the body corporate if appropriate circumstances exist. The main benefits of the module approach are:

- There is a choice of management regimes, thus allowing the most appropriate choice to be made for a particular project.
- Community titles schemes can be managed more efficiently and this helps to minimise conflict.
- A regulation module is easy to change because it is a regulation.
- Changes can be restricted to a particular module, thus allowing government to control the impact of the change being made.

Against these benefits there is the disadvantage of having to work with a number of different management regimes. This is particularly significant for lawyers, body corporate managers and regulators who regularly have to deal with a number of different community titles schemes.

To some degree the concept and benefits of the module system have been compromised by amendments to the BCCM Act and regulation modules subsequent to its enactment. Some of these amendments have resulted in the Standard and Accommodation modules becoming too similar, thus impinging on their original purpose and restricting their effectiveness.

A regulation module applies to a community titles scheme if the community management statement identifies the module as the one applying to the scheme. However, the regulation module does not apply if any circumstances that need to exist for it to apply do not exist. The module itself specifies any such circumstances. When a regulation module fails to apply because of the lack of any such circumstances, then the standard regulation module (as to which see ¶25-300) automatically applies. Indeed, whenever no regulation module is expressed to apply to a community titles scheme, the standard regulation module applies. Only one regulation module can apply to a scheme, but in a layered arrangement of community titles schemes different regulation modules can apply to different bodies corporate in the layered arrangement.

Law: s 21.

Last reviewed: 6 April 2013

[¶25-300] Available modules

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There are currently five regulation modules:

- **Standard Module** — Body Corporate and Community Management (Standard Module) Regulation 2008
- **Accommodation Module** — Body Corporate and Community Management (Accommodation Module) Regulation 2008
- **Commercial Module** — Body Corporate and Community Management (Commercial Module) Regulation 2008
- **Small Schemes Module** — Body Corporate and Community Management (Small Schemes Module) Regulation 2008
- **Specified Two-lot Schemes Module** — Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011.

The standard module is a generic set of management rules intended for normal residential community titles schemes. The standard module regulates most schemes.

The accommodation module is intended for schemes that are predominantly for short or long term lettings or that operate as a hotel.

The commercial module is intended for schemes that are predominantly for commercial use.

The small schemes module is intended for schemes having six or fewer lots, irrespective of the use of the lots.

Finally, the specified two-lot schemes module is intended for schemes having two-lots (ie duplexes) which are to be used for residential purposes.

However, in the case of each module a number of conditions need to be satisfied before a scheme qualifies to use that module. The following table is a guide to the various conditions, although reference should be made to the various modules to determine the exact requirements.

Standard Module	Accommodation Module	Commercial Module	Small Schemes Module	Specified Two-lot Schemes Module
Applies to a community titles scheme if no other module applies to it.	Lots must be predominantly accommodation lots. **OR** Both of the following must apply— • Lots not predominantly accommodation lots. • When first CMS lodged, lots were intended to be predominantly accommodation lots. **OR** All of the following must apply— • Lots were previously but are no longer predominantly accommodation lots. • This module applied when lots stopped	Lots must be predominantly commercial lots. **OR** Both of the following must apply— • Lots not predominantly commercial lots. • When first CMS lodged, lots were intended to be predominantly commercial lots. **OR** All of the following must apply— • Lots were previously but are no longer predominantly commercial lots. • This module applied when lots stopped	**ALL** of the following must apply for the scheme— • It is a basic scheme. • There is no letting agent for the scheme. • There are no more than six lots in the scheme.	**ALL** of the following must apply for the scheme— • There must be only 2 lots included in the scheme. • The scheme must not be part of a layered arrangement of community titles schemes. • There must be no letting agent for the scheme. • The lots included in the scheme must be residential lots.

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	being predominantly accommodation lots. • This module has applied ever since the lots stopped being predominantly accommodation lots.	being predominantly commercial lots. • This module has applied ever since the lots stopped being predominantly commercial lots.		

"Accommodation lot" is defined in the module with reference to long or short term letting or leasing for accommodation, and also being part of a hotel (which is also defined in the module). "Commercial lot" is also defined in the module with reference to use for commercial (including retail) or industrial purposes, rather than accommodation or residential use.

Law: Standard Module, s 3

Accommodation Module, s 3, 4

Commercial Module, s 3, 4

Small Schemes Module, s 3

Specified Two-lot Schemes Module, s 3; BCCM Act s 111C.

Last reviewed: 6 April 2013

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[¶25-350] Transitional arrangements

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Because community management statements did not exist before commencement of the BCCM Act, it was necessary to establish a mechanism to provide all existing building units plans and group titles plans (which became community titles schemes under the transitional arrangements) with community management statements. The mechanism involved the creation of an *interim statement* by the Registrar of Titles. The intention was that this interim statement (which was not a document, but rather a “deemed” statement) was to be replaced by a *new statement* adopted and lodged for recording by the body corporate. If the body corporate failed to have a new statement recorded by 13 July 2000, then the Registrar prepared and recorded a statement known as a *standard statement*. These transitional provisions are fully discussed at ¶7-625ff.

Law: s 336, 337, 339.

Last reviewed: 6 April 2013

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[¶25-400] Changing modules

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A body corporate may change from one regulation module to another, provided it qualifies to be regulated by the new module. For example, a 50-lot high rise scheme cannot change to the small schemes module because of the 6 lots or less qualification requirement in the small schemes module. The procedure to make the change is as follows:

1. Check to ensure that the body corporate qualifies to be regulated by the proposed new module.
2. Prepare a new community management statement which specifies the proposed new module.
3. Submit the proposed new management statement to a general meeting of the body corporate with a proposed special resolution authorising the change of module and recording of the proposed new community management statement. (See Form B2, ¶72-570).
4. The body corporate executes the proposed new statement under its common seal.
5. The proposed new statement and a Request is lodged with the Registrar for recording. (This must be done within three months of it being executed by the body corporate.)

Law: s 62(3), 65(2).

Last reviewed: 6 April 2013

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[¶25-750] Types of lot entitlements

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A lot entitlement is a whole number allocated to a lot in a community titles scheme. There are two types of lot entitlements:

- a ***contribution schedule lot entitlement***
- an ***interest schedule lot entitlement.***

Each lot has both entitlements. They are found in schedules in the community management statement applying to the community titles scheme. The schedules are known as the ***contribution schedule*** and the ***interest schedule***.

Law: s 46.

Last reviewed: 6 April 2013

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[¶25-800] Contribution schedule lot entitlements

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Purpose of the contribution schedule lot entitlements

The contribution schedule lot entitlement for a lot is the basis for calculating:

- the lot owner's liability for body corporate levies (unless the BCCM Act provides that a particular levy is a differential levy), and
- other than for the owner of a lot included in a specified two-lot scheme, the value of the lot owner's vote on a poll for an ordinary resolution.

The relationship between levies and contribution schedule lot entitlements does not extend to levies to cover insurance premiums. These are required to be imposed on the basis of interest schedule lot entitlements and not contribution schedule lot entitlements. Furthermore, utility services are paid for on the basis of usage rather than lot entitlements, unless it is not possible to measure the usage of individual lots (see ¶25-850).

Calculation of contribution schedule lot entitlements for a scheme

Previously, for schemes for which development approval was given after 4 March 2002, the contribution schedule lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal. (See ¶25-925 for discussion on this principle.) However after 14 April 2011, upon the introduction of the *Body Corporate and Community Management and Other Legislation Amendment Act 2011*, there are two principles that may be used to determine contribution schedule lot entitlements for lots included in a community titles scheme (see s 46A). These are:

1. Equality principle — is the principle that the lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.
2. Relativity principle — is the principle that the lot entitlements must clearly demonstrate the relationship between the lots by reference to one or more particular relevant factors.

In relation to the application of the equality principle in deciding on contribution schedule lot entitlements, the Act provides the following examples of circumstances in which it may be just and equitable for lot entitlements not to be equal—

- a layered arrangement of community titles schemes, the lots of which have different uses (including, for example, car parking, commercial, hotel and residential uses) and different requirements for public access or maintenance
- a commercial community titles scheme in which the owner of one lot uses a larger volume of water or conducts a more dangerous or higher risk activity than the owners of the other lots.

The relevant factor in the relativity principle in deciding on contribution schedule lot entitlements may, and may only, be any of the following:

- how the community titles scheme is structured
- the nature, features and characteristics of the lots
- the purposes for which the lots are used
- the impact the lots may have on the costs of maintaining the common property
- the market values of the lots.

Adjustment of contribution schedule by resolution without dissent

The body corporate for a community titles scheme may (under s 47A) by passing a resolution without dissent change the contribution schedule lot entitlement for the scheme. The notice of meeting for the purposes of changing the contribution schedule lot entitlement must state in writing:

- the proposed changes to the contribution schedule lot entitlements
- the reasons for the proposed changes to the contribution schedule lot entitlements.

Adjustment of contribution schedule by order of specialist adjudicator or QCAT

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If a community titles scheme is:

- affected by a material change that has happened since the last time the contribution schedule lot entitlements for the lots in the scheme were decided, or
- the owner of a lot in the scheme believes an adjustment of the contribution schedule lot entitlements is necessary because of a material change, or
- established after 14 April 2011 and the owner of a lot in the scheme believes the contribution schedule lot entitlements for the lots are not consistent with the deciding principle for the lot entitlements,

then the lot owner may apply for an order of a specialist adjudicator or QCAT for an adjustment of the contribution schedule for the community titles scheme. The body corporate must be given notice of the application for an adjustment in accordance with the Act (see s 243 or s 37 of the QCAT Act).

If the specialist adjudicator or QCAT orders an adjustment of the contribution schedule, the adjusted contribution schedule lot entitlements for the lots included in the community titles scheme must be consistent with the deciding principle for the existing contribution schedule lot entitlements, and be just and equitable to the extent the deciding principle allows. If there is no apparent deciding principle for the existing contribution schedule lot entitlements, then it must be just and equitable. However, if there is a deciding principle for the existing contribution schedule lot entitlements, the specialist adjudicator or QCAT cannot change the deciding principle for the lot entitlements.

The body corporate must give effect to an order by lodging a request to record a new community management statement incorporating the adjustment ordered as soon as practicable.

Criteria for deciding whether contribution schedule lot entitlement is consistent with deciding principle

Section 48A(3) sets out matters which a specialist adjudicator or QCAT may have regard for deciding whether the contribution schedule lot entitlements are consistent with the deciding principle for the lot entitlements. The matters are limited to:

- the deciding principle for the contribution schedule lot entitlements, and
- the information about the application of the deciding principle to the lots included in the scheme that is included in the community management statement, and
- if the contribution schedule lot entitlements were decided on the equality principle, the matters to which the specialist adjudicator or QCAT may have regard under s 49, and
- the matters raised by the applicant to support the assertion that the contribution schedule lot entitlements are not consistent with the deciding principle for the lot entitlements, and
- the matters (if any) raised by each respondent to support the assertion that the contribution schedule lot entitlements are consistent with the deciding principle for the lot entitlements.

Law: BCCM Act, s 46, 46A, 46(7), 47, 47(2), (4), 47A, 47B, 48A and 49.

Last reviewed: 6 April 2013

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[¶25-850] Interest schedule lot entitlements

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Purpose of the interest schedule lot entitlement

The interest schedule lot entitlement for a lot is the basis for calculating:

- the lot owner's share of common property
- the lot owner's interest on termination of the scheme, including the lot owner's share in body corporate assets on termination of the scheme, and
- the unimproved value of the lot for rating and taxing purposes.

Where a utility service is supplied to a lot, and it is capable of separate measurement in respect of the various lots, is unrelated to unimproved value and is not charged to the body corporate, then that utility service is billed to the various lots based on usage. Where the utility service is not capable of separate measurement it is payable by the body corporate. Neither the contribution schedule lot entitlement nor the interest schedule lot entitlement is used to calculate the liability of a lot owner for these non-measurable services. However, where the cost of such a service is payable by the body corporate it eventually finds its way to the lot owners via the normal levy process, which is based on the contribution schedule lot entitlements.

How the interest schedule lot entitlement is calculated

The interest schedule lot entitlement for a scheme is calculated by market value principle. The principle is that the lot entitlements must reflect the respective market values of the lots, except to the extent to which it is just and equitable in the circumstances for the individual lot entitlements not to reflect the respective market values of the lots. Section 46B(2) requires that in calculating the market value of a lot:

- if a lot included in the scheme is a subsidiary scheme, the market value of the lot is the market value of the scheme land for the subsidiary scheme
- if a lot was created under a standard format plan of subdivision or volumetric format plan of subdivision, buildings and improvements on the lot are to be disregarded.

Adjustment of interest schedule

The owner of a lot in a community titles scheme may apply under Ch 6 of the Act for an order of a specialist adjudicator or an order of the QCAT for the adjustment of an interest schedule. The body corporate must be given notice of the application for an adjustment in accordance with the Act (see s 243 or s 37 of the QCAT Act). The order of an adjustment from a specialist adjudicator or QCAT must be consistent with the market value principle, as applied in relation to the respective market values of the lots included in the scheme when the order is made. If the specialist adjudicator or QCAT orders an adjustment of the interest schedule, the body corporate must, as quickly as practicable, lodge a request to record a new community management statement incorporating the adjustment ordered.

Criteria for deciding just and equitable circumstances for lot entitlement not to reflect market values

Section 49(4) sets out matters which a specialist adjudicator or QCAT may or may not have regard for deciding if it is just and equitable in the circumstances for the individual lot entitlements not to reflect the respective market values of the lots. These are (but not limited to):

- how the community titles scheme is structured, and
- the nature, features and characteristics of the lots included in the scheme, and
- the purposes for which the lots are used.

The specialist adjudicator or QCAT may not have regard to any knowledge or understanding or misunderstanding the applicant had, at the time the applicant entered into a contract to buy the subject lot, about the lot entitlement for the lot or other lots included in the community titles scheme.

Law: s 46B, 47(3), (4), 48, 49, 195, 196.

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[¶25-900] Adjustment of lot entitlements

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On 27 March 2013, the Body Corporate and Community Management and Other Legislation Amendment Bill 2012 received royal assent after being passed by the Queensland Parliament on 19 March 2013.

As at the time of this edition, no cases have been published demonstrating the adjudicator's exercise of the new law.

Lot entitlements in a community title scheme can be adjusted in one of three ways:

- by an order of the Queensland Civil and Administrative Tribunal, or specialist adjudicator
- by agreement between the owners of two or more lots, or
- by resolution without dissent of the body corporate agreeing to amendment of the relevant schedule of the community management statement.

Adjustment by order of QCAT or specialist adjudicator

So far as an order is concerned, the owner of a lot may apply to the Queensland Civil and Administrative Tribunal (QCAT) or specialist adjudicator for adjustment of a lot entitlement schedule. There are certain criteria a specialist adjudicator and QCAT must adhere to under the Act relating to an adjustment to the contribution schedule lot entitlements or an adjustment to the interest schedule lot entitlements of a scheme.

Adjustment to contribution schedule lot entitlements

If a community titles scheme is:

- affected by a material change that has happened since the last time the contribution schedule lot entitlements for the lots in the scheme were decided, or
- the owner of a lot in the scheme believes an adjustment of the contribution schedule lot entitlements is necessary because of a material change, or
- established after 14 April 2011 and the owner of a lot in the scheme believes the contribution schedule lot entitlements for the lots are not consistent with the deciding principle for the lot entitlements,

then the lot owner may apply for an order of a specialist adjudicator or QCAT for an adjustment of the contribution schedule for the community titles scheme. The body corporate must be given notice of the application for an adjustment in accordance with the Act (see s 243 or s 37 of the QCAT Act). If the specialist adjudicator or QCAT orders an adjustment of the contribution schedule, the adjusted contribution schedule lot entitlements for the lots included in the community titles scheme must be consistent with the deciding principle for the existing contribution schedule lot entitlements, and be just and equitable to the extent the deciding principle allows. If there is no apparent deciding principle for the existing contribution schedule lot entitlements, then it must be just and equitable. However, if there is a deciding principle for the existing contribution schedule lot entitlements, the specialist adjudicator or QCAT cannot change the deciding principle for the lot entitlements. The body corporate must give effect to an order by lodging a request to record a new community management statement incorporating the adjustment ordered as soon as practicable.

Whether contribution schedule lot entitlement is consistent with deciding principle

Section 48A(3) sets out matters which a specialist adjudicator or QCAT may have regard for deciding whether the contribution schedule lot entitlements are consistent with the deciding principle for the lot entitlements. The matters are limited to:

- the deciding principle for the contribution schedule lot entitlements, and
- the information about the application of the deciding principle to the lots included in the scheme that is included in the community management statement, and
- if the contribution schedule lot entitlements were decided on the equality principle, the matters to which the specialist adjudicator or QCAT may have regard under s 49, and

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• the matters raised by the applicant to support the assertion that the contribution schedule lot entitlements are not consistent with the deciding principle for the lot entitlements, and
• the matters (if any) raised by each respondent to support the assertion that the contribution schedule lot entitlements are consistent with the deciding principle for the lot entitlements.

Equality principle to contribution schedule — when is it just and equitable not to have equal lot entitlements

If an applicant applies for an order of the specialist adjudicator or QCAT for an adjustment of a lot entitlement schedule decided on the equality principle, then s 49(4) sets out what the specialist adjudicator or QCAT may or may not have regard to in deciding for a contribution schedule, if it is just and equitable in the circumstances for the respective lot entitlements not to be equal. The specialist adjudicator and QCAT may have regard (but not limited to):

• how the community titles scheme is structured, and
• the nature, features and characteristics of the lots included in the scheme, and
• the purposes for which the lots are used.

The specialist adjudicator or QCAT may not have regard to any knowledge or understanding or misunderstanding the applicant had, at the time the applicant entered into a contract to buy the subject lot, about the lot entitlement for the lot or other lots included in the community titles scheme.

Adjustment of interest schedule

The owner of a lot in a community titles scheme may apply under Ch 6 of the Act for an order of a specialist adjudicator or an order of the QCAT for the adjustment of an interest schedule. The body corporate must be given notice of the application for an adjustment in accordance with the Act (see s 243 or s 37 of the QCAT Act). The order of an adjustment from a specialist adjudicator or QCAT must be consistent with the market value principle, as applied in relation to the respective market values of the lots included in the scheme when the order is made. If the specialist adjudicator or QCAT orders an adjustment of the interest schedule, the body corporate must, as quickly as practicable, lodge a request to record a new community management statement incorporating the adjustment ordered.

Criteria for deciding just and equitable circumstances for lot entitlement not to reflect market values

Section 49(4) sets out matters which a specialist adjudicator or QCAT may or may not have regard for deciding if it is just and equitable in the circumstances for the individual lot entitlements not to reflect the respective market values of the lots. These are (but not limited to):

• how the community titles scheme is structured, and
• the nature, features and characteristics of the lots included in the scheme, and
• the purposes for which the lots are used.

The specialist adjudicator or QCAT may not have regard to any knowledge or understanding or misunderstanding the applicant had, at the time the applicant entered into a contract to buy the subject lot, about the lot entitlement for the lot or other lots included in the community titles scheme.

Adjustment by agreement between owners of two or more lots in the scheme

For the owners of two or more lots to agree to an adjustment, the following must be satisfied:

(1) The owners must agree in writing to change the lot entitlements.
(2) The total lot entitlements of the lots being changed must not be affected.
(3) The registered mortgagee and lessee (if any) of each of the lots being changed must consent to the change.
(4) The owners of the lots being changed must advise the body corporate in writing of the change.

The body corporate must then lodge with the registrar, as quickly as practicable, a request to record a new community management statement reflecting the adjustment agreed to. It is an offence not to do this,

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attracting a maximum penalty of 100 penalty units. The owners changing the lot entitlements must bear the cost of preparation and registration of the new statement.

Adjustment to contribution schedule by resolution without dissent

The body corporate for a community titles scheme may (under s 47A) by passing a resolution without dissent change the contribution schedule lot entitlement for the scheme. The notice of meeting for the purposes of changing the contribution schedule lot entitlement must state in writing:

- the proposed changes to the contribution schedule lot entitlements
- the reasons for the proposed changes to the contribution schedule lot entitlements.

The changed contribution schedule must be consistent with either the deciding principle for the existing contribution schedule or another principle (ie equality or relativity principle).

In relation to s 47A(4), if the original deciding principle for the existing contribution schedule was the relativity principle based on one or more particular relevant factors, and the body corporate wants to make a change to the contribution schedule lot entitlements to be consistent with the same relativity principle, then it may base its changes on the same particular relevant factors to the original factors, or it may consider particular relevant factors that are different to the original factors.

Alternatively if body corporate wants to change its existing contribution schedule lot entitlements derived from a relativity principle to another deciding principle (ie the equality principle), then it may also do so.

For the body corporate to change a schedule of lot entitlements the procedure is as follows:

(1) The body corporate passes a resolution without dissent (see Form B166, ¶74-565). The motion can be submitted by the committee, a lot owner or a body corporate manager (if the body corporate manager is permitted to submit the motion under the relevant regulation module).
(2) A new community management statement is prepared and executed setting out the new schedule(s) of lot entitlements.
(3) A General Request to register the community management statement is prepared and executed.
(4) The General Request and new community management statement are lodged for recording by the registrar within three months of the passing of the resolution.
(5) A copy of the new community management statement must be given to the relevant planning body (ie the local government or urban land development authority) within 14 days of the statement being recorded.

Adjustment to contribution schedule by resolution under s 47A — New s 47AA

There are new sections added to the *Body Corporate and Community Management Act 1997* which have taken effect as of 27 March 2013. This is a result of the Body Corporate and Community Management and Other Legislation Amendment Bill and the new sections added are 47AA, 47AB and 47AC. The newly added sections are below:

(1) Section 47AA applies if a body corporate for a community titles scheme (the scheme) considers a motion under s 47A to change the contribution schedule lot entitlements for the lots included in the scheme.
(2) If the body corporate passes the motion by resolution without dissent (the resolution) under s 47A, an owner of a lot included in the scheme may apply under s 47AA(3) if the owner:

- is an owner of a lot included in the scheme when the body corporate passed the resolution, and
- believes that the contribution schedule lot entitlements as changed by the resolution (the changed entitlements) are not consistent with whichever of the principles (the relevant principle) mentioned in s 47A(3)(a) or (b) as the basis for the change.

(3) The owner may apply:

- under Ch 6 for an order of a specialist adjudicator that the changed entitlements are not consistent with the relevant principle, or
- as provided under the QCAT Act, for an order of QCAT, exercising the tribunal's original jurisdiction, that the changed entitlements are not consistent with the relevant principle.

(4) Except as provided in s 47AA(3) and s 47AC:

- an owner of a lot included in the scheme may not make any application under Ch 6, or to QCAT, in relation to a dispute about the changed entitlements, and
- QCAT, or a department adjudicator or specialist adjudicator under Ch 6, has no jurisdiction to hear and determine a dispute about the changed entitlements.

(5) Without limiting s 47AA(4), a department adjudicator or a specialist adjudicator under Ch 6 has no jurisdiction to determine a dispute about whether or not a body corporate acted reasonably under s 94(2) in deciding to pass, or not to pass, a resolution under s 47A.

Section 47AB: Procedural matters for application under s 47AA

(1) Section 47AB applies if an owner of a lot included in a community titles scheme makes an application under s 47AA(3).
(2) Despite any other law or statutory instrument, the respondent to the application is the body corporate.

Please note: the body corporate must be given notice of the application under:

(a) for an application to a specialist adjudicator under Ch 6 s 243, or
(b) for an application to QCAT as provided under the QCAT Act, s 37.

(3) If the owner applies under s 47AA(3)(a) for an order of a specialist adjudicator under Ch 6:

(a) at the election of another owner of a lot in the scheme, the other owner may be joined as a respondent to the application, and
(b) each party to the application is responsible for the party's own costs of the application.

(4) An owner of a lot included in the scheme who elects, under s 47AB(3)(a), to become a respondent to the application must give written notice of the election to the body corporate.

Section 47AC: Order of specialist adjudicator or QCAT on application under s 47AA

(1) Section 47AC applies if, on an application under s 47AA(3), the specialist adjudicator or QCAT makes an order that the changed entitlements are not consistent with the relevant principle.
(2) The body corporate must not lodge a request under s 47A(5).
(3) Section 47AC(4) applies if the body corporate lodged a request (the original request) under s 47A(5) before the specialist adjudicator or QCAT made the order.
(4) The body corporate must, as quickly as practicable after the specialist adjudicator or QCAT makes the order, lodge a request to record a new community management statement for the scheme that incorporates the contribution schedule lot entitlements that applied to the lots included in the scheme immediately before the body corporate passed the resolution under s 47A.

Maximum penalty — 100 penalty units.
(5) The body corporate need not lodge a request under s 47AC(4) if:

(a) the community management statement mentioned in the original request has not been recorded when the specialist adjudicator or QCAT makes the order, and
(b) after the specialist adjudicator or QCAT makes the order, the body corporate is able to withdraw the original request, and
(c) as a result of the body corporate withdrawing the original request, the community management statement mentioned in the original request is not recorded.

So, what do the changes seek to do?

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Effectively, the above amendments are expected to apply to those lot owners (of which there are currently about 130 schemes) who had their lot entitlements reviewed and ruled upon by a court or tribunal only to later have that decision reversed.

The new sections provide the machinery by which those lots sitting in a current limbo may take their entitlements back.

Although these changes are not expected to open a plethora of challenges to lot entitlements at this stage, any further developments will be updated accordingly.

Law: s 46, 46A, 46B, 47, 47A, 47AA, 47AB, 47AC, 47B, 48, 48A, 49, 50, 61 and 62.

Last reviewed: 23 April 2013

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[¶25-925] The just and equitable circumstances

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If an application is made for an order of a specialist adjudicator or QCAT for the adjustment of a lot entitlement schedule, decided on the equality principle or market value principle, then below sets out matters to which they may or may not have regard for deciding:

• for a contribution schedule — if it is just and equitable in the circumstances for the respective lot entitlements not to be equal, and
• for an interest schedule — if it is just and equitable in the circumstances for the individual lot entitlement not to reflect the respective market values of the lots.

The QCAT or specialist adjudicator may have regard to:

(a) how the community titles scheme is structured
(b) the nature, features and characteristics of the lots included in the scheme, and
(c) the purposes for which the lots are used, in deciding whether it is just and equitable in the circumstances.

The QCAT or specialist adjudicator may not have regard to any knowledge or understanding the applicant had, or any lack of knowledge or misunderstanding on the part of the applicant, at the relevant time, about:

(a) the lot entitlement for the subject lot or other lots included in the community titles scheme, or
(b) the purpose for which a lot entitlement is used.

The "relevant time" is the time the applicant entered into a contract to buy the subject lot and the "subject lot" is the lot owned by the applicant. Also, the above matters are not the only matters that the QCAT or specialist adjudicator may have regard to in deciding an application.

Law: s 49.

Last reviewed: 6 April 2013

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[¶25-930] Contribution schedule lot entitlements and equality

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Contribution schedule determined by equality principle or relativity principle

On 14 April 2011, upon the introduction of the *Body Corporate and Community Management and Other Legislation Amendment Act 2011*, there are now two deciding principles that may be used to determine the contribution schedule lot entitlements for lots included in a community titles scheme (see s 46A). This is a significant departure from the previous operation of the Act which only allowed for the contribution schedule lot entitlement to be calculated based on the equality principle (that is all contribution lot entitlements must be equal and if the lot entitlements within the scheme were not equal, then an explanation was required under the Act as to why it was just and equitable not to have equal lot entitlements for the scheme).

Upon the introduction of the 2011 amendments, a developer or body corporate can now have a choice in deciding how the contribution schedule lot entitlements shall be determined for the community titles scheme. They may choose:

1. Equality principle — that the lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal, or
2. Relativity principle — that the lot entitlements must clearly demonstrate the relationship between the lots by reference to one or more particular relevant factors.

In relation to the application of the equality principle in deciding on contribution schedule lot entitlements, the Act provides the following examples of circumstances in which it may be just and equitable for lot entitlements not to be equal—

- a layered arrangement of community titles schemes, the lots of which have different uses (including, for example, car parking, commercial, hotel and residential uses) and different requirements for public access or maintenance
- a commercial community titles scheme in which the owner of one lot uses a larger volume of water or conducts a more dangerous or higher risk activity than the owners of the other lots.

The relevant factor in the relativity principle in deciding on contribution schedule lot entitlements may, and may only, be any of the following:

- how the community titles scheme is structured
- the nature, features and characteristics of the lots
- the purposes for which the lots are used
- the impact the lots may have on the costs of maintaining the common property
- the market values of the lots.

Legislative history

When the BCCM Act was originally enacted there was no requirement in respect of new schemes for the contribution schedule lot entitlements to be equal. However, if they were not equal a lot owner could apply to the District Court for an order for the adjustment of the lot entitlement schedule. The order of the Court had to be consistent with the principle of equality of contribution schedule lot entitlements “except to the extent to which it is just and equitable in the circumstances for them not to be equal”. There was nothing to guide the Court as to what circumstances might justify departure from equality.

The *Body Corporate and Community Management and Other Legislation Amendment Act 2003*, which commenced on 4 March 2003, introduced the following changes:

- removal of a provision that said it was not a requirement that the original allocation contribution schedule lot entitlements be equal
- introduction of a requirement for contribution schedule lot entitlements in first community management statements to be equal, except to the extent that it is just and equitable for them not to be equal, where development approval for the scheme was given after 4 March 2003

- introduction of a requirement when deciding all first community management statement lot entitlements for regard to be had to the scheme structure, the nature, feature and characteristics of lots and the use of lots
- the conferring of jurisdiction on a specialist adjudicator, in addition to the jurisdiction of the District Court, to adjust lot entitlement schedules
- introduction of a requirement for an order of a court or specialist adjudicator relating to contribution schedule lot entitlements to be consistent with the principle of equality, except to the extent to which it is just and equitable in the circumstances for them not to be equal
- introduction of criteria for deciding just and equitable circumstances.

The net effect of these changes, particularly when viewed in light of the explanatory notes to the Bill for the 2003 Act, and examples appearing under s 46(7) and given by the minister in her Second Reading Speech on the Bill, was to place an even greater emphasis on the presumption for equality and to further limit the circumstances that may result in a departure from equality.

Some historical interpretation on equality — case law

Despite this, the District Court tended to favour a more liberal approach to the departure from equality. See *Sandhurst Trustees Ltd* v *Condah Bay Investments Pty Ltd & Ors* and *Fischer & Ors* v *Body Corporate for Centre Point Community Titles Scheme 7779*.

Fischer's case then went on appeal to the Court of Appeal. Chesterman J, with whom McPherson J and Atkinson J agreed, said at para [26], [30]–[33] after considering the 2003 amendments, the explanatory notes to those amendments and the Minister's Second Reading Speech:

> "26. Although the Act gives no clear indication one way or the other, the preferable view is that a contribution schedule should provide for equal contributions by apartment owners, except insofar as some apartments can be shown to give rise to particular costs to the body corporate which other apartments do not. That question, whether a schedule should be adjusted, is to be answered with regard to the demand made on the services and amenities provided by a body corporate to the respective apartments, or their contribution to the costs incurred by the body corporate. More general considerations of amenity, value or history are to be disregarded. What is at issue is the 'equitable' distribution of the costs.
>
> ...
>
> 30. These materials make it tolerably plain that the Act is intended to produce a contribution lot entitlement schedule which divides body corporate expenses equally except to the extent that the apartments disproportionately give rise to those expenses, or disproportionately consume services. That determination can only be made by reference to factors which have a financial impact or consequence on the body corporate. It cannot be affected by factors which go to an apartment's value or amenity.
>
> 31. Secondly, the nature of a contribution lot entitlement schedule itself suggests that the allocation of lot entitlements is to be made on the basis of the impact that individual apartments make upon the costs of operating and running a community titles scheme. Contribution lot entitlements determine the apartment's share of the outgoings. The starting point is that the entitlements should be equal. A departure from that principle is allowable only where it is just, or fair, to recognise inequality. The departure must take as its reference point the proposition, from which it departs, that apartment owners should contribute equally to the costs of the building. The focus of the inquiry is the extent to which an apartment unequally causes costs to the body corporate.
>
> 32. The third consideration is that if this principle not be the applicable one then there is no basis on which applications for adjustment of a contribution lot entitlement schedules can consistently be made. As the evidence in this application shows, if the inquiry is limited to the extent to which an apartment creates costs, or consumes services, above or below the average, one can readily determine what the contribution lot entitlement should be. The high degree of similarity in the reports of Mr Sheehan and Mr Linkhorn demonstrates this. If the inquiry be wider and include such nebulous criteria as the structure of the scheme, or the nature, features and characteristics of the apartments in the scheme, and the purposes for which they are used, there is no intelligible basis on which there could be a

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consistent and coherent determination of applications for adjustment of lot entitlements. Each case would be determined idiosyncratically and a vast variety of circumstances might be relied upon to depart from, and therefore erode, the principle said to be paramount, that there should be an equality of entitlements.

33. Accordingly I would construe s 49 of the Act, and in particular subsection (4), as meaning that those identified matters to which a court may have regard are to be regarded only to the extent, if any, that they affect the cost of operating a community title scheme."

The Court of Appeal decision in *Fischer's case* is most useful in setting the criteria that the District Court or a specialist adjudicator must take into account when considering whether there should be a departure from equality. However, it leaves open the question of the degree of impact on costs that must be established to justify a departure from equality of contribution schedule lot entitlements. It seems well established that the question is one that must be decided on a case by case basis (*Re: Kurilpa Protestant Hall Pty Ltd*, *Burnitt Investments Pty Ltd* v *Body Corporate for St Andrews Community Titles Scheme* and *Sandhurst Trustees*), but there is a need for further guidance on this question of degree.

Law: s 46–49.

.40 Case references: *Sandhurst Trustees Ltd* v *Condah Bay Investments Pty Ltd & Ors* [2003] QDC 438.

Fischer & Ors v *Body Corporate for Centre Point Community Titles Scheme 7779* [2004] QDC 017; (2004) LQCS ¶90-127.

Re: Kurilpa Protestant Hall Pty Ltd St R Qd 170.

Burnitt Investments Pty Ltd v *Body Corporate for St Andrews Community Titles Scheme 20508* [2002] QDC 6.

Last reviewed: 6 April 2013

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[¶25-950] Limitations on adjustment of lot entitlement schedule

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Limited adjustment to lot entitlement — after subdivision of lots

On 14 April 2011, the *Body Corporate and Community Management Act 1997* was amended with limitations to adjustments to lot entitlements for a community titles scheme after it is subdivided into two or more lots (see s 51B). The limitation does not apply to the situation where the scheme land was intended to be a progressive development or a subsidiary scheme. It requires owners of the new lots created by the subdivision (post subdivision) to ensure the lot entitlements for those lots are consistent with the deciding principle for the scheme pre-subdivision. If there is not already a deciding principle for the lots pre-subdivision then the lot entitlement for post-subdivision lots must be decided by the respective market values of the lots, except to the extent to which it is just and equitable for it not to reflect the market values of the lots. The owners of the post-subdivision lots must also provide the body corporate a written notice of the lot entitlements for the post-subdivision lots. A new community management statement must be lodged by the body corporate as soon as practicable to give effect to the changes. The costs of preparation and lodgement of the new community management statement must be paid by the owners of the post-subdivision lots.

Limited adjustment to lot entitlement — after amalgamation of lots

Pursuant to s 51C of the Act, if two or more lots in a community titles scheme are amalgamated into one lot (post-amalgamation lot), the lot entitlement for the post amalgamation lot must be the total of the lot entitlements for the pre-amalgamation lots. The owner of the post-amalgamation lot must give the body corporate written notice of the lot entitlement for the post-amalgamation lot. The body corporate must, as quickly as practicable, lodge a request to record a new community management statement incorporating the change. The new community management statement must be prepared and recorded at the expense of the owners of the pre-amalgamation lots.

Law: s 51, 51B and 51C.

Last reviewed: 6 April 2013

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[¶26-250] When do they apply?

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Part 7 of Chapter 2 of the BCCM Act creates a number of statutory easements for lots and common property in community titles schemes. However, these easements do not apply to all schemes and it is important to understand when they do and do not apply.

The statutory easements will only apply:

(a) to a community titles scheme if the lots included in the scheme are lots on —

(i) a building format plan of subdivision
(ii) a volumetric format plan of subdivision, or
(iii) a standard format plan of subdivision registered on or after 13 July 1997;

(b) to a standard format lot in a community titles scheme intended to be developed progressively where there are no buildings on the lot;

(c) to the extent that there is no inconsistency with the provisions of an easement established under the *Land Title Act*.

It should be noted that the dependency on a building for the statutory easements to apply has been removed for all staged developments and for standard format plans registered after 13 July 1997. Standard format plans registered before that date and not containing lots for staged development will still not get the benefit of the statutory easements in the absence of a building.

Law: s 67.

Last reviewed: 6 April 2013

[¶26-300] Easements for support

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The first type of statutory easement is an easement for lateral or subjacent support. They subsist for the entire life of the scheme. Lateral support is support from the sides of a thing (eg a wall or part of a wall can be supported laterally by another wall or another part of the wall). Subjacent support is support from underneath or below (eg where a floor depends upon walls below for support). This type of easement exists:

- in favour of a lot against another lot capable of supplying lateral or subjacent support; and
- in favour of a lot against common property capable of supplying lateral or subjacent support; and
- in favour of common property against a lot capable of supplying lateral or subjacent support; and
- in favour of common property against other common property capable of supplying lateral or subjacent support.

A classic example of this type of easement arises in relation to party walls between townhouses where the boundary line passes through the centre of the wall. Each side of the wall depends upon the other for lateral support and the upper section of the wall depends upon the opposite side of the lower section of the wall for subjacent support. These easements provide the necessary protection for both lot owners.

Special rights attach to these easements. The owner of a lot entitled to the easement may enter another lot or common property providing support to maintain or replace that support. Similarly, the body corporate may enter a lot or common property providing support to other common property to maintain or replace that support. The reference to common property may seem odd because both the lot owner and body corporate would be expected to have the right to enter the common property in any event. However, this may not be the case where a right of exclusive use and enjoyment or special privilege has been created over the relevant area of common property. Also, a right of entry in itself may not confer the right to maintain or replace the support because this may require the doing of work on the common property. The exercise of these rights is subject to s 68 of the BCCM Act (see ¶26-550).

Law: s 68 *Land Title Act 1994*, s 115N.

Last reviewed: 6 April 2013

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[¶26-350] Utility easements

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An easement exists in favour of a lot and against other lots and common property for supplying utility services to the lot and establishing and maintaining utility infrastructure reasonably necessary for supplying the utility services. Similarly, an easement exists in favour of common property and against the lots for supplying utility services to the common property and establishing and maintaining utility infrastructure reasonably necessary for supplying utility services to the common property. ``Utility service'' is defined to mean:

(a) water reticulation or supply
(b) gas reticulation or supply
(c) electricity supply
(d) air conditioning
(e) a telephone service
(f) a computer data or television service
(g) a sewer system
(h) drainage
(i) a system for the removal or disposal of garbage or waste, or
(j) another system or service designed to improve the amenity, or enhance the enjoyment, of lots or common property.

``Utility infrastructure'' is defined to mean cables, wires, pipes, sewers, drains, ducts, plant and equipment by which lots or common property are supplied with utility services.

The exercise of rights under this type of easement is regulated by s 68 of the BCCM Act (see ¶26-550). In addition, s 115O(2) and 115P(2) of the *Land Title Act* say that the exercise of rights under this type of easement must not interfere unreasonably with the use or enjoyment of the lot or part of the common property against which the easement lies. To a degree, this provision duplicates the requirements of s 68(1).

Law: s 68(1) *Land Title Act 1994*, s 115O, 115P.

Last reviewed: 6 April 2013

[¶26-400] Easements for shelter

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An easement entitling the owner of a lot to have the lot sheltered by parts of a building within scheme land necessary to supply shelter exists against the lots or parts of common property where the relevant parts of the building are situated. To ``shelter'' includes acting as a barrier against things such as heat, wind and rain.

It is interesting to note that there is no corresponding easement in favour of the common property. This will be important in a building where part of the common property depends upon a part of a lot for shelter. In those circumstances an easement under the *Land Title Act* will need to be created. This type of easement entitles the owner of the lot benefited to enter the lot or common property providing shelter to maintain or replace the shelter. Again, the rights must be exercised in accordance with s 68 (see ¶26-550).

Law: s 68 *Land Title Act 1994*, s 115Q.

Last reviewed: 6 April 2013

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[¶26-450] Easements for projections

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If eaves, guttering, drainpipes, awnings, window sills, or other minor parts of a building within a lot project over the boundaries of another lot or common property, an easement permitting the projection exists in favour of the first mentioned lot against the part of the other lot or common property over which the projection lies. The easement permits the owner of the first mentioned lot (ie the one with the projections) to enter the other lot or the common property to maintain or replace the building parts. Again, the rights under the easement must be exercised in accordance with s 68 (see ¶26-550).

This is an important easement where attached townhouses are being built. Parts of these townhouses frequently encroach onto the adjoining lot and access to maintain and replace is essential.

Law: s 68 *Land Title Act 1994*, s 115R.

Last reviewed: 6 April 2013

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[¶26-500] Maintenance easement

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The easements for projections apply where specified parts of a building actually project over the boundary of another lot or common property. The maintenance easement is intended to cover the situation where the building is wholly within the lot, but is so close to the boundary that it is necessary to enter the other lot or common property to carry out maintenance or replacements. Again, the right of entry must be exercised in accordance with s 68 of the BCCM Act (see ¶26-550).

Law: s 68 *Land Title Act 1994*, s 115S.

Last reviewed: 6 April 2013

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[¶26-550] Exercise of easement rights

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There is a further requirement that the statutory easement rights must not be exercised in a way that unreasonably prevents or interferes with the use and enjoyment of a lot or common property. This requirement is additional to any limitation placed on the exercise of the right by the section that confers the right. In addition, if the purpose of the entry onto a lot or common property is to carry out work, the owner wishing to enter must:

(a) give reasonable written notice —

(i) to the other lot owner and, if they are not the occupier, to the occupier; or
(ii) to the body corporate,

before entering to carry out work; and
(b) comply with the security or other arrangements or requirements ordinarily applying for persons entering the lot or common property.

Similarly, a body corporate wishing to enter a lot to carry out work must give reasonable written notice to the lot owner before entering. However, the body corporate is not under an obligation to give the notice to the occupier where the owner is not the occupier. Despite this, notice to the occupier in those circumstances would be desirable. In all cases, if the need for the work to be carried out is an emergency, or in the nature of an emergency, then the formal notice obligations do not apply. However, the requirement to be reasonable still applies to the extent that it is not inconsistent with the right to access after notice (see s 69(3) of the BCCM Act). What constitutes ``reasonable notice'' will depend upon the circumstances. Circumstances that may influence this include:

- Although the need may not amount to an ``emergency'', the urgency of the work will be relevant.
- Whether the other owner is resident or non-resident.
- Where the other owner lives or whether they can readily access the scheme (eg they may live or be holidaying overseas).
- The type of access that is required. For example, access to a yard area is less intrusive than access to an apartment.

In normal circumstances a 7-day notice period would probably be reasonable. If 14 days can conveniently be given, then that would be preferable. The notice should specify when access is required, but could also invite the other owner or body corporate to make contact to arrange an alternate time if the nominated time is not convenient. (See Form B3, ¶72-590, in the ``Forms • Precedents'' tab).

Finally, the following points should be noted about these statutory easement rights:

- Ancillary rights and obligations necessary to make the easements effective apply. An example of an ancillary right would be the right to be accompanied by tradespeople who may bring equipment onto the lot being entered. An example of an ancillary obligation would be a requirement to reinstate the lot being entered to the condition it was in before it was entered — such as the reinstatement of disturbed lawns or landscaping.
- The community management statement may also establish rights and obligations ancillary to these easements (see ¶24-650).
- Where rights of access are being exercised by a lot owner under the notice provisions, to the extent that there is any inconsistency between the obligation to be reasonable imposed by s 68(1) and the right to enter, then the right to enter prevails (see s 69(3)). However, any obligation about reasonableness or interference in the section that actually confers the right would remain as an overriding obligation.

Law: s 68, 69 *Land Title Act 1994*, s 115O.

Last reviewed: 6 April 2013

[¶26-560] Irregularly procured easements

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It is not uncommon for the developer of adjacent lots to secure easements for itself over those lots as part of the overall development intended to be built in stages however issues can arise where, instead of completing the development over adjacent lots, the developer sells off an adjoining lot to which an easement is attached.

In *Lambert Property Group Pty Ltd* v *Body Corporate for Castlebar Cove* [2015] QSC 179 (29 July 2015) the subsequent owner of an adjoining lot sought to rely on an irregularly procured resolution entered into by the body corporate (during the developer's control period) in which the body corporate approved entry by it into an easement which would allow the construction and development of what was to be stage 3 of the adjacent development for the consideration of one dollar.

Notwithstanding the fact an easement was never entered into (although the motion contemplated same), following the sale of the adjacent block to Lambert Property Group, Lambert sought to rely on a statutory right under s 180 of the *Property Law Act 1974* to allow it access via the common property car park located on the body corporate's property. This would have involved significant structural changes being made to the common property car park in order to allow cars from the to-be-established Lambert Property Group Scheme access to and from their common property. Additionally the grant of the easement would have caused considerable inconvenience to the residents of the established scheme.

Strangely Lambert Property Group already had access to its lot via a neighbouring street but argued it would have been too difficult for it to obtain necessary consent from adjacent land owners in order to secure the agreement it needed. Nevertheless, it persisted with its application in the Supreme Court before Applegarth J.

Lambert Property Group argued that it required access via the body corporate's common property car park because its development approval contemplated access via that common property car park and no other access was approved under the development approval.

Ultimately his Honour found for the respondent body corporate for the following reasons:

- Lambert Property Group did not establish that it was unable to use an alternative means of access to and from its property
- Lambert Property Group did not seek the Council's response to an amended form of development
- The body corporate's town planning evidence suggested that there was a modified development approval to provide access via Lambert Street (as opposed to through the body corporate's common property car park)
- It was not reasonably necessary (in terms of the effective use of its lot) for Lambert Property Group to have access via the body corporate's common property car park
- The grant of an easement through the body corporate's common property car park would have imposed an unacceptable inconvenience to residents in the vicinity of the existing driveway.

The take home lesson is that an easement will not be granted where it results in interference with proprietary rights and loss of amenity.

Last reviewed: 30 November 2015

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[¶26-600] Supplementing statutory easements

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The statutory easement provisions of the BCCM Act have effect for a community titles scheme subject to the provisions of any easement established in the appropriate way under the *Land Title Act*. It is therefore clear that it is possible to supplement or replace the statutory easements with express easements created under the *Land Title Act*. The express easements could impliedly displace the statutory easements, or there appears to be no reason why the express easements cannot specifically state that a particular statutory easement is intended to be displaced.

Before the *Natural Resources and Other Legislation Amendment Act 1997* it was possible to create these additional or substitute easements on plan registration. Unfortunately for land developers, s 87 of that Act repealed Pt 6 Div 4 Sub B of the *Land Title Act*, which was the part that permitted the creation of easements on plan registration. This means that all easements must now be created by the old system of registering an ``instrument of easement''. The only redeeming factor is the inclusion of a provision in s 86 of the *Land Title Act* which allows such an instrument to be registered even if:

- the same person owns the lot benefited and the lot burdened, or
- the owner of the lot benefited holds an interest in the lot burdened.

This enables the easements to be created immediately after the plan has been registered and before settlement of any sales of lots. The disadvantage is the need for separate instruments of easements, with the resultant inconvenience and expense.

Law: s 67(3) *Natural Resources and Other Legislation Amendment Act 1997*, s 87 *Land Title Act 1994*, s 86.

Last reviewed: 6 April 2013

[¶26-650] Services location diagrams

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Mention was made in ¶24-650 of the need for a services location diagram to be included in a community management statement if development approval for the scheme was given after 4 March 2003. Please note: sometimes it is not possible to produce a final services location diagram for attachment to the back of a community management statement as part of the off-the-plan disclosure process. In those cases, a title page headed "Services Location Diagram — To be provided" can be sufficient under s 206(4) of the *Body Corporate and Community Management Act 1997*. In addition to this requirement, in certain circumstances a body corporate must have a new community management statement containing a services location diagram recorded by the registrar. This applies if:

(a) because of a change in the service easements for the standard format lots included in a community titles scheme, a services location diagram no longer reflects the location of the current services easements, or
(b) a services location diagram is not included in the community management statement and, after 4 March 2003, a new service easement is established for a standard format lot in the scheme.

Lodgment must occur within one year of the change happening or the new easement being established.

It follows that nearly all schemes to which pre-March 2003 development approvals relate will not have a services location diagram attached to their community management statements.

Law: *Body Corporate and Community Management Act 1997*, s 66(1)(d)(ii), 70.

Last reviewed: 6 April 2013

[¶26-850] Requirements to register a plan of subdivision

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The *Land Title Act 1994* requires that before a plan of subdivision can be registered it must:

(a) distinctly show all roads, parks, reserves and other proposed lots that are to be public use land
(b) include a statement agreeing to the plan and dedicating the public use land by:

(i) the registered owner, or
(ii) if the mortgagee of the registered owner is in possession — the mortgagee in possession

(c) show all proposed lots marked with separate and distinct numbers
(ca) distinctly show all proposed common property
(d) show all proposed easements marked with separate and distinct letters
(e) comply with the *Survey and Mapping Infrastructure Act 2003*
(f) be certified as accurate by a cadastral surveyor within the meaning of the *Surveyors Act 2003*
(g) have been approved by the relevant planning body, unless the plan of subdivision provides only for:

(i) amalgamation of two or more lots to create a smaller number of lots
(ii) the redefinition of a lot on a resurvey, or
(iii) the incorporation of a lot under the BCCM Act (ie a lot comprising a body corporate asset) with common property or the conversion of lessee common property

(h) if the plan of subdivision provides for the division of one or more lots, or the dedication of land to public use — have been approved by the relevant planning body
(i) comply with directions of the registrar about the required format for a plan of subdivision, and
(j) be consented to by all registered mortgagees of each lot the subject of the plan and all other registered proprietors whose interests are affected by the plan.

A number of matters need to be noted about these requirements:

Item (a)

Dedications of land for public use are dealt with in ¶26-900.

Item (b)

The form of statement appears on the back of the first sheet of the plan. The statement is entitled “Certificate of Registered Owners or Lessees”. It can be used for *either* a registered owner or lessee to consent.

Item (c)

Clause 8.3 of the registrar’s directions deals with the numbering of lots on a standard format plan. Clause 9.4 deals with numbering on a building format plan and 10.3 deals with numbering on a volumetric format plan.

Item (d)

The easements are usually identified as “Emt. A”, “Emt. B”, etc. The registrar’s directions do not give any additional detail about the use of letters to identify easements.

Items (e) and (f)

The *Surveyors Act 2003* is more concerned about the licensing and regulation of surveyors rather than the way in which surveys are undertaken. The *Survey and Mapping Infrastructure Act 2003* also operates primarily at a general regulatory and administrative level; the main purpose of the Act is to maintain the state’s survey and mapping infrastructure, such as records of permanent survey marks, etc. The Survey and Mapping Infrastructure Regulation 2004 contains more detail about geodetic referencing, dealing with boundary inconsistencies and so on.

Items (g) and (h)

Reconfiguring a lot under the Land Title Act may be considered assessable development for the purposes of the *Sustainable Planning Act 2009* and Sustainable Planning Regulation 2009 and may require compliance

assessment under the regulation. Relevant planning body approval for plan of subdivision may not be necessary if the plan does not require compliance assessment under the Sustainable Planning Regulation 2009. If the approval of a plan of subdivision as referred to in items (g) and (h) is in the form of a compliance certificate given under the Sustainable Planning Act, the plan of subdivision must be lodged for registration within 6 months after the compliance certificate is given. If the proposed lots are in an urban development area, the relevant planning body referred to under the Land Title Act is the Urban Land Development Authority, otherwise it is the relevant local government.

Item (i)

The registrar's directions are discussed in ¶22-600 and reproduced in a separate tab at ¶65-100.

Item (j)

A mortgagee's consent is given on a Form 18 — General Consent, available on the Department of Environment and Resource Management website at www.derm.qld.gov.au. A "registered proprietor" is a person recorded in the freehold land register as a ***proprietor*** of the lot. In turn, "proprietor" is defined as a person entitled to an interest in a lot, whether or not the person is in possession. Although this covers a wide range of people, consent is only required from those "whose interests are affected by the plan".

Law: *Land Title Act 1994*, s 50

Sustainable Planning Act 2009, s 232,

Sustainable Planning Regulation 2009

Survey and Mapping Infrastructure Act 2003

Survey and Mapping Infrastructure Regulation 2004

Surveyors Act 2003.

Last reviewed: 6 April 2013

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[¶26-900] Dedications

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A plan of subdivision may show a lot intended to be dedicated as “public use land”. The dedication must be of the registered proprietor’s whole interest, other than for any part of the lot reserved for the registered proprietor.

Any lot to be dedicated for public use on registration of a plan must be noted clearly on the face of the plan with the following:

- ROAD (or New Road)
- Lot number and “PARK’’
- Lot number and “RESERVE’’
- Lot number and “PUBLIC USE LAND’’.

In the cases of “reserve’’ and “public use land’’, the purpose may also be shown on the lot. The purpose of the “public use land’’ shown on the plan must be consistent with the community purposes listed in Sch 1 of the *Land Act 1994*. (See Registrar of Titles Directions for the Preparation of Plans, cl 4.8.1, at ¶65-100.) These requirements remove the need for any condition to be included in the consent of the local government on the plan.

Where the land is affected by registered encumbrances, they do not have to be released or surrendered. The dedication occurs upon registration of the plan without anything further. If a road is being dedicated it is opened as a road for the *Land Act 1994*, or if it is for another public use it becomes unallocated State land under the *Land Act 1994*. See ¶21-900.

Law: *Land Title Act 1994*, s 51.

Last reviewed: 6 April 2013

[¶26-950] Recording registration

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When registering a plan of subdivision, the registrar must record in the freehold land register particulars of:

- each proposed lot that is not public use land, and
- to the extent that it is practicable — common property created under the plan.

Law: *Land Title Act 1994*, s 52.

Last reviewed: 6 April 2013

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[¶27-200] Obligation to establish

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The community titles scheme is established when the plan is registered and community management statement recorded. The body corporate is constituted when the scheme is established. It then remains for the books and records of the body corporate to be established and its affairs put in order. This process of "establishing" the body corporate is the responsibility of the original owner. Except in relation to insurance, this responsibility is not ***expressly*** imposed on the original owner, but rather arises as a practical necessity in that:

- the original owner must convene and hold the first annual general meeting of the body corporate
- certain records and documents must be delivered by the original owner to the body corporate when that meeting is held
- the normal conveyancing process will impose pressure on the original owner to ensure that the affairs of the body corporate are in order by the time sale contracts are settled.

In relation to the last point, s 223(3) of the BCCM Act implies a warranty in favour of buyers that, as at completion of the contract, to the seller's knowledge, there are no circumstances (other than circumstances disclosed in the contract) in relation to the affairs of the body corporate likely to materially prejudice the buyer. Breach of the warranty gives the buyer the right to cancel the contract. Failure to properly establish the body corporate may expose the developer to the risk of a breach of that warranty.

Law: s 24, 30, 223(3), 224

Standard Module, s 77.

Last reviewed: 6 April 2013

[¶27-250] Statutory records

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The BCCM Act and the relevant regulation module determine the records that must be established. They include:

- common seal
- Roll of Lots and Entitlements
- Register of Assets
- Register of Engagements and Authorisations
- Register of Authorisations Affecting Common Property
- Register of Allocations Under Exclusive Use By-laws
- Register of Reserved Issues.

In addition, the body corporate must have a mail box or put suitable arrangements in place (eg a post office box) for the receipt of mail. In most cases the body corporate should also have a notice board.

Law: Standard Module, s 192, 196–201.

Last reviewed: 6 April 2013

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[¶27-300] Insurance

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The original owner must, when the community titles scheme is established, ensure that all compulsory insurances for the body corporate are immediately in force for 12 months. The original owner must bear the cost of taking out these insurances. It is important to note that the obligation applies to all of the required insurances and not just the building insurance. Failure to comply with this requirement is an offence that carries a maximum penalty of 150 penalty units. In addition, the body corporate may recover as a debt the cost of taking out the required insurance.

If an original owner complies with this requirement, the original owner may in the lot sale agreements recoup the costs from buyers as an outgoing (normally by way of an adjustment at settlement). They cannot recoup costs for the period from the date the insurance was effected until the date of settlement, but they may recoup the costs for the period from the date of settlement until the date of expiry of the policies. The right to recoup must be reserved in the sale contracts.

If the relevant regulation module requires a building to be insured for full replacement value, the original owner must obtain a valuation from a quantity surveyor or registered valuer stating the replacement value, and must ensure that the building policy covers the full replacement value stated in that valuation. Again, failure to do this is an offence that carries 150 penalty units.

The following insurance covers are normally required to be effected:

- damage cover (including replacement and reinstatement) over the common property and body corporate assets
- damage cover (including replacement and reinstatement) over any building which contains a lot in a scheme under a building format plan or a volumetric format plan
- damage cover (including replacement and reinstatement) over any buildings comprising lots on a standard format plan that are joined by a common wall
- public risk cover over the common property and relevant assets.

Law: s 191

Standard Module, s 178, 179, 180, 187.

Last reviewed: 6 April 2013

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[¶27-350] Maintenance contributions

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Because the body corporate must fix maintenance contributions on an annual basis, the original owner is effectively required to ensure that the contributions are fixed and levied on lot owners shortly after the body corporate is established. If the majority of the lots in the scheme have been sold and are expected to settle shortly after the scheme is established, then the fixing of the contributions can be delayed until the first annual general meeting of the body corporate. In most cases the budgeting process will already have been completed because of the requirement in s 213 of the BCCM Act for the original owner to disclose in the sale contract the amount of annual contributions reasonably expected to be payable by the lot owner. In any event, the original owner must prepare budgets for adoption at the first annual general meeting. Also, the things to be handed by the original owner to the body corporate at its first annual general meeting include:

- a budget showing the body corporate's estimated spending for the first financial year
- a detailed and comprehensive estimate of the body corporate’s sinking fund expenditure for the scheme’s first ten financial years, which must include an estimate for the repainting of common property and of buildings that are body corporate assets.

Under BUGTA, where sales were slow, it was common for original owners to give the body corporate an undertaking to pay the body corporate’s “running costs” until such time as sufficient lots had been sold to justify commencement of the levy process. On the strength of this undertaking the body corporate then determined that the levies be $Nil until the undertaking ceased to apply. This approach was possible because of the way the relevant provisions of BUGTA were worded. Given the wording of the relevant provisions of the regulation modules under the BCCM Act, it is most unlikely that the same approach is still available. It follows that this practice is not recommended for community titles schemes under the BCCM Act.

Law: Standard Module, s 77, 139–141.

Last reviewed: 6 April 2013

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[¶27-400] First annual general meeting

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The original owner must call and hold the first annual general meeting of the body corporate in accordance with the relevant regulation module. In practice, the body corporate manager appointed will take steps to properly call and convene the meeting upon instructions from the seller/developer client. It must be called for **and held** within two months after the first of the following to happen:

- more than 50% of the lots included in the scheme are no longer in the ownership of the original owner, or
- six months elapses after the establishment of the scheme.

Failure to comply with this obligation attracts a maximum penalty of 150 penalty units and may result in an order of an adjudicator appointing another person to call the meeting.

At the first annual general meeting the original owner must give the following to the body corporate:

(a) a register of assets containing an inventory of all body corporate assets
(b) all plans, specifications, diagrams and drawings of buildings and improvements forming part of scheme land (as built) showing water pipes, electric wiring, drainage, ventilation ducts, airconditioning systems and other utility infrastructure
(c) all policies of insurance taken out by the original owner for the body corporate
(d) an independent valuation for each building the body corporate must insure
(e) documents in the original owner's possession or control relevant to the scheme
(f) the body corporate's seal
(g) documents in the original owner's possession or control relevant to the buildings or improvements on scheme land
(h) administrative and sinking fund budgets showing the body corporate's estimated spending for the first financial year
(i) a detailed and comprehensive estimate of the body corporate's sinking fund expenditure for the scheme's first 10 financial years, which must include an estimate for the repainting of common property and of buildings that are body corporate assets.

The following should be noted about these items —

- The documents required under (b) are "as built" documents. This means that the developer must ensure that the terms of the building contract under which the buildings are built require the builder to provide "as built" drawings covering the things in this item.
- The documents referred to in (e) include the roll, books of account, meeting minutes, registers, body corporate manager or service contractor engagement or letting authorisation, correspondence and tender documentation.
- The documents referred to in (g) do not include any certificates of title for individual lots, or documents evidencing rights or obligations of the original owner that are not capable of being used for the benefit of an owner (other than the original owner) of a lot. However, they do include contracts for building work, or other work of a developmental nature, carried out on the scheme land as well as certificates of classification for buildings and fire safety certificates. To comply with this obligation and still protect their own interests, developers should try to have extra copies of contractual documents executed by contractors.
- If any of these documents come into the possession of the original owner after the first annual general meeting, then they must be handed over to the body corporate at the earliest practicable opportunity. This obligation is reinforced by a maximum penalty of 20 penalty units.

Law: Standard Module s 77–79.

Last reviewed: 6 April 2013

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[¶27-450] Committee

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Under all regulation modules the first committee is chosen at the first annual general meeting of the body corporate. There cannot be a committee before that meeting. Where at the time of the first annual general meeting, or at any time after that meeting, there are only one or two owners in the scheme, then those owners comprise the committee and an election or formal appointment process is not necessary. Where there was only one owner at the first annual general meeting, the committee may be chosen at an extraordinary general meeting held before the next annual general meeting.

Law: Standard Module, s 13–14.

Last reviewed: 6 April 2013

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[¶27-500] Body corporate manager

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It is common for the original owner to procure the body corporate to appoint a body corporate manager shortly after the community titles scheme is constituted. The appointment must be made by ordinary resolution of a general meeting and the usual contractual formalities must be attended to, including observance of the three (3) year “cap” on the term of the appointment. For present purposes it is sufficient to note that no special requirements or restrictions apply to the appointment of a body corporate manager by the original owner, provided adequate contractual disclosure has been made to buyers. (See ¶38-560 regarding the obligations of the original owner.)

Law: Standard Module, s 114, 118.

Last reviewed: 6 April 2013

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[¶27-550] Original owner's agent

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Under BUGTA, original owners could appoint an agent to act on their behalf in dealings with or for the body corporate. There is no similar provision in the BCCM Act and, as a consequence, the appointment of an original owner's agent is no longer an option. The original owner will therefore need to rely upon the body corporate manager and duly appointed proxy (or corporate owner's nominee, if a corporation) to attend to dealings with or for the body corporate.

Law: Standard Module, s 83, 100.

Last reviewed: 6 April 2013

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[¶27-600] Check list

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The following check list is an indicative one intended to assist an original owner to monitor the establishment of the body corporate and implementation of other preliminary management matters. A project specific check list can be prepared along the lines of this indicative one.

Item No	Task	Responsibility	Timing	Status
1	Register plan (Body corporate constituted)	Solicitor	Day 1	
1A	Obtain insurance valuation	B.C. Manager		
2	Effect body corporate insurances	B.C. Manager	Day 1	
3	Establish Roll	B.C. Manager	Day 2	
4	Order common seal	B.C. Manager	Day 2	
5	Prepare Register of Assets	B.C. Manager	Day 2	
6	Prepare Register of Engagements and Authorisations	B.C. Manager	Day 2	
7	Prepare Register of Authorisations Affecting Common Property	B.C. Manager	Day 2	
8	Prepare Register of Allocations Under Exclusive Use By-Laws	B.C. Manager	Day 2	
9	Finalise budgets	B.C. Manager	Day 3	
9A	Obtain sinking fund forecast	B.C. Manager		
10	Prepare new community management statement for exclusive use and occupation authority notifications	Solicitor	Day 3	
11	Hold Initial Extraordinary General Meeting: • Confirm insurances • Adopt budgets • Impose levies • Adopt common seal • Confirm establishment of records • Authorise opening of bank account • Authorise execution of management agreement • Authorise execution of body corporate managers agreement • Authorise execution of letting authority • Approve common property occupation authority for service contractors • Confirm exclusive use by-law allocations • Approval of new community management statement	B.C. Manager/ Developer	Day 3	
12	Body corporate to execute management agreement	B.C. Manager/ Developer	Day 3	
13	Body corporate to execute body corporate management agreement	B.C. Manager/ Developer	Day 3	
14	Body corporate to execute letting authority	B.C. Manager/ Developer	Day 3	
15	Body corporate to execute new community management statement	B.C. Manager/ Developer	Day 3	
16	Lodge new community management statement for recording (or local government approval)	Solicitor	Day 4	
17	Settle sale contracts	Solicitor	Day 15	
18	Send levy notices	B.C. Manager	Day 16	
19	Open bank account	B.C. Manager	Day 16	
20	Establish accounting books and records	B.C. Manager	Day 16	

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21	Convene First Annual General Meeting	B.C. Manager	(When 50% of lots sold or 6 months expires.)	
22	Hold First Annual General Meeting	B.C. Manager		
23	Formal hand-over of documents by original owner	B.C. Manager/ Developer		

Last reviewed: 6 April 2013

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[¶27-800] The process

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The commentary on development has demonstrated the flexibility of the BCCM Act and the complementary new provisions in the *Land Title Act*. The only question remaining is how do we best make use of this flexibility. One thing is for sure, land subdivision is no longer the routine process that is undertaken using a ``check-sheet'' approach. Land subdivision now involves consideration of a range of planning and structuring issues. The planning issues will often influence the choice of subdivision format to be used. Structuring involves the choice of land title, subdivision and management structures for the project being subdivided. Just as this is not a routine process, so too is it not a ``precedent'' based process. If this structuring process is carefully and skilfully undertaken, then the real estate project and the developer's objectives can be substantially enhanced. However, if the structuring process is not done carefully and skilfully, then the project can be destined for future operational problems or even failure. This could be either a marketing failure or a failure to work effectively for the owners and residents. In either case the result reflects badly on the developer **and the developer's legal adviser**.

The first point that needs to be understood by advisers and developers alike is that the analysis and planning process for a major project must commence at a very early stage. Until a whole range of decisions have been made it is not possible to produce contract and supporting documentation for the project. Any attempt to ``short-cut'' this process is likely to result in flawed documentation, which could lead to requests to buyers to amend contracts or supplementary disclosure. The best approach is to ***get it right the first time***!

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[¶27-850] Choosing a management structure

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The choice of management structure for a medium to large sized real estate project flows from the results of a detailed analysis of the particular project. The following factors will influence the structure:

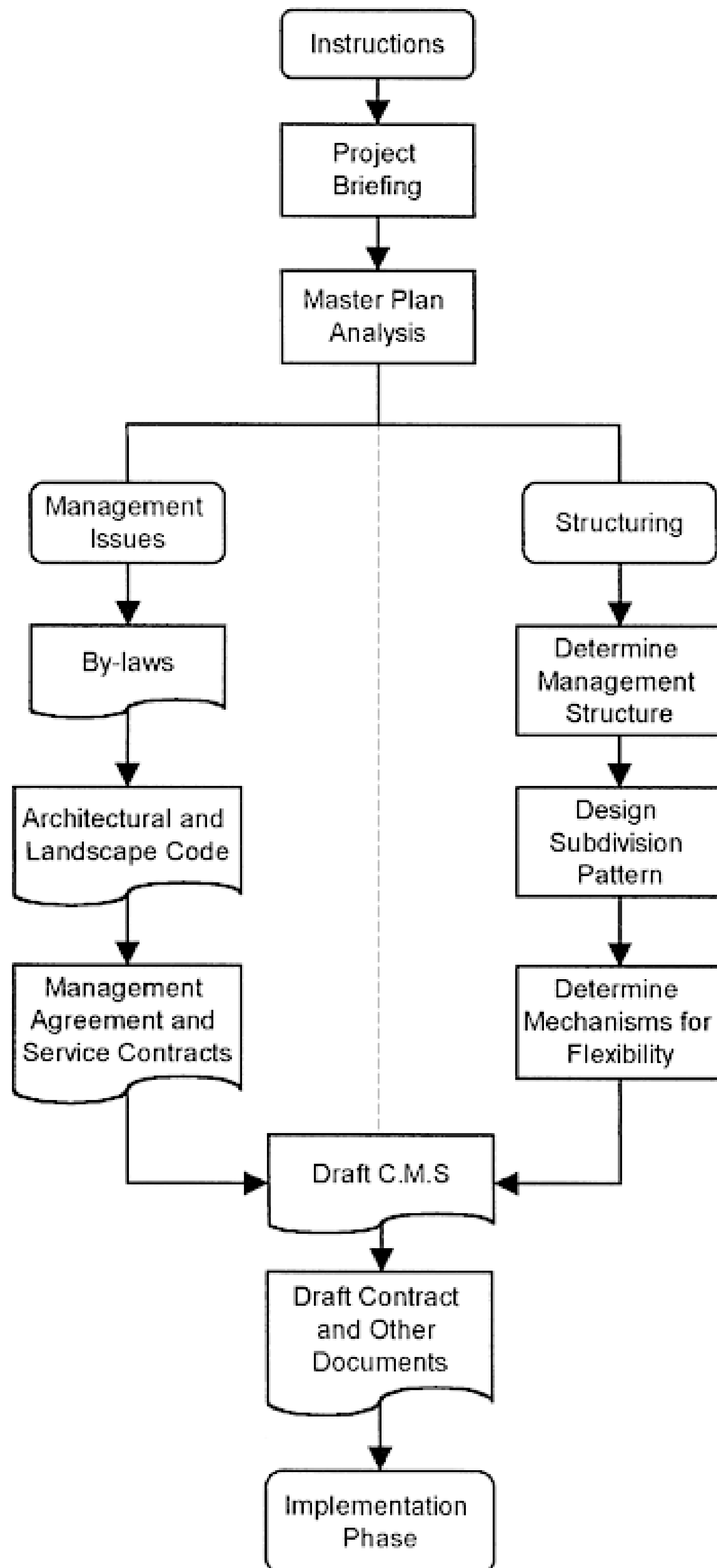
the size of the project
the type of project (eg residential, commercial)
whether there is a mixture of uses
if there is a mixture of uses, the range and type of uses
the range of house or ``building'' products
whether roads are to be private or public
the extent of common facilities and the location of those facilities
the extent to which use of common facilities is to be restricted
whether there is a theme that requires protection
the degree of control over architectual and landscape matters
the level of security
marketing factors
the objectives of the developer.

It follows that the first step in the structuring process is to analyse the project. In the case of a larger project, this analysis is usually approached by dividing the project into ***precincts*** and then separating out the commercial precincts from the non-commercial precincts. The precincts are then divided into ***neighbourhoods***. The designation of a neighbourhood usually depends upon which lots (or ``product'') have a ``sense of place'' with the area being designated as the particular neighbourhood. This ``sense of place'' will be influenced by such things as physical location, architectual style, class of housing or building type (eg townhouses relate to other townhouses, but do not relate to mid-rise buildings), shared facilities, security arrangements, etc. Once the precincts and neighbourhoods have been identified, it is then necessary to look at the merits of having separate bodies corporate for the various precincts and neighbourhoods, as well as the merits of having an ``umbrella'' body corporate sitting over the whole project. Complexity, cost allocation and marketing impact will be key factors in determining which options are best.

Once the management structure has been decided, the land subdivision pattern is then designed so as to achieve that structure. Remember — the subdivision pattern is the main driver of the management structure. The subdivision pattern and the resultant management structure must be pre-planned for the entire project. Furthermore, it must be structured to preserve maximum flexibility for change by the developer. No matter how carefully a project is planned, market and economic conditions will change from time to time and adjustments will need to be made by the developer. A structure that does not permit these adjustments has the potential to have an impact on the viability of a larger project. This is because change will only be possible with the co-operation of the owners at the relevant time, and the reality is that with larger projects such co-operation is rarely available.

Once the subdivision pattern has been decided, the draft subdivision plans for the initial stages and the community management statements can then be drafted. After the community management statement has been drafted, the sale contracts and other project documentation (eg management and service contracts, easements, etc) can then be drafted. The following chart illustrates the process for a medium to large size project:

PROJECT PLANNING AND DOCUMENTATION PROCESS



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[¶27-900] Interscheme arrangements

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All regulation modules give a body corporate the power, if authorised by special resolution, to enter into an agreement with the body corporate of another community titles scheme under which the owners or occupiers of lots in both schemes share the use and enjoyment of —

- facilities forming part of the common property of either scheme, or
- body corporate assets for either scheme.

This provision allows scope for special arrangements between unrelated community titles schemes as part of the project structuring process.

Law: Standard Module, s 168.

Last reviewed: 6 April 2013

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[¶27-950] Management agreements

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Under the BCCM Act, the old management agreements and letting agreements are known as service contracts and letting authorities. The body corporate administration agreements are also categorised as service contracts. There is still scope to have these types of agreements, although they are more strictly regulated under the BCCM Act, particularly as regards the duration of their term. The use of these types of agreements is made easier because under the BCCM Act a body corporate is expressly empowered to enter into the agreements, subject to approval by a general meeting (see ¶7-100ff). However, the developer is now under strict duties to ensure these agreements are fairly balanced (see ¶38-560).

Last reviewed: 6 April 2013

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[¶35-030] Creation of the body corporate

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A body corporate is established when a community titles scheme is created. To create a community titles scheme there must be:

- the identification of the land on which the scheme is to be based ("scheme land") by the registration, under the *Land Title Act 1994*, of a plan of subdivision, and
- the recording by the registrar of titles of the first community management statement (previously sealed by the relevant local council) for the scheme.

The community titles scheme is created when the first community management statement for the scheme is recorded. In practice, this recording occurs momentarily after the plan of subdivision is registered. It follows that the body corporate is also established when the first community management statement for the scheme is recorded. Each community titles scheme has a unique name. This name is made up of:

- an identifying name shown in the community management statement (eg "*Blue Waters*")
- the words "*community titles scheme*", and
- the unique identifying number allocated by the registrar when the first community management statement is recorded (eg "*4321*").

Using the above examples the name of the community titles scheme would be:

***Blue Waters community titles scheme 4321*.**

The name of the body corporate is based on the name of the community titles scheme. In the above example the name of the body corporate would be:

***Body corporate for Blue Waters Community Titles Scheme 4321*.**

The members of the body corporate are the owners of all the lots included in the community titles scheme. Where the scheme is part of a tiered scheme, a body corporate can be a member of another body corporate in a higher tier. Although the members of the body corporate do not hold any "shares" as such, they do have "lot entitlements" which are allocated in the first community management statement. In a very general sense these lot entitlements are similar to a shareholding in a company. It follows that the body corporate is a corporation aggregate that has perpetual succession.

Law: BCCM Act, s 22, 24, 30, 31, 33.

Last reviewed: 30 August 2012

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[¶35-050] The Act and modules

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The greater body of the law in force in Queensland applies to a body corporate in the sense that all the relevant law binds it. However, from a governance and operational sense, the principle sources of law applicable to a body corporate are:

- *Body Corporate and Community Management Act 1997* (BCCM Act)
- Body Corporate and Community Management (Standard Module) Regulation 2008 (Std Mod)
- Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Acc Mod)
- Body Corporate and Community Management (Commercial Module) Regulation 2008 (Com Mod)
- Body Corporate and Community Management (Small Schemes Module) Regulation 2008 (SS Mod)
- Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011 (Two-lot Mod)
- Body Corporate and Community Management Regulation 2008 (BCCM Reg)
- Body Corporate and Community Management (Transitional) Regulation 1997 (BCCM Trans Reg) (expired).

Only one of the "Module" regulations applies to a particular community titles scheme. The one that does apply is identified in the community management statement. That said, a body corporate can elect to change from one module to another, so the best to current module applying to a particular community titles scheme is to undertake a search and obtain a copy of the CMS dealing number for the scheme.

There have also been a number of decided cases throughout Australia dealing with strata and community titles. Some of these cases appear in the "Cases" tab. In addition, a large body of the general law relating to corporations is directly relevant to community titles bodies corporate, although the *Corporations Act 2001* itself does not apply. In parts of this commentary the application of general law principles to community titles bodies corporate has been considered.

Law: BCCM Act, s 32.

Last reviewed: 21 February 2012

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[¶35-100] Features listed

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The basic features of a corporation are:

- it is a separate legal entity
- it has perpetual succession
- it has a common seal
- it has the ability to own property, and
- it may sue and be sued.

A community titles body corporate has all of these features.

See also ¶36-400 (Application of company law principles to community titles).

Last reviewed: 7 February 2016

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[¶35-120] Legal entity

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The fact that it is a separate legal entity distinguishes a corporation from an organisation known as a quasi-corporation, which may have some or all of those basic qualities of a corporation but which is not a separate legal entity. The concept of a company being a separate legal entity to its members was pioneered in the House of Lords decision in *Salomon v Salomon & Co*. In that case it was held that the debts of the company were not the debts of the company's "owner", Mr Salomon, because the company was a separate legal entity. The principle in *Salomon's* case has been applied a number of times over the years and remains applicable today: see, for example, *Macaura v Northern Assurance Co*; *Ascot Investments Pty Ltd v Harper*; *Lonrho Ltd v Shell Petroleum Co*. The principle of a corporation being a separate legal entity has also been applied by the Federal Court in *Alan Bond & Ors v Australian Broadcasting Tribunal*.

In a more general vein, in *Chaff and Hay Acquisition Committee v J A Hemphill & Sons Pty Ltd* Latham CJ said:

> "A body which, as distinct from the natural persons composing it, can have rights and be subject to duties and can own property must be regarded as having a legal personality, whether it is or is not called a corporation."

The separate legal existence of a corporation apart from its constituent members has always been an intriguing aspect of corporation law, no doubt because of the artificial nature of this separate legal entity. An extract from the judgment of Viscount *Haldane* LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* serves to illustrate the nature of this corporate entity. He said, at p 713:

> "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation; the very ego and centre of the personality of the corporation."

A community title body corporate is clearly a separate legal entity. The body corporate has control of the common property and is generally answerable for it. This separate status of the body corporate is further recognised by s 81, which deals with the handling of its assets and liabilities when the body corporate is dissolved upon termination of the scheme.

01. Law: BCCM Act, s 81.

.40 Case references: *Lennard's Carrying Co Ltd* v *Asiatic Petroleum Co Ltd* (1915) AC 705; *Lonrho Ltd* v *Shell Petroleum Co* [1980] 1 WLR 627; *Alan Bond & Ors* v *Australian Broadcasting Tribunal* (1989) 89 ALR 185; *Salomon* v *Salomon & Co* [1897] AC 22; *Macaura* v *Northern Assurance Co* [1925] AC 619; *Chaff and Hay Acquisition Committee* v *J A Hemphill & Sons PA Ltd* (1947) 74 CLR 375 (at p 385); *Ascot Investments Pty Ltd* v *Harper* (1981) 55 ALJR 233.

Last reviewed: 5 February 2016

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[¶35-140] Capacity to sue and be sued

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It has already been stated that a body corporate may sue and be sued. This is done in its corporate name. Proceedings may be civil or criminal (subject to the usual limitations on criminal liability of corporations), and they may include the usual range of civil proceedings in both contract and tort. Some proceedings can only be started by a body corporate if they are authorised by special resolution or, where the scheme is a specified two-lot scheme, authorised by a lot owner agreement. The following should also be noted about a community titles body corporate and legal proceedings:

- The body corporate may sue and be sued for rights and liabilities related to the common property as if the body corporate were the owner of the common property.
- Except where someone other than the body corporate is the occupier of the common property, the body corporate may sue and be sued as if it were the occupier.
- The body corporate is taken to be the owner of the scheme land for the *Dividing Fences Act 1953* and the *Land Act 1994*.
- The body corporate may represent the owners of lots in the scheme in proceedings under the *Sustainable Planning Act 2009*.
- In proceedings by or against a body corporate, the QCAT may order that an amount payable or order against the body corporate be paid by the owners of particular lots in proportions fixed by the tribunal.

Representative proceedings can also be taken under relevant court rules. In *Cameron & Ors v National Mutual Life Association of Australasia Ltd & Ors* a statement of claim was issued under which the plaintiffs sued on behalf of and for the benefit of themselves and the other owners of lots in a registered building units plan. The representative proceedings were based on Order 3 Rule 10 of the then *Queensland Supreme Court Rules*. During the course of the proceedings leave was sought for the owners not named as plaintiffs to be joined in the action, notwithstanding that to do so would deprive the defendants of the opportunity to plead the relevant statute of limitations. The court held that an action brought in the name of one person may be continued by substituting the name of the person on whose behalf it was brought even though the limitation period has expired: see also *Opat & Ors v National Mutual Life Association of Australasia Ltd & Ors*.

Special provision is also made where an owner may obtain a verdict for moneys (including costs) against an owners corporation of which they are a member or where the owner succeeds in an action taken by the owners corporation. Ordinarily, the owners corporation would obtain the funds to discharge its liability under the verdict (including its liability for costs) by levying maintenance contributions, the owner themselves being one of the contributors. Where this is the effect of the verdict the court may order that the necessary funds be raised by contributions from which the successful owner is excluded.

It has also been held in New South Wales that a strata title body corporate may take proceedings in the Supreme Court for a declaration. In *The Proprietors — Strata Plan No 6522 v Furney & Ors*, Needham J said:

> "It seems to me that as registered proprietor of the common property the body corporate would have rights equivalent to the rights of any other registered proprietor to protect its interest or to have the court declare the extent of its interest, the extent of its powers and liabilities. I think that s 146 (of the *Strata Titles Act*) protects the ordinary incidents which attach to the ownership of land registered under the *Real Property Act*. One of these rights, it seems to me, is a right to approach the court to make declarations under s 75 of the *Supreme Court Act, 1970*."

A body corporate may also sue to remedy a nuisance, based on its right to possession of the common property: see *The Proprietors — Cavill Court Building Units Plan No 48 v Smith & Anor*.

In the event the owner of all of the lots within a scheme brings proceedings in their own name, as opposed to in the name of the body corporate, that error may not preclude the claim.

In *Body Corporate for Suzanne Court CTS 13248* v *Kongas* [2014] QCATA 262 the sole owner of all of the lots in the scheme brought a QCAT claim against a handyman for work which she alleged was defective. The

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applicant's claim was in her name as opposed to the name of the body corporate and at the time she owned all of the lots.

Although the applicant's request for leave to appeal was dismissed, the Senior Member noted that if the scheme was dissolved the owners of the lots would each become entitled to a share of the chose in action proportionate to their interest schedule lot entitlement. Given the applicant owned all of the lots, she was entitled to all of the benefit of the action.

Law: BCCM Act, s 33(2), 36, 312, 313.

.40 Case references: *The Proprietors — Strata Plan No 6522* v *Furney & Ors* (1976) 1 NSWLR 412; *Ian Douglas Cameron & Ors on behalf of and for the benefit of themselves and other proprietors of lots in Building Units Plan No 5451* v *National Mutual Life Association of Australasia Ltd & Ors*, Queensland Supreme Court, 6 September 1989 (Previously unreported: see (1989) NSW Titles Cases ¶30-086 for full text of judgment); *Ian Douglas Cameron & Ors on behalf of and for the benefit of themselves and other proprietors of lots in Building Units Plan No 5451* v *National Mutual Life Association of Australasia Ltd & Ors*, Queensland Supreme Court, 7 March 1991 McPherson SPJ, Ryan and Moynihan JJ: see (1991) NSW Titles Cases ¶80-006 for full text of judgment. [1991] 2 Qd R 601; *Opat & Ors* v *National Mutual Life Association of Australasia Ltd*, Victorian Supreme Court, 14 March 1991 Southwell J. (Previously unreported: see (1991) Building Units and Group Titles Cases 30-114 for full text of judgment); *The Proprietors — Cavill Court Building Units Plan No 48* v *Smith & Anor*, Queensland Supreme Court, 1980 Dunn J. (Previously unreported: see (1980) BUGT Cases 30-033 for full text of judgment).

Last reviewed: 5 February 2016

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[¶35-150] Ownership of property

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A body corporate may own any property that an individual is capable of owning. The body corporate holds its property beneficially, but it cannot, unless permitted by its regulation module, mortgage or otherwise create a charge over that property. A body corporate is also able to acquire property as tenant in common for a specified share.

It should be noted that a body corporate has only a limited power to own a lot within its own scheme (see ¶35-160). However, it can have an interest in a lot included in its scheme if the interest is a registered easement for one or more basic utility services for the scheme. Basic utility services are defined as any of the following:

- water reticulation or supply
- gas reticulation or supply
- electricity
- telephone
- computer data or television
- a sewer system
- drainage.

The common property is not property of the body corporate. It is owned by the owners of the lots in the scheme, as tenants in common, in shares proportionate to the interest schedule lot entitlements of their respective lots. This is the case notwithstanding that the registrar creates an indefeasible title for the common property and easements can be registered over that title.

Transactions affecting common property

If authorised by the BCCM Act, a body corporate can enter into a transaction affecting common property, and execute documents relating to the transaction, in its own name, as if it were the owner of an estate in fee simple in the common property. *The Land Title Practice Manual* should be referred to, together with the appropriate module, prior to the execution of any titles office documents to ensure compliance.

Common types of transactions include:

- An occupation authority which may be granted by the body corporate to a resident manager to allow the manager to carry on the letting or caretaking business from a reception desk on the common property or to store cleaning materials in a basement store room on the common property.
- A grant of a licence to a vending machine operator to operate a vending machine from the common property such as the gymnasium or foyer. In such agreements, the body corporate may want to enter an income-splitting arrangement with the vending machine owner and ensure that adequate signage is placed around the machine to ensure that the resident manager is not called upon to restock or repair the machine in the event that it fails to function. Prior to granting such a licence, the body corporate should check whether the resident manager (under the caretaking agreement) has the ability to conduct a vending machine business.
- A lease between the body corporate and a public or private service provider to allow (for example) a portion of the common property roof area to be leased for the installation of a telecommunications or radio tower. Any income derived from such a lease would be treated as “income” in the hands of the individual lot owners and taxed accordingly.

Law: BCCM Act, s 11, 40, 44, 45.

Last reviewed: 5 February 2016

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[¶35-160] Ownership of lots in the scheme

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A body corporate may, pursuant to a resolution without dissent, acquire and incorporate with the common property for the scheme:

(a) land in fee simple contiguous to the scheme land, or
(b) a lot included in the scheme.

Clearly, the acquisition of the lot must be by way of conversion into common property. These types of acquisitions can occur at any time during the life of the scheme.

However, there is another type of lot acquisition that may only occur after the "original owner control period" for the scheme has ended. The original owner control period is the period in which:

(a) the body corporate is constituted solely by the original owner
(b) the original owner owns, or has an interest in, the majority of the lots in the scheme, or
(c) the original owner in any other way controls the voting of the body corporate.

It appears that any interest in a lot (eg a mortgage or the benefit of an easement) is sufficient for the purpose of this provision.

This other type is the acquisition of a lot in the scheme, authorised by resolution without dissent under s 40 of the BCCM Act, where the lot is to become common property for use solely for:

(a) a residence for a letting agent or service contractor (referred to as a **"body corporate lessee"**) for the scheme, or
(b) a residence for the letting agent and an office for conducting the letting agent business.

The lot, once acquired, must be incorporated within the common property of the scheme and then that part of the common property (referred to as the "lessee common property") must be leased to the body corporate lessee for a period no longer than the term of the person's authorisation as a letting agent or engagement as a service contractor. Section 40 was added to the BCCM Act by amendments in 2003. It is not clear why these amendments were necessary, given that the same result could, and probably still can, be achieved under s 37. If s 37 is used as an alternative, the restrictions that apply to an acquisition under s 40 (as to which, see below) would appear not to apply.

Where the acquisition is under s 40, the body corporate is prohibited from receiving, whether directly or indirectly, an amount or benefit by way of premium for the lease, unless the amount or benefit is fair market value for the entitlement under the lease. If this is breached, the amount or value of the benefit may be recovered as a debt by the person who gave it. When the authorisation or engagement ends, whether by termination or otherwise, the lease also ends. The body corporate must then convert the lessee common property into a lot in the scheme, unless it is to be used again for lease to a letting agent or service contractor. This is a curious requirement in that there is no obligation on the body corporate to dispose of that lot.

Law: BCCM Act, s 37, 40, 41, 42, 43

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[¶35-200] Classification of corporations

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One way of classifying corporations is based on the liability of its members. There are three classifications:

(a) **No Liability Corporations** — where the members incur no personal liability for the obligations of the corporation
(b) **Limited Liability Corporations** — where the members' personal liability is limited to the extent of their share capital or guarantee, and
(c) **Unlimited Liability Corporations** — where the members are fully liable to contribute to meeting the obligations of the corporation which cannot be met from its own assets.

In the general context of company law, unlimited liability corporations are fairly rare. It is therefore surprising to note that a community title body corporate is akin to the normal unlimited liability corporation. This does not arise by any deliberate classification, but rather because the body corporate relies on raising maintenance contributions from owners to meet its liabilities. It also arises from the BCCM Act in that there is no procedure for the liquidation of the body corporate in the event of a creditor being unable to obtain payment of a debt. In that event, the remedy available to the creditor is the appointment of an administrator under s 300 of the BCCM Act for the purpose of raising the necessary funds from owners and using them to discharge the liability to the creditor. That section was added in 2003 to provide a specific remedy for judgment creditors of bodies corporate.

It is this potential to divert the liability of the body corporate to the owners and in turn to carry that liability, if necessary, to the bankruptcy of those owners, that establishes the unlimited liability of the owners or members of the body corporate. The liability cannot be avoided by the owners seeking to terminate the scheme and dissolve the body corporate. This is because, on dissolution of the body corporate, its liabilities are vested jointly and severally in the former owners, subject to certain rights of contribution based on lot entitlements.

Law: BCCM Act, s 81, 300.

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[¶35-250] Torts and crimes

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Torts

Primary and vicarious liability

A body corporate would have the usual liability in tort. Because of its inability to act personally it will not usually incur a primary liability. It will generally be vicariously liable for the torts of its servants committed during the course of their employment. Where a body corporate manager acts in their capacity as a delegate of the body corporate, then the liability incurred by the body corporate would be akin to a primary liability, because the act of the agent is the act of the body corporate.

A company will incur a primary liability in tort where the tortious act is committed by the "directing mind and will of the corporation"; *Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd*. If the tort is committed by a person while acting within the scope of their authority or while managing the affairs of the company, the company will be held liable. A company is no different to an employer in so far as they can be held vicariously liable for the torts committed by their employees in the course of their employment. A company will also be liable for torts committed by their agents who act within the scope of their actual or apparent authority (*Lloyd v Grace Smith & Co*). As Lord Denning observed in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*: "in cases where the law requires personal fault as a condition of liability in tort, the fault of a manager will be the personal fault of the company". There are no restrictions on the type of torts a company can be held vicariously liable for.

In *Canberra Formwork Pty Ltd v Civil and Civic Ltd* a building company was found to be directly liable for the death of a workman on the basis that it breached its duty as an occupier of the premises (per Blackburn CJ). One of its employees, an engineer on the site, was negligent. Liability was passed on to the company. In *Stevens v Brodribb Sawmilling Co Pty Ltd* an employee of a sawmilling company was injured when a log was being loaded onto a truck. The company had hired sniggers to move felled trees to a loading area, and truck drivers to move them to the mill. Due to the arrangement they made with the company these workers were independent contractors and not mere servants. The High Court decided that the sawmilling company was not vicariously liable for any tort committed by the independent contractors. A director or company officer can be held personally liable for a tort committed by the company either directly or vicariously. If a director is personally involved in the tortious acts the director will be liable: *O'Brien v Dawson*. The same will apply to directors who simply authorise the tort but do not become involved: *Pollnow v Garden Mews St Leonards Pty Ltd*.

No negligence — upgrading of Australian Standards not common knowledge

In the District Court decision of *Smith* v *Body Corporate for Professional Suites* [2012] QDC 49, the defendant body corporate received a welcome reprieve when it was held not to be liable in negligence for the harm suffered by the applicant in falling partly through an external glass panel on scheme land.

The plaintiff in the case was an employee of a company which leased a portion of the building located in Albert Street. On 21 December 2001, the plaintiff and a number of her work colleagues returned, partly inebriated, to their workplace and the building containing the glass panel so that the sober driver could collect her vehicle and drive the plaintiff and others home.

Unfortunately the plaintiff, whilst ferreting in her hand bag for the swipe access card, stepped back and leaned heavily on the glass panel causing it to shatter and cut her severely. Three days later, the body corporate replaced the offending glass with new toughened glass.

The plaintiff claimed that the body corporate owed her a duty of care and that the body corporate failed to arrange a safety audit which would have shown the extent to which the glass fell short of current safety standards thus justifying replacement. The body corporate had not undertaken such an audit.

Robin DCJ found that on the balance of probabilities had the safety audit taken place and had the glass been upgraded, the plaintiff would not have been injured. The body corporate tendered a report from its architects which mentioned the glass in passing as "existing glazing to remain" and Robin DCJ held that it was difficult

to identify any failure on the part of the body corporate to provide “appropriate, safe access”. His Honour noted that the upgrading of Australian Standards was not shown to be a matter of common knowledge and ultimately the plaintiff’s claim was dismissed.

Crimes

So far as the body corporate’s liability for crimes is concerned, this is similar to the criminal liability of ordinary corporations. This necessarily implies that there are limited circumstances where the body corporate could be held liable for a crime of intent. One such circumstance could arise where the body corporate manager acts as delegate of the body corporate. In that instance the agent’s act is the body corporate’s act and the agent’s intent may be the body corporate’s intent. The body corporate would usually incur a secondary liability, that is it would be liable for the acts of its agents or employees. These are held to be the acts of the employer. The principle is that a company will be liable for criminal offences where the offence is committed by its directors or managers who constitute the “directing mind and will of the corporation”: see *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co* (per Haldane LC at p 713) and *H L Bolton Engineering Co Ltd v TJ Graham & Sons Ltd* (per Denning LJ at p 172).

Tesco Supermarkets v Nattrass is an important case when considering the criminal consequences of the acts of a body corporate manager who has been delegated the powers, authorities, duties and functions of the body corporate and its committee. On the basis of that decision, responsibility for the actions of a corporation will be placed upon the board of directors or any person who has been delegated the relevant powers or authorities of the board.

The principle of vicarious liability also applies to criminal acts. A body corporate can be vicariously liable for criminal acts committed by its employees or agents in the course of their employment. However, this will only occur where the offence is one that imposes strict liability, such as a statutory offence where there is an intention to impose liability on the principal body corporate despite the fact that it is unaware of the criminal act: see *Mousell Bros Ltd v London and North Western Railway Co*. Examples of these types of offences are:

- False and misleading conduct under s 53 of the *Trade Practices Act 1974* (Cth).
- Money laundering under s 85 of the *Proceeds of Crimes Act 1987* (Cth).
- Environmental offences under various state environmental legislation (eg, s 183 of the *Environment Protection Act 1994* (Qld)).

Where an offence carries a mandatory penalty of imprisonment, such as murder, a body corporate could not be convicted (*Pharmaceutical Society v London & Provincial Supply Association*). However, it may be liable for the criminal offence of manslaughter under the principles of vicarious liability. In *S & Y Investments (No 2) Pty Ltd (in liq) v Commercial Union Assurance Co of Australia Ltd* the company was the owner of licensed premises in which the manager unlawfully shot and killed a person. The court held that the company was liable for manslaughter because its directing mind had killed someone while acting for the company. Asche J said (at p 35) that “vicarious liability does not mean that the acts of the servant are the acts of the master. It means only that in certain circumstances the master is responsible for the acts of the servants”.

The appropriate sanction against a body corporate for criminal offences is a monetary penalty or fine.

.40 Case references: *Lennard’s Carrying Company Ltd* v *Asiatic Petroleum Company Ltd* [1915] AC 705; *Lloyd* v *Grace Smith & Co* [1912] AC 716; *H L Bolton (Engineering) Co Ltd* v *T J Graham & Sons Ltd* [1957] 1 QB 159 at 173; *Canberra Formwork Pty Ltd* v *Civil and Civic Ltd* (1982) 41 ACTR 1; *Stevens* v *Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *O’Brien* v *Dawson* (1941) 41 SR (NSW) 295; *Pollnow* v *Garden Mews St Leonards Pty Ltd* (1984) 9 ACLR 82; *Tesco Supermarkets* v *Nattrass* [1972] AC 153; *Mousell Bros Ltd* v *London and North Western Railway Co* [1917] 2 KB 836; *Pharmaceutical Society* v *London & Provincial Supply Association* (1880) 5 AppCas 857; *S & Y Investments (No 2) Pty Ltd (in liq)* v *Commercial Union Assurance Co of Australia Ltd* (1986) 44 NTR 14.

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[¶35-300] Contractual liability

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When considering the contractual liability of a community title body corporate it is important to keep in mind that such a body corporate is generally in the same position as any other corporation, although due allowance must be made for the fact that the *Corporations Act* does not apply to it. This latter point is particularly relevant when applying the doctrine of ultra vires to a community titles body corporate: see ¶35-350.

Because a body corporate does not have a physical existence of its own, it must deal through agents. In *Tesco Supermarkets Ltd v Nattrass* Lord Reid said:

> "… a living person has a mind which can have knowledge or intention to be negligent and he has hands to carry out his intentions. A corporation has none of these: It must act through living persons, though not always one or the same person."

A person who purports to contract on behalf of the body corporate must have the required authority. An employee, office bearer or agent will have actual authority to carry out specific tasks on behalf of the body corporate if these are clearly expressed. In this case the person is said to have **express actual authority**. An alternative is for the employee, officer bearer or agent to have implied authority to do everything necessary or incidental to carry out express instructions or authorities given to them by the body corporate. This is known as **implied actual authority**. A further alternative is for the employee, officer bearer or agent to appear to have the requisite authority to bind the body corporate because of the words or actions of another. This is known as **apparent or ostensible authority**.

Determining whether an employee, office bearer or agent has the requisite authority may also involve looking towards the authority of the person or body delegating the decision making power and the particular nature of this power. Some powers are vested in the general meeting of the body corporate, others are vested in its committee. The chairperson, secretary and treasurer also have limited powers. In addition, a body corporate manager may have been delegated a range of powers. But to what extent can any of these powers be delegated? For example, if a body corporate delegates powers, then it may have to use the procedure in sec 106 of the *BCCM Act*. If a power is delegated to a body corporate manager, does it have to be exercised personally by the agent in view of the prohibition in s106(4) of the BCCM Act?

In most cases the question will not be whether a power has been delegated, but rather, whether an authority has been given to bind the body corporate. Provided the authority is given by the person or entity that has the power to make the decision (eg, secretary, committee or general meeting) there is nothing in the BCCM Act that prevents a person having express actual authority or implied actual authority to bind the body corporate. In some circumstances (eg, where a person dealing with the body corporate has no prior experience in such dealings) a person purporting to act on behalf of the body corporate may be held to have apparent or ostensible authority.

In *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Co Ltd* the company's constitution allowed for the appointment of a Managing Director but no one had been appointed to the position. Kapoor, a director of the company, entered into negotiations with a firm of architects without the knowledge of the other directors. The court found that the board of directors had effectively given Kapoor the authority to enter into the contract by allowing him to act as the company's Managing Director. The court held that the company was liable for Kapoor's actions. Lord *Diplock* laid down four conditions that must be satisfied if a third party intends to enforce a company contract entered into by an agent with no actual authority:

(i) the company must have made a representation to the third party that the agent had the requisite authority
(ii) this representation must have been made by someone who had actual authority to manage the business
(iii) the third party must have been induced to enter into the contract; and
(iv) the company's articles must not deprive the company from entering into certain contracts or delegating certain powers.

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(This was based on the common law doctrine of ultra vires which, although abolished in Australia in respect of most companies by virtue of the Corporations Act, still applies to community titles bodies corporate: see ¶35-350.)

A company is said to enter into a contract directly when the person purporting to bind the company is at a senior level and is regarded as the "directing mind" of the company. Where the company is said to act directly, no issue of authority will arise. This direct liability of corporations for contractual obligations is no different to the reasoning in relation to the direct liability of corporations for criminal or tortious acts.

Also relevant to contractual liability is the rule in *Turquand's* case, which is more commonly referred to as the indoor management rule. Willmer LJ gave a modern interpretation of the principle in *Freeman & Lockyer* at pp 491–492:

> "... when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the article of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company."

The irregularities that his Honour referred to would include such acts as a failure to comply with the procedures set out in the company's articles. However, it should be noted that the High Court in *Northside Developments Pty Ltd v Registrar General* decided that this rule will not protect outsiders when the person purporting to bind the company has acted beyond the limits of the company's constitution. The rule is also inoperative when the outsider has actual or constructive notice of the invalidating irregularity or where the nature of the transaction should have caused inquiries to be made. Mason CJ (at p 619) said:

> "If the nature of the transaction is such as to excite a reasonable apprehension that the transaction is entered into for purposes apparently unrelated to the company's business, it will put the person dealing with the company upon inquiry."

The indoor management rule has a practical application in that it would be very inconvenient and time consuming if outsiders were expected to inquire about the internal affairs of the company each time they dealt with it. The relevance of the rule has still been recognised in some instances despite the *Corporations Act* providing greater protection to outsiders in these situations: see *Westpac Banking Corporation v Dawson*; *Bell Resources Holdings Pty Ltd v Commissioner for ACT Revenue Collections*; and *Brick & Pipe Industries v Occidental Life Nominees Pty Ltd*. The indoor management rule was applied to a building unit title body corporate in *Coastalstyle Pty Ltd v The Proprietors "Surf Regency" Building Units Plan No 4246*. In that case a body corporate under the Queensland legislation entered into management and letting agreements with a company around the time of registration of the building units plan. The interests under these agreements were expressly assignable with the consent of the body corporate. The letting agreement had been assigned by deed three times, with the body corporate consenting on each occasion.

At the time the agreements were entered into, the standard Third Schedule by-laws were in place. There was a further nine days delay until the body corporate's new by-laws were registered, one of those being an empowering by-law 60. The body corporate asserted that the agreements were invalid and that the plaintiff, Coastalstyle, the third assignee, had no rights under them. The body corporate submitted that until by-law 60 became effective there was no by-law permitting the body corporate to grant exclusive use or enjoyment or special privileges in respect of any part of common property. The body corporate also argued that by virtue of s 46 of the then *Building Units and Group Titles Act 1980* the original agreements could only be authorised by general meeting and that such a meeting had not occurred. Coastalstyle was successful on trial of the matter, so the body corporate appealed. In dismissing the appeal the Queensland Court of Appeal allowed Coastalstyle the protection of the "indoor management rule". The Court said that the deed was regular on its face and it was not established that Coastalstyle knew of any deficiency. Also there was nothing that put the respondent on inquiry. The fact that a general meeting was not held did not invalidate the agreements.

.40 Case references: *Tesco Supermarkets Ltd* v *Nattrass* [1972] AC 153; *Gillett & Anor v Halwood Corporation & Ors*, NSW Supreme Court, 25 July 1995, *Rolfe* J (Previously unreported: see (1995) NSW Titles Cases ¶80-035 for full text of judgment); *Freeman & Lockyer* v *Buckhurst Park Properties (Mangal) Co Ltd* [1964] 2 QB 480; *Northside Developments Pty Ltd* v *Registrar General* (1990) 8 ACLC 611; *Westpac Banking Corporation* v *Dawson* (1990) 19 NSWLR 614 at 631; *Bell Resources Holdings Pty Ltd* v *Commissioner for ACT Revenue Collections* (1990) 2 ACSR 211 at 227; *Brick & Pipe Industries* v *Occidental*

Life Nominees Pty Ltd (1990) 3 ACSR 649 at 673; *Coastalstyle Pty Ltd* v *The Proprietors — "Surf Regency" Building Units Plan No 4246* [1995] 1 Qd R 132 (See (1992) Qld Titles Cases (previously referred to as Building Units and Group Title cases: see ¶35-140) ¶30-119 for full text of judgment).

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[¶35-350] The doctrine of *ultra vires*

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The words ``ultra vires'' are defined in *Osborn's Concise Law Dictionary* (6th ed, by John Burke) as:

> ``(**Beyond the power**). An act in excess of the authority conferred by law, and therefore invalid, eg, a company's powers are limited to the carrying out of its objects as set out in its memorandum of association, including anything incidental to or consequential upon those authorised objects, and the shareholders cannot, by any purported ratification of the company's acts, make any other contract valid; any such contract is ultra vires and void.''

This definition is relevant to a community titles body corporate although its powers emanate from the *BCCM Act* and its regulation modules as opposed to a memorandum of association. The doctrine itself has been virtually eliminated in its application to companies regulated under the *Corporations Act*. Nevertheless it appears still to have particular relevance in this country to corporations created by statute, of which a body corporate is one. Where a corporation is so created it is particularly vulnerable to the operation of the doctrine (cf, *Earl of Shrewsbury v North Staffordshire Railway Co*).

The effect of the doctrine, which renders acts in excess of authority void, is to require persons dealing with the company to keep a close lookout for any lack of power. In doing this there seems little doubt that they would be deemed to have constructive notice of the limitations on authority contained in the *BCCM Act* and its regulation modules. The doctrine of constructive notice may also apply to any limitations imposed by registered by-laws. In *Ashbury Railway Carriage & Iron Co v Riche* the company in question had an objects clause which gave it the power ``to make, and sell, and lend or hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors''. The directors of the company entered into a contract to build a railway in Belgium, but later refused to proceed. The House of Lords held that the construction of the railway was outside the company's objects as stated in its memorandum. The company therefore was able to avoid the contract, which being ultra vires was void. Lord *Cairns* LC qualified the doctrine in the following terms:

> ``The question is not to the legality of the contract; the question is as to the competency and power of the company to make the contract.''

Finally, mention should be made of the right of a member of a corporation to bring an action to restrain its board of directors or a general meeting from acting ultra vires. This would appear to apply to a community titles body corporate, even despite the owners' rights to make applications under Chapter 6 of the *BCCM Act*. The right to bring such an action was recognised as early as 1860 in *Simpson v Westminster Palace Hotel*.

.40 Case references: *Earl of Shrewsbury* v *North Staffordshire Railway Co* (1865) 35 LJ Ch 156; *Simpson* v *Westminster Palace Hotel* (1860) 8 HLC 712; 11 ER 608; *Ashbury Railway Carriage & Iron Co* v *Riche* (1875) LR 7 HL 653.

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[¶35-400] Sources of powers and duties

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This subject is dealt with in more detail elsewhere, but at this stage it has been noted that a body corporate must act intra vires. The question then arises as to the source of the powers of the body corporate. Are the *BCCM Act* and the relevant regulation module the only source of the body corporate's power, or is there another source, such as the scheme's management statement or the by-laws of the body corporate? In New South Wales, a strata titles owners corporation can sometimes rely upon provisions of the *Interpretation Act 1987* (NSW) as a source of power. Section 50(1)(e) of that Act provides that a corporation can do all things as are necessary for or incidental for the exercise of its functions. There is no similar provision in Queensland, although there is probably a common law principle that has the same effect as the NSW legislative provision. Also, there appears to be no other Queensland statutory provisions that assist a body corporate in relation to the scope of its powers. As regards the prospect of the body corporate expanding its powers by means of the scheme's management statement or by-laws, this issue needs close examination in the light of the earlier provisions of the *BUGT Act* and the current provisions of the *BCCM Act* and its regulation modules.

Law: *Interpretation Act 1987* (NSW), sec 50(1)(e).

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[¶35-450] Extension of powers under the *BUGT Act*

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To understand the position under the *BCCM Act*, we must first understand the position under the *BUGT Act* and the history behind the expansion of body corporate powers by means of the by-laws. Section 27(3) of the BUGT Act provided:

> ``27(3) Subject to this Act the body corporate shall have the powers, authorities, duties and functions conferred or imposed on it by or under this Act or the by-laws and shall do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property.''

This sub-section clearly pointed to the by-laws as a source of power for the body corporate. In turn, this provided the opportunity for the body corporate to expand the powers it had under the Act by making an empowering by-law. There was also judicial authority for the expansion of the by-laws in this way. In *Travis & Anor v The Proprietors — Strata Plan No 3740 & Anor*, *Street* J, as he then was, held that a strata title body corporate under the *Conveyancing (Strata Titles) Act 1961* (NSW) did not have the power to construct a swimming pool upon common property. The by-laws applying to the strata scheme were those in the First Schedule of that Act and there had been no attempt to add further empowering by-laws. This case suggested that had the body corporate made an additional First Schedule by-law empowering it to construct a swimming pool upon common property, then the decision would most likely have been different. Of course, that was not a possibility at the time because an addition to the First Schedule by-laws required a unanimous resolution (within the meaning of the 1961 NSW Act) and such a resolution was clearly not obtainable because of the opposition of the plaintiffs in that case. However, the significant point is that under the *BUGT Act* the empowering by-law could have been added merely by special resolution, which in a given situation was clearly obtainable.

As to the very question of extending the powers of the body corporate in this way, the following extract from the judgment of *Street* J (p 715) is relevant:

> ``The duties and powers in the statute and the First Schedule are not exhaustive. It is contemplated by the legislature that such of those duties and powers as are contained in by-laws 2 and 3 may be altered to meet the unanimous wish of all the owners. There are, in effect, three stages: first, the basic and unchangeable duties and powers in the statute, these being relatively limited and covering basic essentials; second, the further duties and powers in the First Schedule, these being necessary, but of a more flexible nature; and third, such alterations of the First Schedule duties and powers as all the owners may agree upon, these being controlled in scope by such limitations as are expressed or implicit in the provisions of the Act itself.''

This question was next considered in *Victorian Professional Group Management Pty Ltd v The Proprietors — ``Surfers Aquarius'' Building Units Plan No 3881*. In that case, the Full Court of the Supreme Court of Queensland held that a building letting agreement was not validly entered into by the body corporate because an empowering by-law had not been made and in the absence of that by-law the rights conferred by the agreement were ultra vires the body corporate. Later, in *Coastal Style Pty Ltd v The Proprietors — ``Surf Regency'' Building Units Plan No 4246*, the newly constituted Queensland Court of Appeal upheld interdependent letting and management agreements on the basis of the ``indoor management rule'', notwithstanding that the necessary empowering by-law had not been registered (and therefore had no effect) at the time the agreement was entered into. However, in doing so the Court generally canvassed the question of owners corporation's powers, particularly the importance of an exclusive use or special privilege by-law where rights of that nature are conferred.

The next case to deal with this question was *Re The Proprietors — ``The Hastings'' Group Titles Plan No 1154* in which *Dowsett* J in the Queensland Supreme Court effectively held that a body corporate cannot expand its powers by means of the by-laws. His Honour said (at p 60,216):

> ``The power to make by-laws must be construed in the context of the authorised functions of the body corporate in question and the legislation conferring the power. It follows that such a power cannot

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> be invoked to extend the powers or functions of the body or to contradict a provision of the Act in question, at least in the absence of express or necessarily implied authority to do so.''

However, His Honour based that conclusion on cases that dealt with ``by-laws'' in a more general context. He does not appear to have considered sec 27(3) of the *BUGT Act* as pointing to the by-laws as an additional source of powers for the body corporate. Nor does he appear to have considered the various strata title cases on the question. This decision is therefore clearly out of line with a number of earlier decisions.

In any event, since *The Hastings* case, when delivering judgment in the High Court in *Humphries & Anor v The Proprietors — ``Surfers Palms North'' Group Titles Plan No 1955*, *McHugh* J took the view that a Queensland body corporate may expand its powers by making an empowering by-law. His Honour, when referring to the by-law making power in sec 30(2) of the Queensland Act, said (at p 60,228):

> ``That sub-section indicates that the body corporate can interfere with the rights of proprietors in respect of their lots only by means of by-laws passed in accordance with the Act. The general powers conferred by ss 27 and 37 are insufficient for this purpose. The Third Schedule to the Act contains specific by-laws, but none of those by-laws authorised the making of the Agreement. Nor has the body corporate exercised the power conferred by s 30(2) to make a by-law giving it power to enter into an arrangement containing cll 2(r), 9 and 12 of the Agreement.''

Law: *Building Units and Group Titles Act 1980*, sec 27(3);

Law: *Conveyancing (Strata Titles) Act 1961* (NSW).

.40 Case references: *Travis & Anor* v *The Proprietors — Strata Plan No 3740 & Anor* (1969) 90 WN (Pt 1) 711 (Full text of judgment reproduced at (1969) Building Units and Group Titles Cases ¶30-010); *Humphries & Anor* v *The Proprietors ``Surfers Palms North'' Group Titles Plan No 1955* (1994) 121 ALR 1 (See (1994) Building Units and Group Titles Cases ¶30-134 for full text of judgment); *Victorian Professional Group Management Pty Ltd* v *The Proprietors — ``Surfers Aquarius'' Building Units Plan No 3881* [1991] 1 QdR 487 (See (1989) Building Units and Group Titles Cases ¶30-106 for full text of judgment); *Coastal Style Pty Ltd* v *The Proprietors — ``Surf Regency'' Building Units Plan No 4246* [1995] 1 QdR 132 (See (1992) Building Units and Group Titles Cases ¶30-119 for full text judgment); *Re The Proprietors — ``The Hastings'' Group Titles Plan No 1154* (See (1994) Building Units and Group Titles Cases ¶30-133 for full text of judgment).

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[¶35-500] Position under the BCCM Act

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A body corporate under the BCCM Act is under a statutory obligation to:

- administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme
- enforce the community management statement (including the by-laws affecting the common property in the way provided under the BCCM Act), and
- carry out the other functions given to the body corporate under the BCCM Act and the community management statement.

In turn, the body corporate is given all the powers necessary for carrying out its functions, including those functions arising from that statutory duty. Examples of its powers are:

- to enter into contracts
- acquire, hold, deal with, and dispose of property
- employ staff.

Although a body corporate cannot carry on a business, it may engage in business activities to the extent necessary for properly carrying out its functions. A body corporate can also invest any of its funds not immediately required, provided it does so in the way a trustee would be able to invest those funds, that is, by means of an approved investment.

Section 94(2) of the BCCM Act obliges the body corporate to "act reasonably" in anything that it does under s 94(1) including making or not making a decision under that subsection.

The "reasonableness test" was recently explored in detail in *Ainsworth & Ors* v *Albrecht & Body Corporate for Viridian Noosa Residences CTS 34034* [2014] QCATA where Tribunal Member Mr Roney QC said that where it is possible to ascertain the basis of individual lot holders reasons for dissent, those reasons should be examined. He went on to say that if any of the known bases could be accepted as reasonable (even if a number were unreasonable) the conduct of the body corporate would nevertheless be reasonable.

Mr Roney QC stated "there is no balancing exercise to decide whether overall, the reasonable explanations outweigh the unreasonable ones".

In the event that the known reasons for dissent cannot be ascertained, an adjudicator may consider the surrounding facts to decide whether there is any objectively reasonable basis which can be ascertained for the decision.

In Kauai [2015] QBCCMCmr 1 (7 January 2015), an owner wished to make structural changes to his lot and to part of the common property joining his lot within a standard module scheme of eight lots and common property on a building unit plan.

The owners voted at an extraordinary general meeting, five votes against and three votes for his motion. The applicant sought an adjudicator's order that the body corporate's decision not to approve the renovations was unreasonable. The adjudicator considered Mr Roney QC's decision in *Ainsworth & Ors* v *Albrecht & Body Corporate for Viridian Noosa Residences CTS 34034* [2014] QCATA.

Unfortunately, the applicant did not present plans, concept drawings, details of proposed materials or specific details about the planned renovations sufficient to allow the body corporate to properly examine the proposal as it related to part of the common property. Accordingly, the adjudicator was not satisfied that the applicant had demonstrated the body corporate's decision was invalid.

Although s 97 of the BCCM Act states that a body corporate "can not delegate its powers", the body corporate can engage body corporate managers, building managers, service contractors, letting agents and the like to assist and enable it to perform its statutory obligations (see ¶38-000ff). Whether an engagement constitutes a delegation for the purposes of s 97 is a question of fact, turning on the degree of control given to the party supplying the relevant service: *The Owners Strata Plan No 61643 v On Kent Management Pty Ltd*.

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There is nothing in the BCCM Act to say that the by-laws are a source of power for a body corporate. Furthermore, when you look at the standard by-laws in Schedule 2 of the BCCM Act, and then examine s 168, 169, 180 and 181 (all of which deal with the content and extent of by-laws), there is nothing to suggest that they are a source of power. However, one of the statutory obligations of the body corporate is to carry out the functions given to it under the Act and the community management statement. This suggests that the community management statement is a source of a body corporate's functions. The by-laws are part of the community management statement.

It does not necessarily follow that an empowering by-law added to the community management statement will be effective. The by-law itself may be ultra vires. Indeed, s 180(1) of the BCCM Act says that a by-law which is inconsistent with the BCCM Act, or another Act, is invalid to the extent of any inconsistency. Also, a by-law inconsistent with another provision of a community management statement does not prevail over that other provision. But what about using a "non by-law" provision of a community management statement to expand the function, and hence the powers, of a body corporate?

The answer depends upon what can be included in a community management statement. Section 66(1) of the BCCM Act sets out the matters that must be included in a community management statement. None of those matters appear to have any direct relationship to the functions of the body corporate. Section 66(2) in turn provides that the statement must include anything required by the relevant regulation module and may include anything permitted by the relevant regulation module. None of the regulation modules contain anything that could be construed as giving a body corporate the opportunity to expand its functions, although it is not inconceivable that a function could flow indirectly from one of the permitted matters. For example, all regulation modules permit the establishment of an architectural and landscape code and under such a code the body corporate may well have an approval and supervisory function. Finally, a regulation module may at some stage be amended to expressly allow a body corporate to impose additional functions upon itself, subject to there being no conflict with the BCCM Act or any other Act.

The conclusion from all this is that there is nothing in the BCCM Act that expressly recognises the right for a body corporate to expand its functions, and hence its powers. While there may be some scope for consequential expansion of the powers of the body corporate, the position is fundamentally different from the position under the BUGT Act.

Law: BCCM Act, s 66, 94, 95, 96, 97, 168, 169, 180, 181.

.40 Case references: *The Owners Strata Plan No 61643* v *On Kent Management Pty Ltd* (2008) LQCS ¶90-137; [2007] NSWSC 281.

Last reviewed: 5 February 2015

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[¶36-000] Introduction

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Because of the provisions of modern companies legislation it is a universal practice for the management of corporations to be divided between the general meeting and a board of directors or committee. The exact extent of the division of management powers is always dependent upon the corporate contract, the terms of the corporate contract being ascertained from the controlling statute and the regulations or memorandum and articles of the corporation. Present Australian and English companies legislation, by means of implied articles, provide that, in the absence of provisions to the contrary, the business of the company is to be managed by the directors. This has the effect of severely limiting the function and powers of the members in general meeting. Most companies have adopted this basis of internal management.

Management arrangements for a community title body corporate are similar to those of other corporations. There is a basic division of powers between the members in general meeting (the body corporate) and the committee elected by those members (this committee is the equivalent of the board of directors). In the case of companies regulated under the *Corporations Act 2001* there are a number of court decisions which assist in determining the extent of the division of powers between the general meeting and the board of directors. Unfortunately, in the case of the community title body corporate, there are no clear decisions. In the latter case it is necessary to examine the express provisions of the legislation in the light of the principles laid down in the company law cases. The objective in this part of the commentary will be to outline such provisions and then to consider the general law applicable to incorporated companies with a view to determining its effect on their interpretation.

The following paragraphs will first examine the extent of the powers of the committee, and then try to determine the extent to which the general meeting may interfere in the internal management of the community scheme by the committee.

It should be noted that in a Specified Two-lot Scheme, decisions are not made by committees or by members at a general meeting. Instead the Two-lot Schemes Module makes provision for decisions to be made by *lot owner agreements* which are agreements made between the owners of the two lots.

Last reviewed: 26 December 2008

[¶36-050] Matters that must be decided by a general meeting

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Division 2, Pt 2 of Ch 3 of the BCCM Act envisages the appointment of a committee by the body corporate. However, it also recognises the possibility that a regulation module may not require a committee for schemes governed by that particular module. Despite this, all the regulation modules (except the Two-lot Reg) currently require the formation of a committee. If for some reason there is no committee of the body corporate, then the community titles scheme must be administered by means of a general meeting. If there is a body corporate manager, then he or she will be able to attend to administrative matters but will not be able to exercise the powers of the committee unless expressly authorised to do so by a general meeting. This is a special type of authorisation under the regulation module (see, for example, s 58 of the Std Mod).

The regulation module contains most of the functions, powers and procedures of the committee. However, the following applies to all committees:

- The committee's decision is regarded as the decision of the body corporate, unless the decision relates to a restricted issue for the committee under the relevant regulation module. Under all regulation modules, a committee cannot decide a matter that has been expressly reserved for body corporate decision (by the BCCM Act or a general meeting) or a matter requiring a resolution without dissent or a special resolution. Often the scheme by-laws will contain details of any particular matters reserved for a decision by the body corporate.
- A decision of a body corporate manager that is inconsistent with a decision of the committee is void to the extent of any inconsistency.
- The committee is obliged to put into lawful effect the decisions of the body corporate.

To determine which matters must be decided by the body corporate in general meeting, or by resolution without dissent or special resolution, regard must be had to the following:

- the BCCM Act
- the relevant regulation module
- any resolutions of the body corporate reserving decisions for the general meeting, and
- the by-laws contained within the most up-to-date version of the community management statement.

The last two sources of information must obviously be investigated on a case-by-case basis. As for the Act and the regulation modules, the following tables identify the relevant provisions.

Section 100 of the BCCM Act and s 42 and 43 of the Std Mod (s 42 of the Accommodation Module) are important provisions dealing with restricted issues for the committee. Listed are a number of issues that can only be decided in general meeting, namely, any decision:

- fixing or changing contributions
- changing rights, privileges or obligations of lot owners
- on issues reserved, by ordinary resolution of the body corporate, for decision by ordinary resolution at a general meeting
- requiring a resolution without dissent, special resolution, majority resolution or ordinary resolution
- to bring proceedings in a court, other than—
  - – those to recover a liquidated debt against an owner
  - – a counter-claim, third-party proceeding or other proceeding in relation to existing proceedings
  - – a prescribed Chapter 6 proceeding, or
  - – a proceeding for an offence under Ch 3 Pt 5 Div 4 of the BCCM Act
- to pay remuneration, allowances or expenses to a member of the committee unless the decision is made by ordinary resolution or the payment relates to reimbursement of expenses of not more than $50 and does not exceed $300 in a 12-month period.

A decision to pay remuneration, allowances or expenses to a member of the committee must state:

- the full amount of the remuneration, allowances or expenses
- if the payment relates to expenses — the reason the expenses were incurred.

In addition, an explanatory schedule stating full details of the remuneration, allowances or expenses must accompany the voting paper for the motion.

A prescribed Chapter 6 proceeding means a proceeding under Ch 6 of the BCCM Act, including a proceeding for the enforcement of an adjudicator's order, but does not include an appeal against an adjudicator's order.

See also the commentary in ¶36-100 (Restrictions imposed by a general meeting).

Powers conferred by the BCCM Act 1997 on a Body Corporate

Power / Authority	Type of Resolution	BCCM Act Section
To create common property	Resolution without Dissent	s 37(1)
To acquire and dispose of body corporate assets	(See Regulation Modules)	s 45
To reinstate the building	Resolution without Dissent	s 74(1)
To termination the community titles scheme	Resolution without Dissent	s 77(1)
To amalgamate community titles schemes	Resolution without Dissent	s 85(1)
To amalgamate subsidiary community titles schemes	Ordinary Resolution	s 85(2)
General powers of the body corporate		s 95(1)
To engage in business activities	Committee Resolution	s 96(2)
Power of committee to act for the body corporate		s 100(1)
Delegation of powers to body corporate manager	Committee Resolution	s 119(1), (2), (3)
Termination of financed contract	Committee Resolution	s 126(1)
To review remuneration under an engagement of a service contractor	Committee Resolution	s 129(3)
To dispose of interest in a lease or license of common property	(see Regulation Modules)	s 154(1), (2)
To create easements over common property	(See Regulation Modules)	s 155(1), (2)
To acquire amenities for the benefit of lot owners	(See Regulation Modules)	s 156(1)
To deal with (including the disposal of) an interest in a body corporate asset	(See Regulation Modules)	s 157
To supply services	(See Regulation Modules)	s 158
To authorise owners and occupiers to carry out work	(See Regulation Modules)	s 161
To authorise the remedying of defective building work	(See Regulation Modules)	s 162
To authorise a person to enter a lot	Committee Resolution	s 163(1)
To give by-law contravention notices	Committee Resolution	s 182(2) and s 183(2)
To commence proceedings for an offence	Committee Resolution	s 188 plus Module
To accept certain liabilities relating to utility services	Ordinary Resolution	s 196(4), (5)

To requirement information to be given	Committee Resolution	s 203(1)
To commence proceedings for failure to comply with an adjudicator's order	Committee Resolution	s 288(2) plus Module
To commence proceedings generally	Special Resolution	s 312(1)
To represent owners in planning proceedings	Ordinary Resolution	s 313(1)
Retrospective power to grant a letting agent authorisation under the BUGT Act	N/A	s 343

Duties/Functions conferred by the BCCM Act 1997 on a Body Corporate

Duties / Function	Type of Resolution	BCCM Act Section
Beneficial ownership and enjoyment of body corporate assets	N/A	s 45(1), (3)
Registering an adjustment of the lot entitlement Schedule	Committee Resolution	s 50(2)
Recording of subsequent community management statement	Committee Resolution	s 54(2)
Recording of new statements and subsequent plans of subdivision	Committee Resolution	s 56(4)
Consent to the recording of a new community management statement	Resolution without dissent or Special Resolution or Committee Resolution	s 62(2), (3)
The exercise of rights under an easement	Committee Resolution	s 68(3)
Registration of changes to scheme under approved reinstatement process	Committee Resolution	s 75(1)
Request to record termination of a scheme	Committee Resolution	s 79(2)
Request to record amalgamation of community title schemes	Committee Resolution	s 86(2)
Vesting of body corporate assets, rights and obligations on the dissolution of bodies corporate on amalgamation	N/A	s 87(3)
General functions of the body corporate	N/A	s 94(1)
To hold body corporate meetings	Committee Resolution	s 104(1)
Not to receive consideration for engagement or authorisation of a service contractor	N/A	s 113(1)
Limitation on termination of financed contract	N/A	s 126(2), (4), (5)
Body corporate's general duties regarding common property	N/A	s 152(1)
To have a mail box and notice board if required by the regulation module	Committee Resolution	s 153
To make and notify allocations of exclusive use upon order of an adjudicator	Committee Resolution	s 174(3)
To make and notify further allocations of exclusive use	Committee Resolution	s 176(1)
To apply for review of an exclusive use by-law	Committee Resolution	s 178(5)
To place insurance	(See Regulation Module)	s 189
To have an insurable interest	(See Regulation Module)	s 190
To keep rolls, registers and documents in accordance with regulation modules	(See Regulation Modules)	s 204
To provide information to interested persons	Committee Resolution	s 205(1), (2)
Notice of application to be given	N/A	s 243(3)
To lodge statement with the registrar if an adjudicator requests	N/A	s 295(2)

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Powers conferred by the Regulation Modules on a Body Corporate

Power / Authority	Type of Resolution	MODULE SECTION			
		Standard	Accom.	Commercial	Small Schemes
To decide about voting at general meetings	Committee or Special Resolution	s 87(1) (Special Resolution)	s 85(1) (Special Resolution)	s 54 (Special Resolution)	s 47 (Committee Resolution)
To appoint a returning officer for voting	Committee Resolution	s 91	s 89	s 58	N/A
To prohibit the use of proxies at committee meetings	Special Resolution	s 100(2)	N/A	N/A	N/A
To prohibit the use of proxies at general meetings	Special Resolution	s 107(2)	s 105(2)	N/A	N/A
To limit the commencement of the term of an engagement or authorisation	Committee Resolution	s 121(1)	s 119(1)	s 86(1)	s 64(1)
To approve transfer of engagements and authorisations	Committee Resolution or Ordinary Resolution	s 122(1), (2)	s 120(1)	N/A	N/A
To terminate engagements and authorisations	Ordinary Resolution	s 129(1)	s 127(1)	s 88	s 66(1)
To authorise engagements	Ordinary Resolution	s 114	s 112	s 79	s 60

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or authorisations					
To authorise amendments of engagements or authorisations	Ordinary Resolution	s 114	s 112	s 79	s 60
To terminate an engagement for failure to comply with a remedial action notice	Committee Resolution	s 131	s 129	s 90	s 68
To authorise occupation of common property	Ordinary Resolution	s 136(1)	s 134	s 95	N/A
To fix discounts for timely payment of contributions	Ordinary Resolution	s 143	s 141	s 102	s 77
To fix penalties for late payment of contribution	Ordinary Resolution	s 144(1)	s 142(1)	s 103(1)	s 78(1)
To recover unpaid contributions and penalties	Committee Resolution	s 145(1), (5)	s 143(1), (5)	s 104(1), (5)	s 79(1), (5)
To spend funds for the purposes of promotion (Commercial Module Only)	Committee Resolution	N/A	N/A	s 107(2)	N/A
To borrow money to a set limit	Ordinary Resolution	s 150(1)	s 148(1)	s 109(1)	s 84(1)

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To borrow money in amounts greater than the set limit	Resolution without Dissent or Special Resolution	s 150(2) (Resolution without Dissent)	s 148(2) (Special Resolution)	s 109(2) (Special Resolution)	s 84(2) (Resolution without Dissent)
For committee to spend greater than the set limit	Ordinary Resolution or other grounds	s 51(1)	s 149(1)	N/A	s 85(1)
To recovery costs for common property damage	Committee Resolution	s 159(4)	s 157(1)	s 115(4)	s 93(1)
To dispose of interests in and lease common property	Resolution without Dissent or Special Resolution	s 161(2), (3), (4), (5)	s 159(2), (3), (4), (5)	s 117(2) (3), (4), (5)	s 95(2) (3), (4), (5)
To grant or surrender easements over common property	Resolution without Dissent	s 62(2)	s 160(2)	s 118(2)	s 96(2)
To make improvements to common property	Committee, Special or Ordinary Resolution (dependent on cost)	s 163	s 161	s 119 (Ordinary Resolution)	s 97
To allow an owner to make improvements to common property	Committee or Ordinary Resolution	s 164	s 162	s 120 (Committee Resolution only)	s 98
To acquire amenities (property interests)	Resolution without Dissent, Special Resolution or Ordinary Resolution	s 166 (2), (3), (4) (Resolution without Dissent or Special Resolution)	s 164(2), (3), (4) (Resolution without Dissent or Special Resolution)	s 122(2), (3) (Ordinary Resolution)	s 100(2), (3), (4) (Resolution without Dissent or Special Resolution)
To deal with (including disposal) of body	Resolution without Dissent, Special Resolution or Ordinary Resolution	s 167(a), (b), (c) (Resolution without Dissent or Special Resolution)	s 165(a), (b), (c) (Resolution without Dissent or Special Resolution)	s 123(1), (2), (3) (Ordinary Resolution)	s 101(a), (b), (c) (Resolution without Dissent

corporate assets					or Special Resolution)
To share facilities with another community titles scheme	Special Resolution or Committee Resolution	s 168(2) (Special Resolution)	s 166(2) (Ordinary Resolution)	s 124(2) (Committee Resolution)	s 102(2) (Committee Resolution)
To supply or engage the supply of services	Committee Resolution	s 169(1), (2)	s 167(1), (2)	s 125(1)	s 103(1), (2)
To carry out work required of owners	Committee Resolution	s 171(2)	s 169(2)	s 127(2)	s 105(2)
To take action to remedy defective building work	Committee Resolution	s 172(2)	s 170(2)	s 128(2)	s 106(2)
To authorise improvements to common property by a lot owner	Committee Resolution or Ordinary Resolution	s 174(3), (4)	s 172(3), (4)	s 130(3) (Ordinary Resolution only)	s 108(3), (4)
To adjust insurance premiums	Committee Resolution	s 182(2), (3)	s 180(2), (3)	s 138(2), (3)	s 116(2), (3)
To insure stand alone buildings	Committee Resolution	s 185(2), (5)	s 183(2), (5)	s 141(2), (5)	s 119(2), (5)
To combine insurance policies	Committee Resolution	s 186(2)	s 184(2)	s 142(2)	s 120(2)
To have body corporate property returned	Committee Resolution	s 206(1)(c)	s 204(1)(c)	s 163(1)(c)	s 139(1)(c)
To have documents in custody of body corporate	Committee Resolution	s 207(2)	s 205(2)	s 164(2)	s 140(2)

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manager returned					

Duties/Functions conferred by the Regulation Modules on a Body Corporate

Power / Authority	Type of Resolution	MODULE SECTION			
		Standard	Accom.	Commercial	Small Schemes
To determine how the election of the committee is to held	Ordinary Resolution or Special Resolution	s 15(2), (3) (Ordinary Resolution or Special Resolution)	s 16(2) (Special Resolution)	s 14(2) (Special Resolution)	s 14(2) (Special Resolution)
To ensure conduct of elections of the committee	Ordinary Resolution	s 21, 22	s 22	N/A	N/A
To ratify the carrying out of vetoed committee resolutions	Ordinary Resolution	s 57(1)(c)	N/A	N/A	N/A
To give notice of general meetings	Committee Resolution	s 70	s 68	s 37	s 35
If a subsidiary scheme, to ensure representation at body corporate meetings	Committee Resolution	s 85(2)	s 83(2)	s 52(2)	s 46(2)
To take full and accurate minutes of general meetings	N/A	s 96(1), (2)	s 94(1), (2)	s 63(1), (2)	s 51(1), (2)
To approve transfers of engagements and authorisations	Committee Resolution or Ordinary Resolution	s 122	s 120	N/A	N/A
To authorise occupation of common property by a service provider	Ordinary Resolution	s 136	s 134	s 95	N/A
To adopt budgets	Ordinary Resolution	s 139	s 137	s 98	s 73
To fix contributions to be levied on owners	Ordinary Resolution	s 141	s 139	s 100	s 75
To give owners notice of contributions payable	N/A	s 142	s 140	s 101	s 76
To establish and keep administrative and sinking funds	Committee Resolution	s 146	s 144	s 105 (including Promotional fund)	s 80
To apply administrative and sinking fund moneys towards relevant expenses	Committee Resolution or Ordinary Resolution	s 148	s 146	s 107 (including Promotional fund)	s 82
To keep accounting records	N/A	s 154	s 152	s 110	s 88
To audit accounts unless otherwise authorised	Special Resolution or Committee Resolution	s 155(1) (Special Resolution)	s 153(1) (Special Resolution)	s 111(1) (Special Resolution)	s 89(1) (Committee Resolution)
To appoint an auditor	Ordinary Resolution	s 155(2), (3)	s 153(2), (3)	s 111(2), (3)	N/A
To maintain common property	N/A	s 159*	s 157	s 115	s 93
To maintain a mailbox	N/A	s 160(1)	s 158(1)	s 116(1)	s 94(1)
To maintain a notice board	N/A	s 160(2)	s 158(2)	N/A	s 94(2)
To maintain body corporate assets	N/A	s 165	s 163	s 121	s 99

To recover costs when supplying services	Committee Resolution	s 169(3)	s 167(3)	s 125(3)	s 103(3)
To insure common property and body corporate assets	N/A	s 178	s 176	s 134	s 112
To insure buildings containing certain lots	N/A	s 179	s 177	s 135	s 113
To insure buildings with common walls	N/A	s 180	s 178	s 136	s 114
To agree to an excess arrangement when insuring	Committee Resolution	s 184	s 182	s 140	s 118
To insure stand alone buildings	N/A	s 185	s 183	s 141	s 119
To effect public risk insurance	N/A	s 187	s 185	s 143	s 121
To apply insurance money for replacements or reinstatement	N/A	s 189, 190	s 187, 188	s 145, 146	s 123, 124
To direct regarding custody of the common seal	Ordinary Resolution	s 192	s 190	s 148	s 126
To keep a Roll of lots and entitlements	N/A	s 196	s 194	s 152	s 130
To keep a Registrar of Assets	N/A	s 197	s 195	s 153	s 131
To keep a Register of Engagements and Authorisations	N/A	s 198	s 196	s 154	N/A
To keep a Register of Authorisations Affecting Common Property	N/A	s 199	s 197	s 155	N/A
To keep a Register of Allocations Under Exclusive Use By-laws	N/A	s 200	s 198	s 156	s 132
To keep a Register of Reserved Issues	N/A	s 201	s 199	s 157	s 133
To keep and dispose of records	N/A	s 203	s 201	s 159	s 135
To allow access to records	N/A	s 204	s 202	s 160	s 136

Accommodation Module

The position is the same.

Commercial Module

The position is similar, except that:

- Contributions can be fixed or changed by the committee.
- There are no special requirements about what a decision to pay remuneration, allowances or expenses must contain or what must accompany the voting paper.

Small schemes Module

The position is similar, except that:

- The payment of remuneration, allowances or expenses must be made under the authority of an ordinary resolution or for expenses not exceeding $50.

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• There are no special requirements about what a decision to pay remuneration, allowances or expenses must contain or what must accompany the voting paper.

Two-lot Module

The above does not apply to the Two-lot Module.

Standard Module

*An example of the Body Corporate's duty to maintain common property can be found in *Keypoint* [2013] QBCCMCmr 28 (30 January 2014).

In that case, the applicant owner had a cracked and sagging ceiling due to water entering the roof above the applicant's lot.

The applicant and the body corporate obtained conflicting reports from tradesmen and consultants regarding the roof above her lot and the extent to which a lack of sarking and faulty tile clips in the roof had allowed water to enter and cause damage.

The body corporate denied the leaking roof contributed to the applicant's sagging roof, instead arguing that the applicant had failed to properly patch, paint and maintain her roof. The body corporate was willing to re-paint the applicant's ceiling but not to put sarking in the roof or re-roof the entire building.

After reading the reports, the adjudicator ruled in favour of the applicant and found that the body corporate had been aware of the leaks since at least 2011, and had breached its duty under s 159 of the Std Mod in failing to remedy any defect as soon as it fell into disrepair as found in *Klinger & Anor* v *Body Corporate for Costa D'Ora Apartments* [2007] QDC 300.

The adjudicator ordered the body corporate new tile clips be replaced and the applicant's bowed ceiling be removed, replaced and re-painted at the cost of the body corporate.

The takeaway lesson is that owners should be encouraged to document and bring (in writing) any damage to common property to the immediate attention of the body corporate manager to ensure the owner's interests are protected.

Likewise, the body corporate should be encouraged to act swiftly in the repair, replacement and maintenance issues on such important common property as the building roof.

Law: BCCM Act, s 100

Std Mod, s 42, 43

Acc Mod, s 42, 43

Com Mod, s 18

SS Mod, s 18.

Last reviewed: 4 March 2014

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[¶36-100] Restrictions imposed by a general meeting

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The point has already been made that the committee cannot make a decision on any matter that is a "restricted issue for the committee". Under the Std Mod, one such restricted issue is any issue reserved, by ordinary resolution of the body corporate, for decision by ordinary resolution of the body corporate. This effectively means that the body corporate in general meeting can add to the matters that are restricted issues, which cannot be decided by the committee. **Form B4** (¶72-610) illustrates an ordinary resolution that can be used for this purpose. An ordinary resolution of the body corporate designating a matter as a restricted issue can be repealed by a subsequent ordinary resolution of the body corporate. Upon such repeal the matter ceases to be a restricted issue.

A body corporate needs to be careful about designating matters as restricted issues. Frequent use of this right of designation can impede the day to day management of the community titles scheme.

Having said that, it is also important for the committee to be mindful of when it is overstepping the bounds of what can rightfully be decided at the committee level. In *Famestock Pty Ltd* v *The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368* (2012) LQCS ¶90-178; [2012] QSC 129, the Queensland Supreme Court was called upon by way of *voir dire* to examine the decision of the committee in terminating the caretaking and letting agreements of the resident manager. The committee in that case seized upon the resident manager's lapsed resident letting agent licence (as issued by the Office of Fair Trading) as a reason to terminate the resident manager's contracts. Rather than checking whether this step could be taken at the committee level, notices of termination were issued and the substantive *Famestock* case was commenced by the resident manager as the plaintiff. The Supreme Court held that the committee was not entitled to determine the plaintiff's caretaking and letting agreement without the authority of a general meeting resolution.

If the body corporate is concerned to control the activities of a body corporate manager, then the power to designate restricted issues is not the appropriate solution. Instead, the body corporate should vary the terms of that manager's delegation.

See also 36-200 for commentary on committee decisions (and subsequent ratification).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod, s 42

Acc Mod s 42

Com Mod s 18(b)

SS Mod s 18(c).

Last reviewed: 26 November 2012

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[¶36-150] Restriction on power to expend money

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Limit on committee spending

Section 151 of the Std Mod prohibits the committee from spending money above the relevant limit for the scheme unless:

(a) the spending is specifically authorised by ordinary resolution of the body corporate
(b) the owners of all lots included in the scheme have given written consent
(c) an adjudicator is satisfied that the spending is required to meet an emergency and authorises it under an order made under the dispute resolution provisions, or
(d) the spending is necessary to comply with —

(i) a statutory order or notice given to the body corporate
(ii) the order of an adjudicator
(iii) the judgment or order of a court, or
(iv) the order of QCAT.

Payment to comply with a QCAT order

While it may seem there is little room for an owner to argue with a body corporate's spending in order to comply with a QCAT order, that assumption is incorrect.

In *Drift Palm Cove* [2015] QBCCMCmr 503 (26 October 2015), the body corporate committee, having entered into a settlement arrangement with the scheme's caretaker in order to bring an end to District Court proceedings, were met with opposition by the committee's former treasurer.

Essentially, the applicant and former treasurer took issue with the committee's resolution to authorise a payment of $159,500.00 to the scheme's caretaker which was negotiated between the body corporate and the caretaker to settle a QCAT remuneration review matter and the District Court enforcement of that 2011 QCAT order.

The applicant argued that:

- the committee were trying to overturn an earlier decision of the owners in general meeting not to pay the legal fees associated with the QCAT and District Court proceedings
- the payment of $159,500.00 was not budgeted for and was above the committee spending limit, and
- that the committee ought to be compelled to seek payment of the legal fees attributable to the transfer of the management rights.

The respondent committee argued that:

- the applicant, while the treasurer for the scheme, contributed to the overall legal fees by refusing to accept the legal advice received
- after the applicant's removal, the committee came to an agreement promptly to pay $159,500.00 to the caretaker, confirm the QCT decision as to salary and to take no further action
- the committee's decision was precisely in accordance with the amounts ordered by QCAT as claimed by the caretaker and the committee were entitled to make the payment
- while the motion to pay the legal accounts was defeated at the AGM, this was due to confusion among the owners as to whether the payment should have been subject to a vote at all, given they were within the committee spending limit, and
- as an assignment of the management rights was not consented to, it was not possible to seek to recover legal fees from the caretaker.

After determining she had jurisdiction, the Adjudicator found that the payment was for a QCAT order and although the committee could have put the settlement proposal to a general meeting, that decision may have been unhelpful given time was of the essence to effect a settlement.

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Putting the settlement proposal to a general meeting would have meant the body corporate may well have spent more time and money challenging any failure to pass the motion all while continuing to run up interest and other costs.

In terms of the applicant's argument that the committee ought not to have paid their legal team as the amount was outside of the committee spending limit and was in conflict with the owner's decision at the AGM, the adjudicator made the following points:

1. The mere fact that a number of invoices for legal fees were issued did not mean that those legal fees were part of a single project
2. Even if multiple quotes should have been obtained, it may have been impractical for the committee to obtain those other quotes on several of the issues raised given the costs of engaging a second or third firm to come up to speed with the complexity of the matter and provide the advice required, and
3. It would be meaningless to subsequently obtain a second quote for work already incurred in order to approve spending.

The application was accordingly dismissed.

Provision is also made for a series of proposals that form a single project to effectively be treated as a single proposal for the purpose of this provision. This prevents the "splitting" of a project so that each part costs less than the relevant limit. The relevant limit for a committee regulated under the Std Mod is either the amount set by an ordinary resolution of the body corporate or $200 multiplied by the number of lots in the scheme. This includes lots used for carparking or utility purposes.

Special quote provisions apply to a proposal to spend money where:

- (a) and (b) above apply
- (c) and (d) above do not apply, and
- the proposal involves spending above the relevant limit for major spending, which is either:
  - – the amount set by an ordinary resolution of the body corporate, or
  - – the lesser of: (1) the amount obtained by multiplying the number of lots by $1,100, or (2) $10,000.

What is "Emergency Spending"?

Essentially, an adjudicator can authorise emergency spending where the adjudicator is satisfied that the spending is so urgent that the body corporate has insufficient time to call an extraordinary general meeting (EGM) to authorise it. Given that an EGM is held 21 days after notice of the meeting is provided to all owners, that delay can contribute to irreparable damage to common property.

In *Leman Lodge* [2014] QBCCMCmr 18 (22 January 2014), water began pouring into a lot due to a burst copper water pipe leaking inside the concrete slab between the floor of lot 6 and the ceiling of lot 3 immediately below.

The committee obtained quotes and sought the owners' approval to engage one of the plumbers to replace the leaking pipes. The spending limit was below that of the lowest quote, which meant that in order for the spending to be approved it had to be put to the vote in general meeting.

Turning to the question of whether the situation could be an "emergency", the adjudicator found that:

- the pipes were leaking
- mains water had to be turned off when not in use to prevent water continuing to leak into lot 3
- the spending was so urgent that the body corporate had insufficient time to call the EGM.

This necessitated the adjudicator overriding the normal decision making processes of the body corporate.

The order for emergency spending was made in the body corporate's favour.

Limit on major spending

Section 152 of the Std Mod applies to quotes for major spending. It applies if —

(a) a motion to be moved at a general meeting of the body corporate proposes:

(i) carrying out of work
(ii) acquisition of personal property, or
(iii) acquisition of services (including the engagement of a body corporate manager or service contractor, other than a service contractor who also is, or is to be, a letting agent), and

(b) the cost of carrying the proposal into effect is more than the relevant limit for major spending.

When the section applies —

- At least two quotes must be given to lot owners.
- The committee must obtain the quotations if it is putting forward the proposal, otherwise the person proposing the motion must obtain the quotations.
- Copies of the quotations must accompany the notice of the meeting and the originals must be retained as part of the minutes of the meeting. If they are voluminous, then summaries of the quotations can be substituted, but they must be accompanied by advice as to where the complete documents may be inspected.
- If it is not practical to obtain two quotations, then a single quotation must be obtained and must accompany the notice.
- When calculating the cost of services the cost over the term of the agreement and any option period must be taken into account.
- There is a provision to prevent a project from being carried out in stages to avoid the requirements for quotations.

Accommodation Module

The position is the same.

Commercial Module

There is no provision of this type in this module. As a result, there is no restriction on the expenditure of money by the committee.

Small Schemes Module

The position is similar, except that the relevant limit for major spending is not capped at $10,000.

Law: Std Mod, s 151, 152, Dictionary

Acc Mod, s 149, 150, Dictionary

SS Mod, s 85, 86, Dictionary.

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[¶36-200] Committee decisions (and subsequent ratification)

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When a committee makes a decision on a matter that is within its power to decide, then that decision is a decision of the body corporate. This is the case even if there is a defect in the appointment of the committee, provided the persons purporting to act as the committee honestly and reasonably believe that they are the committee. This "reasonable belief" requirement ensures that there must be some basis for the persons to believe that they are the committee. It is not sufficient that they honestly believe that to be the case.

A decision of a body corporate manager is void to the extent that it is inconsistent with a decision of the committee. This applies notwithstanding anything in a contract (including an engagement contract) with the body corporate manager. There is no express provision in the BCCM Act that deals with an inconsistency between a decision of the committee and a decision of the general meeting of the body corporate.

Committee decisions and subsequent ratification

Often a body corporate committee will find itself in a situation in which it needs to make a decision on a matter which may or may not be a restricted issue (see ¶36-050 and ¶36-100).

The issue may relate to the use of common property, spending funds on legal fees or entering into a contract with a third-party supplier in order to take advantage of a discount. The body corporate committee may not have the time or properly understand its obligation to seek the approval of all lot owners or may not wish to spend the necessary administrative funds to call a general meeting.

The committee may elect to make the decision at the committee level and seek for the body corporate to ratify it at a later extraordinary general meeting (EGM) or even the annual general meeting (AGM). Unfortunately, the "act now, ratify later" mindset can cause issues as demonstrated by the following cases:

• In *Buon Vista* [2004] QBCCMCmr 376 (2 August 2004) (a case regarding the ratification of expenditure on legal fees), the adjudicator noted the ability of a committee to seek to ratify a previous decision by submitting a motion and relevant supporting material for vote at the next AGM.
• In *Banks & Anor* v *Body Corporate for "Noosa On The Beach" Community Titles Scheme 6417* (2000) LQCS ¶90-104; [2000] QCA 146, the Queensland Court of Appeal agreed that a resolution did, in substance, ratify an application for leave to appeal.
• In *Hollis Holdings Pty Ltd* v *P J Hanly & Ors* [2002] QDC 1, the Queensland District Court accepted a resolution made on 16 November 2001 as effective as authorisation by owners for the body corporate to oppose an appeal filed on 25 May 2001 and expend $12,000 to defend that appeal.

In fact, the applicants' application for leave to appeal before the Court of Appeal in that matter appeared to have involved the Court of Appeal accepting a similar resolution as authority for the body corporate to defend the application, even though the legal representatives had commenced the defence of the application at a much earlier date.In fact, the applicants' application for leave to appeal before the Court of Appeal in that matter appears to have involved the Court of Appeal accepting a similar resolution as authority for the body corporate to defend the application, even though the legal representatives had commenced the defence of the application at a much earlier date.
• In *The Docks* [2012] QBCCMCmr 489, the applicant sought an interim order to restrain lot owners from voting on a motion at the upcoming AGM which would have the effect of ratifying an earlier decision of the committee to allow the resident manager to affix two lit signs to the external façade of the building, advertising accommodation and lighting the entrance to the scheme. The applicant, due to a falling-out with the resident owner, took a particular dislike to the signs which had been placed and saw the decision of the committee as evidence of corruption. The applicant's interim orders were refused. The AGM was later held by the scheme and by 54 votes to 4, the committee's original decision was upheld.

Law: BCCM Act, s 100.

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[¶36-250] General meeting supervision of the committee

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This now brings us to the important question whether, and if so to what extent, a general meeting may direct or otherwise interfere with the management decisions of the committee made or intended to be made within its powers. First, it should be clearly understood that the nature of the interference to be considered is otherwise than that provided for in s 42(c) of the *Std Mod* (and the corresponding provision in the other modules), that is, the general meeting imposing a restriction on the powers of the committee: see ¶36-100.

Again, the provisions of the legislation itself do not provide the answer to this question and as there are no direct court decisions on the point, the answer must be arrived at by examining the general company law principles and then attempting to apply them to the community title situation.

Law: *Std Mod*, s 42(c)

Acc Mod, s 42(c)

Com Mod, s 19(b)

SS Mod, s 18(c).

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[¶36-300] General company law principles

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As far back as the eighteenth century the law recognised the right of a corporate body to act in relation to any matter within the corporation's powers on the decision of a majority of members present at a meeting duly summoned: see *A-G v Davy* and *R v Varld*. Any matter not required by the corporate contract to be decided by special majority or with unanimity was regarded as being within the corporation's powers. In the nineteenth century the position of the board of directors came under consideration within the context of the right of the general meeting to exercise control over its management activities. In *Isle of Wight Railway Company v Tahourdin*, it was concluded that the general meeting was, in effect, the company and the board of directors were more akin to the company's agents. That case also recognised a right on the part of the general meeting to interfere with the decisions of the directors. In his judgment *Cotton* LJ said (at p 329):

> ``It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter which is `intra vires' of the directors, is not for the benefit of the company.''

Cotton LJ also said (at p 330):

> ``Directors have great powers, and the Court refuses to interfere with their management of the company's affairs if they keep within their powers, and if a shareholder complains of the conduct of the directors while they keep their powers, the Court says to him, `If you want to alter the management of the affairs of the company go to a general meeting, and if they agree with you they will pass a resolution obliging the directors to alter their course of proceeding.'''

Largely because of changes in the companies legislation, the position was modified in the early twentieth century. The first case of importance was *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame* (*Cunninghame's* case). In that case there were two relevant articles of the company:

> ``81. The company may by special resolution remove any director before the expiration of his period of office and appoint another qualified person in his stead...
>
> 96. The management of the business and the control of the company shall be vested in the directors, who, in addition to the powers and authorities by these presents expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting;...''

Another article clearly gave the directors the power to sell or otherwise deal with any property of the company on such terms as they might think fit.

At a general meeting of the company a resolution was passed by a simple majority of the shareholders for the sale of the company's assets on certain terms to a new company formed for the purpose of acquiring them, and directing the directors to carry the sale into effect. The directors, being of the opinion that a sale on those terms was not for the benefit of the company, declined to carry the sale into effect. The shareholders unsuccessfully attempted to force the directors to comply with the direction of the general meeting. It was held by *Warrington* J, and affirmed by the Court of Appeal, that, upon the construction of the articles, the directors could not be compelled to comply with the resolution. The following passage from the judgment of *Warrington* J at p 38, which was approved by the Court of Appeal at p 43 per *Collins* MR and at p 45 per *Cozens-Hardy* LJ, is particularly relevant:

> ``Article 96 provides that the management of the business and control of the company are to be vested in the directors. Now that article, which is for the protection of a minority of the shareholders, can only be altered by a special resolution, that is to say, by a resolution passed by a three-fourths majority, at a meeting called for the purpose, and confirmed at a subsequent meeting. If that provision could be revoked by a resolution of the shareholders passed by a simple majority, I can see no reason for the provision which is to be found in Article 81 that the directors can only be removed by a special resolution. It seems to me that if a majority of the shareholders can, on a matter which is vested in

> the directors, overrule the discretion of the directors, there might just as well be no provision at all in the Articles as to the removal of the directors by special resolution. Moreover, pressed to its logical conclusion, the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not able to remove the directors, overrule every act which the board might otherwise do."

Cunninghame's case involved a mere majority, but the position would appear to be the same even if the majority were sufficient to remove the directors and alter the articles. The proper procedure is for the shareholders to alter the articles and/or remove the directors, and not to use their majority to require the directors to adopt a particular course of action: see *Imperial Hydropathic Hotel Company, Blackpool v Hampson*.

The approach in *Cunninghame's* case was later approved by a differently constituted Court of Appeal in *Gramophone and Typewriter, Limited v Stanley*. *Fletcher Moulton* LJ said in his judgment at p 97:

> ``It has been decided by this Court, in the case of *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame*, that in an English company, by whose articles of association certain powers are placed in the hands of the directors, shareholders cannot interfere with the exercise of those powers by the directors, even by a majority at a general meeting. Their course is to obtain the requisite majority to remove the directors and put persons in their place who agree to their policy."

Similarly, *Buckley* LJ said in his judgment at p 104:

> ``This Court decided not long since, in *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame*, that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals."

Similar conclusions were reached in a House of Lords decision *Quin & Axtens, Limited & Ors v Salmon* and in a Court of Appeal decision *John Shaw and Sons (Salford), Limited v Peter Shaw and John Shaw*. In the latter case *Greer* LJ gave a clear statement of the relevant principles when he said at p 134:

> ``A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders."

This principle would apply equally to matters not specifically delegated to the directors provided they are not expressly reserved to a general meeting by the governing Act or the Articles. In this regard reference should be made to a passage in *Buckley on Companies* (11th ed, p 723), the accuracy of which was recognised by *Greer* LJ in the *John Shaw and Sons* case at p 134.

There are numerous other cases analysis of which will lead to the same conclusion, that the general meeting is unable to interfere with decisions of the directors. It is not possible to deal with all such cases in detail in a work of this nature; the most important are: *T Logan Limited v Davis*, *Scott v Scott*, *Bamford v Bamford*, and the Australian cases, *Howard Smith Ltd v Ampol Petroleum Ltd*, *Clifton v Mount Morgan Ltd*, *Omega Estates Pty Ltd v Ganke*, *Grant v John Grant Ltd*, and *Winthrop Investments Ltd v Winns Ltd*. *Bamford's* case is particularly useful in that *Plowman* J during the course of his judgment reviewed the entire range of leading cases on this principle. His conclusion is apparent from the following passage at p 324 of the judgment:

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> ``What it [*Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame*] decides, and what the cases which follow, to which I will refer in a moment, decide, in my judgment, is this: that a company cannot by ordinary resolution dictate to or overrule the directors in respect of matters entrusted to them by the articles. To do that it is necessary to have a special resolution.''

Finally, the *Winthrop Investments* case is significant, not only because it is a recent local case, but also because it followed *Bamford's* case and the judgments consider virtually all of the cases that have been dealt with in this part.

.40 Case references: *A-G* v *Davy* (1741) 2 Atk 212; 26 ER 531; *R* v *Varld* (1775) 1 Cowp 248; 98 ER 1068; *Isle of Wight Railway Company* v *Tahourdin* (1883) 25 Ch D 320, CA; *Automatic Self-Cleansing Filter Syndicate Co Ltd* v *Cunninghame* (1906) 2 Ch 34, CA; *Imperial Hydropathic Hotel Company, Blackpool* v *Hampson* (1882) 23 Ch D 1, CA; *Gramophone and Typewriter, Limited* v *Stanley* (1908) 2 KB 89, CA; *Quin & Axtens, Limited & Ors* v *Salmon* (1909) AC 442; *John Shaw and Sons (Salford), Limited* v *Peter Shaw and John Shaw* (1935) 2 KB 113, CA; *T Logan Limited* v *Davis* (1911) 104 LT 914; *Scott* v *Scott* (1943) 1 All ER 582; *Bamford and Bamford (1968)* 3 WLR 317, affd (1969) 2 WLR 1107, CA; *Howard Smith Ltd* v *Ampol Petroleum Ltd* (1974) AC 821; *Clifton* v *Mount Morgan Ltd* (1940) 40 SR (NSW) 31; *Omega Estates Pty Ltd* v *Ganke* (1963) NSWR 1416; *Grant* v *John Grant Ltd* (1950) 82 CLR 1; *Winthrop Investments Ltd* v *Winns Ltd* (1975) 2 NSWLR 666.

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[¶36-350] Relevant community titles law

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Having considered the position at common law it is now necessary to examine those provisions of the BCCM Act and regulation modules that may be relevant in determining the extent to which the common law may be applied to a community titles body corporate.

Sections 30, 31, 32

Sections 30 and 31 provide for the creation of the body corporate and its constitution by the lot owners as "members". Section 32 provides that the *Corporations Act 2001* does not apply to the body corporate.

Sections 94, 95

These sections provide for the general functions and powers of the body corporate. In particular, the body corporate is given the function to "administer the common property and body corporate assets for the benefit of the owners of the lots".

Sections 98, 99

These sections empower the regulation modules to determine whether there must be a committee of the body corporate and how it must function. In turn, each regulation module (except for the Two-lot Schemes Module) currently requires the body corporate to have a committee.

Sections 100, 101

There are three important matters provided in these sections:

- A decision of the committee within its power is a decision of the body corporate.
- A decision of the committee over-rides an inconsistent decision of a body corporate manager.
- The committee must put into effect the lawful decisions of the body corporate.

Chapter 6

This is the chapter dealing with **disputes**. There are three important matters apparent from this chapter:

- An executive committee is now a "person" entitled to apply for an order, as is a body corporate.
- An owner may apply for an order against a body corporate relating to matters of internal management.
- An adjudicator (and the District Court on appeal) can interfere in the internal management of the community titles scheme.

Std Mod, s 7

This section of the standard module makes it clear that there must be a committee where a body corporate is regulated by that module unless a body corporate manager substitutes as its delegate. (There are similar provisions in the other modules, although in the Com Mod there is no provision for the substitution of a body corporate manager.)

Std Mod, s 33

This section allows the body corporate by ordinary resolution to remove a member of the committee from office.

Std Mod, s 42

This section specifies the matters that cannot be decided by the committee, in particular:

- fixing or changing a contribution
- changing rights, privileges or obligations of owners

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- matters that the general meeting reserves for its own decision
- matters that require a resolution without dissent, special resolution or ordinary resolution under the BCCM Act
- bringing certain court proceedings, and
- paying remuneration, allowances or expenses to committee members.

Std Mod, s 56

This section allows owners with at least half of the lots in the scheme to give notice to the secretary opposing the carrying out of a resolution of the committee. In that event, the committee is precluded from carrying out the resolution.

Accommodation Module

The position is the same, except that there is no equivalent provision to s 56 of the Std Mod. Hence, owners of half the lots cannot veto the carrying out of a decision of the committee.

Commercial Module

There are equivalent provisions to s 7 and 33 of the Std Mod. However, the equivalent provision to s 42 of the Std Mod is not as restrictive and there is no equivalent provision to s 56 of the Std Mod. Hence, owners of half the lots cannot veto the carrying out of a decision of the committee.

Small Schemes Module

There are equivalent provisions to s 7, 33 and 42 of the Std Mod. There is no equivalent provision to s 56 of the Std Mod. Hence, owners of half the lots cannot veto the carrying out of a decision of the committee.

Specified Two-lot Schemes Module

The above does not apply to a Two-lot Schemes Module as the body corporate makes decisions by lot owner agreements rather than through committees or at general meetings.

Law: BCCM Act, s 30, 31, 32, 94, 95, 98, 99, 100, 101, Ch 6

Std Mod, s 7, 33, 42, 56

Acc Mod, s 8, 33, 42

Com Mod, s 8, 15, 18

SS Mod, s 8, 15, 18.

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[¶36-400] Application of company law principles to community titles

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Generally speaking, the company law cases are based on the situation where the management of the business of the company is vested in the board of directors. This has led to the general conclusion that the directors have the right to conduct such management without interference from the members in general meeting. The only case which does not fall within this broad statement is *Isle of Wight Railway Company v Tahourdin* which is discussed at ¶36-350. In that case the management of the company's business was vested in the directors, but another article gave the general meeting supervisory rights over the directors. This latter aspect explains why this decision differs from the others discussed.

In some respects the BCCM Act and its modules provide for similar supervision by members (ie owners) of the body corporate. In particular, s 37 of the Std Mod enables a group of owners who do not constitute a formal meeting to veto implementation of a decision of the committee. However, there is nothing in the legislation which purports to enable the general meeting to directly control the committee, beyond its power to vacate the office of a committee member by ordinary resolution. Nor is there anything in s 56 of the Std Mod which purports to enable the general meeting to interfere with a decision of the committee once that decision has been made and the seven day notice period provided for by the section has expired. In any event, there is no such veto provision in the other three modules.

To this extent the only real difference between the position that existed in relation to the company law cases and the position under the community titles legislation is that the community title general meeting has a form of collateral or parallel power with the committee. But that is not to say that the general meeting may direct or control the committee. The general meeting may limit the power of the committee to decide matters, it may remove committee members so as to ensure that the committee is constituted by members representing the wishes of the majority of owners and it may even decide on matters that have not been considered by the committee. Apart from that, if the general meeting allows a committee to make a decision on a particular matter, then maybe the general meeting cannot interfere with that decision once it has been made.

This general argument may be further limited by the likelihood that any matter for decision which has been vested exclusively in the committee may only be determined by the committee and in determining such matter the committee may ignore the directions of a general meeting. This would be an application of the principle enunciated in *Cunninghame*'s case and the various other cases along the same lines considered in ¶36-300. This general argument requires at least one other qualification relating to rescission powers. Clearly, all regulation modules recognise the right to rescind resolutions. In this regard s 95 of the Std Mod (which is the same as s 93 of the Acc Mod, s 62 of the Com Mod and s 50 of the SS Mod) provides where a resolution without dissent, special resolution or ordinary resolution is required for a particular purpose, they may only be amended or revoked by a resolution of the required type. A committee would also have the power to amend or revoke its own decisions in the same way it can make decisions.

But what of the situation where a committee has made a decision and the general meeting wishes to amend or revoke that decision? Do the company law cases apply so as to prevent any interference by the general meeting? The search for the answer to this question must involve a consideration of the very nature of the committee decision. Section 100(1) of the BCCM Act provides that a decision of a committee is taken to be a decision of the body corporate. Is it not then arguable that this decision may be amended or revoked in the same manner as any other decision of the body corporate? That certainly is a clear argument.

It is important not to automatically extend all corporate legal principles (especially the concept of oppression) to the function of a body corporate as noted in *Dindas & Anor* v *Body Corporate for "One Park Road" CTS 2114 & Ors* (2008) LQCS ¶90-136; [2006] QDC 302. In that case, the adjudicator, drawing upon both corporate and equitable legal principles, found certain resolutions to be unreasonable and set them aside accordingly. In addition, he took the view that the majority of lot owners had wrongly overridden the interests of the minority. Unfortunately, the Queensland District Court did not agree with the adjudicator and held that he had fallen into error. So, while a body corporate bears the hallmarks of a company, it is a creature created and administered by a number of very separate Acts.

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Conclusion

It is emphasised that there is no direct authority on this question so far as it relates to community title bodies corporate, but if general company law principles are eventually followed, and there is a fairly strong possibility that they will be, then the position may be summarised as follows:

(1) Where a resolution without dissent or special resolution has been passed in respect of a matter that must be decided by such resolution, then the resolution can only be amended or revoked by a subsequent resolution without dissent or special resolution, as the case may be (refer s 95 Std Mod, s 93 Acc Mod, s 62 Com Mod and s 50 SS Mod).
(2) An ordinary resolution of a general meeting may only be revoked or amended by a subsequent resolution (ordinary, special or unanimous) of a general meeting.
(3) A resolution of the committee may be revoked or amended by a subsequent resolution of the committee.
(4) A resolution of the committee on any matter vested exclusively in the committee may not be interfered with by a general meeting and such meeting may not direct the committee in relation to such a matter.
(5) A resolution of the committee on any matter which may be decided by either the committee or the general meeting shall, once made, be binding on the general meeting. The only remedy available to the general meeting is to restrict the future power of the committee or to remove individual members of the committee.
(6) Where the committee refuses or fails to exercise a power vested exclusively in it and it becomes essential for that power to be exercised, then the general meeting may exercise the power.

Law: BCCM Act, s 100(1)

Std Mod, s 56, 95

Acc Mod, s 93

Com Mod, s 62

SS Mod, s 50.

.40 Case references: *Isle of Wight Railway Company* v *Tahourdin* (1883) 25 Ch D 320, CA; *Automatic Self-Cleansing Filter Syndicate Co Ltd* v *Cunninghame* (1906) 2 Ch 34, CA.

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[¶36-410] Purpose of the body corporate

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It is clear from s 94 of the BCCM Act that the purpose of the body corporate includes:

- maintaining the common property (which includes certain structural components of buildings)
- maintaining body corporate assets, and
- administering the scheme (which includes a supervisory role in relation to the common property and, to a lesser extent, the lots.

This gives an insight into what is involved in not only administering the community title scheme, but also managing the body corporate itself.

Law: BCCM Act, s 94.

Last reviewed: 21 January 2006

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[¶36-413] Management of the scheme

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The management of a community titles scheme by a body corporate involves a number of functions that can generally be categorised under three main headings:

1. Property management
2. Administration, and
3. Financial management.

The following sub-categories can be applied to these headings in the case of a larger community titles scheme:

Property management

- Cleaning
- Gardening
- Repairs and maintenance
- Contract administration, and
- Record keeping.

Administration

- Record keeping
- Community relations
- Meetings
- Insurance, and
- By-law enforcement.

Financial management

- Budgeting
- Levies
- Receipts and payments
- Book-keeping, and
- Reporting.

All of this presents an overview of the management role of the body corporate. It also demonstrates the range of skills required to manage a community titles scheme.

Property Management — Repairs and Maintenance

The body corporate has a duty to maintain the common property when it becomes aware of a maintenance problem per *Magog (No 15) Pty Ltd* v *The Body Corporate for the Moroccan* [2010] QDC 70 at [85].

It is the failure to remedy any defect as soon as it falls into disrepair which gives rise to a breach of the body corporate's duty: *Klinger & Anor* v *Body Corporate for Costa D'Ora Apartments* [2007] QDC 300 at 67.

Additionally, from *Seiwa Pty Ltd* v *Owners Strata Plan 35042* [2006] NSWSC 1157 at [4], we know that "an obligation to keep the thing in proper order by acts of maintenance before it falls out of condition, in a state which enables it to serve the purpose for which it exists, (it) is obliged … to take preventative measures to ensure that there is not a malfunction" as cited with approval by adjudicator Dowling in *Hibbertia* [2014] QBCCMCmr 455 (17 December 2014).

Essentially, the maintenance obligations are "directed to keeping the common property operational and to restoring something which is defective" according to *Ridis* v *Strata Plan 10308* [2005] NSWCA 246 at [158].

But does a lack of funding provide the body corporate with a reasonable excuse to wait and do the repairs once funded? According to adjudicator Dowling in *Hibbertia* [2014] QBCCMCmr 455 (17 December 2014), the answer to that question is "no".

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In *Hibertia*, a lot owner concerned with the lack of common property wall weep holes, potential termite access and the fall of the land on the common property sought orders to compel the body corporate to take action to prevent further issues with the common property as a result of a property building report she had obtained from a builder.

The body corporate obtained their own reports and advised the adjudicator that they would attend to certain items when the body corporate budget and time permitted. They were critical of the applicant's building report and recommendations made therein.

The adjudicator found that the body corporate had a duty to maintain the wall (the scheme was based on a BUP) which it had failed to discharge. In terms of the committee's argument as to timing and costs, the adjudicator said:

> "The committee considers the work could be carried out when the body corporate finances and time permits. I do not consider the body corporate has that luxury … The body corporate has been aware of the maintenance problems for some time. Given the … reports it has failed to fix the problems. I consider the possible consequences if the work is not carried out outweigh any claimed budgetary issues (the body corporate is not relieved of its maintenance obligations because of a lack of available funds)."

Last reviewed: 5 February 2016

[¶36-418] Strategic management

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It follows that in administering a community titles scheme the central focus of the body corporate must be the common property and body corporate assets. Its primary strategic objective must be to preserve and enhance the common property so as to protect the owners' investments in their lots. Everything else is secondary to this strategic objective. This requires the committee, and particularly, body corporate managers, to focus on this strategic objective. This objective can be difficult to pursue in circumstances where the committee members do not agree on whether to take a conservative or proactive approach towards enhancing the common property.

Unfortunately, too often committees and body corporate managers are more concerned with record keeping than with strategic management. This is particularly so where access to computerised processes is not available. Management functions need to be arranged so that records are properly kept and processes (eg meeting procedures) are accurately performed in the most time efficient way. This will allow governance and management to focus on the strategic issues, as well as the promotion of harmonious relations within the community.

Last reviewed: 30 August 2012

[¶36-450] Importance of the committee

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The committee of a body corporate is the representative body of the owners and consists of an elected group of the owners or their nominated representatives. It is similar to the ``committee'' of a sporting club or the board of directors of a company, although it functions differently to such a board. It is largely responsible for the day to day control and management of the community titles scheme. However, the committee (unlike the board of directors of a company) is subject to a degree of control and supervision by the general meeting of the body corporate: see ¶36-250 to ¶36-400.

The following commentary will examine the provisions of the *BCCM Act*, its regulation modules and the relevant common law regulating the appointment of the committee and its office bearers, their functions and the way in which those functions are exercised.

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[¶36-460] BCCM Act provisions

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The BCCM Act does not contain much detail about the composition of the committee, its powers or method of operation. That detail is substantially contained in the various regulation modules. While s 98 of the BCCM Act recognises the possibility that there may not be a committee under a particular regulation module, in fact each module currently provides for an operational committee unless a body corporate manager is specially appointed to act in place of a committee and its office bearers. The BCCM Act also provides for the regulation modules to specify:

- the way the committee is to be composed
- the way the members of the committee are chosen
- the term of office of a member of the committee
- vacancies on the committee and the filling of casual vacancies
- issues about which the committee may not decide
- the procedures and powers of the committee, and
- a range of matters relating to the appointment and use of proxies for committee meetings.

This commentary will now consider the relevant provisions of the various modules in detail.

Law: BCCM Act, s 98, 99, 100(2), 101, 102.

Last reviewed: 22 January 2006

[¶36-500] How the committee is composed

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The Std Mod makes it clear that there must be a committee for bodies corporate regulated under that module unless a body corporate manager is specially appointed to act in place of a committee and its office bearers. That committee consists of:

- the persons chosen to be the executive members of the committee (ie chairperson, secretary and treasurer)
- any ordinary members chosen for the committee, and
- non-voting members.

The non-voting members of the committee are the body corporate manager and caretaker for the community titles scheme, assuming that those positions have been filled in respect of the particular scheme. The non-voting members need not be elected to the committee. They are effectively ex-officio members and have no entitlement to vote. If a body corporate manager or caretaker is also a lot owner, they are precluded from being elected as a voting member of the committee.

The total number of members of the committee depends on the number of owners in the scheme. This number is determined as follows:

- If there are only two lots in the scheme and they are in identical ownership, the committee consists of one individual who is the owner or the nominee of the owners.
- If there are three or more lots in the scheme and all the lots are in identical ownership, the committee consists of one individual who is the owner or the nominee of the owners.
- If there are two lots in the scheme and they are in different ownership, the committee consists of two individuals who are the owners or the nominees of the owners. They decide between them who holds each executive position, and if they cannot agree the two of them hold those positions jointly.
- If there are three or more lots in the scheme and there are only two different owners, the committee consists of two individuals who are the owners or the nominees of the owners. They decide between them who holds each executive position, and if they cannot agree the two of them hold those positions jointly.
- If the scheme consists of fewer than seven lots, then the number of voting members on the committee is at least three but not more than the number of lots.
- If the scheme consists of more than seven lots, then the number of voting members on the committee is at least three but not more than seven.

It is clear that non-voting members are not counted for the purpose of the above calculations. This means that, in a scheme with more than seven lots, the size of the committee is potentially nine, being seven voting members and two non-voting members. The executive members of the committee consist of the chairperson, secretary and treasurer. One person may hold all three positions or any two of them in conjunction. If there is a committee, it is compulsory for a chairperson, secretary and treasurer to be appointed. This is the case even if there is a body corporate manager who has been delegated the powers of the holders of those positions.

Accommodation Module

The position is the same.

Commercial Module

The position is the same, except that there is no provision for a body corporate manager to be substituted for the committee.

Small Schemes Module

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This module is entirely different. The committee consists only of the person or persons chosen to be the secretary and treasurer of the body corporate. One person may hold both positions, in which event there is a committee of one. The positions must be filled even where there is a body corporate manager who has been delegated the powers of the holders of those positions.

Law: Std Mod, s 7, 9, 12, 13

Acc Mod, s 8, 10, 13, 14

Com Mod, s 8, 10, 12

SS Mod, s 8, 10.

Last reviewed: 13 February 2006

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[¶36-550] Eligibility for committee membership

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Eligibility

To be eligible to be a voting member of the committee, a person must be an *individual* (ie a natural person and not a corporate body) nominated for membership by a *member* (ie lot owner) of the body corporate ("the **nominating entity**"). They must also be:

(1) a member of the body corporate, or
(2) a person of the following category:

(a) if the nominating entity is an individual—

(i) a member of the individual's family, or
(ii) a person acting under the authority of a power of attorney given by the individual.

(b) if the nominating entity is a corporation — a director, secretary or other nominee of the corporation
(c) if the nominating entity is the body corporate for a subsidiary scheme — a representative of the subsidiary scheme.

This is somewhat more complicated than the corresponding provisions before the October 2003 amendments to the Std Mod and is a good example of amendments that serve no real purpose, other than to add further complexity to the administration of bodies corporate. The important point to note is that a person who is not a "family" member who is being nominated by an individual nominating entity must be given a power of attorney by the nominating entity before they are eligible to serve on the committee. Curiously, the same requirement does not apply to a corporation or to a subsidiary scheme body corporate — both being able to simply designate any individual even if the individual is totally unrelated to the scheme or the corporation. For the purpose of this provision, "family" of an individual nominator is defined to mean the following persons:

(a) the individual's spouse
(b) each of the children of the individual or the individual's spouse who is 18 years or more, including a step child or an adopted child
(c) each of the individual's parents, including a step parent
(d) a brother or sister of the individual.

It is clear that "in law" relationships (eg brother-in-law or father-in-law) do not qualify and a power of attorney would be necessary. See **Form B167** (¶74-570) for a suggested form of power of attorney under Queensland law.

Ineligibility

A person is not eligible to be a voting member of the committee if they are:

(a) a body corporate manager, service contractor or letting agent
(b) an associate of a body corporate manager, service contractor or letting agent (other than a lot owner who is an associate of a letting agent merely because the letting agent, in conducting the letting agent's business, acts for the lot owner)
(c) a person, other than a letting agent for the scheme, who conducts a letting agent's business for the scheme
(d) a member of the body corporate who owes a debt to the body corporate when the members of the committee are chosen
(e) nominated by a member of the body corporate who owes a debt to the body corporate when the members of the committee are chosen, or
(f) the co-owner of a lot and another co-owner of that lot is a voting member of the committee and membership is not otherwise permitted under the module, for example—

(i) there is a shortage of nominees for the committee and not more than one other co-owner is a nominee (see s 27 of the Std Mod)
(ii) where a casual vacancy on the committee is being filled and not more than one other co-owner is a voting member of the committee (see s 31), and
(iii) where a vacancy arising from a committee member being removed from office is being filled and not more than one other co-owner is a voting member of the committee (see s 40).

To determine whether a person is an "associate" of another person, regard must be had to s 309 of the BCCM Act. Those provisions are very complex and have an extensive reach. The fundamental principle is that a person is associated with someone else if—

(a) a relationship of a type to which s 309 applies exists between them, or
(b) a series of relationships of the type to which s 309 applies can be traced between them through another person and other persons.

Section 309 applies to relationships of the following types:

(a) marriage, de facto relationship or civil partnership
(b) the relationship of ascendant and descendant (including the relationship of parent and child) or the relationship of persons who have a parent or grandparent in common
(c) partnership
(d) the relationship of employer and employee
(e) a fiduciary relationship
(f) the relationship of persons, one of whom is accustomed, or under an obligation (whether formal or informal), to act in accordance with the directions, instructions or wishes of the other
(g) the relationship of a corporation and executive officer of the corporation, and
(h) the relationship of a corporation and a person who is in a position to control or substantially influence the corporation's conduct.

However, the owner of a lot in the scheme and a letting agent for the scheme are not "associates" merely because of their relationship as owner and letting agent. Furthermore, for the purposes of s 309, *"executive officer"*, of a corporation, means a person who is concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer.

Clearly, it could be difficult for a lot owner or the nominee of a lot owner to determine whether or not they are disqualified for nomination for election or appointment to the committee. The inclusion of service contractors in the "relationship" test potentially adds to this difficulty where a scheme has a large number of service contractors. However, it will be virtually impossible for a body corporate to verify whether or not a lot owner or their nominee is eligible for election or appointment to the committee. The mere task of trying to make the determination will be expensive and time-consuming. In practice, these technicalities are simply ignored. This is another example of over-regulation that serves a limited or no purpose in relation to the vast majority of community title schemes.

Accommodation Module

The position is the same.

Commercial Module

The position is much simpler than for the Std Mod and the Acc Mod. To be a member of the executive committee an individual person must be—

(a) a member of the body corporate, or
(b) a person nominated for membership by a member of the body corporate
and must not otherwise be ineligible. They are ineligible if the person is—

(c) a body corporate manager
(d) an associate of a body corporate manager, or
(e) a person who owes a body corporate debt at the time the voting members are chosen or are nominated by such a person.

The meaning of "associate" is the same as that applying to the Std Mod. The disqualification does not apply if the person is chosen as the secretary, treasurer or secretary and treasurer and is otherwise eligible to be a member (ie they are a member or nominated by a member). They are then non-voting members of the committee.

Small Schemes Module

This module is entirely different. An individual who is an owner, or nominated by an owner, is eligible to be the secretary or treasurer of the body corporate. The following should be noted:

1. An owner may not be another body corporate, because this module can only be used where the scheme is a "basic scheme".
2. An owner may be a company, in which event it may appoint an individual as a candidate for appointment as secretary or treasurer.
3. If there are two or more co-owners of a lot, only one of them can be a member of the committee at a time, unless another is eligible as a nominee of another owner.
4. The associate provision does not apply, because letting managers have no relevance to small community titles schemes.

Sub-Committees

Despite the fact that body corporate legislation does not make provision for sub-committees, it is not uncommon for Schedule D of a community management statement to set up an architectural review committee who may purportedly make decisions on the erection of ancillary structures such as sheds, pergolas and external verandahs within a lot.

The functions of a sub-committee may include assessing applications and making recommendations to the body corporate committee on whether to grant approval to an owner to make changes to their lot.

Whilst a sub-committee such as an architectural review committee may provide "approval" to an owner to make certain improvements to their lot, body corporate approval can only be provided at general meetings, at committee meetings or by vote outside of a committee meeting.

In *Ormiston Springs* [2014] QBCCMCmr 183 (16 May 2014), an owner sent a BCCM Form 1 notice to the body corporate requiring it to enforce a by-law against his neighbours who had erected a patio a few days after his arrival at the scheme and which he complained caused noise and had been approved "by stealth".

Ultimately, the adjudicator found for the body corporate by deeming the purported approval for the erection of the patio to have been passed. He noted that although the architectural review committee had voted on the proposed patio by email and had approved it, the committee itself (although comprised of members of the architectural review committee) did not formally approve the improvement.

Law: BCCM Act, s 309, Sch 3

Std Mod, s 10, 11

Acc Mod, s 11, 12

Com Mod, s 11

SS Mod, s 11.

Last reviewed: 23 July 2014

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[¶36-600] Term of office

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A person's term of office as a member of the committee continues until another person is chosen for the position. However, a member's position becomes vacant if the member:

(a) dies
(b) becomes ineligible to hold the position
(c) resigns by written notice given to the chairperson or secretary (see **Form B5**, ¶72-630)
(d) is not present personally or by proxy at two consecutive meetings of the committee without the committee's leave (see **Form B6**, ¶72-650, for a resolution of the committee granting leave)
(e) is convicted (whether or not a conviction is recorded) of an indictable offence, or
(f) is removed from office by ordinary resolution of the body corporate (see **Form B7**, ¶72-670, for the form of general meeting resolution).

To determine ineligibility one must have regard to the criteria that had to be applied for the purpose of the person's nomination and original appointment — see ¶36-550. Apart from those criteria, a person is ineligible to hold their position on the committee if the person:

(a) was a member of the body corporate at the time of their election but is no longer a member
(b) was not a member of the body corporate at the time of their election and was nominated by a member of the body corporate who is no longer a member, or
(c) is engaged as a body corporate manager or service contractor, or authorised as a letting agent.

None of the above provisions apply to a non-voting member of the committee. Also, if the body corporate appoints a body corporate manager to administer the scheme to the exclusion of a committee (ie an appointment under Ch 3 Pt 5 of the Std Mod), the term of office of members of the committee ends and none of the above provisions otherwise apply.

Accommodation Module

The position is the same.

Commercial Module

If there is a vacancy on the committee, then the vacancy must be filled. Either the committee can make an appointment to fill the vacancy (even if the number of committee members has fallen below a quorum) or the committee can call a general meeting of the body corporate to fill the vacancy. This applies to both executive and ordinary positions on the committee. The module does not say how the committee must decide to fill the casual vacancy. In theory, it can appoint whom it likes to fill the vacancy. In practice, it may be appropriate to have regard to the results of the prior committee election (if there was one) and appoint the person who had the largest number of votes after the last person elected to the committee. Failing that, every effort should be made by the committee to ensure all interests (eg resident and non-resident owners) are adequately represented on the committee. Community consultation before the appointment is made is also recommended: see **Form B8**, ¶72-690, for the form of resolution filling a casual vacancy. This form is suitable for an appointment by a committee or a general meeting. In respect of an appointment by a general meeting, no ballot is necessary.

Small Schemes Module

The position is similar to that applying under the Com Mod. However, the position of secretary or treasurer does not become vacant if the member is absent from two consecutive meetings without leave.

Also, if there is a vacancy, then it must be filled by "the body corporate" rather than the committee. Indeed, it appears that the committee has no power to fill the vacancy. The same form of resolution as that in **Form B8**, ¶72-690, would be appropriate to fill the vacancy. No ballot is necessary.

Law: Std Mod, s 33

Acc Mod, s 33

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Com Mod, s 15

SS Mod, s 15.

Last reviewed: 13 February 2006

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[¶36-615] Where member removed from office

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Where a committee member is removed from office by ordinary resolution of a general meeting, the body corporate may at that meeting, without holding an election, appoint an eligible person to fill the casual vacancy (see **Form B8** (¶72-690) for a suggested resolution). Where the position of a committee member otherwise becomes vacant, within one month of the vacancy occurring the committee must —

(a) if the number of committee members **has not** fallen below that required for a quorum —

(i) appoint an eligible person to fill the vacancy (see **Form B8** for a suggested resolution), or

(ii) call a general meeting to choose a person to fill the vacancy, or

(b) if the number of committee members **has** fallen below that required for a quorum, call a general meeting to choose a person to fill the vacancy.

Finally, it should be noted that the above provisions do not apply to committees constituted by one or two members as a consequence of the formation of the community titles scheme (see ¶36-500). Expansion of those types of committee is regulated by s 13 of the Std Mod.

Accommodation Module

The position is the same.

Commercial Module

The position is as set out in ¶36-600 under "Commercial Module".

Small Schemes Module

The position is the same as set out in ¶36-600 under "Small Schemes Module".

Law: Std Mod, s 13, 36, 37, 38

Acc Mod, s 14, 36, 37, 38

Com Mod, s 14; 15

SS Mod, s 14, 15.

Last reviewed: 14 February 2006

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[¶36-620] The general meeting procedure

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Meeting notice

Notice of a general meeting to fill a vacancy caused otherwise than by removal of a committee member from office must be accompanied by an explanatory note prepared by the committee. The following is the required form of note.

> "Members of the body corporate should note the following in relation to this general meeting —
>
> 1. A lot owner may nominate a person for election to a vacant executive or ordinary member position if the lot owner does not owe a body corporate debt at the time of the meeting.
> 2. A nomination may be made:
>
>   (a) orally from the floor of the meeting, or
>   (b) by giving, by hand, by post or by facsimile, a written nomination to the following member of the committee so that the nomination is received by that committee member before the election is conducted at the meeting —
>
>   [Name of committee member]
>   [Address of committee member]
>   [Facsimile number of committee member].
>
> 3. A lot owner must be present personally at the general meeting to vote in the election."

The agenda for the meeting must also include a motion for the appointment of a body corporate manager under Ch 3 Pt 5 of the Std Mod (ie a body corporate manager with power to carry out the functions of the committee in the absence of a committee). That motion is only considered after the election occurs and the following circumstances exist:

- At least one executive member position on the committee is not filled.
- The total number of voting members of the committee is less than three.

This is intended to ensure that a Ch 3 Pt 5 body corporate manager is appointed if there is no operational committee. The body corporate manager then takes the place of the committee.

Procedure

The BCCM Act sets out in some detail the procedure to be followed at the general meeting. The starting point is a requirement for the election to be conducted in a way decided by the body corporate, provided it is fair and reasonable in the circumstances of the scheme. However, the following procedure and rules at the meeting are mandated —

1. The person chairing the meeting (**"chairperson"**) must invite nominations for all vacant or ordinary member positions.
2. The chairperson must accept the following nominations made by lot owners who do not owe a body corporate debt at the time of the meeting —

    (a) nominations made orally from the floor of the meeting, and
    (b) written nominations given by hand, by post or by facsimile to the member of the committee named in the explanatory note to the meeting notice and received by that member before the election is conducted at the meeting.

3. That member of the committee named in the explanatory note to the meeting notice must give the chairperson all nominations received before the election is conducted.
4. A lot owner may not nominate more than one person to any of the vacant executive member or ordinary member positions (ie each lot owner can only make one nomination at the meeting no matter how many positions are to be filled).
5. If a co-owner of a lot is an executive or ordinary member of the committee, not more than one other co-owner of the lot may be nominated for a vacant ordinary member position if necessary to bring the total number of voting members of the committee to three. (Clearly, this is a very

restricted circumstance in which two co-owners of a lot can be members of the same committee, arising out of the filling of a casual vacancy.)
6. To be entitled to vote on the election, a lot owner must be present personally at the meeting.
7. Voting on the election is on an equal basis (ie lot entitlements have no application) and owners of multiple lots only have one vote.
8. The election of the new committee member takes effect immediately after the close of the meeting.

It should also be remembered that a person nominated as a candidate to fill a casual vacancy would also need to be otherwise eligible for appointment to the committee (see ¶36-550).

Accommodation Module

The position is the same.

Commercial Module

This does not apply in the case of schemes regulated by this module.

Small Schemes Module

This does not apply in the case of schemes regulated by this module.

Law: Std Mod, s 39, 40, 41

Acc Mod, s 39, 40, 41.

Last reviewed: 14 February 2006

[¶36-650] The Chairperson

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When choosing people for the committee it is important to have regard to the role that person will have to play and their ability to play that role. The qualifications of a chairperson are well stated in *Shackleton on The Law and Practice of Meetings* by A Harding Boulton (6th ed, Sweet & Maxwell):

> "A successful chairman must have personality, as this is even more important than business acumen or intellectual achievements. A pleasing presence, a good voice, while desirable, are not essential, but self-confidence, fair-mindedness and the ability to arrive at correct decisions on the spur of the moment are absolutely necessary. While he should possess the power to express with facility and discretion the mind of the meeting on the particular question under discussion, he must avoid both garrulousness and secretiveness. As the representative of the meeting itself, chosen or appointed to preside over its deliberations, while he must be ready to guide it into decisions that will make for a successful termination of its deliberations, he must at the same time be careful to subordinate his own views to those of the meeting, both of the majority and the minority."

However, that passage focuses on the "qualities" of a good chairperson rather than the "role" of the chairperson. In *National Dwelling Society v Skyes* the following was said of a chairperson:

> "It is the duty of the chairman, and his function, to preserve order [in the meeting] and to take care that the proceedings are conducted in a proper manner and that the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting."

Later, in *AWA Ltd v Daniels t/a Deloitte Haskins & Sells & Ors*, Rogers CJ said (at p 988):

> "The chairman is responsible to a greater extent than any other director for the performance of the board as a whole and each member of it. The chairman has the primary responsibility of selecting matters and documents to be brought to the board's attention, for formulating the policy of the board and promoting the position of the company."

The chairperson is essential to the operation of the meeting. In the absence of the chairperson motions cannot be put forward let alone passed: see *Colorado Constructions Pty Ltd v Platus* and *Kelly v Wolstenholme*. The chairperson must not only be present, but must exercise procedural control over the meeting. In *Kelly's case* the chairperson had not been elected as chairperson, nor had he exercised any control over the meeting. The court held that this was not enough; a person must actually exercise procedural control of the meeting in order to be its chairperson. In this sense the chairperson can nominate who is to speak, put questions to the meeting, declare resolutions to be carried or defeated, deal with the order of business, ask for any general business and declare the meeting closed.

Despite the chairperson exercising procedural control over the general meeting, their power or authority to affect relations with others is no different than other individual committee members. Exercising procedural control over the general meeting must be done honestly and bona fide for the benefit of the body corporate: see *Corpique (No 20) Pty Ltd v Eastcourt Ltd*. The Chairperson presides at all meetings of the committee at which they are present. If they are absent from any meeting, then the committee members present at that meeting should appoint one of their number to preside at that meeting during the absence of the chairperson.

The chairperson of the body corporate (who is effectively the chairperson of the committee) presides at any general meeting of the body corporate at which they are present. In their absence the persons present at that meeting and entitled to vote should elect one of their number to preside at the meeting. The chairperson does not have a casting vote at either committee or general meetings. The declaration of the chairperson of the result of voting on any motion submitted to a general meeting is not conclusive. In *P & C Hughes Pty Ltd v The Proprietors — "Pacific Plaza" Building Units Plan No 1557*, a resolution which needed to be passed as a special resolution was declared by the chairperson to have been passed as an ordinary resolution. Dowsett J said (at p 50,725) when dealing with a provision in the BUGT Act that provided for the conclusiveness of the chairperson's declaration:

> "Thus I do not think that cl 12 of Sch 2 Part II can be given an effect which would prevent the defendant from going behind the declaration of the vote. As I say, that declaration should be seen in

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> the context of all that had gone before at the meeting. The declaration is, after all, only a chairman's report to the meeting, of what has happened, and it would be unrealistic to attempt to construe it other than in the light of what was the common knowledge of the people at the meeting at the time. They knew that the motion had been put as an ordinary resolution and they knew that Mr Elliott had reported that the vote was 28 to 27, hence, the subsequent declaration by the chairman could not be seen as anything other than a report that the resolution had been passed as an ordinary resolution."

The position under s 93 of the Std Mod would be the same.

At common law the chairperson has the right to refuse any motion that is irrelevant or ambiguous: *Wishart v Henneberry*. Also, s 81 of the Std Mod requires the chairperson of a general meeting to rule a motion out of order if:

- the motion, if carried, would conflict with the BCCM Act, the module or the by-laws or a motion already voted on at the meeting
- the motion, if carried, would be unlawful or unenforceable for another reason, or
- except for a procedural motion for the conduct of the meeting, or a motion to correct minutes — the substance of the motion was not included in the agenda for the meeting.

Where a motion is in order the chairperson is under a duty to allow reasonable opportunity for debate and voting on the motion: *Byng v London Life Association Limited*. An important point is made in the paper entitled "Chairperson's Conduct of Meetings and Members' Right to Speak at Meetings" (*1992 ASC Digest*, Speech 155); namely, that a chairperson should not impose mandatory time limits on members who wish to raise objections, suggestions or comments at a general meeting. To do so may result in only part of an argument being put, thus raising the possibility of other members with the same concerns or suggestions being disadvantaged. However, in an appropriate case a chairperson may stop irrelevant, offensive or provocative discussion by requiring a person to resume their seat. They can also propose to the meeting that, "speaker be no longer heard". If the meeting resolves to this effect then the chairperson should ensure that the resolution is implemented.

There is no power in the BCCM Act for chairpersons to adjourn a general meeting of their own volition. Where there is no quorum the meeting is "automatically" adjourned by virtue of the provisions of s 82 of the Std Mod. The chairperson plays no part in this process. At common law a chairperson may adjourn a meeting provided they take into account all relevant factors and ensure that the decision is reasonable: *Wishart v Henneberry*. If a chairperson uses a power of adjournment to defeat the wishes of members, then the meeting may, at common law, remove the chairperson and appoint someone else to take over as chairperson: *National Dwelling Society v Sykes*. There does not appear to be any reason why these common law principles cannot be applied to a community titles body corporate where a chairperson purports to adjourn a meeting of their own volition and refuses or fails to continue. In particular, the appointment of someone to "take over" the role of chairperson is not inconsistent with s 80 of the Std Mod, because the chairperson is effectively "absent", thus leaving it open, in terms of that section, for the persons present and entitled to vote to elect one of their number to preside.

Neither the Act nor the Std Mod gives the chairperson a casting vote on any motion or on the election of members of the executive committee. The common law is of no assistance in establishing a chairperson's right to a casting vote, because it does not recognise such a right unless there is special provision in the "documents" under which the company is constituted: *Nell v Longbottom*. Apart from the right to chair the meeting and decide matters of procedure and voting at such meetings, the chairperson has no other powers, authorities, duties or functions and should not interfere in the administration of the community titles scheme, particularly by the secretary and the treasurer acting within their areas of responsibility.

Accommodation Module

The position is the same.

Commercial Module

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The position is substantially the same.

Small Schemes Module

Except for the fact that there is no equivalent to s 80 of the Std Mod, the position is the same. Notwithstanding this, the persons left at a meeting that was abandoned without cause by the chairperson would have the power to elect one of their numbers to chair the remainder of the meeting. This is because s 41 of the SS Mod provides for the persons present at the meeting and entitled to vote to elect one of themselves to chair the meeting. There is no permanent chairperson of a community titles scheme regulated by the SS Mod.

Law: Std Mod, s 80, 81, 82, 93

Acc Mod, s 78, 79, 80, 91

Com Mod, s 47, 48, 49, 60

SS Mod, s 41, 42, 43.

.40 Case references: *National Dwelling Society* v *Sykes* (1894) 3 Ch 159; *AWA Ltd* v *Daniels t/a Deloitte Haskins & Sells & Ors* (1992) 10 ACLC 1,643; *Colorado Constructions Pty Ltd* v *Platus* [1966] 2 NSWR 598; *Kelly* v *Wolstenholme* (1991) 9 ACLC 785; *Corpique (No 20) Pty Ltd* v *Eastcourt Ltd* (1989) 7 ACLC 794; *P & C Hughes Pty Ltd* v *The Proprietors — "Pacific Plaza" Building Units Plan No 1557*, Queensland Supreme Court, 3 March 1989, Dowsett J, (Unreported, but see ¶30-081 for full text of judgment); *Wishart* v *Henneberry* (1962) 3 FLR 171; *Byng* v *London Life Association Limited* (1989) 1 All ER 560; *Nell* v *Longbottom* [1894] 1 QB 767.

Last reviewed: 22 January 2006

[¶36-700] The secretary

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The duties of the secretary of the body corporate include the following:

- Inviting and processing nominations for election to the committee.
- Preparation and distribution of ballot-papers for elections to the committee.
- Receiving and having custody of completed ballot-papers for elections to the committee.
- Convening and giving notice of committee meetings.
- Convening and giving notice of general meetings.
- Making certain records and documents available for inspection at general meetings.
- Taking minutes of meetings and maintaining the minute book.
- Organising insurances and processing insurance claims.
- Ordering goods and services (including repairs and maintenance).
- Counter-signing the affixing of the seal of the body corporate.
- Receiving and sending correspondence on behalf of the body corporate and its committee.
- Generally attending to the (non-accounting) clerical affairs of the body corporate.

It is clear from the above list of duties that the secretary needs to be a clerically inclined person who is well organised and good at record keeping.

Accommodation Module

The role of the secretary is substantially the same, except that the ballot-paper procedures do not apply.

Commercial Module

The role of the secretary is substantially the same, except that the ballot-paper procedures do not apply.

Small Schemes Module

The role of the secretary is substantially the same, although probably a little more intense under this module. This is because the secretary and treasurer constitute the committee of the body corporate. Also, it should be noted that the ballot-paper procedures do not apply.

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[¶36-750] The treasurer

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The *BCCM Act* and its regulation modules do not spell out the duties of the treasurer. However, in practice the treasurer's duties will include the following:

- Preparing budgets.
- Preparing and sending out levy notices.
- Receiving levy payments, receipting and recording.
- Processing and paying accounts.
- Keeping the books of account.
- Providing financial reports to committee meetings.
- Transacting the banking business of the body corporate (including funds investment).
- Maintaining (where required) a petty-cash float.
- Preparing annual statements of account.
- Arranging audit of the annual accounts..

From these duties it is clear that a person with a book-keeping or accounting background is the ideal type of person to appoint as the treasurer of the body corporate.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same, although a little more intense than under the other modules because the secretary and treasurer constitute the committee of the body corporate.

[¶36-800] When the committee is chosen

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The members of the committee must be chosen at each annual general meeting of the body corporate unless:

(a) there are only two lots in the scheme and they are both in —

(i) identical ownership, or
(ii) different ownership, or

(b) there are three or more lots in the scheme and —

(i) all are in identical ownership, or
(ii) there are only two different owners for all the lots.

Where all lots are in identical ownership there is a committee of one consisting of the individual who is the owner or the nominee of the owner. That person also holds all of the executive positions on the committee. Where there are only two different owners, the committee consists of the two individuals who are owners, or their nominees and they must decide who holds the executive positions. If they cannot agree who holds the executive positions, they are held jointly by them both. Where there are co-owners of a lot, they must decide between them which one is to be the committee member. They cannot both be members. However, these provisions do not apply where a body corporate manager has been appointed under Ch 3 Pt 5 of the Std Mod to replace a committee.

If the committee formed at the first annual general meeting consists of only one person and the number of owners of lots increase after that meeting, then an extraordinary general meeting may be called to choose a new committee. The meeting must be held before the second annual general meeting. The procedure to be followed for choosing the committee in these circumstances is the same as the procedure that would apply if the extraordinary general meeting were the second annual general meeting. In other words, the procedure is the same as that applying for an annual general meeting.

Accommodation Module

The position is the same.

Commercial Module

The position is the same. However, there is less certainty about what happens in relation to co-owners. This is because of the absence of a subsection in the Com Mod equivalent to s 11 of the Std Mod.

Small Schemes Module

Where all lots are in identical ownership, the individual owner, or the nominee of the owner, holds the positions of both secretary and treasurer. Where there are only two different owners, either —

(a) the committee consists of the two individuals who are owners, or their nominees, and they must decide who is the secretary and treasurer (failing which they hold the positions jointly), or
(b) the committee consists of one of the two individuals or their nominees chosen by agreement between the two individuals.

Otherwise, the position is the same.

Law: Std Mod, s 13, 14

Acc Mod, s 14, 15

Com Mod, s 12, 13

SS Mod, s 12, 13.

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[¶36-830] How the committee is chosen

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Members of the committee must be chosen by means of an election. The election must be conducted in accordance with either:

(a) the procedure set out in the Std Mod, or
(b) some other procedure (that is fair and reasonable in the circumstances of the scheme) decided by the body corporate by special resolution.

If the procedure set out in the Std Mod is used, then the election must be by secret ballot unless the body corporate resolves by ordinary resolution that the election be by open ballot (see **Form B13** (¶72-790) for the wording of the necessary resolution). The secret ballot procedure in the Std Mod is extremely complex and is not recommended for use by bodies corporate unless the circumstances applying to the scheme are such that it is essential to have anonymity. Furthermore, the open ballot procedure in the Std Mod is also too complex for general use and a simpler, more practical procedure is recommended. **Form B14** (¶72-810) sets out the wording of a special resolution that includes a recommended procedure. When deciding on an alternative procedure, two principles must be strictly observed:

- A vote cast for a lot must be of equal value to a vote cast for any other lot.
- Each lot has a vote irrespective of whether its owner is a multiple owner or co-owner.

Accommodation Module

The position is substantially the same, except that it is not possible to opt out of the secret ballot requirement by passing a resolution of a general meeting. If the procedure in the Acc Mod is to be used, then it must be by secret ballot. Again, that procedure is not generally recommended and the procedure in **Form B14** (¶72-810) is recommended as an alternative.

Commercial Module

The committee must be chosen by an election, but the election is conducted in the way decided by the body corporate by special resolution that is fair and reasonable in the circumstances of the scheme. The provisions about the value of a vote and co-ownership and multiple ownership of lots also apply.

Small Schemes Module

The position for schemes regulated by the SS Mod is substantially different. There is no requirement for a secret ballot, merely a requirement for the secretary and treasurer to be chosen by election. The election procedure is not specified. Instead, the module provides that the election must be conducted:

- to the extent that meeting rules apply — in the way the meeting rules provide, and
- to the extent that meeting rules do not apply — in the way decided by the body corporate by special resolution, provided it is fair and reasonable in the circumstances of the scheme.

The resolution in **Form B14** (¶72-810) is again suitable for specifying the election procedure, provided the reference to the module is changed. Despite the procedure adopted, nominations for the positions of secretary and treasurer may be made orally at the general meeting at which the election is being held, or in writing given to the secretary before the meeting. When making meeting rules or adopting an election procedure, it is important to note that they must not conflict with these nomination rights. When voting on the election, the value of the vote for all lots in the scheme is the same.

Law: Std Mod, s 15

Acc Mod s 16

Com Mod s 14

SS Mod s 14.

Last reviewed: 14 February 2006

[¶36-850] Nomination procedure

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The procedure for nominating individuals for election as chairperson, secretary, treasurer or ordinary member of the committee at all general meetings, apart from the first annual general meeting, is set out in the Std Mod.

At least three weeks before, but not earlier than six weeks before the end of the body corporate's financial year, the secretary must serve on each lot owner shown on the roll a notice inviting nominations of candidates for election to the committee. The notice must set out certain information specified in the Std Mod. **Form B9** (¶72-710) is a notice that contains all of the required information. This notice may also invite submission of motions for inclusion on the agenda of the annual general meeting. **Form B9** incorporates that invitation. Generally, the owner of a lot may nominate one person for election as a voting member of the committee. However, if the owner owns two lots, or there are fewer than seven lots in the scheme, the owner may not nominate more than two members. If the owner owns more than two lots and there are seven or more lots in the scheme, the owner may not nominate more than three members.

For a nomination to be valid, it must be made by written notice that is given to the secretary before the end of the body corporate's financial year and must comply with the following requirements:

- If the nomination is from the lot owner nominating the lot owner, it must be signed and dated by the lot owner.
- If the nomination is from a lot owner nominating an individual other than the lot owner, then it must —

    (i) be signed and dated by the individual, and
    (ii) be countersigned by the lot owner, or a person acting under authority of the lot owner.

It is not clear exactly who is "a person acting under authority of a lot owner". The Std Mod allows for a lot owner to nominate a "representative", whose name is then entered on the roll, but it does not appear otherwise to recognise a person acting under authority of a lot owner. It is suggested that the enrolled "representative" could act on behalf of the lot owner for the purpose of countersigning a nomination form, but any other person would most likely require specific authority to do so. It is suggested that such authority should be in writing with a copy attached to the nomination form.

The Std Mod requires the nomination to contain a range of information. **Form B10** (¶72-730) is a suggested form of nomination that contains the required information. As soon as practicable after receiving a nomination, the secretary must forward written notice to the candidate acknowledging that nomination was received. **Form B11** (¶72-750) can be used for this purpose.

In the case of the first annual general meeting, the nominations are given at the meeting either —

- orally from the floor of the meeting, or
- in writing handed to the person chairing the meeting.

There are no particular requirements for consent or the form of the written nomination. **Form B12** (¶72-770) could be used as a written nomination to the chairperson. In that form, the endorsed consent is merely recommended. There appears to be no legal requirement for such consent.

Accommodation Module

The position is the same.

Commercial Module

The Com Mod does not prescribe any procedure for nomination of candidates for election to the committee. Instead, it provides that the members of the committee must be chosen by election, which must be conducted in the way decided by the body corporate by special resolution. One option for the body corporate is to adopt the procedure from the Std Mod. Alternatively, it can specify its own simplified procedure.

The module is silent about what happens if the body corporate fails to specify a procedure, or is unable to decide on the procedure. The obvious remedy would be an application to an adjudicator for an order specifying an appropriate procedure. Upon such an application an adjudicator should take account of the deliberations of the body corporate on any procedures under discussion and confine itself to resolving any differences about those procedures rather than ignoring any progress that may have been made and imposing totally different procedures. Where no progress was made by a body corporate (eg because it simply failed to address the issue) then the adjudicator may choose to impose the procedures in the Std Mod.

Small Schemes Module

In the case of the SS Mod, only the secretary and treasurer have to be chosen. The module says they must be elected. The election is conducted in the way decided by the body corporate by special resolution, or, if no such special resolution has been passed, according to rules determined by the meeting.

Law: Std Mod, s 16, 17, 18, 19, 69(3)

Acc Mod, s 17, 18, 19, 20, 67(3)

Com Mod, s 14

SS Mod, s 14.

.40 Lot owner's right of nomination For a case on this topic decided under the Body Corporate and Community Management (Accommodation Module) Regulation 1997 (since repealed), see *Lee Parker Pty Ltd* v *Young* (2008) LQCS ¶90-144.

Last reviewed: 22 January 2006

[¶36-900] Election procedure generally

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The election must be conducted in accordance with either:

(c) the procedure set out in the Std Mod, or
(d) some other procedure (that is fair and reasonable in the circumstances of the scheme) decided by the body corporate by special resolution.

If the procedure set out in the Std Mod is used, then the election must be by secret ballot unless the body corporate resolves, by ordinary resolution, that the election be by open ballot (see **Form B13** (¶72-790) for the wording of the necessary resolution).

The ballots (whether secret or open) for all positions on the committee must be conducted as the last items of business at the annual general meeting unless there are not more than two owners in the scheme. The election takes effect immediately after the close of the meeting. The ballots (where required) must be conducted in the following order:

• chairperson
• secretary
• treasurer
• ordinary members.

Each ballot may proceed to the count only after the person chairing the meeting has allowed enough time for votes to be cast and has announced the close of the ballot. This is because a voter may delay submission of their vote or withdraw their vote and cast a fresh vote at any time during the meeting: see comments in ¶36-950.

The secretary has custody of the completed ballot-papers but must pass all ballot material to the person chairing the meeting for counting. Each candidate for a ballot, and any scrutineer appointed by the candidate, may watch the count.

Accommodation Module

The position is the same.

Commercial Module

There is no requirement for a secret ballot, merely a requirement for the members of the committee to be chosen by election. The election procedure is not specified. Instead, the module provides that the election must be conducted in the way decided by the body corporate by special resolution. **Form B14** (¶72-810) is suitable for this purpose but the reference to the module will need to be changed. Apart from these points, the position is the same.

Small Schemes Module

The position for schemes regulated by the SS Mod is substantially different. There is no requirement for a secret ballot, merely a requirement for the secretary and treasurer to be chosen by election. The election procedure is not specified. Instead, the module provides that the election must be conducted:

• to the extent that meeting rules apply — in the way the meeting rules provide, and
• to the extent that meeting rules do not apply — in the way decided by the body corporate by special resolution, provided it is fair and reasonable in the circumstances of the scheme.

The resolution in **Form B14** (¶72-810) is again suitable for specifying the election procedure, provided the reference to the module is changed. Despite the procedure adopted, nominations for the positions of secretary and treasurer may be made orally at the general meeting at which the election is being held, or in writing given to the secretary before the meeting. When making meeting rules or adopting an election procedure it is important to note that they must not conflict with these nomination rights. When voting on the election, the value of the vote for all lots in the scheme is the same.

Law: Std Mod, s 15, 21, 24

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Acc Mod, s 17, 22, 25

Com Mod, s 14

SS Mod, s 14.

Last reviewed: 22 January 2006

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[¶36-950] Election by secret ballot

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After nominations close, where an election is to be conducted by secret ballot, the secretary must prepare ballot papers for those positions for which a ballot is required. There must be four separate ballots, but all four ballots may appear on the one ballot paper. Alternatively, four separate ballot papers may be used. To avoid confusion, a single ballot paper covering all ballots is recommended. The separate ballots are for:

- chairperson
- secretary
- treasurer, and
- ordinary members of the committee.

It may not be necessary to conduct a ballot for all positions. For example, if there is only one nominee for the position of chairperson, then a ballot for that position will not be necessary.

The following procedure is recommended for the secretary:

1. Check the nominations and be satisfied that they are in accordance with the regulations.
2. Prepare each ballot paper (or the combined ballot paper) by listing the names of the properly nominated candidates in alphabetical order of surname, showing —

    (a) after each name, a blank space for voting purposes
    (b) whether the candidate is a lot owner, and
    (c) if the candidate is not a lot owner —

        (i) the name of the owner who nominated the candidate
        (ii) the candidate's residential or business address, and
        (iii) the category of person under s 10(1)(b) to which the candidate belongs, and

    (d) details of any payment to be made to, or to be sought by, the candidate for carrying out the duties of a committee member.

    The categories under s 10(1)(b) are:

    - if the nominating entity is an individual

        – a member of the individual's family, or
        – a person acting under the authority of a power of attorney given by the individual

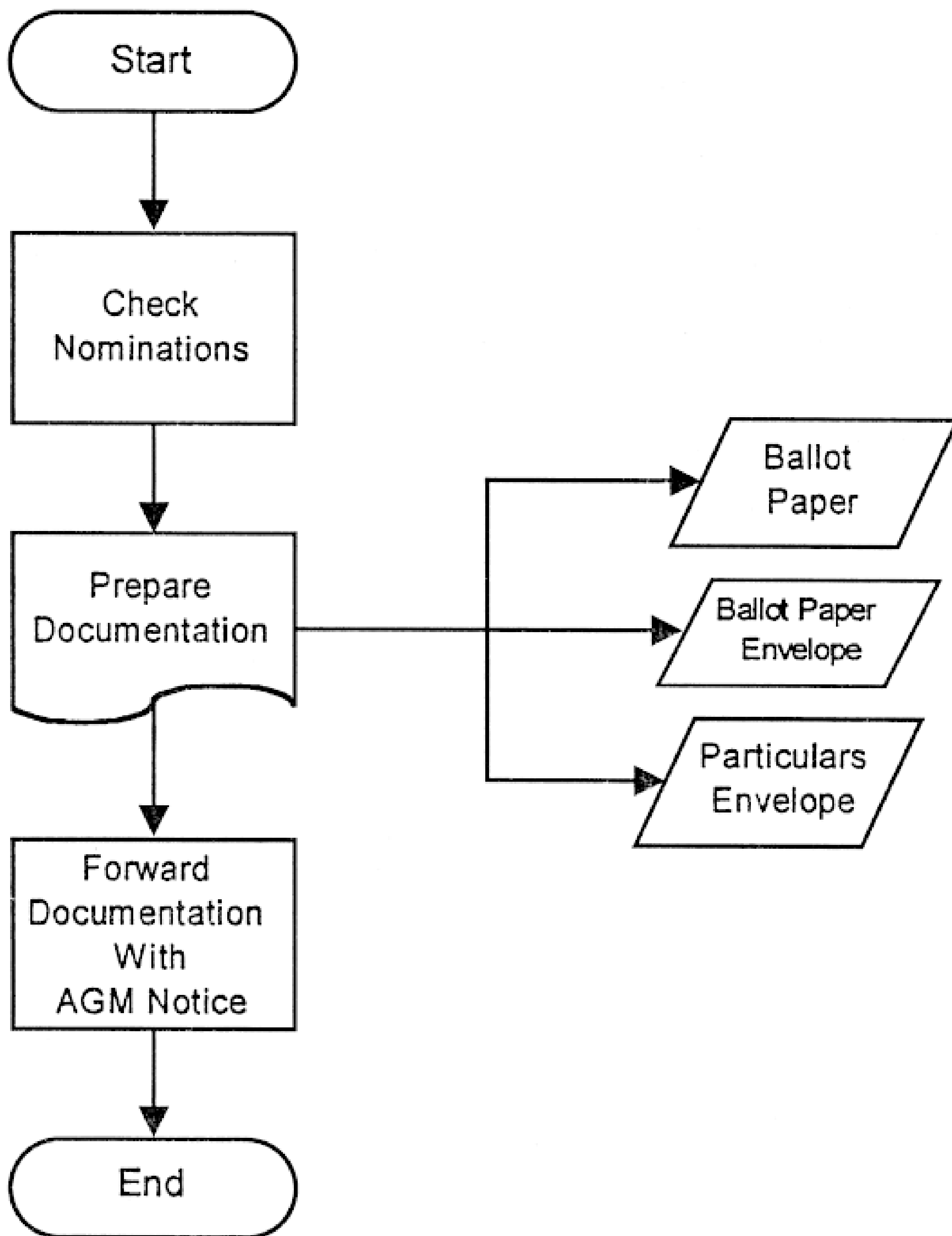
    - if the nominating entity is a corporation — a director, secretary or other nominee of the corporation
    - if the nominating entity is the body corporate for a subsidiary scheme — a representative of the subsidiary scheme.

3. Forward, with the notices for the annual general meeting —

    (a) the ballot-papers
    (b) an envelope marked "ballot paper", and
    (c) either of the following —

        (i) a separate particulars envelope, or
        (ii) a particulars tab that forms part of the ballot-paper envelope but that a person may detach without unsealing or otherwise opening the ballot-paper envelope.

Form B15 (¶72-830) illustrates a combined ballot paper, **Form B16** (¶72-850) illustrates the "ballot paper" envelope, **Form B17** (¶72-870) illustrates a "particulars envelope" with a "particulars tab" and **Form B18** (¶72-890) illustrates a particulars envelope without a particulars tab. The procedure itself is illustrated in the following chart:



The particulars referred to with regard to the “particulars envelope” or “particulars tab” are the particulars that the voter is required to complete during the course of the voting procedure: see below.

The following is the procedure for a person to vote by secret ballot:

1. For a ballot for chairperson, secretary or treasurer, place a mark in the space opposite the name of the candidate for whom the vote is cast.

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2. For a ballot for the ordinary members, place a mark in each of the spaces opposite the names of the candidates for whom votes are cast. The number of names marked should not exceed the number of ordinary member positions to be filled. (The number of ordinary member positions to be filled will be seven, minus the number of people who become executive members of the committee. For example, if one person is elected as secretary and treasurer and another person is elected as chairperson, then there will be five ordinary member positions to be filled.)
3. Place the ballot-paper in the ballot-paper envelope and seal the envelope.
4. If a separate particulars envelope is supplied, place the sealed ballot-paper envelope in the separate particulars envelope and seal the particulars envelope.
5. Complete the separate particulars envelope or particulars tab by signing and dating the envelope or tab and inserting the following information on the particulars envelope or tab —

(a) the number of the lot for which the vote is exercised
(b) the name of the owner of the lot
(c) the name of the person having the right to vote, and
(d) the basis on which the person has the right to vote (eg, owner, proxy or corporate owner nominee).

6. Give the —

(a) completed particulars envelope with the ballot-paper envelope enclosed, or
(b) ballot-paper envelope with the completed particulars tab attached, to the secretary, or forward them to the secretary, so that they are received before or at the annual general meeting.

The above procedure is compulsory. If it is not followed precisely, then the vote is likely to be invalid and cannot therefore be counted. Care needs to be taken when nominating the basis on which the person has the right to vote. The following categories of individuals apply —

(a) a person whose name is entered on the roll as —

(i) the owner of a lot, or
(ii) the representative of the owner of a lot

(b) the nominee of a corporation, the name of which is entered on the roll as the representative of the owner of a lot
(c) a person who is a corporate owner nominee, or
(d) a person who is a subsidiary scheme representative.

Care also needs to be taken when returning the material to the secretary. If the material is to be posted, then a second or third envelope will be required. Where a particulars envelope is used, the duly completed particulars envelope that contains the ballot-paper envelope (which, in turn, contains the ballot-paper) must be placed in a plain envelope addressed to the secretary. Where the ballot-paper envelope has a particulars tab, that envelope (with the particulars tab duly completed and the ballot-paper in the envelope) must be placed in a plain envelope addressed to the secretary.

The clear intention of the secret ballot procedure is to give voters the opportunity to cast a secret vote before the meeting is held. Where a person fails to do this and they attend the meeting without bringing the blank ballot-paper and envelope(s), they may, at the meeting, ask the secretary for a blank ballot-paper and envelope(s) so that they can cast their vote at the meeting. However, they must cast their vote according to the same procedure. A voter may also withdraw a vote already made and submit a replacement vote if their vote can be readily identified and withdrawn. In that event they may ask the secretary for a blank ballot-paper and envelope(s). Again, they must cast their vote according to the same procedure. Of course, these entitlements mean that the secretary should always prepare additional ballot materials so that they are in a position to fulfil any requests at the meeting for further copies. All completed ballot-papers received before the annual general meeting ends are to be held in the custody of the secretary.

Accommodation Module

There is no requirement in the Acc Mod for elections by secret ballot. Subject to the express provisions in that module dealing with ballots, the body corporate may decide by ordinary resolution of a general meeting how a ballot is to be conducted. Of course, such a resolution may adopt the secret ballot procedure in s 21 of the Std Mod.

Since 31 October 2003, the procedures for nomination of candidates before the end of the body corporate's financial year have been applied and the secretary is obliged to forward certain information to owners with the notice of the annual general meeting. The same information is required for each of the following for which a ballot is required:

- Chairperson
- Secretary
- Treasurer
- Ordinary members of the committee.

The information required is:

(b) whether the candidate is a lot owner
(c) if the candidate is not a lot owner —

(i) the name and lot number of the owner who nominated the candidate
(ii) the candidate's residential or business address, and
(iii) the category of person under s 11(1)(b) to which the candidate belongs, and

(d) details of any payment to be made to, or to be sought by, the candidate for carrying out the duties of a committee member.

The categories under s 11(1)(b) are:

- if the nominating entity is an individual —
  - – a member of the individual's family, or
  - – a person acting under the authority of a power of attorney given by the individual
- if the nominating entity is a corporation — a director, secretary or other nominee of the corporation
- if the nominating entity is the body corporate for a subsidiary scheme — a representative of the subsidiary scheme.

Commercial Module

There is no requirement in the Com Mod for elections by secret ballot. There must be an election, but the body corporate by special resolution may determine the way the election must be conducted.

Small Schemes Module

There is no requirement in the SS Mod for elections by secret ballot. Only a secretary and treasurer must be chosen in certain circumstances. They must be chosen by election in the way decided by certain "meeting rules" or by special resolution of the body corporate.

Law: Std Mod, s 10, 21, 23

Acc Mod, s 11, 22, 23

Com Mod, s 14

SS Mod, s 14.

Last reviewed: 14 February 2006

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[¶37-000] Election by open ballot

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After nominations close, where an election is to be conducted by open ballot, the secretary must prepare ballot papers for those positions for which a ballot is required. The ballots must be conducted separately, but all ballots may appear on the one ballot paper. Alternatively, four separate ballot papers may be used. To avoid confusion, a single ballot paper covering all ballots is recommended. The separate ballots are for:

- chairperson
- secretary
- treasurer, and
- ordinary members of the committee.

It may not be necessary to conduct a ballot for all positions. For example, if there is only one nominee for the position of chairperson, then a ballot for that position will not be necessary.

The following procedure is recommended for the secretary:

1. Check the nominations and be satisfied that they are in accordance with the regulations.
2. Prepare each ballot paper (or the combined ballot paper) by listing the names of the properly nominated candidates in alphabetical order of surname, showing —

    (a) after each name, a blank space for voting purposes
    b) whether the candidate is a lot owner
    (c) if the candidate is not a lot owner —

        (i) the name of the owner who nominated the candidate
        (ii) the candidate's residential or business address, and
        (iii) the category of person under s 10(1)(b) to which the candidate belongs, and

    (d) details of any payment to be made to, or to be sought by, the candidate for carrying out the duties of a committee member.

    The categories under s 10(1)(b) are:

    - if the nominating entity is an individual —

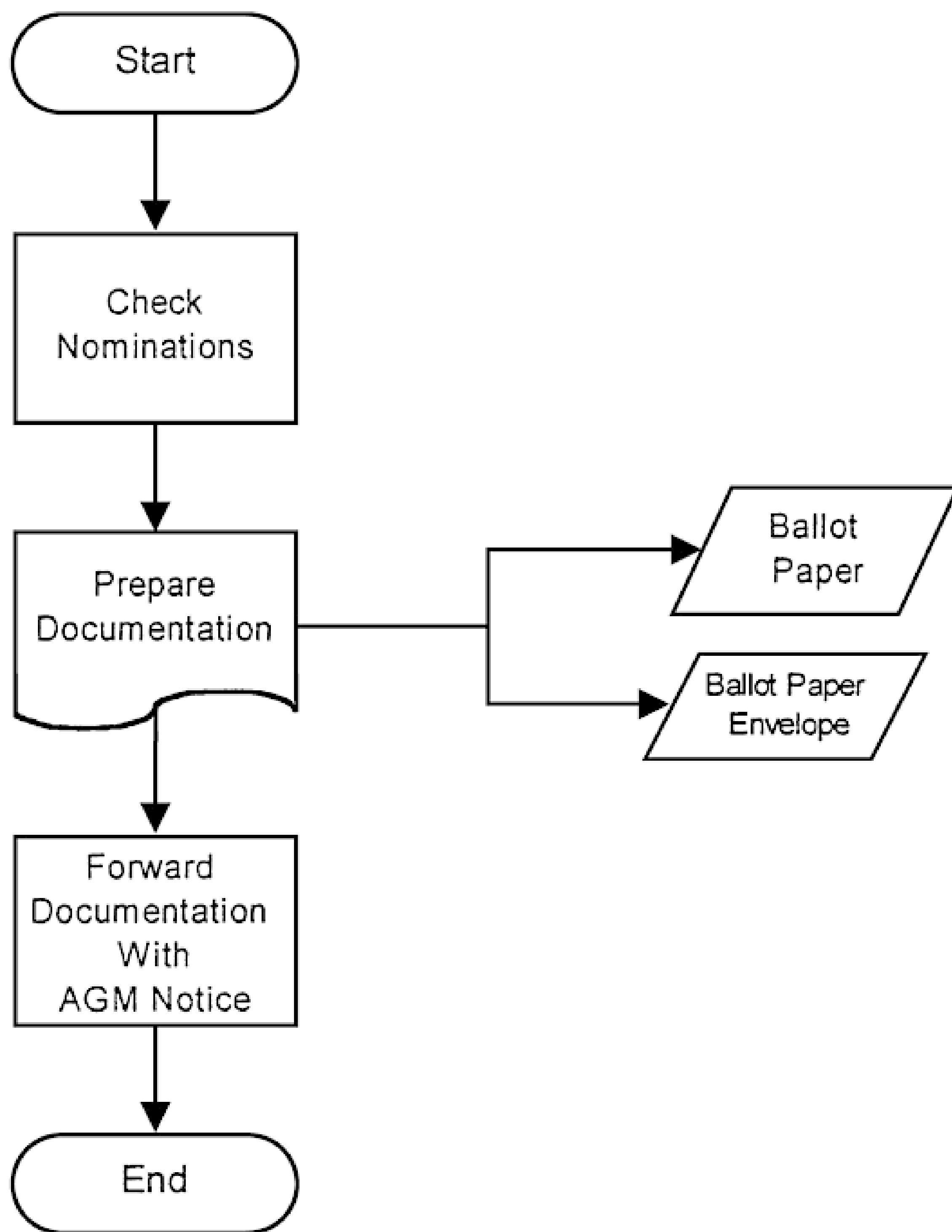
        – a member of the individual's family, or
        – a person acting under the authority of a power of attorney given by the individual

    - if the nominating entity is a corporation — a director, secretary or other nominee of the corporation
    - if the nominating entity is the body corporate for a subsidiary scheme — a representative of the subsidiary scheme.

3. Forward, with the notices for the annual general meeting —

    (a) the ballot-papers, and
    (b) an envelope marked "ballot paper" and self-addressed to the secretary.

Form B15 (¶72-830) illustrates a combined ballot paper and **Form B19** (¶72-910) illustrates the self addressed envelope for return of the envelopes containing the ballot-paper. The procedure itself is illustrated in the following chart:



The following is the procedure for a person to vote by open ballot:

1. For a ballot for chairperson, secretary or treasurer, place a mark in the space opposite the name of the candidate for whom the vote is cast.
2. For a ballot for the ordinary members, place a mark in each of the spaces opposite the names of the candidates for whom votes are cast. The number of names marked should not exceed the number of ordinary member positions to be filled. (The number of ordinary member positions to be filled will be seven, minus the number of people who become executive members of the committee.

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For example, if one person is elected as secretary and treasurer and another person is elected as chairperson, then there will be five ordinary member positions to be filled.)

3. Sign each ballot-paper the voter completes.
4. On each completed ballot-paper write the number of the lot for which the vote is exercised.
5. Place the ballot-paper in the ballot-paper envelope and seal the envelope.
6. Write on the back of the envelope the number of the lot for which the vote is exercised.
6. Give the ballot-paper envelope to the secretary, or forward it to the secretary, so that it is received before or at the annual general meeting.

As an alternative, the ballot-paper may be completed at the annual general meeting. In this event, the ballot-paper must be given to the secretary before or at the meeting. The envelope need not be used in these circumstances. The above procedure is compulsory. If it is not followed precisely, then the vote is likely to be invalid and cannot therefore be counted.

The clear intention of the open ballot procedure is to give voters the opportunity to cast a vote on the election of committee members before the meeting is held. Where a person fails to do this and they attend the meeting without bringing the blank ballot-paper, they may, at the meeting, ask the secretary for a blank ballot-paper so that they can cast their vote at the meeting. However, they must cast their vote according to the same procedure, except for use of the envelope. A voter may also withdraw a vote already made and submit a replacement vote if their vote can be readily identified and withdrawn. In that event they may ask the secretary for a blank ballot-paper. They must cast their vote according to the same procedure, except for use of the envelope. Of course, these entitlements mean that the secretary should always prepare additional ballot-papers so that they are in a position to fulfil any requests at the meeting for further copies. All completed ballot-papers received before the annual general meeting ends are to be held in the custody of the secretary.

Accommodation Module

There is no requirement in the Acc Mod for elections by open ballot. Subject to the express provisions in that module dealing with ballots, the body corporate may decide by ordinary resolution of a general meeting how a ballot is to be conducted. Of course, such a resolution may adopt the open ballot procedure in s 22 of the Std Mod.

Commercial Module

There is no requirement in the Com Mod for elections by open ballot. There must be an election, but the body corporate by special resolution may determine the way the election must be conducted.

Small Schemes Module

There is no requirement in the SS Mod for elections by open ballot. Only a secretary and treasurer must be chosen in certain circumstances. They must be chosen by election in the way decided by certain “meeting rules” or by special resolution of the body corporate.

Law: Std Mod s 22

Acc Mod, s 22, 23

Com Mod, s 14

SS Mod, s 14.

Last reviewed: 13 February 2006

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[¶37-050] Conducting the ballot

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Generally

The ballot for all positions on the committee must be conducted as the last item of business at the annual general meeting unless there are not more than two owners in the scheme. The election takes effect immediately after the close of the meeting. The ballots must be conducted in the following order:

- chairperson
- secretary
- treasurer
- ordinary members.

The result of the ballot must not be counted until the person chairing the meeting has allowed enough time for votes to be cast and announced the close of the ballot. This is necessary because voters have until the close of the ballot to submit their votes. After the ballot has been closed the secretary must hand any ballot papers, particulars envelopes and ballot-paper envelopes for the ballot to the person chairing the meeting so that they can be counted. In practice, this will usually be done only once — at the time of close of the ballot for chairperson. This is because most ballot papers will incorporate all four ballots. If the incumbent chairperson is a candidate for re-election, then he or she should vacate the chair for the ballot in which they are a candidate. The meeting should endorse the choice of the person temporarily chairing the meeting by procedural resolution.

Scrutiny of votes

In the case of an open ballot, the person chairing the meeting or their delegate (who is not a candidate for a position on the committee and is considered to have sufficient independence by the chairperson) must:

- check the ballot-paper envelopes or ballot papers and confirm that each ballot-paper is the vote of a person who has the right to vote in the election, and
- if the ballot-paper is in a ballot-paper envelope — take it out of the envelope.

In the case of a secret ballot, the person chairing the meeting or their delegate must:

- check the particulars envelope or particulars tab and confirm that each ballot-paper is the vote of a person who has the right to vote in the election
- take the ballot-paper envelope out of the particulars envelope, or detach the particulars tab from the ballot-paper envelope
- place all the ballot-paper envelopes in a receptacle in open view of the meeting
- randomly mix the envelopes, and
- take each ballot-paper out of its envelope.

The person chairing the meeting — not the delegate, if any — must then record the count of votes in each ballot in the minutes of the meeting.

The entire election process is subject to scrutiny. Each candidate may appoint a scrutineer and that person, as well as the candidate, may scrutinise the election process.

Deciding executive member positions

If only one person is nominated for the position of chairperson, secretary or treasurer, the person chairing the meeting must declare that person to have been elected unopposed. If no person has been nominated, then the person chairing the meeting must invite nominations from the floor of the meeting and must accept any nomination made:

- by members of the body corporate who are present at the meeting and eligible for election to the position, or

• in writing, by members of the body corporate not present at the meeting, but who are eligible for election to the position.

This nomination process is effectively a self-nomination process, with the result that the nominee's consent is effectively built into the nomination itself. A member of the body corporate cannot nominate more than one person for a position and it does not matter whether the member has previously made a nomination under the nomination procedure conducted before the convening of the meeting.

If more than one person has nominated for a position a ballot is conducted and the person who receives the highest number of votes is declared elected. Sometimes, on a counting of votes, two or more persons each receive an identical number of votes, and no other candidate receives a higher number of votes. In this event, the result is decided between the two or more persons by chance in the way the meeting decides (eg by drawing a name from a hat).

Deciding ordinary member positions

The ordinary member positions are not decided until after the executive member positions have been decided. A person's nomination for a position as an ordinary member has no effect if they are elected as an executive member. This is despite the fact that their name appears on a ballot for ordinary members forwarded before the meeting.

If the number of candidates nominated, plus the number of executive committee members, is not more than the required number of members of the committee, the person chairing the meeting must declare the candidates to have been elected as ordinary members. However, if the number of candidates nominated, plus the number of executive members, is less than the required number of members of the committee, then the person chairing the meeting must invite nominations from the floor of the meeting to bring the total number of all committee members to not more than the required number. They must accept any nomination made:

• by members of the body corporate who are present at the meeting and eligible for election to the position, or
• in writing, by members of the body corporate not present at the meeting, but who are eligible for election to the position.

Again, this nomination process is effectively a self-nomination process, with the result that the nominee's consent is effectively built into the nomination itself. A member of the body corporate cannot nominate more than one person for a position and it does not matter whether the member has previously made a nomination under the nomination procedure conducted before the convening of the meeting.

If the number of candidates nominated, plus the number of executive committee members, is more than the required number, then the person chairing the meeting must proceed with the scrutiny of the ballot-papers relating to the ordinary member positions. The persons who receive the highest number of votes, in descending order until the required number is reached, must be declared elected as ordinary members. Sometimes, on a counting of votes, two or more persons each receive an identical number of votes, and no other candidate receives a higher number of votes. In this event, the result is decided between the two or more persons by chance in the way the meeting decides (eg by drawing a name from a hat). Votes for persons who were previously elected as executive members of the committee are not counted in the election of ordinary members — those votes are void.

Declaration of voting results

The result of the election must be declared by the person chairing the general meeting. They must state the number of votes cast for each candidate and that number must be recorded in the minutes of the meeting, or in a voting tally-sheet kept with the minutes. In addition, for each open ballot the voting tally-sheet must include:

• a list of the votes, identified by lot number, rejected as informal
• for each vote rejected — the reason for the rejection, and
• the total number of votes counted for each candidate.

For each secret ballot the voting tally-sheet must include:

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- a list of the votes, identified by lot number, rejected from the count before the enclosing ballot-papers were opened
- a list of votes taken out of ballot-paper envelopes for counting but rejected as informal
- for each vote rejected — the reason for the rejection, and
- the total number of votes counted for each candidate.

Form B20 (¶72-930) illustrates a voting tally-sheet that incorporates the statutory records. This sheet should be placed in the minute book after the minutes of the meeting at which the election was held. The voting tally-sheet may be inspected at the meeting by any of the following persons:

- a voter for the meeting
- a candidate
- the returning officer (if one was appointed)
- the person chairing the meeting
- a scrutineer appointed by a candidate.

The election procedures are extremely complex. They will be difficult to follow precisely, yet if they are not followed precisely there is a real risk that the election will be invalid. Careful adherence to the prescribed procedures is therefore essential. **Form B21** (¶72-950) is a check-list for use by a person chairing a meeting at which an election by open ballot is being conducted under the Std Mod. **Form B22** (¶72-970) is a check-list for use by a person chairing a meeting at which an election by secret ballot is being conducted under the Std Mod. These check-lists have been prepared to assist chairpersons in the conduct of committee elections, but be forewarned that they too are complex.

Accommodation Module

The Acc Mod does not include a secret ballot procedure. The record-keeping requirements are also less strict.

Commercial Module

None of the above commentary applies to schemes regulated under the Com Mod.

Small Schemes Module

None of the above commentary applies to schemes regulated under the SS Mod.

Law: Std Mod, s 24, 25, 26, 27, 28

Acc Mod, s 25, 26, 27, 28.

Last reviewed: 22 January 2006

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[¶37-080] Elections at the First Annual General Meeting

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Where an election is to be held at a first annual general meeting, the procedures are slightly modified. Firstly, the nominations must be given at the meeting and not as a result of a call for nominations before the meeting is convened. The nominations may be given:

- orally from the floor of the meeting, or
- in writing handed to the person chairing the meeting.

In addition:

- the original owner must perform all the duties imposed on the secretary
- no ballot-papers need be issued before the meeting, and
- to be entitled to vote, a person must be present at the meeting.

Accommodation Module

The position is the same, except that the reference to ballot-papers is not relevant.

Commercial Module

There are no corresponding provisions in this module.

Small Schemes Module

There are no corresponding provisions in this module.

Law: Std Mod, s 19, 20

Acc Mod, s 20, 21.

[¶38-000] Background

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The BCCM Act recognises three categories of service providers to bodies corporate:

- body corporate managers
- service contractors
- letting agents.

Special provisions in the BCCM Act and regulation modules regulate the way in which a body corporate (and an original owner on behalf of a body corporate) can deal with persons who fall within each of these categories. While the body corporate manager was recognised in the BUGT Act, the terms “service contractor” and “letting agent” are new to this type of legislation. This part of the commentary will consider the regulatory environment for the three categories of service providers.

Last reviewed: 23 January 2006

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[¶38-050] Service contractors

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A service contractor is a person engaged by the body corporate (other than as its employee) for a term of at least one year to supply services (other than administrative services) to the body corporate for the benefit of the common property or lots included in the community titles scheme.

The exclusion of "administrative services" ensures that a body corporate manager does not fall within the definition of a service contractor. This exclusion is preserved by various other sections of the BCCM Act which clearly distinguish between service contractors and body corporate managers (see, for example, s 113 to 117).

Examples of potential service contractors are:

- gardeners
- swimming pool maintenance contractors
- caretakers (whether or not they are also letting agents)
- security guards
- elevator maintenance contractors.

Law: BCCM Act, s 15, 113 to 117.

Last reviewed: 30 August 2012

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[¶38-100] Body corporate manager

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A body corporate manager is a person engaged by the body corporate (other than as its employee) to supply administrative services to the body corporate, whether or not the person is also engaged to carry out the functions of a committee, and the executive members of a committee, for a body corporate. The administrative services provided by a body corporate manager include:

- keeping statutory records
- giving notices of meetings, attending meetings and preparing minutes
- handling correspondence
- arranging cleaning and maintenance of the common property
- preparing budgets and sending out levy notices
- receiving, receipting and banking payments
- paying accounts
- keeping financial records
- arranging insurances (and attending to insurance claims)
- preparing and lodging tax returns
- arranging annual audits
- making and responding to applications to an adjudicator
- providing general advice to the body corporate and its office bearers.

Law: BCCM Act, s 14.

Last reviewed: 23 January 2006

[¶38-150] Building managers

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A building manager (sometimes called a caretaker) is not officially recognised by the BCCM Act, except to the extent that a building manager will usually be a service contractor. However, building managers are very common in larger Queensland buildings and they are not uncommon in smaller complexes of less than 20 units. Such smaller complexes were normally set up with an on-site caretaker to entice retirees or those looking to supplement their income to buy into the development with minimal outlay.

Larger complex building managers are usually engaged under a long-term contract, mostly in conjunction with an authority to act as a letting agent, and are paid a fee for undertaking a range of building-related services. Examples of these services include, but are not limited to:

- providing a “front desk” presence during specified hours
- keeping the building secure
- cleaning
- non-technical maintenance
- keeping keys, drawings and manuals
- enforcing by-laws
- supervising use of the common property
- keeping appropriate records about the building and its equipment (eg pool maintenance, lift maintenance and fire safety)
- arranging technical maintenance.

Last reviewed: 30 August 2012

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[¶38-200] Letting agent

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In a technical sense, a letting agent is a person authorised by the body corporate to conduct a letting agent business for the scheme. A letting agent business is the business of acting as the agent of owners of lots who voluntarily engage the letting agent in accordance with the *Property Agents and Motor Dealers Act 2000* to secure, negotiate or enforce (including the collection of rents) leases or other occupancies of lots.

As previously mentioned, the letting agent role is usually performed in conjunction with the building management role. The letting agent operates under a special “authority” from the body corporate. They accept agency appointments from unit owners to arrange tenancies or licences for their units, collect rents or tariffs and enforce leases or occupancies. Most lettings are short term, commonly referred to as “holiday lettings”, but letting agents are also appointed to arrange longer-term tenancies. They usually use the front desk in the foyer of the building as a reception facility and promote the building as a “destination”. Letting agents commonly offer a range of other “user pays” services, such as:

- travel and tourist bookings
- television and equipment hire
- video hire
- linen hire
- telephone and other communication services.

A letting agent who is not a licensed real estate agent must hold a “restricted letting agents licence” under the *Property Agent and Motor Dealers Act 2000*. As the holder of a restricted letting agent’s licence they cannot act for a client unless the client first appoints them as their letting agent under s 114 of that Act. To act in the absence of an appointment is an offence that carries a maximum penalty of 200 penalty units. The appointment must be:

- in writing
- in the approved form, and
- signed and dated by the client and the letting agent or a person authorised or apparently authorised to sign for the letting agent.

The letting agent must give a copy of the signed appointment to the client, otherwise they commit an offence that carries a maximum penalty of 200 penalty units.

The appointment can be for the performance of a particular service (“single appointment”) or a number of services over a period (“continuing appointment”).

The section requires the appointment to:

1. State the service to be performed by the letting agent and how it is to be performed.
2. State —

   (a) in the way prescribed under a regulation, that fees, charges and commission payable for the service are negotiable up to any amount that may be prescribed under a regulation, and
   (b) for a single appointment, if commission is payable and expressed as a percentage of rent, the amount of commission expressed in dollars based on the listed rental charge.
3. State —

   (a) the fees, charges and commission payable for the service
   (b) the expenses, including advertising and marketing expenses, the letting agent is authorised to incur in connection with the performance of the service
   (c) the source and the estimated amount of any rebate, discount, commission or benefit that the letting agent may receive in relation to any expenses that the letting agent may incur in connection with the performance of the service, and
   (d) any condition, limitation or restriction on the performance of the service.
4. State when the fees, charges and commission for the service become payable.

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5. State that the commission is worked out only on the actual amount of rent collected, if the service is the letting of lots or collecting rent and a percentage commission is payable.

Section 114 does not address the issue of marketing or promotional levies. (These are usually a fixed dollar amount payable monthly to the letting agent for use by the letting agent for advertising and general marketing of the building as a destination.) The question is whether a letting agent can impose such a levy without having to account to the lot owner for how it has been spent. It is most unlikely that this is permitted under the *Property Agents and Motor Dealers Act 2000*. This is because it will be either an "authorised expense" incurred by the agent, in which event it must be stated in the appointment, or part of the agent's fee, in which event it will be part of the "price cap".

The safest way to handle marketing levies is for the agent's appointment to authorise advertising and marketing expenditure to a maximum monthly dollar amount which is deducted from the monthly rent collection and accounted for in the monthly owner statement. This will mean that the agent is only reimbursed for money actually spent on advertising and marketing. However, they can continue to have a discretion on how the money is spent, subject to disclosure of related party transactions.

The following should be noted about continuing appointments:

- They must state the date the appointment ends.
- They must state that they can be revoked on the giving of 90 days notice or some lesser period (not less than 30 days) agreed by the parties.
- The notice revoking a continuing appointment must be by signed writing given to the other party.
- The revocation does not affect existing contracts entered into by the letting agent on behalf of the client.

Law: BCCM Act, s 16

Property Agents and Motor Dealers Act 2000, s 114.

Last reviewed: 23 January 2006

[¶38-240] Original owner control period

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In 2003 the BCCM Act was amended to introduce the concept of an "original owner control period". This is defined as the period in which —

(a) the body corporate is constituted solely by the original owner, or
(b) the original owner owns, or has an interest in, the majority of lots in the scheme or, in any other way, controls the voting of the body corporate.

This concept is relevant to a range of prohibitions relating to the appointment of and dealings with body corporate managers, service contractors and letting agents.

In practice it may be difficult to determine when the original owner control period ends. This is because of the common practice of original owners (or developers) taking powers of attorney from buyers in "off-the-plan" contracts. These powers of attorney last for up to "1 year after the scheme is established or changed" (see s 219(3) of the BCCM Act). The use of the words "or changed" in that section makes it unclear as to how long the power of attorney can actually last. For example, in a staged development where stages are not protracted the power of attorney may last for a number of years. It follows that the end of the original owner control period must be determined on a case by case basis, even in the case of an "off-the-plan" project where settlement of the sale of most lots occurs shortly after the scheme is established.

Law: BCCM Act, s 219(3), Sch 6.

Last reviewed: 18 October 2013

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[¶38-250] Prohibition on payments or benefits

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A body corporate is prohibited from seeking or accepting payment of an amount or the conferral of a benefit for:

- the engagement of a service contractor (including a replacement or renewal of an engagement)
- the authorisation of a letting agent (including a replacement or renewal of an authorisation), or
- extending the term of such an engagement or authorisation.

This prohibition does not apply to the first authorisation given by the body corporate after the original owner control period ends if —

(a) the amount or benefit sought or accepted for the authorisation represents fair market value for the authorisation, and
(b) no authorisation was given during the original owner control period.

This exception, and a similar exception that applies to letting agent authorisations, effectively allow a body corporate to “sell” management rights or an extension of management rights where the original owner chose not to do so during the original owner control period.

This prohibition is complemented by two other sections (s 114 and 115) which prohibit an engagement of a service contractor or the authorisation of a letting agent from including, directly or indirectly, a requirement for payment of an amount or conferral of a benefit on the body corporate. In the case of service contractors, the prohibition does not apply to:

- remuneration for services that the service contractor is engaged to supply, or
- an amount or benefit representing fair market value for an entitlement (other than the actual engagement) conferred by the body corporate under the engagement (eg rent for use of common property or a body corporate asset), or
- an amount or benefit for the reasonable costs incurred by the body corporate in preparing an agreement between the body corporate and the service contractor, or
- an engagement (including the extension, renewal or replacement of an engagement) the term of which starts after the commencement of s 114 of the BCCM Act (namely 13 July 1997).

Also, in the case of letting agents, the prohibition does not apply to:

- an amount or benefit representing fair market value for an entitlement (other than the actual engagement) conferred by the body corporate under the engagement (eg rent for use of common property or a body corporate asset), or
- an amount or benefit for the actual authorisation as letting agent if:
  - the amount or benefit represents fair market value for the authorisation, and
  - the authorisation is the first authorisation given after the original owner control period ends, and
  - no authorisation was given during the original owner control period, or
- an amount or benefit for the reasonable costs incurred by the body corporate in preparing an agreement between the body corporate and the letting agent, or
- an authorisation (including the extension, renewal or replacement of an authorisation) the term of which started before 13 July 1997.

An amount paid to, or the value of a benefit conferred on, a body corporate in contravention of these prohibitions is recoverable as a debt from the body corporate by the person who paid the amount or conferred the benefit.

These prohibitions do not cover the making of payments to or the conferring of benefits on a body corporate in consideration of it consenting to the transfer of a service contract or the transfer of an authorisation of a letting agent. However, s 122 of the Std Mod prohibits a body corporate from requiring or receiving a fee or other consideration for approving such a transfer (other than reimbursement for expenses reasonably

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incurred by the body corporate relating to the approval application). (See ¶39-100 for a discussion on the transfer provisions.)

These prohibitions were introduced by the BCCM Act as a consequence of the increasing incidence of bodies corporate refusing to grant or renew management or letting agreements, or refusing to consent to their assignment, unless they were paid a consideration. Sometimes the consideration demanded was a cash amount (eg $50,000) while at other times the consideration took an "in kind" form (eg an obligation to resurface the tennis court or refurbish the foyer). In some cases, this practice amounted to holding the building manager to ransom when their agreements needed to be renewed. The government introducing the prohibitions took the view that it was not in the public interest to allow bodies corporate to continue to demand such payments or benefits.

These provisions appear to displace the common law in relation to agreements entered into during the original owner control period. Under the common law, the owner-developer of a community scheme occupies a position analogous to that of the promoter of a company. That is, it owes the body corporate a fiduciary duty in relation to the agreements it makes on the body corporate's behalf: *Community Association DP No 270180 v Arrow Asset Management Pty Ltd & Ors*. Further details of how the BCCM Act displaces the common law in this respect, together with details of the *Arrow Asset Management* case, appear in an article by the reporter's author, Gary Bugden, at the end of this paragraph.

Despite the complexity of these restrictions and their apparent extensiveness, there is still scope for some bodies corporate to receive consideration for —

- the engagement, or the replacement, extension or renewal of an engagement, of a person as a service contractor
- the authorisation, or the replacement, extension or renewal of an authorisation, of a person as a letting agent.

However, the circumstances of the particular body corporate will need to be carefully analysed to ensure that the various prohibitions do not apply.

Accommodation Module

The position is the same.

Commercial Module

The prohibition against a body corporate requiring or receiving a fee or other consideration for approving a transfer of an appointment of a service contractor or authorisation of a letting manager does not apply. However, all of the other prohibitions do apply. From a building manager's perspective, this effectively requires a clause to be inserted in the management agreement or letting authority mirroring the terms of s 122 of the Std Mod.

Small Schemes Module

The prohibition against a body corporate requiring or receiving a fee or other consideration for approving a transfer of an appointment of a service contractor or authorisation of a letting manager does not apply. While the other prohibitions do apply in a legal sense, in practice they are not relevant. This is because the maximum term of the engagement of a service contractor under this module is one year.

Article

"Implications of the Arrow Asset Management decision

By Gary Bugden OAM

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The New South Wales Supreme Court decision in *Community Association DP No. 270180* v *Arrow Asset Management Pty Ltd & Ors* [2007] NSWSC 527 was handed down by McDougall J. on 30 May 2007.

The facts of the case

The case involved an attempt by the plaintiff, Community Association DP No. 270180, ('**Association**') to avoid a Site Management Agreement ('**Agreement**') entered into by it on 2 December 1998 when the Association was under the control of the third defendant, Australand Consolidated Investments Pty Ltd (known at the time as Walker Consolidated Investments Pty Ltd) ('**Australand**').

Under the Agreement —

(a) the manager, Arrow Asset Management Pty Ltd ('**Arrow**'), was the first defendant;
(b) Arrow was required to perform certain specified duties in exchange for an annual fee;
(c) the annual fee escalated each year by the higher of CPI or 5%;
(d) the term was 10 years with 2 options of up to 5 years each; and
(e) Arrow had the sole right to enter into an agreement with the Association to conduct a letting service and tenancy management service, as well as to provide ancillary services.

The Association was constituted on 27 November 1998. On 2 December 1998 when Australand owned all the lots in the community scheme, an Inaugural General Meeting of the Association was held at which Australand and its solicitors were the only persons present. At that meeting the Association resolved, inter alia, to enter into the Agreement with Arrow. The Agreement was made on the same day.

On or about 30 June 2000 the Agreement was, by Deed of Assignment, assigned to the second defendant, Bondlake Pty Ltd ('**Bondlake**'). The Association was a consenting party to that deed.

The claim

The Association in its action raised a large number of issues for determination by the Court (32 in total). However, in the event, the most significant issue was whether Australand, when it caused the Association to enter into the Agreement with Arrow, owed the Association a fiduciary duty to not place itself in a position of conflict or to profit from contracts entered into between the Association and Arrow, without proper disclosure. This was put more succinctly by McDougall J. (at para 208 of his reasons) as follows:

> `In essence, the Association's case was that Australand, as developer of the community scheme, stood in a position vis-à-vis the Association analogist to that of a promoter vis-à-vis the company promoted. It relied on the judgment of Else-Mitchell J. *in Re Steel & Ors and the Conveyancing (Strata Titles) Act 1961* (1968) 88 WN(PT1) (NSW) 467, and on an article by Mr David Bugden, **Management Rights — Are Developers Promoters?** (1996) QLSJ 281.'

The discussion in this paper is confined to that issue.

The common law position

At common law a person who is involved, as a principal, in the '*birth, formation and floating of the company*' is a promoter of that company.[1] That person remains a promoter until the board of directors of the company is in place and takes control of the company.[2] During the period that a person is a promoter of a company, that person is in a fiduciary relationship with the company and under an obligation to act in good faith towards the company.[3] A promoter must make real and meaningful disclosure to company in respect of related party transactions. This requires disclosure to an independent board of the company, or if such a board is not in place, to the shareholders or prospective shareholders of the company.[4] The onus lies on the promoter to show that full disclosure has been made. Where the company is party to a contract the promoter may not retain any profit out of the transaction unless full disclosure is made. The disclosure must be made before the transaction

is completed and must include the fact that there is an interest in the transaction, the nature of the interest and all other material facts.[5]

Available remedies include affirmation of the contract and an account for secret profits,[6] including interest,[7] and rescission of the contract.[8]

Disclosure

On the question of disclosure, the evidence was that —

(a) Clause 42 of the Association's Community Management Statement ('**CMS**') noted that the Association had power to enter into agreements such as the Agreement; and
(b) Clause 43 of the CMS went into considerable detail about the Association's intention to enter the Agreement and the actual terms of the Agreement.

In turn, the CMS was disclosed in the Contracts for Sale of the lots in the community scheme. However, Australand did not disclose in those contracts for sale, or otherwise to purchasers, an agreement Australand had with Arrow providing for $190,000 to change hands in exchange for Australand procuring the Association to enter into the Agreement with Arrow.

The Court was mindful of the statutory disclosure requirements that applied to the Agreement. McDougall J. said at para 218 —

> 'Clearly, any application in this case of the principles relating to fiduciaries must take account of the way in which the legislature has sought to impose duties of disclosure in certain cases, and to provide for the consequences of non-disclosure. But it does not follow from the legislative scheme that all principles relating to the obligations of fiduciaries have been excluded. In particular, I think, nothing in that scheme excludes the basic principle that a fiduciary should not benefit from its position.'

Decision

After analysing the various cases on fiduciary duties,[9] the Court held —

1 It is appropriate to regard the developer of a community title scheme as being, vis-à-vis, the community association, in a position analogist to that of a promoter of a company.
2 The relationship between the developer and the community association is a fiduciary relationship.
3 Australand owed the Association a duty not to place itself in a position of conflict or to profit from contracts entered into between the Association and Arrow, without proper disclosure.
4 There was a clear conflict between Australand's interest and its duty. On this point His Honour said (at para 231) —

> 'There was a clear conflict between Australand's interest and its duty. Australand's interest was to extract the maximum price from Arrow. That conflicted, or might conflict, with its duty to the Association: to get the benefit of management services at the most reasonable terms commercially available. Further, to the extent that the management agreement provided for an "excessive" remuneration (see para [105(4)] above), Australand acted to the detriment of the Association in causing it to enter into the management agreement on the terms contained in that agreement.'

5 If a premium was to be paid for the making of the Agreement, it should have been paid to the Association and not to Australand.
6 Australand garnered a profit for itself, in the form of the premium of $190,000, through its exploitation of its control of the Association.
7 Prima facie, the breach of duty was not cured by adequate disclosure because, although the Agreement was disclosed, the separate agreement between Australand and Arrow under which the $190,000 was paid, was not disclosed.

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8 Australand is liable to account to the Association for the profit of $190,000 it made by causing the Association to enter into the Agreement.

The Court also decided a number of other important issues that are not dealt with in this paper. One was to deny the Association equitable compensation, being the difference between the amount payable under the Agreement and an amount payable under an agreement entered into at arms length as at the date of the Agreement. This was based on two things —

(a) failure of the Association to prove its losses (because of evidentiary shortcomings); and
(b) the fact that the Agreement terminated at the end of the First Annual General Meeting pursuant to a 'trigger' in the *Strata Schemes Management Act 1996* (NSW); (this being one of the other points decided by the court).[10]

Disclosure

The question arises whether disclosure needs to be made to all of the prospective members of the Association (ie the purchasers of units or land) or simply to the Association itself. Australand submitted that disclosure could be made to a completely independent board of directors or to the existing and potential members of the Association. This submission relied on a statement of principle in the 6th Edition of Gower, **Principles of Modern Company Law** which was accepted by Austin J. in *Aequitas* v. *A.E.F.C.* (2001) 19 ACLC 1006 at 1069 [293] in the following terms:

> 'The position therefore seems to be that disclosure must be made to the company either by making it to an entirely independent board or to the existing or potential members as a whole. If the first method is employed the promoter will be under no further liability to the company, although the directors will be liable to the subscribers if the information has not been passed on … . If the second method is adopted disclosure must be made in the prospectus, or otherwise, so that those who are all or become members, as a result of the transaction in which the promoter was acting as such, have full information regarding it. A partial or incomplete disclosure will not do; the disclosure must be explicit.'

Clearly, in the current case the executive committee or board was made up by the sole representative of Australand, so there could be no disclosure to a completely independent board of directors.

Alternatively, Australand relied upon the doctrine of unanimous consent. It submitted that there had been full disclosure to the Association's sole member, Australand, at the time of the impugned conduct. That proposition was rejected by the Court given the intent of the law on these matters to protect future shareholders.

The conclusion is that, in the case of a normal transaction for the sale of management rights by a developer, the required disclosure and informed consent must be made to and obtained from the purchasers of all of the units or land in the community titles scheme being promoted.

Application to Queensland

In New South Wales, section 24 of the *Community Land Management Act 1989* (NSW) applies to certain service agreements with an association or members of an association. Section 24(2) provides for such an agreement entered into during the initial period to terminate at the end of the first annual general meeting unless 'its effect' was disclosed in the association's management statement before the transfer of any lots in the scheme, or it is ratified at the meeting. This is the sub-section that triggered the termination of the Agreement in the case under consideration.

In Queensland, section 213 of the *Body Corporate and Community Management Act 1997* (Qld) ('**Act**') effectively requires a developer to disclose in relation to management rights agreements:

- the terms;
- the estimated cost to the body corporate; and
- the proportion of the costs to be borne by the purchaser.

Disclosure usually includes annexing a copy of the agreement to the contract of sale. However, disclosure never involves disclosure of the transaction under which the management rights (including the agreements) are sold.

Apart from this provision there are a number of other provisions that need to be considered:

- Section 112 of the Act imposes obligations on a developer procuring a body corporate to enter into a service contract or letting authorization during an 'original owner control period'. These obligations are designed to ensure that the contract or authorization is fair and reasonable.
- Section 113 of the Act prohibits the body corporate from receiving a payment or benefit for entering into a service contract or letting authorization.
- Sections 114 and 115 prohibits an engagement or authorization itself having a requirement for a payment or a benefit for entry into the engagement or authorization.

Clearly, these provisions give rise to an argument in Queensland that the legislative scheme intends to prevent a body corporate from profiting from the sale of management rights so as to facilitate such a sale by the developer. In exchange, the body corporate is protected by the provision requiring the developer to ensure that any contract or authorization is fair and reasonable.

Relevant to this argument are the provisions of s 114 of the Body Corporate and Community Management (Standard Module) Regulation 2008 (and the corresponding provision in section 112 of the Body Corporate and Community Management (Accommodation Module) Regulation 2008). That section requires for a service contract or letting authority an ordinary resolution passed by secret ballot, without proxy votes and with voters having the benefit of a range of information about the documents to be entered into. However, section 87(3) of the Standard Module (section 85(3) of the Accommodation Module) provides that the secret ballot requirement does not apply if all the lots are held by the same person.

The question is whether these provisions displace the common law relating to promoters. If they do not, then a Queensland developer may well be regarded as a common law promoter of membership of a body corporate with the resulting fiduciary relationship requiring full disclosure of any benefit gained out of the sale of the management rights. This would open the remedies of account for profit and equitable compensation. This would need to be supported by the argument that the prohibitions on the body corporate benefiting from a person entering into a service contract or being granted a letting authority do not extend to an award for compensation in favour of the body corporate.

On balance, I am inclined to the view that in Queensland the common law relating to promoters has been displaced by the legislative provisions to which I have referred. However, it should also be remembered that those provisions were only introduced to the Act and modules in March 2003. Therefore, one cannot rule out a claim being made within the next couple of years (being the run-out of any limitation period) based on the former provisions of the Act, which would generally be supportive of the principles decided in the *Arrow Management case.* There is also the prospect of a claim in relation to those bodies corporate still regulated under the *Building Units and Group Titles Act 1980*, as well as those regulated under the *South Bank Corporation Act 1989*.

Other Implications for Developers

Therefore, the direct implications of this decision potentially extend to all Australian jurisdictions and are not confined just to New South Wales. The possible constraints that exist in Queensland may not exist in other Australian jurisdictions. The direct implications are:

- The 'non unit' components of management rights (ie the management and letting agreements) belong to the body corporate and not to the developer.
- If the developer is to 'sell' those rights and profit personally from the sale, it must make 'full disclosure' and obtain 'informed consent' from those persons purchasing units and proposing to become members of the body corporate.

• Full disclosure would need to include the actual price, plus 'all relevant information' about the sale of the management rights. This would extend to information relevant to the reasonableness of the fee having regard to the services to be provided.
• Where this does not occur, the body corporate:

– will be entitled to receive the profit (ie the consideration for the sale); and
– may be entitled to equitable compensation or an account for profits if the relevant agreement is continuing and the fee under that agreement is excessive for the services provided or is likely in the future to become excessive.

Perhaps the most serious indirect implication is the real possibility of existing bodies corporate of some years standing suing the developers of their schemes to recover amounts received by the developers on the sale of the 'non unit' components of management rights. Of course, such action would need to be taken within the relevant limitation period.

Also, the implications may not be confined to management rights agreements. Take for example a developer who enters into an agreement with a body corporate manager for advice on structuring issues relating to a new project and/or the set up of the body corporate records for a nominal or concessional fee. If that occurs on the understanding that the developer will procure the grant of an appointment as body corporate manager, there may be further implications for the developer.

The reduced fee on the consultancy arrangement is a benefit to the developer potentially at the expense of the body corporate. This breaches the developer's fiduciary duty and thereby requires full disclosure to and the informed consent of the purchasers. In the absence of those, on the principles in the *Arrow Management* case, the developer must account to the body corporate for the benefit gained.

Again, there is the possibility of historical claims by bodies corporate, subject again to the relevant limitation period.

The decision in the *Arrow Management* case ushers in an entirely new chapter in the Australian management rights industry. This time the spotlight is clearly focussed on the performance of the developers and, as the play unfolds, the on-site managers can safely take a place in the audience for a change. Or can they? What about secret commissions?"

Law: BCCM Act, s 113, 114, 115

Std Mod, s 122

Acc Mod, s 120

SS Mod, s 25.

.40 Case references: *Community Association DP No 270180 & Ors* v *Arrow Asset Management Pty Ltd* (2008) LQCS ¶90-138, [2007] NSWSC 527.

Footnotes

1 *Whaley Bridge Calico Printing Co* v. *Green* (1879)5 QBD 109, Bowen J at 111.

2 *Twycross* v. *Grant* (1877) 2 CPD 469 (CA), Cockburn CJ at 541.

3 *Twycross v. Grant (supra)* and *Lagunas Nitrate Co* v. *Lagunas Syndicate* [1899] 2 Ch 392 at 428.

4 *Gluckstein* v. *Barnes (Official Receiver & Official Liquidator of Olympia Ltd)* [1900] AC 240.

5 *Re Darby, ex p Brougham* [1911] 1 KB 95; *A-G for Canada* v. *Standard Trust Co of New York* [1911] AC 498, PC; *Emma Silver mining Co* v *Grant* (1879) 11 ChD 918.

6 *Lydney and Wigpool Iron Ore Co* v. *Bird* (1886) 33 ChD 85 CA.

7 *Gluckstein v. Barnes (supra)*.

8 *Erlanger* v. *New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL.

9 From Para 216 of the judgment: 'See (by way of example only) *Tracy and Others* v *Mandalay Proprietary Limited* (1953) 88 CLR 215. However, to say that one person stands in a fiduciary position vis-à-vis another is to begin, not to end, the enquiry: see the observation of Frankfurter J in *Securities*

and Exchange Commission v *Chenery Corporation* (1943) 318 US 80 at 85, 86, cited with approval by the majority (McHugh, Gummow, Hayne and Callinan JJ) in *Pilmer and Others* v *Duke Group Limited (In Liquidation) and Others* (2001) 207 CLR 165 at 198–199 [77]. Their Honours earlier at 197–198 [74] had referred with approval to the observation of Gaudron and McHugh JJ in *Breen* v *Williams* (1996) 186 CLR 71 at 113, that the obligations of a fiduciary are proscriptive — "not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict" — and not positive (or prescriptive): "positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed."'

10 Section 24 of the *Community Land Management Act 1989* (NSW) applies to certain service agreements with an association or members of an association. Section 24(2) provides for such an agreement entered into during the initial period to terminate at the end of the first annual general meeting unless 'its effect' was disclosed in the association's management statement before the transfer of any lots in the scheme, or it is ratified at the meeting. In *Hudson Property Group Pty Ltd* v *Community Association DP 270238* [2005] NSWCA 374 the Court of Appeal held that disclosure similar to that in the CMS referred to in this paper did not satisfy the requirements of section 24(2) and therefore the subject agreement terminated at the end of the first annual general meeting. It followed that McDougall J held that the Agreement also terminated at the time of the first annual general meeting of the Association.

Last reviewed: 13 February 2006

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[¶38-300] Combined engagement and authorisation

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Building management agreements and letting agreements (now called letting authorities) were sometimes separate agreements and sometimes combined in the one agreement. At one stage the government proposed to prohibit the combining of agreements in the one document. Not only was this proposal dropped but a provision was included in the BCCM Act to say that an agreement is not void merely because it includes two or more of the following:

- the engagement of a person as a body corporate manager
- the engagement of a person as a service contractor
- the authorisation of a person as a letting agent.

As a consequence, it is not uncommon to find building management agreements incorporating letting authorisations. Where the documents are kept separate they are usually tied together by cross-default provisions.

Law: BCCM Act, s 117.

Last reviewed: 23 January 2006

[¶38-350] Regulation module variations

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The various regulation modules prescribe limitations on the terms of body corporate manager and service contractor agreements and letting agent authorisations. The following table sets out the limitations that apply:

Document	Std Mod	Acc Mod	Com Mod	SS Mod
Appointment of body corporate manager	3 years	3 years	3 years	1 year
Appointment of service contractor	10 years	25 years	25 years	1 year
Authorisation of letting agent	10 years	25 years	25 years	N/A

A body corporate can change the regulation module under which it operates. This creates a potential problem where a service contractor is appointed or a letting agent is authorised under one module for the maximum permitted term and the body corporate subsequently changes to a module that is prohibitive of that term. For example, a service contractor may have been appointed for 25 years at a time when the Acc Mod applied, and subsequently the body corporate changed to the Std Mod, which has a maximum term of 10 years. The reverse can also apply. A service contractor could be appointed under the Std Mod for 10 years and subsequently the body corporate could change to the Acc Mod, which permits a maximum term of 25 years — the service contractor may wish to take advantage of the longer potential term.

Section 128 of the BCCM Act provides that, in these circumstances, the provisions of the module under which the body corporate manager or service contractor was engaged, or the letting agent was authorised, continue to apply until the engagement or authorisation, including any renewal or extension, comes to an end. It is important to note that not only will the term limitation provision apply but the “provisions of the module” in total will continue to apply.

Law: BCCM Act, s 128

Std Mod, s 118, 119, 120

Acc Mod, s 116, 117, 118

Com Mod, s 84, 85, 86

SS Mod, s 62, 63.

Last reviewed: 13 February 2006

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[¶38-420] Review of service contracts

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Ch 3 Pt 2 Div 7 of the BCCM Act, which was introduced in the 2003 amendments, provides for a more general review of the terms of service contracts. For this review to apply, the following must all be satisfied:

(a) the body corporate enters into a service contract with a person (**service contractor**) after 4 March 2003
(b) that contract was entered into within the original owner control period
(c) the term of the engagement has not ended
(d) the original owner control period has ended
(e) either the body corporate (pursuant to the authority of an ordinary resolution of a general meeting) or the service contractor (each of which are called a **reviewing party**) requests a review of the terms of the contract that provide for:

(i) the functions and powers of the service contractor, or
(ii) the remuneration payable to the service contractor (these all being referred to as **reviewable terms**)

(f) in the case of a review of remuneration, the terms of the contract dealing with remuneration must not have been reviewed by the reviewing parties before 4 March 2003, and
(g) there must not have been a previous review under Div 7.

In relation to the requirement in (e)(ii) above, the review would normally have occurred under s 129 of the BCCM Act. However, the wording of this requirement is such that any form of review (even a voluntary or contractual review) may be sufficient to displace the statutory remuneration review process.

A contract that also incorporates the engagement of a body corporate manager or the authorisation of a letting agent can also be reviewed under this provision, although the review would be restricted to the terms relating to functions, powers and remuneration relevant to the service contract. The purpose of the review is to help the reviewing parties decide if the relevant terms are fair and reasonable and, if not, how they should be changed to make them fair and reasonable.

In Queensland, body corporate managers, committee members and building managers are able to call upon the services of specialist building manager consultants to review the caretaking agreement to the services provided and the remuneration. Such consultants will normally spend time on-site with a caretaker reviewing the functions performed before writing a report detailing the services provided for under the caretaking agreement, describing any discrepancies (or inefficiencies) and recommending a time/remuneration amount for each of the services provided.

The report can then be reviewed by the committee and lot owners before a vote is taken to increase/hold the remuneration as required. Care needs to be taken in reviewing reports to compare the list of jobs detailed with those actually provided for under the caretaking agreement. If, for example, the consultant recommends an increase in remuneration tied to the provision of certain services which do not feature as part of the daily routine, then the committee should be encouraged to vary the caretaking agreement so as to take account of the increased duties.

Law: BCCM Act, s 130, 131.

Last reviewed: 30 August 2012

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[¶38-425] Procedure for review

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Within two months after a party requests a review, that party must obtain from an appropriate person independent written advice about the reviewable terms and give a copy of that advice to the other reviewing party. The advice must be based on specified “review criteria” (see below). An example cited in s 132(1) of the BCCM Act says that an appropriate person would be one who, in the ordinary course of business, has knowledge of the functions and powers of service contractors and the remuneration for performing the functions and powers. This may be a body corporate manager, a facilities manager or even another industry experienced service contractor.

The review must be completed as soon as practicable after the advice is given to the reviewing party, but in any event —

- before the term of the engagement as service contractor ends
- within a specified “review period”.

The body corporate’s final decision about the outcome of the review must be made by ordinary resolution of a general meeting. A member of the body corporate who is the service contractor, or an associate of the service contractor (see ¶38-500), cannot vote, personally or by proxy, on the motion.

The written advice and the review itself must have regard to specified **review criteria**. The review criteria comprises each of the following —

- the appropriateness of the reviewable terms for achieving a fair and reasonable balance between the interests of the reviewing parties
- whether the reviewable terms impose conditions that:
    - – are unreasonably difficult to comply with, or
    - – are not necessary and reasonable for the protection of the legitimate interests of a reviewing party
- the consequences of complying with, or contravening, the reviewable terms and whether the consequences are unfairly harsh or beneficial to a reviewing party
- whether the reviewable terms are appropriate for the scheme having regard, in particular, to the nature, features and characteristics of the scheme
- the terms of engagement as service contractor and the period of the term remaining.

The review period is defined in Sch 6 to mean:

(a) for a service contract entered into after 4 March 2003 (**commencement**) for a term not longer than three years, the first of the following periods to end —

(i) the period of the term
(ii) the period ending immediately before the contract is first extended or varied, or

(b) for a service contract entered into after commencement that is for a term longer than three years, the later of the following periods to end —

(i) three years after the start of the term
(ii) one year after the annual general meeting next held after the original owner control period ends.

A contract entered into before commencement is no longer covered by these review provisions.

Law: BCCM Act, s 132, 134, 135(1).

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[¶38-430] Review disputes

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If a dispute arises out of a review carried out, or required to be carried out, under these statutory provisions, an order may be made under the dispute resolution provisions to resolve the dispute. The application must be referred to a specialist adjudicator or to the Queensland Civil and Administrative Tribunal (QCAT) to resolve the dispute. The specialist adjudicator or QCAT must have regard to the review criteria in deciding the application. A dispute is taken to exist where only one reviewing party carried out the review (ie the other party refused or failed to participate) and that party considers the reviewable terms are not currently fair and reasonable.

The following matters cannot be a ground for terminating a contract or changing the service contractor's term of engagement under the contract —

- the carrying out of a review under the statutory review provisions
- a change in the terms of the contract as a result of the review or an order of a specialist adjudicator or QCAT
- a dispute arising out of the review.

The phrase "term of engagement" most likely refers to the terms of the contract generally rather than its term in a "period" sense.

Law: BCCM Act, s 133, 135(2).

Last reviewed: 19 March 2010

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[¶38-450] Financier arrangements

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The “management rights package” for a community titles scheme is a valuable asset. Building managers pay substantial sums of money for these packages, whether they are purchased from the developer or an existing manager (eg in the range from $500,000 to many millions of dollars). The value of management rights has been supported by the relatively ready availability of finance for purchasers. When the BCCM Act was introduced the government wanted to impose some restrictions on building managers and their management rights packages to address a number of consumer concerns, while at the same time preserving their underlying value. In particular, the government wanted to give bodies corporate restricted rights to terminate service contracts while protecting the interests of a financier. This part of the commentary will discuss the provisions that were inserted in the BCCM Act to protect the financiers of service contracts, particularly those that make up a management rights package.

To understand the financier arrangements, the following must be understood:

- The **“contracts”** covered by the arrangements are contracts or other arrangements under which a person is engaged as a service contractor or authorised as a letting agent. Contracts with body corporate managers are not covered unless they are merely part of a “combined” contract.
- The **“contractor”** is the person who, under the contract, is engaged as the service contractor or authorised as the letting agent.
- A **“financed contract”** is a contract for which there is a financier.
- A person is a **“financier”** if that person and the contractor for the contract give written notice signed by each of them to the body corporate stating that the person is the financier for the contract and the person is:
  - – a financial institution, or
  - – a person who, in the ordinary course of their business, supplies, or might reasonably be expected to supply, finance for business acquisition, using charges over contracts as the whole or part of the person’s security, or
  - – if the contract is in existence immediately before 13 July 1997, a person who, at the time the person supplied finance for a business acquisition, using a charge over the contract as the whole or part of the person’s security, was a person described in the last dash point.
- A person stops being a financier if they give the body corporate a written notice withdrawing the previous notice under which they became a financier. The contractor does not have to sign this second notice or in any way agree to it.
- The notice given to the body corporate by the financier and the contractor should state the financier’s address for service of notices. If it does not, then the financier must, as soon as practicable after that notice is given, give a further notice to the body corporate stating that address.
- If the body corporate and a contractor for a financed contract change the contract or enter into an arrangement that affects the contract, the body corporate must give the financier written notice of the change or arrangement.

The body corporate’s ability to terminate a financed contract is restricted. It may only terminate the contract if all of the following are satisfied —

- The body corporate has given the financier written notice, addressed to the financier at the financier’s address for service previously provided by the financier, that the body corporate has the right to terminate the contract.
- When the notice was given, circumstances existed under which the body corporate had the right to terminate the contract.
- At least 21 days has passed since the notice was given.
- The financier must not, under arrangements between the financier and the contractor —
  - – be acting under the contract in place of the contractor, or
  - – have appointed a person as receiver or receiver and manager for the contract.

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Before the financier can act under the contract or appoint a receiver or receiver and manager, the financier must give written notice to the body corporate of its intention to take such action. The financier can be acting under the contract in place of the contractor in one of two ways —

- personally (which would only apply if the financier is an individual)
- by a person authorised to act for the financier.

The financier can only authorise a person to act for them if the person is not the contractor or an associate of the contractor (see ¶38-500) and the body corporate has first approved the person. For deciding whether to approve the person, the body corporate —

(a) must act reasonably in the circumstances
(b) must act as quickly as practicable, and
(c) may only have regard to:

(i) the character of the person, and
(ii) the competence, qualifications and experience of the person.

The body corporate must not unreasonably withhold approval of the person. Also, it must not require or receive a fee or other consideration for approving the person, other than reimbursement for legal or administrative expenses reasonably incurred by the body corporate for the application for the approval.

The following should also be noted about the termination of financed contracts —

- As per s 126(7), the body corporate can terminate a financed contract for something done or not done after the financier "started to act" under s 126(2). That covers both the situation where the financier has started to act either personally or by means of an approved person, and where a receiver or receiver and manager have been appointed (see *Vie Management Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* v *Body Corporate for Gallery Vie* (2015) LQCS ¶90-204; [2015] QCAT 164). As the Vie Management decision illustrates, a body corporate may be able to terminate an agreement under s 126(7):
  - for subsequent breaches that are outside the financier's control
  - as a result of subsequent third party actions
  - even where the body corporate suffers no detriment as a result of the subsequent breaches.
- The financed contract may still be ended by mutual agreement of the body corporate, the contractor and the financier.

It should also be noted that the old practice where the financier obtained a deed of covenant from the body corporate was outlawed by the 2003 amendments to the BCCM Act. Section 127 now prohibits a financier from entering into an agreement or other arrangement with the body corporate for a matter about —

(a) the role of the financier for the contract
(b) arrangements under which the financier is acting, or may act, under the contract in place of the contractor, or
(c) the operation of Ch 3 Pt 2 Div 4 of the BCCM Act in relation to the contract.

Any such agreement or arrangement is void to the extent it contravenes that prohibition.

The importance of notice of termination being provided to the financier was discussed in the QCAT decision of *Coming Home Pty Ltd ATF The Coming Home Trust* v *Body Corporate for Sunnybank Close* [2014] QCAT 110 (21 March 2014).

The case revolved around the issue of whether the body corporate or the service contractor should have paid legal costs under the QCAT Act, where the body corporate had issued a remedial action notice and placed a motion onto its agenda to terminate the service contractor's service contract.

Solicitors for the parties exchanged correspondence regarding the validity of the remedial action notice and ultimately the service contractor sought and was granted interim orders including an order for the body corporate to pay the service contractor's interim legal costs. The Tribunal subsequently declared that a

resolution by the body corporate to terminate the service contractor's service contract was invalid by reason of the remedial action notice having been withdrawn.

In order for the body corporate to issue the required notice to the financier, the service contractor had to provide its notice of financier to the body corporate first.

Due to timing issues, this was not provided until one day prior to the body corporate's vote to terminate.

The body corporate resolved to terminate the service contract; however, they body corporate wrote to the service contractor advising it would not take steps until the financier had made its position clear.

The member noted the service contractor had known for months that it had not notified the body corporate of its financier's interests whilst commencing proceedings with unnecessary haste. The member accordingly found that the parties should each bear their own legal costs.

Law: BCCM Act, s 126, 127.

Last reviewed: 6 October 2015

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[¶38-500] Conflicts of interest

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The Std Mod contains a suite of four sections intended to prevent body corporate managers and caretaking service contractors from receiving commissions or benefits in respect of contracts entered into by a body corporate. These provisions apply in addition to the general law duties that an agent owes to their principal and also in addition to laws prohibiting the offer and receipt of secret commissions. For the purpose of discussing the first two of these sections, the body corporate manager and caretaking service contractor will be referred to as the "relevant person".

Section 133 of the Std Mod requires the relevant person to give a body corporate written notice disclosing any relationship between that person and a party contracting with the body corporate to supply goods or services. The relationship need only be an *associate* relationship but the relevant person must be aware of the relationship. The notice must be given before the body corporate makes its decision to enter into the contract. It is also important to note that the relevant person does not have to benefit in any way from the associate relationship in order for the section to be breached. The mere fact that the relationship exists is sufficient.

The ease with which the section can be breached becomes apparent when one examines the meaning of the word *associate*. The definition of that word refers to s 309 of the BCCM Act, which provides that a person is associated with someone else if:

> (a) a relationship of a type specified in the section exists between them, or
> (b) a series of relationships of a type specified in the section can be traced between them through another person or other persons.

In other words, the relationship can be direct or indirect through a chain of relationships. The types of relationship specified in the section are:

- Marriage or de facto relationship or civil partnership.
- The relationship of ascendant and descendant (including the relationship of parent and child) or the relationship of persons who have a parent or grandparent in common.
- Partnership.
- The relationship of employer and employee.
- A fiduciary relationship (eg principal and agent).
- The relationship of persons, one of whom is accustomed, or under an obligation (whether formal or informal), to act in accordance with the directions, instructions or wishes of the other.
- The relationship of a corporation and an executive officer of the corporation.
- The relationship of a corporation and a person who is in a position to control or substantially influence the corporation's conduct.

In turn, *executive officer* is defined to mean a person who is concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer.

This extremely wide meaning of *associate* is dramatically illustrated by the following examples:

- A relevant person would be related to the grandfather of his de facto, thus making the grandfather the person's associate.
- A relevant person would be related to a company (eg Coles Myer Limited) where their half brother is an employee of that company, thus making the company the person's associate.
- A relevant person would be related to a company (eg Coles Myer Limited) where one of the employees of the company is the nephew of the person's spouse, thus making the company the person's associate.

However, it should be noted that a lot owner and a letting agent for the scheme are not associated merely because of that relationship.

The net effect of s 133 is to require a relevant person to scrutinise virtually every contract that a body corporate proposes to enter into, whether or not the relevant person has any involvement in arranging

that contract, and to give the required notice in writing if the relevant person is aware of even the slightest relationship. Failing that, the body corporate will have an entitlement to terminate the engagement of the relevant person. From a financier's perspective, before the body corporate can terminate a "financed contract" it must give the financier notice and allow them the opportunity to act under the contract in place of the contractor. If the financier acts quickly the termination can be thwarted but, if the section is breached while the financier is acting in place of the contractor, then the body corporate will be able to terminate the financed contract. (See ¶38-450 for a complete discussion on financier protection.)

Section 133 of the Std Mod requires the relevant person to give written notice to the body corporate before the relevant contract is entered into. Failure to comply with s 133 is an offence carrying a penalty of 20 penalty units. Before the 2003 amendments to the BCCM Act, failure to comply was a ground for terminating the governing contract. This harsh result, particularly for caretaking service contractors, has now been removed.

Another consequence of failing to give that notice is that s 134 of the Std Mod will apply after the contract has been entered into. Under s 134, if the relevant person is aware of a relevant relationship or becomes aware, then the relevant person must, within the shortest practical time, give written notice to the body corporate identifying the contract and disclosing the relationship. For example, if there was a relevant relationship before the contract was entered into but the relevant person was not aware of that relationship, then the agent did not breach s 133. However, if the relevant person becomes aware of the relationship after the contract has been entered into, then the relevant person must give the written notice required by that section to the body corporate within the shortest practical time (ie virtually immediately). Failure to do this means the body corporate may terminate the relevant person's engagement. This is also an offence that carries a penalty of 20 penalty units. The consequences can be the same as described above.

Section 135 of the Std Mod applies if:

(a) the body corporate is considering entering into or proposes to enter into a contract, and
(b) that contract is for the supply of goods or services from a third party, and
(c) under the supply contract (or another contract or arrangement) the relevant person is entitled to receive, other than from the body corporate, a commission, payment or other benefit that is associated with the supply contract, including with entering into the supply contract.

The Std Mod gives two examples of "commissions" intended to be covered by the section —

- a commission received from an insurance company
- a commission received from a financial institution for banking or other business.

When reading these examples, one must remember that "commission" includes any *"payment or other benefit that is associated with the main contract"*. Therefore, in the case of banking arrangements, a relevant person, particularly a body corporate manager, will need to be careful to ensure that they do not receive any benefit (eg in the form of preferential banking arrangements) because they direct the banking business of the body corporate to the particular bank. Banking arrangements are particularly high-risk in relation to this particular section.

Where the section applies, the relevant person must give written notice to the body corporate disclosing the commission, payment or other benefit before the body corporate makes its decision to enter into the supply contract. Failure to comply means the body corporate may terminate the relevant person's engagement. This is also an offence that carries a penalty of 20 penalty units. This section applies in addition to any other duty of disclosure under the general law or secret commission laws. Disclosure under s 135 of the Std Mod would almost certainly be sufficient for the purposes of secret commission laws, but it may not be sufficiently detailed to discharge a body corporate manager's duties as a fiduciary of the body corporate.

Disclosure under this section needs to be carefully handled. The section requires the written notice to disclose "**the** commission, payment or other benefit" (emphasis added). It would not be sufficient to merely disclose the fact that a commission, payment or benefit is being received. The actual amount or value would need to be quantified and disclosed. For example, if a relevant person is receiving a concessional interest rate from a bank because the person directs body corporate banking business to that bank, then the safest way to disclose would be to calculate the savings on the relevant person's borrowings and disclose the total dollar amount. To soften the disclosure, it could be pointed out that the concession does not relate solely to

the body corporate's account with the bank, but the combined banking business introduced. Disclosure of this nature would probably be needed in any event to achieve adequate disclosure by a fiduciary.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same, except that the corresponding sections only apply to a body corporate manager. They do not apply to service contractors who are also letting agents because there is no provision in this module for the appointment of letting agents. Therefore, any service contractor in respect of a scheme regulated by this module will not also be a letting agent. This being the case, it would be inappropriate to extend the operation of the sections to persons other than body corporate managers.

Law: BCCM Act, s 309

Std Mod, s 132, 133, 134, 135

Acc Mod, s 130, 131, 132, 133

Com Mod, s 132, 133, 134, 135

SS Mod, s 69, 70, 71.

Last reviewed: 23 January 2006

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[¶38-550] Occupation authorities

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A body corporate may, by means of an exclusive use by-law, give the occupier of a lot exclusive use to the rights of enjoyment of, or other special rights about, the common property or body corporate assets. Rights to occupy common property are normally conferred in this way. This process usually carries with it a degree of permanence and normally requires a resolution without dissent to repeal the by-law. Occupation authorities (defined below) are also commonly used to allow a building manager or caretaker to use a particular area such as the foyer reception or storage areas to carry out their body corporate tasks. Often the developer's surveyor can be called upon to draft the occupation authority plan which is then annexed to the caretaking agreement.

Section 136(7) of the Std Mod effectively precludes a service contractor or letting agent from acquiring rights to occupy part of the common property for the purpose of their engagement or authorisation otherwise than in accordance with the process in that section. However, it should be noted that this restriction only applies to occupation for the purpose of their engagement or authorisation. In other words, the reason for them requiring the occupation of part of the common property must be related to their duties as a service contractor or their activities as a letting agent. If they require the occupation in some other capacity (eg to house an air conditioning unit to service their home unit that they use as their home), then the exclusive use by-law process is still available to them.

The process is important when it comes to considering the way in which the occupation rights can be terminated. Under the exclusive use by-law approach a resolution without dissent and the consent in writing of the owner entitled to the exclusive occupation is required before the by-law can be repealed or amended. Under the approach in s 136 of the Std Mod the occupation right cannot be terminated or amended during the term of the engagement or authorisation without the agreement of the property occupier. However, the occupation right terminates immediately the service contractor's engagement comes to an end or is terminated or the letting agent's authorisation comes to an end or is terminated. The fundamental difference between the two processes is that the exclusive use rights are normally ongoing whereas the occupation rights under s 136 must end when the service contractor's engagement or letting agent's authorisation ends or is terminated.

Under s 136 of the Std Mod a body corporate may in certain circumstances, by ordinary resolution, give a person who is a service contractor or letting agent an authority (**"occupation authority"**) to occupy a particular part of the common property for particular purposes to enable:

- the service contractor to perform obligations under their engagement, or
- the letting agent to operate as such.

The occupation authority may also be incorporated into or annexed to the terms of engagement of the service contractor (eg a building manager's management agreement) or the letting authority of the letting agent. Examples of circumstances where these rights can be conferred include where:

- a letting agent requires use of the front desk and a number of storage rooms to operate their business, or
- a service contractor requires use of a workshop and storage area in order to carry out maintenance duties imposed by the terms of their engagement.

A body corporate cannot give an occupation authority if occupation of the relevant part of common property by the service contractor or letting agent would interfere to an unreasonable extent with the use and enjoyment of a lot or the common property by an occupier of a lot. For example, an occupation authority could not be used to confer occupation over the entire foyer of the building in a way that would require occupiers to ingress and egress via the basement. The following should also be noted about occupation authorities:

- A non-exclusive right of access over parts of the common property may be included to enable a service contractor to perform obligations under their engagement, other than an obligation to supply utility services. This provision (s 137) was added by the 2003 amendments to the BCCM Act and

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the example cited in the regulation is the granting of access to enable the provision of room service in a tourist-related scheme. The following should be noted about this provision —

– It only applies if there is an **obligation**, as opposed to a **right**, to do something.
– It does not apply to obligations to provide utility services (eg to install wiring to supply Internet or PABX telephone services to lot owners).
– The non-exclusiveness relates to the *"right to perform the obligations"* rather than the actual right of access.

• They may include conditions with which the service contractor or letting agent must comply.
• If they are given by resolution, rather than being incorporated in the terms of an engagement or authorisation, the engagement or authorisation is deemed to incorporate the occupation authority. This would include any conditions in the occupation authority.
• They may confer the right of exclusive occupation of part of the common property, subject to the body corporate retaining the right to authorise access by others if the extent of the access does not unreasonably interfere with the occupation of the service contractor or letting agent.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The above commentary does not apply because there is no corresponding provision in this module. This is because a service contractor cannot be appointed under this module for more than one year and there is no provision at all for the authorisation of a letting agent.

Law: BCCM Act, Ch 3 Pt 5 Div 2

Std Mod, s 136, 137

Acc Mod, s 134, 135

Com Mod, s 95, 96.

Last reviewed: 30 August 2012

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[¶38-560] Obligations of original owner

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Special rules apply to an original owner where a body corporate proposes to engage a body corporate manager or service contractor, or authorise a person to conduct a letting agent business, during the developer control period. In the BCCM Act these people are referred to as the "**contracted party**". The original owner must exercise reasonable skill, care and diligence and act in the best interest of the body corporate, as constituted after the original owner control period ends, in ensuring each of the following —

(a) the terms of the engagement or authorisation achieve a fair and reasonable balance between the interests of:

(i) the contracted party, and
(ii) the body corporate, as constituted after the original owner control period ends

(b) the terms are appropriate for the scheme
(c) the powers able to be exercised, and functions required to be performed, by the contracted party under the engagement or authorisation:

(i) are appropriate for the scheme, and
(ii) do not adversely affect the body corporate's ability to carry out its functions.

The following should be carefully noted about these provisions —

- The "reasonable, care, skill and diligence" test is significant in that it is expansionary in nature and the courts are likely to give it a broad meaning.
- The over-riding duty is to act in the best interests of the body corporate. Furthermore, in looking at the interests of the body corporate (and its constituent members) the test must be applied to the situation that will exist after the original owner control period ends (ie when the original owner's interests have been overtaken by the interests of the new body corporate members). All this effectively displaces the interests of the original owner when it comes to determining whether or not these provisions have been complied with.
- The test must be applied to and satisfied for all three of the criteria (ie paragraphs (a), (b) and (c) above).
- Breach of these provisions can have two consequences:
  - An offence is committed, carrying a maximum penalty of 300 penalty units.
  - The body corporate or any owner incurring loss or damage as a result of the breach can claim compensation from the original owner.
- Developers will need to ensure that management rights arrangements are very carefully structured to achieve the best result for the body corporate, to the exclusion of their own interests. They would also be well advised to obtain independent advice that the arrangements, as structured, achieve that result so that they can lay off some of the risk now associated with the structuring of these arrangements. Clearly, this will have an impact on the yield that a developer is able to obtain for the original sale of the management rights and this may well have to be reflected in the price of the units.
- There are no special transitional arrangements to deal with management rights packages that were the subject of off-the-plan contracts before the 2003 amendments to the BCCM Act took effect.

Law: BCCM Act, s 112.

Last reviewed: 18 October 2013

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[¶38-580] Categories of body corporate managers

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In Queensland, there are effectively three categories of body corporate manager—

- An *executive body corporate manager* appointed and authorised under s 119 of the BCCM Act.
- A *governing body corporate manager* appointed and authorised under s 120 of the BCCM Act.
- An *administrative body corporate manager* appointed and authorised by an adjudicator or a court under the dispute provisions of the BCCM Act. This person is more accurately categorised as an "administrator" rather than a body corporate manager, although a body corporate manager is the type of person who would normally be appointed to the role.

Where a body corporate has a committee, then it can by written instrument appoint and authorise an executive body corporate manager. This type of body corporate manager can only exercise the powers of an executive member of the body corporate (ie chairperson, secretary and treasurer) that they are expressly authorised in the written instrument to exercise.

Where a body corporate does not have a committee (and does not wish to have one), then it can by written instrument appoint and authorise a governing body corporate manager (except for a specified two-lot scheme). This type of body corporate manager may exercise the powers of the committee and the body corporate's executive members that they are expressly authorised in the written instrument to exercise — the difference being that the governing body corporate manager can actually exercise the powers of the committee itself, if so authorised.

An administrative body corporate manager is appointed to take control of all or some of the aspects of the body corporate, its committee and/or its executive officers. They act to the exclusion of those persons or bodies and are effectively the same as an administrator or receiver. They can have much more extensive powers than either an executive body corporate manager or a governing body corporate manager.

The distinction between the three types is very important.

Law: BCCM Act, s 119, 120, 300, 301.

Last reviewed: 17 February 2012

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[¶38-600] Limitation on powers

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A body corporate may authorise an executive body corporate manager to exercise ***some or all*** of the powers of an executive member of the committee. However, the body corporate must not prevent the executive member from —

(a) exercising an authorised power, or
(b) directing the body corporate manager about how an authorised power is exercised.

The powers of an executive body corporate manager are therefore linked directly to the powers of the executive members of the committee. Unfortunately, the exact extent of these powers is not clear in that they are not set out in the BCCM Act or regulation modules in any definitive sense. A review of the Act and modules demonstrates that the executive members of the committee have very limited “powers” and therefore the role of an executive body corporate manager will be very restricted. In practice this means that the executive committee itself will need to meet frequently and actively manage the community titles scheme. This is in contrast to the position before the 2003 amendments, when the body corporate manager could effectively administer the scheme under the supervision of the committee in much the same way as any other corporation is administered.

Committees and body corporate managers will need to be very careful to ensure that executive body corporate managers do not exceed their authorised powers, because anything authorised or done in excess of their authority may have two serious consequences —

• The authorisation or act may be void and of no effect because of excess of authority.
• The executive body corporate manager may be liable for any loss or damage arising as a consequence of the invalidity.

A body corporate may authorise a governing body corporate manager to exercise the powers of a committee and an executive member of a committee. In that case there is no committee of the body corporate in existence and the body corporate manager is effectively the committee. It should also be noted that the authorisation must be of ***all*** the powers. Unlike the authorisation of an executive body corporate manager, it is not possible to pass on ***some or all*** of the powers. This puts the governing body corporate manager in much the same position as a body corporate manager fully delegated under the pre-2003 provisions of the Act, except that there is no committee to supervise their role or effectiveness. A valid decision of a governing body corporate manager exercising a power under an authorisation is a decision of the body corporate. In this case, the powers of the body corporate manager are effectively limited to the powers of the committee and its executive members. Any limitation on their powers will apply to the governing body corporate manager. For example, s 141 of the Std Mod allows a committee to fix only interim levies and s 151 of the Std Mod limits the power of the committee to spend money. Section 100(3) of the BCCM Act also provides that a decision of a body corporate manager is void to the extent that it is inconsistent with a decision of the committee. This applies despite anything in the contract or engagement between the body corporate and the manager. The way in which resolutions of the committee are carried out can also be restrictive of the powers of a body corporate manager (see ¶38-650). Also, see ¶36-000ff where the powers of the committee are discussed further under “Decision Making”.

The powers of administrative body corporate managers are determined by the wording of the order of the adjudicator or court under which they are appointed. Depending on the terms of the order, the powers of an existing body corporate manager, a committee, its executive members and even the body corporate itself can be limited during the term of the administrator’s appointment.

Accommodation Module

The position is the same.

Commercial Module

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The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 100, 119, 120, 121

Std Mod, s 141, 151.

Last reviewed: 24 January 2006

[¶38-650] Exercise of powers

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An executive body corporate manager is not required by the legislation to make any special record of action they take pursuant to an authorisation. However, the normal record requirements will still apply, as will any recording requirements imposed by the terms of their appointment. For example, minutes must be kept of meetings, receipts must be written for money received, etc. Despite this, an executive body corporate manager would be well advised to keep a formal journal in respect of each scheme managed in which actions taken pursuant to their authorisation are recorded.

A governing body corporate manager is in an entirely different position in that —

- Their decisions made on behalf of the committee are the decisions of the body corporate.
- They are under special statutory reporting obligations.

Where decisions take effect as decisions of the body corporate, they should be minuted and placed in the body corporate's minute book, or alternatively, in a special minute book. The statutory reporting obligations are additional to that but the minuting process will assist in complying with those obligations.

Every three months a governing body corporate manager must give to each lot owner a written report about the administration of the scheme. The report must be given within 21 days after the end of each three months for which the person is engaged as governing body corporate manager. That report must set out, as briefly as possible, lists of decisions made by the manager under the engagement and include details of each of the following —

- repairs and maintenance to the common property and body corporate assets proposed to be carried out in the next three months following the date of the report
- any matters known to the manager about the condition of the common property or body corporate assets
- any matters that the manager reasonably considers to be relevant to future performance of the body corporate's duty to maintain common property and body corporate assets
- the balance, as at the date of the report, of the administrative fund and sinking fund and a reconciliation statement for each fund
- the body corporate expenses, including repair and maintenance costs, for the three months immediately preceding the date of the report, and for each expense item the following details:
    - payee
    - amount
    - date the expense was incurred
    - reason the expense was incurred.

In addition to this periodic reporting obligation, the same type of report must be given to all lot owners in response to "one-off" written requests by at least one-half of the lot owners. These requests must not be made more than once every three months and the report must be provided within 21 days of receipt of the request. This effectively allows lot owners to receive this type of report approximately every six weeks as a minimum.

Accommodation Module

The position is the same.

Commercial Module

These requirements do not apply.

Small Schemes Module

The position is the same.

Law: Std Mod, s 62

Acc Mod, s 60

SS Mod, s 27.

Last reviewed: 13 February 2006

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[¶38-700] Engagement and authorisation

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The engagement of an executive body corporate manager is void unless it:

- is in writing
- states the term of the engagement, including:
  - when the term begins and when it ends, and
  - the term of any right or option of extension or renewal of the engagement
- states the functions that the executive body corporate manager is required or authorised to carry out
- states the basis on which payment for the executive body corporate manager's services is to be worked out, and
- states any powers of an executive member of the committee the executive body corporate manager is authorised to exercise.

The engagement will usually list the powers of the body corporate committee executive members that the body corporate manager is authorised to carry out. To protect against a breach of s 119(3) of the BCCM Act, it is recommended that the engagement also contain provisions making it clear that:

- the executive member may themselves exercise a delegated power or direct how the power is to be exercised, and
- the body corporate can revoke the authorisation at any time.

The following should also be noted about the engagement of an executive body corporate manager:

1. Although the engagement can be made by "the body corporate", s 114 of the Std Mod sets out the detail of what is required for a valid engagement. All of the following must be satisfied:
   - An ordinary resolution of a general meeting must be passed approving the engagement without any votes in favour being by proxy.
   - The material forwarded to members of the body corporate for the general meeting that considers the motion for that resolution must include the terms of the engagement, including the beginning and end of the term and the term of any right or option of any extension or renewal of the engagement.
   - If the cost to the body corporate of the engagement exceeds the relevant limit for major spending for the scheme, then two quotations must be submitted in accordance with s 152 of the Std Mod or the exemption must apply.
2. A resolution approving the engagement has no effect if the term of the engagement does not start within 12 months after the passing of the resolution.
3. The engagement must not be in the form of a by-law.
4. Payment can be based on a charge per lot, fee for service or some other "calculable" way. Because the engagement must state the basis on which the payment "is to be worked out" it is suggested that a flat fee arrangement be avoided in case this does not strictly comply with the requirement. However, a flat fee arrangement for the first year followed by an escalation provision for the second or subsequent years would probably be adequate.
5. The term of the engagement must not exceed the statutory term limitation period (see ¶38-750).
6. The engagement can be combined with the engagement of the same person as a service contractor (eg building manager) or the authorisation of the same person as a letting agent, or both.

The engagement of a governing body corporate manager is void unless all of the following are satisfied:

- The original owner control period must have ended.
- A special resolution approving the engagement must be passed without any votes in favour being exercised by proxy.
- The motion for that special resolution must be decided by secret ballot.
- The motion for that special resolution must be the last item on the agenda.

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• The meeting at which that special resolution is passed must be one of the following (unless the scheme has a small number of members, in which event it can be any general meeting):

(a) an annual general meeting at which:

(i) at least one executive member position on the committee is not filled, or
(ii) the total number of voting members of the committee elected is less than three, or

(b) an extraordinary general meeting called under Ch 3 Pt 2 Div 2 Subdiv 2 of the Std Mod following the holding of an annual general meeting where the required number of committee members was not elected, where after the appointment of any additional committee members —

(i) at least one executive member position on the committee is not filled, or
(ii) the total number of voting members of the committee elected is less than three, or

(c) a general meeting called under s 38 of the Std Mod to fill a position after removal of a committee member where, after that meeting —

(i) at least one executive member position on the committee is not filled, or
(ii) the total number of voting members of the committee elected is less than three.

• The material given to members of the body corporate for the general meeting that passes the motion for the special resolution must have included the terms of the engagement and an explanatory note in the approved form explaining the nature of the engagement (see **Form A18** (¶70-235)).
• The engagement must:

(a) be in writing
(b) state that the body corporate manager is required to carry out all the functions of the committee and each executive member of the committee, and
(c) state the basis on which payment for the body corporate manager's services is to be worked out.

• The engagement must not be in the form of a by-law.
• If the cost to the body corporate of the engagement exceeds the relevant limit for major spending for the scheme, then two quotations must be submitted in accordance with s 152 of the Std Mod or the exemption must apply.

An amendment of an engagement of a governing body corporate manager is void unless it complies with s 58 of the Std Mod.

The following should be noted about the engagement of governing body corporate managers —

1. This type of appointment is intended to apply when there are insufficient owners prepared to serve on the committee. However, it can be applied where owners refrain from standing for the committee for the sole purpose of creating the circumstances for this type of appointment to apply.
2. Payment can be based on a charge per lot, fee for service or some other "calculable" way (see comments above).
3. The engagement of a governing body corporate manager may be in addition to an existing engagement of the person as an executive body corporate manager. However, in practice, this would not appear to serve any purpose. Where this does occur, to the extent that the existing engagement is inconsistent with the governing body corporate manager's engagement, the existing engagement is of no effect.
4. The term of the engagement ends on the earlier of —

(a) the end of the body corporate's next annual general meeting held after the general meeting at which the engagement was approved, or
(b) 12 months after the day the engagement began.

This means that two general meetings will need to be held each year if a body corporate wishes to avail itself of having a fully authorised body corporate manager — a most unsatisfactory outcome for both body corporate managers and bodies corporate.
5. A body corporate may terminate the engagement of a governing body corporate manager before the expiry of their term of appointment.
6. During the term of appointment of a governing body corporate manager there cannot be a committee or an executive member of a committee. The governing body corporate manager has exclusive authority, subject to the statutory reporting requirements.

Accommodation Module

The position is the same.

Commercial Module

The position regarding executive body corporate managers (there being no provision for governing body corporate managers because, under the Com Mod, there must be a committee) is the same, except that there is no requirement for quotations to be obtained.

Small Schemes Module

The processes for the appointment of governing and executive body corporate managers are generally less restrictive than those under the Std Mod.

Law: BCCM Act, s 100, 119

Std Mod, s 58, 59, 60, 61, 62, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

Acc Mod, s 56, 57, 58, 59, 60, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

Com Mod, s 78, 79, 80, 81, 82, 83, 84, 85, 86

SS Mod, s 23, 24, 25, 26, 27, 58, 59, 60, 61, 62, 63, 64.

Last reviewed: 25 July 2006

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[¶38-740] Banking arrangements

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Body corporate managers in Queensland do not have to be licensed to operate, and they are not required to comply with normal trust account regulations, such as those applying to real estate agents. However, they are regulated by a number of prescriptive provisions of the BCCM Act. A fundamental requirement of the Act is that the body corporate's bank account must be opened with the consent, and in the name, of the body corporate. Where the contract of engagement of the body corporate manager authorises the manager or an associate of the manager to operate the account, then the account must be capable of being operated by any of the following:

(a) the body corporate manager or associate, or
(b) the "authorising members'' acting jointly.

"Authorising members'' mean one or more members of the committee, depending on the size of the scheme. The purpose of this provision is to allow a body corporate to take control of its account in the event that the manager's engagement ends. To determine the number of committee members who must be able to operate the account, one must first determine whether or not the scheme is a "small scheme''. A small scheme is a scheme that satisfies all of the following:

- It is a basic scheme.
- There is no letting agent.
- There are no more than six lots.
- The Small Schemes Module applies.

If the scheme is a small scheme, at least one member of the committee must be authorised to operate the account. If the scheme is not a small scheme and all lots are not in identical ownership, then at least two members of the committee must be authorised to operate the account. If all lots are in identical ownership, the single owner, or their nominee, must be authorised to operate the account.

Where a manager's engagement has ended, the body corporate may give notice to the financial institution not to allow the manager or their associate to operate the account, in which event the account can only be operated by the alternate nominees. The financial institution must comply with that notice.

While these provisions work where the body corporate manager is an executive body corporate manager, it is not clear how they operate where the manager is a governing body corporate manager. In the latter case there is no committee of the body corporate and therefore there is no member of the committee available to act as an alternate signatory. The only way the provisions can operate in the case of a governing body corporate manager is to assume that they do not apply to such a manager.

Where there is a body corporate manager but they are not authorised to operate the bank account, then the account is operated jointly by the "authorised members'', ascertained as above.

Whether the manager is an executive body corporate manager or a governing body corporate manager, special provisions apply in relation to the administration and reconciliation of administrative and sinking funds of the body corporate. They comprise the following:

1. An invoice of the body corporate manager for services provided to the body corporate by the manager in administering the fund must not include services provided by another person. This provision appears to be restricted to services related to the "fund'' (which presumably means both the administrative and sinking fund), although as a precautionary measure one may regard the restriction as applying to all invoices. An example of services provided by another would be audit fees payable to an external auditor.

2. Both the administrative and sinking funds must be established.

3. Any amount not required to be paid into the sinking fund must be paid into the administrative fund, the amounts required to be paid into the sinking fund being:

(a) contributions raised to the sinking fund (ie those to cover capital or non-recurrent spending)
(b) proceeds of insurance claims for destruction of items of a major capital nature, and
(c) interest from sinking funds invested.

4. The administrative and sinking funds can only be invested in a way a trustee can invest trust funds.

5. Funds received must be paid into one or more accounts kept solely in the name of the body corporate at a financial institution.

6. All payments from the administrative or sinking fund must be made from the account.

7. Funds must not be transferred between the administrative fund and sinking fund.

8. All payments from the administrative and sinking fund may only be made on receipt of:

(a) a written request for payment, or
(b) written evidence of payment, including, for example, a receipt.

9. Unless a manager is given a notice to return records under s 206 of the Std Mod, within 30 days of revocation of an executive body corporate manager's authorisation or 30 days after a governing body corporate manager's engagement ends the manager must hand back a range of financial records to the body corporate. The records are those listed in s 147(5) of the Std Mod.

10. Where a body corporate decides that reconciliation statements must be prepared under s 149 of the Std Mod, the manager must prepare, within 21 days after the last day of each month, for each account kept, a statement showing the reconciliation of:

(a) a statement, produced by the financial institution, showing the amounts paid into and from the account during the month, and
(b) invoices and other documents showing payments into and from the account during the month.

If a body corporate manager fails to comply with any of the obligations listed above in numbers 1 to 9, inclusive, they commit an offence that carries a maximum penalty of 20 penalty units.

These obligations do not sit comfortably with the obligations of a real estate agent who is also carrying on the business of a body corporate manager. Sections 378 to 380 of the *Property Agents and Motor Dealers Act 2000* effectively require a real estate agent who receives money in respect of a "transaction'' to (immediately on receiving the money) pay it into a general trust account with an approved financial institution. That Act then requires the agent to account to the person on whose behalf the transaction was carried out. A "transaction'', by ordinary definition, is an act of transacting business. Payment of money by a lot owner to a body corporate to discharge a debt would appear to be an act of transacting business. Therefore, if a real estate agent acts on behalf of a body corporate in respect of such a transaction, it is clearly arguable that the money received as a result of the transaction must be paid into a general trust account and be accounted for in accordance with the *Property Agents and Motor Dealers Act 2000*.

If this is correct, then a real estate agent, acting as a body corporate manager in conjunction with their normal real estate agency business, must:

(a) deposit money received on behalf of a body corporate in a general trust account, and
(b) account for those moneys by paying them into a qualifying account in the name of the body corporate.

Accounts and Banking

While the body corporate is required to keep separate sinking and administrative funds for each scheme, in practice only one bank account is used by a particular body corporate manager into which all of the deposits for all of the schemes operated by that body corporate manager are banked. This is not dissimilar to the conduct of a solicitors trust account into which client's funds are banked but recorded against each of the client ledgers for the clients of the firm.

Accommodation Module

The position is the same.

Commercial Module

The position is the same, except that the Com Mod also provides for the establishment of a promotion fund (which a body corporate manager may administer).

Small Schemes Module

The position is the same.

Law: BCCM Act s 151

Property Agents and Motor Dealers Act 2000, s 378, 379, 380

Std Mod s 146, 147, 149, 206

Acc Mod s 144, 145, 147, 204

Com Mod s 105, 106, 108, 163

SS Mod s 80, 81, 83, 139.

Last reviewed: 5 February 2016

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[¶38-750] Term limitation

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The term of engagement of an executive body corporate manager must not exceed three years, including any rights or options of extension or renewal. If the term exceeds three years, then the engagement is not void but the term is taken to be three years.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same, except that the maximum term, including any rights or options of extension or renewal is one year.

Law: Std Mod, s 118

Acc Mod, s 116

Com Mod, s 83

SS Mod, s 62.

Last reviewed: 25 July 2006

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[¶38-800] Transfer entitlements

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A body corporate manager may transfer (ie assign) their engagement to another person if the body corporate approves the transfer. The approval may be given by the committee, unless it is a restricted issue (see ¶36-100), or by ordinary resolution of the body corporate. A decision on whether or not to approve a transfer must be made within 30 days of the body corporate receiving the information that is reasonably necessary for it to decide the application.

The body corporate must not unreasonably withhold approval to a proposed transfer. Also, it cannot require a fee or other consideration for approving the transfer (other than reimbursement for expenses reasonably incurred in relation to the application for approval).

In deciding whether to approve, the body corporate may have regard to the following.

1. The character of the proposed transferee and related persons of the proposed transferee.

It would not be unreasonable to require a proposed transferee to be a person of good character. If they had prior criminal convictions relating to honesty, then it would not be unreasonable to refuse consent. Honesty is an important quality for a body corporate manager. However, minor criminal convictions in the distant past may not justify refusal. Mere bad reputation without any evidence to support it would not be sufficient. Section 130 of the Std Mod, which specifies the statutory terms for terminating an engagement, is a useful guide to the type of criminal conviction that would be objectionable. It specifies a conviction (whether recorded or not) of an indictable offence involving fraud, dishonesty or assault, or an indictable offence involving an assault (see ¶38-850).

Related persons means:

- if the proposed transferee is a corporation — the corporation's directors, substantial shareholders and principal staff, or
- if the proposed transferee is a partnership — the partners and principal staff of the partnership.

A substantial shareholder is not defined. Adopting general principles it is likely to be 15% or more of the shares in the company. Principal staff is not defined either. To qualify, a staff member is likely to be in a managerial or supervisory position. He or she would be someone with a relatively high degree of responsibility for either the running of the business or the performance of the duties of the body corporate manager.

Where there is a genuine concern about reputation or character, consideration should be given to raising the issue directly with the proposed transferee and giving them the right to comment and explain. This approach would ensure procedural fairness and make it easier for the body corporate to establish that any refusal of consent is not unreasonable.

2. The financial standing of the proposed transferee.

The body corporate's concern will be to ensure that the proposed transferee has the financial capacity to conduct the business the subject of the engagement. If the body corporate manager is site specific, then the test of financial standing will be lower than for a body corporate manager who is acquiring a large number of engagements at the same time. Care should be taken to ensure that the financial standing test is not set too high. The body corporate clearly has to be satisfied about solvency and about the availability of sufficient financial resources (either in cash or in approved finance facility) to carry on the business relating to the engagement, but taking into account anticipated cash-flow from the engagement or business. Again, any concerns should be disclosed and discussed with the proposed transferee so that the body corporate will have the benefit of all available information when making its decision.

3. The proposed terms of the transfer.

It is difficult to gauge the extent to which the body corporate can have regard to the terms of the proposed transfer. To a large extent these are matters between the body corporate manager and the proposed transferee. However, the following are examples of terms that may be relevant:

- The proposed transferee is obliged to employ the body corporate manager for a set period after the transfer to assist with the changeover.
- The consideration for the transfer is payable over a period, during which the proposed transferee must retain the management.
- The body corporate manager is leaving part of the consideration owing as a loan and securing repayment over the engagement or business.
- The transaction will otherwise be financed.

The actual price may not, in itself, be a relevant term of the proposed transfer.

4. The competence, qualifications and experience of the proposed transferee and any related persons of the proposed transferee, and the extent to which the transferee and any related persons have received or are likely to receive training.

These must be relevant to the role to be performed. For example, it would be unreasonable to require a body corporate manager to have legal or accounting qualifications. However, it would not be unreasonable to require the manager to have some accounting experience. There may also be cause for refusing approval if the proposed transferee has been acting as a body corporate manager for some years but has gained a reputation as lacking competence. Care needs to be taken if approval is to be refused for lack of training or experience. First, the complexity of the community titles scheme should be considered. The degree of training or experience needed for a 20-unit, all-residential complex will be different to the degree needed for a mixed-use complex comprising say a hotel, shops and 140 residential apartments. Consideration will also need to be given to the availability of suitable training and the willingness of the proposed transferee to undertake that training. Again, related persons are defined (see point 1 above). For example, an inexperienced body corporate manager whose experienced and competent wife works in the business as a principal staff member should be differentiated from an inexperienced manager who has no support from a related person.

5. Matters to which, under the engagement, the body corporate may have regard.

The provisions of the engagement itself may supplement these statutory provisions, but the provisions of the engagement must be more extensive than the statutory requirements. For example, the engagement may require the proposed transferee to be a person engaged in the business of body corporate management for a period of not less than three years before the date of transfer. Where the engagement contains more extensive matters for transfer approval, then the body corporate is entitled to take those matters into account.

The point has already been made that the body corporate must not unreasonably withhold approval. It is also prohibited from requiring or receiving a fee or other consideration for approving the transfer, other than reimbursement for reasonable expenses in relation to the application. For body corporate managers there is no exception to this prohibition.

Accommodation Module

The position is the same.

Commercial Module

The Com Mod does not deal with transfer of body corporate managers' engagements. Transfers of engagements under this module are therefore unregulated. Reference would therefore need to be made to the terms of the engagement to determine what is required.

Small Schemes Module

The SS Mod does not deal with transfer of body corporate managers' engagements. Transfers of engagements under this module are therefore unregulated. Reference would therefore need to be made to the terms of the engagement to determine what is required. In practice transfers are not an issue because the term of the engagement is limited to one year.

Law: Std Mod, s 122, 130

Acc Mod, s 120.

Last reviewed: 30 August 2012

[¶38-850] Termination

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The engagement of a body corporate manager can be terminated in the following ways —

- by mutual agreement
- for conviction of particular offences
- for failure to comply with a remedial action notice
- for breach under the terms of an engagement agreement.

Each of these will be examined.

Termination by mutual agreement

The body corporate may only act under the authority of an ordinary resolution of a general meeting. This would normally follow an agreement to terminate between the body corporate manager and the body corporate. A written termination agreement would normally be entered into and in an appropriate case would contain relevant releases between the parties.

Termination for conviction of particular offences

The body corporate may terminate the engagement of a person as a body corporate manager if the person (or, if the person is a corporation, a director of the corporation) —

- is convicted (whether or not a conviction is recorded) of an indictable offence involving fraud or dishonesty
- is convicted (whether or not a conviction is recorded) on indictment of an assault or an offence involving an assault
- carries on a business involving the supply of services to the body corporate, or to owners or occupiers of lots, and the carrying on of the business is contrary to law
- transfers an interest in the engagement without the body corporate's approval.

Approval to terminate on these grounds must be obtained by means of an ordinary resolution of a general meeting.

Termination for failure to comply with a remedial action notice

Under s 131(1) of the Std Mod, the body corporate may terminate the engagement of a person as a body corporate manager if the person (or, if the person is a corporation, a director of the corporation) —

- engages in misconduct, or is grossly negligent, in failing to carry out functions required under the engagement
- fails to carry out duties under the engagement
- contravenes the code of conduct for body corporate managers
- fails to comply with the disclosure requirements imposed by s 133(2) of the Std Mod (supply of goods or services), s 134(2) (associate contracts) or s 135(2) (commissions or other benefits) — as to which see ¶38-500
- fails to comply with s 147 of the Std Mod (which involves an offence for failure to comply with account matters related to the administrative and sinking funds of the body corporate)
- the body corporate manager, being a governing body corporate manager, fails to give the reports required by s 62 of the Std Mod (see ¶38-650).

The following procedure must be observed:

1. The body corporate must give the person a remedial notice (as to which, see below).
2. The person must have failed to comply with the notice within the period allowed.
3. The termination must be approved by an ordinary resolution of a general meeting (unless the body corporate manager is an executive body corporate manager, in which event the owners of at least one half of the lots can give the notice on the body corporate's behalf).

A remedial notice is a written notice that states each of the following —

- that the body corporate believes the person has acted in a way mentioned in s 131(1) of the Std Mod
- details of the action sufficient to identify:
  - the misconduct or gross negligence the body corporate believes has occurred, or
  - the duties the body corporate believes have not been carried out, or
  - the provision of the code of conduct or the Std Mod the body corporate believes has been contravened
- that the person must, within the period stated in the notice (but not less than 14 days after the notice is given):
  - remedy the misconduct or gross negligence, or
  - carry out the duties, or
  - remedy the contravention
- that if the person does not comply with the notice in the period stated, the body corporate may terminate the engagement.

The notice must satisfy each of the above matters and must be properly served on the body corporate manager. The dangers of hastily preparing a faulty remedial action notice were noted in the *Merrimac* decision (*Henderson & Anor* v *The Body Corporate for Merrimac Heights* (2011) LQCS ¶90-174; [2011] QSC 336).

The implications of the inclusion of a breach of the code of conduct as a matter that gives rise to the issue of a remedial notice should not be underestimated; however, the mere canvassing for support by caretakers is not a breach of the code of conduct, as determined in the *Merrimac* decision. The relevant code of conduct is in Sch 2 of the BCCM Act, and a review of the various clauses of the code will reveal:

- that there are a number of generalisations that may be difficult to prove or disprove (eg the manager has failed to act "professionally"; the manager must act in the best interests of the body corporate; the manager must take reasonable steps to ensure employees comply with the BCCM Act; the manager must not engage in unconscionable conduct)
- if breach of those types of requirements can be proved, then it may be impossible for the body corporate manager to remedy the breach upon receipt of the remedial notice. Alternatively, it may be very difficult to prove that any action taken is adequate to remedy the breach — for example, if a body corporate manager has acted unprofessionally in an irretrievable way, how can they demonstrate that they have "remedied" the contravention?

Termination for breach under the terms of the engagement

It is common for the agreement under which a body corporate manager is engaged to contain provisions regulating termination of the agreement for breach. It is also common for the agreement to provide for the issue of a default notice requiring remedy of a breach; in much the same way as a remedial notice under s 131 of the Std Mod operates. In these circumstances the provisions in the agreement apply in addition to the statutory provisions. Therefore, a body corporate could elect which provision it wishes to proceed under or decide to proceed under both provisions. Where a body corporate proceeds under the terms of the agreement, either solely or in addition to the statutory procedure, those terms must be carefully followed to achieve a valid termination.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same. Because the duration of the manager's term is restricted to one year, terminations under this module will not be common.

Law: Std Mod, s 62, 128, 129, 130, 131, 147

Acc Mod, s 60, 126, 127, 128, 129, 145

Com Mod, s 87, 88, 89, 90, 106

SS Mod, s 65, 66, 67, 68.

Last reviewed: 30 August 2012

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[¶38-900] Return of body corporate records and property

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Section 206 of the Std Mod sets up a process for a body corporate to recover **"specified property"** from certain persons who have control of that property, including a body corporate manager or an associate of a body corporate manager (see s 309 of the BCCM Act to determine whether someone is an associate). The specified property comprises —

- a body corporate asset for a community titles scheme
- a record or other document of a body corporate
- a body corporate seal.

The following requirements must be satisfied —

1. The body corporate manager or their associate must have taken possession or control of specified property.
2. That must have been done in the person's capacity or purported capacity as a body corporate manager or an associate of a body corporate manager.
3. The person must have been served with a prescribed notice requiring them to give, within 14 days after service, the specified property to a named committee member or a governing body corporate manager. See **Form B26** (¶73-050).

The right to claim a lien on the specified property has been removed by s 206(3) of the Std Mod. A prescribed notice is a notice of a resolution of the committee or, if a governing body corporate manager is acting, a notice signed by or for the owners of at least 50% of the lots. Failure to comply with the notice is an offence and carries a maximum penalty of 20 penalty units.

Section 207 of the Std Mod regulates the handing over of documents in photographic or electronic image form after a body corporate manager's engagement expires and is not renewed or is otherwise brought to an end. The body corporate has two options:

1. Accept the document in the form of a disc, tape or other article or any material from which writings or messages are capable of being produced or reproduced (with or without the aid of another article or device), if the form is immediately accessible by the body corporate.
2. Require the body corporate manager (at its own expense) to reproduce the document in paper form and hand it over in that form.

Failure to comply with this obligation is an offence that carries a maximum penalty of 20 penalty units.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod, s 206, 207

Acc Mod, s 204, 205

Com Mod, s 163, 164

SS Mod, s 139, 140.

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[¶39-030] Building managers — engagement and authorisation

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A building manager is a service contractor within the meaning of the BCCM Act. Therefore, the engagement of a building manager is void unless it:

- is in writing
- states the term of the engagement, including:
  - when the term begins and when it ends, and
  - the term of any right or option of extension or renewal of the engagement
- states the functions that the building manager is required or authorised to carry out, and
- states the basis on which payment for the building manager's services is to be worked out.

In practice, the engagement takes the form of a management agreement between the body corporate and the building manager. It cannot take the form of a by-law (s 116(3), Std Mod).The engagement should not contain any authority to exercise powers under s 119(2) of the BCCM Act unless it is also intended to appoint the building manager as a body corporate manager. Care therefore needs to be taken when framing the duties of the building manager to ensure that no duty involves such an authority. For example, the right of a building manager to enforce the by-laws on behalf of the body corporate would be an authority to exercise a power.

The following should also be noted about the engagement of a building manager:

1. The engagement, or any amendment of the engagement, must be approved by ordinary resolution of the body corporate, and for the passing of the resolution no votes are to be exercised by proxy. (See **Form B27**, ¶73-070.) In addition, a secret ballot is required for the motion for the engagement or for any amendment to include a right or option of extension or renewal, unless all of the lots in the scheme have identical ownership.
2. The material forwarded to members of the body corporate for the general meeting that considers a motion approving an engagement must include the terms of the engagement, including:
   - when the term of the engagement begins and ends
   - the term of any right or option of extension or renewal of the engagement.

   Although some of the terms are specified, this is only an inclusive list of what has to be disclosed. To avoid doubt it is recommended that a complete copy of the proposed written engagement be sent out with the notice convening the meeting.
3. The material forwarded to members of the body corporate for the general meeting that considers a motion approving an agreement to amend a person's engagement as a service contractor *to include a right or option for extension or renewal* must include an explanatory note in the approved form explaining the nature of the amendment. **Form A20** (¶70-237) should be used.
4. The material forwarded to members of the body corporate for the general meeting that considers a motion approving an agreement to amend a person's engagement as a service contractor *for any other purpose* ("for another agreement to amend an engagement": s 114(2)(c)(iii), Std Mod) must include the terms and effect of the amendment. Again, to avoid doubt it is recommended that a complete copy of the proposed written engagement be sent out with the notice convening the meeting. In addition, there must be an explanation of the effect of the amendment. It is suggested that this be written in simple, but complete and accurate terms.
5. A resolution approving the engagement has no effect if the term of the engagement does not start within 12 months after the passing of the resolution.
6. Payment can be based on a charge per lot, fee for service or some other "calculable" way. Because the engagement must state the basis on which the payment "is to be worked out" it is suggested that a flat fee arrangement be avoided in case this does not strictly comply with the requirement. However, a flat fee arrangement for the first year followed by an escalation provision for the second or subsequent years would probably be adequate.
7. The term of the engagement must not exceed the statutory term limitation period (see ¶39-050).

8. The engagement can be combined with the engagement of the same person as a body corporate manager or the authorisation of the same person as a letting agent, or both. As a general rule, the appointment of a building manager as a body corporate manager is not recommended. This is because the skills required for the two roles are quite different and most building managers are not suited to the more technical and clerically focused role of a body corporate manager.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 119

Std Mod, s 114, 116, 121

Acc Mod, s 112, 114, 119

Com Mod, s 79, 81, 86

SS Mod, s 60, 61, 64.

Last reviewed: 26 January 2006

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[¶39-050] Building managers — term limitation

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The term of engagement of a building manager must not exceed 10 years after allowing for any rights or options of extensions or renewal. If it purports to be longer, then it is reduced to 10 years, and this is the only consequence of the failure to observe the legislative restriction. After the granting of a management agreement, the body corporate may amend it to include a right or option to extend or renew only if —

(a) the subsequent right or option is for no longer than five years
(b) the unexpired term of the agreement, from the day of the approving resolution, is not more than 10 years, and
(c) the formal requirements for the amendment, as set out in s 114 of the Std Mod (see ¶39-030), are complied with for the amendment.

It is clear that at the end of a term the agreement expires and a further agreement is required before the building manager can continue to act beyond the term expiry date. This effectively precludes a "holding over" period.

Accommodation Module

The term limitation is 25 years, including any rights or options of extension or renewal. The position is otherwise the same.

Commercial Module

The term limitation is 25 years, including any rights or options of extension or renewal. The position is otherwise the same.

Small Schemes Module

The term limitation is one year, including any rights or options of extension or renewal. The position is otherwise the same.

Law: Std Mod, s 119

Acc Mod, s 117

Com Mod, s 84

SS Mod, s 63.

Last reviewed: 26 January 2006

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[¶39-100] Building managers — transfer entitlements

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A building manager may transfer (by way of either assignment or transfer) their engagement to another person if the body corporate approves the transfer. The approval may be given by the committee, unless it is a restricted issue (see ¶36-100) for the committee, or by ordinary resolution of the body corporate. A decision on whether or not to approve a transfer must be made within 30 days of the body corporate receiving all of the information that is reasonably necessary for it to decide the application.

The body corporate must not unreasonably withhold approval to a proposed transfer. In deciding whether to approve the body corporate may have regard to the following.

1. The character of the proposed transferee and related persons of the proposed transferee.

It would not be unreasonable to require a proposed transferee to be a person of good character. If they had prior criminal convictions relating to honesty, then it would not be unreasonable to refuse consent. Honesty is an important quality for a building manager who often handles large sums of money acting as a letting agent and who is also responsible for the security of the building. However, minor criminal convictions in the distant past may not justify refusal. Mere bad reputation without any evidence to support it would not be sufficient. Section 130 of the Std Mod, which specifies the statutory terms for terminating an engagement, is a useful guide to the type of criminal conviction that would be objectionable. It specifies a conviction (whether recorded or not) of an indictable offence involving fraud, dishonesty or assault, or an indictable offence involving an assault (see ¶39-150). Related persons means:

- if the proposed transferee is a corporation — the corporation's directors, substantial shareholders and principal staff, or
- if the proposed transferee is a partnership — the partners and principal staff of the partnership.

A substantial shareholder is not defined. Adopting general principles it is likely to be 15% or more of the shares in the company. Principal staff is not defined either. To qualify, a staff member is likely to be in a managerial or supervisory position. They would be someone with a relatively high degree of responsibility for either the running of the business or the performance of the duties of the building manager.

Where there is a genuine concern about reputation or character, consideration should be given to raising the issue directly with the proposed transferee and giving them the right to comment and explain. This approach would ensure procedural fairness and make it easier for the body corporate to establish that any refusal of consent is not unreasonable.

It is not uncommon for the committee to request that the proposed transferee obtain a copy of their criminal history and provide that to the committee along with all other requested documents. The proposed transferee is the only party who can obtain a copy of their criminal record upon written application and the payment of a minimal fee.

2. The financial standing of the proposed transferee.

The body corporate's concern will be to ensure that the proposed transferee has the financial capacity to conduct the business the subject of the engagement. The business will be the management functions combined with the letting operation to be conducted within the building. If the building manager is site specific, then the test of financial standing will be lower than for a building manager who manages a "chain" of buildings. Care should be taken to ensure that the financial standing test is not set too high. The body corporate clearly has to be satisfied about solvency and about the availability of sufficient financial resources (either in cash or in approved finance facility), to carry on the business relating to the engagement, but taking into account anticipated cash-flow from the engagement or business. Again, any concerns should be disclosed and discussed with the proposed transferee so that the body corporate will have the benefit of all available information when making its decision.

3. The proposed terms of the transfer.

It is difficult to gauge the extent to which the body corporate can have regard to the terms of the proposed transfer. To a large extent these are matters between the building manager and the proposed transferee. However, the following are examples of terms that may be relevant:

- The proposed transferee is obliged to employ the outgoing building manager for a set period after the transfer to assist with the changeover.
- The consideration for the transfer is payable over a period, during which the proposed transferee must retain the management.
- The body corporate manager is leaving part of the consideration owing as a loan and securing repayment over the engagement or business.
- The transaction will otherwise be financed.

The actual price may not, in itself, be a relevant term of the proposed transfer. This is despite the fact that the body corporate may have the right to share in the consideration (see below). In other words, the body corporate cannot refuse approval because it thinks the consideration is too low, thus resulting in its share of the consideration being too low. However, if the consideration does not represent fair market value for the transfer, then the amount will be relevant in determining the body corporate's share. This is a separate issue from whether or not the body corporate should give approval.

4. The competence, qualifications and experience of the proposed transferee and any related persons of the proposed transferee, and the extent to which the transferee and any related persons have received or are likely to receive training.

These must be relevant to the role to be performed. For example, it would be unreasonable to require a building manager to have engineering or building qualifications. However, it would not be unreasonable to require the manager to have some clerical experience. This is because of the records that need to be kept and the clerical work involved in operating a letting business. There may also be cause for refusing approval if the proposed transferee has been acting as a building manager for some years but has gained a reputation as lacking competence.

Care needs to be taken if approval is to be refused for lack of training or experience. First, the complexity of the community titles scheme should be considered. The degree of training or experience needed for a 20 unit all-residential complex will be different from the degree needed for a mixed use complex comprising say a hotel, shops and 140 residential apartments.

Consideration will also need to be given to the availability of suitable training and the willingness of the proposed transferee to undertake that training. Again, related persons are defined (see point 1 above). For example, an inexperienced building manager whose experienced and competent brother works in the business as a principal staff member should be differentiated from an inexperienced manager who has no support from a related person.

5. Matters to which, under the engagement, the body corporate may have regard.

The provisions of the engagement itself may supplement these statutory provisions, but the provisions of the engagement must be more extensive than the statutory requirements. For example, the engagement may require the proposed transferee to be a person having not less than three years experience in building management, or in the hospitality industry, during the three years immediately preceding the date of the proposed transfer. Where the engagement contains more extensive matters for transfer approval, then the body corporate is entitled to take those matters into account.

The point has already been made that the body corporate must not unreasonably withhold approval.

It is also prohibited from requiring or receiving a fee or other consideration for approving the transfer, other than reimbursement for reasonable expenses in relation to the application.

In the case of building managers (and service providers and letting agents generally) there is an exception to this prohibition. Section 126 of the Std Mod gives a body corporate the right to share in limited circumstances in the consideration that a service contractor or letting agent receives upon a transfer of their engagement or authorisation.

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Under the section, the transferor *must* pay a “transfer fee” to the body corporate on the transfer of its rights under the engagement or authorisation if:

- s 113 of the BCCM Act previously applied to: (a) the engagement or authorisation, or (b) the extension of the term of the engagement or authorisation. Section 113 prohibits a body corporate from seeking or accepting the payment of an amount, or the conferral of a benefit, for engaging a service contractor, authorising a letting agent or extending the term of an engagement or authorisation
- no more than two years have elapsed since the “initial contract date”, which is defined as the earlier of: (a) the day the service contractor or letting agent entered into the engagement or authorisation, or (b) the day the service contractor or letting agent first entered into any engagement or authorisation that has been continuously replaced or renewed. This period is called the “prescribed period”. Due to the definition of “enter” in s 124, if a service contractor or letting agent acquired his or her engagement or authorisation by means of a transfer/assignment, the initial contract date for that service contractor or letting agent is the day of the transfer, and
- the transferor is not: (a) a financier exercising a power of sale under a charge over the engagement or authorisation, or (b) transferring its rights under the engagement or authorisation because of “genuine hardship” that was not reasonably foreseeable as at the initial contract date. If the transferor falls into either of these two categories and has provided written substantiation of this to the body corporate when seeking approval for the transfer, it will not be liable for the transfer fee.

If a body corporate qualifies for the transfer fee, then the amount is a percentage of “the amount representing fair market value for the transfer”. This will usually be the consideration for the transfer, but that may not always be the case. If the consideration for the transfer is not at fair market value, then a body corporate could seek to have a valuation carried out to determine its entitlement. The valuation would be at the expense of the body corporate. The relevant percentage is:

- if the day when the body corporate approves the transfer (the “approval day”) is not more than one year after the initial contract date — 3%
- if the approval day is more than one year after the initial contract date — 2%.

The money received by the body corporate must be paid into its sinking fund and must be net of GST.

Finally, it should be noted that transfers by building managers are not as simplistic as these provisions might suggest. The transfer usually comprises three components: the manager’s unit, the management agreement (engagement) and the letting authority (authorisation). Each component has a value. The right of the body corporate to share in the consideration for the transfer is restricted to the value attached to the engagement and authorisation. The manager therefore has scope to apportion more of the consideration to the unit, thus minimising the amount payable to the body corporate. There could also be sound taxation reasons for such an approach. Bodies corporate should be mindful of this when receiving a transfer fee under these provisions.

The transfer review process can be handled as follows:

1. The body corporate receives details of the proposed transfer from the outgoing caretaker.
2. A copy of the contract providing details of the proposed transferee is sought by the committee from the outgoing caretaker (this may have price details missing).
3. The committee approaches and appoints a solicitor to handle and advise on the transfer process.
4. The committee’s solicitor reviews the current caretaking agreement to ensure that reasonable legal fees are payable by the outgoing caretaker.
5. The committee’s solicitor writes to the outgoing caretaker’s solicitors advising the documents required to be provided by the proposed new caretaker.
6. Upon that information being received expediently, the committee’s solicitor checks the material and prepares a brief memorandum of advice to the committee, including advice about the strengths and weaknesses of the proposed transferee, any missing material and applicable amendments required to be made to the deed of assignment.
7. The committee’s solicitor or the body corporate manager invites the proposed transferee to attend a meeting with the body corporate manager, lot owners and committee members, and prepares that committee with relevant questions to ask the proposed incoming caretaker.

8. Assuming the caretaker and persons to perform the duties (where the caretaker is a corporation) meets with approval, the committee's solicitor confirms final details of changes required to be made to the deed of assignment to assign the caretaking and letting rights and gives the body corporate manager instructions for the deed to be circulated for consideration either by vote outside the committee meeting or by way of the official committee meeting.
9. The deeds of assignment are executed in triplicate and copies provided to the relevant parties as part of the settlement process, together with the body corporate's tax invoice for payment from the net settlement proceeds.

The requirement to act reasonably

As noted above, the body corporate is required to act reasonably in in all decisions it makes, including when considering and consenting to (or not consenting to) the assignment or transfer of the management rights.

The reasonableness requirement as part of the body corporate's consent was brought under the microscope in *Pulse* (2016) LQCS ¶90-208; [2016] QBCCMCmr 43 (5 February 2016).

The management rights included an electricity meter reading agreement under which the building manager had provided meter reading services to the body corporate from the establishment of the scheme on a month to month basis, for which it was paid by the body corporate.

In February 2013, the committee held a meeting at which the building manager was told that the meter reading agreement as amended was terminated (given it was only a month to month agreement) and that the building manager had never been authorised to undertake the reading duties. The building manager denied this.

Following that, the building manager contracted to sell its management rights in October 2014. Unfortunately however that sale was frustrated by the body corporate's consent process so when the building manager found a new buyer in March 2015, he was keen to ensure the sale proceeded to settlement.

During the body corporate's consideration of the terms of the assignment, the body corporate issued a demand for the repayment of $19,261.90 and in the absence of payment, advised that they would issue a remedial action notice which, if not remedied, would entitle it to terminate the management rights.

Having lost one sale, the building manager decided to instead engage in "without prejudice" negotiations with the body corporate to repay the funds (which it continued to deny it owed) so that the assignment could proceed. The building manager was alive to the concern that the body corporate might unreasonably refuse to provide its consent if funds which it alleged were owed were not repaid to it.

At settlement, the body corporate was provided with a cheque for $12,000.00 plus GST and its consent to the assignment recorded in a deed.

Following the assignment, the former building manager brought an application to seek the repayment of the $12,000.00 plus GST to it.

The body corporate alleged:

- The application should be dismissed as the assignment had already taken place;
- Alternatively — the former building manager had not been authorised to carry out the meter reading services for the body corporate
- The body corporate had engaged Meter2Cash to read the meters until November 2012 and the form building manager was their subcontractor such that any payment to the manager should have been from Meter2Cash
- The former manager was guilty of misconduct by taking money for which no authority existed
- That the former manager had submitted minutes authorising the building manager to "take" periodic readings of unit electricity and water meters which were a "recent invention" in order to shore up its claim for payment
- That the money paid by the former building manager was a proper refund
- That the body corporate had not acted unreasonably.

The Adjudicator agreed with the former building manager and issued orders that the body corporate had acted unreasonably in withholding its consent, that it had breached s 120(6)(b) of the Accommodation

Module by receiving the payment and that the body corporate had breached the code of conduct by failing to act reasonably and fairly. The body corporate was required to repay the $12,000.00 plus GST additionally.

The Adjudicator found that notwithstanding the assignment of the management rights, the former building managers (who had also been lot owners) were directly concerned with the dispute and had standing notwithstanding the sale of the management rights and their lot in the scheme.

In considering whether the body corporate had acted reasonably, the Adjudicator held:

- the question of "reasonableness" was objective, rather than "correct" or "preferable"
- the fact that the body corporate was required to act reasonably and did not profess any reasonable explanation (other than the demand to repay a debt which they knew was disputed) as a reason to withhold its consent, such an entrenched position without adequate explanation, was unreasonable
- the body corporate "certainly has engaged in conduct that that is contrary to legislation, either intentionally or inadvertently"
- The issue of intention is immaterial, what is clear is that the body corporate have breached the legislation.

The Adjudicator, citing the *Grosvenor Apartments — Brisbane* [2006] QBCCMCmr 58 (10 February 2006) said:

> "A body corporate cannot use the power to withhold consent for the approval of the transfer as a tool to hold outgoing management rights owners over a barrel to agree to any demand or condition they seek to impose."

And:

> "The power that the body corporate held was, in my opinion, abused by it knowing that unless the applicant agreed to repay the debt, consent would not be provided to the transfer and that such action of the corporate was unfair and taking advantage of their superior position of power."

She declined to make a determination on whether the body corporate had engaged in unconscionable conduct and confirmed that she was not able to determine whether the former building manager had been engaged to provide the utility reading services and that the parties needed to have their evidence tested in a forum which allowed for cross examination in the minor civil dispute jurisdiction.

The take home lesson is that a body corporate is unable to use the assignment process as the opportunity to secure a benefit for itself at the expense of an outgoing manager. It must act reasonably in considering the assignment, terms and evidence presented to it.

Accommodation Module

The position is the same.

Commercial Module

The Com Mod does not deal with transfer of building managers' engagements. Transfers of engagements under this module are therefore unregulated. Reference would therefore need to be made to the terms of the engagement to determine what is required.

Small Schemes Module

The SS Mod does not deal with transfer of building managers' engagements. Transfers of engagements under this module are therefore unregulated. Reference would therefore need to be made to the terms of the engagement to determine what is required. In practice transfers are not an issue because the term of the engagement is limited to one year.

Law: BCCM Act, s 113

Std Mod, s 123, 124, 125, 126, 127.

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Acc Mod, s 121, 122, 123, 124, 125.

Last reviewed: 5 February 2016

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[¶39-150] Building managers — termination

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Subject to the body corporate first giving notice of the intention to terminate to a financier who has served a s 123 notice on the body corporate, the engagement of a service contractor or the authorisation of a letting agent can be terminated in the following ways —

- by mutual agreement
- for conviction of particular offences
- for failure to comply with a remedial action notice
- for breach under the terms of an engagement agreement.

In addition, the authorisation of a person as a letting agent can be terminated in accordance with s 145 of the BCCM Act (see ¶39-450).

Each of these will be examined.

Termination by mutual agreement

The body corporate may only act under the authority of an ordinary resolution of the body corporate. This would normally follow an agreement to terminate between the service contractor or letting agent and the body corporate. A written termination agreement would normally be entered into and in an appropriate case would contain relevant releases between the parties.

Termination for conviction of particular offences

The body corporate may terminate the engagement of a person as a service contractor or authorisation as a letting agent if the person (or, if the person is a corporation, a director of the corporation):

- is convicted (whether or not a conviction is recorded) of an indictable offence involving fraud or dishonesty
- is convicted (whether or not a conviction is recorded) on indictment of an assault or an offence involving an assault
- carries on a business involving the supply of services to the body corporate, or to owners or occupiers of lots, and the carrying on of the business is contrary to law
- transfers an interest in the engagement or authorisation without the body corporate's approval.

Approval to terminate on these grounds must be obtained by means of an ordinary resolution of the body corporate. In addition, the motion to approve the termination must be decided by secret ballot.

Termination for failure to comply with a remedial action notice

Under s 131 of the Std Mod, the body corporate may terminate the engagement of a person as a service contractor or letting agent if the person (or, if the person is a corporation, a director of the corporation):

- engages in misconduct, or is grossly negligent, in failing to carry out functions required under the engagementor authorisation
- fails to carry out duties under the engagementor authorisation
- contravenes the code of conduct for service contractors or the code of conduct for letting agents (ie there is a "cross obligation" in relation to the two codes of conduct)
- fails to comply with the disclosure requirements imposed by s 133(2) of the Std Mod (supply of goods or services), s 134(2) (associate contracts) or s 135(2) (commissions or other benefits) — as to which see ¶38-500.

The failure to properly prepare and serve a remedial action notice cannot be understated. A consideration of the *Merrimac* decision (*Henderson & Anor* v *The Body Corporate for Merrimac Heights* (2011) LQCS ¶90-174; [2011] QSC 336) should be made prior to the notice being finalised. See also *Peterson Management Services Pty Ltd* v *Body Corporate for The Rocks Resort* (2015) LQCS ¶90-203; [2015] QCAT 255. In that decision, the remedial action notice stated that the caretaker had to remedy the relevant breaches "**within 14 days** of being served with a copy of this Notice". The Queensland Civil and

Administrative Tribunal held that the notice was invalid because it should have stated that the caretaker had "**not less than 14 days**" to remedy the breaches as per the wording in s 129(4) of the Accommodation Module. To be safe, body corporate law firms often provide the caretaker 21 days within which to comply so that the 14-day issue is completely avoided.

The following procedure must be observed:

1. The body corporate must give the person a remedial notice (as to which, see below).
2. The person must have failed to comply with the notice within the period allowed.
3. The termination must be approved by an ordinary resolution of the body corporate.
4. The motion to approve the termination must be by secret ballot.

A remedial notice is a written notice that states each of the following —

- That the body corporate believes the person has acted in a way mentioned in s 131 or 86C(2) of the Std Mod (depending upon whether they are being served as a service contractor or letting agent).
- Details of the action sufficient to identify:
  - the misconduct or gross negligence the body corporate believes has occurred, or
  - the duties the body corporate believes have not been carried out, or
  - the provision of the code of conduct or the Std Mod the body corporate believes has been contravened.
- That the person must, within the period stated in the notice (but not less than 14 days after the notice is given to the person):
  - remedy the misconduct or gross negligence, or
  - carry out the duties, or
  - remedy the contravention.
- That if the person does not comply with the notice in the period stated, the body corporate may terminate the engagement or authorisation.

The notice must satisfy each of the above matters and must be properly served on the service contractor or letting agent.

The implications of the inclusion of a breach of the codes of conduct as a matter that gives rise to the issue of a remedial notice should not be underestimated. The relevant codes of conduct are in Sch 2 of the BCCM Act and a review of the various clauses of the codes will reveal —

- That there are a number of generalisations that may be difficult to prove or disprove (eg the service contractor or letting agent has failed to act "professionally"; the service contractor or letting agent must act in the best interests of the body corporate; the service contractor or letting agent must take reasonable steps to ensure employees comply with the BCCM Act and the code; the service contractor or letting agent must not engage in unconscionable conduct).
- If breach of those types of requirements can be proved, then it may be impossible for the service contractor or letting agent to remedy the breach upon receipt of the remedial notice. Alternatively, it may be very difficult to prove that any action taken is adequate to remedy the breach. For example, if a service contractor or letting agent has acted unprofessionally in an irretrievable way, how can they demonstrate that they have "remedied" the contravention?

Termination for breach under the terms of the engagement or authorisation

It is common for the agreement or authorisation under which a service contractor or letting agent is engaged to contain provisions regulating termination of the agreement or authorisation for breach. It is also common for the agreement or authorisation to provide for the issue of a default notice requiring remedy of a breach, in much the same way as a remedial notice under s 131 of the Std Mod operates. In these circumstances, the provisions in the agreement or authorisation apply in addition to the statutory provisions. Therefore, a body corporate could elect which provision it wishes to proceed under or decide to proceed under both provisions. Where a body corporate proceeds under the terms of the agreement or authorisation, either solely or in addition to the statutory procedure, those terms must be carefully followed to achieve a valid termination.

It is also common for the agreement and/or authorisation to contain cross-default clauses to make a default under one a default under the other. In those cases where, for example, a body corporate seeks to terminate the agreement, it would separately need to seek to terminate the authorisation on the grounds of the default under the agreement. Depending on the wording of the clauses, the termination of either the agreement or the authorisation may automatically bring about termination of the other.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same. Because the duration of the manager's term is restricted to one year, terminations under this module will not be common.

Law: Std Mod, s 128, 129, 130, 131.

Acc Mod, s 126, 127, 128, 129.

Com Mod, s 87, 88, 89, 90.

SS Mod, s 65, 66, 67, 68.

.40 Termination for breach under the agreement – receiver and manager appointed — Gallery Vie Decision Often a standard default clause in an agreement will provide that the body corporate is entitled to terminate the agreement where the manager is a company and is placed into liquidation.

The body corporate's termination effectively deprives the manager (and their creditors) of an asset to sell.

The recent QCAT decision of *Vie Management Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* v *Body Corporate for Gallery Vie* [2015] QCAT 164, has caused ripples in the management rights industry.

As a result of that decision, banks have taken a closer look at the terms upon which they will loan funds to a purchaser of management rights. Additionally, a deed of assignment or deed of variation may now (at the requirement of a caretaker's bank) contain a "Gallery Vie" clause which in effect precludes the body corporate from terminating the management rights where the sole right of termination arises in the context of a liquidator being appointed after receivers are appointed.

Last reviewed: 30 November 2015

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[¶39-200] Building managers — return of body corporate records and property

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Section 206 of the Std Mod sets up a process for a body corporate to recover **"specified property"** from certain persons who have control of that property, including a service contractor (eg building manager) or an associate of the building manager or letting agent (see s 309 of the BCCM Act to determine whether someone is an associate). The specified property comprises:

- a body corporate asset for a community titles scheme (which would include cleaning equipment, tools, furniture and unused materials and office equipment)
- a record or other document of a body corporate
- a body corporate seal.

The following requirements must be satisfied —

1. The building manager or their associate must have taken possession or control of specified property.
2. That must have been done in the person's capacity or purported capacity as a service contractor or an associate of a service contractor.
3. The person must have been served with a prescribed notice requiring them to give, within 14 days after service, the specified property to a named committee member or a governing body corporate manager. A prescribed notice is a notice of a resolution of the committee or, if a governing body corporate manager is acting, a notice signed by or for the owners of at least 50% of the lots. See **Form B26** (¶73-050).

Failure to comply with the notice is an offence and carries a maximum of 20 penalty units. Furthermore, the right to claim a lien on the specified property has been removed by s 206(3) of the Std Mod.

It is important to note that these provisions do not apply to person authorised as a letting agent, unless they are also a service contractor or an associate.

There is nothing in the BCCM Act or Std Mod that provides for recovery of documents or records from building managers. They would need to be recovered as body corporate "assets" in accordance with the above procedure.

Accommodation Module
The position is the same.

Commercial Module
The position is the same.

Small Schemes Module
The position is the same.

Law: Std Mod, s 206

Acc Mod, s 204

Com Mod, s 163

SS Mod, s 139.

Last reviewed: 26 January 2006

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[¶39-250] Engagement

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A letting agent is not a "service contractor" within the meaning of the BCCM Act. They are separately dealt with in both the BCCM Act and the Std Mod. The authorisation of a person as a letting agent is void if it does not comply with the following two requirements:

- it must be in writing, and
- it must state the term of the engagement, including—
  - – when the term begins and when it ends, and
  - – the term of any right or option of extension or renewal of the engagement.

In practice the authorisation is often called a "letting agreement" between the body corporate and the building manager. Sometimes it is incorporated in a building manager's management agreement (ie engagement). The authorisation or agreement should not provide for the letting agent to be remunerated. Where the authorisation is incorporated in a management agreement, the agreement should make it clear that no part of the manager's remuneration applies to the letting authorisation or any duties associated with that authorisation. Also, if duties are attached to an authorisation (usually by way of conditions) care needs to be taken to ensure that the duties do not involve an authority to exercise a power of the committee or any of its office bearers.

The following should also be noted about the authorisation of a letting agent:

1. The authorisation, or any amendment of the authorisation, must be approved by ordinary resolution of the body corporate, and for the passing of the resolution no votes are to be exercised by proxy. (See **Form B28**, ¶73-090.) In addition, a secret ballot is required for the motion for the authorisation or for any amendment to include a right or option of extension or renewal, unless all of the lots in the scheme have identical ownership.
2. The material forwarded to members of the body corporate for the general meeting that considers a motion approving an authorisation must include the terms of the authorisation, including:
   - when the term of the authorisation begins and ends
   - the term of any right or option of extension or renewal of the authorisation.

   Although some of the terms are specified, they are only inclusive of what has to be disclosed. To avoid doubt, it is recommended that a complete copy of the proposed written authorisation be sent out with the notice convening the meeting.
3. The material forwarded to members of the body corporate for the general meeting that considers a motion approving an agreement to amend a person's authorisation as a letting agent *to include a right or option for extension or renewal* must include an explanatory note in the approved form explaining the nature of the amendment. **Form A20** (¶70-237) should be used.
4. The material forwarded to members of the body corporate for the general meeting that considers a motion approving an agreement to amend a person's authorisation as a letting agent *for any other purpose* ("another agreement to amend an ... authorisation": s 114(2)(c)(iii)) must include the terms and effect of the amendment. Again, to avoid doubt it is recommended that a complete copy of the proposed written authorisation, incorporating the amendment, be sent out with the notice convening the meeting. In addition, there must be an explanation of the effect of the amendment. It is suggested that this be written in simple, but complete and accurate terms.
5. A resolution approving the authorisation has no effect if the term of the authorisation does not start within 12 months after the passing of the resolution.
6. The authorisation must not be in the form of a by-law.
7. The term of the authorisation must not exceed the statutory term limitation period (see ¶39-350).
8. The authorisation can be combined with the engagement of the same person as a body corporate manager or service contractor, or both. As a general rule, the appointment of a letting agent as a body corporate manager is not recommended. This is because the skills required for the two roles are quite different and most letting agents are not suited to the more technical and clerically focused role of a body corporate manager.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

This module makes no provision for the appointment of letting agents.

Specified Two-lot Schemes Module

There must not be a letting agent for the scheme in order for this module to apply.

Law: BCCM Act, s 119

Std Mod, s 114, 115, 116, 117, 120, 121

Acc Mod, s 112, 113, 114, 115, 118, 119

Com Mod, s 79, 80, 81, 82, 85, 86.

Last reviewed: 21 February 2012

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[¶39-300] Managed investment schemes

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Many letting businesses that operate within community titles scheme complexes are “managed investment schemes” within the meaning of the *Corporations Act 2001*. It does not matter which module regulates the scheme.

This means that a person selling a unit in combination with the letting operation is potentially a “promoter” of a managed investment scheme and the letting agent is potentially an “operator” of the scheme. Both the seller and agent need to either comply with the law or qualify for exemption from the law. If the seller is a “re-seller” of the unit, then they will be concerned to ensure that there is either an exemption in place or an appropriate “secondary sales notice” is provided to the purchaser. The way in which the Australian Securities and Investment Commission administers the law in relation to community titles schemes is explained in detail in its Policy Statement *PS 140 — Serviced Strata Schemes*.

Last reviewed: 26 January 2006

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[¶39-350] Term limitation

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The term of authorisation of a letting agent must not exceed 10 years, including any rights or options of extension or renewal. If the term exceeds 10 years, then the engagement is not void but the term is taken to be 10 years.

Accommodation Module

The term limitation is 25 years, including any rights or options of extension or renewal. The position is otherwise the same.

Commercial Module

The term limitation is 25 years, including any rights or options of extension or renewal. The position is otherwise the same.

Small Schemes Module

This module makes no provision for the appointment of a letting agent.

Specified Two-lot Schemes Module

There must not be a letting agent for the scheme in order for this module to apply.

Law: Std Mod, s 120

Acc Mod, s 118

Com Mod, s 85.

Last reviewed: 26 December 2008

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[¶39-400] Transfer entitlements

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A letting agent is in the same position as a building manager. The entire contents of ¶39-100 can therefore be applied to letting agents and reference should be made to that paragraph.

[¶39-450] Termination

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A letting agent is in the same position as a building manager. The entire contents of ¶39-150 can therefore be applied to letting agents and reference should be made to that paragraph.

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[¶39-470] Return of assets

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A letting agent, in that capacity, is not subject to s 206 of the Std Mod. Therefore, ¶39-200 does not directly apply.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod, s 206

Acc Mod, s 204

Com Mod, s 163

SS Mod, s 139.

Last reviewed: 26 January 2006

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[¶39-500] Role

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The most common service provider for a community titles scheme is a building manager (often incorporating a letting agent authorisation) but, bearing in mind the definition of a service provider, there are potentially a wide range of service providers, eg an elevator maintenance contractor, fire equipment service contractors, cleaning contractors and communications service providers (such as an Internet access or cable television provider).

The body corporate and the service providers should be careful to view these contractual relationships in light of the provisions of the BCCM Act and its regulation modules. This part of the commentary will serve to further highlight the relevance of the service contractor provisions to the broader range of longer-term contractors. However, it should be emphasised that the provisions are only concerned with contractual arrangements that have a term exceeding one year. Month by month arrangements or arrangements involving a term of one year or a lesser term than one year are not regulated under any of the modules.

Last reviewed: 23 January 2006

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[¶39-550] Engagement

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Other service contractors are in substantially the same position as a building manager. Therefore, the entire contents of ¶39-030 can be applied to other service contractors and reference should be made to that paragraph.

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[¶39-600] Term limitation

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Other service contractors are in substantially the same position as a building manager. Therefore, the entire contents of ¶39-050 can be applied to other service contractors and reference should be made to that paragraph.

[¶39-650] Transfer entitlements

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Other service contractors are in substantially the same position as a building manager. Therefore, the entire contents of ¶39-100 can be applied to other service contractors and reference should be made to that paragraph.

[¶39-700] Termination

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Other service contractors are in substantially the same position as a building manager. Therefore, the entire contents of ¶39-150 can be applied to other service contractors and reference should be made to that paragraph.

[¶39-750] Return of assets

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Other service contractors are in substantially the same position as a building manager. Therefore, the entire contents of ¶39-200 can be applied to other service contractors and reference should be made to that paragraph.

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[¶40-000] Purpose of meetings

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The administration of a community titles scheme is based on the democratic principle of rule by the majority. This is achieved indirectly by a committee of elected representatives of the owners which is able to make certain decisions on behalf of the body corporate. It is also achieved directly by various types of general meetings. These meetings are combined with statutory provisions conferring extensive participatory rights on owners and persons having an interest in the community titles scheme. General meetings are to be distinguished from meetings of the committee because:

- committee meetings are “representative” meetings in that the members of the committee are elected to represent the owners and must act in the interests of the owners and not their own interests, and
- general meetings are “self interest” meetings in that the persons participating represent themselves and, when they are entitled to vote, they are generally entitled to vote in their own interests without regard to the interests of other owners.

Meetings are the forum in which most decisions of the body corporate relating to the administration of the community titles scheme and the common property are made (see *D’Arcy v Tamar etc Railway Co*). The only other way in which decisions can be made for the body corporate is by exercise of an authority delegated by it (eg to a body corporate manager). Although the practical significance of meetings is commonly recognised, too many people living in community title schemes are unaware of the true legal significance of meetings.

This part of the commentary will examine a number of matters relevant to meetings, followed by more specific consideration of the various types of meetings.

.40 Case references. *D’Arcy* v *Tamar etc Railway Co* (1867) LR 2 Ex 158.

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[¶40-050] Types of meetings

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There are committee meetings and general meetings. There are three types of general meetings:

- first annual general meeting;
- annual general meeting;
- extraordinary general meeting.

Strictly speaking, the first annual general meeting is categorised as an annual general meeting but it needs to be considered separately because it has a special agenda. An extraordinary general meeting can be held before the first annual general meeting or at any time between annual general meetings.

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[¶40-100] Applicable law

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The legal significance of meetings becomes apparent when one appreciates that a decision made at an invalid meeting of a body corporate has no effect at law and cannot be acted upon. Such invalidity may arise in a number of ways but it is usually the result of a failure to observe the applicable law and proper procedures when convening or conducting the meeting.

These procedures are ascertained firstly with reference to the BCCM Act and then to the relevant regulatory module, although the Act is more concerned with authorising the content of the modules rather than detailing rules about meetings. The requirements of this legislation must be observed precisely. Next, reference should be made to the actual rules (if any) of the particular community titles scheme. These will usually appear in the by-laws recorded in the community management statement but they may also appear in resolutions of the body corporate or its committee, which are designed to establish special meeting procedures. These rules, whether they appear in the by-laws or in resolutions, must not be in conflict with the provisions of the BCCM Act or the relevant module. Such provisions always prevail over these rules. Finally, there are a number of common law principles that are relevant. These will be discussed in the relevant parts of the commentary.

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[¶40-150] Requirements of BCCM Act

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As mentioned, the BCCM Act does not contain the detailed procedures for the conduct of committee or general meetings. It confines itself to:

- authorising the regulation modules to set out the detailed law and procedures
- requiring meetings to be held in accordance with the relevant module
- prescribing what is required for a resolution without dissent, special resolution or ordinary resolution
- specifying procedures for voting by poll
- facilitating a "written general meeting vote", but only where the relevant module permits such a vote.

All of these provisions will be considered under relevant headings in the commentary that follows.

Law: BCCM Act, s 98–111.

[¶40-200] Motions and resolutions

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Two words inextricably associated with meetings are *motion* and *resolution*. A motion is a proposal put to a meeting for its consideration. It is the forerunner to a resolution. If passed by the meeting the motion becomes a resolution of the meeting. Before it is passed it can be amended. This occurs by "passing" a motion to amend the original motion. If the motion to amend the original motion is passed, then the original motion, as amended, becomes effectively the new motion. The constitution of a company or organisation often provides for different types of resolutions (eg, special resolution and unanimous resolution). In this event a motion may be categorised as a motion for a specified type of resolution (eg, a motion for a special resolution). Before it becomes a resolution the requisite majority of members specified in the constitution must pass it. In the case of a community titles body corporate, its constitution is effectively the BCCM Act and the relevant module.

The following is an example of a *motion* —

Motion 2 *THAT the body corporate consent to Mr John Smith, the owner of lot 4 in the community titles scheme, keeping a spotted cattle dog in his lot and the secretary is authorised to give a letter of consent to Mr Smith.*

The following is an example of a *motion to amend* that motion:

THAT Motion 2 be amended by adding the words "subject to him agreeing to ensure that the dog does not travel in the elevator" after the words "in his lot".

The following is an example of a *resolution* (being a resolution resulting from Motion 2 and the amendment):

RESOLVED that the body corporate consent to Mr John Smith, the owner of lot 4 in the community titles scheme, keeping a spotted cattle dog in his lot, subject to him agreeing to ensure that the dog does not travel in the elevator, and the secretary is authorised to give a letter of consent to Mr Smith.

Motions are normally proposed and seconded by members from the floor of a meeting, except where the constitution requires that a period of prior notice must be given of the motion. If a motion is moved and no one is prepared to second it, then the motion usually lapses and is not further considered by the meeting. In the case of a general meeting of a body corporate, the substance of motions (other than motions to correct minutes or procedural motions) must appear on the notice of the meeting before they can be considered by the meeting. Any member of a community title body corporate may request that a motion be included on a notice of general meeting. The committee can also resolve to include motions on the notice of meeting. In the case of a community title body corporate once a motion has been included on the notice of a general meeting it need not be formally moved and seconded at the meeting.

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[¶40-250] Types of resolutions

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In a community titles scheme there are committee resolutions and general meeting resolutions. There is only one type of resolution that can be passed at a committee meeting but four types of resolutions can be passed at a general meeting of a body corporate:

- an ordinary resolution
- a majority resolution
- a special resolution
- a resolution without dissent.

If a particular type of resolution is required for a particular purpose (eg a special resolution to make a by-law), then a resolution passed for that purpose may only be amended or revoked by a resolution of the required type (eg special resolution in the above case). The type of resolution required for a particular purpose is determined by the BCCM Act and relevant module (see table at ¶36-050). A motion to rescind a resolution must be proposed and notified in the same way as any other motion. A notice of general meeting must clearly indicate whether a motion requires an ordinary, majority, special or unanimous resolution for their passage. A motion that is not designated as a motion for a unanimous resolution does not become a unanimous resolution merely because it is passed unanimously.

Law: BCCM Act, s 105–108

Std Mod, s 71(4).

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[¶40-300] Committee resolution

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Requirements for a committee resolution

All resolutions of the committee are simply "committee resolutions". Provided a quorum is present, a motion for a committee resolution is decided by a majority of votes of the voting members entitled to vote on the question present (either in person or by proxy) and voting. Each voting member entitled to vote on a question (including executive members) has one vote.

For example: There is a committee of seven members, but one member is absent from the meeting and one is not entitled to vote the motion. If all five of the remaining members vote on the motion, three must vote in favour for it to be passed.

There is a difference between a voting member and a member entitled to vote on a question. A voting member is a member of the committee who, in the absence of being disqualified from voting, is entitled to vote at committee meetings. A non-voting member is a member of the committee who under no circumstances has a right to vote. The two committee members who fall into the non-voting category are body corporate managers and caretaker service providers.

Disqualification from voting

In some circumstances a voting member may be disqualified from voting on a question (eg if they have a conflict of interest).

Section 52(5) of the Std Mod makes it clear that a voting member of the committee, who is an executive member, only has one vote, even if they hold more than one executive position (eg chairperson and secretary).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

Because the committee comprises only a secretary and treasurer and both of those positions may be held by one person, a question is decided by:

- in the case of both positions being held by the same person, that person, or
- in the case of the positions being held by different persons, by the two persons acting in agreement about how the question is decided.

Therefore, in the case of this module, committee decisions are effectively decided unanimously.

Law: Std Mod, s 52, 53

Acc Mod s 52, 53

Com Mod s 26, 27

SS Mod s 20, 21.

Last reviewed: 19 March 2010

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[¶40-350] Ordinary resolution

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An ordinary resolution is one passed at a duly convened general meeting of a body corporate by a simple majority, based either on the number of people voting or, in the event of a poll, based on contribution schedule lot entitlements. One vote only may be exercised for each lot included in the scheme, whether personally, by proxy or in writing.

For example: Fifty people vote on a motion. Thirty of those people (whose contribution schedule lot entitlements total 280) vote in favour of the motion while the remaining 20 people (whose contribution schedule lot entitlements total 282) vote against the motion. Based on numbers voting for and against, the motion would be passed. However, if someone demanded a poll, the vote would be determined on the basis of contribution schedule lot entitlements (280 for and 282 against) and the motion would be lost.

Form B29 (¶73-110) shows how a motion can be proposed as an ordinary resolution.

Law: BCCM Act, s 108, 110.

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[¶40-355] Majority resolution

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The vote for a majority resolution —

- must be in writing
- cannot be exercised by proxy.

The motion for a majority resolution is only passed if the votes counted for the motion are more than 50% of the lots for which persons are entitled to vote on the motion.

For example: If a scheme has 20 lots, and valid votes on the motion are cast in writing for 14 lots, then eight of those votes would need to be in favour of the motion for it to be passed.

Law: BCCM Act, s 107.

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[¶40-400] Special resolution

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A motion is passed by special resolution only if:

- for a meeting notice of which is given —
  - – before 4 March 2003 — the votes counted for the motion are more than the votes counted against the motion, or
  - – after 4 March 2003 — at least two-thirds of the votes cast are in favour of the motion, and
- the number of votes counted against the motion are not more than 25% of the number of lots included in the scheme, and
- the total of the contribution schedule lot entitlements for the lots for which votes are counted against the motion is not more than 25% of the total of the contribution schedule lot entitlements for all lots included in the scheme.

Only one vote may be exercised for each lot included in the scheme, whether personally, by proxy or in writing.

For example: Take a scheme comprised as follows:

Lot	Entitlement
1	10
2	15
2	15
4	20
5	20
6	25
7	25

Total	= 130
25% total	= 32.5
25% lots	= 1.75

1. If lots 1 and 4 vote against the motion, then:

   (a) before 4 March 2003 —

   - the votes counted for are more than the votes counted against (ie 5 for and 2 against)
   - the votes counted against are more than 25% of the lots in the scheme (ie 2 is more than 1.75)
   - the contribution schedule lot entitlements against the motion are not more than 25% of the total of the contribution schedule lot entitlements (ie the 30 entitlements against are less than 32.5), and
   - the motion is lost.

   (b) after 4 March 2003 —

   - the votes in favour of the motion are at least two-thirds of the votes cast (ie two-thirds of the votes cast is 4.67 and 5 votes cast in favour is more than 4.67)
   - the votes counted against are more than 25% of the lots in the scheme (ie 2 is more than 1.75)
   - the contribution schedule lot entitlements against the motion are not more than 25% of the total of the contribution schedule lot entitlements (ie the 30 entitlements against are less than 32.5), and
   - the motion is lost.

2. If lot 7 votes against the motion, then:

   (a) before 4 March 2003 —

• the votes counted for are more than the votes counted against (ie 6 for and 1 against)
• the votes counted against are not more than 25% of the lots in the scheme (ie 1 is not more than 1.75)
• the contribution schedule lot entitlements against the motion are not more than 25% of the total of the contribution schedule lot entitlements (ie the 25 entitlements against are less than 32.5), and
• the motion is passed as a special resolution.

(b) after 4 March 2003 —

• the votes in favour of the motion are at least two-thirds of the votes cast (ie two-thirds of the votes cast is 4.67 and 56 votes cast in favour is more than 4.67)
• the votes counted against are not more than 25% of the lots in the scheme (ie 1 is not more than 1.75)
• the contribution schedule lot entitlements against the motion are not more than 25% of the total of the contribution schedule lot entitlements (ie the 25 entitlements against are less than 32.5), and
• the motion is passed as a special resolution.

3. If all owners are entitled to vote but the owners of lots 2, 5 and 6 do not exercise a vote (eg because they are absent or decide not to vote) and the owners of lots 1 and 3 vote against the motion, then:

(a) before 4 March 2003 —

• the votes counted for are not more than the votes counted against (ie 2 for and 2 against)
• the votes counted against are more than 25% of the lots in the scheme (ie 2 is more than 1.75)
• the contribution schedule lot entitlements against the motion are not more than 25% of the total of the contribution schedule lot entitlements (ie the 25 entitlements against are less than 32.5), and
• the motion is lost.

(b) after 4 March 2003 —

• the votes in favour of the motion are not at least two-thirds of the votes cast (ie two-thirds of the votes cast is 2.67 and 2 votes cast in favour is less than 2.67)
• the votes counted against are more than 25% of the lots in the scheme (ie 2 is more than 1.75)
• the contribution schedule lot entitlements against the motion are not more than 25% of the total of the contribution schedule lot entitlements (ie the 25 entitlements against are less than 32.5), and
• the motion is lost.

4. In the case of the last example, before 4 March 2003, if any two or more lots vote against the motion, then it will be lost. If only one lot votes against the motion, then it will be passed. After 4 March 2003 the position will be the same.

Form B30 (¶73-130) shows how a motion can be proposed for a special resolution.

Law: BCCM Act s 106.

[¶40-450] Resolution without dissent

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A motion is passed by resolution without dissent only if no vote is counted against the motion. Only one vote may be exercised for each lot included in the scheme, whether personally, by proxy or in writing. It follows that if any person votes against the motion it is lost.

For example: A scheme has 12 lots with the same contribution schedule lot entitlements. The owners of four of the lots do not attend the meeting or attempt to exercise their vote. Another owner attends, but is unfinancial. If all of the other seven owners vote in favour of the motion, it is passed as a resolution without dissent.

Form B31 (¶73-150) shows how a motion can be proposed for a resolution without dissent.

Law: BCCM Act, s 105.

[¶40-500] Resolutions by written vote

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Section 111 of the BCCM Act provides for certain general meeting matters to be decided by a written vote. However, the section only applies to a body corporate where the module regulating the body corporate says it applies. When the section applies, all general meeting resolutions may be passed by the body corporate by written vote without the need for a meeting to be held. At this stage the section has not been applied to bodies corporate regulated by the Std Mod. However, the Std Mod does provide for committee resolutions to be passed by written vote. This involves giving notice of the motion to all committee members followed by a majority of those members agreeing in writing to the motion (see ¶40-900). The resolution is taken to have been dealt with at a meeting of the committee.

Accommodation Module

The position is the same.

Commercial Module

The position is the same for committee resolutions. In addition, s 111 of the BCCM Act has been applied to bodies corporate regulated by the Com Mod. Therefore, in the case of a body corporate regulated by this module, a resolution on a motion may be passed, and has effect as a resolution without dissent, special resolution or ordinary resolution as may be required for the motion, even though the motion is not placed before and decided at a general meeting of the body corporate. For this to occur:

- a vote on the motion must be exercised for each lot included in the scheme
- the vote for each lot must be exercised by a person who would be entitled (other than merely as a proxy) to exercise the vote for the lot at a general meeting held to decide the motion
- each vote must be a vote for the motion, and
- each vote must be given or confirmed in writing.

This effectively means that a person holding a proxy cannot vote on a motion being considered under this procedure. However, a company nominee or representative of an owner (including a representative of another community title body corporate) would be entitled to exercise a vote. The following procedure is recommended for this type of vote:

1. The committee passes a resolution to authorise conduct of the written vote (see **Form B32**, ¶73-170) or the body corporate manager authorises conduct of the vote by exercising their delegated authority (see **Form B33**, ¶73-190).
2. A notice inviting written votes is sent to all lot owners shown on the roll (see **Form B34**, ¶73-210).
3. Lot owners (or their representatives or company nominees) record their votes in writing using the "Voting Paper".
4. The voting papers are returned to the secretary.
5. The result of the vote is recorded in the minute book (see **Form B35**, ¶73-230).

Small Schemes Module

There is no provision for committee resolutions to be passed by written vote. This is because, at most, the committee is only comprised of two people and the module allows meetings to be called and held in the way, and at the times and places, decided by the committee.

However, s 111 of the BCCM Act has been applied to bodies corporate regulated by this module. Therefore, the procedure set out above for the Com Mod applies.

Law: BCCM Act, s 111

Std Mod, s 54

Acc Mod, s 54

Com Mod, s 28, 162

SS Mod, s 19, 138.

[¶40-550] Importance

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Like other corporations, a body corporate can only make decisions by passing a resolution at either a general meeting or at meetings of its committee. The convening and holding of a general meeting is a complex and expensive exercise and is not a convenient way to make the day-to-day administrative decisions of the body corporate. In contrast to that, a meeting of the committee can be held with relative ease and provides an inexpensive and convenient way for the body corporate to make its decisions. Although there are limitations on the decisions that can be made by a committee (see ¶36-050) most day-to-day administrative decisions are within its power. It follows that meetings of the committee play an important role in the administration of the body corporate and its common property.

[¶40-600] Convening meetings

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A committee meeting may be called by:

- the secretary, or
- in the absence of the secretary — the chairperson, or
- in the absence of both the secretary and the chairperson — another member of the committee acting with the agreement of enough committee members to form a quorum.

A quorum is at least half of the number of voting members of the committee (see ¶40-750). It should be noted that this is discretionary and not obligatory. Also, the right of the chairperson to call a committee meeting is based on the *absence* of the secretary. The same applies to the right of other committee members to call a committee meeting — the secretary and chairperson must be *absent*. This means that the right does not apply if the secretary or chairperson simply refuse to call the meeting. In those circumstances a group of committee members whose numbers are sufficient to form a quorum for a meeting may ask in writing for a meeting to be called. The request is directed to the secretary or, in the absence of the secretary, to the chairperson. The request would need to specify the substance of the issues to be dealt with at the meeting, otherwise the secretary or chairperson would have difficulty preparing the notice of meeting. (See **Form B36**, ¶73-250 for the request.) The meeting must be held within 21 days after receipt of the request. This is obligatory.

The secretary and chairperson may both be presumed to be absent if the request, addressed to the secretary and the chairperson, is given at the address for service of the body corporate, and no reply is received within seven days. This presumption allows a committee member to act on the written request. Unfortunately, if the secretary or chairperson reply within the seven days saying that they refuse to convene the meeting, then the presumption may be defeated and another committee member may not have the right to call the meeting. In that event the only recourse may be an application under Ch 6 of the BCCM Act for an order by an adjudicator requiring the secretary or chairperson to act on the written request and call the meeting.

Although there is no express authority in the BCCM Act or the regulatory module, the committee itself may determine when it will meet (see resolution in **Form B37**, ¶73-270). The secretary would normally act to convene the meeting in accordance with the committee's decision. If the secretary refuses to do this, then the formal written request procedure would probably need to be followed before an application would lie under Ch 6 of the BCCM Act.

The meeting is called by giving at least seven days notice to committee members of when and where the meeting is to be held. At least seven days' notice must be given of the meeting unless all voting members of the committee:

(a) vote at the last committee meeting held before the proposed meeting, in favour of a reduced notice period of at least two days, or
(b) agree in writing to the reduced notice period.

It is important to note that all voting members must vote on the matter and they must all vote in favour. If one voting member is absent from the meeting, then the reduced notice period cannot be approved. If there is a defect in the approval of the reduced notice period and the seven-day notice period is not complied with, then the committee meeting will not be valid.

See **Form B38**, ¶73-290, for a notice of committee meeting. The person giving the notice need not give it to himself or herself. In addition:

(a) if the body corporate has a notice board — advice of the proposed meeting must be placed on that notice board, and
(b) advice of the proposed meeting must be given to each lot owner individually unless there is in place a current instruction to the secretary that they do not want that advice.

The "advice" required to be given:

- must state when and where the meeting is to be held
- must be accompanied by the agenda for the meeting
- must be placed on the notice board, and
- must be delivered to the residential or business address of a lot owner when notice of the meeting is given to committee members.

In practice, the “advice” will usually take the form of a complete copy of the meeting notice and agenda. These requirements ensure that owners know about committee meetings and the business proposed to be transacted at them in advance so that they may exercise their “opposition” rights (see ¶41-200) before decisions are implemented.

The requirement for “delivery” to the residential or business address of the lot owner may cause difficulties. These addresses are not necessarily the address shown on the roll and it may be difficult for a body corporate to ascertain these addresses. Where this is the case, the only other course is to deliver the advice to the address shown on the roll.

The address for service on a subsidiary scheme body corporate that owns a lot in the principal scheme would have to be the address for service recorded on the title for its common property. The actual manner of “delivery” is not specified. Subject to anything in the by-laws for the particular community titles scheme, delivery options are essentially:

- by hand delivery
- by facsimile, or
- by mail.

Hand delivery could involve handing the advice to the owner personally or placing the advice under a door or in a letterbox. The important thing to note is that the delivery must be at the lot owners’ residential or business address. The same applies to a facsimile and mail item. The facsimile or mail item must arrive at the residential or business address, not some other address.

The Std Mod also specifies where a committee meeting must be held. The first meeting after formation of the committee is held at the place where the person convening the meeting (usually the secretary) determines. After that, the committee itself determines where meetings must be held. However, a meeting cannot be held more than 15 km (measured in a straight line on a horizontal plane) from the scheme land if at least half the number of committee members required for a quorum object by written notice to the secretary. The objection would need to be received by the secretary before the meeting is convened. Also, the objection could be for a specific meeting or for meetings generally. See **Form B39** (¶73-310) for a general notice of objection.

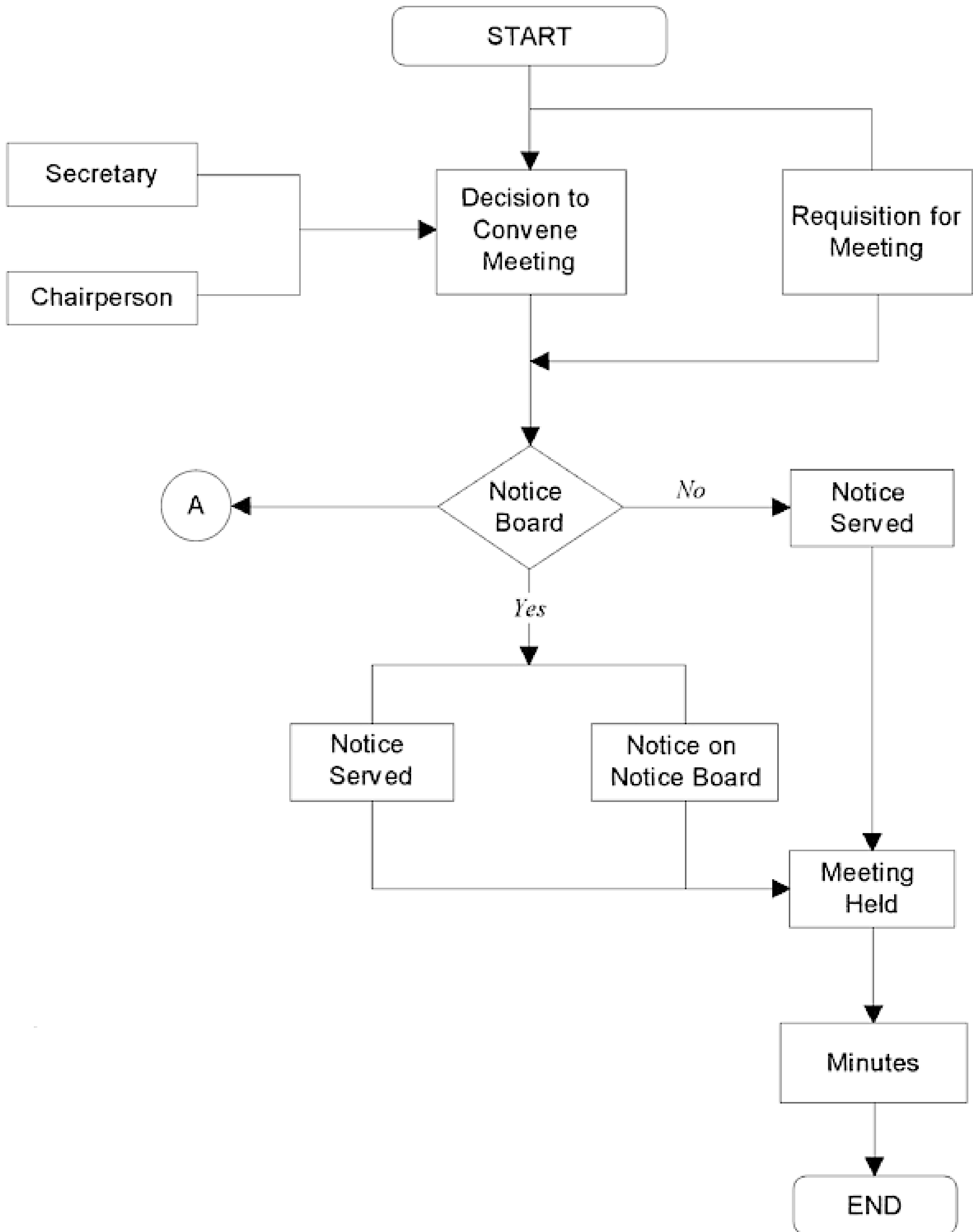
In summary, the procedure for convening a meeting of the committee is as follows:

1. Either:

    (a) the secretary or chairperson (in the secretary’s absence) decides to convene a meeting (with or without a committee resolution), or
    (b) another committee member (in the absence of the secretary and chairperson) with the support of members making up a quorum decides to convene a meeting, or
    (c) members making up a quorum make a written request for a meeting.

2. Prepare and sign notice of meeting (see **Form B38**, ¶73-290).
3. Place notice of meeting on the body corporate notice board (if there is one).
4. Deliver a copy of the notice to each lot owner entitled to receive notice at their residential or business address.
5. Hold the meeting.
6. Prepare the minutes (see ¶41-150).

Committee Meeting Process



Accommodation Module

The position is the same.

Commercial Module

The position is substantially the same.

Concerning the time for the giving of notice of the meeting, it may be two days if the members vote at “a” meeting (not “the last” meeting) in favour of the reduced period for all “future committee meetings” (not simply for the “proposed meeting”). Concerning the place of the meeting, the 15 km requirement does not apply.

Small Schemes Module

None of these procedures apply to bodies corporate regulated by the SS Mod. Instead, committee meetings are required to be called and held in the way, and at the times and places, decided by the committee.

Law: Std Mod s 44, 45, 46

Acc Mod s 44, 45, 46

Com Mod s 19, 20, 21

SS Mod s 19.

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[¶40-650] Agenda

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It has already been noted that the notice of a committee meeting must contain an agenda for the meeting. This agenda must state the substance of the issues to be considered at the meeting. This requires more than a mere topical listing. For example the following approach to an agenda would not be adequate:

AGENDA

1. Record persons present.
2. Record apologies.
3. Determine if there is a quorum.
4. Minutes of previous meeting.
5. Action on by-law breach.
6. Pool fencing issue.
7. Elevator noise.
8. General business.

Instead, the following approach would be adequate:

AGENDA

1. Record persons present.
2. Record apologies.
3. Determine if there is a quorum.
4. To confirm that the minutes of the previous meeting held on 3 March 2006 are an accurate account of proceedings at that meeting.
5. To receive a report on alleged breaches of by-law 16 by the occupiers of lot 22 and to decide whether enforcement action should be taken.
6. To consider a request from the building manager to expend $450 to improve the safety of the swimming pool fence and to decide whether to authorise the expenditure.
7. To consider a complaint from the owner of lot 33 about operating noise from the elevator and to decide what action (if any) should be taken.
8. General business.

The agenda must include the substance of the following motions —

- to confirm the minutes of the previous meeting (if there was one)
- to confirm a previous resolution passed by written vote (if there was one).

The inclusion of “general business” is in order. This is because s 47 of the Std Mod says that the committee may consider issues raised at the meeting that are not on the agenda. This entitlement does not mean that the agenda can be manipulated so that contentious issues are not disclosed but are dealt with as “other issues” from the floor of the meeting. That would be an abuse of the obligation to include the substance of the issue on the agenda. The general business item should be restricted to genuine “last minute issues” and issues raised in good faith by committee members.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

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This does not apply to bodies corporate regulated by the SS Mod. Instead, committee meetings are required to be called and held in the way, and at the times and places, decided by the committee.

Law: Std Mod s 47

Acc Mod s 47

Com Mod s 22

SS Mod s 19.

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[¶40-700] Conducting meetings

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The chairperson must chair all meetings of the committee at which the chairperson is present. In the absence of the chairperson, the voting members present at the meeting choose one of the members of the committee (with the consent of that person) to chair the meeting. There is no requirement for the member chosen to be a voting member, so there does not appear to be any reason why the body corporate manager cannot be chosen to chair the meeting. Section 119(2) of the BCCM Act clearly allows a body corporate to delegate to the body corporate manager some or all of the powers of an executive member of its committee. The chairperson is clearly an executive member, so there is no reason why the powers of the chairperson cannot be delegated to the body corporate manager. Section 27A(7) of the *Acts Interpretation Act 1954* says that a properly exercised delegated power is taken to have been exercised by the delegator. However, in the absence of the chairperson from the meeting s 48(2) of the Std Mod makes it clear that there is no default entitlement for the body corporate manager, as delegate of the chairperson, to chair the meeting. The position can be stated as follows:

- If a chairperson is present at a committee meeting, then they have the right to chair the meeting.
- If a chairperson is absent from a committee meeting but a body corporate manager who is the delegate of the chairperson is present, then the body corporate manager has no entitlement to chair the meeting in the absence of being chosen to do so by the voting members of the committee.
- If a chairperson and a body corporate manager who is the delegate of the chairperson are both present at the meeting, then the chairperson has the first right to the chair. This is because s 119(3) of the BCCM Act preserves the right of an executive member whose power has been delegated to exercise that power.
- If the chairperson does not want to chair the meeting, then he or she may stand down from the chair in favour of a body corporate manager delegate. Section 48(2) of the Std Mod would not apply because the chairperson is not absent from the meeting. However, at any stage during the meeting the chairperson may give directions to the manager who is acting as their delegate. This is because s 119(3) of the BCCM Act ensures that an executive committee member whose duties have been delegated is able to direct how the delegated power is exercised. This is consistent with s 27A(10A) of the *Acts Interpretation Act 1954*, which provides that the delegation of a power does not relieve the delegator of the delegator's obligation to ensure that the power is properly exercised.
- The body corporate manager, while acting as delegate of the chairperson, would not be entitled to exercise the vote of the chairperson. This is because the chairperson would still be at the meeting unless the manager was elected by the voting members to chair the meeting in the absence of the chairperson. In those circumstances the manager is not acting as the delegate of the chairperson. In any event, voting is not a function or power of the chairperson as such and is not capable of being included in the delegation. Furthermore, the right to vote on behalf of the chairperson cannot be obtained by the manager by having the chairperson appoint the manager as his or her proxy. This is because s 101 of the Std Mod prohibits the appointment of a body corporate manager as the proxy of a member of the committee. (Sections 101(2)(b) and 49(2)(b) of the Std Mod are in conflict but it is likely that the prohibition in s 101(2)(b) is the deciding provision.)

The following procedure is suggested for conducting the meeting:

1. The chairperson calls the meeting to order.
2. The names of committee members present are noted by the chairperson and recorded by the secretary.
3. The names of other persons present (eg building manager, lot owners) are noted by the chairperson and recorded by the secretary.
4. The chairperson determines that a quorum is present and declares to this effect. The secretary notes the chairperson's declaration.
5. The chairperson calls for any apologies and the secretary records them.
6. The minutes of the previous meeting are read (or, if the members so agree, are taken as read).

7. The minutes are discussed and then confirmed as an accurate account of the proceedings of the last committee meeting. The chairperson then signs the minutes.
8. Each agenda item is then dealt with as follows:

   – The chairperson reads and explains the agenda item.
   – There may be some discussion about the matter.
   – A motion is proposed.
   – The motion is debated.
   – A vote is taken on the motion.
   – The secretary records the result.

9. After all specific agenda items are dealt with, the meeting considers any general business.
10. The chairperson declares the meeting closed.
11. The secretary prepares the minutes of the meeting.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

This does not apply to bodies corporate regulated by the SS Mod because the committee does not have a chairperson. Instead, committee meetings are required to be called and held in the way, and at the times and places, decided by the committee.

Law: BCCM Act, s 119

Acts Interpretation Act 1954, s 27A

Std Mod, s 48, 49, 101

Acc Mod, s 48, 49, 99

Com Mod, s 23, 24, 68

SS Mod, s 19.

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[¶40-750] Quorum

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A quorum for a meeting of the committee is at least half the number of voting members of the committee. A non-voting member who is present is not counted. The only non-voting members of a committee are body corporate managers or caretaking service contractors. A voting member who is present is counted as one. However, if the voting member also has proxies of one or more absent voting members, they are counted as two unless the use of proxies at that meeting is prohibited by s 100(2) or 103(2)(b) of the Std Mod. This is the case even if they hold two or more proxies of absent members.

The following examples illustrate how these provisions operate:

1. If the committee comprises 7 voting members, a quorum is 4. This is because half of 7 equals 3.5, which is taken to the next full number, namely 4.
2. If the committee comprises 6 voting members, a quorum is 3.
3. If the committee comprises 7 voting members, a quorum is 4 (as per calculation in 1. above). Three of those members give their proxies to one of the other members. In order for a quorum to be present the member holding the 3 proxies and 2 other voting members of the committee must be present. This is because the member holding the 3 proxies is only counted as "2" and not as "3" or "4" as one might expect.

Accommodation Module

The position is the same.

Commercial Module

The position is the same, except that the only non-voting member of a committee is a body corporate manager who is chosen only as secretary, treasurer or secretary and treasurer. The restriction on committee membership does not apply to service contractors or letting agents.

Small Schemes Module

This has no application to bodies corporate regulated under the SS Mod. Where the committee comprises one person, that person decides all questions. Where the committee comprises two persons, those two persons in agreement decide all questions. Quorums are irrelevant.

Law: Std Mod, s 12, 49, 100, 103

Acc Mod s 13, 49, 98, 101

Com Mod s 11, 24, 67, 70

SS Mod s 20.

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[¶40-800] Adjournments

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Neither the BCCM Act nor the Std Mod gives a committee the right to adjourn its meetings. However, the right to adjourn would exist at common law. It would need to be exercised by resolution of the meeting rather than declaration of the chairperson. If the chairperson purported to adjourn the meeting without a resolution, the remaining members of the committee (if they comprised a quorum and if the chairman leaves the meeting) could elect one of their number to chair the meeting and they could then continue with the meeting. It would probably not be necessary to give notice of the adjourned meeting but, unless there is good reason not to do so, it would be preferable to give such notice. It would also be wise to prepare and distribute minutes of that part of the meeting that has been completed. There are two reasons for this:

1. They will serve as notice of the adjourned meeting (assuming the date, time and place of the adjournment are included in the minutes).
2. They will serve as notice of the resolutions passed, which may be a necessary pre-requisite to implementation of the resolutions (see ¶41-200).

Accommodation Module

The position is the same, except that the giving of notice of the resolution is not a pre-requisite to implementing the resolution.

Commercial Module

The position is the same, except that the giving of notice of the resolution is not a pre-requisite to implementing the resolution.

Small Schemes Module

The position is the same, except that the giving of notice of the resolution is not a pre-requisite to implementing the resolution.

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[¶40-850] Voting

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At committee meetings where there is a quorum questions are decided by a majority of votes of the voting members entitled to vote on the question present (in person or by proxy) and voting. The following should be noted:

- If there are four members present and one of those members holds a proxy for another member who is absent, then five votes can be exercised. The member holding the proxy effectively has two votes. The other members have one vote each.
- A voting member who is an executive member only has one vote, even if they hold more than one executive position.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

This has no application to bodies corporate regulated under the SS Mod. Where the committee comprises one person, that person decides all questions. Where the committee comprises two persons, those two persons in agreement decide all questions. Quorums are irrelevant. No provision is made for committee members to appoint a proxy.

Law: Std Mod s 49, 52

Acc Mod s 49, 52

Com Mod s 24, 26

SS Mod s 20.

© CCH

[¶40-900] Written votes

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A committee need not meet to pass a resolution on a motion. Instead, the resolution is valid if:

- notice of the motion is given to all committee members or, in an emergency, as many members as it is practicable to contact, and
- a majority of all voting members of the committee entitled to vote on the motion agrees to the motion.

The following should be noted about this provision:

- The notice must be given in writing and the members' agreement must be given in writing. The notice in **Form B40** (¶73-330) is recommended. It includes provision for the written agreement of the member.
- In an emergency the notice may be given orally or by another appropriate form of communication (eg email) and the members' agreement may be expressed in the same way. Care needs to be taken to ensure that it is a genuine emergency.
- Advice of the motion must be given at the same time notice of the motion is given (except in an emergency when it must be given as soon as reasonably practicable) to each lot owner, other than those who are under a current election not to receive such notice.
- The notice and advice of the motion must be given by the secretary, or another member of the committee authorised by a majority of voting members of the committee to give the notice and advice.
- The resolution is taken to have been dealt with at a meeting of the committee.
- The obligations of committee members and their proxy holders regarding conflicts of interest (see ¶41-000) apply to motions to be passed in this way.

Accommodation Module

The position is the same.

Commercial Module

The position is substantially the same.

Small Schemes Module

This has no application to bodies corporate regulated under the SS Mod. Where the committee comprises one person, that person decides all questions. Where the committee comprises two persons, those two persons in agreement decide all questions. They decide if and how committee meetings are held. Committee meetings may therefore be unnecessary.

Law: Std Mod, s 54

Acc Mod, s 54

Com Mod, s 28

SS Mod, s 19, 20.

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[¶40-950] Proxies

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A voting member of the committee may appoint a proxy to act for them at a meeting of the committee (**Form A7** (¶70-170) is the approved proxy form for committee members). The person appointed must be another voting member of the committee or a person who is eligible to be an ordinary member of the committee. The secretary and treasurer can only appoint a proxy with the committee's approval. Such approval should be given by resolution of the committee (see **Form B41**, ¶73-350). The appointment of a proxy is only effective if the member or holder of the proxy gives, by hand, by post or by facsimile, a properly completed proxy form to the secretary before:

- the start of the committee meeting at which the proxy is to be exercised, or
- if the body corporate or committee has fixed an earlier time (which cannot be earlier than 24 hours before the time fixed for the meeting), that earlier time (see **Form B42**, ¶73-370).

However, the body corporate can pass a special resolution prohibiting the use of proxies:

- for particular things described in the special resolution (see **Form B43**, ¶73-390), or
- altogether (see **Form B44**, ¶73-410).

A proxy can only be used at one meeting of the committee and ceases to have effect immediately after the meeting. The proxy document itself:

- must be in the approved form
- must be in the English language
- must be in a document separate from a contract
- cannot be irrevocable
- cannot be transferred by the holder of the proxy to a third person, and
- must appoint a named individual.

The following points should also be noted about proxies:

1. A voting committee member who is the proxy for another member may, in the absence of the other member, vote both in their own right and also for their proxy. However, a person may exercise the proxy of only one person for voting at a committee meeting.
2. A proxy cannot be exercised at a meeting if the committee member who gave the proxy is personally present at the meeting or if the scheme is the principal scheme in a layered arrangement of schemes.
3. A voting committee member cannot be prevented by contract from exercising a vote at a committee meeting and cannot be required by contract to make someone else the member's proxy for voting at a committee meeting.
4. A voting committee member cannot be represented by proxy at more than two meetings of the committee in the year for which the committee is appointed.
5. A person may be appointed the proxy of not more than one voting member of the committee for a meeting.
6. If a person exercises a proxy at a committee meeting knowing that they do not have the right to exercise it, they commit an offence which carries a maximum penalty of 100 penalty units.

Accommodation Module

The position is the same, except that:

- the body corporate cannot pass a special resolution prohibiting the use of proxies.

Commercial Module

The position is substantially the same, except that:

- the body corporate cannot pass a special resolution prohibiting the use of proxies, and
- there is no limit on the number of meetings at which a committee member may be represented by a proxy in any year.

Small Schemes Module

None of this applies to bodies corporate regulated by the SS Mod.

Law: Std Mod s 100, 101, 102, 103, 104, 105

Acc Mod s 98, 99, 100, 101, 102, 103

Com Mod s 67, 68, 69, 70, 71, 72.

[¶41-000] Conflicts of interest

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Section 53(1) of the Std Mod provides:

> "A member of the committee must disclose to a meeting of the committee the member's direct or indirect interest in an issue being considered, or about to be considered, by the committee if the interest could conflict with the appropriate performance of the member's duties about the consideration of the issue."

The following should be noted:

1. The same obligation of disclosure is placed on a committee member's proxy holder with regard to:
    - interests of the proxy holder, and
    - interests of the committee member of which the proxy holder is aware.
2. In addition to making the disclosure, the member or proxy holder must not vote on a motion involving the issue.
3. The Std Mod does not require the member or proxy holder to leave the meeting while the issue is discussed or the vote on the issue taken but this would be a normal requirement of the chairperson.
4. The interest can be either "direct or indirect". For example:
    - A person would have a direct interest if the issue involved compensation for damage to floor tiles in that person's bathroom.
    - A person would have an indirect interest if they owned a ground floor unit in a mid-rise building and the issue involved landscaping around the building, where the work would enhance the livability and, possibly, value of the person's unit.
    - A person would not generally have an indirect interest if the issue involved repainting the whole building. If this were not the case, then the committee could not function because virtually every member would have a conflict on virtually every issue to be considered by the committee. It follows that the decision on anything that is for the benefit of all lot owners would not involve a conflict. One exception to the above example might be when a committee member or proxy holder intends to sell their unit and a repaint of the entire building will improve their chances of making a sale or the price they are likely to obtain.
5. It is not essential that there is a conflict, it is sufficient if there *could be* a conflict. The conflict concerned is between the interest of the member or proxy holder in the issue and their ability not to be influenced in performing their duties (ie debating and voting on the matter impartially and without regard to their own interests).
6. The disclosure can be made verbally to the meeting. The committee member or proxy holder would not need to give details of the conflict provided they are satisfied that there is or could be a conflict and they do not attempt to vote on a motion involving the issue.
7. The secretary should note the disclosure in the minutes and note the fact that the committee member or proxy holder did not vote on the issue. If the member or proxy holder leaves the meeting while the issue is debated and the vote taken, then this should also be recorded in the minutes.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

Section 53 of the Std Mod is not repeated in the SS Mod. This is because a body corporate regulated by this module only has a secretary and a treasurer making up its committee and one person may hold both positions. Decisions are made by that person or those two persons jointly. It is therefore not appropriate to disqualify one of them from voting because the other could not make a decision in that event. Therefore, s 21 of the SS Mod prohibits an office holder, without specific authorisation of a general meeting, from making a decision on an issue if:

(a) the issue concerns the office holder’s duties as an office holder
(b) the office holder has a direct or indirect interest in the issue, and
(c) the interest could conflict with the appropriate performance of the office holder’s duties about the consideration of the issue.

Law: Std Mod s 53

Acc Mod s 53

Comm Mod s 27

SS Mod s 21.

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[¶41-050] Validity of proceedings

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As a general common law principle, where the governing rules of a corporation or association (including its sponsoring legislation) sets up a process or procedure to achieve something (eg procedures for election of office bearers), then that process or procedure must be followed precisely. Failing this the result will be invalid. In the case of an election of office bearers, the election would be a nullity. Section 100(4) of the BCCM Act seeks to address this problem. It effectively says that a decision is taken to be a decision of the committee despite a defect in the election of one or more of the members of the committee if the persons who made the decision honestly and reasonably believed that they were the committee for the body corporate. Note that the belief must not only be honest, but it must also be reasonably held.

This provision has very limited effect. It does not protect against a failure to follow proper procedures for convening and conducting the meeting. In that event any decisions made at the meeting would be invalid. It is most unlikely that a body corporate could make a by-law expanding this type of protection to cover, say, invalidity of proceedings because of failure to follow proper procedures. The Std Mod does not provide any additional protection.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 100(4).

[¶41-100] Owner's right to attend

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A person who is not a member of the committee may attend a meeting of the committee if the person is:

(a) a lot owner who has given the requisite notice of intention to attend, or
(b) another person who is invited to attend by a majority of the voting members who are present at the meeting personally or by proxy.

The notice for the purposes of (a) above must be in writing and received by the secretary not later than 24 hours before the meeting starts.

The person attending the meeting under these circumstances must not be present for an item of business about any of the following matters if the committee decides that the person must not be present for the item:

- a breach of the by-laws
- starting a proceeding (where the decision is not a restricted issue)
- a proceeding against the body corporate
- a dispute between the body corporate and an owner, occupier, body corporate manager or caretaking service contractor.

The committee decision to exclude a person must be made by resolution of the committee (see **Form B45** (¶73-420)) and the person to be excluded must not be present for the discussion or vote on whether or not they should be excluded. Nor are they to be present when a vote is taken on the item of business for which they are excluded.

The person attending the meeting under these circumstances may observe the meeting but must not address the meeting unless the meeting invites them to speak to the meeting. An invitation to speak may be revoked at any time and if a person speaks without an invitation or after being asked to stop they may be required by the committee to leave the meeting.

Accommodation Module

The position is the same.

Commercial Module

Lot owners have no statutory right to attend meetings of the committee. However, the committee may invite owners to attend or may permit a particular owner to attend. This right to attend should be confirmed by resolution of the committee which should specify whether or not the owner will be permitted to address the committee and under what conditions.

Small Schemes Module

The position is the same as for the Commercial module.

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[¶41-125] Exclusion of non-voting members

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A person who is a non-voting member of the committee must not be present for an item of business about any of the following matters if the committee decides that the person must not be present:

- a dispute between the body corporate and the person, or an owner or occupier of a lot included in the community title scheme
- the person's engagement as body corporate manager or service contractor
- the person's authorisation as a letting agent where he or she is a caretaking service contractor.

The committee decision to exclude a person must be made by resolution of the committee (see **Form B45**, ¶73-420) and the person to be excluded must not be present for the discussion or vote on whether or not they should be excluded. Nor are they to be present when a vote is taken on the item of business for which they are excluded.

The above list of matters justifying exclusion is not exhaustive. There may be other circumstances where a non-voting member of the committee should be excluded.

Accommodation Module

The position is the same.

Commercial Module

There is no similar provision.

Small Schemes Module

There is no similar provision.

Law: Std Mod s 50

Acc Mod s 50.

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[¶41-150] Minutes

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The committee must ensure that:

- full and accurate minutes of its meetings are taken, and
- a full and accurate record is kept of each motion voted on other than at a meeting.

The secretary is the person primarily responsible for preparing the minutes and other records of motions. Where there is a body corporate manager who has been delegated the powers of the secretary, then the secretary would be able to leave those tasks to the body corporate manager.

The words “full and accurate minutes” have a defined meaning. Under that definition the minutes must include each of the following:

- the date, time and place of the meeting
- the names of persons present and details of the capacity in which they attended the meeting
- details of proxies tabled
- for each motion voted on at the meeting — the words of the motion and the number of votes for and against the motion
- details of correspondence, reports, notices or other documents tabled
- the time the meeting closed
- details of the next scheduled meeting
- the secretary’s name and contact address.

The words “full and accurate record” are also defined in relation to a motion voted on other than at a meeting. They mean a record of each of the following:

- the date notice of the motion was given
- the names of the committee members to whom notice was given
- the words of the motion voted on
- the names of the committee members who voted on the motion
- the number of votes for and against the motion.

The secretary must give a copy of the minutes and a copy of the record of each motion voted on without a meeting to each member of the committee and each lot owner who is not a committee member, other than a lot owner who is currently covered by a notice to the effect that they do not wish to receive such copies. The copy must be given within 21 days of the meeting (for a copy of minutes of a meeting) or the deciding of a motion (for a copy of a record of a motion voted on other than at a meeting)in one of the following ways:

- by handing it to the person
- by sending it by mail
- by sending it by facsimile
- by sending it electronically.

Accommodation Module

The position is the same.

Commercial Module

The committee must ensure that:

- full and accurate minutes of its meetings are taken, and
- a full and accurate record is kept of each motion voted on other than at a meeting.

The secretary is the person primarily responsible for preparing the minutes and other records of motions. Where there is a body corporate manager who has been delegated the powers of the secretary, then the secretary would be able to leave those tasks to the body corporate manager.

© CCH

Small Schemes Module

The SS Mod simply provides that the committee must ensure full and accurate minutes of its meetings are taken. There is no procedure for voting in writing in the SS Mod.

Law: Std Mod s 55

Acc Mod s 55

Com Mod s 29

SS Mod s 22.

[¶41-200] Carrying out decisions

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Owners of at least one-half of the lots in a scheme may prevent the committee from carrying out a resolution it has passed by serving a “notice of opposition” to the resolution (except where the resolution is of a routine, administrative nature and involves spending not more than the greater of $200 or $5 multiplied by the number of lots included in the scheme).

The notice must be in writing, signed by the requisite number of lot owners and given to the secretary within seven days of the secretary giving a copy of the relevant minutes or resolution to each lot owner as required by s 55 of the Std Mod (see ¶41-150). **Form B46** (¶73-450) is an example of a “notice of opposition”.

There are limitations on the ability of a “notice of opposition” to prevent a committee from carrying out a resolution. The committee can carry out the resolution in any of the following circumstances even if a “notice of opposition” is served:

- If the resolution is necessary to deal with an emergency and —
  - (a) the amount required to put the resolution into effect is within the relevant limit for committee spending, or
  - (b) an adjudicator authorises the committee to give effect to the resolution.
- If the resolution is ratified by ordinary resolution of the body corporate.
- The resolution is of a routine administrative nature and involves spending not more than the greater of:—
  - (i) $200, or
  - (ii) $5 multiplied by the number of lots in the scheme.

If there is a challenge to the right of the committee or body corporate manager to carry out a resolution or decision, the burden of proving compliance with the minute or resolution process falls on the person asserting the right of reliance on the process. The challenger need do no more than challenge the right to carry out the resolution or decision. Strict compliance with the notice process and the keeping of an appropriate “paper trail” is therefore important.

Accommodation Module

The above does not apply to a body corporate regulated under the Acc Mod.

Commercial Module

The above does not apply to a body corporate regulated under the Com Mod.

Small Schemes Module

The above does not apply to a body corporate regulated by the SS Mod.

Law: Std Mod, s 56, 57.

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[¶41-250] Reporting payments to committee

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A body corporate manager (other than a governing body corporate manager) who pays an account on the basis of an authorisation given by the committee, or by a general meeting, must, if required by the committee or body corporate, give the committee a written report on the payment containing details about the payment or costs reasonably required by the committee or body corporate.

Accommodation Module

The position is substantially the same.

Commercial Module

There is no similar provision.

Small Schemes Module

There is no similar provision.

Law: Std Mod s 155, 156

Acc Mod s 35.

© CCH

[¶41-300] Importance

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The first annual general meeting of a body corporate is important because it usually provides the first real opportunity for the new owners to impose their wishes on the original owner. This is because at the time of the meeting the original owner either owns less than 50% of the lots in the scheme or six months have passed since the scheme was established. It usually marks the point in time when control of the body corporate is effectively turned over to the owners. However, the first annual general meeting is also significant because:

- it is separately (but similarly) regulated in all of the regulation modules, a number of provisions applying to this meeting having no application to other meetings;
- responsibility for convening and holding this meeting rests with the original owner; and
- the original owner is required to hand over a number of documents and materials to the body corporate.

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[¶41-320] Obligation to call and hold

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The original owner is required to call and hold the first annual general meeting. This not only requires the original owner to "convene" the meeting, but also to attend the meeting and ensure that it is properly held. Attendance may be by representative (eg solicitor, proxy or body corporate manager) but ultimate responsibility for it to be "held" rests with the original owner. The way in which the meeting must be called and held is specified in the regulation module. Failure to call and hold the meeting in accordance with the procedures specified is an offence that carries a penalty of 150 penalty units.

The meeting must be called for and held within two months after the ***first*** of the following to happen:

- more than 50% of the lots included in the scheme are no longer in the ownership of the original owner, and
- six months elapse after the establishment of the scheme.

It should be noted that the meeting must be called ***and held*** within the two months specified. Because at least 21 days' notice of general meetings must be given to owners and allowance must be made for the time required for delivery of the notice by post (see ¶41-370), there should be no delay in convening the meeting. In practice, most community title projects do not get underway until around 50% of the units have been pre-sold and the settlements are usually all due at the same time. This is usually within a specified number of days from the date of registration of the community titles plan. Therefore the original owner can be ready to post the notices calling the meeting as soon as the pre-sale settlements are effected. It is likely that the original owner ceases to have "ownership" of a lot when the settlement occurs rather than when the registration is effected. This is because the definition of "owner" includes persons entitled to be registered as well as persons actually registered. If the position were otherwise, the original owner would effectively need to undertake daily searches of the register at the Titles Office to determine the point in time when ownership of 50% of the lots has passed.

If the original owner does not call and hold the first annual general meeting as required, an adjudicator may make an order under the dispute resolution provisions appointing a person to call the meeting within a stated time. The original owner is not relieved of liability for the offence and penalty because the meeting is called and held under the order of an adjudicator.

The above provisions do not apply to a body corporate constituted upon the amalgamation of two or more community titles schemes. The first annual general meeting of such a body corporate is regulated by s 78 of the Std Mod.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same, except that there is scope for the body corporate, acting fair and reasonably, to decide on a lesser period of notice than the normal 21 days. For example, the original owner at an extraordinary general meeting convened and held immediately after registration of the community titles plan may pass a resolution reducing the period of notice to 14 days. In the case of a small scheme this may well be fair and reasonable.

Law: Std Mod s 74, 77, 78

Acc Mod s 72, 75, 76

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Com Mod s 41, 44, 45
SS Mod s 36, 38, 39.

[¶41-340] Meeting place

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A general meeting of a body corporate, including the first annual general meeting, must be held not more than 15 km (measured in a straight line on a horizontal plane) from the scheme land. However, the committee may, in certain circumstances, cause the meeting to be held outside the 15 km radius. The following is the procedure that must be adopted:

1. The committee resolves to depart from the 15 km radius requirement (see **Form B47**, ¶73-470).
2. The committee notifies the owners of its intention to hold the meeting at a stated place more than 15 km from scheme land (see **Form B48**, ¶73-480). The notification would need to be served in a similar way to a notice of meeting.
3. Sufficient time is allocated to allow owners a reasonable opportunity to object in writing to the proposed place of the meeting. A period of 14 days is suggested for this purpose, although a shorter period may be justifiable in some circumstances.
4. Owners may submit their written objections. No form is required, but **Form B49** (¶73-490) illustrates a form of objection.
5. Not more than 25% of owners of lots included in the scheme object to the proposed place of the meeting.

Once the above has been satisfied, then the meeting can be convened to be held at the place proposed in the notice to owners. Of course, the requirement for not more than 25% of owners of lots included in the scheme to object to the proposed place is critical. If the objections are above that percentage, then the meeting cannot be held at that proposed place. The following should also be noted:

- For the purpose of determining the percentage “co-owners” should be counted together as an “owner”. Although “owner” is defined in the BCCM Act as including **each** of two or more persons who are registered owners it is most unlikely that this subsection is intended to be read so as to include individual co-owners in the calculation.
- It would be most unwise to incorporate the notice to owners in a notice convening the meeting itself. This is because the meeting would need to be reconvened if more than 25% of owners recorded an objection.
- It is not entirely clear whether a separate notice must be given to owners in respect of each meeting that is proposed to be held outside the 15 km radius, or whether a single notice relating to a number of future meetings can be given. Bearing in mind that in most schemes owners change on a regular basis, the likelihood is that a court would be mindful to protect their rights to object by interpreting the subsection so as to require the notice to be given in respect of each meeting.
- Where there are two or more land parcels involved in the scheme (eg there is a beach facility some distance away from the main development), then the “scheme land” is the land associated with the main development. This is because the external facility is an “asset” rather than being part of the scheme land. The 15 km radius must therefore be measured from the scheme land and not the associated land asset.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

There is no requirement in this module for general meetings to be held within a 15 km radius of the scheme land. Therefore, none of the above commentary applies to bodies corporate regulated by this module.

Law: Std Mod s 75

Acc Mod s 73

Com Mod s 42.

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[¶41-350] Submitting motions for the agenda

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Motions for inclusion on the agenda of an annual general meeting can be submitted at any time by the committee or a member of the body corporate. Where a notice is sent out inviting nominations for the committee, then at the same time the members must be invited to submit motions for consideration at the annual general meeting. The motion must be received before the end of the body corporate's financial year immediately preceding the meeting. If it is not received on time it will have to wait for the next meeting.

The following types of motion cannot be included on the agenda for an annual general meeting if it would result in that type of motion having been considered by the body corporate more than once in its financial year:

- a motion to change the regulation module applying to the scheme
- a motion proposing that the remuneration paid to a particular service contractor be changed
- a motion proposing that the engagement of a person as a service contractor, or authorisation of a person as a letting agent, be amended to include a right or option of extension or renewal.

Where a member of the body corporate submits a motion for inclusion on the agenda, they may also provide an explanatory note about the motion, provided the note does not exceed 300 words. That note will be included in the meeting materials.

Accommodation Module

The position is the same.

Commercial Module

The position is substantially the same.

Small Schemes Module

There is simply a right to submit a motion without significant detail or restriction.

Law: Std Mod s 69

Acc Mod s 67

Com Mod s 36

SS Mod s 34.

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[¶41-360] Agenda

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Section 76(2) of the Std Mod sets out the things that must be included on the agenda for general meetings of the body corporate. Some of these things apply to the first annual general meeting. In addition, s 77(3)of the Std Mod deals specifically with first annual general meetings and sets out the things that must be included on the agenda for those particular meetings.

Section 76(2) requires the agenda to include the following:

- the substance of any motion that the committee proposes for consideration by the meeting (including, for motions with alternatives, the substance of each alternative)
- the substance of any motion submitted by a member of the body corporate for consideration by a general meeting (other than a motion stated in the agenda as an alternative under motions with alternatives), and
- if there has been a previous general meeting, the substance of a motion to confirm the minutes of that meeting.

If it is proposed to not have a committee of the body corporate, then there would also need to be a motion for the appointment of a governing body corporate manager.

In addition, s 77(3) requires the agenda for the first annual general meeting to include the following items of business:

- adopting or reviewing budgets, and fixing a contribution to be levied against the owners of lots, for the body corporate's first financial year
- reviewing the policies of insurance taken out for the body corporate and, if appropriate, changing the insurance
- choosing the members of the committee
- providing for the custody and use of the body corporate's seal
- deciding what issues are reserved for decision by ordinary resolution
- deciding whether the by-laws should be amended or repealed
- appointing an auditor to audit the accounts of the body corporate, or resolving by special resolution not to appoint an auditor, and
- if the meeting is called on the order of an adjudicator under the dispute resolution provisions — deciding issues that the adjudicator orders to be placed on the agenda for the meeting.

While s 76(2) requires the substance of motions to appear on the agenda, s 77(3) is not so clear in this regard because it only says the "items" must appear. However, s 70 makes it clear that the notice of a proposed general meeting (which would include a first annual general meeting) must be accompanied by a voting paper "stating each motion to be considered at the meeting". It follows that actual motions must appear on the agenda for each item referred to in s 77(3). This is supported by s 81 which requires the chairperson to rule a motion out of order where its substance was not included in the agenda and s 87(5), which says only motions on the agenda and in the voting can be passed.

Accommodation Module

The position is the same.

Commercial Module

The position is substantially the same.

Small Schemes Module

Voting papers are not used for bodies corporate regulated by the SS Mod. Therefore, it is only necessary to include the s 38(3) “items” on the agenda. The wording of motions to be considered in relation to these items can be determined at the meeting. However, motions must still be included on the agenda for the s 37(2) “items”. The list of items is also slightly different. The s 37(2) items are:

- motions the committee proposes for consideration at the meeting
- if the general meeting is a requested extraordinary general meeting — the motions proposed in the notice asking for the meeting
- a motion submitted under s 34 by a member of the body corporate and required to be included in the agenda
- if an adjudicator makes an order under the dispute resolution provisions authorising or requiring the calling of the general meeting to consider motions stated in the order — the motions stated in the order
- if there has been a previous general meeting — a motion to confirm the minutes of the last meeting.

The s 38(3) items are:

- adopting or reviewing budgets, and fixing a contribution to be levied against the owners of lots, for the body corporate’s first financial year
- reviewing the policies of insurance taken out for the body corporate and, if appropriate, changing the insurance
- choosing the secretary and treasurer
- providing for the custody and use of the body corporate’s seal
- deciding what issues are reserved for decision by ordinary resolution
- deciding whether the by-laws should be amended or repealed, and
- if the meeting is called on the order of an adjudicator under the dispute resolution provisions — deciding issues that the adjudicator orders to be placed on the agenda for the meeting.

Law: Std Mod s 69, 70, 76, 77

Acc Mod s 67, 68,74, 75

Com Mod s 36, 37, 43, 44

SS Mod s 34, 35, 37, 38.

[¶41-365] Voting papers

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The secretary must prepare voting papers to be sent out with the notice of meeting. If all motions to be decided at the meeting are “open motions” (ie motions that do not require a secret ballot) then only one voting paper need be prepared. However, if any motion has to be decided by secret ballot, then a second “secret voting paper” must also be prepared. If there is more than one motion to be decided by secret ballot, then they can all be included on the one secret voting paper or a separate paper can be prepared for each motion.

Where a motion does not involve alternatives (ie the voter does not have to choose one of a number of alternatives within the motion) then the voting paper must state:

- the motion in the form it was submitted without amendment
- if the motion is not submitted by the committee — the name and, if applicable, the lot number of the person submitting the motion
- if the motion is submitted by the committee — that it is submitted by the committee and whether it is a statutory motion.

Where a motion does involve alternatives, then the voting paper must state:

- the motion and alternatives as required by s 72 of the Std Mod
- the name and, if applicable, the lot number of the person submitting each alternative
- that the motion is submitted by the committee.

Section 72 deals with the situation where two or more motions (“original motions”) propose alternative ways of dealing with the same issue — for example, if the secretary receives three motions from three different people proposing the appointment of a body corporate manager but each motion nominates a different person as the proposed appointee. In these circumstances the voting paper must:

- list as alternatives under one motion submitted by the committee (a “motion with alternatives”) the substance of each of the original motions
- show after the motion and each alternative a blank space for voting purposes.

To vote for the motion, a voter must vote both for the motion and for one of the alternatives. Alternatively, the voter may simply vote against the motion. If the motion is passed then the alternative with the largest number of votes is the decision of the body corporate. If two or more alternatives have an equal highest number of votes, then the qualifying alternative is decided by chance in the way the meeting decides (eg a toss of a coin may be used to decide which alternative will become the decision of the body corporate).

Finally, there may be only one motion per issue on a voting paper. If there is more than one, then all motions about the issue are void. The correct approach is to use a motion with alternatives.

A voting paper must be in accordance with an approved form. The approved form approved, **Form A4** (¶70-140) in the Forms Tab, serves as both a notice of the meeting and the voting paper.

Accommodation Module

The position is the same.

Commercial Module

There is no similar provision.

Small Schemes Module

There is no similar provision.

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Law: Std Mod s 71, 72

Acc Mod s 69, 70.

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[¶41-367] Explanatory material

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A voting paper for a general meeting must be accompanied by an explanatory schedule in any of the following circumstances:

1. A person who submitted a motion for inclusion on the voting paper has provided an explanatory note about the motion (provided the note does not exceed 300 words).

The schedule can only include the following:

- the motion number
- the explanatory note in the form given by the person who submitted the motion
- that person's name.

2. The voting paper is for an annual general meeting.

For a motion adopting administrative and sinking fund budgets there must be an explanatory note stating that, under s 140 of the Std Mod, the amount of the budget adopted at the meeting may be more or less than the proposed budget amount by an amount equivalent to not more than 10% of the proposed budget amount.

3. The voting paper states a motion with alternatives.

The schedule must include each of the following:

- the exact wording (as originally submitted) of each motion that makes up the motion with alternatives
- the explanatory note about each such motion as originally given to the secretary (provided the note does not exceed 300 words)
- an explanatory note stating that the voters must vote either for the motion (by voting for the motion **and** one of the alternatives) or against the motion.

4. The voting paper states a motion proposing that the regulation module applying to the scheme be changed.

The schedule must include an explanatory note, in the approved form, explaining the effect of the proposed change. The approved form is Form BCCM 19 (see **Form A19**, ¶70-236, in the Forms Tab).

5. A section of the module otherwise requires an explanatory schedule (eg s 42 of the Std Mod dealing with committee restricted issues requires certain information to be provided when certain general meeting approvals are being sought).

The only explanatory material that can be in an explanatory schedule is material permitted under the above circumstances. The committee may include other explanatory material with the notice of meeting, but it must be kept separate from the explanatory schedule. Apart from those materials no other explanatory material can accompany a meeting notice or voting paper.

These provisions need to be strictly observed, otherwise the validity of the meeting or particular resolutions may be called into question. **Form B53** (¶73-570) shows how explanatory material must be set out to comply with these requirements.

Is an incorrect explanatory note sufficient to declare a meeting or a resolution invalid?

In *Morat Pharmaceuticals Pty Ltd* v *Hoft & Anor* [2014] QCA 319 (2 December 2014), the caretaker (Morat) submitted a motion to an extraordinary general meeting for the body corporate to enter into new caretaking and letting agreements with Morat. Morat's material included an explanatory memorandum which stated:

> "the committee has also reviewed the new agreements and recommends they be entered into".

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However, the body corporate had not provided that recommendation. They were advised by their body corporate manager that it was too late to amend the explanatory note and instead the chairperson contacted as many voters as possible to advise them that the committee had not recommended the new agreements.

By 14 votes to 13 the motion was passed and the agreements were entered into on 23 July 2013. Two voters were considered unfinancial and their votes disregarded.

In the QCAT appeal, the member determined that the explanatory note was wrong and therefore misleading such that it could affect the decision of a lot owner to vote in favour of the resolution which appeared to be recommended by the committee.

An order was made that the resolution be declared to be void.

Morat appealed to the Court of Appeal and Muir JA with Holmes JA and McMeekin J agreeing found that the application for the appeal should be refused and ordered the Morat to pay the body corporate's legal costs.

The judges found that the grounds of appeal raised were not reasonably argued and lacked merit in denying the appeal.

Muir JA went on to state that proprietors of lots are entitled to expect that materials provided to them by the body corporate committee are accurate and not misleading in any way. Where the committee's obligation in that regard has been breached, the obvious course to take is to set the tainted resolution aside so that the owners may have the opportunity to vote without the influence of tainted information.

Overall Muir JA held that the Appeal Tribunal took a course which was sensible and justified.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

There is no similar provision.

Law: Std Mod s 73

Acc Mod s 71

Com Mod s 40.

Last reviewed: 5 February 2015

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[¶41-370] Convening the meeting

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The original owner must call the meeting. It is called by giving a notice of meeting to the owner of each lot included in the scheme. If the notice is not given to the owners personally it must be sent to them at their address for service. Unless the by-laws state otherwise, this means that it must be posted. Strictly speaking, if all the lots have identical ownership (eg if they were all sold to the one person), then no notice of the meeting need be given. However, in a practical sense the original owner will need to give notice to the purchaser of the lots to ensure that he or she is represented at the meeting, otherwise the meeting will not be able to proceed. The notice must state the time and place of the proposed meeting and must provide for the meeting to be held at least 21 days after the notice is given (see further commentary below). The notice itself must:

(a) contain an agenda for the meeting (see ¶41-360), and
(b) be accompanied by —

(i) a proxy form, and
(ii) if the notice is given to a corporate lot owner — a form of notification of corporate owner nominee, and

(c) be accompanied by a voting paper for all open motions to be decided at the meeting, and
(d) for a motion to be decided at the meeting by secret ballot, be accompanied by each of the following:

(i) a secret voting paper
(ii) an envelope marked “secret voting paper”
(iii) either a separate particulars envelope or a particulars tab forming part of the secret voting paper envelope that a person may detach without unsealing or otherwise opening the envelope, and

(e) be accompanied by any explanatory material required to be included.

Form B50 (¶73-510) illustrates the notice of first annual general meeting *based on the approved form.* **Form A6** (¶70-160) is a proxy form. (See ¶41-500 for detailed commentary about the use of proxies *and note that a proxy must be in the approved form to be valid*.) **Form B17** (¶72-870) can be referred to for an example of a voting envelope with a detachable particulars tab and **Form B18** (¶72-890) and **Form B19** (¶72-910) can be referred to for an example of separate particulars envelope and posting envelope.

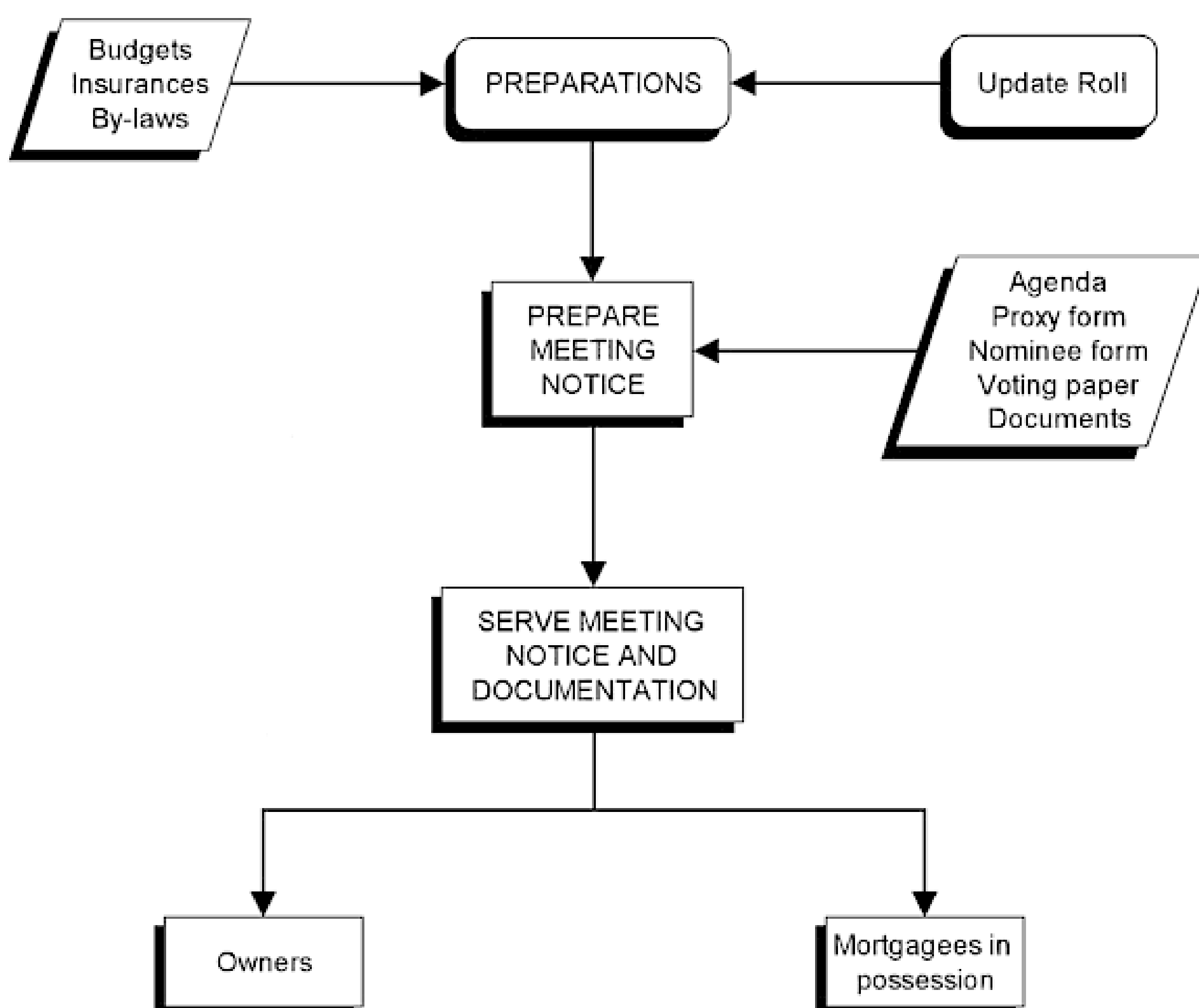
See ¶41-367 for the explanatory material that must accompany the meeting notice.

There are other materials that are not required by the regulation module to accompany the meeting notice, but which, as a matter of practicality, should accompany the notice. They are:

- particulars of the policies of insurance that the meeting has to review, and
- a copy of the by-laws that the meeting has to consider amending or repealing.

It is also useful to include an explanatory note from the committee with the meeting notice so that new owners, who are often inexperienced unit dwellers, can understand the purpose of the meeting and the various agenda items. **Form B53** (¶73-570) illustrates this type of explanatory note.

The following chart illustrates the process for convening a first annual general meeting of a body corporate.



Special care needs to be exercised to ensure that the 21-day notice requirement is observed. As mentioned, if the notice is not given to the owner personally it must be sent to them at their address for service. The address for service of an owner (other then a subsidiary scheme body corporate owner) is the address recorded in the body corporate's records or, if no address is recorded, the address of the lot. The address for service on a subsidiary scheme body corporate that owns a lot in the principal scheme is the address for service recorded on the title for its common property.

The meeting must be held at least 21 days after the notice of meeting is given to lot owners. The Std Mod does not specify "clear" days, but in the absence of specific provision to this effect the term "days" means "clear days". The term "clear days" means exclusive of the day the notice is served, and of the day on which the meeting is held. Before any calculation can be made to determine the number of "clear days" it is necessary to determine the day on which the notice is served. This depends on how the notice is given. If the notice is given (or served) personally, then the date of actual service will be known. If the notice is sent by mail it will be more difficult to determine when it is received. If there is direct evidence when the notice is received (eg someone saw the postman deliver the letter to the letterbox) then that will suffice. However, in most cases there is no direct evidence. Presumptions then need to be relied upon.

Section 39A of the *Acts Interpretation Act 1954* says that a document required or permitted by an Act to be served (which includes "given") by post is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved. Delivery times can vary depending upon distance and location. A post office can advise normal delivery times. However, it is usually safe to assume that mail within Australia would be delivered in the normal course on the third business day after posting. In New South Wales, the legal presumption is four working days under that State's interpretation legislation. Some secretaries may therefore wish to allow a longer period as a special precaution, particularly in view of the fact that the presumption only applies "unless the contrary is proved". It will be noted that all addresses for service must be Australian addresses (see s 194 of the Std Mod). Overseas mail delivery times are therefore not relevant.

Notice periods are best illustrated by examples.

Service by personal delivery

If a first annual general meeting is to be held on 27 June and all the notices are to be personally delivered (which will usually only be the case where all owners reside in their lots), then the notices will need to be delivered on 5 June. The date on which the notice is delivered and the date of the meeting are both excluded from the calculation. The following illustrates the calculation:

June	Activity	Comment
5	Date of delivery	
6		Clear day 1
7		Clear day 2
8		Clear day 3
9		Clear day 4
10		Clear day 5
11		Clear day 6
12		Clear day 7
13		Clear day 8
14		Clear day 9
15		Clear day 10
16		Clear day 11
17		Clear day 12
18		Clear day 13
19		Clear day 14
20		Clear day 15
21		Clear day 16
22		Clear day 17
23		Clear day 18
24		Clear day 19
25		Clear day 20
26		Clear day 21
27	Date of meeting	
28		

Service by post

If a first annual general meeting is to be held on 27 June and the notices are to be served by post (which will be the most common situation), then the notices will need to be posted on 2 June (assuming that 2 June is a Monday or Tuesday). The date on which the notice is delivered and the date of the meeting are both excluded from the calculation and there must be an allowance for the number of days in the post (in this case the allowance being the minimum of 3). If 2 June is a Wednesday, Thursday or Friday, then an extra two days, to allow for the weekend, must be added. The following illustrates the calculation:

June	Activity	Comment
2 (Monday)	Date of posting	
3		1st business day after posting
4		2nd business day after posting
5	Date of delivery	3rd business day after posting
6		Clear day 1
7		Clear day 2
8		Clear day 3
9		Clear day 4
10		Clear day 5
11		Clear day 6
12		Clear day 7
13		Clear day 8
14		Clear day 9
15		Clear day 10
16		Clear day 11
17		Clear day 12
18		Clear day 13
19		Clear day 14
20		Clear day 15
21		Clear day 16
22		Clear day 17
23		Clear day 18
24		Clear day 19
25		Clear day 20
26		Clear day 21
27	Date of meeting	
28		

To ensure that the first annual general meeting is called and held within the statutory one month period, the meeting will need to be called within the first few days of that period. Care therefore needs to be exercised when monitoring the time when the month period commences. The timeframe during which the first annual general meeting must be held is illustrated in the following chart.

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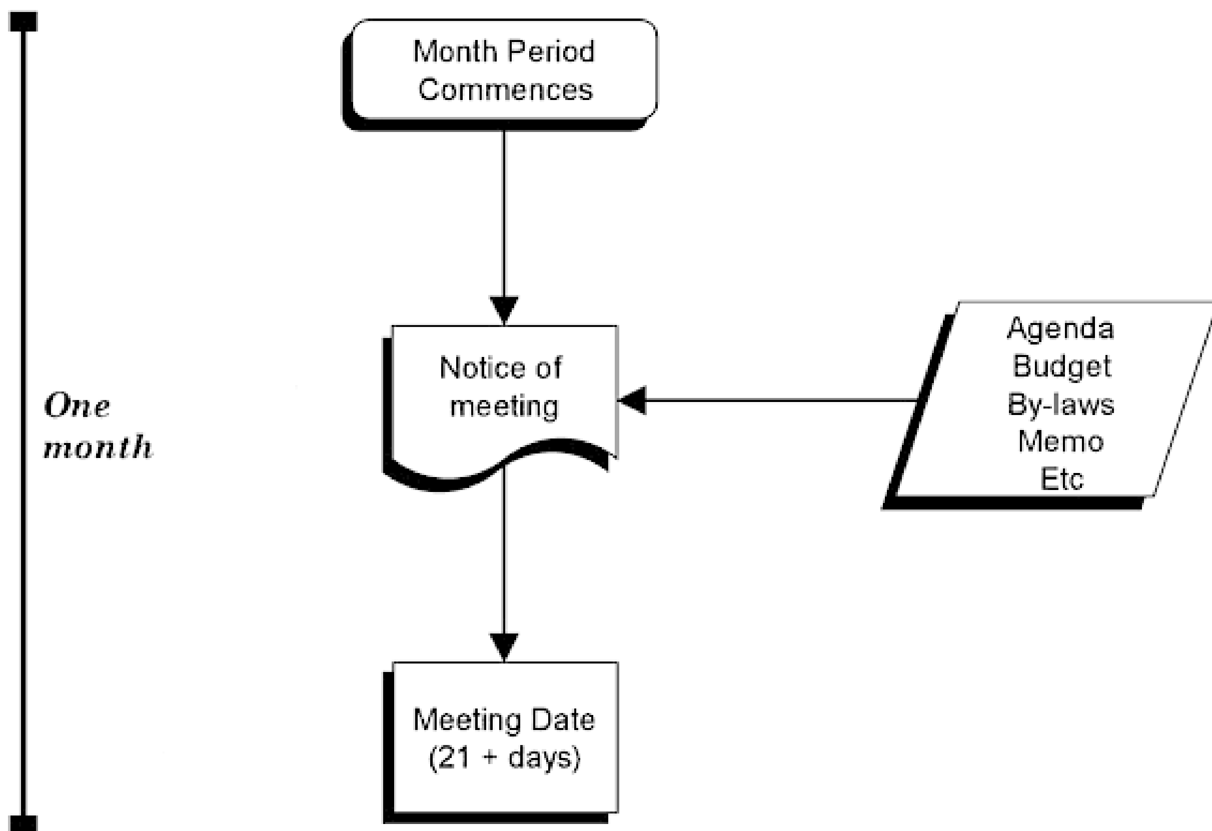
Chart 2



Accommodation Module

The position is the same, except that the Acc Mod does not require an owner's address to be an Australian address. This means that allowance must be made for overseas delivery times where one or more owners have overseas addresses recorded.

Commercial Module

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The position is the same, except that the Com Mod does not require an owner's address to be an Australian address. This means that allowance must be made for overseas delivery times where one or more owners have overseas addresses recorded.

Small Schemes Module

The SS Mod requires a first annual general meeting to be convened and held within the same one-month period. Written notice of the meeting must be given to lot owners personally or sent to them at their address for service. Their address for service can be an overseas address, so there may be an issue about overseas delivery times. Also, it is not necessary for the meeting notice to set out the wording of the resolutions, to include a voting paper or to be accompanied by the 100 word explanation about owner sponsored motions. There is also scope for the body corporate to reduce the 21-day notice period.

Law: Std Mod, s 70, 74, 77, 139(6), 194

Acc Mod, s 68, 72, 75, 137(6), 192

Com Mod, s 37, 41, 44, 98(6), 150

SS Mod, s 35, 36, 38, 73(6), 128.

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[¶41-380] Conducting the meeting

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The chairperson must chair the first annual general meeting if they are present. In the event that:

- the chairperson is absent, or
- the chairperson's position is vacant, or
- a chairperson has not been chosen,

then the persons present at the meeting and having the right to vote should elect another person (who consents to their election) to chair the meeting. An executive body corporate manager to whom powers of the chairperson has been delegated has no automatic right to chair a first annual general meeting if the chairperson is absent or unwilling to act as chairperson for the meeting. Before the executive body corporate manager can act as chairperson they would have to be elected as chairperson for the meeting. However, the Std Mod recognises the right of an executive body corporate manager to whom the powers of the chairperson have been delegated to advise and help the chairperson during the course of their chairing a meeting. Also, if the executive body corporate manager holding the chairperson's delegation is the only person forming a quorum at an adjourned meeting, then the manager may proceed to chair the meeting.

Those provisions do not apply to a governing body corporate manager. Where there is a governing body corporate manager, a person elected, with the person's consent, by the persons present and having the right to vote at a general meeting, must chair the meeting.

The following procedure is suggested for conducting the first annual general meeting:

1. Declare the commencement of the meeting (eg "I declare the meeting open at 8.05 pm").
2. Record the names of those persons present either in person or by proxy.
3. Determine the persons entitled to vote.
4. Determine that a quorum is present (there should be a quorum for at least the first item of business).
5. Read and explain the first item of business and proposed motion.
6. If the motion is out of order, declare it out of order (see discussion below)
7. Encourage and conduct debate/discussion on the motion.
8. Put the motion to a vote (see ¶41-480 for complete discussion about voting).
9. Count the votes (remembering to include any votes cast by voting paper).
10. Declare the result of the vote (see discussion below).
11. Deal with each other item of business in the same manner (but as regards the election of the office bearers and committee, see ¶36-900 ff).
12. Accept delivery on behalf of the body corporate of the documents and materials that the original owner hands over.
13. When all items of business have been dealt with, declare the meeting closed (eg "I declare the meeting closed at 9.38 pm").
14. Sign the minutes of the meeting after they have been confirmed.

The chairperson of the first annual general meeting is required to rule a motion out of order if:

(a) the motion, if carried, would conflict with:

(i) the Act, or
(ii) the relevant regulation module, or
(iii) the by-laws, or
(iv) a motion already voted on at the meeting, or

(b) the motion, if carried, would be unlawful or unenforceable for another reason, or
(c) except for a procedural motion for the conduct of the meeting, or a motion to correct minutes — the substance of the motion was not included in the agenda for the meeting.

The chairperson must give reasons for ruling a motion out of order and the reasons must be recorded in the minutes. In the case of rulings under (a) above, the chairperson must state to the meeting how the ruling may be reversed by the persons present and entitled to vote on the issue. Effectively, this means that if the

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persons present at the meeting and entitled to vote disagree with the chairperson's ruling, they may pass an ordinary resolution disagreeing with the ruling. Although the Std Mod does not say so specifically, this would effectively overrule the chairperson's decision and allow the motion to proceed to the vote. This provision is obviously intended to overcome problems that often occur where a body corporate has a dominating chairperson who manipulates the agenda by preventing particular items from going to a vote.

The chairperson must declare the result of voting on motions at the first annual general meeting. In doing so the chairperson must state:

- the number of votes cast for the motion
- the number of votes cast against the motion, and
- the number of abstentions from voting on the motion.

Those numbers must be recorded in the minutes of the meeting. A voting tally sheet must be kept in respect of voting at the meeting. **Form B54** (¶73-590) illustrates a voting tally sheet. The recordings on the voting tally sheet must include, for each motion (other than a motion decided by secret ballot):

(a) a list of the votes, identified by lot number, rejected from the count
(b) for each vote rejected — the reason for the rejection
(c) for each lot for which a vote was cast, or for which there was an abstention from voting —

- the number of the lot, and
- whether there was a vote for or against or an abstention from voting, and

(d) the total number of —

- votes cast for the motion
- votes cast against the motion, and
- abstentions from voting on the motion.

As regards motions decided by secret ballot, the recordings on the tally sheet must include:

(a) a list of the votes rejected from the count
(b) for each vote rejected — the reason for the rejection, and
(c) the total number of —

- votes cast for the motion
- votes cast against the motion, and
- abstentions from voting on the motion.

The actual wording of the chairperson's declaration would be along the following lines: "*I declare motion No 4 carried, there being 23 votes recorded for the motion, 11 votes recorded against the motion and 3 persons entitled to vote abstaining from voting on the motion.*"

The Std Mod does not say how debate should proceed on motions. The debate may be regulated by "rules" or "conventions" adopted by resolution of a general meeting or by recorded by-law. Where this has occurred, those rules or conventions should be followed, provided they are not inconsistent with the BCCM Act or relevant regulation module. In the absence of these rules, the debating procedure is at the discretion of the chairperson, but again subject to there being no conflict with the BCCM Act or relevant regulation module. The rules in **Form B55** (¶73-610) may be used as a guide.

The voting tally sheet may be inspected at the meeting by any of the following persons:

- a voter, or a person holding a proxy from a voter
- the returning officer, if any, appointed by the body corporate for the meeting
- the person chairing the meeting.

Accommodation Module

The position is the same.

Commercial Module

The position is substantially the same.

Small Schemes Module

There is no permanent chairperson for bodies corporate regulated by the SS Mod. Therefore, the chairperson for a meeting is elected at the beginning of each meeting. However, the chairperson has the same power to declare motions out of order. No rules are specified about:

- how the chairperson must declare the result of a vote
- recording the result in the minutes or on a tally sheet, or
- the actual information that must be recorded.

While a chairperson may choose to follow the Std Mod procedure in this regard, they need not do so and may simply declare the result of the vote (eg "*I declare motion No 4 carried*").

Law: Std Mod, s 80, 81, 93

Acc Mod, s 78, 79, 91

Com Mod, s 47, 48, 60

SS Mod, s 41, 42.

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[¶41-400] Meaning of "voter" and entitlement to vote

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Before it is possible to determine whether a quorum is present for the first annual general meeting, the number of potential "voters" for the meeting must be determined. A voter is an individual:

(a) whose name is entered on the body corporate's roll as —

(i) the owner of a lot, or
(ii) the *representative* of the owner of a lot, or

(b) who is a *corporate owner nominee*, or
(c) who is a nominee of a corporation the name of which is entered on the body corporate's roll as the representative of the owner of a lot, or
(d) who is a subsidiary scheme representative.

A person or company is a *representative* of an owner if:

(a) the person is a guardian, trustee, receiver or other representative and is authorised to act on the owner's behalf, or
(b) the person

(i) is acting under authority of a power of attorney from the owner, and
(ii) is not the original owner, except if the power of attorney is given under s 211 or 219 of the Act (being the sections permitting powers of attorney to sellers for no more than one year), and
(iii) is not the body corporate manager, a service contractor or a letting agent.

In addition, the person will only be treated as the owner's representative if they:

• give the secretary a copy of the instrument under which they derive their representative capacity (eg deed of trust or instrument of appointment as receiver) or otherwise satisfy the secretary about that capacity, and
• advise the secretary of their residential or business address and (if different) their address for service (see **Form B56**, ¶73-630).

A mortgagee in possession of a lot may claim, by written notice to the secretary, the right to vote for the lot. This displaces the vote of the owner or a person deriving a right to vote from the registered owner.

Where the representative is a company, the company must also appoint an individual to be its *corporate nominee*. This is the same appointment that must be made by a company that is the owner of a lot in the community titles scheme.

A person is only taken to be the corporate nominee if the corporation gives the secretary written notice of nomination, stating the name of the nominee or the names of two nominees, one of whom is to act in the absence of the other. The notice must:

• be given under common seal of the company or in another way permitted by s 127 of the Corporations Act, or by a person acting under power of attorney (a copy of which must be given to the secretary) from the company, and
• advise the residential or business address and (if different) the address for service of each nominee.

Form B57 (¶73-650) shows the notification of corporate representative capacity of an owner coupled with a notice of appointment of corporate nominee. If the appointment is to be made under common seal it should be supported by a resolution of the company (see **Form B58**, ¶73-670). **Form B59** (¶73-690) shows a notice of appointment of corporate nominee by a corporate lot owner. Again, the appointment, if made under common seal, should be supported by a resolution (see **Form B58**, ¶73-670). A corporation may change its nominee by giving the secretary notice of a new nomination. If the notice is given under common seal there should be a supporting resolution of the corporation. See **Form B60** (¶73-710) for the resolution and **Form B61** (¶73-730) for the notice to the body corporate.

Where one community titles scheme (“scheme B”) is a lot included in another community titles scheme (“scheme A”), the body corporate for scheme B must ensure at all times there is a person (the *subsidiary scheme representative*) appointed by the committee for scheme B’s body corporate to represent the body corporate for scheme B on scheme A’s body corporate. The subsidiary scheme representative must be a member of the committee appointing them. If the committee fails to make the appointment, then the chairperson is the “default” appointee. An appointment of a subsidiary schemes representative has no effect until written notice of the appointment is received by the body corporate for scheme A (see **Form B62**, ¶73-750). The appointee must represent their body corporate:

- in the way it directs, and
- subject to such direction, in a way that is in its best interests.

If a mortgagee in possession claims, by written notice to the secretary, the right to vote for a lot, the mortgagee’s right to vote replaces the right of the fee simple owner or their devisee. See **Form B63** (¶73-770) for the required notice.

Finally, entitlement to vote (ie “voter” status) on a motion or for choosing a member of the committee is lost (other than in respect of a motion for a resolution without dissent) if the owner of the lot owes a debt to the body corporate at the time of the meeting.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same.

Law: BCCM Act s 211, 219

Std Mod, s 83, 85

Acc Mod, s 81, 83

Com Mod, s 50, 52

SS Mod, s 44, 46

Corporations Act, s 127.

[¶41-420] Quorum

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Before a general meeting can be held there must be a quorum present. There must be at least 25% of the total number of "voters" for the meeting present (ie 25% of the total number of persons entitled to vote). That is different to the total number of lot owners. The number can also vary if a resolution without dissent is involved, because a person may be disqualified from voting on ordinary and special resolutions (eg if they have not paid their levies) but entitled to vote on a resolution without dissent. Two or more co-owners for a lot are counted as one voter.

A voter is taken to be present at a general meeting if they are present personally, by proxy or by written or electronic voting paper.

Example:

There are 20 lots in a scheme and the owners of four lots are in arrears with their levies. In the case of a motion for an ordinary or special resolution, there are 16 potential "voters". The quorum is at least 25% of 16, which means the quorum is four voters present. In the case of a motion for a resolution without dissent the owners of the four lots in arrears are entitled to vote on the motion. There are 20 potential voters. The quorum is at least 25% of 20, which means the quorum is five.

If the number of voters for the meeting is three or more, two individuals must be present personally (ie otherwise than by proxy or voting paper). If the number of voters for the meeting is less than three, there is a quorum if at least one individual is present personally.

Accommodation Module

The position is the same.

Commercial Module

The position is substantially the same. However, there is no provision for electronic voting.

Small Schemes Module

The position is substantially the same. However, there is no provision for electronic voting.

Law: Std Mod s 48

Acc Mod s 46

Com Mod s 37

SS Mod s 29.

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[¶41-440] Adjournment

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If within 30 minutes of the scheduled starting time of the meeting a quorum is not present, the meeting must be adjourned to be held at the same place, on the same day and at the same time, in the next week. If at the adjourned meeting a quorum is again not present within 30 minutes of the scheduled starting time of the meeting, the persons present (whether personally or otherwise) form a quorum if:

- the chairperson is present personally, or
- a body corporate manager, with the delegated powers of the chairperson, is present personally.

If it is not practical to hold the adjourned meeting at the same place, it may be held at another place if all lot owners are advised personally or in writing of the new location before the adjourned meeting is to start. Telephone or facsimile advice will be sufficient advice for the purpose of this provision. Depending upon how far apart the two locations are and the number of lot owners involved, it may be sufficient if someone simply stays at the old location and redirects lot owners to the new location. See **Form B64** (¶73-790) for the type of written advice required.

The BCCM Act and Std Mod are silent on the question of other adjournments, but there appears to be no reason why the common law rules of meeting adjournments should not apply to general meetings of bodies corporate. Under those rules a general meeting could be adjourned for any reason if a motion is passed at the meeting for the adjournment. The motion would be a procedural motion and there would be no need for prior notification. A chairperson cannot adjourn a meeting at his or her own will and pleasure unless the business for which the meeting was convened has been concluded. If the chairperson vacates the chair or purports to adjourn the meeting in the absence of a resolution of the meeting to that effect, then the persons remaining can appoint a chairperson and conduct the unfinished business. At common law it is not necessary to give fresh notice of the adjourned meeting, but it is suggested that some attempt should be made to give fresh notice, particularly where there is time to do so. The notice in **Form B65** (¶73-800) is suggested for this purpose.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Scheme Module

Under the SS Mod, if at an adjourned meeting a quorum is again not present within 30 minutes of the time scheduled to start the adjourned meeting, the persons present (whether personally, by proxy or by a vote cast in a way permitted by the body corporate under s 47) form a quorum if —

(a) at least one voter is present personally, or
(b) no voter is present personally, but a body corporate manager, with authority from the body corporate to conduct the meeting, is present personally, or
(c) a committee member is present personally.

Law: Std Mod, s 82

Acc Mod, s 80

Com Mod, s 49

SS Mod, s 43.

[¶41-480] Exercise of vote

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A voter for a general meeting may vote on a motion, other than a motion to be decided by secret ballot, in any of the following ways:

- personally (by attending the meeting).
- by proxy.
- by casting a written vote. A written vote is cast by completing the voting papers as required by the instructions included with the meeting notice. The voting papers must then be given to the secretary (personally, by post or by facsimile) before the start of the meeting. The voter may withdraw the written vote at any time before the result of the motion is declared. A proxy for the voter cannot withdraw the voter's written vote.
- By recording a vote electronically for open motions (where the body corporate has decided by ordinary resolution to permit this). An electronic vote is cast by completing and signing an electronic form of the voting papers and sending it electronically to the secretary. It must be sent in accordance with any requirement under the *Electronic Transactions (Queensland) Act 2001* about how a document must be signed or sent electronically, as well as any instructions accompanying the voting paper that are not in conflict with that Act. The voter may withdraw the written vote at any time before the result of the motion is declared. A proxy for the voter cannot withdraw the voter's written vote.

Persons present at the meeting must vote by show of hands, or by giving completed voting papers to the secretary (or, if the secretary is not present, the person chairing the meeting) not later than the start of the meeting, unless:

- a ballot is required by the BCCM Act, the Std Mod or the by-laws, or
- the chairperson decides a ballot is necessary to ensure an accurate count of votes.

Ballots are discussed in detail in ¶41-520. It should also be noted that there is some scope to vary the above rules relating to voting by persons present at the meeting. Section 87(1) of the Std Mod allows the body corporate to decide by special resolution that such voting is to be done in another way. In practice, it is difficult to see how the statutory provisions can be improved.

A person entitled to vote may ask for a poll for the counting of the vote on a motion to be decided by ordinary resolution, other than an ordinary resolution conducted by secret ballot. The request must be done:

- in person at the meeting, or
- on the voting paper on which the person votes, whether or not the person is present at the meeting.

The request may be made whether or not a vote has already been taken by show of hands, provided it is made before the next motion is considered or before the meeting ends if the motion is the last motion on the agenda. The request may also be withdrawn at any time before the poll is completed. On a poll only one vote may be exercised for each lot, whether personally, by proxy or in writing. Electronic voting is not catered for because the electronic voting provisions are in the Std Mod and Acc Mod and the poll provisions are in the BCCM Act, which has not been amended to recognise electronic voting. The motion is passed if the total of the contribution schedule lot entitlements for the motion is more than the total of the contribution schedule lot entitlements against the motion.

Co-owners of a lot need not appoint a proxy in order to vote. If they are all present, they can exercise their vote as a block vote, but the vote is only counted once. If one or some of them are present, the vote can still be exercised. However, the vote of co-owners cannot be counted if there is a conflict between the votes of the co-owners.

A general meeting may pass a resolution on a motion only if the motion is:

(a) a motion —

- included as an item of business on the general meeting's agenda, and

- stated in the voting papers accompanying the notice of the meeting, or

(b) one or more of the following —

- a procedural motion for the conduct of the meeting
- a motion to amend a motion, or
- a motion to correct minutes.

Although this particular provision is in s 87 of the Std Mod and s 87(1) provides some scope for variation of its provisions by special resolution of the body corporate, it is unlikely that this provision can be varied. This is because it is not directly relating to “voting” and the right to vary is restricted to matters of voting. Also, other provisions of the Std Mod (eg s 70, 81, 86) reinforce the need for the wording of motions to appear on the agenda.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The voting procedures are different for bodies corporate regulated by the SS Mod. Voting is done in the way the body corporate decides, which:

- must be fair and reasonable
- may include voting by telephone, electronic mail or some other way
- must, if the way involves an electronic communication of a vote, be consistent with any requirement under the *Electronic Transactions (Queensland) Act 2001*.

The rules relating to votes by co-owners are similar and there is still a requirement for motions to appear on the agenda. Voting papers are not required.

Law: BCCM Act, s 109, 110

Std Mod, s 86, 87

Acc Mod, s 84, 85

Com Mod, s 53, 54

SS Mod, s 47.

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[¶41-500] Proxies

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A voter for a general meeting may appoint a proxy to act for them at the meeting. However, the body corporate may by special resolution prohibit the use of proxies either totally or for particular things. **Form B66** (¶73-810) illustrates a resolution totally prohibiting proxies and **Form B67** (¶73-830) illustrates a resolution prohibiting proxies for particular things. The appointment of a proxy is only effective if the voter or the holder of the proxy gives a properly completed form to the secretary personally, by post or by facsimile before:

- the start of the meeting at which the proxy is to be exercised, or
- if the body corporate fixes an earlier time (not earlier than 24 hours before the time fixed for the meeting) — the earlier time.

An earlier time could be fixed by either the body corporate in general meeting or by the committee. The fixed time could relate to a particular meeting or to all general meetings. **Form B68** (¶73-850) illustrates a resolution fixing a time for submission of proxies.

A proxy:

- must be in the approved form (see **Form A6**, ¶70-160)
- must be in a document separate from a contract (unless it is given to an original owner in accordance with the Std Mod)
- must be in the English language
- cannot be irrevocable
- cannot be transferred by the holder to a third person
- lapses at the end of the body corporate's financial year or at the end of a shorter period stated in the proxy
- may be given by any person who has the right to vote at a general meeting (including an owner's representative, a corporate owner nominee and a subsidiary scheme representative)
- must appoint a named individual who can be anyone, other than a person disqualified by the Std Mod.

A person who holds a proxy may vote in their own right and in their capacity as proxy holder. The vote can be exercised by show of hands or by completing a voting paper or electronic vote. If at least one co-owner of a lot is present at the meeting, a proxy given by another co-owner is of no effect. Furthermore, a vote by proxy must not be exercised at a general meeting:

(a) if the member who gave the proxy is personally present at the meeting and does not consent to the proxy being used
(b) on a particular motion, if the person who gave the proxy exercised a written or electronic vote on the motion
(c) on a ballot for the election of a member of the committee, or for otherwise choosing a member of the committee
(d) for voting for a special resolution —

> (i) prohibiting, wholly or partly, the use of proxies at committee meetings or general meetings (ie a resolution in **Form B66** (¶73-810) or **Form B67** (¶73-830)), or
> (ii) consenting to the recording of a new community management statement that identifies a different regulation module to apply to the scheme

(e) for voting for a majority resolution
(f) on a motion approving —

> (i) the engagement of an executive or governing body corporate manager, or a service contractor, or the authorisation of a letting agent
> (ii) the amendment or termination of such an engagement or authorisation

(g) on a motion decided by secret ballot
(h) if the scheme is a principal scheme

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(i) if the general meeting is called to replace a committee member removed from office by the body corporate, or
(j) in circumstances where the Std Mod requires the resolution to be passed without proxy voting.

Subject to one exception (discussed below) there are a number of other restrictions on the use of proxies at general meetings of the body corporate. In particular:

1. A person cannot hold more than a specified number of proxies. The Std Mod says if there are 20 or more lots in the scheme the proxy holder cannot hold proxies from persons greater in number than 5% of the lots. If there are fewer than 20 lots in the scheme a proxy holder may not hold more than one proxy. In practice, this means if there are 39 or fewer lots, the maximum number of persons from whom proxies may be held is one. This is because 5% of 39 = 1.95 persons, which must logically be rounded back to one person.
2. A body corporate member (other than an owner with a mortgagee in possession of their lot) cannot be prevented by contract from exercising a vote at a general meeting, and cannot be required by contract to make someone else their proxy for voting at a general meeting.
3. A proxy cannot be exercised for someone else by:

- the original owner (apart from the circumstances in 2 above)
- a body corporate manager
- an associate of the original owner or a body corporate manager.

An "associate" is defined in very wide terms in s 256 of the BCCM Act (see ¶38-500 for a detailed discussion of the term).
4. A person does not have the right to exercise a proxy on a motion for the engagement of a person as a body corporate manager or service contractor or the authorisation of a person as a letting agent (or the amendment of an engagement or authorisation) if —

- the person exercising the proxy, or
- an associate of the person exercising the proxy,

stands to gain a financial benefit from the making or amending of the engagement or authorisation. For the purpose of this provision an "associate" has its normal meaning (see ¶38-500). In addition, a person is taken to be an associate if they are solicited by another person to appoint a proxy to vote in the interests of that other person, where that other person stands to gain a financial benefit from the entering into or amending of the engagement or authorisation referred to above.

There is an exception from 2 above in favour of an original owner. The original owner may exercise a proxy for a person if:

(a) the original owner is appointed proxy in the contract for sale of the lot to that person
(b) the proxy is for voting on issues stated in the contract for a period stated in the contract (not exceeding one year after registration of the community titles plan)
(c) those issues are limited to one or more of the following —

(i) engaging a person as a body corporate manager or service contractor or authorising a person as a letting agent (if the details are disclosed before the person enters into the contract)
(ii) authorising a service contractor or letting agent to occupy a part of the common property, the details of which authorisation were disclosed before the person entered into the contract), or
(iii) consenting to the recording of a new community management statement to include a by-law, the details of which were disclosed before the person entered into the contract.

These provisions in favour of an original owner apply notwithstanding the restrictions on proxy use that would normally apply to (b)(i) above. Also, the restrictions on the number of proxies that can be held by any one person do not apply for the purposes of these provisions.

Finally, it should be noted that it is an offence for a person to exercise a proxy, or otherwise purport to vote on behalf of another person, at a general meeting knowing that the person does not have the right to exercise the proxy or otherwise vote on behalf of the other person. The offence carries a maximum penalty of 100 penalty units.

Accommodation Module

The position is substantially the same.

Commercial Module

There are a number of differences, namely:

- there is no provision for the body corporate to prohibit the use of proxies by special resolution
- the restrictions in items 1 to 4 above, inclusive, do not apply
- a proxy does not lapse at the end of the body corporate's financial year
- there is no prohibition on a proxy being exercised at a general meeting on a ballot for the election of a member of the committee, or for otherwise choosing a member of the committee, and
- there is no prohibition on a proxy being exercised at a general meeting for voting for a special resolution prohibiting the use of proxies or deciding whether a person may act as proxy for a committee member.

Small Schemes Module

There are a number of differences, namely:

- there is no provision for the body corporate to prohibit the use of proxies by special resolution
- provided the proxy is to a named individual, there is no restriction on who that individual may be
- the restrictions in items 1 to 4 above, inclusive, do not apply
- there is no prohibition on a proxy being exercised at a general meeting on a ballot for the election of a member of the committee, or for otherwise choosing a member of the committee
- there is no prohibition on a proxy being exercised at a general meeting for voting for a special resolution prohibiting the use of proxies or deciding whether a person may act as proxy for a committee member
- the prohibition against a proxy being exercised at a general meeting on a particular motion if there has been a written vote on the motion is extended to include any vote on the motion cast in accordance with the procedure determined by that particular body corporate, and
- there is a prohibition against a proxy being exercised for someone else by a body corporate manager or an associate of a body corporate manager.

Law: Std Mod, s 106–111

Acc Mod, s 104–109

Com Mod, s 73–77

SS Mod, s 107–111.

[¶41-520] Secret ballots

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When is a secret ballot required?

A motion to be decided at a general meeting must be decided by secret ballot if:

(a) it is required by the BCCM Act or the Std Mod to be decided by secret ballot
(b) the committee has recommended it be decided by secret ballot and there is sufficient time to prepare and send out the required voting material, or
(c) the body corporate has by ordinary resolution required that the motion be decided by secret ballot.

A requirement under (c) above will normally apply to a particular motion. However, the resolution may be framed so that it applies to all motions about a stated particular subject or to all motions generally for the period stated in the resolution. That period must not end later than the end of the next annual general meeting held after the general meeting at which the resolution was passed.

Casting a vote

The following will be required (to be prepared by the secretary) in order for a person to cast a secret vote:

- a separate secret voting paper for the motion or motions requiring a secret vote— see **Form B70** (¶73-890)
- a secret voting paper envelope without a particulars tab (see **Form B71**, ¶73-910) or with a particulars tab (see **Form B73**, ¶73-950)
- if the secret voting paper envelope does not have a particulars tab, a separate particulars envelope (see **Form B72**, ¶73-930)

A vote on a motion to be decided by secret ballot may be made:

- by casting a written vote
- by casting an electronic vote (where the body corporate has decided by ordinary resolution that voters may cast votes electronically in secret ballots).

A resolution for electronic voting on secret ballots can only be passed if the body corporate operates a system for receiving electronic votes that do not disclose a voter's identity and rejects a vote cast by a person who is not a voter for a general meeting. Sections 89 and 90 of the Std Mod regulate electronic voting. At this stage, no electronic voting system for bodies corporate exists in Australia and electronic voting on secret ballots is not possible.

A vote may be cast in advance of the meeting by the voter returning the voting paper in the way prescribed, or it may be cast at the meeting. Where a voting paper has been submitted it may be withdrawn and a replacement vote submitted, but only where it is possible to readily identify the vote to be withdrawn. All voting papers received before the vote is counted must be given to the returning officer and held by him or her until the time comes to count the votes.

For a person to cast a vote on a motion to be decided by secret ballot they must:

1. Place a mark on the voting paper indicating the person's vote.
2. Place the voting paper in the secret voting paper envelope supplied by the secretary and seal it.
3. If a separate particulars envelope is supplied, place the sealed secret voting paper envelope in the separate envelope and seal it.
4. Complete the particulars envelope or particulars tab by signing and dating and insert the following information on the envelope or tab:

    (a) the number of the lot for which the vote is exercised
    (b) the name of the owner of the lot
    (c) the name of the person having the right to vote, and
    (d) the basis on which the person has the right to vote.

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5. Give the completed particulars envelope with the secret voting paper envelope enclosed (or the secret voting paper envelope with the completed particulars tab attached) to the returning officer, or forward the envelope to the returning officer so that the returning officer receives it before the votes are counted at the general meeting.

If the secret voting paper envelope or particulars envelope are to be sent to the returning officer by post, then a further envelope, addressed to the returning officer, will be required.

Returning officer

Where a secret ballot is to be held, the body corporate must appoint a returning officer whose functions are to:

- decide questions about eligibility to vote and voting entitlements
- receive secret voting papers
- count votes or inspect the counting of votes
- decide whether a vote is valid.

A returning officer cannot be a lot owner, a body corporate manager, service contractor or letting agent engaged by the scheme or an associate of any of those persons. The appointment may be made by the committee or at a general meeting — see **Form B74** (¶73-970) for the form of resolution.

When a returning officer receives a written vote for the ballot, they must (in the following order):

1. Confirm, by scrutiny of the details on each particulars envelope or particulars tab, that the voting paper is the vote of a person who has the right to vote on the motion.
2. Take the secret voting paper envelope out of the particulars envelope, or detach the particulars tab from the secret voting paper envelope.
3. For a vote on a motion required to be decided by special resolution, record on the secret voting paper envelope the contribution schedule lot entitlement for the lot for which the vote is cast.
4. Place the secret voting paper envelope in a receptacle in open view of the meeting.
5. When all the voting paper envelopes are in the receptacle, randomly mix the envelopes.
6. Take each secret voting paper out of its envelope.
7. For a vote on a motion to be decided by special resolution, record on the voting paper the contribution schedule lot entitlement of the lot for which the vote is cast.
8. Inspect and count the votes.
9. Provide each of the following to the person chairing the meeting:

   (a) the written voting papers, secret voting paper envelopes and particulars envelopes or particulars tabs
   (b) the number of electronic votes cast for and against the motion, and the number of abstentions from voting on the motion recorded electronically
   (c) the total number of votes cast for and against the motion
   (d) the total number of abstentions from voting on the motion
   (e) the number of votes rejected from the count, and
   (f) for each vote rejected, the reason for the rejection.

The secretary must have at the meeting and available for inspection by voters:

- the roll
- a list of persons who have the right to vote
- all proxy forms and voting papers.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The secret ballot provisions have no application to bodies corporate regulated by this module. Also, there is no provision for the appointment of a returning officer. However, s 47 of the module provides that voting must be done in the way the body corporate decides. It would therefore be possible for a body corporate to decide to adopt voting procedures that incorporate a secret ballot option.

Law: Std Mod s 88, 89, 90, 91

Acc Mod s 86, 87, 88, 89

Com Mod s 55, 56, 57, 58

SS Mod s 47.

[¶41-540] Amending motions and resolutions

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A motion may be amended at a general meeting by the persons present, and having the right to vote, at the meeting. However:

1. The amendment must occur before the motion is passed.
2. An amendment cannot change the subject matter of the motion.
3. In counting the votes for and against a motion to amend a motion, all persons who are not present personally or by proxy at the meeting, but would, if present, have the right to vote —

   (a) if the person has not cast a written or electronic vote on the motion — must not be counted as voting for or against the motion, or
   (b) if the person has cast a written or electronic vote on the motion — must be counted as voting against the motion.

The following example illustrates the difference between a motion that simply amends a motion and one that changes the subject matter of the original motion.

Original motion

"THAT the body corporate authorises the Secretary to expend $1,000 to replace the security camera at the front entrance to the building."

Amendment preserving subject matter

"THAT the body corporate authorises the Secretary to expend $1,100 to replace the security camera at the front entrance to the building."

Amendment changing subject matter

"THAT the body corporate authorises the Secretary to expend $1,000 to replace the swimming pool furniture."

Once a motion has been passed and becomes a resolution, the resolution itself may be amended or revoked. However, care needs to be taken to ensure that the right type of resolution is used.

General meeting resolutions

There are four types of general meeting resolutions:

- a resolution without dissent
- a special resolution
- a majority resolution
- an ordinary resolution

Where the BCCM Act or the regulation module requires a decision to be made by one of the above resolutions, then the decision or resolution can only be amended or revoked by a resolution of the same type. For example, to borrow money the body corporate must pass an ordinary resolution authorising the amount to be borrowed. Having done that, to change the amount to be borrowed another ordinary resolution would be required. A "higher" resolution may not be used to amend or revoke a "lower" resolution (eg a majority resolution cannot be revoked by a special resolution).

Where a decision can be made by the committee but it is made by the body corporate in general meeting by ordinary resolution, then it is most likely that an ordinary resolution will still be necessary to amend or revoke the original resolution.

Committee resolutions

If the resolution is a committee resolution and that was sufficient for the original decision, then the resolution may be amended or revoked by a further committee resolution.

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Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same.

Law: Std Mod, s 94, 95

Acc Mod, s 92, 93

Com Mod, s 61, 62

SS Mod, s 49, 50.

[¶41-560] Handing over of documents and materials

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At the first annual general meeting, the original owner must give the following to the body corporate:

1. A register of assets containing an inventory of all body corporate assets.
2. All plans, specifications, diagrams and drawings of buildings and improvements forming part of scheme land (as built) showing water pipes, electrical wiring, drainage, ventilation ducts, air-conditioning systems and other utility infrastructure. Note that this effectively requires the original owner to commission "as built" drawing for the buildings the subject of the community titles scheme.
3. All policies of insurance taken out by the original owner for the body corporate.
4. An independent valuation for each building that the body corporate must insure.
5. Documents in the original owner's possession or control relevant to the scheme, including, for example, the body corporate's roll, books of account, meeting minutes, registers, any body corporate manager or service contractor engagement or letting agent authorisation, correspondence and tender documentation.
6. The body corporate's seal.
7. Documents in the original owner's possession or control relevant to the buildings or improvements on scheme land, not including certificates of title for individual lots, or documents evidencing rights or obligations of the original owner that are not capable of being used for the benefit of the body corporate or an owner (other than an owner who is an original owner) of a lot, but including —
    - contracts for building work, or other work of a developmental nature, carried out on scheme land, and
    - certificates of classification for buildings and fire safety certificates.
8. Administrative and sinking fund budgets showing the body corporate's estimated spending for the financial year.
9. A detailed and comprehensive estimate of the body corporate's sinking fund expenditure for the scheme's first 10 financial years, which must include an estimate for the repainting of common property and of buildings that are body corporate assets.

The following should be noted about this requirement:

- It effectively obligates the original owner to establish and hand over the statutory records of the body corporate.
- If any of the documents are not available at the time of the first annual general meeting, but come into the possession of the original owner after the meeting, then the original owner must hand them to the secretary at the earliest practicable opportunity.
- Failure to comply with the obligation to hand over documents and materials at the first annual general meeting is a serious offence. It carries a maximum penalty of 150 penalty units. Original owners should therefore be very careful to comply fully with this requirement.
- Failure to comply with the obligation to hand over documents that come into the possession of the original owner after the meeting is also an offence. It carries a maximum penalty of 20 penalty units.

Accommodation Module

The position is the same.

Commercial Module

The position is substantially the same.

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Small Schemes Module

The position is substantially the same.

Law: Std Mod, s 79

Acc Mod, s 77

Com Mod, s 46

SS Mod, s 40.

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[¶41-580] Minutes

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The body corporate must ensure that full and accurate minutes are taken of the meeting. A copy of the minutes must be given to each lot owner within 21 days after the meeting. A detailed discussion about minutes commences at ¶42-300.

Accommodation Module

The position is the same.

Commercial Module

The position is substantially the same.

Small Schemes Module

The position is substantially the same.

Law: Std Mod, s 96

Acc Mod, s 94

Com Mod, s 63

SS Mod, s 51.

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[¶41-600] Inaugural general meetings

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The affairs of the body corporate need to be put in order long before the first annual general meeting. In addition, original owners often need to procure the body corporate to enter into agreements before control is lost to the initial unit buyers. It is therefore necessary for a general meeting of the body corporate to be held shortly after registration of the community titles plan when the original owner owns all the lots. This is commonly called the inaugural general meeting of the body corporate. This is not a category of meeting that is recognised by the BCCM Act or the Std Mod. It is actually an extraordinary general meeting and it is convened and held in the same way as any other extraordinary general meeting. Business commonly dealt with at this meeting includes:

- Noting the registration of the community titles plan and constitution of the body corporate.
- Authorising or noting establishment of the statutory records.
- Authorising or noting insurance covers.
- Adoption of budget and establishing initial maintenance contributions.
- Appointment and delegation of body corporate manager.
- Authorising opening and operation of bank account.
- Adoption of common seal.
- Appointment of building manager and issue of letting authority.

A set of minutes of an inaugural general meeting appears in **Form B75** (¶73-990).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶41-700] Purpose

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The annual general meeting is intended to give owners the opportunity to:

- review the performance of the body corporate and its committee over the past year
- re-elect the committee or elect a new committee
- consider the financial statement and any auditor's report
- adopt administrative fund and sinking fund budgets for the financial year
- fix contributions for the next financial year, and
- decide whether an auditor should be appointed or re-appointed.

In most community titles schemes the annual general meeting is the most important meeting held each year. In many cases it is the only general meeting held each year. The committee and body corporate manager should make a special effort to ensure that this meeting is properly convened and held, and that it serves as an effective reporting medium for the owners.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶41-720] Obligation to call and hold

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An annual general meeting, other than the first annual general meeting (which is dealt with at ¶41-300 ff) must be called and held within three months after the end of each of the scheme's financial years. The date on which the financial year ends depends upon whether the body corporate was constituted under the BCCM Act or the old Building and Group Titles Act (BUGT Act). If it was constituted under the BCCM Act (ie after 13 July 1997) then "financial year" means:

- the period from the establishment of the scheme until the end of the month immediately before the month when the first anniversary of the establishment of the scheme falls, and each successive period of one year from the end of the financial year, or
- if an adjudicator changes the financial year of the body corporate — the period fixed by the adjudicator as the financial year and each successive period of one year from the end of the period.

Example:

If a community titles plan was registered on 12 August 1998, the scheme was established on that date. In the absence of an adjudicator's order, the first financial year of the body corporate commences on that date and ends on 31 July 1999 (which is a broken period). Subsequent financial years commence on 1 August and end on 31 July. It follows that the period during which the annual general meeting must be held each year is the period from 1 August to 31 October.

If the scheme was constituted under the BUGT Act, then the financial year depends upon whether the body corporate had held its first annual general meeting before 13 July 1997. If it had, then its financial year is:

- each year ending on the last day of the month containing the anniversary of the first annual general meeting held for the body corporate, or
- if a referee under the BUGT Act had fixed a date to be taken to be the anniversary of the first annual general meeting of the body corporate — each year ending on the last day of the month containing the date fixed by the referee.

Example:

If the old building unit titles plan was registered on 11 March 1992, and under the BUGT Act it held its first annual general meeting on 16 April 1992, then its financial year (in the absence of a referee's order) commences on 1 May and ends on 30 April each year. It follows that the period during which the annual general meeting must be held each year is the period from 1 May to 31 July.

If the body corporate had not held its first annual general meeting before 13 July 1997, then, for the purpose only of calculating when the first annual general meeting was to be held, and for determining the scheme's financial year, the establishment of the scheme was taken to have happened when the plan was registered under the BUGT Act. The first annual general meeting should then have been held in accordance with the timetable under the BCCM Act and the date of that meeting is used to calculate the financial year, the calculation being made in the same way as is illustrated in the first example.

An adjudicator may change the body corporate's financial year and the dates when later financial years end. This is done by order under s 283 of the BCCM Act. If the scheme involved a building units plan under the BUGT Act that was registered before 13 July 1997, then s 330(9) and (10) are also relevant. If the scheme was constituted after 13 July 1997, then the definition of "financial year" in Sch 4 of the BCCM Act is also relevant.

Finally, another important point needs to be made about timing. Within three to six weeks before the end of the body corporate's financial year the secretary must serve notice on each owner inviting nominations of candidates for election to the committee. This effectively means that the timetable for annual meeting procedures commences six weeks before the end of the financial year. (See ¶36-850 for detailed discussion.)

© CCH

Accommodation Module

The position is the same.

Commercial Module

The position is the same, except that the requirement to call for nominations for candidates for election to the committee within three to six weeks before the end of the financial year does not apply.

Small Schemes Module

The position is the same, except that the requirement to call for nominations for candidates for election to the committee within three to six weeks before the end of the financial year does not apply.

Law: BCCM Act s 283, 330(9), (10) and Sch 4

Std Mod s 13, 60

Acc Mod s 58

Com Mod s 46

SS Mod s 37.

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[¶41-740] Meeting place

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A general meeting of a body corporate, including the annual general meetings, must be held not more than 15 km (measured in a straight line on a horizontal plane) from the scheme land. However, the committee may, in certain circumstances, cause the meeting to be held outside the 15 km radius. The following is the procedure that must be adopted:

1. The committee resolves to depart from the 15 km radius requirement (see **Form B47**, ¶73-470).
2. The committee notifies the owners of its intention to hold the meeting at a stated place more than 15 km from scheme land (see **Form B48**, ¶73-480). The notification would need to be served in a similar way to a notice of meeting.
3. Sufficient time is allocated to allow owners a reasonable opportunity to object in writing to the proposed place of the meeting. A period of 14 days is suggested for this purpose, although a shorter period may be justifiable in some circumstances.
4. Owners may submit their written objections. No form is required, but **Form B49** (¶73-490) illustrates a form of objection.
5. Not more than 25% of owners of lots included in the scheme object to the proposed place of the meeting.

Once the above has been satisfied, then the meeting can be convened to be held at the place proposed in the notice to owners. Of course, the requirement for not more than 25% of owners of lots included in the scheme to object to the proposed place is critical. If the objections are above that percentage, then the meeting cannot be held at that proposed place. The following should also be noted:

• For the purpose of determining the percentage "co-owners" should be counted together as an "owner". Although "owner" is defined in the BCCM Act as including ***each*** of two or more persons who are registered owners it is most unlikely that this subsection is intended to be read so as to include individual co-owners.
• It would be most unwise to incorporate the notice to owners in a notice convening the meeting itself. This is because the meeting would need to be reconvened if more than 25% of owners recorded an objection.
• It is not entirely clear whether a separate notice must be given to owners in respect of each meeting that is proposed to be held outside the 15 km radius, or whether a single notice relating to all future meetings can be given. Bearing in mind that in most schemes owners change on a regular basis, the likelihood is that a court would be mindful to protect their rights to object by interpreting the subsection so as to require the notice to be given in respect of each meeting.
• Where there are two or more land parcels involved in the scheme (eg there is a beach facility some distance away from the main development), then the "scheme land" is the land associated with the main development. This is because the external facility is an "asset" rather than being part of the scheme land. The 15 km radius must therefore be measured from the scheme land and not the associated land asset.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

There is no requirement in this module for general meetings to be held within a 15 km radius of the scheme land. Therefore, none of the above commentary applies to bodies corporate regulated by this module.

Law: Std Mod, s 75

Acc Mod, s 73

Com Mod, s 43.

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[¶41-750] Submitting motions for the agenda

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Motions for inclusion on the agenda of an annual general meeting can be submitted at any time by the committee or a member of the body corporate. Where a notice is sent out inviting nominations for the committee, then at the same time the members must be invited to submit motions for consideration at the annual general meeting. The motion must be received before the end of the body corporate's financial year immediately preceding the meeting. If it is not received on time it will have to wait for the next meeting.

The following types of motion cannot be included on the agenda for an annual general meeting if it would result in that type of motion having been considered by the body corporate more than once in its financial year:

- a motion to change the regulation module applying to the scheme
- a motion proposing that the remuneration paid to a particular service contractor be changed
- a motion proposing that the engagement of a person as a service contractor, or authorisation of a person as a letting agent, be amended to include a right or option of extension or renewal.

Where a member of the body corporate submits a motion for inclusion on the agenda, they may also provide an explanatory note about the motion, provided the note does not exceed 300 words. That note will be included in the meeting materials.

Accommodation Module

The position is the same.

Commercial Module

The position is substantially the same.

Small Schemes Module

There is simply a right to submit a motion without significant detail or restriction.

Law: Std Mod s 69

Acc Mod s 67

Com Mod s 36

SS Mod s 34.

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[¶41-760] Agenda

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Section 76(2) of the Std Mod sets out the things that must be included on the agenda for general meetings of the body corporate. Some of these things apply to the annual general meeting. In addition, s 77(3) of the Std Mod deals specifically with annualgeneral meetings and sets out the things that must be included on the agenda for those particular meetings.

Section 76(2) requires the agenda to include the following:

- the substance of any motion that the committee proposes for consideration by the meeting (including, for motions with alternatives, the substance of each alternative)
- the substance of any motion submitted by a member of the body corporate for consideration by a general meeting (other than a motion stated in the agenda as an alternative under motions with alternatives), and
- if there has been a previous general meeting, the substance of a motion to confirm the minutes of that meeting.

If it is proposed not to have a committee of the body corporate, then there would also need to be a motion for the appointment of a governing body corporate manager.

Section 76(3) requires the agenda to include the substance of "statutory motions" and anything else required under the Act to be included on the agenda. The words "statutory motion" are defined in the Dictionary to mean a motion about —

(a) presenting the body corporate's accounts for the financial year
(b) appointing an auditor of the body corporate's accounts for the next financial year, or not auditing the accounts
(c) adopting administrative fund and sinking fund budgets for the financial year
(d) fixing contributions to be paid by the owners of lots for the next financial year, and
(e) reviewing each insurance policy held by the body corporate.

A special resolution that the accounts not be audited must be worded in accordance with s 155(8) of the Std Mod and the motion must bear the notation required by that subsection.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same except that:

- Section 37(2) does not require the "substance" of the motions to be included, but rather the "motions".
- There is no requirement to appoint an auditor.
- There is no reference to other things required by the BCCM Act being included on the agenda.
- There is no mention of any special resolution requirements to dispense with an audit.

Law: Std Mod, s 76, 155, Dictionary

Acc Mod, s 74, 153, Dictionary

Com Mod, s 43, 111

SS Mod, s 37.

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[¶41-780] Convening the meeting

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The following procedure is recommended to convene an annual general meeting:

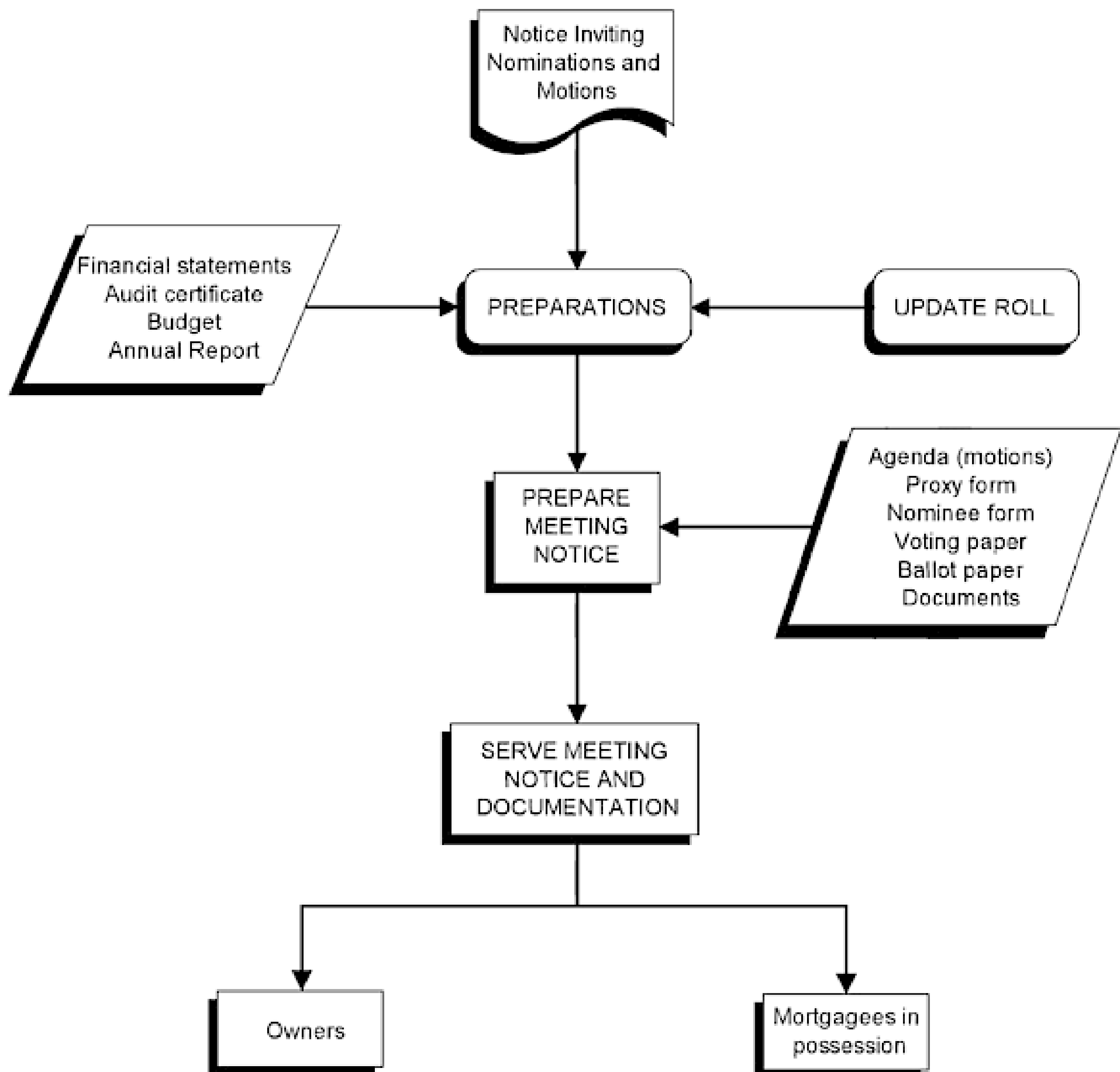
Step	Action	Timing
1	Send notice to owners inviting: • nominations of candidates for election to the committee, and • motions for inclusion on the agenda (see ¶36-850)	3–6 weeks before end of financial year
2	Treasurer to prepare the annual financial statements and a budget for the next financial year	End of financial year
3	If required, have the financial statements audited	End of financial year
4	Prepare the annual report — see **Form B76** (¶74-010) (This is not required by law, but is recommended as a means of keeping owners informed about the affairs of the owners corporation and interested in its management.)	End of financial year
5	Ensure the roll is up to date	1–7 weeks after end of financial year
6	Prepare the meeting notice (see below for inclusions)	1–7 weeks after end of financial year
7	Serve the meeting notice (and accompanying documents)	1–7 weeks after end of financial year

The meeting notice must state the time and place of the meeting, contain or be accompanied by:

1. An agenda (as to which see ¶41-760).
2. A proxy form (see **Form A6**, ¶70-160).
3. A form for appointment of a corporate nominee, but only if the notice is being given to a corporate owner (see **Form B57**, ¶73-650).
4. A voting paper (see ¶41-365).
5. Any explanatory material required to be included (see ¶41-367).
6. Committee election ballot papers (see ¶36-950).
7. A copy of the proposed budget.
8. A copy of the statement of accounts.
9. A copy of the auditor's certificate (if the accounts were required to be audited).
10. Copies of any quotations supporting motions proposing major spending.
11. Other materials required to support particular motions (eg the terms of any proposed engagement of a body corporate manager or service contractor).
12. A statement detailing all insurance policies held by the body corporate (see ¶47-030).

Form B77 (¶74-030) illustrates a notice of annual general meeting. The following chart illustrates the process for convening an annual general meeting.

Annual General Meeting Process



Although the meeting has to confirm the minutes of the last general meeting, there is no requirement for the meeting notice to be accompanied by a copy of the minutes of that meeting. This is because a copy of those minutes was required to be given to each lot owner within 21 days after the meeting. However, there may have been changes in lot ownership or lot owners may have misplaced their copy of the minutes. It may therefore be desirable to send out a further copy of the last general meeting minutes with the meeting notice.

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An annual general meeting must be held at least 21 days after the notice of the meeting is given to lot owners. The Std Mod does not specify “clear” days, but in the absence of specific provision to this effect the term “days” means “clear days”. The term “clear days” means exclusive of the day the notice is served, and of the day on which the meeting is held. Before any calculation can be made to determine the number of “clear days” it is necessary to determine the day on which the notice is served. This depends on how the notice is given. If the notice is given (or served) personally, then the date of actual service will be known. If the notice is sent by mail it will be more difficult to determine when it is received. If there is direct evidence when the notice is received (eg someone saw the postman deliver the letter to the letterbox) then that will suffice. However, in most cases there is no direct evidence. Presumptions then need to be relied upon.

Section 39A of the *Acts Interpretation Act 1954* says that a document required or permitted by an Act to be served (which includes “given”) by post is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved. Delivery times can vary depending upon distance and location. A post office can advise normal delivery times. However, it is usually safe to assume that mail within Australia would be delivered in the normal course on the third business day after posting. In New South Wales, the legal presumption is four working days under that state’s interpretation legislation. Some secretaries may therefore wish to allow a longer period as a special precaution, particularly in view of the fact that the presumption only applies “unless the contrary is proved”. It will be noted that all addresses for service must be Australian addresses (see s 194 of the Std Mod). Overseas mail delivery times are therefore not relevant.

Notice periods are best illustrated by examples.

Service by personal delivery

If an annual general meeting is to be held on 27 June and all the notices are to be personally delivered (which will usually only be the case where all owners reside in their lots), then the notices will need to be delivered on 5 June. The date on which the notice is delivered and the date of the meeting are both excluded from the calculation.

The following illustrates the calculation:

June	Activity	Comment
5	Date of delivery	
6		Clear day 1
7		Clear day 2
8		Clear day 3
9		Clear day 4
10		Clear day 5
11		Clear day 6
12		Clear day 7
13		Clear day 8
14		Clear day 9
15		Clear day 10
16		Clear day 11
17		Clear day 12
18		Clear day 13
19		Clear day 14
20		Clear day 15
21		Clear day 16
22		Clear day 17
23		Clear day 18
24		Clear day 19
25		Clear day 20
26		Clear day 21
27	Date of meeting	
28		

Service by post

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If an annual general meeting is to be held on 27 June and the notices are to be served by post (which will be the most common situation), then the notices will need to be posted on 2 June (assuming that 2 June is a Monday or Tuesday). The date on which the notice is delivered and the date of the meeting are both excluded from the calculation and there must be an allowance for the number of days in the post (in this case the allowance being the minimum of three). If 2 June is a Wednesday, Thursday or Friday, then an extra two days, to allow for the weekend, must be added.

The following illustrates the calculation:

June	Activity	Comment
5	Date of delivery	
6		Clear day 1
7		Clear day 2
8		Clear day 3
9		Clear day 4
10		Clear day 5
11		Clear day 6
12		Clear day 7
13		Clear day 8
14		Clear day 9
15		Clear day 10
16		Clear day 11
17		Clear day 12
18		Clear day 13
19		Clear day 14
20		Clear day 15
21		Clear day 16
22		Clear day 17
23		Clear day 18
24		Clear day 19
25		Clear day 20
26		Clear day 21
27	Date of meeting	
28		

To ensure that the annual general meeting is called and held within the statutory three month period, notice of the meeting will usually need to be sent out within the first two months of that period.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same, except that:

- The voting paper provisions do not apply.
- The secretary is the person primarily responsible for the process rather than the committee.
- The agenda must state, in addition to the wording of the motions, whether motions require a resolution without dissent, special resolution or ordinary resolution.
- No provision has to be made for the appointment of an auditor or the auditing of annual accounts.
- No provision is made for including on the agenda other things that are required by the BCCM Act. There are no such other provisions in any event and, even if there were, the secretary would still be required to include them.
- Written notice of the meeting must be given to lot owners personally or sent to them at their address for service.

• There is also scope for the body corporate to reduce the 21-day notice period.

Law: Std Mod, s 70, 74, 76, 96

Acc Mod, s 68, 72, 74, 94

Com Mod, s 37, 41, 43, 63

SS Mod, s 35, 36, 37, 51.

Last reviewed: 17 July 2006

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[¶41-800] Conducting the meeting

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The chairperson must chair the annual general meeting if they are present. In the event that:

- the chairperson is absent, or
- the chairperson's position is vacant, or
- a chairperson has not been chosen,

then the persons present at the meeting and having the right to vote should elect another person (who consents to their election) to chair the meeting. An executive body corporate manager to whom powers of the chairperson has been delegated has no automatic right to chair an annual general meeting if the chairperson is absent or unwilling to act as chairperson for the particular meeting. Before the executive body corporate manager can act as chairperson they would have to be elected as chairperson for the meeting. However, the Std Mod recognises the right of an executive body corporate manager to whom the powers of the chairperson has been delegated to advise and help the chairperson during the course of their chairing a meeting. Also, if the executive body corporate manager holding the chairperson's delegation is the only person forming a quorum at an adjourned meeting, then the manager may proceed to chair the meeting.

These provisions do not apply to a governing body corporate manager. Where there is a governing body corporate manager, a person elected, with the person's consent, by the persons present and having the right to vote at a general meeting, must chair the meeting.

The following procedure is suggested for conducting the meeting:

1. Declare the commencement of the meeting (eg "I declare the meeting open at 8.05 pm").
2. Record the names of those persons present either in person or by proxy.
3. Determine the persons entitled to vote.
4. Determine that a quorum is present (there should be a quorum for at least the first item of business).
5. Read and explain the first item of business and proposed motion.
6. If the motion is out of order, declare it out of order (see discussion below).
7. Encourage and conduct debate/discussion on the motion.
8. Put the motion to a vote (see ¶41-880 for complete discussion about voting).
9. Count the votes (remembering to include any votes cast by voting paper).
10. Declare the result of the vote (see discussion below).
11. Deal with each other item of business in the same manner (but as regards the election of the office bearers and committee, see ¶36-900 ff).
12. When all items of business have been dealt with, declare the meeting closed (eg "I declare the meeting closed at 9.38 pm").
13. Sign the minutes of the meeting after they have been confirmed.

The chairperson of an annual general meeting is required to rule a motion out of order if:

(a) the motion, if carried, would conflict with:

(i) the Act, or
(ii) the relevant regulation module, or
(iii) the by-laws, or

(b) the motion, if carried would be unlawful or unenforceable for another reason, or
(c) except for a procedural motion for the conduct of the meeting, or a motion to correct minutes — the substance of the motion was not included in the agenda for the meeting.

The chairperson must give reasons for ruling a motion out of order and the reasons must be recorded in the minutes. In the case of rulings under (a) above, the chairperson must state to the meeting how the ruling may be reversed by the persons present and entitled to vote on the issue. Effectively, this means that if the persons present at the meeting and entitled to vote disagree with the chairperson's ruling, they may pass an ordinary resolution disagreeing with the ruling. Although the Std Mod does not say so specifically, this would effectively overrule the chairperson's decision and allow the motion to proceed to the vote. This provision

is obviously intended to overcome problems that often occur where a body corporate has a dominating chairperson who manipulates the agenda by preventing particular items from going to a vote.

The chairperson must declare the result of voting on motions at the meeting. In doing so the chairperson must state:

- the number of votes cast for the motion
- the number of votes cast against the motion
- the number of abstentions from voting on the motion.

Those numbers must be recorded in the minutes of the meeting or in a voting tally sheet kept with the minutes. **Form B54** (¶73-590) illustrates a voting tally sheet. The recordings on the voting tally sheet must include, for each motion (other than a motion decided by secret ballot):

(a) a list of the votes, identified by lot number, rejected from the count
(b) for each vote rejected — the reason for the rejection
(c) for each lot for which a vote was cast, or for which there was an abstention from voting:

- the number of the lot
- whether there was a vote for or against or an abstention from voting, and

(d) the total number of:

- votes counted for the motion
- votes counted against the motion, and
- abstentions from voting on the motion.

As regards motions decided by secret ballot, the recordings on the tally sheet must include:

(a) a list of the votes rejected from the count
(b) for each vote rejected — the reason for the rejection, and
(c) the total number of:

- votes cast for the motion
- votes cast against the motion, and
- abstentions from voting on the motion.

The actual wording of the chairperson's declaration would be along the following lines: "*I declare motion No 4 carried, there being 23 votes recorded for the motion, 11 votes recorded against the motion and three persons entitled to vote abstaining from voting on the motion*."

The Std Mod does not say how debate should proceed on motions. The debate may be regulated by "rules" or "conventions" adopted by resolution of a general meeting or by recorded by-law. Where this has occurred, those rules or conventions should be followed, provided they are not inconsistent with the BCCM Act or relevant regulation module. In the absence of these rules, the debating procedure is at the discretion of the chairperson, but again subject to there being no conflict with the BCCM Act or relevant regulation module. The rules in **Form B55** (¶73-610) may be used as a guide.

The voting tally sheet may be inspected at the meeting by any of the following persons:

- a voter, or a person holding a proxy from a voter
- the returning officer, if any, appointed by the body corporate for the meeting
- the person chairing the meeting.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

© CCH

Small Schemes Module

There is no permanent chairperson for bodies corporate regulated by the SS Mod. Therefore, the chairperson for a meeting is elected at the beginning of each meeting. However, the chairperson has the same power to declare motions out of order. No rules are specified about:

- how the chairperson must declare the result of a vote
- recording the result in the minutes or on a tally sheet, or
- the actual information that must be recorded.

While a chairperson may choose to follow the Std Mod procedure in this regard, they need not do so and may simply declare the result of the vote (eg "*I declare motion No 4 carried*").

Law: Std Mod, s 80, 81, 93

Acc Mod, s 78, 79, 91

Com Mod, s 47, 48, 60

SS Mod, s 41, 42.

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[¶41-820] Meaning of “voter” and entitlement to vote

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Before it is possible to determine whether a quorum is present for the annual general meeting, the number of potential “voters” for the meeting must be determined. A voter is an individual:

(a) whose name is entered on the body corporate’s roll as —

(i) the owner of a lot, or
(ii) the *representative* of the owner of a lot, or

(b) who is a *corporate owner nominee*, or
(c) who is a nominee of a corporation the name of which is entered on the body corporate’s roll as the representative of the owner of a lot, or
(d) who is a subsidiary scheme representative.

A person or company is a *representative* of an owner if —

(a) the person is a guardian, trustee, receiver or other representative and is authorised to act on the owner’s behalf, or
(b) the person —

(i) is acting under authority of a power of attorney from the owner, and
(ii) is not the original owner, except if the power of attorney is given under s 211 or 219 of the Act (being the sections permitting powers of attorney to sellers for no more than one year), and
(iii) is not the body corporate manager, a service contractor or a letting agent.

In addition, the person will only be treated as the owner’s representative if they —

• give the secretary a copy of the instrument under which they derive their representative capacity (eg deed of trust or instrument of appointment as receiver) or otherwise satisfy the secretary about that capacity, and
• advise the secretary of their residential or business address and (if different) their address for service (see **Form B56**, ¶73-630).

A mortgagee in possession of a lot may claim, by written notice to the secretary, the right to vote for the lot. This displaces the vote of the owner or a person deriving a right to vote from the registered owner.

Where the representative is a company, the company must also appoint an individual to be its *corporate nominee*. This is the same appointment that must be made by a company that is the owner of a lot in the community titles scheme.

A person is only taken to be the corporate nominee if the corporation gives the secretary written notice of nomination, stating the name of the nominee or the names of two nominees, one of whom is to act in the absence of the other. The notice must:

• be given under common seal of the company or in another way permitted by s 127 of the *Corporations Act 2001*, or by a person acting under power of attorney (a copy of which must be given to the secretary) from the company, and
• advise the residential or business address and (if different) the address for service of each nominee.

Form B57 (¶73-650) shows the notification of corporate representative capacity of an owner coupled with a notice of appointment of corporate nominee. If the appointment is to be made under common seal it should be supported by a resolution of the company (see **Form B58**, ¶73-670). **Form B59** (¶73-690) shows a notice of appointment of corporate nominee by a corporate lot owner. Again, the appointment, if made under common seal, should be supported by a resolution (see **Form B58**, ¶73-670). A corporation may change its nominee by giving the secretary notice of a new nomination. If the notice is given under common seal there should be a supporting resolution of the corporation. See **Form B60** (¶73-710) for the resolution and **Form B61** (¶73-730) for the notice to the body corporate.

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Where one community titles scheme ("scheme B") is a lot included in another community titles scheme ("scheme A"), the body corporate for scheme B must ensure at all times there is a person (the *subsidiary scheme representative*) appointed by the committee for scheme B's body corporate to represent the body corporate for scheme B on scheme A's body corporate. The subsidiary scheme representative must be a member of the committee appointing them. If the committee fails to make the appointment, then the chairperson is the "default" appointee. An appointment of a subsidiary scheme representative has no effect until written notice of the appointment is received by the body corporate for scheme A (see **Form B62**, ¶73-750). The appointee must represent their body corporate:

- in the way it directs, and
- subject to such direction, in a way that is in its best interests.

If a mortgagee in possession claims, by written notice to the secretary, the right to vote for a lot, the mortgagee's right to vote replaces the right of the fee simple owner or their devisee. See **Form B63** (¶73-770) for the required notice.

Finally, entitlement to vote (ie "voter" status) on a motion or for choosing a member of the committee is lost (other than in respect of a motion for a resolution without dissent) if the owner of the lot owes a debt to the body corporate at the time of the meeting.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same.

Law: BCCM Act, s 211, 219

Corporations Act 2001, s 127

Std Mod, s 83, 85

Acc Mod, s 81, 83

Com Mod, s 50, 52

SS Mod, s 44, 46.

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[¶41-840] Quorum

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Before an annual general meeting can be held there must be a quorum present. There must be at least 25% of the total number of “voters” for the meeting present (ie 25% of the total number of persons entitled to vote). That is different to the total number of lot owners. The number can also vary if a resolution without dissent is involved, because a person may be disqualified from voting on ordinary and special resolutions (eg if they have not paid their levies) but entitled to vote on a resolution without dissent. Two or more co-owners for a lot are counted as one voter. A voter is taken to be present at a general meeting if they are present personally, by proxy or by written voting paper.

A voter is taken to be present at a meeting if they are there personally, by proxy or by written or electronic voting paper.

Example:

There are 20 lots in a scheme and the owners of four lots are in arrears with their levies. In the case of a motion for an ordinary or special resolution, there are 16 potential voters. The quorum is at least 25% of 16, which means the quorum is four voters present. In the case of a motion for a resolution without dissent the owners of the four lots in arrears are entitled to vote on the motion. There are 20 potential voters. The quorum is at least 25% of 20, which means the quorum is five.

If the number of voters for the meeting is three or more, two individuals must be present personally (ie otherwise than by proxy or voting paper). If the number of voters for the meeting is less than three, there is a quorum if at least one individual is present personally.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same.

Law: Std Mod, s 82

Acc Mod, s 80

Com Mod, s 49

SS Mod, s 43.

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[¶41-860] Adjournment

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If within 30 minutes of the scheduled starting time of an annual general meeting a quorum is not present, the meeting must be adjourned to be held at the same place, on the same day and at the same time, in the next week. If at the adjourned meeting a quorum is again not present within 30 minutes of the scheduled starting time of the meeting, the persons present (whether personally or otherwise) form a quorum if:

- the chairperson is present personally, or
- a body corporate manager, with the delegated powers of the chairperson under an authorisation given by the body corporate, is present personally.

If it is not practical to hold the adjourned meeting at the same place, it may be held at another place if all lot owners are advised personally or in writing of the new location before the adjourned meeting is to start. Telephone or facsimile advice will be sufficient advice for the purpose of this provision. Depending upon how far apart the two locations are and the number of lot owners involved, it may be sufficient if someone simply stays at the old location and redirects lot owners to the new location. See **Form B64** (¶73-790) for the type of written advice required.

The BCCM Act is silent on the question of other adjournments, but there appears to be no reason why the common law rules of meeting adjournments should not apply to general meetings of bodies corporate. Under those rules a general meeting could be adjourned for any reason if a motion is passed at the meeting for the adjournment. The motion would be a procedural motion and there would be no need for prior notification. A chairperson cannot adjourn a meeting at his or her own will and pleasure unless the business for which the meeting was convened has been concluded. If the chairperson vacates the chair or purports to adjourn the meeting in the absence of a resolution of the meeting to that effect, then the persons remaining can appoint a chairperson and conduct the unfinished business. At common law it is not necessary to give fresh notice of the adjourned meeting, but it is suggested that some attempt should be made to give fresh notice, particularly where there is time to do so. The notice in **Form B65** (¶73-800) is suggested for this purpose.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same.

Law: Std Mod s 82

Acc Mod s 80

Com Mod s 49

SS Mod s 43.

[¶41-880] Exercise of vote

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A voter for an annual general meeting may vote on a motion, other than a motion to be decided by secret ballot, in any of the following ways—

• Personally (by attending the meeting).
• By proxy.
• By casting a written vote. A written vote is cast by completing the voting papers as required by the instructions with the meeting notice. The voting papers must then be given to the secretary (personally, by post or by facsimile) before the start of the meeting. The voter may withdraw the written vote at any time before the result of the motion is declared. A proxy for the voter cannot withdraw the voter's written vote.
• By recording a vote electronically for open motions (where the body corporate has decided by ordinary resolution to permit this). An electronic vote is cast by completing and signing an electronic form of the voting papers and sending it electronically to the secretary. It must be sent in accordance with any requirement under the *Electronic Transactions (Queensland) Act 2001* about how a document must be signed or sent electronically, as well as any instructions accompanying the voting paper that are not in conflict with that Act. The voter may withdraw the written vote at any time before the result of the motion is declared. A proxy for the voter cannot withdraw the voter's written vote.

Persons present at the meeting must vote by show of hands, or by giving completed voting papers to the secretary or, if the secretary is not present, the person chairing the meeting not later than the start of the meeting, unless:

• a ballot is required by the BCCM Act, the Std Mod or the by-laws, or
• the chairperson decides a ballot is necessary to ensure an accurate count of votes.

Ballots are discussed in detail in ¶41-520. It should also be noted that there is some scope to vary the above rules relating to voting by persons present at the meeting. Section 87(1) of the Std Mod allows the body corporate to decide by special resolution that such voting is to be done in another way. In practice, it is difficult to see how the statutory provisions can be improved.

A person entitled to vote may ask for a poll for the counting of the vote on a motion to be decided by ordinary resolution, other than an ordinary resolution conducted by secret ballot. The request must be done:

• in person at the meeting, or
• on the voting paper on which the person votes, whether or not the person is present at the meeting.

The request may be made whether or not a vote has already been taken by show of hands, provided it is made before the next motion is considered or before the meeting ends, other than an ordinary resolution conducted by secret ballot. It may also be withdrawn at any time before the poll is completed. On a poll only one vote may be exercised for each lot, whether personally, by proxy or in writing. Electronic voting is not catered for because the electronic voting provisions are in the Std Mod and Acc Mod and the poll provisions are in the BCCM Act, which has not been amended to recognise electronic voting. The motion is passed if the total of the contribution schedule lot entitlements for the motion is more than the total of the contribution schedule lot entitlements against the motion.

Co-owners of a lot need not appoint a proxy in order to vote. If they are all present, they can exercise their vote as a block vote, but the vote is only counted once. If one or some of them are present, the vote can still be exercised. However, the vote of co-owners cannot be counted if there is a conflict between the votes of the co-owners.

An annual general meeting may pass a resolution on a motion only if the motion is:

(a) a motion —

  • included as an item of business on the annual general meeting's agenda, and

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- stated in the voting papers accompanying the notice of the meeting.

(b) one or more of the following —

- a procedural motion for the conduct of the meeting
- a motion to amend a motion, or
- a motion to correct minutes.

Although this particular provision is in s 87 of the Std Mod and s 87(1) provides some scope for variation of its provisions by special resolution of the body corporate, it is unlikely that this provision can be varied. This is because it is not directly relating to "voting" and the right to vary is restricted to matters of voting. Also, other provisions of the Std Mod (eg s 70, 81 and 86) reinforce the need for the wording of motions to appear on the agenda.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The voting procedures are different for bodies corporate regulated by the SS Mod. Voting is done in the way the body corporate decides which:

- must be fair and reasonable, and
- may include voting by telephone, electronic mail or some other way that can be clearly communicated to the meeting; if it is by electronic communication, it must be consistent with the *Electronic Transactions (Queensland) Act 2001*.

The rules relating to votes by co-owners are similar and there is still a requirement for motions to appear on the agenda. Voting papers are not required.

Law: BCCM Act s 109, 110

Std Mod s 86, 87

Acc Mod s 84, 85

Com Mod s 53, 54

SS Mod s 47.

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[¶41-900] Proxies

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A voter for a general meeting may appoint a proxy to act for them at the meeting. However, the body corporate may by special resolution prohibit the use of proxies either totally or for particular things. **Form B66** (¶73-810) illustrates a resolution totally prohibiting proxies and **Form B67** (¶73-830) illustrates a resolution prohibiting proxies for particular things. The appointment of a proxy is only effective if the voter or the holder of the proxy gives a properly completed form to the secretary personally, by post or by facsimile before:

- the start of the meeting at which the proxy is to be exercised, or
- if the body corporate fixes an earlier time (not earlier than 24 hours before the time fixed for the meeting) — the earlier time.

An earlier time could be fixed by either the body corporate in general meeting or by the committee. The fixed time could relate to a particular meeting or to all general meetings. **Form B68** (¶73-850) illustrates a resolution fixing a time for submission of proxies. There are strict rules about the form and use of proxies. See ¶41-500 for a complete discussion about proxies.

Accommodation Module

The position is the same.

Commercial Module

The position is the same, except that the body corporate cannot prohibit the use of proxies.

Small Schemes Module

The position is the same, except that the body corporate cannot prohibit the use of proxies.

Law: Std Mod s 107

Acc Mod s 105

Com Mod s 74

SS Mod s 54.

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[¶41-920] Secret ballots

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A motion to be decided at a general meeting must be decided by secret ballot if:

(a) it is required by the BCCM Act or the Std Mod to be decided by secret ballot
(b) the committee has recommended that it be decided by secret ballot and there is sufficient time to prepare and send out the required voting material, or
(c) the body corporate has by ordinary resolution required that it be decided by secret ballot.

A requirement under (c) above will normally apply to a particular motion. However, the resolution may be framed so that it applies to all motions about a stated particular subject or to all motions generally for the period stated in the resolution. That period must not end later than the end of the next annual general meeting held after the general meeting at which the resolution was passed.

The processes for conducting a secret ballot and voting on a secret ballot are complex and reference should be made to ¶41-520 for a complete discussion of those processes.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The secret ballot provisions have no application to bodies corporate regulated by this module. However, s 47 of the module provides that voting must be done in the way the body corporate decides. It would therefore be possible for a body corporate to decide to adopt voting procedures that incorporate a secret ballot option.

Law: Std Mod s 88

Acc Mod s 86

Com Mod s 55

SS Mod s 47.

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[¶41-940] Amending motions and resolutions

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A motion may be amended at an annual general meeting by the persons present, and having the right to vote, at the meeting. However:

1. The amendment must occur before the motion is passed.
2. An amendment cannot change the subject matter of the motion.
3. In counting the votes for and against a motion to amend a motion, all persons who are not present personally or by proxy at the meeting, but would, if present, have the right to vote:

   (a) if the person has not cast a written or electronic vote on the motion — must not be counted as voting for or against the motion, or
   (b) if the person has cast a written or electronic vote on the motion — must be counted as voting against the motion.

The following example illustrates the difference between a motion that simply amends a motion and one that changes the subject matter of the original motion.

Original motion

"**THAT** the body corporate authorises the Secretary to expend $1,000 to replace the security camera at the front entrance to the building."

Amendment preserving subject matter

"**THAT** the body corporate authorises the Secretary to expend $1,100 to replace the security camera at the front entrance to the building."

Amendment changing subject matter

"**THAT** the body corporate authorises the Secretary to expend $1,000 to replace the swimming pool furniture."

Once a motion has been passed and becomes a resolution, the resolution itself may be amended or revoked. However, care needs to be taken to ensure that the right type of resolution is used.

General meeting resolutions

There are four types of general meeting resolutions:

- a resolution without dissent
- a special resolution
- a majority resolution
- an ordinary resolution.

Where the BCCM Act or the regulation module requires a decision to be made by one of the above resolutions, then the decision or resolution can only be amended or revoked by a resolution of the same type. For example, to borrow money the body corporate must pass an ordinary resolution authorising the amount to be borrowed. Having done that, to change the amount to be borrowed another ordinary resolution would be required. A "higher" resolution may not be used to amend or revoke a "lower" resolution (eg a majority resolution cannot be revoked by a special resolution).

Where a decision can be made by the committee but it is made by the body corporate in general meeting by ordinary resolution, then it is most likely that an ordinary resolution will still be necessary to amend or revoke the original resolution.

Committee resolutions

If the resolution is a committee resolution and that was sufficient for the original decision, then the resolution may be amended or revoked by a further committee resolution.

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Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 94, 95

Acc Mod s 92, 93

Com Mod s 61, 62

SS Mod s 49, 50.

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[¶41-960] Minutes

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The body corporate must ensure that full and accurate minutes are taken of an annual general meeting. A copy of the minutes must be given to each lot owner within 21 days after the meeting. A detailed discussion about minutes commences at ¶42-300.

Accommodation Module
The position is the same.

Commercial Module
The position is the same.

Small Schemes Module
The position is the same.

Law: Std Mod s 96

Acc Mod s 94

Com Mod s 63

SS Mod s 51.

[¶42-000] Purpose

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All general meetings of bodies corporate, other than annual general meetings are “extraordinary general meetings”. They are usually convened by the committee when a particular matter has to be dealt with in a general meeting of the body corporate, and for whatever reason (eg urgency) it is not possible to deal with the matter at the next annual general meeting. They therefore provide a “bridge” between annual general meetings. Because of the time between the registration of a community titles plan (ie constitution of the body corporate) and the holding of the first annual general meeting, an extraordinary general meeting is usually held shortly after plan registration. These meetings are commonly called inaugural general meetings (although that term does not originate from the BCCM Act): see ¶41-600.

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[¶42-020] Obligation to convene and hold

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An extraordinary general meeting of the body corporate may be convened by:

- the secretary
- another member of the committee, or
- a person authorised or required to call the meeting by an order of the adjudicator.

If the secretary convenes the meeting of their own volition, no minute or special recording is required. The secretary just proceeds to convene the meeting. However, if the secretary convenes the meeting at the request of the committee there will usually be a resolution of the committee supporting the secretary's action (see **Form B78**, ¶74-050).

An extraordinary general meeting must be called if a notice asking for the meeting to consider and decide motions proposed in the notice is:

- signed by or for the owners of at least 25% of all the lots in the scheme, and
- given to the secretary.

If the secretary is absent the notice can be given to the chairperson or, if the committee has not been chosen at the time, it can be given to the original owner. The secretary is presumed to be absent if the notice is given to the secretary at the address for service of the body corporate and no reply is received within seven days. See **Form B80** (¶74-090) for a notice asking for an extraordinary general meeting to be convened.

Where an extraordinary general meeting is requested in this way, the meeting must be called within 14 days after the notice asking for the meeting is given and held within six weeks after the notice is given. The meeting can be held even though the body corporate's first annual general meeting has not been held.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same. The persons entitled to call a general meeting are:

- if the positions of secretary and treasurer are held by one person, that person;
- if the positions of secretary and treasurer are held by two persons, the secretary or treasurer (if authorised by committee resolution to call the particular meeting), and
- a person authorised or required to call the meeting by an order of an adjudicator.

If positions for the secretary and treasurer are held by two persons and the secretary is absent then the notice to call an extraordinary general meeting must be given to the treasurer. If the committee has not been chosen at the time, notice can be given to the original owner.

Law: Std Mod, s 65, 67

Acc Mod s 63, 65

Com Mod s 32, 34

SS Mod s 30, 32.

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[¶42-040] Meeting place

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An extraordinary general meeting of a body corporate must be held not more than 15 km (measured in a straight line on a horizontal plane) from the scheme land. However, the committee may, in certain circumstances, cause the meeting to be held outside the 15 km radius. The following is the procedure that must be adopted:

1. The committee resolves to depart from the 15 km radius requirement (see **Form B47**, ¶73-470).
2. The committee notifies the owners of its intention to hold the meeting at a stated place more than 15 km from scheme land (see **Form B48**, ¶73-480). The notification would need to be served in a similar way to a notice of meeting.
3. Sufficient time is allocated to allow owners a reasonable opportunity to object in writing to the proposed place of the meeting. A period of 14 days is suggested for this purpose, although a shorter period may be justifiable in some circumstances.
4. Owners may submit their written objections. No form is required, but **Form B49** (¶73-490) illustrates a form of objection.
5. Not more than 25% of owners of lots included in the scheme object to the proposed place of the meeting.

Once the above has been satisfied, then the meeting can be convened to be held at the place proposed in the notice to owners. Of course, the requirement for not more than 25% of owners of lots included in the scheme to object to the proposed place is critical. If the objections are above that percentage, then the meeting cannot be held at that proposed place. The following should also be noted:

- For the purpose of determining the percentage “co-owners” should be counted together as an “owner”. Although “owner” is defined in the BCCM Act as including ***each*** of two or more persons who are registered owners it is most unlikely that this subsection is intended to be read so as to include individual co-owners.
- It would be most unwise to incorporate the notice to owners in a notice convening the meeting itself. This is because the meeting would need to be reconvened if more than 25% of owners recorded an objection.
- It is not entirely clear whether a separate notice must be given to owners in respect of each meeting that is proposed to be held outside the 15 km radius, or whether a single notice relating to all future meetings can be given. Bearing in mind that in most schemes owners change on a regular basis, the likelihood is that a court would be mindful to protect their rights to object by interpreting the subsection so as to require the notice to be given in respect of each meeting.
- Where there are two or more land parcels involved in the scheme (eg there is a beach facility some distance away from the main development), then the “scheme land” is the land associated with the main development. This is because the external facility is an “asset” rather than being part of the scheme land. The 15 km radius must therefore be measured from the scheme land and not the associated land asset.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

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There is no requirement in this module for general meetings to be held within a 15 km radius of the scheme land. Therefore, none of the above commentary applies to bodies corporate regulated by this module.

Law: Std Mod s 75

Acc Mod s 73

Com Mod s 42.

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[¶42-060] Agenda

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Section 76(2) of the Std Mod sets out the things that must be included on the agenda for general meetings of the body corporate. These apply to an extraordinary general meeting.

Section 76(2) requires the agenda to include the following:

- the substance of any motion that the committee proposes for consideration by the meeting (including, for motions with alternatives, the substance of each alternative)
- if the meeting has been requested by owners (see ¶42-020), the motions proposed in the notice asking for the meeting
- the substance of any motion submitted by a member of the body corporate for consideration by a general meeting (other than a motion stated in the agenda as an alternative under motions with alternatives)
- if an adjudicator has authorised or required the meeting to be called, any motions required by the adjudicator's order to be considered by the meeting
- if there has been a previous general meeting, the substance of a motion to confirm the minutes of that meeting, and
- any other motion required under the regulation to be included in the agenda (for example, engagement of a body corporate manager).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same, except each motion that is not submitted by the committee must state the name (and lot number if applicable) of the person submitting the motion. If the motion is submitted by the committee, the motion must state that it was submitted by the committee and whether it is a statutory motion.

Law: Std Mod s 76

Acc Mod s 74

Com Mod s 43

SS Mod s 37.

[¶42-065] Voting papers

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Voting papers will need to be prepared to accompany the notice of the meeting. If all motions to be decided at the meeting are "open motions" (ie motions that do not require a secret ballot) then only one voting paper need be prepared. However, if any motion has to be decided by secret ballot, then a second "secret voting paper" must also be prepared. These are fully discussed at ¶41-365.

Accommodation Module

The position is the same.

Commercial Module

There is no similar provision.

Small Schemes Module

There is no similar provision.

Law: Std Mod s 42A, 42B

Acc Mod s 40A, 40B.

[¶42-070] Explanatory material

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A voting paper for a general meeting must be accompanied by an explanatory schedule in any of the following circumstances:

1. A person who submitted a motion for inclusion on the voting paper has provided an explanatory note about the motion (provided the note does not exceed 300 words).
2. The voting paper is for an annual general meeting.
3. The voting paper states a motion with alternatives.
4. The voting paper states a motion proposing that the regulation module applying to the scheme be changed.
5. A section of the module otherwise requires an explanatory schedule (eg s 42 of the Std Mod dealing with committee restricted issues requires certain information to be provided when certain general meeting approvals are being sought).

These provisions need to be strictly observed, otherwise the validity of the meeting or particular resolutions may be called into question. Explanatory material requirements are fully discussed at ¶41-367.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

There is no similar provision.

Law: Std Mod s 73

Acc Mod s 71

Com Mod s 40.

[¶42-080] Convening the meeting

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The following procedure is recommended to convene an extraordinary general meeting:

1. Ensure the roll is up to date.
2. Prepare the meeting notice (see below for inclusions).
3. Serve the meeting notice (and accompanying documents).

The meeting notice must state the time and place of the meeting, contain or be accompanied by:

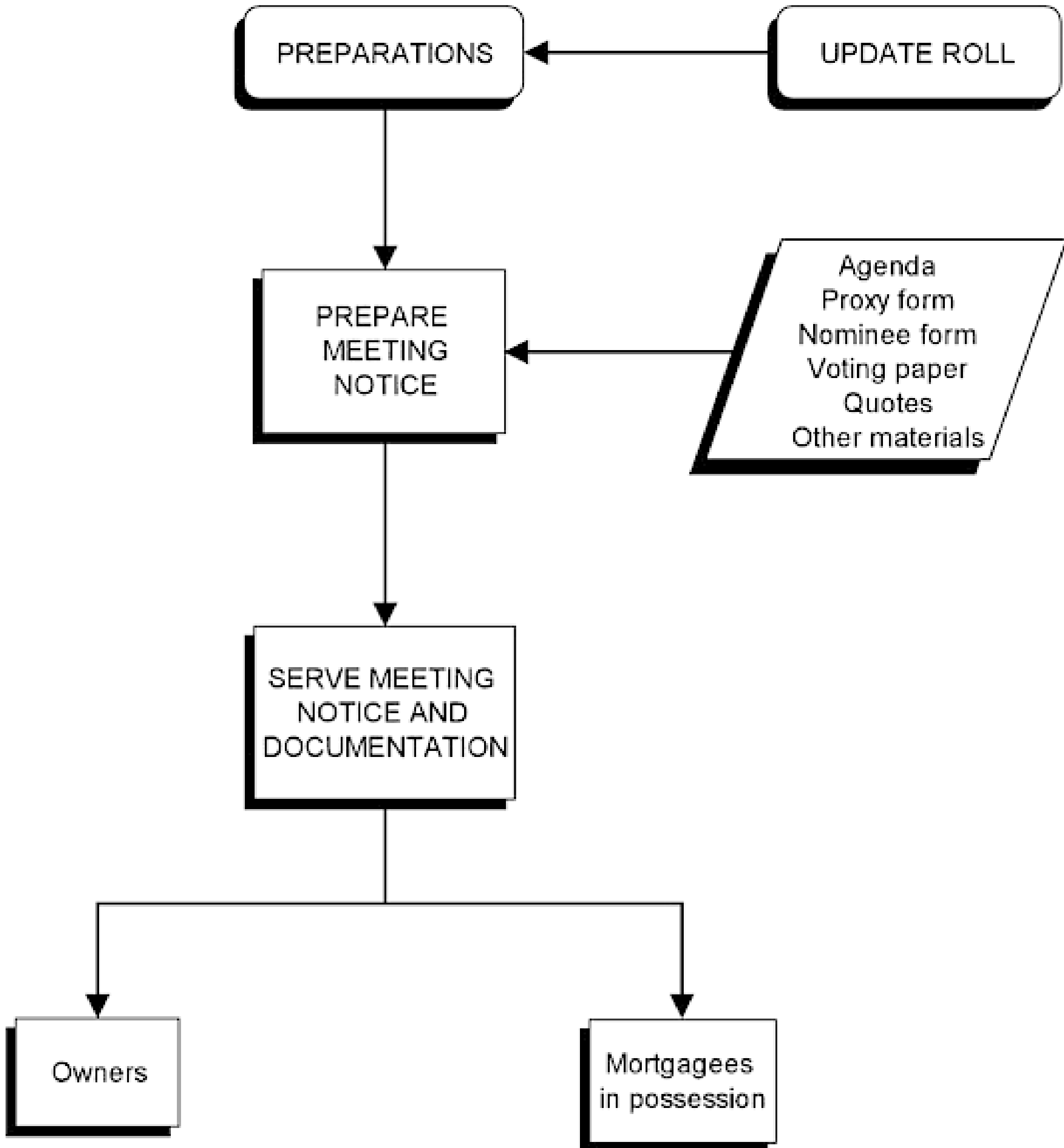
1. An agenda, that must include the substance of the following motions:

    (a) those proposed by the committee (including, for a motion with alternatives, the substance of each alternative)
    (b) those submitted by body corporate members to be included on the agenda, other than a motion stated in the agenda as an alternative under a motion with alternatives
    (c) if the meeting was requisitioned, the motions proposed in the notice asking for the meeting
    (d) those required by an adjudicator to be considered at the meeting (if the meeting itself was required to be convened), and
    (e) to confirm the minutes of the previous general meeting (whether annual or extraordinary).
2. A proxy form (see **Form A6**, ¶70-160).
3. A form for appointment of a corporate owner nominee, but only if the notice is being given to a corporate owner (see **Form B57**, ¶73-650).
4. A voting paper for all motions to be decided at the meeting.
5. For a motion to be decided at the meeting by secret ballot — each of the following —

    (i) a secret voting paper
    (ii) an envelope marked "secret voting paper"
    (iii) either a separate particulars envelope or a particulars tab forming part of the secret voting paper envelope that a person may detach without unsealing or otherwise opening the envelope.
6. Any explanatory material required to be included.
7. Copies of any quotations supporting motions proposing major spending.
8. Other materials required to support particular motions (eg the terms of any proposed engagement of a body corporate manager or service contractor).

Form B81 (¶74-110) illustrates a notice of extraordinary general meeting based on the approved form. **Form A6** (¶70-160) is a proxy form. (See ¶41-500 for detailed commentary about the use of proxies *and note that a proxy must be in the approved form to be valid*.) **Form B17** (¶72-870) can be referred to for an example of a voting envelope with a detachable particulars tab and **Form B18** (¶72-890) and **Form B19** (¶72-910) can be referred to for an example of separate particulars envelope and posting envelope. See ¶41-367 for the explanatory material that must accompany the meeting notice.

The following chart illustrates the extraordinary general meeting process.



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Although the meeting has to confirm the minutes of the last general meeting, there is no requirement for the meeting notice to be accompanied by a copy of the minutes of that meeting. This is because a copy of those minutes was required to be given to each lot owner as soon as practicable after the meeting was held. However, there may have been changes in lot ownership or lot owners may have misplaced their copy of the minutes. It may therefore be desirable to send out a further copy of the last general meeting minutes with the meeting notice.

The meeting must be held at least 21 days after the notice of meeting is given to lot owners. The Std Mod does not specify “clear” days, but in the absence of specific provision to this effect the term “days” means “clear days”. The term “clear days” means exclusive of the day the notice is served, and of the day on which the meeting is held. Before any calculation can be made to determine the number of “clear days” it is necessary to determine the day on which the notice is served. This depends on how the notice is given. If the notice is given (or served) personally, then the date of actual service will be known. If the notice is sent by mail it will be more difficult to determine when it is received. If there is direct evidence when the notice is received (eg someone saw the postman deliver the letter to the letterbox) then that will suffice. However, in most cases there is no direct evidence. Presumptions then need to be relied upon.

Section 39A of the *Acts Interpretation Act 1954* says that a document required or permitted by an Act to be served (which includes “given”) by post is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved. Delivery times can vary depending upon distance and location. A post office can advise normal delivery times. However, it is usually safe to assume that mail within Australia would be delivered in the normal course on the third business day after posting. In New South Wales, the legal presumption is four working days under that State’s interpretation legislation. Some secretaries may therefore wish to allow a longer period as a special precaution, particularly in view of the fact that the presumption only applies “unless the contrary is proved”. It will be noted that all addresses for service must be Australian addresses (vide s 194 of the Std Mod). Overseas mail delivery times are therefore not relevant.

Notice periods are best illustrated by examples.

Service by personal delivery

If an extraordinary general meeting is to be held on 27 June and all the notices are to be personally delivered (which will usually only be the case where all owners reside in their lots), then the notices will need to be delivered on 5 June. The date on which the notice is delivered and the date of the meeting are both excluded from the calculation.

The following illustrates the calculation:

June	Activity	Comment
5	Date of delivery	
6		Clear day 1
7		Clear day 2
8		Clear day 3
9		Clear day 4
10		Clear day 5
11		Clear day 6
12		Clear day 7
13		Clear day 8
14		Clear day 9
15		Clear day 10
16		Clear day 11
17		Clear day 12
18		Clear day 13
19		Clear day 14
20		Clear day 15
21		Clear day 16
22		Clear day 17
23		Clear day 18
24		Clear day 19

25		Clear day 20
26		Clear day 21
27	Date of meeting	
28		

Service by post

If an extraordinary general meeting is to be held on 27 June and the notices are to be served by post (which will be the most common situation), then the notices will need to be posted on 2 June (assuming that 2 June is a Monday or Tuesday). The date on which the notice is delivered and the date of the meeting are both excluded from the calculation and there must be an allowance for the number of days in the post (in this case the allowance being the minimum of three). If 2 June is a Wednesday, Thursday or Friday, then an extra two days, to allow for the weekend, must be added.

The following illustrates the calculation:

June	Activity	Comment
2 (Monday)	Date of posting	
3		1st business day after posting
4		2nd business day after posting
5	Date of delivery	3rd business day after posting
6		Clear day 1
7		Clear day 2
8		Clear day 3
9		Clear day 4
10		Clear day 5
11		Clear day 6
12		Clear day 7
13		Clear day 8
14		Clear day 9
15		Clear day 10
16		Clear day 11
17		Clear day 12
18		Clear day 13
19		Clear day 14
20		Clear day 15
21		Clear day 16
22		Clear day 17
23		Clear day 18
24		Clear day 19
25		Clear day 20
26		Clear day 21
27	Date of meeting	
28		

To ensure that a requisitioned extraordinary general meeting is called and held within the statutory six weeks period, notice of the meeting will usually need to be sent out within the first two weeks of that period.

Accommodation Module

The position is the same, except that the Acc Mod does not require an owner's address to be an Australian address. This means that allowance must be made for overseas delivery times where one or more owners have overseas addresses recorded.

Commercial Module

The position is the same, except that the Com Mod does not require an owner's address to be an Australian address. This means that allowance must be made for overseas delivery times where one or more owners have overseas addresses recorded.

Small Schemes Module

The position is the same, except that:

- The voting paper provisions do not apply.
- The secretary is the person primarily responsible for the process rather than the committee.
- The agenda must state, in addition to the wording of the motions, whether motions require a resolution without dissent, special resolution or ordinary resolution.
- Written notice of the meeting must be given to lot owners personally or sent to them at their address for service.
- There is also scope for the body corporate to reduce the 21-day notice period.

Law: Std Mod s 70, 74, 76, 96

Acc Mod s 68, 72, 74, 94

Com Mod s 37, 41, 43, 63

SS Mod s 35, 36, 37, 51.

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[¶42-100] Conducting the meeting

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The chairperson must chair an extraordinary general meeting if they are present. In the event that:

- the chairperson is absent, or
- the chairperson's position is vacant, or
- a chairperson has not been chosen

then the persons present at the meeting and having the right to vote should elect another person (who consents to their election) to chair the meeting. An executive body corporate manager to whom powers of the chairperson has been delegated has no automatic right to chair an extraordinary general meeting if the chairperson is absent or unwilling to act as chairperson for the particular meeting. Before the executive body corporate manager can act as chairperson they would have to be elected as chairperson for the meeting. However, the Std Mod recognises the right of an executive body corporate manager to whom the powers of the chairperson has been delegated to advise and help the chairperson during the course of their chairing a meeting. Also, if the executive body corporate manager holding the chairperson's delegation is the only person forming a quorum at an adjourned meeting, then the manager may proceed to chair the meeting.

Those provisions do not apply to a governing body corporate manager. Where there is a governing body corporate manager, a person elected, with the person's consent, by the persons present and having the right to vote at a general meeting must chair the meeting.

The following procedure is suggested for conducting the meeting:

1. Declare the commencement of the meeting (eg "I declare the meeting open at 8.05 pm").
2. Record the names of those persons present either in person or by proxy.
3. Determine the persons entitled to vote.
4. Determine that a quorum is present (there should be a quorum for at least the first item of business).
5. Read and explain the first item of business and proposed motion.
6. If the motion is out of order, declare it out of order (see discussion below).
7. Encourage and conduct debate/discussion on the motion.
8. Put the motion to a vote (see ¶42-180 for complete discussion about voting).
9. Count the votes (remembering to include any votes cast by voting paper).
10. Declare the result of the vote (see discussion below).
11. Deal with each other item of business in the same manner.
12. When all items of business have been dealt with, declare the meeting closed (eg "I declare the meeting closed at 9.38 pm").
13. Sign the minutes of the meeting after they have been confirmed.

The chairperson of an extraordinary general meeting is required to rule a motion out of order if:

(a) the motion, if carried, would conflict with:

(i) the Act, or
(ii) the relevant regulation module, or
(iii) the by-laws, or
(iv) a motion already voted on at the meeting, or

(b) the motion, if carried would be unlawful or unenforceable for another reason, or
(c) except for a procedural motion for the conduct of the meeting, or a motion to correct minutes — the substance of the motion was not included in the agenda for the meeting.

The chairperson must give reasons for ruling a motion out of order and the reasons must be recorded in the minutes. In the case of rulings under (a) above, the chairperson must state to the meeting how the ruling may be reversed by the persons present and entitled to vote on the issue. Effectively, this means that if the persons present at the meeting and entitled to vote disagree with the chairperson's ruling, they may pass an ordinary resolution disagreeing with the ruling. Although the Std Mod does not say so specifically, this would effectively overrule the chairperson's decision and allow the motion to proceed to the vote. This provision

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is obviously intended to overcome problems that often occur where a body corporate has a dominating chairperson who manipulates the agenda by preventing particular items from going to a vote.

The chairperson must declare the result of voting on motions at the meeting. In doing so the chairperson must state:

• the number of votes cast for the motion
• the number of votes cast against the motion
• the number of abstentions from voting on the motion.

Those numbers must be recorded in the minutes of the meeting or in a voting tally sheet kept with the minutes. A voting tally sheet must be kept in respect of voting at the meeting. **Form B54** (¶73-590) illustrates a voting tally sheet. The recordings on the voting tally sheet must include, for each motion (other than a motion decided by secret ballot):

(a) a list of the votes, identified by lot number, rejected from the count
(b) for each vote rejected — the reason for the rejection
(c) for each lot for which a vote was cast, or for which there was an abstention from voting —

• the number of the lot
• whether there was a vote for or against or an abstention from voting, and

(f) the total number of —

• votes cast for the motion
• votes cast against the motion, and
• abstentions from voting on the motion.

As regards motions decided by secret ballot, the recordings on the tally sheet must include —

(a) a list of the votes rejected from the count
(b) for each vote rejected — the reason for the rejection, and
(c) the total number of —

• votes cast for the motion
• votes cast against the motion, and

abstentions from voting on the motion.

The actual wording of the chairperson's declaration would be along the following lines: "*I declare motion No 4 carried, there being 23 votes recorded for the motion, 11 votes recorded against the motion and three persons entitled to vote abstaining from voting on the motion*."

The Std Mod does not say how debate should proceed on motions. The debate may be regulated by "rules" or "conventions" adopted by resolution of a general meeting or by recorded by-law. Where this has occurred, those rules or conventions should be followed, provided they are not inconsistent with the BCCM Act or relevant regulation module. In the absence of these rules, the debating procedure is at the discretion of the chairperson, but again subject to there being no conflict with the BCCM Act or relevant regulation module. The rules in **Form B55** (¶73-610) may be used as a guide.

The voting tally sheet may be inspected at the meeting by any of the following persons —

• a voter, or a person holding a proxy from a voter
• the returning officer, if any, appointed by the body corporate for the meeting
• the person chairing the meeting.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

There is no permanent chairperson for bodies corporate regulated by the SS Mod. Therefore, the chairperson for a meeting is elected at the beginning of each meeting. However, the chairperson has the same power to declare motions out of order.

Law: Std Mod s 80, 81, 93

Acc Mod s 78, 79, 91

Com Mod s 47, 48

SS Mod s 41, 42.

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[¶42-120] Meaning of “voter” and entitlement to vote

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Before it is possible to determine whether a quorum is present for an extraordinary general meeting, the number of potential “voters” for the meeting must be determined. A voter is an individual:

(a) whose name is entered on the body corporate’s roll as —

(i) the owner of a lot, or
(ii) the *representative* of the owner of a lot, or

(b) who is a *corporate owner nominee*, or
(c) who is a nominee of a corporation the name of which is entered on the body corporate’s roll as the representative of the owner of a lot, or
(d) who is a subsidiary scheme representative.

A person or company is a *representative* of an owner if —

(a) the person is a guardian, trustee, receiver or other representative and is authorised to act (either contractually or as a matter of law) on the owner’s behalf, or
(b) the person —

(i) is acting under authority of a power of attorney from the owner, and
(ii) is not the original owner, except if the power of attorney is given under s 211 or 219 of the Act (being the sections permitting powers of attorney to sellers for no more than one year), and
(iii) is not the body corporate manager, a service contractor or a letting agent.

In addition, the person will only be treated as the owner’s representative if they —

- give the secretary a copy of the instrument under which they derive their representative capacity (eg deed of trust or instrument of appointment as receiver) or otherwise satisfy the secretary about that capacity, and
- advise the secretary of their residential or business address and (if different) their address for service (see **Form B56**, ¶73-630).

A mortgagee in possession of a lot may claim, by written notice to the secretary, the right to vote for the lot. This displaces the vote of the owner or a person deriving a right to vote from the registered owner.

Where the representative is a company, the company must also appoint an individual to be its *corporate nominee*. This is the same appointment that must be made by a company that is the owner of a lot in the community titles scheme.

A person is only taken to be the corporate nominee if the corporation gives the secretary written notice of nomination, stating the name of the nominee or the names of two nominees, one of whom is to act in the absence of the other. The notice must:

- be given under common seal of the company or in another way permitted by s 127 of the *Corporations Act 2001*, or by a person acting under power of attorney (a copy of which must be given to the secretary) from the company, and
- advise the residential or business address and (if different) the address for service of each nominee.

Form B57 (¶73-650) shows the notification of corporate representative capacity of an owner coupled with a notice of appointment of corporate nominee. If the appointment is to be made under common seal it should be supported by a resolution of the company (see **Form B58**, ¶73-670). **Form B59** (¶73-690) shows a notice of appointment of corporate nominee by a corporate lot owner. Again, the appointment, if made under common seal, should be supported by a resolution (see **Form B58**, ¶73-670). A corporation may change its nominee by giving the secretary notice of a new nomination. If the notice is given under common seal there should be a supporting resolution of the corporation. See **Form B60** (¶73-710) for the resolution and **Form B61** (¶73-730) for the notice to the body corporate.

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Where one community titles scheme (“scheme B”) is a lot included in another community titles scheme (“scheme A”), the body corporate for scheme B must ensure at all times there is a person (the *subsidiary scheme representative*) appointed by the committee for scheme B’s body corporate to represent the body corporate for scheme B on scheme A’s body corporate. The subsidiary scheme representative must be a member of the committee appointing them. If the committee fails to make the appointment, then the chairperson is the “default” appointee. An appointment of a subsidiary schemes representative has no effect until written notice of the appointment is received by the body corporate for scheme A (see **Form B62**, ¶73-750). The appointee must represent their body corporate:

- in the way it directs, and
- subject to such direction, in a way that is in its best interests.

If a mortgagee in possession claims, by written notice to the secretary, the right to vote for a lot, the mortgagee’s right to vote replaces the right of the fee simple owner or their devisee. See **Form B63** (¶73-770) for the required notice.

Finally, entitlement to vote (ie “voter” status) on a motion or for choosing a member of the committee is lost (other than in respect of a motion for a resolution without dissent) if the owner of the lot owes a debt to the body at the time of the meeting.

Accommodation Module

The position is the same.

Commercial Module

The position is substantially the same.

Small Schemes Module

The position is substantially the same.

Law: BCCM Act, s 211, 219

Std Mod, s 83, 85

Acc Mod s 81, 83

Com Mod s 50, 52

SS Mod s 44, 46

Corporations Act 2001, s 127.

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[¶42-140] Quorum

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Before an extraordinary general meeting can be held there must be a quorum present. There must be at least 25% of the total number of "voters" for the meeting present (ie 25% of the total number of persons entitled to vote). That is different to the total number of lot owners. The number can also vary if a resolution without dissent is involved, because a person may be disqualified from voting on ordinary and special resolutions (eg if they have not paid their levies) but entitled to vote on a resolution without dissent. Two or more co-owners for a lot are counted as one voter.

A voter is taken to be present at a meeting if they are there personally, by proxy or by written or electronic voting paper.

Example:

There are 20 lots in a scheme and the owners of four lots are in arrears with their levies. In the case of a motion for an ordinary or special resolution, there are 16 potential voters. The quorum is at least 25% of 16, which means the quorum is four voters present. In the case of a motion for a resolution without dissent the owners of the four lots in arrears are entitled to vote on the motion. There are 20 potential voters. The quorum is at least 25% of 20, which means the quorum is five.

If the number of voters for the meeting is three or more, two individuals must be present personally (ie otherwise than by proxy or voting paper). If the number of voters for the meeting is less than three, there is a quorum if at least one individual is present personally.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same.

Law: Std Mod s 82

Acc Mod s 80

Com Mod s 49

SS Mod s 43.

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[¶42-160] Adjournment

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The process of an adjournment of an annual general meeting also applies for an extraordinary general meeting. If within 30 minutes of the scheduled starting time of an extraordinary general meeting a quorum is not present, the meeting must be adjourned to be held at the same place, on the same day and at the same time, in the next week. If at the adjourned meeting a quorum is again not present within 30 minutes of the scheduled starting time of the meeting, the persons present (whether personally or otherwise) form a quorum if:

- the chairperson is present personally, or
- a body corporate manager, with the delegated powers of the chairperson, is present personally.

See ¶41-860 for a complete discussion.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same.

Law: Std Mod s 82

Acc Mod s 80

Com Mod s 49

SS Mod s 43.

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[¶42-180] Exercise of vote

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The voting exercise at an extraordinary general meeting follows the same rules as voting at an annual general meeting. A voter for an extraordinary general meeting may vote on a motion other than a motion to be decided by secret ballot, in any of the following ways —

- Personally, by attending the meeting.
- By proxy.
- By casting a written vote. A written vote is cast by completing the voting papers as required by the instructions with the meeting notice. The voting papers must then be given to the secretary (personally, by post or by facsimile) before the start of the meeting. The voter may withdraw the written vote at any time before the result of the motion is declared. A proxy for the voter cannot withdraw the voter's written vote.
- By recording a vote electronically for open motions (where the body corporate has decided by ordinary resolution to permit this). An electronic vote is cast by completing and signing an electronic form of the voting papers and sending it electronically to the secretary. It must be sent in accordance with any requirement under the *Electronic Transactions (Queensland) Act 2001* about how a document must be signed or sent electronically, as well as any instructions accompanying the voting paper that are not in conflict with that Act. The voter may withdraw the written vote at any time before the result of the motion is declared. A proxy for the voter cannot withdraw the voter's written vote.

Persons present at the meeting must vote by show of hands, or by giving completed voting papers to the secretary (or, if the secretary is not present, the person chairing the meeting), not later than the start of the meeting, unless:

- a ballot is required by the BCCM Act, the Std Mod or the by-laws, or
- the chairperson decides a ballot is necessary to ensure an accurate count of votes.

See ¶41-880 for a complete discussion.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The voting procedures are different for bodies corporate regulated by the SS Mod. Voting is done in the way the body corporate decides which:

- must be fair and reasonable, and
- may include voting by telephone, electronic mail or some other way that can be clearly communicated to the meeting; if it is by electronic communication then it must be consistent with the *Electronic Transactions (Queensland) Act 2001*.

The rules relating to votes by co-owners are similar and there is still a requirement for motions to appear on the agenda. Voting papers are not required.

Law: BCCM Act s 109, 110

Std Mod s 86, 87

Acc Mod s 84, 85

Com Mod s 53, 54

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SS Mod s 47.

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[¶42-200] Proxies

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A voter for a general meeting may appoint a proxy to act for them at the meeting. However, the body corporate may by special resolution prohibit the use of proxies either totally or for particular things. **Form B66** (¶73-810) illustrates a resolution totally prohibiting proxies and **Form B67** (¶73-830) illustrates a resolution prohibiting proxies for particular things. The appointment of a proxy is only effective if the voter or the holder of the proxy gives a properly completed form to the secretary personally, by post or by facsimile before:

- the start of the meeting at which the proxy is to be exercised, or
- if the body corporate fixes an earlier time (not earlier than 24 hours before the time fixed for the meeting) — the earlier time.

An earlier time could be fixed by either the body corporate in general meeting or by the committee. The fixed time could relate to a particular meeting or to all general meetings. **Form B68** (¶73-850) illustrates a resolution fixing a time for submission of proxies. There are strict rules about the form and use of proxies, including restrictions on the use of proxies in certain circumstances. See ¶41-500 for a complete discussion about proxies.

Accommodation Module

The position is the same.

Commercial Module

The position is the same, except that the body corporate cannot prohibit the use of proxies.

Small Schemes Module

The position is the same, except that the body corporate cannot prohibit the use of proxies.

Law: Std Mod s 107

Acc Mod s 105

Com Mod s 74

SS Mod s 54.

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[¶42-220] Secret ballots

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A motion to be decided at a general meeting must be decided by secret ballot if —

(a) it is required by the BCCM Act or the Std Mod to be decided by secret ballot
(b) the committee has recommended it be decided by secret ballot and there is sufficient time to prepare and send out the required voting material, or
(c) the body corporate has by ordinary resolution required that it be decided by secret ballot.

A requirement under (c) above will normally apply to a particular motion. However, the resolution may be framed so that it applies to all motions about a stated particular subject or to all motions generally for the period stated in the resolution. That period must not end later than the end of the next annual general meeting held after the general meeting at which the resolution was passed.

The secret ballot provisions are complex and reference should be made to ¶41-520 for a complete discussion on this topic.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The secret ballot provisions have no application to bodies corporate regulated by this module. However, s 47 of the module provides that voting must be done in the way the body corporate decides. It would therefore be possible for a body corporate to decide to adopt voting procedures that incorporate a secret ballot option.

Law: Std Mod s 88

Acc Mod s 86

Com Mod s 55

SS Mod s 47.

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[¶42-240] Amending motions and resolutions

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A motion may be amended at an extraordinary general meeting by the persons present, and having the right to vote, at the meeting. However:

1. The amendment must occur before the motion is passed.
2. An amendment cannot change the subject matter of the motion.
3. In counting the votes for and against a motion to amend a motion, all persons who are not present personally or by proxy at the meeting, but would, if present, have the right to vote —

    (a) must not be counted as voting for or against the motion if they have cast a written or electronic vote on the motion, or
    (b) must be counted as voting against the motion if they have cast a written or electronic vote on the motion.

The following example illustrates the difference between a motion that simply amends a motion and one that changes the subject matter of the original motion.

Original motion

"**THAT** the body corporate authorises the Secretary to expend $1,000 to replace the security camera at the front entrance to the building."

Amendment preserving subject matter

"**THAT** the body corporate authorises the Secretary to expend $1,100 to replace the security camera at the front entrance to the building."

Amendment changing subject matter

"**THAT** the body corporate authorises the Secretary to expend $1,000 to replace the swimming pool furniture."

Once a motion has been passed and becomes a resolution, the resolution itself may be amended or revoked. However, care needs to be taken to ensure that the right type of resolution is used.

General meeting resolutions

There are four types of general meeting resolutions:

- a resolution without dissent
- a special resolution
- a majority resolution
- an ordinary resolution.

Where the BCCM Act or the regulation module requires a decision to be made by one of the above resolutions, then the decision or resolution can only be amended or revoked by a resolution of the same type. For example, to borrow money the body corporate must pass an ordinary resolution authorising the amount to be borrowed. Having done that, to change the amount to be borrowed another ordinary resolution would be required. A "higher" resolution may not be used to amend or revoke a "lower" resolution (eg a majority resolution cannot be revoked by a special resolution).

Where a decision can be made by the committee but it is made by the body corporate in general meeting by ordinary resolution, then it is most likely that an ordinary resolution will still be necessary to amend or revoke the original resolution.

Committee resolutions

If the resolution is a committee resolution and that was sufficient for the original decision, then the resolution may be amended or revoked by a further committee resolution.

In all cases a “higher” category of resolution may be used to revoke the “lower” category of resolution (eg in the case of an ordinary resolution, a special resolution or a resolution without dissent).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 94, 95

Acc Mod s 92, 93

Com Mod s 61, 62

SS Mod s 49, 50.

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[¶42-260] Minutes

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The body corporate must ensure that full and accurate minutes are taken of an extraordinary general meeting. A copy of the minutes must be given to each lot owner as soon as practicable after the meeting. A detailed discussion about minutes commences at ¶42-300.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 96

Acc Mod s 94

Com Mod s 63

SS Mod s 51.

[¶42-300] Introduction

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Responsibility to record accurate minutes of general meeting

The body corporate is under a duty to ensure that full and accurate minutes are taken of each general meeting. The committee is under the same duty in relation to its meetings. The duty imposed on the committee extends to ensuring that a full and accurate record is kept of each motion voted on other than at a meeting (ie by means of the written voting procedure).

The Std Mod also requires the body corporate to keep:

- all minutes of meetings of the committee and all associated committee meeting material, and
- all minutes of general meetings of the body corporate, and all associated general meeting material.

How long do records have to be kept?

Notices of meetings, including agendas and attachments, may be disposed of after six years. Associated committee meeting material and associated general meeting material may be disposed of after two years. The minutes themselves must be retained indefinitely. They can be retained in paper form or in photographic or electronic image form.

The secretary plays an integral role

It should always be remembered that minutes constitute the official record of what takes place at meetings and as such they are very important documents. The secretary should have a clear idea of how minutes are to be taken, what facts it is essential to preserve and the form in which they should be produced. This calls for the secretary to have special ability, knowledge and enthusiasm. The achievements of the body corporate and its committee will largely depend upon the abilities of the secretary; he or she being the person charged with the responsibility of carrying out the meeting's instructions. Where a body corporate manager is undertaking the secretary's duties then such achievements will likewise depend on the manager's abilities.

Accommodation Module

The position is the same.

Commercial Module

The Com Mod only requires the body corporate to ensure that full and accurate minutes are taken of each general meeting. The committee is under the same duty in relation to its meetings. No detail as to the contents of minutes is specified.

Small Schemes Module

The SS Mod imposes the same obligation on the body corporate in relation to general meeting minutes as is placed on a body corporate under the Com Mod, but the position in relation to committee meeting minutes is different in that:

- There is no obligation to prepare minutes of committee meetings conducted by written vote (because there is no written voting procedure for the SS Mod).
- There is no obligation to actually keep minutes of committee meetings. In practice they should be kept in exactly the same way as minutes of general meetings.

Law: Std Mod s 55, 96, 203

Acc Mod s 55, 94, 201

Com Mod s 29, 63, 159

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SS Mod s 22, 51, 135.

Last reviewed: 19 March 2010

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[¶42-320] Recording of minutes

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The first step towards the successful recording of minutes is to ensure that all items on the agenda for the meeting are numbered. This saves considerable time when making notes at the meeting; the secretary merely records the item number relevant to the particular notes. The notes taken at the meeting will usually contain much more detail than that which will eventually appear in the minutes. They may even include details of consequential directions and instructions given to the secretary during the course of the meeting.

Requirements of full and accurate minutes

When they are eventually prepared the minutes must contain the following information:

1. The date, time and place of the meeting.
2. The names of persons present and details of the capacity in which they attended the meeting.
3. Details of proxies tabled.
4. The words of each motion voted on.
5. For each motion voted on —
    - (a) the number of votes for and against the motion, and
    - (b) the number of abstentions from voting on the motion.
6. If a committee member is elected at the meeting — the number of votes cast for each candidate.
7. The time the meeting closed.
8. The secretary's name and contact address.
9. Anything else required by the regulation to be included.

A copy of the minutes must be given to each owner of a lot within 21 days after the meeting. All minutes should be as brief as possible and they should be presented in a way that permits rapid understanding of the proceedings. Marginal headings are useful in permitting such understanding. A shorthand writer or tape recorder may be used but both of these methods have disadvantages. Both methods require concentrated editing and this usually proves very time-consuming. In addition, the tape recording method is most undesirable because it:

- inhibits free discussion
- is usually resented by at least some people present, and
- may increase the risk that statements will be held defamatory.

Generally speaking, minutes should show clearly and beyond doubt exactly what was decided at the meeting — not what was said, nor what were the reasons urged for or against any particular course advocated, but what was formally proposed and what was ultimately decided upon. The brevity of this approach may be sacrificed to some degree in the case of minutes of committee meetings. This is because at those meetings the persons present are merely considering a particular agenda item without the benefit of a pre-worded motion as is the case with general meetings. It may, in those instances, be necessary for the minutes to provide additional detail designed to record particular approaches to the various agenda items. **Form B82** (¶74-130) illustrates the brief form of minutes desirable for general meetings while **Form B83** (¶74-150) illustrates the slightly more detailed form that might be adopted for meetings of the committee.

Accommodation Module

The position is the same.

Commercial Module

The position is the same except there is no requirement to note the number of votes for a candidate elected as a committee member at the meeting.

Small Schemes Module

The position is the same except there is no requirement to note the number of votes for a candidate elected as a committee member at the meeting.

Law: Std Mod s 96

Acc Mod s 94

Com Mod s 63

SS Mod s 51.

Last reviewed: 19 March 2010

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[¶42-340] Keeping and disposal of records

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What records must the body corporate keep?

The body corporate is obligated under the regulations to keep:

- body corporate accounting records and statements of account for each financial year
- notices relating to the community titles scheme given by a public authority or local government
- orders against the body corporate or in relation to the scheme by a judicial or administrative authority
- each policy of insurance the body corporate puts in place
- documents evidencing each engagement of a body corporate manager or service contractor and each authorisation of a letting agent
- each agreement between the body corporate and the owner of a lot included in the scheme about the giving of rights, or the imposing of conditions, under an exclusive use by-law
- documents evidencing each authorisation of a service contractor or letting agent to occupy a part of the common property, and each authorisation of someone else to have access to or use of part of common property
- correspondence sent or received by the body corporate
- all minutes of meeting of the committee and all associated committee meeting materials
- all minutes of general meetings of the body corporate and its associated materials
- reports given to members of the body corporate by a body corporate manager
- any conciliation statements prepared for an account kept for the sinking or administrative fund and the associated financial institution statement and invoices
- notices for resolutions of the committee to be passed other than at a meeting, and the responses of committee members.

What documents and when can body corporate dispose of?

6 years after the receipt or creation, the body corporate can dispose of:

- statements of accounts, including certificates of auditors
- notices of meetings, including agendas and attachments
- documents relating to major repairs or installations carried out on the common property
- orders against the body corporate, or in relation to the scheme, by a judicial or administrative authority
- notices given by a public authority or local government in relation to the scheme
- written agreements to which the body corporate is a party
- reports given to members of the body corporate by a body corporate manager.

2 years after the receipt or creation, the body corporate can dispose of:

- associated committee meeting material and associated general meeting material other than material relating to an order against the body corporate by a judicial or administrative authority
- correspondence of no significance or continuing interest
- reconciliation statements and associated financial institution statement and invoices.

Documents that must not be disposed of

The body corporate must not dispose of a contract that is relevant to the scheme and in force for longer than 6 years. The body corporate must also keep a notice required to be given to the body corporate if the information included in the notice is still current information.

Documents to be kept in paper or electronic form?

Documents to be kept by a body corporate may be kept in their original paper form or in photographic or electronic image form. In the past there has been some diversity of opinion about the propriety of using

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loose-leaf minute books but the practice has now become fairly general. The following safeguards are recommended where loose-leaf minute systems are used:

1. Each minute should be numbered.
2. Each page in the minute book should be numbered.
3. The chairperson should sign at the end of each complete set of minutes and initial each page in the set.

Digital minutes are becoming more common and can be even more controversial than loose-leaf systems, because of a perceived ability to tamper with them. However, if the following safeguards are adopted there should be little justification for complaint:

1. The minutes should be kept in a *read only* format.
2. The database should be set up so that:
    - all activity within it is fully recorded (eg if it is accessed, if a file is changed, etc), and
    - if a file is changed, the earlier version of the file is separately saved, so that it can be accessed if required.
3. The chairperson's verification of the minutes should be capable of separate notation, which should include the name of the chairperson, date and time of notation.

In the case of larger community title schemes it is desirable to keep separate minute books for the proceedings of the various bodies within the scheme. This might involve three separate minute books, one for general meetings, one for committee meetings and one for body corporate manager's minutes. Wherever possible it is also desirable to incorporate some form of indexing system for minutes, to make it easier to find particular items. Digital systems based on a database will have special potential for comprehensive and fast searching.

Accommodation Module

The position is the same.

Commercial Module

The position is similar, except the body corporate is not required to keep reports given to members of the body corporate by a body corporate manager or notices for resolutions of the committee to be passed other than at a meeting, and the responses of committee members.

Small Schemes Module

The position is similar except the body corporate need not keep contracts in force for longer than 6 years only relevant notices given to the body corporate.

Law: Std Mod s 203

Acc Mod s 201

Com Mod s 159

SS Mod s 135.

Last reviewed: 19 March 2010

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[¶42-360] Inspection of minutes

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Body corporate must allow access to records

The body corporate is obliged to allow all members of its committee reasonable access (without payment of a fee) to its records. Subject to the appropriate procedures being followed, the body corporate is also obliged to permit certain persons to inspect its records. The "records" include the general meeting and committee minutes. Because these inspections may be required at short notice it is important for the secretary to ensure that minutes are prepared and placed in the minute book without delay.

Exceptions to access

However, the body corporate is not required to allow a person access to records if a legal proceeding between the body corporate and the person has started or threatened and the records are privileged from disclosure. Also, the body corporate is not required to allow a person access to a part of a record if the body corporate reasonably believes the part contains defamatory material.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 205

Std Mod s 204

Acc Mod s 202

Com Mod s 160

SS Mod s 136.

Last reviewed: 19 March 2010

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[¶42-380] Circulation of minutes

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Circulation of General Meeting minutes

A copy of the minutes of a general meeting of the body corporate must be given to each owner within 21 days after the meeting.

Circulation of Committee Meeting minutes

The position in relation to committee meeting minutes is a little more complex. Copies of committee meeting minutes and resolutions (whether separately or as part of a copy of minutes of the meeting) must be given to each lot owner (other than those who have asked not to be given copies) within 21 days after the meeting or the passing of the resolution. A copy may be given by hand, mail, facsimile or electronically. Please refer to ¶41-200 for details of opposing resolutions.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position in relation to general meeting minutes is the same as for the Std Mod. As regards committee meeting minutes, the secretary must give a copy of the minutes of each meeting to, if the treasurer position is held by another person, then the treasurer, and each lot owner who is not a member of the committee within 21 days after the holding of the meeting.

Law: Std Mod s 55, 96

Acc Mod s 55, 94

Com Mod s 29, 63

SS Mod s 22, 51.

Last reviewed: 19 March 2010

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[¶42-400] “Motion” and “resolution”

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The words “motion” and “resolution” are commonly used in the same context, but they have different meanings. A motion is a mere proposal for consideration by the meeting. A resolution is a decision of the meeting and usually takes the form of an expression of opinion or intention by the meeting. A motion when passed by the meeting becomes a resolution. A motion takes the form of a proposal for an ordinary resolution, majority resolution, special resolution or resolution without dissent. Motions for general meeting resolutions need to identify an intention that the resolution will be ordinary, majority, special or without dissent. See ¶40-200 for a complete discussion on motions and resolutions.

Last reviewed: 19 March 2010

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[¶42-420] How to record resolutions

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Full and accurate minutes required from body corporate

The body corporate is under a duty to ensure that full and accurate minutes are taken of each general meeting. The committee is under the same duty in relation to its meetings. The duty imposed on the committee extends to ensuring that a full and accurate record is kept of each motion voted on other than at a meeting (ie by means of the written voting procedure). The terms "full and accurate minutes" and "full and accurate record" are defined terms (see ¶41-150, ¶42-320).

The process of recording proceedings of a meeting

There are many ways to record the proceedings of a meeting. Many provide details of the persons who moved and seconded motions. In the case of general meetings, there is no need for motions (other than amendment or procedural motions) to be moved or seconded because they are before the meeting for consideration as a result of being on the notice of the meeting. Likewise, the resolutions will not be difficult to record because they will necessarily have to follow the wording of the motion on the notice of the meeting. However, in the case of meetings of the committee, the notice of the meeting only contains an agenda item and the motions must be proposed from the floor of the meeting. This is where some skill is required on the part of the secretary to record accurately and properly the motions and their transmission into resolutions.

The following are examples of some of the ways in which resolutions may be recorded:

- It was proposed by Mr White, seconded by Mr Brown, and subsequently carried, that the sign in the entrance foyer be repainted.
- On the motion of Mr White, seconded by Mr Brown, it was resolved that the sign in the entrance foyer be repainted.
- It was resolved that the sign in the entrance foyer be repainted, the motion being moved by Mr White and seconded by Mr Brown.
- It was decided that the sign in the entrance foyer be repainted, the resolution being proposed by Mr White and seconded by Mr Brown.
- After some discussion about the sign in the foyer it was decided to repaint the sign.
- RESOLVED that the sign in the foyer be repainted.

The method in the last point is preferable as it concisely records the decision of the meeting and contains all necessary information relevant to the decision. Although some record of the discussion may appear in the minutes prior to the resolution, this should be avoided or kept to a minimum if possible.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The SS Mod imposes similar obligations as that imposed on a body corporate under the Std Mod except it does not require the number of votes for each motion to be noted in a Committee meeting.

Law: Std Mod s 55, 96

Acc Mod s 55, 94

Com Mod s 29, 63
SS Mod s 22, 51.

Last reviewed: 19 March 2010

[¶42-440] How to record objections and points of order

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During the course of the meeting the chairperson may be confronted with an objection or a point of order. The chairperson will usually inquire into the matter raised, and when the chairperson indicates their view on the matter, the person who raised the matter may decide not to press the point. If this happens, there is no need to record the occurrence. However, if the point is left unresolved or if the chairperson makes a formal ruling on the matter then particulars should be recorded in the minutes. Likewise anyone who feels strongly enough on any resolution on which they are outvoted may ask that their vote be recorded; in this event the minutes should record such request. Where the chairperson disallows proxies or rejects a vote then, in addition to any special statutory requirements, a record of the decision should also appear in the minutes.

The following examples of these types of recordings may be helpful:

- Before this motion was put to the vote Mr Brown raised a point of order; namely, that the motion conflicted with the provisions of s 126 of the *Body Corporate and Community Management Act 1997*. He asked that the motion be ruled out of order by the chairperson pursuant to s 81 of the Standard Regulation Module. The chairperson ruled that the motion did not so conflict.
- Mr Brown asked that the minutes record the fact that he voted against the resolution.
- The chairperson ruled that the proxy from Mr White to Mr Black is invalid because it was not in the approved form.
- The chairperson ruled that the ballot paper submitted by Mrs Small is invalid because of the failure of Mrs Small to sign the paper.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 81

Acc Mod s 79

Com Mod s 48

SS Mod s 42.

Last reviewed: 19 March 2010

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[¶42-460] Adoption of minutes

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Confirmation of minutes of previous general meeting

In the common law context, decisions arrived at by meetings do not need confirmation. Hence, such confirmation, when it does occur in the absence of a legislative requirement, does not amount to giving force to the minutes but merely declaring them to be accurate (see *R v York, Mayor of*).

However, in the community title context, there is now a requirement for the confirmation of minutes of general meetings to be considered at the next following general meeting. Although there must be a motion to confirm the minutes there is no requirement for the motion to be passed nor is any consequence expressly attached to any failure of a meeting to confirm them. So presumably the common law position would still apply to minutes that have not been confirmed.

Scope for correction

When the minutes are being confirmed the business dealt with in them should not be re-opened. The discussion should merely be directed towards determining whether the minutes are accurate. If errors are discovered the minutes are usually altered and the alterations verified by the chairperson, who is the person who usually signs the minutes as further evidence of their accuracy.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 76(2)(v)

Acc Mod s 74(2)(v)

Com Mod s 43(2)(v)

SS Mod s 37(2)(v).

.40 Case references: *R* v *York, Mayor of* (1853) 1 E7B 594.

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[¶42-480] Effect of minutes

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Companies regulated under the *Corporations Act 2001* have the benefit of the provisions of s 251A of that Act and it is of some advantage to mention those provisions briefly. The section requires such companies to keep minutes of their proceedings and to cause those minutes to be signed by the chairperson of the meeting at which the proceedings were had or by the chairperson of the next succeeding meeting. There is no requirement for approval or adoption of those minutes. Any minute entered and signed in this way is evidence of the proceedings to which it relates. Likewise, where minutes have been so entered and signed, then until the contrary is proved:

(a) the meeting is deemed to have been duly held and convened
(b) the proceedings of the meeting are deemed to have been duly had, and
(c) all appointments of officers or liquidators made at the meeting are deemed to be valid.

It is interesting to note that there is no corresponding provision in the BCCM Act or any of its regulation modules. The Corporations Act provision itself has no application to community title bodies corporate (BCCM Act s 32). Therefore, although the effect of company minutes seems clear where the company is regulated under the Corporations Act, the effect of community title bodies corporate minutes is not as easily determined. The common law principles appear to be the only ones that apply; namely, that the minutes are acceptable as evidence of what occurred at the meeting until and unless the contrary is proved. In other words, they are prima facie evidence that the meeting was held and that the proceedings, business transacted and decisions made were as recorded in those minutes. This is not to say that they are readily admissible into evidence from a technical point of view. In community title appeal proceedings before the QCAT there is usually no problem in having the minutes admitted into evidence because it is not bound by, nor does it strictly apply, the rules of evidence when dealing with appeals. However, in non-appeal proceedings before higher courts, and even before the District Court and magistrate's courts, the rules of evidence will be applied and should be observed so far as they relate to the admissibility of minutes into evidence.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 32..

Corporations Act 2001 s 251A.

.40 Case reference: *Berard* v *Jonshel (No 15) Pty Ltd & Anor*, (1992) NSW Titles Cases ¶80-016 [NSW Land & Environment Court, Talbot J, 18 September 1992].

Last reviewed: 19 March 2010

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[¶42-500] Sub-committee meetings

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In larger community title schemes where a sub-committee system is used the sub-committee should keep a separate minute book to record its proceedings. Members of the sub-committee can then produce this minute book at committee meetings for inspection and notation. This ensures that the committee is kept informed on the activities of the sub-committee.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

Sub-committees are not relevant to schemes regulated under the SS Mod.

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[¶42-600] Introduction

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Because the body corporate is an artificial person created by the provisions of the BCCM Act, it is logical and necessary for the will of this "person" to be ascertained by its members meeting together and making democratic decisions. To regulate and assist this meeting process the legislature has prescribed detailed, and in some cases complex, procedures for the conduct of meetings and elections of committee members. It is therefore important to consider the effect on the validity of the proceedings or any failure (innocent or otherwise) to observe these procedures strictly.

[¶42-620] The law applying to meetings

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There are three basic areas of law relevant to community title meetings. These areas, in order of importance, are:

- the BCCM Act and the relevant regulation module for the body corporate
- the by-laws and rules of the particular body corporate, and
- the common law.

Generally speaking, the requirements of all three areas must be observed if the proceedings and the business transacted at the meetings are to be valid.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶42-640] BCCM Act and regulation modules

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The procedures laid down by the BCCM Act and the various regulation modules are considered in detail elsewhere in this work. The following finding list may assist in locating the various paragraphs where such procedures are dealt with:

First annual general meeting	¶41-300
Annual general meeting	¶41-700
Extraordinary general meeting	¶42-000
Committee meeting	¶40-550
Election of members of the committee	¶36-900

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[¶42-660] By-laws and rules

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By-laws made by body corporate cannot conflict with Act or regulations

A body corporate may make by-laws specifying additional rules or procedures to apply to meetings, both general and committee. The only real restriction is that any by-laws so made must not conflict with the provisions of the BCCM Act or the relevant regulation module. For example, a by-law could not purport to require three clear days notice of annual general meetings to be given because this would conflict with the provisions of s 74 of the Std Mod which requires 21 days. To some degree a body corporate or a committee may make its own procedural rules and regulations. Generally speaking, they should only involve matters of meeting procedure or "standing orders" and they should not conflict with the by-laws, the BCCM Act or the relevant regulation module. Where such rules extend beyond procedural matters, ie when they seek to bind owners generally rather than merely binding those present at the meeting, then it would be desirable to introduce them as formal by-laws. Otherwise they may be invalid.

Where such by-laws or rules and regulations apply, then they must be complied with by the relevant meeting. If they are not to be complied with they must be either suspended (where this is permitted by the by-laws or rules themselves) or they must be repealed in the manner prescribed.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The SS Mod allows the body corporate to decide the notice period for a general meeting, so unless otherwise decided, a general meeting for a small scheme must be held 21 days after notice of the meeting is given to the owners of lots. The decision to set the notice period for a general meeting must be fair and reasonable for the scheme.

Law: Std Mod s 74

Acc Mod s 72

Com Mod s 41

SS Mod s 36.

Last reviewed: 19 March 2010

[¶42-680] Common law

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The common law is often described as the "law of custom and early English statutes, generally found in decided cases and in the writings of authoritative textbook authors". It forms an important part of the law relating to meetings although its degree of application is determined by the provisions of the BCCM Act and the regulation modules, as well as the by-laws and rules of the body corporate. Generally speaking, the common law principles apply wherever they complement and do not conflict with these other provisions. There are a number of areas of the common law that may have some application to community title meetings. It is proposed to deal with these individually and examine the leading cases to determine the extent of their applicability. Many of the cases that will be examined are of considerable antiquity and they may therefore, in appropriate areas, be regarded as persuasive and illustrative rather than authoritative. The principal areas to be considered are:

- the essential requirements for a valid meeting
- the effect of non-compliance with the prescribed procedures, and
- circumstances in which the prescribed procedures may be waived.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

[¶42-700] Valid meetings

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At the outset it should be clearly understood that in relation to community title meetings the essential requirements would include compliance with all procedures specified in the BCCM Act, the relevant regulation module and the rules and by-laws of the body corporate. From a literary point of view it is not possible for some requirements to be more essential than others. But on a more practical level there are some requirements, the absence of which will result in a total failure of a meeting or election; and there is no need to look beyond these to determine the invalidity of the proceedings. These are the requirements that are in this paragraph being classified as essential. They are:

- proper notice
- a quorum, and
- proper determination of votes.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

[¶42-720] Proper notice

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Notice of meeting in the prescribed manner

The Latin word "notitia" (from which the word "notice" is derived) means "known". The basic test of proper notice is therefore making known the intention to hold the meeting. This basic test must be extended a little further in that the intention to hold the meeting must be made known in any prescribed manner.

Case examples

Meetings properly convened by notice

There are a number of cases dealing with this question of notice. The first case of importance is *Barron v Potter* in which it was held that a meeting of a board of directors must be properly convened by notice and the directors must attend and vote as directors. The rules allowing informal meetings of directors do not extend to a situation where the directors meet casually without prior notice and without an intention on the part of one of the directors to transact the business of the meeting. In addition, when giving notice of a meeting, the provisions of the body's rules, whether they be in the form of company articles or otherwise, must be strictly observed, as must the provisions of any relevant statute (see *King v Fulton*).

Notice must still be issued regardless of recipient's wish to dispense with notice

The mere fact that a person entitled to notice says that they do not wish to receive it does not relieve the obligation to give notice to that party. Accordingly, where notice was not given in such a situation a meeting was held to be void (see *R v Langhorn*).

Notice to all members

In *Royal Mutual Benefit Building Society v Sharman & Ors*, the rules of the society provided that notices of all meetings of the members should be sent to all members of the society. Certain members were, however, disqualified from voting at such meetings. Notice of a meeting called to pass certain special resolutions was sent to voting members only. There was no evidence that the failure to give notice to the non-voting members was accidental, so there could be no application of a provision in the relevant statute that accidental omission to give notice shall not invalidate the proceedings. Accordingly, since notice was not given to all the persons entitled under the society's rules to receive notice of the meeting, the special resolutions passed at the meeting were invalid.

Australian case — notice must be given to all members

An Australian case along similar lines was *In re Merchants and Shippers SS Co Ltd*. In that case an article of the company provided that the non-receipt of notice by any member should not invalidate any proceeding taken, or any resolution passed, at a meeting. In the case of a particular meeting the secretary deliberately omitted to send notice of the meeting to members absent from the state. The proceedings of the meeting were in effect invalidated, it being held that the saving provision only applied to cases of accidental omission. In his judgment Street J (as he then was) cited a passage by Lord Campbell in *Smyth v Darley*. Lord Campbell was speaking of a meeting of magistrates held for the purpose of electing a treasurer of the County of Dublin when he said (at p 802):

> "The election being by a definite body on a day of which, till summons, the electors had no notice, they were all entitled to be specially summoned, and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance — as, for instance, abroad — there could not be a good electoral assembly; and even a unanimous election by those who did attend would be void."

It should be noted that the *Merchants and Shippers SS Co* case went on appeal but the findings of Street J were upheld so far as concerned the invalidity of the proceedings of the meeting.

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Notice to state purpose of meeting

An English case decided a few years later, *Young v Ladies Imperial Club Limited*, is further authority for the need to give notice to all members clearly specifying the purpose of the meeting. One of the rules of that Club provided that if the conduct of any member should, in the opinion of the committee, be injurious to the character and interests of the club, the committee had power to suspend the member from the use of the club and to recommend her to resign. If she did not resign within a certain time, the committee was to erase her name from the list of members. However, no member could be suspended or recommended to resign unless a resolution to that effect was passed by a certain majority of the members of the committee. The members had to be actually present at a meeting specially convened for the purpose.

Acting under this rule the committee of the club recommended the member resign and as she did not do so the committee erased her name from the list of members. The notice convening the meeting of the committee stated that the object of the meeting was "to report on and discuss the matters concerning Mrs Young and Mrs Lawrence" (these two ladies being parties to an altercation which led to the meeting). The notice was sent to each member of the committee except one, who had previously intimated to the chairman that she would be unable to attend meetings of the committee. The Court of Appeal held that the omission to summon the absent member of the committee invalidated the meeting and that the notice did not state the object of the meeting with sufficient particularity. On both these grounds the plaintiff was entitled to succeed.

The passage from Lord Campbell's judgment quoted by Street J in *In re Merchants and Shippers SS Co Ltd* is also quoted and followed by Lord Sterndale MR in the *Ladies' Imperial Club* case. It should be observed that although lack of proper notice may invalidate a meeting as regards the company or organisation and its members, this in itself may not adversely affect the rights of creditors (see *In re Miller's Dale and Ashwood Dale Lime Company*).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

.40 Case references: *Barron* v *Potter* (1914) 1 Ch 895; *King* v *Fulton* (1876) 2 VLR (Eq) 100; *R* v *Langhorn* (1836) 4 A & E 538; *In re Merchants and Shippers SS Co Ltd* (1917) 17 SR (NSW) 21, 146; *Smyth* v *Darley* (1849) 2 HLC 789; *Young* v *Ladies Imperial Club Limited* (1920) 2 KB 523; *Royal Mutual Benefit Building Society* v *Sharman & Ors* (1963) 1 WLR 581; *In re Miller's Dale and Ashwood Dale Lime Company* (1886) 31 Ch D 211.

Last reviewed: 19 March 2010

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[¶42-740] Quorum

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A quorum is the minimum number of members of an organisation who must be present at meetings of that organisation before those meetings are properly constituted. (See ¶41-420 for the requirements.) Unless a meeting is properly constituted the business of the organisation cannot be validly transacted at it. The number of members necessary to constitute a quorum is ascertained with reference to the rules of the particular organisation. It is a generally accepted principle that a quorum is essential for a meeting. If there is no quorum then there is no meeting. This principle was clearly recognised in *In re Romford Canal Company*. It was also recognised in a similar case, *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Company*.

Any business transacted at any meeting which proceeds without a quorum is invalid. However, both of the above cases are also authority for the proposition that, notwithstanding the absence of a quorum, the proceedings will be regarded as valid so far as a third party is concerned where the third party has provided a consideration and was not aware of the irregularity at the time.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 82

Acc Mod s 80

Com Mod s 49

SS Mod s 43.

.40 Case references: *In re Romford Canal Company* (1883) 24 Ch D 85; *County of Gloucester Bank* v *Rudry Merthyr Steam and House Coal Colliery Company* (1895) 1 Ch 629.

Last reviewed: 19 March 2010

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[¶42-760] Proper determination of votes

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The regulations prescribes how a vote may be cast and counted to pass a resolution at a general meeting. A voter for a general meeting may vote on a motion, other than a motion to be decided by secret ballot (see s 88) , in any of the following ways:

- personally
- by proxy
- by casting a written vote
- if the body corporate has by ordinary resolution decided that voters for general meetings may record votes electronically for open motions, and
- by casting an electronic vote.

A written or electronic vote on a motion may be withdrawn by a voter at any time before the result of the motion is declared by the person chairing the meeting. There is one except to this, that is an owner's written or electronic vote can not be withdrawn by a person voting as the proxy of the owner.

Voting by person present at general meeting

Voting by persons present at a general meeting must be done by show of hands, or by giving completed voting papers to the secretary (or if secretary is absent, the person chairing the meeting) before the meeting starts. If 1 or more, but not all of the co-owners of a lot are present at the meeting, the co-owners present vote as the owner of the lot (ie one vote). If there is conflict between the co-owners regarding their vote then the vote cannot be counted for that motion.

Declaring votes

The person chairing a general meeting must declare the result of voting on motions at the meeting. The person chairing the meeting must state:

- the number of votes cast for the motion
- the number of votes cast against the motion, and
- the number of abstentions from voting on the motion.

A voting tally sheet must be kept that includes information on each open motion decided at the meeting including a list of the votes identified by lot number and votes that were rejected from the count and the reason for the rejection.

Sometimes the rules or statute applicable to a particular organisation will confer on the chairman of a meeting the right to a "casting vote". This is simply a right to exercise an additional vote to decide any matter on which the voting is equal. In the community title context there is nothing in the BCCM Act or any of the regulation modules that confers a casting vote on the chairperson of any meeting.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

In the case of the SS Mod the law allows considerable flexibility on meeting procedures in that the body corporate can often decide on the procedures to be followed. The body corporate may decide a fair and reasonable way voting is cast and counted at general meetings.

Law: Std Mod s 86, 87 and 93

Acc Mod s 84, 85, 91

Com Mod s 53, 54, 60

SS Mod s 47.

Last reviewed: 19 March 2010

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[¶42-780] Effect of non-compliance

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It has already been pointed out that in order for a meeting to be valid it must comply with the procedural requirements (both as to convening and conduct of the meeting) of the BCCM Act, the relevant regulation module, the by-laws and the rules or regulations of the body corporate.

Invalidate meetings

However, an equity court will sometimes refuse to invalidate proceedings where an irregularity has occurred. In *Browne v La Trinidad* it was said:

> "A court of equity refuses to interfere where an irregularity has been committed, if it is within the power of the persons who have committed it at once to correct it by calling a fresh meeting and dealing with the matter with all due formalities."

Where the irregularity is related to a basic or essential requirement or involves the question of authority, then an equity court may not follow the principle enunciated in *Browne v La Trinidad*.

Adjudicators discretion

In relation to strata title meeting procedures it seems clear that an equity court may well be able to apply the principle of *Browne v La Trinidad*. Although adjudicators are not an "equity court" they do have a discretion as to whether they make an order in relation to a particular application and it is suggested that such discretion should be exercised on equitable principles, including the principle of *Browne v La Trinidad*. The difficulty lies in determining whether an irregularity is sufficiently minor to enable the application of that principle. For instance, a failure to include all the statutory information required by s 70 of the Std Mod with a notice convening a general meeting may be sufficiently minor to enable application of the principle. But on the other hand, five days notice of the meeting in lieu of the required 21 days' notice may be sufficiently serious to justify invalidation of the meeting.

In re State of Wyoming Syndicate, which followed a similar decision in *In re Haycraft Cold Reduction and Mining Co*, a number of shareholders requisitioned for an extraordinary meeting pursuant to the provisions of s 13 of the *English Companies Act 1900*. The directors acting together as a board could only summon the meeting, but the secretary of the company summoned the meeting without the authority of the directors. It was held that the secretary had no power to issue the notices, that there was no ratification of his act and that the so-called ratification of the company was invalid. In his judgment Wright J had the following to say, at p 437:

> "If he does summon a meeting without authority I do not think I ought to hold that a resolution passed at the meeting is valid. If it had been a mere question of informality with reference to the constitution of the Board which summoned the meeting, for instance, some question as to whether there was a proper quorum present, I might have applied the principle of *Browne v La Trinidad* but I think I should be going too far if I held that it applied to the present case."

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same, except that the body corporate can change the requirement for 21 days' notice.

Law: Std Mod s 70, 74

Acc Mod s 68, 72

Com Mod s 37, 41

SS Mod s 35, 36.

.40 Case references: *Browne* v *La Trinidad* (1887) 37 Ch D 1; *In re State of Wyoming Syndicate* (1901) 2 Ch 431; *In re Haycraft Gold Reduction and Mining Co* (1900) 2 Ch 230.

Last reviewed: 19 March 2010

[¶42-800] Waiver of prescribed procedures

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The question is whether there may ever exist circumstances in which there is no need to comply strictly with the prescribed formalities. An examination of the relevant cases leads to the conclusion that, in theory, there may be such circumstances. It also shows that in practice the necessary circumstances will only rarely be found to exist.

Intra vires case

The first case of importance is *Salomon v Salomon & Co*. The essence of that case is found in the following passage taken from the judgment of Lord Davey:

> "I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires by the unanimous agreement of its members."

Salomon's case involved a matter intra vires the company.

Ultra vires case

Where the subject matter of a decision is ultra vires the company then the position is different. In *In re George Newman & Co* a director made payments to himself by way of gift and also used company funds to improve his private residence which was his own property; the latter funds were also disposed of by way of gift. All shareholders were aware of the payments and use of company funds and did not object at any stage to these applications of funds; however, no meeting was ever held to authorise them. It was held that the gifts were themselves ultra vires and for this reason the company was not bound by the agreement or concurrence of its members.

Applying the cases

Both of these cases were considered in *In re Express Engineering Works Limited*. In the *Express Engineering* case, all five shareholders of the company met in a directors' meeting and made a decision regarding the issue of debentures, this decision being one that required a resolution of a general meeting. It was held, there being no suggestion of fraud, that the company was bound in a matter intra vires by the unanimous agreement of its members. Although the meeting was styled a directors' meeting, all the five shareholders were present, and they might well have turned it into a general meeting and transacted the same business. In these circumstances the issue of the debentures was not invalid, the directors' meeting being held to be, in effect, a general meeting. Warrington LJ in his judgment at p 471 said:

> "In as much as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as business men they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out."

Younger LJ in his judgment at p 471 said:

> "In my opinion the true view is that if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed, and every competent resolution passed for which no further formality is required by statute becomes binding on the company."

The *Express Engineering* case decision followed the decision in *Salomon's* case and the passage quoted above from Lord Davey's judgment was quoted and applied. However, Lord Sterndale MR, in the *Express Engineering* case, declined to follow the judgment of Lindley LJ in *In re George Newman & Co* because in the *George Newman* case there never was a meeting and the transaction under consideration was ultra vires in any event. The relevant passage from the judgment of Lord Sterndale MR is:

> "Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of the meeting."

Principle of the decision being sanctioned intra vires by all members

The decision in the *Express Engineering* case has been applied in a number of later cases: see *Parker & Cooper Ltd v Reading*; *Commercial Bank v Furey*; *In re Duamatic Ltd and In re Bailey*; and *Hay & Co Ltd*. Of these, *Reading's* case is particularly relevant here. *Reading's* case was also followed in *In re Bailey*, *Hay & Co Ltd* and in *In re Duamatic Ltd*. In *Reading's* case it was held that a company is bound in a matter intra vires the company by the unanimous agreement of all the individual corporators. If all the individual corporators in fact assent to a transaction that is intra vires the company, though ultra vires the board, it is not necessary that they should hold a meeting in one room or one place, or express that assent simultaneously. *Reading's* case also considered, explained and applied the *Express Engineering* case and *In re George Newman & Co* Astbury J made reference in his judgment at p 982 to the judgment of Lindley LJ in *In re George Newman & Co* as follows:

> "But what he really means is that where a transaction is intra vires the company and honest the sanction of all the members of the company, however expressed, is sufficient to validate it, especially if it is a transaction entered into for the benefit of the company itself."

Later in his judgment at p 984 Astbury J said:

> "Now the view I take of both these decisions is that where the transaction is intra vires and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously.... I can find nothing in *In re George Newman & Co* to prevent all the corporators from arranging to carry out an honest intra vires transaction entered into for the benefit of the company, even if they do not meet together in one room or place, but all of them merely discuss and agree to it one with another separately."

A similar principle was applied in *In re Oxted Motor Co*. In that case both of the two shareholders held a meeting and passed a special resolution without the required notice and without the meeting being properly convened. The court held that the shareholders acting together can waive notice and other formalities. Other cases along these lines are *Re Toowoomba Acceptances Pty Ltd* and *In re Bailey, Hay & Co Ltd*.

All members must be present to sanction the decision

The *Oxted Motor Co* case and the *Express Engineering* case were both distinguished in a New South Wales case, *In re Sanders Limited*. In the latter case there was a meeting of the company that was attended by all except one of its registered shareholders. The members present included the unregistered transferee of the shareholding of the absent registered shareholder. The meeting purported to pass an extraordinary resolution in accordance with s 130(1)(c) of the *Companies Act 1899* (NSW) and it unanimously resolved that the company go into voluntary liquidation. No notice of the meeting as prescribed by s 247 of that Act and by the articles of the company had been given to the absent shareholder, nor had such notice been waived by him. It was held that although a company may go into voluntary liquidation at a meeting attended by all the members of the company entitled to vote, of which no notice has been given, the meeting in question, in the absence of the registered shareholder, who had not been given the prescribed notice and had not waived the same, was not a meeting of all the members of the company entitled to vote. Accordingly, the resolution was not validly passed and the company was not in liquidation.

In a similar Victorian case, the *Oxted Motor Co* case was again distinguished. The case was *In re Stanley W Johnson Pty Ltd*. In that case it was held, notwithstanding that one of the shareholders may not be entitled to notice of meetings of a company (because he has no registered address), the remaining shareholders cannot in his absence and without notice to him waive the formalities required by s 76 of the *Companies Act 1928* (Vic) as to notice of intention to propose a resolution as an extraordinary resolution.

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The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

.40 Case references: *Salomon* v *Salomon & Co* (1897) AC 22; *In re George Newman & Co* (1895) 1 Ch 674; *In re Express Engineering Works Limited* (1920) 1 Ch 466; *Parker & Cooper Ltd v Reading* (1926) Ch 975 (*Reading's* case); *Commercial Bank* v *Furey* (1954) NZLR 851; *In re Duamatic Ltd* (1969) 2 WLR 114; *In re Bailey, Hay & Co Ltd* (1971) 3 All ER 693, (1971) 1 WLR 1357; *In re Oxted Motor Co* (1921) 3 KB 32; *Re Toowoomba Acceptances Pty Ltd* (1940) QWN 24; *In re Sanders Limited* (1932) 49 WN (NSW) 220; *In re Stanley W Johnson Pty Ltd* (1936) VLR 59.

Last reviewed: 19 March 2010

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[¶42-820] Application of common law

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So far, the cases applying to the validity of meetings have been considered. Generally speaking, the principles enunciated in these cases apply to all meetings of corporate and incorporate bodies, except where inconsistent with relevant statutory provisions. It is now necessary to consider the provisions of the BCCM Act and the regulation modules so as to see how far these common law principles may be applied to community title proceedings.

Adjudicators powers in relation to invalidating meetings

So far as the BCCM Act is concerned, it is clear that meetings and resolutions purportedly passed at meetings can be invalidated by an adjudicator under Ch 6 of the Act. The following provisions are relevant:

- Section 242 imposes certain time limits for the making of applications to declare void meetings of the committee, general meetings, resolutions and committee elections.
- Section 276(1) empowers an adjudicator to make an order "that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute".
- Schedule 5, cl 7, states, by way of example of the types of order an adjudicator may make, that an order may declare a committee meeting or general meeting "void for irregularity".
- Schedule 5, cl 9, states, again by way of example of the types of order an adjudicator may make, that an order may declare that a resolution purportedly passed at a committee meeting or general meeting was "at all times void".

NSW comparison

There is nothing in the BCCM Act that expressly allows an adjudicator to take into account the nature of the irregularity and the ease with which it could be rectified. This is in contrast with s 153 of the New South Wales *Strata Schemes Management Act 1996*. It is one of the sections conferring jurisdiction on an adjudicator in that jurisdiction. The section enables an adjudicator to make an order invalidating a resolution or election if the provisions of the Act have not been complied with in relation to the meeting at which the resolution was passed or election held. However, an adjudicator may refuse to make an order under the section, but only if the adjudicator considers:

- the failure to comply with the provisions of the Act did not adversely affect any person, and
- compliance with the provisions would not have resulted in a failure to pass the resolution or have affected the result of the election.

This provision is in line with the common law principles, namely that failure to follow correct procedures in circumstances where, had those procedures been followed, the result would have been the same, should not invalidate the proceedings. There is no corresponding provision in the BCCM Act. Also, the regulation modules do not deal with the issue of validity of proceedings at all. It therefore remains to be seen how the common law principles can be applied in Queensland.

Problems in applying common law

The first problem in attempting to apply the common law to community title proceedings arises out of the need to determine who are the "members" or "corporators" of a community title body corporate. In the case of a company there is usually no difficulty in this regard; the members or corporators are the shareholders. However, in the case of the community title body corporate the situation is as follows:

1. Owners, whether shown on the roll or not, or whether registered or not, have interests in the body corporate.
2. Only owners shown on the roll may vote at general meetings and this right to vote may be subject to cancellation where moneys are owing to the body corporate.
3. Mortgagees, whether shown on the strata roll or not, have interests in the body corporate.

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4. Only mortgagees in possession may vote at general meetings in lieu of their mortgagor owners, and this right to vote is subject to cancellation where moneys are owing to the body corporate with respect to the lot over which the mortgage is held.

This illustrates the difficulty involved in determining who are the members of a community title body corporate at any given time. This may be necessary, for example, to determine whether an informal unanimous decision would operate to bind the body corporate. There seems to be three possibilities; namely, the members consist of:

- all owners and all mortgagees, whether they are shown on the roll or not and without having regard to their entitlement to vote
- all owners who are shown on the roll and all mortgagees in possession but without otherwise having regard to their entitlement to vote, or
- all owners and all mortgagees in possession who are entitled to vote.

There is no doubt that the first possibility is by far the safest in any given situation. The third would be the most unlikely of the three because it ignores the fact that persons who are not entitled to vote are entitled to receive notice of general meetings. They are therefore given the opportunity after receipt of the notice to restore their voting rights (ie by paying the outstanding moneys before the start of the meeting). This third possibility also ignores the principle established in *Royal Mutual Benefit Building Society v Sharman* (see ¶11-560).

The second possibility is also unlikely because an owner not shown on the roll still has the right to receive notice of the meeting. This is because s 70 of the Std Mod requires notice to be given to “the owner of each lot included in the scheme” and the word “owner” is defined with reference to registered owners.

Perhaps the best argument for applying common law or equitable principles arises out of the adjudicator’s discretion to make an order if it is “just and equitable in the circumstances”. An adjudicator may well take the view that he or she should not make an order declaring a proceeding void if the circumstances were such that a court exercising an equitable jurisdiction or applying common law principles would not make such an order.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 242, 276(1), Sch 5 cl 7 and 9.

Std Mod s 70.

.40 Case references: *Royal Mutual Benefit Building Society* v *Sharman* (1963) 1 WLR 581; *In re Sanders Limited* (1932) 49 WN (NSW) 220.

Last reviewed: 31 July 2006

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[¶42-840] Guidelines for avoiding defamation

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Meetings by their very nature are, not surprisingly, a rich source of defamation proceedings or allegations. Such proceedings or allegations usually arise from:

- the contents of the preliminary documentation for the meeting
- the events and discussions at the meeting, or
- the record (or minutes) of the proceedings.

It is not possible in this work to examine in detail the law of defamation in relation to meetings. However, the following brief points are made so as to provide rough guidelines for use in relation to meetings:

1. Many statements made at meetings are defamatory, but they are usually protected by a defence known as “qualified privilege”.
2. To preserve the availability of this defence, care should be taken to ensure:
   - that the person making a statement is not motivated by malice or want of good faith
   - that such statement appears only in necessary preliminary documentation, at the meeting or in a necessary record of the proceedings
   - that the statement is true
   - that the statement is not over-emphasised or unduly repeated.
3. The defence of qualified privilege for statements made, arguably in the public interest, in the context of debate is not available if tape recordings are replayed later outside the meeting. The tape recording of meeting proceedings is therefore best avoided.
4. Where possible avoid any statements that may be defamatory.
5. The body corporate and the committee do not incur liability for defamation by the inclusion of defamatory matter in —

   (a) a motion, other than a motion submitted by the committee, contained in the agenda or a voting paper for a general meeting, or
   (b) an explanatory schedule, other than an explanatory note written by the committee, accompanying a voting paper.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 111A

Std Mod s 76, 204

Acc Mod s 74, 202

Com Mod s 43, 160

Ss Mod s 37,136

Last reviewed: 19 March 2010

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[¶43-000] Importance

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The residents of a community titles scheme have the right to occupy their lots and to use and enjoy the common property. The rights over common property are rights in common with other residents. The by-laws of a community titles scheme are the means used by the body corporate to regulate such occupation, use and enjoyment. They are also the mechanism used by the body corporate to confer exclusive use to the rights and enjoyment of, or other special rights about, the common property or body corporate assets. The developer of a community titles scheme (``original owner'') decides what by-laws will apply upon registration of the scheme. This is ensured by a requirement for the by-laws to be included in the community management statement. These by-laws become effective once the community titles plan is registered. After that, they may be changed by the body corporate. It follows that the by-laws are of fundamental importance to the day to day use of the lots and common property.

Last reviewed: 19 March 2010

[¶43-020] What by-laws apply?

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In the case of a community titles plan registered after 13 July 1997 the by-laws for the resulting community titles scheme are those (if any) that appear under the heading "BY-LAWS" in the community management statement. If no by-laws appear under that heading (ie, if that part of the community management statement is left blank), then the by-laws in Sch 4 of the BCCM Act are the by-laws that apply to the scheme. These are commonly called the "standard by-laws" (see ¶43-240).

The position in relation to plans registered as building units plans or group title plans before 13 July 1997 is slightly more complex. Those plans, provided they were not part of the Sanctuary Cove development, a development under the *Integrated Resort Development Act 1987* or the *Mixed Use Development Act 1993*, were:

- replaced by community titles schemes regulated under the BCCM Act, and
- taken to have an "interim" community management statement.

This interim statement was taken to include by-laws identical to the by-laws that were in force for the relevant plan as at 13 July 1997. Where under those by-laws allocations (including variations and transpositions) of exclusively used common property were made, then those allocations as they existed on 13 July 1997 were continued. In other words, the existing by-laws, including common property use "allocations", were continued in operation. The interim statement lasted until 13 July 2000, after which the registrar of titles recorded a "standard" community management statement. The registrar reported preparing approximately 20,000 standard statements in mid July 2000 and sending notices of recording to all bodies corporate involved. The by-laws for the purpose of the standard statements were those in force immediately before 13 July 2000.

The transitional provisions of the BCCM Act also provided for:

- amendment of, addition to or repeal of by-laws between the period from 13 April 1997 to 13 July 1997
- notification of exclusive use allocations (including variations or transpositions) under exclusive use by-laws before 13 January 1999
- preservation of former by-laws that could not properly be made under the BCCM Act, and
- preservation of exclusive use or special privilege rights granted under earlier building unit and group title legislation other than by way of exclusive use by-law.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 168, 337–341.

Last reviewed: 19 March 2010

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[¶43-040] Content and extent of by-laws

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The by-laws may only provide for the following:

(a) the administration, management and control of common property and body corporate assets
(b) regulation of, including conditions applying to, the use and enjoyment of:

(i) lots included in the scheme
(ii) common property, including utility infrastructure
(iii) body corporate assets, including easement areas relevant to common property, and
(iv) services and amenities supplied by the body corporate, and

(c) other matters permitted by the BCCM Act.

Under previous legislation the by-laws were a source of power for the body corporate. Accordingly, it was possible to pass a by-law extending the powers of the body corporate. There is nothing in the BCCM Act that suggests the by-laws are a source of power for the body corporate. Indeed, it is not possible under the BCCM Act to extend the powers of the body corporate by means of by-laws or any other provision in the community management statement.

An interesting question is whether a by-law can give a lot owner the right to use and occupy part of another person's lot. In New South Wales, the question was answered affirmatively by a majority in the New South Wales Court of Appeal in *White v Betalli & Anor*. In Queensland, such a by-law would not qualify as an "exclusive use by-law" (BCCM Act, s 170(1); ¶43-160), but may, conceivably, be permissible as a by-law for the "regulation of ... the use and enjoyment of: (i) [a lot] included in the scheme" (BCCM Act, s 169(1)(b)). It remains to be seen whether a Queensland court would hold that such a by-law was consistent with the BCCM Act.

There are a number of provisions in the BCCM Act dealing with inconsistencies, namely:

- If a by-law is inconsistent with another provision of the community management statement, the other provision prevails to the extent of the inconsistency.
- If a by-law is inconsistent with the BCCM Act (including the regulation module applying to the scheme) or another Act, the by-law is invalid to the extent of the inconsistency. However, this does not apply to an inconsistency between a by-law and a local law if the inconsistency is about keeping animals on the scheme land.
- If a lot may be lawfully used for residential purposes, the by-laws cannot restrict the type of residential use.
- A by-law cannot prevent or restrict a transmission, transfer, mortgage or other dealing with a lot.
- A by-law cannot discriminate between types of occupiers.
- A by-law (other than an exclusive use by-law) cannot impose a monetary liability on the owner or occupier of a lot.

In addition a by-law must not be oppressive or unreasonable, having regard to the interests of all owners and occupiers of lots included in the scheme and the use of the common property for the scheme. A by-law must not include a provision that has no force or effect under the *Building Act 1975*, Ch 8A, Pt 2 (ie any prohibitions on sustainable housing).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 169, 180.

.40 Case references: *White* v *Betalli & Anor* (2008) LQCS ¶90-140; [2007] NSWCA 243.

Last reviewed: 19 March 2010

[¶43-060] Disabled persons

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The BCCM Act expressly provides for a blind person to be accompanied by a guide dog while on the lot or common property. They can also keep the dog on their lot. A by-law cannot exclude or restrict these rights and to the extent that they purport to do so they are invalid. This is because they are inconsistent with the provisions of the BCCM Act.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 180, 181.

Last reviewed: 19 March 2010

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[¶43-080] Making by-laws

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By-laws are made, repealed or amended by changing the "BY-LAW" section of the community management statement. This requires the recording of a new community management statement because there is no ability to "amend" an existing statement. The body corporate must:

- consent (under s 55 of the Act) to the recording of the new statement, and
- endorse its consent on the new statement.

The body corporate consent (for by-law purposes) requires a special resolution, unless an exclusive use by-law is involved. A change involving an exclusive use by-law requires body corporate consent by resolution without dissent.

The process for making or changing by-laws is as follows:

1. Draft the new by-law or amendment required.
2. Prepare a new community management statement incorporating the new by-law or amendment.
3. Convene a general meeting to consider the special resolution (or resolution without consent in the case of an exclusive use by-law). The earlier requirement for the proposed new community management statement to be distributed with the notice of meeting was removed by the 2003 amendments to the BCCM Act. It is now sufficient for the resolution itself to detail the changes to the by-laws.
4. Pass the special resolution or resolution without dissent. (See **Form B84** **(¶74-155)** and **Form B85** **(¶74-160)**..)
5. The body corporate executes the new community management statement. (relevant planning body approval of the new community management statement will usually not be necessary for by-law related changes to a community management statement.)
6. The new community management statement (along with a Request form) is lodged with the registrar of titles for recording.

The new community management statement takes effect when the registrar of titles records it.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: *Body Corporate and Community Management Act 1997*, s 54, 59, 60, 62.

Last reviewed: 19 March 2010

[¶43-100] Persons bound

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Because the by-laws are in the community management statement, the persons bound by the by-laws are the persons bound by the community management statement. The community management statement is binding on:

- the body corporate, and
- each member of the body corporate (ie each owner).

To the extent that the following people are not bound under the above categories, they too are bound:

- each registered proprietor of a lot (which, by definition, includes mortgagees and lessees), and
- each person who is a registered proprietor of common property (which again extends to people with "interests", such as lessees).

To the extent that any of the following people are not bound by any of the categories already mentioned, they too are bound:

- occupiers of lots, and
- occupiers of common property.

All these people are bound as if the community management statement included mutual covenants entered into by them under seal to observe its provisions. The binding nature of a community management statement therefore rests on contract (albeit a "statutory contract", which carries with it special considerations when it comes to enforcement (see ¶43-140)). This is similar to the binding nature of by-laws under strata title legislation generally.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 59.

Last reviewed: 19 March 2010

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[¶43-120] Awareness of by-laws

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There is clearly a wide range of people who are bound by the by-laws and the most frequent reason given for non-compliance with a by-law is that the person was unaware of its contents. But how do these people become aware of the by-laws that they must observe? The simple answer is that they will not become aware unless they are told about the by-laws. In New South Wales there are extensive provisions dealing with the notification of by-laws to tenants, but there are no corresponding requirements in Queensland. The body corporate should receive notice of new owners and tenants (see s 193 of the Std Mod). It is suggested that, upon receipt of those notices, a copy of the by-laws should be sent to the new owner or tenant. See **Form B86 (¶74-165)** for a possible covering letter.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 193.

Acc Mod s 191

Com Mod s 149

SS Mod s 127

Last reviewed: 19 March 2010

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[¶43-140] Enforcement of by-laws

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By-laws are normally enforced in one of two ways:

1. By application to the Commissioner for an order requiring compliance with the by-laws (see "DISPUTES" tab).
2. By serving a "Continuing Contravention Notice" or a "Future Contravention Notice" on the person against whom enforcement is sought.

Enforcement as contractual covenants

Because the by-laws have effect as contractual covenants (¶43-100), they can also be enforced in the same way as any other contractual provision can be enforced (eg, by injunction or by action for damages). See *The Proprietors — Strata Plan No 464 v Oborn & Anor* and *The Proprietors — Strata Plan No 9616 v Knaggs* as examples of circumstances where a mandatory injunction was an appropriate remedy.

Exclusivity of dispute resolution process under BCCM

Historically, the Court would not always exercise its jurisdiction where there was an alternative dispute resolution process. See *Rugby Court Pty Ltd v The Proprietors — Strata Plan No 7712*; *The Proprietors — Strata Plan No 7712 v Scott*; *North Wind Pty Ltd v The Proprietors — Strata Plan No 3143*; *The Proprietors — Strata Plan No 30234 v Margiz Pty Ltd*; and *The Proprietors — Surfers International Building Units Plan No 2889 & Ors v Paradise Projects Pty Ltd*. However, the position is different under the BCCM Act. Section 229 provides for the dispute resolution processes under the BCCM Act to be exclusive in respect of any dispute capable of resolution under those processes. This effectively excludes the original jurisdictions of the various Courts of Queensland.

By-laws are "statutory contracts" — objective interpretation

In construing the terms of a by-law, regard must be had to the special nature of the "contract" constituted by it. While the by-law takes effect as a mutual covenant entered into under seal by the relevant parties (BCCM Act, s 59; ¶43-100), it is different to a normal contract in several ways. In particular, it is a public document — not merely a private record of a private bargain — upon which prospective purchasers and other third parties rely from time to time. That being so, there are limits to which an adjudicator or court can have recourse to the circumstances surrounding the formation of the by-law — circumstances unknown to anyone reading the by-law at a later time — in construing its terms. As a "statutory contract", the by-law "should be interpreted objectively by what it would convey to a reasonable person"; according to its "constitutional function in the [community] scheme in regulating the rights and liabilities of lot proprietors"; and "so that it is consistent with its statutory context": *The Owners of Strata Plan No 3397 v Tate*, per McColl JA.

Continuing Contravention Notice

A Continuing Contravention Notice can only be given by a body corporate. Special provisions apply (see ¶43-150) to owners or occupiers who are experiencing problems with other owners or occupiers breaching by-laws.

Before a body corporate can serve a Continuing Contravention Notice it must reasonably believe that:

- a person who is the owner or occupier of a lot is contravening a provision of the scheme by-laws, and
- the circumstances of the contravention make it likely that the contravention will continue.

That raises the threshold issue — how can a body corporate **reasonably believe**? In this regard there must be both a decision on the part of the body corporate as to its "belief" and there must be evidence to show that such belief is "reasonable". The decision is made by resolution of the body corporate or its committee. An appropriately delegated governing body corporate manager may also make the decision. Irrespective of who makes the decision the resolution should be properly documented. The reasonableness of the belief must be

determined with reference to the facts. There should be a clear "paper trail" that demonstrates the relevant facts.

Example:

Suppose, for example, an owner is parking a motor vehicle on the common property and the vehicle has been parked alongside a driveway for eight consecutive nights. The body corporate manager has asked the owner on two occasions not to park on the common property and the owner has ignored both requests. The committee resolves to serve a Continuing Contravention Notice.

In those circumstances a body corporate could reasonably form the view that a by-law contravention is occurring and it is likely that it will continue to occur. The type of resolution and paper trail that is required is illustrated in **Form B87 (¶74-170)**. If, again using the above example, the owner had not been asked to stop parking on the common property, the body corporate's position may not be as clear-cut. One argument is that eight consecutive occasions is sufficient to allow the body corporate to reasonably conclude that the practice will continue. However, the contrary argument is that a simple request for the owner to stop may resolve the problem and in the absence of such a request the body corporate cannot form the reasonable belief. There may also be history of other by-law breaches that demonstrate a likelihood that the current breach can reasonably be expected to continue. In any event, in the absence of unusual circumstances, it is always preferable for an owner or occupier to be warned before they are served with this type of notice.

Requirements of the Continuing Contravention Notice

The Continuing Contravention Notice must state:

(a) that the body corporate believes the person is contravening a provision of the by-laws
(b) the provision the body corporate believes is being contravened
(c) details sufficient to identify the contravention
(d) the period (which must be reasonable in the circumstances) within which the person must remedy the contravention, and
(e) that if the person does not comply with the notice the body corporate may, without further notice, start proceedings in the Magistrates Court for the failure to comply with the notice or make an application under Ch 6 of the BCCM Act for resolution of the dispute.

The penalty

Although not required by the BCCM Act, the notice could also state the penalty that could be applied by the Magistrates Court — currently 20 penalty units. The proceedings for such an offence can only be started by the body corporate.

The approved form

A form of Continuing Contravention Notice has been approved under the BCCM Act (see **Form 10 — ¶70-200**). The approved form suggests that a minimum period of seven days should be allowed within which the contravention must be remedied. There is nothing in the BCCM Act to support this minimum. In a particular case a shorter period may be appropriate. The test for any period is whether it is "reasonable in the circumstances".

Defence to penalty

A person does not commit the offence of failing to comply with a Continuing Contravention Notice if they were not contravening the particular by-law provision in the way specified in the notice at the time the notice is given. This effectively means that in the case of the above example the vehicle must be actually parked on the common property at the time the notice is given. If there is any doubt about this timing, then a Future Contravention Notice may be the more appropriate course. Determining the actual time when a notice is "given" can also be a problem. (See the discussion in ¶41-370.).

This "defence" provision serves to demonstrate that the choice of the type of notice is a critical choice. In the case of the vehicle parked on common property, if it is parked continuously, then clearly the contravention

is "continuing" and a Continuing Contravention Notice is appropriate. But if it is only being parked overnight, then a Future Contravention Notice may be more appropriate.

Future Contravention Notice

A Future Contravention Notice can only be given by a body corporate. Before a body corporate can serve a Future Contravention Notice it must reasonably believe that:

- a person who is the owner or occupier of a lot has contravened a provision of the scheme by-laws, and
- the circumstances of the contravention make it likely that the contravention will be repeated.

The Future Contravention Notice must state:

(a) that the body corporate believes the person has contravened a provision of the by-laws
(b) the provision the body corporate believes has been contravened
(c) details sufficient to identify the contravention
(d) that the person must not repeat the contravention, and
(e) that if the person does not comply with the notice the body corporate may, without further notice, start proceedings in the Magistrates Court for the failure to comply with the notice or make an application under Ch 6 of the BCCM Act to resolve the dispute.

Again, there is an approved form of notice (**Form 11 — ¶70-210**) and the notice must be supported by a resolution of the body corporate or its committee (see **Form B88 — ¶74-175**.) The notice has effect for three months after it is given, or for such shorter period mentioned in the notice. There is also a defence if, when the notice is given, the person receiving it has not contravened the specified by-law in the way detailed in the notice.

The Body Corporate must act reasonably in enforcing its by-laws

The body corporate has a duty to enforce by-laws under s 94(1) of the Act; however, in exercising that responsibility the body corporate must act reasonably, thereby protecting the rights of individuals.

The test of the term "reasonable" is not a question of whether the decision of the body corporate is "correct" but rather whether it is objectively reasonable: *Commonwealth Bank of Australia* v *Human Rights and Equal Opportunity Commission* (1997) [50 ALR] at pp 34 and 38.

In *Brigaston Lodge* [2014] QBCCMCmr 181 (16 May 2014), the adjudicator was called upon to consider the steps taken by the body corporate in enforcing a by-law against an owner who had installed her air-conditioning condenser on her balcony as opposed to in the courtyard of her lot.

The owner, in seeking the body corporate's consent to the installation of her air-conditioner, indicated the condenser would be located in the courtyard of her lot. The body corporate granted approval for the installation of the air-conditioner and the owner had the condenser installed on the balcony of her lot instead of the courtyard.

After an unsuccessful conciliation at which the body corporate offer to pay $1,350 towards the relocation of the condenser, the adjudicator examined the body corporate's duty to enforce its by-laws whilst acting reasonably.

The owner argued that other occupiers had installed condensers on their balconies and given the "conditions of approval" from the body corporate did not state the condenser had to be placed in the courtyard, she instructed her installer to instal the unit on her balcony.

The noise from the condenser and the location of the waste pipes were cited as additional reasons for the condenser to be moved.

The adjudicator noted it was important for a body corporate to maintain control over structural alterations to the building to ensure the building's visual amenity was maintained and this meant the particular by-law was not unreasonable.

Applying the "reasonableness" test, the adjudicator confirmed an objective assessment was required so that the factors of the particular circumstance were balanced.

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Ultimately the adjudicator found that the body corporate had not acted unreasonably and that the requirement to move the condenser was appropriate in the circumstances.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 182, 183, 185, 186, 188.

Std Mod, s 42.

Acc Mod s 42

Com Mod s 18

SS Mod s 18

.40 Case references:

The Owners of Strata Plan No 3397 v *Tate* (2008) LQCS ¶90-139; [2007] NSWCA 207.

Last reviewed: 23 July 2014

[¶43-145] By-law enforcement cases

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Hard Flooring

It is common for high rise by-laws to contain a hard flooring by-law so that as lots are renovated and carpet replaced with tiles or timber, residents living above and below each other can be assured of noise transference into their lot being limited.

Like all by-laws, a hard flooring by-law must not be oppressive or unreasonable as per s 276 of the Act, Schedule 5 — Item 20, the question of reasonableness being one of fact to be determined objectively.

A by-law which seeks to apply a blanket ban will be unreasonable, especially where a number of lots within the scheme already have hard flooring, as was the case in *Liberty* [2015] QBCCMCmr 372 (10 August 2015).

A hard flooring by-law may be worded as follows:

> "By-law x — Hard Flooring
> X.1 An owner or occupier of a lot must not install or cause to be installed or place in or upon any part of hard flooring, such as timber, tiles, marble or similar material ('flooring') unless the owner or occupier has first obtained the written approval of the committee.
> X.2 Where the committee grants consent to the installation of the flooring, in addition to any other conditions the committee may impose, the following conditions may also apply:
>
> > (a) The field impact insulation class ('FIIC') of the flooring when completed must not be less than the following performance specification:
> >
> > > (i) Kitchen 60*
> > > (ii) Lounge/Bedroom 60*
> >
> > (b) Following the installation of the flooring, the owner or occupier must at its cost have the FIIC determined by a field test conducted by an accredited acoustic consultant approved by the committee, and provide a copy of the consultant's report to the committee within seven (7) days of receiving it.
> > (c) Where the FIIC of the completed flooring is less than the level detailed in by-law C.2(a), the owner or occupier must, within a reasonable time and at its cost, cause the flooring to be removed and/or have any necessary procedures or additional works undertaken in order for the flooring to comply with the requirements in the paragraph and, following any such remedial action, the provisions of by-law X.2(b) must again be complied with." (*an FIIC of 55 is also common).

In *Crystal Bay Resort* [2013] QBCCMCmr 214 (22 May 2013), a lot owner sought orders that the body corporate enforce its hard flooring by-law.

The body corporate committee had previously refused to enforce its by-laws on the basis of the by-laws being unreasonable and that the enforcement would result in discrimination between the lot owners.

The adjudicator agreed with the lot owner and ordered the body corporate to issue by-law contravention notices against any owners or occupiers who had installed hard flooring in contravention of the hard flooring by-law and that where owners or occupiers had failed to comply, further reasonable steps be taken by the body corporate to enforce its by-law.

In reaching that decision, the adjudicator considered what the hard flooring by-law required, whether it was valid, whether the committee were required to enforce it and whether there was any special reason for not enforcing the by-law.

Was the by-law valid?

The adjudicator held the by-law was not "oppressive or unreasonable" when compared to the test laid out by Barlow SC in *Body Corporate for River City Apartments CTS 31622* v *McGarvey* [2012] QCATA 47. The scheme had a history of noise transference complaints and was a high rise.

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The body corporate committee argued that the by-law was invalid because:

(a) it required the owner to incur a cost in contravention of s 180(6) of the Act
(b) compliance with the hard flooring could be determined using sound insulation material specifications provided, and
(c) the standard as a whole was substantially better than the Australian Standard set under the Building Code of Australia.

The adjudicator, in reference to argument (a) found the by-law did not impose a direct monetary liability but rather an obligation which may incur costs. He referred to the previous case of *Grosvenor Apartments — Brisbane* [2006] QBCCMCmr 725 (15 September 2006) in which the adjudicator had upheld a by-law requiring an acoustic report to be provided by owners at their own cost.

In reference to the committee's argument (b), he noted the use of insulation specifications might be the committee's way of alternatively managing the hard flooring approvals, it would not be unreasonable to require actual testing. In any event the current by-law did not allow for that methodology.

Turning to the committee's argument (c), the adjudicator confirmed it was not unreasonable for owners to require an acoustic performance above the Building Code of Australia. He noted the adjudicator's decision in *Victoria Square* [2013] QBCCMCmr 48 (11 February 2013) in which that adjudicator said "the BCA criteria for sound impact noise have been held by adjudicators as an appropriate guide in considering levels of noise transference. However, adjudicators have also widely accepted the view that the BCA criteria are very much a minimum standard and that even when met, there will be poor levels of insulation."

Was it reasonable for the committee not to enforce the by-law?

The committee argued that, as the by-law had not previously been enforced, it would be discriminatory for it to enforce it now given there were no complaints about noise. The adjudicator rejected this argument. The committee were required to enforce the scheme's by-laws under s 94(1)(b) of the Act.

Was there a special reason for not enforcing the by-laws?

The adjudicator found that just because the by-law had never been enforced did not mean it should continue to not be enforced. The committee may not agree with the by-law but unless the owners resolved at general meeting to amend it, the committee were obligated to take reasonable action to enforce the by-law.

He advised the body corporate to enforce the by-law against every owner or occupier who had installed hard flooring since the by-law commenced as best as those owners could be identified. Fit would have been unreasonable to require owners who had since sold their lot and left the scene to comply or for those owners who had installed the hard flooring prior to the by-law being recorded for the scheme.

Regrettably that was not the end of the hard flooring issues for the Crystal Bay scheme. In 2014 the committee sought a declaration as to which by-laws to enforce, given the owners had resolved to amend the by-laws to make them less onerous.

The adjudicator found, in *Crystal Bay Resort* [2014] QBCCMCmr 112 (1 April 2014) that the committee was required to enforce the current by-laws, even though effectively as some submissions suggested, this would mean that those owners who had acted outside the by-laws would be able to avoid complying with the earlier by-laws.

In *3 Parkland Boulevard* [2014] QBCCMCmr 91 (14 March 2014), a new community management statement was recorded in which the hard flooring FIIC rating was changed from 50 to 60 in both the kitchen and Lounge/Bedroom for lots within the scheme. The by-law was in terms of that set out above.

The applicant owner argued, citing an acoustic report they had received, that the by-law was unreasonable and impossible to achieve given the low quality of the building construction which included thin concrete slabs between lots and/or no suspended ceilings in each lot. The owner stated they could not find an underlay product which would meet FIIC 60 which meant that the by-law indirectly prevented owners from installing tiled floors. The owners alleged the body corporate committee did not give them any guidance as to a product which would assist in ensuring the underlay and tiles met the FIIC 60.

Members of the committee agreed that in arriving at the "unobtainable" FIIC rating of 60, it was intended to discourage people from installing hard flooring given the committee were aware that the building had not

been constructed properly with sufficient sound proofing to ensure an FIIC level of 60 was achievable. They were confident technology would change so that eventually the by-law would be achievable.

In assessing whether the by-law was “oppressive or unreasonable”, the adjudicator noted that it was not unreasonable for a by-law to regulate flooring within units to contain the possibility of nuisance. This by-law contemplated a variety of hard flooring materials being used without prohibiting any particular type.

The adjudicator was provided with an acoustic report recommending a FIIC level of 55 be adopted for the scheme and ultimately found that an FIIC level of 60 was unreasonable but confirmed it was up to the body corporate to either agree on an FIIC level or reinstate the previous FIIC level of 50.

In *4 Parkland Boulevard* [2015] QBCCMCmr 110 (5 March 2015), the body corporate by-laws contained a requirement for newly installed hard flooring to reach an FIIC level of 60 in the kitchen and lounge/bedroom, identical to the draft by-law above.

The respondent, Mrs Hogan, agreed to comply with the by-law and agreed to obtain a subsequent acoustic engineering report to show her hard flooring had met the required sound transference level but subsequently refused to obtain a report. Correspondence was exchanged by the parties in which the respondent argued that “deemed to satisfy” explanatory memorandum prepared by Uniroll (the underlay company) meant that she complied with the Building Code of Australia such that a further acoustic report was not required, despite her earlier agreement.

Subsequently, the body corporate served a contravention notice on the respondent and the report she obtained showed that the installed hard flooring failed to meet the FIIC level of 60 but performed well on the Weighted Standardised Impact Sound Pressure Level (“LNTW”) rating system.

When the respondent refused to replace her hard flooring, the body corporate commenced dispute proceedings and adjudicator found:

(a) the body corporate’s reliance on by-law 13 at a sound rating of FIIC 60 was unreasonable in all the circumstances
(b) the by-law assumed that the building complied with “good building” standards and that the constructed result was in accordance with finished drawings and engineering plans
(c) that the body corporate’s AECOM report which showed that a rating of FIIC 60 was achievable was of little weight given its conclusion was inconsistent with its results
(d) that the acoustic report obtained by another resident in the building showing an FIIC of 60 was achievable was an “anomaly” such that for other residents the rating would be unattainable
(e) the respondent had laid expensive tiles and the underlay which was recommended
(f) the flooring complied with the Building Code of Australia criteria at LNTW 51 and 53
(g) there had been no noise complaints from neighbours including the neighbour immediately beneath her lot, and
(h) the flooring was properly installed with appropriate sound insulation.

Accordingly, the body corporate’s application was dismissed.

In *Stradbroke Tower & Villas* [2015] QBCCMCmr 11 (13 January 2015), the body corporate, through its community management statement, had an FIIC rating of 60 in the kitchen area and 77 in the lounge/ bedroom areas required of any hard-flooring installed with the committee’s written approval.

The applicant argued that the by-law were unreasonable given existing tiles in the kitchen laid by the developer did not meet the standard set under the community management statement.

The body corporate argued that given the increase in the value of the property with the hard flooring, the applicant ought to spend more on a better product and thicker insulation.

The applicant’s hard flooring was expected to reach an FIIC level of between 57 and 62 while the body corporate agreed to compromise if the applicant could reach an FIIC level of 65 with her installation.

The adjudicator held the body corporate was entitled to seek a high standard of noise isolation, which may be higher than in other buildings and that an FIIC level of 65 was reasonable even though it may be significantly higher than that required by the Building Code of Australia.

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The adjudicator went on to say that the fact it was more inconvenient and/or expensive to comply with the condition did not make the body corporate unreasonable.

In closing, the adjudicator noted that it is likely to be unreasonable for the body corporate to require a higher measurement of noise insulation than currently existing where hard surfaces are already present as owners are not expected to increase sound insulation by their renovations of the original building.

It seems the battle of the engineering report writers is far from over.

The adjudicator in *Points North* [2015] QBCCMCmr 449 (24 September 2015) was presented with two reports, one from ATP Consulting Engineers and one from Craig Hill Acoustics and after comparing the two reports, noted that the report from ATP Consulting Engineers was informative because:

- it was detailed and comprehensive running to 23 pages
- it took into account the flooring insulation, underlay and adhesives used prior to the tiles being laid
- it took into account the use of rugs by testing with and without rugs
- it took into account the fact that the building and its manner of construction would impact on whether the requisite standard for sound insulation could ever be reached
- it took into account the slab dimensions and the ceiling below the flooring of the particular unit.

Unfortunately for the applicant, the report prepared for him by Craig Hill Acoustics contained a summary of two pages long, did not consider the type of building and method of construction and did not test the floors with and without rugs.

The lesson from the adjudicator’s comments is clear — if you need to rely on an acoustic report make sure it is detailed and comprehensive.

The above cases can be contrasted with *Kooba Court* [2016] QBCCMCmr 47 (9 February 2016).

The *Kooba Court* case involved a two lot scheme set up under the *Building Units Titles Act (BUTA) 1962* in which the applicant’s main bedroom was located directly below the respondent’s toilet.

The applicant could clearly hear toilet noises at all hours of the day and night as a result of the concrete slab construction and poorly insulated flooring between the lots. She complained that his amounted to a nuisance within the meaning of s 167 of the Act.

The applicant sought an order that the respondent remedy the toilet flooring in his lot in accordance with a sound test recommendation report undertaken by her chosen acoustic engineers. The Adjudicator declined to make that order after conducting an investigation into the sound transference issues.

Essentially, the age and construction of the building meant that the toilet plumbing and waste pipe ran through the concrete slab which was the roof to the applicant’s lot and the floor of the respondent’s lot. No evidence was filed to show that the pipes and ducts were not in good condition.

After finding that the unreasonable interference was caused by that sound transference from the respondent’s lot to the applicant’s lot, the adjudicator found that both parties were responsible for improving the sound insulation in order to prevent continued unreasonable interference.

Both parties were charged with sharing the costs of installing a new toilet, new screen and tiles to the toilet, insulating all pipes and ducting between the lot and the costs of new ceiling insulation tiles.

Parking and Towing

By-laws will often contain a prohibition on parking on the common property which is binding on owners and occupiers within the scheme.

The by-law may simply state:

> 2.1 The occupier of a lot must not, without the body corporate’s written approval:
>
> > (a) park a vehicle or allow a vehicle to stand on the common property; or
> > (b) permit an invitee to park vehicle, or allow a vehicle to stand, on the common property.
>
> 2.2 An approval under 2.1 must state the period for which it is given.

2.3 However, the Body Corporate may cancel the approval by giving seven days written notice to the occupier.

The current state of the law is that a by-law cannot be used by a body corporate as a means to tow an occupier's vehicle from the scheme for parking without permission on common property.

It is also unlikely that a body corporate will be granted the right to prospectively tow a vehicle from the common property even in circumstances where the car's occupant owner is served multiple contravention notices and ignores them.

In *Everton Green* [2011] QBCCMCmr 576 (21 December 2011) the body corporate sought an order directing the occupiers of a lot within the scheme to stop parking their vehicle on common property and an order to allow the body corporate to tow the vehicle in the event it was parked again in contravention of the by-law.

The adjudicator made an order for the occupiers not to park on the common property, including in visitor parking spaces and to take all reasonable steps to ensure that their guests or invitees only parked in visitor car parking but did not make an order allowing the body corporate to tow prospectively should the parking continue.

While sympathizing with the body corporate's position in dealing with occupiers who had not responded to contravention notices, the Adjudicator noted that it was a bridge too far to delegate to the body corporate an ability to tow an occupier's vehicle if in future it was parked on common property in contravention of the by-law without an independent assessment on whether the by-law had in fact been breached and that towing was the only appropriate remedy. It would be a subversion of the legislative procedure set out for determining a by-law breach and the appropriate remedy.

The Everton Green case was subsequently cited with approval in *Ephraim Island — Subsidiary 106* [2012] QBCCMCmr 435 (27 September 2012) at [46] where the Adjudicator said it has been held many times by this office that there is no authority for a body corporate to remove an owner's car, and that a by-law which purports to do so may be oppressive and unreasonable and therefore contrary to s 180(7) of the Act.

In *Freedom Terrace* [2013] QBCCMCmr 423 (24 October 2013) the body corporate sought an order for an owner to stop parking his boat and trailer in the area in front of lot 4 within the scheme and in the area in front of his lot together with an order allowing the body corporate to tow the car and boat if it was again parked on that common property.

The respondent owner objected to the application stating that he had previously received permission and that the area in front of lot 4 was a parking bay and had always been.

He also argued that he had offered to move his vehicle if requested, that his vehicle did not stop other owners from parking, that there was inadequate parking in the complex and that he had permission from the Commissioner's office to park his boat and trailer in place.

The Adjudicator considered the by-law and found it was not unreasonable. The Adjudicator noted the decision of *Aztec on Joyce* [2013] QBCCMCmr 28 which highlighted a body corporate's common law rights to tow a vehicle completely separately from the body corporate's rights to tow under a by-law although towing under that common law right would have to be determined in a separate jurisdiction.

The Adjudicator declined to grant an order allowing the body corporate to tow the boat and trailer in future if it was parked but did make orders that the respondent not park on the common property without the written approval of the body corporate.

Although a parking by-law may not be enforceable, a body corporate may resolve to include a towing by-law on the understanding that it would be for deterrent purposes only. The by-law may go so far as to authorise the committee to enter into a towing agreement with a towing company however caution should be exercised and the proposed agreement reviewed.

It is not uncommon to find an indemnity in a towing contract which the body corporate's insurance provider may ultimately refuse to honour.

Pets

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It is well established that regardless of what a by-law may say, pets cannot be banned from being kept on a lot within a community titles scheme.

Section 169(1)(b)(i) provides that a by-law may only provide for the regulation of the use and enjoyment of lots within a scheme. Where the by-law effectively prohibits a particular use or enjoyment of a lot, it will be found to be invalid.

In *Body Corporate for River City Apartments* v *McGarvey* [2012] QCATA 47, Mr Barlow SC stated that "a by-law that prohibits altogether the keeping of pets is not a by-law regulating the use or enjoyment of lots, but purports to prohibit a particular use and type of enjoyment altogether. It goes therefore beyond the scope of a valid by-law permitted by s 169 and is invalid".

McKenzie v *Body Corporate for Kings Row Centre CTS 11632* [2010] QCATA 57 provides that a committee must "consider each case upon its facts and, in making a decision whether or not to approve the keeping of a particular animal in a particular lot, the committee would have to act reasonably". Part of acting reasonably include the imposition of conditions in order to avoid genuine problems arising.

Can an owner simply refuse to obtain the body corporate's consent to keeping an animal on their lot? In *The Shore* [2014] QBCCMCmr 347 (27 September 2014) the answer to that question was no. In that case, the owners of a lot elected to bring a small dog onto their lot without having first obtained the approval of the body corporate to keeping the dog.

The pet by-law provided that the body corporate committee could give consent with conditions and withdraw that consent at any time.

No argument was made that the by-law was invalid or did any more than regulate the use and enjoyment of lots within the scheme. The fact that the owners sought approval on one occasion was not sufficient to comply with the by-laws. In the absence of having obtained that approval, the body corporate was obliged to enforce the by-law by giving the owners a contravention notice.

The Adjudicator ordered that the owners advise the body corporate of whether or not they would seek the body corporate's approval to keep the dog and dismissed the application.

In *The Timbertop Terraces* [2014] QBCCMCmr 366 (10 October 2014), the Adjudicator was called upon to consider the actions of a owners who wished to keep an invalid by-law which prohibited the keeping of a dog in the scheme. The by-law allowed the committee to grant the keeping of a cat. The complex was promoted as a "no dog" complex.

Owners objected to the keeping of dogs within the scheme because of the scheme's no dog policy, the environment was said to be unsuitable, because the keeping of dogs within the scheme would cause a nuisance and because dogs they thought of dogs as dangerous.

The Adjudicator held that none of those grounds were circumstances sufficient to require the prohibition of all dogs. The Adjudicator instead found that there would be circumstances within which dogs could be kept without causing an inconvenience to owners.

The Adjudicator provided the committee with an outline of conditions which previous Adjudicators had placed on the keeping of pets within a scheme:

- The dog must be kept within the lot while it is present on scheme land.
- The dog must traverse the common property only for the purpose of being brought onto or taken off scheme land, at which time the dog must be appropriately restrained.
- The dog must not cause a nuisance to any other occupiers or unreasonably interfere with the enjoyment of their lot.
- The dog must be cleaned, trimmed, immunized and treated for worms, fleas and ticks in accordance with the recommendations of a vet.
- The dogs waste must be disposed of in such a way that it does not create noxious odours or otherwise contaminate the scheme.
- The committee shall be entitled to rescind permission for the dog if it reasonably considers the applicant has not complied with these conditions and that the applicant has failed to respond appropriately to warnings about their concerns.

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[¶43-150] Owner or occupier sponsored notices

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If an individual owner or occupier ("**complainant**") is having difficulty with another person ("**accused person**") over a by-law contravention they will need to ask the body corporate, in the approved form (**Form A1** — ¶70-105), to give the accused person a contravention notice. If the body corporate gives the contravention notice it must, within 14 days after that request, advise the complainant that the notice has been given. The complainant can only make an application to the commissioner under the dispute resolution provisions of the BCCM Act if the body corporate does not advise that the contravention notice has been given, unless one of two possible dispensation provisions apply, namely:

- the dispute is incidental to an application for an order under s 281 of the BCCM Act to have repairs carried out to damaged property or pay reimbursement for repair of the damage, or
- special circumstances apply.

For special circumstances to apply:

- the body corporate, owner or occupier ("**initiating party**") reasonably believes:
  - "special circumstances apply" for the contravention, and
  - because of the special circumstances, it is necessary for the dispute to be resolved urgently, and
- the application is for an interim order of an adjudicator.

For this purpose, "special circumstances" apply if the contravention:

(a) is likely to cause:

(i) injury to persons, or
(ii) serious damage to property, or

(b) is a risk to the health or safety of persons, or
(c) is causing a serious nuisance to persons, or
(d) for another reason, gives rise to an emergency.

A complainant who is the owner or occupier of a lot included in a specified two-lot scheme may make an application under the dispute resolution provisions of the BCCM Act for resolution but only if the complainant has given the accused person a contravention notice (where the complainant is an owner) or if the complainant is an occupier, where they have asked the owner to give the accused person a contravention notice and the owner does not advise the complainant that the contravention notice has been given.

.01 Law: BCCM Act, s 185, 186, 238.

Last reviewed: 29 April 2010

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[¶43-160] Introduction

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What is an exclusive use by-law?

An exclusive use by-law is a by-law that attaches to a lot in the scheme and gives the occupier of the lot for the time being exclusive use to the rights and enjoyment of, or special rights about:

(a) common property, or
(b) a body corporate asset.

Characteristics of an exclusive use or special rights by-law

The following should be noted about these rights:

- They are conferred on an occupier, not an owner. The owner can only exercise the rights if they are in occupation. This is different to the position under the BUGT Act.
- They confer either an exclusive use right or a "special right". A special right is a right that is different to an exclusive use right (eg a right to conduct a business within the community titles scheme).
- They can apply to the common property or to a body corporate "asset" (eg a boat mooring leased from the Crown).

A tiered community scheme

In the case of "tiered" community titles schemes, an exclusive use right in a higher scheme can be conferred on one of its body corporate members. In that case the right will be for the benefit of all the members of the scheme on which the right is conferred. In turn, that exclusive use right is an "asset" that can itself be the subject of another exclusive use right created by the lower scheme.

How are exclusive use by-laws allocated?

The common property or body corporate asset to which an exclusive use by-law applies must be:

(a) specifically identified in the by-law, or
(b) allocated:

(i) by a person (who may be the original owner or their agent) authorised under the by-law to make the allocation, or
(ii) by two or more lot owners under a reallocation agreement.

The allocation referred to in paragraph (b)(i) above is called an "**authorised allocation**" and an allocation referred to in paragraph (b)(ii) above is called an "**agreed allocation**".

Exclusive use rights allocated after the first CMS is registered

An exclusive use by-law that is made subsequent to the recording of the first community management statement and that specifically identifies the common property or body corporate asset to which it applies:

(a) may only attach to the lot if the owner agrees to it in writing **before** the necessary resolution without dissent is passed or the lot owner votes personally in the resolution, and
(b) may only stop applying to the lot if the owner agrees in writing **before** the necessary resolution without dissent is passed or the lot owner votes personally in the resolution.

The requirement for the lot owner to vote personally in the resolution is not entirely clear. This is because of the various ways in which a vote can occur (eg by voting paper, by personally indicating a vote at the meeting, by proxy, by company nominee and by owner representative). A vote cast by an owner by personally indicating a vote at the meeting or by submitting a voting paper would most likely satisfy the requirement, but it is not as clear whether the other types of votes will satisfy the requirement.

Conditions may be attached to the exclusive use rights

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Furthermore, if conditions are attached to the by-law, a written consent will be required in any event. This is because s 123(1) of the Standard Module requires the consent in writing of a recipient lot owner before conditions are imposed. The alternative of having voted in the resolution has not been carried over into the regulation module provisions. Therefore, it is suggested, as a precautionary measure, a written consent should be obtained in all cases. The written consent should be retained in the minute book as a permanent record because it may be required for future inspection by a buyer. If a vote in a resolution is to be relied upon, care should be taken to ensure that the minutes of the meeting clearly show the vote and the way in which it was cast. Again, this may be required for future verification.

When the exclusive use rights take effect — on recording of new CMS

The resolutions without dissent do not actually make the by-law creating or extinguishing the exclusive use right, as was the case under the BUGT Act. Instead, they authorise the recording of a new community management statement that includes or omits the by-law, as the case may be. The owner's agreement in writing or by voting in the resolution therefore relates to the recording of the community management statement with or without the exclusive use by-law.

The process of granting or extinguishing an exclusive use by-law

The process to make or extinguish an exclusive use by-law that identifies the common property or body corporate asset is as follows:

1. Determine the changes that need to be made to the by-law section of the community management statement (eg decide on the wording of the new exclusive use by-law or decide on the wording in the community management statement to be deleted).
2. Prepare a new community management statement incorporating the changes or a motion for a resolution setting out the changes in detail.
3. Convene a general meeting of the body corporate, including on the agenda a motion for a resolution without dissent consenting to the recording of the new community management statement (see **Form B85** — ¶74-160) or consenting to the changes set out in the resolution in detail. As mentioned earlier, the new community management statement need not be sent out with the notice of the meeting.
4. Obtain the written agreement of the lot owner to the recording of the new community management statement or ensure that the lot owner will be voting personally in the resolution. The written agreement of the lot owner must be obtained before the meeting. Also, if the by-law being created contains any conditions, the lot owner must agree in writing to the conditions. (**Form B89** (¶74-180) is a written agreement to both the recording of the new community management statement and the conditions in the by-law.)
5. Pass the resolution without dissent at the meeting.
6. Execute the new community management statement under the seal of the body corporate.
7. Lodge the new community management statement and a Request form with the registrar for recording.

So far as extinguishment is concerned, what has been said so far only applies to an *"exclusive use by-law that specifically identifies the common property or body corporate asset to which it applies, other than an exclusive use by-law contained in the first community management statement for the scheme*" (see s 171(2)). Unfortunately that subsection does not say how an exclusive use by-law that is contained in the first community management statement and specifically identifies the common property or body corporate asset to which it applies can be made to cease to apply. There does not appear to be any other provision dealing with that situation. The same can be said of a similar by-law in the first community management statement that contains provisions authorising the revocation of an allocation.

Where common property is allocated

Similarly, an **authorised allocation** can only attach to a lot, with the agreement in writing of the owner. The written agreement must occur before the allocation is made.

Before recording a community management statement containing an exclusive use by-law, the registrar may require the common property or body corporate asset to be identified in a plan, or in some other way.

A by-law for an authorised allocation can stop applying to a lot only if the lot owner agrees in writing before:

(a) the allocation is revoked under the by-law (if the by-law provides for the revocation of an allocation), or
(b) the passing of the resolution without dissent –

(i) consenting to the recording of the community management statement that does not incorporate the exclusive use by-law, or
(ii) in which the lot owner voted personally.

The procedure in the case of (a) will depend on the wording of the by-law. The procedure in the case of (b) is as follows:

1. Determine the changes that need to be made to the by-law section of the community management statement (eg decide on the wording in the community management statement to be deleted).
2. Prepare a new community management statement incorporating the changes or a motion for a resolution setting out the changes in detail.
3. Convene a general meeting of the body corporate, including on the agenda a motion for a resolution without dissent consenting to the recording of the new community management statement (see **Form B85** — ¶74-160) or consenting to the changes set out in the resolution in detail. As mentioned earlier, the new community management statement need not be sent out with the notice of the meeting.
4. Obtain the written agreement of the lot owner to the recording of the new community management statement or ensure that the lot owner will be voting personally in the resolution. The written agreement of the lot owner must be obtained before the meeting.
5. Pass the resolution without dissent at the meeting.
6. Execute the new community management statement under the seal of the body corporate.
7. Lodge the new community management statement and a Request form with the registrar for recording.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 170, 171, 172.

Last reviewed: 19 March 2010

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[¶43-170] Allocations of property under exclusive use by-laws

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In ¶43-160 mention was made of **authorised allocations** and **agreed allocations** of common property or body corporate assets under exclusive use by-laws. This “allocation” process originally arose out of the desire of developers to retain flexibility in the allocation of car parking spaces by delaying the allocation until after the relevant plan was registered, even though the lot and “a car space” were sold some months earlier. To achieve this the car spaces were designated as common property and an exclusive use by-law was made granting rights to car spaces to be identified and allocated by the developer within a certain time of registration of the plan. One of the problems with these by-laws was the lack of permanent records of the actual allocations.

Body Corporate must be given details of allocations

The BCCM Act expressly recognised these types of by-laws and introduced special “allocation” provisions to overcome the poor recording practices that previously existed. These provisions were extensively reviewed in the 2003 amendments to the BCCM Act. Section 174 now provides that an authorised or agreed allocation has no effect unless details of the allocation are given to the body corporate. Before the 2003 amendments, authorised allocations had to be made within 12 months of recording of the relevant community management statement. Those amendments introduced the concept of a “**base allocation period**” and an “**extended allocation period**”. The base allocation period is the period ending one year after the recording of the relevant community management statement. An extended allocation period is a period stated in an order of an adjudicator, which may not extend beyond two years after the recording of the relevant community management statement. The order can be sought and made before or after expiry of the base allocation period.

Allocations to reflect informal use over time

It is possible for formal allocations of exclusive use areas to be overlooked from the start of the scheme.

In *Anna Palms* [2016] QBCCMCmr 1 (6 January 2016), occupiers of the 8 lot scheme had informally used common property car spaces as though they had been allocated under the exclusive use provisions from the establishment of the scheme in 1995.

Regrettably, the use or the common property areas for car parking was never recorded in a community management statement even though the car parking areas were marked with lot numbers and used as informally allocated. All lots, aside from lot 6, had use of one car parking space while lot 6 had the use of two car spaces and part of an area on which utility infrastructure was installed.

In March 2014, the owner of lot 6 sought to formalise the arrangements by having the body corporate enter into a new community management statement which allocated the car spaces. However, the body corporate failed to pass a motion granting the applicant the use of his car spaces. The applicant challenged the reasonableness of that decision and the adjudicator held it would be unreasonable to refuse the applicant the use of the double car space and utility area after 19 years of unchallenged use or to require the applicant to remove the garage doors which had been installed by the previous developer/owner.

At that time, the adjudicator encouraged the body corporate to formalise the de facto use of the car parking areas and commented that the parties could agree on reasonable conditions to be imposed on the continued use.

Subsequently the applicant proposed at the following AGM a motion which granted lot 6 exclusive use of the double car parking spaces for the sum of $10,000.00 together with other conditions to ensure the body corporate had access to the utility infrastructure and that the applicant keep the area clean and maintained. The form of the motion was by resolution without dissent and predictably, all of the other lot owners voted against the motion.

By and large the minutes of the meeting indicated the body corporate’s position was that more information was required and that a lease or licence (as opposed to an exclusive use allocation) was more appropriate for the area given the existence of utility infrastructure within it.

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The applicant again applied to the commissioner's office for a ruling that the opposition to the motion was unreasonable.

Allocations within the base or extended allocation period

Section 174(2) then provides that an authorised allocation has no effect unless notified within the base allocation period or extended allocation period, as the case may be. The "relevant community management statement" is given an extended meaning. In the case of a non-staged development it means the community management statement that first includes the exclusive use by-law. In the case of a staged development, it means the community management statement that replaces the existing community management statement. This can have the effect of substantially extending the base allocation period in the case of a staged development.

Recording of new CMS showing all authorised and agreed allocations

The body corporate must lodge a request to record a new community management statement showing all authorised and agreed allocations. That request must be lodged within three months (or such extended period authorised in an order of an adjudicator) after expiry of the relevant period. This new community management statement does not require approval by special resolution or resolution without dissent. An ordinary resolution or a resolution of the committee is sufficient. If the body corporate fails to lodge the new community management statement in time, all of the allocations cease to have effect. The relevant point for this to occur is likely to be the time of expiry of the three months or extended period. It will also be noted that it is sufficient for the request to be lodged; it need not be recorded within the relevant time.

Reallocation agreements

An agreed allocation may occur at any time after the base allocation period or extended base allocation period expires. This arises as a result of a "reallocation agreement", which is defined in Sch 6 as "*an agreement in writing under which 2 or more owners of lots for which allocations are in place under an exclusive use by-law agree to redistribute the allocations between the lots*". It is not possible to simply transfer an allocation from one lot to another lot under a reallocation agreement. What is required is to "swap" one allocation for another allocation, more akin to a mutual transfer arrangement. Where this occurs the body corporate must lodge a request to record a new community management statement showing all current allocations within three months (or longer period authorised by an adjudicator) of the reallocation occurring. Again, this new community management statement does not require approval by special resolution or resolution without dissent. An ordinary resolution or a resolution of the committee is sufficient. If the body corporate fails to do this, the further allocation ceases to have effect.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 62, 170, 171, 172, 174, 175, 176.

Last reviewed: 5 February 2016

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[¶43-180] Conditions and obligations under exclusive use by-laws

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What do the regulations require?

An exclusive use by-law may impose conditions, which would normally be conditions relating to the use and enjoyment of the common property or relevant body corporate asset. The conditions may include an obligation to:

- make a payment or periodic payments to the body corporate or other lot owners, or both
- make the common property or body corporate asset available for use by other owners in certain circumstances (eg in an emergency)
- ensure that noise levels are not such as to disturb adjoining occupiers, or
- attend to ongoing repair and maintenance (including renewals and replacements).

Before a person is bound by the conditions of an exclusive use by-law it must be shown that the owner of the lot at the time the rights were first given (ie, when the by-law was made) agreed in writing to the conditions. This requirement in s 173(1) of the Std Mod does not make it clear whether an original owner should provide a written consent where the by-law is included in the first community management statement. However, as the original owner must sign the first community management statement, a court is likely to conclude that such signature is sufficient evidence of the written consent of the original owner. The issue could be put beyond doubt by simply adding at the end of the first community management statement, but before the signature, the words, "The original owner consents to the exclusive use by-laws and the conditions in them".

Who is responsible for the maintenance of the exclusive use area?

In relation to the last point in the list above, s 173(2) of the Std Mod implies an obligation on the part of the owner of a lot entitled to the benefit of the by-law to be responsible for the maintenance of and operating costs for the part of the common property to which the exclusive use by-law applies. However, the following should be noted about that provision:

1. If the by-law contains specific provisions about maintenance and operating costs, then the obligation does not apply. The provision in the by-law displaces the implied provision.
2. Maintenance and operating costs most likely do not include renewals and replacements.
3. The implied provision only relates to common property. Therefore it would not apply to body corporate assets (eg in the absence of a special provision the person entitled to use of a sea bed lease marina berth would not be responsible for maintenance or operating costs).
4. In the case of building format lots, in the absence of other specific provision in the by-law, the recipient owner is relieved of responsibility for maintaining certain parts of the common property (eg membranes, foundations, roofs and load bearing walls) — see Std Mod s 173(3) .

The written consent required to an exclusive use by-law is a very important document and it must be preserved indefinitely. Reference should be made to its existence in the minutes of the meeting at which the community management statement first containing the by-law was approved. The consent document itself should also be placed in the minute book so that it is readily available for inspection. Note how the wording of the consent in **Form B89 (¶74-180)** includes consent to the conditions as well as the by-law.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod, s 173

Acc Mod s 171

Com Mod s 129

SS Mod s 107.

Last reviewed: 19 March 2010

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[¶43-190] Authority to make improvements

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An exclusive use by-law may authorise the lot owner who has the benefit of the by-law to make improvements to the subject common property that are stated in the by-law. These may include the installation of fixtures on the common property and the making of changes to the common property. In the absence of such an authorisation the improvement may only be made if the body corporate authorises it to be made. If the value of the improvement is $3,000 or less the authorisation can be given by the committee. There should be both a resolution (see **Form B90 — ¶74-185**) and a written consent (see **Form B91 — ¶74-190**). If the value of the improvement is more than $3,000 an ordinary resolution is required (see **Form B92 — ¶74-195**).

A body corporate should carefully consider the implications of granting authority to a lot owner to make improvements to common property for the lot owner's benefit. If the authority granted by the body corporate allows the lot owner exclusive possession for an indefinite period of time over that part of the common property, then it may be interpreted as an intention by the body corporate to dispose of that part of the common property to the lot owner. (See *Katsikalis* v *Body Corporate for "The Centre"* (2009) LQCS ¶90-150)

Accommodation Module

The position is the same.

Commercial Module

The position is similar except if the exclusive use by-law does not authorise the owner of the lot to make an improvement, the improvement can only be made if authorised by the body corporate by ordinary resolution.

Small Schemes Module

The position is the same.

Law: Std Mod, s 174, 161 and 164

Acc Mod s 172, 159 and 162

Com Mod s 130, 117 and 120

SS Mod s 108, 95 and 98.

Last reviewed: 19 March 2010

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[¶43-200] Recovery of money under exclusive use by-laws

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Where an exclusive use by-law requires the payment of money (either in a lump sum or in installments), the money may be recovered as a debt from the owner of the lot concerned. Except where the lot concerned relates to another scheme, the liability is enforceable jointly and severally against both the lot owner at the time the liability was incurred and a successor in title for the lot. This highlights the need for a purchaser to ensure that any amounts owing are paid (or subject to adjustment against the price) before they become the owner of the lot. These amounts are covered by the information certificates issued by a body corporate under s 151 of the Std Mod.

Where the lot concerned relates to another community titles scheme, then the body corporate for that scheme is liable to pay money due. Of course, that liability flows on to the lot owners in that other scheme via the normal budgeting and levy process.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same, except that in the case of a body corporate regulated under this module there cannot be another community titles scheme as a lot owner. This is because a scheme under this module cannot be a principal scheme.

Law: Std Mod, s 125, 151.

Acc Mod s 124, 150.

Com Mod s 105, 131.

SS Mod s 86, 110.

[¶43-210] Prohibited matters for exclusive use by-laws

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An exclusive use by-law must not give exclusive use to the rights and enjoyment of, or other special rights about, utility infrastructure that is common property or a body corporate asset. Utility infrastructure is defined to mean cables, wires, pipes, sewers, drains, ducts, plant and equipment by which lots or common property are supplied with utility services. Also, utility services are defined to mean:

(a) water reticulation or supply
(b) gas reticulation or supply
(c) electricity supply
(d) air conditioning
(e) a telephone service
(f) a computer data or television service
(g) a sewer system
(h) drainage
(i) a system for the removal or disposal of garbage or waste
(j) another system or service designed to improve the amenity, or enhance the enjoyment, of lots or common property.

Clearly, the provision of these services is reserved for the body corporate. In the case of most services this will not be a contentious issue. However, telephone, data and television services (particularly CATV) will often be issues of contention. Indeed, before 13 July 1997 it was not uncommon for a building manager in a holiday letting scheme to be given exclusive use of the telephone system so that they could operate a PABX system and charge a premium for outgoing calls. Such by-laws are preserved by the transitional provisions of the BCCM Act, but they are clearly not capable of being made since that date.

If infrastructure is to be "owned" by anyone other than the body corporate, then this can only be achieved by excluding the infrastructure from the common property. To do this, its positioning within the building or land must be the subject of an agreement to which the original owner (before constitution of the scheme) or the body corporate (after constitution of the scheme) is a party. That agreement must provide that ownership of the utility infrastructure does not pass to the original owner or body corporate, as the case may be. This means that the agreement must be made at the time the utility infrastructure is installed in the common property. Clearly, this mechanism does not allow the "transfer" of existing utility infrastructure to a building manager or other person.

Another prohibition relates to reallocation agreements. These are agreements under which lot owners "swap" areas of common property, usually car parking spaces. The BCCM Act does not allow an exclusive use by-law to prohibit allocations under reallocation agreements.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 20, 177, 340.

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[¶43-220] Review of exclusive use by-laws

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Since commencement of the BCCM Act on 13 July 1997 it has not been possible to confer rights of exclusive use and enjoyment on building managers. Instead, a special "occupation authority" has to be given to the manager. A feature of an occupation authority is that it terminates once the person benefited (usually a building manager) ceases to be a service contractor or letting agent, as the case may be. This ensures that the body corporate can deal effectively with a new building manager. These provisions of the BCCM Act do not assist bodies corporate where, before the commencement date of the Act, exclusive use rights had been conferred by an exclusive use by-law. However, s 178of the BCCM Act is intended to assist in those circumstances.

The section applies if:

(a) an exclusive use by-law is in force
(b) the owner of the lot to which the by-law attaches stops being a body corporate manager, service contractor or letting agent, and
(c) the exclusive use by-law is not for the continuing engagement or authorisation of the lot owner as a body corporate manager, service contractor or letting agent for the scheme.

Clearly, the section only applies where a body corporate manager, service contractor or letting agent is involved. They must also be the owner of the lot to which the by-law attaches. If the lot is owned by their family company but they have individual appointment as a body corporate manager, service contractor or letting agent (or vice versa), then the section will not be effective to achieve its objectives.

Where the section applies, the body corporate may apply for an order under the dispute resolution provisions to resolve a dispute about whether the exclusive use by-law should be continued in force. Regard must be had especially to the interests of all lot owners in the use and enjoyment of their lots and the common property. For example, take a building manager who had exclusive use of the recreation facilities in a scheme so that they could charge for their use. If they cease to be the building manager and effectively become an ordinary lot owner, then it would clearly be in the interests of the other owners to regain use of the recreation facilities. The same may apply in relation to a reception desk in a common property foyer.

The application can only be made by a body corporate and must be determined by specialist adjudicator and, unless the adjudicator otherwise decides, the body corporate must pay all amounts owing for the specialist adjudication. The application is made and dealt with in the same way as any other dispute application (see Ch6 of the BCCM Act and the "DISPUTES" tab).

The adjudicator's order may include provision for either or both of the following:

- lodging a request with the registrar for recording a new community management statement omitting the exclusive use by-law, and
- payment of compensation to the lot owner by the body corporate.

Note that the by-law can only be left intact or "omitted". It cannot be amended under s 178.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same, although in a practical sense the section would rarely apply to a scheme regulated under this module. This is because appointments of body corporate managers and service contractors cannot be for a period of more than a year and there is no provision for the appointment of letting agents.

Law: BCCM Act, s 140.

[¶43-240] Application

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The Sch 4 by-laws are the ones that apply to a scheme if no by-laws are included in the community management statement for the scheme. It is not uncommon for a developer to allow the “standard” by-laws to apply rather than going to the trouble and expense of having project specific by-laws drafted. Therefore, the Sch 4 by-laws commonly apply to community titles schemes. Where these by-laws apply, their application is the same irrespective of the module under which the scheme is regulated. Because of this each of these “standard” by-laws will be considered briefly.

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[¶43-250] By-law 1 — Noise

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The occupier of a lot must not create noise likely to interfere with the peaceful enjoyment of a person lawfully on another lot or the common property.

An ``occupier'' is defined to mean:

(a) a resident owner or resident lessee of the lot, or someone else who lives on the lot; or
(b) a person who occupies the lot for business purposes or works on the lot in carrying on a business from the lot.

Whether a person is an ``occupier'' within the meaning of the definition is a matter of fact. The circumstances and length of their stay will be relevant factors in determining whether a person is an occupier. For example, in a residential situation, a dinner guest would not be an occupier, whereas a person visiting for say a week would be living on the lot and would therefore most likely be an occupier. An employee of a business being conducted on the lot would be an occupier but a customer calling to the lot to conduct business would not be an occupier.

The by-law does not prohibit the creation of noise as such. The noise must be such as to be likely to interfere with the peaceful enjoyment of someone using another lot or the common property. This is also a matter of fact. Regard would be had to the nature of the noise, its frequency, volume and the time of day at which it is made. Regard might also be had to where the noise is made and the moderating influences of physical structures (eg, noise made in a house with masonry walls and carpeted floors may have a different effect to the same noise made in an open-air courtyard).

Sometimes noise emanating from community title premises may be against the law. The *Environmental Protection Act 1994*, Pt 4, gives the police special powers to investigate and deal with certain illegal noise. Those provisions can be useful if there is a particularly bad noise problem involving a community titles scheme.

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[¶43-260] By-law 2 — Vehicles

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(1) The occupier of a lot must not

(a) park a vehicle, or allow a vehicle to stand, in a regulated parking area, or
(b) without the approval of the body corporate, park a vehicle, or allow a vehicle to stand, on any other part of the common property; or
(c) permit an invitee to park a vehicle, or allow a vehicle to stand, on the common property, other than a regulated parking area.

(2) An approval under subsection (1) (b) must state the period for which it is given.

(3) The body corporate may cancel the approval by giving 7 days written notice to the occupier.

This by-law is relatively straightforward. The prohibition is against the occupier of a lot but it extends to permitting their invitees to park a vehicle or allow it to stand on the common property. Therefore, if an invitee of an occupier parks a vehicle on the common property and the occupier of the lot is aware of this and permits it, then the occupier (not the invitee) breaches the by-law. The invitee is not in breach because they are not bound by the by-laws. A difficulty arises in determining what amounts to "permitting" the invitee to park the vehicle or allow it to stand. Clearly, if the occupier tells the invitee that it is in order or "not to worry about it", then there would be a breach. However, the position may not be so clear if the occupier seeks to prevent the breach but the invitee refuses to co-operate. On one point of view this does not amount to "permitting" the parking of the vehicle or allowing it to stand. Yet it can also be argued that the occupier should go so far as exercising their right to require the invitee to leave the scheme land. Where an occupier is aware that an invitee has parked on common property, then there is likely to be a strong presumption that this is being "permitted" by the occupier.

The body corporate can approve of an occupier or their invitee parking a vehicle on common property provided the area is not a "regulated parking area". A regulated parking area is an area designated as being available for use by invitees of occupiers of lots for parking vehicles (ie visitor's parking areas). Therefore, the net effect of this by-law is to remove from lot owners and occupiers the right under any circumstances to park in a visitor's parking area. Any approval under the by-law would require a resolution (usually of the committee) and a written instrument of approval. See **Form B93 (¶74-200)** for the resolution and **Form B94 (¶74-205)** for the instrument. Note how the approval must state the period during which it applies. It is also worth noting in the approval that it is subject to cancellation upon seven days notice. The approval is nothing more than a bare licence, the recipient having no right to exclusive possession of the area of common property. The rights arising from the approval would also be subject to the general rights of other occupiers of lots to use and enjoy the common property. To achieve exclusiveness or permanency of occupation an exclusive use or special privilege by-law would need to be created.

What about the ability of developers to subsequently create car parking facilities by way of a revocable licence disguised as a by-law or an exclusive use easement?

In *The Proprietors Cathedral Village Building Units Plan No 106957 & Ors* v *Cathedral Place Community Body Corporate & Ors* (2012) LQCS ¶90-180; [2012] QSC 301, the Village (a plaintiff) together with 24 unit holder plaintiffs (some residential and some commercial), after failing to obtain what they were promised by the developer, unsuccessfully tried to insist on a by-law (subsequently successfully terminated) which granted them the right to use certain car parks.

The commercial tenants had purchased their commercial lots within the mixed use development under representations that they would receive unallocated car parking spaces. Unfortunately, none of these commercial tenants actually received the use of those car parking spaces.

A decision was made by the developer to pass a comprehensive resolution, required under the *Mixed Use Development Act 1993* (Qld), which purported to convert a portion of subsidiary body corporate car parking which was the common property for one subsidiary (which was car parking by virtue of an easement) into car parking for a different but related scheme.

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Douglas J held that the special by-law, although created to comply with the development approval and to fulfil the developer's contractual obligations with buyers, was validly terminated by the owner, Cathedral Place Community Body Corporate. The Village, at best, only had a licence to occupy the property of a subsidiary scheme.

Particularly hurtful to the plaintiffs' case was the fact that their much-later introduced by-law did not replace or lock in with the existing car parking by-law.

The subject car park needed to remain within the control of its body corporate and the registration of a fresh community management statement noting the new by-law did not confer a registered interest to benefit the plaintiffs. A question of an equitable interest in the plaintiffs' favour was also dismissed.

The plaintiffs' appeal was dismissed by the Queensland Supreme Court of Appeal (see *The Proprietors Cathedral Village Building Units Plan No 106957 & Ors* v *Cathedral Place Community Body Corporate & Ors* (2013) LQCS ¶90-189; [2013] QCA 264).

Last reviewed: 21 October 2013

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[¶43-270] By-law 3 — Obstruction

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The occupier of a lot must not obstruct the lawful use of the common property by someone else.

All occupiers have the right to use the common property unless the by-laws remove or limit that right. To a lesser degree invitees of occupiers also have rights to use common property. An owner of a lot who is not an occupier or an invitee of an occupier may not have the right to occupy or use the common property. This is because that right appears to be transferred to the occupier by s 37(4) of the BCCM Act. These principles need to be kept in mind when determining whether an occupier is "unlawfully" obstructing use of the common property by someone else.

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[¶43-280] By-law 4 — Damage to lawns etc

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(1) The occupier of a lot must not, without the body corporate's written approval —

(a) damage a lawn, garden, tree, shrub, plant or flower on the common property; or

(b) use a part of the common property as a garden.

(2) An approval under subsection (1) must state the period for which it is given.

(3) However, the body corporate may cancel the approval by giving 7 days written notice to the occupier.

This by-laws seeks to prevent destructive action in relation to common property landscaping, as well as preventing use of the common property for cultivating private gardens. Common property the subject of an exclusive use by-law would be covered by the restriction in this by-law unless the terms of the exclusive use by-law made it clear that the position was otherwise. Again, the body corporate can approve such action. The approval would require a resolution (usually of the committee) and a written instrument of approval. See **Form B95 (¶74-210)** for the resolution and **Form B96 (¶74-215)** for the instrument. Note how the approval must state the period during which it applies. Again, it is worth noting in the approval that it is subject to cancellation upon seven days notice.

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[¶43-290] By-law 5 — Damage to common property

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(1) An occupier of a lot must not, without the body corporate's written approval, mark, paint, drive nails, screws or other objects into, or otherwise damage or deface a structure that forms part of the common property.

(2) However, an occupier may install a locking or safety device to protect the lot against intruders, or a screen to prevent entry of animals or insects, if the device is soundly built and is consistent with the colour, style and materials of the building.

(3) The owner of a lot must keep a device installed under subsection (2) in good order and repair.

The basic prohibition under this by-law is the marking, painting, driving nails, screws or other objects into, or otherwise damaging or defacing a structure that forms part of the common property. The structure itself would need to be common property. Great care needs to be taken to ensure that a particular structure is actually part of the common property. For example, the wall separating a living room in a home unit from an adjoining balcony would generally not be common property. This is because the wall separates two parts of the same lot and the boundary between each of the two parts is the center of the wall. This means that the whole of the wall is within the lot. Therefore the occupier of the lot could, for example, drive a nail in the wall without breaching the by-law.

There may be a different result for other walls (eg where half of the wall is within a lot and the other half is common property). The exact position of the boundary between a lot and common property must be determined. This will require reference to all or some of the following:

- the registered plan
- the Registrar of Titles Directions (see “REGISTRAR'S DIRECTIONS” tab, and
- the transitional provisions relating to plans.

Even where common property is involved there is an exception to the prohibition. It relates to locking or safety devices or screens, provided the device (as opposed to the screen) is soundly built and is consistent with the colour, style and materials of the building. No special consent from the body corporate is necessary. The lot owner is also required to keep the device in good order and repair. Again, a screen is not subjected to the same requirement.

Anything that goes beyond the permitted device or screen would require the written approval of the body corporate. The approval would require a resolution (usually of the committee) and a written instrument of approval. See **Form B97 (¶74-220)** for the resolution and **Form B98 (¶74-225)** for the instrument. The approval can impose obligations relating to appearance, repair and maintenance.

In *Ashworth* v *Foreman* [2015] QCATA 001 (7 January 2015), the Appeal Tribunal found that a “security device” can include a security camera.

The parties to the appeal were quarrelling owners of a duplex. As a result of orders made by an Adjudicator, Mr Ashworth appealed an order made that he remove a security camera which he had installed on the common property without the approval of the body corporate.

Mr Ashworth argued that he needed the security camera to prevent violent intrusions by Mr Foreman and others.

The Member confirmed that the device could be installed without body corporate approval under by-law 5(2) which the Adjudicator had failed to take into account. That failure meant the Adjudicator did not take into account whether Mr Ashworth’s fears were rationally based, whether the installed camera was installed for safety reasons or simply to intimidate his neighbours and whether the camera was soundly built and consistent with the style, colour and materials of the rest of the building.

The Adjudicator’s order, so far as it related to the security camera being removed, was amended.

Last reviewed: 5 February 2015

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[¶43-300] By-law 6 — Behaviour of invitees

Click to open document in a browser

An occupier of a lot must take reasonable steps to ensure that the occupier's invitees do not behave in a way likely to interfere with the peaceful enjoyment of another lot or someone else's peaceful enjoyment of the common property.

This by-law seeks to regulate the behavior of invitees of occupiers rather than the behavior of the occupiers themselves. Because the by-laws do not bind invitees, the by-law achieves its purpose by imposing an obligation on the occupier to ensure that their invitees behave themselves. The by-law is breached if:

- the person misbehaving is an invitee of an occupier
- the behavior is such as to be **likely** to interfere with the peaceful enjoyment of another lot or the common property, and
- the occupier fails to take reasonable steps to prevent the behavior.

It does not matter whether the behavior occurs on the common property or within a lot and it does not have to actually interfere with peaceful enjoyment. The "reasonable steps" test is not a particularly difficult one. If the occupier asked their invitee on a number of occasions to desist from the misbehavior, then they may well have taken reasonable steps. This is in contrast to the position of an occupier under by-law 2 (about parking on common property) where the occupier "must not ... permit" their invitee to park contrary to the by-law. This is an absolute prohibition that would require something more than reasonable steps to prevent it.

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[¶43-310] By-law 7 — Leaving of rubbish etc on the common property

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The occupier of a lot must not leave rubbish or other materials on the common property in a way or place likely to interfere with the enjoyment of the common property by someone else.

This by-law does not simply prohibit the leaving of rubbish or other materials on common property. The effect must be likely to interfere with the enjoyment of the common property by someone else. For example, leaving an old refrigerator in the front foyer of the building may amount to an obstruction of the foyer and thus be contrary to the by-law. Where the refrigerator is not an actual obstruction, the by-law may still be breached. This is because the by-law speaks about interfering with **enjoyment** of the common property, which could extend to ascetic enjoyment. On the other hand, the dropping of an empty cigarette packet on the common property is not likely to breach the by-law.

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[¶43-320] By-law 8 — Appearance of lot

Click to open document in a browser

(1) The occupier of a lot must not, without the body corporate's written approval, make a change to the external appearance of the lot unless the change is minor and does not detract from the amenity of the lot and its surrounds.

(2) The occupier of a lot must not, without the body corporate's written approval —

(a) hang washing, bedding, or another cloth article if the article is visible from another lot or the common property, or from outside the scheme land; or

(3) Subsection 2(b) does not apply to a real estate advertising sign for the sale or letting of the lot if the sign is of a reasonable size.

(b) display a sign, advertisement, placard, banner, pamphlet or similar article if the article is visible from another lot or the common property, or from outside the scheme land.

(4) This section does not apply to a lot created under a standard format plan of subdivision.

In general terms, this by-law is only intended to apply to home units or lots within a building. It is directed at an occupier and prohibits:

- changes (other than certain minor changes) to the external appearance of the lot
- hanging certain cloth articles in a visible position, and
- displaying signs and similar articles in a visible position (other than a real estate advertising sign).

However, the body corporate can approve any of those things. The approval would require a resolution (usually of the committee) and a written instrument of approval. See **Form B99 (¶74-230)** for the resolution and **Form B100 (¶74-235)** for the instrument. The approval can impose conditions, such as conditions of maintenance or a maximum duration for the hanging or display.

© CCH

[¶43-330] By-law 9 — Storage of flammable materials

Click to open document in a browser

(1) The occupier of a lot must not, without the body corporate's written approval, store a flammable substance on the common property.

(2) The occupier of a lot must not, without the body corporate's written approval, store a flammable substance on the lot unless the substance is used or intended for use for domestic purposes.

(3) However, this section does not apply to the storage of fuel in —

(a) the fuel tank of a vehicle, boat, or internal combustion engine; or

(b) a tank kept on a vehicle or boat in which the fuel is stored under the requirements of the law regulating the storage of flammable liquid.

This by-law prohibits the storage of flammable substances on the common property and lots. However, it does not apply to:

- flammable substances on a lot if they are being used or are intended for use for domestic purposes (eg a gas bottle for an outdoor cooker)
- fuel in the tank of a vehicle, boat or internal combustion engine, or
- fuel being legally stored in a tank on a vehicle or boat.

Again, the body corporate can approve storage of flammable liquids contrary to the by-law. The approval would require a resolution (usually of the committee) and a written instrument of approval. See **Form B101 (¶74-240)** for the resolution and **Form B102 (¶74-245)** for the instrument. The approval can impose conditions and can be limited as to time.

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[¶43-340] By-law 10 — Garbage disposal

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(1) Unless the body corporate provides some other way of garbage disposal, the occupier of a lot must keep a receptacle for garbage in a clean and dry condition and adequately covered on the lot, or on a part of the common property designated by the body corporate for the purpose.

(2) The occupier of a lot must —

(a) comply with all local government local laws about disposal of garbage; and

(b) ensure that the occupier does not, in disposing of garbage, adversely affect the health, hygiene or comfort of the occupiers of other lots.

This by-law does not seek to be definitive about how an occupier should dispose of their garbage. Instead it sets down general principles and invokes local laws (to the extent that there are any). It also recognises that the body corporate can provide ``some other way of garbage disposal''. This raises the interesting question of how the body corporate can provide for an alternative way of disposal. Clearly, the by-law does not envisage that the by-laws themselves will be amended, because this qualification would not be necessary in that event. It suggests that the body corporate can ``designate'' an alternative way of disposal, most likely by resolution. Yet there are serious questions as to the enforceability of any ``rules'' established by resolution of the body corporate or its committee. The preferred way to establish alternative procedures is to amend this by-law.

© CCH

[¶43-350] By-law 11 — Keeping of animals

Click to open document in a browser

(1) The occupier of a lot must not, without the body corporate's written approval —

(a) bring or keep an animal on the lot or the common property; or

(b) permit an invitee to bring or keep an animal on the lot or the common property.

(2) The occupier must obtain the body corporate's written approval before bringing, or permitting an invitee to bring, an animal onto the lot or the common property.

This by-law establishes a general prohibition against animals on the lots or common property. It is in contrast with similar by-laws under previous Queensland legislation that permitted the keeping of animals until the body corporate required their removal. This by-law does not operate to restrict a person legally keeping or using a guide dog, provided the guide dog is kept within a lot and not on the common property. The body corporate can approve an occupier or their invitee bringing a dog onto a lot or common property or keeping a dog on a lot. The approval would require a resolution (usually of the committee) and a written instrument of approval. See **Form B103 (¶74-250)** for the resolution and **Form B104 (¶74-255)** for the instrument. The approval can impose conditions.

Law: BCCM Act, s 181.

[¶43-500] Importance

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The BCCM Act and Std Mod impose statutory duties on bodies corporate to keep certain records, commonly called statutory records. Failure to comply with these duties can result in an order being made by the commissioner against the body corporate, its body corporate manager or office bearers. However, a stronger motivation to comply with these duties is the fact that purchasers and mortgagees of lots in the community titles scheme will be concerned to inspect the body corporate records from time to time to ensure:

- the records are being properly kept, and
- there is nothing disclosed that would concern them as an incoming owner (eg unfunded liabilities, disharmony or building defects).

Another incentive is the possibility that the body corporate may sue or be sued and for the purpose of the proceedings may need to produce relevant statutory records. If the records are not properly kept it is a difficult and expensive task to reconstruct them. Indeed, sometimes it is not possible to reconstruct them at all and the body corporate is left with an ongoing defect in its affairs which potentially could alarm purchasers or mortgagees of lots.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶43-520] Source of information

Click to open document in a browser

Most of the information in the statutory records comes from the contents of notices given to the body corporate by owners, mortgagees and occupiers of lots in the community titles scheme. Some of the information also comes from the records of the Registrar of Titles and various contract documents involving the body corporate (eg insurance policies, management agreements and letting authorities). When completing the statutory records it is most important that the information is obtained from the correct source and not just based on local knowledge or intuition. Periodic (eg every 2–3 years) cross-checking of the body corporate's statutory records with the records of the Registrar of Titles is also recommended, although this is not a requirement of the BCCM Act or the Std Mod.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶43-540] Notices for the Roll

Click to open document in a browser

Section 201 of the BCCM Act authorises a regulation module to prescribe arrangements about the giving of notices by certain persons in certain events involving a lot. Section 140 of the Std Mod then sets out the circumstances in which a notice must be given and the person responsible for giving the notice. The following table summarises the requirement of that section. A single notice has been approved for every event covered by the section (see **Form 8 — ¶70-180**). However, it should not be necessary to reproduce the entire form to give a notice for only one event. Therefore, in the following table, using precedent forms, the relevant part of the approved form has been extracted for each event. This approach is effectively sanctioned by s 49(1) of the *Acts Interpretation Act 1954* which says strict compliance with an approved form is not necessary and substantial compliance is sufficient.

Event requiring notice	Person to give notice	Information required in the notice	Form
A person becomes a lot owner by transfer, transmission or in another way.	The person who becomes the lot owner.	(a) The person's • name, • residential or business address, • Australian address for service (if different or if the other address is not Australian). (b) Brief details about the way the person became the owner.	B105
A leasehold interest for 6 months or more is created in a lot by lease or sublease.	The lot owner.	1. The lessee's or sub-lessee's • name, • residential or business address, • address for service (if different). 2. The term of the lease sub-lease.	B106
A leasehold interest in a lot with 6 months or more to run is transferred.	The lot owner.	The transferee's • name, • residential or business address, • address for service (if different).	B107
A leasehold interest in a lot with 6 months or more to run is terminated.	The lot owner.	When the interest was terminated.	B108
A lot owner engages a person as a letting or leasing agent.	The lot owner.	The • name, • residential or business address, • address for service (if different) of the person appointed.	B109
A lot owner terminates the engagement of a person as a letting or leasing agent.	The lot owner.	When the engagement was terminated.	B110
A mortgagee under a registered mortgage of an interest in a lot enters into possession of the lot.	The registered mortgagee.	The • name, • residential or business address,	B111

		• address for service (if different) of the registered mortgagee.	

These notices must be given within two months after the relevant event happens, or the person becomes aware of the happening of the event. Failure to comply is an offence that carries a maximum penalty of 20 penalty units.

Accommodation Module

The position is the same, except that an Australian address is not required. Reference to an Australian address in the above table can be ignored.

Commercial Module

The position is the same, except that an Australian address is not required. Reference to an Australian address in the above table can be ignored.

Small Schemes Module

The position is the same, except that an Australian address is not required. Reference to an Australian address in the above table can be ignored.

Law: BCCM Act, s 201.

Acts Interpretation Act 1954, s 49(1)

Std Mod, s 140

Acc Mod s 139

Com Mod s 120

SS Mod s 101

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[¶43-560] Other notice by mortgagees

Click to open document in a browser

Apart from the notices required by the various regulation modules to be given by mortgagees, s 202 of the BCCM Act requires a mortgagee in possession of a lot to immediately give written notice to the body corporate if they decide not to enforce their mortgage. Failure to do this is an offence that carries a maximum penalty of 20 penalty units. Once the mortgagee gives that notice the mortgagee ceases to be a mortgagee in possession of the lot and is not the owner of the lot under the BCCM Act.

This provision is difficult to understand, but it appears to be relevant when a mortgagee in possession reaches a settlement with a defaulting mortgagor and as part of the settlement gives up their possession of the lot in favour of the mortgagor and thereafter reverts to reliance on the mortgage. (See **Form B112 — ¶74-295**). Where a mortgagee in possession forecloses on the mortgage, then a notice of lot ownership (**Form B105 — ¶74-260**) would be the appropriate notice to give.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 202.

[¶43-580] Address for service

Click to open document in a browser

As indicated in the table in ¶43-540, all addresses for service must be Australian addresses. Non-Australian residents will need to arrange for an Australian address at which notices and other documents can be served. If no address for service is notified to the body corporate, the last residential or business address notified to the body corporate, whether an Australian address or not, is the address for service. Where there are two or more co-owners there can only be one address for service. The co-owners should agree on whose address is nominated as the address for service.

Accommodation Module

The position is the same, except that an Australian address is not required. References in this paragraph to Australian addresses can be ignored.

Commercial Module

The position is the same, except that an Australian address is not required. References in this paragraph to Australian addresses can be ignored.

Small Schemes Module

The position is the same, except that an Australian address is not required. References in this paragraph to Australian addresses can be ignored.

Law: Std Mod, s 194

Acc Mod s 192

Com Mod s 150

SS Mod s 128.

Last reviewed: 23 November 2011

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[¶43-600] Change of address

Click to open document in a browser

A person may change their residential address, business address or address for service by another notice given to the body corporate. **Form B113 (¶74-300)** can be used for this purpose.

Accommodation Module
The position is the same.

Commercial Module
The position is substantially the same.

Small Schemes Module
The position is substantially the same.

Law: Std Mod s 195

Acc Mod s 193

Com Mod s 151

SS Mod s 129.

Last reviewed: 23 November 2011

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[¶43-620] Requisitions for information

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Where a body corporate suspects on reasonable grounds, that a person should have given a notice of the type discussed in ¶43-540 to ¶43-600 (ie, a notice under Pt 2 Div 1 of the BCCM Act), but has not done so, then the BCCM Act sets up a procedure whereby the body corporate can obtain the information that was required to be given by the notice. According to s 203of the BCCM Act, this is a two-step process involving:

- obtaining preliminary information the body corporate reasonably requires to decide whether the person should have given the notice, and
- obtaining the notice containing the information that should have been provided.

A written notice from the body corporate to the person concerned is required for each step. The notice to obtain the preliminary information can only be given by the body corporate if it suspects on reasonable grounds that the person should have, but has not, given the required notice under Pt 2 Div 1. The notice by the body corporate requires the person to give in writing to the body corporate, within a stated reasonable time (of at least 28 days after the notice is given), the information the body corporate reasonably requires to decide whether the person should have given the Pt 2 Div 1 notice.

If the information the body corporate obtains as a result of this first notice confirms that the person should have given a notice under Pt 2 Div 1, then the body corporate may by second notice require the person to give in writing to the body corporate, within a stated reasonable time (of at least 28 days after the notice is given), the information required to have been included in the Pt 2 Div 1 notice.

It will not always be necessary for the first notice seeking the preliminary information to be given. If the body corporate is “satisfied” that a person should have, but has not, given a Pt 2 Div 1 notice, then it may immediately proceed to give the notice seeking the information that should have been provided in the Pt 2 Div 1 notice. A person given these types of notice by a body corporate must comply with them, unless they have a reasonable excuse. Failure to comply is an offence that carries a maximum penalty of 20 penalty units. This is in addition to the offence involved in failing to give the Pt 2 Div 1 notice in the first place.

These particular provisions are unnecessarily complex. All that should be required is a single notice from the body corporate seeking advice as to whether the person should have served a Pt 2 Div 1 notice, and if they should have, requiring them to serve that notice within 28 days. Ordinarily, this simpler approach could not be adopted by a body corporate in the absence of legislative changes. However, the form approved under the BCCM Act purports to combine the two-step process into a single step. Given that failure to comply with the requirements of this form is an offence, at some stage there may be a challenge to the validity of this particular approved form. Section 49(3) of the *Acts Interpretation Act 1954*, which authorises the combining of two forms in certain circumstances, will be relevant in the event of such a challenge.

In the meantime, a body corporate may choose to use the approach adopted by the approved form. Alternatively, a body corporate may decide to use the two-step approach. The approved form is **Form 9 (¶70-190)**. If the two-step approach is used separate forms, based on the approved form, would be required. **Form B114 (¶74-305)** shows the type of notice required to be given by the body corporate, while **Form B115 (¶74-310)** shows how the preliminary information should be provided by the person who received that notice. **Form B116 (¶74-315)** shows the type of second notice required to be given by the body corporate. The person receiving the second notice should use the form provided with the second notice to supply the information. That form would be approved **Form 8 (¶70-180)** or the relevant derivative form (see **Forms B105 (¶74-260)** to **B115 (¶74-310)** , inclusive).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act, s 203.

Acts Interpretation Act 1954, s 49(3).

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[¶43-640] The Roll

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The most important statutory record required to be kept by a body corporate is the "Roll of lots and entitlements", commonly referred to as the **Roll**. The body corporate is under a statutory duty to prepare and keep the Roll. There is no requirement as to the form of the Roll or the medium in which it should be maintained. Rolls are usually kept in:

- a bound book
- looseleaf format, or
- a computer data file.

Form B117 (¶74-320) illustrates a Roll. A perusal of that form will show the information required to be recorded in the Roll.

The body corporate's duty to provide a copy of the Roll

Section 205 of the Act provides that interested persons, including owners, are entitled to inspect and/or be given copies of body corporate records, "records" being further defined to include Rolls, registers and other records.

The extent to which records, including those that are legally sensitive, are to be disclosed to a interested party who has requested them was considered in *Unicentral* [2014] QBCCMCmr 10 (17 January 2014).

In that case, the applicant owners wished to communicate with other owners regarding the cost of ongoing legal action between the body corporate and the caretaking contractor. Upon making the request for a copy of the roll to the body corporate manager in order to obtain contact details for each of the owners, the applicants were advised the information could not be provided given the potential for misuse.

In analysing s 205, the adjudicator found that there was no exemption under s 205 in which information could be classed as personal or confidential and, further, that there was no other legislative provision (such as the *Privacy Act 1988* (Cth)) which prevented the release of the subject information.

The adjudicator ruled that the information on the body corporate Roll, including contact details, was to be provided to the applicants and that there was no legislative basis upon which to withhold that information.

In body corporate for the *Rocks Resort* v *East* [2014] QCATA 308 (6 November 2014), the body corporate claimed legal professional privilege as the reason that certain documents not be produced.

As the matter was interlocutory, the Senior Member was not obliged to reach any conclusion on whether the owner had made out a case of privilege, the Senior Member was only obliged to determine if there was an arguable case.

The Senior Member noted that normally a party opposing the production of documents would need to at the very least provide a list of documents over which privilege is claimed.

Given the order for disclosure was too wide in the circumstances, the stay was granted.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

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The position is the same.

Law: Std Mod s 196

Acc Mod s 194

Com Mod s 152

SS Mod s 130

Last reviewed: 5 February 2015

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[¶43-660] Register of assets

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The body corporate is under a statutory duty to keep a Register of Body Corporate Assets. It must record in this register all of its assets that are valued at more than $1,000. This is a new record introduced under the BCCM Act, made necessary by the more liberal provisions in that Act allowing a body corporate to acquire assets ranging from gardening tools to a piece of distant real estate. The register is intended to make it easier for people to identify the assets that a body corporate owns. It must contain the following details for each asset recorded:

(a) a brief description of the asset
(b) whether it was purchased or was a gift
(c) when it became a body corporate asset
(d) if it was purchased:

- its cost, and
- the name and address of the person from whom it was purchased, and

(e) if it was a gift:

- its estimated value, and
- the name and address of the donor.

Form B118 (¶74-325) illustrates a Register of Body Corporate Assets. Again, there is no requirement as to the form of the register or the medium in which it should be maintained. Registers are usually kept in:

- a bound book
- loose-leaf format, or
- computer data file.

Accommodation Module

The position is the same.

Commercial Module

The obligation to maintain the register is the same and it must record the same information as that required for the other modules. However, it must contain the following additional information if the asset is mortgaged or the subject of a charge:

- the amount secured by the mortgage or charge when the mortgage is entered into or the charge created
- the amount of each further advance made under the security of the mortgage or charge
- the period within which the amount secured must be repaid
- the interest rate payable, and
- the name and address of the mortgagee or chargee.

The need for this additional information arises from the entitlement of a body corporate regulated by the commercial module to mortgage or charge body corporate assets that it owns. Bodies corporate under the other modules do not have this right.

Small Schemes Module

The position is the same.

Law: Std Mod s 197

Acc Mod s 195

Com Mod s 153

SS Mod s 131.

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[¶43-680] Register of engagements and authorisations

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The body corporate is under a statutory duty to keep a register of each:

- engagement by it of a person as a body corporate manager
- engagement by it of a person as a service contractor, and
- authorisation of a person as a letting agent.

The register must show the following details for each engagement or authorisation recorded:

(a) the name and address of the body corporate manager, service contractor or letting agent
(b) for an engagement, a statement of the—

- duties they are required to perform, and
- basis on which they are remunerated

(c) when the engagement or authorisation takes effect, and the term of the authorisation or engagement
(d) for an engagement of a person as an executive body corporate manager — the powers that have been delegated to that person.

Further, the body corporate must note in the register the giving to the body corporate of a written notice that a person is a financier of the contract or other arrangement under which a person is engaged as a service contractor, or authorised as a letting agent and the giving to the body corporate of a written notice withdrawing such a notice.

In addition to recording that information, an original executed copy of the contract or other arrangement under which the person is engaged as a body corporate manager or service contractor, or authorised as a letting agent, must be kept as part of the register. This requirement seriously limits the prospect of keeping this particular register in an electronic format. To do this one would need to scan in an image of an executed copy of the relevant document. Even this would not strictly comply with the requirement that it be "an original, executed copy". To comply strictly with the regulation the register would need to be kept in the form of a bound book (with the document pasted in) or loose-leaf (with the document inserted). **Form B119 (¶74-330)** illustrates a Register of Engagements and Authorisations.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

A body corporate regulated by the small schemes module does not have to keep a Register of Engagements and Authorisations.

Law: Std Mod s 198

Acc Mod s 196

Com Mod s 154.

Last reviewed: 11 November 2011

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[¶43-700] Register of authorisations affecting common property

Click to open document in a browser

A service contractor or letting agent cannot be given exclusive use and enjoyment of or special privileges over common property for the purpose of their engagement or authorisation. Instead, they are given an "occupation authority" by ordinary resolution of the body corporate. Unlike exclusive use or special privilege by-laws, occupation authorities are not recorded on the community management statement for the community titles scheme. The Standard Module (¶74-335) therefore requires the body corporate to keep a register to record any occupation authorities that it gives. In addition, a body corporate may from time to time authorise a lot owner to make an improvement to common property for the benefit of their lot (eg to install an external blind or enclose a balcony). This is usually done by resolution of the body corporate or its committee consenting to the making of the improvement. To make it easier for people to find these types of authorisations the Standard Module also requires their details to be recorded in the same register, commonly called the Register of Authorisations Affecting the Common Property.

This register must show the following details about an authorisation in the form of an occupation authority:

- when the resolution was passed giving the authorisation
- a description of the area of common property authorised for occupation, and
- any conditions, including conditions as to use of the common property by other persons, stated in the authorisation.

The register must also show the following information about authorisations to make improvements to the common property:

- when the authorisation was given
- a description of the area of common property authorised for use for the improvement
- any conditions, including conditions as to the use of common property by other persons, stated in the authorisation, and
- if an adjudicator ordered the body corporate to consent to the improvement — when the order was made.

Form B120 (¶74-335) illustrates a Register of Authorisations Affecting the Common Property Assets. Once again, there is no requirement as to the form of the register or the medium in which it should be maintained.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The small schemes module does not provide for the appointment of a service contractor for a period of more than one year. Nor does it provide for the authorisation of a letting agent. Also, because of the size of schemes regulated by this module there is unlikely to be a significant number of authorisations to make improvements to common property. Therefore a body corporate regulated by this module is not required to keep a Register of Authorisations Affecting the Common Property.

Law: Std Mod s 199

Acc Mod s 197

Com Mod s 155.

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[¶43-720] Register of allocations under exclusive use by-law

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An exclusive use by-law usually identifies the part of common property or the body corporate asset to which it relates. However, the BCCM Act allows a by-law to provide for a nominated person to “allocate” the relevant parts of the common property, or the relevant body corporate assets, to particular lots within 12 months of recording the community management statement giving effect to the by-law. This approach is commonly used for allocating car parking spaces or garages to lots. Provision is also made for “reallocation” of the common property areas or body corporate assets by agreement of relevant lot owners. The body corporate must be given notice of the allocations and within a specified time it must lodge a new community management statement showing the allocations. In addition, it must keep a register of those allocations. Where there is no by-law authorising these types of allocations, then this particular register need not be kept.

A body corporate required to keep this register must record both allocations and reallocations of common property areas or body corporate assets. The register must record the following about each allocation (and reallocation):

- the exclusive use by-law under which the allocation (or reallocation) was made
- the common property or body corporate asset allocated (or reallocated), and
- the lot in favour of which the allocation (or reallocation) was made.

The register can be kept in the form of a bound book, in loose-leaf format or in the form of a computer data file. **Form B121 (¶74-340)** illustrates a Register of Allocations Under Exclusive Use By-law.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 171–174

Std Mod s 200

Acc Mod s 198

Com Mod s 156

SS Mods s 132.

Last reviewed: 23 November 2011

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[¶43-740] Keeping and disposal of records

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The body corporate is under a statutory duty to keep (ie preserve) a comprehensive range of records. The Standard Module specifies how they should be kept and the period during which they should be kept. These records will need to be accessible because of the obligation on the body corporate to produce them for inspection by an "interested person" (see ¶43-760). The following table summarises what is required for a body corporate to comply with this duty.

Documents to be kept	Form in which they must be kept	Period for which they must be kept
Accounting records and statements of account for each financial year (including auditors certificates)	Not specified	6 years after creation or receipt
Notices given by a public authority, local government or other authority	Not specified	6 years after creation or receipt
Orders against the body corporate, or in relation to the scheme by a judicial or administrative authority	Not specified	6 years after creation or receipt
Policies of insurance	Not specified	Not specified
Documents evidencing engagement of a body corporate manager or service contractor	Not specified	6 years after creation or receipt
Documents evidencing authorisation of a letting agent	Not specified	6 years after creation or receipt
Agreements with owners about giving of rights, or imposing conditions, under an exclusive use by-law	Not specified	6 years after creation or receipt (if in writing)
Documents evidencing occupation authorities to a service contractor or letting agent	Not specified	6 years after creation or receipt (if agreement in writing)
Documents authorising persons to have access to, or use of, part of the common property	Not specified	6 years after creation or receipt (if agreement in writing)
Inward and outward correspondence	Not specified	2 years after creation or receipt (if of no significance or continuing interest)
Minutes of committee meetings (including attachments)	Original paper form or in photographic or electronic image form	6 years after creation or receipt
Associated committee meeting material*	Not specified	2 years after creation or receipt
Minutes of general meetings (including attachments)	Original paper form or in photographic or electronic image form	6 years after creation or receipt
Associated general meeting material*	Not specified	2 years after creation or receipt
Roll	Original paper form or in photographic or electronic image form	Not specified
Registers	Original paper form or in photographic or electronic image form	Not specified
Documents evidencing or detailing major repairs or installations	Not specified	6 years after creation or receipt
Written agreements to which the body corporate is a party	Not specified	6 years after creation or receipt

* These terms are defined — see later in this paragraph.

Where the period for which records must be kept is not specified, the presumption is likely to be that the particular record must be kept indefinitely. Although the Standard Module requires minutes of meetings to be kept for only six years after they are created, in practice they should be kept indefinitely. Furthermore, documents that can be disposed of after two and six years (as indicated in the above table) may not be disposed of if they still have current relevance to the scheme, including, for example, the following:

- a contract that is in force for longer than six years, and
- a notice required to be given to the body corporate, if the information included in the notice is still current information.

Finally, it should be noted that the phrases “associated committee meeting material” and “associated general meeting material” are defined for the purpose of the relevant section. **Associated committee meeting material** is defined to mean the following material related to meetings of the committee:

(a) notices of meeting, including agendas and attachments
(b) committee member proxy appointment documents
(c) notices for resolutions to be passed other than at a meeting, and
the responses of committee members
(d) notices of resolutions sent to owners or exhibited on the notice board, if the notices are given other than in the minutes of the relevant committee meetings
(e) notices of opposition to committee resolutions
(f) notice of resignation by committee members, and
(g) written agreements of committee members reducing the notice period for committee meetings.

Associated general meeting material is defined to mean the following material related to general meetings of the body corporate:

(a) notices calling for nominations for committee positions
(b) notices by owners requesting general meetings
(c) notices of meetings, including agendas, written voting papers, ballot-papers, secret voting documentation, budgets, statements of account, certificates of auditors, tender documents and other attachments accompanying notices
(d) notices of motion received, including explanatory notes for motions
(e) nominations for election as a committee member
(f) proxy appointment documents
(g) completed voting papers (including ballot papers and secret voting documentation) for motions and election ballots
(h) voting tally sheets or other records showing votes for motions and election ballots
(i) notices of objection by lot owners to meeting locations, and
(j) copies of instruments, notices and powers of attorney given to the body corporate under s 49, 49A or 50 of the Standard Module.

Accommodation Module

The position is the same, except that there are minor differences to the definitions of associated committee meeting material and associated general meeting material necessitated by slightly different meeting procedures.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same except for the following:

- There is no reference to authorisation of letting agents, because letting agents are not appointed by bodies corporate regulated under this module.
- There is no reference to occupation authorities and authorisations of access to, or use of, part of the common property.
- There is no reference to committee meetings or **associated committee meeting material** because there are no formal committee meetings of bodies corporate regulated under this module.
- The definition of **associated general meeting material** is considerably simpler to take account of the simpler general meeting procedures under this module.

Law: Std Mod s 49, 49A or 50148, 149

Acc Mod s 47, 47A, 48, 147, 148

Com Mod s 38, 128, 129

SS Mod s 107, 108.

[¶43-760] Provision of information

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The body corporate is under statutory duties to:

- permit an **interested person** to inspect its records
- give that person a copy of a record kept by it
- issue to an interested person a “body corporate information certificate” giving financial and other information about a lot, and
- allow all members of its committee reasonable access (without payment of a fee) to its records.

A breach of these duties is an offence and carries a maximum penalty of 20 penalty units. It may also give rise to a claim for damages.

An **interested person** is defined to mean:

(a) the owner, or a mortgagee, of a lot included in the scheme
(b) the buyer of a lot included in the scheme
(c) another person who satisfies the body corporate of a proper interest in the information sought, or
(d) the agent of a person mentioned in (a), (b) or (c).

The duty to allow an interested person to inspect the records, obtain a copy of a record or issue a body corporate information certificate does not arise until that person makes a written request for the inspection, copy record or certificate and tenders with that request the prescribed fee. The body corporate must permit the inspection, provide the copy record or certificate within seven days of receiving the request. The prescribed fee for an inspection is $15.55 for a lot owner and $29.90 for other persons, while the prescribed fee for copies of records is 65¢ for each page supplied. The prescribed fee for a certificate is $57.65, plus a priority fee of $21.65 if the certificate is required within 24 hours and $14.95 if the certificate is to be faxed. A priority fee must be refunded if the certificate is not supplied within 24 hours. These fees would be exclusive of GST.

The following should be noted about these provisions:

1. If a legal proceeding between a member of the committee and the body corporate has been started, then the body corporate does not have to give the committee member access to any records that are privileged from disclosure (such as legal advice). Arguably, the same would apply if there were proceedings on foot against an adjudicator. However, the same limitation does not expressly apply to other persons (eg owners or buyers of lots) seeking access to the records. Notwithstanding this a body corporate would most likely be justified in refusing access to any records that are privileged from disclosure. The QCATA decision of *Body Corporate for Astor Centre CTS 6371* v *Victorious Dyna Pty Ltd A.C.N. 125 095 534 as trustee* [2014] QCATA 47 (21 March 2014) further considered disclosure under s 205 in the context of legal proceedings. The case concerned the decision of an adjudicator to allow a lot owner (against whom the body corporate was planning to bring proceedings) access to the recording of the meeting. The members held that legal professional privilege is a right which can only be abolished by legislation, by express language or unmistakable implication and that the BCCM Act does not abrogate the right to privilege. The members allowed the appeal and set aside the adjudicator’s decision to allow the lot owner access to the recorded meeting minutes.
2. The body corporate cannot be unreasonable when trying to satisfy itself that a person has “a proper interest in the information sought”. For example, a letter from a solicitor advising that they are acting for a person considering buying a lot and appointing an inspection agency probably should be accepted on face value. A prospective buyer of a lot clearly has an interest in the body corporate records before they sign a contract to buy the lot and the special relationship between a solicitor and their client would give the solicitor authority to deal with the body corporate.
3. A person inspecting records is entitled to see all the records, including historical records. Where records are kept in electronic form the body corporate would need to either make available the

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means for the person to access the electronic information (eg a computer terminal) or print copies of the information for inspection.

4. Although an inspection application may relate to a particular lot, the applicant is entitled to inspect all of the records, including those relating to another lot. For example, the body corporate would need to make the entire Roll available and not just the page or pages relating to the particular lot. In other words, if a person seeks information relating to a number of lots the body corporate cannot insist on multiple fees.

5. There is an approved form of application (**Form A12** (see ¶70-220)) for information (ie inspection or certificate).

6. The decision to inspect or obtain a copy document is the decision of the applicant, not the body corporate. However, it is arguable that either or both options must be specified in the application. The approved form “asserts” the right of the applicant to obtain copies.

7. If an application seeks a body corporate information certificate for more than one lot, then most likely, multiple fees must be paid to the body corporate. This is because the approved form for a body corporate information certificate (**Form A13** (see ¶70-230)) clearly envisages that the certificate only relates to one lot.

8. The body corporate is not required to allow a person access to part of a record if the body corporate reasonably believes the part contains defamatory material.

A body corporate information certificate is conclusive evidence of the matters stated in the certificate in favour of the person who obtained it. However, this does not apply where the certificate contains an error that is reasonably apparent.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 205.

Std Mod s 204, 205

Acc Mod s 203

Com Mod s 161

SS Mod s 137.

Last reviewed: 31 July 2015

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[¶45-000] The financial process

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A community titles body corporate depends upon the imposition of contributions on lot owners to finance its operations. The level of contributions is determined by an annual budgeting process that involves two funds, an administrative fund and a sinking fund. Accumulated moneys in either fund (but particularly the sinking fund) are usually invested to earn interest to supplement the amounts raised by contributions. Other potential revenue sources include interest on overdue contributions, supply of goods and services, the provision of information and fees or rent for the occupation of common property.

These moneys are expended in accordance with the budget, or otherwise as decided by the body corporate in general meeting or by its executive committee. The movement of funds is recorded in books of account and an annual set of financial statements is prepared from these books each year. Those books and statements are usually subject to annual audit. The following paragraphs explain this financial process in some detail.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same, except that whether or not an audit is carried out is discretionary.

Law: Std Mod Ch 7

Acc Mod Ch 7

Com Mod Ch 7

SS Mod Ch 7.

Last reviewed: 22 November 2011

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[¶45-020] The funds

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As mentioned, a body corporate must have two funds, an administrative fund and a sinking fund. The obligation is to “establish and keep” those funds. Both funds may be invested in a way a trustee can invest trust funds. The sinking fund can be applied towards:

- spending of a capital or non-recurrent nature
- the periodic replacement of major items of a capital nature, and
- other spending that should reasonably be met from capital.

Contributions to the sinking fund are also raised for those purposes. Examples of sinking fund expenditure include repainting common property, replacement of carpet in a common property entrance foyer and replacing common property equipment, such as swimming pool equipment. The following moneys must be paid into the sinking fund:

- the amount raised by way of contributions to the fund
- amounts received under policies of insurance for destruction of items of a major capital nature, and
- interest from investment of the sinking fund.

All other moneys must be paid into the administrative fund which is used to meet all other spending of the body corporate (eg insurance premiums, cleaning, electricity). Unlike the position under the BUGTA, there is no scope to pay expenses properly due from one fund out of the other fund. There is also a prohibition against transfer of funds between the administrative fund and the sinking fund. Therefore, if there is insufficient money in the administrative fund to pay the electricity bill, the body corporate will need to raise a special levy, despite the fact that there may be a healthy credit balance in the sinking fund.

All amounts received for the credit of the administrative fund or sinking fund must be paid into one or more accounts kept solely in the name of the body corporate at a financial institution. A financial institution is defined in s 36 of the *Acts Interpretation Act 1954* as an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cth). This would include a bank, building society or credit union. All payments from the administrative and sinking funds must be made from that account. The keeping of “cash on hand” is therefore not permitted.

All payments from the administrative or sinking fund may only be made on receipt of –

(a) a written request for payment, or
(b) written evidence of payment (eg a receipt).

The requirement for a request for or evidence of payment does not apply, nor does the prohibition against inter-fund transfers. This provision makes it very difficult for a body corporate to manage its expenditure. Effectively it requires an invoice or receipt to support every payment made from the administrative or sinking fund before the payment is actually made. The inclusion of an item of expenditure in a budget adopted by a body corporate is not, of itself, authority for the expenditure.

Accommodation Module

The position is the same.

Commercial Module

A third fund is provided for in the commercial module — a promotional fund. The fund is optional, but if the body corporate decides to adopt a budget for a promotional fund it must establish and maintain such a fund. Payments to that fund comprise contributions to cover scheme promotion expenses and interest received on investment of that fund. Spending from that fund is restricted for that purpose and the requirement for a bank account also applies.

Small Schemes Module

The position is the same.

Law: Std Mod Ch 7, Pt 5

Acc Mod Ch 7, Pt 5

Com Mod Ch 7, Pt 5

SS Mod Ch 7, Pt 5.

Last reviewed: 23 November 2011

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[¶45-030] Financial year

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Before considering matters of financial management in detail it is necessary to understand how to determine the financial year for a particular body corporate. Unfortunately, this is not straightforward. The position will vary depending upon whether the community titles scheme was established under:

- the BCCM Act, or
- the BUGTA and transited to the BCCM Act.

Each of these situations will be examined in some detail.

Schemes established under the BCCM Act

The first financial year for a scheme established under the BCCM Act is the period from the establishment of the community titles scheme (ie the date of registration of the plan) until the end of the month immediately before the month when the first anniversary of the establishment of the scheme falls. In almost all cases the first financial year will be a broken period. Each subsequent financial year is the successive period of one year from the end of the first financial year. For example, in the case of a plan registered on 17 November 2000:

- the first financial year is the period from 17 November 2000 to 31 October 2001
- the second financial year is the period from 1 November 2001 to 31 October 2002, and
- subsequent financial years are the periods from 1 November to 31 October.

However, where a plan is registered under the BCCM Act, an adjudicator may make an order changing the financial year of the body corporate. Where this occurs the financial year is the period fixed by the adjudicator and each successive period of one year from the end of the period so fixed.

Schemes transited from the BUGTA

Where the community titles scheme was established under the transitional provisions for an existing BUGTA plan, then its financial year depends upon whether:

- its first annual general meeting had been held before the date of commencement of the BCCM Act (namely, 13 July 1997), or
- a referee under the BUGTA made an order fixing another date to be taken as the anniversary of the first annual general meeting of the body corporate.

If the first annual general meeting had been held before 13 July 1997 and no order had been made by a referee, then its financial year is each year ending on the last day of the month containing the anniversary of the first annual general meeting held for the existing plan. For example, if the first annual general meeting had been held on 10 May 1996:

- the first full financial year after commencement of the BCCM Act was the period from 1 June 1998 to 31 May 1999, and
- each subsequent financial year is the period from 1 June to 31 May.

If a referee made an order under the BUGTA fixing another date to be taken to be the anniversary of the first annual general meeting, then the financial year of the body corporate is each year ending on the last day of the month containing the date fixed by the referee. For example, if in the above case the referee fixed 30 June 1996 as a date to be taken to be the anniversary of the first annual general meeting (in place of the actual date of 10 May 1996), then:

- the first full financial year after commencement of the BCCM Act was the period from 1 July 1998 to 30 June 1999, and
- each subsequent financial year is the period from 1 July to 30 June.

Finally, if the first annual general meeting had not been held before 13 July 1997, then, for the purpose only of calculating when the first annual general meeting was to have been held, and for determining the new scheme's financial year, the establishment of the scheme (ie the date of registration of its plan) is used.

For example, where a plan was registered under the BUGTA on 16 June 1997 and its first annual general meeting had not been held as at 13 July 1997, then:

- the first financial year was the period from 16 June 1997 until 31 May 1998
- the second financial year was the period from 1 June 1999 to 31 May 2000, and
- each subsequent financial year is the period from 1 June to 31 May.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 330.

Last reviewed: 23 November 2011

[¶45-040] Budgets

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A body corporate must, by ordinary resolution (ie one passed by simple majority at a general meeting), adopt two budgets for each financial year:

- the administrative fund budget, and
- the sinking fund budget.

The budget must relate to a particular financial year (see ¶45-030 for a detailed discussion about financial years).

The administrative fund budget must:

(a) contain estimates for the financial year of necessary and reasonable spending from the administrative fund to cover:

(i) the cost of maintaining common property and body corporate assets
(ii) the cost of insurance, and
(iii) other expenditure of a recurrent nature, and

(b) fix the amount to be raised by way of contribution to cover the estimated recurrent expenditure mentioned in paragraph (a).

The following should be noted about this requirement:

- The expenditure must be both **necessary** and **reasonable**.
- The fund is restricted to recurrent expenditure rather than capital expenditure.
- When fixing the amount to be raised it is implicit that any “non-contribution” income to that account (eg, rents, fees for information certificates, etc), as well as any credit balance in the fund left from the preceding year, must be taken into account. This is because the fund is restricted to recurrent expenditure and is not in the nature of an accumulation fund. Also, there is no mechanism in the BCCM Act to allow for the distribution of surplus moneys in the fund.

An administrative fund budget is illustrated in **Form B122 (¶74-345)**. Where a body corporate is registered for GST, allowance will need to be made for GST in both the income and expenditure sides of this budget (see ¶45-170).

The sinking fund budget must:

(a) allow for raising a reasonable capital amount both to provide for necessary and reasonable spending from the sinking fund for the financial year, and also to reserve an appropriate proportional share of amounts necessary to be accumulated to meet anticipated major expenditure over at least the next nine years after the financial year, having regard to:

(i) anticipated expenditure of a capital or non-recurrent nature
(ii) the periodic replacement of items of a major capital nature, and
(iii) other expenditure that should reasonably be met from capital, and

(b) fix the amount to be raised by way of contribution to cover the capital amount mentioned in paragraph (a).

The following should be noted about this requirement:

- The item of expenditure taken into account (eg lift replacement, balcony railing replacement) must be both **necessary** and **reasonable**.
- The allowance against each item of expenditure must be reasonable when taken both over the nine-year period and the current budget period.
- It would not be sufficient in the case of a new building to say that the lift has a life of 20 years, so therefore it is unnecessary in the next nine years to budget anything for its replacement. The correct approach is to look at the normal life of a particular item and budget on a present cost basis to replace it, apportioning the amount over the total life period to arrive at the current year amount. Cost increases are allowed for when the exercise is repeated in future years.

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- Because of the complexity of these calculations it is preferable for a body corporate to have a proper sinking fund analysis undertaken for its building every two or three years. There are companies and some body corporate managers who specialise in this type of analysis. There are also computer programs that allow a body corporate to undertake the analysis itself.
- This fund is clearly an accumulation fund. Any recent major expenditure items from the fund will need to be taken into account when preparing a current budget. For example, if the building has just been repainted, then the timing for the next repaint and the cost of the recent repaint will influence the amount to be allowed for future repainting.
- The fund is not restricted to renewal and replacement of fixtures, fittings and assets. It should be used to anticipate any potential capital liability that should reasonably be taken into account. For example, if someone was injured while using the common property and, for whatever reason, the body corporate's insurance policies did not cover the liability, it would be reasonable to accumulate funds to discharge that potential liability while the matter was being litigated or the claim was being negotiated.

Adequacy of the Sinking Fund Budget

Under s 276(3) of the Act, an adjudicator can make an order or reduce or increase levy contributions to a "reasonable" amount or provide for its payment in a different way.

In *Valley View* [2016] QBCCMCmr 22 (22 January 2016), the applicant lot owner requested adjudicator Miskinis make an order increasing the sinking fund budget for the year so as to allow for important (and to her mind urgent) works to be undertaken.

In reviewing the budget, the adjudicator noted that the scheme was comprised of 10 lots, was about 30 years old and surrounded by mature trees. Additionally he noted that over the last 20 years, roots from those three had perforated sewerage pipes up to 3 times per year.

The applicant argued that the approve budget of $11,556.00 for the prospective year was insufficient due to the repair work which needed to be done, including the following:

- Retaining walls behind and in front of several units required replacement
- Several roofs required repairs or replacement, and
- Downpipes and guttering required replacement.

Ultimately the adjudicator declined to make the order sought as the applicant failed to produce enough evidence to establish the budget adopted was objectively unreasonable noting that no independent sinking fund forecast had been obtained by the applicant and the applicant had failed to produce any evidence that the required repairs needed to be undertaken on an immediate basis.

A sinking fund budget is illustrated in **Form B123 (¶74-350)**. Again it will be necessary to allow for GST if the body corporate is registered for GST purposes.

Where the scheme is a lot included in another community titles scheme, there must be an item in the administrative fund budget for the lower scheme to cover contributions to both the administrative and sinking funds of the higher scheme. Both contributions are payable out of the administrative fund of the lower scheme. If the higher scheme is regulated under the commercial module it may have a promotion fund contribution. If contributions to that fund are also payable, they are payable from the administrative fund of the lower scheme.

The preparation of budgets is the responsibility of:

- the original owner, in the case of budgets for adoption at the first annual general meeting, and
- the committee, in the case of budgets to be adopted at later annual general meetings.

The treasurer is the office bearer who has responsibility to the committee for carriage of the budgeting process. Copies of the proposed budgets must accompany the notice of an annual general meeting.

Where a budget is proposed to an annual general meeting, the amount budgeted to the administrative or sinking funds may, in certain circumstances, be adjusted up or down by 10% of the budgeted amount during the course of its adoption. This can only occur if —

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(a) the motion to approve the spending is stated in the agenda; and
(b) either—

(i) the spending is approved but is not adequately provided for in the proposed budget, or
(ii) the spending is provided for in the proposed budget but the body corporate does not approve the spending at the meeting.

The adjustment must be approved by a majority of voters present and entitled to vote on the adjustment. It is not clear whether an owner represented at the meeting by proxy is “present” within the meaning of this provision. Following the adjustment, the amount of contributions that will be payable are adjusted proportionately without the need to formally amend the motion in the voting paper for the fixing of contributions.

Accommodation Module

The position is the same.

Commercial Module

The provision is substantially the same. However, in addition to administrative and sinking fund budgets, a body corporate may by ordinary resolution adopt a promotion fund budget that:

- contains estimates for the financial year of necessary and reasonable spending to cover the cost of promoting the scheme (eg by leasing, installing, maintaining and operating advertising signs), and
- fixes the amount to be raised by way of contribution, from lot owners who have agreed to make contributions, to cover the estimated expenditure.

It should be noted that two things are required, the ordinary resolution adopting a promotional fund budget (see **Form B124 (¶74-355)** for the resolution and **Form B125 (¶74-360)** for the budget) and the agreement of all lot owners who are to be levied with the contribution. Payment of the contribution is therefore voluntary. The agreement of a lot owner should be in writing (see **Form B126 — ¶74-365**)) so that there is no doubt about their intention to pay. Such a written agreement may also have the effect of turning the voluntary contribution into an obligatory contribution, thus allowing the body corporate to recover any unpaid contributions. This will be required for certainty of budgeting and expenditure.

Small Schemes Module

The position is the same.

Law: Std Mod s 139, 140

Acc Mod s 137, 138

Com Mod s 98, 99

SS Mod s 73, 74.

Last reviewed: 4 March 2016

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[¶45-060] Contributions

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The annual budgets are used to determine the total contributions that need to be raised from lot owners as well as the apportionment of that total among the lot owners in proportion to their contribution schedule lot entitlements. However, it should be noted that there are circumstances in which contributions are not allocated in proportion to those lot entitlements (eg, certain insurance premiums and other expenses expressly provided for in the BCCM Act or the Standard Module). In those circumstances the allocation is made in the manner required by the BCCM Act or the Standard Module. The next step in the contribution process is for the body corporate by ordinary resolution (see **Form B127 — ¶74-370**) to:

- fix those contributions
- decide the number of instalments (two or more) in which the contributions are to be paid, and
- fix the date on or before which payment of each instalment is required.

It would appear that normal contributions based on the annual budget must be payable by instalments and cannot be required to be paid as a single amount. This is because of the clear distinction that the Standard Module makes between normal contributions and special contributions. Section 141(1)(b), dealing with normal contributions, only envisages "instalments" whereas s 141(2)(b), dealing with special contributions, envisages either a "single amount" or "instalments".

In theory, a single annual budgeting process should work very effectively. However, in practice, because of the timing of the annual general meeting and its relationship to the body corporate's financial year, there is often a "gap" between the end of one annual budgeting period and the commencement of the next. The Standard Module allows the committee to deal with this gap by fixing an interim contribution to be levied on lot owners before the budgeted contribution is levied. The committee can impose the contribution without the need for an ordinary resolution (see **Form B128 — ¶74-375**). However, the amount of this interim contribution must:

- be subsequently set off against the budgeted contributions
- be calculated on the basis of the level of contributions for the previous financial year
- relate, as closely as practicable, to the period from the end of the previous financial year to 2 months after the proposed date of the annual general meeting, and
- be levied in the same way as normal contributions are levied (ie in proportion to contribution schedule lot entitlements or, for particular items, in accordance with the BCCM Act or Standard Module).

Also, despite the accuracy of the annual budgeting process, unexpected liabilities can arise during the financial year. Where no provision has been made for these in the budget, or where inadequate provision has been made, the body corporate is obliged, by ordinary resolution, to:

- fix a special contribution to be levied on the owner of each lot towards the liability
- decide whether the contribution is to be paid by a single amount or in instalments and, if in instalments, the number of instalments, and
- fix the date on or before which payment of the single amount or each instalment is required.

The committee will need to convene an extraordinary general meeting to consider the necessary motion for ordinary resolution (see ¶42-020). See **Form B129 (¶74-380)** for the resolution.

Once the contributions have been determined or "fixed", they must then be "levied". This is done by serving written notice of the contribution on each lot owner. The notice must be given (ie served) at least 30 days before the payment of the contribution, or instalment of a contribution, is required. If this 30-day requirement is not observed then the notice would be ineffective and the contribution would not be recoverable by the body corporate. Care, therefore, needs to be taken to allow for the period of service of the notice. The Standard Module does not specify 30 "clear" days notice, but in the absence of specific provision to this effect the term "days" means "clear days". The term "clear days" means exclusive of the day the notice is served, and of the day on which the contribution is payable. Before any calculation can be made to determine the number of "clear days" it is necessary to determine the day on which the notice is served. This

depends on how the notice is given. The Standard Module simply says that the notice may be served at the lot owner's address for service "or in the way directed by the owner".

If the notice is given (or served) personally, then the date of actual service will be known. If the notice is sent by mail it will be more difficult to determine when it is received. If there is direct evidence when the notice is received (eg someone saw the postman deliver the letter to the letter box) then that will suffice. However, in most cases there is no direct evidence. Presumptions then need to be relied upon.

Section 39A of the *Acts Interpretation Act 1954* says that a document required or permitted by an Act to be served (which includes "given") by post is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved. Delivery times can vary depending upon distance and location. A post office can advise normal delivery times. However, it is usually safe to assume that mail within Australia would be delivered in the normal course on the third business day after posting. In New South Wales, the legal presumption is four working days under that State's interpretation legislation. Some secretaries may therefore wish to allow a longer period as a special precaution, particularly in view of the fact that the presumption only applies "unless the contrary is proved". It will be noted that all addresses for service must be Australian addresses (see s 194 of the Standard Module). Overseas mail delivery times are therefore not relevant.

The notice **must** set out:

- the total amount of the contribution levied on the owner
- the amount of the contribution, or instalment of contribution, of which payment is currently required
- the date (date for payment) on or before which the contribution, or instalment of contribution, must be paid
- any discount to which the owner is entitled for payment of the contribution, or instalment of contribution, by the date for payment
- any penalty to which the owner is liable for each month payment is in arrears, and
- if the owner is in arrears in payment of a contribution or penalty — the arrears.

The notice **may** also include notice about the amount payable by the lot owner to the body corporate for:

- a specially contracted service enjoyed by the owner (eg electricity charge), or
- an exclusive use or special right over common property enjoyed by the owner (ie occupation fee or capital payment).

A contribution levy notice is illustrated in **Form B130 (¶74-385)**. The same form of notice will be required for each instalment of a contribution. The GST related items can be omitted if the body corporate is not registered for GST. The "services" and "insurance" items are only used where separate charges are made for insurance and special services are being provided by the body corporate to particular owners (eg balcony window cleaning).

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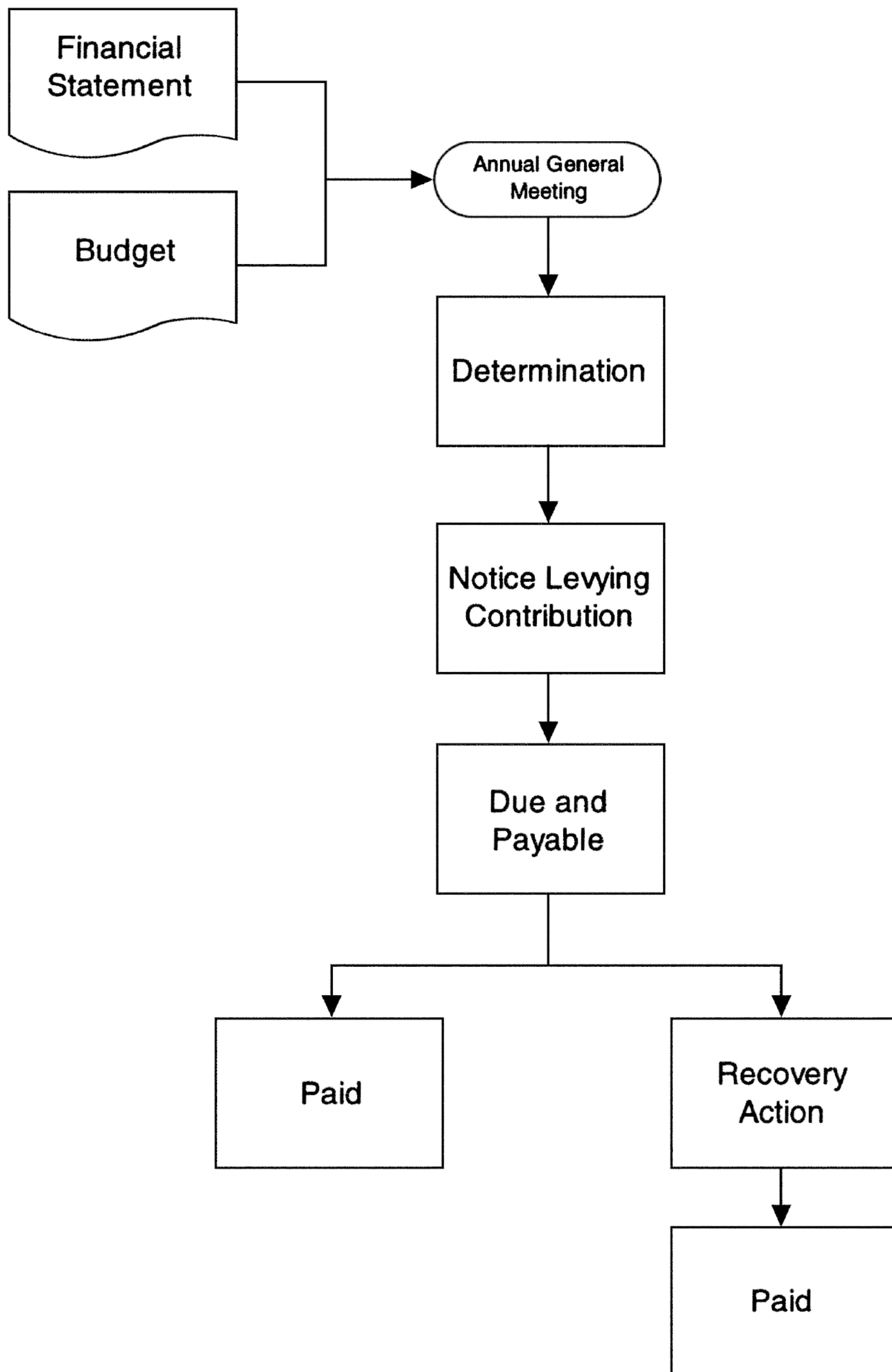

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Accommodation Module

The position is the same.

Commercial Module

The position is the same. It should also be noted that contributions to a promotional fund are not necessarily made in proportion to the contribution schedule lot entitlements. They are imposed in the manner agreed by the lot owners paying the contribution.

Small Schemes Module

There is no provision for an interim contribution to be imposed. Otherwise, the position is the same.

Law: Std Mod s 141, 142

Acts Interpretation Act 1954 s 39A

Acc Mod s 139, 140.

Com Mod s 100, 101

SS Mod s 75, 76.

Last reviewed: 23 November 2011

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[¶45-080] Discounts and interest

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The body corporate may, by ordinary resolution, fix a discount to be given to owners of lots if a contribution, or an instalment of a contribution, is received by the body corporate by the date for payment fixed in notices of contribution given to owners. The discount cannot be more than 20% of the amount to be paid. The purpose of the discount is to encourage payment of contributions by the due date. Of course, the annual budget should allow for the likely discounts to be allowed (see **Form B122 (¶74-345)** by way of example). **Form B131 (¶74-390)** illustrates the ordinary resolution required to allow the discount. This resolution would need to be passed, at the latest, when the contributions are fixed.

The body corporate may also, by ordinary resolution (as to which see **Form B132 —¶74-395**), fix a penalty to be paid by lot owners if a contribution, or an instalment of a contribution, is not received by the body corporate by the date for payment fixed in notices of contribution given to the owners. The penalty must consist of simple interest at a stated rate (of not more than 2.5%) for each month the contribution or instalment is in arrears. The following should be noted:

- the maximum effective annual interest rate is 30% (ie 2.5% x 12), and
- the interest is calculated on monthly rests with part months being ignored.

For example, where $1,000 is payable by 30 June and it is not paid until 29 September, interest can only be charged for July and August. Because the amount was not outstanding for the whole of September interest cannot be charged for September.

If the body corporate is satisfied there are special reasons for allowing a discount of contribution, or waiving a penalty, the body corporate may allow the discount or waive the penalty in whole or in part. This decision should be made formally. The committee can make it by resolution (see **Form B133 —¶74-400**) or a body corporate manager can make it by exercising their delegated authority (see **Form B134 — ¶74-405**).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 143, 144, 145(5)

Acc Mod s 141, 142, 143(5)

Com Mod s 102, 103, 104(5)

SS Mod s 77, 78, 79(5).

Last reviewed: 23 November 2011

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[¶45-100] Recovery of contributions

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If a contribution or contribution instalment is not paid by the date for payment, the body corporate may recover each of the following amounts as a debt:

(a) the amount of the contribution or instalment
(b) any penalty for non-payment, and
(c) any recovery costs reasonably incurred.

In this regard:

- The liability is enforceable jointly and severally against the current owner (including a mortgagee in possession) and the person who was the former owner when the liability was incurred. Purchasers of lots can obtain protection from earlier liability by obtaining, as part of their purchase process, an information certificate from the body corporate (see ¶62-750).
- If there are two or more co-owners of a lot, they are jointly and severally liable to pay.
- Payments made must first be credited against the penalty and then against the contribution or instalment and finally against the costs. This means that penalties may continue to accrue in respect of any unpaid balance of a contribution or instalment.
- After a debt is outstanding for two years, the body corporate must, within two months of expiry of the two years, start proceedings to recover the debt.

Common sense steps to recover debt

Body corporate managers should take care to ensure that "common sense" steps (such as simply calling a lot owner by mobile phone before incurring legal fees) are taken to recover any outstanding debt as the body corporate manager learned in *Body Corporate for Nut Tree Hill* v *Lilley* [2012] QCATA 230. In that case, the lot owner resided in Sydney for a number of years (the unit was in Wynnum West). She did not inform the body corporate of the fact that her postal details had changed but used a mail re-direction and received some but not all of her body corporate levy notices. Levies accrued to $4,622.79 including legal costs of $2,277.72.

Once aware of the amounts owed, the lot owner paid the outstanding amount which meant that the application concerned the fees accrued in order to recover the debt.

The respondent kept a diary and made no fewer than 42 attempts to resolve differences with the body corporate but the body corporate manager remained passive and refused to engage. The body corporate manager at all times had the respondent's mobile phone number and it was not until several months after proceedings had commenced that the body corporate's lawyers called the respondent seeking payment which was made within 14 days. The applicant led evidence which demonstrated that she had always paid on time. The adjudicator's decision was upheld. The appeal division noted that this dispute was precisely the type which the legislature wished to see resolved speedily. The appeal division noted that the body corporate did not incur costs reasonably because it did not use a simple and readily available means of contacting the respondent.

Can a body corporate recover its legal fees against a mortgagee in possession?

In *Westpac Banking Corporation* v *Body Corporate for the Wave Community Titles Scheme 36237* [2014] QCA 73 after the lot owners were sued by the body corporate for outstanding levies and the owners became bankrupt, the lot owner's bank entered into possession of their lot.

The body corporate sought the bank pay their recovery costs which were in part, generated prior to the bank taking possession of the lot. The primary judge found that the Westpac was liable for the body corporate's recovery costs even though those were incurred prior to the bank taking possession of the lot.

Westpac argued in its appeal to the Supreme Court that s 143(1) of the Act unfairly allowed the body corporate to take advantage of the statutory deeming of any unpaid amounts as a debt and that as the mortgagee in possession, its liability was limited because the recovery costs under s 143(1)(c) did not align with the third limb of the definition of "body corporate debt".

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The Supreme Court found that the definition of "body corporate debt" included "recovery costs" as that term is defined under s 143(1)(c) and were associated with the ownership of that lot regardless of the fact that Westpac had taken possession after the body corporate had incurred the legal fees in pursuing the owners for unpaid levies.

The reasonableness of the total amount claimed by the body corporate was not an issue dealt with by the court.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 145

Acc Mod s 143

Com Mod s 104

SS Mod s 79.

Last reviewed: 23 July 2014

[¶45-120] Banking

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All moneys received by the body corporate are payable to either its administrative fund or sinking fund (see ¶45-020). In turn, all such moneys are to be paid into one or more accounts kept solely in the name of the body corporate at a financial institution. Section 36 of the *Acts Interpretation Act 1954* defines "financial institution" as an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cth). This would include a bank, building society or credit union. It is not necessary to have a separate account for each of the administrative and sinking funds. Both funds can be combined in the same account provided they are accounted for separately in the accounting records of the body corporate.

This obligation to pay into an account also applies where a body corporate manager has been appointed. For a discussion on the banking arrangements applying to body corporate managers (see ¶38-740).

Law: Std Mod s 146(5)

Acts Interpretation Act 1954 s 36

Banking Act 1959 (Cth)

Acc Mod s 144(5)

Com Mod s 105(7)

SS Mod s 80(5).

Last reviewed: 23 November 2011

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[¶45-140] Investments

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The administrative and sinking funds may be invested in the way a trustee may invest trust funds. Investments by trustees are regulated by Pt 3 of the *Trusts Act 1973*. Section 21 in that Part confers very wide powers of investment on trustees. Indeed, depending only on “the instrument creating the trust” a trustee can invest in “any form of investment”. This wide power is tempered a little by other sections in that part which require trustees to exercise certain standards of care and take certain things into account when deciding on investments. However, these provisions appear to have no application to a body corporate deciding to invest its funds. It follows that a body corporate can invest its administrative and sinking funds in any form of investment.

In practice it would be unwise for a body corporate to invest outside “mainstream financial institution investments”, such as on deposit with a financial institution. To do otherwise may render its committee members liable for poor investment performance or capital losses.

One interesting consequence of the application of these wide investment powers is the prospect of a body corporate investing in a business undertaking. Section 96(1) of the BCCM Act prohibits a body corporate from carrying on a business. The section gives examples of businesses, including “a letting agent”. However, s 96(2) allows two exceptions in that it says the body corporate may:

> (a) engage in business activities to the extent necessary for properly carrying out its functions and
> (b) invest amounts not immediately required for its purposes in the way a trustee may invest trust funds.

It is clearly arguable that a body corporate may “invest” funds that are not immediately required in a company that carries on a business, such as a corporate letting agent. This is not entirely inconsistent with the BCCM Act. The Act needs to ensure that the body corporate does not itself conduct a business. There are at least three good reasons for this:

- The nature of the business may conflict with the rights or obligations of the body corporate under the BCCM Act. For example, the disclosure and service contractor provisions of the Act would not operate correctly if the body corporate were a developer or letting agent (respectively).
- The BCCM Act is not equipped to regulate the business activities of a body corporate in the same way that say the *Corporations Act 2001* regulates the business activities of an incorporated company (eg insolvent trading).
- The body corporate is an unlimited liability entity and it would be entirely inappropriate to expose its members to the risk of personally discharging its unfunded liabilities in respect of a business venture.

These factors cease to be relevant if the body corporate simply “invests” in a company (regulated by the *Corporations Act*) that itself carries on the business.

Accommodation Module

The position is the same.

Commercial Module

The position is the same. This also applies to moneys in the promotion fund.

Small Schemes Module

The position is the same.

Law: BCCM Act s 96

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Std Mod s 146(4)

Trusts Act 1973, Pt 3

Corporations Act.

Acc Mod s 144(4)

Com Mod s 105(6)

SS Mod s 80(4).

Last reviewed: 23 November 2011

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[¶45-160] Borrowings

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The body corporate may, by ordinary resolution, borrow money on security agreed between it and the lender. A resolution without dissent is necessary if the body corporate is to be in debt at any time for an amount greater than an amount worked out by multiplying the number of lots included in the scheme by $250. The amount of the debt would include both capital and interest.

There are restrictions on the security that the body corporate can offer. The body corporate cannot give security over the common property. Section 35(6) of the BCCM Act authorises the body corporate to enter into transactions and execute documents affecting the common property if it is authorised to do so under the BCCM Act. There is nothing in the BCCM Act that authorises the body corporate to give security over the common property. This is supported by s 41C(3) of the *Land Title Act 1994* that prevents the fee simple interest in common property being the subject of a mortgage.

Under the Standard Module the body corporate is also restricted from giving security over a body corporate asset. Section 45(3) of the BCCM Act prohibits a body corporate from mortgaging or creating a charge over a body corporate asset unless that is permitted under the relevant regulation module. The Standard Module does not permit such a mortgage or charge.

Form B135 (¶74-410) illustrates an ordinary resolution authorising borrowings that do not exceed the amount calculated using the above formula. **Form B136 (¶74-415)** illustrates a resolution without dissent authorising a debt exceeding the amount calculated using the above formula.

Accommodation Module

If a body corporate regulated by this module wants to have borrowings exceeding the amount calculated using the formula, then only a special resolution (not a resolution without dissent) is required. Otherwise, the position is the same.

Commercial Module

A body corporate regulated by the Com Mod may mortgage or charge a body corporate asset, but the amount secured under the mortgage or charge must not, at any time when the mortgage or charge is in force, be more than 70% of the value of the asset. Also, to have borrowings exceeding the amount calculated using the formula only a special resolution (not a resolution without dissent) is required. Otherwise, the position is the same.

Small Schemes Module

A body corporate regulated by this module cannot, without the authority of a resolution without dissent, be in debt for a borrowed amount greater than $3,000. The formula approach has no application. Otherwise the position is the same.

Law: BCCM Act s 35(6), 45(3)

Land Title Act 1994 s 41C(3)

Std Mod s 150

Acc Mod s 148

Com Mod s 109, 123(2)

SS Mod s 84.

Last reviewed: 23 November 2011

[¶45-170] Goods and services tax (GST)

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The new tax system

The introduction of a goods and services tax (GST) occurred as part of a fundamental overhaul of the Australian taxation system. This overhaul involved a reduction of income tax rates (effective 1 July 2000) and the abolition of a range of indirect taxes (such as sales tax and to a very limited extent stamp duty). Further, as a result of the Ralph Review into business taxation, a number of changes are proposed to the way trusts and business enterprises are taxed. The GST took effect on 1 July 2000 as well as the new Pay-As-You-Go system. However, a number of the changes (particularly to indirect taxes) are being phased in over a five-year period.

What is the GST?

The GST is a broad-based consumption tax, which is effectively a value added tax. It is levied at the rate of 10% on the **supply** of most goods, services and things consumed in Australia. The tax is paid progressively at each step of the supply chain. Each person paying the tax, apart from the ultimate user, is entitled to a credit for the amount paid. Take the following example to see how the tax operates in its simplest form to business related transactions:

John makes bicycles. He buys his materials and parts from Peter at a GST exclusive cost of $100. When the bicycle is complete he sells it to Robert (a wholesaler) for $200 (GST exclusive) who then sells it to Mark (the retailer) for $300 (GST exclusive). In turn Mark sells the bicycle to Mary (the consumer) for $400 (GST exclusive). The taxing process operates as follows:

- Peter charges John $110 for his materials and parts ($100 being the actual cost and $10 being the tax)
- John charges Robert $220 for the bicycle ($200 being the actual cost and $20 being the tax)
- Robert charges Mark $330 for the bicycle ($300 being the actual cost and $30 being the tax)
- Mark charges Mary $440 for the bicycle ($400 being the actual cost and $40 being the tax).

If the process stopped there the Government would effectively receive $100 tax on the transactions leading to the sale of the bicycle. However, the process does not stop there. John, Robert and Mark are all entitled to **input tax credits** for the GST that they have paid on the business inputs (which go into making their taxable supply). In other words, at the end of the relevant tax period, John calculates the amount of tax that he has collected (which is due to be paid to the Government). He deducts from this the total amount of tax he has paid on goods and services he has purchased and is only obliged to remit the difference to the Government. Robert and Mark undertake the same process. The end result is that the net tax actually collected by the Government as a result of the series of transactions relating to the bicycle is $40. This is equivalent to the amount of tax paid by Mary (who is the final consumer). The following chart illustrates the process:

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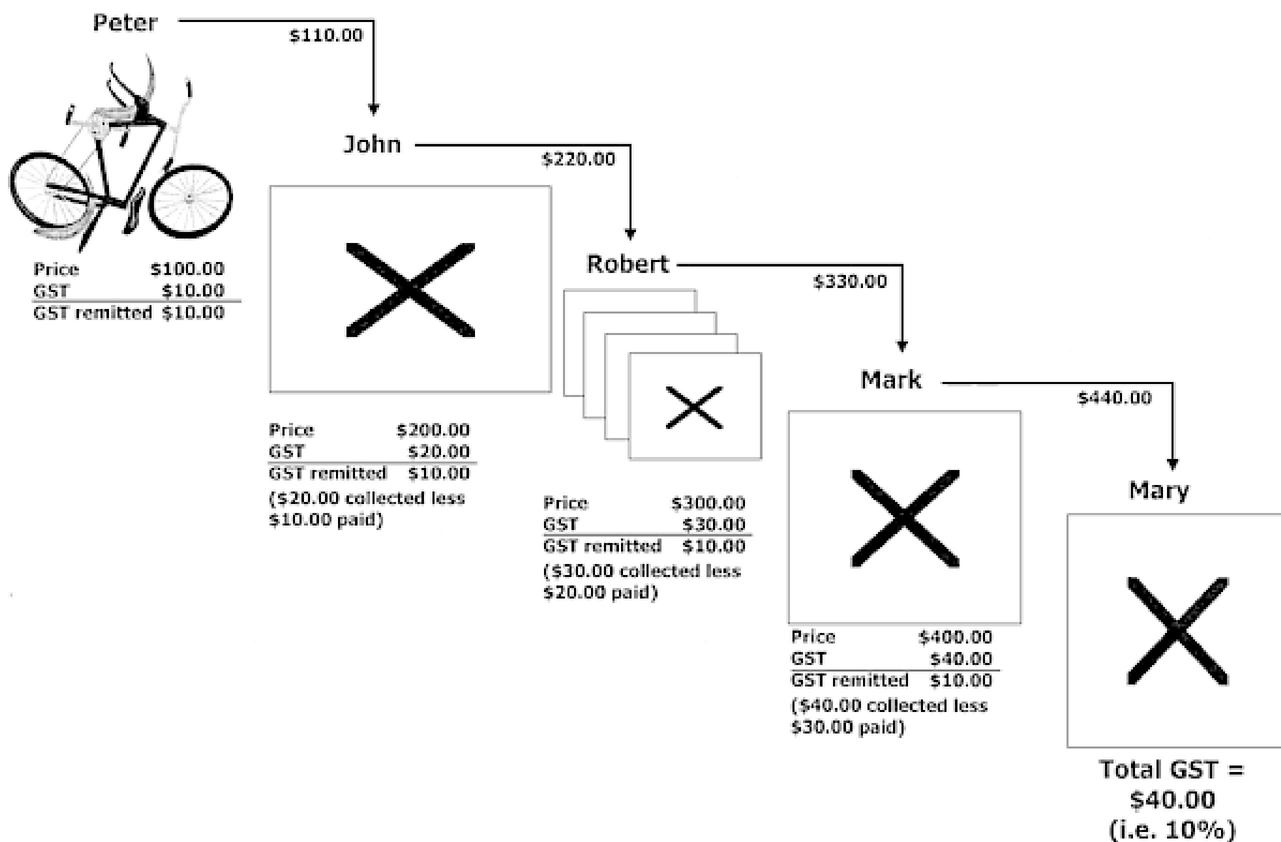

From this process you will see there is a need for everyone (except Mary) to keep a record of the tax they collect and the tax they pay. It is only in this way that they will know how much they have to remit to the Government at the end of the relevant tax period. Mary is not involved in the record keeping process because she is the ultimate "consumer" and is not entitled to any input tax credits.

Unfortunately the process is made more complex because of certain exemptions that were introduced. Some supplies are not subject to GST because they are GST free (but input tax credits are still able to be claimed). Other supplies are **input taxed**, which means that GST is not charged on such supplies but a supplier cannot claim input tax credits for the inputs involved in the making of the supply.

Registering for GST

An **entity** that carries on an **enterprise** can register for the GST. A body corporate is an entity for GST purposes and its usual activities under the *BCCM Act* are such that it is carrying on an enterprise within the meaning of the GST legislation. Therefore, any body corporate can register for GST. However, a body corporate with an annual turnover of $50,000 or more must register for GST. Turnover includes levies, s 108 fees for records inspections and s 109 fees for levy certificates, as well as rental and other "income".

If a body corporate registers for GST it will be entitled to claim **input tax credits** for any GST it pays on goods and services it acquires. Any entities registered for GST that deal with the body corporate (including business dealings by lot owners) will be able to claim input tax credits for payments for supplies from the body corporate (eg an input tax credit for the GST component of levies).

If a body corporate does not register for GST then it does not charge GST on supplies it makes. However, on the flip side, the body corporate will not be able to claim as an input tax credit the GST it has paid on its business inputs. This means that the GST on the body corporate's inputs represents an additional cost. In addition, a body corporate that is not registered:

- is not required to issue tax invoices (since it does not make taxable supplies), and
- is not required to lodge periodic returns known as business activity statements.

As a general rule all bodies corporate with a turnover below $50,000 should carefully consider the issues before they voluntarily register for GST. If they do not register they will not have to charge GST on their levies and they will be spared the extra accounting requirements.

Australian Business Number

If it is considered unnecessary for a body corporate to register for GST, then it may not be necessary for the body corporate to have an Australian Business Number. This is because the Commissioner of Taxation on 29 June 2000 varied the amount to be withheld from withholding payments to bodies corporate in respect of the following class of cases:

- body corporate levies
- access fees to inspect books of account, insurance policies, rolls, minutes, etc, or
- fees payable to a body corporate for the collection of rents from the common property.

The variation was from 48.5% to nil%. However, it should be noted that not all payments to bodies corporate are covered by the variation. For example, interest received on invested funds or payable on overdue levies and fees payable for information certificates under s 162(3) of the BCCM Act are not covered. If a body corporate does not have an Australian Business Number, then, technically, payers of those types of payments may be legally obliged to deduct and remit tax at the maximum rate of income tax plus the Medicare levy. From a payer's point of view it would be preferable if the body corporate had an Australian Business Number.

Charging for the GST

When a body corporate that is registered for GST makes a taxable supply in return for some form of payment (eg use of a coin operated washing machine for a fee) it should increase the amount of the fee to cover the GST component. In this way the body corporate has passed on its GST liability to the end consumer. If the body corporate did not collect this amount of GST from the end consumer it would effectively be required to meet the GST liability from its own funds.

The GST rate is 10%. Therefore in the situation where a fee of $2.00 per wash is charged before 1 July 2000 then this will need to be increased to $2.20 post 1 July 2000 if the GST is to be fully recovered. However, this ignores any savings that may accrue to the body corporate as a result of reductions of indirect taxes arising from the new tax system (eg the purchase of a washing machine after 1 July 2000 may be cheaper than prior to 1 July 2000). Strictly speaking, the body corporate should determine whether there are any savings and only increase the original price by the net percentage amount (ie GST percentage — percentage saving). There are detailed price exploitation provisions published by the Australian Competition and Consumer Commission which set out the guidelines for determining prices post-1 July 2000

When budgeting to determine levies, a body corporate registered for GST should add the GST (ie an extra 10%) to the amount that they need to raise from members. In most cases a 10% increase in levies would arise. It could be expected that the savings resulting to a body corporate as a result of the A New Tax System changes would be minimal.

Invoices

The GST legislation distinguishes between **invoices** and **tax invoices**. An invoice is any document which notifies an obligation to make a payment. Where the body corporate accounts for GST on an a non-cash basis, an invoice is relevant for the purposes of determining:

- when the body corporate liability for GST will arise, and
- when the body corporate's entitlement to an input tax credit arises.

A tax invoice is the document required to be held by a registered entity before this entity can validly make a claim for an input tax credit. A tax invoice must be issued by the body corporate to a member for any taxable supply made within 28 days of a request being made by a member. For administrative convenience, the invoice and the tax invoice can be combined into the one document and this document would usually be issued by the supplier at the time of supply. A tax invoice is not required to be issued if the value of the supply is less than $50.

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A tax invoice must contain the following information if the total amount, including GST, is more than $1,000:

(a) the body corporate's **Australian Business Number** (which it receives when it registers for GST)
(b) the GST inclusive price of the relevant supply
(c) the words "Tax Invoice" shown prominently
(d) the date of issue
(e) the name of the body corporate (as supplier)
(f) the name of the recipient
(g) the address or ABN of the recipient
(h) a brief description of each thing supplied, and
(i) for each description — the quantity of the goods or the extent of the services provided.

If the total amount, including GST, is less than $1,000, the details in items (f), (g) and (i) above are not required on the particular tax invoice.

Paying the GST

If a body corporate registers for GST then it will have to lodge a **business activity statement** on a monthly or quarterly basis. All bodies corporate will have a choice of whether they lodge their statements on a monthly or quarterly basis (lodging on a monthly basis is not compulsory unless the entities' turnover is $20 million or more). A body corporate should choose quarterly lodgement to save on administrative costs. Provision is made on the internet for lodgement of business activity statements. (Go to *www.business.gov.au* and follow the links.)

On the business activity statement the body corporate will, at a minimum:

• report the GST payable on its taxable supplies, and
• claim the GST that it has paid on its acquisitions.

Where the GST payable exceeds the input tax credits claimed, the difference is remitted to the tax office. Where the input tax credits claimed exceed the GST payable, the Australian Taxation Office will pay a refund to the body corporate.

From the third quarter of the GST tax regime (ending March 2001), two changes to the business activity statements were introduced:

• All taxpayers who paid GST quarterly were given the option of reporting less information and then filing an annual information report.
• Taxpayers with an annual turnover of $2 million or less were given the option of simply paying a quarterly GST amount calculated and sent to them by the Tax Office, and then completing an annual GST return. However, this option was only available to taxpayers who completed their first two quarterly returns for the year 2000.

Common examples of income received by bodies corporate

The following are common examples of income received by a body corporate:

(a) maintenance contribution levies
(b) s 108 fees (for records inspections)
(c) s 109 fees (for levy certificates)
(d) interest on overdue levies
(e) interest on invested funds
(f) proceeds of sale of assets (eg second-hand furniture that is no longer required)
(g) proceeds of insurance claims
(h) charges for services provided by the body corporate (eg gardening within a private courtyard)
(i) rent received under a common property lease or exclusive use by-law
(j) income from a public telephone provided on common property.

All of this income, except for that in paragraphs (d), (e), (g) and (i), would result in a taxable supply. The income in paragraph (i) would only relate to a taxable supply if it related to non-residential premises. In New

Zealand maintenance contribution levies have been held (with a degree of hesitation) not to be subject to GST (*Taupo Ika Nui Body Corporate* v *CIR* (1997) 18 NZTC 13147 at 13150). However, the preferred view in Australia is that such levies are subject to GST.

Common examples of payments made by a body corporate

The following are common examples of payments made by bodies corporate:

(a) purchase of goods (eg cleaning materials, hardware items, furniture)
(b) purchase of services (eg cleaners, trades persons, strata managing agents, lawyers)
(c) insurance premiums
(d) bank fees
(e) wages to employees
(f) transfer of funds from one account to another account (eg from Sinking Fund to an investment account)
(g) electricity and gas
(h) excess water or local government charges (ie apart from rates)
(i) government fees (eg search fees, fees on applications to the Commissioner for Body Corporate and Community Management).

If the body corporate has registered for GST, then it will be entitled to claim the GST paid (if such GST is correctly charged) on any of these items of expenditure as input tax credits against any GST payable by the body corporate. However, GST will not be payable in respect of the expenditure in paragraphs (d), (e) and (f) and therefore an input tax credit would not be available. The fees in paragraph (i) will be subject to GST unless they are specifically excluded by a determination made by the Treasurer.

Fees under s 162

Records inspections under s 162(2) and certificates under s 162(3) are provided by the body corporate. Although a body corporate manager, as delegate of the body corporate, may provide the actual inspection or certificate, the manager does so as “delegate” of the body corporate and the act itself is in fact the act of the body corporate. The supply is therefore being made by the body corporate.

The fee may be paid directly to the body corporate or indirectly to the body corporate through the body corporate manager. Irrespective of whether the fee is paid by the applicant directly to the body corporate or to the manager that passes it onto the body corporate, the body corporate will be liable for the GST on the fee. The normal principles of agency apply and the supply will be made by the body corporate as principal.

In addition, where the body corporate pays the manager an amount for issue of the certificate or allowing the inspection, there may be another taxable supply (ie by the manager to the body corporate).

If both the body corporate and the manager are registered for GST, there are two taxable supplies and GST will be payable to the Tax Office by the body corporate in relation to the supply to the applicant and by the manager in relation to its supply to the body corporate. In that event tax invoices may need to be provided by both the body corporate and the manager if the GST inclusive price for the supply is above $55.

Where a body corporate is registered for GST, it will be liable to the Tax Office for the amount of its GST liability. The body corporate may be able to increase the fees to take into account its GST liability. However, there is no statutory entitlement to recover GST and the supplier will be able to increase the fees to include GST only if the agreement between the parties allows it to do so. Presuming that the body corporate and the manager are entitled to recover GST from the recipient of the supply, they can increase the prescribed fees under s 162 by 10%. Where the body corporate is not registered the prescribed fees remain the same because no GST is payable and they are not entitled to recover GST from the recipient of the supply.

Other relevant matters

The following matters are also relevant for bodies corporate:

1. The body corporate is not a “non-profit organisation” for GST purposes and the GST legislation does not contain provisions equivalent to the “mutual income” provisions of the income tax legislation.
2. Where a body corporate has a turnover in excess of $1 million, then for GST purposes it must account on a non-cash (accruals) basis.
3. Where discounts are allowed on levies, GST will be payable on the amount finally charged. If the pre-discount amount is paid (because the payment is late) then GST will be payable on the pre-discount amount. If the discounted amount is paid, then GST will be payable on that amount and not on the pre-discount amount. This means levy invoices will need to show both the pre-discount amount and the discount amount, both inclusive of GST.
4. Where interest on overdue levies is waived by a body corporate there may be GST implications. A debt arises if the owner fails to pay the levy to the body corporate within the specified time. This is a “financial supply” for the purposes of the GST legislation, therefore if the body corporate forgives the debt, there is no GST payable on this supply.
5. Where an office bearer of a body corporate receives an honorarium no GST is payable.
6. A body corporate manager can lodge a business activity statement on behalf of a body corporate but they cannot charge (directly or indirectly) for doing this unless they are approved by the tax commissioner. In other words, they must perform the service for nothing.
7. A security deposit paid by an owner or occupier on a key is not subject to GST. However, GST would be payable if the security deposit is forfeited because the key is not returned.
8. Where a body corporate has registered for GST it should ensure that all of its suppliers are also registered, otherwise input tax credits will not be available in respect of supplies made to the body corporate by unregistered suppliers.

Income tax

GST collected by a body corporate is not liable to income tax.

Canceling GST registration

A body corporate that has registered for GST but has a turnover of less than $50,000 can apply to cancel its registration.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶45-180] Spending generally

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Expenditure of body corporate funds can only be authorised in one of three ways:

1. By resolution of a general meeting.
2. By resolution of the committee.
3. By act of a governing body corporate manager exercising the power of the committee to authorise the expenditure.

All three ways will be considered in the following paragraphs, but first, something needs to be said about the relatively common practice of allowing building managers to expend body corporate funds or pledge credit on behalf of bodies corporate.

Accommodation Module

The position is the same.

Commercial Module

A body corporate regulated by the commercial module does not face the same expenditure restrictions as a body corporate regulated by the standard module. In the former case, expenditure is in the hands of the committee and general meeting involvement is minimal.

Small Schemes Module

The position is the same.

Law: Std Mod Ch 7, Pt 7

Acc Mod Ch 7, Pt 7

Com Mod Ch 7

SS Mod Ch 7, Pt 7.

Last reviewed: 29 November 2007

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[¶45-183] Body corporate managers

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Sometimes bodies corporate purport to give body corporate managers the authority to expend body corporate funds or to pledge credit on behalf of the body corporate (subject to a specified limit). Where the body corporate manager is given such authority then it is likely to be invalid, giving rise to one of three possibilities:

- The clause itself, being a bare authority, has no impact on the rest of the agreement. Its invalidity, therefore, has no impact on the rest of the agreement, which is therefore read as if the clause had not been included. This is a form of “severance” of the offending clause.
- The clause can be severed from the rest of the agreement (because there is a “severance clause” in the agreement). This means that the rest of the agreement can continue to operate but the expenditure authority is excluded.
- The clause is integral to the agreement and therefore cannot be severed from the rest of the agreement (despite any severance clause). This can occur when the authority to expend funds is worded in the form of a “duty”. Being a duty, its performance is covered in the remuneration. Therefore, if you exclude the duty (by severing the clause) you must adjust the remuneration. If there is no mechanism in the agreement for adjustment of the remuneration, then the clause is integral to the agreement and cannot be severed. The result is that the invalidity of the clause invalidates the whole agreement. This is effectively what occurred in *Humphries & Anor v The Proprietors — “Surfers Palms North” Group Titles Plan No 1955*.

It may be possible to avoid these consequences by the body corporate contractually agreeing to reimburse the body corporate manager for money spent on certain specified items. Under this arrangement, the body corporate manager would incur the primary liability to pay for the items purchased and would then make a claim for reimbursement from the body corporate. This claim would then be processed by the body corporate in the normal way.

Law: BCCM Act, s 119.

.40 Case reference: *Humphries & Anor* v *The Proprietors “Surfers Palms North” Group Titles Plan No 1955* (1998) LQCS ¶90-100 (High Court of Australia, 4 May 1994).

Last reviewed: 28 November 2006

[¶45-185] General meeting authority

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A general meeting of the body corporate can authorise any level of spending. However, if the amount to be spent exceeds what is known as the “relevant limit for major spending”, then there is a requirement for quotes to be obtained and circulated. The “relevant limit for major spending” is defined as follows:

(a) the amount last set as the relevant limit for major spending by ordinary resolution of the body corporate at a general meeting
(b) where there is no amount set, the amount worked out by multiplying the number of lots included in the scheme by $1,100, or
(c) $10,000.

Quotations are required if:

• a general meeting motion proposes the carrying out of work or the acquisition of personal property or services, and
• the cost of carrying the proposal into effect is more than the relevant limit for major spending for the scheme.

The carrying out of work or the acquisition of personal property or services includes the engagement of a body corporate manager or service contractor, but does not include the engagement of a service contractor who also is, or is to be, a letting agent. Service contractors who are letting agents have been excluded because:

• initial appointments are usually made by the developer and fully disclosed in initial sale contracts, and
• in the case of assignments or re-appointments it would not be practicable for quotations to be obtained as key facilities (eg the manager’s unit and front desk) are in private ownership and could not be made available to tenders.

At least two quotations must be obtained and given to lot owners. If the motion is proposed by the committee, then the committee must obtain the quotations, otherwise the person proposing the motion must obtain them and give them to the secretary. Copies of the quotations must then accompany the notice of meeting at which the motion is to be considered. However, if the quotations are voluminous, summaries may be sent with the notice of meeting provided they include advice about where the complete documents may be inspected. The documents would need to be readily available for inspection without payment of a fee. All quotations must be retained as an attachment to the minutes of the meeting at which the quotation is considered.

If, for exceptional reasons, it is not practicable to obtain two quotations, a single quotation must be obtained and must accompany the notice of meeting. An example of an exceptional reason is where particular goods or services are only available from one source.

Two motions in the alternative must be proposed so that owners can choose which of the two quotations they prefer (see **Form B138** — ¶74-425).

It is also worth noting at this stage that s 312 of the BCCM Act prohibits a body corporate from starting certain legal proceedings unless they are authorised to do so by special resolution or by a lot owner agreement where the scheme is a specified two-lot scheme.

Accommodation Module

The position is the same.

Commercial Module

These requirements do not apply to a body corporate regulated by the commercial module. The general meeting can authorise any level of spending without the need for quotations.

Small Schemes Module

The position is substantially the same. Because a body corporate regulated by the small schemes module cannot appoint a letting agent, the comments about excluding service contracts where the contractor is also the letting agent do not apply.

Law: BCCM Act s 312

Std Mod s 152

Acc Mod s 150

Com Mod Ch 7

SS Mod s 86.

Last reviewed: 23 November 2011

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[¶45-187] Committee meeting authority

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The ability of the committee of the body corporate to expend funds is limited. Where the amount involved is within the "relevant limit for committee spending", then the committee may expend the amount on authority of a committee resolution, either specific or general. **Form B139** (¶74-430) illustrates a committee resolution authorising expenditure of a set amount and **Form B140** (¶74-435) illustrates a committee resolution authorising general expenditure.

The "relevant limit for committee spending" is:

- the amount last set as the relevant limit for committee spending by ordinary resolution of the body corporate at a general meeting, or
- where there is no amount set, an amount worked out by multiplying $200 by—

  (i) for a principal scheme in a layered arrangement of community titles schemes — the number of layered lots for the scheme, or
  (ii) for another scheme — the number of lots included in the scheme. For example, if the scheme has 12 lots, then its relevant limit for major spending is $2,400 (ie 12 x $200).

Where the proposed expenditure exceeds the relevant limit for committee spending, then the committee cannot authorise the expenditure unless one of the following circumstances exist:

1. The spending is specifically authorised by ordinary resolution of the body corporate. Note that the requirement for two quotations applies if the amount is more than the relevant limit for major spending.
2. The owners of all lots included in the scheme have given written consent. The consent could be on a single document (see **Form B141** — ¶74-440) or on a collection of separate documents (see **Form B142** — ¶74-445).
3. An adjudicator is satisfied that the spending is required to meet an emergency and authorises it under an order made under the dispute resolution provisions (see DISPUTES tab).
4. The spending is necessary to comply with:

   (a) a statutory order or notice given to the body corporate, or
   (b) the order of an adjudicator, or
   (c) the judgment or order of a court, or
   (d) the order of QCAT.

Breaking the expenditure up into a number of "stages" or components so that each one costs less than the relevant limit for committee spending cannot circumvent this restriction. This is because s 151(2) of the Standard Module requires the cost of each component to be taken to be more than the relevant limit for committee spending. This effectively removes the power of the committee to authorise that component of the expenditure even though it is, in itself, below the relevant limit for committee spending.

If a proposal involves spending above the relevant limit for major spending and 1 and 2 above applies (but 3 and 4 do not apply), then the provisions of the Standard Module requiring quotes for major spending apply in addition.

There are two other provisions that are relevant to the power of the committee to spend money:

- Section 42(e) of the Standard Module, when read with s 100 of the BCCM Act, prevents the committee from bringing certain proceedings in a court.
- Section 42(f) of the Standard Module, when read with s 100 of the BCCM Act, prevents the committee from paying certain amounts of remuneration, allowances or expenses to a member of the committee.

Accommodation Module

The position is the same.

Commercial Module

Section 100 of the BCCM Act applies, as does a provision equivalent to s 42 of the Standard Module (namely s 18 of this module). Apart from that, none of the above provisions are relevant for a body corporate regulated by the commercial module. Expenditure of funds is effectively unregulated.

Small Schemes Module

The restriction on spending does not apply to the payment of an account of a routine, administrative nature.

Law: BCCM Act s 100

Std Mod s 42, 43, 151

Acc Mod s 42, 43, 149

Com Mod s 18, Ch 7

SS Mod s 18, 85.

Last reviewed: 23 November 2011

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[¶45-210] Surplus money

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If a body corporate finds in a particular year that it has money that is surplus to its requirements, then it has no power to distribute that money to lot owners. Nor does it have power to transfer the surplus money from one fund to another fund (eg from the sinking fund to the administrative fund). The only legitimate solution is to take the surplus money into account when preparing future budgets and determining future maintenance contributions. In this way the surplus money can be used up gradually and lot owners will get the benefit of lower contributions.

The position is different upon termination of a community titles scheme. The money belonging to the body corporate becomes "vested" in the lot owners in proportion to their interest schedule lot entitlements, while they also become responsible for discharge of the liabilities of the body corporate.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 78.

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[¶45-220] Required records

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The body corporate is under a duty to keep proper accounting records. However, there is nothing in the BCCM Act or Standard Module that says exactly what are proper records. Using long-standing accounting principles traditionally adopted by bodies corporate, the following records can be regarded as "proper" accounting records:

1. Receipts consecutively numbered.
2. A passbook, deposit book, or statement of deposits and withdrawals that are in chronological order, for the account of the body corporate.
3. A cash book.
4. A levy register.

If the body corporate accounting is to be done on an accrual basis, then a journal and ledger can be added to the above list.

Nothing requires separate "books" to be kept for the administrative and sinking funds, although the provisions of the BCCM Act and Standard Module make it clear that separate "records" must be kept for each fund. Therefore, it is common for both funds to be kept in the same bank or financial institution account while separating the records in the books of account to ensure that both funds are individually documented.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 154

Acc Mod s 152

Com Mod s 110

SS Mod s 88.

Last reviewed: 23 November 2011

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[¶45-240] Receipts

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The easiest way for a self managed body corporate to handle receipts is to use a machine numbered duplicate receipt book. At the time of publication no custom printed receipt book was on the market. This means that the body corporate will need to adapt a commercially available format for community title use, or have its own receipt format printed. Bodies corporate with a body corporate manager may have their accounting done on a computerised facility, in which event their receipts and other records will be produced by the computer. Either way, the treasurer (or the manager as the delegate of the treasurer) should issue a receipt for each payment of money received by the treasurer on behalf of the body corporate. The receipt should include the following:

- its date of issue
- the amount of money received
- the form in which the money was received (eg cash, cheque or postal order)
- the name (and possibly the address) of the person on whose behalf the payment was made
- if the payment is for a contribution to the administrative or sinking fund:
  - a statement to that effect
  - the relevant lot number
  - the period the payment relates to (if relevant)
  - details of any discount
- if the payment does not relate to a contribution — particulars of the transaction in respect of which the payment is received, and
- if the payment relates to more than one transaction — the manner in which the payment is apportioned between transactions.

If the receipt is issued from a receipt book, the treasurer should keep a carbon duplicate of the receipt. In all other cases (eg using computerised systems), the treasurer should cause a record to be kept of all the details of the receipt. **Form B144** (¶74-455) shows a receipt for a contribution payment and **Form B145** (¶74-460) shows a receipt for another transaction. Provision may also need to be made for GST where the body corporate is registered for GST purposes.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

[¶45-260] Deposit records

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Most financial institutions provide records of deposits made. These records usually take the form of a passbook, deposit book or statement of deposits and withdrawals in chronological order (eg a bank statement). These types of records are adequate. If a body corporate uses a separate deposit form for each deposit, then it should ensure that the stamped "butts" are kept in book form.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶45-280] Cash records

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The cash records effectively involve the keeping of cash books. As soon as practicable after a transaction is effected, the treasurer must enter:

- in the receipts section of the cash record (ie the Receipts Cash Book) — particulars of all money received, and
- in the payments section of the cash record (ie the Payments Cash Book) — particulars of all money disbursed.

See **Form B146** (¶74-465) for example pages from a cash book (ie cash record). An additional column should be added for GST if the body corporate is registered for GST. At the end of an appropriate period, the cash record should be balanced and the balance carried forward to the commencement of the next period (see **Form B146**). An appropriate period would be three or six months, although a shorter period (eg monthly) may be appropriate in the case of larger schemes.

Again, at the end of the relevant period, the treasurer should:

- compare the entries in the cash record with the account banking records (ie, the passbook, deposit book or account statement)
- enter in the cash record all account credits appearing in the banking records for which no receipt was given (eg, electronic transfers into the account), and
- enter in the cash record all account debits appearing in the banking records for which no cheque has been drawn (eg, bank fee debits).

Any necessary reconciliation should be entered in the cash record at the end of the entries for the relevant period. The reconciliation shows the balance in the account, as indicated in the banking records, plus money received but not banked and minus cheques drawn but not presented. See **Form B147** (¶74-470) for an example reconciliation.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

[¶45-300] Reconciliation

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To restate these principles in a different way, this reconciliation process simply involves reconciling the Cash Receipts Book and the Cash Payments Book with the account statements. Before doing this the two books should be written up to date and a current account statement should be obtained from the bank or institution. All the account statements since the last reconciliation date should be examined and a note should be made of all miscellaneous debits and credits, that is, debits or credits on the account statement arising otherwise than in pursuance of a cheque being presented or a deposit being made to the account (eg a credit transferred to the account or bank charges debited to the account). Any debits should be entered in the Cash Payments Book and credits should be entered in the Cash Receipts Book. All columns in both books should then be balanced and cross-balanced in the manner shown in **Form B146 (¶74-465)**.

When this has been done you can start to reconcile. Draw up a reconciliation statement along the lines illustrated in **Form B147 (¶74-570)**. The unpresented cheques are ascertained by comparing each cheque butt with the account statements to verify whether or not it has been presented and paid. If not, then it is an outstanding cheque. Likewise, outstanding deposits are those deposits that have been made but which do not appear on the account statements (ie the deposit may have been made after the last account statement was obtained). If the account balance shown in the reconciliation statement does not correspond with the balance shown on the actual account statement then an error has been made and the following check list can be used to locate the error:

1. Check all additions.
2. Check correctness of balance carried forward.
3. Compare amount of each cheque (from the butts) with the corresponding debits on the account statements.
4. Ensure that all miscellaneous debits and credits appearing on the account statements have been entered.
5. Check each banking (from the bank column in the Cash Receipts Book) with the deposits shown on the account statements.
6. Ensure that all cheques and receipts have been written into the cash books.

Remember: A reconciliation is simply the checking of all entries in the cash books with the contents of the account statements.

Once the error has been located it should be corrected and the reconciliation statement reworked. This procedure is repeated until the two “account balance” figures are the same. When an account reconciliation is used in conjunction with levy reconciliation (as to which see ¶45-340), the amount of funds available to the body corporate can be seen with more certainty. This is because both the true “account” position and the true “outstanding levy” position will have been verified by the reconciliations.

If reconciliation is mandatory because of a body corporate determination under s 149 of the Standard Module, then the reconciliation must extend to the invoices and other documents showing payments into and from the account during the relevant period. Not only must the receipts and payments be reconciled with the account statement, but they must also be reconciled with (i.e. supported by) the invoices and other documents. In that event, reconciliation must also occur each month.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 149

Acc Mod s 147

Com Mod s 108

SS Mod s 83.

Last reviewed: 23 November 2011

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[¶45-320] Levy register

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The levy register should include a separate section (which could be in the form of a page, card or computer file) for each lot in the community titles scheme that is not a garage or storage lot owned by a principal lot owner. The intention is that a garage or storage lot will be treated as part of the principal lot to which it is "attached". This requires both lots to be shown in the same section of the levy register and for the contribution schedule lot entitlements of those lots to be combined. Where the owner of another lot in the scheme is not also the owner of a garage or storage lot, then a separate section should be kept for that garage or storage lot.

Each section of the levy register should specify, by appropriate entries, the following matters in respect of each contribution levied by the body corporate and must indicate whether those entries are debits or credits and the balances for those entries:

- the date on which the contribution is due and payable
- the type of contribution
- the period in respect of which the contribution is made
- the amount of the contribution levied (shown as a debit)
- the amount of each payment (shown as a credit)
- the date on which each payment was made
- whether a payment was made in cash, cheque or other manner
- whether the amount paid comprised full payment or part payment
- details of any discount given for early payment
- particulars relating to interest debits and credits, and
- the balance of the account.

Form B148 (¶74-475) illustrates a "page" of a levy register.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

[¶45-340] Reconciling the levy register

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It was mentioned earlier that this reconciliation is important because the levy register and its entries provide an avenue for error, whether such error is innocent or intentional. In addition, it is important to enable a proper view of the financial standing of the body corporate and individual owners. In turn, the accuracy of an owners' financial standing is important when the question of entitlement to vote has to be determined. Despite the importance of this procedure, in practice little attention is paid to levy reconciliation. Therefore, the need for the reconciliation of the levy register cannot be over-emphasised.

The **reconciliation** is carried out in the following manner:

Levies received for the period			$1,245-00
Add levies in arrears at the end of the period	$ 28-00		
Add levies paid in advance at the commencement of the period	$106-00	$ 134-00	
Sub-total:			$1,379-00
Deduct levies in arrears at the commencement of the period	$ 32-00		
Deduct levies paid in advance at the end of the period	$ 73-00	$105-00	
TOTAL LEVIES RECEIVABLE FOR THE PERIOD			$1,274-00

The levies receivable figure, derived from the above calculation, should in fact be the total amount of levies that were due and payable by owners within the relevant period. Interest on overdue levies, if received, would be treated separately so as not to be included as a general levy received. Similarly, an allowance will need to be made for any discounts that may have been given. If the two amounts agree then the only error that may still exist would be an incorrect posting on one of the "pages" of the levy register. That is, a debit or a credit may have been posted to owner "A" whereas it should have been posted to owner "B". This will usually become apparent when the next levy statements are sent out because one of the two owners involved will then raise the question of their incorrect statement. If the two amounts do not agree, then each page of the levy register should be checked by re-working the entries and calculations until the error has been discovered. The reconciliation can then be attempted again.

If the body corporate does its accounting on a "cash" basis and incorporates into its system a means of reconciling contribution levies, then a practical compromise involving something between the "cash" and "accruals" systems will have been achieved. This will be much more easily understood by the average owner and should prove an adequate safeguard for the funds of the body corporate.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

[¶45-360] Petty cash

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A “petty cash” system is a convenient way to meet small recurrent expenses, such as stamps, photocopies and stationary items. In Queensland there does not appear to be anything preventing a body corporate from operating a petty cash system. If a petty cash system is to be operated, then a petty cash book should be kept by the treasurer. See the example in **Form B149 (¶74-480)** .

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶45-380] Journals and ledgers

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Traditional accounting has always required the use of a journal and ledger. However, these two records are not essential for the average body corporate. In practice they are rarely used and, before they are used, consideration should be given to:

- the time available for accounting functions
- the cost of maintaining a journal and ledger, and
- the capabilities of the persons responsible for the accounting functions (eg the treasurer or the body corporate manager).

It should also be noted that in the average community titles scheme entries rarely originate from a source other than a payment or a receipt and this, combined with the more common situation whereby accounting is done on a cash basis, would make both the journal and ledger unnecessary.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

[¶45-400] Body corporate managers and trust accounts

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See the discussion in ¶38-740.

[¶45-420] Period for financial statements

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Financial statements must relate to a “financial year”. For a body corporate for a community titles scheme established under the BCCM Act, the financial year means either:

- The period from the establishment of the scheme until the end of the month immediately before the month when the first anniversary of the establishment of the scheme falls, and each successive period of one year from the end of the first financial year. For example, if the scheme was established on 5 October 1999, the first financial year would be the period from 5 October 1999 to 30 September 2000. Subsequent financial years would be the period from 1 October to 30 September.
- If an adjudicator changes the financial year — the period fixed by the adjudicator as the financial year and each successive period of one year from the end of the period.

For a body corporate for a community titles scheme established for an existing plan under the BUGTA there are transitional provisions that are used to determine the financial year. The position differs depending upon whether the first annual general meeting of the scheme had been held at the time of commencement of the BCCM Act (namely, 13 July 1997). If the first annual general meeting had been held as at that date then the financial year of the body corporate is either:

- Each year ending on the last day of the month containing the anniversary of the first annual general meeting held for the existing plan. For example, if the first annual general meeting had been held under the BUGTA on 18 April 1986, the first financial year under the BCCM Act would be the period from 1 May 1997 to 30 April 1998. Subsequent financial years would be the same period.
- If a referee under the BUGTA had fixed a date to be taken to be the anniversary of the annual general meeting of the body corporate (usually because the meeting had not been held) — each year ending on the last day of the month containing the date fixed by the referee. For example, if the referee fixed a date of 23 August 1994, the first financial year under the BCCM Act would be the period from 1 September 1996 to 31 August 1997. Subsequent financial years would be the same period.

For a body corporate for a community titles scheme established for an existing plan under the BUGTA it should be noted that there does not appear to be any current jurisdiction for an adjudicator to change the date of its financial year. The definition of “financial year”' in Sch 6 of the BCCM Act makes it clear that an adjudicator can change the financial year for a body corporate established under that Act. However, there is no express provision elsewhere in the BCCM Act that allows an adjudicator to change the financial year for a body corporate that came through the transition process. Section 273(3)(h) gives an adjudicator jurisdiction to order a body corporate to “amend its records in a stated way” and this suggests there may be a power to order amendment of the period of the financial year. This is not at all clear and there is a strong argument that no such jurisdiction exists.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 273(3)(h), 330(9) (10), Sch 6.

[¶45-440] Content of statements

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The body corporate is under a statutory duty to prepare for each financial year (see ¶45-420) a statement of accounts showing the income and spending (or receipts and payments) of the body corporate for the financial year. The statement may be prepared on a cash or accrual basis. Most bodies corporate prepare their statements on a cash basis.

If the statement of accounts is prepared on a cash basis, then it must include disclosure of the following:

- total contributions paid in advance to the administrative and sinking funds
- total contributions in arrears, and total outstanding penalties
- balances for all financial institution accounts and investments, and
- all outstanding receipts and payments.

If the statement of accounts is prepared on an accrual basis, it must show the assets and liabilities of the body corporate at the end of the financial year.

In the case of both methods, except where a statement relates to a first financial year, it must include the corresponding figures for the previous financial year (ie comparative figures). It must also disclose all remuneration, allowances or expenses paid to committee members under the following categories:

- remuneration or allowances
- expenses, split into—
  - – travelling
  - – accommodation
  - – meal
  - – other.

A copy of the statement must then be distributed to owners with the notice of the next annual general meeting.

Form B150 (¶74-485) illustrates a statement of accounts prepared on a cash basis.

Accommodation Module

The position is the same.

Commercial Module

A body corporate regulated by the Commercial Module must include in its annual statement of accounts a statement of assets and liabilities. This effectively means that its statement must be prepared on an accrual basis. It is not necessary to disclose committee-related expenses. Otherwise, the position is substantially the same.

Small Schemes Module

The expenses of the secretary and the treasurer must be disclosed. Otherwise, the position is the same.

Law: Std Mod, s 154

Acc Mod s 152

Com Mod s 110

SS Mod s 88.

Last reviewed: 23 November 2011

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[¶45-460] Legislative requirements

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The body corporate must have its statement of accounts for each financial year audited by an auditor unless:

(a) the scheme is a basic scheme, and
(b) the body corporate resolves by special resolution not to have the statement audited.

The motion for such a resolution must contain specified wording, as well as being accompanied by a specified "note". See **Form B151** (¶74-490) for the wording of the motion.

Where an auditor must be appointed, then they must be agreed to by ordinary resolution of a body corporate. The motion for that resolution:

- must be included in the agenda for the general meeting at which the motion is to be considered
- must include the name of the auditor proposed to be appointed, and
- is not voted on if it is otherwise resolved not to have the statement of accounts audited.

See **Form B152** (¶74-495) for the wording of a motion for an ordinary resolution appointing an auditor.

Where a body corporate decides not to have its accounts audited for a particular financial year, this does not prevent it from deciding, by ordinary resolution, to have its accounting records audited for a particular period or a particular project and to appoint an auditor for that purpose. The qualifications of the auditor will still apply and the auditor should be appointed in the same way that one is appointed to audit the annual financial statements. **Form B152** can be used.

On finishing an annual audit the auditor must give a certificate:

- stating whether the statement of accounts gives a true and fair view of the body corporate's financial affairs, and
- if the statement of accounts does not give such a view, identifying the deficiencies in the statement.

A copy of the auditor's certificate must accompany the notice of the next annual general meeting held after the certificate is given.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

Under the SS Mod a body corporate is not under a statutory duty to have its annual statement of accounts audited. However, it may decide to have such an audit. This can be by ordinary resolution or a resolution of its committee. No special rules apply in relation to such resolutions. However, if the body corporate decides to have the audit, then:

- a qualified auditor must be used
- the requirements for the auditor's certificate are the same, and
- the certificate must still accompany the next annual general meeting notice.

Law: Std Mod s 155

Acc Mod s 153

Com Mod s 111

SS Mod s 89.

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[¶45-480] Qualifications of auditors

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"Auditor" is defined in Sch 6 to the BCCM Act as —

(a) a person who:

(i) is a registered company auditor, or
(ii) has the qualifications and experience in accountancy approved under the regulation module applying to the particular scheme, and

(b) includes an unincorporated body of auditors.

Section 156 of the Std Mod sets out, by way of approval, the necessary qualifications and experience in accounting. The auditor must be a member of one of three specified professional accounting bodies and must have a total of two years auditing experience, whether or not continuous.

A member of the committee, a body corporate manager, or an associate of a member of the committee or a body corporate manager, cannot be appointed to audit the accounting records or the statement of accounts. Reference should be made to s 309 of the BCCM Act to determine whether a particular person or company is an "associate". The word is given a very wide meaning for the purposes of the Act and regulation modules. (Also see the discussion at ¶38-500).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is substantially the same.

Law: BCCM Act s 309, Sch 6

Std Mod s 155, 156

Acc Mod s 153, 154

Com Mod s 111, 112

SS Mod s 89, 90.

Last reviewed: 23 November 2011

[¶46-500] Importance

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The insurance arrangements for a community titles scheme are one of the most important aspects of management. This is because:

- Lots in a community titles scheme are usually a major investment for their owners, particularly where they comprise the family home.
- The *BCCM Act* and the *Std Mod* contain strict insurance requirements that must be complied with.
- Office bearers and body corporate managers risk substantial personal liability if adequate insurance covers are not in place.

It follows that bodies corporate and their office bearers, including body corporate managers, should pay particular attention to the insurance aspects of community title management.

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[¶46-520] History

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Since the introduction of strata titles in New South Wales in 1961, insurance has been a key component of strata title management. All Australian strata and community titles legislation has required owners corporations or bodies corporate to insure their buildings and, in most cases, to effect certain other types of insurance, such as public liability insurance. This requirement was driven by the need to protect lot owners, as well as financiers lending money on security of strata and community title lots. Financiers were given additional security in the form of a special mortgagee protection cover, but this was removed from the Queensland legislation in 1997. While the insurance aspects of strata and community titles legislation have undergone refinement over the past 40 years, the basic requirements are still in place and are treated seriously by most people who have an interest in a strata scheme or community titles scheme. The 1997 Act in particular reformed and strengthened the insurance requirements. Those requirements were further adjusted by amendments in 2003.

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[¶46-540] Approach to insurance covers

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The BCCM Act leaves it to the regulation modules to specify the detail of the insurance requirements. However, it also makes it clear that a body corporate:

- may put in place additional insurance to that required by the regulation module, and
- must have any insurance required by another Act.

Initially, the insurance obligations are placed on the original owner or developer. They must ensure that when the scheme is established, required policies of insurance are immediately in force for 12 months. It is also the duty of the original owner to ensure that the full replacement value for insurance purposes is determined by a quantity surveyor or registered valuer. If they fail to do either of these things the original owner will commit an offence and, in the case of placement of the insurance, the body corporate, or other entity that is required to take out insurance, may recover as a debt the cost of taking the insurance out. However, the original owner may, and usually does, contractually seek reimbursement for insurance costs from individual lot purchasers.

After the initial insurances are effected by the original owner, the body corporate takes over responsibility for insurance matters.

Accommodation Module

The position is the same

Commercial Module

The position is the same

Small Schemes Module

The position is the same.

Law: BCCM Act s 189, 191.

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[¶46-560] Insurable interests

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Section 190 of the BCCM Act says that the body corporate has an insurable interest for the purpose of the insurance it is required to put in place under the regulation module that applies to its scheme. This provision is necessary to ensure the validity of the building insurance that is normally required to be taken out in the name of the body corporate. Because the body corporate does not own all of the building it would not otherwise be legally capable of insuring it.

It is important to note that this provision only assists a body corporate where it is required to put the relevant insurance in place. However, the declaration in s 189(2) may assist in cases where the insurance is effected voluntarily. That subsection says:

> "To avoid doubt:
>
> (a) the body corporate may put in place for the scheme, in the way and to the extent the body corporate decides, additional insurance to the insurance it is required to put in place under the regulation module applying to the scheme; and"

It can be argued that this subsection provides the necessary insurable interest for a body corporate effecting additional insurance to that required by the relevant regulation module.

Accommodation Module

The position is the same

Commercial Module

The position is the same

Small Schemes Module

The position is the same.

Law: BCCM Act s 189(2)(a), 190.

[¶46-580] Insurance of common property

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Insurance is covered in Ch 8, Pt 9 of the Standard Module. A number of sections in that division deal with insurance of common property. It is important to understand the interrelationship of these sections before considering them in detail. The sections and the circumstances in which they apply are summarised in the following table:

Section	When Applies
178	When none of the other sections apply.
179	If one or more lots are created under a building format plan or a volumetric format plan and a lot is located in a building.
180	If: • one or more lots are created under a standard format plan, and • a building on one lot has a common wall with a building on an adjoining lot.
185	If: • the scheme is a basic scheme • lots in the scheme were created under a standard format plan • on one or more of the lots there is a building having no common wall, and • the body corporate has established a *voluntary insurance scheme*.

Where a scheme has different housing types (eg townhouses and free-standing houses) then it may be necessary for a number of these sections to be applied to insuring the various buildings. It is not necessarily the case that only one section will apply to a community titles scheme. For example, if a scheme covered by a standard format plan of subdivision has 20 townhouses with common walls and 10 free standing villa homes, then the following insurance arrangements could be applied:

- a policy in the name of the body corporate under s 180 of the Standard Module for the 20 townhouses with common walls, and
- a policy in the name of the body corporate giving effect to a voluntary insurance scheme for the 10 free standing villa homes.

The discussion in this paragraph is restricted to s 178 which imposes an obligation on the body corporate to insure the common property to full replacement value. First, it should be noted that the obligation extends to the common property and not to the overall building. "Common property" is the land in the community titles scheme other than the lots. This section is therefore intended for schemes where lots are not part of a building, such as a cluster or group title layout. From the above table it will be noted that this section only applies where the common property is not required to be insured under one of the other sections.

The policy required by this section must not only be taken out for full replacement value, but it must:

(a) cover, to the greatest practical extent—

(i) damage, and

(ii) costs incidental to the reinstatement or replacement of insured buildings, including the cost of taking away debris and the fees of architects and other professional advisers, and

(b) provide for the reinstatement of property to its condition when new.

The owner of each lot must pay a contribution levied by the body corporate that is a proportionate amount of the premium that reflects the interest schedule lot entitlement of the lot. This means that a separate levy must be imposed on owners to recover the cost of this insurance. Instead of basing the levy on contribution schedule lot entitlements it must be based on interest schedule lot entitlements. Note however that this calculation may be affected by owner's improvements or use that affects the premium levels (see ¶46-880 and ¶46-900). There is no need for a special fund to collect these levies. They should be deposited to the administrative fund and the insurance should be paid from that fund. There is probably no need for any formality to impose this levy as it appears to fall outside the normal levy process. It could be imposed independently, or in conjunction with the normal levies. Obviously, where this type of insurance is involved the insurance premium should not be included in the normal administrative fund budget, because that budget forms the basis of the levies that are imposed using contribution schedule lot entitlements.

For record purposes, it would be preferable for the body corporate to note the premium and authorise recovery from owners. The resolution in **Form B153** (¶74-500) would be suitable.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 178, 179, 180, 185

Acc Mod s 176, 177, 178, 183

Com Mod s 134, 135, 136, 141

SS Mod s 112, 113, 114, 119.

Last reviewed: 23 November 2011

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[¶46-600] Insurance of body corporate assets

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Section 178(1)(b) of the Standard Module says the body corporate must insure the body corporate assets to full replacement value. Body corporate assets are items of real or personal property acquired by the body corporate, other than property that is incorporated into and becomes part of the common property. They may consist of any property an individual is capable of acquiring. It follows that some body corporate assets, by their very nature, will not be capable of being insured (eg shares in a company). This requirement must therefore be interpreted in the context of the nature of the asset. If the asset is such that it is not possible to insure it, or, commercially, it is never insured (eg an investment in a bank), then this requirement is unlikely to be interpreted so as to require insurance in any event.

The policy required by this subsection must not only be taken out for full replacement value, but it must:

(a) cover, to the greatest practical extent—

(i) damage, and
(ii) costs incidental to the reinstatement or replacement of insured buildings, including the cost of taking away debris and the fees of architects and other professional advisers, and

(b) provide for the reinstatement of property to its condition when new.

The owner of each lot must pay a contribution levied by the body corporate that is a proportionate amount of the premium that reflects the interest schedule lot entitlement of the lot. The comments in ¶46-580 regarding the levy process are also relevant to this type of insurance.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 11

Std Mod s 178

Acc Mod s 176

Com Mod s 134

SS Mod s 112.

Last reviewed: 23 November 2011

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[¶46-620] Insurance of building including lots

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As stated in ¶46-580, s 179 of the Standard Module applies if one or more of the lots included in a community titles scheme are created under a building format plan of subdivision or a volumetric format plan of subdivision. In that case the body corporate must insure, to full replacement value, each building in which is located a lot included in the scheme, to the extent that the building is scheme land. Where a scheme has multiple buildings but not all buildings contain a lot, then this obligation would only extend to those buildings that actually contain a lot. The other buildings will need to be insured under s 178 of the Standard Module (if they are wholly common property) or s 180 (if there are common walls envisaged by the section) or s 185 (if there are no common walls).

The policy required by this section must not only be taken out for full replacement value, but it must:

(a) cover —

(i) damage, and
(ii) costs incidental to the reinstatement or replacement of insured buildings, including the cost of taking away debris and the fees of architects and other professional advisers, and

(b) provide for the reinstatement of property to its condition when new.

If a body corporate cannot comply with those requirements, the Commissioner, on application in writing by the body corporate, can authorise alternative insurance (such as insurance to an agreed value). However, if the insurance is not for full replacement value and as a consequence the body corporate must contribute to repair, then that contribution must be at the expenses of the body corporate.

The body corporate is not obliged to insure under s 179 in either of the following two circumstances:

1. Where:

   (a) the scheme is a subsidiary scheme, and
   (b) the body corporate for the higher scheme is required to insure the building or part of the building under s 179(2) of the Standard Module or another section in that Module.

2. Where:

   (a) the building or part of the building is scheme land
   (b) the whole of the building is the subject of a building management statement (see ¶22-650)
   (c) the building management statement provides for insurance for the building to a level comparable with insurance otherwise required by Ch 8, Pt 9 of the Standard Module, and
   (d) the insurance is in place.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 179

Acc Mod s 177

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Com Mod s 135

SS Mod s 113.

Last reviewed: 23 November 2011

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[¶46-640] Insurance of buildings with common walls

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As stated in ¶46-580 s 180 of the Standard Module applies if:

- one or more of the lots included in the scheme are created under a standard format plan of subdivision, and
- in one or more cases, a building on one lot has a common wall with a building on an adjoining lot.

Where the section applies the body corporate must insure each building to its full replacement value. The policy:

(a) must cover:

(i) damage, and
(ii) costs incidental to the reinstatement or replacement of the buildings, including the cost of taking away debris and the fees of architects and other professional advisers

(b) must provide for the reinstatement of the buildings to their condition when new, and
(c) may give effect, in whole or in part, to a voluntary insurance scheme (as to which see ¶46-660).

A voluntary insurance scheme could only be implemented in respect of those lots containing buildings without common walls (ie, free standing buildings entirely within a lot). Where some lots involve buildings with common walls and some do not, then all the buildings can be insured under this section, or alternatively, those with common walls can be made the subject of a voluntary insurance scheme.

Where reinstatement insurance is not for full replacement value, then the body corporate must make up any difference between the cover and the cost of repair or reinstatement.

A body corporate need not insure under this section if:

- the scheme is a subsidiary scheme, and
- the body corporate for the other scheme is required by the section to insure the building or part of the building.

This provision simply seeks to avoid conflicting obligations to insure.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 180

Acc Mod s 178

Com Mod s 136

SS Mod s 114.

Last reviewed: 23 November 2011

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[¶46-660] Insurance of buildings with no common walls

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As stated in ¶46-580, s 185 of the Standard Module applies if:

- the scheme is a basic scheme (ie there is no higher scheme)
- lots included in the scheme were created under a standard format plan of subdivision, and
- on one or more of those lots there is a stand alone building having no common wall with a building on another lot.

In those circumstances, the body corporate may establish a voluntary insurance scheme under which it puts in place insurance over stand alone buildings for the owners of the lots on which they are located. Owners of stand alone buildings can decide themselves whether or not to take part in the voluntary insurance scheme. However, if they choose to take part in the scheme they must:

(a) notify the body corporate of the replacement value of the stand alone buildings to be insured, and
(b) comply with other requirements under—

(i) the decision of the body corporate establishing the voluntary insurance scheme, or
(ii) the policy of insurance.

The body corporate then effects the insurance in its name. Where the voluntary insurance scheme only applies to part of a community titles scheme a single policy may be used for the entire community titles scheme despite the need for two different types of insurance covers. Participating owners must then pay a contribution levied by the body corporate that is a proportionate amount of the premium fairly reflecting:

- the proportion of the total replacement value of the buildings insured under the voluntary insurance scheme represented by the stand alone buildings on the owner's lot, and
- the proportion of the total risks covered by the policy attributed to activities carried on, or proposed to be carried on, on the owner's lot (eg the risks will be higher in the case of some commercial uses).

The body corporate has power to recover an owner's premium contribution as part of their annual contribution to the administrative fund.

The requirement for owners to notify the replacement value of their building replaced a pre-2003 requirement for owners to notify the estimated value of their building. The earlier requirement had a potential problem. If an owner under-estimated the value they could benefit from a lower premium share but at the same time cause the total cover to be inadequate. The new requirement to notify the actual replacement value overcomes that problem but, in a practical sense, at the expense of requiring lot owners to have their buildings valued for insurance purposes.

A resolution establishing a voluntary insurance scheme is in **Form B154** (¶74-505) and a by-law establishing a scheme in **Form B155 (¶74-510)**. Both forms give an indication of the type of requirements a body corporate should consider imposing.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 185, 186

Acc Mod s 183, 184

Com Mod s 141, 142

SS Mod s 119, 120.

Last reviewed: 23 November 2011

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[¶46-680] Valuations

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Neither the BCCM Act or the Standard Module requires the body corporate (as distinguished from the original owner) to obtain a valuation for insurance purposes before effecting building insurance. However, the Standard Module makes it very clear in all cases that the building insurance must be for "full replacement value". This imposes a duty on the body corporate to determine the full replacement value of the building. The best way for a body corporate to discharge that duty is to obtain a valuation. It will not normally be necessary to obtain a valuation every year. In New South Wales insurance valuations by persons with specified qualifications are compulsory, but they need only be undertaken once every five years. A five-year interval is probably too long and a body corporate would be well advised to obtain a valuation every two or three years.

Care needs to be taken when choosing a valuer. Some valuers base their calculations on a superficial inspection of the common areas of the building. Others inspect inside most or all of the lots, taking into account standards of finish and owner's improvements. If the sum insured is to cover these standards and improvements (so that they are achieved in a new building in the event of a total destruction) then the valuation would need to take them into account.

When instructing the valuer, the body corporate should ensure that the valuer is asked to carry out the valuation as at the last day of the period of insurance. For reasons that will become apparent in the following paragraphs, the valuer should also be asked to ensure that adequate allowance is made for cost increases during the period of a projected rebuilding program (eg an 18-month program) and to ensure the valuation includes:

- calculation on a "replacement value" basis
- allowance for additional cost of labour and materials in catastrophic circumstances (eg in the case of a major earthquake or bushfire causing widespread damage, when local building costs generally increase)
- cost of demolition and removal of debris
- cost of professional fees for architects, engineers and other consultants that will be required for the rebuilding
- associated or incidental costs, and
- any additional costs due to planning restrictions.

Professional fee allowances should include legal and survey costs in the event of a total destruction. The cost of terminating existing schemes, obtaining new planning, building and subdivision approvals and registering a new plan can be substantial, particularly if court appeals are required. If this approach is adopted, the body corporate will be sure to have discharged its duty and the body corporate and owners will be adequately protected.

Finally, if the same valuation is to be used in subsequent years, then it should be increased to take account of cost increases that may have occurred subsequent to its preparation. It is only in this way that office bearers and body corporate managers will be fully protected against personal liability and owners will be protected against financial loss due to destruction or serious damage to their building.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

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The position is the same.

Specified Two-lot Schemes Module

Under this Module, where the body corporate must insure one or more buildings for full replacement value, the body corporate must, at least every five years, obtain an independent valuation stating the full replacement value of the building.

Last reviewed: 21 February 2012

[¶46-700] Calculating the sum insured

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Building insurance policies need to specify a sum insured. In Queensland the way in which the sum insured is arrived at is not specified. Therefore, the body corporate must decide how it should arrive at the figure. From the Standard Module it is clear that the following principles must be followed:

- the amount must represent “full replacement value”
- it must cover damage (as well as destruction)
- it must cover costs incidental to the reinstatement or replacement of the insured buildings, including removal of debris costs and the fees of architects and other professional advisers
- those covers must be “to the greatest possible extent”, and
- provision must be made for the reinstatement of property to its condition when new.

Bearing in mind these principles, it is recommended that the sum insured should be arrived at by adding together the following amounts:

(a) the estimated cost, as at the proposed date of expiry of the policy, of the rebuilding of the building or its replacement of a similar building so that every part of the rebuilt building or the replacement building is in a condition no worse or less extensive than that part or its condition when the building was new
(b) the estimated cost, as at the proposed date of expiry of the policy, of removing debris from the parcel in the event of the building's being destroyed by an occurrence specified in the policy
(c) the fees (estimated as at the proposed date of expiry of the policy) payable to architects and other professional persons employed in the course of the rebuilding or replacement, and
(d) the estimated amount by which the expenditure referred to in the preceding paragraphs may increase during the period of 18 to 24 months following the date of expiry of the policy (see ¶46-720 for the reasons for this period).

The **estimate** referred to in paragraph (a) should be based on the valuation obtained specifically for insurance purposes. The **estimates** referred to in paragraphs (b), (c) and (d) are usually included in that valuation as well. The insurance valuation, in most cases, therefore forms the basis on which the sum insured is determined. However, the insurance valuation may be carried out in a number of different ways and may make allowance for optional extended coverage. It is therefore important to understand how the valuation has been undertaken and what covers it takes into account. It is also important to understand why additional coverage under the policy is desirable. A body corporate may decide to take out additional coverage (see s 189(2)).

If the sum insured is insufficient to cover the reinstatement or rebuilding, then the difference has to be made up from the funds of the body corporate, which are raised by levies against owners. For an example where a body corporate has had to make up a difference, in a public liability situation, see *The Body Corporate, Strata Plan No 4303 v Albion Insurance Co Ltd*.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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Law: BCCM Act s 189(2).

.40 Case reference: *The Body Corporate, Strata Plan No 4303* v *Albion Insurance Co Ltd* Vic Supreme Court, Kaye J, 23 June 1982. Full Court, on appeal, 24 March 1983.

[¶46-720] Rebuilding program

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The BCCM Act effectively requires, unless it is not legally possible, a building that is totally or partially destroyed to be rebuilt to the same condition that it was in when new. The rebuilding program starts when the building is damaged or destroyed. This could be on the last day of the period of insurance, which would usually be 12 months after the policy was taken out and the sum insured calculated. But this is only the starting point of the rebuilding program. A total rebuilding program, following a total destruction, would typically involve the following:

1. A claim is lodged under the policy.
2. The Loss Assessor inspects the site to:
    - ensure it is made safe
    - determine the extent of the loss, and
    - make a recommendation on the claim to the insurance company.
3. The insurance company authorises the rebuilding.
4. The body corporate meets to authorise the rebuilding process.
5. A project manager is appointed to manage the rebuilding process.
6. Tenders are obtained to demolish the damaged building.
7. The damaged building is wholly or partly demolished.
8. Development consent may need to be obtained from the council.
9. A Court appeal against the council decision may be necessary.
10. Meetings are held to discuss design and construction issues.
11. Plans and specifications are prepared for the new building.
12. Council approval is obtained for the plans and specifications.
13. Tenders are obtained to construct the new building.
14. Building contracts are prepared and checked by the lawyer for the body corporate.
15. A meeting is held to authorise signing of the building contracts.
16. Building contracts are signed.
17. The new building is constructed.
18. Council inspection occurs and a Certificate of Occupancy issues.
19. Owners move in to their new units.

This type of rebuilding program would take between 18 and 24 months to complete and (assuming destruction occurred at the end of the period of insurance) the tenders for construction of the new building would be obtained about 18 months after the sum insured in the policy was originally calculated. The following chart illustrates the likely timing using a “best case” scenario. In a “worst case” scenario another 12 months (at least) could be added to the timing.

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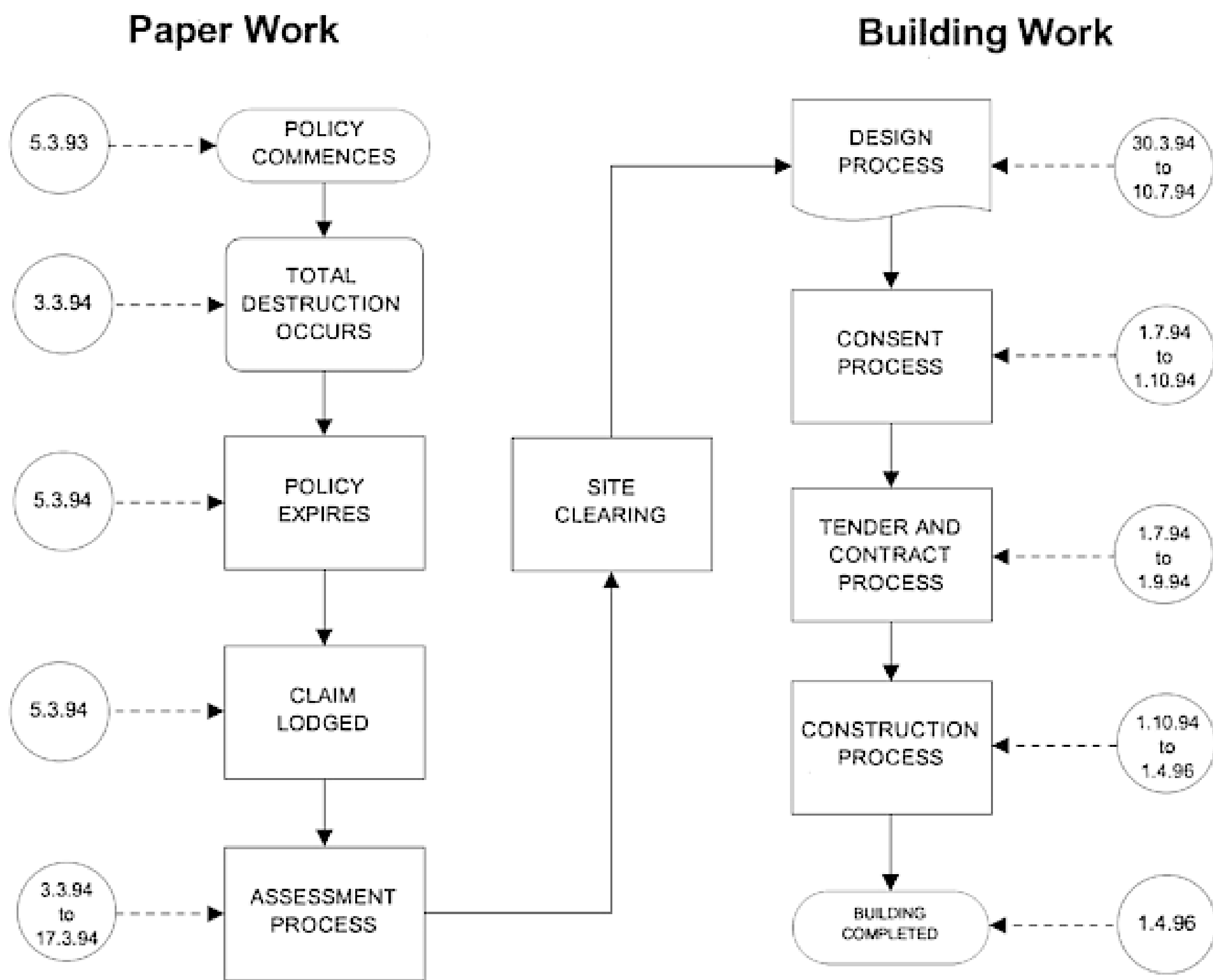

This demonstrates the need to ensure that the sum insured is calculated as at a date well in excess of the period of insurance to allow for increases in building costs.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶46-740] Alternative accommodation

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The complexity and length of a rebuilding program also highlights the need for insurance cover against:

- the cost of alternative accommodation for individual resident owners during the rebuilding process (initially in a hotel and subsequently in a dwelling); or
- loss of rent by individual investor owners.

This is particularly important because mortgage commitments normally continue during the rebuilding period and most people would not have the financial strength to continue to make their mortgage payments while paying rent for alternative accommodation, or alternatively, making mortgage payments without rental income.

This cover is usually included in the sum insured. The effect of this is to reduce the amount available to reinstate the building in the event of a total destruction. It is therefore important to ensure that the ``alternative accommodation'' cover is included in the valuation process that arrives at the sum insured. Alternatively, this cover should be expressed to be additional to the sum insured.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶46-760] Planning restrictions

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Planning laws often change after buildings are built, with the result that the same building could not be built again on the same site. This can prevent the rebuilding of a totally destroyed building and, in some cases, reinstatement of a badly damaged building. In these circumstances an insurer may agree to build on another site a similar building to that destroyed, or alternatively, the community titles scheme can be terminated and a cash settlement made under the policy. This may necessitate an application to a court and again a considerable period of time may be involved before the owners are able to establish themselves in a new building. An allowance for such costs should also be made when calculating the sum insured.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶46-780] Choice of insurers

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When choosing an insurer a body corporate should take into account the following:

- financial strength of the insurer;
- terms of the policy (particularly the extent of the cover and exclusions);
- reputation of the insurer in relation to claims payments; and
- premium.

Of all of the above, the amount of the premium is the least important.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

[¶46-800] Premium

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Owners of lots covered by reinstatement insurance required to be taken out by the body corporate must pay a contribution levied by the body corporate that is a proportionate amount of the premium. The word "premium" would have its normal (rather than its technical) meaning and would include GST, stamp duty and any applicable levies or charges. The amount to be contributed is the proportion of the premium that reflects:

- for a lot created under a building or volumetric format plan — the interest schedule lot entitlement of the lot, and
- for a lot created under a standard format plan — the cost of reinstating the buildings on the lot.

In addition, the body corporate may adjust the amount in a way that fairly reflects:

- the extent to which fixtures and fittings forming part of the lot are of a higher standard than the fixtures and fittings of lots generally, or
- the extent to which the premium relates to improvements made to the common property that benefit the lot
- the proportion of the total risks covered by the policy attributable to activities carried on, or proposed to be carried on, on the lot.

In practice, these provisions are difficult to administer. This arises mainly because:

1. These provisions have no application to a lot in a voluntary insurance scheme.
2. Although the body corporate may recover the contribution as part of the owner's annual administrative fund contribution, that contribution is based on contribution schedule lot entitlements whereas in the case of lots in a building or volumetric format plan the recovery must be based on interest schedule lot entitlements.
3. In the case of lots in a standard format plan, the buildings on each lot need to be considered (and effectively valued for insurance purposes) separately. However, no provision is made for valuations and no mechanism is available to guide the body corporate in making the necessary determination.
4. The body corporate has no way of finding out about the standard of fixtures and fittings in the lots unless "improvements" are made and notified to the body corporate.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 182

Acc Mod s 180

Com Mod s 138

SS Mod s 116.

Last reviewed: 23 November 2011

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[¶46-820] Improvements affecting premium

Click to open document in a browser

The owner of a lot who has made improvements to the lot or common property must give the body corporate details of the nature and value of the improvements. This will apply if:

(a) improvements are made to a lot resulting in—

(i) fixtures and fittings forming part of the lot being of a higher standard than fixtures and fittings in other lots generally, and
(ii) the premium for reinstatement insurance being likely to increase, or

(b) improvements are made to the common property, including improvements made under a right of exclusive use, licence or occupation authority, and—

(i) the improvements are made for the benefit of a lot included in the scheme, and
(ii) because of the improvements, the premium for reinstatement insurance required to be taken out by the body corporate is likely to increase.

The notification must be given as soon as practicable after the improvements are substantially completed.

If a lot owner does not give the required notification, then they must reimburse the body corporate for any contribution that has to be made for the cost of reinstatement or repair of the lot, or any other lot or common property, but only to an extent that can reasonably be attributed to the owner's failure to give the notification. The effect of this is to make the defaulting lot owner bear the risk of any "averaging" that is applied by the insurer to any claim because of underinsurance resulting from the body corporate's lack of knowledge of the improvements and their value.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 183

Acc Mod s 181

Com Mod s 139

SS Mod s 117.

Last reviewed: 23 November 2011

[¶46-840] Use affecting premium

Click to open document in a browser

If, because of the way in which a lot is used, the premium for the body corporate's reinstatement insurance or the premium for their public risk insurance is likely to increase, then:

- the lot owner must give the body corporate details of the use, and
- the body corporate may adjust the amount that would normally be payable by the lot owner in a way that fairly reflects the proportion of the total risks covered by the policy attributable to that use (see ¶46-800).

These provisions are intended to ensure that the cost of the additional risk is borne by the owner of the lot concerned and not the community in general.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 182, 188

Acc Mod s 180, 186

Com Mod s 138, 144

SS Mod s 116, 122.

Last reviewed: 23 November 2011

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[¶46-860] Excess

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The obligations of the body corporate to insure expressly require insurance for “full replacement value”. In practice insurers insist on imposing an excess on all insurance covers. An excess would generally prevent a body corporate from complying with this obligation. However, s 184 of the Standard Module expressly provides that an excess does not prevent a body corporate from insuring for full replacement value. This is provided the excess is not such that it would impose an unreasonable burden on the owners of individual lots who have to pay or contribute to the excess.

Where an insurance claim relates only to one lot, then the lot owner must pay the excess unless the body corporate decides it is unreasonable in all the circumstances for the owner to bear the liability. For example, a child playing on the common property hits a cricket ball over a unit balcony and breaks the glass in the sliding door connecting the balcony to the unit. The door is part of the lot for title purposes but part of the building for insurance purposes. Therefore, the lot owner can claim on the body corporate’s insurance and would normally have to pay the excess. However, in this case, the identity of the child is not known and the owner was not at fault. Under those circumstances the body corporate may decide that the owner should not pay the excess.

Where the insurance claim relates to two or more lots, or one or more lots and common property, the body corporate is liable to pay the excess. However, it may decide in all the circumstances it is reasonable for the excess to be paid for by the owner of a particular lot, or to be shared between owners, or between an owner or owners and the body corporate.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod s 184

Acc Mod s 182

Com Mod s 140

SS Mod s 118.

Last reviewed: 23 November 2011

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[¶46-880] Public risk insurance

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This is a particularly important insurance cover. If the body corporate does not have adequate public risk insurance cover and it incurs a liability exceeding its cover, then the lot owners must make up the difference. This highlights the need for special attention when determining the amount of cover and when completing the proposal form. The proposal form is important because failure to disclose material information in the proposal may impact on the right of the body corporate to claim on the policy (eg where domestic cover is taken out for a building containing commercial uses).

The public risk insurance must be maintained for the common property and "relevant assets". Relevant assets are assets for which it is practicable to maintain public risk insurance. For example, a motor vehicle would need to be insured but investment bonds could not be insured under a public risk policy. The body corporate is not required to maintain public risk insurance for any other property (eg a lot owned by another person).

The insurance is for amounts the body corporate becomes liable to pay for—

- compensation for death, illness and bodily injury, and
- damage to property.

The cover must be for at least $10,000,000 for a single event **and** at least $10,000,000 in a single period of insurance. In the case of many bodies corporate this minimum amount will be inadequate. A body corporate should obtain professional advice as to the amount of cover appropriate for its particular scheme (eg from an insurance broker).

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: Std Mod, s 187

Acc Mod s 185

Com Mod s 143

SS Mod s 121.

Last reviewed: 23 November 2011

[¶46-900] Other insurance covers

Click to open document in a browser

So far we have dealt with insurance that is required to be put in place by the BCCM Act and the Standard Module. However, the BCCM Act allows the body corporate to put in place additional insurance. It may do this "in the way and to the extent the body corporate decides". Additional insurance may take the form of an additional policy or an additional cover on the building insurance policy. All these additional covers must be authorised by a decision of the body corporate. Such a decision must be made by resolution of either the committee or a general meeting. **Form B157 (¶74-520)** shows the type of resolution required. Examples of additional insurance include:

- directors and officers cover
- machinery breakdown
- cost of alternative accommodation.

Apart from these types of additional cover, a body corporate, because of the nature of its scheme or the use or activities on parts of the parcel, may be required by another Act to take out a particular type of insurance. Examples of this type of insurance include workers compensation and home building insurance.

A body corporate must have an insurable interest (based on normal legal principles) in these additional covers because the "imputed" insurable interest under s 190 of the BCCM Act only applies to insurance "required to be put in place under the regulation module".

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 189, 190.

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[¶46-920] Use of insurance money

Click to open document in a browser

Special provisions apply where a body corporate receives an amount of insurance money for damage to property, other than an amount paid under a voluntary insurance scheme. If the body corporate is authorised by a resolution without dissent it may apply the money for a purpose other than the repair, reinstatement or replacement of the damaged property. Otherwise, the money must be applied to such repair, reinstatement or replacement unless the work would be unlawful (eg because of a building or planning restriction).

In *The Esplanade* [2015] QBCCMCmr 586 (15 December 2015), the adjudicator considered whether (in the context of a three lot small scheme on a BUP) it was appropriate for the owners of lot 3 to have control over the way in which insurance proceeds were spent as a result of claims brought by lots 1 and 2.

Essentially, as a result of storm damage in 2013, the interiors of lots 1 and 2 were damaged and the damage covered by the body corporate's insurance. The body corporate received $63,177.80 from its insurance provider, some of which was spent repairing the damage with the balance remaining in the body corporate's account.

After a number of months the owners of lot 1 and 2 had not spent all of the insurance proceeds due to the fact that certain works were undertaken at a cheaper rate than expected and certain other work was not scheduled to be completed until the owners had returned from overseas.

The owners of lots 1 and 2 became concerned that if the balance of funds were left with the body corporate, they would be spent on other proposals submitted by the lot 3 owners so that they would be unable to complete the final necessary works to lots 1 and 2.

Accordingly, the owners of lot 1 and 2 submitted a motion proposing that the excess insurance monies be handed over to them. The motion required was without dissent and predictably, the owners of lot 3 objected to lots 1 and 2 receiving the balance insurance proceeds.

The owners of lot 1 brought an adjudication application seeking an order that the lot 3's opposition to their motion was unreasonable.

The adjudicator agreed with the owners of lot 1 and held that:

- The owners of lot 3 were not entitled to control spending of the funds on the repairs
- There was no requirement on the owners of lots 1 and 2 to spend the insurance process within a specified time
- The funds should have been paid to the owners of lots 1 and 2 to allow them to undertake the rest of the repairs as required, and
- In the event the owners of lots 1 and 2 sought further funds from the body corporate in respect of the repairs, they would have no recourse to any further funds.

Where the work is unlawful, the body corporate will need to consider a motion for a resolution without dissent or an application to the District Court for reinstatement of the building (s 72 BCCM Act). Alternatively, it will need to consider terminating the scheme under Ch 2, Pt 9 of the BCCM Act.

Where the scheme is to be terminated, the money must be applied as follows:

(a) first, towards discharge of registered mortgages, and
(b) the balance as required by the order or resolution under which the termination is being effected.

Payments to a registered mortgagee of a particular lot must be in proportion to the total insurance money attributable to that lot. The starting point to determine that proportion is the interest schedule lot entitlements. An adjustment must then be made for additional cover attributable to that lot for improvements notified under s 183 of the Standard Module.

Where a voluntary insurance scheme is involved, the money must be paid, subject to the prior claim of a registered mortgagee, to the owner of the damaged property. That owner is then responsible for reinstating the property.

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Money relating to an indemnity (eg where a person sues the body corporate for damages for personal injury) is usually paid directly by the insurer, on behalf of the body corporate, in discharge of the liability. Money relating to other types of loss (eg “key man” insurance, loss of profits, etc) would be paid into the administrative fund. (Amounts received under policies for destruction of items of a major capital nature are payable into the sinking fund but these compensatory type payments do not fall under that category.)

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 72, Ch 2, Pt 9

Std Mod s 183, 189, 190

Acc Mods 181, 187, 188

Com Mod s 139, 145, 146

SS Mod s 117,123, 124.

Last reviewed: 5 February 2016

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[¶46-940] Insurance by owners

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The BCCM Act is silent on the question of insurances by lot owners. Therefore, a lot owner can take out any insurance, subject to there being an insurable interest where, as a matter of law, this is required. The two most common covers for residential lot owners are contents and public liability. Ideally, these should be covered on a policy that "dove-tails" with the body corporate policies to ensure that what is not covered by one policy is covered by the other. Sometimes a body corporate insurer will offer a tailored policy to lot owners to ensure this compatibility of covers.

Depending upon the type of lot and how it is being used, a lot owner may require other insurances. The advice of a competent insurance broker should be obtained where special circumstances exist.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶46-960] Mortgagee insurance

Click to open document in a browser

Provided a body corporate has insurance cover in place, the interest of a registered mortgagee of a lot is taken to be noted on the policy for the insurance. The following should be noted about this particular provision of the BCCM Act:

- It applies to every policy and not just to building policies.
- While the mortgage must be registered, no notification is required to the body corporate for the provision to operate. Therefore, before payments can be made distributing insurance proceeds (upon reconstruction or termination of a scheme) searches of the register would need to be made.
- Insurers will need to consider whether they are at risk paying the proceeds of major claims to bodies corporate without regard to the interests of mortgagees. While the body corporate is under a duty to attend to the payments to mortgagees, if it fails to discharge that duty a mortgagees who suffer a loss may seek indemnity direct from the insurer.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 192

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[¶46-980] Insurance by body corporate managers

Click to open document in a browser

The BCCM Act is silent on the question of insurances by body corporate managers. Clearly, as business people they need a range of insurances. They should rely upon the advice of a competent insurance broker when deciding what insurances to effect. However, one cover that should be regarded as essential is a professional indemnity cover. A body corporate manager carries substantial risk of liability to the bodies corporate they manage, as well as the individual owners and third parties (such as lot occupiers, solicitors, search agents and even contractors).

Before a body corporate appoints a body corporate manager it should ensure that the manager has adequate professional indemnity insurance.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

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[¶47-000] Subrogation

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Where loss or damage is caused by a third party, in circumstances where the third party would be liable to the insured, then the rights of the insured against the third party pass to the insurer when the insurer settles the claim. This is the principle of subrogation. Sometimes the insurer restricts their rights where there is a family or other personal relationship between the insured and the third party. While the *Insurance Contracts Act 1984* (Cth) removes the right of subrogation against an employee of the insured, it does not remove the right where there are family or personal relationships. However, it does restrict the right where there is a family or personal relationship and "the insured has not exercised those rights and might reasonably be expected not to exercise those rights" because of that relationship. This means that, in the absence of express provision in a body corporate's policy of insurance, a lot owner may be at risk of having an insurer exercise their right of subrogation where the lot owner was responsible for the loss or damage. Even where there is express provision, the lot owner will usually be liable where they are guilty of serious or wilful misconduct.

For example, if a lot owner negligently causes a fire in the building and the body corporate suffered a loss as a result, the body corporate would claim on its building insurance policy. The insurer would pay the claim and there is a risk that the rights the body corporate had to sue the lot owner for negligence would be subrogated to the insurer. Under normal circumstances an insurer would not seek to exercise these rights, but there is no absolute bar in the *Insurance Contracts Act 1984* (Cth) and the BCCM Act is silent on the issue. (This is in contrast with the position under the New South Wales *Strata Schemes Management Act 1996* where s 92 negates the insurer's subrogation rights unless it is proved that the act or omission of the lot owner that caused the damage was wilful.) When effecting insurances, care should therefore be taken to ensure that this issue is either satisfactorily dealt with under the body corporate's policy or the lot owner is covered under their contents policy.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: *Insurance Contracts Act 1984* (Cth), s 65, 66

Strata Schemes Management Act 1996 (NSW), s 92.

Last reviewed: 31 July 2006

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[¶47-020] Owner's rights against body corporate

Click to open document in a browser

A lot owner has the same rights to sue the body corporate as any other person. This applies to suits involving the common property, even though the lot owner is a part owner of the common property. If successful, the verdict (including costs) may be required to be paid from a special contribution from which the lot owner is excluded.

Accommodation Module

The position is the same.

Commercial Module

The position is the same.

Small Schemes Module

The position is the same.

Law: BCCM Act s 314.

Last reviewed: 31 July 2006

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[¶47-030] Annual meeting insurance disclosures

Click to open document in a browser

A notice of annual general meeting must be accompanied by particulars of all current insurance policies. These particulars must be either part of the notice of the meeting or attached to the administrative fund budget and must include the following for each policy:

(a) name of insurer
(b) amount of cover under the policy
(c) a summary of the type of cover (eg public risk, building)
(d) amount of the premium
(e) the amount of any excess
(f) the date the cover expires
(g) the amount and type of any financial or other benefit given, or to be given, by the insurer, for the insurance being taken out, to any of the following –

(i) the body corporate
(ii) a member of the body corporate
(iii) a member of the committee of the body corporate
(iv) a person engaged as a body corporate manager or service contractor for the scheme
(v) an associate of a person mentioned in (iv).

Accommodation Module

The position is the same.

Commercial Module

There is no corresponding provision.

Small Schemes Module

There is no corresponding provision.

[¶55-010] Introduction

Click to open document in a browser

Over the years, strata and community titles projects have been a rich source of disputes for Australian courts and tribunals and the lawyers that practise in them. In many cases, the disputes should not have arisen. In other cases, while the disputes are understandable, they should have been resolved long before they reached the courts or tribunals.

Before dealing with the actual dispute resolution mechanisms in the *Body Corporate and Community Management Act 1997* (BCCM Act), three related issues need to be examined briefly:

- Human conflict in a community titles context (¶55-020)
- Conflict management techniques (¶¶55-030)
- The use of mediation to resolve this type of conflict (¶55-040).

The objective is to demonstrate that mediation is a particularly valuable mechanism to deal with community title disputes and to provide a better understanding of how mediation works in practice.

Last reviewed: 11 July 2013

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[¶55-020] Conflict in community titles context

Click to open document in a browser

Community title disputes are clearly distinguishable from most other types of disputes, with the possible exception of some types of matrimonial disputes. They generally fall within the "neighbourhood dispute" category. The fundamentally distinguishing feature is the need for the disputant parties to have an ongoing neighbourly relationship. To illustrate this by way of example:

Example

Dispute A

John is driving his motor vehicle along Queen Street. Peter is driving his vehicle in Creek Street and collides with John at the corner of Creek and Queen Streets. Both deny liability and, after all of the preliminary processes, end up in court in a bitter battle to determine who must pay for the damage to both vehicles. John wins and Peter is left, not only with the damages costs, but also the legal costs and the trauma of the battle and the loss. In his own mind he still does not accept responsibility.

Dispute B

Mark and Tony are both drinking at a hotel in The Valley. They did not know each other before this occasion. Their conversation develops into an argument and Mark ends up hitting Tony in the face, breaking his nose. Tony sues Mark for damages. Mark defends the action on the basis that Tony provoked the fight and that, under those circumstances, he should not be liable. The matter goes to a hearing and the judge decides in favour of Mark. Tony ends up with a broken and crooked nose, the prospect of an operation to straighten the nose and the bill for legal costs.

Dispute C

Bob lives in a high rise home unit building. Peter lives in the unit above Bob's. Peter has a large collection of pot plants on the balcony of his unit, which balcony is situated immediately above Bob's balcony. Peter waters his pot plants every day and the water drips down onto Bob's balcony. Bob takes action to stop Peter from watering his pot plants. Bob is successful and, as a result, Peter's pot plants die in the summer heat.

Both parties to each of the above disputes have ill feelings towards each other.

The parties who lost the battle have particularly strong feelings, especially when they still feel that they were the innocent party.

In the case of Disputes A and B, the parties can get on with their lives and their recovery from the ordeal without having to face each other on an ongoing basis.

In the case of Dispute C, Peter and Bob have to continue to live in close proximity to each other.

The likelihood is that they will meet each other on a regular basis and they will be involved in the joint decision-making process that underlies the operation of a community titles scheme. In short, they have to continue to get along with each other on a day-to-day basis.

There is a strong likelihood that further conflict will occur between them.

Matrimonial disputes involving children are similar in that there will be the need for ongoing contact between the parties. This can often lead to an extension of the personal trauma of the parties and the possibility of further conflict. It is therefore not surprising that mediation is used extensively in the resolution of matrimonial disputes.

This leads to the question of how disputes normally arise in a community titles context.

These disputes usually involve one or more of the following:

- property rights;
- interpreting the law;
- deficiencies in the law;
- poor governance;
- poor management; and
- daily living tensions.

The potential for disputes in community titles schemes and the special nature of those disputes require:

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- greater effort on the part of everyone to manage the circumstances that could lead to a dispute (***dispute risk management***); and
- commitment to deal with the dispute in an effective way (***dispute management***).

Last reviewed: 11 July 2013

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[¶55-030] Conflict management program

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Effective “dispute risk management” and “dispute management” require a comprehensive ***conflict management program***. Four things are important in helping to avoid disputes in a community titles scheme and these must underpin any conflict management program. They are:

- clear standards
- a sense of community
- good communications, and
- good management.

Clear standards

Clear standards involve clear and effective laws regulating community titles, as well as appropriate well-drafted by-laws.

A body corporate obviously has no control over the laws that apply to community titles schemes, except to the extent they are able to adopt a regulation module that most suits the particular scheme.

However, through industry associations and local members of Parliament a body corporate can play a part in influencing improvement of community title laws. At body corporate level, care should be taken to apply the most appropriate management module and to have a good set of by-laws.

Good by-laws do not come from good precedents, but rather from a thorough assessment of the particular community titles scheme, followed by careful identification of the issues to be dealt with and specialist advice on areas of management and maintenance of common property.

Finally, the by-laws need to be professionally drafted in plain English, validly adopted by the body corporate and recorded by the Registrar of Titles.

A sense of community

A sense of community and pride within the scheme can have the effect of uniting owners and residents and motivating them to preserve peace and harmony in their community.

Everyone, owners and tenants alike, should feel part of the community and be committed to its wellbeing.

Inevitably, there will be someone who does not conform. However, a strong sense of community will help deal with such a person. He or she will either respond positively or be increasingly marginalised to the extent where they become less disruptive or entirely ineffective.

This sense of community can be achieved in a number of ways.

Social functions and regular gatherings of owners and tenants can be very helpful. For example, the body corporate can arrange drinks or coffee after its meetings and invite owners to stay on and chat.

An invitation can also be extended to tenants so that they have the opportunity to speak with owners and body corporate office bearers and understand the issues currently confronting the body corporate. This approach is far better than treating tenants as second class citizens.

Newsletters can also generate a real sense of awareness, pride and co-operation. Again, they should be made available to tenants and written in a way that makes tenants feel like a valuable part of the community.

Inevitably, it is up to the individual members of a body corporate to volunteer their time to keep community spirit alive.

Good communications

Good communications are also essential. They start with clear communication of the standards by which people are judged. For example, everyone (particularly tenants) should be given a copy of the by-laws and be made aware of the management module that applies to the community titles scheme. Too often, by-laws are breached because owners or tenants are unaware of their contents.

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Tenants who have no idea of the contents of the by-laws initially feel reticent about what is required to conform to community standards. However, this can quickly lead to indifference when they get the feeling that nobody cares.

This information process must be followed by good but sensitive communications in the event that problems are encountered.

The way a problem is dealt with will often determine whether it is resolved or inflamed. It is always best to speak to people rather than make demands or write letters.

Borrowing one particular approach from Asian culture can be particularly useful. It involves appreciating the need for the other party to "save face". This starts with giving them the benefit of the doubt.

For example, when you approach them it is best done by saying, *"I am sure you are unaware, but our by-laws require wet garbage to be securely wrapped before being put in the shute. Our cleaner would really appreciate it if you could do that in future".*

That approach invites the response, *"I wasn't aware, but that's no problem. Thank you for letting me know".* The owner or tenant is able to comply without losing face.

If the friendly approach does not work, then one moves to the next level — a firmer requirement.

However, even this should be done in a way that invites compliance rather than provoking defiance.

Only when these approaches fail should recourse be had to nasty letters of demand and applications to the Commissioner for Body Corporate and Community Management. The prospect of internal mediation should also be considered. This is dealt with in ¶55-040.

Management

Management plays an important role in all of these things. If management is efficient and sensitive, then one of the very sources of dispute will be virtually eliminated.

Management needs to be "solution oriented" rather than "problem oriented". This requires a proactive approach to resolving issues along the lines of a "peacemaker". Where management itself is involved in an issue, then one of the office bearers of the body corporate should be available to act as the peacemaker.

Dispute management

Unfortunately, the existence of these factors will not, of themselves, eliminate disputes. Regrettably, both parties need to recognise these factors and work towards a solution together and that program cannot be successful where one party refuses to acknowledge a problem.

When a dispute does occur, the issue then remains as to how it can best be dealt with. This leads to the question of dispute management.

The two most valuable aids to dispute management within a community titles scheme are:

- a ***positive attitude*** to deal with disputes; and
- a ***community relations person***.

Positive attitude

As part of the sense of community, everyone should have a desire to avoid disputes.

The communal culture should be one of harmony and compromise. There should be a generally accepted expectation that disputes will be resolved within the community. This will assist with motivating people to find their own solutions to problems. It will also complement the whole concept of mediation.

Clearly, this sounds like Utopia, but remember, what is being suggested is an environment that will not always work, but will, if properly promoted, assist in either:

(a) finding the best solution to the dispute; or
(b) minimising the impact of the dispute on the community.

Community relations person

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The community relations person will be a key player in the dispute management process. The person must be carefully chosen for “people skills”.

While the body corporate manager could undertake this role at an extra cost to the owners, it would be preferable for a member of the community who is known and respected by the community to undertake the role.

However, time constraints and the pressures of work and family life may mean no owner is available to volunteer their time.

Body corporate managers with large businesses may wish to consider engaging a person to specialise in community relations services.

Such a person can help a community develop the skills to implement a conflict management program and can be “on call” to visit disputant parties when a dispute occurs.

Such a position, while adding to the overheads of the business, may well have valuable marketing benefits. It may even be possible to make the community relations person’s services available on an “additional fee” basis.

At the first sign of a dispute, the community relations person (whether internal or external) should visit both of the disputant parties to see if there is anything that can be done to assist in resolving the dispute.

Holders of this position should operate according to strict rules of impartiality and confidentiality and these rules should be known to everyone in the community. They effectively act as mediators.

Last reviewed: 11 July 2013

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[¶55-040] Mediation

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First there needs to be an understanding of what is meant by mediation. It is a process that can be used by two people in dispute who are genuinely interested in setting hostility aside and discovering a way of resolving their conflict peacefully.

They tell their story to a neutral professional who has no stake in the outcome of the mediation and whom they trust. The mediator does not take sides, but assists the participants to create their own mutually beneficial solutions.

The goal of a mediator is to foster a fair environment that facilitates mutual, respectful problem-solving efforts by the parties. To reach that goal, a mediator tries to assist those involved in the conflict to communicate clearly with each other, identify their own needs and then work together to develop a solution that meets those needs.

Mediators are neither counsellors nor therapists. However, the more successful mediators will handle their role with compassion for both sides.

Mediators help focus attention on specific problems or issues. The mediator guides those in conflict through a series of problem-solving steps so they can find their own solutions. (Extracted from "From Hatred and Blame to Compassion and Resolution", Jack A Hamilton PhD, *The California Therapist*, Jan/Feb 1997.)

The process has been formally defined in the following terms in the publication *Mediation — A Guide for Victorian Solicitors* (Alternate Dispute Resolution Committee, Council of the Law Institute of Victoria):

> "Mediation is an informal process, in which an independent and impartial person is appointed by the parties in conflict to facilitate communication of the issues and the needs of those involved without prejudicing their legal rights. The mediator is neither a judge nor an arbitrator and has no authority or power to make a decision or to give advice to any party. However, a mediator may canvass options to assist the parties in reaching an acceptable settlement of the conflict."

Mediation is understood in similar terms in the North American context.

At the 44th Community Associations Institute National Conference in the United States (*Mediation as a Dispute Resolution Mechanism: Hot Topics and Current Trends*), mediation was defined in the following terms:

> "Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties. Mediation is an evolving process and the parties determine the process, strategies and eventual outcome."

Mediation is not new. It has been the principal means of dispute resolution in China since ancient times and it is practised extensively in Asian countries where litigation in the Western sense is virtually unknown.

In Australia, mediation has been used in industrial disputes since before the Second World War.

It is used extensively by the Family Law Courts and by community justice centres throughout Australia. Also, in most courts a system of mediation now operates. Novel but important uses for mediation are being developed.

In the United States, peer mediation programs are being used increasingly in high schools to resolve conflict between students. Under these programs, peer mediators are trained using videos and course material so that they can deal with a range of typical school-yard conflicts.

There is also a range of internet on-line mediation services. These provide an alternative to face-to-face conflict resolution.

Mediation is different from litigation, counselling, conciliation and arbitration.

Litigation involves use of the court system. It is a "win/lose" or adversarial system.

Counselling is more to do with personal emotions. It seeks self-awareness and helps people to change their reactions to certain situations.

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Conciliation is very similar to mediation, except that it is non-consensual — it is imposed upon the parties.

Arbitration is also non-consensual and is adversarial in nature — not too different from litigation.

The form of conciliation provided for in the BCCM Act is more like mediation in that it is voluntary and a party may withdraw at any time.

The main difference between mediation and conciliation in a community title context will be the approach of the conciliator. It is likely to be firmer and more probing than the approach of a mediator in a straight mediation session.

Confidentiality and preservation of an ongoing relationship are important outcomes of a resolution of a community titles dispute. Resolution of such disputes in this manner can maximise the chances of the parties living within their community in an ongoing harmonious way. This is often the case because the mediation process has assisted the parties in delivering a "win/win" outcome. That is not to say that the outcome has to be one of compromise. An ideal mediation produces a real win/win situation rather than mere compromise.

A famous example of this is cited in Fisher & Ury, *Getting to Yes* (Penguin, 1981):

> "Two young girls wanted an orange. In a win/lose situation, one girl would get the whole orange and the other would get none. A compromise solution would be for one girl to get half the orange and for the other girl to get half. A win/win solution would be to look for the needs or interests of the girls. Why do they want the orange? It may turn out that one girl wants the drink of the juice and the other girl wants the peel to bake a cake, or perhaps the seed to plant for a science experiment. In this situation, it is possible for a co-operative solution to be arrived at under which both girls achieve what they want. The orange can be squeezed to extract the juice for one girl, while the other girl can be given the peel and/or the seeds. This is a win/win situation for both.
>
> In the case of the orange, there are five possibilities:
>
> (a) Both girls can avoid conflict by agreeing that neither of them will have the orange. This is a lose/lose situation.
> (b) One of the girls can decide that she wishes to avoid a conflict and submit to the wishes of the other girl by giving her the orange. This is a lose/win situation.
> (c) The girls can compete by "fighting" over the orange on the basis that the winner takes the whole of the orange. This is a win/lose situation.
> (d) The girls can compromise by cutting the orange in half and taking half each. This is a part win/part lose situation.
> (e) The girls can determine what each want with the orange and arrive at a solution where one gets the juice and the other gets the peel and seeds. This co-operative approach produces a win/win situation.
>
> It is the co-operative win/win situation that is the objective in a mediation process."

When dealing with community titles disputes it is also worth keeping in mind that many disputes are about power. They are not about the law or about the facts of the case. The impact of the power dynamic cannot be understated.

The dispute (and resultant litigation) is merely a vehicle to express feelings about issues.

This becomes an important factor when trying to bring about a settlement of the dispute. Merely focusing on the law or the facts may not result in a solution.

One has to get to the underlying issue and ensure that it is dealt with in the chosen solution. If this can be achieved, then the legal and factual issues can usually be accommodated without too much difficulty. This is another reason why mediation is such an effective mechanism for resolving community titles disputes.

The chances of a successful mediation will to some degree depend upon the choice of the mediator. In the case of a community titles dispute, the choice will usually be out of the following:

- a volunteer (eg a member of the community titles scheme)
- a private practitioner (who could be either agreed to by the parties or nominated by a third party)
- a formal mediation session under the BCCM Act (ie by a specialist mediator or a dispute resolution centre mediator).

The actual choice of a mediator depends to some degree on the nature of the conflict. For example, if the dispute is between the resident unit manager and the owners as to what duties the caretaker should perform, then aside from a mediator, the parties may want to enlist the assistance of a specialist building management consultant to review the caretaking agreement, visit the complex and write a report detailing the needs of the complex and those duties which should be performed by the caretaker for that complex.

Skills, expertise and stature are important considerations.

Sometimes expertise is less important. A mediator with well-developed process skills and stature may not require particular expertise in the subject matter of the dispute. Costs will also be a factor in the final choice.

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[¶55-100] Introduction

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The BCCM Act set up extensive mechanisms for resolution of community title related disputes. Where it has not been possible to resolve the dispute within the scheme itself, then recourse can be had to the relatively inexpensive and quick processes set out in that Act.

Those processes will be dealt with in this part of the text. Interestingly, they also emphasise the mediation approach. They apply to disputes about:

- the legislation or community management statement
- rights, powers or duties under the legislation or community management statement
- lot entitlements
- body corporate managers, service contractors and letting agents.

These mechanisms are intended to be used exclusively for community title disputes, and recourse directly to the Supreme Court is very limited.

The BCCM Act also authorises the provision of information and education services aimed at promoting the avoidance of disputes. The BCCM website operated by the government and accessible at www.justice.qld.gov.au/justice-services/body-corporate-and-community-management contains great resources including plain English fact sheets and answers to commonly asked questions.

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[¶55-110] Overview

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An important aspect of setting up the dispute resolution mechanisms was the establishment of the office of Commissioner for Body Corporate and Community Management (**Commissioner**).

The Commissioner has administrative responsibility for the dispute resolution mechanisms, including the provision of a dispute resolution service. The Commissioner is also given the power to provide an education and information service to the various stakeholders, including the making of practice directions.

Provision is made for:

- applications for resolution of disputes
- dispute resolution recommendations before an application is referred for adjudication
- mediation and conciliation
- department adjudicators (who determine applications)
- specialist adjudicators (who determine more complex disputes)
- enforcement of orders
- appeals to the District Court on questions of law.

.01 Law: Ch 6.

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[¶55-120] The Commissioner

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The Commissioner is appointed under the *Public Service Act 2008* (Qld) and has responsibility for administration of Ch 6 of the BCCM Act and for providing a dispute resolution service.

The Commissioner may also provide an education and information service (readily available through its website found at ¶55-100) for helping lot owners, members of the public and bodies corporate become aware of the right and obligations under the Act and to increase the proficiency of dispute resolution officers.

The Commissioner is subject to direction from the Department of Justice & Attorney-General and may delegate a power to a public service employee who is appropriately qualified to exercise that power.

In performing official functions under Ch 6, the Commissioner has the privileges and immunities from liability that a magistrate has in exercising the jurisdiction of a Magistrates Court.

The scheme of Ch 6 is for the Commissioner to receive and process applications, make dispute resolution recommendations (such as conciliation or mediation) and then, if necessary, refer the application to an adjudicator for determination.

Once the application has been referred to an adjudicator, the Commissioner has no role in relation to the substance of the dispute or the outcome sought by the application.

The Commissioner may make practice directions for the dispute resolution service about all or any of the following:

- the contents of applications, documents supporting applications or submissions about applications
- dispute resolution recommendations
- procedures for conducting the dispute resolution service.

Although a practice direction is not subordinate legislation, it is binding on those involved in the dispute resolution process.

.01 Law: s 231 to 235.

Last reviewed: 11 July 2013

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[¶55-130] Department adjudicators

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The Chief Executive appoints and contracts with Department adjudicators under the *Public Service Act 1996* (Qld) for conducting the dispute resolution service.

Department adjudicators are to be distinguished from specialist adjudicators. A person is appointed for specialist mediation, specialist conciliation or specialist adjudication on a case-by-case basis in accordance with special provisions in the BCCM Act.

In performing functions under Chapter 6, a dispute resolution officer has the privileges and immunities from liability that a magistrate has in exercising the jurisdiction of the Magistrates Court. By definition:

- A dispute resolution officer is a specialist mediator, specialist conciliator and an adjudicator.
- An adjudicator includes a departmental adjudicator and a specialist adjudicator.

.01 Law: s 236, 237.

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[¶55-140] Dispute Resolution Centre

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One of the options for the Commissioner when making a dispute resolution recommendation is Dispute Resolution Centre mediation.

The *Dispute Resolution Centres Act 1990* (Qld) sets up Dispute Resolution Centres to provide mediation services.

The Commissioner effectively makes a "referring order" under that Act, after which a mediation session is arranged. The Commissioner must comply, to the greatest practical extent, with the procedures under that Act.

This process must be voluntary and the Commissioner will only make a referring order if satisfied that the parties are voluntarily submitting to mediation. The mediation session is conducted in accordance with the Dispute Resolution Centres Act.

The Commissioner must refer the application to the dispute resolution centre closest to the scheme land, unless the parties agree that another dispute resolution centre is preferred. Evidence of anything said or done in a Dispute Resolution Centre mediation session is inadmissible in a proceeding. If a party withdraws from mediation, no agreement is reached or an agreement is reached and no further action can be taken under the Dispute Resolution Centres Act, then the director of the Dispute Resolution Centre concerned must refer the application back to the Commissioner, advising that the director's action under that Act has been completed.

.01 Law: s 248(3), 253 to 254. *Dispute Resolution Centres Act 1990* (Qld).

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[¶55-150] Specialist adjudicators

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The Commissioner may recommend an application be the subject of specialist adjudication if:

(a) the parties to the application agree on a person who is to be the adjudicator for the application
(b) the Commissioner considers that person has the qualifications, experience or standing appropriate for acting as an adjudicator in the application
(c) the parties and the adjudicator agree on the amount to be paid for the adjudication, and agree on its being paid either by a particular person in a particular way, or in the way decided by the adjudicator, and
(d) the adjudicator gives the parties written confirmation of that agreement regarding payment.

Separate from that legislative discretion to recommend specialist adjudication, the adjudication of a dispute **must** be specialist adjudication if:

(i) the dispute is about a claimed or anticipated contractual matter about the engagement of a person as a body corporate manager or service contractor or the authorisation of a person as a letting agent
(ii) the dispute is about the transfer of a letting agent's management rights under Ch 3 Pt 2 Div 8 (which deals with compulsory transfer of management rights relating to non-compliance with the Code of Conduct), or
(iii) another provision of the BCCM Act requires the adjudication to be specialist adjudication.

Examples of the provisions referred to in (iii) above are:

• adjustment of a lot entitlement interest schedule (s 48)
• review of remuneration under the engagement of a service contractor (s 130)
• disputes arising out of such a review (s 133)
• review of exclusive use by-law (s 178).

Where specialist adjudication is mandatory, the specialist adjudicator must be the person chosen by the Commissioner and need not be a person nominated by a party to the application.

However, in practice, the applicant usually nominates the person that the applicant requires to adjudicate and the Commissioner will decide if that person is appropriate, after taking into account any objection that may be raised by a party to the dispute.

Where specialist adjudication is discretionary for the Commissioner, it will not occur unless the parties agree on the person who is to be the adjudicator for the application and the basis for remunerating that person.

This effectively pre-supposes that the parties agree on the referral to specialist adjudication in the first place. If that agreement cannot be reached, agreement on the identity of and remuneration for the adjudicator will not follow.

In those circumstances the Commissioner's recommendation will not eventuate and the matter will be referred for department adjudication.

In all cases where a person is proposed as a specialist adjudicator, the Commissioner will require from that person a letter setting out:

• consent to act in the capacity of a specialist adjudicator
• evidence of the person's qualifications, experience and standing to act in that capacity
• an assurance that the person has no prior association with the scheme or parties that may give rise to a conflict of interest.

The evidence of qualification, experience and standing usually takes the form of a curriculum vitae. Where the specialist adjudication is discretionary, the letter from the specialist adjudicator can incorporate the agreement relating to costs, in which event it would need to be countersigned by the parties.

Alternatively, that agreement can be a separate document.

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It is not common for a detailed agreement to regulate the appointment of the adjudicator, as would be the case with a commercial arbitration, probably because of the quasi-judicial role the specialist adjudicator undertakes and the protections against liability contained in the Act. **Form B158** (¶74-525) is a letter of consent incorporating the agreement as to costs. **Form B158A** (¶74-527) is a bare letter of consent (suitable for use where the specialist adjudication is mandatory).

.01 Law: s 263, 264.

Last reviewed: 11 July 2013

[¶55-160] Specialist mediators and conciliators

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The Commissioner may recommend that an application be the subject of specialist mediation or specialist conciliation if:

(a) the parties agree on a person who is to be the mediator or conciliator
(b) the Commissioner considers that such person has the qualifications, experience or standing appropriate for acting, and
(c) the parties and the mediator or conciliator (or, if the mediator or conciliator is an officer of the Department, the Commissioner) agree on the amount to be paid for the mediation or conciliation, how it is to be paid and by whom it is to be paid.

Once all this has occurred, the Commissioner must refer the matter to the specialist mediator or specialist conciliator. It seems clear from the BCCM Act that the specialist mediator or specialist conciliator may be an officer of the Department, but it is open to the Commissioner to agree on a charge for their services.

There is no mention of how the agreement on the costs of the mediation or conciliation should be evidenced. An endorsed letter of proposal or an exchange of letters would appear to be a minimum prudent requirement. A professional mediator or conciliator is likely to have a standard mediation and conciliation agreement.

The process is private and entirely voluntary. It must be conducted as quickly and with as little formality and technicality as possible. Third parties may attend and participate if the dispute resolution officer is satisfied they may help resolve the dispute.

A third party may be an agent of a party intended to represent the party if the dispute resolution officer is satisfied that is appropriate. The dispute resolution officer may impose conditions to the representation and those conditions must be observed. Apart from that, an officer of a corporate party may represent the corporation and one or more owners may represent the body corporate.

A mediation session may progress to a conciliation session if the Commissioner makes a further dispute resolution recommendation to that effect and the conditions in (a), (b) and (c) above are again satisfied.

The BCCM Act does not envisage that the progression from mediation to conciliation will be automatic, without further involvement of the Commissioner. However, there does not appear to be anything preventing the Commissioner, subject to the normal formalities, recommending a mediation session, to be followed by a conciliation session if the mediation is not successful and everyone agrees.

This would remove the need for the matter to be referred back to the Commissioner before it could progress from mediation to conciliation.

In turn, the conciliation session may then progress to department or specialist adjudication conducted by the same person if:

(a) the Commissioner makes a further dispute resolution recommendation that the matter proceed to adjudication
(b) the person who conducted the conciliation is an adjudicator, and
(c) all parties to the application consent to that person being the adjudicator.

It is less clear whether the Commissioner can further link the adjudication to a mediation and conciliation session in the one dispute resolution recommendation.

Evidence of anything said or done in a mediation session is inadmissible in a proceeding.

Evidence of anything said or done in a conciliation session is inadmissible in a proceeding unless the proceeding is an adjudication conducted by the same person who acted as the conciliator.

This is a matter that must be considered by a party who is asked to consent to a matter progressing from conciliation to adjudication by the conciliator.

A mediation or conciliation session may be terminated at any time by the mediator or conciliator. A party to the dispute may also withdraw from a session at any time. When this happens, or if no agreement

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is reached, the mediator or conciliator must refer the application back to the Commissioner, unless the mediator or conciliator considers that some further action is still available.

The same applies if an agreement is reached at a session. If an application is referred back to the Commissioner, the mediator or conciliator must inform the Commissioner why the matter is being referred back.

.01 Law: s 248, 252, 256 to 262.

Last reviewed: 11 July 2013

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[¶55-165] The dispute resolution process

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There are essentially two parts to the dispute resolution process:

- The application and its processing — see Chart A.
- Resolving the dispute — see Chart B.

Chart A

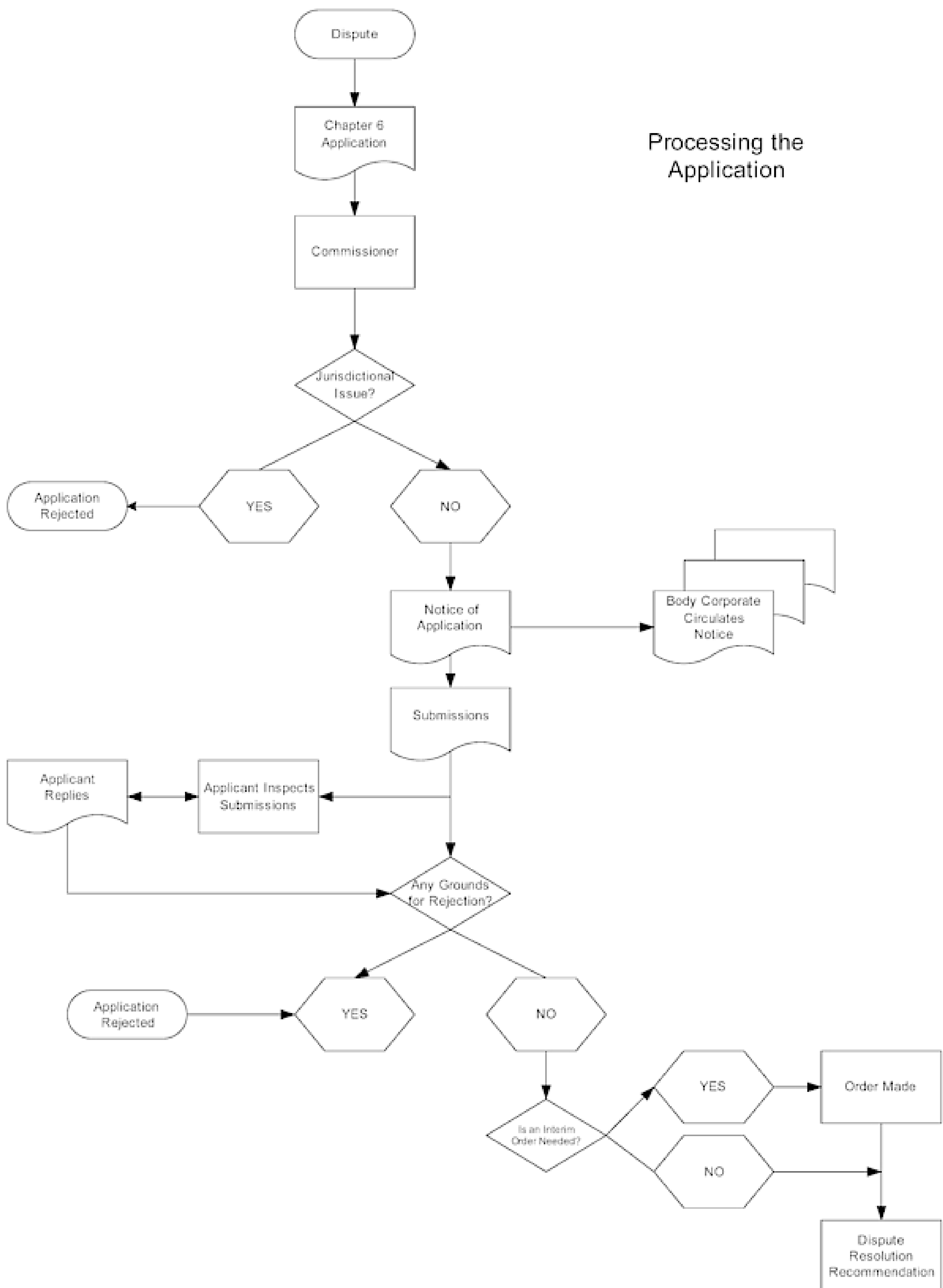
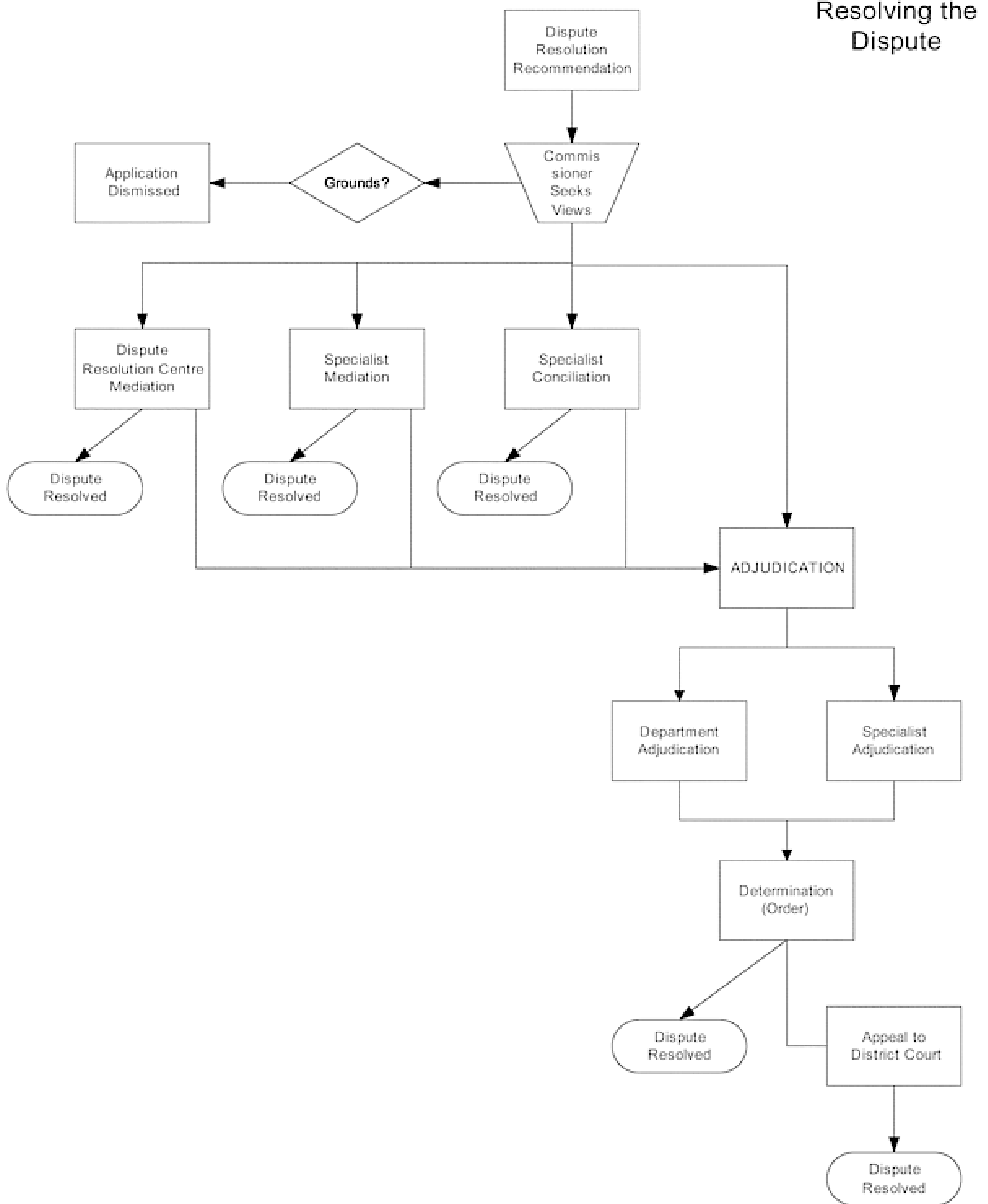

Processing the Application
Dispute
Chapter 6 Application
Commissioner
Jurisdictional Issue?
YES
NO
Application Rejected
Notice of Application
Body Corporate Circulates Notice
Submissions
Applicant Replies
Applicant Inspects Submissions
Any Grounds for Rejection?
YES
NO
Application Rejected
Is an Interim Order Needed?
YES
NO
Order Made
Dispute Resolution Recommendation

Chart B



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[¶55-170] What is a dispute?

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Exclusivity of dispute resolution provisions

Because the community title dispute resolution process is a creature of statute, the powers of the Commissioner and the powers and jurisdiction of dispute resolution officers (ie mediators, conciliators and adjudicators) are strictly limited by the provisions of the statute. When dealing with disputes this will be relevant from time to time, but it will be particularly relevant when determining if a dispute is one that can be referred for resolution under the BCCM Act.

If a "dispute" qualifies for resolution under Ch 6 of the BCCM Act, then, subject to minor exceptions, the only remedy for that dispute is:

- the resolution of the dispute by the dispute resolution process under that Chapter, or
- an order of the QCAT on appeal from an adjudicator on a question of law.

Complex disputes

The only remedy for a complex dispute is:

(a) the resolution of the dispute by:

(i) an order of a specialist adjudicator, or
(ii) an order of QCAT exercising its original jurisdiction

(b) an order of the appeal tribunal on appeal from a specialist adjudicator or QCAT on a question of law.

Exceptions to exclusivity

The exceptions are when the Commissioner summarily dismisses an application or if the dispute is a debt dispute.

Essentially, a debt dispute is a dispute between a body corporate for a community titles scheme and the owner of a lot included in the scheme about the recovery, by the body corporate from the owner, of a debt under this Act. Debt disputes are dealt with before the QCAT and an adjudicator has no jurisdiction to deal with those disputes (s 229A).

The exclusivity provisions under this Ch 6 does not limit the power of the QCAT to refer a question of law to the Court of Appeal or to transfer proceedings to the Court of Appeal.

In *Harvard Investments* v *Body Corporate* [2013] QCAT 254, the lot owner's application under Ch 6 was summarily dismissed due to the matter failing to fall within the categories set out under Ch 6. In that case, the lot owner's lot was flooded in January 2011. Repairs amounted to more than $49,000 and the lot owner sued the body corporate for failing to insure the body corporate's assets sufficiently.

After examining the facts of the case, the adjudicator noted the tribunal's minor civil dispute jurisdiction was limited to $25,000 and the amount claimed, if heard by an adjudicator, would exceed $10,000. Accordingly, the Tribunal lacked the appropriate jurisdiction.

Definition of dispute

For the purposes of Ch 6, a "**dispute**" is defined in s 227(1) as a dispute within the same community titles scheme between:

- the owner or occupier of a lot and the owner or occupier of another lot
- the body corporate and the owner or occupier of a lot
- the body corporate and a body corporate manager
- the body corporate and a caretaking service contractor

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- the body corporate and a service contractor where the dispute arises out of a review carried out, or required to be carried out, under Ch 3 Pt 2 Div 7 (which deals with the review of terms of service contracts)
- the body corporate and a letting agent
- the body corporate and a member of the committee
- the committee and a member of the committee, or
- the body corporate and a former body corporate manager about the return of body corporate property.

The reference to “owner” is a reference to a person in that capacity only and not to any other capacity, such as a service contractor or letting agent. The same applies to references to an “occupier”.

Declaratory orders

The above types of disputes involve an order in favour of one or more persons against one or more other persons.

Declaratory orders may also be made where there is no affected person for the application or respondent under s 227(2). In the case of declaratory orders, the application may be made by any of the following, if they are part of the Scheme:

- an owner of a lot
- an occupier of a lot
- the body corporate
- a body corporate manager (other than a former body corporate manager)
- a caretaking service contractor
- any other service contractor
- a letting agent
- a member of the committee
- the committee.

Purpose of Chapter 6

The BCCM Act provides a purpose statement for this Ch 6 at s 228 and it is to resolve disputes about:

- contraventions of the BCCM Act or community management statements
- the exercise of rights or powers, or the performance of duties, under the BCCM Act or community management statements
- the adjustment of lot entitlement schedules, or
- matters arising under the engagement of persons as body corporate managers, the engagement of certain persons as service contractors, and the authorisation of persons as letting agents.
- in addition, Ch 6 authorises for education and information services to be provided to promote the avoidance of disputes.

By virtue of s 7 of the *Acts Interpretation Act 1954* (Qld), references above to the BCCM Act include the regulations under the Act, including the particular management module that applies to the scheme. Once it has been established that the dispute qualifies for resolution under Ch 6, the preparation of an application may be progressed.

Structure of the dispute resolution process

The main elements of the dispute resolution process are:

- the definition of the dispute and discovery of the relevant parties to that dispute
- evidence gathering of conduct allegedly causing the dispute
- informal attempts by the parties to deal with the problem
- applications to the commissioner
- dispute resolution recommendations, especially at the preliminary stage of the dispute resolution process
- mediation, conciliation and adjudication

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- orders, including interim orders, by adjudicators
- enforcement of orders through a Magistrates Court, and
- appeals to the QCAT on questions of law.

.01 Law: s 227, 228, 229, 230;s 7,*Acts Interpretation Act 1954* (Qld).

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[¶55-180] Preliminaries to making applications

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Before a person makes an application to the Commissioner for resolution of a dispute, the person should ensure that he, she or it is qualified to make that application. The following analysis is essential:

1. Is there a "dispute" within the meaning of Ch 6 of the BCCM Act?
2. Is the person making the application (including a scheme body corporate party) a party to or directly concerned with that dispute?
3. Does the dispute relate to the contravention of a by-law?
4. Is the by-law contained within the current community management statement?

To determine whether there is a qualifying dispute, refer to ¶55-170.

It is important for any by-law dispute to closely review the by-laws against the conduct complained of prior to undertaking any further action. For example, an owner's tenant may park in an area thought to be common property despite repeated requests to move their vehicle. A review of the by-laws, however, might reveal that the area complained of is not common property but the exclusive use area of another lot owner who has no issues with the tenant parking their vehicle there.

It may be that the failure to correctly identify the by-law which has been breached is not always fatal to the case.

In *Tudor Pines Village* [2014] QBCCMCmr 22 (23 January 2014), the body corporate issued a continuing contravention notice to an owner who had failed to allow the roof of his lot and external walls to be re-painted, arguing he was in breach of the by-laws, having failed to comply with s 168 of the Accommodation Module.

The adjudicator was not satisfied that the owner had breached the by-laws but nevertheless ordered that the owner ensure his roof and external walls were painted given the obligation under s 160 of the Act.

If the dispute relates to the contravention of a by-law, then the need for a preliminary procedure to occur should be considered. This preliminary procedure relates to the service of a by-law contravention notice and varies depending upon whether the body corporate or the owner or occupier of a lot is the complainant.

If the dispute is between the body corporate and the owner or occupier of a lot, and the dispute arises because the body corporate reasonably believes:

- the owner or occupier has contravened a provision of a by-law, and
- the circumstances of the contravention make it likely the contravention will continue or be repeated,

then the body corporate may only make the application if it has given the owner or occupier a contravention notice for the by-law contravention the subject of the dispute.

Alternatively, the body corporate must qualify for exemption from this restriction. Exemption is available in one of two circumstances:

(1) if the dispute about the by-law is incidental to the application by the body corporate for an order to repair damage or reimburse an amount paid for repairs (ie it is incidental to an application for an order under s 281)
(2) where the application is for an interim order and the body corporate reasonably believes:

- – special circumstances apply for the contravention
- – because of the special circumstances, it is necessary for the dispute to be resolved urgently.

Special circumstances apply for a contravention if the contravention:

- is likely to cause:
  - – injury to persons, or
  - – serious damage to property

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- is a risk to the health or safety of persons
- is causing a serious nuisance to persons, or
- for another reason, gives rise to an emergency.

If the dispute is between the owner or occupier of a lot (**complainant**) and the owner or occupier of another lot (**accused**) and the dispute arises because the complainant reasonably believes that:

- the accused has contravened a provision of a by-law, and
- the circumstances of the contravention make it likely the contravention will continue or be repeated,

then the complainant may only make the application if he or she has, in the approved form, asked the body corporate to give the accused a contravention notice and the body corporate does not advise the complainant that the contravention notice has been given. See **Form A1** (¶70-105). The body corporate is under a duty to advise the complainant if it gives the contravention notice.

As an alternative to that process, the complainant must qualify for exemption from this restriction. Exemption is available in only one set of circumstances, namely, where the application is for an interim order and the complainant reasonably believes:

- special circumstances apply for the contravention, and
- because of the special circumstances, it is necessary for the dispute to be resolved urgently.

Special circumstances apply for a contravention if the contravention:

- is likely to cause:
  - injury to persons, or
  - serious damage to property, or
- is a risk to the health or safety of persons, or
- is causing a serious nuisance to persons, or
- for another reason, gives rise to an emergency.

.01 Law: BCCM Act, s 183A,184 to 186, 238.

Last reviewed: 4 March 2014

[¶55-183] Time limits

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Time limits apply to applications for an order declaring void:

- a meeting of the committee
- a general meeting of the body corporate
- a resolution of the committee or body corporate
- a decision of the body corporate for a specified two-lot scheme made by a lot owner agreement
- the election of an executive or other member of the committee.

The application must be made within three months of the above occurring.

If an application is made outside this time limit, the Commissioner must deal with the application in the normal way and an adjudicator to which it is referred may, for good reason, waive the non-compliance.

.01 Law: BCCM Act, s 242.

Last reviewed: 11 July 2013

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[¶55-185] Making the application

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Applications must be in the approved form (see **Form A15**, ¶70-232).

When completed it is given to the Commissioner, along with the prescribed fee (see Body Corporate and Community Management Regulation 2008 (Qld)).

The approved form makes provision for the name and address of each person affected by the application. If the application is for an outcome affecting owners or occupiers generally, or a particular class of owners or occupiers, this part may be completed by reference to the owners and occupiers generally or by reference to the particular class. In other words, it is not necessary in those circumstances to state all of the names and addresses.

The details of the Commissioner's office are as follows:

Office of the Commissioner for Body Corporate and Community Management — Department of Justice and Attorney-General

Level 11, 259 Queen Street, Brisbane
GPO Box 1049, Brisbane Qld 4001.
Tel: 1800 060 119
Email: bccm@justice.qld.gov.au
Website: www.justice.qld.gov.au/bccm

Law: s 239

Body Corporate and Community Management Regulation 2008 (Qld): Schedule.

Last reviewed: 11 July 2013

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[¶55-190] Request for further information

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After receiving the application, the Commissioner may require the applicant to give further information or material about the application.

This may include requests for amendment of the application.

The Commissioner will state the period within which the information or material must be given. The Commissioner can also require any information or material to be verified by statutory declaration.

.01 Law: s 240.

Last reviewed: 11 July 2013

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[¶55-200] Rejecting applications

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Circumstances for rejection by Commissioner

The Commissioner may reject an application under s 241:

- for lack of jurisdiction
- for a conciliation application — the Commissioner considers the dispute is not appropriate for department conciliation
- if the Commissioner believes the applicant has not made a reasonable attempt to resolve the dispute by internal dispute resolution
- for failure, without reasonable excuse, to comply with a practice direction
- for failure, without reasonable excuse to comply with a requirement to provide further information or material
- if the Commissioner is satisfied that a party to the applicant is no longer a party to the dispute (within the definition of "dispute" under s 227) and the outcome sought by the application is not longer relevant or required
- if the subject of the application is a debt dispute and a proceeding between the parties has been started before QCAT in relation to the debt dispute (debt dispute as defined under s 229A)
- if the subject of the application is a related dispute to a debt dispute (related dispute as defined under s 229A)
- if the Commissioner reasonably considers the applicant does not wish to proceed and gives the applicant 28 days to advise that the applicant still wishes to proceed and the applicant either does not respond or advises that he, she or it does not wish to proceed.

When Commissioner may make exceptions

The Commissioner may accept an application that a Commissioner is entitled to reject if it thinks it appropriate.

For example, the Commissioner may accept an application that did not comply with a practice direction because the Commissioner believes it is appropriate to make a declaratory order or an order for emergency expenditure.

Another example is the Commissioner accepting an application even though the parties did not attempt to resolve the dispute by internal dispute resolution because of a threat of violence between the parties to the application.

Notice of decision

If the Commissioner decides to reject an application, the Commissioner must immediately give the applicant a QCAT information notice.

.01 Law: s 241, 241A.

Last reviewed: 11 July 2013

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[¶55-210] Amendment or withdrawal of applications

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At any time before the Commissioner makes an initial dispute resolution recommendation (as to which see ¶55-240), an applicant may, with the permission of the Commissioner, change the application.

The permission is entirely discretionary, and the Commissioner may impose conditions to the permission.

An application may also be withdrawn by the applicant at any time before it is disposed of under Ch 6.

.01 Law: s 245.

Last reviewed: 11 July 2013

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[¶55-220] Notice of application

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The Commissioner must give written notice of the application to the body corporate and each affected person whose name does not appear on the roll as a lot owner (eg a tenant or service contractor).

That notice must include a copy of the application and an invitation to make written submissions about the application within a specified time. The invitation is to each person officially receiving the notice (whether directly from the Commissioner or via the body corporate).

Unless excused by the Commissioner, the body corporate must, within the shortest practical time after receiving the notice, give a copy (including attachments) to each owner whose name appears on the roll.

In addition, the body corporate must give the Commissioner a "**confirmation notice**". Failure to do either of these things is an offence that carries a maximum penalty of 20 penalty units.

The confirmation notice must state the persons to whom the body corporate gave a copy of the original notice and when the copy was given. If the Commissioner requires, the confirmation notice must be verified by statutory declaration.

The Commissioner must also give written notice to the applicant advising that if the applicant wishes to reply to any submission made as a consequence of the original notice, the applicant must apply to inspect them within the time allowed in the notice and make a written reply to the submissions. This reply must be confined to the issues raised by the submissions.

The Commissioner may extend the time for the making of submissions or for the making of a reply by the applicant. In the case of submissions, this is done by a further notice given in the same way as the original notice to the same persons.

In certain emergency situations, the Commissioner may refer the matter to a dispute resolution officer where it is not appropriate to refer the matter for an interim order under s 247.

An emergency situation may include a burst water pipe causing damage to common property where the replacement expense exceeds the committee's expenditure limit without reference to a general meeting.

In those emergency situations, the Commissioner need not ensure notice is provided to the relevant parties prior to referring the matter to a dispute resolution officer.

.01 Law: s 243, 243A, 244.

Last reviewed: 11 July 2013

[¶55-225] Submissions

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Anyone who receives notice of the application may make a submission to the Commissioner. The submission need not be in any particular form. **Form B159** (¶74-530) can be used for this purpose.

The submissions may be inspected and replied to by the applicant (see ¶55-220). In addition, any other "interested person" may apply to inspect the application and the submissions and obtain copies of them. Such an application must be in writing and accompanied by the prescribed fee (see Body Corporate and Community Management Regulation 1997 (Qld)).

An interested person means:

- the applicant
- an affected person
- the body corporate
- a member of the committee
- a person who has made a submission on the application.

.01 Law: s 246.

Last reviewed: 11 July 2013

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[¶55-230] Interim orders

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If the Commissioner considers on reasonable grounds that an interim order should be considered by an adjudicator because of the nature or urgency of the circumstances to which the application relates, then the Commissioner may so refer the application to a departmental adjudicator.

The referral may be made even though notice of the application has not been given or persons have not had the opportunity to make submissions, for example, to ensure a general meeting takes place as scheduled.

When the application is referred, the adjudicator deals with it in accordance with s 279. The adjudicator then refers the application back to the Commissioner to be dealt with in the usual way.

.01 Law: s 247, 279.

Last reviewed: 11 July 2013

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[¶55-240] Processing the application

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After the time has expired for making submissions and before the dispute is resolved or referred to a dispute resolution officer, the Commissioner can make one or more dispute resolution recommendations for the application.

A dispute resolution recommendation is for one of the following dispute resolution processes:

- Dispute Resolution Centre mediation
- Specialist mediation
- Specialist conciliation
- Department adjudication
- Specialist adjudication.

A recommendation for specialist mediation, specialist conciliation or specialist adjudication can only be made if the parties ask for it, or if the Commissioner is entitled to make it having regard to the conditions applying under Ch 6 (see ¶55-150 and ¶55-160).

The Commissioner can make a further recommendation.

That recommendation may be for the application to be the subject of the same type of dispute resolution process, or a different type. Where a dispute resolution officer refers an application back to the Commissioner and the dispute has not been resolved, then the Commissioner can make a further dispute resolution recommendation.

Instead of making a recommendation, the Commissioner may dismiss the application if satisfied that the dispute should be dealt with in a court or tribunal of competent jurisdiction. When this occurs the Commissioner must give a certificate in the approved form to each party.

The Commissioner is given a number of powers to assist him or her to decide on a dispute resolution recommendation that is most likely to promote a quick and efficient resolution of the application. The same powers can be used to assist in making a decision whether to dismiss the application. Those powers are:

1. To seek the views of:
    - (a) the applicant
    - (b) affected persons
    - (c) the body corporate.
2. To require a party to the application to obtain, and give to the Commissioner, a report or other information.
3. To interview persons the Commissioner considers may be able to help in resolving issues raised in the application.
4. To inspect a body corporate asset, record or other document of the body corporate. Anyone with access to the body corporate records is under a duty to make them available to the Commissioner, free of charge, within 24 hours and to give the Commissioner copies or allow copies to be taken.
5. To enter and inspect common property (including exclusive use areas) or a lot in the scheme. If any place is occupied, the Commissioner needs the consent of the owner to inspect that place and must give the occupier reasonable notice of the proposed entry time. While the owner has to consent to the entry, it would appear that no consent is required from a tenant of the owner, only the reasonable notice. If the place is unoccupied, the Commissioner still needs the consent of the owner to inspect that place and must also give the owner reasonable notice of the proposed entry time. Therefore, in the case of unoccupied places, the owner has to both consent and receive reasonable notice.

.01 Law: s 248, 250 to 252.

Last reviewed: 11 July 2013

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[¶56-000] Adjudicators

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Many of the sections in Ch 6 of the BCCM Act refer to an “adjudicator”. The word “adjudicator” is defined in the Dictionary as a person appointed —

(a) under s 236 as a department adjudicator; or
(b) under Pt 8 of Ch 6 as a specialist adjudicator.

It follows that most, if not all, of the references in the general provisions of the Act to an “adjudicator” apply equally to department and specialist adjudicators.

.01 Law: BCCM Act, s 236.

Last reviewed: 11 July 2013

[¶56-010] Referral of applications

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As soon as practicable after the Commissioner recommends that an application be the subject of specialist or department adjudication, the Commissioner must refer the application to:

- if the recommendation is for a specialist adjudication — the adjudicator decided under the recommendation, or
- if the recommendation is for department adjudication — an adjudicator appointed for conducting department adjudication.

The adjudicator to whom an application is referred cannot be the person who conducted the department conciliation for the dispute the subject of the application.

.01 Law: s 267.

Last reviewed: 11 July 2013

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[¶56-020] Adjudicator's investigation & dismissal of application

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The adjudicator must investigate the application to decide whether it would be appropriate to make an order on the application. The adjudicator has discretion whether or not to make an order; however, it is clear from the express provisions of the BCCM Act, the adjudicator must investigate the application.

But what exactly does "investigating the application" entail?

Walden v *Broadwater Tower Body Corporate* [2015] QCATA 28 *(23 February 2015)* examined what an adjudicator's investigation may or may not entail. Member Rogers found that it may be sufficient for an adjudicator to consider the application itself as opposed to *investigating the activities the subject of the application*.

Additionally, Member Rogers found that where an adjudicator decides a matter is not a "dispute" within the meaning of s 227 of the Act, there would be no further obligation on the adjudicator to investigate the substance of the dispute. The obligation is to investigate the application in light of the legislation at a whole.

Member Rogers went on to helpfully recall the ruling of Robin DCJ in *KG Tully & Anor* v *The Proprietors The Nelson Body Corporate* [2000] QDC 31 in which the judge said:

> "it is for the adjudicator to determine what ought to be done by way of investigations and there is no error of law by an adjudicator who determines that the evidence is insufficient to justify a necessary conclusion and does not actively seek further evidence to support the application."

When investigating the application or agreement (by consent of the parties) the adjudicator must—

- observe natural justice
- act quickly and with as little formality and technicality as is consistent with a fair and proper consideration of the application or agreement.

Importantly, the adjudicator is not bound by the rules of evidence. This is particularly relevant where the best evidence available would otherwise be considered inadmissible hearsay.

For a comparative situation see *Jet 60 Minute Cleaners Pty Ltd v Brownette & Anor*, in which the exercise of the jurisdiction of a referee under the *Consumer Claims Tribunal Act 1974* (NSW) was considered.

From a procedural perspective, if an adjudicator decided not to make a substantive order on an application, the adjudicator would make an order dismissing the application.

The adjudicator may make an order dismissing the application if:

(a) it appears to the adjudicator that the adjudicator does not have jurisdiction to deal with the matter
(b) the adjudicator is satisfied the dispute should be dealt with in a court or tribunal of competent jurisdiction
(c) it appears to the adjudicator that the application is frivolous, vexatious, misconceived or without substance (this is particularly relevant to schemes embroiled in entrenched disputes)
(d) the applicant fails, without reasonable excuse, to comply with a requirement of the adjudicator under s 271(1)
(e) the adjudicator is satisfied that a party to the application is no longer a person mentioned in s 227(1) for the dispute and the outcome sought by the application is no longer relevant or required, or
(f) the subject of the application is a debt dispute before the QCAT or is a related dispute to a debt dispute (see s 229A for definition of debt dispute).

The adjudicator can make such an order without investigating the detail of the application or before an investigation of an application has ended. The adjudicator can also make a compensatory order for costs against the applicant, subject to a limit of $2,000 (see s 270(4)).

An example of the dismissal of an application for want of jurisdiction under s 270(1)(b) can be found in *St Minivers* [2014] QBCCMCmr3, where Adjudicator Smith was called upon by the owner applicants to determine whether two plant rooms directly above the two lots on top of the building were common property.

The applicants argued that lots 9 and 10, which had exclusive access to the plant rooms above their lots, had converted those lots to habitable space when in fact the lots were not intended for that use. The use of those plant rooms would have created a four-storey building, not compliant with the Council's 1985 Town Planning Scheme.

The adjudicator dismissed the application, noting that the Office of the Commissioner had no jurisdiction as to the compliance with building and planning requirements for a scheme and that under s 285 of the Act there was no jurisdiction to resolve a question regarding title to land — which a declaration of common property was.

The adjudicator noted the declaration sought was not contemplated by Sch 5 of the Act (although he confirmed that list was not exhaustive), dismissed the application and invited the parties to pursue an answer through a court or tribunal of competent jurisdiction.

Application Dismissal on the grounds of being vexatious

Adjudicators have the ability to dismiss an application on the grounds of it being vexatious, misconceived and without substance as provided for within the meaning of s 270(1)(c) of the Act.

That said and perhaps with a view to ensuring all claims, no matter how misconceived, are heard it is not often that costs are awarded against a lot owner applicant as a result of their application being dismissed on vexatious grounds.

In *Walden* v *Broadwater Tower Body Corporate* [2015] QCATA 28 (23 February 2015), QCAT's appeal division was called upon to consider an adjudicator's decision in which eight of the applicant's nine outcomes sought were dismissed under s 270(1)(c).

The applicant appealed the adjudicator's decision arguing that the dispute had not been investigated by the commissioner's office, natural justice had been denied and that decisions had been made in way that no other person "of integrity and knowledge" could have made given the evidence.

In considering the adjudicator's decision, Member Rogers considered the six earlier approaches of the applicant to the Commissioner's office, the fact that the applicant was advised each time about the requirements of conducting an application to no avail, the fact that the applicant had made an application seeking outcomes which were outside the scope of legislation or which did not follow the prescribed process and commented that the applicant:

> "has argued his strongly held views without providing necessary supportive independent expert evidence"

all of which counted as evidence on which it was open to the adjudicator to make the order under s 270(1)(c).

Member Rogers confirmed the right of the adjudicator to dismiss the application and to award a modest amount of costs given the expense to which the body corporate were put in responding to each application.

.01 Law: s 269, 270.

.40 Case references. See *Jet 60 Minute Cleaners Pty Ltd* v *Brownette & Anor* (1982) ASC ¶55-203; 4 ALN N184.

Last reviewed: 12 February 2016

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[¶56-030] Investigating powers of an adjudicator

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When investigating an application, the adjudicator may do all or any of the following:

- Require a party to the application, s 271 provides an affected person, the body corporate, or another person the adjudicator considers may be able to help resolve the issues raised by the application, to:

  (a) obtain, and give to the adjudicator, a report or other information
  (b) be present to be interviewed, after reasonable notice is given of the time and place of the interview, or
  (c) give information in the form of a statutory declaration.
- In the case of a body corporate manager, service contractor or letting agent who is party to an application involving a dispute about the service they provide, require that they give to the adjudicator a record held by them that relates to the dispute.
- Invite persons the adjudicator considers may be able to help resolve issues raised by the application to make written submissions within a stated time.
- Inspect (or enter and inspect) —

  (a) a body corporate asset, or record or other document of the body corporate or
  (b) common property (including common property the subject of an exclusive use by-law), or
  (c) a lot included in the scheme concerned.

Consent of occupier to enter premises

Where a body corporate asset (such as a boat), common property or a lot is occupied, the adjudicator must obtain the consent of the occupier before entering and in seeking consent must give the occupier reasonable notice to the occupier of the time the adjudicator wishes to enter the place.

The occupier of a lot, means a person in the person's capacity as the occupier of the lot, and not, for example, in the person's capacity as a service contractor or letting agent for the scheme.

Consent of owner to enter premises

Where a body corporate asset, common property or a lot is not occupied, the adjudicator must obtain the consent of the owner before entering. An owner of a lot, means a person in the person's capacity as the owner of the lot, and not, for example, in the person's capacity as a service contractor or letting agent for the scheme. In seeking that consent, the adjudicator must give reasonable notice to the body corporate of the time when the adjudicator wishes to enter.

The legal and beneficial owner of a body corporate asset is the body corporate.

The legal owner of the common property is also the body corporate, but the lot owners are the beneficial owners, as tenants in common in shares proportional to their interest schedule lot entitlements.

For an adjudicator to enter an unoccupied body corporate asset (such as a boat) then clearly the consent of the body corporate is required. However, whose consent is required before the adjudicator can enter unoccupied common property? Is it the body corporate, or the beneficial owners, or lot owners?

Given the power and duty to act reasonably in s 94 of the Act for the body corporate to administer the common property, it is clear that the consent can come from the body corporate and need not come from the individual beneficial owners.

Failure to comply with requirements is an offence

A person who fails to comply with a requirement or obstructs an adjudicator in the conduct of an investigation under this part, commits an offence unless the person has a reasonable excuse. Maximum penalty — 20 penalty units.

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It is a reasonable excuse for a person not to comply with a requirement to give information or a document, if giving the information or document might tend to incriminate the person.

.01 Law: s 94, 271.

Last reviewed: 11 July 2013

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[¶56-040] Administrative help for adjudicators

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Adjudicators for department adjudication are entitled to receive reasonable administrative help in investigating applications from the commissioner.

Specialist adjudicators have no such entitlement, although in practice the commissioner will provide some assistance on administrative matters. Generally speaking, specialist adjudicators use their own resources and facilities to investigate and determine applications, although they do have the ability to recover associated costs through their remuneration arrangements.

Both department adjudicators and specialist adjudicators can delegate their powers, other than their power to summarily dismiss under s 270, to an appropriately qualified officer of the department.

Referral back to the Commisioner

When the adjudicator has completed the adjudicator's duties (ie made an order or dismissed an application), the adjudicator must refer the application (including any order the adjudicator has made) back to the commissioner.

Notice to all owners and occupiers of adjudicators order

If the order is a declaratory or other order affecting the owners or occupiers of the lots in the scheme, the adjudicator must give notice in a way that ensures as far as reasonably practicable, it comes to the attention of all owners or occupiers of the scheme. For example, posting a copy of the order on the notice board for the scheme.

.01 Law: s 270, 271, 272, 274 and 275.

Last reviewed: 11 July 2013

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[¶56-050] Production of body corporate records

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The body corporate or someone else who has control of the body corporate's records (eg a secretary or body corporate manager) must, if asked by an adjudicator, and without payment of a fee:

- allow the adjudicator access to the records within 24 hours of a request, and
- give the adjudicator copies of the records or allow the adjudicator to make the copies.

Failure to do those things is an offence that carries a maximum penalty of 20 penalty units. It is also an offence to obstruct an adjudicator in the conduct of an investigation of an application, without reasonable excuse. The maximum penalty is 20 penalty units.

If the obstruction relates to a person giving information or a document, it is a reasonable excuse for the person not to give that information or document if it might tend to incriminate them.

.01 Law: s 271(5), (6).

Last reviewed: 11 July 2013

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[¶56-060] Representation of parties

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For an adjudication, a party to the application has the right to be represented by an agent.

Alternatively, they may be represented by a solicitor. An agent should be appointed in writing and the written instrument should be made available to the adjudicator.

.01 Law: s 273.

Last reviewed: 11 July 2013

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[¶56-070] Conducting hearings

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The Act does not provide for an adjudicator to conduct a hearing. Nor does it provide for an adjudicator to administer an oath. Where the complexity of the subject matter is such that an adjudicator needs access to the parties or the opportunity to test any evidence, then the adjudicator may convene a meeting of the parties and require provision of information, the production of documents or the attendance of certain persons at the meeting.

The adjudicator can direct questions to various persons at the meeting and allow the parties, or their legal representatives, to direct questions.

In the latter case, the questions should be asked "through" the adjudicator rather than by the parties or legal representatives directly.

In this way the adjudicator can decide whether the question is appropriate before a person answers it. Although the adjudicator does not have the benefit of taking information on oath, s 297 (relating to the giving of false information) and s 298 (relating to false or misleading documents) will serve a similar purpose.

.01 Law: s 297, 298.

Last reviewed: 11 July 2013

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[¶56-100] Adjudicator's orders

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What can an adjudicator make orders about?

Section 276 of the *Body Corporate and Community Management Act 1997* (Qld) (BCCM Act) says that an adjudicator can only make an order about:

- A claimed or anticipated contravention of the BCCM Act
- A claimed or anticipated contravention of the community management statement for the particular scheme
- The exercise of rights or powers, or the performance of duties, under the BCCM Act
- The exercise of rights or powers, or the performance of duties, under the community management statement for the particular scheme
- A claimed or anticipated contractual matter about the engagement of a person as a body corporate manager or service contractor for a scheme
- A claimed or anticipated contractual matter about the authorisation of a person as a letting agent for a scheme.

In *MacDonald & Anor* v *Clark & Anor* (2012) LQCS ¶90-183; [2012] QSC 418, the Supreme Court of Queensland was called upon to consider s 276 and Sch 5 of the BCCM Act.

One of the parties sought a resolution of their title to land due to an encroachment issue between two neighbouring lots in a scheme. Ultimately the Supreme Court held that the adjudicator was not empowered to make a decision relating to land under s 184 and 185 of the *Property Law Act 1974*. This case highlights the importance of resolving jurisdictional issues prior to engaging in litigation on a client's behalf.

In *Paroo* [2014] QBCCMCmr 7 (14 January 2014), in the context of considering whether to overturn a body corporate's decision not to allocate exclusive use of common property to an owner, the adjudicator, after referring to the body corporate's obligation to act reasonably in anything it does as required by s 94(2) of the Act, considered the necessary approach.

Regrettably sometimes the timing of an application can impact on whether an adjudicator can make an order.

Outlook Caloundra [2014] QBCCMCmr 11 (20 January 2014) involved an application by an owner to the body corporate for approval to install a roller blind on the verandah attached to the owner's unit.

Over the months following the owner's request, the body corporate sought details from the owner including that the owner provide an independent engineering certificate regarding the installation of the blinds and a consultant's report evaluating the impact of the blinds on the aesthetics of the complex.

The owner attempted to provide both reports but was unable to find an engineer or a consultant who would write the necessary reports, and so accordingly he sought the adjudicator make an order that the committee ought to remove its unreasonable requirements regarding the reports and that the request to install the blinds be approved as they complied with the relevant by-laws.

Between the application being brought and the hearing, the body corporate retained a company to prepare a screening policy for the building. There was therefore not a dispute between the body corporate and the owner such that it was not appropriate for the adjudicator to make a decision.

The power to declare opposition to a motion was unreasonable

Under s 276(3) and cl 10 of Sch 5 of the Act, an adjudicator has the ability to declare that a motion which was not passed is declared as passed in circumstances where the opposition to that motion was unreasonable.

In *Boca Raton West* [2014] QBCCMCmr 25 (29 January 2014), the applicant body corporate sought an order concerning the grant of exclusive use of courtyards which backed onto owners building format plan town houses.

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After having draft exclusive use by-laws prepared, the body corporate put its motion to the owners for consideration at an annual general meeting.

Overall thirty owners voted “yes” to accept the exclusive use by-laws and amend the CMS accordingly; however, two owners voted “no”, when a resolution without dissent was required. Those two owners argued that the grant of exclusive use would transfer the liability for those areas to the adjacent owners. Their “no” vote meant the motion was lost.

The body corporate requested the adjudicator make an order giving effect to the motion.

The adjudicator considered the balance between protecting the genuine interests of the minority owners and upholding the justifiable position of the majority in the face of unfounded or vexatious opposition.

The adjudicator referred to *Points North* [2004] QBCCMCmr 423 (2 September 2004) and *Ocean Plaza Apartments* [2004] QBCCMCmr 452 (23 September 2004) wherein the specialist adjudicator found that it was necessary to consider the “subjective intention” of each of the lot owners who voted in opposition and whether that opposition was objectively relevant in the circumstances.

Applying that test, the adjudicator found that the opposition was unreasonable — the areas would still remain common property and thus require body corporate approval for the erection of any improvements. Regardless of the grant of exclusive use, the body corporate would still be liable to insure the areas.

A just and equitable order

Once the adjudicator is satisfied that the subject matter of the application falls within one of the above categories, then the adjudicator may make an order that is just and equitable in the circumstances to resolve the dispute.

The order may be declaratory or it may require a person to act, or prohibit a person from acting, in a way stated in the order. The question of what is just and equitable in the circumstances is a question of fact that must be decided on a case by case basis: *Re: Kurilpa Protestant Hall Pty Ltd*. However, in the case of an order invalidating a body corporate resolution, the order would not be just and equitable simply because it redressed a voting imbalance among the lot owners. In the absence of evidence of fraud, actual oppression, bad faith or ulterior motive, the majority lot owners should not be disenfranchised: *Dindas & Anor v Body Corporate for “One Park Road” CTS 2114 & Ors*.

Schedule 5 — List of orders that may be made by an adjudicator

Schedule 5 of the BCCM Act sets out a range of orders that an adjudicator may make, but the contents of that schedule are not exhaustive and are virtually in the form of examples. The table below lists the orders in Sch 5.

Furthermore, s 276 is not the only source of the adjudicator’s power to make orders.

Other sections in the BCCM Act also confer certain powers (eg s 48 relating to adjustment of interests, s 280 relating to costs of conciliation and adjudication and s 281 relating to damages and repairs).

An example of application fees being awarded can be found in Careel [2014] QBCCMCmr 30.

In that case, the applicant successfully sought an order that the respondent (who failed to respond to the application and did not attempt to participate in the subsequent conciliation conference) should pay the application fees.

The adjudicator in awarding the fees to the applicant noted that the respondent’s failure to participate without reasonable excuse had unnecessarily delayed the progress of the matter and incurred increased costs for the applicant.

These are in addition to the general powers conferred on an adjudicator (see *James & Anor v Body Corporate for Aarons community title scheme 11476*). An adjudicator does not have the power to resolve a question about title to land. With the consent of a body corporate, an adjudicator’s order may change the body corporate’s financial year, including later financial years.

However, it is important to note that some disputes may be referred to by the Commissioner to be determined by a specialist adjudicator pursuant to s 263.

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Consent orders by adjudicator

The adjudicator may also make consent orders. However, if an adjudicator makes an order in a form agreed to by the parties to the application following mediation or conciliation, the order —

- may include only matters that may be dealt with under the BCCM Act
- must not include matters that are inconsistent with the BCCM Act or another Act.

Although this requirement probably refers to formal mediation and conciliation undertaken under the BCCM Act, the same principles should be applied to consent orders generally.

An adjudicator's order may also contain ancillary and consequential provisions that the adjudicator considers appropriate.

It can fix the time when it takes effect or a time within which it must be complied with. If no time is otherwise fixed, an adjudicator's order takes effect when it is served on the person against whom it is made, or if it is not made against a particular person, when it is served on the body corporate. The order may also provide that it is to have effect as a resolution without dissent, special resolution, ordinary resolution or lot owner agreement.

Failure to attend interview does not preclude an order being made

If an adjudicator considers it just and equitable in the circumstances, the adjudicator may make an order even if a person fails, without reasonable excuse, to comply with the requirement made by the adjudicator to be present at a meeting or interview.

Administrator may be appointed by an adjudicator

An adjudicator may appoint an administrator to the body corporate to perform the obligations of the body corporate and its committee. Anything done by the administrator under the authority of the order is taken to have been done by the body corporate, committee or member of the committee.

Interim orders may be made by adjudicator

The adjudicator may make an interim order if satisfied on reasonable grounds, that an interim order is necessary because of the nature or urgency of the circumstances to which the application relates.

For example, an adjudicator may make an interim order to stop the body corporate from carrying out work on common property until a dispute about the irregularity of the proceedings has been investigated and resolved.

An interim order made by an adjudicator has effect for a period as stated by the order but no longer than 1 year. It may be extended, varied or renewed or cancelled by the adjudicator until a final order is made. Once the adjudicator makes an interim order, or decides not to make an interim order, the application must be referred back to the Commissioner. An applicant may appeal against the interim order to the QCAT.

Schedule 5

1. An order requiring the body corporate to lodge a request to record a new community management statement consistent with the statement for which the body corporate gave its consent.
2. An order requiring the body corporate to lodge a request to record a new community management statement, regardless of whether the body corporate consents to the recording.
3. An order requiring the body corporate to take out insurance or to increase the amount of insurance.
4. An order requiring the body corporate to take action under an insurance policy to recover an amount or to have repairs carried out.
5. An order requiring the body corporate —

   (a) to acquire, within a stated time, stated property the adjudicator considers necessary for the use or convenience of the owners or occupiers of lots; or
   (b) not to acquire stated property, or to dispose of stated common property, within a stated time.
6. An order requiring the body corporate to call a general meeting of its members to deal with stated business or to change the date of an annual general meeting.

7. An order declaring that a meeting of the committee for the body corporate, or a general meeting of the body corporate, is void for irregularity.
8. An order declaring that a resolution purportedly passed at a meeting of the committee for the body corporate, or a general meeting of the body corporate was, at all times void.
8A. An order declaring that a decision purportedly made by a lot owner agreement was at all times void.
9. An order declaring that a resolution purportedly passed at a meeting of the committee for the body corporate, or a general meeting of the body corporate, is a valid resolution of the meeting.
9A. An order declaring that a decision purportedly made by a lot owner agreement is a valid decision of the body corporate.
10. If satisfied a motion (other than a motion for reinstatement of scheme land or termination or amalgamation of the scheme) considered by a general meeting of the body corporate and requiring a resolution without dissent was not passed because of opposition that in the circumstances is unreasonable — an order giving effect to the motion as proposed, or a variation of the motion as proposed.
11. If satisfied a contribution levied on lot owners, or the way it is to be paid, is unreasonable — an order reducing or increasing the contribution to a reasonable amount or providing for its payment in a different way.
12. An order requiring the body corporate to have its accounts, or accounts for a stated period, audited by an auditor stated in the order or appointed by the body corporate.
13. If satisfied the applicant has been wrongfully denied access to, or a copy of, information or documents — an order requiring the body corporate to give stated information to the applicant, to make particular information available for inspection by the applicant, or to give copies of stated documents to the applicant.
14. If satisfied the body corporate has the right to terminate a person's engagement as a body corporate manager or service contractor — an order declaring that the engagement is terminated.
15. If satisfied the body corporate does not have the right to terminate a person's engagement as a body corporate manager or service contractor — an order declaring that the engagement is not terminated.
16. An order requiring a body corporate manager, letting agent or service contractor to comply with the terms of the person's engagement, including the code of conduct, or authorisation.
17. If satisfied the body corporate's decision about a proposal by the owner of a lot to make improvements on or changes to common property is an unreasonable decision — an order requiring the body corporate—

(a) to reject the proposal; or
(b) to agree to the proposal; or
(c) to ratify the proposal on stated terms.

18. If satisfied an animal is being kept on common property or a lot contrary to the by-laws — an order requiring the person in charge of the animal to remove it and keep it away.
19. If satisfied an animal kept on common property or a lot under the by-laws is causing a nuisance or a hazard or unduly interfering with someone else's peaceful use and enjoyment of another lot or common property — an order requiring the person in charge of the animal—

(a) to take stated action to remedy the nuisance, hazard or interference; or
(b) to remove the animal and keep it away.

20. If satisfied a by-law is, having regard to the interests of all owners and occupiers of lots included in the scheme, oppressive or unreasonable — an order requiring the body corporate to lodge a request to record a new community management statement —

(a) to remove the by-law; and
(b) if it is appropriate to restore an earlier by-law, to restore the earlier by-law.

21. If satisfied a by-law is invalid — an order declaring that the by-law is invalid and requiring the body corporate to lodge a request to record a new community management statement to remove the by-law.
22. If satisfied the owner of a lot reasonably requires a licence over part of the common property for the appropriate enjoyment of the lot, and the body corporate has unreasonably refused to give the licence — an order requiring the body corporate to give a licence to the owner on terms (that may require a payment or periodic payments to the body corporate) over a stated part of the common property.
23. An order appointing an administrator, and authorising the administrator to perform—

(a) obligations of the body corporate, its committee, or a member of the committee under this Act or the community management statement; or
(b) obligations of the body corporate under another Act.

24. If satisfied a decision to pass or not pass a motion at a general meeting of the body corporate was unreasonable — an order declaring that a motion was invalid or giving effect to the motion as proposed, or a variation of the motion as proposed.
25. If satisfied that a decision made by a lot owner agreement was unreasonable — an order —

(a) declaring that the decision was at all times void; or
(b) giving effect to a variation of the lot owner agreement.

26. If satisfied that an owner of a lot included in a specified two-lot scheme was unreasonable in not entering into a lot owner agreement following a request from the owner of the other lot — an order —

(a) giving effect to the decision proposed by the owner of the other lot; or
(b) giving effect to a variation of the decision proposed by the owner of the other lot.

.01 Law: BCCM Act, s 48, 263, 276, 277, 278, 279, 280, 281, 283, 284, 285, Sch 5.

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.40 Case references. See *Re: Kurilpa Protestant Hall Pty Ltd* (1946) St R Qd 170; *James & Anor* v *Body corporate for Aarons community title scheme 11476* [2003] QCA 329 (see ¶90-122 for full text of judgment); *Dindas & Anor* v *Body Corporate for "One Park Road" CTS 2114 & Ors* (2008) LQCS ¶90-136; [2006] QDC 302.

Last reviewed: 4 March 2014

[¶56-150] Administrators

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Item 23 of Sch 5 of the BCCM Act allows an order appointing an administrator and authorising the administrator to perform:

(a) obligations of the body corporate, its committee, or a member of the committee under the BCCM Act or the community management statement, or
(b) obligations of the body corporate under another Act.

An order appointing an administrator may be the only order an adjudicator makes for an application or it may be made to assist the enforcement of another order for the application.

The administrator has the powers given under the order.

This may include the power to levy a special contribution against lot owners to meet the costs of complying with obligations to which the order relates and the costs of the administration. In the case of a specified two-lot scheme, this may include the power to authorise an item of expenditure for the body corporate to meet the cost of complying with obligations to which the order relates as well as the costs of the administration.

Anything done by an administrator under the authority of an order is taken to have been done by the body corporate, its committee or relevant member.

The order may:

- withdraw all or particular stated powers from the body corporate, a body corporate manager (voluntarily appointed) or stated officers of the body corporate, until the administrator has taken the necessary action to secure compliance with the obligations
- require officers of the body corporate or a body corporate manager (voluntarily appointed) to take stated action to help perform the work the administrator is required to perform
- fix the administrator's remuneration (which must be paid by the body corporate).

In most cases there should be a withdrawal of powers so that the role of the administrator is not frustrated by the body corporate, its committee or an office bearer attempting to perform the obligation (which is effectively the exercising of powers) at the same time as the administrator. In that event, the administrator acts in substitution for the body corporate, its committee or relevant office bearer and to their exclusion.

Where the recovery of a "debt" is involved, the BCCM Act sets up special provisions to enable a relevant court to appoint an administrator to ensure that the debt is paid (see ¶56-160). The Magistrates Court may also appoint an administrator for the purpose of enforcing an adjudicator's order or an order made on appeal from an adjudicator's order. The appointment is made under s 287(3) and the administration proceeds in the normal way with the administrator having the usual powers and authorities.

An examination of the appropriate circumstances for the appointment of an administrator was undertaken in *Body Corporate for Donnelly House* v *Shaw* (2015) LQCS ¶90-200; Court citation: [2015] QDC 139(5 June 2015) by Robertson DCJ.

Ultimately, his Honour dismissed the body corporate's appeal of decisions made by the Maroochydore Magistrates Court and agreed that an administrator should be appointed, agreeing with the Magistrate that it was not necessary for the court to have made a finding as to the party ultimately at fault.

His Honour further found that while s 287 provided no guidance as to how to exercise the court's discretion in the appointment of an administrator, the evidence clearly established that the parties were not going to agree as to whether the adjudicator's orders had been or would be complied with, without the intervention of an independent administrator.

.01 Law: BCCM Act, s 276(4), 278, 287, 301, Sch 5.

Last reviewed: 11 July 2015

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[¶56-160] Enforceable money orders

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Terminology

An “enforceable money order” is a term used in the Uniform Civil Procedures Rules 1999. An enforceable money order is defined in s 793 of those rules to mean:

- a money order of the court, or
- a money order of another court or tribunal filed or registered under an Act in the court for enforcement.

In other words, the order may be an order of the court itself, or it may be an order of another court or tribunal (eg the QCAT) enforceable in the court (eg the Magistrates Court). In any case, the “**enforcement creditor**” is the person entitled to enforce an order for the payment of money, or a person to whom that benefit has passed (eg by way of assignment). An “**enforcement debtor**” is the person required to pay the money under the order.

Appointment of an administrator

Where the body corporate for a community titles scheme is an enforcement debtor, the court in which the enforceable money order may be enforced may, on application of the enforcement creditor, make an order appointing an administrator and authorising the administrator to perform the body corporate’s obligations under the money order.

Jurisdictional requirements

However, there are certain jurisdictional requirements that may need to be satisfied before such an application is made. If the court to which the application is made (“**officiating court**”) is not the court that made the money order in the first place, the officiating court may appoint the administrator if:

- for an officiating court that is the Supreme Court — the money order has been filed in the officiating court, or
- for an officiating court that is the District Court or Magistrates Court — unless the officiating court otherwise orders, the money order has been filed in the officiating court for the district:
    - – in which the scheme land is located, or
    - – closest to the court that made the money order.

Section 301 applies to an administrator appointed under these provisions (see ¶56-150).

Anything done by an administrator under the authority given on such an appointment is taken to have been done by the body corporate.

The administrator will usually draw from the funds of the body corporate to pay the money owing under the order, or, if those funds are insufficient, impose and collect levies to the appropriate fund to raise the necessary money.

The net effect of these procedures is to put a judgment creditor of a body corporate in a powerful position to recover the amount of the judgment in the event that the body corporate refuses or fails to settle the debt. They effectively make individual lot owners jointly and severally liable for the judgment debt.

.01 Law: s 300, 301. Uniform Civil Procedures Rules 1999, s 793.

Last reviewed: 11 July 2013

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[¶56-170] Orders for payment of money

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There is nothing in Ch 6 (including Sch 5) of the BCCM Act that expressly prevents an adjudicator from making an order requiring the payment of money, including where the situation warrants it, by way of reimbursement.

Section 276(2) says that an order may require a person to act, or prohibit a person from acting, in a way stated in the order.

An example in applying statutory provisions

Take the case of a dispute between a service contractor and a body corporate under which the body corporate is refusing to pay $12,000 for work performed "out of scope" by the contractor.

Arguably, that is a contractual matter about the engagement of a person as a service contractor, within the meaning of s 276(1)(c).

As such it would be within the jurisdiction of an adjudicator to make an order requiring the body corporate to pay the $12,000. Section 286 provides for enforcement of orders for payment of an amount of money with the Magistrates Court even if the amount exceeds the amount for which an action can be brought to the Magistrates Court.

Enforcement of orders for payment of money is discussed in ¶56-200.

In *Body Corporate for Calypso Plaza on Coolangatta CTS 24595* v *Larraine Pty Ltd*[2014] QCATA (14 January 2014), member Barlow QC considered the ability of adjudicators to order the body corporate reimburse monies charged incorrectly by it.

He noted that although no specific power was granted under s 276, that alone was not determinative of the issue. He noted that s 276(2) made it clear an adjudicator may require a person to act in a way stated in an order. That section, he opined, would include an order requiring the body corporate to reimburse to its members amounts charged to those members, paid by those members which it was not entitled to charge.

.01 Law: s 276, 286.

Last reviewed: 23 July 2014

[¶56-200] Enforcement of adjudicator's orders

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Penalty for non-compliance with adjudicator's orders

A person who contravenes an adjudicator's order (other than an order for the payment of an amount of money) commits an offence.

The maximum penalty is 400 penalty units, but in addition costs (including the fee originally paid to the Commissioner) may be awarded against the defendant. This is the primary remedy for breach of an adjudicator's order requiring a person to do or refrain from doing something.

Who may take proceedings to enforce orders

The following persons may take proceedings for this offence:

- the Attorney-General
- the applicant for the original order
- the respondent to the original order
- a person in whose favour the order is made
- the body corporate
- an administrator authorised to perform obligations of the body corporate or its committee.

Orders against the body corporate

If the order is made against the body corporate or the owner or occupier of a lot requiring the performance of an obligation and it or they fail to comply with the order, then the person in whose favour the order is made may file a copy of the order with the registrar of the Magistrates Court.

The copy must be certified by the adjudicator to be a true copy if it was made by an adjudicator, or by the registrar of the court if it was made by a court on appeal. A sworn statement must also be filed by the person stating that an obligation imposed under the order has not been performed.

The registrar then registers the order and the Magistrates Court may appoint an administrator to perform the obligation of the body corporate, its committee, a member of the committee or the owner or occupier of a lot.

Anything done by the administrator under the authority of such an order is taken to have been done by the body corporate, its committee, a member of the committee or the owner or occupier of a lot, as the case may be.

Orders requiring payment of moneys

If an order requiring the payment of an amount of money is not complied with, then the person in whose favour the order is made may file a copy of the order with the registrar of the Magistrates Court.

The copy must be certified by the adjudicator to be a true copy if it was made by an adjudicator, or by the registrar of the court if it was made by a court on appeal. A sworn statement must also be filed by the person stating the amount outstanding under the order.

When the registrar registers the order it can be enforced as if it were a judgment of the court properly given in the exercise of its civil jurisdiction. It does not matter if the amount outstanding is more than an amount for which an action may be brought in a Magistrates Court.

.01 Law: s 286, 287, 288.

Last reviewed: 11 July 2013

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[¶56-250] Appeals from adjudicators

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Appeal to the QCAT

Appeals from orders of an adjudicator (other than consent orders) may be made only to the Queensland Civil and Administrative Tribunal (QCAT) on a question of law by an aggrieved person.

An aggrieved person is:

- the applicant
- the body corporate
- a person against whom the order is made
- a person who, on an invitation to make submissions, made a submission about the application
- an affected person for an application made, or
- a person not otherwise mentioned, against whom the order is made.

Documents and timing

An appeal to the QCAT must be started within six (6) weeks after the aggrieved person receives a copy of the order appealed against.

If requested by the principal registrar, the Commissioner must send to the principal registrar copies of each of the following:

- the application for which the adjudicator's order was made
- the adjudicator's order
- the adjudicator's reasons
- other materials in the adjudicator's possession relevant to the order.

When the appeal is finished, the principal registrar must send to the Commissioner a copy of any decision or order of the appeal tribunal. The Commissioner must forward to the adjudicator all materials that the adjudicator needs to take any further action for the application, having regard to the decision or order of the appeal tribunal.

Once the adjudicator has completed the further action, the adjudicator must return all materials to the Commissioner.

Jurisdiction and powers of the QCAT

In deciding an appeal, in addition to the jurisdiction and powers of the appeal tribunal under the QCAT Act, the tribunal may also exercise all jurisdiction and powers of an adjudicator under the BCCM Act. The appeal tribunal may amend or substitute an order only if the adjudicator, who made the order being appealed, would have had jurisdiction to make the amended or substituted order or decision. The tribunal has power to award costs for a proceeding.

Power to stay proceedings

To secure the effectiveness of the appeal, if agreed between the Commissioner and the president, the Commissioner may stay the application by written notice given to the parties to the application, each affected person and the body corporate. The president may also stay a proceeding by written notice given to the parties to the proceeding.

.01 Law: s 288A, 289, 290, 292, 294, 294A.

Last reviewed: 11 July 2013

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[¶56-260] Appeals from preliminary decisions

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Appeals from certain preliminary decisions under Ch 6 are also made to the Queensland Civil and Administrative Tribunal. They involve action taken by the Commissioner to:

- reject an application
- withhold permission to change an application
- impose conditions on permission to change an application, or
- substitute a person as a relevant person for the application.

The aggrieved person for a decision may apply, as provided under the QCAT Act, to QCAT for a review of the decision. An application for review to QCAT must be made within six weeks after the aggrieved person receives a QCAT information notice.

Appeal and Costs Implications

Costs in QCAT are not always awarded as a matter of course. It is generally expected that each party must pay their own legal costs unless of course the “interests of justice” require that QCAT order one party to pay the costs of another.

That said, QCAT has a very broad discretion to award costs as discovered by the parties in *Body Corporate for Sunnybank* v *Coming Home Pty Ltd ATF The Coming Home Trust* [2014] QCAT 192.

In *Alex & Gail Douglas as Trustee for Kingfisher Super Fund* v *Pegasus Equity Pty Ltd as Trustee for Pegasus Property Trust* [2015] QCATA 182, QCATA considered whether it was appropriate to award costs against the Mr and Mrs Douglas whom, as lot owners, lacked standing to appeal an order made in favour of the Body Corporate for Stanley Point CTS 32639.

Essentially, after Mr and Mrs Douglas files no fewer than 40 pages of submissions alleging denials of natural justice, misleading conduct and bias their appeal (which although baseless was not dismissed in the interim stages) their appeal was dismissed leaving QCATA with the question of whether or not to award costs against the couple.

Costs were ultimately awarded based on the District Court scale and Senior Member Stilgoe held:

- The allegations levelled by the appellants were baseless
- The applicants lacked standing to bring the application
- By pursuing an appeal with little or no merit the appellants impinged on the Tribunal’s limited resources and required the responding party to incur costs retaining a lawyer to defend the matter
- This in turn was not in the interests of justice, it forced the unsuccessful party to incur costs pointlessly.

.01 Law: Section 303, 304, 306, *Queensland Civil and Administrative Tribunal Act 2009* (QLD) s 100 and 102(3).

Last reviewed: 5 February 2016

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[¶56-300] Privilege

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The privilege that exists with respect to defamation for a proceeding before the Supreme Court, and a document produced in the proceedings, extends to the dispute resolution process under the BCCM Act.

It extends to:

- an adjudication (including action taken in making arrangements for an adjudication or follow up)
- a specialist conciliation session (including action taken in making arrangements or follow up)
- a specialist mediation session (including action taken in making arrangements or follow up)
- a document or other materials sent or given to a person or produced for enabling a dispute resolution recommendation to be made
- a statement made to the Commissioner or a dispute resolution officer for enabling a dispute resolution recommendation to be made.

.01 Law: s 296.

Last reviewed: 11 July 2013

[¶56-350] Offences involving information provided to adjudicators

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The BCCM Act creates two offences designed to ensure the integrity of Ch 6 dispute resolution proceedings.

Those offences are:

(1) Stating something to the Commissioner or an adjudicator the person knows is false or misleading in a material particular (60 penalty units).
(2) Giving the Commissioner or an adjudicator a document containing information the person knows is false or misleading (60 penalty units).

The second offence does not apply where the person, when giving the document:

(a) informs the Commissioner or adjudicator, to the best of the person's ability, how it is false and misleading, and
(b) if the person has, or can reasonably obtain, the correct information — gives the correct information to the Commissioner or adjudicator.

.01 Law: s 297, 298.

Last reviewed: 11 July 2013

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[¶56-400] Public access to adjudicator's orders

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Any person can apply to the Commissioner for information about Ch 6 applications in respect of particular community titles schemes under s 299. The application must be in writing and accompanied by the prescribed fee. The Commissioner must inform the applicant:

- whether an order has been made under Ch 6 (or an earlier law) within the previous six years and, if so, the nature and effect of the order
- whether there is an application that has not been disposed of and, if so, the nature of the application.

In addition, the Commissioner may make any of the following available for inspection by the public:

- a copy of an order made under Ch 6 (or an earlier law) about a community titles scheme
- the reasons for the order.

That information is published by the Commissioner on the department's website and at: www.austlii.edu.au/au/cases/qld/QBCCMCmr.

.01 Law: s 299.

Last reviewed: 11 July 2013

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[¶57-000] Jurisdictional issues

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Before commencing proceedings involving a dispute about a community titles scheme consideration should be given as to the appropriate jurisdiction.

The position under the BCCM Act

Section 229 of the *Body Corporate and Community Management Act 1997* (Qld) (BCCM Act) says that, in respect of a dispute (that is a complex dispute) under Ch 6, the only remedy for the dispute is:

- an order of a specialist adjudicator under Ch 6
- an order of the Queensland Civil and Administrative Tribunal (QCAT) exercising its original jurisdiction under the *Queensland Civil and Administrative Tribunal Act 2009*, or
- an order of the appeal tribunal on appeal from a specialist adjudicator or QCAT on a question of law.

If the dispute is not a complex dispute, then the remedy is:

- the resolution of the dispute by a dispute resolution process, or
- an order of the appeal tribunal on appeal from an adjudicator on a question of law.

Regardless of the complexity of the dispute, the process will not apply to an application which has already been dismissed by the Commissioner.

If the dispute relates to a debt dispute commenced before the QCAT, then the dispute resolution process does not apply and an adjudicator has no jurisdiction in the debt dispute.

The exclusivity provisions of s 229 do not limit the powers of QCAT to refer a question of law to the Court of Appeal or transfer a proceeding to the Court of Appeal.

Dismissal of proceedings

If proceedings are commenced in a court despite the jurisdictional limitation imposed by s 229, then the court will dismiss the proceedings: *James and Anor v Body corporate for Aarons community titles scheme 11476* and *Sail Isle v Body corporate for Surfers Aquarius community titles scheme 11295*.

Arbitration is not an option for complex disputes

While parties (such as a body corporate and a service contractor) may attempt to resolve issues among themselves by resorting to arbitration, unfortunately, arbitration is not a recognised exclusive remedy under s 229 of the BCCM Act which may be accessed to resolve a complex dispute.

In *The Body Corporate for Liberty CTS 27241* v *Batwing Resorts Pty Ltd* (2012) LQCS ¶90-181; [2012] QSC 340, the parties had agreed to remove the provision of security services for the scheme from the caretaker's duties.

Unfortunately despite repeated attempts to do so, the parties were unable to agree on the appropriate reduction in the caretaker's salary to account for the reduced duties.

After partly participating in the arbitration proceedings and receiving an award with which it did not agree from the arbitrator, the caretaker subsequently sought to challenge the jurisdiction of the arbitrator. The body corporate sought to enforce the award and the Supreme Court held that the matter was a "complex dispute" which meant that the remedies set out in s 229(2) were the remedies open to the parties.

The result of the arbitration failed to resolve the dispute and ultimately the court declined to uphold the arbitrator's award.

Exclusivity of dispute resolution process not a barrier to raising a defence

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The provisions of s 229 does not preclude a defendant from raising a defence to a claim. It only prevents the defendant from instituting separate proceedings challenging a claim: *Body Corporate of the Lang Business v Green*.

The position under BUGT Act

Under the old *Building Units and Group Titles Act 1980*, if proceedings were commenced in a court in preference to using the dispute resolution procedures in that Act, the court had the discretion to order costs against the plaintiff if it was of the view that those procedures made adequate provision for the enforcement of the particular rights or remedies sought to be enforced. In other words, the court could proceed to determine the matter and then impose a costs penalty.

Definitions under this section

Complex dispute means —

(a) a matter for which an application mentioned in s 48 is, or may be, made, or
(b) a dispute mentioned in s 133, 149A, 149B or 178.

Debt dispute means a dispute between a body corporate for a community titles scheme and the owner of a lot included in the scheme about the recovery, by the body corporate from the owner, of a debt under this Act.

Law: BCCM Act, s 229, 229A.

Building Units and Group Titles Act 1980, s 119.

.40 Case references. *James* v *Body corporate for Aarons community title scheme 11476* (2004) LQCS ¶90-122; [2003] QCA 329.

Sail Isle v *Body corporate for Surfers Aquarius community titles scheme 11295* (2006) LQCS ¶90-134; [2006] QDC 109.

Body Corporate of the Lang Business v *Green* (2008) LQCS ¶90-149; [2008] QSC 318.

Last reviewed: 11 July 2013

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[¶57-020] Dividing fences

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For the purposes of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, the body corporate for a community titles scheme is taken to be the owner of the scheme land. Where there is a layered scheme, the body corporate for the principal scheme is taken to be the owner of the land for that purpose. However, where the matter involves the owners of adjoining lots in a community titles scheme (eg two townhouses or villa homes), those owners are taken to be the owners of the lots for the purposes of that Act.

The importance of ascertaining the true boundaries of body corporate scheme land in the context of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* was discussed in the QCAT decision of *Body Corporate for Victoria Gardens CTS 19272 v Banner & Ors (4 June 2014)*.

In that case, the body corporate's scheme land was thought to share boundaries with four neighbouring lots. A quotation obtained for the colour bond fencing did not indicate whether the paling fence was positioned on the true boundary or within the scheme land.

Subsequently, the body corporate sought contributions to the replacement of the paling fence from the owners of the neighbouring lots.

The adjudicator found that for two out of the four neighbouring lots, the original body corporate fence was not constructed on the true boundaries adjoining those lots and accordingly, the replacement of the paling fence (which was on body corporate scheme land) was a cost the body corporate would have to wear.

In *Hartley* v *Body Corporate for Terraces on the Park* [2014] QCAT 624 (2 December 2014), the applicant (Hartley) alleged the roots from a gum tree located on body corporate land had cross onto her land and damaged her sewerage.

The position of the tree and advice from the council made it impossible for the tree to be dug out.

The body corporate indicated it would pay $500.00 towards the costs of an independent tree assessor checking out the issues while the applicant argued that in no way had she contributed to the damage caused by the tree.

There was insufficient evidence to establish whether the roots of the tree were from the tree on body corporate land, whether the roots caused the damage by breaking the pipes or whether the types of pipes may have had a characteristic allowing the roots to infiltrate them.

In those circumstances, the member ordered the parties each pay half the cost of the tree assessment being undertaken by the tribunal's assessor.

Law: s 311.

Last reviewed: 5 February 2015

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[¶57-030] Community Ambulance Cover

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A body corporate may purchase electricity from an energy retailer and sell that electricity to the occupiers of the scheme.

The question of how the *Community Ambulance Cover Act 2003 (Qld)* applies to a body corporate was considered in *Body Corporate for Club Tropical Resort* v *Commissioner of State Revenue* [2014] QCATA 9 (14 January 2014).

Initially, the resort came into existence in 1989 as a purpose built all-suite hotel of 50 rooms, two restaurants and two manager's apartments, boutique and conference room.

Ergon was contracted to supply energy to the resort as a whole via a fitted meter. Subsequenlty, the resort was placed into receivership and its purchaser received development approval to strata title the resort into 57 separate lots by way of BUP. At the time of the appeal 52 of the lots were being used for short term residential accommodation whilst the other five were used for commercial and retail purposes.

At the time the resort was strata titled, no requirement was made for the lots to be separately metered with electricity. The owner sold each of the lots with a lease back arrangement and conducted a hotel until 28 February 1999. There terms of the lease back arrangement meant that the owner paid all of the expenses for the lot owners including electricity.

After the end of the lease back arrangement on 28 February 1999, the electricity account was transferred into the name of the body corporate.

The body corporate then used the contribution schedule lot entitlements to calculate the amount of electricity payable by each lot owner which resulted in disharmony until 2006 when the owners agreed to install separate meters for each lot.

The body corporate manager's office received an On-Supplier Return Form 21 in April 2009 and it was completed, noting 57 separate on-supply arrangements commencing April 2004, one lot being exempted. The body corporate subsequently received a bill for $26,491.64, being 56 levies payable for five years.

At first instance, the member held that the body corporate was part of an "on-supply arrangement" within the meaning of s 14(1)(d) of the *Community Ambulance Cover Act 2003 (Qld)* in that the body corporate purchased electricity from the retailer and sold that electricity to the owners of the units within the building. The ambulance cover, under s 53 and 54 of that Act, were paid by the body corporate as the on-supplier and again on behalf of each of the individual lot owners.

In interpreting the meaning of an "on-supply" arrangement under the *Community Ambulance Cover Act 2003*, the QCAT member found that it was not necessary for the body corporate to either own or be in possession of the electricity consumed in each area.

The body corporate's appeal was dismissed.

Last reviewed: 23 July 2014

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[¶57-040] Commencement of legal proceedings

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A body corporate cannot start a legal proceeding unless it is authorised by a special resolution or by a lot owner agreement where the scheme is a specified two-lot scheme.

However, this does not apply to “prescribed proceedings” which are defined as:

- proceedings for recovery of a liquidated debt against a lot owner
- a counter claim, third party proceeding or other proceeding, in a proceeding to which the body corporate is already a party
- a proceeding for an offence in relation to by-law contraventions
- a proceeding, including a proceeding for enforcement of an adjudicator’s order or an appeal against an adjudicator’s order, under Ch 6.

The failure to commence proceedings without the authority granted under special resolution will not make proceedings a nullity as was recognised by the House of Lords in *Russian Commercial and Industrial Bank* v *Comptoir d’Escompte de Mulhouse* [1925] AC 112 noted with approval by the Queensland Supreme Court in *McEvoy & Anor* v *The Body Corporate for No 9 Port Douglas Road* (2013) LQCS ¶90-186; [2013] QCA 168.

Holmes JA, after much consideration of English cases on point, held that bringing a proceeding could be ratified after its conclusion. Effectively, the ratification would “clothe the agent with authority” for the purposes of the unauthorised act.

An example of the importance of obtaining the special resolution can also be found in *The Body Corporate La Porte D’Or and the Gold Coast City Council* (P & E Appeal No 537 of 2013), handed down on 3 May 2013.

In that case, the body corporate was challenging a development approval granted to a developer which allowed the developer to build a 41-storey apartment building between the parcel on which the body corporate scheme sat at Surfers Paradise.

By way of background, inexplicably the body corporate’s submissions to the Gold Coast City Council, hand-delivered during the public notification stage, were lost by the Council and therefore not considered in the grant of approval to the developer. Accordingly, the body corporate sought in a separate proceeding for the development to be returned to the decision stage so its material could be considered.

In the appeal at hand, the developer argued the body corporate lacked the competence to continue with its appeal as a special resolution had not been obtained to authorise the appeal.

Interestingly, the information was uncovered when the principal of the co-respondent searched the body corporate records as a proposed purchaser and obtained manager’s voting figures which revealed the discrepancy between votes cast and the two-thirds majority failing to be reached.

His Honour considered the fact that the body corporate required six days’ adjournment to allow it to ascertain whether the special resolution could be achieved at an extraordinary general meeting (EGM) to be held on the sixth day.

In granting the adjournment to allow the EGM to take place, his Honour noted previous indulgences granted by the court and the possibility of retrospective ratification.

It seems even a resolution based on a motion which notes the incorrect body corporate proceeding can be sufficient to validly authorise an appeal.

In Body Corporate for Calypso Plaza on Coolangatta CTS 24595 [2014] QCATA 004, the committee resolved to appoint their lawyers for the purposes of lodging a notice of appeal to appeal an adjudicator’s order.

The committee then called an EGM and submitted a motion which referred to the incorrect proceedings from which the appeal was to spring. The motion was passed and the respondent argued that the resolution providing the basis for the appeal was invalid, which meant the appeal ought to be dismissed.

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The member reviewed the motion and the explanatory note and ruled that the motion was not invalid given the explanatory note clearly referred to the correct decision to be appealed such that members voting at the meeting would have understood the appeal they were voting on.

Law: BCCM Act, s 312.

Last reviewed: 4 March 2014

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[¶57-060] Planning proceedings

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The body corporate may represent the owners of lots in the scheme in a proceeding under the *Sustainable Planning Act 2009*.

However, this does not affect the right of any owner who wants to be separately represented in the proceedings from exercising a right to be separately represented.

Law: s 313.

Last reviewed: 11 July 2013

[¶57-080] Differential levies

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Body corporate contributions are generally imposed according to contribution schedule lot entitlements.

One exception is when a court orders that an amount payable under a judgment or order against the body corporate be paid by particular lot owners in proportions fixed by the court.

This type of order is made when the proceedings are by or against the body corporate and will usually, although not necessarily always, involve those lot owners who are parties to the proceedings. Where a lot owner is not a party to the proceedings, they must be joined as a party before an order can be made imposing the costs liability on them.

The recommended procedure is for the court to require the body corporate to raise a stated sum, or a sum to be determined (eg by taxation), by raising a contribution on the owners of specified lots.

The contribution would then be determined and levied in the usually way, but the levy would be confined to the lot owners who must contribute under the terms of the order. Payments would be credited to the administrative fund and payment would then be made from that fund. **Form B160** illustrates the wording of the resolution determining the contributions.

Law: s 314.

Last reviewed: 11 July 2013

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[¶57-090] Lot entitlements — 2013 amendments

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On 27 March 2013, the *Body Corporate and Community Management and Other Legislation Amendment Act 2013* commenced.

The Act was designed to bring an end to the lot entitlement reversion process which was established in 2011 and affected those bodies corporate (estimated to be fewer than 400 across the state) that had their adjustments reversed under the 2011 amendments.

The Act was also designed to reduce the red tape associated with a lot owner's seller disclosure requirements in selling their lot. The red tape reduction measures took effect from 1 August 2013 and more can be read about those at ¶61-250 (Conveyancing).

Effectively from 27 March 2013, if a body corporate had previously received a ruling from a specialist adjudicator, court or tribunal determining what its entitlements should be on a just and equitable basis and that ruling had been disturbed by an owner citing the 2011 amendments, then from 27 March 2013 a member of that particular body corporate could apply for the original ruling to be put back into place.

It is anticipated that affected lot owners will take the following steps to resolve the contribution schedule lot entitlements :

1. write to their body corporate committee seeking the contribution schedule lot entitlements be changed back to the just and equitable decision of a specialist third party
2. the committee would invite submissions from all lot owners
3. after receiving the submissions, the committee would make and publish its decision
4. depending on the decision, the committee would take steps to ensure a new community management statement giving effect to the original determined entitlements is included for resolution at the next general meeting, and then cause that new community management statement to be lodged for registration at Department of Environment and Resource Management.

As yet cases reflecting the judicial position on the 2013 amendments have yet to be decided *en masse*.

In the QCAT decision of *Higham* v *The Body Corporate for the Palms No Three Warana CTS 20039* [2013] QCAT 228, member Sandra Deane had cause to briefly consider the amendments.

Ms Higham sought an adjustment to the contribution schedule lot entitlements for all of the owners so that they would be equal as opposed to being five, six or seven as set out in the community management statement.

After finding that the tribunal was required to determine the substantive application for the adjustment, the member noted there was no evidence to suggest a material change had taken place following a previous decision on the contribution schedule.

The applicant's argument was that the equality principle should apply regardless of when s 47A to 48 commenced and that it should apply without limit to her scheme. The member disagreed citing a limited ability to adjust purely on the equality principle alone.

The member held that the tribunal had no basis upon which to order an adjustment to the contribution schedule.

Last reviewed: 2 August 2013

[¶60-100] Scope of commentary

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Most of the conveyancing procedures applicable to ordinary land apply equally to land comprising lots in a community titles scheme. However, there are additional procedures and factors that apply to the conveyance of such lots. This commentary is not intended to cover all those conveyancing procedures, but is restricted to those that are peculiar to community titles properties. For a detailed coverage of non-community title procedures reference should be made to the CCH loose-leaf service *Queensland Conveyancing Law and Practice* from ¶5-010.

Where possible in this commentary, common conveyancing documents relevant to community titles will be referred to and their use demonstrated and commented upon. The objective will be to outline the procedures that are usually followed in a community titles transaction and consider the reasons for those procedures, but to do this in a practical way.

Last reviewed: 11 July 2013

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[¶60-120] Distinguishing features of community titles transactions

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When a person acts on the sale or mortgage of a community titles lot, there are 3 elements to the transaction:

- Title to the lot(s).
- Title to the common property.
- Membership of the body corporate.

In the case of a buyer, an *interest* in all 3 elements is being acquired. In the case of a lender, an *interest* is being acquired in the first 2 elements and there is a potential for future *membership* of, or involvement with, the body corporate. Buyers and lenders are therefore concerned to investigate all 3 elements as part of the normal conveyancing process.

Generally speaking, the sale or mortgage transaction so far as it relates to the title to the lot(s) and common property is treated in the same way as any other transaction involving the sale or mortgage of ``land''. However, special treatment is necessary so far as membership of the body corporate is concerned. The need for this special treatment becomes clearer when one appreciates that membership of a community titles body corporate is akin to membership of an unlimited liability company.

Leases of community title lots differ from normal land leases in that:

- A leasehold interest in a community titles lot confers special rights on the lessee in respect of the common property.
- The lessee is bound by the community management statement (which includes the by-laws).
- Certain notices must be given to the body corporate.

These and other relevant matters will be fully dealt with in the following commentary.

Last reviewed: 11 July 2013

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[¶60-140] REIQ Standard Contracts

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The Real Estate Institute of Queensland has produced (with the approval of the Queensland Law Society Inc) a range of standard land sale contracts. Some of these incorporate provisions dealing with the sale of community title properties. These provisions are intended to be common to all of the contracts. The range of contracts comprises:

- REIQ Contract for residential lots in a community titles scheme
- REIQ Contract for commercial lots in a community titles scheme, and
- REIQ Contract for management rights business sale.

The REIQ contracts are updated with versions that reflect legislative changes from time to time. Copies of the above contracts and REIQ Disclosure Statement are reproduced at ¶70-299. Practitioners should check that the most current version of the contracts are used as precedent. The REIQ website can be accessed at www.reiq.com.au.

The standard community title provisions of these contracts are dealt with in the following commentary, commencing at ¶60-700.

Last reviewed: 11 July 2013

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[¶60-300] Introduction

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There are a number of legislative provisions relevant to the conveyance of a lot in a community titles scheme. Those provisions will be identified in this part of the commentary and dealt with in detail later. The relevant legislation is the:

- BCCM Act and the various regulation modules under that Act
- *Land Sales Act 1984* (LS Act)
- *Land Title Act 1994* (LT Act).

In addition, BUGTA will be relevant where lots the subject of the conveyance are lots in building units plans or group titles plans registered under BUGTA for the purposes of a specified Act. A specified Act means any one of:

- *Integrated Resort Development Act 1987*
- *Mixed Use Development Act 1993*
- *Registration of Plans (H.S.P. (Nominees) Pty Limited) Enabling Act 1980*
- *Registration of Plans (Stage 2) (H.S.P. (Nominees) Pty Limited) Enabling Act 1984*
- *Sanctuary Cove Resort Act 1985*.

Last reviewed: 11 July 2013

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[¶60-330] Body Corporate and Community Management Act

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The provisions of the *Body Corporate and Community Management Act* (BCCM Act) directly relevant to conveyancing (other than management rights conveyancing) are:

- *Section 201* — Authorises a regulation module to prescribe requirements about giving of notices to the body corporate on the transfer of the ownership of a lot or happening of other events affecting the lot.
- *Section 205* — Provides for the giving of information to an "interested person" by the body corporate from its records.
- *Sections 205A to 205B* — Provide for the giving of a disclosure statement, information sheet and use of the *Electronic Transactions (Queensland) Act 2001*.

The below sections are relevant to the sale of existing lots:

- *Section 206* — Provides the details required to be included in a disclosure statement.
- *Section 206A* — Provides for the buyer's ability to terminate a contract if s 368A(2)(c)(ii) (a statement from the seller or agent regarding the information sheet) is not followed.
- *Section 207* — Provides for a contract entered into to include the disclosure statement and all accompanying material but not the information sheet.
- *Section 208* — Provides the buyer may rely on information in the disclosure statement as if the seller had warranted its accuracy.
- *Section 209* — Provides the buyer may terminate a contract if the disclosure statement is inaccurate.
- *Section 209A* — Provides for the buyer to terminate the contract if the contribution schedule lot entitlement is inconsistent with the schedule principle.
- *Section 210* — Provides for the refund of the buyer's deposit in the event the buyer terminates the contract under Pt 1 — existing lots.
- *Section 211* — Provides a restriction on the power of attorney given to the original owner.

The below sections are relevant to the sale of proposed lots:

- *Sections 212 to 218* — Provide for the giving of a disclosure statement to buyers of proposed lots, variation of that disclosure statement, the giving of the information sheet, restriction on the buyer's power of attorney in favour of a seller and specify the consequences of failure to comply with the various obligations.
- *Sections 220 to 224* — Provide for certain warranties to be implied in all sale contracts and specify the consequences of failure to comply with the various obligations.

The following table sets out the provisions of the various regulation modules under the BCCM Act that are directly related to conveyancing (other than management rights conveyancing):

MODULE	SECTIONS			PROVISION
Standard	Accommodation	Commercial	Small Schemes	
145(3)	143(3)	104(3)	79(3)	Imposes liability on new lot owner for unpaid contributions.
175(3)	173(3)	131(3)	109(2)	Imposes liability on new lot owner for money outstanding under exclusive use by-law.
193	191	149	127	Requires new lot owner and others to give notice to the body corporate.
200	198	156	132	Sets up register of allocations under exclusive use by-laws.

205	203	161	137	Specifies fees payable for certificates and information from body corporate.

Last reviewed: 9 August 2013

[¶60-350] Land Sales Act

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The provisions of the LS Act directly relevant to community titles conveyancing are:

- Section 6 — in which appears the definition of ***allotment***, ***proposed allotment*** and ***proposed lot***, as well as the related definitions of ***lot***, ***registered lot*** and ***plan***.
- Section 21(1) — which requires a seller to give a statement in writing setting out certain information to the buyer of a proposed lot (which includes a lot included in a proposed community titles scheme).
- Section 22 — which requires a seller to give a rectification statement if a statement given under sec 21(1) was not accurate when given or subsequently becomes inaccurate.
- Section 23 — which requires money paid in respect of a purchase of a proposed lot to be held by the public trustee, solicitor or estate agent.
- Section 24 — which sets out the duties of the trustee holding the deposit money.
- Section 25 — which allows the buyer to terminate the contract if the seller or seller's agent breaches their obligation under s 21(1).
- Section 27 — which provides for the buyer's ability to terminate the contract if the buyer is not provided with a transfer to the property within a set period of time after signing the contract.
- Section 28 — which allows the seller to extend the period provided for by s 27.
- Section 29 — which sets out the consequences to the trustee if the buyer elects to avoid the contract under this part of the Act.

See ¶23-510 for a detailed coverage of the *LS Act* provisions.

Last reviewed: 11 July 2013

[¶60-370] Land Title Act

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The provisions of the Land Title Act directly relevant to community titles conveyancing are:

• Sections 41A and 41B — relating to the creation of an indefeasible title for the common property in a community titles scheme.
• Sections 48A, 48B, 48C, 48D and 48E — relating to the different types of plan formats.
• Sections 54Aff — relating to building management statements.

Last reviewed: 9 August 2013

[¶60-400] Building Units and Group Titles Act

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Mention was made in ¶60-300 that *Building Units and Group Titles Act* (BUGTA) will be relevant where lots the subject of the conveyance are lots in building units plans or group titles plans registered under BUGTA for the purposes of a specified Act. It will also be relevant for certain transitional provisions in the BCCM Act. The following provisions of BUGTA will be relevant:

- Section 40 — which relates to the supply of information by a body corporate.
- Section 49(1) — which requires an original proprietor to give a buyer of a lot or proposed lot a statement in the prescribed form setting out certain information.
- Section 49(4) — which requires an original proprietor to give a rectification notice to a buyer where the notice given under sec 49(1) was not accurate or subsequently becomes inaccurate.
- Section 53 — which requires notice to be given to a body corporate of certain dealings with a lot.

Last reviewed: 9 August 2013

[¶60-700] REIQ Contracts

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REIQ Contract for Residential Lots in Community Title Scheme

The Real Estate Institute of Queensland produces a range of standard sale contracts for the use of its members. Some of the contracts relate to sales of community titles properties. The range of sale contracts that are reproduced in this service as a point of reference are:

- REIQ Contract for residential lots in a community titles scheme
- REIQ Contract for commercial lots in a community titles scheme, and
- REIQ Contract for management rights business sale.

It is important to note that the REIQ contracts reproduced in this service are updated and maintained by the REIQ. They are updated with current versions that reflect legislative changes from time to time. CCH Australia has permission to reproduce the REIQ contracts in this service. Practitioners should check that the most current version of the above REIQ contracts are being used in practice. Please refer to the REIQ's website: www.realworks.com.au/information-centre.asp.

Standard Contract for Commercial Lots

The Real Estate Institute of Queensland has also produce a standard Contract for Commercial Lots in a Community Titles Scheme which is similar to the standard contract for residential lots. From a community titles point of view, the commentary that follows applies to both contracts equally as the terms are very similar. However, it is important to note that neither contract is suitable for use for the sale of a lot in a building units plan or a group titles plan registered under the BUGT Act for the purposes of a *specified Act* (see ¶60-300).

Standard Contract for management rights business sale

The management rights contract form is used to purchase a management rights business conducted from within a community titles scheme. That contract form is intended to be used in conjunction with a standard contract under which the lot in the community titles scheme is sold. The two contracts are interdependent by virtue of a clause in the management rights contract.

Copies of standard REIQ contracts in this service

The *Contract for Residential Lots in a Community Titles Scheme* appears in the FORMS tab at ¶70-300, the *Contract for Commercial Lots in a Community Titles Scheme* at ¶70-305, and the *Contract for Management Rights Business Sale* at ¶70-310.

Last reviewed: 11 July 2013

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[¶60-730] Definitions in standard REIQ contract for residential lots in community titles scheme

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When reading the standard contract, great care needs to be taken to consider the implications of the defined words. For example, cl 7.7(1)(b) refers to the **Land** being affected by certain proposals, while cl 8.1 puts the **Property** at the Buyer's risk from a specified time. **Land** means the Scheme land while **Property** includes more than the lot but does not go so far as to include the common property.

Clause 1.1 of the standard REIQ contract for residential lots in a community titles scheme provides that words and phrases defined in the BCCM Act have the same meaning in the contract unless the context indicates otherwise. Also, the standard contract contains a number of definitions relevant to community titles schemes. They are:

1. **"Body Corporate"** means the body corporate of the Scheme.

   The word "Scheme" is defined as the community titles scheme containing the lot (which is the lot described in the Reference Schedule to the contract). If the scheme is a subsidiary scheme then the term "Body Corporate" does not include the body corporate for the principal scheme or the body corporate for any other scheme related to the principal scheme.
2. **"Bond"** means a bond under the *Residential Tenancies and Rooming Accommodation Act 2008*.
3. **"Building"** means any building that forms part of the Lot or in which the Lot is situated.

   This is an improvement on the definition in the earlier versions where a building was restricted to buildings in standard format and building format plans, thus preventing the contracts being used for lots in volumetric format plans or lots in building format plans based on a lot in a volumetric format plan. The contract now appears to be suitable for use for all community title lots.
4. **"Court"** includes any tribunal established under statute.
5. **"Disclosure Statement"** means the statement under s 206 (existing lot) or s 213 (proposed lot) of the *Body Corporate and Community Management Act 1997*.

   This is the statement that a seller must give to the buyer of an existing or proposed lot in a community titles scheme before the buyer enters into the contract. The REIQ provides a disclosure statement for use in conjunction with the standard contract. It is a separate form to the contract so that it can be physically provided to the buyer before the contract is entered into. Although the definition refers to proposed lots, the standard contract is clearly not intended for use as a developer's "off-the-plan" contract without substantial adaptation. The REIQ Disclosure Statement appears at ¶70-320 in the FORMS tab.
6. **"Essential Term"** includes, in the case of breach by:

   (i) the Buyer: cl 2.2, 2.5(1), 5.1 and 6.1, and
   (ii) the Seller: cl 5.1, 5.3(1)(a)–(d), 5.3(1)(e)(ii) and (iii), 5.3(1)(f), 5.5 and 6.1

   but nothing in this definition precludes a Court from finding other terms to be essential.

   This new definition was inserted as part of the amendments of 1 July 2010, and allows for termination of the contract by either the Buyer or Seller for breach of an essential term.
7. **"GST"** means the goods and services tax under the GST Act.

   The principal legislation, *A New Tax System (Goods and Services Tax) Act 1999*, is referred as the "GST Act". "GST Act" also includes other GST-related legislation.

8. **“Improvements”** means fixed structures in the Lot (such as stoves, hot water systems, fixed carpets, curtains, blinds and their fittings, clothes lines, fixed satellite dishes and television antennae, in-ground plants) but does not include the Reserved Items.

Note that the fixed structures must be “in the Lot”. Lot is not defined but is specified in the Reference Schedule to the contract. (Terms in **bold** in the Reference Schedule and the Disclosure Statement have the meanings shown opposite them unless the context requires otherwise.) The lot may be a home unit, town house, villa home or even a vacant allotment of land or an allotment of land on which is situated a free standing house. Reserved Items is defined with reference to Excluded Fixtures and chattels. Common property and improvements to the common property in a community titles scheme are not included in the definition of Improvements.

9. **“Land”** means the Scheme land.

It does not mean the lot, except in so far the lot is part of the Scheme land. Scheme is defined below. Section 115H of the LT Act deals with scheme land; it is effectively all of the lots and common property.

10. **“Outgoings”** means:

> (i) rates or charges on the Lot by any competent authority (for example, council rates, water rates, fire service levies)
> (ii) land tax, and
> (iii) regular periodic contributions payable to the Body Corporate (other than Special Contributions).

Note that the rates or charges are restricted to the Lot. They do not include any rate or charge that may relate to the common property. Regular periodic contributions are not defined, nor is it a term recognised by the Act. It is a term that appeared in s 38A(5) of BUGTA. However, that term is meant to refer to contributions payable by instalments. This in itself requires care in circumstances where a body corporate imposes a substantial special contribution (eg $10,000 per lot) but provides for payment by two or more instalments. That would be an instalment contribution, but it is clearly not intended to be treated as an outgoing for adjustment purposes under a sale contract. The words in brackets, combined with the definition of “Special Contribution”, address this problem.

11. **“Plan”** means the building units, group titles or survey plan containing the Lot.

This is unfortunate terminology because for lots intended to be the subject of the standard contract there is no such thing as a building units plan or a group titles plan. Instead of “building units, group titles or survey plan” it should read “standard format or building format plan”. Lot is not defined but is specified in the Reference Schedule to the contract.

12. **“Property”** means:

> (i) the Lot
> (ii) the Improvements, and
> (iii) the Included Chattels.

Lot is not defined but is specified in the ***Property*** section of the Reference Schedule to the contract. Improvements is defined above. Included Chattels is not defined but they are specified in the ***Property*** section of the Reference Schedule. Note that the common property **does not** form part of the Property.

13. **“Regulation Module”** means the regulation module for the Scheme.

The regulation module is not specified in the contract itself, but it is disclosed in the Disclosure Statement. If the incorrect module is disclosed in the disclosure statement, then the contract would be taken to refer to the correct module because this would be the “module for the Scheme”.

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14. **“Scheme”** means the community titles scheme containing the Lot.

A community titles scheme (see s 10 of the BCCM Act) comprises a community management statement and the scheme land which it identifies. Lot is not defined but is specified in the ***Property*** section of the Reference Schedule to the contract.

15. **“Special Contribution”** means an amount:

(i) levied by the Body Corporate under the Regulation Module for a liability for which no provision or inadequate provision has been made in the budget of the Body Corporate, or
(ii) payable in connection with an exclusive use by-law; that is not an Outgoing.

The words “special contribution” are used in the Act, but the same words in the contract will not mean the same. The words in paragraph (i) are borrowed from the Act, but otherwise the definition departs from the Act in that:

- amounts payable under exclusive use by-laws (whether of a capital nature or not) are included in the term, and
- amounts do not fall within the definition if they are an Outgoing.

Outgoing is defined above.

Law: BCCM Act, s 10, 206, 213; BUGTA, s 38A(5); LT Act, s 115H.

Last reviewed: 9 August 2013

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[¶60-740] Buyer notifications under REIQ standard contract for lots

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The standard terms of the REIQ contract for residential lots in a community titles scheme places notification requirements on the Buyer to inform the Seller of satisfactory prerequisite conditions during the initial contract stages.

Notification of finance approval from the Buyer

Clause 3, the Finance clause in the standard contract requires the Buyer to provide the Seller, by 5 pm on the Finance Date, notice of the lack of finance approval and notice that the Buyer terminates the contract, or the finance condition has been either satisfied or waived by the Buyer. Failure by the Buyer to provide notice by 5 pm on the Finance Date allows the Seller to terminate the contract.

Notification of satisfactory Pest & Building Inspection Report

In the past, a Building and Pest Inspection Reports clause (cl 4) was considered satisfactorily met if no advice was given by the Buyer to the Seller to the contrary by 5 pm on the Inspection Date.

However, from 1 July 2010, the contract is conditional upon the Buyer obtaining a written pest and building report on the Property by the Inspection Date. The Buyer **must** give notice to the Seller that a satisfactory Inspector's report has not been obtained by the Inspection Date and the Buyer terminates the contract or alternatively, notice that this clause has been satisfied or waived by the Buyer. The Seller has the right to terminate the contract by notice to the Buyer if the Buyer has not given notice by 5 pm on the Inspection Date.

Notification of satisfactory Pool Safety Certificate

Where there is a non-shared pool on the Lot, the seller must specify in the Reference Schedule whether there is a Pool Safety Certificate for the pool at the time of the contract. If the seller indicates that there is no Certificate or if the seller fails to complete this part of the Reference Schedule, cl 4.7 of the contract become operative. Clause 4.7 makes the contract conditional upon (inter alia) the buyer obtaining, by the inspection date notified in the Reference Schedule, a Pool Safety Certificate or confirmation from a pool safety inspector of the works required to make the pool compliant before the Certificate will be issued.

The seller may terminate the contract by 5 pm on the Pool Safety Inspection Date if the buyer does not give notice to the seller that:

- a Pool Safety Certificate has been issued
- the buyer is terminating the contract because a Certificate has not been issued, or
- the buyer is electing to proceed to settlement despite the lack of Certificate.

Last reviewed: 9 August 2013

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[¶60-750] Seller's warranties and statements

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Clause 7 — Matters affecting the property

Clause 7.4 of the standard contract contains the seller's warranties to the buyer regarding the property which the buyer may rely on upon entering into the contract. It allows the buyer to terminate the contract if those warranties are incorrect.

There are two categories of seller warranties under the standard contract. Pursuant to the warranties given by the seller under the first category (cl 7.4(1) and (2)), if a warranty is incorrect, the buyer may terminate the contract by notice to the seller. The buyer would have to give the seller the opportunity to correct any inaccurate warranties relating to matters under cl 7.4(1) and (2) "at settlement" prior to exercising its termination.

The second category of seller warranties (cl 7.4(3)) relate to the affairs of the body corporate and the common property, rather than the Lot. If a second category warranty is incorrect ***and the buyer is materially prejudiced***, the buyer may terminate the contract by notice to the seller given within 14 days after the date of the contract but cannot claim any damages or compensation. Similarly, if the *Additional Body Corporate Information* in the Reference Schedule is not completed ***and the buyer is materially prejudiced***, the buyer may terminate the contract by notice to the seller given within 14 days after the date of the contract. Again, there can be no claim for damages.

First category warranties

The first category warranties under cl 7.4(1) are that ***the seller warrants that at settlement***:

> ***(a) it will be the registered owner of an estate in fee simple in the Lot and will own the rest of the Property***
>
> This is effectively a condition as to title. As regards the Lot, the seller must be the owner of the fee simple. As regards the rest of the Property (namely, the Improvements and the Included Chattels) the seller must simply be the owner. Encumbrances are not dealt with in this statement. They are covered by clause 7.2 which provides that the Property (ie the Lot, Improvements and Included Chattels) is sold free of Encumbrances (which includes unregistered and statutory encumbrances) other than the Title Encumbrances, Tenancies and interests registered on the Plan. Title Encumbrances and Tenancies are those disclosed in the Reference Schedule. Interests registered on the Plan are discoverable by search, but again the wording is deficient because, although under BUGTA interests were recorded or registered on the plan, under the BCCM Act those interests are recorded on the title for the common property. Note also that there is a deficiency in the definition of Plan (see item 8 in ¶60-730). Therefore, there may be an argument that the current wording does not cover the interests recorded on the common property.
>
> ***(b) it will be capable of completing this contract (unless the seller dies or becomes mentally incapable after the Contract Date)***
>
> This is a condition as to capacity, worded to protect the seller in the event of death or mental incapacity.
>
> ***(c) there will be no unsatisfied judgment, order, or writ affecting the Property***
>
> It is important to note that Property includes the Lot, Improvements or Included Chattels, and not common property. This means that an unsatisfied judgment, order or writ affecting one of the chattels stated in the Reference Schedule as included in the sale will put the entire sale in jeopardy, unless it is satisfied before settlement.

Clause 7.2 warranty states that ***the seller warrants that at the Contract Date and at settlement there are no current or threatened claims, notices or proceedings that may lead to a judgment, order or***

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writ affecting the Property. Again it is important to note that Property includes the Lot, Improvements or Included Chattels, and not common property. This broadens the seller's warranty to include any threatened claims against the Lot, Improvements or Included Chattels.

Second category statements

The second category warranties (under cl 7.4(3)) are that ***the seller states that, except as disclosed in this contract, at the Contract date***:

(a) there is no unregistered lease, easement or other right capable of registration and which is required to be registered to give indefeasibility affecting common property or Body Corporate Assets

These unregistered dealings or interests are restricted in that they must:

• be capable of conferring indefeasibility if registered (eg an unregistered by-law would not qualify), and
• relate to the common property (not the lot or the parcel) or Body Corporate Assets.

(b) there is no proposal to record a new community management statement for the Scheme and it has not received a notice of a meeting of the Body Corporate to be held after the Contract Date or notice of any proposed resolution or a decision of the Body Corporate to consent to the recording of a new community management statement for the Scheme

It does not matter what is in or proposed to be in the new community management statement. If the circumstances are met, the statement is inaccurate and the "material prejudice" test must then be applied. Note that the meeting must be proposed to be held after the contract date. However, the resolution or decision of the body corporate may occur at any time.

(c) all Body Corporate consents to improvements made to the common property and which benefit the Lot, or the registered owner of the Lot, are in force, and

Improvements to common property by lot owners have always required the consent of the body corporate. In the absence of consent, the improvements may have to be removed and the common property reinstated. This statement seeks to protect a buyer against unauthorised improvements that benefit the lot or the registered owner of the lot. Although it does not expressly refer to improvements made by the lot owner or occupier (as opposed to those made by the body corporate itself), the use of the word "consents" suggest it is restricted to those made by owners or occupiers. Not only must there have been an original consent, but that consent must still be in force.

(d) the community management statement recorded for the Scheme contains details of all allocations that affect the Lot or the registered owner of the Lot, and

This refers to allocations of common property under an exclusive use or special privilege by-law (eg for a car space or storeroom). It is important for the buyer to know exactly what allocations are current in respect of the lot and this statement is intended to protect the buyer in this regard. Another way to protect the buyer is to include any right of exclusive use or special privilege as part of the sale.

(e) the Additional Body Corporate Information is correct (if completed)

The Additional Body Corporate Information is the information in the Reference Schedule about lot entitlements. It must be correct as at the Contract Date. The buyer bears the risk of any changes after that date.

Last reviewed: 9 August 2013

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[¶60-760] Requirements of authorities

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Onus of responsibility for complying with notices

Pursuant to cl 7.6 of the standard contract, the seller is obliged to comply with any valid notice or court order by any competent authority, requiring work to be done or money spent in relation to the Property before the settlement date, if issued before the Contract Date. If the issue of the notice or court order is after the Contract Date then the responsibility to comply with the notice is on the buyer.

However, if there are outstanding notices at the Contract Date relating to s 247 (show cause notices) or s 248 (local government "enforcement notices") of the *Building Act 1975* or s 588 ("show cause notices" for development offences) or s 590 (enforcement notices) of the *Sustainable Planning Act 2009* that affects the Property or Land, then the buyer may terminate the contract by notice to the seller.

If work not completed by seller, buyer can complete and claim cost as debt

If the work or expenditure falls on the responsibility of the seller and is not done before the settlement date, then the buyer is entitled to claim the reasonable cost of work done by the buyer in accordance with the notice or order as a debt.

Seller to complete work that is buyer's responsibility and add expenditure to Balance of Purchase Price

Any work or expenditure that is the responsibility of the buyer required to be done prior to settlement, must be done by the seller unless the buyer directs the seller not to and indemnifies the seller against any liability for not carrying out the work. If the seller does the work or spends the money the reasonable cost of the work or expenditure must be added to the Balance of the Purchase Price.

Last reviewed: 11 July 2013

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[¶60-780] Certificates and records inspection on body corporate

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Seller not obliged to give body corporate certificates to buyer

There is nothing in the standard contract (see ¶60-700) about the buyer's right to obtain certificates from the body corporate or to inspect its records. Standard conveyance practice would dictate that it is for the buyer to request a copy of the body corporate records for its own enquiries on the property. There is no obligation on the seller to provide body corporate certificates to the buyer.

In practice — searches on the body corporate should be obtained

The official "Contract Warning" (which forms the first page of the standard contract) recommends the buyer to obtain a body corporate information certificate and conduct a search of the body corporate records. Section 205 of the BCCM Act gives the buyer of a lot (as well as other people who have a "proper interest" in information) the right to obtain a body corporate information certificate or conduct a search of the body corporate records. The detail about these certificates and searches is contained in the appropriate regulation module. It is recommended that the buyer is advised to obtain these certificates and searches by the conveyancing practitioner to ensure all possible enquires are made regarding the Property and common property. The buyer and practitioner will find useful information regarding levies and (if any) future agenda for body corporate expenditure which will affect the buyer upon purchasing the property.

.01 Law: Sec 205.

Last reviewed: 9 August 2013

[¶60-790] Parties' default

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Rights and remedies

The standard contract provides direction regarding the termination rights of both the seller and buyer upon default of either party. The provisions of cl 9 are not to be taken to limit either parties' rights or remedies at common law. The standard contract seeks to provide each party with a clear idea of what rights and remedies are available to the party upon a default event.

Affirming the contract

If the buyer fails to comply with an essential term of the contract, the seller may either affirm or terminate the contract. Should the seller affirm the contract then the seller may sue the buyer for damages or specific performance or both. If the seller defaults then the buyer has the same rights.

Terminating the contract

If the seller terminates the contract for the buyer's default then the seller may resume possession of the Property, keep the Deposit with interest, sue the buyer for damages and resell the property. If the buyer terminates the contract for the seller's default, then the buyer may recover the Deposit with interest earned, and sue the seller for damages.

On the resale of the property by the seller, the seller may recover from the buyer as liquidated damages, any deficiency in price on a resale and its expenses connected with repossession. This includes any expenses connected to a failed resell and the resale provided the resale settles within two years of termination of the contract. The seller will keep any profit on a resale of the property.

What damages include

The seller may claim damages for any loss suffered by the seller as a result of the buyer's default under the contract, including its legal costs on an indemnity basis and cost of any works complete or expenses paid in relation to cl 7.6(3) (see ¶60-760 "Requirements of authorities").

The buyer may claim damages for any loss suffered as a result of the seller's default including legal expenses on an indemnity basis. A careful note to practitioners, as per case authorities, loss suffered by the claiming party must be evidenced and quantified in a damages claim.

Last reviewed: 9 August 2013

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[¶60-795] Severance clause

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From 1 July 2010, the Australian Consumer Law provisions at Sch 2 of the *Competition and Consumer Act 2010* (ACL) will apply to standard form contracts, in particular targeting those contract terms which cause a significant imbalance in the parties' rights and obligations. Any terms within a standard contract that are deemed to be unfair will be void. To ensure the validity and enforceability of the standard contract is not affected by terms deemed to be void for unfairness, a new severance cl 10.8 has been incorporated into the standard contract. This clause provides that any offending term or part of a term in the contract that becomes legally ineffective, invalid or unenforceable in any jurisdiction will be severed and the effectiveness, validity or enforceability of the remainder of the term of the contract will not be affected.

Last reviewed: 9 August 2013

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[¶60-800] Adjustments and outgoings

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Onus on payment of special contributions

Clause 2.6 of the standard contract (see ¶60-700) deals with adjustments between the parties as at settlement. The process of adjustment is not substantially affected because a community titles transaction is involved. The difference arises from the definition of "Outgoings" which include "regular periodic contributions to the Body Corporate (other than Special Contributions)". This means that regular periodic contributions fall for adjustment in the same way as rates and other outgoings. This is in contrast to special contributions which (according to cl 2.6(13) of the standard contract) are payable by:

- the seller, if levied on or before the contract date, or
- the buyer, if levied after the contract date.

Unfortunately, the meaning of "regular periodic contributions" is not clear. The term is not defined in either the BCCM Act or the regulation modules. It is a term used in BUGTA. It is most likely meant to refer to annual contributions payable by instalments. However, special contributions may also be made payable by instalments, in which event reference is made to the purpose for which the special contribution was made and the definition of "Special Contribution" in cl 1.1(2) of the standard contract (see ¶60-730). The purpose will appear on the body corporate information certificate.

The position in relation to amounts payable under exclusive use by-laws should also be noted. Clause 2.6(14) of the standard contract provides:

> "For the purposes of clause 2.6(13), an amount payable under an exclusive use by-law will be treated as levied on the date it is due."

Clause 2.6(13) deals with liability for special contributions. This (combined with the definition of "Special Contribution") means that all amounts payable under exclusive use by-laws are treated as special contributions, whether of a capital nature or otherwise. The fairest approach would be to require non-capital payments (eg those in the nature of "rent") to be adjusted as outgoings and capital payments to be treated as special contributions.

Guide for practitioners

Until a court determines otherwise the safest approach for practitioners is to:

- treat the instalments of annual contributions as "regular periodic contributions" and thus adjust them in the same way as other outgoings
- adjust all special contributions (whether or not payable by instalments) in accordance with cl 2.6(13) of the standard contract, and
- treat all payments under exclusive use by-laws as special contributions.

Last reviewed: 9 August 2013

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[¶60-850] Notices to body corporate

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Previous editions of the standard contract (based on BUGTA) required a buyer to prepare, in duplicate, a notice of change of ownership to the body corporate and submit it to the seller with the transfer. The buyer and the seller, or their solicitors, had to sign the notice and each retained a copy. This allowed the seller to discharge their obligation to notify the body corporate of the change of ownership. It also allowed the buyer to give a notification to the body corporate as a precautionary measure. Although the standard contract set up this process, it was actually giving effect to the requirements of BUGTA and, in particular, the requirement for a notice to be “confirmed” by the buyer.

The current standard contract is silent on the question of these notices of change of ownership. This is because the provisions of the BCCM Act dealing with these notices are fundamentally different to the corresponding provisions in BUGTA. Section 201 of the BCCM Act authorises a regulation module to prescribe requirements about the giving of notices to the body corporate on the transfer of the ownership of a lot or on the happening of other events affecting the lot. All of the regulation modules contain the same provisions. They provide that a person who becomes the owner of a lot by transfer, transmission, or in another way, must within two months give a written notice to the body corporate setting out:

- the person’s name and residential or business address
- the person’s address for service (unless the residential or business address is the address for service), and
- brief details about the way the person became the owner of the lot.

Reasons for prompt notice of change of ownership

Form BCCM 8 (¶70-180) should be used to notify the body corporate. A buyer who fails to notify the body corporate commits an offence which carries a maximum penalty of 20 penalty units. This highlights the need for a buyer’s solicitor to ensure that the necessary notice is given promptly on settlement. Other reasons why the notice should be given promptly are:

- the buyer will not be able to vote at body corporate meetings until recorded on the roll
- contribution notices will continue to be sent to the seller (thus generating a paper trail involving the body corporate, seller, seller’s solicitor, buyer’s solicitor and buyer at a time when everyone has finished with the matter and payment has been made), and
- the body corporate will not know with whom to communicate in relation to the lot.

These very reasons raise an issue for the seller — how can the seller be satisfied that the body corporate roll has been changed? This was important under BUGTA, not only because of the reverse implications of the above reasons, but also because the seller continued to be liable for contributions until the records of the body corporate were changed. This was because an “owner” (proprietor) was determined with reference to the roll. The position is slightly different under the BCCM Act in that an “owner” is now determined with reference to the person who is, or is entitled to be, the registered owner of the lot. However, the short answer to the question is that the seller cannot reasonably be satisfied. Also, there is no mechanism for the seller to provide the notice. Although the legal consequences for the seller are not serious, there is the potential for inconvenience. The best approach is for the seller, upon becoming aware of the fact that the body corporate records are out of date, to give the body corporate information about the transfer and request it to serve a notice on the buyer under s 203 of the BCCM Act.

.01 Law: *Body Corporate and Community Management Act 1997*, s 201, 203; Body Corporate and Community Management (Standard Module) Regulation 2008, s 193 to 195.

Last reviewed: 11 July 2013

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[¶60-880] Pre-settlement resolutions

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The second category seller's warranties under the standard contract dealt with in ¶60-750 apply as at the date of the contract. If circumstances change between the date of contract and the date of settlement, there is nothing in the standard contract terms that requires a "correction notice" which carries with it a right for a "materially prejudiced" buyer to terminate. However, it is important for practitioners to bear in mind the "Further Disclosure Statement" requirements on the seller under s 214 of the Body Corporate and Community Management Act. In respect of the standard contract, instead, cl 8.4 requires a degree of ongoing disclosure by the seller about body corporate meetings held before settlement. The protection offered by this process does not extend to all of the matters covered in the second category seller's warranties.

Clause 8.4(1) requires the seller to promptly give the buyer a copy of:

- any notice the seller receives of a proposed meeting of the body corporate to be held after the contract date, and
- resolutions passed at that meeting and prior to settlement.

"Body corporate" is the body corporate of the scheme. It therefore does not include any other body corporate in a tiered scheme. Also, the resolutions covered are restricted to those passed prior to settlement. If the meeting notice was given pre-settlement but the meeting not held until after settlement, then the obligation would not apply to a resolution passed at that meeting.

Clause 8.4(2) allows a buyer to terminate the contract before settlement ***if the buyer is materially prejudiced*** by:

- a resolution of a body corporate passed after the contract date, other than one to record a new community management statement, details of which were disclosed to the buyer in the contract, or
- where the scheme is a subsidiary scheme, any resolution of a body corporate of a higher scheme.

All resolutions of a higher scheme are caught, irrespective of whether they relate to the recording of a new community management statement. Also, resolutions of a body corporate committee consenting to the recording of a new community management statement are covered by cl 8.4(2) (see cl 8.4(3)). To negate this right to terminate, details of the new community management statement, and not just the resolution, would need to be disclosed. Disclosure would normally include annexure of a copy of the proposed new statement.

Practical difficulties of disclosure

Clauses 8.4(1) and 8.4(2) do not work together very well. Subclause (1) is intended to provide the buyer with information to enable an assessment of whether a resolution will result in material prejudice. Subclause (2) then gives the right of termination. A problem arises from the wording of subcl (1) in that subcl (2) allows termination in respect of resolutions of "the scheme" and higher schemes, whereas subcl (1) only provides information about "the scheme". Herein lies a predicament. To expand subcl (1) to require a buyer to provide information about higher schemes will overcome the problem for the buyer, but will create a problem for the seller who is not in a position to obtain, as of course, the information about the higher scheme. The information must come from the records of the body corporate for the scheme, or possibly from the records of the body corporate for the higher scheme. The onus is clearly on the buyer to obtain the information from those records.

If the buyer is not given a copy of the resolutions before settlement in accordance with cl 8.4(1), then the buyer is given a right to sue the seller for damages. The right is clearly intended to survive settlement, although it would be restricted to circumstances where the buyer was materially prejudiced.

Last reviewed: 11 July 2013

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[¶60-900] Control of voting power

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Buyer has no voting right at body corporate meetings prior to settlement

The standard contract (see ¶60-700) does not provide for the buyer to have the right to vote at meetings of the body corporate prior to settlement. Also, it does not pass entitlement to vote to the buyer during the period between settlement and entry of the purchaser on the roll. Buyers must therefore act promptly to ensure that their notice is given to the body corporate (see ¶60-850) and their name is entered on the roll. Restrictions in the BCCM Act and various regulation modules make it difficult to interfere with voting rights in contractual situations and, no doubt, this is why the standard contract has steered clear of these types of provisions.

Notice of any body corporate meetings and resolutions

Although the buyer has no power to vote at any body corporate meetings while in the process of its purchase of the property, the safe guard in the standard contract (cl 8.4 Meetings) requires that the seller promptly provide the buyer a copy of any notice it receives of a proposed meeting of the body corporate to be held after the Contract Date, and resolutions passed at that meeting, and prior to settlement. The buyer does have the right to terminate the contract by notice to the seller given before settlement ***if it is materially prejudiced*** by any resolution of the body corporate passed after the Contract Date other than a resolution to record a new community management statement. Details of the new community management statement should be provided and disclosed to the buyer. If the buyer does not receive a copy of the resolutions before settlement, it may sue the seller for damages.

Last reviewed: 9 July 2013

[¶60-950] Foreign resident capital gains tax withholding regime

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A purchaser that buys a property for $2m or more from a vendor that is a foreign resident must pay 10% of the purchase price to the Australian Tax Office (for contracts entered into on or from 1 July 2016). The purchaser may exclude that amount from the sale price paid to the vendor on completion.

Where an amount is withheld, the purchaser is required to complete an online “Purchaser Payment Notification” form to provide details of the vendor, purchaser and the property being acquired to the ATO.

Clearance certificates for Australian residents

Australian residents selling property for $2m or more must obtain a clearance certificate from the ATO confirming that they are not a foreign resident and then give the certificate to the purchaser before settlement, to ensure that the 10% withholding tax is not withheld from the sale proceeds. Clause 2.5(3) of the standard contract authorises the purchaser to withhold 10% where the vendor has not provided a clearance certificate on or before settlement.

Where there is more than one vendor, a clearance certificate must be provided for each vendor. Ideally, the clearance certificate should be attached to the contract, though it can be provided at any time before settlement.

A vendor may wish to apply for a clearance certificate in circumstances where it is uncertain whether or not they will reach the $2m threshold (for example, if the property is to be sold at auction or the sale contract is yet to be signed). If the eventual sale price is less than $2m, the vendor will not need to provide the purchaser with the clearance certificate.

Last reviewed: 1 July 2016

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[¶61-200] Introduction

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Contractual disclosure is covered by the *Body Corporate and Community Management Act 1997* as well as the *Property Agents and Motor Dealers Act 2000*. The provisions of the Body Corporate and Community Management Act complement the consumer protection provisions of the *Property Agents and Motor Dealers Act 2000*. Practitioners should be aware of provisions of both Acts (which refer to each other) and how they relate to each other in drafting and preparing a valid contract for prospective purchasers. Practitioners should ensure their contracts for sale of lots strictly (proscriptively) comply with both Acts.

Historically, contractual disclosure has long been part of Queensland building units and group titles conveyancing practice. In the case of contracts by "original proprietors" the disclosure was required by statute, but in the case of secondary sales, the disclosure was entirely voluntary. Over the years it became apparent that, notwithstanding the levels of disclosure, people were buying into complexes without understanding the implications of their purchase. The greatest number of problems occurred in relation to units in managed complexes. Consumer groups became increasingly vocal about these issues and demanded substantial interference with the way in which "management rights" operated. In an attempt to address the issues without interfering unduly with the management rights industry (which plays an important role in Queensland's tourism industry), the government sought to ensure that buyers were better informed about their purchase and the communal environment which they were proposing to join. The statutory "information sheet" and disclosure statement requirements were key initiatives in the government's efforts. This part of the commentary deals with those matters.

Last reviewed: 9 August 2013

[¶61-230] Information sheet and warning statement

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Information sheet for proposed and existing lot sales

All relevant contracts (whether for existing lots or proposed lots) must have attached to them an information sheet in the approved form — headed "Contract Warning" (see **Form A14**, ¶70-231). The content of the information sheet is liable to change, and care needs to be taken to ensure that the latest version is being used.

This information sheet is given because the property the subject of the contract is a unit sale.

For contracts entered into prior to 1 December 2014:

The seller must give the proposed buyer a clear statement directing the proposed buyer's attention to the warning statement and proposed relevant contract and the information sheet (s 368A(2)(c)(ii) PAMDA and s 206A BCCM Act) in compliance with the PAMDA requirements up to and including 30 November 2014. See ¶23-635 as to the importance of the statement directing the buyer's attention to the PAMD Form 30c warning statement and the BCCM Form 14 information sheet. As a result of the *Body Corporate and Community Management and Other Legislation Amendment Act 2013*, the updated BCCM Form 14 is available.

For contracts entered into from 1 December 2014:

The *Property Occupations Act 2014* (Qld) commenced on 1 December 2014.

The new Act defines residential property as "real property that is used or intended to be used for residential purposes but does not include real property that is used primarily for the purpose of industry, commerce or primary production".

The seller is required to give the proposed buyer a statement, immediately above and on the same page where the proposed buyer signs as follows:

> "The contract may be subject to a 5 business day statutory cooling-off period. A termination penalty of 0.25% of the purchase price applies if the buyer terminated the contract during the statutory cooling off period. It is recommended the buyer obtain an independent property valuation and independent legal advice about the contract and his or her cooling-off rights, before signing."

The exact wording must be used and replaces the previous Form 30c. The cooling-off period remains the same as under the earlier Form 30c.

A failure to comply by including that statement in the contract may result in a penalty of up to $22,000.00 but the buyer does not receive a termination right.

The seller is still required, under the new regime, to provide disclosure under the BCCM Act.

No longer will a buyer's solicitor be required to execute a Form 32a to waive or shorten a cooling-off period, this can instead be done by way of the buyer providing written notice to the seller without having to consult a solicitor.

The new standard contract for the sale of residential lots in a community titles scheme can be found on the QLS website.

The standard contract can be found (in two versions: see ¶70-300).

For contracts entered into prior to 1 December 2014: What is meant by "attached" to the relevant contract

Pursuant to the definition in s 205A of the Body Corporate and Community Management Act 1997, the definition of attached in relation to an information sheet and a contract means attached in a secure way so that the information sheet and the contract appear to be a single document (for example, binding or stapling the information sheet to the contract). If the documents are given by way of electronic communication, then "attached" will mean the information sheet and contract are given at the same time (for example in a single

email). If the information sheet and contract are being faxed to the buyer then both the documents should be faxed as near as possible to the same time having regard to the normal operation of fax machines.

Buyer's right to terminate for non-compliance

The contract for a proposed lot, if not settled, is subject to termination by the buyer in any of the following circumstances:

- If the contract has not already settled and if the disclosure statement requirements in s 213(1), which includes s 213(2), 213(3) and 213(4) by virtue of the definition in s 205A, are not complied with.

Requirements of the disclosure plan

The BCCM Act was amended on 1 December 2014 to incorporate a new s 213AA which provides all of the details which a disclosure plan must include under the disclosure statement required by s 213(2)(a)(ii).

.01 Law: BCCM Act, s 205A, 206, 213, 213AA.

Last reviewed: 6 February 2015

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[¶61-235] Non-residential property transactions

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For all proposed and existing lots that are non-residential property transactions entered into prior to 1 December 2014, an information sheet in the approved form must have been "attached" to the contract in a way mentioned in s 205A of the BCCM Act. There are three possibilities:

By facsimile

If the seller intends to fax the contract and the information sheet to the buyer then in order to comply with s 205A and s 213(5), the information sheet is "attached" to the contract if the documents are faxed as near as possible to the same time (having regard to the normal operation of fax machines).

By electronic communication, other than facsimile

The information sheet and contract must be given (prior to 1 December 2014) at the same time, for example by including both documents in a single email. The use of electronic communication under this section of the Act is subject to the *Electronic Transactions (Queensland) Act 2001*.

Any other way

If the seller has given the buyer the information sheet with the contract in a way other than by electronic communication, the seller must have ensured the information sheet was attached to the contract. To "attach" means to attach in a secure way so that the information sheet and contract appear to be a single document (eg by stapling or binding). The use of a paper clip that can be easily removed would not be adequate because it is not secure enough.

Law: BCCM Act, s 205A, 206(5), 213(5).

Last reviewed: 6 February 2015

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[¶61-240] Residential transactions

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Where a “relevant contract” (ie most residential contract transactions) is involved, then the seller must provide a warning statement incorporated into the contract to the buyer for their review (see ¶61-230 for the meaning of “relevant contract”).

Cases — interpretation of “relevant contract” and “residential property” under PAMDA (prior to 1 December 2014)

Ross Nielson case

In the case of *Ross Nielson Properties Pty Ltd* v *Orchard Capital Investments Ltd* (2011) LQCS ¶90-168, Ross Nielson Properties Pty Ltd (RNP), the developer, and Orchard Capital Investments Limited (OCIL), the entity for the property fund, had entered into a development agreement. When RNP was unable to obtain development approval for a shopping centre to be built on the site, the joint venture between RNP and OCIL broke down. If no sale of the land was made within 12 months of the specified date in the development agreement, then OCIL could “put” it to RNP, that RNP (or its nominee) must purchase the land from OCIL for $2.9m, with 60 days settlement. The agreement also conferred a call option in RNP’s favour in similar terms. OCIL’s solicitors exercised OCIL’s put option to RNP to require RNP deliver and execute the necessary documents to purchase the land. RNP did not comply with that demand. RNP gave OCIL notice purporting to terminate the development agreement under s 367(2) of PAMDA, as it then was (now equivalent being s 368A(2)), on the ground that OCIL had not attached or drawn RNP’s attention to a warning statement which is required in relation to “relevant contracts”.

OCIL commenced proceedings in the trial division for orders to enforce RNP’s obligations under the development agreement. RNP defended the proceedings. The trial judge found in favour of OCIL and declared that the development agreement was not a “relevant contract” as that term is defined in PAMDA and that RNP was not entitled to terminate the development agreement as it purported to do so. RNP appealed the decision to the Court of Appeal.

The Court of Appeal held that the provisions in the former Ch 11 of PAMDA themselves indicate that a “relevant contract” is a contract “for the sale” of “residential land” between parties who may be described as “the buyer” and “the seller” of that land, which might “settle”, and in respect of which a “deposit” might be payable and, if paid, might be returned to “the buyer” upon termination. As a matter of ordinary language the development agreement was not a contract “for” the sale of residential property in which RNP was “the buyer” and OCIL was “the seller”. Nor was the agreement of a character which might partake of the payment by “the buyer” of a refundable deposit upon the purchase of land. When regard is had to the whole of the development agreement, as is necessary for the purposes of Ch 11 of PAMDA, it is clear that the development agreement did not meet the statutory definition of “relevant contract”.

Gallagher case

In the case of *Gallagher* v *Boylan* (2011) LQCS ¶90-170, the plaintiff purchaser executed a put and call option deed with the defendant vendor in respect of two adjoining lots on which a dwelling, swimming pool and tennis court were constructed. At the time the deed was executed, there was a single indefeasible title for the two lots and the dwelling, swimming pool and tennis court were built across both lots. Clause 1A of the deed provided that the deposit was to be released to the vendor after a signed copy of the deed had been delivered to the purchaser. The deposit was expressed to be non-refundable unless the vendor was in default of its obligations under the deed or the contract. The purchaser sent the deed and the deposit to the vendor and the vendor complied with cl 1A. Subsequently the purchaser sought to withdraw her offer to purchase pursuant to the then s 365(3) of the *Property Agents and Motor Dealers Act 2000* as a result of the vendor’s failure to comply with the warning statement provisions of the Act. However, the vendor later purported to exercise the put option. When the purchaser failed to complete, the vendor sought to terminate the contract for the purchaser’s breach and resold the land to a third party.

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In these proceedings, the purchaser was seeking a refund of the deposit paid under the deed. The vendor claimed that the Act did not apply to the transaction as the land was not “residential property” within the meaning of s 17 of the PAMDA as the two lots were two parcels of land. “Residential property” is defined in s 17(1) of the Act as inter alia, “a single parcel of land on which a place of residence is constructed or being constructed …”. “Place of residence” is defined in Sch 2 of the Act as a building used, or currently designed for use, as a single dwelling and any outbuildings or other appurtenances incidental to the use of the building. The purchaser countered that the land was residential property as the two lots were a single parcel and were used as such by the residents. The vendor counterclaimed for the shortfall on the resale of the land plus the expenses of resale which was agreed at $2.1m.

The Supreme Court held the definition of “residential property” in the Act is critical for determining whether the consumer protection rights that are conferred under the Act on purchasers of residential property apply in a particular case. The words “a single parcel of land” are descriptive rather than technical. Those words take their meaning from the balance of the definition in s 17(1) of the Act and the definition of “place of residence” which concentrates on the use to which the parcel of land is or can be put and, where there is a place of residence that has been or is being constructed, whether it is built on land that is properly characterised for the purpose of the definition in s 17(1)(a) of the Act as a single parcel of land.

As both lots were used as one parcel of land for the residence and appurtenances that were constructed on them, the two lots comprised a single parcel of land for the purposes of s 17(1) of the Act. Consequently, the deed related to residential property and was therefore a relevant contract for the purposes of the Act. Further, in *Cheree-Ann Property Developers Pty Ltd & Anor* v *East West International Development Pty Ltd* [2007] 1 Qd 132 it was noted in passing that a parcel could comprise more than one registered lot, if they adjoined and were intended to be used for the construction of one place of residence.

Last reviewed: 6 February 2015

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[¶61-250] Disclosure requirements

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An ***existing lot*** is a lot included in a community titles scheme, as opposed to a ***proposed lot*** (see ¶61-280), which is a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established. Under BUGTA it was not necessary for the seller of an existing lot equivalent, other than an original proprietor, to make any form of disclosure. However, in practice the standard contract of the Real Estate Institute of Queensland required a level of disclosure for existing lots. An original proprietor, when selling lots in building units or group titles plans (whether the equivalent of either existing lots or proposed lots), had to disclose a range of statutory information. The information was the same for both types of lots.

The BCCM Act now requires disclosure for all sales, whether they relate to existing lots or proposed lots. The information to be disclosed depends upon the type of lot rather than the status of the seller. Therefore, an original owner must disclose one range of information for proposed lots but a different range of information once the community titles plan has been registered and the lots become existing lots. This requires the form of contract to be modified during the course of the project sales period.

Disclosure Statement requirements under the BCCM Act

The BCCM Act requires the seller of an existing lot to give the proposed buyer, before entering into a contract to buy the lot, a ***disclosure statement*** that complies with s 206(2) to (4) of the BCCM Act. A ***seller*** includes the original owner of scheme land or a mortgagee exercising a power of sale. Section 206(2) says the statement must:

- state the name, address or contact telephone number for the secretary of the body corporate or its body corporate manager (if it is the duty of the manager to issue body corporate information certificates) or each person who is responsible for keeping body corporate records where the scheme is a specified two-lot scheme
- state the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot
- identify improvements on the common property for which the owner is responsible
- list the body corporate assets required to be recorded on a register the body corporate keeps
- state whether there is a committee for the body corporate or a body corporate manager is engaged to perform the functions of a committee
- include other information prescribed under the regulation module applying to the scheme.

Disclosure statement must be signed by seller or authorised agent

The statement to be signed by the seller or a person authorised by the seller to sign the statement. The authorisation should be in writing for evidential purposes. In the case of *Pazcuff Pty Ltd* v *Farmilo & Ors* (2009) LQCS ¶90-151, the sellers did not sign the disclosure statement provided to the buyer and accordingly the buyer terminated the contract of sale. The sellers argued that the disclosure statements, although unsigned, had been authorised and provided under a covering letter signed by the sellers' solicitor. The Supreme Court held that there was no actual authority provided by the sellers to their solicitor to verify the contents of the disclosure statement or to sign the disclosure statement on their behalf. Accordingly, the unsigned disclosure statement did not comply with the Act and the buyers were entitled to terminate the contract.

Disclosure statement must be substantially complete

Section 206(4) requires the statement to be "substantially complete", while s 206(8) says the seller does not fail to comply with s 206(1) merely because the statement, although substantially complete as at the day the contract was entered into, contains inaccuracies. The requirement for the statement to be substantially complete is therefore an over-riding requirement. (See detailed discussion in ¶61-294).

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Further, if there is no information created by a body corporate in relation to a particular question in the statement, an answer of “non-applicable” is acceptable. In *Menniti & Ors* v *Winn & Anor* (2008) LQCS ¶90-142, it was argued that the vendors had not complied with their s 206 disclosure obligations because they had answered the questions with “not applicable”. The Queensland Supreme Court of Appeal determined that the statement complied with s 206 because the answers were accurate in light of the fact that the body corporate had been run informally, without complying with the requirements of the Act.

Last reviewed: 6 February 2015

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[¶61-251] Termination rights for non-compliance by seller

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Termination for failure to attach an Information Sheet to the contract

Section 206A was introduced into the BCCM Act to clarify that a buyer has the right to terminate a contract for the sale of a lot that is residential property, prior to settlement, if the seller has failed to give the clear statement relating to an information sheet in the approved form as required by the *Property Agents and Motor Dealers Act 2000*, s 368A(2)(c)(ii). The buyer may terminate the contract at any time before it settles by giving a signed notice of termination, stating that the contract is terminated under this section, to the seller.

However, the buyer may not terminate the contract under this section if:

- the buyer has signed the information sheet attached to the contract form under s 368A(2)(b) of the *Property Agents and Motor Dealers Act 2000*, or
- it has been 90 days since the buyer received a copy of the contract from the seller.

Liability for costs after termination

If the contract is terminated, the seller must repay the buyer any amount paid to the seller for the purchase of the lot (ie the deposit) within 14 days of termination. The seller or seller's agent is also liable to the buyer for the buyer's reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract under s 206A(7) and that amount can be recovered as a debt under s 206A(8). It is too early for any case law to be developed in the interpretation of what is covered by "other expenses" claimable by the buyer, but it may be safe to say that at least the buyer's expenses in obtaining purchaser enquiries relating to the property would be recoverable from the seller or seller's agent. This section also begs the question whether sellers may be in a position to negotiate with the real estate agent (who are often the persons issuing the contract for sale to the buyer) in the agency agreement that the agent will be liable to the buyer under this section if the agent fails to comply with s 206A.

The termination provisions here is really a mirror of the termination provisions of s 214 of the Act (ie re-disclosure requirements).

Law: BCCM Act, s 206A.

Last reviewed: 9 August 2013

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[¶61-252] Secretary or body corporate manager

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The information should not be provided for both the secretary and the body corporate manager. If there is no body corporate manager then the information relating to the secretary should be provided. If there is a body corporate manager, then consideration should be given as to whether it is the duty of the body corporate manager to issue body corporate information certificates (which must be distinguished from the duty to provide records for inspection). This can only be determined with reference to the wording of the written engagement of the body corporate manager. If it is the duty of the body corporate manager to issue information certificates, then the disclosed information should relate to the body corporate manager. However, if it is not the duty of the body corporate manager to issue body corporate information certificates, then the disclosed information should relate to the secretary.

In most cases the body corporate manager is the person that provides the information certificates and allows the records inspections. However, this, in itself, does not mean that that person legally has the ``duty'' to issue the information certificates.

All three pieces of information must be given — the name, address and contact telephone number. The status of the person (ie, secretary or body corporate manager) should also be given.

Finally, when giving the name of the body corporate manager care should be taken to ensure that it is the correct name (eg, in the case of a company manager, the company name should be given and not the name of the person responsible for the particular community titles scheme).

.01 Law: Sec 206.

Last reviewed: 9 August 2013

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[¶61-254] Annual contributions

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Annual contributions relate to both the administrative fund and sinking fund. They are the contributions, fixed on the basis of the annual budget, to be levied on the owner of each lot for the financial year. They are usually payable by instalments (eg quarterly or monthly) and separate amounts are specified for the administrative and sinking funds. These contributions do not include special contributions (or special levies). The disclosure requirements are satisfied if the annual amounts (ie for both the administrative and sinking funds) are provided. There is no need to include details of the instalments. They must be the current amounts and they must relate to the lot or lots being sold. (Because the amounts are calculated with reference to contribution lot entitlements, they may vary from lot to lot.) This information is obtained from the minutes of the last annual general meeting of the body corporate, or from the contribution records of the body corporate.

.01 Law: s 206(2)(b).

Last reviewed: 9 August 2013

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[¶61-256] Lot entitlements

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The annual contributions (ie body corporate levies) for a scheme are calculated with respect to the contribution schedule lot entitlements and the interest schedule lot entitlements in the community management statement.

Instructions should be sought from the buyer to obtain a copy of the current community management statement which, depending on the age of the scheme, will set out the way in which the deciding principle for the contribution schedule lot entitlements (ie either equality or relativity under s 46A(1) or (2)) has been determined.

Similarly, the community management statement should set out whether the interest schedule lot entitlements (under s 46B) reflect the respective market values of the lots within the scheme.

In addition to obtaining a copy of the community management statement, instructions should be sought to undertake an inspection of the body corporate records. The minutes of the scheme will indicate whether the scheme's lot entitlements have been subject to dispute so that further investigations can be undertaken with the Commissioner's office and the Queensland Civil and Administrative Tribunal.

.01 Law: s 206(2)(b)(ii).

Last reviewed: 9 August 2013

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[¶61-258] Common property improvements

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Under BUGTA the body corporate could authorise the owner of a lot to effect improvements (including the installation of fixtures and fittings) in or upon the common property for the owner's own benefit. Section 37A(2) of BUGTA provided that the owner for the time being of such a lot was, unless excused by the body corporate, responsible for the performance of the duty of the body corporate to repair and maintain the improvement. The rights and obligations created under this 1980 Act provision would be preserved even though that Act ceased to have effect with respect to the body corporate (cf sec 20(1)(c) of the *Acts Interpretation Act 1954*). Under the BCCM Act and its regulation modules, a body corporate may authorise the owner of a lot to make an improvement to the common property for the benefit of the owner's lot. Such an owner must maintain the improvement in good condition, unless excused by the body corporate. Subsequent owners will have the same obligation because of sec 35A of the *Acts Interpretation Act 1954*.

Improvements made on common property in accordance with these provisions, where the owner has an ongoing obligation to maintain, are the improvements that must be identified for the purpose of this item. Improvements where there is no obligation to maintain, or improvements to the lot itself, need not be disclosed. The obligation is merely to identify (eg, ``glass enclosure to balcony''). Further details are not required. The required information can be obtained from the minute book of the body corporate or from the register of authorisations affecting the common property. Care should be taken to ensure that the register is accurate and up- to-date, because if a seller relies on the register in preference to the minute book and the register is unreliable, this will be no excuse for non-compliance with the disclosure requirements. At best, the seller may have rights against the body corporate in tort.

.01 Law: Sec 206.

Last reviewed: 9 August 2013

[¶61-260] Body corporate assets

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A body corporate is able to acquire ``assets'', which are known as ``body corporate assets''. They are items of real or personal property, other than property that is incorporated into and becomes part of the common property. Examples of body corporate assets are a lawn mower, mini-bus and a beach house. However, an airconditioning unit may not be a body corporate asset if it is attached to the common property in such a way that it becomes part of the common property. The body corporate must keep a register of body corporate assets and record in it all assets worth more than $1,000.00 in value. Because the body corporate must maintain these assets and pay all outgoings associated with them, it is important that a buyer is aware of their existence. Under this item the seller must list all assets that are ``required to be recorded'' on the register.

This disclosure requirement presents the following problems for a seller:

- All of the body corporate assets may not be recorded on the register. A search of the minute book and accounting records (to identify purchases) may be necessary in the case of some schemes.
- It may be difficult to determine if a particular item is a ``fixture'' and therefore part of the common property rather than an asset.
- The item must be disclosed if it has a ``value'' ***over*** $1,000.00. The cost of the item may not be a reliable indicator of value. Some items may increase in value, while others decrease in value. Some items are worth more than they cost at the time of purchase.
- It is difficult to determine whether ``sets'' of items should be valued separately or as a single item (eg, an outdoor set of table and chairs).

The starting point for determining which body corporate assets should be disclosed is the register kept by the body corporate, but clearly it will be important for some sellers to look beyond the register and into the general records of the body corporate.

.01 Law: Sec 206.

Last reviewed: 9 August 2013

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[¶61-262] A copy of the community management statement

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After the amendment of s 206 of the Act which commenced on 1 August 2013, the seller of an existing lot is no longer required to provide the buyer with a copy of the current community management statement.

Regardless, instructions should be sought from the buyer to obtain a copy to check whether basic details correspond with those disclosed in the contract and to ensure that, for example, the exclusive use car park or storage locker exists and is capable of being transferred to the buyer at settlement.

Last reviewed: 9 August 2013

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[¶61-264] Committee or body corporate manager

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In general terms, the body corporate must have a committee unless it has engaged a body corporate manager to carry out the functions of the committee and each of its executive members. This engagement occurs under a special division of the relevant module. The procedure for appointment is complex and such appointments are not common at this stage. The disclosure statement must show whether the particular body corporate has a committee, or whether it has engaged a body corporate manager to carry out the functions of the committee and each of its executive members.

Law: Sec 206.

Last reviewed: 9 August 2013

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[¶61-266] Prescribed information

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The regulation module applying to the scheme may prescribe additional information that must be disclosed. None of the regulation modules prescribe any additional information.

Subsections 206(3) and (4) of the BCCM Act require the statement to be:

- signed by the seller or a person authorised by the seller, and
- substantially complete.

Although the BCCM Act does not require the authority to be in writing, for evidentiary reasons that is the best way to give the authority. In the case of *Pazcuff Pty Ltd* v *Farmilo & Ors* (2009) LQCS ¶90-151, the sellers did not sign the disclosure statement provided to the buyer and accordingly the buyer terminated the contract of sale. The sellers argued that the disclosure statements, although unsigned, had been authorised and provided under a covering letter signed by the sellers' solicitor. The Supreme Court held that there was no actual authority provided by the sellers to their solicitor to verify the contents of the disclosure statement or to sign the disclosure statement on their behalf. Accordingly, the unsigned disclosure statement did not comply with the Act and the buyers were entitled to terminate the contract.

Care should be taken to ensure that the statement is fully completed, thus avoiding the argument whether it is "substantially complete". Section 206(7) makes it clear that a seller does not fail to comply with s 206(1) merely because the statement, although substantially complete as at the day the contract is entered into, contains inaccuracies. In any event, it will become apparent later in the commentary that it is better for the statement to be complete but inaccurate, rather than substantially incomplete. (See ¶61-384.)

The REIQ standard form of disclosure statement for existing lots is illustrated at ¶70-320. A simpler form is illustrated in **Form B1** (¶72-550).

Law: BCCM Act, s 206.

Last reviewed: 9 August 2013

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[¶61-280] Disclosure requirements

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Before considering the disclosure requirements for a proposed lot, there are two limitations on the actual sale of a *proposed* lot that must be understood. A proposed lot is a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established. These limitations are effectively the only restrictions that apply to the sale of proposed lots in a community titles scheme (see also the commentary on the *Land Sales Act 1984* at ¶61-300). The limitations are:

(1) A contract for the sale of a proposed lot must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
(2) When the contract is entered into, there must be a proposed community management statement for the scheme provided to the buyer. It will be seen that this is also important for disclosure purposes.

The BCCM Act requires the seller of a proposed lot to give the proposed buyer, before entering into a contract to buy the lot, a statement (*disclosure statement*) that complies with s 213(2) to 213(4) of the BCCM Act. The seller will usually be the original owner (or developer), but this will not always be the case. If a buyer of a proposed lot "on-sells" that lot before the community titles scheme is established, then the buyer must comply with the disclosure requirements for a proposed lot. Section 213(2) of the BCCM Act says the first statement must:

- state the amount of annual contributions reasonably expected to be payable to the body corporate by the owner of the proposed lot
- include, for any proposed engagement of a person as a body corporate manager or service contractor for the scheme proposed to be entered into after the establishment of the scheme or proposed to be continued or entered into after the scheme is changed:
  - the terms of the engagement other than the provisions of a Code of Conduct
  - the estimated cost of the engagement to the body corporate, and
  - the proportion of the cost to be borne by the owner of the proposed lot
- include, for any proposed authorisation of a person as a letting agent for the scheme proposed to be given after the establishment of the scheme, or proposed to be continued or entered into after the scheme is changed, the terms of the authorisation
- include details of all body corporate assets proposed to be acquired by the body corporate after the establishment of the scheme
- be accompanied by the proposed community management statement and (if the scheme is to be a subsidiary scheme) the existing or proposed community management statement for any "higher" scheme
- identify the regulation module proposed to apply to the scheme, and
- include other matters prescribed under the regulation module applying to the scheme.

Section 213(3) requires the statement to be signed by the seller or a person authorised by the seller to sign the statement. The authorisation should be in writing for evidential purposes. In the case of *Pazcuff Pty Ltd* v *Farmilo & Ors* (2009) LQCS ¶90-151, the sellers did not sign the disclosure statement provided to the buyer and accordingly the buyer terminated the contract of sale. The sellers argued that the disclosure statements, although unsigned, had been authorised and provided under a covering letter signed by the sellers' solicitor. The Supreme Court held that there was no actual authority provided by the sellers to their solicitor to verify the contents of the disclosure statement or to sign the disclosure statement on their behalf. Accordingly, the unsigned disclosure statement did not comply with the Act and the buyers were entitled to terminate the contract.

Section 213(4) requires the statement to be substantially complete, while s 213(7) says the seller does not fail to comply with s 213(1) merely because the statement, although substantially complete, contains inaccuracies. The requirement for the statement to be substantially complete is therefore an overriding requirement. (See ¶61-294 for a detailed discussion on "substantially complete".)

It is important to understand exactly what s 213(2) requires, so each of these pieces of information will now be considered in turn.

.01 Law: BCCM Act, s 213.

Last reviewed: 9 August 2013

[¶61-282] Annual contributions

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Annual contributions relate to both the administrative fund and sinking fund. They are the contributions, fixed on the basis of the annual budget, to be levied on the owner of each lot for the financial year. They are usually payable by instalments (eg quarterly or monthly), and separate amounts are specified for the administrative and sinking funds. These contributions do not include special contributions (or special levies). The obligation is effectively to disclose a reasonable estimate of the amount payable by the owner of the proposed lot.

The disclosure statement must disclose to the buyer the extent to which the annual contributions fixed by the body corporate for the scheme and payable by the owner of the lot is based on the contribution schedule lot entitlement and the extent to which it is based on the interest schedule lot entitlement. The Act does not provide any guidance on how "the extent" should be reflected in the disclosure statement.

To arrive at this estimate of annual levies, the original owner must prepare a draft budget and contribution calculation. The amounts payable may vary as between lots because of differences in the contribution lot entitlements and interest lot entitlements. To standardise contract documents most original owners attach a schedule showing the estimated contributions for all of the lots. Sometimes a draft budget is also attached, although this is not necessary. Details of the proposed instalments are also not necessary, because the requirement is to disclose only the annual amount.

The following should be noted about this requirement:

- During a body corporate's first year, its operating expenses are much lower than in subsequent years because plant and equipment (and to some extent the common property generally) is covered by various warranties. For example, there are no lift maintenance costs during that year.
- It is common practice for developers to only disclose the annual contributions for the first year.
- Developers almost invariably ensure that the body corporate budget is kept artificially low for the first year so as to keep the contributions low and thereby facilitate marketing. This applies particularly to the sinking fund. For example, it is not uncommon for contributions for years two and three to be twice as much as the disclosed contributions for year one, or more.
- It is not clear whether the disclosure should be restricted to annual contributions for the first year or whether it should include two or more years. Given that the intent of the disclosure is to ensure that the buyer is aware of what they will have to pay for contributions, it is clearly arguable that it is misleading to confine the disclosure to the first year and the disclosure should at least extend to the second year. This is particularly so where the lot is intended to be placed in a rental pool and return will depend on the level of outgoings, which include levies.

This raises the question whether the current practice of developers disclosing low contributions for only the first year can be said to satisfy the "reasonably expected" test. There is a strong argument that the test would not be satisfied, and in many cases buyers may be able to establish "material prejudice" and cancel their contracts.

Leaving aside the risk of cancellation, there is also a risk of the seller being liable for damages for breach of warranty. Section 216 of the BCCM Act says the buyer may rely on the information in the disclosure statement "*as if the seller had warranted its accuracy*". Also, there is nothing to restrict that provision from surviving settlement of the contract and there is no need to establish "material prejudice".

.01 Law: BCCM Act, s 213.

Last reviewed: 9 August 2013

[¶61-284] Managers and contractors

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Many of the larger developments warrant the appointment of a body corporate manager, building manager and various service contractors (eg lift maintenance contractor, gardening contractor). If the original owner intends the body corporate to engage these managers or contractors, then the required information must be disclosed for **each** proposed engagement. It is not clear how much detail is required of the terms of the engagement. While the commercial terms would be essential, more technical terms (eg the extent of any delegation to a body corporate manager) may also need to be disclosed. It is common practice to disclose the terms of these engagements by annexing draft copies of the proposed documentation. This is the safest course to ensure compliance.

Another issue concerns disclosure of the contracting party. In the case of management agreements, the identity of the contracting party will not be known until well into the marketing program and it will not be possible to identify the party in the initial sale contracts. The practice is to disclose to the buyer the fact that the party's identity is not known and to reserve the right for the original owner to nominate the party. Sometimes the right extends to the nomination of a related party to the original owner.

There is doubt as to the effectiveness of this approach. In *Lee & Anor v Surfers Paradise Beach Resort Pty Ltd*, a draft caretaking and letting agreement annexed to a disclosure statement had left a number of details blank, including the identity of the proposed letting agent. The Queensland Court of Appeal held that the missing details rendered the disclosure statement inaccurate, thereby requiring the seller to submit a further statement rectifying the inaccuracies (BCCM Act, s 214(2)). But for the fact that the buyers had not led any evidence that they would have been materially prejudiced if required to complete, an entitlement to cancel the contract for the inaccuracies in the disclosure statement may well have arisen.

The risks associated with relying on a right in the disclosure statement to nominate a manager are also illustrated in the decision of Bergin J in the New South Wales Supreme Court in *Community Association DP 270238 v Hudson Property Group*. Section 24 of the *Community Land Management Act 1989* (NSW) provides that an agreement in the nature of a caretaking agreement that is entered into during an "initial period" (ie a developer control period) terminates at the end of the first annual general meeting unless "its effect" was disclosed, or it is ratified at that meeting. In *Hudson's* case the substantive contents of the proposed agreement were disclosed, as was the possibility that the manager might be a company related to the developer, but a copy of the proposed agreement was not disclosed, nor was the identity of the proposed manager. It was held that on both accounts there was a failure to disclose the "effect" of the proposed agreement and as it was not ratified, it terminated automatically at the end of the first annual general meeting.

The cost estimates must be prepared with reference to the financial terms of the proposed engagement. Care should be taken to include "outgoings" and the related costs of the body corporate having to provide people, equipment or supplies to the manager or contractor. For example, if the body corporate is required, as a condition of the engagement, to employ a cleaner, it is clearly arguable that the cost of satisfying the condition (ie the cost of employing the cleaner) is a cost to the body corporate. This cost should be reflected in the estimated cost to the body corporate, and ultimately, in the estimated proportion to be borne by the owner of the proposed lot.

Law: BCCM Act, s 213.

.40 Case reference: *Community Association DP 270238* v *Hudson Property Group* [2005] NSWSC 725 (NSW Supreme Court, 18 July 2005, Bergin J); *Lee & Anor* v *Surfers Paradise Beach Resort Pty Ltd* (2008) LQCS ¶90-141; [2008] QCA 29.

Last reviewed: 9 August 2013

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[¶61-286] Letting agent

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The obligation here is to disclose the terms of the proposed authorisation. There is no requirement to estimate costs because authorisations of letting agents do not normally involve the body corporate in any costs. If a particular authorisation does require a body corporate to make a payment, then the likelihood is that the letting agent would be a service contractor and the transaction would require disclosure as a proposed engagement of a service contractor. Again, the common way to make the disclosure is by annexing a copy of the proposed documentation to the sale contract.

The comments in ¶61-284 above about the identity of the parties to service contracts apply equally to the identity of parties to letting agent authorities.

.01 Law: Sec 213.

Last reviewed: 9 August 2013

[¶61-288] Body corporate assets

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The disclosure of body corporate assets for existing lots involves the provision of a ``list'' of the assets. Also, the assets that must be listed are only those that are required to be recorded in the assets register (ie, those valued at more than $1,000). The position is different for proposed lots in that:

- ``details'' of the assets must be provided (which suggests that something more than a ``listing'' is required); and
- there is no monetary limit (hence **all** assets proposed to be acquired by the body corporate after the establishment of the scheme must be disclosed).

Use of the word ``acquired'' suggests that the disclosure is not restricted to those assets to be ``purchased'' by the body corporate. Assets proposed to be purchased by the original owner and given to the body corporate would also need to be disclosed.

.01 Law: Sec 213.

Last reviewed: 9 August 2013

[¶61-290] Community management statements

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The proposed community management statement for the scheme in which the proposed lot will be situated must be disclosed. A draft of the community management statement should form part of the disclosure statement. While some blanks in the draft will be inevitable, special care will need to be taken to ensure that these are kept to a minimum and that they are not material (eg proposed lot entitlements).

If the scheme is a subsidiary scheme, then the existing or proposed community management statement for ***each*** other scheme in the hierarchy must also be disclosed. For example: if the project involves a three-tier management structure and the proposed lot is in a proposed third tier community titles scheme, then three community management statements (actual or proposed) must be disclosed. Once again, annexing copies to the disclosure statement does this.

On 14 April 2011, the *Body Corporate and Community Management and Other Legislation Amendment Act 2011* introduced additional grounds for buyer termination of contracts for sale of proposed lots under s 217(b) and 217A. The additional termination rights are discussed in detail at ¶61-395 and ¶61-396 (regarding inaccurate community management statement and inconsistent lot entitlements). Should the seller provide a proposed community management statement that is inaccurate to the buyer (ie the statement breaches one of the requirements of s 217(b)), and the buyer believes he would be materially prejudiced because of the inaccuracies in the community management statement (see s 217(c)), then the buyer can terminate the contract before the contract is settled. Practitioners should be aware of these additional rights and the time period specified for a buyer to exercise those rights.

.01 Law: s 213, 217 and 217A.

Last reviewed: 9 August 2013

[¶61-292] Regulation module

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The seller is simply required to “identify” the regulation module proposed to apply to the scheme. This may be done using the full citation (eg “Body Corporate and Community Management (Standard Module) Regulation 2008”) or the commonly used short form (eg “Standard Regulation Module”).

.01 Law: BCCM Act, s 213.

Last reviewed: 9 August 2013

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[¶61-294] Prescribed matters

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The regulation module applying to the scheme may prescribe additional matters that must be disclosed. None of the regulation modules prescribe any additional information.

Subsections 213(3) and (4) of the BCCM Act require the statement to be:

- signed by the seller or a person authorised by the seller, and
- substantially complete.

Although the BCCM Act does not require the authority to be in writing, for evidentiary reasons that is the best way to give the authority. Care should be taken to ensure that the statement is fully completed, thus avoiding the argument whether it is "substantially complete". It is difficult to know what is meant by substantially complete. The term "substantial" has been criticised judicially for the lack of precision that results. In some cases "substantial" was held to mean real and not immaterial or ephemeral; in other cases it means most or nearly the whole of the thing being considered. (See *Terry's Motors Ltd* v *Rinder* (¶61-294.40), *Maclay* v *Dixon* (¶61-294.41) and *Tillmans Butcheries Pty Ltd* v *Australasian Meat Industries Employees Union* (¶61-294.42).) In our case the statement must be "substantially complete". Clearly, the intention is that at least most of the required information must be included. However, a statement could contain most of the required information but still lack information that is important to the decision to buy. A sensible interpretation would be that applied in *Re Asset Risk Management Ltd and Others* (¶61-294.43). That case involved the words "substantially complied with" in s 205(11) of the *Corporations Act 2001* (as it existed at the time). Burchett J held that "substantial compliance" is a question of degree assessed against "the practical effect the legislature appears to have sought to achieve".

While the words "substantially complete" have been considered in a number of contexts, no definite meaning is clear. However, a number of principles emerge from the cases. First, to talk about something being "substantially complete" implies that something is outstanding: *Bowery* v *Babbitt*. The term "substantially" connotes "in the main" or "essentially": per Ambrose J in *Re Bonny*. Substantial completion would also involve completion to an extent necessary to achieve the purpose of the legislative provision: *Aetna Cas and Sur Co* v *Butte-Meade Sanitary Water District*.

A requirement for there to be "substantial" compliance with legislative formalities indicates an intention to allow a degree of discretion. When the term is used in a quantitative sense it does not necessarily mean "most", but may mean only "much" or "some": *Terry's Motors Ltd* v *Rinder*. See also *Re Cashin*. Dean J in *Tillmanns Butcheries Pty Ltd* v *Australasian Meat Industry Employees Union* observed that "substantial is a word calculated to conceal a lack of precision". In a relative sense substantial means considerable: *Radio 2UE Sydney Pty Ltd* v *Stereo FM Pty Ltd*.

This suggests that completeness will be a question of degree, although the addition of "substantial" suggests that any missing material would be comparatively small and minor.

Then there is the question of "inaccuracy". Is an incomplete disclosure statement inaccurate? Arguably, incompleteness is simply a factor or circumstance that gives rise to inaccuracy. To be accurate, a thing must be "conforming exactly with the truth or with a given standard" (The *Australian Concise Oxford Dictionary*, 3rd Edition). If it fails to conform because something is missing, then it is inaccurate.

There is nothing in Ch 5 Pt 2 Div 2 of the BCCM Act (which is the Division in which s 206 and 213 are situated) that would suggest that anything other than the ordinary meaning of "inaccurate" should apply. Indeed, the contrary is arguable. Sections 208, 209 and 210 in relation to existing lots and s 214, 215, 216 and 217 in relation to proposed lots, have been included to protect buyers by ensuring that they are given accurate information relevant to their purchase. If they are given inaccurate information and they are materially prejudiced, then they can cancel their contracts. If the information they are given is incomplete and they are materially prejudiced as a result, it is entirely consistent with the intention of the legislative provisions that the incompleteness be regarded as an inaccuracy, with the resulting consequences for the seller.

Another troublesome question is whether a statement is substantially complete if it was not signed by the seller or the seller's authorised agent. Clearly this would be a technical breach in the sense that the buyer will not have missed any important information. In the case of *Pazcuff Pty Ltd* v *Farmilo & Ors* (2009) LQCS ¶90-151, the sellers did not sign the disclosure statement provided to the buyer and accordingly the buyer terminated the contract of sale. The sellers argued that the disclosure statements, although unsigned, had been authorised and provided under a covering letter signed by the sellers' solicitor. The Supreme Court held that there was no actual authority provided by the sellers to their solicitor to verify the contents of the disclosure statement or to sign the disclosure statement on their behalf. Accordingly, the unsigned disclosure statement did not comply with the Act and the buyers were entitled to terminate the contract.

It should also be noted that s 213(7) of the BCCM Act makes it clear that a seller does not fail to comply with s 213(1) merely because the statement, although substantially complete as at the day the contract is entered into, contains inaccuracies. In any event, it will become apparent later in the commentary (see ¶61-384) that it is better for the statement to be complete but inaccurate, rather than substantially incomplete.

Law: BCCM Act, s 213

.40 Case references See *Terry's Motors Ltd* v *Rinder* [1948] SASR 167 at 180

.41 Case references See *Maclay* v *Dixon* [1944] 1 All ER 22 at 22-24

.42 Case references See *Tillmans Butcheries Pty Ltd* v *Australasian Meat Industries Employees Union* (1979) 42 FLR 331 at 348

.43 Case references See *Re Asset Risk Management Ltd and Others* (1995) 130 ALR 605

.44 Case references See *Deming No 456 Pty Ltd* v *Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129

.45 Case references *Bowery* v *Babbitt 99* Fla 1151

.46 Case references *Re Bonny* [1986] 2 Qld R 80 at 82

.47 Case references *Aetna Cas. And Sur. Co. - Butte-Meade Sanitary Water District 500* F.Supp 193

.48 Case references *Terry's Motors Ltd* v *Rinder* [1948] SASR 167 at 180

.49 Case references *Re Cashin* [1992] 2 Qld R 63

.50 Case references *Butcheries Pty Ltd* v *Australasian Meat Industry Employees Union* (1979) 42 FLR 331 at 348

.51 Case references *Radio 2UE Sydney Pty Ltd* v *Stereo FM Pty Ltd* (1982) 44 ALR 557

Last reviewed: 9 August 2013

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[¶61-296] Chart of the disclosure process

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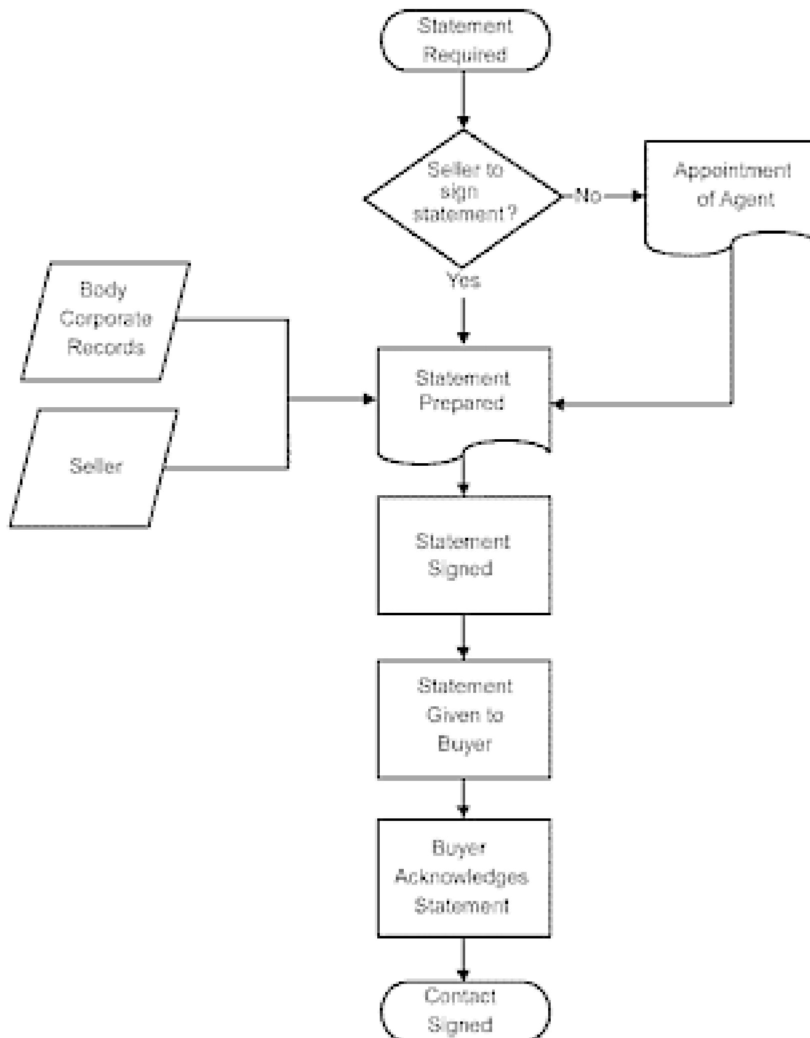
The following chart illustrates the process of disclosure.



.01 Law: Sec 213.

Last reviewed: 9 August 2013

[¶61-300] Land Sales Act

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Provisions of the *Land Sales Act 1984* relevant to community titles conveyancing were identified in ¶60-350. At this point it is important to note that:

- the restriction imposed on the sale of "relevant land" by that Act does not apply to proposed lots in a proposed community titles scheme, and
- the statement required to be given under that Act before the sale of a proposed lot may be incorporated in a first statement under s 213 of the BCCM Act.

Law: BCCM Act, s 213

Land Sales Act 1984, s 6(1); 8(1); 21(5), (6)

Last reviewed: 9 August 2013

[¶61-350] Further statements

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Disclosure statements for proposed lots are often given very early in the development process, thus increasing the risk of circumstances changing to the extent that the information in the disclosure statement becomes inaccurate. The BCCM Act recognises this and makes provision for variation of the disclosure statement pursuant to s 214. If the contract has not settled and:

- the seller becomes aware that information contained in the disclosure statement was inaccurate as at the day the contract was entered into, or
- the disclosure statement would not be accurate if now given as a disclosure statement,

then the seller must give the buyer a further statement (**"further statement"**) rectifying the inaccuracies in the disclosure statement.

This further statement must be given at least 21 days before the contract is settled and that further statement must be signed by the seller and (as required) rectify any inaccuracies to building format lot particulars or standard format lot particulars.

In *Lee & Anor v Surfers Paradise Beach Resort Pty Ltd*, a draft caretaking and letting agreement annexed to a disclosure statement had left a number of details blank, including the identity of the proposed letting agent and the dates between which the proposed agreement was to run. The Queensland Court of Appeal held that the missing details rendered the disclosure statement inaccurate, thereby requiring the seller to submit a further statement rectifying the inaccuracies.

The timing of the giving of the further statement is critical.

In cases where the contract has not settled, and the seller becomes aware that information in the disclosure statement was inaccurate as at the day the contract was entered into or if the disclosure statement would not now be accurate if entered into, then the seller must, at least 21 days before the contract is settled, give the buyer a further statement which rectifies the inaccuracies in the disclosure statement.

When a further statement is given, it must be:

- signed by the seller, and
- to the extent that the further statement rectifies inaccuracies in the building format lot particulars, volumetric format lot particulars or standard format lot particulars mentioned in the initial or earlier disclosure statement(s) be certified as accurate by a cadastral surveyor.

Although the BCCM Act does not require the authority to be in writing, for evidentiary reasons, that is the best way to give the authority. Also, these provisions about further statements continue to operate once a further statement has been given under s 214(5).

If a seller fails to comply with s 214, the buyer may terminate the contract by written notice to the seller if the contract has not already settled and the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was or has become inaccurate.

Law: BCCM Act, s 214.

.40 Case references: *Lee & Anor* v *Surfers Paradise Beach Resort Pty Ltd* (2008) LQCS ¶90-141; [2008] QCA 29.

Last reviewed: 5 July 2015

[¶61-380] Circumstances for cancellation

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Buyers of existing and proposed lots may have a right to terminate their contracts for non-compliance with the disclosure requirements in these circumstances under the BCCM Act:

In relation to existing lots:
(1) Because the seller makes no disclosure statement to the proposed buyer (s 206(1)).
(2) Because the seller makes inaccurate disclosure and the proposed buyer would be materially prejudiced by the inaccuracy (s 209(1)(b)(i)).
(3) Because the buyer is unable (despite reasonable efforts) to verify the accuracy of the information disclosed (s 209(1)(b)(iii)).
(4) Because the buyer reasonably believes the contribution schedule lot entitlements for the lots in the scheme are inconsistent with the contribution schedule principle on which they were decided and the buyer would be materially prejudiced if compelled to complete the contract (s 209A(1)(b)(i) and 209A(1)(b)(ii)).
In relation to proposed lots:
(5) Because a community management statement does not exist at the time the contract is entered into (s 212A).
(6) Because the seller makes no disclosure statement to the proposed buyer (s 213(1)).
(7) Because the seller provides a Further Disclosure Statement and the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement is, or has become, inaccurate (s 214(4)).
(8) Because the community management statement recorded for the scheme on its establishment or change is different from the proposed community management statement most recently advised to the buyer and community management statement falls into one of the categories under s 217(b) and the buyer would be materially prejudiced because of the inaccuracy (s 217(c)).
(9) Because the buyer reasonably believes the proposed contribution schedule lot entitlements for the lots proposed to be included in the scheme are inconsistent with the contribution schedule principle on which they are proposed to be decided and the buyer would be materially prejudiced if compelled to complete the contract (s 217A(1)(b)(i)).
(10) Because the buyer believes the proposed interest schedule lot entitlements for the lots proposed to be included in the scheme are inconsistent with the market value principle and the buyer would be materially prejudiced if compelled to complete the contract (s 217A(1)(b)(ii)).

Each of these needs to be considered in detail. The buyer's rights mentioned above are subject to the buyer exercising its right in accordance with the provisions of the Act. The buyer must comply with the time limits and notice requirements specified under the Act to ensure proper execution of those termination rights. For example, if a buyer attempts to issue a notice of termination under s 213A(2) for failure by the seller to give a clear statement relating to the information sheet in the approved form, but the notice was given after the specified 90 days after the day the buyer received a copy of the contract from the seller (s 213A(4)), then the buyer's termination may not be a valid termination under the Act.

.01 Law: s 206, 206A, 209(1)(b), 209A, 212A, 213, 213A, 214(4), 217(b) and (c), 217A(1)(b)(i) and (ii).

Last reviewed: 9 August 2013

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[¶61-382] Information sheet

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Directing buyer's attention to information sheet

The BCCM Act was amended on 1 October 2010 to incorporate new s 206A and 213A which provide express provisions relating to termination rights of the buyer for contraventions of s 368A(2)(c)(ii) of the *Property Agents and Motor Dealers Act 2000* (ie failure to direct the buyer's attention to the warning statement, contract and information sheet). It is suggested under s 368A(2)(c)(ii) of PAMDA that if the relevant contract with the disclosure statement was enclosed by a covering letter, the letter could include a clear statement as follows:

> "Your attention is drawn to the warning statement, information sheet and proposed relevant contract accompanying this letter."

Under s 206A and 213A of the BCCM Act, if the seller or its agent fails to give a clear statement relating to an information sheet in the approved form, the buyer may terminate the contract at any time before it settles, by giving a signed and dated notice of termination to the seller. The notice must state that the contract is terminated under this section.

Termination by buyer is subject to 90 days time limit

The termination must happen not later than 90 days after the day the buyer receives a copy of the contract from the seller. Further, interestingly the buyer may not terminate the contract if the buyer signed the information sheet attached to the contract before the buyer signed the contract (by signing the information sheet it is implied that the buyer was aware of the information sheet before the buyer signed the contract).

If the contract is terminated, the seller must within 14 days after the termination, repay the buyer any amount paid to the seller towards the purchase of the proposed lot. Failure by the seller to repay the buyer will attract a penalty. If the contract is terminated, the seller or the seller's agent is liable to the buyer for the buyer's reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract. The amount owed to the buyer is recoverable as a debt.

.01 Law: BCCM Act, s 206A, 213A.

Last reviewed: 9 August 2013

[¶61-384] Incomplete disclosure

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No express right for buyer to terminate contract

If the disclosure statement provided to the proposed buyer for an existing lot and a proposed lot is not substantially complete in accordance with s 206 or 213, then the buyer may have a right to terminate the contract. There are no express termination rights for the buyer under the legislation in relation to the receipt of substantially incomplete disclosure statement. However, this has been the subject of numerous disputes and litigation. It is the author's opinion that if s 206(8) were read together with s 206(4), the provisions suggest that although the disclosure statement may contain some inaccuracies (which may be able to be cured by a Further Statement), the first statement provided to the buyer should be substantially complete and failure to ensure it is substantially complete may be considered a breach of subsection (1) as suggested in the wording of s 206(8). Further discussion and case law can be found at ¶61-294.

No express right for seller to correct incomplete disclosure

There is nothing the seller can do to correct a substantially incomplete disclosure statement once the buyer enters into the contract. For proposed lots, a further statement is not an option because it can only be given in relation to inaccuracies in the disclosure statement (see ¶61-350).

The seller does not fail to comply with subsection (1) merely because the disclosure statement, although substantially complete as at the date the contract was entered into, contains inaccuracies (s 206(6) and 213(6)). Since there is no room to correct a substantially incomplete disclosure statement under the legislation, care should be taken to ensure that the statement is fully completed before it is given to the proposed buyer. This will avoid unnecessary litigation and dispute relating to whether or not the disclosure statement was "substantially complete".

.01 Law: Sections 206, 206(6), 213, 213(6).

Last reviewed: 9 August 2013

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[¶61-386] Inaccurate disclosure — existing lots

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Buyer's termination rights for inaccurate disclosure

If a disclosure statement for an existing lot is inaccurate at the time the contract was entered into, then the buyer may terminate the contract if:

(a) it has not already been settled
(b) the buyer would be materially prejudiced because of the inaccuracy in the disclosure statement if compelled to complete the contract
(c) the buyer, despite reasonable efforts, has not been able to verify the information contained in the disclosure statement, and
(d) the termination is effected by written notice to the seller of the termination within 14 days (or agreed longer period) after the contract was received by the buyer or person acting for the buyer.

Please also refer to buyer termination rights at ¶61-393 and ¶61-394 (regarding inconsistencies in the community management statement and inconsistencies in the contribution schedule lot entitlements for the scheme). The additional termination rights were introduced by the *Body Corporate and Community Management and Other Legislation Amendment Act 2011* on 14 April 2011.

Verifying information in disclosure statement

If the buyer terminated the contract because it could not verify the information contained in the disclosure statement then the onus is on the buyer to prove the buyer had made reasonable efforts to verify the information. The buyer must give written notification to the seller that it terminated the contract under this provision.

A buyer has no right to terminate if the statement was accurate at the time it was given but subsequently became inaccurate. This is unlikely to happen for an existing lot. However, where there is an ongoing development of the lot and scheme, the seller must provide a further statement to correct the subsequent inaccuracies as the development of the lot and scheme progresses (see ¶61-350 for detailed discussion).

What is "material prejudice"

The buyer has a right to terminate the contract if the disclosure statement is inaccurate or becomes inaccurate and those inaccuracies would materially prejudice the buyer if the buyer was compelled to complete the contract. What then is considered material prejudice to the buyer? The legislation does not specify, which means one has to look to case law to determine what can be considered material prejudice to the buyer enough to allow the buyer to terminate the contract. The test for determining whether "the buyer would be materially prejudiced if compelled to complete the contract" within the meaning of s 214 has not been authoritatively determined. In the case of *Wilson* v *Mirvac Queensland Pty Ltd* (2010) LQCS ¶90-157, Wilson J provided some guidelines:

- the test for material prejudice tends to be a subjective test; the focus has been on the buyer's circumstances. That is to say, having regard to a particular buyer's circumstances, would he/she be materially prejudiced by the inaccuracy in the disclosure statement?
- the material prejudice must be assessed at the time the Further Statement (re-disclosure) is received by the buyer and the buyer's circumstances at that point in time
- there must be a causal relationship between the inaccuracy and the prejudice complained of
- there must be a proportionality between the inaccuracy and the prejudice, and
- this is a consumer protection provision and it should be construed beneficially.

Case example

In *Wilson* v *Mirvac Queensland Pty Ltd* (2010) LQCS ¶90-157, the buyer complained that the original disclosure statement stated that the seller would provide as part of the establishment of the scheme, CCTV security for the complex, BBQ equipment and decorative artworks as part of the body corporate assets.

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However, on re-disclosure, a Further Statement was issued to the buyer which did not include those items. The buyer purported to terminate the contract because of those inaccuracies between the two statements and argued that the missing equipment and security would cause her material prejudice if she was made to settle the contract. It was important to the buyer that the security items were provided because of the proximity of the apartment to public parklands. Further, the buyer argued that the seller's unwillingness to provide the BBQ equipment and artworks as per the original disclosure would put all apartment holders (including her) to expense. Wilson J agreed with the buyer. A person in the buyer's circumstances would be disadvantaged in a substantial way by the omission of the security system and other assets. The buyer validly terminated the contract within the 14 day period given to do so in accordance with the Act.

"Not applicable" as a disclosure is acceptable if accurate

Further, if there is no information created by a body corporate in relation to a particular question in the statement, an answer of "notapplicable" is acceptable. In *Menniti & Ors* v *Winn & Anor* (2008) LQCS ¶90-142, it was argued that the vendors had not complied with their s 206 disclosure obligations because they had answered the questions with "not applicable". The Queensland Supreme Court of Appeal determined that the statement complied with s 206 because the answers were accurate in light of the fact that the body corporate had been run informally, without complying with the requirements of the BCCM Act.

Loss of floor space with a gain of balcony space

Can a smaller floor space render a buyer materially prejudiced?

In *Orchid Avenue Pty Ltd* v *Hingston & Anor* (2015) LQCS ¶90-201; Court citation: [2015] QSC 42 (6 March 2015), the purchasing defendants pleaded that the reduction of three square meters within their lot and the increase of one square meter to one of their balconies meant that they were materially prejudiced given the amenity of the property was less desirable and that the value of the property was reduced as a result of the changed. No evidence was tendered at the trial (the defendants were unrepresented) and the defence was ultimately not pursued.

Contractual Misrepresentation under the Trade Practices Act

The defendants further pleaded they suffered misrepresented under s 52 of the Trade Practices Act as to the views which would be available in the building as constructed.

Their allegation as to the views was that:

> (a) the views from the property would be unobstructed by any other building, and
> (b) the views would be protected from being obstructed because the local council would not approve another building in front of the scheme at such a height that would obstruct the views.

Unfortunately, the only evidence provided was by one of the defendants, Mr Hingston. Mrs Hingston (also a party to the contract) did not attend trial or provide any written evidence.

Regrettably, although Mr Hingston's evidence referred to glossy brochures detailing the apartment and views, no copies of the brochures were tendered. The brochures tendered by the plaintiff developer showed that if the buildings were built with no buildings in front of them, there would be no obstruction to the views from them. There was, however, no text within the brochures which stated that no other buildings would be built in front of their scheme buildings. According to the defendant, that representation was made orally by an agent of the plaintiff in the sales office on site.

Justice Phillip McMurdo preferred the plaintiff's evidence and found it "remarkable" that the defendants would have decided to purchase an apartment at more than three million dollars without giving any consideration to what was otherwise available in the same market, additionally, the defendant admitted that he was an experienced property investor.

Ultimately, McMurdo J was unsatisfied that a representation as to the views or future development protecting the views had been made. The plaintiff was awarded judgement including interest and damages as a result of the defendant's wrongful termination of the contract.

Seller's obligation to repay money once contract terminated

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If a contract is terminated under these provisions, then the seller must repay to the buyer any amount paid to the seller (including the seller's agent) towards the purchase of the lot within 14 days of the termination.

Historical case references to assist with "material prejudice"

"Material prejudice" is a difficult area. It is likely to mean more than a mere "adverse affectation" and the cases dealing with s 49 of Building Units and Group Titles Act 1980 may assist. Refer in particular to *Bassingthwaighte* v *Butt* (¶61-386.40), *Brisbane Unit Development Corporation Pty Ltd* v *Robertson & Anor* (¶61-386.41), *Sommer & Ors* v *Abatti Holdings Pty Ltd* (¶61-386.42) and *Deming No 456 Pty Ltd & Ors* v *Brisbane Unit Development Corporation Pty Ltd* (¶61-386.43).

.01 Law: Section 206, 209, 209(1)(b)(ii), 210, 214, 217, 218.

.40 Case references. See *Bassingthwaighte* v *Butt* (1983) Q ConvR ¶50-074; (1982) QdR 670.

.41 Case references. See *Brisbane Unit Development Corporation Pty Ltd* v *Robertson & Anor* (1983) Q ConvR ¶54-092; (1983) 2 QdR 105.

.42 Case references. See *Sommer & Ors* v *Abatti Holdings Pty Ltd* (1992) 1 QdR 300.

.43 Case references. See *Deming No 456 Pty Ltd & Ors* v *Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129.

Last reviewed: 3 July 2015

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[¶61-388] Inaccurate disclosure — proposed lots

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Rectifying inaccuracies in disclosure statement — giving a Further Disclosure Statement

As the development progresses and the proposed lot is being constructed, the disclosure statement as it was initially given to the buyer may become inaccurate. The seller has the opportunity within 14 days (or a longer period as agreed between the parties) after the seller becomes aware of any inaccuracies in the disclosure statement to issue a Further Statement to the buyer rectifying those inaccuracies in the original disclosure statement. This is an opportunity for the seller to disclose any changes to the proposed lot and scheme to the buyer. The buyer in turn has the opportunity within 14 days of receiving the Further Statement to consider the changes (ie disclosed inaccuracies) made to the scheme or proposed lot. If the buyer considers that it will be materially prejudice if compelled to complete the contract due to the changes (ie disclosed inaccuracies) then the buyer may give written notice to the seller within the 14 days of receipt of the Further Statement of its termination of the contract.

Buyer's termination rights regarding Further Disclosure Statement

The buyer may cancel the contract if:

(a) it has not already been settled
(b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate, and
(c) the termination is effected by written notice given to the seller within 14 days (or a longer period agreed between the buyer and seller) after the seller gives the buyer the Further Statement.

Termination rights for inaccurate community management statement

On 14 April 2011, the *Body Corporate and Community Management and Other Legislation Amendment Act 2011* introduced additional grounds for buyer termination of contracts for sale of proposed lots under s 217(b) and 217A. The additional termination rights are discussed in detail at ¶61-395 and ¶61-396 (regarding inaccurate community management statement and inconsistent lot entitlements). Practitioners should be aware of these additional rights and the time period specified for a buyer to exercise those rights.

Case example

In *Lee & Anor v Surfers Paradise Beach Resort Pty Ltd*, a draft caretaking and letting agreement annexed to a disclosure statement had left a number of details blank, including the identity of the proposed letting agent and the dates between which the proposed agreement was to run. The Queensland Court of Appeal held that the missing details rendered the disclosure statement inaccurate, thereby requiring the seller to submit a further statement rectifying the inaccuracies (BCCM Act, s 214(2)). However, the court held that the buyers had not been entitled to cancel the contract, because there was no evidence that they would have been materially prejudiced if compelled to complete.

Inaccuracies in the community management statement

For the sale of a proposed lot, the seller must provide the buyer with a copy of the proposed Community Management Statement for the scheme. The buyer has rights to terminate the contract if the Community Management Statement that is recorded in the establishment of the scheme is different (ie inaccurate) to the initial proposed Community Management Statement given to the buyer. The different circumstances under which a buyer may terminate the contract for an inaccurate Community Management Statement is set out under s 217 of the Act.

.01 Law: Section 214; 217; 217(b); 217A.

.40 Case references: *Lee & Anor* v *Surfers Paradise Beach Resort Pty Ltd* (2008) LQCS ¶90-141; [2008] QCA 29.

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[¶61-390] Manner of termination

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Termination for inaccurate community management statement — proposed lots

Should the buyer obtain a community management statement that is different from the proposed community management statement most recently advised to the buyer (ie the statement breaches one of the requirements of s 217(b)), and the buyer believes he would be materially prejudiced because of the inaccuracies in the community management statement (see s 217(c)), then the buyer can terminate the contract before the contract is settled. The notice of termination to be provided by the buyer must be effected by no later than:

- three days before the buyer is required to settle the contract, or
- 14 days after the buyer is given notice that the scheme has been established or changed, or
- another day as agreed between the seller and buyer, whichever is the latest.

If a contract is terminated under these provisions, then the seller must repay to the buyer any amount paid to the seller (including the seller's agent) towards the purchase of the lot within 14 days of the termination.

.01 Law: s 217, 217(b), (c) and (d) and 218.

Last reviewed: 9 August 2013

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[¶61-392] Verifying the information

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If, despite reasonable efforts, the buyer has not been able to verify the information contained in a disclosure statement for an existing lot, then the buyer may terminate the contract if:

(a) it has not already been settled;
(b) the termination is effected by written notice given to the seller —

- notifying the seller that the contract is terminated; and
- advising the seller of the efforts made by the buyer to verify the information; and

(c) the notice is given to the seller within 14 days (or agreed longer period) after the contract was received by the buyer or a person acting for the buyer.

In a proceeding in which it is alleged that the buyer did not make reasonable efforts to verify the information, the onus is on the buyer to prove the reasonable efforts.

.01 Law: Section 209.

Last reviewed: 9 August 2013

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[¶61-393] Inconsistent community management statement — existing lots

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Following changes to the Act and the removal of s 206B, the buyer no longer has a right of termination upon receiving a materially prejudicial community management statement.

Last reviewed: 11 July 2013

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[¶61-394] Inconsistent contribution schedule lot entitlements — existing lots

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The BCCM Act requires the seller to state in the disclosure statement (provided at the time the buyer signs the contract for sale) the annual contributions (ie levies payable by the owner of the existing lot) for the scheme fixed by the body corporate as payable by all owners.

If the seller is the original owner of the community titles scheme and the buyer is buying an existing lot in the scheme, and the buyer believes that the contribution schedule lot entitlements for the lots in the scheme are inconsistent with the contribution schedule principle on which they were decided, and the buyer would be materially prejudiced if compelled to complete the contract, then the buyer may terminate the contract with written notice to the seller. The notice of termination to the seller must be given by the buyer before the contract is settled and not later than 30 days (or longer if agreed between the parties) after the buyer first received the contract. The notice must clearly state that the contract is terminated under s 209A.

Last reviewed: 9 August 2013

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[¶61-395] Inaccurate community management statement — proposed lots

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Termination rights for the buyer if there is no proposed community management statement

Pursuant to s 212A there must be a proposed community management statement for the scheme as established or changed when the contract is entered into by the buyer.

If there is no proposed community management statement (and the section does not state the seller must provide it to the buyer so the question remains how the buyer, in the absence of a search which would not yield a community management statement given the scheme was not at that time in existence, obtains a copy of the statement) then the buyer may terminate the contract if the contract has not already settled.

Terminating the contract for the inaccuracy of the community management statement

The buyer may terminate the contract for sale of a proposed lot, if the community management statement breaches one of the following under s 217(b):

> (i) the community management statement recorded for the scheme on its establishment or change is different from the proposed community management statement most recently advised to the buyer
> (ii) a community management statement, to which the recorded community management statement mentioned in (i) is subject, is different from a proposed or existing community management statement previously advised to the buyer
> (iii) the community management statement most recently advised to the buyer is required under s 66(1)(da) to explain why the contribution schedule lot entitlements are not equal and does not contain the explanation
> (iv) the community management statement most recently advised to the buyer is required under s 66(1)(db)(i) to state the contribution schedule principle on which the contribution schedule lot entitlements have been decided and does not include the statement
> (v) the community management statement most recently advised to the buyer is required under s 66(1)(db)(ii) to explain why the contribution schedule lot entitlements are not equal and does not contain the explanation
> (vi) the community management statement most recently advised to the buyer is required under s 66(1)(db)(iii) to include sufficient details about the relativity principle to show how individual contribution schedule lot entitlements were decided by using it (the **details**) and does not include the details
> (vii) the community management statement most recently advised to the buyer is required under s 66(1)(dc)(ii) to explain why the interest schedule lot entitlements do not reflect the respective market values of the lots included in the scheme and does not contain the explanation
> (viii) information disclosed in the disclosure statement, as rectified by any further statement, is inaccurate, and

because of a difference or inaccuracy under s 217(b), the buyer would be materially prejudiced if compelled to complete the contract.

Last reviewed: 9 August 2013

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[¶61-396] Lot entitlements inconsistent with deciding principle — proposed lots

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On establishment of a proposed community titles scheme, the seller under the off the plan contracts for sale of proposed lots is also the original owner of the scheme established. In this situation, before the off the plan contract is settled between the seller and the buyer, there is a new termination right for the buyer should the buyer reasonably believe that either:

> (i) the proposed contribution schedule lot entitlements for the lots proposed to be included in the scheme are inconsistent with the contribution schedule principle on which they are proposed to be decided, or
> (ii) the proposed interest schedule lot entitlements for the lots proposed to be included in the scheme are inconsistent with the market value principle, and

the buyer reasonably believes the buyer would be materially prejudiced if compelled to complete the contract.

Practitioners for the buyer should check and compare the schedule lot entitlements for the lot and scheme as recorded in the community management statement once the scheme has been established against the schedule of lot entitlements in the latest community management statement provided to the buyer before settlement. If there are inconsistencies in the comparison then the practitioner should highlight this to the buyer, advising the buyer of their rights to terminate under the Act. Practitioners should also note the time period for certain termination rights under the Act. If the buyer fails to exercise its termination rights within the specified time under the Act, the buyer may have lost its chance to avoid the contract.

If the buyer is able to terminate under s 217A, then the notice of termination to be provided to the seller must state that the buyer is terminating the contract under this section, be dated and signed. It must be furnished to the seller no later than 30 days (or longer if agreed by seller and buyer) after the buyer received a copy of the contract.

Last reviewed: 9 August 2013

[¶61-400] Rights to damages

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The BCCM Act says a contract for sale of an existing lot, when entered into, includes the disclosure statement and all material accompanying that statement, but does not include the information sheet. Similarly, a contract for sale of a proposed lot, when entered into, includes the first statement and any material accompanying it, as well as each further statement and any material accompanying them, but does not include the information sheet. The BCCM Act also provides, in the case of both types of contract, that the buyer may rely on the information in the relevant statement as if the seller had warranted its accuracy.

This means that a buyer can claim damages against a seller if the information in a statement is inaccurate. This claim does not depend upon a buyer being materially prejudiced, and so this remedy may assist a buyer who is prejudiced by inaccurate information, but not to the extent of being able to establish material prejudice. For example, if a seller disclosed the annual contributions as $2,500 when, in fact, that was a half-yearly contribution, the buyer would not be materially prejudiced and would therefore be unable to cancel the contract. Instead, the buyer could claim damages for breach of the warranty that the $2,500 figure was accurate.

.01 Law: Sec 207; 208; 215; 216.

Last reviewed: 9 August 2013

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[¶61-700] Introduction

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To protect buyers against the unlimited liability attaching to membership of a community title body corporate, the Government included in the BCCM Act five warranties that are implied in every contract. These warranties were designed to complement the Queensland conveyancing system under which real estate agents arrange for buyers to sign contracts, usually by way of offer to purchase. The warranties give buyers a period (minimum 14 days) to undertake a due diligence on the body corporate, and if that due diligence shows that a buyer would be materially prejudiced by breach of these warranties, then the buyer may cancel the contract or claim damages. In other circumstances the buyer may simply be able to claim damages.

This part of the commentary will consider those warranties and their implications for both buyers and sellers. The issues discussed in this context will then be reflected in recommended conveyancing procedures in later paragraphs.

At the outset, it is important to note that these warranties are implied in all contracts for sale of lots and proposed lots and they cannot be excluded. To achieve this, ``lot'' is defined in sec 220 of the BCCM Act as meaning both a lot in a community titles scheme and a lot intended to come into existence as a lot in a community titles scheme when the scheme is established.

.01 Law: Sec 220; 222.

Last reviewed: 9 August 2013

[¶61-730] Latent or patent defects

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It is implied in the contract for sale that the seller makes certain warranties relating to the common property and body corporate assets of the scheme in which the buyer's lot will be established.

Under this warranty the seller warrants that, as at the date of the contract, to the seller's knowledge there are no latent or patent defects in the common property or body corporate assets, other than the following:

- defects arising through fair wear and tear, and
- defects disclosed in the contract.

A latent defect is one that is difficult to discover. The *Macquarie Dictionary*, 2nd Revised Edition (at p 980), says a latent defect is a hidden defect that could not have been discovered by reasonable examination. (See also *Mellish v Motteux* Peake, 156, where a latent defect was said to be one where the greatest attention would not enable it to be discovered.) A patent defect is one that is obvious from inspection.

The seller must also warrant that the body corporate's records did not disclose any defects to the common property or body corporate assets and that the seller is not aware of any actual, contingent or expected liabilities on the body corporate other than the normal operating expenses of the body corporate as disclosed in the contract (s 223(2)(b)–(d)).

It must also be noted that there is a broad encompassing obligation on the seller to warrant that at the completion of the contract, there are no circumstances (other than those disclosed in the contract) in relation to the affairs of the body corporate likely to materially prejudice the buyer. In the author's opinion this is a difficult warranty to reconcile as it requires the seller to stand in the shoes of the buyer and consider in the buyer's circumstances whether any of the possible affairs of the body corporate, known to the seller at the completion of the contract, materially prejudice the buyer.

The following should be noted about the implied warranties:

(1) Defects in both the common property and body corporate assets must be considered.
(2) Although latent defects, because of their very nature, are unlikely to be discovered before completion, they will still be important because of the potential liability of the seller, after completion, for damages.
(3) The exclusion of defects arising through fair wear and tear should not be underestimated. In practice many defects will fall within this exemption, particularly where the scheme is old. This exclusion has the effect of substantially reducing the potential impact of the warranty, even in relation to latent defects.
(4) Subject to the difficulties in relation to latent defects, the ultimate protection is in the hands of sellers themselves — disclosure of the defects in the contract.
(5) The warranty only applies "to the seller's knowledge". However, a seller is taken to have knowledge of a matter if the seller has actual knowledge of the matter or "*ought reasonably to have knowledge of the matter*". This is effectively an imputed knowledge provision and sellers will need to be careful to read up on the material circulated to them by their body corporate before instructing their agent or solicitor on the preparation of the contract.

.01 Law: s 223, 223(2)(a), 223(2)(b)–(d), 223(3) and 223(4).

Last reviewed: 9 August 2013

[¶61-740] Body corporate records and defects

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The seller's implied warranties in the contract for sale also extends to a warranty that the body corporate records do not disclose any latent or patent defects in the common property or body corporate assets. It effectively makes an inspection of the body corporate records essential before any sale contract can be prepared. Practitioners should ensure an inspection of the body corporate records are made and disclosure of any latent or patent defects as noted in the records are included in the contract for sale of the lot. The warranty also extends to the seller's knowledge (actual, contingent or expected) of any liabilities of the body corporate that are not part of the normal operating expenses of the body corporate. If there are expected outlays of expenses that are not part of the norm and these are noted in the body corporate records (for example, minutes of a body corporate meeting) then it should be disclosed in the contract for sale.

.01 Law: Section 223(2)(b).

Last reviewed: 9 August 2013

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[¶61-750] Actual, contingent or expected liabilities

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The seller's implied warranties under a contract for sale also relates to actual, contingent or expected liabilities of the body corporate. Under this warranty the seller warrants that, as at the date of the contract, to the seller's knowledge there are no actual, contingent or expected liabilities of the body corporate, other than the following:

- liabilities that can reasonably be regarded as normal operating expenses, and
- liabilities disclosed in the contract.

Actual liabilities can be easily identified because they have materialised, although in some circumstances they may be difficult to quantify.

Contingent liabilities are liabilities that may or may not arise. The *Macquarie Dictionary* defines contingent as "dependent for existence, occurrence, character, etc. on something not yet certain: liable to happen or not". Also, in *Winter* v *IRC* [1963] AC 235 a "contingent liability" was described as a liability which by reason of something done by the person bound will necessarily arise if a certain event occurs, but it does not include everything which a prudent businessman would think it proper to provide against, nor is an existing legal obligation essential to its creation.

Expected liabilities are those that can be reasonably anticipated to arise.

The following should be noted about this warranty:

(1) Although some liabilities, because of their very nature, may not be discovered before completion, they will still be important because of the potential liability of the seller, after completion, for damages.
(2) The exclusion of normal operating expenses is important. This would not only include management fees, cleaning, lift maintenance and similar items, but would extend to insurance, routine maintenance and similar things. It would not extend to income tax, because income tax is rarely, if ever, categorised as an operating expense.
(3) Subject to the difficulties in relation to some contingent and expected liabilities, the ultimate protection is in the hands of sellers themselves — disclosure of the liabilities in the contract.
(4) The warranty only applies "to the seller's knowledge". However, a seller is taken to have knowledge of a matter if the seller has actual knowledge of the matter or "*ought reasonably to have knowledge of the matter*". Again, this is effectively an imputed knowledge provision and sellers will need to be careful to read up on the material circulated to them by their body corporate before instructing their agent or solicitor on the preparation of the contract.

.01 Law: Section 223(2)(c).

.40 Case reference. *Winter* v *IRC* [1963] AC 235.

Last reviewed: 9 August 2013

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[¶61-760] Body corporate records and liabilities

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Express in s 223(2)(d) is the seller's warranty that the body corporate records do not disclose any liabilities to which the first warranty (under s 224(2)(c)) applies (ie actual, contingent or expected liabilities). The following should be noted about this warranty:

(1) It applies as at the date of the contract.
(2) It is an absolute warranty and is not restricted to the knowledge of the seller.
(3) The only way for a seller to deal with the warranty is to ensure that proper disclosure of relevant defects is made in the contract.
(4) It effectively makes an inspection of the body corporate records essential before any sale contract can be prepared.

.01 Law: Section 223(2)(d).

Last reviewed: 9 August 2013

[¶61-780] Body corporate affairs

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The broadest warranty under s 223 relates to the state of affairs of the body corporate. Under this warranty the seller warrants that, as at the completion of the contract, to the seller's knowledge there are no circumstances (other than circumstances disclosed in the contract) in relation to the affairs of the body corporate likely to materially prejudice the buyer. The term “affairs of the body corporate” is not defined, which could extend to management of the body corporate as well as the financial circumstances of the scheme. It also requires to a certain extent that the seller stand in the shoes of the buyer in considering whether the seller's knowledge of a certain affair relating to the body corporate would materially prejudice the buyer. However, based on the examples given under the Act of possible circumstances which may breach this warranty, the circumstances must be of a serious nature. The following points are important:

(1) The warranty is as at completion. Before the 2003 amendments to the BCCM Act (which took effect on 4 March 2003) this warranty was as at completion of the contract, but the termination provisions gave the buyer the right to cancel before completion.
(2) Once again, the seller has the opportunity to negate the warranty by making full disclosure in the contract.
(3) The BCCM Act gives two examples of circumstances which would result in breach of the warranty, namely —

- An administrator has been appointed under the order of an adjudicator under the dispute resolution provisions.
- The body corporate has failed to comply with the provisions of the BCCM Act to the extent that its affairs are in disarray, records are incomplete and there is no reasonable prospect of the buyer finding out whether the second implied warranty has been breached.

The fact that these two circumstances have been given as examples makes it clear that they are serious enough to cause a breach of this warranty. They also serve as a guide to other circumstances that may result in a breach of the warranty. For example, the mere fact that the body corporate does not have all of the required registers would not result in a breach of the warranty. Also, a history of internal disputes within the scheme may not result in a breach of the warranty.
(4) The warranty only applies “to the seller's knowledge”. However, unlike the first and third warranties, there is no provision imputing knowledge. This is because the imputed knowledge provisions in s 223(4) only apply to the warranties in s 223(2), whereas the “affairs warranty” is in s 223(3).

.01 Law: Section 223(3).

Last reviewed: 9 August 2013

[¶61-800] Cancelling contracts

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A buyer may, by written notice to the seller, cancel a contract if there would be a breach of any of the above warranties were the contract to be completed at the time it is in fact cancelled. Section 224(2) of the BCCM Act provides that the notice of cancellation must be given:

(a) if the lot is a proposed lot — not later than three days before the buyer is otherwise required to complete the contract, or
(b) if the lot is an existing lot — within 14 days of the later to happen —

- the buyer's copy of the contract is received by the buyer (including a person acting for the buyer), or
- another period agreed between the buyer and the seller ends.

If the buyer terminates the contract under this provision, the seller must repay to the buyer any amount paid to the seller (including the seller's agent) towards the purchase of the lot, within 14 days after the termination.

The following points are important:

(1) If a buyer does not act within the relevant time limit, the right to cancel is lost.
(2) The right to cancel is in addition to, and does not limit, any other remedy available to the buyer for breach of the warranty. This means:

- A buyer may choose to claim damages in preference to cancelling the contract.
- If a buyer loses the right to cancel because of failure to act within the required time, the buyer will still have a right to damages.
- There appears to be no reason why the right to damages will not survive completion of the contract.

(3) From a seller's point of view, it is important to ensure that the signed contract reaches the buyer or the buyer's solicitor promptly after signing, so that time for cancellation begins to run.

.01 Law: Sections 222(2), 224.

Last reviewed: 9 August 2013

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[¶62-000] Introduction

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The discussion so far of the disclosure requirements and implied warranty provisions of the BCCM Act has highlighted a number of circumstances in which contracts can be cancelled or buyers can claim damages against sellers. In this part of the commentary the practical steps required to protect a seller of an ***existing lot*** in a community titles plan will be considered. The sale of proposed lots will be dealt with elsewhere.
The commentary assumes that the solicitor acting for the seller is instructed to prepare the sale contract. Where the sale contract is being prepared by the seller's real estate agent, the agent should ensure that the appropriate procedures are followed and the practitioner should record, whether by means of a file note or other correspondence that the agent has prepared the contract.

Last reviewed: 9 August 2013

[¶62-030] Objectives

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A solicitor acting for a seller must:

- protect the sale contract from cancellation; and
- protect the seller against liability for damages.

Protecting the sale contract from cancellation is particularly important where a seller plans to enter into another unconditional contract to buy a property with the intention of using the sale proceeds to settle the purchase. If the sale contract is cancelled the seller may not have funds to complete the purchase. Protecting the seller against liability for damages can be equally as important, particularly in view of the fact that such liability survives settlement of the contract and can appear years after the transaction has been completed.

Last reviewed: 9 August 2013

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[¶62-060] Taking instructions

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Taking instructions is a critical part of the process of acting for a seller. This is where the solicitor gets the information needed to prepare the contract in a way that offers maximum protection for the seller. Where the seller cannot provide all of the information required, the solicitor must (subject to contrary instructions) pursue the information elsewhere. In addition to normal information about the land being sold, the solicitor will need to know a range of "community titles" information. The following information must be obtained (the words in italics having the meaning defined in the contract — see ¶60-730):

- Is there any notice or order by a competent authority or court requiring work to be done or money spent in relation to the *property or building*?
- Are there any unsatisfied judgments, orders or writs affecting the body corporate?
- Are there any current court proceedings or applications to the commissioner involving *the body corporate* or the *property*?
- Are there any unpaid *special contributions* to the body corporate or anything that might result in a *special contribution*?
- Is there any unregistered lease, easement or other right capable of registration affecting the common property?
- Have there been any recent changes to the by-laws?
- Has the body corporate mortgaged or charged any of its assets?
- Is there likely to be a new community management statement for the scheme in the near future?
- Have there been any improvements to the common property which benefit the lot, or the registered owner of the lot? If so, is any relevant body corporate consent in force?
- If the lot is entitled to exclusive use and enjoyment of part of the common property, has the allocation been properly recorded in the office of the Registrar of Titles?
- Is it the secretary or the body corporate manager who is responsible for issuing body corporate information certificates on behalf of the body corporate?
- What is their (ie the secretary's or the body corporate manager's) name, address and contact telephone number?
- What is the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot?
- Is the information regarding the annual contributions and how they are calculated included in the community management statement?
- Are there any improvements on the common property for which the seller is responsible?
- What regulation module applies to the scheme?
- Has a list of all body corporate assets required to be recorded on its assets register been provided?
- Are there any patent defects (or likely latent defects) in the common property or body corporate assets, other than those arising through fair wear and tear?
- What are the actual, expected or contingent liabilities of the body corporate apart from those that can be regarded as normal operating expenses?
- Are there any circumstances in relation to the affairs of the body corporate that are likely to materially prejudice a buyer of the lot?
- Have the body corporate records been reviewed and checked to ensure the seller complies with the seller warranties regarding disclosure of liabilities in those records?

If the disclosure statement being used by the solicitor is more detailed than the one required by s 206 of the BCCM Act, then additional information may need to be obtained (eg insurance details, contribution instalments, lot entitlements, etc).

It is important to properly record the seller's instructions. This can be done by means of a "checklist" which is completed by the solicitor, or a form can be sent to the seller for completion and return to the solicitor. It is important that the solicitor ensures the buyer complies with s 206 and 223 of the Act as those provisions allow a potential buyer to terminate the contract and may also afford a potential buyer rights to claim damages against the seller.

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.01 Law: s 206, 223.

Last reviewed: 9 August 2013

[¶62-100] Pre-contract enquiries

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In most cases the seller will not be able to provide the answers to all of these questions. The extent of pre-contract enquiries that should be undertaken on behalf of a seller will depend upon:

• the questions that the seller cannot answer;
• any plans (or willingness) to delete statements from cl 7.4(2) of the standard residential or commercial contract (see FORMS tab at ¶70-300 and ¶70-305); and
• the extent to which the seller is prepared to risk a cancellation of the contract or claim for damages.

If a seller is prepared to take a risk, then the seller's solicitor should ensure that the client is fully advised of the consequences of not undertaking normal pre-contract enquiries. This should be done in writing and the solicitor should get written instructions not to do the particular enquiries.

The following pre-contract enquiries should be considered:

(1) Search of the lot title.
(2) Search of the common property title including a search of any easements registered against the common property.
(3) Copy of the community management statement.
(4) Copy of any other notifications or administrative advices on the common property title.
(5) A body corporate information certificate (s 205 of the BCCM Act).
(6) Search the office of the Commissioner for Adjudicator's Orders.
(7) Conduct (or obtain) a body corporate records inspection.

The following should be noted about these enquiries:

• The lot title and the common property title will show the community management statement number.
• As a transitional measure, if the community titles scheme existed under BUGTA it will initially have an "interim community management statement". This effectively comprises the old building units or group titles plan and any recorded document relevant to the common property. A request for a copy of an interim community management statement will result in copies of the plan and those documents being provided. When the body corporate replaces this interim statement with a "new" community management statement, then a search will produce a copy of the new statement.
• Sellers should be made aware that even if all of these pre-contract enquiries are made, there is no guarantee against a cancellation of the contract or claim for damages. For example, there may be a latent defect in the common property. It is a matter of minimising the risk.
• If a body corporate has a reasonable set of records, then a body corporate records inspection will usually remove the need for enquiries (5) and (6) above to be undertaken. The cost of a professional inspection (which should cover everything a seller needs) will be close to the combined cost of enquiries (5) and (6).

.01 Law: s 205.

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[¶62-150] Preparing the contract and statement

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Preparing the contract itself is relatively straightforward. Using the standard form (see ¶70-300 and ¶70-305 for residential and commercial lots), it is simply a matter of completing the Reference Schedule and adding appropriate clauses to limit the operation of the implied warranties and the Seller's Statements in the contract. These clauses go in the "Seller's Disclosure" part of the standard contract. The need for these clauses and the matters they disclose will depend upon the information obtained at the time of taking instructions (see ¶62-060) and the result of the pre-contract enquires (see ¶62-100).

Although the disclosure statement is easy to complete (once the necessary information is available), it must be completed with great care. It must be both ***complete*** and ***accurate***. The need for these two things is clear from ¶61-200ff. Care should be taken to ensure that the disclosure statement is not incorporated into the contract and that it is dated and properly signed by or on behalf of the seller.

Last reviewed: 9 August 2013

[¶62-180] Requisitions on title

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Clause 7.3 of the standard contracts (see ¶70-300 and ¶70-305) precludes the buyer from delivering any requisitions or enquiries on title. As a result, no standard requisitions form has been prepared for use in Queensland.

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[¶62-200] Adjustment of outgoings

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``Outgoings'' are defined in the standard contracts (see ¶70-300 and ¶70-305) to include regular periodic contributions (other than payments of a capital nature). The seller must pay outgoings until settlement, after which the buyer must pay them. This requires any outgoings that are paid or payable to be adjusted as between the seller and buyer. Special contributions levied on or before the date of the contract are payable by the seller. Those levied after the date of the contract are payable by the buyer. A contribution is ``levied'' when the levy notice is served, not when the resolution determining the contribution is passed by the body corporate. Amounts payable under an exclusive use by-law are regarded as special contributions and are taken to have been ``levied'' on the date they are due.

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[¶62-220] Outstanding maintenance contributions

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Unpaid contributions can result in loss of a discount of up to 20% as well as attracting a simple interest penalty of up to 2.5% per month. Liability for unpaid contributions (including penalties) that exists as at the date of settlement of a sale contract attaches to both the seller and the buyer (or mortgagee in possession), jointly and severally. Therefore, it is important to the seller to ensure that any outstanding contribution is paid on settlement and adjusted on a paid basis. Failing this the seller may be liable for the full amount of the outstanding contribution, even though the seller allowed an adjustment in favour of the buyer.

.01 Law: *Body Corporate and Community Management (Standard Module) Regulation 2008* , s 143, 144 and 145.

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[¶62-250] Notice to body corporate

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The obligation is on the buyer to notify the body corporate of the change of ownership. If the buyer fails to do this, there is no legal consequence for the seller. This is because:

- the legal obligation clearly rests with the buyer, and
- once the buyer becomes entitled to be the registered owner, the buyer falls within the definition of "owner" in the BCCM Act and therefore becomes liable for future maintenance contributions.

However, the seller may be inconvenienced by ongoing communications from the body corporate if the buyer does not promptly notify the body corporate about the change in ownership. For this reason alone the seller should ensure, so far as possible, that the buyer sends off the notification promptly.

The regulation requires that the buyer must notify the body corporate of its name and address details within two months of the completion of the sale. Failure to do so may incur a penalty.

.01 Law: Body Corporate and Community Management (Standard Module) Regulation 2008, s 193.

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[¶62-500] Introduction

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Apart from the normal land conveyancing issues, the buyer of a lot in a community titles scheme will be particularly concerned about the implications of automatically becoming a member of the body corporate. Because this membership of the body corporate carries with it virtual unlimited liability, a purchaser will be vitally concerned by the state of affairs of the body corporate. This is why the BCCM Act implies a number of warranties in all sale contracts (see ¶61-700ff). The ``corporate aspects'' of a community titles conveyance will account for a significant amount of the work undertaken by a buyer's solicitor and thus results in a somewhat higher fee for this type of conveyancing when compared to standard land conveyancing. The role of the solicitor acting for a buyer will be dealt with in the following section of the commentary. Coverage is again restricted to the community titles aspect of the transaction.

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[¶62-530] Objectives

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The main community titles related objectives of solicitors acting for buyers are to:

- ensure that the buyer is protected against unfunded liabilities of the body corporate;
- determine whether a buyer is entitled to cancel the contract or claim damages for incomplete or inaccurate disclosure or breach of warranty and to properly advise the buyer about the buyer's rights in this regard; and
- ensure the buyer receives full entitlement on adjustment of ``outgoings''.

These objectives determine the conveyancing process for buyers' solicitors.

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[¶62-550] Taking instructions

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The buyer will instruct the solicitor either before or after signing the sale contract. In the past very few buyers sought legal advice before signing the contract, but since the introduction of the compulsory ``Information Sheet'' or ``Contract Warning'' (see ¶61-230 and **Form A14**, ¶70-231) it has become increasingly common for buyers to consult their solicitors about the contract before they sign. The timing of the instructions will determine what the solicitor needs to do. If the instructions are received before the contract is signed, then the solicitor may have to undertake pre-contract enquires on behalf of the buyer. If the instructions are received after the contract is signed, then the solicitor will proceed immediately to undertake the normal searches and enquiries, which are aimed at determining rights of cancellation or damages.

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[¶62-570] Pre-contract enquiries

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An intending buyer can adopt one of three approaches to the transaction. The buyer can:

(a) elect not to make any pre-contract enquiries and rely entirely on the statutory warranties to deal with any problems that may be discovered during the course of the conveyancing process
(b) elect to make limited pre-contract enquiries (eg a body corporate records inspection) and then rely on the statutory warranties to deal with any problems that may not have been evident from those enquiries, or
(c) undertake a full due diligence for the lot being purchased so as to be aware of any problems before signing the contract.

Approach (a) is the most risky, because there may be things about the building or the body corporate that are very important to the buyer but which do not give rise to a right to cancel the contract. For example, the body corporate may be strongly opposed to the keeping of animals, yet the buyer may need to keep the family pet. Approach (b) is less risky and, time permitting, the limited pre-contract enquiry approach should always be regarded as the minimal approach. It follows that approach (c) is by far the safest approach for a buyer, but it does have the disadvantage of requiring the expenditure of substantial costs at a time when the property has not been secured. It is the duty of the buyer's solicitor to ensure that the buyer is properly advised about the options available. In this way the buyer can give the solicitor informed instructions about the approach the buyer wishes to pursue.

The following pre-contract enquiries should be considered:

(1) Search of the lot title.
(2) Search of the common property title and any easements registered against it.
(3) Copy of the plan.
(4) Copy of the community management statement.
(5) Copy of any other notifications or administrative advices on the common property title.
(6) A body corporate information certificate (s 205 of the BCCM Act).
(7) Search of the office of the Commissioner for Adjudicator's Orders.
(8) Conduct (or obtain) a body corporate records inspection.

The following should be noted about these enquiries:

- The lot title and the common property title will show the community management statement number.
- The copy of the plan will be essential to enable the buyer to verify the identity of the lot being purchased (see ¶62-590).
- As a transitional measure, if the community titles scheme existed under BUGTA it will initially have an "interim community management statement". This effectively comprises the old building units or group titles plan and any recorded document relevant to the common property. A request for a copy of an interim community management statement will result in copies of the plan and those documents being provided. When the body corporate replaces this interim statement with a "new" community management statement, then a search will produce a copy of the new statement.
- Buyers should be made aware that even if all of these pre-contract enquiries are made, there is still no guarantee that there are no problems with the building or the body corporate, especially in terms of social or personality conflicts that may arise in the buyer's dealings with the committee, other owners or the onsite manager.
- If a body corporate has a reasonable set of records then a body corporate records inspection will usually remove the need for enquiries (5) and (6) above to be undertaken. The cost of a professional inspection (which should cover everything a seller needs) will be close to the combined cost of enquiries (5) and (6).
- In an appropriate case (eg older buildings) a buyer may consider having a building inspection (covering the lot or the lot and common property) carried out.

Purchase of a lot from a mortgagee

Particular care should be taken when acting for the buyer in the purchase of a lot from a mortgagee. As seen in *Foresight Acquisitions Pty Ltd* v *Body Corporate for Paradise Sands* [2012] QCAT 55, buyers may find themselves, for example, subject to the payment of an undisclosed caretaking salary relating to work done prior to the settlement of the contract.

In that case, a number of unit holders purchased units from a mortgagee under a mortgagee contract which excluded all of the usual terms which would make the seller of the unit liable for any outgoing charges arising after settlement for the period prior to settlement.

The applicant caretaker sought four orders and the payment of its salary which was outstanding. Unfortunately the caretaker had not diligently provided regular monthly invoices to the respondent body corporate for payment. The respondent body corporate denied it needed to pay the caretaker and claimed:

- that the applicant caretaker had never received the assignment of the management rights
- that the applicant caretaker had not properly exercised the option to extend the management agreement a further five years
- the caretaker did not do the works necessary to justify payment, and
- the caretaker failed to notify of the amounts outstanding.

The Member found for the applicant caretaker on all grounds, noting, with respect to the assignment and the option, that the whole of the contractual relationship between the parties was such that the “clerical error” was not enough to void either the assignment or the option being exercised.

The Member noted that the applicant caretaker had been remiss in its duties to regularly provide statements and that the respondent body corporate had requested updated statements on a number of occasions.

Ultimately the new owners had to pay the applicant caretaker’s outstanding salary of which they were not aware prior to settlement.

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[¶62-590] Plan examination

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Before a buyer signs a contract to purchase a lot in a community titles scheme, the buyer must ensure must ensure that the lot described in the contract is the lot he or she inspected and negotiated to buy. It will be the responsibility of the selling agent or buyer's solicitor (depending upon who is assisting the buyer with the pre-contract issues) to help the buyer confirm the identity of the lot. A copy of the plan will be required for this purpose. If the lot is an existing lot, a copy of the registered plan should be used. If the lot is a proposed lot, the plan in the contract should be used. In the case of a home unit, the plan should be examined and consideration given to:

- The position of the lot on the plan compared with the position of the unit in the building. (For example: On the plan the lot is in the north-west corner on the third level facing the street. Is the unit in the same position?)
- The approximate layout of the unit. (For example: On the plan the lot is ``L'' shaped. Is the layout of the unit the same?)
- Whether all of the components that the buyer thinks are being purchased are identifiable as included in the lot illustrated on the plan. (For example: If the buyer inspected a unit, double garage and storeroom, are they shown on the plan and are they in the same position as those inspected?)
- Whether these additional components are on the same title as the unit (ie, they are all ``part lots'') or whether the additional title(s) appears in the description of the ``Property''.
- Whether the number of the unit corresponds with the number of the lot and the number on the door of the unit inspected. If not, is the difference explainable?

In the case of a townhouse, free-standing home or vacant allotment of land, the same type of identification process must be undertaken. Roads, development features and dimensions may be used to ``fix'' the position of the property inspected. If an additional component (eg, garage) is not included in the title to the lot, it may be the subject of a right of exclusive use and enjoyment or occupation authority over common property (see ¶62-610).

If after undertaking this identification process there is any doubt about the location of the property being purchased, then an identification report from a surveyor should be obtained. The importance of the process is clearly demonstrated by the decision of the New South Wales Supreme Court in *LDJ Investments* v *Howard* (1981) 3 BPR 9614 (¶62-590.40). In that case the defendant purchased a home unit and garage on the same title. The physical appearance of the garage was long and narrow — thus providing ample room for a car and work area at the end. The adjoining garage, which was attached to another unit, had a similar physical appearance. However, an examination of the strata plan some years after both units had been sold revealed that the adjoining garage was shown on the plan as ``L'' shaped — the foot of the ``L'' being the area the defendant was using as a workshop. The plaintiff sought and obtained possession of the workshop area although part of the wall structure had to be changed before he could obtain the benefit of use. Had the above procedures been carefully followed at the time of contract, the variation between the plan and the physical structure should have been detected.

.40 Case reference. See *LDJ Investments* v *Howard* (1981) 3 BPR 9614, NSW Supreme Court, *Holland* J, 20 November 1981. (Previously unreported.)

Last reviewed: 9 August 2013

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[¶62-610] Use of common property

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As indicated in ¶62-590, additional components of the lot (eg garage, storeroom, etc) may not form part of the lot itself, but may be areas of common property "attached" to the lot by rights of exclusive use and enjoyment. Also, if management rights are involved, the owner may only have an "***occupation authority***" in respect of the additional component. In either of these cases it is most important that the contract expressly provides that the particular component is included in the sale. Unfortunately, the standard contracts (see ¶70-300 and ¶70-305) do not make provision for this in the "Property" section of the Reference Schedule. There are three options:

(1) At the bottom of the "Property" section of the Reference Schedule add the words — "*Included in the sale is exclusive use of lock-up garage 25 and storeroom 15.*" Alternatively, "*Included in the sale is an occupation authority for storeroom 25.*"
(2) Add a special condition saying that exclusive use (or occupation authority) of the garage and storeroom is included in the sale.
(3) Add a special condition saying the contract is conditional upon it being established that attached to the lot is the right of exclusive use and enjoyment of (or occupation authority over) the garage and storeroom. (This is the best approach.)

If a seller is not prepared to "include" the rights in this way, then the buyer's solicitor (subject to instructions) will need to fully investigate the validity and effectiveness of the right of exclusive use and enjoyment (or occupation authority) before the contract is signed. In addition, where rights of exclusive use and enjoyment are involved, it is important that the buyer fully understands the implications of this type of "title". The buyer should understand that:

• the garage, storeroom or other component is and will remain common property
• the buyer will be entitled to use and occupy the area to the exclusion of other owners
• the buyer will be liable to make any payment required to be made by the terms of the by-law that confers the right and will be bound by any conditions or reservations contained in such by-law
• the by-law can only be revoked or amended following a resolution without dissent **and** the written agreement of the owner of the lot entitled to the benefit
• if management rights are involved, in some circumstances the by-law may be discontinued by an order of an adjudicator, and the by-law may be declared invalid by an adjudicator.

So far as occupation authorities are concerned, the buyer should understand:

• the garage, storeroom or other component is and will remain common property
• the buyer will be entitled to occupy the area, but only to the exclusion of other owners if the occupation authority expressly provides for this
• the buyer will be obliged to comply with any conditions of the occupation authority as if those conditions were a term of the service contract engagement or authorisation as a letting agent
• the occupation authority cannot be amended or terminated during the term of any engagement or authorisation without the agreement of the buyer
• the occupation authority terminates when the engagement or authorisation comes to an end or is terminated, and
• the occupation authority may be declared invalid by an adjudicator.

A body corporate can also confer rights of exclusive use and enjoyment over body corporate assets. While this is not common, where this has been done for a particular lot, the buyer of that lot will be concerned to ensure that the rights are also included in the sale. The way in which this is done, and the principles that generally apply, are the same as those dealt with above in relation to common property.

.01 Law: BCCM Act, s 122; 171; 178; Body Corporate and Community Management (Standard Module) Regulation 2008, s 136.

Last reviewed: 9 August 2013

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[¶62-640] Lot entitlements

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Lot entitlements are clearly an important influence on an owner's rights and obligations within the community titles scheme. They are liable to be altered in a number of ways, particularly:

- during the course of a staged development
- when certain subdivisions occur
- if the body corporate decides to alter them, or
- if a specialist adjudicator or court decides to alter them.

Prior to the legislative amendments introduced by the *Body Corporate and Community Management and Other Legislation Amendment Act 2011* on 14 April 2011, it was not uncommon for the lot entitlements to have been allocated otherwise than as envisaged by the BCCM Act (ie, interest lot entitlements based on respective values and contribution lot entitlements equally). Many lot entitlements set for schemes prior to 14 April 2011 were therefore at risk of being reallocated by a specialist adjudicator or court.

Currently, the BCCM Act requires all lot entitlements to be allocated in accordance with the principles set out under s 46, 46A and 46B (ie, for contribution schedule lot entitlements, they must be set by applying either the relativity principle or equality principles and for the interest schedule lot entitlement they must be set by applying a market value principle). Because this can have a substantial impact on the rights and obligations of some owners it is not unreasonable for the buyer to expect the solicitor to examine the lot entitlements and either:

- indicate whether the lot entitlement schedules have been allocated in accordance with the BCCM Act
- indicate whether they are at risk of being reallocated, or
- generally explain about the possibility of a reallocation occurring if the lot entitlement schedules have not been allocated consistently with the deciding principles under the Act.

Schemes established after the commencement of s 46(7) and 46(8) of the Act must be consistent with the market value principle.

This was examined in *Fleger and Anor* v *Body Corporate for Villa Santai CTS* [2014] QCTA 493.

In that case, the owners had operated as though the interest schedule lot entitlements were equal for all of the owners, however a prospective owner of lot 2 was not happy and declined to proceed with a purchase of the lot.

Given the scheme was established in 2003, its interest schedule lot entitlements had to be consistent with the market value principle.

In deciding the new interest schedule lot entitlements, the Adjudicator had regard to a report prepared by a valuer. The report set out the methodology for establishing the interest schedule lot entitlements with reference to the comparable sales, size, elevation, aspect and car spaces.

In the absence of any contrary market value evidence, the report was accepted.

.01 Law: BCCM Act, s 46, 46A, 46B, 47, 47A and 47B.

Last reviewed: 10 November 2014

[¶62-660] By-laws

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By-laws are another important influence on the rights and obligations of an owner. Often it is not possible to assess by-laws on a purely legal basis, because the solicitor will not be aware of what is important to the buyer. For example, the ability to keep a dog on the lot may be fundamental to a buyer's decision whether or not to proceed with a purchase. Therefore, the buyer's solicitor should ensure that a copy of the by-laws is made available to the buyer to consider at the earliest point in time, preferably before any contract is signed.

Last reviewed: 9 August 2013

[¶62-690] Receiving the contract

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In the case of existing lots, if a sale contract is to be cancelled by a buyer for breach of a statutory warranty, notice of the cancellation must be given by the buyer within 14 days after the later of the following to happen:

- the buyer's copy of the contract is received by the buyer (including a person acting for the buyer); or
- another period agreed between the buyer and the seller ends.

This requirement imposes an obligation on the buyer's solicitor to note carefully when the buyer's copy of the contract is received and to work within the consequential time period to complete any due diligence process and advise the buyer about any rights to cancel or claim damages.

.01 Law: Sec 224.

Last reviewed: 9 August 2013

[¶62-720] Searches and enquiries

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The community title related searches and enquiries to be undertaken after the contract has been signed will be determined by the:

- searches and enquiries that were undertaken before contract;
- currency of those searches and enquiries; and
- instructions of the buyer (eg the buyer, after being properly advised, may instruct the solicitor not to have a body corporate records inspection carried out).

The following is a complete list of the community title related searches and enquiries:

(1) Search of the lot title.
(2) Search of the common property title and any easements noted against the common property.
(3) Copy of the plan.
(4) Copy of the community management statement.
(5) Copy of any other notifications or administrative advices on the common property title.
(6) A body corporate information certificate (s 205 of the BCCM Act).
(7) Search the office of the Commissioner for Adjudicator's Orders.
(8) Conduct (or obtain) a body corporate records inspection.

The following should be noted about these searches and enquiries:

- The lot title and the common property title will show the community management statement number.
- The copy of the plan will be essential to enable the buyer to verify the identity of the lot being purchased (see ¶62-590).
- As a transitional measure, if the community titles scheme existed under BUGTA it will initially have an "interim community management statement". This effectively comprises the old building units or group titles plan and any recorded document relevant to the common property. A request for a copy of an interim community management statement will result in copies of the plan and those documents being provided. When the body corporate replaces this interim statement with a "new" community management statement, then a search will produce a copy of the new statement.
- Buyers should be made aware that even if all of these enquiries are made, there is still no guarantee that there are no problems with the building or the body corporate.
- If a body corporate has a reasonable set of records then a body corporate records inspection will usually remove the need for enquiries (6) and (7) above to be undertaken. The cost of a professional inspection (which should cover everything a buyer needs) will be close to the combined cost of enquiries (6) and (7).
- In an appropriate case (eg older buildings) a buyer may consider having a building inspection (covering the lot or the lot and common property) carried out.

Last reviewed: 9 August 2013

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[¶62-750] Body corporate information certificates

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A body corporate information certificate is available from the body corporate. It is issued on an approved form pursuant to sec 205 of the BCCM Act (**Form A13**, ¶70-230). The certificate will provide the following information in respect of the specified lot:

(1) Particulars of annual contributions.
(2) Particulars of special contributions.
(3) Particulars of other amounts payable to the body corporate.
(4) The name of the regulation module applying to the scheme.
(5) A list of body corporate assets required to be recorded in the assets register.
(6) Details of improvements to the common property that the lot owner must maintain.

This information will be useful for calculating the adjustment of outgoings and for checking the completeness and accuracy of the disclosure statement, but it will be of no use in determining whether an implied warranty has been breached. While the same information can usually be obtained from a body corporate records inspection, a buyer's solicitor should not use such an inspection as a substitute for the details of contributions in a body corporate information certificate. This is because of the statutory protection available to buyers who obtain a body corporate information certificate. Section 205(5) of the BCCM Act provides that a person who obtains such a certificate may rely on the certificate against the body corporate as conclusive evidence of matters stated in the certificate, other than to the extent to which the certificate contains an error that is reasonably apparent.

An ``interested person'' may make application for a body corporate information certificate. The body corporate must issue the certificate within seven days after receiving a written request and the prescribed fee. An interested person is defined to include the buyer of a lot in the scheme and the agent of such a buyer. It follows that both the buyer and the buyer's solicitor would qualify to make the application if a contract has already been signed. If the contract has not been signed then there may be an issue about whether the person proposing to buy the lot is a ``buyer'' within the meaning of the definition. This can usually be resolved by satisfying the body corporate that the intending buyer is a person who has ``a proper interest in the information being sought'' (this being another category of ``interested person''). Clearly, a person proposing to sign a purchase contract has a proper interest in the information being sought.

.01 Law: Sec 205.

Last reviewed: 9 August 2013

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[¶62-780] Records inspections

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Records inspections only became common in Queensland during the mid-1990s. This is in contrast to the position in New South Wales where they have been virtually standard practice for over 20 years. Another difference between the two states is the timing for the inspections. In New South Wales the inspections are commonly carried out before contracts are exchanged. In Queensland the inspections were initially carried out after the parties signed the contract. This is because of the conveyancing practice in Queensland where contracts are usually signed under supervision of the real estate agent. However, the new legislation in 1997 and the Information Sheet requirement have put pressure on Queensland practice to shift to pre-contract inspections. The pre-contract approach has the advantage, from a buyer's perspective, of allowing the opportunity to decide not to proceed because of "communal issues" rather than legal issues (eg, the state of disharmony within the building or the inability to obtain permission to keep an animal). The maintenance history of the building and its likelihood of being an indicator of future problems can also be of interest to a buyer. These are issues that may be important to a buyer but which are not protected by the disclosure requirements or implied warranties.

Regarding the legal basis for the inspection, the only way a buyer can determine whether there has been a breach of the implied warranties (which may confer a cancellation right or entitlement to damages) is to inspect the body corporate records. Also, if rights of exclusive use and enjoyment over an area of common property are involved in a sale (eg, over a car space or storeroom), then a records inspection will be necessary to properly investigate the "title" to the area and, possibly, to verify the location of the area (see ¶63-300ff). There are a number of options for these inspections:

(1) Buyers can carry out their own inspection.
(2) Buyer's solicitors (or their articled clerks) can carry out the inspection.
(3) The information can be obtained (verbally or in writing) from the body corporate manager.
(4) A professional search agent can be engaged to carry out the inspection.

In most cases the professional search agent option is the best option. This is because the inspection process is a highly specialised process and requires someone who is very familiar with community titles management and understands the information relevant to the conveyancing process. Using the body corporate manager is risky because they are there to serve the interests of the body corporate and its constituent owners and those interests are usually in conflict with the interests of a buyer. From a business perspective, the body corporate manager may also have difficulty being so frank in the provision of information that one of their owners' sales fails to proceed. In any event, body corporate managers should not be encouraged to profit from supplying information that does not belong to them in circumstances where they may make a mistake or be misleading and thus attract a liability to the body corporate.

Finally, a buyer, after being properly advised by a solicitor, may instruct the solicitor not to have a records inspection undertaken. It would be preferable for that advice to be given to the buyer in writing and for the solicitor's instructions to also be in writing.

.01 Law: BCCM Act, s 205.

Last reviewed: 9 August 2013

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[¶62-820] Insurance

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Clause 8.1 of the standard contracts (see ¶70-300 and ¶70-305) provides that the property (ie the lot, improvements and chattels) is at the buyer's risk from 5.00 pm on the first business day after the date of the contract. This is a fundamental flaw in the standard contract. It is entirely inappropriate for community title properties that are covered by body corporate insurance to be at the buyer's risk before settlement. This is because:

- The body corporate's insurance policy does not cover a buyer's "interest" in the property.
- Buyers cannot economically take out their own insurance for the term of the contract.
- Buyers cannot, in any practical sense, address any deficiencies in the body corporate's insurances (eg inadequate cover, disclosure deficiencies, unpaid premiums, lapsed policies, etc).

It follows that buyers of properties covered by body corporate insurance should seek to have clause 8.1 of the standard contract amended to leave the risk with the seller until settlement. If this is not possible, then the buyer should be warned of the possible consequences in the event of the property being substantially damaged or destroyed during the contract period.

Apart from that, a buyer's solicitor should, as part of the conveyancing process, ensure that:

- the body corporate has the statutory insurance covers;
- those covers are current; and
- those covers are for adequate sums insured.

Insurance cover is increasingly relevant for those schemes located in Cairns, Townsville, Port Douglas and other regional north Queensland areas given the recent exodus of insurance companies prepared to offer insurance to those schemes.

Last reviewed: 9 August 2013

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[¶62-850] Cancelling the contract

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If a buyer's solicitor determines that there has been:

- inaccurate disclosure;
- incomplete disclosure;
- breach of implied warranty; or
- inaccurate contractual statements,

then the entitlement of the buyer to cancel the contract must be investigated and the buyer advised about that entitlement. The buyer should also be made aware of any possible alternative entitlement to damages. (See ¶61-380ff, ¶61-400, ¶61-800.)

Last reviewed: 9 August 2013

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[¶62-880] Claiming damages

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The important point from a buyer's perspective is to be aware that damages are an alternative to cancellation and they should receive due consideration. Damages are more fully discussed in ¶61-400.

Last reviewed: 9 August 2013

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[¶62-920] Adjustment of outgoings

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The adjustment of outgoings is a relatively routine matter. However, a buyer needs to ensure:

- payments of a capital nature that comprise a regular periodic contribution are paid by the seller;
- all special contributions levied on or before the date of the contract are paid by the seller; and
- all payments under an exclusive use by-law are paid by the seller.

There is further discussion on this topic in ¶60-800 and ¶62-200.

Last reviewed: 9 August 2013

[¶62-950] Outstanding maintenance contributions

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From a seller's perspective, maintenance contributions outstanding as at settlement should be paid out of the sale proceeds and not left for the buyer to pay later. This is because the seller remains jointly and severally liable for those contributions (see ¶62-220). So far as the buyer is concerned, apart from any penalty and interest issues, it does not matter whether payment is made on settlement or left to the buyer. If left to the buyer, clearly, the buyer will be concerned to ensure that an allowance for the seller's share is made in the settlement adjustment figures.

Last reviewed: 9 August 2013

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[¶62-990] Notice to body corporate

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The Standard Module (and the corresponding sections of the other modules) requires a buyer of a lot in a community titles scheme to give a written notice to the body corporate, within two months of becoming the owner, advising:

- name of owner
- residential or business address of owner
- an Australian address for service, and
- brief details of the way in which they became the owner (ie, by transfer on purchase).

Failure to give this notice is an offence that carries a maximum penalty of 20 penalty units. It is normal conveyancing practice for a buyer's solicitor to give this notice on behalf of the buyer. A solicitor who fails to do this without instructions would risk a liability to the buyer. The form of notice is one issued by the Commissioner for Body Corporate and Community Management — see **Form 8**, ¶70-180.

.01 Law: Body Corporate and Community Management (Standard Module) Regulation 2008, s 193 and 194.

Last reviewed: 9 August 2013

[¶63-300] Introduction

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Before the new legislation in 1997 it was normal practice in Queensland for car spaces, garages, courtyards, storerooms and similar facilities to be made the subject of a grant of exclusive use and enjoyment, rather than being made part of the lot. There were a number of reasons for this practice, but the limitations of BUGTA were a major influencing factor. Because of the increased flexibility of the BCCM Act there has been a move towards putting such facilities ``on title'' rather than using rights of exclusive use and enjoyment. Also, the BCCM Act introduced two new concepts:

- rights of exclusive use and enjoyment and special rights over body corporate ``assets''; and
- ``occupation authorities'' in favour of service contractors and letting agents.

When a conveyance involves facilities or assets subject to rights of exclusive use and enjoyment, special rights or occupation authorities, then, in addition to investigating the title to the lot, the buyer's solicitor must investigate the validity of the contractual rights associated with those arrangements. This is important because the additional facilities will usually be fundamental to the effective use and enjoyment of the lot. The following commentary will serve as a guide to the process of investigating the validity of those contractual rights.

Last reviewed: 9 August 2013

[¶63-350] Rights under the 1965 and 1973 Acts

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Under both the 1965 Act and the 1973 Act a body corporate could grant rights of exclusive use and enjoyment or special privileges over common property. Depending upon how the body corporate approached the grant, it could be achieved by amendment of the by-laws or by resolution of the body corporate. The transitional provisions of BUGTA saved rights created in that way and deemed the resolution or by-law to be an exclusive use or special privilege by-law under BUGTA. The relevant provision is s 5(11) of BUGTA, which says:

> "Where immediately before the appointed day a proprietor of a former lot was entitled, whether pursuant to a resolution of the body corporate under the former Acts or pursuant to a former by-law, to a right of exclusive use and enjoyment of, or special privileges in respect of, any of the former common property, the proprietor for the time being of the lot shall continue to be entitled to that right or those special privileges and the resolution or former by-law, as the case may be, shall be deemed to be a by-law made pursuant to section 30(7)."

There must be a valid entitlement — validly passed by-law or resolution

The entitlement of the proprietor before the appointed day (whether arising from a *resolution* or a *by-law*) must have been a "valid" entitlement. That is, the *resolution* or a *by-law* must have been valid before any continuation of rights or privileges could flow from s 5(11). Therefore a buyer's solicitor will be concerned to ensure that the former resolution or former by-law on which a "saved" right or privilege is based was validly passed or made, as the case may be, under the appropriate former Act. This necessitates a consideration of the appropriate provisions of the former Acts.

By-law 3(f) in the First Schedule to the 1965 Act provided:

> "3. The body corporate may—
>
> > (f) grant to a proprietor the right to exclusive use and enjoyment of common property, or special privileges in respect thereof, provided that any such grant shall be determinable on reasonable notice unless the body corporate by unanimous resolution otherwise resolves."

Schedule 2 of the 1965 Act contained by-laws that may be described as "house rules" and these could only be amended, added to or repealed in the manner specified in by-law 37 of Sch 1. That by-law (which could itself be altered by unanimous resolution) required a special resolution for such amendment, addition or repeal: a special resolution involving a three-quarter majority of unit entitlements and a three-quarter majority of members. The relevant provisions of the 1973 Act were identical and the by-laws in the First Schedule to both the 1965 Act and the 1973 Act required a unanimous resolution for amendment, addition or repeal. A unanimous resolution was defined in both Acts as follows:

> "**Unanimous resolution** — A resolution unanimously passed at a duly convened meeting of the body corporate at which all persons entitled to exercise the power of voting conferred by or under this Act are present personally or by proxy at the time of the motion."

In the days of the 1965 Act and the 1973 Act these special rights or privileges were usually created in one of the following ways:

1. By direct amendment of or addition to the by-laws in Sch 1. (A unanimous resolution was necessary and the Registrar of Titles would register a form of notification of change of by-laws.)
2. By a unanimous resolution. (This would be done pursuant to by-law 3(f) of Sch 1, but without another by-law and without any registration.)
3. By the addition of a by-law to Sch 2. (This would be done pursuant to by-law 3(f) of Sch 1, a special resolution being necessary but registration being unnecessary.)
4. By a mere resolution of a general meeting of the body corporate or a resolution of its council. (This would be done pursuant to the power conferred by by-law 3(f) of Sch 1.)

Licences and Lease Deeds

Sometimes merely the resolution or by-law evidenced the special rights or privileges. In other cases, a licence or lease deed was entered into by the body corporate. It was possible for the resolution, by-law or deed to provide for formal assignment of the right or privilege to an incoming proprietor upon a change of ownership. Where this was the case a common law chain of title was established which had to be investigated and proved in a similar manner to an old system title to land. Likewise a deed of assignment was usually prepared upon a change of ownership.

The grant must be "determinable on reasonable notice" to be valid

In all cases where a grant was made by a body corporate otherwise than pursuant to a registered First Schedule by-law or a unanimous resolution, it had to be "determinable on reasonable notice". If not, then the grant would have been *ultra vires* the body corporate and invalid. In *Craig-Gordon* v *The Proprietors — Strata Plan No 16*, (1964-1965) NSWR 1576 (¶63-350.40) a grant of exclusive use and enjoyment was made in New South Wales (pursuant to identical provisions) by the addition of a by-law to the Second Schedule by-laws. The resolution effecting this addition was a unanimous resolution. Jacobs J held that the resolution adding the by-law was a unanimous resolution which "otherwise resolved" in terms of by-law 3(f) of the First Schedule of the New South Wales Act.

In *Rugby Court Pty Limited* v *The Proprietors — Strata Plan No 7712* (¶63-350.41), the subject by-law made by resolution under the New South Wales *Conveyancing (Strata Titles) Act 1961* conferred "the right in perpetuity free from any charge or occupation fee to the exclusive use occupation and enjoyment of that part of the common property situate on the roof of the building". Sheppard J said:

> "the use of the words 'in perpetuity' in the resolution excluded the provision in the by-law by which the grant was to be determinable on reasonable notice."

Upon the repeal of the 1965 Act and the 1973 Act, s 5(11) of BUGTA saved all *validly* created rights of exclusive use and enjoyment of common property or special privileges with respect to common property, provided that such rights or privileges were created by *resolution* or *by-law*. If they were created in some other manner (eg by means of licence deed or lease) then they would not be saved by s 5(11). However, if they fail to qualify for saving under s 5(11), they may qualify for saving under s 5(4)(b) which was designed to save all other "estates or interests in former lots and former common property and rights in former common property". This subsection provides:

> "(4) A person who, immediately before the appointed day—
>
> > (a) had an estate or interest in a former lot, has on that day the same estate or interest in the lot which corresponds to that former lot; or
> > (b) had an estate or interest (not being a right or special privilege referred to in subsection (11)) in former common property, has on that day the same estate or interest in the common property which corresponds to that former common property."

If a right was saved by s 5(11) of BUGTA then the relevant *resolution* or *by-law* made under the former Act was "deemed to be a by-law made pursuant to section 30(7)". This meant that it could only be interfered with by a resolution without dissent and the written consent of the proprietor entitled to the right or privilege. By way of contrast, rights or privileges saved by s 5(4) of BUGTA were not deemed to be by-laws under s 30(7) and solely the deed or document under which they were created determined their preservation. It should be noted however, that some rights or privileges created by resolution or by-law under the 1965 Act or the 1973 Act (pursuant to by-law 3(f) of the First Schedule) were "determinable upon reasonable notice" because the body corporate did not otherwise resolve by unanimous resolution. As regards these rights or privileges, the effect of s 5(11) of BUGTA was to convert them into a more permanent form in that they were deemed to be a s 30(7) by-law requiring a resolution without dissent and written consent before they could be changed or taken away. They therefore ceased to be "determinable upon written notice". This may however have been subject to the terms of the by-law or resolution itself.

Provisions under the BCCM Act

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Section 337(2)(g) of the BCCM Act provides that the interim community management statement includes by-laws that are identical to the by-laws that, immediately before the commencement, were the by-laws in force for the BUGTA plan. The question is whether this would include the deemed by-laws. On a proper interpretation of the transitional provisions as a whole, this appears to be most unlikely. These deemed by-laws would not have been recorded as by-laws under BUGTA because there was no mechanism for their recording. In most cases the only evidence of their existence or terms would be contained in very old minute books of the body corporate. An astute body corporate may be able to be relied upon to incorporate these deemed by-laws in a new community management statement when one is lodged, but this is most unlikely. It follows that the mechanisms for identifying and recording the by-laws that were in force as at commencement of the BCCM Act (including the interim, standard and new management statement mechanisms) are not effective to properly record these deemed by-laws. This leads to the most likely conclusion that the provisions of s 337(2)(g) of the BCCM Act do not cover the deemed by-laws. So that brings us to the question of how these 1965 Act and 1973 Act rights are intended to be regularised and recorded.

The answer to this question lies in s 341 of the BCCM Act. That section is said to apply if, immediately before commencement of the BCCM Act (13 July 1997), the proprietor of a lot in an existing 1980 Act plan was entitled, or purportedly entitled, under a resolution of a body corporate, to a right of exclusive use or a special privilege, but no exclusive use by-law for the purpose of the right or special privilege had been agreed to. This section is intended to apply to rights or privileges that are the subject of deemed by-laws. The mere fact that they are deemed by-laws does not have the effect of making s 341 irrelevant to them, and thus applying s 337(2)(g), because:

- as deemed by-laws they had not "been agreed to"
- the interim, standard and new management statement provisions do not provide a mechanism for recording of these deemed by-laws
- s 341 is clearly intended to provide a mechanism for recording them, and
- s 341 could have no other purpose because it was not possible under BUGTA to confer rights of exclusive use or special privileges over common property by means of "a resolution of the body corporate".

The process set up by s 341 is as follows:

- A by-law giving effect to the resolution is taken to have been agreed to by the body corporate under BUGTA before its commencement. (This, in itself, achieves no more than what was achieved under BUGTA transitional provisions.)
- If the lot owner entitled to the right asks the body corporate to record the by-law, then it may be recorded by the body corporate. The request from the lot owner must be made "within a reasonable time before" 13 January 1999. The wording is curious because it does not require the request to be made "before" the January date, but rather "within a reasonable time before" the date. This suggests that lot owners with these types of rights must act promptly. There is no time limit during which the body corporate must record the by-law.
- If the body corporate does not record the by-law, the lot owner may apply to an adjudicator for an order requiring the body corporate to deposit the by-law for recording.
- When considering such an application, the adjudicator may consider whether it is equitable in all the circumstances for the order to be made, having regard especially to the following:
  - the interests of other persons having an estate or interest in lots in the scheme, and
  - the extent to which the right or privilege has been exercised or apparent before and after the commencement.
- The adjudicator's order may direct variation or modification of the by-law or may direct that no by-law be deposited.

Although the new by-law is deemed to have been agreed to by the body corporate before commencement of the BCCM Act, it is clear that the by-law has no effect before it is recorded. Furthermore, it may never be recorded. While this may appear inconsistent with the status of the right under the deemed by-law made pursuant to BUGTA transitional provisions, no other interpretation can be given to s 341 to enable it to

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operate. It must therefore follow that any rights under BUGTA transitional provisions (ie, rights originally created under the 1965 Act and 1973 Act) ceased to have effect upon commencement of the BCCM Act.

.01 Law: BCCM Act, s 337(2)(g), 341; *Building Units and Group Titles Act 1980*, s 5(4), (11); 30(7); *Building Units Titles Act 1965–1973*, Sch 1, 3(f); 37; *Group Titles Act 1973*, Sch 1, 3(f); 37; *Conveyancing (Strata Titles) Act, 1961* (NSW), Sch 1, 3(f); 34.

.40 Case references. See *Craig-Gordon* v *The Proprietors — Strata Plan No 16* (1964–1965) NSWR 1576.

.41 Case references. See *Rugby Court Pty Ltd* v *The Proprietors — Strata Plan No 7712*, NSW Supreme Court, Sheppard J, 19 September 1979. (Previously unreported.)

Last reviewed: 9 August 2013

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[¶63-400] Investigation of rights under the 1965 and 1973 Acts

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If an exclusive use or special privilege right forms part of a sale, then the buyer's solicitor must endeavour to establish the continued existence of the right under the BCCM Act. This will require the following issues to be addressed in the light of the commentary in ¶63-350:

(1) How was the right created under the 1965 Act or the 1973 Act?
(2) Was the right **validly** created? (Recordings on the original building units or group titles plan, original minutes and other body corporate documentation will be relevant to this issue.)
(3) Did BUGTA transitional provisions preserve the right?
(4) Is it possible to determine the exact terms of the original right?
(5) Do the transitional provisions of the BCCM Act bring about deemed body corporate agreement to a by-law giving effect to the original resolution?
(6) Has the Registrar of Titles recorded that by-law?

All of these issues must be addressed. It is not sufficient to rely upon the fact that a by-law has been recorded. This is because pursuant to s 59 of the BCCM Act, the Community Management Statement takes effect under the Land Title Act, s 115L(3). However, expressed in s 115L(2) of the Land Title Act is the warning that it must not be presumed that a community management statement is valid or enforceable, including, for example, that the by-laws for the scheme included in the statement are valid and enforceable, because the registrar records it. Furthermore, an adjudicator can invalidate the by-law and the community management statement can be amended to give effect to the invalidation.

It is therefore suggested that the following procedure be followed:

(1) Check to see how the rights or privileges were created under the 1965 Act or the 1973 Act:

(a) If created by direct amendment of the old Sch 1, then proceed to step (2).
(b) If created by resolution then the solicitor would need to be satisfied as to *one* of the following:

(i) that the old by-law 3(f) had been repealed at the time the resolution was passed and another empowering by-law had been added, or
(ii) that the grant was determinable upon written notice, or

(If the by-law was not expressed to be determinable upon reasonable notice then this may not mean that it is invalid. In *Craig-Cordon* v *The Proprietors — Strata Plan No 16* at p 1579 (¶63-400.40) Jacobs J in dicta expressed the view that the by-law was valid but only to the extent that it is determinable upon reasonable notice.)
(iii) that an exception was made by unanimous resolution.

(The purpose of this is to ensure that the original right or privilege was *validly* created. It is suggested that if the rights were not validly created, then they did not exist, therefore they cannot be saved.)

AND THAT in the case of a grant determinable upon reasonable notice, the grant had not been determined.
(c) If created by the addition of a by-law to Sch 2, then the solicitor would need to be satisfied as to *one* of the following:

(i) that the old by-law 3(f) had been repealed at the time the resolution was passed and another empowering by-law had been added, or
(ii) that the grant was determinable upon written notice (but note comments in brackets to (1)(b)(ii) above), or

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(iii) that an exception was made by unanimous resolution (see comments in brackets to (1)(b)(iii) above).

AND THAT in the case of a grant determinable upon reasonable notice, the grant had not be determined.

(d) If created by deed of licence or lease, the following procedure may not apply and reference should be made to the discussion below.

(2) Ensure, so far as is possible by inspection of the minute book and other records, that the amendments to Sch 1, the relevant resolution or the Sch 2 by-law were *validly* effected or created.

(3) Be satisfied that the transitional provisions of the BCCM Act bring about deemed body corporate agreement to a by-law giving effect to any original resolution.

(4) Check that the Registrar has recorded that by-law.

(5) Ensure that there is no unregistered amendment, addition to or repeal of the right or privilege (which is now regulated in the same way as an exclusive use or special privilege by-law under Div 2 of Pt 5 of Ch 3 of the BCCM Act).

It was possible for these rights or privileges to be created under the 1965 Act or the 1973 Act by means of deeds of licence or lease. Many of these deeds did not qualify for saving under s 5(11) of BUGTA because that provision only provides for the saving of rights or privileges that existed pursuant to a resolution of the body corporate or a former by-law. These deeds do not fall into either of those categories. The same can be said of the transitional provisions in s 341 of the BCCM Act. That being the case, the estate or interest of the proprietor in the subject area of common property would (by virtue of s 5(4)) of BUGTA have been continued after 3 November 1980 and, subject to the provisions of the deed, may have remained in existence. However, there is no provision in the BCCM Act which corresponds with s 5(4) of BUGTA, and if those estates or interests are to survive the commencement of the BCCM Act, they would need to rely upon the provisions of the *Acts Interpretation Act 1954*.

Mention was made above of the possibility that the terms of the deed, resolution or by-law conferring these rights or privileges may require a formal assignment or transfer when there is a change of ownership. Particular care is called for when this type of provision is encountered. The title to the right or privilege would need to be investigated in the same way as an old system title is investigated.

The following chart illustrates the process for investigating the validity of rights under the 1965 Act and 1973 Act.

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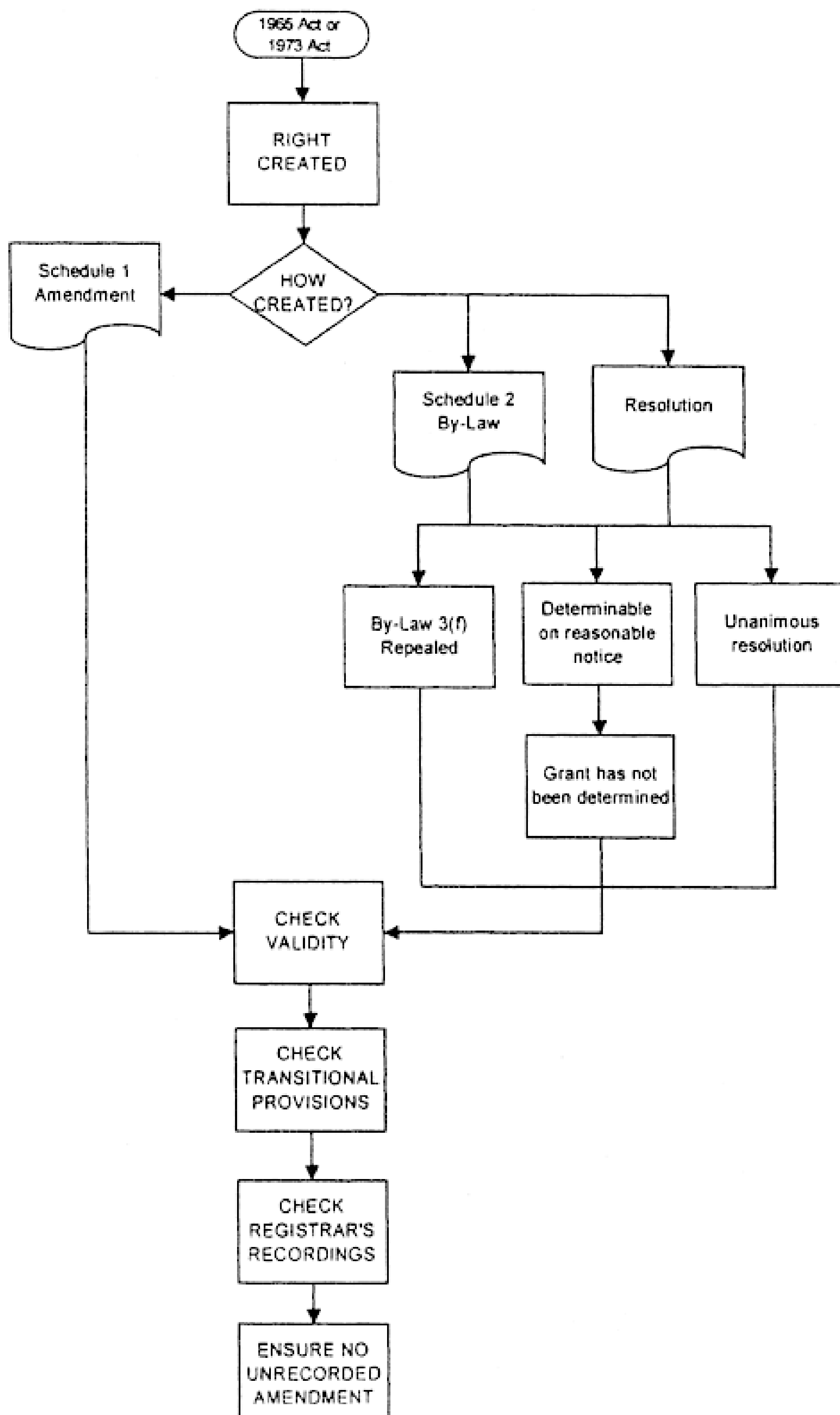
1966 Act or
1973 Act
RIGHT CREATED
HOW CREATED?
Schedule 1 Amendment
Schedule 2 By-Law
Resolution
By-Law 3(f) Repealed
Determinable on reasonable notice
Unanimous resolution
Grant has not been determined
CHECK VALIDITY
CHECK TRANSITIONAL PROVISIONS
CHECK REGISTRAR'S RECORDINGS
ENSURE NO UNRECORDED AMENDMENT

.01 Law: BCCM Act, s 59; 341; *Building Units and Group Title Act 1980*, s 5(4), (11); 30(7); *Building Units Titles Act 1965–1972*, Sch 1, 3(f); *Group Titles Act 1973*, Sch 1, 3(f); *Land Title Act 1994*, s 115L(2) and s 115L(3).

.40 Case reference. See *Craig-Gordon* v *The Proprietors — Strata Plan No 16* (1964–1965) NSWR 1576.

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[¶63-450] Rights under BUGTA

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Essential rights under BUGTA

The essential features of these rights under BUGTA (apart from those already dealt with) were:

- They could have been rights of exclusive use and enjoyment of or special privileges in respect of common property.
- They could only be conferred upon a proprietor or proprietors jointly in respect of a particular lot or lots and the proprietor or proprietors were required to consent in writing to the grant.
- They were conferred by means of a by-law made pursuant to a resolution without dissent (as to which see below).
- They could be made subject to conditions, including the proper maintaining and keeping in a state of good and serviceable repair the subject area of common property and the payment of money (either by way of premium or occupation fee).
- The area of common property involved could be designated in the by-law or with reference to a plan. Alternatively, the by-law could authorise a person (usually the original proprietor) to identify or define the area of common property involved.
- The by-law could authorise the transposition of an identified or defined area of common property from one proprietor to another.
- They could only be amended, added to or repealed by a further by-law made pursuant to a resolution without dissent *and* the written consent of any proprietor affected.
- The by-law enured as appurtenant to and for the benefit of the proprietor or proprietors for the time being of the lot or lots in respect of which they were made. That is, the rights could not be assigned or transferred. (See *Rugby Court Pty Limited* v *The Proprietors — Strata Plan No 7712* (¶63-450.40).)
- If the by-law was made before 1 April 1992, then the obligations of the proprietor as regards maintenance of the subject area of common property may be difficult to determine. Before that date s 30(9)(b) of BUGTA provided that the proprietor, unless excused by the by-law, was responsible for performance of the body corporate's duties to repair and maintain under s 37(1)(b) and (c)(i) of BUGTA. Section 30(9) of BUGTA was repealed on that date. At the same time a new s 30(7A) was introduced. That subsection required these types of by-laws to provide either that the body corporate shall carry out those duties or the proprietor or proprietors holding the grant shall take over those duties. If the by-law did not provide one or the other, then the subsection automatically imposed the obligation to perform the body corporate's duties on the recipient proprietor or proprietors. Did this automatic imposition apply to a by-law made before 1 April 1992? From one point of view the then new s 30(7A) was only intended to apply to by-laws made under the then new s 30(7) (ie the subsection inserted by s 12 of the *Building Units and Group Titles Act Amendment Act 1990*). Because of the opening words in s 30(7A), the better view was that the subsection did not apply to a by-law made before 1 April 1992. Hence, the terms and conditions of that by-law determined the responsibility of a proprietor for repairs and maintenance under such a by-law. In some cases this may mean a change in responsibility as at 1 April 1992 where the by-law did not expressly impose or excuse responsibility for performance of the body corporate's duties — the old s 30(9) having been repealed.

Important notes on BUGTA

The following matters are also important:

- A "resolution without dissent" was one passed at a duly convened meeting and against which no vote was cast. (See definition in s 7(1) of BUGTA.)
- The Registrar of Titles, when checking notifications of change of by-laws before their registration, did not have to be concerned with the validity of the proceedings at which the by-law was made,

or the validity of the by-law itself. Despite the practice adopted, the Registrar was only required to ensure that the document was in a form acceptable for registration.
• Registered proprietors of lots who had the benefit of rights of exclusive use or special privileges would have an "indefeasible" title so far as their interest in their lot was concerned (see *Rochester Investments Pty Ltd* v *Couchman and Ors* (1969) 90 WN (Pt 1) 311 (¶63-450.41)). It did not follow that the "title" they had to their exclusive use interest in the common property or special privilege was also "indefeasible". In other words, the same degree of conclusiveness of the Register does not apply to these rights over common property.
• A by-law conferring rights of exclusive use and enjoyment or special privileges was subject to invalidation by an order under Pt V of BUGTA (see s 77 and 90 of BUGTA), in which event the entry on the Register of the notification could be cancelled.
• A by-law, or an amendment, addition to or repeal thereof, had no force or effect until recorded by the Registrar of Titles.

BCCM Act provisions

On commencement of the BCCM Act, a new community titles scheme was established for a plan under BUGTA (s 330 of the BCCM Act). That new scheme is taken to have a community management statement that is taken to:

• include by-laws that are identical to the by-laws that, immediately before commencement of the BCCM Act, were the by-laws in force for the plan (as well as certain by-laws that were in the process of being made), and
• show allocations of common property, including variations and transpositions of common property, that were in the process of being made or were in force under the by-laws immediately before commencement of the BCCM Act (s 337 of the BCCM Act).

By-laws that cannot be made under the BCCM Act are still continued in operation by these transitional provisions (see s 340 of the BCCM Act). When a body corporate records a new community management statement it need not include the "continued" by-laws on the statement (see s 337(5) of the BCCM Act). In that event the "continued" by-laws remain in force. To determine what by-laws are in force one would need to search the old plan and by-law notifications. If the body corporate does not record a new statement within three years after commencement of the BCCM Act, the Registrar will record an actual community management statement, called a "standard statement" (see s 339 of the BCCM Act). This standard statement will not set out the actual by-laws, although it will not affect the operation of the "continued" by-laws. The intention is that eventually the body corporate will lodge another community management statement that will set out the actual by-laws. Unfortunately, this may be many years away, or may not happen at all in some schemes. It follows that the conveyancing practice will be slightly complicated by the fact that all of the by-law information may not be in the one place — in the community management statement.

.01 Law: BCCM Act, s 330; 337; 339; 340; *Building Units and Group Titles Act 1980*, s 7(1); 30(7); 77; 90.

.40 Case references. See *Rugby Court Pty Limited* v *The Proprietors — Srata Plan No 7712*, NSW Supreme Court, Sheppard J, 19 September 1979.

.41 Case references. See *Rochester Investment Pty Ltd* v *Couchman and Ors* (1969) 90 WN (Pt 1) 311.

Last reviewed: 9 August 2013

[¶63-500] Investigation of rights under BUGTA

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Investigating seller's title

What has been said so far about rights of exclusive use and enjoyment or special privileges under s 30(7) of BUGTA and their transition to the BCCM Act should give some indication of the problems involved in the investigation of an owner's title to them. Generally speaking, before accepting a seller's title to such a right, a buyer's solicitor should ensure that:

(a) the by-law has been validly made, and
(b) a notification of the by-law was recorded by the Registrar of Titles (either under s 30 of BUGTA or s 337(3) of the BCCM Act), and
(c) the area of common property was clearly identified when the original allocation was made, and
(d) any delegated allocation of the common property, or any variation or transposition of common property under the relevant by-law, was recorded by the Registrar, and
(e) the by-law has been included in the community management statement, and
(f) there is no "un-actioned" resolution without dissent authorising the recording of a community management statement without inclusion of the by-law (ie there is no unrecorded repeal of the by-law).

Validity of by-laws

The first point is the one most difficult to establish. The body corporate records may give some indication as to the validity of the meeting proceedings, but at the time of inspection they are usually incomplete or the meeting records (apart from the minutes) are non-existent. The second point is established by the usual search of the registered plan. The third and fourth points are established either by search of the registered plan or the body corporate records (depending upon when the allocation was made). The fifth point is established by obtaining a copy of the recorded community management statement. The final point can only be established by inspecting the records of the body corporate and in particular the minute book. The result of such an inspection can then be compared with the search of the registered plan or community management statement.

Before concluding that a by-law has been validly made, one may need to consider whether:

- the meeting at which the by-law was made was a duly convened general meeting
- proper procedures were followed at that meeting
- the motion to make the by-law was proposed as a resolution without dissent and no vote was cast against the motion
- the minutes of the meeting record the motion and the by-law (although this is only suggested from an evidentiary point of view), and
- the recipient proprietor consented in writing to the making of the by-law.

It will immediately be obvious that in many instances it will not be possible to conclude the validity of a by-law without reasonable doubt. This is a most unsatisfactory situation and illustrates a need for further provisions in the BCCM Act designed to protect a proprietor's "title" to exclusive use or enjoyment or special privileges over common property.

Finally, it is necessary to ensure that the by-law came within the ambit of the provisions of s 30(7), (7A) and (7B) of BUGTA. The by-law should be carefully compared with the requirements of every aspect of those subsections. For example, does it identify or define the common property concerned or, alternatively, prescribe a method of identifying or defining such common property? Even after the buyer's solicitor has been satisfied as to the existence of the rights or privileges, the solicitor must then establish the location of the subject area of common property and ensure that it is the area inspected by the buyer. Sometimes the area is described in the by-law and can thus be identified. In other cases the by-law may refer to a plan. Sometimes the plan forms part of the recorded notification or plan, in which event a copy is readily available. Unfortunately, the by-law sometimes refers to a plan attached to a minute book of the body corporate. This

was a most undesirable practice not only because it is difficult to inspect, but also because these minute books are often lost, notwithstanding the obligation for them to be retained.

The following chart illustrates the process for investigating the validity of rights under BUGTA.

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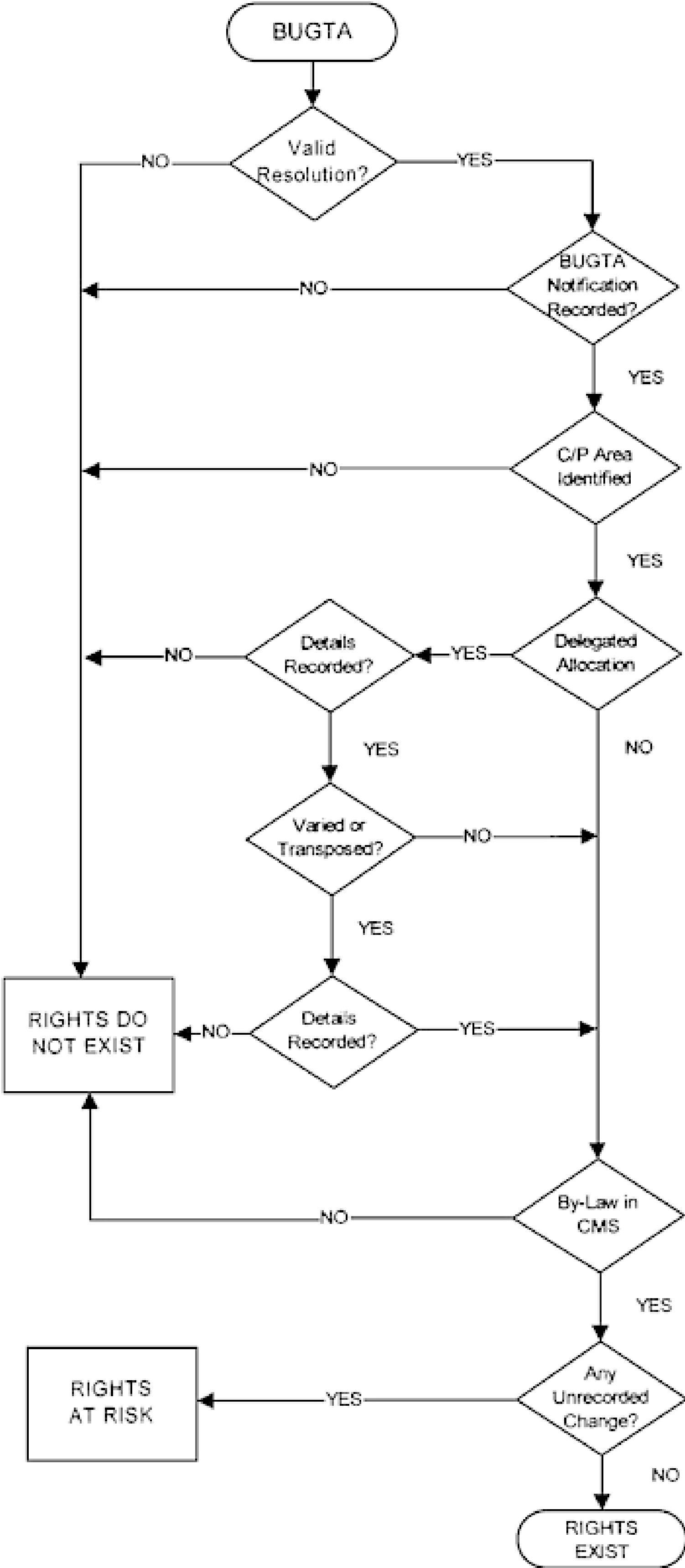
Chart 3



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.01 Law: BCCM Act, s 337(3); *Building Units and Group Titles Act 1980*, s 30.

Last reviewed: 9 August 2013

[¶63-550] Exclusive use and special privileges under the BCCM Act

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Under the BCCM Act, an exclusive use by-law for a community titles scheme is a by-law attaching to a lot that gives the occupier for the time being of the lot exclusive use to the rights and enjoyment of, or other special rights about:

- common property, or
- a body corporate asset.

Of course, a "lot" may be a lot that is another community titles scheme. If an exclusive use or special right is given to such a lot, the right is for the benefit of the community titles scheme based on that lot. This means all of the owners in the subsidiary community titles scheme have the benefit of the right. However, there may be doubt about the effectiveness of an exclusive use by-law in favour of two or more lots jointly. The BCCM Act does not make provision for joint grants, as was the case during the later years of BUGTA. As a result there are no mechanisms to regulate the rights and obligations of joint recipients, inter se. To be effective such a by-law would need to rely upon the "singular means plural" rule in the *Acts Interpretation Act 1954*. It would be risky to rely solely upon that rule.

Body corporate assets

A body corporate asset is an item of real or personal property acquired by the body corporate, other than property that is incorporated into and becomes part of the common property. Examples of body corporate assets are motor vehicles, "off site" recreational facilities (such as a beach club), furniture and boats. Indeed, the assets may consist of any property an individual is capable of acquiring. This ability to give exclusive use of assets takes the concept of exclusive use further than the original concept under the 1965 Act, as continued by the 1973 Act and BUGTA. However, an exclusive use by-law cannot apply to utility infrastructure that is common property or a body corporate asset. "Utility infrastructure" is defined to mean "cables, wires, pipes, sewers, drains, ducts, plant and equipment" by which lots or common property are supplied with utility services. In turn there is an extensive list of services in a definition of "utility services".

Exclusive use of common property to be in a by-law

The BCCM Act requires the common property or body corporate asset to which an exclusive use by-law applies to be:

- specifically identified in the by-law, or
- allocated in accordance with an authority in the by-law.

The provisions of the BCCM Act dealing with allocations are considered in ¶63-600. The Registrar is given clear power to require the subject matter of an exclusive use by-law to be adequately identified.

It is very important to identify with certainty the exclusive use area to be allocated to lot owners. In the QCAT Appeal decision of *The Body Corporate for No 9 Port Douglas Road* v *McEvoy and Anor* [2012] QCATA 114, the lot owners (also the resident caretakers) received the right to the exclusive use of a roof top area of common property directly adjacent to their Lot 16. However, no survey plans setting out the exact area boundaries were prepared and provided to either the lot owners, the committee or the Department of Environment and Resource Management (DERM) as part of the registration of the new community management statement confirming the allocation of the exclusive use area. Even during the initial QCAT hearing, no plans were provided to show the area to be granted by way of exclusive use.

Accordingly, the DERM requisitioned the community management statement and eventually rejected its registration. By that time any ability to lodge a new community management statement was out of time — hence the original application. The QCATA Member held that the adjudicator's orders directing the new community management statement to be registered should be set aside and dismissed the appeal filed by the applicants.

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Relevantly, a body corporate must act reasonably in considering an owner's motion for a grant of exclusive use. This is important given the form of the motion required in a general meeting is a resolution without dissent (s 171(1)(a) and (2)(a)) of the Act.

In Mariner Quays [2014] QBCCMCmr 336 (17 September 2014), 4 lots voted against a motion in which owners sought to enclose a small part of common property for their own use and benefit.

Part of the motion included conditions such as the owner being required to maintain that part of the common property, being responsible for the lodgement of new plans and a new community management statement and the construction of a fence in keeping with the development.

The four objecting owners cited, inter alia, precedent, privacy and nuisance and proposed use of the area.

The Adjudicator held that precedent (ie the concern that the grant of this area of exclusive use would trigger a flood of requests from other lot owners), was not a basis upon which to found reasonable opposition on the part of the body corporate. The Adjudicator noted that whilst a body corporate is generally expected to make decisions which are consistent, a general concern about a precedent being set is not an objective basis for opposing a properly made request given each and every application must be assessed on its own merit.

The applicants submitted that the area which they wished to turn into their exclusive use was less than one meter from common property pathways going past their windows and loungeroom. This made noise and privacy an issue. The Adjudicator noted that the body corporate could have dealt with those issues but its failure to do so did not mean that the application for exclusive use was improperly made.

The applicant's proposed to use the area as a place to put a washing line, store their bins and place a garden. The owners who opposed the grant of exclusive use being made objected to bins being kept behind the fence given the by-laws provided for washing and bins to be stored in the garage. The Adjudicator held that an objection to the proposed use was not in and of itself sufficient to found a reasonable objection given the applicants were still subject to the by-laws for the scheme.

Except where an exclusive use by-law is contained in the first community management statement, the owner of the lot receiving the right must either—

> (a) agree in writing to the by-law before a resolution without dissent is passed consenting to the recording of a community management statement incorporating the by-law, or
> (b) vote personally in the resolution.

Similarly, the owner of a lot entitled to a right must agree in writing or vote personally in the resolution before a resolution without dissent can be passed to remove the by-law. In the case of by-laws that authorise an allocation or reallocation of common property or assets the subject of an exclusive use by-law, no allocation or reallocation can be made without the agreement in writing of the lot owner.

Where the owner of a lot was a body corporate manager, service contractor or letting agent for the scheme and that lot has the benefit of an exclusive use by-law, then under certain circumstances the body corporate can apply for specialist adjudication with a view to having the by-law discontinued. This provision will be of concern to someone who buys a manager's unit to which no management rights attach, but to which an exclusive use by-law still attaches.

Law: BCCM Act, s 11; 170; 171; 172; 177; Sch 6.

Last reviewed: 10 November 2014

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[¶63-600] Allocation of areas or assets

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Mention was made in ¶63-550 that the BCCM Act requires the common property or body corporate asset to which an exclusive use by-law applies to be:

(a) specifically identified in the by-law; or
(b) allocated in accordance with an authority in the by-law.

Once allocated, the area or assets can be ``reallocated'' by the lot owner entitled to the right to another lot owner within the scheme. This is called an ``agreed allocation'', and is achieved by means of a ``reallocation agreement''. Special requirements apply to all of these forms of ``allocation''.

Identification in the by-law

The common property area is usually identified in the by-law withe reference to a plan attached to the community management statement, although in an appropriate case it may be identified with reference to the plan of subdivision or by general description. An asset is usually identified by general description. However, it should be noted that the Registrar may require a plan for identification purposes — see sec 172 of the BCCM Act. This is the most direct and simplest way to allocate areas or assets. For an example of this type of identification see **Form B161** (¶74-540).

Allocation by authority

Under this system, the by-law authorises a person (who may be the original owner or the original owner's agent) to make the allocation. For an example of this type of authority see **Form B162** (¶74-545). For the appointment of an owner's agent see **Form B163** (¶74-550).

An authorised allocation has no effect unless:

(a) details of the allocation are given to the body corporate;
(b) the allocation is made during the *base allocation period*; or
(c) as an alternative to (b), the allocation is made during an *extended allocation period*.

The *base allocation period* is the period commencing on recording of the relevant community management statement and ending one year later. An *extended allocation period* is a period after the *base allocation period* specified in an order of an adjudicator under the dispute resolution provisions. The relevant community management statement means:

- the statement that first includes the exclusive use by-law; or
- where the scheme is progressively developed, the new statement that replaces the existing statement.

It seems clear that, once notified to the body corporate, the allocation has effect and continues to have effect until it is the subject of a request to record a new community management statement (which effectively confirms its effectiveness), or it ``lapses'' because of a failure of the body corporate to request the recording of a community management statement (see later regarding this ``lapsing'').

Agreed allocations

Two or more lot owners may enter into a ``reallocation agreement'' in relation to common property or body corporate assets the subject of exclusive use rights. Under this agreement they may change the lot to which an area or asset is allocated under the recorded exclusive use by-law. This may be:

- a swapping of allocations; or
- a change of allocation from one lot owner to another lot owner.

Before the reallocation (ie, ``agreed allocation'') takes effect, details of it must be given to the body corporate. Again, it seems clear that, once notified to the body corporate, the allocation has effect and continues to have effect until it is the subject of a request to record a new community management statement (which effectively confirms its effectiveness), or it ``lapses'' because of a failure of the body corporate to request the

recording of a community management statement (see later regarding this ``lapsing"). **Form B164** (¶74-555) is an example of a simple reallocation agreement.

Notifying the authorised allocations

The body corporate must lodge a request to record a new community management statement (**first subsequent statement**) showing:

- all authorised allocations made in the *base allocation period*; and
- all authorised and agreed allocations currently in place when the body corporate consented to the recording of that statement.

If an *extended allocation period* applies, the body corporate must lodge a request to record a new community management statement (**second subsequent statement**) showing:

- all authorised allocation made between the end of the *base allocation period* and the end of the *extended allocation period*; and
- all authorised and agreed allocations currently in place when the body corporate consented to the recording of that statement.

The request to record a community management statement must be lodged within three months after expiry of the base allocation period or extended allocation period, as the case may be. This time can be extended (before or after expiry of the three months) by an order of an adjudicator under the dispute resolution provisions. Failure to lodge the request to record the community management statement results in all authorised and agreed allocations not previously notified ceasing to have effect. If an adjudicator extends the time after the three months expires, then the allocation is taken to have remained in effect despite the three months having ended.

Notifying agreed allocations

Within three months after an agreed allocation takes effect, the body corporate must lodge a new community management statement showing all allocations currently in place when it consented to the recording. However:

- this does not apply where the agreed allocation has already been recorded as a consequence of a request to record an earlier community management statement; and
- an adjudicator may extend the three-month period.

Failure to lodge the request to record the community management statement results in the agreed allocation ceasing to have effect. If an adjudicator extends the time after the three months expires, then the allocation is taken to have remained in effect despite the three months having ended.

.01 Law: Sec 171, 172, 174, 175, 176.

Last reviewed: 9 August 2013

[¶63-650] Investigation of rights under the BCCM Act

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Where a lot being purchased has the benefit of an exclusive use by-law, the buyer's solicitor should check for the following:

That the by-law appears in the current community management statement for the scheme.
That either:

- the by-law was in the first community management statement for the scheme; or
- recording of the community management statement in which the by-law first appeared was authorised by resolution without dissent.

In the case of the second dot point above, that before the resolution was passed the owner of the lot at the time agreed in writing to the passing of the resolution or voted in favour of the resolution.
That the by-law attaches to the lot. (The by-law should mention the lot and there is doubt about a by-law attaching to two or more lots jointly.)
That the common property area or asset is identified in:

- the by-law;
- an authorised allocation; or
- an agreed allocation.

That the area or asset so identified corresponds with the area or asset inspected by the buyer.
In the case of an authorised allocation or an agreed allocation, that the allocation was effective. For example:

- An authorised allocation was made within the base allocation period or an extended allocation period.
- Details of either the authorised allocation or agreed allocation were given to the body corporate. (This is necessary despite the fact that the allocation was recorded — it was a condition precedent to the validity of the allocation.)
- The correct person did an authorised allocation. If an agent did the allocation, the agent must have had proper authority.

That any authorised allocation or agreed allocation has been recorded by the Registrar ***and*** that the recording was done within the required time (see sec 175 or 176 of the BCCM Act).
That the common property or asset the subject of the exclusive use by-law is not utility infrastructure.
If the owner of the lot being purchased was formerly a body corporate manager, service contractor or letting agent for the scheme, that no application is pending or proposed to have the by-law discontinued.
That there is no ``un-actioned'' resolution without dissent authorising the recording of a community management statement without inclusion of the by-law (ie, there is no unrecorded repeal of the by-law).

The following chart illustrates the process for investigating the validity of rights under the BCCM Act.

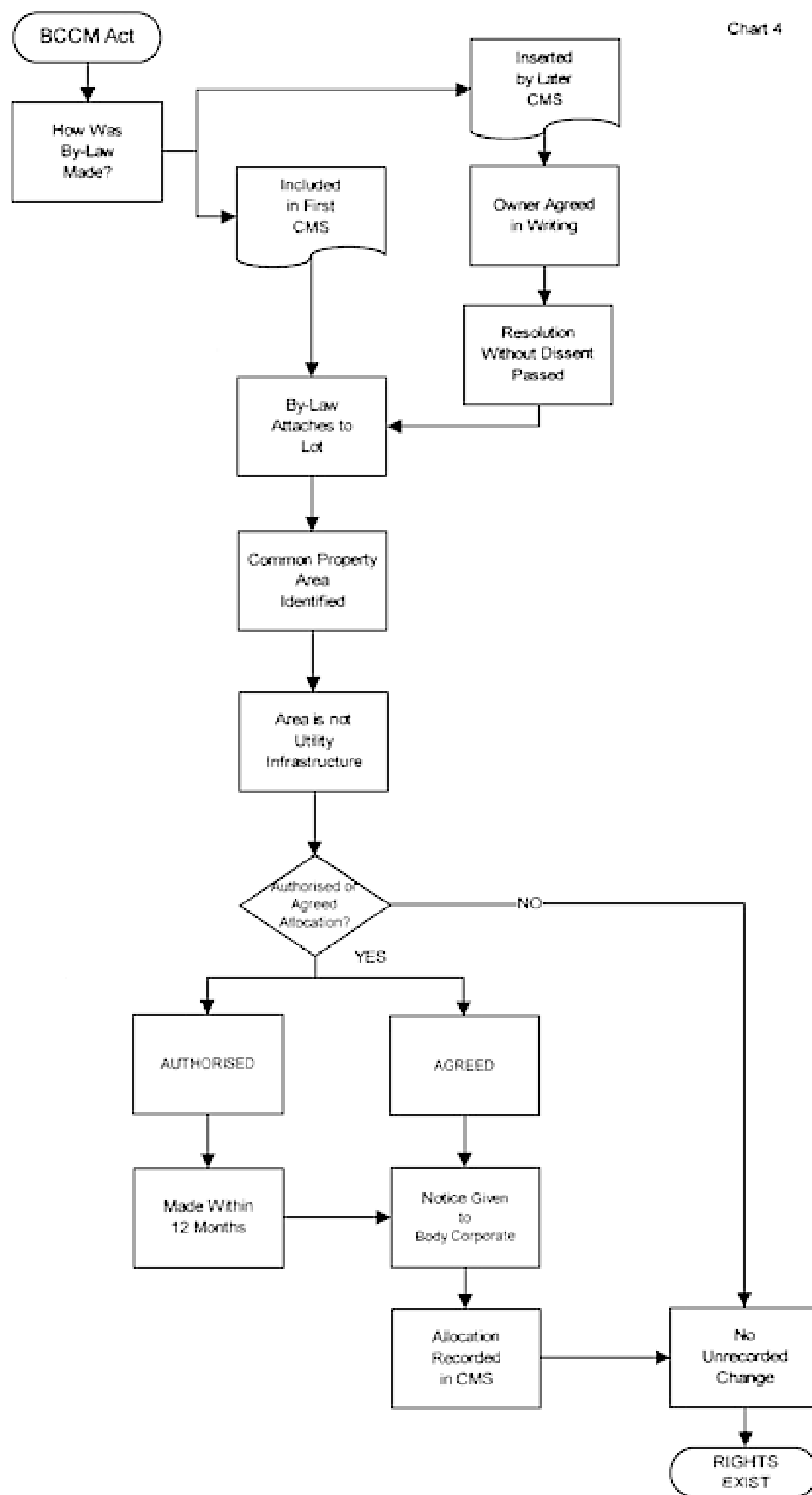
Chart 4
BCCM Act
How Was By-Law Made?
Inserted by Later CMS
Included in First CMS
Owner Agreed in Writing
Resolution Without Dissent Passed
By-Law Attaches to Lot
Common Property Area Identified
Area is not Utility Infrastructure
Authorised or Agreed Allocation?
NO
YES
AUTHORISED
AGREED
Made Within 12 Months
Notice Given to Body Corporate
Allocation Recorded in CMS
No Unrecorded Change
RIGHTS EXIST

.01 Law: Sec 175, 176.

Last reviewed: 9 August 2013

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[¶63-700] Occupation authorities

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Under BUGTA, building and letting managers were given rights of exclusive use and enjoyment over any parts of the common property that they needed to conduct their business (eg the front desk, storerooms, parking areas, etc). Since the commencement of the BCCM Act, a service contractor or letting agent can only acquire rights to occupy part of the common property for the purpose of their engagement or authorisation by means of a new *occupation authority*. The main features of an occupation authority are:

- they terminate when the engagement or authorisation terminates
- they do not apply to body corporate assets
- they appear to apply to common property which is utility infrastructure
- they can be conferred by ordinary resolution
- they may be incorporated in any agreement or authorisation between the body corporate and the service contractor or letting agent
- if they contain conditions, those conditions are taken to be a term of the service contract or letting authority, and
- they cannot otherwise be amended or terminated during the term without the agreement of the service contractor or letting agent.

.01 Law: Body Corporate and Community Management (Standard Module) Regulation 2008, s 136; Body Corporate and Community Management (Accommodation Module) Regulation 2008, s 134.

Last reviewed: 9 August 2013

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[¶63-750] Investigation of validity of occupation authorities

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Occupation authorities are relatively simple to investigate when compared to rights of exclusive use and enjoyment or special rights. A buyer's solicitor will be concerned to ensure:

(1) That the occupation authority was authorised by an ordinary resolution.
(2) That the resolution was validly passed at a duly convened meeting.
(3) That the occupation authority only relates to common property necessary to enable:

– a service contractor to perform obligations under their engagement, or
– a letting agent to operate as such.

(4) That the nature of the occupation authority is such that it is unlikely to interfere to an unreasonable extent with the use and enjoyment of a lot or the common property by an occupier of a lot. For example, an authority over the whole of the common property in the scheme would be objectionable; an authority over the swimming pool may not be objectionable; an authority over a storage facility would not be objectionable.
(5) The service contractor or letting agent has complied with any conditions in the occupation authority.

.01 Law: Body Corporate and Community Management (Standard Module) Regulation 2008, s 136; Body Corporate and Community Management (Accommodation Module) Regulation 2008, s 134.

Last reviewed: 9 August 2013

[¶63-800] Problems with invalid grants

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In the past insufficient care has been taken by Queensland solicitors and body corporate managers when drafting and creating rights of exclusive use and enjoyment and special privileges over common property. As a result a large number of grants would fail the ``validity'' tests suggested in the above commentary. Some estimates put the percentage of invalid exclusive use and special privilege by-laws as high as 70%. Unfortunately, sometimes it is not possible to be entirely satisfied about validity issues. The important thing for solicitors acting for parties taking the benefit of such rights is to ensure that their clients are aware of the difficulties with these types of ``titles''. Their client should be given the choice to either accept the risk of invalidity or go to the expense of allowing their solicitor to properly investigate the question of validity.

Where an invalid grant exists there may be an argument that the body corporate is estopped from denying the existence and validity of the grant. However, there could be some difficulty in making out such an argument in favour of a new buyer of the lot entitled to the benefit. Ultimately, the body corporate will have to be convinced to re-make the offending by-laws or the buyer will have to accept the risk. Otherwise the buyer should not proceed with the purchase.

Last reviewed: 9 August 2013

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[¶64-100] Introduction

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A mortgagee will generally be concerned about the same issues that concern a purchaser. Ultimately, the mortgagee wants to be assured that the property will be reasonably marketable in the event that they have to exercise their power of sale. However, a mortgagee may be more business like when assessing the possible impact of body corporate issues on a buyer. For example, if the scheme has a very bad maintenance history and a record of large special contributions a mortgagee may more closely examine the capacity of a buyer to meet likely financial commitments. The mortgagee's concern about the affairs of the scheme may therefore be a little different to the buyer's concern. This is because of the usual enthusiasm that the buyer has for the property.

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[¶64-140] Requisitions on title

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It will have been noted that the practice of making requisitions on title during a purchase transaction has been abandoned. This was achieved by express provision in the standard contract. Strictly speaking, there is nothing to prevent a mortgagee from insisting on a borrower answering requisitions on title. This may prove difficult for the buyer because:

- they do not have the benefit of replies to similar requisitions from the seller, and
- they have limited knowledge about the property.

A mortgagee can usually receive all of the available information about the property from copies of the normal searches and enquiries. It is therefore not surprising that the practice of mortgagees making requisition on title has substantially diminished.

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[¶64-160] Searches and enquiries

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A mortgagee should do the same searches and enquiries as a buyer (see ¶62-720). Consideration should be given to using copies of the searches and enquiries obtained by the buyer. If this practice is adopted the mortgagee should:

- before settlement, conduct fresh title searches; and
- ensure that their name is included (as one of the addressees) on the body corporate information certificate and body corporate records inspection report.

Last reviewed: 9 August 2013

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[¶64-180] Records inspections

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Because a mortgagee will be concerned about:

- the marketability of the property;
- the soundness of ``title'' to exclusive use areas; and
- the potential future financial commitments of the borrower,

it is desirable for the mortgagee to have the benefit of a body corporate inspection report. Some mortgagees insist on reports being obtained. In most cases it will be sufficient for the mortgagee to rely upon a report obtained by the borrower/buyer provided:

- the mortgagee is named as an addressee so that they can directly rely on the report; and
- the report is by a competent inspection agency that had no conflicting interests when providing the report (eg conflict with duties as a body corporate manager of the scheme).

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[¶64-200] Insurance

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Under BUGTA a mortgagee usually required the mortgagor to effect what was commonly called a "mortgagee protection policy". These policies protected mortgagees against a body corporate's failure to insure or to adequately insure. They also allowed a mortgagee to recover from the insurer as soon as a loss was incurred, without having to wait for any claim by the body corporate to be finalised. After making a payment to the mortgagee the insurer was effectively subrogated to the rights of the mortgagee under the mortgage, subject to any remaining interest the mortgagee may have had. Although these policies were inexpensive, the requirement to take them out was often resented by borrowers.

There is no provision for a similar cover in the BCCM Act. Instead, s 192 of the BCCM Act provides for a mortgagee's interest in the lot the subject of the mortgage to be taken as noted on a policy taken out by a body corporate in accordance with a requirement in its regulation module. The following should be noted about this provision:

- It appears to relate to all policies, not just the building insurance, although it is hard to imagine what interest the mortgagee would have in being noted on the public liability or workers compensation insurance policies.
- The policy must be *required* to be effected under the relevant regulation module. Not all policies fall within this category (eg a voluntary insurance scheme in respect of freestanding houses is, as the name implies, purely voluntary).
- In some community titles schemes individual houses will be insured by their owners and the mortgagee's interest should be noted on the individual policy in the same way it is for normal housing or commercial loans.
- If there is a loss, the body corporate is obliged to apply the insurance proceeds to replace or reinstate the damaged property. The mortgagee's rights to the funds are therefore restricted to payments upon termination of the scheme, notwithstanding that the value of their security may be reduced in the meantime.

All of this effectively requires a mortgagee to determine its insurance requirements on a property by property basis. If there is a body corporate cover and that cover is required to be effected by the body corporate, then the mortgagee may be content to rely upon the deemed notation of their interest. If there is a body corporate cover, but that cover was taken out voluntarily (eg as would be the case with a voluntary insurance scheme), then the mortgagee would have no deemed notation of their interest. Furthermore, they could not insist upon the old mortgagee protection policy, because there is now no statutory basis for that type of policy in relation to community titles schemes. If there is no body corporate cover and all properties are individually insured, the mortgagee should require the borrower to effect their own insurance and have the mortgagee's interest noted on the policy.

.01 Law: BCCM Act, s 192; Body Corporate and Community Management (Standard Module) Regulation 2008, s 185, 189.

Last reviewed: 9 August 2013

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[¶64-220] Influencing body corporate voting

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It has long been common for mortgages over building units or group titles lots to require the mortgagor to give the mortgagee a power of attorney or proxy appointment to enable the mortgagee to vote at body corporate meetings. Sometimes the mortgages also required a mortgagor not to vote in any way that may adversely impact on the value of the mortgagee's security. The BCCM Act and various regulation modules contain serious restrictions on these types of provisions. The following provisions of the Standard Module should be noted:

- The mortgagee no longer receives notices of meetings and, except when in possession, cannot vote.
- The mortgagor may appoint a proxy.
- There is a restriction on how many proxies one person may hold.
- There is an approved form of proxy and it must be separate from any contract.
- All proxies lapse at the end of a body corporate's financial year.
- A mortgagor cannot be prevented by contract from exercising a vote at a general meeting and cannot be required to give a proxy.
- A body corporate may prohibit the use of proxies for a particular purpose or generally.

The Accommodation Module contains substantially the same provisions and most of the same provisions are in the Commercial Module. It is only the Small Schemes Module where proxies are comparatively unregulated. For a mortgagee, this means:

- the provisions of mortgage documents seeking to influence the vote at body corporate meetings will need to differentiate between regulation modules, and
- in most cases, there will be little prospect for a mortgagee to influence the conduct of the affairs of a body corporate, other than making applications for orders by an adjudicator.

.01 Law: BCCM Act, s 103; Body Corporate and Community Management (Standard Module) Regulation 2008, s 107, 108, 110(1).

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[¶64-240] Body corporate notices

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There is no provision in the BCCM Act for a mortgagee to give notice of the mortgage to the body corporate, except where the mortgagee enters into possession. A mortgagee with a registered mortgage over the lot, or a mortgagee with a registered mortgage over an interest in a lot, who enters into possession of the lot must give notice to the body corporate. Failure to give the notice is an offence. The notice must advise:

- name of mortgagee
- residential or business address of mortgagee
- address for service (if different to the residential or business address).

There is a form of notice issued by the Commissioner for Body Corporate and Community Management — see **Form 8**, ¶70-180.

.01 Law: Body Corporate and Community Management (Standard Module) Regulation 2008, s 193.

Last reviewed: 9 August 2013

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[¶64-500] Introduction

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Conveyancing procedures for lessors of community titles properties are not very different to those applying to other properties, but to the extent that there are differences, they are important. The process is simplified to some degree by sec 59 of the BCCM Act, which effectively provides that an occupier of a lot or common property is bound by a community management statement as if the statement included mutual covenants to observe its provisions by each person bound by it and each such person signed the statement under seal. Because the by-laws are in the community management statement, this effectively removes the need for a lease to even require a lessee to comply with the by-laws.

.01 Law: Sec 59.

Last reviewed: 9 August 2013

[¶64-530] Provision of copy of by-laws

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The old obligation for the owner to give the tenant a copy of the by-laws when the lease is signed has not been repeated in the BCCM Act. Therefore, a lessor is not under an obligation to ensure that the lessee is aware of the by-laws for the scheme. Despite this, it is good practice to provide a tenant with a copy of the current by-laws. Where a lot is regularly leased (eg in a holiday letting situation) it is good practice to display a framed copy of the by-laws on the back of the front door to the lot. These initiatives often avoid disputes in which a lessor can become indirectly involved.

Last reviewed: 9 August 2013

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[¶64-560] ``Outgoings'' clauses

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Commercial leases of community titles lots frequently contain clauses requiring the lessee to pay maintenance contributions to the body corporate, or to pay any increase in contributions beyond the level at the time of commencement of the lease. When drafting these clauses it must be remembered there are:

- contributions to two different funds (the Administrative Fund and the Sinking Fund);
- two types of contributions (instalment contributions and special levies); and
- some contributions that are entirely of a capital nature.

Contributions of a capital nature cannot fairly be placed on the lessee of a lot.

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[¶64-580] Retail shop leases

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Following on from the conclusion in the last paragraph that capital contributions cannot fairly be placed on a lessee, in the case of retail shop leases it may not be legally possible to pass on capital-related contributions in any event. This is because sec 7 of the *Retail Shop Leases Act 1994* defines ``outgoings'' for a retail shopping centre or leased building so as to exclude:

- expenditure of a capital nature, including the amortisation of capital costs; and
- contributions to a depreciation or sinking fund.

There is a clear argument that any component of either an administrative fund contribution or a sinking fund contribution that is of a capital nature is excluded from ``outgoings'' for the purposes of that Act.

.01 Law: *Retail Shop Leases Act 1994*, sec 7.

Last reviewed: 9 August 2013

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[¶64-600] Body corporate notices

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The regulation modules require a written notice to be given to the body corporate if:

- a leasehold interest in a lot in a community titles scheme is created by lease or sublease for a term of six months or more, or
- a leasehold interest in the lot with six months or more to run is transferred or terminated.

The notice must be given within two months after the event, or after the person required to give the notice becomes aware of the event. Failure to give the notice is an offence that carries a maximum penalty of 20 penalty units. The Commissioner for Body Corporate and Community Management issues a form of notice for the purpose of this provision; see **Form 8**, ¶70-180.

.01 Law: Body Corporate and Community Management (Standard Module) Regulation 2008, s 193.

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[¶64-700] Scope of commentary

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A number of conveyancing principles applicable to the sale of a business in Queensland also apply to the sale of management rights. However, there are additional procedures and factors which apply to the sale process.

This commentary is restricted to the procedures which are a function of the conveyance of a management rights business. In addition, the sale of management rights will often involve the sale conveyance of an on-site unit from which the resident unit manager (also known as the caretaker or building manager) conducts their business and resides. This commentary is not intended to cover the forced sale of management rights under Div 8 of the *Body Corporate and Community Management Act 1997*. In addition, this chapter is not intended to cover the conveyancing process for the sale of the unit. Please see ¶60-100ff.

For a detailed coverage of the sale of business in Queensland, reference should be made to CCH Australia's *Buying & Selling Businesses — Personal Property*.

Where possible in this commentary, common documents and precedents relevant to community titles will be referred to and their use demonstrated and commented upon. The objective will be to outline the procedures that are often followed in a management rights transaction and consider the reasons for those procedures, and do so in a practical way.

Last reviewed: 26 April 2013

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[¶64-710] Distinguishing features of a management rights sale

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A management rights sale involves the transfer of:

- an on-site residence*
- a letting component (ie the rent roll)*
- a caretaking contract
- a utility agreement (less common), and/or
- the transfer of an occupation authority.

The parties to the sale are known (and referred to in the deed of assignment) as the seller/assignor/outgoing manager/former manager/former caretaker and buyer/assignee/proposed assignee/new manager/new caretaker. Care must be taken when dealing with the body corporate's solicitor, the agent and the other party to ensure that documents and correspondence reflect the uniformly accepted term of reference.

The other parties involved in the transaction include the body corporate manager, body corporate committee, management rights sales agent and the buyer's financier. For the purposes of this chapter, we will simply refer to the seller and buyer by those terms.

Essentially, the seller sells the interest which it holds under the agreements listed above. The foundation caretaking and letting documents may be referred to as the "management agreement", "caretaking contract", "caretaking agreement", "letting agreement", "letting agent authorisation" or "letting contract". For the purposes of this chapter, they will be known as the caretaking agreement and letting authority.

Much like the sale of a standard business, one party has an ultimate ability to delay settlement of the sale and, in this case, that party is the body corporate.

A body corporate committee is charged with the role of consenting to the admission of the buyer into the role of the resident manager and scheme letting agent. This involves the review of material provided by the buyer which demonstrates that the buyer is respectable, financially sound and capable of performing all of the duties set out in the caretaking agreement and letting authority. In this way, the committee's function is quite similar to that of a landlord considering the purchase of a business run from premises leased by the seller of that business.

Footnotes

* While it is not common for management rights to be sold in which no residence or rent roll is included, such a sale may occur. A resident unit manager (RUM) may have, for example, regrettably allowed the letting authority to lapse or have applied to the body corporate to unbind the residence from the caretaking agreement and letting authorisation in order to sell the residence if the RUM was experiencing financial difficulty necessitating the sale of an asset.

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[¶64-720] Pre-sale considerations

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As with the sale of any business, a successful and timely settlement is the direct result of thorough preparation. Clients, however, may not have the luxury of a considered approach to the sale of their business.

Financial hardship, an unpleasant relationship with the committee, health concerns, a sea change or imminent retirement may mean that the seller begins the sale process by engaging an agent and listing the management rights for sale prior to contacting a Practitioner for assistance.

Even if presented with a signed contract, basic due diligence should be undertaken to iron out any contractual anomalies sooner rather than later.

At a minimum, the seller must have financial details up to date so that the financial due diligence will meet the buyer's expectation in terms of salary and letting return. If these details are not up to date, the seller may experience difficulty in attracting a buyer.

Please see ¶74-590 for a list of documents to request from the seller together with the review required of those documents.

Last reviewed: 26 April 2013

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[¶64-730] REIQ contracts

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The Real Estate Institute of Queensland (REIQ) has been the state's peak professional association for the real estate industry since 1918. Almost 85% of all real estate agencies in Queensland are members — accounting for more than 15,000 agents, salespeople, property managers, resident unit managers, auctioneers, business brokers and commercial agents state-wide.

With a strong reputation as the leading authority on real estate and property-related issues across Queensland, the REIQ:

- undertakes political advocacy on behalf of its members and the industry
- provides property research, advice and training to members
- acts as a source of real estate products and services, and
- provides a platform for dispute resolution between member agents.

REIQ has produced (with the approval of the Queensland Law Society Inc.) a standard management rights contract. These provisions are intended to be common to all management rights contracts.

The REIQ contract is updated with versions that reflect legislative changes from time to time. A sample copy of the above contract is reproduced at ¶70-310.

Practitioners should check that the most current version of the contract is used as precedent. The REIQ website can be accessed at www.reiq.com.au and forms can be requested from the REIQ if one is a member.

The standard terms of this contract are dealt with in the following commentary, commencing at ¶70-299.

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[¶64-740] Introduction

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There are a number of legislative provisions relevant to the conveyance of management rights. Those provisions will be identified in this part of the commentary and dealt with in detail in due course. The relevant legislation includes the:

- *Body Corporate and Community Management Act 1997* and the various regulation modules under that Act
- *Property Agent's and Motor Dealer's Act 2000*.

In addition, if the seller is a company, it will need to ensure it complies with the requirements regarding the conduct of its dealings with the buyer; namely, the requirement not to engage in misleading or deceptive conduct. A consideration of those duties are beyond the scope of this commentary.

Last reviewed: 26 April 2013

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[¶64-750] Body Corporate and Community Management Act 1997

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The provisions of the *Body Corporate and Community Management Act 1997* (BCCM Act) that are directly relevant to the sale of management rights are s 149A and 149B. These allow for a party to a dispute about the transfer of the management rights to apply to Queensland Civil and Administrative Tribunal or to an adjudicator for an order to resolve the dispute.

The following table sets out the provisions of the various regulation modules under the BCCM Act that are directly related to the sale of management rights:

MODULE	SECTIONS			PROVISION
Standard	**Accommodation**	**Commercial**	**Small Schemes**	
s 122	s 120	Not Applicable	Not applicable	Sets out the right of the seller to sell its rights, the considerations a committee must have as to the buyer, the committee's thirty (30) day decision period and provisions which may be included in the deed of assignment
s 123	s 121	Not applicable	Not applicable	Provides for the payment of a transfer fee to the body corporate's sinking fund
s 124	s 122	Not applicable	Not applicable	Sets out the definitions for the transfer fee provision
s 125	s 123	Not applicable	Not applicable	Sets out the prescribed period — 2 years from the initial contract date
s 126	s 124	Not applicable	Not applicable	Sets out the amount payable upon transfer: Not more than 1 year — 3% More than 1 year — 2% and sets out the seller's hardship provisions to avoid payment of the fee
s 127	s 125	Not applicable	Not applicable	Sets out the provisions for a seller to claim a

				transfer fee is not payable

Last reviewed: 26 April 2013

[¶64-760] Property Agents and Motor Dealers Act 2000

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Sections 152 and 153 of the *Property Agents and Motor Dealers Act 2000* (Qld) provide that a real estate agent who is authorised to sell a letting agent's business must provide the proposed buyer with a written statement which complies with s 153.

This statement is prepared by the seller's agent and annexed to the contract between the items schedule and the special conditions. Both the buyer and the agent must sign this page.

Last reviewed: 26 April 2013

[¶64-770] REIQ contracts

Click to open document in a browser

REIQ contract for management rights business sale

The Real Estate Institute of Queensland (REIQ) produces a standard sale contract for the use of its members.

It is important to note that the REIQ contracts reproduced in this Service are updated and maintained by the REIQ. They are updated with current versions that reflect legislative changes from time to time. CCH Australia has permission to reproduce the REIQ contracts in this Service. Practitioners should check that the most current version of the above REIQ contracts are being used in practice. Please refer to the REIQ's website: www.reiq.com.au.

In addition to the management rights contract, a separate contract will be required for the sale of the associated unit.

The two contracts are interdependent by virtue of a clause in the management rights contract.

Copies of standard REIQ contracts in this Service

The REIQ Contract for Management Rights Business appears in the FORMS tab at ¶70-310.

Last reviewed: 26 April 2013

[¶64-780] Definitions in standard REIQ contract for sale of management rights business

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When reading a standard contract, great care needs to be taken to consider the implications of the defined words.

Clause 1.1 of the standard REIQ conditions of sale for a management rights business sets out the defined terms used within the contract. The seller is referred to as the "vendor" while the buyer is referred to as the "purchaser".

The definitions are:

1. **"Body Corporate"** means the body corporate administering the scheme complex from which the Business is conducted.

The word "scheme" is unfortunately not defined in the contract.
2. **"the Business"** means the vendor's building management and letting agency business carried on at the premises, and includes the Business Assets.
3. **"Business Assets"** means the assets described. Normally, this will include goodwill, fixtures, chattels, plant and equipment as set out in the inventory list attached to the contract.
4. **"Complex"** means the community titles scheme Complex in which the Business is being conducted. Note that **"Premises"** or **"the Premises"** also includes the premises from which the Business is conducted.
5. **"Gross Income"** means the income earned by the vendor in carrying out the Business.
6. **"Keys"** means any implement or instrument necessary to fasten or unfasten a door lock or entry. Please note: the seller will likely hold spare keys for the investors living off site and to allow the seller to perform the usual functions of a real estate agent. The seller may also keep records of those parties who hold swipe cards to enter the Complex; the buyer will expect that these keys and access cards together with a log of holders will be handed over at settlement. The seller may hold a deposit from each tenant payable upon the return of the card. If these records are not in order, encourage the seller to have them ready for settlement.
7. **"the Management and Letting Agreements"** means the agreements with the body corporate relating to the Business particulars. Practitioners should ensure that they have received the most up-to-date form of the current agreements together with any and all earlier agreements and assignments.
8. **"GST Act"** means the principal legislation, *A New Tax System (Goods and Services Tax) Act 1999*. "GST Act" also includes other GST-related legislation.
9. **"the Stakeholder"** means the person named at Item I in the contract. Normally, this person is the agent who holds the deposit but the parties may agree (if there is no active agent) for the seller's solicitor to hold the deposit in its trust account.

Last reviewed: 26 April 2013

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[¶64-790] Who is the buyer?

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Unless the buyer is purchasing the business in its personal capacity, then the seller should insist on the company buyer's directors (commonly, it will be a company as trustee for a family or other discretionary trust) signing the guarantee portion of the contract.

Prior to ensuring the right parties sign for the buyer as guarantor, the practitioner should conduct an ASIC search of the company buyer to ensure all directors sign as needed.

Please note: the buyer's director's execution of the sale contract as a guarantor(s) is separate to the buyer's execution of the deed of assignment as a guarantor.

Acceptable guarantee provisions can be found at standard condition 36; however, although the clause is titled "guarantee and indemnity", the clause does not contain an indemnity necessary to protect the seller's interests. A further indemnity should be considered and inserted into the contract by way of special conditions.

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[¶64-800] Entire agreement?

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As noted, in an earlier checklist, it is important to ensure that the agreement reflects the deal struck by the parties.

This may be difficult where the practitioner is not a party to the negotiations. Standard condition 38 provides that the written agreement reflects the entire agreement reached by the parties.

Inexplicably, standard condition 39 (which does not include a heading) provides that the seller assign all of its interest in each of the letting agreements to the buyer from settlement. The clause could be better placed within the contract; however, it achieves the aim if somewhat belatedly.

Last reviewed: 26 April 2013

[¶64-810] Buyer notifications under REIQ standard contract for lots

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The standard terms of the REIQ contract for sale of management rights place notification requirements on the buyer to inform the seller of satisfactory prerequisite conditions during the initial contract stages.

Last reviewed: 26 April 2013

[¶64-820] Verification of financial records

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Under cl 12, the verification clause in the standard conditions of sale, the buyer is required to provide the seller, by 5 pm on the verification date, notice that the business does not meet the amount set out in the contract. The buyer may waive the verification requirement within two (2) business days of the verification period commencing.

Please note that the verification required is "according to normal accounting principles".

Usually, the buyer will have its accountant or financial planner review a copy of the letting agreement, a copy of the caretaking agreement and copies of the most recent financial records for the business. To this end, the seller should be encouraged to co-operate by providing all documents requested by the buyer and/or the buyer's professional advisers. The seller may have already provided copies of these documents to the seller's agent as part of the sale process.

Failure by the buyer to provide notice by 5 pm on the verification date allows the seller to terminate the contract. Please note: there is no automatic deeming provision on which the seller can rely to lock the buyer into the contract.

If the contract is terminated under this provision, then all deposit monies paid must be refunded by the stakeholder to the buyer.

Last reviewed: 26 April 2013

[¶64-830] Notification of finance

Click to open document in a browser

Under cl 25, provided the relevant portions of the items schedule are completed, the contract is subject to and conditional upon the buyer obtaining finance on terms and conditions which are satisfactory to the buyer.

The buyer must take measures which are reasonably necessary to obtain the approval of its financier (this would include submitting an application). The buyer may terminate the contract if it fails to obtain the finance or may waive the benefit of finance within two (2) business days after the commencement of the finance approval period.

If the buyer obtains finance, it must communicate this to the seller within two (2) business days of receiving the finance approval.

If the buyer does not obtain the necessary finance approval and fails to waive the finance approval condition, then the seller may, after the date has lapsed, terminate the contract.

The seller must, if it terminates the contract under this provision, ensure that the stakeholder refunds the deposit or any part thereof paid to the buyer.

The buyer's bank may tie a certain amount of the finance granted to the value of the business and the value of the lot as separate considerations. Clause 29 provides that the completion of the management rights business sale contract is subject to, and conditional upon, the contemporaneous completion of the contract for the sale of the manager's lot in the scheme.

Last reviewed: 26 April 2013

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[¶64-840] Body corporate consent to the assignment

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The buyer must obtain the consent of the body corporate to the assignment of the caretaking agreement, letting authorisation and any other agreements prior to the parties settling the sale of the transaction.

The seller must, as is customary, provide an undertaking to the body corporate's solicitors to pay for the body corporate's legal and administrative fees in granting the assignment, even if the assignment does not end in settlement. This is partly echoed in cl 33.2 of the standard terms. For this reason, the seller should not commence the process of seeking that approval until such time as the buyer is satisfied with finance and its verification of the books and records.

It is also customary for the seller's solicitor to correspond with the body corporate's solicitor while the buyer's solicitor prepares the deed of assignment and collates the reference and resume material before submitting that to the seller's solicitor to transmit to the body corporate's lawyer. Neither the buyer nor the buyer's solicitor is recognised as parties to the transaction until after the committee has minuted its approval of the buyer as the new manager.

An attempt to transfer the interest in the management rights without body corporate approval may trigger a breach of the caretaking agreement and letting authorisation depending on the construction of those documents. Accordingly, care should be taken and client's expectations managed.

Both the buyer and the seller must take all steps necessary to obtain the body corporate's consent. A well-prepared buyer will arrive at the transaction with its financial, reference and resume material ready for scrutiny.

The caretaking agreement and letting agent authorisation should set out the documents which the body corporate may request the buyer to provide. However, if the agreements are silent, it is customary for the body corporate to ask for two (2) written business references and two (2) written personal references together with a resume from each buyer, or, in the case of the company buyer, from the director(s) standing behind that buyer. Sometimes, the body corporate may request a copy of police checks for the buyer although this is not a common requirement.

In addition, the company buyer can expect its director(s) to be asked to sign personal guarantees as part of the deed of assignment. A well-prepared seller and/or its agent will have ensured the buyer is aware of that requirement as part of the pre-contractual stage of negotiations.

The body corporate will usually ask for either a copy of the bank's letter of offer to the buyer or for a statement of assets and liabilities from the buyer demonstrating that the buyer is financially sound.

It is generally accepted that a major financial institution will not advance funds to a party who is indigent or financially unstable. Therefore, the provision of a copy of a letter of offer or letter of comfort is often accepted by the body corporate as sufficient evidence on the buyer's behalf.

In addition, the body corporate may carry out a bankruptcy or company search of the buyer for which the seller will pay.

Once the material regarding the buyer has been received, the body corporate manager will normally liaise with the seller's solicitor to arrange for a mutually convenient time for the buyer and/or the buyer's directors to attend a meeting with the committee so that the committee may interview the proposed new manager.

During that interview, the buyer may be asked questions similar to a job interview designed to test the buyer's knowledge of the complex, the duties and the buyer's willingness to learn new skills. A well-prepared seller or seller's agent will ensure the buyer is ready for the interview.

Please see ¶74-580 regarding the questions a buyer may be asked at a body corporate interview.

Last reviewed: 26 April 2013

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[¶64-850] Business assets and stock in trade

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Clause 3 provides the business includes (much like the sale of any other business) goodwill, fixtures, fittings, plant and equipment. Importantly, standard condition 3 provides that if the details of stock are *not* included, then the business will include all stock in trade as at the date of completion.

Given management rights involve the transfer of service contracts, the type of stock referred to may not be immediately clear. However, the stock referred to is that stock sold by the seller as part of its usual day to day business. For example, the seller may keep a candy or soft drink fridge in the reception office from which occupiers can purchase items over the weekend or after hours.

Alternatively, the body corporate may keep a vending machine on common property from which occupiers can purchase cold drinks. If the body corporate has entered into an agreement with a soft drink company for the provision of such a machine, the buyer should be made aware that neither the stock within nor the machine belongs to the seller or will form part of the business being sold.

Depending on the seller's entrepreneurial skill, the seller may keep a collection of movies available for rent by occupiers, beach towels or water sport equipment. While these items may not fit into the defined category of stock per se, the buyer will expect to receive them as part of settlement if the contract does not exclude them.

(Please note: certain stock such as movies, beach towels, etc, would more than likely be found in holiday letting sales as opposed to a residential unit block or town house complex. All the same, the practitioner should check to ensure any stock not intended to be sold is excluded if the unsigned contract is presented for negotiation.)

Last reviewed: 26 April 2013

[¶64-860] Seller's warranties and statements

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Standard condition 8 — Promises by the seller

Clause 8.1 of the standard contract contains the seller's warranties to the buyer regarding the business, which the buyer may rely on upon entering into the contract.

It allows the buyer to terminate the contract if those warranties are incorrect.

The seller essentially provides five (5) warranties to the buyer:

> "8.1
>
> (a) that the seller is the owner of the business and the business is not subject to any charges not disclosed in the contract
> (b) that the seller has obtained all necessary licenses and permits to carry on the business and that it is not in contravention of any licence, permit or consent
> (c) that all plant set out in the contract is in good working order and condition
> (d) that the information set out in the contract is true and correct, and
> (e) that at settlement there will be no existing breach of either the caretaking agreement or letting agent authorisation."

If a warranty is incorrect, the buyer may terminate the contract by notice to the seller and may sue the seller for any damages suffered arising from the breach, or the buyer may continue with the contract by affirming it and sue the seller for damages, seek an order for specific performance and recover as a liquidated debt any deposit paid to the stakeholder.

The buyer would have to give the seller the opportunity to correct any inaccurate warranties relating to matters under cl 7.4(1) and (2) "at settlement" prior to exercising its termination.

Standard condition 8 — Promises by the buyer

The buyer provides four (4) warranties to the seller, which are as follows:

> "8.3
>
> (a) the buyer (if a company) is duly incorporated and capable of entering into the contract
> (b) the contract is validly binding on the buyer
> (c) the contract and its completion do not conflict with any articles of association or agreement or deed or writ to which the buyer is subject, and
> (d) the buyer acknowledged that the contract requires the buyer to obtain a letting agent's licence such that the contract is not subject to such a licence being granted — the buyer must in fact obtain that licence as soon as finance, financial verification and body corporate approval are satisfied."

Last reviewed: 26 April 2013

[¶64-870] Restriction on seller's competition

Click to open document in a browser

As with a normal business sale, the buyer's goodwill purchased as part of the business is protected by the seller's restraint of trade. Standard condition 13 provides that the seller must not act either alone or in partnership with or as manager or agent for any of the lots in the complex for the period set out in item T of the items schedule.

The seller should be advised on the extent to which the restraint of trade will impact on his, her or its ability to earn an income after the sale is settled. The clause contains no geographical restriction and would not prevent the seller from purchasing another set of management rights next door to the complex and acting as a letting agent for the new complex.

Three (3) years is a standard amount of time normally set for a seller under this standard condition.

Last reviewed: 26 April 2013

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[¶64-880] Appointment of agent

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Standard condition 14 essentially ratifies the appointment of the agent to introduce the buyer. The clause does little more than protect the agent's interest in receiving its commission.

Instructions should be taken from the seller to remove the clause from the contract.

Last reviewed: 26 April 2013

[¶64-890] Contracts and hire equipment

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The seller may use contractors or hire equipment to assist it in the day-to-day activities of the business and these contracts are dealt with by standard condition 17.

A common example is the hire or purchase of a photocopy machine or laundry service/garden maintenance provider. Details of all hire arrangements and contracts must be disclosed in items L(b) and L(c) of the contract.

Ensure all hire or purchase agreements are reviewed to ascertain whether those agreements provide for assignment to take place. Many do not and aside from imposing a Personal Property Securities Register charge, they may require the seller to pay out the balance of the contract at settlement so that a fresh contract can be entered into with the buyer. This can result in a delay in settlement and unexpected expense for the seller. Care should be taken and the seller’s expectations managed.

Once the contract is on foot, the seller should not enter into any other service contracts or hire or purchase agreements without the prior consent of the buyer.

Last reviewed: 26 April 2013

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[¶64-900] Requisitions

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Onus of responsibility for complying with notices

A requisition is notice from a government authority or court which requires the seller to take a particular step in order to comply with legislative requirements. Standard condition 19 deals with requisitions.

A common example is a health notice issued by Queensland Safe Foods directing the seller to apply fresh sealant to the tiles and sink edges in food preparation areas in order to meet approved safety standards.

Pursuant to standard condition 19, the seller must attend to any requisition issued once the contract is on foot in a proper and workman-like manner. If the buyer has conducted a search and uncovered the requisition notice, the seller will be asked to provide proof of compliance by way of, for example, a follow up inspection certification.

Please note: a requisition issued in the context of the conveyance of the lot will involve a consideration of the date on which the requisition notice was issued (ie pre contract — seller to fix, post contract — buyer to fix). Care should be taken.

Last reviewed: 26 April 2013

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[¶64-910] Employees

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The contract items schedule provides for the seller to list details of its employees. The transfer or discharge of employees is dealt with under standard conditions 20.

In practice, the seller would attach a separate schedule at the back of the items schedule after having checked that information with its accountant.

The buyer has the option to employ those employees featured on the list of employees provided by the seller. The buyer must advise the seller prior to completion (usually two days is sufficient) of the chosen employees. The seller then includes the entitlements of those employees as a settlement adjustment. The seller remains liable for the employment benefits payable to all other employees whom the buyer does not wish to employ.

If the employees do not take up the offer of employment, then the buyer must pay the entitlements back to the seller following settlement so that the seller can properly see to the employees entitlements.

Unlike a standard business sale contract, the clause does not provide for the buyer to offer employment to the employees which is on the same terms as their employment with the seller.

The clause provides at 20.1 that the seller is to pay superannuation entitlements to the employees. However, it is usual for the seller to make a final contribution to the employees' superannuation funds with all earlier benefits. Clause 20.8 echoes that requirement.

Last reviewed: 26 April 2013

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[¶64-920] Seller's tuition and seller's assistance

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The contract provides for the seller to give the buyer tuition prior to settlement and assistance following settlement to ensure that the buyer settles into the business under standard conditions 21 and 22.

The tuition provided by the seller involves the buyer observing the way in which business is conducted. That tuition should include a tour of the premises, an overview of the caretaking duties and the use of equipment to fulfil those duties.

The seller may introduce the buyer to the letting software system (if in use) and demonstrate the way in which bookings are taken, lots inspected and owners' concerns dealt with.

The tuition period should commence only after finance and financial verification have taken place. Usually, one week prior to settlement is the suitable time to ensure that the seller does not waste its time on a party without an ability to complete the contract.

The seller's assistance is provided for an agreed time after settlement. The seller is not compensated for any time spent with the buyer; however, the buyer may not need a significant amount of training if the buyer is keeping the seller's employees or the pre-settlement tuition was comprehensive.

Last reviewed: 26 April 2013

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[¶64-930] Risk

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The business continues to be the seller's risk until settlement has taken place, pursuant to standard condition 23. The seller should ensure all insurance is kept up to date. Please note: the contractual risk under the sale of lot contract may reverse this position. Check the contract and, if needed, incorporate a change to the risk provision by way of the special conditions.

Once settlement is effected, it is up to the seller to cancel the insurance and seek a return on any premium paid.

Last reviewed: 26 April 2013

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[¶64-940] Settlement documents

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The documents exchanged at settlement include:

- the original caretaking agreement and letting authorisation (together with the successors of those documents)
- the original utility supply agreement (if any)
- the deed of assignment
- all earlier original deeds of assignment
- a business name transfer key[*] .

While settlement between practitioners takes place, the seller may, while on-site, hand over to the buyer (Please note: the seller prepares the below documents):

- copies of scheme plans, fire escape plans, workplace health and safety records
- original letting agreements with lot owners and completed transfer details to provide to tenants following settlement
- telephone, postal and facsimile details transfer
- website and email address transfer
- copies of any equipment instruction manuals and warranties
- employee details.

Footnotes

[*] The seller may have the right to incorporate the scheme name into its business name and, if so, the seller must provide the buyer with details necessary to allow the buyer to transfer that business name to itself. Please note: ASIC now handles all business names such that a Form 4 Statement of Change in Certain Particulars is no longer required. The party wishing to transfer the business name will, however, require an ASIC key to access ASIC connect.

Last reviewed: 26 April 2013

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[¶64-950] Parties' default

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Dispute resolution

Standard condition 15 effectively prevents a party from commencing litigation or arbitration (unless that litigation is to obtain urgent interlocutory relief) until such time as the party has complied with the dispute resolution provisions contained within standard condition 15.

The dispute resolution clause essentially provides that the party alleging the dispute must provide notice of the dispute to the other party (known as a "designation notice") and the party receiving that designation notice must appoint a representative (the natural choice here would surely be the party's practitioner; however, that is not stated).

The parties so appointed have five (5) business days within which to resolve the dispute. If the dispute is not resolved, then within the next ten (10) days, the parties must then agree on a process to resolve the dispute that does not involve litigation.

The aim of the clause is clear: to avoid litigation at all costs while keeping the deal alive; the practitioner may want to pare back the aspects of the clause using special conditions. Reliance on the standard terms alone may see the practitioner's client engaged in a talkfest with an ultimately unwilling buyer.

Rights and remedies

The standard contract provides direction regarding the termination rights of both the seller and buyer upon default of either party although the seller's rights to terminate are not set out in one neat clause. Rather, they feature as part of standard conditions 5.1 (deposit), 25.2, 25.5 (buyer's finance) and 31 (buyer's default).

Standard condition 31 provides for the seller's remedy in the event of the buyer's default.

The buyer breaches the contract by failing to pay the deposit or by failing to comply with any of the terms of the contract.

Upon breach, the seller has a choice to affirm or terminate the contract.

If the seller affirms the contract, it may sue the buyer for damages for the loss suffered as a result of the breach. In addition, it may seek specific performance of the contract and/or recover the deposit from the buyer as a liquidated debt, but it must pay the stakeholder any part of the deposit which is unpaid at that time.

If the seller terminates the contract, they may forfeit the deposit (cl 31.6 allows the stakeholder to pay itself) and sue the buyer for damages, resell the business and if the re-sale is completed within 2 years of the date of termination, recover the shortfall in purchase price from the buyer.

The provisions of cl 31 are not to be taken to limit the seller's rights or remedies at common law.

The standard contract seeks to provide each party with a clear idea of what rights and remedies are available to the party upon a default event.

The buyer can only terminate the contract if the seller defaults by breaching a warranty as set out in standard condition 8.2.

Last reviewed: 26 April 2013

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[¶64-960] Special conditions to consider and include

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Severance condition

From 1 July 2010, the Australian Consumer Law provisions at Sch 2 of the *Competition and Consumer Act 2010* (ACL) will apply to standard form contracts, in particular targeting those contract terms which cause a significant imbalance in the parties' rights and obligations.

Any terms within a standard contract that are deemed to be unfair will be void.

To ensure that the validity and enforceability of the standard contract are not affected by terms deemed to be void for unfairness, a severance condition should be included by way of the special conditions. Essentially, the clause would provide that any offending term or part of a term in the contract that becomes legally ineffective, invalid or unenforceable in any jurisdiction will be severed, and the effectiveness, validity or enforceability of the remainder of the term of the contract will not be affected.

Subject to review of practitioner

The buyer may want to incorporate a clause in the special conditions which allows it to sign the contract subject to that contract being reviewed by the buyer's solicitors together with the community management statement, caretaking agreement and letting authorisation.

The advantage to the buyer in such a clause is to allow that buyer two opportunities to terminate the contract if its solicitor uncovers an issue. The clause can act as a de-facto cooling off provision.

Electronic Transactions Act 2001 (Qld)

The seller may want to include a provision which allows for the contract to be signed in counter parts and transmitted by electronic means.

Please note: the buyer's solicitor should not be taken to have approved the receipt of the contract by electronic means simply by the incorporation of the clause given that portion of the Electronic Transactions Act has not as yet been tested.

Prior to transmitting the contract, the seller's solicitor should send an email seeking written confirmation of the buyer's agreement to the electronic receipt.

Last reviewed: 26 April 2013

[¶64-970] Settlement preparations

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A Week Prior to Settlement

The practitioner should complete a settlement statement detailing the adjustments necessary for settlement of the business (remembering the same process should be followed for the conveyance of a lot if attached to the sale).

Clause 18 sets out the adjustment details. Standard condition 30.1 provides for interest at an amount of 5% pa accruing daily to be paid in the event money due to be paid is not paid on time. In practice, the parties would usually grant 1 or 2 extensions to allow for a deposit to be paid or settlement to take place. It is not common practice to automatically impose the interest payment at settlement.

The seller will be required to pay the legal and administrative costs of the body corporate from settlement proceeds. If not already provided, the seller should seek an invoice from the body corporate's solicitor and the body corporate manager together with a copy of the minute noting the approval of the buyer as the assignee.

The Day of Settlement

Clause 7.1 provides that the buyer is to obtain possession of the business on the day of settlement while cl 9.1 provides that the seller is to remain in possession until settlement. The balance of cl 9.1 does not place a requirement on the seller to act "reasonably" in running the business prior to settlement. A prudent buyer may want to include this as a special condition.

The seller must continue to accept forward bookings so that the buyer will have the enjoyment of those bookings following settlement. The clause contemplates a holiday letting style business as opposed to a residential long-term rental business.

In practice, the seller and buyer will usually have worked together for a number of days after receiving the body corporate's approval at the business and prior to settlement.

The parties may agree to hold a stocktake on the morning of settlement before calling their practitioners to confirm the value of the stock for settlement and stamp duty calculations.

The seller should be encouraged to undertake the stocktake as close to the settlement as possible and, once stocktake is complete, not to dramatically decrease or increase the value of the stock by, for example, holding a fire sale or placing a disproportionately large order for new stock.

On the day of settlement, the buyer should bring a float with them ready for settlement if the business includes a cash till. Once settlement has taken place, the seller removes their float from the till (if any) and hands over the keys to the buyer.

Last reviewed: 26 April 2013

[¶64-980] Steps after settlement

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Post settlement considerations

Once settlement has been effected, the practitioner should ensure that the settlement is confirmed in writing to the seller. It is helpful to the seller to enclose a copy of the contract and the settlement statement to assist in the preparation of the seller's next taxation return.

The practitioner should also consider whether the sale triggers a requirement for the seller's director(s) or the seller (if the seller is a natural person) to create and execute a new will given the change in asset-holding.

Last reviewed: 26 April 2013

[¶65-010] Introduction

Click to open document in a browser

The *Registrar of Titles Directions for the Preparation of Plans* details the standards and specifications for the types of plans acceptable to the Titles Registry.

The *Directions* must be read in conjunction with the:

- *Land Title Act 1994*
- *Land Act 1994*
- *Body Corporate and Community Management Act 1997*
- *Land Title Practice Manual*.

Further requirements for surveys are available at www.nrm.qld.gov.au/property/surveying/technical_standards.html.

Updates

Per the Department of Natural Resources and Mines website at www.dnrm.qld.gov.au/, as the *Directions* are updated periodically, practitioners are advised to refer to this online version only, not to previously downloaded versions.

To receive email notification of updates about survey practice, practitioners can subscribe to the Surveying Alerts mailing list at www.nrm.qld.gov.au/cgi-bin/lwgate/surveyors_private/.

The Registrar of Titles issues *Directions for the Preparation of Plans*, which are updated and amended from time to time. The most recent version, effective from 28 February 2013, is reproduced in full at www.nrm.qld.gov.au.

The department administering the *Directions* has changed from the Department of Environment and Resource Management in 2010 to the Department of Natural Resources and Mines. All references to the previous department should be taken to be a reference to the current Department of Natural Resources and Mines. Users are responsible for ensuring that they are using the most up-to-date version.

An electronic copy of the *Directions* is available at www.nrm.qld.gov.au/property/titles/rdpp/pdf/rdpp.pdf.

Last reviewed: 7 July 2015

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[¶65-020] Practice Direction 1 EVIDENCE OF A DISPUTE

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This Practice Direction is issued pursuant to *section* 233 of the *Body Corporate and Community Management Act 1997.* Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The legislation requires applicants to attempt internal dispute resolution and conciliation before making an application for adjudication.

2. The Commissioner may reject a conciliation application where internal dispute resolution has not been attempted. The Commissioner may also reject an adjudication application where internal dispute resolution or department conciliation has not been attempted.

3. The Commissioner requires an applicant to demonstrate that a dispute actually exists between the parties in relation to the matters raised before it falls within the scope of the dispute resolution provisions of the Act.

4. The requirement to demonstrate a dispute between the parties does not apply to applications for a declaratory order about the operation of the Act, where there is no dispute and no respondent or adjudication applications to approve emergency expenditure.

5. Applicants should attempt to resolve the dispute in accordance with the provisions of the legislation prior to making an application for conciliation or adjudication, and provide evidence of these attempts.

6. Attempts to resolve the dispute may include seeking a decision of the body corporate or committee, or written correspondence or other communication between the parties. If the outcome sought by an applicant can only be decided by the body corporate at a general meeting, applicants should provide evidence that they have submitted a motion to the general meeting and the outcome.

7. The Commissioner's Office also provides specific information on self resolution and conciliation on its website www.qld.gov.au/body-corporate.

Ingrid Rosemann

A/COMMISSIONER

Last reviewed: 1 October 2015

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[¶65-030] Practice Direction 2 REPRESENTATION

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This Practice Direction is issued pursuant to *section* 233 of the *Body Corporate and Community Management Act 1997.* Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The following sets out the requirements for representation of parties involved in dispute resolution applications, particularly applicants.

2. Separate issues apply to participation in conciliation sessions and are set out in Practice Direction 11: *Representation and attendance at conciliation sessions*.

Authorisation of a representative

3. Where an applicant is represented by a third party, the application form should name the person as the applicant and then provide details of the representative. The representative should not be named as the applicant.

4. The application form must be personally signed by all applicants, unless it is signed by an applicant's authorised representative.

5. Where the applicant is a body corporate or a body corporate committee, the application must be accompanied by minutes evidencing a committee or general meeting resolution authorising the lodgement of the application.

6. Where the applicant is a company who is represented by an officer or nominee of the company, the application must be accompanied by a statement or appropriate documentation identifying the representative and detailing their authority to act on behalf of the company, for example the authorisation of a director of the company.

7. Where an applicant is represented by a power of attorney, the application must be accompanied by a copy of the instrument granting the representative authority.

8. Where an individual applicant is represented by a person other than a solicitor or a power of attorney, the application must be accompanied by a statement signed by the applicant and which specifically authorises the representative to act on their behalf in respect of the application.

9. Where appropriate, the Commissioner's Office may request evidence of the authority of a person to make submissions or otherwise act on behalf of a respondent or other affected person.

Communication with applicants

10. The Commissioner's Office will communicate directly with an applicant unless that applicant has authorised a representative.

11. The Commissioner's Office will use the contact details supplied on the application form unless an applicant advises otherwise.

12. Where there are multiple applicants, the applicants should identify one point of contact with the Commissioner's Office.

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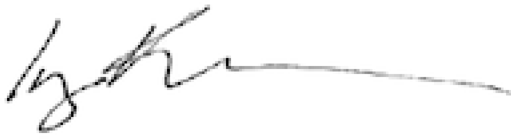

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Last reviewed: 3 July 2015

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[¶65-040] Practice Direction 3 COMMUNICATION AND DOCUMENT MANAGEMENT

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This Practice Direction is issued pursuant to *section* 233 of the *Body Corporate and Community Management Act 1997.* Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The following sets out information relating to communication and document management regarding dispute resolution applications.

2. All communication relating to the dispute resolution application should include the file reference number provided in the letter acknowledging receipt of the application.

3. Only one copy of any correspondence or document should be provided to the Commissioner's Office, unless the Office requests otherwise.

Mode of communication

4. Dispute resolution applications, submissions, requested documents and all other communication relating to an application will be accepted by mail, email or facsimile. Documents can also be hand-delivered to the Office.

5. Where correspondence or documents are provided by email or facsimile, it is not necessary to also provide the original hard copy, unless the electronic form is not fully legible or if otherwise requested.

6. Where information is provided in other formats, such as CD, CD-Rom, DVD and large format plans, a copy should be provided for the Commissioner's Office along with duplicates for each respondent.

7. Where a signature is required on a document, such as an application form or the authorisation of a representative, an electronic version of the document will be sufficient if it includes a scanned or facsimile copy of the signature. If not, a signed hard copy must also be provided.

8. Email communications should be directed to the general office address (bccm@justice.qld.gov.au) rather than the address for individual officers.

9. Where documents are sent electronically, such as email attachments, the file name should clearly identify the contents or nature of the document.

10. Very large email attachments (over 15MB) or large numbers of attachments may need to be sent in multiple emails, or individual attachments reduced in size, or the information should be sent through alternative means.

Response to correspondence

11. The Commissioner's Office will not automatically acknowledge the receipt of correspondence to the Office. Where acknowledgement of receipt is required, the correspondence must clearly state that.

12. Where correspondence requests a response, a response will be provided as soon as practical having regard to the urgency of the matter and the resources of the Office.

13. Where a correspondent has a specific request regarding the mode of response (for example, by email, post, facsimile or telephone) or preferred contact times, these should be clearly specified. The Commissioner's Office will endeavour to meet to such requests, if reasonably practical.

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Access to documents

14. Applications, submissions, replies to submissions and all other information provided for the consideration of the Commissioner or an adjudicator are not confidential. Such information is entitled to be accessed by interested persons for a dispute resolution application [Act, *section 246*].

15. Parties should also be aware that all correspondence and documents sent to the Commissioner's Office may also be publicly accessible pursuant to the provisions of the *Right to Information Act 2009*.

Communication assistance

16. For parties with a hearing or speech impairment, the Commissioner's Office can, on request, arrange communication through the National Relay Service or a sign language interpreter.

17. For parties who do not speak English, the Commissioner's Office can, on request, organise a telephone or face-to-face interpreter through the Translating and Interpreter Service National.

18. The Office also publishes a *Guide to Community Living* in Chinese, German, Greek, Italian, Spanish and Vietnamese.

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Last reviewed: 3 July 2015

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[¶65-050] Practice Direction 4 FEES AND CHARGES FOR DISPUTE RESOLUTION APPLICATIONS

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This Practice Direction is issued pursuant to section 233 of the *Body Corporate and Community Management Act 1997.* Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. This practice direction is limited to fees and charges required for dispute resolution applications.

2. The Act requires that dispute resolution applications must be accompanied by the prescribed fee. The fees payable are outlined on the Commissioner's Office website.

3. A separate fee is payable for an application for conciliation and an application for adjudication.

4. Cheques should be made payable to the 'Office of the Commissioner for Body Corporate and Community Management'.

5. Credit card payments can be accepted through the mail or fax by completing BCCM Form 21: *Credit Card Payment Authorisation.* To ensure the security of details, this form should not be emailed. Credit card payments can also be processed over the telephone.

6. EFTPOS payments can be made at the Commissioner's Office reception.

7. Applications which are not accompanied by the prescribed fee may not be actioned until the payment is received.

8. The prescribed fee for making an application is generally not refundable.

9. The Commissioner may waive the fee for lodging an application where payment of the fee would cause an applicant financial hardship [Act, section 239(3)]. Applicants seeking a waiver of the fee must complete BCCM Form 23: *Application — Waiver of Application Fee.*

In considering whether payment of the fee would cause an individual financial hardship, the Commissioner may consider whether the applicant has a concession card and other evidence of financial hardship.

10. If an application for conciliation has been rejected by the Commissioner as not suitable for conciliation, the applicant is not required to pay a further fee for making an adjudication application for substantially the same dispute.

11. If an application for adjudication has been rejected by the Commissioner, the Commissioner may waive the application fee for a conciliation application for the same dispute.

12. If an applicant requests it in their application, an adjudicator may consider making an order that a respondent to an application pay the fees associated with making conciliation and adjudication applications where the Commissioner has ended the conciliation application because the respondent failed, without reasonable excuse, to participate in conciliation.

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[¶65-060] Practice Direction 5 PARTIES' COSTS

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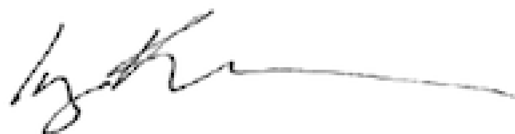
This Practice Direction is issued pursuant to *section* 233 of the *Body Corporate and Community Management Act 1997.* Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The parties to a dispute resolution application are generally required to meet their own costs. This includes the application fee and any legal costs incurred in making the application.

2. If an adjudicator dismisses an application for adjudication because it appears to the adjudicator that it is frivolous, vexatious, misconceived or without substance, the adjudicator may order costs against the applicant for loss resulting from the application to the respondent, the body corporate or another affected person under the Act. This can include legal expenses. The costs awarded must not be more than $2,000.

3. An applicant may request that an adjudicator make an order that a respondent to an application pay the fees associated with making conciliation and adjudication applications where the Commissioner has ended the conciliation application because the respondent failed, without reasonable excuse, to participate in conciliation.



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[¶65-070] Practice Direction 6

BY-LAW ENFORCEMENT APPLICATIONS

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This Practice Direction is issued pursuant to *section* 233 of the *Body Corporate and Community Management Act 1997.* Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The legislation sets out preliminary procedures for applications seeking to enforce body corporate by-laws [Act, *sections 184 –186*].

2. Applications that do not comply with the preliminary procedures may be rejected by the Commissioner or an adjudicator for not meeting the jurisdictional requirements of the legislation.

Applications by the body corporate

3. Where a body corporate has concerns that an owner or occupier has not complied with the by-laws, they may consider making informal contact with the person involved to raise their concerns.

4. The first formal step a body corporate must take is to issue a future or continuing by-law contravention notice. A contravention notice can be issued if the body corporate reasonably believes that a person (an owner or occupier) has breached a by-law.

5. A contravention notice must specify in a single document:

a. That the body corporate believes the person is breaching a provision of the by-laws;
b. The by-law provision the body corporate believes is being breached;
c. Sufficient details to identify the contravention;
d. That the person must not repeat the contravention, or a reasonable period in which the person must remedy the contravention; and
e. That if the person fails to comply with the notice the body corporate may, without further notice, start proceedings in the Magistrates Court or lodge a dispute resolution application.

6. The Commissioner's Office provides BCCM Forms 10 and 11 which set out all the requirements for a contravention notice. The use of these forms is not mandatory but if a form is not used, the body corporate should ensure that the notice includes all five elements outlined above.

7. The contravention notice must name and be sent to the person who the body corporate believes is contravening the by-law. If the person contravening the by-law is an occupier, the body corporate must also provide a copy of the notice to the lot owner.

8. After a contravention notice has been issued, and if the notice does not resolve the matter, the body corporate may lodge an application to rectify the contravention named in the notice.

9. The person named in the contravention notice must be named as the respondent to the application.

Applications by an owner or occupier

10. Where an owner or occupier (the 'complainant') is concerned that another owner or occupier has not complied with the by-laws, they may consider making informal contact to raise their concerns.

11. The first formal step the complainant must take is to issue a notice to the body corporate advising that they reasonably believe the by-laws are being breached. The complainant must use BCCM Form 1, which is a prescribed form. The notice must name the person who the complainant believes is breaching the by-law.

12. It is advisable that the complainant also give a copy of the notice to the person who the complainant believes is breaching the by-law.

13. On receipt of the BCCM Form 1 notice the body corporate should notify the complainant within 14 days after receiving the request of whether a contravention notice has been given.

14. If the body corporate notifies the complainant that it has issued a contravention notice, the body corporate is then responsible for taking action if the contravention notice is not complied with. If the body corporate does not take action to pursue the matter, the complainant may only lodge an application to require the body corporate to enforce the contravention notice. In this case the complainant may not lodge an application directly against the person they believe is breaching the by-law.

15. If the body corporate does not advise the complainant that it has issued a contravention notice to the person believed to be breaching the by-laws, the complainant may lodge an application directly against the person they believe is breaching the by-law seeking compliance with the by-laws.

16. In making an application directly against an owner or occupier, the complainant must consider the self-resolution requirements of the dispute resolution process.

17. If the body corporate has not issued a contravention notice, an applicant should demonstrate that the person who they believe is breaching the by-law has been otherwise notified of the complaint and been given an opportunity to rectify the complaint.

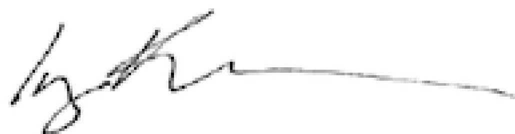
Dispensing with preliminary procedures

18. A body corporate or any owner or occupier may bring an application to enforce a by-law without having complied with the applicable preliminary procedures if:

a. The by-law contravention is incidental to an application for any order [under Act, *section* 281(1)] to repair damage or reimburse an amount paid for carrying out repairs; or
b. The application is for an interim order and the applicant reasonably believes that special circumstances apply which make it necessary for the dispute to be resolved urgently.

19. Special circumstances may apply if the by-law contravention is:

a. likely to cause injury to people or serious damage to property; or
b. a risk to people's health or safety; or
c. is causing a serious nuisance to people; or
d. otherwise gives rise to an emergency.



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[¶65-080] Practice Direction 7

CONCILIATION PROCESS

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1. The following summarises the process for conciliation applications in the Commissioner's Office.

2. Please note, the Commissioner's Office is impartial in relation to the disputes lodged. The Commissioner's staff (including conciliators) are unable to give legal advice on the issues in dispute or the conduct of a dispute. Parties seeking legal advice should direct their enquiries to an appropriately qualified person, such as a legal practitioner.

Case management

3. As soon as an application is received by the Commissioner's Office a new file is opened and allocated a unique file number.

4. The applicant is sent a letter acknowledging receipt of the application and application fee. This letter includes the file number which should be quoted in all communication on the application.

5. The application is then assessed by a case manager. The case manager acts as a delegate of the Commissioner in determining whether the application complies with the legislative requirements for applications. In particular, the case manager will seek to ensure that the application falls within the jurisdiction of the Commissioner's Office.

6. Where necessary, case managers will contact applicants to seek clarification of their application or request additional information.

7. The Commissioner may reject an application that fails to comply with the jurisdictional requirements of the legislation, or where an applicant fails without reasonable excuse to provide requested information.

Referral to conciliation

8. Once the Commissioner has decided that the matter should be referred to conciliation, the application is referred to a conciliator to commence conciliation as soon as practicable after making the decision.

9. In certain circumstances the Commissioner or their delegate may determine that a dispute is not appropriate for conciliation. This issue is set out in Practice Direction 9: *Matters Not Appropriate for Conciliation*.

10. More information about the conduct of conciliations sessions are provided in Practice Direction 10: *Preparing for Conciliation*.

11. If the parties reach agreement at conciliation on any of the issues in dispute, the parties can choose to sign a written agreement documenting their agreement.

12. An applicant may lodge an adjudication application if conciliation was not suitable, or if the parties cannot reach agreement at conciliation, or if the terms of a conciliation agreement are not carried out, providing the applicant has made a reasonable attempt to conciliate.

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13. If a respondent does not agree to attend a conciliation session, or otherwise does not make a reasonable attempt to conciliate the dispute, an applicant may request an adjudicator to order that the respondent reimburse the applicant for their application fees if a subsequent adjudication application is made.

Ending conciliation

14. At the end of the conciliation process the parties will be issued with a conciliation certificate to inform them that the matter has been finalised.

15. Once the conciliation process has been finalised the conciliator has no further involvement with the dispute.

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[¶65-090] Practice Direction 8

CONCILIATION APPLICATIONS

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1. Applicants for conciliation must complete the *Conciliation Application Form* [BCCM Form 22]. In addition to the information set out in the *Guide to completing the Conciliation Application Form* and accompanying checklist, applicants should note the following.

Respondent

2. The respondent to the application is the other person or party to the dispute with the applicant.

3. If the applicant has separate disputes against separate respondents, not related to the same issue, separate applications will generally be required.

4. There are specific legislative provisions guiding the different categories of person that an applicant can bring an application against (refer to the *Guide* for full details). For example, an owner or occupier can only bring an application naming the body corporate or another owner or occupier as a respondent. An owner or occupier cannot lodge an application against the body corporate manager, the committee or a caretaker.

5. If an owner has a dispute about a decision made, or the failure to make a decision at a general meeting or committee meeting, the respondent to the dispute should normally be the body corporate.

Outcome sought

6. The applicant should provide a short statement of what outcome they believe would resolve the matter.

7. Applicants should note that conciliators are not decision makers. Conciliators will not make an order for the outcome sought or otherwise decide on the merits of the dispute. Rather, they will assist the parties to the dispute to reach an outcome which can satisfactorily resolve the dispute for the parties. The use of information included in an application is limited to enabling the conciliator and other parties to understand the issues in dispute.

Background

8. Applicants must provide a brief summary of the background to the dispute. The conciliator is not a decision maker and consequently does not need to know in advance all the issues in detail. This is in contrast to making an application for adjudication if conciliation does not resolve the matter.

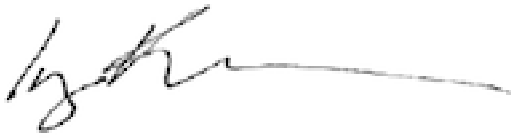
9. The conciliator will contact the applicant if they require further information.

General

10. The application form and any attachments should preferably be typed, in a clear font. Handwritten applications must be clear and legible.

11. An applicant can request to amend their application or provide additional information prior to the referral to conciliation.

12. An applicant may withdraw an application in writing at any time before the conciliation application is finalised. Once an application is withdrawn, the Commissioner's Office will take no further action on the application.



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[¶65-100] Practice Direction 9 MATTERS NOT APPROPRIATE FOR CONCILIATION

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997.* Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The Commissioner may reject an application for conciliation if the Commissioner considers the dispute is not appropriate for conciliation.

2. If the Commissioner decides to reject an application, the Commissioner will provide a written notice stating the reasons for the decision and the applicant's right to seek a review of the decision.

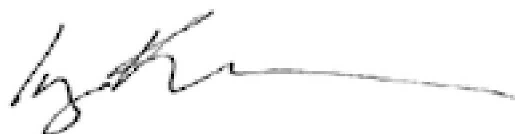
3. If an application for conciliation is rejected, the applicant may lodge an application for adjudication providing the dispute is within the jurisdiction of a dispute resolution officer.

4. The following information describes the factors which the Commissioner may take into account in deciding whether the matter is not appropriate for conciliation. It is not an exhaustive list.

5. The Commissioner is committed to offering a responsive conciliation service and the existence of one or more of the following factors will not necessarily lead to a determination that the matter is not appropriate for conciliation. The particular facts and circumstances of each dispute must be considered and the Commissioner may make an appropriate level of enquiry before making a decision.

6. Factors which the Commissioner may take into account include:

a. The urgency of the issues in dispute, including whether an emergency order is required.
b. Whether the application seeks an adjudicator's order where there is no respondent and no dispute, for example a request for a change of financial year.
c. Whether the application is seeking the return of body corporate property, such as records, necessary for the operation of the body corporate.
d. Whether the respondent to the application can not be otherwise determined for example, where a body corporate has no functioning committee and is not able to appoint representatives to act on its behalf.
e. Whether the application involves numerous applicants and respondents, making conciliation impractical.
f. Where there are issues or factors likely to adversely impact on the parties including the special needs of the parties which cannot be accommodated for example, through the appointment of a representative in the process.
g. Where there is related legal proceedings arising from the same set of facts in dispute.
h. Whether the history and nature of dispute, including threats of violence that cannot be accommodated by the conciliation process or previous unsuccessful attempts at conciliation, indicate that the matter is not suitable for conciliation.



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[¶65-110] Practice Direction 10 PREPARING FOR CONCILIATION

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997.* Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The Commissioner's Office provides a conciliation service through the use of trained conciliators to assist parties involved in community titles schemes to resolve a wide range of issues in a constructive and non-confrontational manner. The following information provides a guide to assist parties in preparing for conciliation.

The role of the conciliator

2. The role of the conciliator is to facilitate discussions and assist parties to resolve issues that they are unable to resolve themselves. See the Information Sheet: *Conciliation* for further information.

3. Conciliators are trained to provide general information on the legislation relevant to the issues in dispute and to discuss possible resolution with the parties.

4. Conciliators do not provide legal advice or make judgement about who is right, who is wrong or what the outcome of the dispute should be.

The conciliation session

5. Conciliation may be conducted either face-to-face or via a telephone conference.

6. Conciliation may take up to 3 hours and parties are requested to set aside this time for a possible resolution.

7. Generally parties represent themselves. Please see Practice Direction 11: *Representation and Attendance at Conciliation Sessions* for further information on who may attend conciliation.

8. The Commissioner's Office notifies parties in writing of the time of a conciliation session. Parties may request a more suitable time but should be aware that re-scheduling will be dependant on the availability of other parties to the dispute and the conciliator. The legislation requires conciliation to be conducted as quickly as possible.

Preparing for the conciliation session

9. Parties should advise the conciliator of any special needs prior to the session. This may include interpreting services and physical access requirements to attend the session.

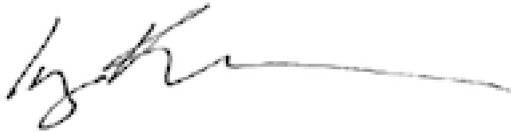
10. Conciliation is a non-adversarial process and conciliators will not make a decision in relation to the dispute. Parties can prepare for conciliation by:

a. Identifying the issues that relate to the dispute and being prepared to give a brief description of the situation.
b. Considering what the issues may be for the other parties to the dispute and how these issues may affect them.
c. Bringing or making available any relevant documents, plans or photographs that might assist the other party to better understand your point of view.

d. Obtaining information on the issues in dispute from the BCCM Office Information Service or other specialist information which may relate to the dispute.
e. Considering the sort of outcomes you think you could accept as a resolution to the matter.
f. Being prepared to listen to other points of view.

11. If parties have additional information to add to the dispute, such as photographs or documentation, the conciliator will allow this material if they believe it is relevant and will assist in resolving the dispute.

12. A formal response or submission is not required to be submitted by the respondent to a dispute. It is the role of the conciliator to ensure the respondent's views are considered during the conciliation process regardless of what written material has been provided.



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[¶65-120] Practice Direction 11 REPRESENTATION AND ATTENDANCE AT CONCILIATION SESSIONS

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Attendance

1. In most cases, only the parties directly involved in the dispute should attend the conciliation session and they should have the authority to resolve the dispute by entering into an agreement. This may not always be possible, depending on the nature of the dispute.

2. The conciliator makes the final decision as to who should attend the conciliation session.

3. The conciliator can allow people who are not a party to attend the conciliation session if they believe it may help resolve the dispute. For example, a body corporate manager may be of assistance where the dispute is between an owner and a body corporate. If the conciliator allows a person who is not a party to the dispute to attend they can clearly set out the role of the person in the conciliation session.

4. If a party requires an interpreter in the conciliation session the Commissioner's Office will arrange an interpreter.

Representation by an agent

5. The legislation provides that an agent may represent a party to an application at the conciliation session with the permission of the conciliator. The legislation also provides that the conciliator may impose conditions on their approval for the agent's attendance at the session.

6. If the party is a corporation under the *Corporations Act*, an authorised officer of the corporation may represent the party.

7. If the party is the body corporate for the community titles scheme, not more than two individual lot owners or committee voting members can represent the body corporate.

Representation by committee voting members as an agent of a body corporate

8. It can be useful for the body corporate to be represented by voting committee members if the resolution sought by the conciliation application is not a restricted issue. That is, where the committee has the power under the legislation to make a decision.

9. The legislation provides that a committee voting member may be appointed as an agent for the body corporate if authorised in writing by a majority of the committee voting members. The authorisation can limit the representative from making certain decisions.

10. In acting as agent for the body corporate, the committee voting member may do anything the committee may do according to the authorisation provided or under the regulation module applying to the community titles scheme.

11. The committee voting member is not able to make a decision on a restricted issue under the regulation module applying to the scheme. These issues must be decided by the body corporate at general meeting.

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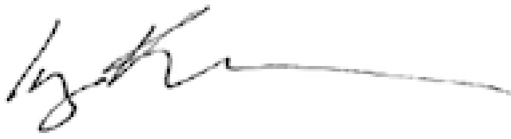

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Last reviewed: 3 July 2015

[¶65-130] Practice Direction 12 ADMISSIBILITY OF INFORMATION FROM CONCILIATION

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1. The following is a guide to the confidentiality and admissibility of information arising out of departmental conciliation.

Conciliators and confidentiality

2. A conciliator must not disclose any information they have acquired in conciliation to anyone else unless the following circumstances apply [Act, *section 252L*].

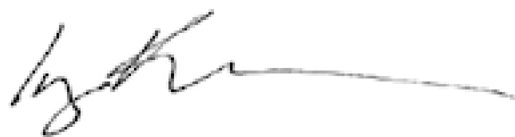
3. Information can only be disclosed by a conciliator:

a. With the person's consent;
b. For statistical purposes such as departmental reporting, if the disclosure is made to a public service employee in the department and does not reveal the identity of the person;
c. For the purpose of conducting the conciliation session during which the information was provided;
d. Where the disclosure is reasonably necessary because there is a serious threat to personal property or safety;
e. For an investigation or proceeding for an offence against the Act; or
f. If the disclosure or giving of access is otherwise required under an Act.

Admissibility

4. Evidence of anything said or done about a dispute in conciliation is inadmissible in a proceeding [Act, *section 252E(5)*]. As a result, such evidence arising from conciliation will not be admissible in an adjudication process or another legal proceeding outside of the Commissioner's Office.

5. This requirement exists to encourage an open flow of information between the parties and assist resolving the dispute in a way that satisfies the parties.



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[¶65-140] Practice Direction 13 ADJUDICATION PROCESS

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1. The following summarises the process for dispute resolution applications seeking the order of an adjudicator.

2. Please note, the Commissioner's Office provides a quasi-judicial dispute resolution service and is impartial between the parties. Commissioner's Office staff are unable to give legal advice on the conduct of a dispute. Parties seeking legal advice should direct their queries to an appropriately qualified person, such as a legal practitioner.

Case management

3. As soon as an application is received by the Commissioner's Office a new file is opened and allocated a unique file number.

4. The applicant is sent a letter acknowledging receipt of the application and application fee. This letter includes the file number which should be quoted in all communication on the application.

5. The application is then assessed by a case manager. The case manager acts as a delegate of the Commissioner in determining whether the application complies with the legislative requirements for applications. In particular, the case manager will seek to ensure that the application falls within the jurisdiction of the Commissioner's Office.

6. In addition, case managers seek to ensure that an application includes sufficient information and is sufficiently clear that the respondent to the dispute can understand and adequately respond to the application, and that an adjudicator can understand and determine the dispute.

7. Where necessary, case managers will contact applicants to seek clarification of their application or request additional information.

8. The Commissioner may reject an application that fails to comply with the jurisdictional requirements of the legislation, or where an applicant fails without reasonable excuse to provide requested information.

Submissions

9. When the Commissioner is satisfied that the application meets the requirements of the legislation and is appropriate to proceed, the Commissioner will generally invite written submissions from affected parties other than the applicant.

10. Submissions may support, oppose or comment generally on the application. All information and evidence that a party seeks to rely on should be included in the written submission. Parties may not be provided with a further opportunity to comment on the application.

11. Subject to the circumstances of the dispute and the parties named in the application, submissions will generally be invited from the respondent, the body corporate committee, and all owners. Submissions may also be invited from tenants, a body corporate manager, and a caretaking service contractor where the Commissioner determines that their input may be relevant to the dispute.

12. Parties invited to make a submission may request an extension of time to make a submission. Unless the extension is for a brief time only (less than a day or two) this request should be in writing, set out the

period of extension required, and outline the reason for the extension. If a lengthy extension is sought, the Commissioner may seek comment from the applicant before deciding on the request.

13. The applicant is entitled to inspect or obtain copies of all submissions received, for the prescribed fee.

14. If the applicant inspects or obtains copies of the submissions, they may make a written reply limited to responding to issues in the submissions. The applicant should not include new information in the reply.

15. If an applicant includes new issues or information in their reply to submissions, the adjudicator may, in the interests of natural justice, disregard the new material or may require its distribution to other parties for further submissions.

16. Submissions and replies to submissions cannot be confidential. Any party is entitled to obtain copies of these, for the prescribed fee.

17. The submissions process will generally differ for interim order applications [see the Practice Direction 16: *Interim Order Applications*].

Referral to adjudication

18. Once the submissions process is completed, the Commissioner will assess the application and make a dispute resolution recommendation. In most cases the Commissioner will refer the application to adjudication.

19. Applications are generally allocated to adjudicators in chronological order from the date of the referral to adjudication.

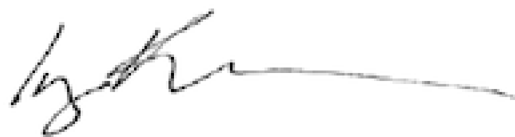
20. The time taken to determine the application from this point will be affected by factors such as the number of applications on hand in the Commissioner's Office, the complexity of the matter, and the need to seek additional information from parties.

21. The adjudication process does not include a hearing. The application will generally be determined "on the papers". In some cases the adjudicator may determine that it is appropriate to conduct a teleconference or face-to-face meeting with the parties.

22. Adjudicators have broad powers of investigation. As well as reviewing the application, submissions, reply to submissions and scheme documentation (such as the community management statement and plan), the adjudicator may request additional information from any party or from any other person that they consider may be able to assist. In addition, the adjudicator may request a site inspection or copies of body corporate records.

23. While adjudicators may investigate a dispute, they cannot meet with or speak to parties individually due to the need to ensure natural justice for all parties.

24. Once the adjudicator has completed their investigation, they will publish a written order with a full statement of reasons for their decision. This will be sent to all parties, including all persons who made a written submission.



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[¶65-150] Practice Direction 14 ADJUDICATION APPLICATIONS

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997.* Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. Applications for the order of an adjudicator must complete the *Adjudication Application Form* [BCCM Form 15]. In addition to the information set out in the *Guide to completing the Adjudication Application Form* and accompanying checklist, applicants should note the following.

Respondent

2. The respondent is the other person or party to the dispute who the applicant seeks an order against.

3. If different outcomes are sought against different respondents, separate applications will generally be required.

4. There are specific legislative provisions guiding the different categories of person that an applicant can bring an application against (refer to the *Guide* for full details). For example, an owner or occupier can only bring an application naming the body corporate or another owner or occupier as a respondent. An owner or occupier cannot lodge an application against the body corporate manager, the committee or a caretaker.

5. If an applicant is seeking an order about a decision made, or the failure to make a decision, at a general meeting or a committee meeting the respondent to the dispute should normally be the body corporate.

Outcomes Sought

6. Applicants must clearly and concisely set out the outcome or outcomes sought by the application. This requires a statement of what the applicant would like an adjudicator to order to resolve the dispute. For example, what action would the applicant like the respondent to take or cease taking to address the issue of concern?

Supporting grounds

7. The onus is on the applicant to prove their case. To do this, the applicant must provide a statement of grounds setting out the full circumstances of the dispute and the basis of the outcome sought.

8. The statement of grounds should be specific, concise and to the point, ensuring that all details relevant to the outcomes sought are included.

9. The statement of grounds must demonstrate that there is a genuine dispute: that is, a disagreement between the parties over an issue that the applicant has been unable to resolve by self-resolution. The statement should describe what actions the applicant has taken in an attempt to resolve the dispute.

10. The statement of grounds must set out how the issue in dispute amounts to a claimed or anticipated breach of the body corporate legislation or the community management statement for the scheme, or relates to the exercise of rights and powers under the legislation or community management statement. In doing so, the applicant should demonstrate that there is some legal basis for the outcome sought.

11. The statement of grounds must set out the history or background to the dispute including, where appropriate, a chronology of the events and circumstances leading up to the lodgement of the application. Consider questions relating to when, who, what, how, why and where of each circumstance.

12. If multiple outcomes are sought, separate grounds should be set out in respect of each outcome sought.

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13. The statement of grounds should generally comprise a single document (excluding attachments).

14. The onus is on the applicant to provide all relevant evidence to support the outcomes they seek. Where applicable, applicants should attach duplicates (not originals) of documentation relevant to the dispute such as:

a. Full copies of the minutes of committee and general meetings;
b. The full notice for general meetings;
c. Correspondence;
d. Witness statements, statutory declarations or affidavits;
e. Quotes, invoices, receipts, calculations, financial statements or other relevant financial documentation;
f. Contracts and agreements;
g. Photographs, plans, sketches and diagrams; and h. Reports from qualified persons.

15. Each attachment must be numbered and referenced in the statement of grounds, with an explanation of the relevance of attachment. Ideally, applicants will provide a schedule listing all attachments.

16. The inclusion of information, arguments and attachments that are not directly relevant to the outcomes sought should be avoided.

17. Where a conciliation application has been made and finalised, a copy of the conciliation certificate must be attached to the application.

18. Information included in a conciliation application will not be transferred to the adjudication application by the Commissioner's Office. It is the responsibility of the applicant to resubmit any information from the conciliation application that remains relevant.

General

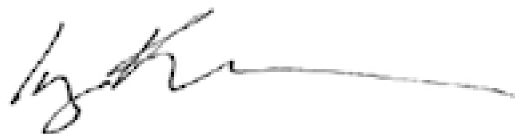
19. The application form and attachments should preferably be typed, in a clear font. Handwritten material must be clear and legible.

20. Applications and their contents are not confidential.

21. Applicants can request to amend their application or provide additional information at any time before the Commissioner has made a dispute resolution recommendation on the application (for example, referring it to an adjudicator).

22. If amendments or additional information are provided by the applicant after the Commissioner has sought submissions on the application, the Commissioner will generally require the applicant to distribute the amendments or additional information to those parties who have been invited to make submissions, at the applicant's expense, and provide a statutory declaration confirming the distribution has occurred.

23. An applicant may withdraw an application in writing at any time before a final order is made. Once an application is withdrawn, the Commissioner's Office will take no further action in respect of the matter.



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[¶65-160] Practice Direction 15 APPLICATION TIME LIMITS

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. For most types of disputes there is no time limit on the lodging of a dispute resolution application with the Commissioner.

2. However lengthy delays in pursuing a dispute may be a factor considered by an adjudicator, and applicants may need to explain any reasons for such delays in their statement of grounds.

Time limit for meeting disputes

3. Certain applications relating to body corporate meetings must be lodged within three months of the meeting in question [Act, *section 242*].

4. Applications covered by this time limit are:

a. An application to invalidate a general meeting;
b. An application to invalidate a resolution at a general meeting;
c. An application to invalidate the election of a committee member;
d. An application to invalidate a committee meeting; or
e. An application to invalidate a committee resolution.

5. The time limit does not apply in relation to a motion that failed to pass.

6. The time limit will have been complied with if a conciliation application for the same dispute is lodged within the time limit.

7. The basis for the time limit for meeting decisions is to give a body corporate certainty in its actions and enable it to rely on decisions that have not been challenged.

Waiver of the time limit

8. An adjudicator may waive the requirement to lodge a meeting application covered by the time limit within three months for "good reason".

9. Where a meeting application is lodged outside the time limit, the Commissioner will treat the application as if it were lodged in time. It will, in due course, be for the adjudicator to determine whether to waive the time limit.

10. Applicants should include the reasons the application was not lodged within the time limit in the statement of grounds for their application for the adjudicator to consider.

11. There are a range of factors an adjudicator will weigh up when deciding whether to waive the non-compliance with the time limit. These include:

a. The length of the delay;
b. The reasons for the delay;
c. The effect of the delay on other parties affected by the disputes; and
d. Whether, apart from the non-compliance with the time limit, the applicant would have been entitled to the outcome sought.

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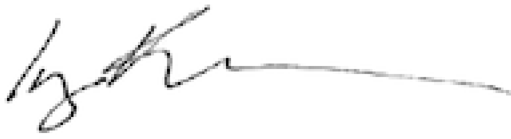

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[¶65-170] Practice Direction 16 INTERIM ORDER APPLICATIONS

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The legislation provides that the Commissioner may refer an application for interim orders immediately to an adjudicator [Act, *section 247*].

2. The Commissioner may refuse to refer an application to an adjudicator for consideration of an interim order, and instead proceed only with the application for final orders, if the Commissioner does not reasonably consider that the nature or urgency of the circumstances warrant referral.

Purpose of interim orders by adjudicators

3. Interim orders will not be granted unless the adjudicator is satisfied that they are necessary due to the nature and urgency of the circumstances to which the application relates [Act, *section 279*].

4. Interim orders are generally in the nature of injunctive relief. This means that they put an action on hold or maintain the status quo until the substantive dispute can be investigated and resolved.

5. The onus is on the applicant to establish that there is genuine urgency or other circumstances that warrant an interim order being made.

6. In considering whether to make an interim order sought, an adjudicator must be satisfied that the application raises serious legal questions and that the balance of convenience between the parties justifies injunctive relief. The adjudicator must balance the inconvenience of granting relief now if final orders are ultimately refused against the inconvenience of refusing relief now if final orders are ultimately granted.

7. A matter is not suitable for an interim order if the only urgency relates to an applicant's desire to resolve or expedite the matters in dispute.

8. A matter is not suitable for an interim order if the orders sought are final in nature, in that it would finally determine a substantive issue in dispute.

Interim submissions

9. An interim order may be made by an adjudicator without submissions being sought from all affected parties [Act, *section 247*].

10. An adjudicator may investigate the interim order application. As part of this investigation, the respondent will, where possible, be provided with a limited opportunity to make a submission in response to the interim orders sought. Due to the urgency of many interim applications, the time provided for interim submissions is often very limited.

11. Generally there will be limited opportunity to grant extensions to the period provided for interim submissions. However, depending on the nature of the order sought, a party seeking an extension may wish to consider whether they are able to provide a written undertaking not to undertake the action which the interim order seeks to put on hold.

12. The applicant has no right of reply to interim submissions before the interim order is made, but may obtain copies on request. The applicant may comment on the interim submissions when making a reply to the final order submissions.

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Effect of an interim order

13. An interim order has effect for the period (not longer than one year) specified in the order.

14. An interim order may be extended, varied, renewed or cancelled by the adjudicator until a final order is made.

15. An interim order lapses when it expires, it is cancelled by the adjudicator, the application is withdrawn or rejected, or when a final order is made.

16. An adjudicator will not automatically extend an interim order. It is the responsibility of the applicant to make a written request for the extension of the interim order if no final order has been made within the time specified within the interim order.

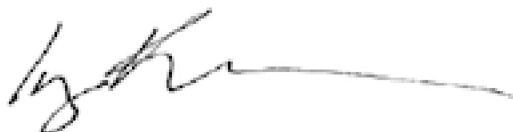
After an interim order is made

17. After an interim order is made, whether the order sought is granted or not, the application will proceed in the same manner as a final order application.

18. If there has been no attempt at conciliation prior to the consideration of the interim order, the Commissioner will assess whether the application should be referred for attempted conciliation.

19. If conciliation does not proceed, or is unsuccessful, final order submissions will be sought from affected parties.

20. The application will then be referred back to the adjudicator for investigation and determination of the final order.



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[¶65-180] Practice Direction 17 ADMINISTRATOR APPOINTMENTS

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1. An adjudicator may make an order appointing an administrator to perform the obligations of the body corporate, the committee or a member of a committee [Act, *section 178* and *301*].

2. An administrator has the powers given to them under the order.

3. An administrator's remuneration is to be paid by the body corporate.

4. Owners should not lodge an application for the appointment of an administrator simply to enable the engagement of a body corporate manager. If an owner seeks the engagement of a body corporate manager they should submit an appropriate motion to a general meeting in accordance with the legislative processes provided for that purpose.

Short term appointments

5. Administrators are often appointed for a period of up to three months to enable them to call and convene a general meeting for a body corporate.

6. Such orders may be appropriate where a body corporate has failed to hold its annual general meeting within three months of the end of the financial year applying to the scheme. In some cases a body corporate may not have held an annual general meeting for many years or at all.

7. In these circumstances there is no person within the scheme who is authorised to convene a general meeting and an adjudicator's order is necessary to authorise a person to convene the meeting.

Longer term appointments

8. In certain circumstances, an adjudicator may consider it appropriate to appoint an administrator to take responsibility of the administration of a scheme for a longer period of time.

9. There is no limit on an adjudicator's discretion in this regard, but such an appointment may be made where there is a significant break down in the administration of the scheme, particularly in decision-making.

Requirements for nomination

10. An applicant who seeks an order to appoint an administrator must nominate a person who they seek to have appointed as administrator. The applicant may choose to nominate multiple alternative administrators.

11. The person nominated may be a member of the body corporate or an external person, as appropriate. Often administrators are professional body corporate managers.

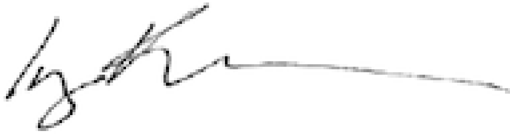
12. A nomination should include the following information:

a. The name and contact details of the nominee;
b. A statement from the nominee consenting to the appointment;
c. Details of the nominee's qualifications, experience or other basis for appointment;
d. Details of any possible or perceived conflict of interest;

e. If the nominee will seek remuneration from the body corporate for the appointment, full details of the remuneration sought; and
f. Any other terms and conditions which the nominee may have in relation to the appointment (such as an administration agreement).

13. Respondents and other affected parties may raise reasonable objections to the nominee in their submission. If they oppose the applicant's nominee they may nominate one or more preferred alternatives.

14. If an applicant seeks an appointment by consent, they may include the signed agreement of other owners in their application. If all owners consent in writing, an application may be able to be expedited.



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[¶65-190] Practice Direction 18 EMERGENCY EXPENDITURE APPLICATIONS

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1. The legislation sets limits on the amount that a body corporate committee can spend without general meeting authorisation. An exception exists when an adjudicator is satisfied that the spending is required to meet an emergency and makes an order authorising the expenditure [for example Standard Module, *section 151*].

2. A body corporate may lodge an application seeking the authorisation of an adjudicator for emergency expenditure.

3. The applicant must demonstrate a genuine emergency. Emergency expenditure applications are not a means of circumventing the normal processes for approving expenditure or for expediting authorisation of expenditure when there is no genuine emergency.

4. Factors to consider may include:

a. whether there is an immediate and serious health or safety risk;
b. whether the failure to act immediately may result in the body corporate incurring significant additional costs; or
c. whether there is an urgent need to act to protect the body corporate's rights or interests.

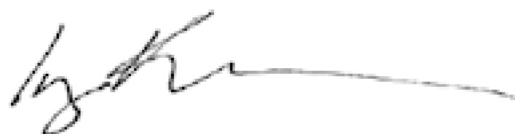
5. The fact that the body corporate has failed to take appropriate or necessary action to address an issue over time does not necessarily create emergency circumstances.

6. An application for authorisation of emergency expenditure should include a written quote for the proposed expenditure. Multiple quotes are preferable, and may be required by the adjudicator where the proposed expenditure would be above the major spending limit for the body corporate. Applications should also detail the expected timeframe for the work, including when contractors are able to commence.

7. Where the Commissioner reasonably considers that an application should be referred to an adjudicator immediately, because it relates to emergency circumstances, the Commissioner may refer the application without seeking submissions from all affected parties [Act, *section 243A*].

8. Where appropriate, applications for emergency expenditure may be expedited by the Commissioner and/or the adjudicator.

9. The applicant body corporate may wish to consider taking steps to convene a general meeting to seek owner approval for the expenditure as well as lodging an emergency expenditure application. This will limit delays in the event that the requested expenditure is not authorised by an adjudicator.



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[¶65-200] Practice Direction 19 EXPEDITABLE APPLICATIONS

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1. The following describes certain types of dispute resolution applications which may be expedited by the Commissioner and adjudicators because of their routine nature. Whether an individual application within these categories can be expedited will depend on the nature and circumstances of the application, including whether the application also raises more complex issues.

Return of body corporate property

2. The legislation provides for a body corporate to seek the return of body corporate property, including assets, records, documents and the body corporate seal, from a person associated with the body corporate by issuing a prescribed notice [eg. Standard Module, *section 206*].

3. If the property is not returned as requested, the body corporate may lodge an application for the return of the property.

4. The application must include a copy of the prescribed notice issued requesting the property.

Access to body corporate records

5. The legislation provides for interested persons to access body corporate records [eg. Act, *section 205* and Standard Module, *section 204-205*].

6. If the body corporate fails to provide the access to records, the person requesting access may lodge an application against the body corporate.

7. The application must include copies of correspondence requesting the records and, if applicable, payment of the prescribed fee.

Change of financial year

8. The legislation provides for an adjudicator to make an order to change the financial year end date for a scheme if the body corporate consents to the change [Act, *section 283*].

9. Such applications should be lodged by the body corporate and, as they seek a declaratory order, need not name a respondent.

10. Such applications must be accompanied by a general meeting resolution approving the change of financial year.

Annual general meetings out of time

11. The legislation requires a body corporate to hold an annual general meeting each year within three months of the end of the scheme's financial year end date [for example, Standard Module, *section 66*].

12. Occasionally a body corporate may unavoidably be unable to convene its annual general meeting within the required time frame. In such cases the body corporate may apply for an order of an adjudicator that the annual general meeting is not void simply for being held out of time.

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13. Such applications are not a mechanism to avoid compliance with legislative requirements, and should be based on genuine reasons.

14. Such applications should be lodged by the body corporate and, as they seek a declaratory order, need not name a respondent.

15. Such applications should specify when the annual general meeting is proposed to be held, the reason for the delay, and provide a copy of the notice of meeting if the meeting has already been called.

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[¶65-210] Practice Direction 20 SPECIALIST ADJUDICATION

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1. The legislation provides for certain complex disputes to be determined either by a specialist adjudicator appointed by the Commissioner or the Queensland Civil and Administrative Tribunal. Applicants may choose which forum they wish to lodge their complex dispute [Act, *section 229(2)*].

2. If an applicant seeks to have their complex matter heard by a specialist adjudicator they should lodge a dispute resolution application with the Commissioner which complies with the following requirements.

Requirements for specialist adjudication

3. The parties must agree on who is to be appointed as adjudicator.

4. The parties and the adjudicator must agree on the amount the adjudicator is to be paid for the adjudicator. The parties must agree how and by whom the amount is to be paid, or agree that the amount is to be paid in the way decided by the adjudication.

5. The applicant must provide the following information:

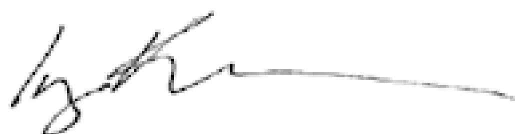
a. The name and contact details of the nominee;
b. A statement from the nominee consenting to the appointment;
c. A statement from the nominee that they have no prior knowledge or involvement with the parties that could give rise to a conflict of interest in determining the dispute;
d. Details of the nominee's qualifications, experience and standing to determine the dispute;
e. Written agreement from the respondent to the nomination and to the remuneration of the nominee; and
f. Written confirmation from the nominee of their agreement to the amount of remuneration.

6. A specialist adjudicator will be appointed by the Commissioner if satisfied that there is the required agreement to the appointment and that the person nominated has the qualifications, experience or standing appropriate for acting as an adjudicator.

7. A specialist adjudicator should normally be a legally qualified person of senior standing with experience in the area of law in which the dispute relates and with demonstrated capacity to determine disputes.

8. The Commissioner's Office does not recommend nominees or provide a list of potential appointees. Applicants may wish to contact the Queensland Law Society or Queensland Bar Association, or identify persons previously appointed by the Commissioner's Office as a specialist adjudicator.

9. Where a body corporate is a party to an application to be determined by specialist adjudicator, the committee may agree to the person to be appointed as adjudicator and their remuneration, unless the potential remuneration for the specialist adjudicator will be above the spending limit for the Committee. Voting committee members should also consider any potential conflict of interest, for example if they are an applicant to the dispute, before casting their vote to agree to the specialist adjudicator.



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[¶65-220] Practice Direction 21 ADJUDICATOR'S ORDERS

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Role of the Commissioner's Office

1. Once a final order is made by an adjudicator to determine a dispute resolution application, the file is closed by the Commissioner's Office. Staff of the Commissioner's Office, including the Commissioner and the adjudicator, have no further role in relation to the dispute.

2. The statement of reasons for the order is the full explanation for and basis of the order made. The Commissioner's Office cannot further explain or interpret adjudicator's orders, as this would amount to the provision of legal advice which is beyond the legislative role of the Office.

3. An adjudicator generally has no capacity to review or amend a final order once it has been issued.

Appeal of orders

4. The Commissioner has no capacity to review an adjudicator's decision.

5. A departmental adjudicator's order can be appealed to the Queensland Civil and Administrative Tribunal by a person [defined in Act, *section 289*] aggrieved by the order.

6. A specialist adjudicator's order can be appealed to the Queensland Civil and Administrative Tribunal by a person [defined in Act, *section 289*] aggrieved by the order.

7. An appeal must be lodged within six weeks of receiving a copy of the order, unless the appeal body allows the appeal to be started later.

8. Appeals are only heard on a question of law.

9. An appellant can apply to the appeal tribunal for a stay (a stop) on the adjudicator's order pending the outcome of the appeal.

10. There is no right to appeal a consent order.

Enforcement of orders

11. The Commissioner has no role in the enforcement of adjudicator's orders.

12. An adjudicator's order, including a consent order, can be enforced in the Magistrates Court as if it were a judgment handed down by a court.

13. To enforce an order, the person in whose favour the order is made must file with the registrar of the Magistrates Court:

a. a copy of the adjudicator's order certified by the Commissioner
b. a sworn statement stating the amount outstanding under the order, or
c. a sworn statement stating that the specific action imposed in the order has not been undertaken.

14. Certified copies of orders can be supplied by the Commissioner's Office on request.

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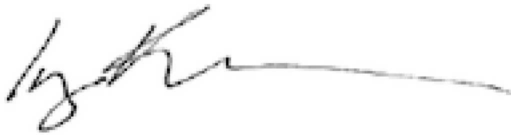
15. An application for enforcement by the Magistrates Court is not an appeal or a re-hearing of the merits of the original application.

Contravention of orders

16. The Commissioner has no role in respect to the contravention of adjudicator's orders.

17. A person who contravenes an adjudicator's order (other than an order for the payment of money) commits an offence, which can attract a penalty of up to 400 penalty units (a penalty unit is currently $110.00).

18. Certain persons related to a dispute [detailed in Act, *section 288*] may commence proceedings for an offence in the Magistrates Court.



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[¶65-230] Practice Direction 22

STANDING OF PARTIES

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. Standing in this context refers to the legal ability of a person to be an applicant or respondent to a dispute resolution application.

General

2. A dispute resolution application may only be brought by a person who is directly involved in the dispute. [Refer to Practice Direction 2: *Representation* where an applicant is represented by a third party.]

3. The legislation specifies the possible parties, and the permitted combinations of parties, to a dispute resolution application [Act, *section 227*]. An applicant is required to identify the capacity in which they make the application, and the capacity of the respondent.

4. If a dispute is brought by or against a party in a particular capacity, the dispute must relate to that capacity. For example, a dispute about a person's role as caretaker cannot be brought against that person in their capacity as an owner.

Former parties

5. If a person held one of the specified capacities of parties at one time, but ceased to hold that capacity at the time that a dispute resolution application is lodged, the person would ordinarily not have standing to be a party to the dispute. For example, a lot owner cannot lodge an application after ceasing to be the owner of a lot.

6. An exception exists in regard to a person who formerly held the position of body corporate manager. A body corporate may bring an application against a former body corporate manager in relation to a dispute about the return of body corporate property by the former body corporate manager to the body corporate.

7. If a person's loss of position is in dispute, the person may still have capacity to bring an application about that issue. For example, a person disputing a body corporate decision to remove that person from the position of committee member, would have standing to lodge an application challenging that decision in the capacity of a committee member.

Changes to the standing of parties

8. Where a person who had standing as a party to a dispute ceases to hold that capacity before the application is finalised, the Commissioner may, by written notice to the parties, substitute another person as the relevant party [Act, *section 239C*]. For example, if a respondent lot owner sells their lot, the new owner may be substituted as the respondent.

9. If there is a substitution of a respondent, the Commissioner may require evidence of the applicant's attempts at internal dispute resolution with the new respondent before proceeding with the application.

10. If a party to a conciliation application ceases to be a relevant party, the Commissioner may allow an adjudication application to be made involving the new party, without requiring a further conciliation

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application with the new party. The appropriateness of waiving any requirement for further conciliation will be assessed in the circumstances.

11. If a person who had standing as a party ceases to have that capacity, and the outcome sought in the application is no longer relevant or required as a result of the change in standing, the Commissioner may reject the application. For example, if an owner brings an application disputing a matter that the owner cannot reasonably have any continuing interest in after they cease to be an owner, the Commissioner may reject the application if the person ceases to be an owner.

12. Similarly, if a person who had standing as a party ceases to have that capacity, and the outcome sought in the application is no longer relevant or required as a result of the change in standing, an adjudicator may dismiss the application.

Robert Walker

COMMISSIONER

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[¶65-240] Practice Direction 23

INTERNAL DISPUTE RESOLUTION

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The Commissioner may reject a conciliation application where internal dispute resolution has not been attempted. The Commissioner may reject an adjudication application where internal dispute resolution and department conciliation have not been attempted.

2. The obligation for internal dispute resolution is consistent with the legislative responsibility for self management as an inherent aspect of community titles schemes.

3. Internal dispute resolution includes any reasonable endeavour or step taken to attempt to resolve a dispute, before a conciliation or adjudication application is commenced.

4. An applicant bears the onus of demonstrating reasonable attempts have been taken to resolve the dispute through internal dispute resolution..

5. Evidence of internal dispute resolution must be included in an application.

Specific steps

6. Although not an exhaustive list, the following are examples of internal dispute resolution steps that may be required:

a. If an issue requires a committee decision, the applicant will normally be required to demonstrate a formal request has been made to the committee and that it was refused or the committee unreasonably failed to consider the request.
b. If an issue requires a general meeting resolution, the applicant will normally be required to demonstrate an appropriate motion was submitted to a general meeting on the issue and that the motion failed or the body corporate unreasonably failed to consider the motion.
c. For a dispute between owners or occupiers, the applicant will normally be required to document the verbal and written attempts to address the matter with the other party.
d. If a dispute relates to an alleged breach of the by-laws, the legislation sets out specific preliminary steps that the applicant must take [see Practice Direction 6: *By-law enforcement applications*.]
e. If an applicant seeks to overturn the decision of a body corporate not to pass a resolution without dissent, the applicant will normally be required to demonstrate that the dissenting voters have been contacted to ascertain their objections to the motion.
f. If an applicant disputes the validity of a by-law, the applicant may be required to demonstrate that a motion has been submitted to a general meeting proposing a new community management statement incorporating a change to the by-laws and that the motion failed or the body corporate unreasonably failed to consider the motion.
g. If an issue relates to a claim for an amount, the applicant will normally be required to demonstrate that a written request for the amount has been made to the other party.

Body corporate processes

7. Bodies corporate are encouraged to establish internal dispute resolution processes to assist in resolving disputes within the scheme, including disputes between the body corporate and its members, and disputes between individual owners and occupiers.

8. A body corporate's internal dispute resolution process may be approved by an ordinary resolution at a general meeting.

9. Without limiting what a body corporate may choose to include, internal dispute resolution processes could encompass steps such as:

a. identifying a committee member as a first point of contact for concerns;
b. establishing timeframes for a committee to respond to written and verbal requests and queries; and
c. the use of informal and formal meetings or mediation between the disputing parties.

10. Any internal dispute resolution process established by a body corporate should be fair to all parties.

11. Evidence that a party has followed an internal dispute resolution process adopted by a body corporate will be accepted as evidence of attempted self resolution prior to lodging a dispute resolution application.

Robert Walker

COMMISSIONER

Last reviewed: 3 July 2015

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[¶65-250] Practice Direction 24

DEBT DISPUTES

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. Under the Act a *debt dispute* is a dispute about the recovery of a debt under the Act by a body corporate from an owner [Act, *section 229A*.

2. Debts claimed by a body corporate from an owner may include those relating to contributions, penalties for the late payment of contributions, costs reasonably incurred in recovering unpaid contributions, amounts incurred by a body corporate in repairing damage caused by an owner or in carrying out work which was the obligation of the owner, agreed charges for the supply of services by the body corporate, and amounts an owner is required to pay under an exclusive use by-law.

3. A body corporate may commence a proceeding to recover a debt through the Queensland Civil and Administrative Tribunal (QCAT) or a court of competent jurisdiction. QCAT publishes information on taking action to recover a debt at www.qcat.qld.gov.au .

4. A dispute is a *related dispute* if:

a. The subject matter of the dispute is related to the subject matter of a *debt dispute*;
b. There are proceedings in a court or QCAT to recover the debt that is the subject of the *debt dispute*; and
c. The Commissioner considers that the dispute and the *debt dispute* are connected in a way that makes it inappropriate for the dispute to be dealt with in a dispute resolution application.

5. The Commissioner may determine that an application is a *related dispute*, and should be rejected. The Commissioner may make this determination if satisfied that the disputes are connected in a way that warrants their determination in a single forum, such that it would be inappropriate for the lot owner's application to proceed in the Commissioner's Office. If an application is rejected on this basis, the parties should argue the issues in the *related dispute* during the course of the *debt dispute* proceedings.

6. Where proceedings have previously been taken in QCAT or a court and judgment has been given, any judgment amount not paid should be recovered through action to enforce the previous order rather than new proceedings.

Conciliation

7. A body corporate may make an application for conciliation about a *debt dispute*, if proceedings about the *debt dispute* have not already commenced in QCAT or a court.

8. If a proceeding for a *debt dispute* is commenced in QCAT or a court at any time after a conciliation application has been lodged, then the conciliation is at an end.

9. The grounds in support of an application for conciliation of a *debt dispute* should include:

a. A summary of the background to the dispute and the steps taken to recover the debt;
b. The total amount currently claimed by the body corporate;
c. The basis for calculating the amount claimed by the body corporate, including a breakdown of which amounts are unpaid contributions, penalties, debt recovery costs etc;

d. Where the amount claimed includes penalty interest, a copy of the general meeting minutes at which the imposed penalty interest was approved; and
e. Evidence of requests to the lot owner for the amount claimed, such as contribution notices.

10. The parties to an application should inform the Commissioner as soon as possible when the party becomes aware that a proceeding has been commenced in QCAT or a court regarding a debt that is the subject of a current application.

Adjudication

11. An adjudicator does not have jurisdiction to determine a *debt dispute*.

12. Where a debt is disputed, and the disputed amount has been paid, an adjudicator may have jurisdiction to determine whether the amount was incorrectly charged and should be reimbursed.

Ingrid Rosemann

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Last reviewed: 3 July 2015

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[¶65-260] Practice Direction 25 COMPLEX DISPUTES

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The legislation provides for certain complex disputes to be determined either by a specialist adjudicator appointed by the Commissioner or the Queensland Civil and Administrative Tribunal (QCAT) [Act, *section 229(2)*].

2. If the subject matter of an application comprises a complex dispute, there is no jurisdiction for the matter to be referred to conciliation or departmental adjudication.

3. A 'complex dispute' is any of the following matters:

a. An application to adjust the lot entitlement schedule for a community titles scheme [Act, *section 48*].
b. A dispute arising out of a review carried out, or required to be carried out, of the terms of service contracts, brought by a reviewing party [Act, *section 133*].
c. A dispute about the transfer of a letting agent's management rights, brought by a party to the dispute [Act, *section 149A*].
d. A dispute about a claimed or anticipated contractual matter about the engagement of a person as a body corporate manager or a caretaking service contractor or the authorisation of a person as a letting agent, brought by a party to the dispute [Act, *section 149B*].
e. A dispute about whether an exclusive use by-law should continue in force, where the owner of the lot to which the exclusive use bylaw attaches stops being a body corporate manager, service contractor or letting agent for the scheme and the exclusive use by-law is not for the continuing engagement of the lot owner as a body corporate manager, service contractor or letting agent for the scheme, brought by the body corporate [Act, *section 178*].

4. A 'contractual matter' about the engagement or authorisation of a person as a body corporate manager, caretaking service contractor or letting agent means the following:

a. a contravention of the terms of the engagement or authorisation;
b. the termination of the engagement or authorisation;
c. the exercise of rights or powers under the terms of the engagement or authorisation; or
d. the performance of duties under the terms of the engagement or authorisation;

5. If the subject matter of a dispute resolution application includes complex matters and other matters, the application in its entirety must be determined by QCAT or specialist adjudication.

6. Applicants may choose the forum in which a complex dispute is lodged. An applicant seeking to have a complex dispute heard by a specialist adjudicator should consider Practice Direction 20, *Specialist Adjudication*, which sets out the requirements for an application for specialist adjudication.

7. Parties wishing to pursue a complex dispute in QCAT should contact the QCAT registry regarding the relevant application requirements at www.qcat.qld.gov.au , 1300 753 228 or enquiries@qcat.qld.gov.au

Robert Walker

COMMISSIONER

Last reviewed: 3 July 2015

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[¶65-270] Practice Direction 26 FALSE OR MISLEADING INFORMATION OR DOCUMENTS

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The legislation provides for the integrity of the dispute resolution process by providing that the submission of false or misleading information and documents to the Commissioner or an adjudicator may be an offence [Act, *sections 297 and 298*].

2. These offences may apply to an applicant, a person making a submission, or any other person required, or invited, to provide information or documents to the Commissioner or an adjudicator.

3. In regard to false or misleading information, the relevant considerations are that the statement made by the person was false or misleading to the person's knowledge, and that the statement was false or misleading in a material particular.

4. In regard to false or misleading documents, the relevant consideration is that the document contained information that was false or misleading to the person's knowledge. However, there is no offence if the person, when giving the document, informs the Commissioner or adjudicator to the best of the person's ability how the document is false or misleading, and gives the correct information if the person has or can reasonably obtain the correct information.

5. Allegations that information or documents submitted in relation to a dispute resolution application are false or misleading may be considered by an adjudicator when determining the application, including in regard to the weight to be given to the disputed evidence.

6. The Commissioner and adjudicators have no authority to impose a penalty in regard to false or misleading information or documents.

7. The Commissioner and adjudicators have no authority to prosecute a complaint in regard to false or misleading information or documents.

8. Parties may take proceedings in the Magistrates Court for a private complaint in regard to false or misleading information or documents pursuant to the *Justices Act 1886*. The *Justices Act 1886* provides that a complaint must be commenced in the Court within one year from the time the matter of the complaint arose.

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COMMISSIONER

Last reviewed: 3 July 2015

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[¶65-280] Practice Direction 27 DISMISSAL OF APPLICATIONS BY THE COMMISSIONER

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This Practice Direction is issued pursuant to *section* 233 of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The Commissioner may dismiss an application if satisfied that the dispute should be dealt with in a court or tribunal of competent jurisdiction, or another process capable of dealing with the dispute and binding the parties [Act, *section 250*].

2. The question of whether an application should be dismissed on this basis may be raised by any party to the dispute, or the Commissioner.

3. The party raising the issue of the dismissal of an application on this basis should provide a statement explaining why the application should be dealt with by a stated alternative process.

4. The Commissioner will seek submissions from relevant affected parties before deciding whether to dismiss an application on this basis.

5. Without limiting the Commissioner's discretion in this regard, factors that may be considered in determining whether an application should be dismissed on this basis include:

a. the nature and history of the dispute;
b. whether the parties agree to the dismissal of the application;
c. whether the dispute can be adequately dealt with by the alternative process;
d. the quantum in dispute, including whether it is above the monetary jurisdiction of the Magistrates Court;
e. whether the applicant seeks remedies that are beyond the power of an adjudicator to award;
f. whether the evaluation of evidence in the dispute would require the taking of evidence on oath; or
g. whether the subject matter of the dispute is part of, or closely related to, existing proceedings in a court or tribunal.

6. The decision of the Commissioner in regard to the dismissal of an application does not affect the power of an adjudicator to dismiss an application if satisfied that the dispute should be dealt with in a court or tribunal of competent jurisdiction [Act, *section* 270(1)(b)].

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COMMISSIONER

Last reviewed: 3 July 2015

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[¶65-290] Practice Direction 28 APPROVAL OF ALTERNATIVE INSURANCE

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The legislation sets out the requirements for bodies corporate to obtain insurance. *Section 179 of the Body Corporate and Community Management (Standard Module) Regulation 2008*, and equivalent provisions in the other regulation modules, establish the insurance required for buildings including lots in a community titles scheme created under a building format plan or volumetric format plan of subdivision.

2. *Section 179(4)* of the Standard Module, and equivalent provisions in the other regulation modules, provide that if the body corporate cannot comply with the required level of insurance, it may apply in writing to the Commissioner for authorisation to put in place alternative insurance in a form approved by the Commissioner, if the Commissioner is satisfied that the alternative insurance gives it cover that is as close as practicable to the cover required under the section.

3. A written request for authorisation of alternative insurance is not a dispute resolution application under Chapter 6 of the Act. However, in making a written request the following steps must be followed:

a. the request should be made using the adjudication application form [BCCM Form 15];
b. the request should be accompanied by the prescribed fee for a dispute resolution application;
c. the applicant must be the body corporate;
d. no respondent should be named; and
e. the request must be accompanied by a committee resolution authorising the making of the written request.

4. The grounds supporting the written request, and the accompanying documentation should demonstrate:

a. why the body corporate is unable to obtain the required level of insurance;
b. the attempts made to obtain the required level of insurance;
c. the proposed alternative insurance;
d. how the proposed alternative insurance is as close as practical to the required level of insurance;
e. that the proposed alternative insurance has been submitted to a general meeting as a motion for approval as an ordinary resolution by owners; and
f. if the proposed alternative insurance has been submitted to a general meeting but not approved by ordinary resolution, why the proposed alternative insurance should be authorised by the Commissioner notwithstanding.

5. The Commissioner may make further investigations and seek submissions from affected parties as necessary to determine whether the proposed alternative insurance is appropriate and is as close as practicable to the cover required by the regulation module.

6. The Commissioner will provide a written decision outlining whether the proposed alternative insurance is authorised or not and giving reasons for the decision.

7. In the event that the Commissioner authorises alternative insurance, a copy of that authorisation should be included with the disclosure of insurance details at the annual general meeting [*section 177* , Standard Module and equivalent provisions in the other regulation modules.]

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[¶65-300] Practice Direction 29 LEGAL AND OTHER ASSISTANCE

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. The Commissioner's Office provides a quasi-judicial dispute resolution service and is impartial in its dealings between the parties.

2. Information about the dispute resolution processes and the body corporate legislation is available on the Commissioner's Office website [www.justice.qld.gov.au/bccm]. Case management staff [(07) 3227 7654] can provide information about the processes and requirements for current dispute resolution applications. Information Service staff can provide general information about the body corporate legislation [1800 060 119].

3. Commissioner's Office staff are unable to provide legal advice to persons contacting the Information Service or to parties to dispute resolution applications in regard to the conduct of an application or the subject matter of a dispute. If legal advice or other assistance is required in preparing and pursuing a dispute resolution application or in relation to an issue concerning a community titles scheme, an appropriately qualified person or service should be contacted.

4. The following are some possible sources of information, advice and assistance.

Community titles industry organisations

Unit Owners Association of Queensland

GPO Box 2359, Brisbane Q 4001; (07) 3220 0959; www.uoaq.org.au

Queensland Body Corporate Association

office@qbca.org ; (07) 5570 2688; www.qbca.org

Strata Community Australia (QLD) Limited

PO Box 1280, Spring Hill Q 4004; (07) 3839 3011;

http://qld.stratacommunity.org.au/

Australian Resident Accommodation Managers Association Queensland Inc

PO Box 2477, Fortitude Valley Q 4006; (07) 3257 3927; www.aramaqld.com.au

Courts and tribunals

Queensland Civil and Administrative Tribunal

GPO Box 1639, Brisbane 4001; 1300 753 228; www.qcat.qld.gov.au

Magistrates Courts

Contact details are provided at:

www.justice.qld.gov.au/corporate/contact-us/magistrate-courthouses

District Court

QEII Courts of Law Courts Complex, 415 George Street, Brisbane; (07) 3247 4313

For regional courthouses see:

www.justice.qld.gov.au/corporate/contact-us/district-courthouses

Supreme Court

QEII Courts of Law Complex, 415 George Street, Brisbane; (07) 3247 4314

For regional courthouses see:

www.justice.qld.gov.au/corporate/contact-us/contacts-courts-and-tribunals

See also: www.courts.qld.gov.au for information on Queensland Courts.

Alternative dispute resolution

Dispute Resolution Centres

GPO Box 149, Brisbane 4001; (07) 3239 2518 and 1800 017 288

For regional centres see: www.justice.qld.gov.au/justice-services/disputeresolution/dispute-resolution-centres

Institute of Arbitrators and Mediators Australia (Queensland Chapter)

PO Box 10525, Brisbane QLD 4000; (07) 3220 2122; www.iama.org.au

Legal information and referrals

Queensland Law Society

GPO Box 1785, Brisbane Q 4001; 1300 367 757; www.qls.com.au

Legal Aid Queensland

GPO Box 2449, Brisbane Q 4001; 1300 651 188; www.legalaid.qld.gov.au

Queensland Public Interest Law Clearing House

Facilitates referrals to solicitors who may provide free or reduced fee legal assistance for individuals and community groups in civil law cases

PO Box 3631, South Brisbane Q 4141; (07) 3846 6317; www.qpilch.org.au

Queensland Association of Independent Legal Services

Can provide details on the over 30 community legal centres around Queensland

PO Box 119, Stones Corner Q 4120; (07) 3392 0092; www.qails.org.au

Australian College of Community Association Lawyers

PO Box 182 Moorooka Qld 4105, (07) 3848 2328; www.accal.org.au

Other information and assistance

Justices of the Peace

Find a Justice of the Peace or Commissioner for Declarations at

www.justice.qld.gov.au/justice-services/justices-of-the-peace or 1300 301 147

Department of Environment and Resource Management — Titles Registry

Statewide; 13 74 68; www.derm.qld.gov.au/property/index.html

Residential Tenancies Authority

GPO Box 390, Brisbane QLD 4001; 1300 366 311; www.rta.qld.gov.au

Ingrid Rosemann

A/COMMISSIONER

Last reviewed: 3 July 2015

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[¶65-310] Practice Direction 30 MATERIAL SUBMITTED IN RELATION TO AN APPLICATION

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1. Parties should have regard to the following concerning evidence submitted in respect of a dispute resolution application. [Note also Practice Direction 25: *False or misleading information or documents]*.

General

2. Parties to a dispute bear the onus of presenting evidence to support their case.

3. All material submitted should be relevant to the issue to be determined by the adjudicator.

4. An adjudicator is not bound by the rules of evidence.

5. Information and documents included in an application, submission or reply to submissions cannot be kept private or confidential. Pursuant to the principles of natural justice, any material considered by an adjudicator in making a decision must be available to the other parties to the dispute.

6. The Commissioner has no capacity to remove information from an application or submission because of objections about its content, for example allegations that the information is defamatory or improperly obtained.

7. The Commissioner or adjudicator cannot investigate or prosecute objections relating to material submitted by a party. However an adjudicator may give consideration to such allegations when determining what weight should be given to disputed evidence.

8. Where a party objects to material submitted by another party, and the matter is relevant to the issues in dispute, the appropriate course of action is to outline the concerns in a submission or the reply to submissions.

9. The legislation provides that the same privilege exists with respect to defamation for adjudication and conciliation processes as for a Supreme Court proceeding [Act, *section 296*]. A person does not incur liability for defamation by publishing any defamatory material in the course of a proceeding in a court or tribunal [Defamation Act 2005, *section 27*].

Expert evidence

10. Where it is necessary or appropriate to verify claims made, a party may provide evidence from an appropriately qualified expert, such as a builder or an acoustic engineer.

11. Pursuant to the investigative powers provided in the Act, an adjudicator may invite a party to obtain and submit expert evidence.

12. Expert evidence should normally comprise a written report. It should include details of any information, tests or sources which the report is based on, any assumptions relied upon in making the report, and the reasons for any stated opinions.

13. Expert evidence should be accompanied by the expert's contact details, and their qualifications and experience relevant to the area of expertise.

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14. A party will normally be liable for the cost of expert evidence obtained by them in support of their claims.

15. An expert is expected to assist the adjudicator in preference to any party to the application or any party who is liable for the expert's fees or expenses. An expert is not an advocate for a party.

16. Where the parties submit conflicting expert evidence, the adjudicator may require the experts to meet to identify and clarify areas of agreement and disagreement between the experts and the reasons for any disagreement. Alternatively, the adjudicator may require the parties to jointly select a third expert to provide a further opinion.

Robert Walker

COMMISSIONER

Last reviewed: 3 July 2015

[¶65-320] Practice Direction 31 CONSENT ORDERS

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. If the parties to an adjudication application agree to the terms of a proposed order, the adjudicator may, in his or her discretion, issue a consent order.

2. If the parties to a conciliation application reach an agreement at a departmental conciliation session, and the parties consent to the agreement being formalised as a consent order, the Commissioner must refer the agreement to an adjudicator for a consent order. The adjudicator may, in his or her discretion, issue a consent order.

3. A consent order may only include matters that may be dealt with under the Act and must not include matters that are inconsistent with the Act or another Act.

4. There is no right to appeal a consent order.

Robert Walker

COMMISSIONER

Last reviewed: 3 July 2015

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[¶65-330] Practice Direction 32 SUPPLEMENTARY ORDERS

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This Practice Direction is issued pursuant to *section 233* of the *Body Corporate and Community Management Act 1997*. Its purpose is to provide further information on the policies and procedures applying to dispute resolution applications lodged with the Commissioner's Office. Nothing in this Practice Direction supersedes or overrides the requirements of the legislation and the Commissioner retains the discretion provided for in the legislation in the case management of dispute resolution applications.

1. An adjudicator generally has no capacity to review or amend a final order or the accompanying statement of reasons once they have been issued, except where directed to by a court of competent jurisdiction.

2. Where an order or a statement of reasons contains an accidental slip or omission, such as a typographical or clerical error, an adjudicator has an inherent power to issue a further order correcting the error.

3. The capacity to correct accidental errors is limited to correctly stating what was decided and intended at the time of the original judgment. It does not extend to substantive issues of fact or legal interpretation.

4. Adjudicators will only consider issuing a supplementary order that alters the order or the statement of reasons on the written request of a party to the dispute.

5. It is a matter for the adjudicator's discretion whether a supplementary order is warranted in the circumstances. Without limiting this discretion, adjudicators may have regard to the nature of the error; whether the error appears in the order or the statement of reasons; and whether the error has any effect on the meaning, comprehension or enforcement of the order.

6. Other parties to the application would not normally be invited to make submissions in respect of the proposed correction.

7. Unless otherwise stated in the order, a supplementary order will have effect from the date that it is issued.

Robert Walker

COMMISSIONER

Last reviewed: 3 July 2015

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[¶65-340] Practice Direction 33 ELECTRONIC COMMUNICATION

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1. The following sets out information relating to electronic communication for dispute resolution applications, having regard to the *Acts Interpretation Act 1954* and the *Electronic Transactions (Queensland) Act 2001*.

Transmission of documents to the Commissioner's Office

2. Dispute resolution applications, submissions, correspondence, requested documents and all other communication relating to an application will be accepted by email or other readily accessible means of electronic communication.

3. Where correspondence or documents are provided electronically, it is not necessary to also provide a hard copy, unless the electronic form is not fully legible or if otherwise requested.

4. Where a signature is required on a document, such as an application form or the authorisation of a representative, an electronic copy of an original signature will be sufficient. Alternatively a hard copy with an original signature must also be provided.

5. All email communications should be directed to the address bccm@justice.qld.gov.au.

6. Where documents are sent electronically such as email attachments, the file name should clearly identify the contents or nature of the document. In addition, emails should ideally, in their subject line, contain the reference number (if known) for the matter in question.

7. Very large email attachments (over 15MB) or large numbers of attachments may need to be sent in multiple emails, or individual attachments reduced in size, or the information should be sent through alternative means.

Transmission of documents from the Commissioner's Office

8. The Office of the Commissioner for Body Corporate and Community Management will routinely communicate with parties via email, where an email address has been provided for a party, unless that party has asked not to receive communication by email.

Distribution of notice by a body corporate

9. Where a body corporate has been requested to distribute a *Notice of application and invitation to make a submission, or a Notice of extension of time for making submissions* to specified persons (such as all owners), it will be sufficient for the body corporate to email thte notice and any attachments.

10. However, the notice and any attachments may only be emailed to a person who has given the body corporate a current email address and has not instructed the body corporate that they do not wish to receive communications by email.

Distribution of notices by an applicant

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11. Where an applicant has been requested to distribute a notice of further material submitted on an application to specified persons (such as all owners), it will be sufficient for the applicant to email the notice and any attachments.

12. However, the notice and any attachments may only be emailed to a person who has given the applicant or the body corporate a current email address and has not instructed the applicant or the body corporate that they do not wish to receive communications by email.

Chris Irons

COMMISSIONER

Last reviewed: 3 July 2015

Editorial information

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Please note: the Land Registry Forms are available on the Department of Natural Resources and Mines website at www.nrm.qld.gov.au.

Last reviewed: 19 April 2013

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[¶70-050] Introducing BCCM forms

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The forms included here apply to the *Body Corporate and Community Management Act 1997*.

These forms are amended from time to time. You should always check with the Department of Justice and Attorney-General to confirm that the latest version of the form is being used. Electronic versions of these forms can be found at: http://www.justice.qld.gov.au.

Copyright in the forms belongs to the Department of Justice and Attorney-General (Queensland) and they are reproduced with the permission of the Department of Justice and Attorney-General.

Last reviewed: 9 July 2012

Editorial information

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Note: BCCM forms fall into two categories: approved forms and office forms.

- For approved forms, CCH has inserted the letter “A” before the form number. For example, “Form A1” indicates that BCCM Form 1 is an approved form.
- If the letter “A” is absent, this indicates that the BCCM form is an office form.

Last reviewed: 11 July 2012

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[¶70-105] Form A1: Notice to body corporate of a contravention of a body corporate by-law

Click to open document in a browser

Click here to see the Form

Last reviewed: 11 July 2012

[¶70-115] Form A2: Notice of authorised signatories on body corporate financial institution account

Click to open document in a browser

Click here to see the Form

Last reviewed: 23 September 2011

[¶70-130] Form 3: Search of orders

Click to open document in a browser

Click here to see the Form

Last reviewed: 19 March 2010

[¶70-140] Form 4: Notice of annual general meeting of the body corporate

Click to open document in a browser

Click here to see the Form

Last reviewed: 16 August 2010

[¶70-150] Form 5: Notice of extraordinary general meeting of the body corporate

Click to open document in a browser

Click here to see the Form

Last reviewed: 16 August 2010

[¶70-160] Form A6: Proxy form for body corporate general meetings

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Click here to see the Form

Last reviewed: 28 September 2011

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[¶70-170] Form A7: Proxy form for committee meetings

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Click here to see the Form

Last reviewed: 28 September 2011

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[¶70-180] Form 8: Information for body corporate roll

[Click to open document in a browser]

Click here to see the Form

Last reviewed: 16 August 2010

[¶70-190] Form 9: Information required by body corporate

Click to open document in a browser

Click here to see the Form

Last reviewed: 16 August 2010

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[¶70-200] Form 10: Notice of continuing contravention of a body corporate by-law

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Last reviewed: 11 July 2012

[¶70-210] Form 11: Notice regarding likely future contravention of a body corporate by-law

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Click here to see the Form

Last reviewed: 11 July 2012

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[¶70-220] Form 12: Requiring information from a body corporate

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Last reviewed: 16 August 2010

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[¶70-230] Form A13: Body corporate information certificate

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Last reviewed: 11 July 2012

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[¶70-232] Form A15: Adjudication application form

Click to open document in a browser

Click here to see Form

BCCM Form 15

Body Corporate and Community Management Act 1997
This form is effective from 2 September 2013

Reset Print

Adjudication Application Form

Office Use Only
Date lodged.................. Time lodged.................... File subject matter......................MIS ref number...........................

Section 1 **Body Corporate / Scheme information** Refer to guide	Name of Scheme CTS / CMS Number Number of lots Physical address of scheme Locality / Suburb State Postcode Regulation Module (*Standard, Accommodation, Commercial, Small Schemes, Two-Lot Schemes)*
Section 2 **Secretary's information** Refer to guide	Name Address Locality / Suburb State Postcode Daytime phone Home phone Mobile Fax Email
Section 3 **Body corporate manager's information** Refer to guide	Name Company name Address Locality / Suburb State Postcode Daytime phone Mobile Email
Section 4(a) **Applicant's information** Complete the applicant's details as registered (for e.g. the name of the owner as it appears on the title search). If corporation provide authority for individual to act.	Name Address Locality / Suburb State Postcode Daytime phone Home phone Mobile Fax Email Lot number/s on Plan type and number

Form A15 — continued

Section 4(b) **Are you applying as?** Refer to guide and *section 227* of the Act	☐ an owner ☐ the body corporate ☐ the committee ☐ letting agent ☐ service contractor	☐ an occupier ☐ the body corporate manager ☐ a committee member ☐ caretaking service contractor
Section 5(a) **Respondent's information** Refer to guide	Name Address Locality / Suburb Daytime phone Mobile Email	 State Postcode Home phone Fax
Section 5(b) **Is the respondent?** Refer to guide and *section 227* of the Act	☐ an owner ☐ the body corporate ☐ the committee ☐ letting agent ☐ service contractor	☐ an occupier ☐ the body corporate manager ☐ a committee member ☐ caretaking service contractor
Section 5(c) **Are other persons affected by the outcome sought by you?** Refer to guide	☐ Yes *(provide details below or attached)*	☐ No
Section 6(a) **What attempts have you made to resolve your dispute by internal dispute resolution and/or department conciliation** Your application may be rejected if you have not attempted internal dispute resolution <u>and</u> department conciliation.		

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Form A15 — continued

Section 6(b) **Do you have a conciliation certificate?**	☐ Yes *(you must attach a copy of the Conciliation Certificate)* ☐ No *(you must attach grounds to be excused from conciliation)*
Section 7 **What outcome are you seeking?** If insufficient space on this page attach detailed outcomes sought on an A4 page under the heading- 7. Outcome sought	
Section 8 **Interim Order Request** (if applicable) Refer to guide & Practice Direction 16 If insufficient space on this page attach detailed outcomes sought on an A4 page under the heading - 8. Interim order	

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Form A15 — continued

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Section 9 Grounds A statement of grounds should clearly outline the history and nature of the issue, what action has been taken and when, and why you consider each of the outcomes sought should be made. Refer to guide If insufficient space on this page attach concise and relevant details of the background to the dispute on an A4 page under the heading - 9. Grounds	

Warning: *Sections 297* and *298* of the Act provide that it is an offence for a person to supply false or misleading information or documents in relation to an application.

The information requested in this form is collected under the authority of the Act. Information in the application and any attachments will be disclosed to other parties in the dispute (Please refer to the Privacy Statement located in the guide to the *adjudication application* for further information). It is collected for the purpose of resolving disputes under the Act and for providing information to the community.

I believe the information given in this application to be true.

Signature____ **Date**____

Signature____ **Date**____

Note: Each applicant must sign the application. An unsigned or undated application cannot be accepted. If the applicant is a corporation, this form may be signed by a person authorised by the corporation to act on its behalf, and must be accompanied by evidence of authorisation. Additional A4 pages may be attached.

If the applicant is a body corporate, a copy of minutes containing the resolution authorising the application must be provided.

APPLICATION FEE: See our website for current application fees.

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[¶70-235] Form A18: Guidelines for the engagement of a body corporate manager to carry out the functions of a committee and its executive members

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Click here to see the Form

Last reviewed: 23 September 2011

[¶70-236] Form A19: The effect of a change in the regulation module applying to a scheme

Click to open document in a browser

Click here to see the Form

Last reviewed: 11 July 2012

[¶70-237] Form A20: Explanatory note — proposal to amend

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Click here to see the Form

Last reviewed: 19 March 2010

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[¶70-238] Form 21: Credit card payment authorisation

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Click here to see the Form

Last reviewed: 1 October 2015

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[¶70-239] Form A22: Conciliation application form

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Click here to see Form

Last reviewed: 1 October 2015

[¶70-240] Form A23: Application — waiver of application fee

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Click here to see the Form

Last reviewed: 1 October 2015

[¶70-241] Form A25: Notice to owner of a contravention of a body corporate by-law (Specified Two-Lot Scheme)

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Click here to see the Form

Last reviewed: 11 July 2012

[¶70-242] Form A26: Body corporate information certificate (Specified Two-Lot Scheme)

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Click here to see the Form

Last reviewed: 11 July 2012

[¶70-243] Form 27: Notice of continuing contravention of a body corporate by-law (Specified Two-Lot Scheme)

Click to open document in a browser

Click here to see the Form

Last reviewed: 11 July 2012

[¶70-244] Form 28: Notice regarding likely future contravention of a body corporate by-law (Specified Two-Lot Scheme)

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Last reviewed: 11 July 2012

[¶70-299] Introducing REIQ forms

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The Real Estate Institute of Queensland (www.reiq.com.au) provides a number of forms that are relevant to community title schemes. Specimens of these forms are reproduced below with the REIQ's permission. Copyright in the forms remains with the REIQ.).

[¶70-300] REIQ Contract for Residential Lots in a Community Titles Scheme, eighth edition

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Copyright in the Contract for Residential Lots in a Community Titles Scheme, eighth edition, is vested in the Real Estate Institute of Queensland Ltd. CCH acknowledges the kind permission of the Real Estate Institute of Queensland Ltd to reproduce the contract in *Queensland Community Schemes Law and Practice*.

The Queensland Law Society has approved this contract in this form.

Queensland Law Society

REIQ

REAL ESTATE INSTITUTE QUEENSLAND

Contract for Residential Lots in a Community Titles Scheme

Eighth Edition

This document has been approved by The Real Estate Institute of Queensland Limited and the Queensland Law Society Incorporated as being suitable for the sale and purchase of Residential Lots in a Community Titles Scheme in Queensland except for new residential property in which case the issue of GST liability must be dealt with by special condition.

The Seller and Buyer agree to sell and buy the Property under this contract.

REFERENCE SCHEDULE

Contract Date:

SELLER'S AGENT

NAME:

ABN:

LICENCE NO:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

SELLER

NAME: ABN:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

NAME: ABN:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

SELLER'S SOLICITOR

☐ *or any other solicitor notified to the Buyer*

NAME:

REF: CONTACT:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

sample only

INITIALS

BUYER

NAME: ABN:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

NAME: ABN:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

BUYER'S AGENT *(if applicable)*

NAME:

ABN: LICENCE NO:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

BUYER'S SOLICITOR

☐ *or any other solicitor notified to the Seller*

NAME:

REF: CONTACT:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

PROPERTY

Lot: ADDRESS:

SUBURB: STATE: POSTCODE:

Description: Lot: on: ☐ BUP ☐ GTP ☐ SP

Scheme: Community Titles Scheme:

Title Reference:

Present Use:

INITIALS

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Local Government:

Excluded Fixtures:

Included Chattels:

PRICE

Deposit Holder:

Deposit Holder's Trust Account:

Bank:

BSB: Account No:

Purchase Price: $

Unless otherwise specified in this contract, the Purchase Price includes any GST payable on the supply of the Property to the Buyer.

Deposit: $ Initial Deposit payable on the day the Buyer signs this contract unless another time is specified below.

$ Balance Deposit (if any) payable on:

Default Interest Rate: %

If no figure is inserted, the Contract Rate applying at the Contract Date published by the Queensland Law Society Inc will apply.

FINANCE

Finance Amount: $

Unless all of "Finance Amount", "Financier" and "Finance Date" are completed, this contract is not subject to finance and clause 3 does not apply.

Financier:

Finance Date:

BUILDING AND/OR PEST INSPECTION DATE:

Inspection Date:

If "Inspection Date" is not completed, the contract is not subject to an inspection report and clause 4.1 does not apply.

MATTERS AFFECTING PROPERTY

Title Encumbrances:

Is the Property sold subject to any Encumbrances? ☐ No ☐ Yes, listed below:

***WARNING TO SELLER**: You are required to disclose all Title Encumbrances which will remain after settlement (for example, easements on your title and statutory easements for sewerage and drainage which may not appear on a title search). Failure to disclose these may entitle the Buyer to terminate the contract or to compensation. It is NOT sufficient to state "refer to title", "search will reveal", or similar.*

Tenancies:

If the property is sold with vacant possession from settlement, insert 'Nil'. Otherwise complete details from Residential Tenancy Agreement.

TENANT'S NAME:

TERM AND OPTIONS:

STARTING DATE OF TERM: ENDING DATE OF TERM: RENT: $ BOND: $

INITIALS

Sample only

Managing Agent:

AGENCY NAME:

PROPERTY MANAGER:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: FAX: MOBILE: EMAIL:

POOL SAFETY FOR NON-SHARED POOLS

Complete the following questions if there is a non-shared pool in the Lot

Q1. Is there a **non-shared** pool on the **Lot**?

☐ Yes
☐ No Clause 4.2 of this contract does not apply

Q2. If the answer to Q1 is Yes, is there a Compliance or Exemption Certificate for the **non-shared** pool at **the time of contract**?

☐ Yes Clause 5.3(1)(f) applies
☐ No Clause 4.2 applies (except for auction and some other excluded sales)

Q3. If the answer to Q2 is No, has a Notice of No Pool Safety Certificate been given prior to contract?

☐ Yes
☐ No

Pool Safety Inspector:

Pool Safety Inspection Date:

__WARNING TO SELLER:__ Failure to comply with the Pool Safety Requirements is an offence with substantial penalties.

__WARNING TO BUYER:__ If there is no Compliance or Exemption Certificate at Settlement, the Buyer becomes responsible at its cost to obtain a Pool Safety Certificate within 90 days after settlement. The Buyer can also become liable to pay any costs of rectification necessary to comply with the Pool Safety Requirements to obtain a Pool Safety Certificate. The Buyer commits an offence and can be liable to substantial penalties if the Buyer fails to comply with this requirement.

If there is a pool on the __Lot__ and Q2 is not completed then clause 4.2 applies.

Note: This is an obligation of the Seller under Section 16 of the Building Regulation 2006.

The Pool Safety Inspector must be licensed under the Building Act 1975 and Building Regulation 2006.

Clause 4.2(2) applies except where this contract is formed on a sale by auction and some other excluded sales.

STATUTORY WARRANTIES AND CONTRACTUAL RIGHTS

The Seller gives notice to the Buyer of the following matters:

(a) Latent or Patent Defects in Common Property or Body Corporate Assets (s 223(a)(b))*

(b) Actual or Contingent or Expected Liabilities of Body Corporate (s 223(2)(c)(d))*

(c) Circumstances in Relation to Affairs of Body Corporate (s 223(3))*

(d) Exceptions to Warranties in clause 7.4(3)*

(e) Proposed Body Corporate Resolutions (clause 8.4)*

**Include in attachment if insufficient space*

__WARNING TO SELLER:__ The Body Corporate and Community Management Act 1997 and the Contract include warranties by the Seller about the Body Corporate and the Scheme land. Breach of a warranty may result in a damages claim or termination by the Buyer. Seller should consider whether to carry out an inspection of the Body Corporate records to complete this section.

sample only

INITIALS

ADDITIONAL BODY CORPORATE INFORMATION

Interest Schedule Lot Entitlement of Lot:

Aggregate Interest Schedule Lot Entitlement:

Contribution Schedule Lot Entitlement of Lot:

Aggregate Contribution Schedule Lot Entitlement:

INSURANCE POLICIES

Insurer: Policy No:

Building:

Public Liability:

Other:

POOL SAFETY FOR SHARED POOLS

Only complete the following questions if there is a shared pool on the Land.

A. Is there a shared pool on the Land or on adjacent land used in association with the Land? ☐ Yes ☐ No

B. If the answer to A is Yes, is there a Compliance or Exemption Certificate for the shared pool at the time of contract? ☐ Yes ☐ No

C. If the answer to B is No, has a Notice of No Pool Safety Certificate been given prior to contract? ☐ Yes ☐ No

Note: This is an obligation of the Seller under Section 16 of the Building Regulation 2006.

ELECTRICAL SAFETY SWITCH AND SMOKE ALARM

This section must be completed unless the Lot is vacant

The Seller gives notice to the Buyer that an Approved Safety Switch for the General Purpose Socket Outlets is:

(select whichever is applicable)

☐ installed in the residence

☐ not installed in the residence

***WARNING**: By giving false or misleading information in this section, the Seller may incur a penalty. The Seller should seek expert and qualified advice about completing this section and not rely on the Seller's Agent to complete this section.*

The Seller gives notice to the Buyer that a Compliant Smoke Alarm(s) is/are:

(select whichever is applicable)

☐ installed in the residence

☐ not installed in the residence

***WARNING**: Failure to install a Compliant Smoke Alarm is an offence under the Fire and Emergency Services Act 1990.*

NEIGHBOURHOOD DISPUTES (DIVIDING FENCES AND TREES) ACT 2011

The Seller gives notice to the Buyer in accordance with Section 83 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* that the Land:

(select whichever is applicable)

☐ is not affected by any application to, or an order made by, the Queensland Civil and Administrative Tribunal (QCAT) in relation to a tree on the Lot or

☐ is affected by an application to, or an order made by, QCAT in relation to a tree on the Lot, a copy of which has been given to the Buyer prior to the Buyer signing the contract.

***WARNING:** Failure to comply with s83 Neighbourhood Disputes (Dividing Fences and Trees Act) 2011 by giving a copy of an order or application to the Buyer (where applicable) prior to Buyer signing the contract will entitle the Buyer to terminate the contract prior to Settlement.*

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The REIQ Terms of Contract for Residential Lots in a Community Titles Scheme (Pages 7-16) Eighth Edition Contain the Terms of this Contract.

SPECIAL CONDITIONS

SETTLEMENT

Settlement Date: ______ *or the next Business Day if that is not a Business Day in the Place for Settlement.*

Place for Settlement: ______ *If Brisbane is inserted, this is a reference to Brisbane CBD.*

SIGNATURES

The contract may be subject to a 5 business day statutory cooling-off period. A termination penalty of 0.25% of the purchase price applies if the Buyer terminates the contract during the statutory cooling-off period.
It is recommended the Buyer obtain an independent property valuation and independent legal advice about the contract and his or her cooling-off rights, before signing.

Buyer: ______ Witness: ______

Buyer: ______ Witness: ______

Seller: ______ Witness: ______

Seller: ______ Witness: ______

Deposit Holder: ______ *Who acknowledges having received the Initial Deposit and agrees to hold that amount and any Balance Deposit when received as Deposit Holder for the parties as provided in the Contract.*

INITIALS

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TERMS OF CONTRACT
FOR RESIDENTIAL LOTS IN A COMMUNITY TITLES SCHEME

1. DEFINITIONS

1.1 In this contract:

(1) terms in **bold** in the Reference Schedule and the Disclosure Statement have the meanings shown opposite them unless the context requires otherwise; and

(2) (a) "**Approved Safety Switch**" means a residual current device as defined in the *Electrical Safety Regulation 2013;*

(b) **"ATO Clearance Certificate"** means a certificate issued under s14-220(1) of the Withholding Law which is current on the date it is given to the Buyer;

(c) "**Balance Purchase Price**" means the Purchase Price, less the Deposit, adjusted under clause 2.6;

(d) "**Bank**" means an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cth).

(e) "**Body Corporate**" means the body corporate of the Scheme;

(f) "**Body Corporate Debt**" has the meaning in the Regulation Module but excludes the Body Corporate Levies for the period which includes the Settlement Date:

(g) "**Body Corporate Levies**" means regular periodic contributions levied on the owner of the Lot (including, if applicable, levied under an exclusive use by-law) excluding any Special Contribution:

(h) "**Bond**" means a bond under the *Residential Tenancies and Rooming Accommodation Act 2008;*

(i) "**Building**" means any building that forms part of the Lot or in which the Lot is situated;

(j) "**Building Inspector**" means a person licensed to carry out completed residential building inspections under the *Queensland Building and Construction Commission Regulations 2003*:

(k) "**Business Day**" means a day other than:

(i) a Saturday or Sunday

(ii) a public holiday in the Place for Settlement: and

(iii) a day in the period 27 to 31 December (inclusive).

(l) **"CGT Withholding Amount"** means the amount determined under s14-200(3)(a) of the Withholding Law or, if a copy is provided to the Buyer prior to settlement, a lesser amount specified in a variation notice under s14-235;

(m) "**Compliance or Exemption Certificate**" means:

(i) a Pool Safety Certificate; or

(ii) a building certificate that may be used instead of a Pool Safety Certificate under Section 246AN(2) of the *Building Act 1975; or*

(iii) an exemption from compliance on the grounds of impracticality under Section 245B of the *Building Act 1975;*

(n) "**Compliant Smoke Alarm**" means a smoke alarm complying with Sections 104RB (2) or (4) of the *Fire and Emergency Services Act 1990;*

(o) "**Contract Date**" or "**Date of Contract**" means the date inserted in the Reference Schedule;

(p) "**Court**" includes any tribunal established under statute;

(q) "**Disclosure Statement**" means the statement under Section 206 (Existing Lot) or Section 213 (Proposed Lot) of the *Body Corporate and Community Management Act 1997;*

(r) "**Encumbrances**" includes:

(i) unregistered encumbrances

(ii) statutory encumbrances; and

(iii) Security Interests.

(s) **"Essential Term"** includes, in the case of breach by:

(i) the Buyer: clauses 2.2, 2.5(1), 5.1 and 6.1; and

(ii) the Seller: clauses 5.1, 5.3(1)(a) – (d), 5.3(1)(e)(ii) & (iii), 5.3(1)(f), 5.5 and 6.1; but nothing in this definition precludes a Court from finding other terms to be essential;

(t) "**Exclusive Use Areas**" means parts of the common property for the Scheme allocated to the Lot under an exclusive use by-law;

(u) "**Financial Institution**" means a Bank, Building Society or Credit Union;

(v) "**General Purpose Socket Outlet**" means an electrical socket outlet as defined in the *Electrical Safety Regulation 2013;*

(w) "**GST**" means the goods and services tax under the *GST Act;*

(x) "**GST Act**" means *A New Tax System (Goods and Services Tax) Act* and includes other GST related legislation;

(y) "**Improvements**" means fixed structures in the Lot (such as stoves, hot water systems, fixed carpets, curtains, blinds and their fittings, clothes lines, fixed satellite dishes and television antennae, in-ground plants) but does not include the Reserved Items;

(z) "**Keys**" means keys, codes or devices in the Seller's possession or control for all locks or security systems on the Property or necessary to access the Property;

(aa) "**Land**" means the scheme land for the Scheme;

(bb) "**Notice of No Pool Safety Certificate**" means the Form 36 under the *Building Regulation 2006* to the effect that there is no Pool Safety Certificate issued for the Land and/or the Lot;

(cc) "**Notice of nonconformity**" means a Form 26 under the *Building Regulation 2006* advising how the pool does not comply with the relevant pool safety standard;

(dd) "**Outgoings**" means:

(i) rates or charges on the Lot by any competent authority (for example, council rates, water rates, fire service levies) but excludes land tax; and

(ii) Body Corporate Levies.

(ee) "**Pest Inspector**" means a person licensed to undertake termite inspections on completed buildings under the *Queensland Building and Construction Commission Regulations 2003;*

(ff) "**Pool Safety Certificate**" has the meaning in Section 231C(a) of the *Building Act 1975;*

(gg) "**Pool Safety Requirements**" means the requirements for pool safety contained in the *Building Act 1975* and *Building Regulation 2006;*

(hh) "**Pool Safety Inspection Date**" means the Pool Safety Inspection Date inserted in the Reference Schedule. If no date is inserted in the Reference Schedule, the Pool Safety Inspection Date is taken to be the earlier of the following:

(i) the Inspection Date for the Building and/or Pest Inspection; or

(ii) 2 Business Days before the Settlement Date;

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(ii) "**Pool Safety Inspector**" means a person authorised to give a Pool Safety Certificate;

(jj) "**PPSR**" means the Personal Property Securities Register established under *Personal Property Securities Act 2009* (Cth);

(kk) "**Property**" means:

- (i) the Lot;
- (ii) the right to any Exclusive Use Areas;
- (iii) the Improvements;
- (iv) the Included Chattels;

(ll) "**Regulation Module**" means the regulation module for the Scheme;

(mm) "**Rent**" means any periodic amount, including outgoings, payable under the Tenancies;

(nn) "**Reserved Items**" means the Excluded Fixtures and all Chattels in the Lot and Exclusive Use Areas other than the Included Chattels;

(oo) "**Scheme**" means the community titles scheme containing the Lot;

(pp) "**Security Interests**" means all security interests registered on the PPSR over Included Chattels and Improvements;

(qq) "**Special Contribution**" means an amount levied by the Body Corporate under the Regulation Module for a liability for which no provision or inadequate provision has been made in the budget of the Body Corporate.

(rr) "**Transfer Documents**" means:

- (i) the form of transfer under the *Land Title Act 1994* required to transfer title in the Lot to the Buyer; and
- (ii) any other document to be signed by the Seller necessary for stamping or registering the transfer;

(ss) "**Transport Infrastructure**" has the meaning defined in the *Transport Infrastructure Act 1994*; and

(tt) "**Withholding Law**" means Schedule 1 to the *Tax Administration Act 1953* (Cth).

1.2 Words and phrases defined in the *Body Corporate and Community Management Act 1997* have the same meaning in this contract unless the context indicates otherwise.

2. PURCHASE PRICE

2.1 GST

(1) Unless otherwise specified in this contract, the Purchase Price includes any GST payable on the supply of the Property to the Buyer.

(2) If a party is required to make any other payment or reimbursement under this contract, that payment or reimbursement will be reduced by the amount of any input tax credits to which the other party (or the representative member for a GST group of which it is a member) is entitled.

2.2 Deposit

(1) The Buyer must pay the Deposit to the Deposit Holder at the times shown in the Reference Schedule. The Deposit Holder will hold the Deposit until a party becomes entitled to it.

(2) The Buyer will be in default if it:

- (a) does not pay the Deposit when required;
- (b) pays the Deposit by a post-dated cheque; or
- (c) pays the Deposit by cheque which is dishonoured on presentation.

(3) The Seller may recover from the Buyer as a liquidated debt any part of the Deposit which is not paid when required.

2.3 Investment of Deposit

If:

(1) the Deposit Holder is instructed by either the Seller or the Buyer; and

(2) it is lawful to do so;

the Deposit Holder must:

(3) invest as much of the Deposit as has been paid with any Financial Institution in an interest-bearing account in the names of the parties; and

(4) provide the parties' tax file numbers to the Financial Institution (if they have been supplied).

2.4 Entitlement to Deposit and Interest

(1) The party entitled to receive the Deposit is:

- (a) if this contract settles, the Seller;
- (b) if this contract is terminated without default by the Buyer, the Buyer;
- (c) if this contract is terminated owing to the Buyer's default, the Seller.

(2) The interest on the Deposit must be paid to the person who is entitled to the Deposit.

(3) If this contract is terminated, the Buyer has no further claim once it receives the Deposit and interest unless the termination is due to the Seller's default or breach of warranty.

(4) The Deposit is invested at the risk of the party who is ultimately entitled to it.

2.5 Payment of Balance Purchase Price

(1) On the Settlement Date, the Buyer must pay the Balance Purchase Price by Bank cheque as the Seller or the Seller's Solicitor directs.

(2) Despite any other provision of this contract, reference to a "Bank cheque" in clause 2.5:

- (a) includes a cheque drawn by a Building Society or Credit Union on itself;
- (b) does not include a cheque drawn by a Building Society or Credit Union on a Bank;

and the Seller is not obliged to accept a cheque referred to in clause 2.5(2)(b) on the Settlement Date.

(3) If both the following apply:

- (a) the market value of the Lot and Improvements at the Contract Date is $2,000,000 or more and this sale is not otherwise an excluded transaction under s14-215 of the Withholding Law; and
- (b) the Seller has not given the Buyer on or before settlement for each person comprising the Seller either:
  - (i) an ATO Clearance Certificate; or
  - (ii) a variation notice under s14-235 of the Withholding Law which remains current at the Settlement Date varying the CGT Withholding Amount to nil,

then:

- (c) for clause 2.5(1), the Seller irrevocably directs the Buyer to draw a bank cheque for the CGT Withholding Amount in favour of the Deputy Commissioner of Taxation or, if the Buyer's Solicitor requests, the Buyer's Solicitor's Trust Account;
- (d) the Buyer must lodge a *Foreign Resident Capital Gains Withholding Purchaser Notification Form* with the Australian Taxation Office for each person comprising the Buyer and give copies to the Seller with the payment reference numbers (PRN) on or before settlement;

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(e) the Seller must return the bank cheque in paragraph (c) to the Buyer's Solicitor (or if there is no Buyer's Solicitor, the Buyer) at settlement; and

(f) the Buyer must pay the CGT Withholding Amount to the Commissioner in accordance with s14-200 of the Withholding Law and give the Seller evidence that it has done so within 2 Business Days of settlement occurring.

(4) For clause 2.5(3), the market value of the Lot and Improvements is taken to be the Purchase Price less any GST included in the Purchase Price for which the Buyer is entitled to an input tax credit unless:

(a) the Property includes items in addition to the Lot and Improvements; and

(b) no later than 2 Business Days prior to the Settlement Date, the Seller gives the Buyer a valuation of the Lot and Improvements prepared by a registered valuer,

in which case the market value of the Lot and Improvements will be as stated in the valuation.

2.6 Adjustments to Balance Purchase Price

(1) The Seller is liable for Outgoings and is entitled to Rent up to and including the Settlement Date. The Buyer is liable for Outgoings and is entitled to Rent after the Settlement Date.

(2) Subject to clauses 2.6(3), 2.6(5) and 2.6(17), Outgoings for periods including the Settlement Date must be adjusted:

(a) for those paid, on the amount paid;

(b) for those assessed but unpaid, on the amount payable (excluding any discount); and

(c) for those not assessed:

(i) on the amount the relevant authority or the Body Corporate advises will be assessed (excluding any discount); or

(ii) if no advice on the assessment to be made is available, on the amount of the latest assessment (excluding any discount).

(3) If there is no separate assessment of rates for the Lot at the Settlement Date and the Local Government informs the Buyer that it will not apportion rates between the Buyer and the Seller, then:

(a) the amount of rates to be adjusted is that proportion of the assessment equal to the ratio of the interest schedule lot entitlement of the Lot to the aggregate interest schedule lot entitlement of the Scheme; and

(b) if an assessment of rates includes charges imposed on a "per lot" basis, then the portion of those charges to be adjusted is the amount assessed divided by the number of lots in that assessment.

(4) The Seller is liable for land tax assessed on the Lot for the financial year current at the Settlement Date. If land tax is unpaid at the Settlement Date and the Office of State Revenue advises that it will issue a final clearance for the Lot on payment of a specified amount, then the Buyer may deduct the specified amount from the Balance Purchase Price at settlement and must pay it promptly to the Office of State Revenue.

(5) Any Outgoings assessable on the amount of water used must be adjusted on the charges that would be assessed on the total water usage for the assessment period, determined by assuming that the actual rate of usage shown by the meter reading made before settlement continues throughout the assessment period. The Buyer must obtain and pay for the meter reading.

(6) If any Outgoings are assessed but unpaid at the Settlement Date, then the Buyer may deduct the amount payable from the Balance Purchase Price at settlement and pay it promptly to the relevant authority or the Body Corporate, as appropriate. If an amount is deducted under this clause, the relevant Outgoing will be treated as paid at the Settlement Date for the purposes of clause 2.6(2).

(7) Arrears of Rent for any rental period ending on or before the Settlement Date belong to the Seller and are not adjusted at settlement.

(8) Unpaid Rent for the rental period including both the Settlement Date and the following day ("**Current Period**") is not adjusted until it is paid.

(9) Rent already paid for the Current Period or beyond must be adjusted at settlement.

(10) If Rent payments are reassessed after the Settlement Date for periods including the Settlement Date, any additional Rent payment from a Tenant or refund due to a Tenant must be apportioned under clauses 2.6(7), 2.6(8) and 2.6(9) and 2.6(10).

(11) Payments under clause 2.6(10) must be made within 14 days after notification by one party to the other but only after any additional payment from a Tenant has been received.

(12) The Seller is liable for:

(a) any Special Contribution for which a levy notice has been issued on or before the Contract Date; and

(b) any other Body Corporate Debt (including any penalty or recovery cost resulting from non-payment of a Body Corpoorate Debt) owing in respect of the Lot at settlement.

The Buyer is liable for any Special Contribution levied after the Contract Date.

(13) If an amount payable by the Seller under clause 2.6(12) is unpaid at the Settlement Date, the Buyer may deduct the specified amount from the Balance Purchase Price at settlement and must pay it promptly to the Body Corporate.

(14) For the purposes of clause 2.6(12), an amount payable under an exclusive use by-law will be treated as levied on the date it is due.

(15) The cost of Bank cheques payable at settlement:

(a) to the Seller or its mortgagee are the responsibility of the Buyer; and

(b) to parties other than the Seller or its mortgagee are the responsibility of the Seller.

(16) The Seller is not entitled to require payment of the Balance Purchase Price by means other than Bank cheque without the consent of the Buyer.

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(17) Upon written request by the Buyer, the Seller will, prior to settlement, give the Buyer a written statement, supported by reasonable evidence, of –
(a) all Outgoings and all Rent for the Property to the extent they are not capable of discovery by search or enquiry at any office of public record or pursuant to the provisions of any statute; and
(b) any other information which the Buyer may reasonably require for the purpose of calculating or apportioning any Outgoings or Rent under this clause 2.6.

If the Seller becomes aware of a change to the information provided the Seller will as soon as practicably provide the updated information to the Buyer.

3. FINANCE

3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount from the Financier by the Finance Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain approval.

3.2 The Buyer must give notice to the Seller that:
(1) approval has not been obtained by the Finance Date and the Buyer terminates this contract; or
(2) the finance condition has been either satisfied or waived by the Buyer.

3.3 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 3.2 by 5pm on the Finance Date. This is the Seller's only remedy for the Buyer's failure to give notice.

3.4 The Seller's right under clause 3.3 is subject to the Buyer's continuing right to give written notice to the Seller of satisfaction, termination or waiver pursuant to clause 3.2.

4. BUILDING AND PEST INSPECTION REPORTS AND POOL SAFETY

4.1 Building and Pest Inspection

(1) This contract is conditional on the Buyer obtaining a written building report from a Building Inspector and a written pest report from a Pest Inspector (which may be a single report) on the Property by the Inspection Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain the reports (subject to the right of the Buyer to elect to obtain only one of the reports).
(2) The Buyer must give notice to the Seller that:
(a) a satisfactory Inspector's report under clause 4.1(1) has not been obtained by the Inspection Date and the Buyer terminates this contract. The Buyer must act reasonably; or
(b) clause 4.1(1) has been either satisfied or waived by the Buyer.
(3) If the Buyer terminates this contract and the Seller asks the Buyer for a copy of the building and pest reports, the Buyer must give a copy of each report to the Seller without delay.
(4) The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 4.1(2) by 5pm on the Inspection Date. This is the Seller's only remedy for the Buyer's failure to give notice.
(5) The Seller's right under clause 4.1(4) is subject to the Buyer's continuing right to give written notice to the Seller of satisfaction, termination or waiver pursuant to clause 4.1(2).

4.2 Pool Safety for non-shared pool on Lot

(1) This clause 4.2 applies if:
(a) there is a pool on the Lot and the answer to Q2 of the Reference Schedule is No or Q2 is not completed (for a non-shared pool on the Lot); and
(b) this contract is not a contract of a type referred to in Section 160(1)(b) of the *Property Occupations Act 2014*.
(2) This contract is conditional upon:
(a) the issue of a Pool Safety Certificate; or
(b) a Pool Safety Inspector issuing a Notice of Nonconformity stating the works required before a Pool Safety Certificate can be issued;

by the Pool Safety Inspection Date.
(3) The Buyer is responsible for arranging an inspection by a Pool Safety Inspector at the Buyer's cost. The Seller authorises:
(a) the Buyer to arrange the inspection; and
(b) the Pool Safety Inspector to advise the Buyer of the results of the inspection and to give the Buyer a copy of any notice issued.
(4) If a Pool Safety Certificate has not been issued by the Pool Safety Inspection Date, the Buyer may give notice to the Seller that the Buyer:
(a) terminates this contract; or
(b) waives the benefit of this clause 4.2

The Buyer must act reasonably.
(5) The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 4.2(4) by 5pm on the Pool Safety Inspection Date.
(6) The Seller's right under clause 4.2(5) is subject to the Buyer's continuing right to give written notice to the Seller of termination or waiver pursuant to clause 4.2(4).
(7) The right of a party to terminate under this clause 4.2, ceases upon receipt by that party of a copy of a current Pool Safety Certificate.
(8) If the Buyer terminates this contract under clause 4.2(4)(a), and the Seller has not obtained a copy of the Notice of Nonconformity issued by the Pool Safety Inspector, the Seller may request a copy and the Buyer must provide this to the Seller without delay.

5. SETTLEMENT

5.1 Time and Date

(1) Settlement must occur between 9am and 4pm AEST on the Settlement Date.
(2) If the parties do not agree on where settlement is to occur, it must take place in the Place for Settlement at the office of a Solicitor or Financial Institution nominated by the Seller, or, if the Seller does not make a nomination, at the Land Registry Office in or nearest to the Place for Settlement.

5.2 Transfer Documents

(1) The Transfer Documents must be prepared by the Buyer's Solicitor and delivered to the Seller a reasonable time before the Settlement Date.
(2) If the Buyer pays the Seller's reasonable expenses, it may require the Seller to produce the Transfer Documents at the Office of State Revenue nearest the Place for Settlement for stamping before settlement.

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5.3 Documents and Keys at Settlement

(1) In exchange for payment of the Balance Purchase Price, the Seller must deliver to the Buyer at settlement:
   (a) any instrument of title for the Lot required to register the transfer to the Buyer; and
   (b) unstamped Transfer Documents capable of immediate registration after stamping; and
   (c) any instrument necessary to release any Encumbrance over the Property in compliance with the Seller's obligation in clause 7.2; and
   (d) if requested by the Buyer not less than 2 clear Business Days before the Settlement Date, the Keys; and
   (e) if there are Tenancies:
      (i) the Seller's copy of any Tenancy agreements;
      (ii) a notice to each tenant advising of the sale in the form required by law; and
      (iii) any notice required by law to transfer to the Buyer the Seller's interest in any Bond; and
   (f) if the answer to Q2 in the Reference Schedule is Yes, a copy of a current Compliance or Exemption Certificate, if not already provided to the Buyer.

(2) If the Keys are not delivered at settlement under clause 5.3(1)(d), the Seller must deliver the Keys to the Buyer. The Seller may discharge its obligation under this provision by authorising the Seller's Agent to release the Keys to the Buyer.

5.4 Assignment of Covenants and Warranties

At settlement, the Seller assigns to the Buyer the benefit of all:
(1) covenants by the tenants under the Tenancies;
(2) guarantees and Bonds (subject to the requirements of the *Residential Tenancies and Rooming Accommodation Act 2008*) supporting the Tenancies; and
(3) manufacturers' warranties regarding the Included Chattels;
(4) builders' warranties on the Improvements;

to the extent that they are assignable and the Buyer accepts the assignment. However, the right to recover arrears of Rent is not assigned to the Buyer and Section 117 of the *Property Law Act 1974* does not apply.

5.5 Possession of Property and Title to Included Chattels

On the Settlement Date, in exchange for the Balance Purchase Price, the Seller must give the Buyer vacant possession of the Lot and Exclusive Use Areas except for the Tenancies. Title to the Included Chattels passes at settlement.

5.6 Reservations

(1) The Seller must remove the Reserved Items from the Property before settlement.
(2) The Seller must repair at its expense any damage done to the Property in removing the Reserved Items. If the Seller fails to do so, the Buyer may repair that damage.
(3) Any Reserved Items not removed before settlement will be considered abandoned and the Buyer may, without limiting its other rights, complete this contract and appropriate those Reserved Items or dispose of them in any way.
(4) The Seller indemnifies the Buyer against any damages and expenses resulting from the Buyer's actions under clauses 5.6(2) or 5.6(3).

6. TIME

6.1 Time of the Essence

Time is of the essence of this contract, except regarding any agreement between the parties on a time of day for settlement.

6.2 Suspension of Time

(1) This clause 6.2 applies if a party is unable to perform a settlement obligation solely as a consequence of a Natural Disaster but does not apply where the inability is attributable to: –
   (a) damage to, destruction of or diminution in value of the Property or other property of the Seller or Buyer; or
   (b) termination or variation of any agreement between a party and another person whether relating to the provision of finance, the release of an Encumbrance, the sale or purchase of another property or otherwise.
(2) Time for the performance of the parties' settlement obligations is suspended and ceases to be of the essence of the contract and the parties are deemed not to be in breach of their settlement obligations.
(3) An Affected Party must take reasonable steps to minimise the effect of the Natural Disaster on its ability to perform its settlement obligations.
(4) When an Affected Party is no longer prevented from performing its settlement obligations due to the Natural Disaster, the Affected Party must give the other party a notice of that fact, promptly.
(5) When the Suspension Period ends, whether notice under clause 6.2(4) has been given or not, either party may give the other party a Notice to Settle.
(6) A Notice to Settle must be in writing and state:
   (a) that the Suspension Period has ended; and
   (b) a date, being not less than 5 nor more than 10 Business Days after the date the Notice to Settle is given, which shall become the Settlement Date;
   (c) that time is of the essence.
(7) When Notice to Settle is given, time is again of the essence of the contract.
(8) In this clause 6.2:
   (a) "Affected Party" means a party referred to in clause 6.2(1);
   (b) "Natural Disaster" means a tsunami, flood, cyclone, earthquake, bushfire or other act of nature;
   (c) "Settlement Obligations" means, in the case of the Buyer, its obligations under clauses 2.5(1) and 5.1(1) and, in the case of the Seller, its obligations under clauses 5.1(1), 5.3(1)(a) – (e) and 5.5;
   (d) "Suspension Period" means the period during which the Affected Party (or if both the Buyer and Seller are Affected Parties, either of them) remains unable to perform a settlement obligation solely as a consequence of a Natural Disaster.

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7. MATTERS AFFECTING THE PROPERTY

7.1 Title

The Lot is sold subject to the *Body Corporate and Community Management Act 1997* and the By-Laws of the Body Corporate.

7.2 Encumbrances

The Property is sold free of all Encumbrances other than the Title Encumbrances, Tenancies, statutory easements implied by part 6A of the *Land Title Act 1994* and interests registered on the common property for the Scheme.

7.3 Requisitions

The Buyer may not deliver any requisitions or enquiries on title.

7.4 Seller's Warranties

(1) The Seller warrants that, except as disclosed in this contract, at settlement:

(a) it will be the registered owner of an estate in fee simple in the Lot and will own the Improvements and Included Chattels;

(b) it will be capable of completing this contract (unless the Seller dies or becomes mentally incapable after the Contract Date); and

(c) there will be no unsatisfied judgment, order (except for an order referred to in clause 7.6(1)(b)) or writ affecting the Property.

(2) The Seller warrants that, except as disclosed in this contract, at the Contract Date and at settlement there are no current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the Property.

(3) The Seller warrants that, except as disclosed in this contract, at the Contract Date:

(a) there is no unregistered lease, easement or other right capable of registration and which is required to be registered to give indefeasibility affecting the common property or Body Corporate assets;

(b) there is no proposal to record a new community management statement for the Scheme and it has not received a notice of a meeting of the Body Corporate to be held after the Contract Date or notice of any proposed resolution or a decision of the Body Corporate to consent to the recording of a new community management statement for the Scheme;

(c) all Body Corporate consents to improvements made to common property and which benefit the Lot, or the registered owner of the Lot, are in force; and

(d) the Additional Body Corporate Information is correct (if completed).

(4) If the Seller breaches a warranty in clause 7.4(1) or clause 7.4(2), the Buyer may terminate this contract by notice to the Seller.

(5) If:

(a) the Seller breaches a warranty in clause 7.4(3); or

(b) the Additional Body Corporate Information is not completed;

and, as a result, the Buyer is materially prejudiced, the Buyer may terminate this contract by notice to the Seller given within 14 days after the Contract Date but may not claim damages or compensation.

(6) Clauses 7.4(4) and 7.4(5) do not restrict any statutory rights the Buyer may have which cannot be excluded by this contract.

(7) (a) The Seller warrants that, except as disclosed in this contract or a notice given by the Seller to the Buyer under the *Environmental Protection Act 1994* ("**EPA**"), at the Contract Date:

(i) there is no outstanding obligation on the Seller to give notice to the administering authority under EPA of notifiable activity being conducted on the Land; and

(ii) the Seller is not aware of any facts or circumstances that may lead to the Land being classified as contaminated land within the meaning of EPA.

(b) If the Seller breaches a warranty in clause 7.4(7), the Buyer may:

(i) terminate this contract by notice in writing to the Seller given no later than 2 Business Days before the Settlement Date; or

(ii) complete this contract and claim compensation, but only if the Buyer claims it in writing before the Settlement Date.

(8) The Seller does not warrant that the Present Use is lawful.

7.5 Survey and Mistake

(1) The Buyer may survey the Lot.

(2) If there is:

(a) an error in the boundaries or area of the Lot;

(b) an encroachment by structures onto or from the Lot; or

(c) a mistake or omission in describing the Lot or the Seller's title to it;

which is:

(d) immaterial; or

(e) material, but the Buyer elects to complete this contract;

the Buyer's only remedy against the Seller is for compensation, but only if claimed by the Buyer in writing on or before settlement.

(3) The Buyer may not delay settlement or withhold any part of the Balance Purchase Price because of any compensation claim under clause 7.5(2).

(4) If there is a material error, encroachment or mistake, the Buyer may terminate this contract before settlement.

7.6 Requirements of Authorities

(1) Subject to clause 7.6(5), any valid notice or order by any competent authority or Court requiring work to be done or money spent in relation to the Property ("**Work or Expenditure**") must be fully complied with:

(a) if issued before the Contract Date, by the Seller before the Settlement Date;

(b) if issued on or after the Contract Date, by the Buyer.

(2) If any Work or Expenditure that is the Seller's responsibility under clause 7.6(1)(a) is not done before the Settlement Date, the Buyer is entitled to claim the reasonable cost of work done by the Buyer in accordance with the notice or order referred to in clause 7.6(1) from the Seller after settlement as a debt.

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(3) Any Work or Expenditure that is the Buyer's responsibility under clause 7.6(1)(b), which is required to be done before the Settlement Date, must be done by the Seller unless the Buyer directs the Seller not to and indemnifies the Seller against any liability for not carrying out the work. If the Seller does the work, or spends the money, the reasonable cost of that Work or Expenditure must be added to the Balance Purchase Price.

(4) The Buyer may terminate this contract by notice to the Seller if there is an outstanding notice at the Contract Date under Section 246AG of the *Building Act 1975* that affects the Property. The Buyer may terminate this contract by notice to the Seller if there is an outstanding notice at the Contract Date under Sections 247 or 248 of the *Building Act 1975* or Sections 588 or 590 of the *Sustainable Planning Act 2009* that affects the Property or Land.

(5) Clause 7.6(1) does not apply to orders disclosed under Section 83 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*.

7.7 Property Adversely Affected

(1) If at the Contract Date:

(a) the Present Use is not lawful under the relevant town planning scheme;

(b) the Land is affected by a proposal of any competent authority to alter the dimensions of any Transport Infrastructure or locate Transport Infrastructure on the Land;

(c) access or any service to the Land passes unlawfully through other land;

(d) any competent authority has issued a current notice to treat, or notice of intention to resume, regarding any part of the Land;

(e) the Property is affected by the *Queensland Heritage Act 1992* or is included in the World Heritage List;

(f) the Property is declared acquisition land under the *Queensland Reconstruction Authority Act 2011*; or

(g) there is a charge against the Lot under s104 of the *Foreign Acquisitions and Takeovers Act 1975*,

and that has not been disclosed in this contract, the Buyer may terminate this contract by notice to the Seller given on or before settlement.

(2) If no notice is given under clause 7.7(1), the Buyer will be treated as having accepted the Property subject to all of the matters referred to in that clause.

(3) The Seller authorises the Buyer to:

(a) inspect records held by any authority, including Security Interests on the PPSR, relating to the Property or the Land; and

(b) apply for a certificate of currency of the Body Corporate's insurance from any insurer.

7.8 Dividing Fences

Notwithstanding any provision in the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, the Seller need not contribute to the cost of building any dividing fence between the Lot and any adjoining land owned by it. The Buyer waives any right to claim contribution from the Seller.

8. RIGHTS AND OBLIGATIONS UNTIL SETTLEMENT

8.1 Risk

The Property is at the Buyer's risk from 5pm on the first Business Day after the Contract Date.

8.2 Access

After reasonable notice to the Seller, the Buyer and its consultants may enter the Property:

(1) once to read any meter;
(2) for inspections under clause 4;
(3) once to inspect the Property before settlement; and
(4) once to value the Property before settlement.

8.3 Seller's Obligations After Contract Date

(1) The Seller must use the Property reasonably until settlement. The Seller must not do anything regarding the Property or Tenancies that may significantly alter them or result in later expense for the Buyer.

(2) The Seller must promptly upon receiving any notice, proceeding or order that affects the Property or requires work on the Property, give a copy to the Buyer.

(3) Without limiting clause 8.3(1), the Seller must not without the prior written consent of the Buyer, give any notice or seek or consent to any order that affects the Property or make any agreement affecting the Property that binds the Buyer to perform.

8.4 Body Corporate Meetings

(1) The Seller must promptly give the Buyer a copy of:

(a) any notice it receives of a proposed meeting of the Body Corporate to be held after the Contract Date; and

(b) resolutions passed at that meeting and prior to settlement.

(2) The Buyer may terminate this contract by notice in writing to the Seller given before settlement if it is materially prejudiced by:

(a) any resolution of the Body Corporate passed after the Contract Date, other than a resolution, details of which are disclosed to the Buyer in this contract; or

(b) where the Scheme is a subsidiary scheme, any resolution of a Body Corporate of a higher scheme.

(3) In clause 8.4(2) a resolution includes a decision of the Body Corporate Committee to consent to recording a new community management statement.

(4) If the Buyer is not given a copy of the resolutions before settlement, it may sue the Seller for damages.

8.5 Information Regarding the Property

Upon written request of the Buyer but in any event before settlement, the Seller must give the Buyer:

(1) copies of all documents relating to any unregistered interests in the Property;

(2) full details of the Tenancies to allow the Buyer to properly manage the Property after settlement;

(3) sufficient details (including the date of birth of each Seller who is an individual) to enable the Buyer to undertake a search of the PPSR;

Sample Only

8.6 Possession Before Settlement

If possession is given before settlement:

(1) the Buyer must maintain the Property in substantially its condition at the date of possession, fair wear and tear excepted;

(2) entry into possession is under a licence personal to the Buyer revocable at any time and does not:

(a) create a relationship of landlord and tenant; or

(b) waive the Buyer's rights under this contract;

(3) the Buyer must insure the Property to the Seller's satisfaction; and

(4) the Buyer indemnifies the Seller against any expense or damages incurred by the Seller as a result of the Buyer's possession of the Property.

8.7 Seller's Obligations After Contract Date

(1) the Seller must promptly upon receiving any notice, proceeding or order that affects the Property or requires work on the Property, give a copy to the Buyer.

(2) After the Contract Date, the Seller must not without the prior written consent of the Buyer, give any notice, seek or consent to any order or make an agreement that affects the Property.

9. PARTIES' DEFAULT

9.1 Seller and Buyer May Affirm or Terminate

Without limiting any other right or remedy of the parties including those under this contract, or any right at common law, if the Seller or Buyer, as the case may be, fails to comply with an Essential Term, or makes a fundamental breach of an intermediate term, the Seller (in the case of the Buyer's default) or the Buyer (in the case of the Seller's default) may affirm or terminate this contract.

9.2 If Seller Affirms

If the Seller affirms this contract under clause 9.1, it may sue the Buyer for:

(1) damages;

(2) specific performance; or

(3) damages and specific performance.

9.3 If Buyer Affirms

If the Buyer affirms this contract under clause 9.1, it may sue the Seller for:

(1) damages;

(2) specific performance; or

(3) damages and specific performance.

9.4 If Seller Terminates

If the Seller terminates this contract under clause 9.1, it may do all or any of the following:

(1) resume possession of the Property;

(2) forfeit the Deposit and any interest earned;

(3) sue the Buyer for damages;

(4) resell the Property.

9.5 If Buyer Terminates

If the Buyer terminates this contract under clause 9.1, it may do all or any of the following:

(1) recover the Deposit and any interest earned;

(2) sue the Seller for damages.

9.6 Seller's Resale

(1) If the Seller terminates this contract and resells the Property, the Seller may recover from the Buyer as liquidated damages:

(a) any deficiency in price on a resale; and

(b) its expenses connected with any repossession, any failed attempt to resell, and the resale;

provided the resale settles within 2 years of termination of this contract.

(2) Any profit on a resale belongs to the Seller.

9.7 Seller's Damages

The Seller may claim damages for any loss it suffers as a result of the Buyer's default, including its legal costs on an indemnity basis and the cost of any Work or Expenditure under clause 7.6(3).

9.8 Buyer's Damages

The Buyer may claim damages for any loss it suffers as a result of the Seller's default, including its legal costs on an indemnity basis.

9.9 Interest on Late Payments

(1) The Buyer must pay interest at the Default Rate:

(a) on any amount payable under this contract which is not paid when due; and

(b) on any judgement for money payable under this contract.

(2) Interest continues to accrue:

(a) under clause 9.9(1)(a), from the date it is due until paid; and

(b) under clause 9.9(1)(b), from the date of judgement until paid.

(3) Any amount payable under clause 9.9(1)(a) in respect of a period prior to settlement must be paid by the Buyer at settlement. If this contract is terminated or if any amount remains unpaid after settlement, interest continues to accrue.

(4) Nothing in this clause affects any other rights of the Seller under this contract or at law.

10. GENERAL

10.1 Seller's Agent

The Seller's Agent is appointed as the Seller's agent to introduce a Buyer.

10.2 Foreign Buyer Approval

The Buyer warrants that either:

(1) the Buyer's purchase of the Property is not a notifiable action; or

(2) the Buyer has received a no objection notification,

under the *Foreign Acquisitions and Takeovers Act 1975*.

10.3 Duty

The Buyer must pay all duty on this contract.

10.4 Notices

(1) Notices under this contract must be in writing and may be given by a party's Solicitor.

(2) Notices may be given by:

(a) delivering or posting to the other party or its solicitor; or

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(b) sending to the facsimile number or email address of the other party or its solicitor stated in the Reference Schedule or another facsimile number or email address specified in a notice given by the recipient to the sender.

*[**Note**: Whilst notices under this contract may be sent by email they are not 'given' until they are capable of being retrieved by the addressee at the nominated email address in accordance with s24 of the Electronic Transactions (Queensland) Act 2001.]*

(3) Posted notices will be treated as given 3 Business Days after posting.

(4) Notices sent by facsimile will be treated as given when the sender obtains a clear transmission report.

(5) Notices given after 5pm will be treated as given on the next Business Day.

(6) Notices or other written communications by a party's solicitor (for example, varying the Inspection Date, Finance Date or Settlement Date) will be treated as given with that party's authority.

10.5 Business Days

(1) If anything is required to be done on a day that is not a Business Day, it must be done instead on the next Business Day.

(2) If the Finance Date or Inspection Date fall on a day that is not a Business Day, then it falls on the next Business Day.

10.6 Rights After Settlement

Despite settlement and registration of the transfer, any term of this contract that can take effect after settlement or registration remains in force.

10.7 Further Acts

If requested by the other party, each party must, at its own expense, do everything reasonably necessary to give effect to this contract.

10.8 Severance

If any term or part of a term of this contract is or becomes legally ineffective, invalid or unenforceable in any jurisdiction it will be severed and the effectiveness, validity or enforceability of the remainder will not be affected.

10.9 Interpretation

(1) **Plurals and Genders**

Reference to:

(a) the singular includes the plural and the plural includes the singular;

(b) one gender includes each other gender;

(c) a person includes a Body Corporate; and

(d) a party includes the party's executors, administrators, successors and permitted assigns.

(2) **Parties**

(a) If a party consists of more than one person, this contract binds them jointly and each of them individually.

(b) A party that is a trustee is bound both personally and in its capacity as a trustee.

(3) **Statutes and Regulations**

Reference to statutes includes all statutes amending, consolidating or replacing them.

(4) **Inconsistencies**

If there is any inconsistency between any provision added to this contract and the printed provisions, the added provision prevails.

(5) **Headings**

Headings are for convenience only and do not form part of this contract or affect its interpretation.

11. ELECTRONIC SETTLEMENT

11.1 Application of Clause

(1) Clause 11 applies if the Buyer, Seller and each Financial Institution involved in the transaction agree to an Electronic Settlement and overrides any other provision of this contract to the extent of any inconsistency.

(2) Acceptance of an invitation to an Electronic Workspace is taken to be an agreement for clause 11.1(1).

(3) Clause 11 (except clause 11.5(2)) ceases to apply if either party gives notice under clause 11.5 that settlement will not be an Electronic Settlement.

11.2 Completion of Electronic Workspace

(1) The parties must:

(a) ensure that the Electronic Workspace is completed and all Electronic Conveyancing Documents and the Financial Settlement Schedule are Digitally Signed prior to settlement; and

(b) do everything else required in the Electronic Workspace to enable settlement to occur on the Settlement Date.

(2) If the parties cannot agree on a time for settlement, the time to be nominated in the Workspace is 4pm AEST.

(3) If any part of the Purchase Price is to be paid to discharge an Outgoing:

(a) the Buyer may, by notice in writing to the Seller, require that the amount is paid to the Buyer's Solicitor's trust account and the Buyer is responsible for paying the amount to the relevant authority;

(b) for amounts to be paid to destination accounts other than the Buyer's Solicitor's trust account, the Seller must give the Buyer a copy of the current account for the Outgoing to enable the Buyer to verify the destination account details in the Financial Settlement Schedule.

(4) If the Deposit is required to discharge any Encumbrance or pay an Outgoing at settlement:

(a) the Deposit Holder must, if directed by the Seller at least 2 Business Days prior to Settlement, pay the Deposit (and any interest accrued on investment of the Deposit) less commission as clear funds to the Seller's Solicitor;

(b) the Buyer and the seller authorise the Deposit Holder to make the payment in clause 11(4)(a);

(c) the Seller's Solicitor will hold the money as Deposit Holder under the Contract;

(d) the Seller and Buyer authorise the Seller's Solicitor to pay the money as directed by the Seller in accordance with the Financial Settlement Schedule.

11.3 Electronic Settlement

(1) Clauses 5.1(2) and 5.2 do not apply.

(2) Payment of the Balance Purchase Price electronically as directed by the Seller's Solicitor in the Financial Settlement Schedule satisfies the Buyer's obligation in clause 2.5(1) and 2.5(3)(f).

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(3) The Seller and Buyer will be taken to have complied with clause 2.5(3) (if applicable) if:
  (a) the Buyer complies with clause 2.5(3)(d);
  (b) the Financial Settlement Schedule specifies payment of the CGT Withholding Amount to the account nominated by the Deputy Commissioner for Taxation.

(4) The Seller will be taken to have complied with clauses 5.3(1)(b) and (c) if, at settlement, the Electronic Workspace contains Transfer Documents and (if applicable) releases of the Encumbrances (other than the releases of Encumbrances referred to in clause 11.3(5)) for Electronic Lodgement in the Land Registry.

(5) The Seller will be taken to have complied with clause 5.3(1)(c), (d), (e) and (f) if the Seller's Solicitor:
  (a) confirms in writing prior to settlement that it holds all relevant documents which are not suitable for Electronic Lodgement and all Keys (if requested under clause 5.3(1)(d)) in escrow on the terms contained in the QLS E-Conveyancing Guidelines; and
  (b) gives a written undertaking to send the documents and Keys (if applicable) to the Buyer or Buyer's Solicitor no later than the Business Day after settlement; and
  (c) if requested by the Buyer, provides copies of documents in the Seller's Solicitors possession.

(6) A party is not in default to the extent it is prevented from complying with an obligation because the other party or the other party's Financial Institution has not done something in the Electronic Workspace.

(7) Any rights under the contract or at law to terminate the contract may not be exercised during the time the Electronic Workspace is locked for Electronic Settlement.

11.4 Computer System Unavailable

(1) If settlement fails and cannot occur by 4pm AEST on the Settlement Date because a computer system operated by the Land Registry, Office of State Revenue, Reserve Bank, a Financial Institution or PEXA is inoperative, neither party is in default and the Settlement Date is deemed to be the next Business Day. Time remains of the essence.

(2) A party is not required to settle if Electronic Lodgement is not available. If the parties agree to Financial Settlement without Electronic Lodgement, settlement is deemed to occur at the time of Financial Settlement.

11.5 Withdrawal from Electronic Settlement

(1) Either party may elect not to proceed with an Electronic Settlement by giving written notice to the other party.

(2) A notice under clause 11.5(1) may not be given later than 5 Business Days before the Settlement Date unless an Electronic Settlement cannot be effected because:
  (a) the transaction is not a Qualifying Conveyancing Transaction; or
  (b) a party's solicitor is unable to complete the transaction due to death, a loss of legal capacity or appointment of a receiver or administrator (or similar) to their legal practice or suspension of their access to PEXA; or
  (c) the Buyer's or Seller's Financial Institution is unable to settle using PEXA.

(3) If clause 11.5(2) applies:
  (a) the party giving the notice must provide satisfactory evidence of the reason for the withdrawal; and
  (b) the Settlement Date will be extended to the date 5 Business Days after the Settlement Date.

11.6 Costs

Each party must pay its own fees and charges of using PEXA for Electronic Settlement.

11.7 Definitions for clause 11

In clause 11:

Digitally Sign and Digital Signature have the meaning in the ECNL.

ECNL means the Electronic Conveyancing National Law (Queensland).

Electronic Conveyancing Documents has the meaning in the *Land Title Act 1994*.

Electronic Lodgement means lodgement of a document in the Land Registry in accordance with the ECNL.

Electronic Settlement means settlement facilitated by PEXA.

Electronic Workspace means a shared electronic workspace within PEXA that allows the Buyer and Seller to affect Electronic Lodgement and Financial Settlement.

Financial Settlement means the exchange of value between Financial Institutions in accordance with the Financial Settlement Schedule.

Financial Settlement Schedule means the electronic settlement schedule within the Electronic Workspace listing the source accounts and destination accounts.

PEXA means the system operated by Property Exchange Australia Ltd for settlement of conveyancing transactions and lodgement of Land Registry documents.

Qualifying Conveyancing Transaction means a transaction that is not excluded for Electronic Settlement by the rules issued by PEXA, Office of State Revenue, Land Registry, or a Financial Institution involved in the transaction.

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[¶70-305] REIQ Contract for Commercial Lots in a Community Titles Scheme, third edition

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REIQ Contract for Commercial Lots in a Community Titles Scheme

Queensland Law Society

REIQ

Contract for Commercial Lots in a Community Titles Scheme

Third Edition

This document has been approved by The Real Estate Institute of Queensland Limited and the Queensland Law Society Incorporated as being suitable for the sale and purchase of Commercial Lots in a Community Titles Scheme in Queensland.

The Seller and Buyer agree to sell and buy the Property under this Contract.

REFERENCE SCHEDULE

Contract Date:

AGENT

NAME:

LICENCE NO: ABN/ACN:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

PARTIES

SELLER

NAME:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL: ABN:

NAME:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL: ABN:

SELLER'S SOLICITOR

or any other Solicitor notified to the Buyer

NAME:

REF: CONTACT:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

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BUYER

NAME:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL: ABN:

NAME:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL: ABN:

BUYER'S SOLICITOR

or any other Solicitor notified to the Seller

NAME:

REF: CONTACT:

ADDRESS:

SUBURB: STATE: POSTCODE:

PHONE: MOBILE: FAX: EMAIL:

PROPERTY

Lot Address:

Suburb: STATE: POSTCODE:

Description: Lot: on: ☐ BUP ☐ GTP ☐ SP

Scheme: Community Titles Scheme:

County: Parish:

Title Reference:

Local Government:

Present Use:

Excluded Fixtures:

Included Chattels:

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PRICE

Purchase Price: $

Deposit: $ Initial Deposit payable on the day the Buyer signs this contract unless another time is specified below:

$ Balance Deposit (if any) payable on:

Deposit Holder:

Deposit Holder's Trust Account BANK:

BSB:

ACCOUNT NO:

Default Interest Rate: % *If no figure is inserted, the Contract Rate applying at the Contract Date published by the Queensland Law Society Inc. will apply.*

FINANCE

Finance Amount: $ *Unless all of "Finance Amount", "Financier" and "Finance Date" are completed, this contract is not subject to finance and clause 3 does not apply.*

Financier: Finance Date:

BUILDING AND/OR PEST INSPECTION DATE

Inspection Date: *If "Inspection Date" is not completed, the contract is not subject to an inspection report and clause 4 does not apply.*

MATTERS AFFECTING PROPERTY

Title Encumbrances:

Is the Property sold subject to any Encumbrances? ☐ No ☐ Yes, listed below:

WARNING TO SELLER:
You are required to disclose all Title Encumbrances which will remain after settlement (for example, easements on your title and statutory easements for sewerage and drainage which may not appear on a title search). Failure to disclose these may entitle the Buyer to terminate the contract or to compensation. It is NOT sufficient to state "refer to title", "search will reveal", or similar.

ADDITIONAL BODY CORPORATE INFORMATION

Interest Schedule Lot Entitlement of Lot:

Aggregate Interest Schedule Lot Entitlement:

Contribution Schedule Lot Entitlement of Lot:

Aggregate Contribution Schedule Lot Entitlement:

INSURANCE POLICIES

Insurer: Policy No:

Building:

Public Liability:

Other:

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NEIGHBOURHOOD DISPUTES (DIVIDING FENCES AND TREES) ACT 2011

The Seller gives notice to the Buyer in accordance with Section 83 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* that the Lot:
(select whichever is applicable)

- [ ] is not affected by any application to, or an order made by, the Queensland Civil and Administrative Tribunal (QCAT) in relation to a tree on the Land or
- [ ] is affected by an application to, or an order made by, QCAT in relation to a tree on the Land, a copy of which has been given to the Buyer prior to the Buyer signing the contract.

***WARNING:** Failure to comply with s83 Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 by giving a copy of an order or application to the Buyer (where applicable) prior to the Buyer signing the contract will entitle the Buyer to terminate the contract prior to Settlement.*

GST TABLE

GOODS AND SERVICES TAX - WARNING

Marking the GST Items in the GST Table may have significant consequences for the Seller and Buyer. The Seller and Buyer should seek professional advice about the completion of the GST Items and not rely on the Agent to complete the GST items.

Notes to Completion:

A. Only **1** box in the selected item must be marked.

B. If the Yes box in item GST 1 is marked:
- items GST2 and GST3 must not be marked;
- despite any markings of items GST2 and GST3, clauses **11.4**, **11.5** and **11.6** do not apply.

C. If the Yes box in item GST2 is marked:
- item GST1 and GST3 must not be marked;
- despite any marking of items GST1 and GST3, clauses **11.4**, **11.5** and **11.7** do not apply.

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GST1 GOING CONCERN

***WARNING**: There are strict requirements for the sale of a Going Concern under the GST Act. If in doubt about complying with those provisions, seek professional advice before marking this item.*

Is this a sale of a Going Concern? Yes [ ]

If Yes, clause **11.7** (If the Supply is a Going Concern) applies.

Otherwise clause **11.7** (If the Supply is a Going Concern) does not apply.

If the Yes box is marked, do not complete items GST2 and GST3.

GST2 MARGIN SCHEME

Is the Margin Scheme to apply to the sale of the Property? Yes [ ]

If Yes, clause **11.6** (Margin Scheme) applies.

Otherwise clause **11.6** (Margin Scheme) does not apply.

The Seller must not apply the Margin Scheme to the Supply of the Property if clause **11.6** does not apply.

If the Yes box is marked, do not complete items GST1 and GST3.

GST3 INCLUSIVE OR EXCLUSIVE PURCHASE PRICE

(Do not complete item GST3 if the item GST1 (Going Concern) or item GST2 (Margin Scheme) are marked Yes.)

Does the Purchase Price include GST? **Mark 1 box only**

Yes [ ] If Yes, clause **11.4** (Purchase Price Includes GST) applies.

No [ ] If No, clause **11.5** (Purchase Price Does Not Include GST) applies.

If neither box is marked or both boxes are marked, clause **11.4** (Purchase Price Includes GST) applies.

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*COMMERCIAL TENANCY SCHEDULE**

**Attach further Schedule if insufficient space.*

LEASE 1

Name of Tenant:

Use: Location/Tenancy No:

Area of Tenancy (m^2approx): Current Rent per Annum: $

☐ inclusive of outgoings ☐ exclusive of outgoings

Current Commencement Date: Current Term:

Remaining Option/s: Option 1 Term: years

Option 2 Term: years

Option 3 Term: years

Tenant Car Park: No: Rate $ per ☐ annum ☐ month

LEASE 2

Name of Tenant:

Use: Location/Tenancy No:

Area of Tenancy (m^2approx): Current Rent per Annum:

☐ inclusive of outgoings ☐ exclusive of outgoings

Current Commencement Date: Current Term:

Remaining Option/s: Option 1 Term: years:

Option 2 Term: years:

Option 3 Term: years:

Tenant Car Park: No: Rate $ per ☐ annum ☐ month

*SERVICE AGREEMENT SCHEDULE**

** Attach further Schedule if insufficient space.*

CONTRACT 1

Contractor:

Service performed:

Cost: $ per ☐ annum ☐ quarter ☐ month

CONTRACT 2

Contractor:

Service performed:

Cost: $ per ☐ annum ☐ quarter ☐ month

CONTRACT 3

Contractor:

Service performed:

Cost: $ per ☐ annum ☐ quarter ☐ month

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SELLER'S DISCLOSURE

WARNING: *The Seller is taken to have knowledge of significant Body Corporate matters that may affect the Buyer, where the Seller ought reasonably to be aware of those matters.*

[Section 223(4) *Body Corporate and Community Management Act 1997*]

The Seller gives notice to the Buyer of the following matters:

(a) LATENT OR PATENT DEFECTS IN COMMON PROPERTY OR BODY CORPORATE ASSETS

[Sections 223(2)(a) and 223(2)(b) *Body Corporate and Community Management Act 1997*] Annex details of disclosure made by the Seller (if any).

(b) ACTUAL CONTINGENT OR EXPECTED LIABILITIES OF BODY CORPORATE

[Sections 223(2)(c) and 223(2)(d) *Body Corporate and Community Management Act 1997*]. Annex details of disclosure made by the Seller (if any).

(c) CIRCUMSTANCES IN RELATION TO AFFAIRS OF THE BODY CORPORATE

[Sections 223(3) *Body Corporate and Community Management Act 1997*]. Annex details of disclosure made by the Seller (if any).

(d) EXCEPTIONS TO STATEMENTS IN CLAUSE 7.4(2)

Annex details of disclosure made by the Seller (if any).

(e) PROPOSED BODY CORPORATE RESOLUTIONS (CLAUSE 8.4)

Annex details of disclosure made by the Seller (if any).

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The REIQ Terms of Contract for Commercial Lots in a Community Titles Scheme (Pages 8-17)
Third Edition Contain the Terms of this Contract

SPECIAL CONDITIONS

SETTLEMENT

Settlement Date:

Or the next Business Day if that is not a Business Day in the Place for Settlement.

Place for Settlement:

If Brisbane is inserted, this is a reference to Brisbane CBD.

SIGNATURES

Seller: ______________________ Witness: ______________________

Seller: ______________________ Witness: ______________________

Buyer: ______________________ Witness: ______________________

Buyer: ______________________ Witness: ______________________

Deposit Holder: ______________________

Who acknowledges having received the Initial Deposit and agrees to hold that amount and any Balance Deposit when received as Deposit Holder for the parties as provided in the Contract.

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TERMS OF CONTRACT

For Commercial Lots in a Community Titles Scheme

1. DEFINITIONS

1.1 In this Contract:

(1) terms in **bold** in the Reference Schedule and the Disclosure Statement have the meanings shown opposite them unless the context requires otherwise; and

(a) "**Balance Purchase Price**" means the Purchase Price, less the Deposit, adjusted under clause 2.5;

(b) "**Bank**" means an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cth);

(c) "**Body Corporate**" means the body corporate of the Scheme;

(d) "**Body Corporate Debt**" has the meaning in the Regulation Module but excludes the Body Corporate Levies for the period which includes the Settlement Date;

(e) "**Body Corporate Levies**" means regular periodic contributions levied on the owner of the Lot (including, if applicable, levied under an exclusive use by-law) excluding any Special Contribution;

(f) "**Bond**" includes any security for payment of Rent or other monies or performance of any obligation pursuant to any Lease;

(g) "**Building**" means any building that forms part of the Lot or in which the Lot is situated;

(h) "**Business Day**" means a day other than:

(i) a Saturday or Sunday;

(ii) a public holiday in the Place for Settlement; and

(iii) a day in the period 27 to 31 December (inclusive);

(i) "**Commercial Tenancies**" means the tenancies referred to in the Commercial Tenancies Schedule and any additional tenancies granted by the Seller with the Buyer's consent under clause 10.6(1)(a);

(j) "**Commercial Tenancy Documents**" means all agreements, deeds of covenant and other documents relating to the Commercial Tenancies;

(k) "**Contractor Date**" or "**Date of Contract**" means the date inserted in the Reference Schedule.

(l) "**Contractor**" means any party performing services under a Service Agreement;

(m) "**Court**" includes any tribunal established under statute;

(n) "**Disclosure Statement**" means the statement under section 206 (existing lot) or section 213 (proposed lot) of the *Body Corporate and Community Management Act 1997*;

(o) "**Encumbrances**" includes:

(i) unregistered encumbrances

(ii) statutory encumbrances; and

(iii) Security Interests.

(p) "**Essential Term**" includes, in the case of breach by:

(i) the Buyer: clauses 2.1, 2.4(1), 5.1 and 6.1; and

(ii) the Seller: clauses 5.1, 5.3(1)(a) - (d), 5.3(1)(e)(ii) & (iii), 5.7 and 6.1;

but nothing in this definition precludes a Court from finding other terms to be essential;

(q) "**Exclusive Use Areas**" means parts of the common property for the Scheme allocated to the Lot under an exclusive use by-law;

(r) "**Financial Institution**" means a Bank, building society or credit union;

(s) "**GST**" means the goods and services tax under the *GST Act*;

(t) "**GST Act**" means *A New Tax System (Goods and Services Tax) Act* and includes other GST related legislation;

(u) "**Improvements**" means fixed structures in the Lot (such as stoves, hot water systems, fixed carpets, curtains, blinds and their fittings, clothes lines,fixed satellite dishes and television antennae, in-ground plants) but does not include the Reserved Items;

(v) "**ITAA**" means the *Income Tax Assessment Act 1936* ("**1936 Act**") and the *Income Tax Assessment Act 1997* ("**1997 Act**"), or if a specific provision is referred to, the Act which contains the provision; however if a specific provision of the 1936 Act is referred to which has been replaced by a provision of the 1997 Act, the reference must be taken to be to the replacement provision;

(w) "**Keys**" means keys, codes or devices in the Seller's possession or control for all locks or security systems on the Property or necessary to access the Property;

(x) "**Land**" means the scheme land for the Scheme;

(y) "**Outgoings**" means:

(i) rates or charges on the Lot by any competent authority (for example, council rates, water rates, fire service levies);

(ii) land tax; and

(iii) Body Corporate Levies;

(z) "**PPSR**" means the Personal Property Securities Register established under the *Personal Property Securities Act 2009* (Cth);

(aa) "**Property**" means:

(i) the Lot;

(ii) the right to any Exclusive Use Areas;

(iii) the Improvements;

(iv) the Included Chattels;

(bb) "**Regulation Module**" means the regulation module for the Scheme;

(cc) "**Rent**" means any periodic amount, including outgoings, payable under the Tenancies;

(dd) "**Reserved Items**" means the Excluded Fixtures and all chattels in the Lot and Exclusive Use Areas other than the Included Chattels;

(ee) "**Scheme**" means the community titles scheme containing the Lot;

(ff) "**Security Interests**" means all security interests registered on the PPSR over Included Chattels and Improvements;

(gg) "**Service Agreement**" means any agreement between the Seller and another party in connection with services performed for the benefit of the Property and set out in the Service Agreement Schedule;

(hh) "**Service Agreement Documents**" means the Service Agreements and all other documents relating to the Service Agreements;

(ii) "**Site Value**" means:

(i) in the case of non-rural land, site value under the *Land Valuation Act 2010;* or

(ii) in the case of rural land, the unimproved value of the land under the *Land Valuation Act 2010;*

(jj) "**Special Contribution**" means an amount: levied by the Body Corporate under the Regulation Module for a liability for which no provision or inadequate provision has been made in the budget of the Body Corporate;

(kk) "**Tenant**" means a Tenant under the Commercial Tenancies;

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(ll) "**Transfer Documents**" means:

(i) the form of transfer under the *Land Title Act 1994* required to transfer title in the Lot to the Buyer; and

(ii) any other document to be signed by the Seller necessary for stamping or registering the transfer; and

(mm) "**Transport Infrastructure**" has the meaning defined in the *Transport Infrastructure Act 1994*.

1.2 Words and phrases defined in the *Body Corporate and Community Management Act 1997* have the same meaning in this contract unless the context indicates otherwise.

2. PURCHASE PRICE

2.1 Deposit

(1) The Buyer must pay the Deposit to the Deposit Holder at the times shown in the Reference Schedule. The Deposit Holder will hold the Deposit until a party becomes entitled to it.

(2) The Buyer will be in default if it:

(a) does not pay the Deposit when required;

(b) pays the Deposit by post-dated cheque; or

(c) pays the Deposit by cheque which is dishonored on presentation.

(3) The Seller may recover from the Buyer as a liquidated debt any part of the Deposit which is not paid when required.

2.2 Investment of Deposit

(1) If:

(a) the Deposit Holder is instructed by either the Seller or the Buyer; and

(b) it is lawful to do so;

the Deposit Holder must:

(c) invest as much of the Deposit as has been paid with any Financial Institution in an interest-bearing account in the names of the parties; and

(d) provide the parties' tax file numbers to the Financial Institution (if they have been supplied).

(2) If there is income from the investment of the Deposit in respect of any financial year to which no beneficiary is presently entitled for the purpose of Division 6 of Part III of ITAA as at 30 June of that financial year:

(a) the parties must pay to the Deposit Holder the tax assessed to it in respect of that income (other than tax in the nature of a penalty for late lodgement ("**Penalty**") which the Deposit Holder must bear itself) and all expenses of the Deposit Holder in connection with the preparation and lodgement of the tax return, payment of the tax, and furnishing to the parties the information and copy documents they reasonably require;

(b) if the tax (other than Penalty) and the Deposit Holder's expenses are not paid to the Deposit Holder on demand, it may deduct them from the Deposit and income;

(c) if tax is not assessed on the income when the Deposit and income are due to be paid to the party entitled, the Deposit Holder may deduct and retain its estimate of the assessment; and

(d) as between the parties, the tax must be paid by the party receiving the income on which the tax is assessed, and the Deposit Holder's expenses.

2.3 Entitlement to Deposit and Interest

(1) The party entitled to receive the Deposit is:

(a) if this contract settles, the Seller;

(b) if this contract is terminated without default by the Buyer, the Buyer; and

(c) if this Contract is terminated owing to the Buyer's default, the Seller.

(2) The interest on the Deposit must be paid to the person who is entitled to the Deposit.

(3) If this contract is terminated, the Buyer has no further claim once it receives the Deposit and interest unless the termination is due to the Seller's default or breach of warranty.

(4) The Deposit is invested at the risk of the party who is ultimately entitled to it.

2.4 Payment of Balance Purchase Price

(1) On the Settlement Date, the Buyer must pay the Balance Purchase Price by Bank cheque as the Seller or the Seller's Solicitor directs.

(2) Despite any other provision of this contract, reference to a "Bank cheque" in clause 2.4(1):

(a) includes a cheque drawn by a building society or credit union on itself;

(b) does not include a cheque drawn by a building society or credit union on a Bank;

and the Seller is not obliged to accept a cheque referred to in clause 2.4(2)(b) on the Settlement Date.

2.5 Adjustments to Balance Purchase Price

(1) The Seller is liable for Outgoings and is entitled to Rent up to and including the Settlement Date. The Buyer is liable for Outgoings and is entitled to Rent after the Settlement Date.

(2) Subject to clauses 2.5(3), 2.5(4), 2.5(5), 2.5(6), 2.5(7), 2.5(15) and 2.5(18), Outgoings for periods including the Settlement Date must be adjusted:

(a) for those paid, on the amount paid;

(b) for those assessed but unpaid, on the amount payable (excluding any discount); and

(c) for those not assessed:

(i) on the amount the relevant authority or the Body Corporate advises will be assessed (excluding any discount); or

(ii) if no advice on the assessment to be made is available, on the amount of the latest assessment (excluding any discount).

(3) If there is no separate assessment of rates for the Lot at the Settlement Date and the Local Government informs the Buyer that it will not apportion rates between the Buyer and the Seller, then:

(a) the amount of rates to be adjusted is that proportion of the assessment equal to the ratio of the interest schedule lot entitlement of the Lot to the aggregate interest schedule lot entitlement of the Scheme; and

(b) if an assessment of rates includes charges imposed on a "per lot" basis, then the portion of those charges to be adjusted is the amount assessed divided by the number of lots in that assessment.

(4) Land tax must be adjusted:

(a) on the assessment that the Office of State Revenue would issue for the land tax year current at the Settlement Date if the Seller was one natural person resident in Queensland and the Lot was the Seller's only land; or

(b) based on the assumptions in clause 2.5(4)(a), if there is no separate Site Value for the Lot, on a notional Site Value equal to:

$$\text{Site Value of the Land} \times \frac{\text{Interest schedule lot entitlement of Lot}}{\text{Aggregate interest schedule lot entitlement}}$$

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(5) If land tax is unpaid at the Settlement Date and the Office of State Revenue advises that it will issue a final clearance for the Lot on payment of a specified amount, then the Buyer may deduct the specified amount from the Balance Purchase Price at settlement and must pay it promptly to the Office of State Revenue. If an amount is deducted under this clause, then land tax will be treated as paid at the Settlement Date for the purposes of clause 2.5(2).

(6) Any Outgoings assessable on the amount of water used must be adjusted on the charges that would be assessed on the total water usage for the assessment period, determined by assuming that the actual rate of usage shown by the meter reading made before settlement continues throughout the assessment period. The Buyer must obtain and pay for the meter reading.

(7) If any Outgoings are assessed but unpaid at the Settlement Date, then the Buyer may deduct the amount payable from the Balance Purchase Price at settlement and pay it promptly to the relevant authority or the Body Corporate, as appropriate. If an amount is deducted under this clause, the relevant Outgoing will be treated as paid at the Settlement Date for the purpose of clause 2.5(2).

(8) Arrears of Rent for any rental period ending on or before the Settlement Date belong to the Seller and are not adjusted at settlement.

(9) Unpaid Rent for the rental period including both the Settlement Date and the following day ("**Current Period**") is not adjusted until it is paid.

(10) Rent already paid for the Current Period or beyond must be adjusted at settlement.

(11) If Rent payments are reassessed after the Settlement Date for periods including the Settlement Date, any additional Rent payment from a Tenant or refund due to a Tenant must be apportioned under clauses 2.5(8), 2.5(9), 2.5(10) and 2.5(11).

(12) Payments under clause 2.5(11) must be made within 14 days after notification by one party to the other but only after any additional payment from a Tenant has been received.

(13) The Seller is liable for:

(a) any Special Contribution for which a levy notice has been issued on or before the Contract Date; and

(b) any other Body Corporate Debt (including any penalty or recovery cost resulting from non-payment of a Body Corporate Debt) owing in respect of the Lot at settlement.

The Buyer is liable for any Special Contribution levied after the Contract Date.

(14) If an amount payable by the Seller under clause 2.5(13) is unpaid at the Settlement Date, the Buyer may deduct the specified amount from the Balance Purchase Price at settlement and must pay it promptly to the Body Corporate.

(15) For the purposes of clause 2.5(13), an amount payable under an exclusive use by-law will be treated as levied on the date it is due.

(16) The cost of Bank cheques payable at Settlement:

(a) to the Seller or its mortgagee are the responsibility of the Buyer; and

(b) to parties other than the Seller or its mortgagee are the responsibility of the Seller.

(17) The Seller is not entitled to require payment of the Balance Purchase Price by means other than Bank cheque without the consent of the Buyer.

(18) Upon written request by the Buyer, the Seller will, prior to Settlement, give the Buyer a written statement, supported by reasonable evidence, of:

(a) all Outgoings and all Rent for the Property to the extent they are not capable of discovery by search or enquiry at any office of public record or pursuant to the provisions of any statute; and

(b) any other information which the Buyer may reasonably require for the purpose of calculating or apportioning any Outgoings or Rent under this clause 2.5.

If the Seller becomes aware of a change to the information provided the Seller will as soon as practicably provide the updated information to the Buyer.

3. FINANCE

3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount from the Financier by the Finance Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain approval.

3.2 The Buyer must give notice to the Seller that:

(1) approval has not been obtained by the Finance Date and the Buyer terminates this contract; or

(2) the finance condition has been either satisfied or waived by the Buyer.

3.3 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 3.2 by 5pm on the Finance Date. This is the Seller's only remedy for the Buyer's failure to give notice.

3.4 The Seller's right under clause 3.3 is subject to the Buyer's continuing right to give written notice to the Seller of satisfaction, termination or waiver pursuant to clause 3.2.

4. BUILDING AND PEST INSPECTION REPORTS

4.1 This contract is conditional on the Buyer obtaining a written building report and a written pest report (which may be a single report) on the Property by the Inspection Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain the reports (subject to the right of the Buyer to elect to obtain only one of the reports).

4.2 The Buyer must give notice to the Seller that:

(1) a satisfactory report under clause 4.1 has not been obtained by the Inspection Date and the Buyer terminates this contract. The Buyer must act reasonably; or

(2) clause 4.1 has been either satisfied or waived by the Buyer.

4.3 If the Buyer terminates this contract and the Seller asks the Buyer for a copy of the building and pest reports, the Buyer must give a copy of each report to the Seller without delay.

4.4 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 4.2 by 5pm on the Inspection Date. This is the Seller's only remedy for the Buyer's failure to give notice.

4.5 The Seller's right under clause 4.4 is subject to the Buyer's continuing right to give written notice to the Seller of satisfaction, termination or waiver pursuant to clause 4.2.

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5. SETTLEMENT

5.1 Time and Date

(1) Settlement must occur between 9am and 4pm AEST on the Settlement Date.

(2) If the parties do not agree on where settlement is to occur, it must take place in the Place for Settlement at the office of a solicitor or Financial Institution nominated by the Seller, or, if the Seller does not make a nomination, at the land registry office in or nearest to the Place for Settlement.

5.2 Transfer Documents

(1) The Transfer Documents must be prepared by the Buyer's Solicitor and delivered to the Seller a reasonable time before the Settlement Date.

(2) If the Buyer pays the Seller's reasonable expenses, it may require the Seller to produce the Transfer Documents at the Office of State Revenue nearest the Place for Settlement for stamping before settlement.

5.3 Documents and Keys at Settlement

(1) In exchange for payment of the Balance Purchase Price, the Seller must deliver to the Buyer at settlement:

(a) any instrument of title for the Lot required to register the transfer to the Buyer; and

(b) unstamped Transfer Documents capable of immediate registration after stamping; and

(c) any instrument necessary to release any Encumbrance over the Property in compliance with the Seller's obligation in clause 7.2; and

(d) if requested by the Buyer not less that 2 clear Business Days before the Settlement Date, the Keys; and

(e) if there are Commercial Tenancies or Service Agreements:

(i) the Seller's copy of any Commercial Tenancy Documents or Service Agreement Documents;

(ii) a notice to each Tenant and Contractor advising of the sale and assignment of rights under this contract in the form required by law (if applicable); and

(iii) any notice required by law to transfer to the Buyer the Seller's interest in any Bond.

(2) If the Keys are not delivered at Settlement under clause 5.3 (1)(d), the Seller must deliver the Keys to the Buyer. The Seller may discharge its obligation under this provision by authorising the Seller's Agent to release the Keys to the Buyer.

5.4 Assignment of Covenants and Warranties

At Settlement, the Seller assigns to the Buyer, the benefit of all:

(1) covenants by the Tenant under the Commercial Tenancies;

(2) guarantees and Bonds supporting the Commercial Tenancies; and

(3) the Seller's rights under the Service Agreements;

(4) manufacturers' warranties for the Included Chattels;

(5) builders' warranties on the improvements.

to the extent that they are assignable and the Buyer accepts the assignment. However, the right to recover arrears of Rent is not assigned to the Buyer and section 117 of the *Property Law Act 1974* does not apply.

5.5 Bonds

On settlement, the Seller will:

(1) allow as a deduction from the Balance Purchase Price any Bond received by the Seller from any Tenant and held by the Seller;

(2) transfer control to the Buyer over any trust account or fund held on trust for Tenants as Bond; and

(3) assign to the Buyer, Bank guarantees held in respect of any Tenant as a Bond. If any Bank guarantee is not assignable, the Seller will enforce the guarantee at the written direction and expense of the Buyer for the Buyer's benefit.

5.6 Indemnity

The Buyer indemnifies the Seller in respect of claims by Tenants for the return of Bonds held or controlled by the Seller before settlement which are dealt with under clause 5.5 of this contract.

5.7 Possession of Property and Title to Included Chattels

On the Settlement Date, in exchange for the Balance Purchase Price, the Seller must give the Buyer vacant possession of the Lot and Exclusive Use Areas except for the Tenancies. Title to the Included Chattels passes at settlement.

5.8 Reservations

(1) The Seller must remove the Reserved Items from the Property before settlement.

(2) The Seller must repair at its expense any damage done to the Property in removing the Reserved Items. If the Seller fails to do so, the Buyer may repair that damage.

(3) Any Reserved Items not removed before settlement will be considered abandoned and the Buyer may, without limiting its other rights, complete this contract and appropriate those Reserved Items or dispose of them in any way.

(4) The Seller indemnifies the Buyer against any damages and expenses resulting from the Buyer's actions under clauses 5.8(2) or 5.8(3).

6. TIME

6.1 Time is of the essence of this contract, except regarding any agreement between the parties on a time of day for settlement.

6.2 Suspension of Time

(1) This clause 6.2 applies if a party is unable to perform a Settlement Obligation solely as a consequence of a Natural Disaster but does not apply where the inability is attributable to:

(a) damage to, destruction of or diminution in value of the Property or other property of the Seller or Buyer; or

(b) termination or variation of any agreement between a party and another person whether relating to the provision of finance, the release of an Encumbrance, the sale or purchase of another property or otherwise.

(2) Time for the performance of the parties' Settlement Obligations is suspended and ceases to be of the essence of the contract and the parties are deemed not to be in breach of their Settlement Obligations.

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(3) An Affected Party must take reasonable steps to minimise the effect of the Natural Disaster on its ability to perform its Settlement Obligations.

(4) When an Affected Party is no longer prevented from performing its Settlement Obligations due to the Natural Disaster, the Affected Party must give the other party a notice of that fact, promptly.

(5) When the Suspension Period ends, whether notice under clause 6.2(4) has been given or not, either party may give the other party a Notice to Settle.

(6) A Notice to Settle must be in writing and state:

(a) that the Suspension Period has ended; and

(b) a date, being not less than 5 nor more than 10 Business Days after the date the Notice to Settle is given, which shall become the Settlement Date;

(c) that time is of the essence.

(7) When Notice to Settle is given, time is again of the essence of the contract.

(8) In this clause 6.2:

(a) "Affected Party" means a party referred to in clause 6.2(1);

(b) "Natural Disaster" means a tsunami, flood, cyclone, earthquake, bushfire or other act of nature;

(c) "Settlement Obligations" means, in the case of the Buyer, its obligations under clauses 2.5(1) and 5.1(1) and, in the case of the Seller, its obligations under clauses 5.1(1), 5.3(1)(a)-(e) and 5.7;

(d) "Suspension Period" means the period during which the Affected Party (or if both the Buyer and Seller are Affected Parties, either of them) remains unable to perform a Settlement Obligation solely as a consequence of a Natural Disaster.

7. MATTERS AFFECTING THE PROPERTY

7.1 Title

The Lot is sold subject to the *Body Corporate and Community Management Act 1997* and the by-laws of the Body Corporate.

7.2 Encumbrances

The Property is sold free of all Encumbrances other than the Title Encumbrances, Tenancies, statutory easements implied by part 6A of the *Land Title Act 1994* and interests registered on the common property for the Scheme.

7.3 Requisitions

The Buyer may not deliver any requisitions or enquiries on title.

7.4 Seller's Warranties

(1) The Seller warrants that, except as disclosed in this contract, at settlement:

(a) it will be the registered owner of an estate in fee simple in the Lot and will own the Improvements and Included Chattels;

(b) it will be capable of completing this contract (unless the Seller dies or becomes mentally incapable after the Contract Date); and

(c) there will be no unsatisfied judgment, order (except for an order referred to in clause 7.6(1)(b)) or writ affecting the Property.

(2) The Seller warrants that, except as disclosed in this contract, at the Contract Date and at settlement there are no current or threatened claims, notices or proceedings that may lead to a judgement, order or writ affecting the Property.

(3) The Seller warrants that, except as disclosed in this contract, at the Contract Date:

(a) there is no unregistered lease, easement or other right capable of registration and which is required to be registered to give indefeasibility affecting the common property or Body Corporate assets;

(b) there is no proposal to record a new community management statement for the Scheme and it has not received a notice of a meeting of the Body Corporate to be held after the Contract Date or notice of any proposed resolution or a decision of the Body Corporate to consent to the recording of a new community management statement for the Scheme;

(c) all Body Corporate consents to improvements made to common property and which benefit the Lot, or the registered owner of the Lot, are in force; and

(d) the Additional Body Corporate Information is correct (if completed).

(4) If the Seller breaches a warranty in clause 7.4(1) or clause 7.4(2), the Buyer may terminate this contract by notice to the Seller.

(5) If:

(a) the Seller breaches a warranty in clause 7.4(3); or

(b) the Additional Body Corporate Information is not completed;

and, as a result, the Buyer is materially prejudiced, the Buyer may terminate this contract by notice to the Seller given with 14 days after the Contract Date but may not claim damages or compensation.

(6) Clauses 7.4(4) and 7.4(5) do not restrict and statutory rights the Buyer may have which cannot be excluded by this contract.

(7) (a) The Seller warrants that, except as disclosed in this contract or a notice is given by the Seller to the Buyer under the *Environmental Protection Act 1994* ("**EPA**"), at the Contract Date:

(i) there is no outstanding obligation on the Seller to give notice to the administering authority under EPA of notifiable activity being conducted on the Land; and

(ii) the Seller is not aware of any facts or circumstances that may lead to the Land being classified as contaminated land within the meaning of EPA.

(b) If the Seller breaches a warranty in clause 7.4(7), the Buyer may:

(i) terminate this contract by notice in writing to the Seller given no later than 2 Business Days before the Settlement Date; or

(ii) complete this contract and claim compensation, but only if the Buyer claims it in writing before the Settlement Date.

(8) The Seller does not warrant that the Present Use is lawful.

7.5 Survey and Mistake

(1) The Buyer may survey the Lot.

(2) If there is:

(a) an error in the boundaries or area of the Lot;

(b) an encroachment by structures onto or from the Lot; or

(c) a mistake or omission in describing the Lot or the Seller's title to it;

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which is:

(d) immaterial; or

(e) material, but the Buyer elects to complete this contract;

the Buyer's only remedy against the Seller is for compensation, but only if claimed by the Buyer in writing on or before settlement.

(3) The Buyer may not delay settlement or withhold any part of the Balance Purchase Price because of any compensation claim under clause 7.5(2).

(4) If there is a material error, encroachment or mistake, the Buyer may terminate this contract before settlement.

7.6 Requirements of Authorities

(1) Subject to clause 7.6(5), any valid notice or order by any competent authority or Court requiring work to be done or money spent in relation to the Property ("**Work or Expenditure**") must be fully complied with:

(a) if issued before the Contract Date, by the Seller before the Settlement Date;

(b) if issued on or after the Contract Date, by the Buyer.

(2) If any Work or Expenditure that is the Seller's responsibility under clause 7.6(1)(a) is not done before the Settlement Date, the Buyer is entitled to claim the reasonable cost of work done by the Buyer in accordance with the notice or order referred to in clause 7.6(1) from the Seller after settlement as a debt.

(3) Any Work or Expenditure that is the Buyer's responsibility under clause 7.6(1)(b), which is required to be done before the Settlement Date, must be done by the Seller unless the Buyer directs the Seller not to and indemnifies the Seller against any liability for not carrying out the work. If the Seller does the work, or spends the money, the reasonable cost of that Work or Expenditure must be added to the Balance Purchase Price.

(4) The Buyer may terminate this contract by notice to the Seller if there is an outstanding notice at the Contract Date under section 246AG of the *Building Act 1975* that affects the Property. The buyer may terminate this contract by notice to the Seller if there is an outstanding notice at the Contract Date under sections 247 or 248 of the *Building Act 1975* or sections 588 or 590 of the *Sustainable Planning Act 2009* that affects the Property or Land.

(5) Clause 7.6(1) does not apply to orders disclosed under section 83 or the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011.*

7.7 Property Adversely Affected

(1) If at the Contract Date:

(a) the Present Use is not lawful under the relevant town planning scheme;

(b) the Land is affected by a proposal of any competent authority to alter the dimensions of any Transport Infrastructure or locate Transport Infrastructure on the Land;

(c) access or any service to the Land passes unlawfully through other land;

(d) any competent authority has issued a current notice to treat, or notice of intention to resume, regarding any part of the Land;

(e) the Property is affected by the *Queensland Heritage Act 1992* or is included in the World Heritage List; or

(f) the Property is declared acquisition land under the *Queensland Reconstruction Authority Act 2011;*

and that has not been disclosed in this contract, the Buyer may terminate this contract by notice to the Seller given no later than 2 Business Days before the Settlement Date.

(2) If no notice is given under clause 7.7(1), the Buyer will be treated as having accepted the Property subject to all of the matters referred to in that clause.

(3) The Seller authorises the Buyer to:

(a) inspect records held by any authority, including Security Interests on the PPSR, relating to the Property or the Lot; and

(b) apply for a certificate of currency of the Body Corporate's insurance from any insurer.

7.8 Dividing Fences

Notwithstanding any other provision in this contract, the Seller need not contribute to the cost of construction of any dividing fence between the Lot and any adjoining land owned by it.The Buyer waives any right to claim contribution from the Seller.

8. RIGHTS AND OBLIGATIONS UNTIL SETTLEMENT

8.1 Risk

The Property is at the Buyer's risk from 5pm on the first Business Day after the Contract Date.

8.2 Access

After reasonable notice to the Seller, the Buyer and its consultants may enter the Property:

(1) once to read any meter;

(2) for inspections under clause 4;

(3) once to inspect the Property before settlement; and

(4) once to value the Property before settlement.

8.3 Seller's Obligations After Contract Date

(1) The Seller must use the Property reasonably until settlement. The Seller must not do anything regarding the Property or Commercial Tenancies that may significantly alter them or result in later expense for the Buyer.

(2) The Seller must promptly upon receiving any notice, proceeding or order that affects the Property or requires work on the Property, give a copy to the Buyer.

(3) Without limiting clause 8.3(1), the Seller must not without prior written consent of the Buyer, give any notice or seek or consent to any order that affects the Property or make any agreement affecting the Property that binds the Buyer to perform.

8.4 Body Corporate Meetings

(1) The Seller must promptly give the Buyer a copy of:

(a) any notice it receives of a proposed meeting of the Body Corporate to be held after the Contract Date; and

(b) resolutions passed at that meeting and prior to settlement.

(2) The Buyer may terminate this Contract by Notice in writing to the Seller given before settlement if it is materially prejudiced by:

(a) any resolution of the Body Corporate passed after the Contract Date, other than a resolution, details of which are disclosed to the Buyer in this Contract; or

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(b) where the Scheme is a subsidiary scheme, any resolution of a body corporate of a higher scheme.

(3) In clause 8.4(2) a resolution includes a decision of the Body Corporate Committee to consent to recording a new community management statement.

(4) If the Buyer is not given a copy of the resolutions before settlement, it may sue the Seller for damages.

8.5 Information Regarding the Property

Upon written request of the Buyer but in any event before settlement, the Seller must give the Buyer:

(1) copies of all documents relating to any unregistered interests in the Property;

(2) full details of the Tenancies to allow the Buyer to properly manage the Property after settlement;

(3) sufficient details (including date of birth of each Seller who is an individual) to enable the Buyer to undertake a search of the PPSR.

8.6 Possession Before Settlement

If possession is given before settlement:

(1) the Buyer must maintain the Property in substantially its condition at the date of possession, fair wear and tear excepted;

(2) entry into possession is under a licence personal to the Buyer revocable at any time and does not:

(a) create a relationship of landlord and tenant; or

(b) waive the Buyer's rights under this contract;

(3) the Buyer must insure the Property to the Seller's satisfaction; and

(4) the Buyer indemnifies the Seller against any expense or damages incurred by the Seller as a result of the Buyer's possession of the Property.

8.7 Seller's Obligations After Contract Date

(1) The Seller must promptly upon receiving any notice, proceeding or order that affects the Property or requires work on the Property, give a copy to the Buyer.

(2) After the Contract Date, the Seller must not without written consent of the Buyer, give any notice, seek or consent to any order or make an agreement that affects the Property.

9. PARTIES' DEFAULT

9.1 Seller and Buyer May Affirm or Terminate

Without limiting any other right or remedy of the parties including those under this contract, or any right at common law, if the Seller or Buyer, as the case may be, fails to comply with an Essential Term, or makes a fundamental breach of an intermediate term, the Seller (in the case of the Buyer's default) or the Buyer (in the case of the Seller's default) may affirm or terminate this contract.

9.2 If Seller Affirms

If the Seller affirms this contract under clause 9.1, it may sue the Buyer for:

(1) damages;
(2) specific performance; or
(3) damages and specific performance.

9.3 If Buyer Affirms

If the Buyer affirms this contract under clause 9.1, it may sue the Seller for:

(1) damages;
(2) specific performance; or
(3) damages and specific performance.

9.4 If Seller Terminates

If the Seller terminates this contract under clause 9.1, it may do all or any of the following:

(1) resume possession of the Property;
(2) forfeit the Deposit and interest earned;
(3) sue the Buyer for damages;
(4) resell the Property.

9.5 If Buyer Terminates

If the Buyer terminates this contract under clause 9.1, it may do all or any of the following:

(1) recover the Deposit and any interest earned;
(2) sue the Seller for damages.

9.6 Seller's Resale

(1) If the Seller terminates this contract and resells the Property, the Seller may recover from the Buyer as liquidated damages:

(a) any deficiency in price on a resale; and

(b) its expenses connected with any repossession, any failed attempt to resell, and the resale;

provided the resale settles within 2 years of termination of this contract.

(2) Any profit on a resale belongs to the Seller.

9.7 Seller's Damages

The Seller may claim damages for any loss it suffers as a result of the Buyer's default, including its legal costs on an indemnity basis and the cost of any Work or Expenditure under clause 7.6(3).

9.8 Buyer's Damages

The Buyer may claim damages for any loss it suffers as a result of the Seller's default, including its legal costs on an indemnity basis.

9.9 Interest on Late Payments

(1) Without affecting the Seller's other rights, if any money payable by the Buyer under this contract is not paid when due, the Buyer must pay the Seller at settlement interest on that money calculated at the Default Interest Rate from the due date for payment until payment is made.

(2) The Seller may recover that interest from the Buyer as liquidated damages.

(3) Any judgment for money payable under this contract will bear interest from the date of judgment to the date of payment and the provisions of this clause 9.9 apply to calculation of that interest.

10. COMMERCIAL TENANCIES

10.1 Seller's Statement

(1) Within a reasonable time after written request by the Buyer, the Seller must give the Buyer:

(a) a statement of Outgoings which cannot be discovered by search; and

(b) a notice under section 262A(4AH) of ITAA (if applicable to the Property).

(2) The Seller must update the statement if the Seller becomes aware that it has become inaccurate in a material respect.

(3) The Seller warrants that the statement and notice will be accurate at the Settlement Date.

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10.2 Commercial Tenancies and Service Agreements

The Seller states that details of all Commercial Tenancies and Service Agreements affecting the Property are disclosed in the Commercial Tenancy Schedule and Service Agreement Schedule respectively.

10.3 Commercial Tenancy Warranties

The Seller warrants that, except as disclosed in this contract, the following are correct at the Contract Date:

(1) details of the Commercial Tenancies set out in the Commercial Tenancy Schedule;

(2) each of the Commercial Tenancies is valid and subsisting;

(3) no Tenant is in arrears with the payment of any Rent or other money payable under any Commercial Tenancy;

(4) there is no subsisting breach of a provision of any Tenancy Document;

(5) there is no notice or correspondence between the Seller and any Tenant relating to Rent review or the exercise of an option for renewal;

(6) for each Commercial Tenancy, the relevant Commercial Tenancy Documents constitute the entire agreement between the Seller and each Tenant and there is no written, oral or other agreement between the Seller and any Tenant varying the terms of a Commercial Tenancy or granting any additional option for renewal of the term of any Commercial Tenancy;

(7) no Tenant received any incentive or inducement to enter into its initial or current Commercial Tenancy;

(8) there is no pending litigation or arbitration between the Seller and any Tenant arising out of any of the Commercial Tenancies; and

(9) if any Commercial Tenancy is a retail shop lease within the meaning of the *Retail Shop Leases Act 1994*

(a) as far as the Seller is aware the Seller has complied with the *Retail Shop Leases Act 1994* in relation to the Commercial Tenancy;

(b) there is no existing or renewed retail tenancy dispute in relation to a Commercial Tenancy;

(c) there are no mediation agreements, proceedings or orders in existence under the *Retail Shop Leases Act 1994* in respect of a Commercial Tenancy;

(d) no Tenant has notified the Seller requesting a right to renew any Commercial Tenancy for a further period; and

(e) no Tenant has made a claim against the Seller for compensation for loss or damage suffered by the Tenant under sections 43, 46G or 46K of the *Retail Shop Leases Act 1994* and there are no circumstances existing to the Seller's knowledge which might give rise to a claim for compensation.

10.4 Inaccuracies

The Buyer may terminate this contract by notice in writing to the Seller if a warranty contained in clause 10.3 is inaccurate and the Buyer is materially prejudiced by that inaccuracy.

10.5 Commercial Tenancy Documents

(1) The Seller must produce to the Buyer's Solicitor within 7 days after the Contract Date copies of all Commercial Tenancy Documents and Service Agreements.

(2) If the Seller does not deliver the Commercial Tenancy Documents when required under clause 10.6(1), the Buyer may terminate this contract by notice to the Seller given no later than 14 days after the Contract Date.

(3) If the Buyer is not satisfied with the terms of the Commercial Tenancies, it may terminate this contract by notice to the Seller given no later than 7 days after the Buyer's receipt of the Commercial Tenancy Documents.

(4) If no notice is given under this clause 10.6, the Buyer will be treated as having accepted the Commercial Tenancies and all matters referred to in the Commercial Tenancy Documents.

10.6 Dealings with Commercial Tenancies

(1) Unless it would breach a provision of, or waive or prejudice the Seller's rights under, a Commercial Tenancy, the Seller must not, after the Contract Date:

(a) deal with the Property or any of the Commercial Tenancies without the Buyer's consent (which must not be unreasonably withheld);

(b) accept a surrender of any Commercial Tenancy;

(c) consent to a transfer of any Commercial Tenancy;

(d) terminate any Commercial Tenancy;

(e) consent to any request by a Tenant;

(f) grant or agree to grant a new Commercial Tenancy of any part of the Property or an extension of a Commercial Tenancy other than where a Tenant validly exercises an option in a Commercial Tenancy; or

(g) initiate or negotiate a Rent review or respond to any Rent review notice from a Tenant.

(2) If any Tenant seeks the Seller's consent under a Commercial Tenancy before Settlement:

(a) the Seller must inform the Buyer and give the Buyer a copy of any written material received from the Tenant;

(b) the Buyer must co-operate with the Seller in dealing with the application;

(c) the Buyer must inform the Seller whether it agrees to the Seller giving consent and any conditions which should be imposed by the Seller;

(d) the Buyer must not withhold or delay its agreement to the Seller giving consent except on reasonable grounds which must be indicated in writing to the Seller; and

(e) the Seller must not give its consent to any Tenant without having first obtained the Buyer's agreement to do so in accordance with this clause.

(3) If any Tenant defaults in the payment of Rent, the Seller must promptly inform the Buyer in writing. The Buyer may require the Seller to do either or both of the following actions at the Seller's expense:

(a) serve on the Tenant a notice of breach of covenant if required by law;

Sample

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(b) terminate the Commercial Tenancy by physical re-entry (subject to the provisions of the Commercial Tenancy).

(4) The Seller must give the Buyer copies of any documents relating to the Commercial Tenancies that come within the control or possession of the Seller between the Contract Date and settlement.

10.7 Service Agreements

(1) The Seller:

(a) may terminate any Service Agreement which is not capable of assignment (subject to the provisions of the relevant Service Agreement); and

(b) indemnifies the Buyer against claims under the Service Agreements prior to the Settlement Date.

(2) The Buyer:

(a) assumes the obligations of the Seller under those Service Agreements which are assigned until their termination; and

(b) indemnifies the Seller against claims under Service Agreements after the Settlement Date.

(3) If:

(a) the Seller cannot terminate a Service Agreement; or

(b) the Seller's rights under a Service Agreement cannot be assigned or are not effectively assigned to the Buyer;

the Seller must enforce that Service Agreement at the direction of the Buyer for the Buyer's benefit.

11. GOODS AND SERVICES TAX

11.1 Definitions

Words and phrases defined in the GST Act have the same meaning in this Contract unless the context indicates otherwise.

11.2 GST Table

The GST Table and the notes in it are part of this clause 11.

11.3 Taxable Supply

This clause 11 applies where the transaction is:

(1) a Taxable Supply; or

(2) not a Taxable Supply because it is the Supply of a Going Concern.

11.4 Purchase Price Includes GST

If this clause 11.4 applies, the Purchase Price includes the Seller's liability for GST on the Supply of the Property. The Buyer is not obliged to pay any additional amount to the Seller on account of GST on the Supply of the Property.

11.5 Purchase Price Does Not Include GST

If this clause 11.5 applies, the Purchase Price does not include the Seller's liability for GST on the Supply of the Property. The Buyer must on the Settlement Date pay to the Seller in addition to the Purchase Price an amount equivalent to the amount payable by the Seller as GST on the Supply of the Property.

11.6 Margin Scheme

Warning: The Seller is warranting that the Margin Scheme can apply. If in doubt about using the Margin Scheme you should seek professional advice.

If this clause 11.6 applies:

(1) the Purchase Price includes the Seller's liability for GST on the Supply of the Property. The Buyer is not obliged to pay any additional amount to the Seller on account of GST on the Supply of the Property.

(2) the Seller:

(a) must apply the Margin Scheme to the Supply of the Property; and

(b) warrants that the Margin Scheme is able to be applied.

(3) if the Seller breaches clause 11.6(2)(a) or its warranty under clause 11.6(2)(b) then:

(a) the Buyer may terminate this contract if it becomes aware of the breach prior to the Settlement Date;

(b) if the Buyer does not terminate this contract under clause 11.6(3)(a) or does not become aware of the breach until after the Settlement Date, it must pay to the Seller an amount equal to the Input Tax Credit which the Buyer will receive for GST payable for the Supply of the Property. Payment must be made when the Buyer receives the benefit of the Input Tax Credit;

(c) the Buyer is entitled to compensation from the Seller if there is a breach of clause 11.6(2).

11.7 If the Supply is a Going Concern

Warning: The parties are providing certain warranties under this clause. If there is doubt about whether there is a Supply of a Going Concern you should seek professional advice.

If this clause 11.7 applies:

(1) the Purchase Price does not include any amount for GST;

(2) the parties agree the Supply of the Property is a Supply (or part of a Supply) of a Going Concern;

(3) the Seller warrants that:

(a) between the Contract Date and the Settlement Date the Seller will carry on the Enterprise; and

(b) the Property (together with any other things that must be provided by the Seller to the Buyer at the Settlement Date under a related agreement for the same Supply) is all of the things necessary for the continued operation of the Enterprise;

(4) the Buyer warrants that at the Settlement Date it is Registered or Required to be Registered under the *GST Act*;

(5) if either of the warranties in clause 11.7(3) is breached:

(a) the Buyer may terminate this contract if it becomes aware of the breach prior to the Settlement Date;

(b) if the Buyer does not terminate this contract then, at the Settlement Date, the Buyer must pay to the Seller the amount payable by the Seller as GST on the Supply of the Property;

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(c) if the Buyer does not become aware of the breach until after the Settlement Date, it must pay to the Seller an amount equal to the Input Tax Credit which the Buyer will receive for GST payable in respect of the Supply of the Property. Payment must be made when the Buyer receives the benefit of the Input Tax Credit;

(d) the Buyer is entitled to compensation from the Seller if there is a breach of the warranty.

(6) if the warranty in clause 11.7(4) is not correct the Buyer must pay to the Seller an amount equal to the GST payable in respect of the Supply of the Property. Payment must be made at the Settlement Date or, if settlement has occurred, immediately on demand;

(7) if for any reason other than a breach of a warranty by the Seller or the Buyer this transaction is not a Supply of a Going Concern, the Buyer must pay to the Seller the amount payable by the Seller as GST on the Supply of the Property. Payment must be made at the Settlement Date or, if settlement has occurred, immediately on demand.

11.8 Adjustments

Where this Contract requires an adjustment or apportionment of Outgoings or Rent and profits of the Property, that adjustment or apportionment must be made on the amount of the Outgoing, Rent or profit exclusive of GST.

11.9 Tax Invoice

Where GST is payable on the Supply of the Property, the Seller must give to the Buyer a Tax Invoice at the Settlement Date.

11.10 No Merger

To avoid doubt, the clauses in this clause 11 do not merge on settlement.

11.11 Remedies

The remedies provided in clauses 11.6(3), 11.7(5) and 11.7(6) are in addition to any other remedies available to the aggrieved party.

12. GENERAL

12.1 Agent

The Agent is appointed as the Seller's agent to introduce a buyer.

12.2 Foreign Investment Review Board

The Buyer warrants that either:

(1) the Treasurer has consented under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) to the Buyer's purchase of the Property; or

(2) the Treasurer's consent is not required to the Buyer's purchase of the Property.

12.3 Duty

The Buyer must pay all duty on this contract.

12.4 Notices

(1) Notices under this contract must be in writing and may be given by a party's solicitor.

(2) Notices may be given by:

(a) delivering or posting to the other party or its solicitor; or

(b) sent to the facsimile number or email address of the other party or its solicitor stated in the Reference Schedule or another facsimile number or email address specified in a notice given by the recipient to the sender.

*[**Note:** Whilst notices under this Contract may be sent by email they are not 'given' until they are capable of being retrieved by the addressee at the nominated email address in accordance with s 24 of the Electronic Transactions (Queensland) Act 2001]*

(3) Posted notices will be treated as given 3 Business Days after posting.

(4) Notices sent by facsimile will be treated as given when the sender obtains a clear transmission report.

(5) Notices given after 5pm will be treated as given on the next Business Day.

(6) Notices or other written communications by a party's solicitor (for example, varying the Inspection Date, Finance Date or Settlement Date) will be treated as given with that party's authority.

12.5 Business Days

(1) If anything is required to be done on a day that is not a Business Day, it must be done instead on the next Business Day.

(2) If the Finance Date or Inspection Date fall on a day that is not a Business Day, then it falls on the next Business Day.

12.6 Rights After Settlement

Despite settlement and registration of the transfer, any term of this contract that can take effect after settlement or registration remains in force.

12.7 Further Acts

If requested by the other party, each party must, at its own expense, do everything reasonably necessary to give effect to this contract.

12.8 Severance

If any term or part of a term of this contract is or becomes legally ineffective, invalid or unenforceable in any jurisdiction it will be severed and the effectiveness, validity or enforceability of the remainder will not be affected.

12.9 Interpretation

(1) **Plurals and Genders**

Reference to:

(a) the singular includes the plural and the plural includes the singular;

(b) one gender includes each other gender;

(c) a person includes a body corporate; and

(d) a party includes the party's executors, administrators, successors and permitted assigns.

(2) **Parties**

(a) If a party consists of more than one person, this contract binds them jointly and each of them individually.

(b) A party that is a trustee is bound both personally and in its capacity as a trustee.

(3) **Statutes and Regulations**

Reference to statutes includes all statutes amending, consolidating or replacing them.

(4) **Inconsistencies**

If there is any inconsistency between any provision added to this contract and the printed provisions, the added provision prevails.

(5) **Headings**

Headings are for convenience only and do not form part of this Contract or affect its interpretation.

Sample Only

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[¶70-310] REIQ Contract for management rights business sale

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REIQ Contract for management rights business sale

REIQ Standard Conditions of Sale for Management Rights Business Sale

Last reviewed: 9 January 2014

[¶70-320] REIQ Disclosure Statement

Click to open document in a browser

REIQ Disclosure Statement — Section 206 of BCCM Act 1997

Last reviewed: 9 January 2014

[¶72-500] Precedent forms

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The forms reproduced are designed to be used for the purposes of the *Body Corporate and Community Management Act 1997*.

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[¶72-550] Form B1: Short form disclosure statement

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Disclosure Statement

Body Corporate and Community Management Act 1997

Section 206

Lot and plan	Lot # on Plan #
Name of body corporate	Body corporate for #name of scheme# community titles scheme #
Secretary of body corporate or body corporate manager	**Name:** # **Address:** # **Telephone:** # **Position:** Secretary and body corporate manager
Annual contributions and levies	**Administration Fund:** # **Sinking Fund:** # **Other:** # [Explain nature of levy or contribution]
Improvements on common property for which buyer will be responsible	#
Regulation Module	Standard Regulation Module
Body corporate assets on register	#
Information prescribed under Regulation Module	#

Signed by the Vendor or Vendor's authorised agent

On the .... day of .... 201...

....

Vendor or Vendor's agent

....*
acknowledge(s) receiving a copy of this statement

On the .... day of .... 201...

....

Buyers *Insert names of all buyers

Last reviewed: 25 September 2013

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[¶72-570] Form B2: Resolution authorising change of module

Click to open document in a browser

Category: B

Resolution Authorising Change of Module

In accordance with section 62(3)(b) of the *Body Corporate and Community Management Act 1997*, **the body corporate resolves by special resolution THAT:**

(a) the regulation module applying to its community titles scheme be changed from the Standard Module to the Accommodation Module;
(b) the body corporate endorse its consent on the new community management statement giving effect to the change (a copy of the new statement having accompanied the notice of the meeting at which this resolution was passed and a further copy circulated with the minutes of that meeting);
(c) that two members of the Committee, one of whom must be the chairperson or secretary, sign the new community management statement; and
(d) that the Committee take all reasonable steps necessary to ensure the new community statement is recorded by the Registrar of Titles.

Last reviewed: 25 September 2013

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[¶72-590] Form B3: Notice requiring access under easement

Click to open document in a browser

Category: C

Notice Requiring Access Under Easement

To:

....

Please note that I need access to lot ...... in community titles scheme.................to carry out the following work:

....

Access is required at .... am/pm on .... the ....201......, until the work is completed (expected to take ...... hours).

If another time is more convenient to you, please call me on .... and I will try to arrange a more convenient time.

Dated: .... 201......

.... (Owner of lot ......)

(Signature)

Last reviewed: 25 September 2013

[¶72-610] Form B4: Ordinary resolution designating a restricted issue

Click to open document in a browser

Form B4

Form B4   Ordinary resolution designating a restricted income

RESOLVED in accordance with section 26(1)(c) of the *Body Corporate and Community Management (Standard Module) Regulation 1997* that the following issues may not be determined by the committee and may only be determined by ordinary resolution of the body corporate:

1.)

2.) [List the issues here.]

3.

Last reviewed: 25 September 2013

[¶72-630] Form B5: Resignation of committee member

Click to open document in a browser

To

The Secretary

Blue Waters Community Titles Scheme 4321

1 Smith Street

Brisbane QLD 4000

Dear Sir,

I resign as a member of the committee of the Blue Waters Community Titles Scheme 4321 effective today.

DATED 15 March 2006

....

Signature

Last reviewed: 25 September 2013

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[¶72-650] Form B6: Form B6: Resolution granting leave of absence

Click to open document in a browser

In accordance with section 33 of the Accommodation Module (SM 33), the Committee resolve to grant a leave of absence to .... from the meeting to be held on (**date**) and the meeting to be held on (**date**) in accordance with the written request received from .... dated (**date**) a copy of which is circulated with this resolution.

Form B6

Form B6 Committee resolution granting leave of absence from committee meetings

RESOLVED that Mr John Jones be granted leave of absence from the next 4 meetings of the committee because of his planned trip to London.

Last reviewed: 7 November 2013

[¶72-670] Form B7: General meeting resolution removing committee member

Click to open document in a browser

Form B7

Form B7 General meeting resolution removing committee member

RESOLVED in accordance with section 25(2)(f) of the *Body Corporate and Community Management (Standard Module) Regulation 1997* that Mr John Jones be removed from office as an ordinary member of the committee of the body corporate.

Last reviewed: 25 September 2013

[¶72-690] Form B8: Resolution filling casual vacancy on the committee

Click to open document in a browser

Resolution filling casual vacancy on the committee

RESOLVED, in accordance with section [insert section number]* of the Body Corporate and Community Management (Standard Module) Regulation 1997 that the casual vacancy for an ordinary member on the committee caused by the resignation of Mr John Jones be filled by Mr John Smith.

* Section 25B applies to appointments at general meetings and section 25C applies to appointments at committee meetings.

Last reviewed: 25 September 2013

[¶72-710] Form B9: Notice inviting lot owners to nominate for election to the committee

Click to open document in a browser

Body Corporate and Community Management (Standard Module) Regulation 1997 (Sections 13 and 41)

Notice Inviting Nominees for Election to the Committee

To:

Lot owners

Community titles scheme [*insert number*]

You are invited —

(a) if you are an individual — to nominate yourself, or another individual; or
(b) if you are not an individual, to nominate an individual,

for election as a member of the committee.

Your nomination must be received by me no later than [insert date of end of financial year] and must conform to the requirements set out below.

You are also invited to submit, by the same date, motions for inclusion on the agenda of the annual general meeting.

Dated [*insert date*]

....

Secretary

Statutory Requirements

About who can be nominated …

1. **If you are an individual** and you are nominating another individual, that other individual must be either a lot owner or one of the following —

(a) a member of your family; or
(b) a person acting under the authority of a power of attorney given by you,

but must not be any of the following —

(c) a body corporate manager, service contractor or letting agent for the scheme;
(d) an "associate" of a body corporate manager, service contractor or letting agent (other than a letting agent who would be an associate merely because they are acting for you in letting your lot or other property); or
(e) a person, other than a letting agent for a scheme, who conducts a letting agent business for the scheme.

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2. **If you are a corporation** you may nominate an individual who is a director, secretary or other nominee (including a lot owner in the scheme who is an individual), provided that person is not any of the following —

(a) a body corporate manager, service contractor or letting agent for the scheme;
(b) an “associate” of a body corporate manager, service contractor or letting agent (other than a letting agent who would be an associate merely because they are acting for you in letting your lot or other property); or
(c) a person, other than a letting agent for a scheme, who conducts a letting agent business for the scheme.

3. **If you are a body corporate for a subsidiary scheme** in a layered arrangement of community title schemes you may nominate an individual as your representative, provided that person is not any of the following —

(a) a body corporate manager, service contractor or letting agent for the scheme;
(b) an “associate” of a body corporate manager, service contractor or letting agent (other than a letting agent who would be an associate merely because they are acting for you in letting your lot or other property); or
(c) a person, other than a letting agent for a scheme, who conducts a letting agent business for the scheme.

4. “Family’’ means the following persons —

(a) your spouse;
(b) your children who are 18 years or more, including a step child or adopted child;
(c) your spouse’s children who are 18 years or more, including a step child or adopted child;
(d) your parents, including a step parent; or
(e) your brother or sister.

5. An “associate’’ is defined in section 309 of the *Body Corporate and Community Management Act 1997*.
6. You may not nominate another individual for membership of the committee if you owe a body corporate debt when the nomination is received by the secretary.
7. An individual you nominate for membership of the committee who is a lot owner will not be eligible to be appointed if that individual owes a body corporate debt when the members of the committee are chosen.
8. Only one co-owner of a lot may be a member of the committee at the one time.

About how you nominate ...

9. A nomination must comply with section 13A of the Body Corporate and Community Management (Standard Module) Regulation 1997 (“**Module**") in that it must be by written notice and —

(a) if the nomination is from a lot owner nominating a lot owner — must be signed and dated by the lot owner; or
(b) if the nomination is from a lot owner nominating an individual other than a lot owner —

(i) must be signed and dated by the individual;
(ii) must be countersigned by the lot owner, or a person acting under the authority of the lot owner; and
(iii) must state the lot owner’s lot number.

10. A nomination must also contain each of the following details:

(a) the surname and either the first given name or other name or abbreviation by which the nominated person (the “**candidate**”) is generally known;
(b) the position or positions the candidate is nominated for;
(c) whether the candidate is a lot owner;
(d) if the candidate is not a lot owner —

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(i) the candidate's residential or business address; and

(ii) the category of person mentioned in section 10(1)(b) of the Module to which the candidate belongs (ie family member, attorney, director, secretary, nominee or representative); and

(e) details of any payment to be made to, or to be sought by, the candidate from the body corporate for the candidate carrying out the duties of a committee member.

You may use the attached *Notice Nominating for Election to the Committee* to make your nomination. All information should be accurately completed.

[**CCH Note:** For a precedent for the *Notice Nominating for Election to the Committee*, see Form B10, ¶72-730.]

Last reviewed: 25 September 2013

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[¶72-730] Form B10: Nomination of candidate for committee election

[Click to open document in a browser]

Body Corporate and Community Management (Standard Module) Regulation 1997

(sections 13A and 41)

Notice Nominating Candidate for Election to the Committee

To:

The Secretary

Body corporate for ....community titles scheme

………

I submit the following nomination of candidate for election to the committee:

Self Nomination by a Lot Owner

Lot Owner's Surname: ………………………………
First given name (or other name or abbreviation) …………………………………..
Position(s) nominated for: …………………………………………………………..
Number of lot owned: …………
Details of payment to be made to or sought by the candidate from the body corporate:
……………………………………………………………………………………..
……………………. 201 …..   ………………………………..
Date   Signature of lot owner

Other Nomination by a Lot Owner

Candidate's Surname: ………………………………
First given name (or other name or abbreviation) …………………………………..
Position(s) nominated for: …………………………………………………………..
Candidate is a lot owner: # Yes   # No
If the candidate is not a lot owner:
Residential or business address: ……………………………………………

Last reviewed: 25 September 2013

[¶72-790] Form B13: Body corporate resolution for open ballot

Click to open document in a browser

Body corporate resolution for open ballot

RESOLVED, in accordance with section 12(3) of the Body Corporate and Community Management (Standard Module) Regulation 1997, that the elections of members of the committee of the body corporate be held by open ballot and not by secret ballot.

Last reviewed: 25 September 2013

[¶72-810] Form B14: Resolution adopting alternate election procedure

Click to open document in a browser

Body Corporate and Community Management Act 1997 (Section 213) | ***Land Sales Act 1994*** (Section 21)

Disclosure Statement

SPECIALLY RESOLVED in accordance with section 12(1) of the Body Corporate and Community Management (Standard Module) Regulation 1997 that elections of members of the committee of the body corporate at the annual general meeting be conducted in accordance with the procedures set out in the annexure to this resolution instead of the procedures set out in sections 13 to 22 of that regulation.

ANNEXURE
Community Titles Scheme [*insert number*]
Procedure for Election of Committee at the Annual General Meeting

1. Eligibility for —
   (a) nominating a candidate for election as a voting member of the committee; and
   (b) being elected as a voting member of the committee,
   is determined in accordance with section 10 of the **Body Corporate and Community Management (Standard Module) Regulation 1997** ("*Regulation*").
2. For a person to be nominated as a candidate for election as a voting member of the committee, the nomination must be —
   (a) in writing, specifying whether the nomination is for the position of chairperson, secretary, treasurer or ordinary member of the committee; and
   (b) signed by the candidate and the nominating member of the body corporate; and
   (c) given to the secretary at least 14 days before the annual general meeting at which the election is to be held.
3. If at the start of the meeting —
   (a) the number of candidates nominated for a position is less than the number of positions to be filled, then further nominations may be taken from the floor of the meeting provided the person nominated consents to their nomination; or
   (b) the number of candidates nominated for a position equals the number of positions to be filled, then that candidate or those candidates must be declared elected to the position.
4. If —
   (a) at the start of the meeting the number of candidates nominated for a position is more than the number of positions to be filled; or
   (b) after the taking of nominations from the floor of the meeting in accordance with paragraph 3 (a) of this procedure, the number of candidates nominated for a position is more than the number of positions to be filled,
   then a ballot must be held in respect of each of the positions to elect a person or persons to those positions.
5. Each person entitled to vote may vote for any number of candidates not more than the number of positions to be filled.
6. The ballots shall be taken in the following order —
   (a) chairperson;
   (b) secretary;
   (c) treasurer; and
   (d) ordinary members of the committee.
7. Once a person is elected as the chairperson, secretary or treasurer they cannot be elected as an ordinary member of the committee.
8. Section 12 of the Regulation applies to the ballot, which will otherwise be taken in the way determined by the person chairing the meeting.

Last reviewed: 25 September 2013

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[¶72-820] Form B15: Ballot paper

Click to open document in a browser

Body Corporate and Community Management (Standard Module) Regulation 1997

(Section 17)

Ballot Paper

Election of Chairperson				
Candidate No	**Item**	**Details**		**Vote***
1	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			
	• Lot number of that lot owner			
	• Residential or business address of Candidate			
	• Category of person to which Candidate belongs			
	Payment to be made to or sought by the Candidate for committee duties			
2	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			
	• Lot number of that lot owner			
	• Residential or business address of Candidate			
	• Category of person to which Candidate belongs			
	Payment to be made to or sought by the Candidate for committee duties			
3	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			
	• Lot number of that lot owner			
	• Residential or business address of Candidate			
	• Category of person to which Candidate belongs			
	Payment to be made to or sought by the Candidate for committee duties			

* To vote for a candidate, mark the box opposite the candidate. Only one box should be marked.

Election of Secretary				
Candidate No	**Item**	**Details**		**Vote***
1	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			
	• Lot number of that lot owner			
	• Residential or business address of Candidate			
	• Category of person to which Candidate belongs			
	Payment to be made to or sought by the Candidate for committee duties			
2	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			
	• Lot number of that lot owner			
	• Residential or business address of Candidate			

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	• Category of person to which Candidate belongs			
	Payment to be made to or sought by the Candidate for committee duties			
3	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			
	• Lot number of that lot owner			
	• Residential or business address of Candidate			
	• Category of person to which Candidate belongs			
	Payment to be made to or sought by the Candidate for committee duties			

* To vote for a candidate, mark the box opposite the candidate. Only one box should be marked.

Election of Treasurer

Candidate No	Item	Details		Vote*
1	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			
	• Lot number of that lot owner			
	• Residential or business address of Candidate			
	• Category of person to which Candidate belongs			
	Payment to be made to or sought by the Candidate for committee duties			
2	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			
	• Lot number of that lot owner			
	• Residential or business address of Candidate			
	• Category of person to which Candidate belongs			
	Payment to be made to or sought by the Candidate for committee duties			
3	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			
	• Lot number of that lot owner			
	• Residential or business address of Candidate			
	• Category of person to which Candidate belongs			
	Payment to be made to or sought by the Candidate for committee duties			

* To vote for a candidate, mark the box opposite the candidate. Only one box should be marked.

Election of Ordinary Members of the Committee

Candidate No	Item	Details		Vote*
1	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			
	• Lot number of that lot owner			
	• Residential or business address of Candidate			
	• Category of person to which Candidate belongs			
	Payment to be made to or sought by the Candidate for committee duties			
2	Name of Candidate			#
	Is Candidate a lot owner?	# Yes	# No	
	If Candidate is not a lot owner —			
	• Name of nominating lot owner			

	• Lot number of that lot owner		
	• Residential or business address of Candidate		
	• Category of person to which Candidate belongs		
	Payment to be made to or sought by the Candidate for committee duties		
3	Name of Candidate		#
	Is Candidate a lot owner?	# Yes # No	
	If Candidate is not a lot owner —		
	• Name of nominating lot owner		
	• Lot number of that lot owner		
	• Residential or business address of Candidate		
	• Category of person to which Candidate belongs		
	Payment to be made to or sought by the Candidate for committee duties		
4	Name of Candidate		#
	Is Candidate a lot owner?	# Yes # No	
	If Candidate is not a lot owner —		
	• Name of nominating lot owner		
	• Lot number of that lot owner		
	• Residential or business address of Candidate		
	• Category of person to which Candidate belongs		
	Payment to be made to or sought by the Candidate for committee duties		
5	Name of Candidate		#
	Is Candidate a lot owner?	# Yes # No	
	If Candidate is not a lot owner —		
	• Name of nominating lot owner		
	• Lot number of that lot owner		
	• Residential or business address of Candidate		
	• Category of person to which Candidate belongs		
	Payment to be made to or sought by the Candidate for committee duties		

* To vote for a candidate, mark the box opposite the candidate. Only [*insert number*] boxes should be marked.

…………………………………….

Signature of voter

Lot for which vote is exercised ……

Last reviewed: 25 September 2013

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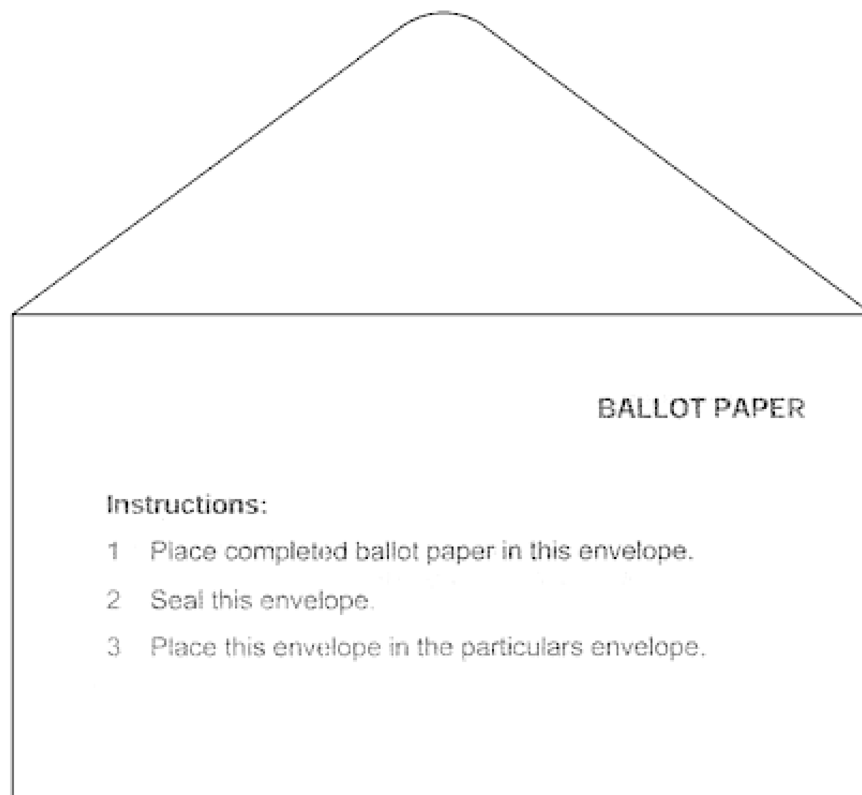
[¶72-850] Form B16: Ballot-paper envelope

Click to open document in a browser


BALLOT PAPER

Instructions:

1 Place completed ballot paper in this envelope.

2 Seal this envelope.

3 Place this envelope in the particulars envelope.

Last reviewed: 25 September 2013

[¶72-870] Form B17: Particulars envelope with particulars tab

Click to open document in a browser

Lot No. ....

Owner's Name: ....

Name of person having right to vote: ....

Basis of right to vote: ....

.... / / 201 .

Signature Date

PARTICULARS ENVELOPE

Instructions:

1 Place the sealed ballot paper envelope in this envelope.

2 Seal this envelope.

3 Complete the information on the particulars tab.

4. Sign and date the particulars tab.

5. Give or forward this envelope to the Secretary before at the Annual General Meeting with the particulars tab attached.

Last reviewed: 25 September 2013

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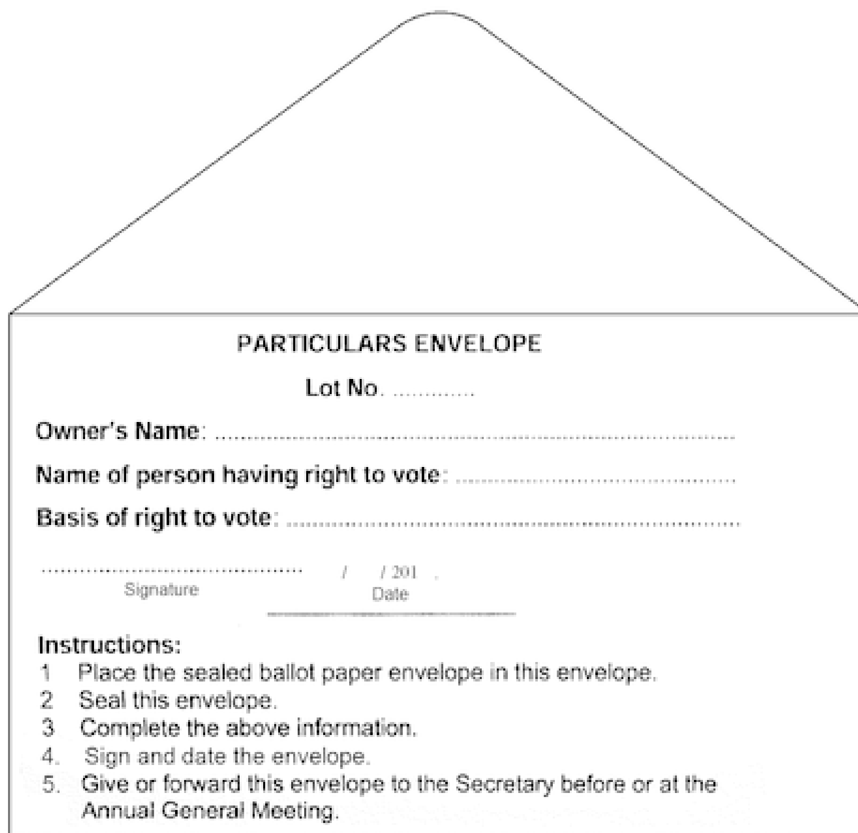
[¶72-890] Form B18: Particulars envelope without particulars tab

Click to open document in a browser



PARTICULARS ENVELOPE

Lot No. ....

Owner's Name: ....

Name of person having right to vote: ....

Basis of right to vote: ....

.... / / 201
Signature Date

Instructions:

1 Place the sealed ballot paper envelope in this envelope.
2 Seal this envelope.
3 Complete the above information.
4. Sign and date the envelope.
5. Give or forward this envelope to the Secretary before or at the Annual General Meeting.

Last reviewed: 25 September 2013

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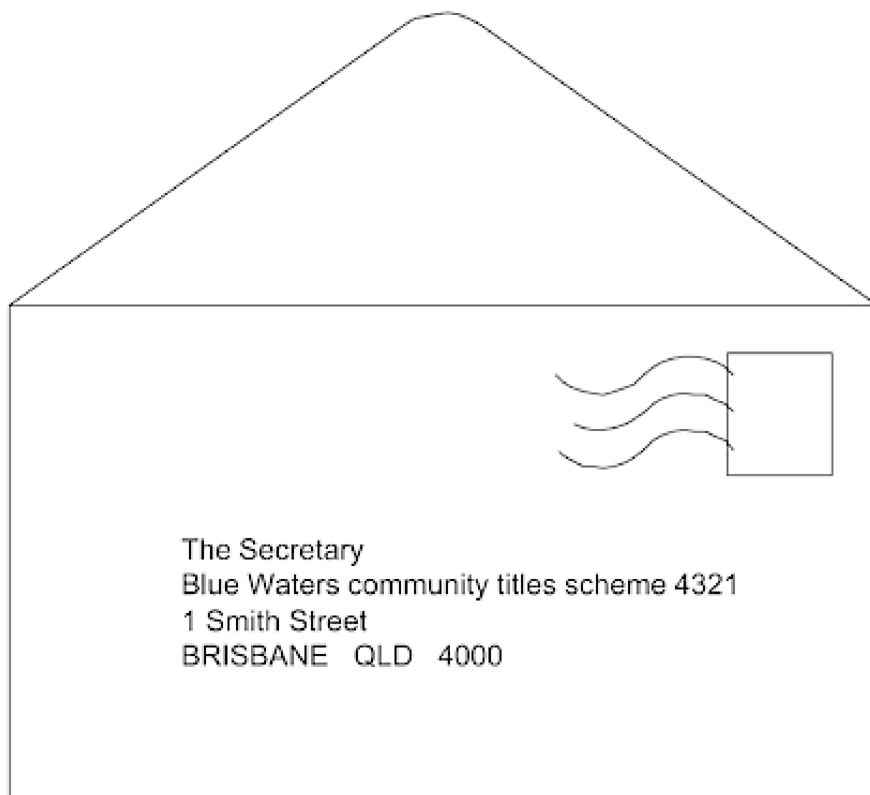
[¶72-910] Form B19: Self-addressed envelope

Click to open document in a browser


Form B19

Form B19 Self-addressed envelope

Last reviewed: 25 September 2013

[¶72-930] Form B20: Voting tally-sheet

Click to open document in a browser

Body Corporate and Community Management
(Standard Module) Regulation 2008
(Section 28)

Voting Tally-Sheet

Election of Chairperson		
Candidate	Record of Votes Cast	Total
1	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
2	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
3	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
4	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
Election of Secretary		
Candidate	Record of Votes Cast	Total
1	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
2	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
3	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
4	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
Election of Treasurer		
Candidate	Record of Votes Cast	Total
1	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
2	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
3	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
4	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
Election of Ordinary Members		
Candidate	Record of Votes Cast	Total
1	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
2	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
3	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
4	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
5	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
6	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
7	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
8	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
9	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	

Instructions:

1. List the candidates for each election – as per the ballot-paper.
2. Cross one number opposite a candidate each time a vote is counted for that candidate.

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(Reverse Page)

Record of Votes Rejected

(Separate entry required for each vote rejected.)

Which Election?	Reason for Rejection		Lot No.
	Before removal from envelope (1)	After removal from envelope (2)	

Notes:
(1) Only required where the ballot is a secret ballot.
(2) Not required where the ballot is a secret ballot and the vote is rejected after the voting-paper is removed from the envelope.

Last reviewed: 25 September 2013

[¶72-950] Form B21: Open Ballot — Chairperson's Check-Sheet (Standard Module)

Click to open document in a browser

<table>
<tr><th>Step No.</th><th colspan="2">Preliminary Tasks</th><th>Check</th></tr>
<tr><td>1</td><td colspan="3">Ensure that the only item of business remaining is the election of members of the committee</td></tr>
<tr><td>2</td><td colspan="2">Ensure that a supply of:
•blank ballot-papers, and/or
•printed ballot-papers (as distributed with the meeting notice),
is available at the meeting.</td><td></td></tr>
<tr><td>3</td><td colspan="2">Ensure that the secretary has custody of all ballot-papers submitted by voters before and during the meeting (if any).</td><td></td></tr>
<tr><td>4</td><td colspan="2">Announce to the meeting the order in which the ballots must be conducted, namely:
•Chairperson
•Secretary
•Treasurer
•Ordinary members.</td><td></td></tr>
<tr><td></td><td colspan="2">Election of chairperson</td><td></td></tr>
<tr><td>5</td><td colspan="2">Determine whether a ballot is necessary. (A ballot will not be necessary if only one person has nominated for the position of chairperson.)</td><td></td></tr>
<tr><td>6</td><td colspan="2">If only one person has nominated for the position of chairperson, then:
•Declare that person elected unopposed to the position of chairperson.
•Ask the secretary to record that declaration in the minutes of the meeting.
•Proceed to Step 11.</td><td></td></tr>
<tr><td></td><td colspan="2">Alternatively
If no person has nominated for the position of chairperson, then:
•Invite nominations for the position from the floor of the meeting.
•Accept any nomination made —
–by persons present at the meeting, or
–in writing, by persons not present at the meeting, but who are eligible for election to the position.
•If, as a result, only one person has nominated, proceed as above.
•If, as a result, more than one person has nominated, proceed to Step 7 Alternative "B".</td><td></td></tr>
<tr><td></td><td colspan="2">Alternatively
If more than one person has nominated before the meeting for the position of chairperson and pre-meeting ballot-papers were distributed, then proceed to Step 7 Alternative "B".</td><td></td></tr>
<tr><td>7</td><td>Alternative "A"</td><td>Alternative "B"</td><td></td></tr>
<tr><td></td><td>Call for any further votes for the ballot to elect the chairperson and allow sufficient time for outstanding votes to be cast.</td><td>Prepare and distribute blank ballot-papers.</td><td></td></tr>
<tr><td></td><td>Announce to the meeting the close of the ballot to elect the chairperson.</td><td>Collect completed ballot-papers.</td><td></td></tr>
<tr><td></td><td>Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)</td><td>Call for any further votes for the ballot to elect the chairperson and allow sufficient time for outstanding votes to be cast.</td><td></td></tr>
<tr><td></td><td>Collect ballot-papers and ballot-paper envelopes from the secretary.</td><td>Announce to the meeting the close of the ballot to elect the chairperson.</td><td></td></tr>
<tr><td></td><td>Confirm from the details on the ballot-papers or ballot-paper envelopes that the person voting has the right to vote in the election.</td><td>Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)</td><td></td></tr>
<tr><td></td><td>Announce details of votes rejected (ie lot number and reason) and ask the secretary to record the details in the minutes.</td><td>Confirm from the details on the ballot-papers that the person voting has the right to vote in the election.</td><td></td></tr>
</table>

	Take ballot-papers out of any ballot-paper envelopes.	Announce details of votes rejected (ie lot number and reason) and ask the secretary to record the details in the minutes.	
8	Count the votes in the presence of the scrutineers. (Use the voting tally sheet — **Form B20**, ¶72-930.)		
9	Declare the successful candidate elected, stating the number of votes cast for each candidate.		
10	Ask the secretary to record the count of votes for each candidate in the minutes. (Alternatively, ask the secretary to attach the voting tally sheet to the minutes.)		
	Election of Secretary		
11	Determine whether a ballot is necessary. (A ballot will not be necessary if only one person has nominated for the position of secretary.)		
12	If only one person has nominated for the position of secretary, then: •Declare that person elected unopposed to the position of secretary. •Ask the current secretary to record that declaration in the minutes of the meeting. •Proceed to **Step 17**.		
	Alternatively If no person has nominated for the position of secretary, then: •Invite nominations for the position from the floor of the meeting. •Accept any nomination made - –by persons present at the meeting, or –in writing, by persons not present at the meeting, but who are eligible for election to the position. •If, as a result, only one person has nominated, proceed as above. •If, as a result, more than one person has nominated, proceed to **Step 13 Alternative "B"**.		
	Alternatively If more than one person has nominated before the meeting for the position of secretary and pre-meeting ballot-papers were distributed, then proceed to **Step 13 Alternative "A"**.		
13	*Alternative "A"*	*Alternative "B"*	
	Call for any further votes for the ballot to elect the secretary and allow sufficient time for outstanding votes to be cast.	Prepare and distribute blank ballot-papers.	
	Announce to the meeting the close of the ballot to elect the secretary.	Collect completed ballot-papers.	
	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)	Call for any further votes for the ballot to elect the secretary and allow sufficient time for outstanding votes to be cast.	
	Collect ballot-papers and ballot-paper envelopes from the current secretary.	Announce to the meeting the close of the ballot to elect the secretary.	
	Confirm from the details on the ballot-papers or ballot-paper envelopes that the person voting has the right to vote in the election.	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)	
	Announce details of votes rejected (ie lot number and reason) and ask the current secretary to record the details in the minutes.	Confirm from the details on the ballot-papers that the person voting has the right to vote in the election.	
	Take ballot-papers out of any ballot-paper envelopes.	Announce details of votes rejected (ie lot number and reason) and ask the current secretary to record the details in the minutes.	
14	Count the votes in the presence of the scrutineers. (Use the voting tally sheet — **Form B20**, ¶72-930.)		
15	Declare the successful candidate elected, stating the number of votes cast for each candidate.		
16	Ask the current secretary to record the count of votes for each candidate in the minutes. (Alternatively, ask the current secretary to attach the voting tally sheet to the minutes.)		
	Election of Treasurer		
17	Determine whether a ballot is necessary. (A ballot will not be necessary if only one person has nominated for the positions of treasurer.)		
18	If only one person has nominated for the position of treasurer, then:		

Step	Action		
	•Declare that person elected unopposed to the position of treasurer. •Ask the secretary to record that declaration in the minutes of the meeting. •Proceed to **Step 23.**		
	Alternatively If no person has nominated for the position of treasurer, then: •Invite nominations for the position from the floor of the meeting. •Accept any nomination made — –by persons present at the meeting, or –in writing, by persons not present at the meeting, but who are eligible for election to the position. •If, as a result, only one person has nominated, proceed as above. •If, as a result, more than one person has nominated, proceed to **Step 19 Alternative "B"**.		
	Alternatively If more than one person has nominated before the meeting for the position of treasurer and pre-meeting ballot-papers were distributed, then proceed to **Step 19 Alternative "A"**.		
19	*Alternative "A"*	*Alternative "B"*	
	Call for any further votes for the ballot to elect the secretary and allow sufficient time for outstanding votes to be cast.	Prepare and distribute blank ballot-papers.	
	Announce to the meeting the close of the ballot to elect the treasurer.	Collect completed ballot-papers.	
	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)	Call for any further votes for the ballot to elect the treasurer and allow sufficient time for outstanding votes to be cast.	
	Collect ballot-papers and ballot-paper envelopes from the secretary.	Announce to the meeting the close of the ballot to elect the treasurer.	
	Confirm from the details on the ballot-papers or ballot-paper envelopes that the person voting has the right to vote in the election.	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)	
	Announce details of votes rejected (ie lot number and reason) and ask the secretary to record the details in the minutes.	Confirm from the details on the ballot-papers that the person voting has the right to vote in the election.	
	Take ballot-papers out of any ballot-paper envelopes.	Announce details of votes rejected (ie lot number and reason) and ask the secretary to record the details in the minutes.	
20	Count the votes in the presence of the scrutineers. (Use the voting tally sheet — **Form B20**, ¶72-930.)		
21	Declare the successful candidate elected, stating the number of votes cast for each candidate.		
22	Ask the secretary to record the count of votes for each candidate in the minutes. (Alternatively, ask the secretary to attach the voting tally sheet to the minutes.)		
	Election of Ordinary Members		
23	Determine whether a ballot is necessary. (A ballot will not be necessary if the number of candidates, other than people elected as executive members, plus the number of executive members, equals the number of positions to be filled.)		
24	If an election is not necessary: •Declare all candidates elected as ordinary members. •Ask the secretary to record that declaration in the minutes of the meeting. •Declare the meeting closed.		
	Alternatively If the number of candidates , other than people elected as executive members, plus the number of executive members, is less than 3, then: •Invite nominations for the positions from the floor of the meeting. •Accept any nomination made — –by persons present at the meeting, or –in writing, by persons not present at the meeting but eligible for election to the positions.		

	•If as a result the number of candidates and executive members is still less than 3 — –declare the election of the committee a failure, –ask the secretary to record the declaration in the minutes of the meeting, and –declare the meeting closed. •If as a result the number of candidates and executive members equals the number of positions to be filled, an election is not necessary and the person chairing the meeting should proceed as above. •If as a result the number of candidates and executives members is more than the number of positions to be filled, then proceed to **Step 25 Alternative "B"**.		
	Alternatively If the number of candidates nominated before the meeting and named on ballot-papers distributed before the meeting, other than people elected as executive members, plus the number of executive members, is more than the number of positions to be filled, then proceed to **Step 25 Alternative "A".**		
25	**Alternative "A"**	**Alternative "B"**	
	Call for any further votes for the ballot to elect the secretary and allow sufficient time for outstanding votes to be cast.	Prepare and distribute ballot-papers.	
	Announce to the meeting the close of the ballot to elect the ordinary member.	Collect completed ballot-papers.	
	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)	Call for any further votes for the ballot to elect the ordinary members and allow sufficient time for outstanding votes to be cast.	
	Collect outstanding ballot-papers and ballot-paper envelopes (if any) from the secretary.	Announce to the meeting the close of the ballot to elect the ordinary members.	
	Confirm from the details on any new ballot-papers or ballot-paper envelopes that the person voting has the right to vote in the election.	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)	
		Confirm from the details on ballot-papers that the person voting has the right to vote in the election.	
26	Announce details of any further votes rejected (ie lot number and reason) and ask the secretary to record the details in the minutes.		
27	Count the votes in the presence of the scrutineers. (Use the voting tally sheet — **Form B20**, ¶72-930		
28	Declare the successful candidate elected, stating the number of votes cast for each candidate.		
29	Ask the secretary to record the count of votes for each candidate in the minutes. (Alternatively, ask the secretary to attach the voting tally sheet to the minutes.)		

Last reviewed: 25 September 2013

[¶72-970] Form B22: Secret Ballot — Chairperson's Check-Sheet (Standard Module)

Click to open document in a browser

<table>
<tr><th>Step No.</th><th colspan="2">Preliminary Tasks</th><th>Check</th></tr>
<tr><td>1</td><td colspan="2">Ensure that the only item of business remaining is the election of members of the committee.</td><td></td></tr>
<tr><td>2</td><td colspan="2">Ensure that a supply of:
•blank ballot-papers
•ballot-papers
•ballot-paper envelopes, and
•particulars envelope or tab
are available at the meeting.</td><td></td></tr>
<tr><td>3</td><td colspan="2">Ensure that the secretary has custody of all ballot-papers submitted by voters before and during the meeting (if any).</td><td></td></tr>
<tr><td>4</td><td colspan="2">Announce to the meeting the order in which the ballots must be conducted, namely:
•Chairperson
•Secretary
•Treasurer
•Ordinary members.</td><td></td></tr>
<tr><td></td><td colspan="2">Election of Chairperson</td><td></td></tr>
<tr><td>5</td><td colspan="2">Determine whether a ballot is necessary. (A ballot will not be necessary if only one person has nominated for the position of chairperson.)</td><td></td></tr>
<tr><td>6</td><td colspan="2">If only one person has nominated for the position of chairperson, then:
•Declare that person elected unopposed to the position of chairperson.
•Ask the secretary to record that declaration in the minutes of the meeting.
•Proceed to Step 11.</td><td></td></tr>
<tr><td></td><td colspan="2">Alternatively
If no person has nominated for the position of the chairperson, then:
•Invite nominations for the position from the floor of the meeting.
•Accept any nomination made —
–by persons present at the meeting, or
—in writing, by persons not present at the meeting, but who are eligible for election to the position.
•If, as a result, only one person has nominated, proceed as above.
•If, as a result, more than one person has nominated, proceed to Step 7 Alternative "B".</td><td></td></tr>
<tr><td></td><td colspan="2">Alternatively
If more than one person has nominated before the meeting for the position of chairperson and pre-meeting ballot-papers were distributed, then proceed to Step 7 Alternative "A".</td><td></td></tr>
<tr><td>7</td><td>Alternative "A"</td><td>Alternative "B"</td><td></td></tr>
<tr><td></td><td></td><td>Prepare and distribute blank ballot-papers, ballot-paper envelope and particulars envelope or tab.</td><td></td></tr>
<tr><td></td><td></td><td>Collect completed envelopes containing ballot-paper envelopes.</td><td></td></tr>
<tr><td></td><td>Call for any further votes for the ballot to elect the chairperson and allow sufficient time for outstanding votes to be cast.</td><td>Call for any further votes for the ballot to elect the chairperson and allow sufficient time for outstanding votes to be cast.</td><td></td></tr>
<tr><td></td><td>Announce to the meeting the close of the ballot to elect the chairperson.</td><td>Announce to the meeting the close of the ballot to elect the chairperson.</td><td></td></tr>
<tr><td></td><td>Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)</td><td>Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)</td><td></td></tr>
</table>

	Collect particulars envelopes from the secretary.		
	Confirm from the details on the particulars envelopes or tabs that the person voting has the right to vote in the election.	Confirm from the details on the particulars envelopes or tab that the person voting has the right to vote in the election.	
	Announce details of votes rejected (ie lot number and reason) and ask the secretary to record the details in the minutes.	Announce details of votes rejected (ie lot number and reason) and ask the secretary to record the details in the minutes.	
	Take the ballot paper envelope out of the particulars envelope, or detach the particulars tab from the ballot paper envelope. Place the ballot paper envelopes in a receptacle in open view and randomly mix them before taking each ballot paper out of its envelope.	Take the ballot paper envelope out of the particulars envelope, or detach the particulars tab from the ballot paper envelope. Place the ballot paper envelopes in a receptacle in open view and randomly mix them before taking each ballot paper out of its envelope.	
8	Count the votes in the presence of the scrutineers. [Use the voting tally sheet — **Form B20**, ¶72-930.]		
9	Declare the successful candidate elected, stating the number of votes cast for each candidate.		
10	Record the count of votes for each candidate in the minutes. (Also ask the secretary to attach the voting tally sheet to the minutes.)		
	Election of Secretary		
11	Determine whether a ballot is necessary. (A ballot will not be necessary if only one person has nominated for the position of secretary.)		
12	If only one person has nominated for the position of secretary, then: •Declare that person elected unopposed to the position of secretary. •Ask the current secretary to record that declaration in the minutes of the meeting. •Proceed to **Step 17**.		
	Alternatively If no person has nominated for the position of secretary, then: •Invite nominations for the position from the floor of the meeting. •Accept any nomination made — –by persons present at the meeting, or –in writing, by persons not present at the meeting, but who are eligible for election to the position. •If, as a result, only one person has nominated, proceed as above. •If, as a result, more than one person has nominated, proceed to **Step 13 Alternative "B"**.		
	Alternatively If more than one person has nominated before the meeting for the position of secretary and pre-meeting ballot-papers were distributed, then proceed to **Step 13 Alternative "A"**.		
13	*Alternative "A"*	*Alternative "B"*	
		Prepare and distribute blank ballot-papers, ballot-paper envelope and particulars envelope or tab.	
		Collect completed envelopes containing ballot-paper envelopes.	
	Call for any further votes for the ballot to elect the secretary and allow sufficient time for outstanding votes to be cast.	Call for any further votes for the ballot to elect the secretary and allow sufficient time for outstanding votes to be cast.	
	Announce to the meeting the close of the ballot to elect the secretary.	Announce to the meeting the close of the ballot to elect the secretary.	
	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)	
	Collect particulars envelopes from the current secretary.		

	Confirm from the details on the particulars envelopes or tabs that the person voting has the right to vote in the election.	Confirm from the details on the particulars envelopes or tab that the person voting has the right to vote in the election.	
	Announce details of votes rejected (ie lot number and reason) and ask the current secretary to record the details in the minutes.	Announce details of votes rejected (ie lot number and reason) and ask the current secretary to record the details in the minutes.	
	Take the ballot paper envelope out of the particulars envelope, or detach the particulars tab from the ballot paper envelope. Place the ballot paper envelopes in a receptacle in open view and randomly mix them before taking each ballot paper out of its envelope.	Take the ballot paper envelope out of the particulars envelope, or detach the particulars tab from the ballot paper envelope. Place the ballot paper envelopes in a receptacle in open view and randomly mix them before taking each ballot paper out of its envelope.	
14	Count the votes in the presence of the scrutineers. [Use the voting tally sheet — **Form B20**, ¶72-930.]		
15	Declare the successful candidate elected, stating the number of votes cast for each candidate.		
16	Record the count of votes for each candidate in the minutes. (Also ask the secretary to attach the voting tally sheet to the minutes.)		
	Election of Treasurer		
17	Determine whether a ballot is necessary. (A ballot will not be necessary if only one person has nominated for the position of treasurer.)		
18	If only one person has nominated for the position of treasurer, then: •Declare that person elected unopposed to the position of treasurer. •Ask the secretary to record that declaration in the minutes of the meeting. •Proceed to **Step 23.**		
	Alternatively If no person has nominated for the position of the treasurer, then: •Invite nominations for the position from the floor of the meeting. •Accept any nomination made — –by persons present at the meeting, or –in writing, by persons not present at the meeting, but who are eligible for election to the position. •If, as a result, only one person has nominated, proceed as above. •If, as a result, more than one person has nominated, proceed to **Step 19 Alternative "B"**.		
	Alternatively If more than one person has nominated before the meeting for the position of treasurer and pre-meeting ballot-papers were distributed, then proceed to **Step 19 Alternative "A"**.		
19	*Alternative "A"*	*Alternative "B"*	
		Prepare and distribute blank ballot-papers, ballot-paper envelope and particulars envelope or tab.	
		Collect completed envelopes containing ballot-paper envelopes.	
	Call for any further votes for the ballot to elect the treasurer and allow sufficient time for outstanding votes to be cast.	Call for any further votes for the ballot to elect the treasurer and allow sufficient time for outstanding votes to be cast.	
	Announce to the meeting the close of the ballot to elect the treasurer.	Announce to the meeting the close of the ballot to elect the treasurer.	
	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the person chairing the meeting may appoint scrutineers.)	
	Collect particulars envelopes from the secretary.		
	Confirm from the details on the particulars envelopes or tabs that the person voting has the right to vote in the election.	Confirm from the details on the particulars envelopes or tabs that the person voting has the right to vote in the election.	

Step	Alternative "A"	Alternative "B"	
	Announce details of votes rejected (ie lot number and reason) and ask the secretary to record the details in the minutes.	Announce details of votes rejected (ie lot number and reason) and ask the secretary to record the details in the minutes.	
	Take the ballot paper envelope out of the particulars envelope, or detach the particulars tab from the ballot paper envelope. Place the ballot paper envelopes in a receptacle in open view and randomly mix them before taking each ballot paper out of its envelope.	Take the ballot paper envelope out of the particulars envelope, or detach the particulars tab from the ballot paper envelope. Place the ballot paper envelopes in a receptacle in open view and randomly mix them before taking each ballot paper out of its envelope.	
20	Count the votes in the presence of the scrutineers. [Use the voting tally sheet — **Form B20**, ¶72-930.]		
21	Declare the successful candidate elected, stating the number of votes cast for each candidate.		
22	Record the count of votes for each candidate in the minutes. (Also ask the secretary to attach the voting tally sheet to the minutes.)		
	Election of Ordinary Members		
23	Determine whether a ballot is necessary. (A ballot will not be necessary if the number of candidates, other than people elected as executive members, plus the number of executive members, equals the number of positions to be filled.)		
24	If an election is not necessary: •Declare all candidates elected as ordinary members. •Ask the secretary to record that declaration in the minutes of the meeting. •Declare the meeting closed.		
	Alternatively If the number of candidates , other than people elected as executive members, plus the number of executive members, is less than 3, then: •Invite nominations for the positions from the floor of the meeting. •Accept any nomination made — –by persons present at the meeting; or –in writing, by persons not present at the meeting, but who are eligible for election to the positions. •If as a result the number of candidates and executive members is still less than 3 — –declare the election of the committee a failure, –ask the secretary to record the declaration in the minutes of the meeting, and –declare the meeting closed. •If as a result the number of candidates and executive members equals the number of positions to be filled, an election is not necessary and the person chairing the meeting should proceed as above. •If as a result the number of candidates and executives members is more than the number of positions to be filled, then proceed to **Step 25 Alternative "B"**.		
	Alternatively If the number of candidates nominated before the meeting and named on ballot-papers distributed before the meeting, other than people elected as executive members, plus the number of executive members, is more than the number of positions to be filled, then proceed to **Step 25 Alternative "A".**		
25	**Alternative "A"**	**Alternative "B"**	
		Prepare and distribute blank ballot-papers, ballot-paper envelope and particulars envelope or tab.	
		Collect completed envelopes containing ballot-paper envelopes.	
	Call for any further votes for the ballot to elect the ordinary members and allow sufficient time for outstanding votes to be cast.	Call for any further votes for the ballot to elect the ordinary members and allow sufficient time for outstanding votes to be cast.	
	Announce to the meeting the close of the ballot to elect the ordinary members.	Announce to the meeting the close of the ballot to elect the ordinary members.	
	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the	Invite scrutineers to come forward. (Any candidate can act as a scrutineer and may also appoint a scrutineer. In addition, the	

	person chairing the meeting may appoint scrutineers.)	person chairing the meeting may appoint scrutineers.)	
	Collect outstanding particulars envelopes (if any) from the secretary.		
	Confirm from the details on any new particulars envelopes or tabs that the person voting has the right to vote in the election.	Confirm from the details on the particulars envelopes or tabs that the person voting has the right to vote in the election.	
26	Announce details of any further votes rejected (ie lot number and reason) and ask the secretary to record the details in the minutes.		
27	Take the ballot paper envelope out of the particulars envelope, or detach the particulars tab from the ballot paper envelope.		
28	Place the ballot paper envelopes in a receptacle in open view and randomly mix them.		
29	Take each ballot paper out of its envelope ready for counting.		
30	Count the votes in the presence of the scrutineers. [Use the voting tally sheet — **Form B20**, ¶72-930.]		
31	Declare the successful candidate elected, stating the number of votes cast for each candidate.		
32	Record the count of votes for each candidate in the minutes. (Also ask the secretary to attach the voting tally sheet to the minutes.)		

Last reviewed: 25 September 2013

[¶72-990] Form B23: Record of exercise of authorised power

Click to open document in a browser

Body Corporate and Community Management Act 1997

Body Corporate and Community Management (Standard Module) Regulation 1997

RECORD OF EXERCISE OF AUTHORISED POWER BY BODY CORPORATE MANAGER

..............................Community Titles Scheme..................

Person exercising power:....................................

Date power exercised:....................................

Decision made:....................................

....

....

....

....

....

....

....

Signature of person exercising power

Last reviewed: 25 September 2013

[¶73-010] Form B24: Resolution approving engagement of body corporate manager

Click to open document in a browser

RESOLVED, by ordinary resolution at a general meeting without the use of proxies, in accordance with section 119 of the *Body Corporate and Community Management Act 1997* and section 114 of the Standard Module under that Act, that the body corporate:

(a) engage .... ("Manager") as its body corporate manager on the terms in the agreement circulated with the notice of motion for this resolution ("Engagement Agreement"), and
(b) authorise the Manager to exercise all of the powers of the executive members of its committee in terms of the Engagement Agreement, and
(c) authorise two members of the Committee, one of whom must be the chairperson or secretary to execute the Engagement Agreement and affix the common seal to it.

Last reviewed: 25 September 2013

[¶73-015] Form B24a: Resolution terminating engagement and authorisation

Click to open document in a browser

It is recommended that prior to simply terminating the agreement, the body corporate manager be put on notice and allowed an opportunity to remedy issues. This can be done by way of correspondence which sets out the grievances of the committee. Grounds for terminating the body corporate manager's contract can be found:

(a) Under the Act;
(b) By agreement; or
(c) Under the terms of the written agreement..

Also, for those schemes in which there is no committee for the body corporate, the body corporate may revoke the body corporate manager's authorisation to exercise powers at any time — s 120(3) of the Act.

Chapter 6, Part 5 of the Standard Module sets out the grounds upon which a body corporate manager's contract can be terminated and the steps the body corporate must follow to terminate that engagement or authorisation.

In accordance with section 86 of the Standard Module (84 of the Accommodation Module), the body corporate resolves by ordinary resolution that:

(a) the engagement of [**name**] as body corporate manager be terminated as at [**date**]
(b) the right to exercise powers be revoked on the same date; and
(c) this resolution be implemented by written notice from the secretary.

Last reviewed: 25 September 2013

[¶73-020] Form B24b: Notice terminating engagement and authorisation

Click to open document in a browser

TO:

[name]

[address]

Notice terminating engagement and authorisation as body corporate manager

I refer to your engagement as our body corporate manager dated [date].

On [date] our [committee/general meeting] of the body corporate resolved to terminate your engagement, effective from [date]. It was also resolved to revoke your right to exercise executive committee member powers, effective from the same date.

This will serve as notice of the termination and revocation.

Dated [date]

....

Secretary

[name] Community Titles Scheme [number]

Last reviewed: 25 September 2013

© CCH

[¶73-030] Form B25: Resolution requiring return of assets

Click to open document in a browser

RESOLVED, in accordance with section 152 of the Body Corporate and Community Management (Standard Module) Regulation 1997 that ………………………… be served with a notice requiring delivery of …………………………………………… to ………………………………… .

© CCH

[¶73-050] Form B26: Notice requiring return of assets

Click to open document in a browser

The body corporate resolve that in accordance with section 206 of the Standard Module, the former body corporate manager [**name**] be served with a prescribed notice directing the return of the body corporate books, records and seal to [**name of secretary**] and that the secretary receive and hold the books, records and seal until otherwise directed by the body corporate committee".

© CCH

Body Corporate and Community
Management (Standard Module) Regulation 1997

NOTICE TO RETURN ASSETS

TO:

……………………………………

On …………………………… 200 …. the committee of ……………… community titles scheme ……………… passed a resolution requiring you to return the following assets belonging to it by delivering them to …………………………… of ………………………………………… , being a member of its committee:

Description of Assets

……………………………………………………………………………………………..

……………………………………………………………………………………………..

……………………………………………………………………………………………..

……………………………………………………………………………………………..

You must comply with the requirements of that resolution within 7 days after service of this notice, otherwise you may commit an offence and be liable to prosecution.

Dated ………………… 200 …

…………………………………
Secretary of the body corporate

Last reviewed: 7 November 2013

© CCH

[¶73-070] Form B27: Resolution approving engagement of building manager

Click to open document in a browser

RESOLVED, by ordinary resolution without the use of proxy votes, in accordance with section 114 of the Body Corporate and Community Management (Standard Module) Regulation 1997, that the body corporate:

(a) enter into the contract circulated with the notice of motion to appoint .... as a service contractor to act as its building manager; and
(b) authorise two members of the committee, one of who must be the chairperson or secretary execute that agreement and affix the common seal.

Last reviewed: 25 September 2013

[¶73-090] Form B28: Resolution approving authorisation of a letting agent

Click to open document in a browser

PLEASE NOTE: This vote must be carried out by secret ballot.

RESOLVED, by ordinary resolution without the use of proxies in accordance with section 114 of the Body Corporate and Community Management (Standard Module) Regulation 1997, that the body corporate:

(a) enter into the contract circulated with the notice of motion to appoint .... to act as letting agent for owners of lots in the community titles scheme; and
(b) authorise two members of the committee, one of whom must be the chairperson or secretary to execute that agreement and affix the common seal.

Last reviewed: 25 September 2013

© CCH

[¶73-110] Form B29: Motion for ordinary resolution

Click to open document in a browser

Motion

THAT the body corporate resolve by ordinary resolution that ……………………

Resolution

RESOLVED by ordinary resolution that ……………………..

Last reviewed: 25 September 2013

[¶73-130] Form B30: Motion for special resolution

Click to open document in a browser

© CCH

Motion

THAT, in accordance with section ………. of the Body Corporate and Community Management (Standard Module) Regulation 1997*, the body corporate specially resolves that ……………………….

Resolution

RESOLVED by special resolution, in accordance with section ………. of the Body Corporate and Community Management (Standard Module) Regulation 1997*, that ……………………………

* Insert the BCCM Act or other appropriate module.

© CCH

[¶73-150] Form B31: Motion for resolution without dissent

Click to open document in a browser

Motion

THAT, in accordance with section ………. of the Body Corporate and Community Management (Standard Module) Regulation 1997*, the body corporate resolves by resolution without dissent that ……………………….

Resolution

RESOLVED by resolution without dissent, in accordance with section ………. of the Body Corporate and Community Management (Standard Module) Regulation 1997*, that ………………………….

* Insert the BCCM Act or other appropriate module.

Last reviewed: 25 September 2013

© CCH

[¶73-170] Form B32: Committee resolution authorising written vote

Click to open document in a browser

RESOLVED that the secretary is authorised to propose the following motion to owners to be passed as a .... resolution by written vote in accordance with section 111 of the Body Corporate and Community Management Act 1997:

THAT ....

Last reviewed: 25 September 2013

© CCH

[¶73-190] Form B33: Delegates authority for written vote

Click to open document in a browser

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Body Corporate and Community Management Act 1997
Body Corporate and Community Management (Standard Module) Regulation 2008

RECORD OF EXERCISE OF DELEGATED POWER
BY BODY CORPORATE MANAGER

Blue Waters community titles scheme 4321

Person exercising power: JOHN AGENT

Date power exercised: 1 January 2000

Decision made:

That the secretary, or myself as the secretary's delegate, is authorised to propose the following motion to owners to be passed as a .... resolution by written vote in accordance with section 111 of the Body Corporate and Community Management Act 1997:

THAT ....

....
Signature of person exercising power

Last reviewed: 27 September 2013

© CCH

[¶73-210] Form B34: Notice inviting written votes

Click to open document in a browser

Body Corporate and Community Management Act 1997
Section 111
Body Corporate and Community Management (Standard Module) Regulation 2008
Section 38

NOTICE INVITING WRITTEN VOTE

Date ………………. 2000 ….

TO:
The owners
……………. Community titles scheme …………

The following motion is proposed to be passed by written vote without the need for the motion to be placed before and decided at a general meeting of the body corporate:

THAT ……………………….

To achieve this the following must occur –

1. A vote on the motion must be exercised for each lot in the scheme.
2. A person entitled to vote at a general meeting, other than a proxy holder, must exercise the vote.
   (For example, individual owners can vote themselves or their representative may vote and a company nominee can vote for a corporate owner.)
3. Each vote must be in favour of the motion.
4. Each vote must be given or confirmed in writing.

Please exercise the vote in respect of your lot (or arrange for it to be exercised) by means of the following voting slip, which must be returned to:

……………………………..
Secretary
………… Community titles scheme ………….
……………………………..

--c—u—t--------------------------------------

Date …………………….201…

I, ……………………………….., being a person entitled to vote in respect of lot …… in community titles scheme ………….. record the following vote in respect of the above motion.

☐ In favour ☐ Against

Last reviewed: 27 September 2013

© CCH

[¶73-230] Form B35: Minute of written vote

Click to open document in a browser

………………. community titles scheme ………

MINUTE OF RESOLUTION PASSED BY WRITTEN VOTE
UNDER SECTION 111 OF THE Body Corporate and Community Management Act 1997 ON ……………………. 201….*

RESOLVED ………………….

We certify that the above resolution was passed in accordance with the above section.

……………………………….	………………………………..
Chairperson	Secretary

* The date on which the last written vote was cast.

Last reviewed: 25 September 2013

© CCH

[¶73-250] Form B36: Request to convene committee meeting

Click to open document in a browser

Body Corporate and Community Management
(Standard Module) Regulation 2008
Section 44

REQUEST TO CONVENE COMMITTEE MEETING

TO:

The Secretary
…………………… community titles scheme ………..

The undersigned, being members of the committee sufficient in number to form a quorum at a meeting of the committee, request that you convene a meeting of the committee within 21 days after you receive this request. The agenda for the meeting should include the following item(s):

1. THAT ……………….
2. THAT ……………….

DATED …………………. 201 ….

……………………………………….	……………………………………….
Committee member	Committee member
……………………………………….	……………………………………….
Committee member	Committee member

Last reviewed: 25 September 2013

© CCH

[¶73-270] Form B37: Committee resolution fixing meeting dates

Click to open document in a browser

© CCH

RESOLVED that:

(a) the committee meet at 7.00 pm on the second Tuesday of each month, except for the months of December and January;

(b) those meetings be held at ……………………….;

(c) the secretary, in consultation with the chairperson, fix the agenda for those committee meetings; and

(d) the secretary give notice of those meetings in accordance with the regulations.

Last reviewed: 25 September 2013

© CCH

[¶73-290] Form B38: Notice of committee meeting

Click to open document in a browser

Body Corporate and Community Management
(Standard Module) Regulation 2008
Section 45

NOTICE OF COMMITTEE MEETING

TO:

Members of the committee
.... community titles scheme ....

Please note that a meeting of the committee will be held on .... 201 ....
at .... p.m. at ....

AGENDA

1. Record persons present and pologies
2. Determine if a quorum is present
3. Confirm the minutes of the previous meeting held on [date]
4. ....
5. ....

DATED .... 201 ....

....
Secretary

Last reviewed: 25 September 2013

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[¶73-310] Form B39: Objection to place of committee meeting

Click to open document in a browser

Body Corporate and Community Management
(Standard Module) Regulation 1998
Section 46

OBJECTION TO PLACE OF COMMITTEE MEETING

TO:

The Secretary
…………………… community titles scheme ………..

The undersigned, being members of the committee making up at least half of the total number of committee members, object to *

[the meeting called for ……………….. 201 …. being held at ……………………… on the basis that it is to be held more than 15 km (measured in a straight line on a horizontal plane) from the scheme land.]

[meetings of the committee being held more than 15 km (measured in a straight line on a horizontal plane) from the scheme land.]

DATED …………………. 201 ….

…………………………………….	…………………………………….
Committee member	Committee member
…………………………………….	…………………………………….
Committee member	Committee member

* Select one of the 2 alternatives depending on whether the objection relates to a particular meeting or to meetings of the committee generally.

Last reviewed: 25 September 2013

© CCH

[¶73-330] Form B40: Notice of written vote on motion

Click to open document in a browser

Body Corporate and Community Management
(Standard Module) Regulation 2008
Section 54

NOTICE OF MOTION TO BE PASSED BY
THE COMMITTEE BY WRITTEN VOTE

Date .... 201 ....

TO:

Committee members
.... Community titles scheme.............................

The following motion is proposed to be passed by written vote without the need for the motion to be passed at a properly convened committee meeting:

THAT ....

To achieve this the following must occur –

1. This notice must be given to all committee members or, in an emergency, as many members as it is practicable to contact. The current situation is/is not* an emergency.
2. A majority of all voting members of the committee entitled to vote on the motion must agree to the motion.
3. That agreement must be in writing, unless the current situation is an emergency.

Please exercise your vote by means of the following voting slip, which must be returned to:

....

Secretary

....

Community titles scheme ....

....

* Delete as appropriate

---c—u—t---

Date .... 201 ....

I, ..., being a member of the committee of the body corporate of community titles scheme .... and being entitled to vote on the above motion, record the following vote in respect of the above motion.

[ ] In favour	[ ] Against
....	....
Name of committee member	Signature of committee member

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[¶73-350] Form B41: Resolution approving appointment of proxy

Click to open document in a browser

© CCH

RESOLVED that the committee approves of the secretary appointing …………………
as their proxy for the next …. Meeting(s) of the committee.

Last reviewed: 25 September 2013

© CCH

[¶73-370] Form B42: Resolution fixing time for submission of proxy

Click to open document in a browser

RESOLVED that the time before which committee members' proxies must be submitted to the secretary be fixed at ….. hours* before the time fixed for the meeting, or first meeting, at which the proxy is to be used.

* Not earlier than 24 hours before the time fixed for the meeting.

Last reviewed: 25 September 2013

© CCH

[¶73-390] Form B43: Special resolution prohibiting proxies for specified matters

Click to open document in a browser

© CCH

RESOLVED by special resolution in accordance with section 100 of the Body Corporate and Community Management (Standard Module) Regulation 2008, that the use of proxies by members of the committee is prohibited for the purpose of deciding the following matters at meetings of the committee:

1. ……………
2. ……………

Last reviewed: 25 September 2013

© CCH

[¶73-410] Form B44: Special resolution prohibiting proxies generally

Click to open document in a browser

RESOLVED by special resolution in accordance with section 100 of the Body Corporate and Community Management (Standard Module) Regulation 2008, that the use of proxies by members of the committee at meetings of the committee is prohibited.

Last reviewed: 25 September 2013

© CCH

[¶73-420] Form B45: Resolution excluding person from committee meeting

Click to open document in a browser

RESOLVED that .... be excluded from this meeting while the item of business dealing with .... is discussed and/or decided by the committee.

Last reviewed: 25 September 2013

[¶73-450] Form B46: Notice of opposition

Click to open document in a browser

Body Corporate and Community Management
(Standard Module) Regulation 1998
Section 56

NOTICE OPPOSING CARRYING OUT OF COMMITTEE RESOLUTION

TO:
The Secretary
………… community titles scheme ………

We, being the owners of at least half the lots in community titles scheme …….., oppose the carrying out of the following resolution of the committee passed at it meeting on ……………… 201 ….:

RESOLVED that ……………… (set out the terms of the resolution opposed).

DATED …………… 201 ….

………………………………….. Owner lot ….	………………………………… Owner lot ….
………………………………….. Owner lot ….	………………………………… Owner lot ….
………………………………….. Owner lot ….	………………………………… Owner lot ….
………………………………….. Owner lot ….	………………………………… Owner lot ….

Last reviewed: 25 September 2013

© CCH

[¶73-470] Form B47: Committee resolutions about place of meeting

Click to open document in a browser

RESOLVED that, subject to any over-riding objection from owners, the general meeting of the body corporate scheduled for ……………….. 201 … be convened to be held at …………………….. , notwithstanding that such location is outside the statutory 15 km radius from the scheme land.

Last reviewed: 25 September 2013

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[¶73-480] Form B48: Notice to owners of proposed place of meeting

Click to open document in a browser

Body Corporate and Community Management
(Standard Module) Regulation 2008
(Section 75)

NOTICE OF PROPOSED PLACE OF MEETING

TO:
The Owners
……….. community titles scheme …………..

The committee has resolved that, subject to any over-riding objection from owners, a meeting of the body corporate scheduled for ………….. 201 … is to be convened to be held at …………………….. , notwithstanding that such location is outside the statutory 15 km radius from the scheme land.

You may object in writing to the proposal to hold the meeting outside the statutory 15 km radius. I should receive your objection within 14 days of the date of this notice. If owners of at least 25% of the lots in the scheme lodge objections, then a location within the statutory 15 km radius will be chosen instead.

Dated ………………….. 201 …

Secretary
Address for objections:
………………………………..
………………………………..
………………………………..

Last reviewed: 25 September 2013

[¶73-490] Form B49: Owners objection to proposed place of meeting

Click to open document in a browser

Body Corporate and Community Management
(Standard Module) Regulation 2008
(Section 75)

OBJECTION TO PROPOSED PLACE OF MEETING

TO:
The Secretary
…………….. community titles scheme …………
……………………………
……………………………

I / We object to the committee's proposal to hold a general meeting of the body corporate on ………………… 201 … at ………………………… , which location is outside the statutory 15 km radius.

Dated ………………… 201 …

Owner of Lot ……

Owner of Lot ……

Last reviewed: 25 September 2013

[¶73-510] Form B50: Notice of first annual general meeting (approved form)

Click to open document in a browser

Body Corporate and Community Management Act 1997

NOTICE OF FIRST ANNUAL GENERAL MEETING OF THE BODY CORPORATE

TO:
Mr John Smith
Unit 5
35 West Street
East Brisbane Qld 4169

You are advised that the First Annual General Meeting for —

[Name of scheme]: “Seaview” community titles scheme 12345 is to be held at — CMS No 12345

[Address of meeting venue] : 35 West Street, East Brisbane
[Time and date of meeting] : at 8.00 pm on Monday 3 April 2013.

Please read the attached notice which sets out your rights and responsibilities in respect of the meeting.

The following agenda sets out the substance of the motions to be considered at the meeting. The **full text** of each motion is set out in the accompanying “Voting Paper”. Any explanatory material provided by an owner proposing a motion is included in the schedule accompanying the voting paper.

AGENDA

1. Attendance record and apologies.
2. Admittance of proxies and voting papers.
3. Confirmation of minutes.

   Substance of Motion 1

   A motion to confirm the minutes of the Inaugural Extraordinary General Meeting held on 5 February 2013.
4. Adopting or reviewing budgets, and fixing of the contributions to be levied against the owners of lots, for the body corporate's first financial year.

   Substance of Motion 2

   A motion to adopt the draft budget and fix the contributions provided for in that budget.
4. Reviewing the policies of insurance taken out for the body corporate and, if appropriate, changing the insurance.

   Substance of Motion 3

   A motion to confirm the existing insurance covers in the name of the body corporate.
5. Providing for the use and custody of the body corporate's seal.

   Substance of Motion 4

   A motion to authorise the secretary to hold the seal and require its use to be authorised by resolution and witnessed by two committee members.
6. Deciding what issues are reserved for decision by ordinary resolution.

   Substance of Motion 5

   A motion to provide that, at this stage, no issues be reserved for decision by ordinary resolution.
7. Deciding whether the by-laws should be amended or repealed.

   Substance of Motion 6

   A motion to provide, at this stage, no amendment or repeal be made of the by-laws.
8. Appointing an auditor to audit the accounts of the body corporate, or resolving by special resolution not to appoint an auditor.

Substance of Motion 7
A motion to appoint Smith & Co as auditors.

9. Choosing the members of the Committee

Name of Secretary:	Peter Jones	Signature: ....
Address for reply:	Unit 8, 35 West Street, East Brisbane Qld 4169	

Telephone No: 1234–1234 Fax No: 1235–1235 Date: ....20.....

VOTING PAPER

If you want to vote using this voting paper, then mark either "YES", "NO" or "ABSTAIN" (eg by a circle) printed opposite each motion you wish to vote on. You may vote for as few or as many motions as you wish. It is not necessary to vote on all motions.

After signing the completed voting paper, forward it promptly to the Secretary at the address shown at the end of the agenda.

Motion No	***Motion***	***Vote***
1	***Motion for Ordinary Resolution Proposed by Original Owner, ABC Developments Pty Ltd (Lots 1, 5, 9, 13 in Plan No 12345)*** **THAT** the minutes of the Inaugural Extraordinary General Meeting of the body corporate held on 5 February 2013 be confirmed.	YES NO ABSTAIN
2	***Motion for Ordinary Resolution Proposed by Original Owner*, ABC Developments Pty Ltd *(Lots 1, 5, 9, 13 in Plan No 12345)*** **THAT** the draft budget date 5 February 2013 (a copy of which was/is attached to the minutes of this meeting) be adopted for the body corporate's first financial year and that contributions based on that budget be fixed: (a) to the administrative fund at the rate of $350 per contribution schedule lot entitlement per annum; and (b) to the sinking fund at the rate of $178 per contribution schedule lot entitlement per annum. to be levied on lot owners by 4 equal quarterly instalments payable on or before the first days of the months of April, July, October 2013 and January 2013.	YES NO ABSTAIN
3	***Motion for Ordinary Resolution Proposed by Original Owner, ABC Developments Pty Ltd (Lots 1, 5, 9, 13 in Plan No 12345)*** **THAT** the body corporate confirm the following existing insurance covers: **Building and asset insurance:** Company: National Insurance Limited Policy No: DP12345 Due Date: 2 February 2013 Sum Insured: $23,000,000 **Public risk insurance:** Company: National Insurance Limited Policy No: PL654321 Due Date: 2 February 2013 Sum Insured: $30,000,000 **Workers compensation insurance:** Company: National Insurance Limited Policy No: WC98765 Due Date: 2 February 2013 Sum Insured: Statutory cover	YES NO ABSTAIN
4	***Motion for Ordinary Resolution Proposed by Original Owner, ABC Developments Pty Ltd (Lots 1, 5, 9, 13 in Plan No 12345)*** **THAT** the Secretary be authorised to have custody of the common seal of the body corporate and be instructed to not allow the seal to be used unless such use is first authorised by resolution of the body corporate or its	YES NO ABSTAIN

	committee and witnessed by the secretary and one other committee member or by two committee members.	
5	***Motion for Ordinary Resolution Proposed by Original Owner, ABC Developments Pty Ltd (Lots 1, 5, 9, 13 in Plan No 12345)*** **THAT** at this stage, no issues are reserved for decision by the body corporate by ordinary resolution.	YES NO ABSTAIN
6	***Motion for Ordinary Resolution Proposed by Original Owner, ABC Developments Pty Ltd (Lots 1, 5, 9, 13 in Plan No 12345)*** **THAT**at this stage, the by-laws of the body corporate should not be amended or repealed.	YES NO ABSTAIN
7	***Motion for Ordinary Resolution Proposed by Original Owner, ABC Developments Pty Ltd (Lots 1, 5, 9, 13 in Plan No 12345)*** **THAT**Smith & Co. being an auditor having approved qualifications and experience, be appointed as auditor of the body corporate to audit its accounts for the current financial year.	YES NO ABSTAIN

I/We require that this voting paper, completed by me/us, be recorded as my/our vote in respect of the motions set out above.

I/We have signed the bottom of each page comprising this voting paper.

Signature(s) of Voter(s)

....

Name(s) of Voter(s)

....

Lot No. .... Plan No. ....

Date ....

BALLOT PAPER FOR THE ELECTION OF COMMITTEE MEMBERS

Chairperson

Candidates in alphabetical order of surname.	State whether owner or non-owner	only	Tick ONE name
....			

Secretary

Candidates in alphabetical order of surname.	State whether owner or non-owner. If non-owner, state the name of any organisation represented.	only	Tick ONE name
....			

Treasurer

Candidates in alphabetical order of surname.	State whether owner or non-owner. If non-owner, state the name of any organisation represented.	only	Tick ONE name
....			

Ordinary Members

Candidates in alphabetical order of surname.	State whether owner or non-owner.		Tick however many candidates you prefer*
....			

#Signature(s) of Voter(s) ....
#Name(s) of Voter(s) ....
#Lot No .... Plan No ....
#Date ....
#Where the ballot is a secret ballot these details should not be shown on this form (details are shown on the "Particulars Envelope" — see "Conduct of elections for body corporate committee by secret ballot" in the Regulation Module).

STATEMENT REGARDING MEETING PROCEDURE AND VOTERS' RIGHTS

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FOR AN ANNUAL GENERAL MEETING

1. The Regulations* define who is entitled to vote at a meeting of the body corporate.
2. The Regulations** set out how a person can vote at a meeting of the body corporate.
3. A notice is enclosed for a corporate owner to appoint a company nominee to vote on its behalf.
4. A person cannot vote on a motion requiring an ordinary resolution or a special resolution, or, in an election ballot, if a contribution, instalment or penalty due to the body corporate has not been paid.
5. A person has 1 vote for each lot the person owns or represents.
6. Where there are 2 or more co-owners of a lot, a vote by any one of the co-owners will be counted as the vote for the lot unless a contrary vote is cast by another co-owner, in which case no vote will be counted for the lot.
7. A voter may demand that a motion requiring an ordinary resolution be determined by a poll of the Contribution Schedule lot entitlements of voters, instead of on the basis of one vote for each lot. The demand may be made in writing beside the motion where it appears on the Voting Paper, or personally at the meeting by the owner or the owner's proxy.

* See, for example, s 49 of the Standard Module Regulation.

** See, for example, s 51 of the Standard Module Regulation, which provides that a person may vote in any of the following three ways —

- in person at the meeting
- in writing, by completing a "Voting Paper" and "Ballot Paper" and returning them promptly to the Secretary at the address shown on the first page.
- by appointing a proxy to vote on the person's behalf.

Last reviewed: 25 September 2013

[¶73-570] Form B53: Explanatory notes from committee

Click to open document in a browser

FIRST ANNUAL GENERAL MEETING
EXPLANATORY NOTES FROM COMMITTEE

***Seaview* community titles scheme 1234**

4 March 2013

Dear lot owner

These Explanatory Notes accompany the notice of First Annual General Meeting of ***Seaview* community titles scheme 1234**. They are provided by the body corporate committee to help you understand the purpose of this meeting. This meeting effectively marks the point where control of the body corporate passes from the original owner (developer) to the new lot owners. It is an important meeting and you are encouraged to attend The original owner is legally required to convene and hold this meeting.

The business of the meeting is set out in the agenda on the notice of meeting. To a large degree, the community titles law determines this agenda. The following is a brief explanation of the various items of business.

Item 3 Minutes

An Inaugural Extraordinary General Meeting of the body corporate was held on 5 February 2013 to attend to a range of post-incorporation matters that needed to be dealt with before the sales of lots could be settled. A copy of the minutes of this inaugural meeting accompanies the notice of the meeting. The motion proposed under this item will confirm the minutes of the inaugural meeting.

Item 4 Budget and contributions

The body corporate needs money to fund its operations. It obtains this money by levying contributions on the lot owners. The budget that accompanies the meeting notice shows how much money the body corporate will need for its first financial year. The motion proposed under this item will adopt the budget and fix the contributions to be levied on lot owners. You can work out how much you will have to pay for your lot for the full financial year by multiplying the amount being levied per "contribution schedule lot entitlement" by the number of contribution schedule lot entitlements that were allocated to your lot by the community titles plan.
Please read the statutory note in the Explanatory Schedule accompanying the meeting notice about this agenda item.

Item 5 Insurances

The original owner has taken out the following insurance covers in the name of the body corporate:

Building and asset insurance:

Company:	National Insurance Limited
Policy No:	DP12345
Due Date:	2 February 2013
Sum Insured:	$23,000,000

Public risk insurance:

Company:	National Insurance Limited
Policy No:	PL654321
Due Date:	2 February 2013
Sum Insured:	$30,000,000

Workers compensation insurance:

Company:	National Insurance Limited
Policy No:	WC98765

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Due Date:	2 February 2013
Sum Insured:	Statutory cover

The motion proposed under this item will confirm these insurance covers. The debate on the motion will give lot owners the opportunity to review the covers and consider whether they should be changed.

Item 6 Common seal

The body corporate must decide who is to have custody of its common seal and how it is to used. The motion proposed under this item will give custody of the common seal to the secretary of the body corporate and restrict its use to circumstances where it has been approved by resolution and affixed in the presence of the secretary and one other committee member, or two committee members, as witnesses.

Item 7 Reserved issues

The body corporate may decide that specified issues or matters (decisions) can only be made by ordinary resolution of a general meeting. This means that the committee would not have the power to decide such matters. The motion proposed under this item will provide that no issues are to be restricted issues at this stage. The body corporate can decide to restrict any issue at any future time.

Item 8 By-laws

By-laws regulate the conduct of owners and occupiers of lots in the way in which they use or enjoy their lots and the common property. They are important rules by which the home unit community operates. The original owner has caused the body corporate to adopt the by-laws that were included with the meeting notice. These are thought to be appropriate for this particular community titles scheme. However, these by-laws can be changed if the need arises. The motion proposed under this team will confirm the adequacy of the existing by-laws. No amendments or repeals are proposed at this stage.

Item 9 Auditor

Unless the body corporate resolves by special resolution it must appoint an auditor at this meeting. Because of the size of the community titles scheme an auditor is considered appropriate. Therefore, the motion proposed under this item will appoint Smith & Co as the body corporate's auditors for the current financial year. That firm has the necessary qualifications and experience and its fee proposal is considered competitive.

Item 10 Committee

This meeting will choose a committee as its last item of business. Three executive members must be chosen: a chairperson, secretary and treasurer. In addition, a number of ordinary members can be chosen. The number of committee members for this particular community titles scheme must be at least 3 people, but not more than 7 people. If necessary an election will be held. Further details of the relevant procedures will be given at the meeting. In the meantime, please consider accepting a position on the committee. An active and competent committee is most important for any community titles scheme.

Finally, if you have any questions or would like to discuss any respect of the meeting agenda, please do not hesitate to contact the representative of the original owner.

....
Bill East (Secretary)
John Smith (Representative of the Original Owner)
Telephone: 7890 7890
E-mail: jsmith@seaview.com.au

FIRST ANNUAL GENERAL MEETING
EXPLANATORY SCHEDULE

***Seaview* community titles scheme 1234**

(This Schedule contains explanatory notes required to be provided to lot owners by the law as well as any explanatory notes submitted by persons who have proposed motions for consideration by the meeting.)

Motion 4 — Budgets

Under section 94A of the Standard Module Regulation, the amount of a budget adopted at the meeting may be more or less than the proposed budget amount by an amount equivalent to not more than 10% of the proposed budget amount.

Last reviewed: 25 September 2013

[¶73-590] Form B54: Voting tally sheet

Click to open document in a browser

Motion No	In Favour		Against		Abstentions		Rejections			Result
	Total	Lots Voting	Total	Lots Voting	Total	Lots	Total	Lots	Reason	
1										
2										
3										
4										
5										
6										
7										
8										
9										

Last reviewed: 25 September 2013

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[¶73-610] Form B55: Rules of debate

Click to open document in a browser

1. The meeting is subject to the direction and control of the Chairperson.
2. Any person desiring to speak must do so respectfully through the Chairperson.
3. Unless permitted by the Chairperson, a person can only speak on the motion under consideration. They must not speak more than once on a question, except in explanation or reply.
4. *A motion may be moved by any person, but it cannot be debated until seconded. The mover of the original motion must get the consent of the seconder, as well as the approval of the meeting, before making any alteration to the wording of the motion.
5. *An amendment may be moved to an original motion. The Chairperson must first put the amendment to the meeting and if carried the original motion, as amended, must be put to the meeting. If the amendment is lost, then the original motion must be put to the meeting.
6. *The Chairperson must refuse to accept an amendment that is a direct negative of the motion.
7. *Voting will be by the voices, by show of hands or by division, at the discretion of the Chairperson.
8. A speaker must not digress from the subject under discussion.
9. Imputation of improper motives and all personal reflections on members will be regarded as disorderly.
10. A person must not interrupt while another is speaking, except on a point of order.
11. Upon the direction of the Chairperson during debate, a person must stop speaking.
12. A person may during debate raise a point of order. They must concisely state the point and, without further discussion, the Chairperson must give a ruling on the point.
13. A person may at any time during the debate, without notice, move "***that the question be now put***" and upon being seconded, that motion must be put without further debate. If carried, the question must be put to the vote. If lost, the debate must proceed.

** These rules would have no application to a General Meeting of a body corporate regulated by the Standard Module or the Accommodation Module. Also, they would not apply to a body corporate regulated by the Commercial Module where voting papers have not been excluded by ordinary resolution of that body corporate.*

Last reviewed: 25 September 2013

[¶73-630] Form B56: Notice of appointment as owner's representative

Click to open document in a browser

This precedent has been deleted due to the fact that the BCCM Form 8 has replaced this requirement.

The BCCM Form 8 can be found at ¶70-180.

Body Corporate and Community Management Act 1997

INFORMATION FOR BODY CORPORATE ROLL

TO: The Secretary,
(Name and address of scheme)

You are required to include the following information in the roll of the body corporate in respect of-

Name of Scheme .... CMS No.
....

Lot No. .... Plan No. ....

REPRESENTATIVE OF OWNER

The following person is a "representative" of the owner under this Act. Attached is a certified copy of the instrument giving representative capacity, or other documentation evidencing the claimed capacity. Details for entry in the roll are-

Full name of representative ....

Residential address ....
(or business address if a corporate representative)

Address for service of notices ....

Representative capacity (eg guardian, trustee)..

Brief description of instrument
or documentation attached ....

Date of appointment as representative ....

Signature of representative ....

Date ....

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[¶73-650] Form B57: Notification of corporate representative and nominee

Click to open document in a browser

Body Corporate and Community Management Act 1997

INFORMATION FOR BODY CORPORATE ROLL

TO: The Secretary,
(Name and address of scheme)

You are required to include the following information in the roll of the body corporate in respect of-

Name of Scheme .... CMS No. ....

Lot No. .... Plan No. ....

REPRESENTATIVE OF OWNER

The following corporation is a "representative" of the owner under this Act. Attached is a certified copy of the instrument giving representative capacity, or other documentation evidencing the claimed capacity. Details for entry in the roll are-

Full name of representative ....

Residential address ....
(or business address if a corporate representative)

Address for service of notices ....

Representative capacity (eg guardian, trustee)..

Brief description of instrument
or documentation attached ....

Date of appointment as representative ....

NOMINEE OF A CORPORATION

The following individual is the nominee of such corporate representative, being corporations entitled to be entered on the body corporate roll as provided for above. Details for entry in the roll are-

Full name of nominee ....

Residential address ....

Address for service of notices ....

Date of appointment ....

Signature of nominee ....

Full name of alternative nominee (if any) ....

Residential address ....

Address for service of notices ....

Date of appointment ....

Signature of alternative nominee ....

Seal of the corporation-

Signatures of authorised persons- **Seal**

(1) Signature ....

Name of person signing ....

Date ....

(2) Signature ....

Name of person signing ....

Date ....

[¶73-670] Form B58: Resolution authorising corporate nominee

Click to open document in a browser

[*Where a representative capacity is involved.*]

RESOLVED that:

(a) the company give notice under its common seal to the body corporate for community titles scheme ………….. of its representative capacity for ………………………… , the owner of lot…… ;

(b) …..…………………… is appointed as the corporate nominee of the company for the purpose of such representation; and

(c) the notice to the body corporate incorporate notice of that appointment.

[*Where no representative capacity is involved.*]

RESOLVED that:

(a) …..……………………., or in his/her absence, ……………………….., is appointed as the corporate nominee of the company for community titles scheme ………………; and

(b) the company give notice of this appointment under its common seal to the body corporate for that community titles scheme.

Last reviewed: 25 September 2013

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[¶73-690] Form B59: Notice of appointment of corporate nominee

Click to open document in a browser

Body Corporate and Community Management Act 1997

INFORMATION FOR BODY CORPORATE ROLL

TO: The Secretary,
(Name and address of scheme)

You are required to include the following information in the roll of the body corporate in respect of-

Name of Scheme .... CMS No. ....

Lot No. .... Plan No. ....

NOMINEE OF A CORPORATION

The following individual is the nominee of a corporate owner, corporate mortgagee in possession, corporate lessee under a leaseback arrangement or a corporate representative, being corporations entitled to be entered on the body corporate roll as provided for above. Details for entry in the roll are-

Full name of nominee ....
Residential address ....
Address for service of notices ....
Date of appointment ....
Signature of nominee ....

Full name of alternative nominee (if any) ....
Residential address ....
Address for service of notices ....
Date of appointment ....
Signature of alternative nominee ....

Seal of the corporation-
Signatures of authorised persons- **Seal**
(1) Signature ....
Name of person signing ....
Date ....

(2) Signature ....

Name of person signing ....

Date ....

Last reviewed: 25 September 2013

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[¶73-710] Form B60: Resolution authorising change of corporate nominee

Click to open document in a browser

RESOLVED that:

(a) ……………………………., or in his/her absence, …………………………., is appointed as the corporate nominee of the company for community titles scheme ……………… in place of ………………………. and his/her alternate ………………………..; and

(b) the company give notice under its common seal of this change of nomination to the body corporate for that community titles scheme.

Last reviewed: 25 September 2013

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[¶73-730] Form B61: Notice of appointment of replacement nominee

Click to open document in a browser

PLEASE NOTE: Consider whether a BCCM Form 8 should be completed.

The BCCM Form 8 can be found at ¶70-180.

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Body Corporate and Community Management Act 1997

INFORMATION FOR BODY CORPORATE ROLL

TO: The Secretary,
(Name and address of scheme)

You are required to include the following information in the roll of the body corporate in respect of-

Name of Scheme .... CMS No. ....

Lot No. .... Plan No. ....

NOMINEE OF A CORPORATION

The following individual is the nominee of a corporate owner, corporate mortgagee in possession, corporate lessee under a leaseback arrangement or a corporate representative, being corporations entitled to be entered on the body corporate roll as provided for above.

This nomination is a replacement for the previous nomination of ………………………..

and their alternate nominee ………………………

Details for entry in the roll are-

Full name of nominee ....
Residential address ....
Address for service of notices ....
Date of appointment ....
Signature of nominee ....

Full name of alternative nominee (if any) ....
Residential address ....
Address for service of notices ....
Date of appointment ....
Signature of alternative nominee ....

Seal of the corporation-

Signatures of authorised persons- **Seal**

(1) Signature ....

Name of person signing ....

Date ....

(2) Signature ....

Name of person signing ....

Date ....

Last reviewed: 25 September 2013

[¶73-750] Form B62: Notice of appointment of subsidiary scheme representative

Click to open document in a browser

Body Corporate and Community Management (Standard Module) Regulation 1997

Notice of Appointment of Subsidiary Scheme Representative

The Secretary
.... community titles scheme ....
……………………………….
……………………………….

Please note that …………………… community titles scheme …………… has appointed ……..………………..………. , being a member of its committee, as its representative for lot ……… in your community titles scheme.

Address for service:

……………………………….
……………………………….
……………………………….

Dated: ………………… 201…..

THE COMMON SEAL of …………………………)
community titles scheme …………… was affixed in)
the presence of:)

……………………………..
Committee Member

……………………………….
Secretary

Last reviewed: 25 September 2013

[¶73-770] Form B63: Notice of mortgagee taking possession

Click to open document in a browser

INFORMATION FOR BODY CORPORATE ROLL

TO: The Secretary,
(Name and address of scheme)

You are required to include the following information in the roll of the body corporate in respect of-

Name of Scheme .... CMS No. ....

Lot No. .... Plan No. ....

MORTGAGEE IN POSSESSION

The following mortgagee has taken steps to enforce a mortgage over the lot or an interest in the lot and the details for entry in the roll are-

Full name of mortgagee ....
Residential address ....
(or business address if a corporate mortgagee)
Address for service of notices ....
Steps taken to enforce the mortgage ....
(attach supporting documentation)
Date steps taken ....

Signature of mortgagee ....
Date ....

[¶73-790] Form B64: Meeting relocation advice

Click to open document in a browser

Body Corporate and Community Management (Standard Module) Regulation 1997

Meeting Relocation Advice

TO

The Owners
…………… community titles scheme …………..

Take notice that the ………………….. general meeting of **……………. community titles scheme ……….** that was to be held on ………………….. 201 …. at ………………………. was adjourned for lack of quorum and will be reconvened at ……… am/pm on ……………….. 201 …. at a new venue, namely …………………………..

Dated ………………. 201 ….

…………………………………..
Secretary

Last reviewed: 25 September 2013

[¶73-800] Form B65: Notice of adjourned meeting

Click to open document in a browser

Body Corporate and Community Management
(Standard Module) Regulation 1997

Notice of Adjourned Meeting

TO

The Owners
…………… community titles scheme …………..

Take notice that the ………………….. general meeting of **……………. community titles scheme ……….** that commenced on ………………….. 201 …. was adjourned on motion of the meeting to be reconvened at ……… am/pm on ……………….. 201 …. at ……………………………………………..

Dated ………………. 201 ….

…………………………………..
Secretary

Last reviewed: 25 September 2013

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[¶73-810] Form B66: Special resolution prohibiting proxies

Click to open document in a browser

RESOLVED by special resolution in accordance with section 107(2) of the *Body Corporate and Community Management (Standard Module) Regulation 2008* that the use of proxies for any purpose is totally prohibited at general meetings of the body corporate.

Last reviewed: 25 September 2013

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[¶73-830] Form B67: Special resolution restricting use of proxies

Click to open document in a browser

RESOLVED by special resolution in accordance with section 107(2) of the *Body Corporate and Community Management (Standard Module) Regulation 2008* that the use of proxies at general meetings of the body corporate is prohibited in respect of any decision involving ....

(**Example:** “the appointment or removal of a service contractor or letting agent”.)

Last reviewed: 25 September 2013

[¶73-850] Form B68: Resolution fixing time for submission of proxies

Click to open document in a browser

RESOLVED that, in respect of all future general meetings of the body corporate, the time for submission of proxies to the secretary will be not later than 4 hours before the start of the meeting at which the proxy is to be exercised, this time being in place of the 24 hours specified in section 107(5) of the *Body Corporate and Community Management (Standard Module) Regulation 2008*.

Last reviewed: 25 September 2013

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[¶73-870] Form B69: Committee resolution recommending secret ballot

Click to open document in a browser

RESOLVED that the committee recommends that a secret ballot be conducted at the ……………. general meeting to be held on ……………….. 201 …. to decide ……………………………………

(**Example:** "whether to appoint John Smith as the new building manager and letting agent".)

Last reviewed: 25 September 2013

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[¶73-890] Form B70: Secret ballot paper for motion

Click to open document in a browser

Body Corporate and Community Management Act 1997

SECRET BALLOT VOTING PAPER

To vote using this voting paper you should carefully follow these instructions:

1. Mark either "YES", "NO" or "ABSTAIN" (eg by a circle) printed opposite each motion you wish to vote on. (You may vote for as few or as many motions as you wish. It is not necessary to vote on all motions.)
2. Place the voting paper in the secret voting paper envelope and seal the envelope.
3. If a separate particulars envelope is supplied, place the sealed secret voting paper envelope in the separate particulars envelope and seal the particulars envelope.
4. Complete the separate particulars envelope or particulars tab on the secret voting paper envelope by signing and dating the envelope or tab and inserting the relevant information. (You must provide all the information.)
5. Give the:
   - completed particulars envelope with the secret voting paper envelope enclosed, or
   - voting paper envelope with the completed particulars tab attached,

   to the returning officer, or forward them to the returning officer, so that they are received before or at the general meeting.
6. The returning officer is —
   [Name] ....
   [Address] ....

Motion No	***Motion***	***Vote***
1	***Motion for Ordinary Resolution Proposed by*** .... ***(Lot*** .... ***in Plan No*** ....***)*** ***THAT***	YES NO ABSTAIN
2	***Motion for Ordinary Resolution Proposed by*** .... ***(Lot*** .... ***in Plan No*** ....***)*** ***THAT***	YES NO ABSTAIN
3	***Motion for Ordinary Resolution Proposed by*** .... ***(Lot*** .... ***in Plan No*** ....***)*** ***THAT***	YES NO ABSTAIN

Last reviewed: 4 May 2006

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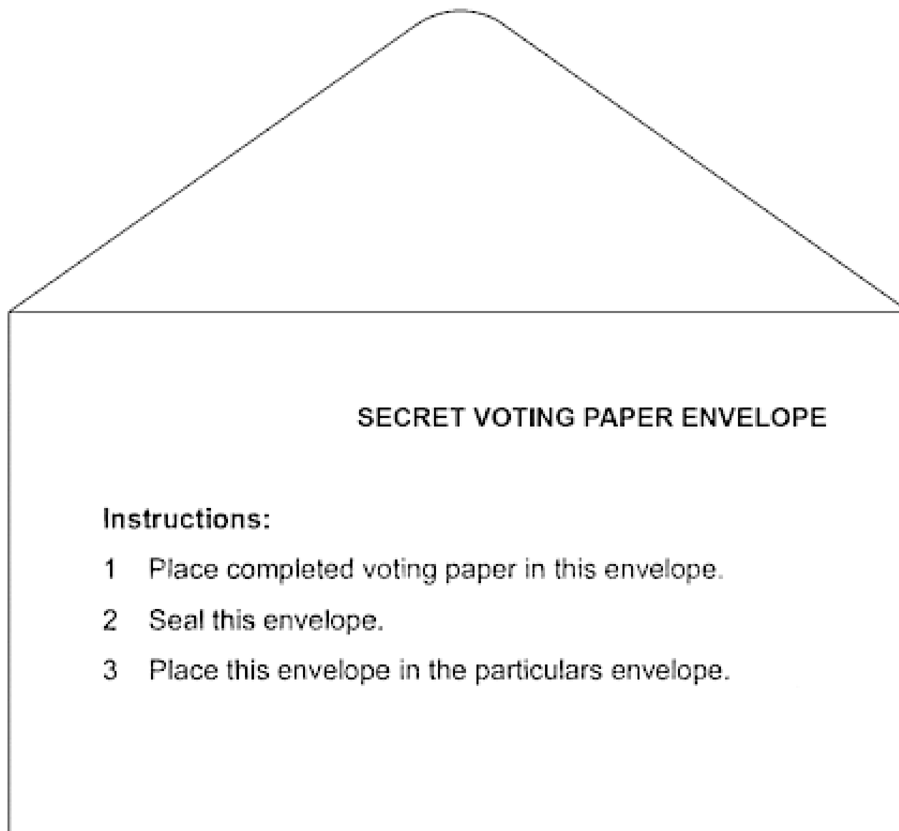
[¶73-910] Form B71: Secret voting paper envelope

Click to open document in a browser


SECRET VOTING PAPER ENVELOPE

Instructions:

1 Place completed voting paper in this envelope.

2 Seal this envelope.

3 Place this envelope in the particulars envelope.

Last reviewed: 25 September 2013

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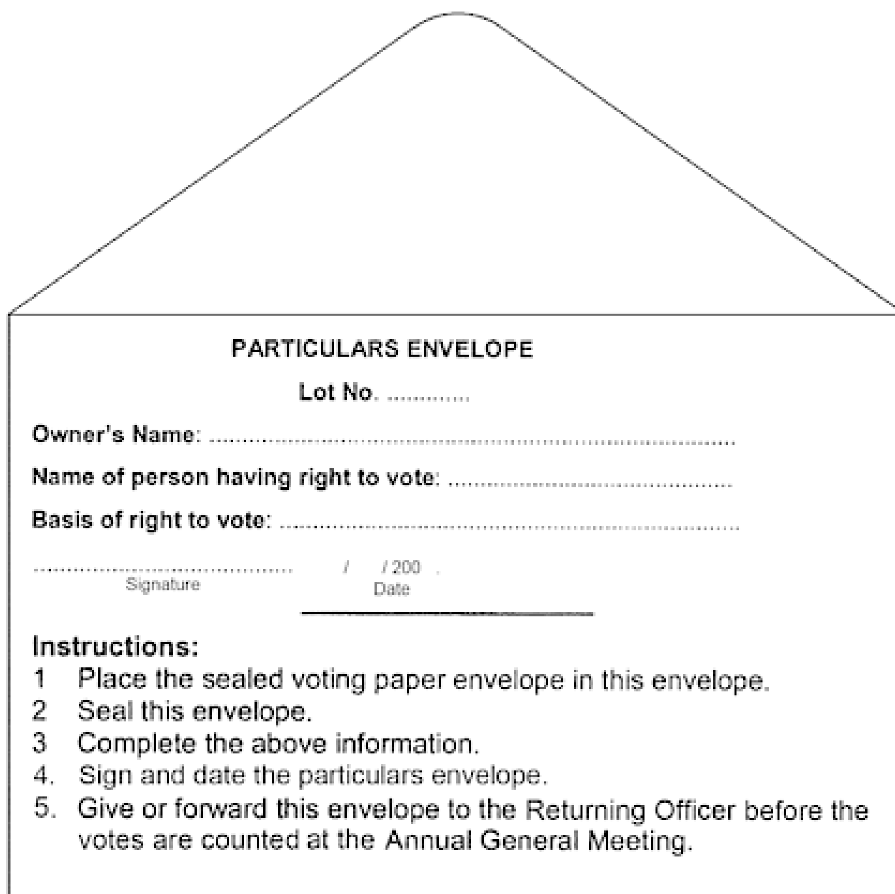
[¶73-930] Form B72: Particulars envelope

Click to open document in a browser



PARTICULARS ENVELOPE

Lot No. ....

Owner's Name: ....

Name of person having right to vote: ....

Basis of right to vote: ....

.... / / 200 .
Signature Date

Instructions:

1 Place the sealed voting paper envelope in this envelope.
2 Seal this envelope.
3 Complete the above information.
4. Sign and date the particulars envelope.
5. Give or forward this envelope to the Returning Officer before the votes are counted at the Annual General Meeting.

Last reviewed: 25 September 2013

[¶73-950] Form B73: Secret voting paper envelope with particulars tab

Click to open document in a browser

Lot No. ....

Owner's Name: ....

Name of person having right to vote: ....

Basis of right to vote: ....

.... / / 200 .
Signature Date

SECRET VOTING PAPER ENVELOPE

Instructions:

1 Place the sealed voting paper envelope in this envelope.

2 Seal this envelope.

3 Complete the information on the particulars tab.

4. Sign and date the particulars tab.

5. Give or forward this envelope to the Returning Officer before the votes are counted at the Annual General Meeting.

Last reviewed: 25 September 2013

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[¶73-970] Form B74: Resolution appointing returning officer

Click to open document in a browser

RESOLVED in accordance with section 91 of the *Body Corporate and Community Management (Standard Module) Regulation 2008* that Peter South be appointed returning officer for the .... general meeting to be held on .... 201 .... to decide questions about eligibility to vote and voting entitlements, and to count the votes.

Last reviewed: 25 September 2013

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[¶73-990] Form B75: Minutes of inaugural extraordinary general meeting

Click to open document in a browser

MINUTES OF THE INAUGURAL EXTRAORDINARY GENERAL MEETING OF
Seaview community titles scheme 1234 HELD AT
1 GEORGE STREET, BRISBANE ON
MONDAY 25 JANUARY 2013 AT 10 a.m.

PRESENT	Mr James Smith, the corporate nominee for Tower Developments Pty Ltd (ACN 123-123-123), the original owner and owner of all lots in community titles scheme 1234.
ATTENDING	Mr Robert Jones, Solicitor for Tower Developments Pty Ltd.
REGISTRATION OF PLAN	Mr Jones produced a copy of registered community titles plan No 1234 relating to 23 West Street, East Brisbane. The meeting then noted the constitution of the body corporate under the name ***Seaview community titles scheme 1234*** in accordance with section 30 of the *Body Corporate and Community Management Act 1997* (referred to as “the Act”) as from the date of registration of the plan, namely 22 January 2006.
MODULE	The meeting noted that the body corporate is regulated by the *Body Corporate and Community Management (Standard Module) Regulation 1997* (referred to as the “Module”).
CHAIRPERSON	Mr James Smith was elected Chairperson of the meeting.
VALIDITY OF MEETING	The meeting noted sections 42(4) and 48(2) of the Module that allows this meeting to be validly held even though the Chairperson is the only person present and no formal notice of the meeting has been given.
INSURANCE	Mr Smith produced an insurance valuation of the building and improvements the subject of community tiles scheme 1234 dated 21 January from South-East Valuations Pty Ltd showing a value for community title insurance purposes of $22,340,000. He then advised the meeting that the following insurance covers [are proposed to be effected] [have been effected][1] in the name of the body corporate:

Building and asset insurance:

Company:	National Insurance Limited
Policy No:	DP12345
Due Date:	22 January 2013
Sum Insured:	$23,000,000

Public risk insurance:

Company:	National Insurance Limited
Policy No:	PL654321

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Due Date: 22 January 2013
Sum Insured: $30,000,000

Workers compensation insurance:
Company: National Insurance Limited
Policy No: WC98765
Due Date: 22 January 2013
Sum Insured: Statutory cover

RESOLVED that the insurance covers [effected] [proposed to be effected] by the original owner in the name of the body corporate be confirmed and that all premiums be paid by the body corporate.[2]

COMMITTEE

It was noted that there is no provision in the Module for the constitution of a committee of the body corporate at this stage.

BUDGET AND LEVIES

Administrative Fund
Mr Smith produced an estimate (in the form of a budget) of the money that the body corporate will need to credit to its administrative fund for actual and expected expenditure until the anticipated date of the first annual general meeting

RESOLVED that:
(a) contributions to the administrative fund are fixed under section 95(1) of the Module at $4,560 for the period from 25 January 2013 to 31 December 2013;
(b) those contributions be paid by three equal instalments to be due on 1 March, 1 June and 1 September 2013; and
(c) those contributions be levied in proportion to contribution schedule lot entitlements by notice under section 95 of the Module.

Sinking Fund
Mr Smith advised the meeting that contributions to the sinking fund need not be determined until the first annual general meeting and recommended that their determination be delayed until that meeting.

RESOLVED that no contributions to the sinking fund be determined at this stage.

BOOKS AND RECORDS

RESOLVED that Mr Smith is authorised to purchase, commence and maintain all books and records necessary to ensure that the affairs of the body corporate are managed efficiently and in compliance with the Act and Module.

BANKING AUTHORITY

RESOLVED that:
(a) the owners corporation open a cheque account with the George Street branch of XXX Banking Corporation Ltd: and

(b) Mr James Smith be authorised to operate the account and to endorse and negotiate instruments on behalf of the body corporate and to generally conduct the administrative fund banking and investment affairs of the body corporate.

COMMON SEAL

Mr Smith produced a seal, an impression of which was made in the right hand margin of this page of the minute book of the body corporate. ***[SEAL]***

RESOLVED that the common seal impressed above on this page of the minute book of the body corporate be:

(a) adopted as the common seal of the body corporate;

(b) kept and used in accordance with section 139 of the Module; and

(c) affixed to any deed, instrument or document only in accordance with the provisions of that section and with the prior authority of the body corporate.

CONCLUSION

The meeting concluded at 10.34 a.m.

Chairperson
Date / /201 ....

Footnotes

1 Delete as required.

2 If the premiums are to be paid by the original owner, this wording may be modified.

Last reviewed: 25 September 2013

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[¶74-010] Form B76: Annual report

Click to open document in a browser

Seaview community titles scheme 1234

ANNUAL REPORT

(Year Ended 30 June 1998)

On behalf of the committee it is my pleasure to present to owners this annual report for the year ended 30 June 2013. In doing so I would like to extend my personal thanks to the members of the committee for their support and assistance during the past year. In particular, I would like to pay tribute to our Chairperson, Mr R. South, for the exceptional effort he has put in over the past year on behalf of the body corporate.

1. Highlights

The highlights for the year included:

- Establishment of our monthly newsletter
- Transfer of the building management from Kev Smith to JBG Pty Ltd
- Re-surfacing of the tennis courts
- Our best ever Christmas party for owners, occupiers and their guests

2. Committee

The committee for the past year comprised:

Mr Robert South (Chairperson)
Mr Peter North (Secretary)
Mr Paul West (Treasurer)
Mrs Mary Weston
Ms Karen Jones
Mrs Peta White

3. Maintenance program

Last year we continued to make progress with our 3 year maintenance program. The resurfacing of the tennis courts was completed, as was the re-tiling of the rear driveway and adjustments to landscaping around the cloths drying areas. Refurbishment of the gymnasium and change rooms has commenced and is likely to be completed before Christmas. The repainting of the building exterior will follow this.

The committee is expected to consider priorities for the next stage of the maintenance program at its January meeting.

4. Newsletter

By now owners will be familiar with our new newsletter. It will be produced monthly, except for January. We are indebted to the owner of Unit 34, Mr Neil Black, for his work on the

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graphics and layout. Mr Black has also kindly offered to produce "camera ready copy" of the newsletter each month to help relieve the financial burden of the newsletter from the body corporate. If any owners would like to advertise in the newsletter, then attractive rates are available. Either Mr Black or I can provide full details.

5. Social functions

Last year's Christmas party was an overwhelming success. Over 130 people attended and I am pleased to report that it was self funding – virtually no funds were provided by the body corporate. The committee is planning to have at least one social function each month. Some will be as simple as casual drinks in the western garden area, while others will involve dinners and various "off-parcel" outings. Please make a special effort to participate – the rewards will be well worthwhile.

6. 2013-2014 Budget

This years budget will raise $207,000 to the Administrative Fund and $186,000 to the Sinking Fund. Expenditure from the Administrative Fund is budgeted at $192,000 while expenditure from the Sinking Fund is budgeted at $143,000. No special levies are anticipated to either funds. While next year's budget has not yet been set, it is likely that contributions will increase by about 3% for both funds. To date the budget has been met and the body corporate manager informs us that expenditure for the current year is not likely to exceed budget. However, it is disappointing to note that unpaid contributions are starting to be a problem. We currently have a little over $5,000 in outstanding contributions. The committee is likely to authorize recovery action at its next meeting.

Finally, I would like to encourage owners to consider standing for election to the committee. A strong and representative committee is essential for the ongoing success of "Seaview" and the only way this can be achieved is for all owners to take their turn serving on the committee.

I recommend this report to owners.

Dated 31 August 2013

…………………………………….
Peter North – Secretary

Last reviewed: 26 September 2013

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[¶74-030] Form B77: Notice of annual general meeting

Click to open document in a browser

Body Corporate and Community Management Act 1997

NOTICE OF ANNUAL GENERAL MEETING
OF THE BODY CORPORATE

TO: Mr John Smith
Unit 5
35 West Street
East Brisbane Qld 4169

You are advised that the Annual General Meeting for-

[Name of Scheme] *Seaview community titles scheme 12345*

CMS No. 12345

is to be held at-

[Address of meeting venue] 35 West Street, East Brisbane
[Time and date of meeting] Monday 3 April 2006 at 8.00 pm

Please read the attached notice which sets out your rights and responsibilities in respect of the meeting.

The following agenda sets out the substance of the motions to be considered at the meeting. The **full text** of each motion is set out in the accompanying “Voting Paper”. An explanatory note by the owner proposing a motion may accompany the agenda.

The last item of business is the election of Committee members and the accompanying “Ballot Paper” lists the candidates for the various Committee positions.

AGENDA

Attendance record and Apologies
Admittance of voting papers and proxies

Motion No	*Substance of Motion*
1	A motion to confirm the minutes of the extraordinary general meeting held on 5 November 2005.
2	A motion to adopt the annual accounts of the body corporate.
3	A motion to appoint an auditor for the next financial year.
4	A motion to approve the budgets for the Administrative and Sinking Funds for the next financial year.
5	A motion to fix the contributions to the administrative and sinking funds for the next financial year.
6	A motion reviewing the insurance policies of the body corporate as detailed in the attached statement.
7	To consider a motion submitted by an owner proposing the establishment of a newsletter for the body corporate.

Election of committee.

Name of
Secretary ....Signature ....

Address to reply ....
....

© CCH

Telephone No. .... Fax No ....
Date...

[IMPORTANT NOTE: Voting Paper, Ballot Paper and Statement Regarding Meeting Procedure and Voters' Rights For An Annual General Meeting must be added to this notice — see Form 4, ¶70-140]

Last reviewed: 26 September 2013

© CCH

[¶74-050] Form B78: Committee resolution convening extraordinary general meeting

Click to open document in a browser

RESOLVED that an extraordinary general meeting of the body corporate be convened to be held at ………. am/pm on ………………. 2013 …. at …………………………………. to consider the following matters:

1. ……………………
2. ……………………
3. ……………………

AND that the secretary is requested to convene the meeting.

Last reviewed: 26 September 2013

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[¶74-090] Form B80: Notice asking for an extraordinary general meeting

Click to open document in a browser

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Body Corporate and Community Management
(Standard Module) Regulation 1997

Notice Asking for an Extraordinary General Meeting

The Secretary
…………. community titles scheme …………
………………………………..
………………………………..

The owners of lots in community titles scheme …………. who have signed this notice and who comprise owners of at least 25% of all the lots in the scheme, ask that an extraordinary general meeting of the body corporate be called within 6 weeks from service of this notice to consider the following motions:

1. …………………..
2. …………………..
3. …………………..

Dated: ……………………. 201 ….

Lot No	Owner's name	Signature

Last reviewed: 26 September 2013

© CCH

[¶74-110] Form B81: Notice of extraordinary general meeting

Click to open document in a browser

Body Corporate and Community Management Act 1997

NOTICE OF EXTRAORDINARY GENERAL MEETING OF THE BODY CORPORATE

TO: Mr John Smith
Unit 5
35 West Street
East Brisbane Qld 4169

You are advised that an Extraordinary General Meeting for-

Name of Scheme: *Seaview community titles scheme 12345*

CMS No. 12345

is to be held at-

Address of meeting venue: 35 West Street, East Brisbane
Time and date of meeting: Monday 3 April 2013 at 8.00 pm

Please read the attached notice which sets out your rights and responsibilities in respect of the meeting.

The following agenda sets out the substance of the motions to be considered at the meeting. The **full text** of each motion is set out in the accompanying "Voting Paper". An explanatory note by the owner proposing a motion may accompany the agenda.

AGENDA

Attendance record and Apologies
Admittance of voting papers and proxies

Motion No	***Substance of Motion***
1	A motion to confirm the minutes of the annual general meeting held on 5 November 2012.
2	A motion to authorize acceptance of a quotation from A G Painter & Sons for $38,7000 to repaint the building.
3	A motion for a special resolution to amend by-law 26 to prohibit the keeping of animals.

Name of Secretary …………………………………… Signature ………………………

Address for reply …………………………………………………………………...

…………………………………………………………………………………

Telephone No. …………...…. Fax No ……………………..…. Date …………………….

[IMPORTANT NOTE: A Voting Paper and Statement Regarding Meeting Procedure and Voters' Rights for a General Meeting must be added to this notice – see Form A4]

© CCH

[¶74-130] Form B82: General meeting minutes

Click to open document in a browser

MINUTES OF AN EXTRAORDINARY GENERAL MEETING OF "*BODY CORPORATE FOR SEAVIEW COMMUNITY TITLES SCHEME 1234*" HELD AT 1 SMITH STREET, BRISBANE ON 31 MARCH 2013 AT 10.00 am

---

PRESENT PERSONALLY	Mrs G East (owner Lot 1); Mr J Smith (co-owner lot 2); Mrs P Jones (co-owner lot 5); Mr R P South (owner lot 9); Mr S Rose (owner lot 10); Mrs L North (representative of owner lot 12); Mr G West (corporate nominee for Tower Developments Pty Ltd, owner of lots 2, 4 and 8); Mr R Red (co-owner lot 14); Miss P Green (owner lot 15).		
PRESENT BY PROXY	Mrs L East, proxy for Mr J B East (owner lot 11).		
VOTING PAPERS SUBMITTED	Mr S P Blue (owner lot 16)		
APOLOGIES	Dr N Devon (owner lot 6)		
CHAIRPERSON	Mr G West, the Chairperson of the body corporate, took the chair and declared the meeting opened at 10.04 am.		
QUORUM	Mr West noted that a quorum was present for the first item of business and, assuming that everyone remains at the meeting, a quorum will be present for all remaining items of business.		
MOTION 1 *(Minutes)*	***RESOLVED*** that the minutes of the last annual general meeting of the body corporate held on 1 December 2013 be confirmed.		
MOTION 2 *(Removal of Executive Committee Member)*	***RESOLVED*** that the office of Mr John Smith as a member of the committee of the body corporate is vacated.		
	Votes for: 10	**Votes against: 2**	**Abstentions: 1**
CLOSURE	The Chairman declared the meeting closed at 10.45 am.		
CONFIRMATION	The above minutes were confirmed on / /201 . ... Chairperson		
VOTING RECORD	Statutory voting tally sheet is attached to these minutes.*		
SECRETARY'S CONTACT DETAILS	Mr Bill Downs 23/76 George Street Brisbane Qld 4000 Telephone 07 1234 4321		

* [CCH Note: See Form B20, ¶72-930, for voting tally-sheet.]

Last reviewed: 26 September 2013

[¶74-150] Form B83: Committee meeting minutes

Click to open document in a browser

MINUTES OF A MEETING OF THE COMMITTEE OF "*BODY CORPORATE FOR SEAVIEW COMMUNITY TITLES SCHEME 1234*" HELD AT 1 SMITH STREET, BRISBANE ON 5 APRIL 2013 AT 4.00 pm

---

PRESENT PERSONALLY Mrs G East (owner Lot 1 and committee member);
Mr R P South (owner lot 9 and committee member); Mr S Rose (owner lot 10 and committee member); Mr R Red (co-owner lot 14 and committee member); Mr Bill Downs (non-voting body corporate manager and delegate of the secretary).

PRESENT BY PROXY Mrs L East, proxy for Mr J B East (owner lot 11 and committee member).

IN ATTENDANCE Mrs P Jones (co-owner lot 5), having given the requisite notice.

APOLOGIES Mr G West (Chairperson)

CHAIRPERSON The Chairperson of the body corporate being absent, the committee members present personally or by proxy **RESOLVED** that MR R P South act as chairperson of the meeting.

Votes for: 5 **Votes against: 0** **Abstentions: Nil**

CORRESPONDENCE

The following correspondence was tabled by the secretary —

Inward

1. Letter from Brisbane City Council regarding water usage dated 22 March 2013
2. Letter from owner of unit 5 regarding dogs in unit 15 dated 25 March 2013

Outward

1. Letter to Mr J Hope, local state member, dated 12 March 2013 regarding complexity of community titles laws.
2. Letter to cleaner dated 12 March 2013 advising of termination of cleaning contract.

BY-LAW BREACH The secretary reported on the problem being experienced with 2 dogs in unit 15. Mr Rose confirmed that they were a major problem for residents on level 5 and the meeting noted that the owners of unit 15 had ignored a number of requests to deal with the problem. **RESOLVED** that the secretary is authorised to give on behalf of the body corporate a Continuing Contravention Notice to the owner of unit 15 for contravention of by-law 18 by allowing their 2 dogs to disturb the peaceful enjoyment of other owners and occupiers of their lots.

ELECTRICITY ACCOUNT Mr South reported that the last electricity account was $2,987, which is almost twice the amount paid by "Fairweather", which is a similar building to "Seaview". Mr South has discussed the account with Energex and they believe that the body corporate can reduce consumption if it undertakes an energy use assessment. Energex recommends Power Services Pty Ltd to undertake the assessment and they have quoted $300 to do this. **RESOLVED** that Power Services be engaged to undertake an energy use assessment on behalf of the body corporate at a cost of $300.

Votes for: 4 **Votes against: 1** **Abstentions: Nil**

PUMP REPAIRS The secretary reported that the bearings in the swimming pool pump need replacing and the cost is likely to be between $300 and $350. He sought approval to have the work done. **RESOLVED** that the secretary is authorised to have the bearings replaced in the swimming pool pump at a cost not exceeding $400.

Votes for: 4 **Votes against: 1** **Abstentions: Nil**

GENERAL MEETING The need for an extraordinary general meeting to authorise repainting of the building was discussed. It was agreed that this matter can be dealt with at the annual general meeting in view of the time it is likely to take to obtain the necessary quotations.

CLOSURE The Chairperson declared the meeting closed at 6.08 pm.

CONFIRMATION The above minutes were confirmed on / /201 .

…………………………
Chairperson

SECRETARY'S CONTACT DETAILS Mr Bill Downs
23/76 George Street
Brisbane Qld 4000 Telephone 07 1234 4321

© CCH

[¶74-155] Form B84: Special resolution approving new by-law

Click to open document in a browser

RESOLVED by special resolution in accordance with s 62(3) of the *Body Corporate and Community Management Act 1997* that the body corporate consent to the recording of the new community management statement (a copy of which was circulated with the notice of the meeting at which this resolution was passed*) for the purpose of making the following changes to the by-laws:

[Here set out full details of the changes.]

AND FURTHER that two members of the committee, one of whom must be the chairperson or secretary sign the new community management statement and affix the common seal and take all steps necessary to have the new community management statement recorded in the Department of Environment and Resource Management.

* It is not essential to send a copy of the community management statement with the meeting advice.

Last reviewed: 26 September 2013

© CCH

[¶74-160] Form B85: Resolution without dissent approving new by-law

Click to open document in a browser

RESOLVED by resolution without dissent in accordance with s 62(2) of the *Body Corporate and Community Management Act 1997* that the body corporate consent to the recording of the new community management statement (a copy of which accompanied the notice of the meeting at which this resolution was passed*) for the purpose of making the following by-law conferring exclusive use and enjoyment of part of the common property:

[Here set out the proposed new exclusive use by-law.]

* It is not essential to send a copy of the community management statement with the meeting notice.

Last reviewed: 26 September 2013

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[¶74-165] Form B86: Letter to new owner or tenant

Click to open document in a browser

***Seaview* Community Titles Scheme 1234**
35 West Street
East Brisbane Qld 4169

Telephone 3243 1234

1 July 2013

Mr Robert Smith
Unit 5
35 West Street
East Brisbane Qld 4169

Dear Mr Smith

Welcome to Seaview

On behalf of the committee of *Seaview* Community titles scheme I would like to welcome you to *Seaview*. Please let me know if my committee or I can do anything to help you settle into your new home.

In the meantime, I take this opportunity to attach a copy of the by-laws that regulate our scheme. I hope you will find time to read and consider them at your earliest convenience. These by-laws ensure a quality living environment for us all and the committee and residents would appreciate your compliance.

Please do not hesitate to give me a call if you have any questions about any aspect of living in *Seaview*.

Yours sincerely

(Mrs) B G South
Secretary

Encl.

Last reviewed: 26 September 2013

© CCH

[¶74-170] Form B87: Resolution authorising a Continuing Contravention Notice

Click to open document in a browser

RESOLVED, for the purpose of s 182(1) of the *Body Corporate and Community Management Act 1997*, that having regard to the written report from the body corporate manager dated 12 August 2013, the body corporate:

(a) reasonably believes that:

(i) the owner of lot 10, Mr Bill Bligh, is contravening by-law 2 of the scheme's by-laws by repeatedly parking his motor vehicle in the common property car wash bay without the necessary written approval, and

(ii) the circumstances of the contravention, as outlined in that report, make it likely that the contravention will continue; and

(b) authorises the secretary to sign and serve a continuing contravention notice on its behalf requiring Mr Bligh to remedy the contravention within 7 days.

Last reviewed: 26 September 2013

[¶74-175] Form B88: Resolution authorising Future Contravention Notice

Click to open document in a browser

RESOLVED, for the purpose of s 183(1) of the *Body Corporate and Community Management Act 1997*, that having regard to the written report from the body corporate manager dated 12 August 2013, the body corporate:

(b) reasonably believes that:

(iii) the owner of lot 10, Mr Bill Bligh, is contravening by-law 2 of the scheme's by-laws by parking his motor vehicle in the common property car wash bay each Saturday evening without the necessary written approval; and
(iv) the circumstances of the contravention, as outlined in that report, make it likely that the contravention will be repeated; and

(c) authorises the secretary to sign and serve a future contravention notice on its behalf requiring Mr Bligh not to repeat the contravention.

Last reviewed: 26 September 2013

© CCH

[¶74-180] Form B89: Consent of owner to exclusive use by-law

Click to open document in a browser

TO:

The Secretary
Seaview community titles scheme 1234
35 West Street
East Brisbane Qld 4169

Dear Sir

I agree to:

(a) the recording of the proposed new community management statement accompanying the notice of general meeting to be held on 26 August 2013;
(b) the making of by-law 23 as incorporated in that statement; and
(c) the conditions appearing in that by-law.

This consent is given by me before the passing of the resolution without dissent consenting to the recording of that statement.

Dated: 20 August 2013

....
John Smith
Owner of lot 14

Last reviewed: 26 September 2013

© CCH

[¶74-185] Form B90: Resolution authorizing improvements to exclusively used common property

Click to open document in a browser

RESOLVED for the purpose of section 174 of the *Body Corporate and Community Management (Standard Module) Regulation 2008* that the body corporate authorize:

(a) the owner of lot 14, Mr John Jones, to construct a planter box in the common property courtyard over which he has exclusive use under by-law 11, according to the plan provided to the body corporate; and

(b) the secretary to sign a written authorization on behalf of the body corporate.

Last reviewed: 26 September 2013

© CCH

[¶74-190] Form B91: Letter authorizing improvements to exclusively used common property

Click to open document in a browser

Seaview Community Titles Scheme 1234
35 West Street
East Brisbane Qld 4169

Telephone 3243 1234

24 August 2013

Mr John Jones
Unit 14
35 West Street
East Brisbane Qld 4169

Dear Mr Jones

This letter will confirm that the body corporate, by resolution passed on 23 August 2013 for the purpose of section 174 of the *Body Corporate and Community Management (Standard Module) Regulation 2008*, authorizes you to construct a planterbox in the common property courtyard over which you have exclusive use under by-law 11, according to the plan provided by you to the body corporate.

Yours sincerely

(Mrs) B G South
Secretary

Last reviewed: 26 September 2013

[¶74-195] Form B92: Ordinary resolution authorizing improvements to exclusively used common property

Click to open document in a browser

RESOLVED by ordinary resolution for the purpose of section 174 of the *Body Corporate and Community Management (Standard Module) Regulation 2008* that the body corporate:

(a) authorize the owner of lot 14, Mr John Jones, to construct a gazebo in the common property courtyard over which he has exclusive use under by-law 11, according to the plans and specifications provided to the body corporate; and

(b) consent to Mr Jones making a building application to Brisbane City Council for approval of those plans and specifications,

AND that the secretary has authority to sign a written authorization and consent on behalf of the body corporate.

Last reviewed: 26 September 2013

[¶74-200] Form B93: Resolution approving parking of a vehicle

Click to open document in a browser

RESOLVED that body corporate approval under by-law 2 be given in writing by the secretary to the owner of lot 14, Mr John Jones, to park his Holden sedan motor vehicle on the area of common property adjacent to the car washing bay, on the understanding that this approval:

(a) is a non-exclusive license and confers no exclusive rights or privileges relating to the common property;
(b) applies during the period from 1 August 2013 until 31 October 2013; and
(c) may be cancelled by the body corporate giving 7 days written notice to the owner.

Last reviewed: 26 September 2013

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[¶74-205] Form B94: Instrument approving parking of a vehicle

Click to open document in a browser

Seaview Community Titles Scheme 1234
35 West Street
East Brisbane Qld 4169

Telephone 3243 1234

24 July 2013

Mr John Jones
Unit 14
35 West Street
East Brisbane Qld 4169

Dear Mr Jones

This letter will confirm that the body corporate, by resolution passed on 23 July 2013 gave approval under by-law 2 to you parking your Holden sedan motor vehicle on the area of common property adjacent to the car washing bay, on the understanding that this approval:

(a) is a non-exclusive license and confers no exclusive rights or privileges relating to the common property;
(b) applies during the period from 1 August 2013 until 31 October 2013; and
(c) may be cancelled by the body corporate giving 7 days written notice to the owner.

Yours sincerely

(Mrs) B G South
Secretary

Last reviewed: 26 September 2013

© CCH

[¶74-210] Form B95: Resolution approving a private garden

Click to open document in a browser

RESOLVED that body corporate approval under by-law 4 be given in writing by the secretary to the owner of lot 14, Mr John Jones, to establish and maintain a vegetable garden on the area of common property comprising the lower terrace, on the understanding that this approval:

(d) is a non-exclusive license and confers no exclusive rights or privileges relating to the common property;
(e) applies during the period from 1 August 2013 until 31 December 2013;
(f) may be cancelled by the body corporate giving 7 days written notice to the owner; and
(g) will be cancelled if the garden is not properly maintained.

Last reviewed: 26 September 2013

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[¶74-215] Form B96: Instrument approving a private garden

Click to open document in a browser

Seaview Community Titles Scheme 1234
35 West Street
East Brisbane Qld 4169

Telephone 3243 1234

24 July 2013

Mr John Jones
Unit 14
35 West Street
East Brisbane Qld 4169

Dear Mr Jones

This letter will confirm that the body corporate, by resolution passed on 23 July 2013 gave approval under by-law 4 for you to establish and maintain a vegetable garden on the area of common property comprising the lower terrace, on the understanding that this approval:

(a) is a non-exclusive license and confers no exclusive rights or privileges relating to the common property;
(b) applies during the period from 1 August 2013 until 31 December 2013;
(c) may be cancelled by the body corporate giving 7 days written notice to the owner; and
(d) will be cancelled if the garden is not properly maintained.

Yours sincerely

(Mrs) B G South
Secretary

Last reviewed: 26 September 2013

© CCH

[¶74-220] Form B97: Resolution approving attachment to common property

Click to open document in a browser

RESOLVED that body corporate approval under by-law 5 be given in writing by the secretary to the owner of lot 14, Mr John Jones, to erect an aluminum awning over the back door to his unit by attaching it to the common property wall, on condition that the awning be kept in good order and repair at all times.

Last reviewed: 26 September 2013

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[¶74-225] Form B98: Instrument approving attachment to common property

Click to open document in a browser

Seaview Community Titles Scheme 1234
35 West Street
East Brisbane Qld 4169

Telephone 3243 1234

24 July 2013

Mr John Jones
Unit 14
35 West Street
East Brisbane Qld 4169

Dear Mr Jones

This letter will confirm that the body corporate, by resolution passed on 23 July 2013 gave approval under by-law 5 for you to erect an aluminum awning over the back door to your unit by attaching it to the common property wall. This approval is subject to the condition that the awning be kept in good order and repair at all times.

Yours sincerely

(Mrs) B G South
Secretary

Last reviewed: 26 September 2013

[¶74-230] Form B99: Resolution approving a sign

Click to open document in a browser

RESOLVED that body corporate approval under by-law 8 be given in writing by the secretary to the owner of lot 14, Mr John Jones, to erect a "For Sale" sign on the balcony of his unit, on condition that the sign:

(a) cannot be larger than 1m x 1.3m;
(b) must be removed as soon as a contract for sale of the unit is signed, or on 31 October 2013, whichever is the later; and
(c) must be kept in good condition.

Last reviewed: 26 September 2013

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[¶74-235] Form B100: Instrument approving a sign

Click to open document in a browser

***Seaview* Community Titles Scheme 1234**
35 West Street
East Brisbane Qld 4169

Telephone 3243 1234

24 July 2013

Mr John Jones
Unit 14
35 West Street
East Brisbane Qld 4169

Dear Mr Jones

This letter will confirm that the body corporate, by resolution passed on 23 July 2013 gave approval under by-law 8 for you to erect a "For Sale" sign on the balcony of your unit, on condition that the sign:

(a) cannot be larger than 1m x 1.3m;
(b) must be removed as soon as a contract for sale of the unit is signed, or on 31 October 2013, whichever is the later; and
(c) must be kept in good condition.

Yours sincerely

(Mrs) B G South
Secretary

Last reviewed: 26 September 2013

© CCH

[¶74-240] Form B101: Resolution approving storage of flammable liquids

Click to open document in a browser

RESOLVED that body corporate approval under by-law 9 be given in writing by the secretary to the owner of lot 14, Mr John Jones, for him to keep 500 litres of heating oil in the garage part of his lot on condition that it is stored in a tank approved by the local fire authority and a fire extinguisher is installed in the vicinity of the tank.

Last reviewed: 26 September 2013

© CCH

[¶74-245] Form B102: Instrument approving storage of flammable liquids

Click to open document in a browser

Seaview Community Titles Scheme 1234
35 West Street
East Brisbane Qld 4169

Telephone 3243 1234

24 July 2013

Mr John Jones
Unit 14
35 West Street
East Brisbane Qld 4169

Dear Mr Jones

This letter will confirm that the body corporate, by resolution passed on 23 July 2013 gave approval under by-law 9 for you to keep 500 litres of heating oil in the garage part of your lot on condition that it is stored in a tank approved by the local fire authority and a fire extinguisher is installed in the vicinity of the tank.

Yours sincerely

(Mrs) B G South
Secretary

Last reviewed: 26 September 2013

© CCH

[¶74-250] Form B103: Resolution approving an animal

Click to open document in a browser

RESOLVED that body corporate approval under by-law 11 be given in writing by the secretary to the owner of lot 14, Mr John Jones, for him to keep a brown cattle dog on his lot, subject to conditions that the dog must:

(a) only be on common property for the purpose of ingress to or egress from the lot;
(b) be on a lead when on common property; and
(c) be removed from the lot if it is a nuisance to other lot occupiers.

Last reviewed: 26 September 2013

© CCH

[¶74-255] Form B104: Instrument approving an animal

Click to open document in a browser

Seaview Community Titles Scheme 1234
35 West Street
East Brisbane Qld 4169

Telephone 3243 1234

24 July 2013

Mr John Jones
Unit 14
35 West Street
East Brisbane Qld 4169

Dear Mr Jones

This letter will confirm that the body corporate, by resolution passed on 23 July 2013, gave approval under by-law 11 for you to keep a brown cattle dog on your lot, subject to conditions that the dog must:

(a) only be on common property for the purpose of ingress to or egress from the lot;
(b) be on a lead when on common property; and
(c) be removed from the lot if it is a nuisance to other lot occupiers.

Yours sincerely

(Mrs) B G South
Secretary

Last reviewed: 26 September 2013

[¶74-260] Form B105: Notice of lot ownership

Click to open document in a browser

PLEASE NOTE: This precedent has been deleted as the BCCM Form 8 is the current form used to advise of a change of lot ownership, corporate nominees and details of the lot being leased out. The BCCM Form 8 can be found at ¶70-180.

Last reviewed: 26 September 2013

© CCH

[¶74-265] Form B106: Notice of Lease or Sublease

Click to open document in a browser

PLEASE NOTE: This precedent has been deleted as the BCCM Form 8 is the current form used to advise of a change of lot ownership, corporate nominees and details of the lot being leased out. The BCCM Form 8 can be found at ¶70-180.

Last reviewed: 26 September 2013

© CCH

[¶74-270] Form B107: Notice of transfer of leasehold interest

Click to open document in a browser

Body Corporate and Community Management Act 1997. S. 201.

INFORMATION FOR BODY CORPORATE ROLL

To: The Secretary

Name:

Address

Include the details in this notice in the roll of the body corporate in respect of:

Name of Scheme:

CTS/CMS No:

Lot No: *Plan No:*

TRANSFER OF LEASE OR SUB-LEASE

The following lease or sub-lease, over the whole or part of the lot, has been transferred.

Full Name of Transferee:

Residential/Business Address:

Postcode:

Address for service of notices (if different to the residential or Business address):

Address:

Postcode:

Signature of owner: *Date and term of lease/sub-lease:*

Name of owner: *Date:*

Last reviewed: 26 September 2013

© CCH

[¶74-275] Form B108: Notice of termination of leasehold interest

Click to open document in a browser

Body Corporate and Community Management Act 1997. S. 201.

INFORMATION FOR BODY CORPORATE ROLL

To: The Secretary *Name:*

Address

Include the details in this notice in the roll of the body corporate in respect of:

Name of Scheme:

CTS/CMS No:

Lot No: *Plan No:*

TERMINATION OF LEASE OR SUBLEASE

The following lease or sub-lease, over the whole or part of the lot, has been terminated.

Full Name of lessee/sub-lessee:

Residential/Business Address:

Postcode:

Date of termination:

Signature of owner: *Date and term lease/sub-lease:*

Name of owner: *Date:*

Last reviewed: 26 September 2013

© CCH

[¶74-280] Form B109: Notice of engagement of letting or leasing agent

Click to open document in a browser

Body Corporate and Community Management Act 1997. S. 201.

INFORMATION FOR BODY CORPORATE ROLL

To: The Secretary *Name:*

Address

Include the details in this notice in the roll of the body corporate in respect of:

Name of Scheme:

CTS/ CMS No:

Lot No: *Plan No:*

LETTING OR LEASING AGENT

The following person is appointed by the owner to let or lease the lot.

Full name of agent:

Residential/Business Address:

Postcode:

Address for service of notices (if different to the residential or Business address): *Address:*

Postcode:

Signature of owner:

Name of owner: *Date:*

Last reviewed: 26 September 2013

[¶74-285] Form B110: Notice of termination of engagement of letting or leasing agent

Click to open document in a browser

Body Corporate and Community Management Act 1997. S. 201.

INFORMATION FOR BODY CORPORATE ROLL

To: The Secretary *Name:*

Address

Include the details in this notice in the roll of the body corporate in respect of:

Name of Scheme:

CTS/ CMS No:

Lot No: *Plan No:*

LETTING OR LEASING AGENT

The appointment of the following person to let or lease the lot is terminated.

Full name of agent: *Date of termination:*

Signature of owner:

Name of owner: *Date:*

Last reviewed: 26 September 2013

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[¶74-290] Form B111: Notice by mortgagee entering into possession

Click to open document in a browser

Body Corporate and Community Management Act 1997. S. 201.

INFORMATION FOR BODY CORPORATE ROLL

To:
The Secretary *Name:*

Address

Include the details in this notice in the roll of the body corporate in respect of:

Name of Scheme:	
CTS/ CMS No:	
Lot No:	*Plan No:*

MORTGAGEE IN POSSESSION

The following mortgagee has taken steps to enforce a mortgage over the lot or an interest in the lot.

Full Name of Mortgagee:		
Residential/ Business Address:		
		Postcode:
Address for service of notices (if different to the residential or Business address):	*Address:*	
		Postcode:
Date Steps taken:		
Signature of Mortgagee:		*Date:*

Last reviewed: 26 September 2013

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[¶74-295] Form B112: Notice of intention not to enforce mortgage

Click to open document in a browser

Body Corporate and Community Management Act 1997. S. 201.

INFORMATION FOR BODY CORPORATE ROLL

To: The Secretary *Name:*

Address

Include the details in this notice in the roll of the body corporate in respect of:

Name of Scheme:	
CTS/ CMS No:	
Lot No:	*Plan No:*

MORTGAGEE IN POSSESSION **The following mortgagee in possession has decided not to enforce the mortgage over the lot or its interest in the lot.**		
Full Name of Mortgagee:		
Residential/ Business Address:		
		Postcode:
Address for service of notices (if different to the residential or Business address):	*Address:*	*Postcode:*
Date Decision taken:		
Signature of Mortgagee:		*Date:*

Last reviewed: 26 September 2013

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[¶74-300] Form B113: Notice of change of address

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INFORMATION FOR BODY CORPORATE ROLL

TO: The Secretary,
(Name and address of scheme)

You are required to include the following in the roll of the body corporate in respect of-

Name of Scheme...CMS No.
....

Lot No. .... Plan No. ....

CHANGE OF ADDRESS

The following person(s) has/have changed their address:

Name(s) ....
*Status ....

Old residential address ....
Old business address ....

New residential address ....
New business address ....

Signature ....
Date ....

*Owner/Mortgagee/Lessee/etc.

Last reviewed: 26 September 2013

[¶74-310] Form B115: Notice giving preliminary information

Click to open document in a browser

Body Corporate and Community Management Act 1997

NOTICE GIVING PRELIMINARY INFORMATION TO BODY CORPORATE

TO: The Secretary,
(Name and address of scheme)

The following preliminary information is given for the purposes of section 203 of the Act in respect of —

Name of Scheme .... CMS No. ....

Lot No. .... Plan No. ....

* I was required by section .... of .... to give the body corporate a notice and:

(a) I failed to give that notice. +

(b) I gave that notice on .... 201... (a copy of which is attached). +

* I was not required by section .... of .... to give the body corporate a notice.

Signature ....

Name ....

Date ....

* These are alternatives — delete one.

+ These are alternatives — delete one.

Last reviewed: 26 September 2013

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[¶74-315] Form B116: Notice by body corporate seeking information

Click to open document in a browser

Body Corporate and Community Management Act 1997

INFORMATION REQUIRED BY BODY CORPORATE

TO: (Name and address)

Section 203 of the Act states that the body corporate may serve notice on a person who it is satisfied has failed to give a notice required to be given under the Act or one of its regulation modules*. Such notice may require that person to give the notice containing the information that they should have given under the Act or relevant regulation module. The body corporate is satisfied that you have not given such a notice in respect if the following lot:

Name of Scheme .... CMS No. ....

Lot No. .... Plan No. ....

The notice you have failed to give was a notice under section .... of ....

You are required to complete the attached notice and give it to the body corporate within 28 days.

Section 203 also provides that you may incur a penalty if you fail to comply with this notice within the required time.

Signature of Secretary .... Date ....

Name of Secretary ....

Address for reply ....

....

Telephone No .... Fax No. ....

---

* See, for example, section 196 of the Standard Module Regulation.

Last reviewed: 26 September 2013

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[¶74-320] Form B117: Roll

Click to open document in a browser

Body Corporate and Community Management Act 1997

ROLL

Community titles scheme ....

SCHEME INFORMATION

ORIGINAL OWNER

Name	
Residential or business address	
Postal address	

LOT ENTITLEMENTS

Lot Number	**Contribution Schedule Lot Entitlement**	**Interest Schedule Lot Entitlement**
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		

Community titles scheme ....
LOT INFORMATION

Lot No .... **(Unit No ....)** **Page No ......**

CURRENT OWNER(S)

Name	
Residential or Business Address	
Address for Service of Notices	

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How interest acquired	
When interest acquired	

OWNER CORPORATION DETAILS

Business Address	
ACN	
ARBN	

MORTGAGEE IN POSSESSION

Name	
Residential Address	
Business Address (if a corporation)	
Address for Service of Notices	
Date Notice Received (entry into possession)	
Date Notice Received (decision not to enforce)	

REPRESENTATIVE OF OWNER

Full name	
Residential Address	
Business Address (if a corporation)	
Address for Service of Notices	
Representative Capacity	
Instrument or document	
Appointment Date	
Date Information Given	

NOMINEE OF A CORPORATION

Name of Corporation	
Capacity	
Date Information Given	
Primary Nominee	
Full Name	
Residential Address	
Address for Service of Notices	
Date of Appointment	
Alternate Nominee	
Full Name	
Residential Address	
Address for Service of Notices	
Date of Appointment	

POWER OF ATTORNEY

Full name	
Residential Address	
Business Address (iIf a corporation)	
Address for Service of Notices	
Appointment Date	
Date Information Given	

LEASES FOR 6 MONTHS OR MORE

Particulars of Grant	
Full Name of Lessee	
Residential Address	
Business Address (if a corporation)	

Address for Service of Notices	
Date of Lease	
Term of Lease	
Date Information Given	
Particulars of Termination	
Date of Termination	
Date Information Given	
Particulars of Assignment	
Date of Assignment	
Full Name of Assignee	
Residential Address	
Business Address (if a corporation)	
Address for Service of Notices	
Date Information Given	

SUB-LEASES FOR 6 MONTH OR MORE

Particulars of Grant	
Full Name of Sub-Lessee	
Residential Address	
Business Address (if a corporation)	
Address for Service of Notices	
Date of Sub-Lease	
Term of Sub-Lease	
Date Information Given	
Particulars of Termination	
Date of Termination	
Date Information Given	
Particulars of Assignment	
Date of Assignment	
Full name of Assignee	
Residential Address	
Business Address (if a corporation)	
Address for Service of Notices	
Date Information Given	

LEASING OR LETTING AGENT

Full Name of Agent	
Residential Address	
Business Address (if a corporation)	
Address for Service of Notices	
Appointment Date	
Date Information Given	
Termination Date	

SUBSIDIARY SCHEME REPRESENTATIVE (SCHEME 1)

Name of Scheme	
Name of Representative	
Address for Service of Notices	
Date Information Given	

SUBSIDIARY SCHEME REPRESENTATIVE (SCHEME 2)

Name of Scheme	
Name of Representative	
Address for Service of Notices	
Date Information Given	

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SUBSIDIARY SCHEME REPRESENTATIVE (SCHEME 3)

Name of Scheme	
Name of Representative	
Address for Service of Notices	
Date Information Given	

OTHER INFORMATION

Section of Act/Module	
Type of Notice	
Full name	
Residential Address	
Business Address (if a corporation)	
Address for Service of Notices	
Appointment Date	
Other Details	
Date Information Given	

Last reviewed: 26 September 2013

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[¶74-325] Form B118: Register of Assets

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Body Corporate and Community Management Act 1997

REGISTER OF ASSETS

No.	Description of Asset	Purchase/Gift	Date Acquired	Purchased Assets		Gifted Assets	
				Cost	Name and Address of Seller	Value	Name and Address of Donor
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
13							
14							

Last reviewed: 26 September 2013

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[¶74-330] Form B119: Register of Engagements and Authorizations

Click to open document in a browser

REGISTER OF ENGAGEMENTS AND AUTHORIZATIONS

No.	Category[1]	Name and Address	Effective Date[2]	Term[3]	For Engagements[4]		Powers of Body Corporate Manager[5]	For Financiers[6]		Annexure Number[7]
					Duties	Remuneration		Date Notice Given	Date Notice Withdrawn	
1										
2										
3										
4										

[1] Body Corporate Manager, Service Contractor, Letting Agent or Financier.
[2] Not required for Financier.
[3] Not required for Financier.
[4] Only required for Body Corporate Manager and Service Contractor.
[5] Only required for Body Corporate Manager.
[6] Only required for Financier.
[7] Number of annexed copy document of the engagement or authorization. (Not required for Financier.)

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[¶74-335] Form B120: Register of Authorizations Affecting Common Property

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REGISTER OF AUTHORIZATIONS AFFECTING COMMON PROPERTY

No.	Category of Authorization[1]	Date of Resolution	Description of Common Property Area[2]	Conditions Attached[3]	For Owner Improvements[4]	
					Lot No.	Date of Order[5]
1						
2						
3						
4						
5						
6						
7						

[1] Service Contractor, Letting Agent or Owner Improvement.
[2] This is the part of the common property authorized for use.
[3] These are the conditions imposed on the authority by the body corporate resolution.
[4] Only required for Owner Improvement Authorizations.
[5] Only applies if an Adjudicator order the body corporate to consent.

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[¶74-340] Form B121: Register of Allocations Under Exclusive Use By-laws

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REGISTER OF ALLOCATIONS UNDER EXCLUSIVE USE BY-LAWS

Entry No.	By-Law No.[1]	Allocation or Reallocation[2]	Description of Area or Asset[3]	Lot Benefited[4]	Reallocation Particulars[5]			Other Details (if any)
					Entry No[6]	Previous Lot[7]	New Lot[8]	
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								
11								

[1] This is the by-law under which the allocation is made.
[2] State which one applies. (Allocations are the initial allocations while reallocations are changes made by owner agreements.)
[3] This is the description of the area of common property allocated (usually with reference to a plan) or the body corporate asset (usually with reference to the number in the asset register).
[4] This is the lot to which the allocation is attached.
[5] This section is only completed for a reallocation.
[6] This is the number of the entry in this register that is effectively cancelled by the reallocation.
[7] This is the lot that was previously benefited.
[8] This is the lot that is now benefited.

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[¶74-345] Form B122: Administrative fund budget

Click to open document in a browser

Blue Waters community titles scheme 1234

Budget for period 1 January 2013 to 31 December 2013

ADMINISTRATIVE FUND

INCOME

Contributions	$ 42,779.00
Interest on unpaid contributions	$ 230.00
Interest on investments	$ 2,320.00
Certificate & inspection fees	$ 300.00
Sale of personal property	$ Nil
Contributions in arrears	$ 543.00
Total Income	$ 46,172.00

EXPENDITURE

Insurances	Building	$2,560.00	
	Public liability	$ 342.00	
	Workers compensation	$ 210.00	
	Voluntary workers	$ 310.00	$ 3,422.00
Cleaning			$ 5,670.00
Electricity			$ 2,100.00
Gardening			$ 3,400.00
Pool cleaning and treatment			$ 3,700.00
Management			$ 6,200.00
Lift maintenance			$ 9,500.00
Unpaid expenses at commencement of period			$ 520.00
General maintenance	Electrical	$ 900.00	
	Plumbing	$2,000.00	
	Handyman	$3,000.00	$ 5,900.00
Globes and hardware			$ 400.00
Income tax			$ 1,040.00
Excess water			$ 320.00
Auditors fees			$ 1,000.00
Contingency allowance			$ 3,000.00
Total Expenditure			$46,172.00

Administrative Fund levy calculation

Aggregate lot entitlement = 1300

Rate of contribution per lot entitlement = $\frac{\$42,779.00}{1300}$

= $32.91

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[¶74-350] Form B123: Sinking fund budget

Click to open document in a browser

Blue Waters community titles scheme 1234

Budget for period 1 January 2013 to 31 December 2013

SINKING FUND

INCOME

Contributions		$11,972.00
Interest on unpaid contributions		$ 58.00
Interest on invested funds		$ 5,620.00
Total income		$17,650.00

EXPENDITURE

Within next 10 years

Lift machinery	$ 34,500.00	
Pool equipment	$ 8,000.00	
Resurface roof	$ 21,000.00	
Resurface driveway	$ 12,000.00	
Window frames	$ 9,000.00	
Air conditioning	$ 23,000.00	
Total	$107,500.00	
Allow 1/10 for current year		$ 10,750.00

Within next 5 years

Painting	$ 23,000.00	
Carpets	$ 4,000.00	
Clothes lines	$ 600.00	
Guttering	$ 3,000.00	
Fences	$ 2,000.00	
Television antenna	$ 800.00	
Light fittings	$ 1,100.00	
Total	$ 34,500.00	
Allow 1/5 for current year		$ 6,900.00
Total expenditure		$ 17,650.00

Sinking Fund levy calculation

Aggregate lot entitlement = 1300

Rate of contribution per lot entitlement = $\frac{\$11,972.00}{1300}$

= $9.21

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[¶74-355] Form B124: Resolution adopting Promotion Fund Budget

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RESOLVED that the Promotion Fund Budget circulated with the notice of this meeting be adopted by the body corporate and that levies be imposed in accordance with that budget.

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[¶74-360] Form B125: Promotion Fund Budget

Click to open document in a browser

Blue Waters community titles scheme 1234

Budget for period 1 January 2013 to 31 December 2013

PROMOTION FUND

INCOME

Contributions	$10,400.00
Interest on invested funds	380.00
Total income	$10,780.00

EXPENDITURE

Advertising agency (including placement)	$ 6,340.00
Brochures and signs	2,240.00
Secretarial and accounting	1,200.00
Contingency	1,000.00
Total expenditure	$10,780.00

LEVY CALCULATION

Lot No.	Owner	Entitlement	Levy Amount
1	Smith & Co	34	$ 2,318.75
2	Ace Car Repairs	34	$ 2,318.75
5	John South	30	$ 2,045.84
7	ABC Insurance Ltd	22	$ 1,501.00
8	Big Brother Auto Electrical	38	$ 2,595.66
	Totals	158	$10,780.00

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Last reviewed: 26 September 2013

[¶74-365] Form B126: Agreement to pay Promotion Fund contribution

Click to open document in a browser

Promotion Fund Agreement

Date 2013

Body Corporate ***Ocean View community titles scheme 1234***
26 Seaview Street, Surfers Paradise, 4217
(ABN 123 123 123)

Owner ***Ace Fried Chicken Pty Ltd***
Shop 4, 26 Seaview Street, Surfers Paradise
4217
(ABN 321 321 321)

The Body Corporate and the Owner agree:

1. The Body Corporate will:
   (a) establish a promotion fund (“**Fund**”) to promote the shops within community titles scheme 1234 (“**Scheme**”); and
   (b) endeavor to enter into agreements, in the same form as this agreement, with other owners of shops within the Scheme.
2. The Owner will contribute to the Fund in respect of lot 3 in the Scheme.
3. The committee of the Body Corporate will administer the Fund.
4. The total amount to be raised by contributions each financial year (“**Total Levy**”) must be determined by an annual budget to be prepared by the committee and adopted in accordance with the *Strata Schemes Management Act 1997*.
5. Each owner who has agreed to contribute to the Fund will contribute an amount calculated using the following formula:

$$C = \frac{LLE}{ALE} \times TL$$

   Where:

   C = the owners contribution to the Fund.
   LLE = the lot entitlement of the lot of the particular owner.
   ALE = the aggregate lot entitlement of the Scheme.
   TL = the Total Levy.

6. The Fund must not be used for television advertising.

SIGNED for and on behalf of the Body Corporate: ……………………………………..
Secretary

SIGNED for and on behalf of the Owner: ……………………………………
Owner

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[¶74-370] Form B127: Ordinary resolution fixing contributions

Click to open document in a browser

RESOLVED by ordinary resolution that, having regard to the budget circulated with the notice of this meeting, the following contributions be fixed and levied on owners:

(a) $12,600.00 to the administrative fund, payable by 4 equal installments which must be paid on or before the following dates:
(i) 1 January 2013
(ii) 1 April 2013
(iii) 1 July 2013
(iv) 1 October 2013; and

(b) $5,890.00 to the sinking fund, payable by 4 equal installments which must be paid on or before the following dates:
(i) 1 January 2013
(ii) 1 April 2013
(iii) 1 July 2013
(iv) 1 October 2013.

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[¶74-375] Form B128: Committee resolution for interim contribution

Click to open document in a browser

RESOLVED that, having regard to the budget for the next financial year, the following interim contributions be fixed and levied on owners:

(a) $1,200.00 to the administrative fund; and
(b) $878.00 to the sinking fund,

both being in respect of the period from 1 December 2013 to 31 December 2013, and to be paid on or before 12 November 2013.

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[¶74-380] Form B129: Ordinary resolution imposing special levy

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RESOLVED by ordinary resolution that, because of inadequate provision in the last sinking fund budget to cover the cost of repainting the building, a special contribution of $8,000.00 be fixed and levied to the sinking fund to be payable by a single amount on or before 12 March 2013.

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[¶74-385] Form B130: Contribution notice

Click to open document in a browser

……………..*community titles scheme*………

ABN [Insert number]
[Address]
[Telephone Number]

Community Schemes Management Act 1997
Body Corporate and Community Management (Standard Module) Regulation 2008
(Section 142)

NOTICE OF MAINTENANCE CONTRIBUTION

TAX INVOICE

TO:
[Name]
[Address]

Notice is given of contributions levied by and other moneys owing to the body corporate:

ADMINISTRATIVE FUND ($ for the period from / /0 to / /0 , payable by [number] [frequency] installments.)

Item	Due Date	Pre-Discount Amount	Pre-Discount GST	Pre-Discount Total	Discount Amount	Discount Amount GST	Discount Amount Total
Instalment		$	$	$	$	$	$
Services		$	$	$			
Insurance		$	$	$			
Special Levy		$	$	$	$	$	$
Arrears		$		$			
Interest		$		$			
TOTALS		$	$	$	$	$	$

SINKING FUND ($ for the period from / /0 to / /0 , payable by [number] [frequency] installments.)

Item	Due Date	Pre-Discount Amount	Pre-Discount GST	Pre-Discount Total	Discount Amount	Discount Amount GST	Discount Amount Total
Instalment		$	$	$	$	$	$
Special Levy		$	$	$	$	$	$
Arrears		$		$	$		$
Interest		$		$	$		$
TOTALS		$	$	$	$	$	$
COMBINED TOTALS		$	$	$ (1)	$	$	$ (2)

Please note:

1. If you pay by the due date you should pay the amount designated (1) above.
2. If you do not pay by the due date you should pay the amount designated (2) above.
3. Also, if you do not pay by the end of one month after the due date, simple interest will be charged at the rate of [insert rate]% per month on the amount unpaid until payment is received.

Issue date: [Insert date]

…………………………………………

Treasurer

………..community titles scheme………….

[¶74-390] Form B131: Ordinary resolution allowing a discount

[Click to open document in a browser]

RESOLVED by ordinary resolution that the body corporate allow a discount of 20% on all contributions and contribution installments paid by the relevant payment dates fixed in notices of contributions given to owners.

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[¶74-395] Form B132: Ordinary resolution imposing interest

Click to open document in a browser

RESOLVED by ordinary resolution that the body corporate impose a penalty by way of simple interest at a rate of 2.5% per month on all contributions and contribution installments not paid by the relevant payment dates fixed in notices of contributions given to owners.

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Last reviewed: 26 September 2013

[¶74-400] Form B133: Committee resolution allowing discount or waiving interest

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RESOLVED that because of special reasons [the normal discount be allowed] [the usual penalty interest be waived] in respect of the contribution payment for Lot [number] that was due and payable on [date].

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[¶74-405] Form B134: Governing body corporate manager's minute allowing discount or waiving interest

Click to open document in a browser

[Name of governing body corporate manager] in exercise of delegated authority from [name] Community titles scheme [number] **RESOLVES** that because of special reasons [the normal discount be allowed] [the usual penalty interest be waived] in respect of the contribution payment for Lot [number] that was due and payable on [date].

Last reviewed: 26 September 2013

[¶74-410] Form B135: Ordinary resolution authorizing a debt

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RESOLVED by ordinary resolution that the body corporate borrow $2,300.00 from ABC Bank Limited, such amount being within the limits set by section 150 of the *Body Corporate and Community Management (Standard Module) Regulation 2008*.

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[¶74-415] Form B136: Resolution without dissent authorizing a debt

Click to open document in a browser

PLEASE NOTE: Under s 150 of the Standard Module, a body corporate may borrow money by way of ordinary resolution however, a body corporate may not (unless it has resolved to do so without dissent) be in debt for greater than an amount which is more than $250 per each lot in the scheme.

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RESOLVED by resolution without dissent that the body corporate borrow $22,800.00 from ABC Bank Limited, such amount being outside the limits set by section 150 of the *Body Corporate and Community Management (Standard Module) Regulation 2008*.

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[¶74-425] Form B138: Alternate motions for acceptance of a quotation

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ALTERNATE MOTIONS

YOU SHOULD VOTE FOR EITHER *Motion 1* OR *Motion 2*.
DO NOT VOTE FOR BOTH THESE MOTIONS.

Motion 1
THAT the quotation dated 12 August 2013 of $8,230.00 from Bright Roof Repairs Pty Ltd for repair of hail damage to the roof be accepted and the committee is authorized to enter into a contract with that company to have the work carried out.

OR

Motion 2
THAT the quotation dated 18 July 2013 of $8,900.00 from East Coast Industries Pty Ltd for repair of hail damage to the roof be accepted and the committee is authorized to enter into a contract with that company to have the work carried out.

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[¶74-430] Form B139: Committee resolution authorizing expenditure of a set amount

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RESOLVED that the body corporate contract to have the roof repairs carried out by Bright Roof Repairs Pty Ltd at a cost of $840.00 and the treasurer is authorized to make payment on satisfactory completion of the work.

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[¶74-435] Form B140: Committee resolution authorizing general expenditure

Click to open document in a browser

RESOLVED that the secretary is authorized to contract on behalf of the body corporate to have the driveway paving repaired at a cost not exceeding $1,000.00 and the treasurer is authorized to pay for that work upon its satisfactory completion.

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[¶74-440] Form B141: Single document consent to expenditure

Click to open document in a browser

Body Corporate and Community Management (Standard Module) Regulation 2008
(Section 152)

CONSENT TO SPENDING PROPOSAL

TO:

The Secretary
Ocean View community titles scheme 1234
26 Seaview Street
Surfers Paradise Qld 4217

We, being all of the owners of lots in community titles scheme 1234, **CONSENT** to the proposal by the committee to spend up to $4,000.00 on repairs to the roof.

We understand that such amount exceeds the relevant limit for committee spending for the scheme.

Dated: 10 June 2013

………………………………………	………………………………………
Owner(s) Lot 1	Owner(s) Lot 2
………………………………………	………………………………………
Owner(s) Lot 3	Owner(s) Lot 4
………………………………………	………………………………………
Owner(s) Lot 5	Owner(s) Lot 6

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[¶74-445] Form B142: Multiple document consent to expediture

Click to open document in a browser

CONSENT TO SPENDING PROPOSAL

TO:

The Secretary
Ocean View community titles scheme 1234
26 Seaview Street
Surfers Paradise Qld 4217

I, being the owner of a lot in community titles scheme 1234, **CONSENT** to the proposal by the committee to spend up to $4,000.00 on repairs to the roof.

I understand that:
(a) such amount exceeds the relevant limit for committee spending for the scheme; and
(b) this consent will be used in conjunction with similar consents from other lot owners.

Dated: ……………… 2013

……………………………………
Owner(s)

Lot ………

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[¶74-450] Form B143: Resolution fixing relevant limit for committee spending

Click to open document in a browser

RESOLVED by special resolution in accordance with the Body Corporate and Community Management (Accommodation Module) Regulation 1997 that the relevant limit for committee spending be increased from $125.00 to $400.00.

Last reviewed: 26 September 2013

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[¶74-455] Form B144: Receipt for contribution payment

Click to open document in a browser

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Ocean View Community Titles Scheme 1234

RECEIPT

Date 15th March 2013

Received from J. B. Smith

of unit 6, 1 South Street, Balmain

the sum of one hundred and sixty *dollars*

eighty *cents by* cash ($ 160 :80)

being for contributions / ~~*other*~~

Lot No. 28 *Period* 1-4-2013 to 30-6-2013

Administrative Fund	$ 120:80	(*Discount:* $ 12:08)
Sinking Fund	$ 40:00	(*Discount:* $ 4:00)

Other particulars —

B. West
Treasurer

No **163445**

Last reviewed: 26 September 2013

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[¶74-460] Form B145: Receipt for general transaction

Click to open document in a browser

Ocean View Community Titles Scheme 1234

RECEIPT

Date 15th March 2013

Received from Big Star Insurance Ltd

of 1 George Street, Sydney

the sum of one thousand one hundred dollars

no cents by cheque ($ 1,100 : 00)

being for ~~contributions~~ / other insurance claim

Lot No. — Period —

Administrative Fund $ — : (Discount: $ — :)

Sinking Fund $ — : (Discount: $ — :)

Other particulars damage to swimming pool equipment

B. West

Treasurer

No 163446

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[¶74-465] Form B146: Example cash book pages

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Date	Particulars	Receipt	Administrative Fund						Sinking Fund					Bank		
			Levies	S. 108 Fees	Interest on Levies	Interest on Invest.	Sale of Ppty.	Sundries	Levies	Interest on Levies	Interest on Invest.	Insur-ance Claims	Sundries	Admin. Fund	Sinking Fund	Total
1998	Credit Balance B/F							$2,000.00					$1,000.00	$2,000.00	$4,000.00	$3,000.00
Jan 1	J.M. Smith	62	108.40		0.30				2.20	0.10				108.70	2.30	111.00
Jan 2	B.L. Jones	63	107.20						2.00					107.20	2.00	109.20
Jan 2	R.M. Roberts	64	107.20		0.20				2.00					107.40	2.00	109.40
Feb 8	L.M. Legal Co.	65		16.00										16.00		16.00
Feb 20	Quick Auction Co. (Sale Washing Machine)	66					82.20							82.20		82.20
Feb 21	Badpay Insurance Co	67										129.30			129.30	129.30
Feb 28	National Bank	68				1.80					0.75			1.80	0.75	2.55
Feb 28	B. Clarke	69	108.40						2.20					108.40	2.20	110.60
Mar 16	J.M. Smith	70	108.40						2.20					108.40	2.20	110.60
Mar 16	B.L. Jones	71	107.20						2.00					107.20	2.00	109.20
May 8	Badpay Insurance Co											16.20			16.20	16.20
			646.80	16.00	0.50	1.80	82.20	2,000.00	12.60	0.10	0.75	145.50	1,000.00	2,747.30	1,158.95	3,906.25
			(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)

Note:
(a) The aggregate of the totals in columns (1) to (6) inclusive must equal the total of column (12).
(b) The aggregate of the totals in columns (7) to (11) inclusive must equal the total of column (13).
(c) The aggregate of the totals in columns (1) to (11) inclusive must equal the total of column (14).
(d) The aggregate of the totals in columns (12) and (13) must equal the total of column (14).

Date	Particulars	Cheque	Administrative Fund									Sinking Fund			Bank		
			Insurance	Management Fees	Postage etc	Cleaning	Repair & Maint	Lift Serv	Electricity	Sundries	Gardening	Painting	Replacements	Sundries	Admin. Fund	Sinking Fund	Total
1999																	
Jan 8	Quick Cleaning Co	12805				78.00									78.00		78.00
Jan 8	Badpay Insur Co	12806	287.00												287.00		287.00
Jan 11	B.J.P. Locksmiths	12807					16.40								16.40		16.40
Jan 27	Smith Discounts	12808											221.00			221.00	221.00
Jan 27	Unit Painting Services	12809										420.00				420.00	420.00
Mar 6	Ocean City Council	12810							42.70						42.70		42.70
Mar 16	United Strata Mgmt	12811		82.40	16.20										98.60		98.60
Apr 10	L.B. Lawnley	12812									20.00				20.00		20.00
Apr 10	Quick Cleaning Co	12813				156.00									156.00		156.00
Apr 20	Unsafe Lift Co	12814						280.00							280.00		280.00
May 2	United Strata Mgmt	12815		82.40	9.20										91.60		91.60
May 8	National Bank Fee	-								2.20					2.20		2.20
			287.00	164.80	25.40	234.00	16.40	280.00	42.70	2.20	20.00	420.00	221.00	-	1,072.50	641.00	1,713.50
			(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)

Note:
(a) The aggregate of the totals in columns (1) to (9) inclusive must equal the total of column (13).
(b) The aggregate of the totals in columns (10) to (12) inclusive must equal the total of column (14).
(c) The aggregate of the totals in columns (1) to (12) inclusive must equal the total of column (15).
(d) The aggregate of the totals in columns (13) and (14) must equal the total of column (15).

Last reviewed: 26 September 2013

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[¶74-470] Form B147: Example of reconciliation statement

Click to open document in a browser

Reconciliation Statement @ 30 June 2013

Part 1

Credit balance as per bank statement	$2,192.75
PLUS outstanding deposits	$ Nil
	$2,192.75
LESS unpresented cheques	$ Nil
Balance (A)	$2,192.75

Part 2

Total receipts (From the total of the bank column in the Cash Receipts Book)	$3,906.25
LESS total payments (From the total of the bank column in the Cash Payments Book)	$1,713.50
Balance (B)	$2,192.75

Notes about this procedure:

1. Balance (A) must be the same as Balance (B) before the books are reconciled.
2. Balance (A) represents the funds available as at the date of the reconciliation statement.
3. To determine the proportion of Balance (A) that represents the balance of the Administrative Fund, deduct the total of column 13 in the Cash Payments Book (**Form B146**) from the total of column 12 in the Cash Receipts Book (**Form B146**).
4. The same formula can be used to determine the balance of the Sinking Fund, but this time using columns 14 and 13 respectively.

Last reviewed: 26 September 2013

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[¶74-475] Form B148: Levy register

Click to open document in a browser

NAME OF PROPRIETOR(S) Mr J.M. SMITH

ADDRESS: 5/58 ROUND STREET, BALMAIN **LOT NO.** 5.

Administrative Fund

Date	Particulars	Folio *	Debit	Credit	Balance
1998					
Aug 3	Standard Levy (1/8 - 31/10)	-	63.20		63.20
Aug 9	Payment in cash	3		63.20	-
Oct 1	Special Levy	-	300.00		300.00
Oct 21	Payment by cheque	3		150.00	150.00
Nov 5	Interest	-	1.10		151.10
Nov 5	Payment by cheque	3		151.10	-
Nov 13	Standard Levy (1/11 - 31/1)	-	108.40		108.40
1999					
Jan 1	Interest	-	0.30		108.70
Jan 1	Payment by cheque	3		108.70	-
Feb 3	Standard Levy (1/2 - 30/4)	-	108.40		108.40
Feb 16	Payment by cheque	3		108.40	-

Sinking Fund

Date	Particulars	Folio *	Debit	Credit	Balance
1998					
Aug 3	Standard Levy (1/8 - 31/10)	-	24.00		24.00
Aug 9	Payment in cash	3		24.00	-
Nov 13	Standard Levy (1/11 - 31/1)	-	2.20		2.20
1999					
Jan 1	Interest	-	0.10		2.30
Jan 1	Payment by cheque	3		2.30	-
Feb 3	Standard Levy (1/2 - 30/4)	-	2.20		2.20
Feb 16	Payment by cheque	3		2.20	-
Jun 3	Special Levy		34.50		34.50

* The cash book page number on which the entry appears should be inserted in this column.

Last reviewed: 26 September 2013

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[¶74-480] Form B149: Petty cash book

Click to open document in a browser

Date	Particulars	Stamps	Stationery	Phone	Photo Copies	Cleaner	Sundries	Total	Credits
1999									
Jan 1	By cheque								50.00
Jan 8	Post Office	2.80						2.80	
Jan 8	M. Grill - Secretary		1.10	2.20	0.80			4.10	
Jan 16	Speedy Cleaning Co					20.00		20.00	
Feb 3	Post Office	0.80		0.35				1.15	
Feb 13	Post Office	1.10						1.10	
Mar 2	By cheque								50.00
Mar 27	G.J. Hardware						24.70	24.70	
Mar 27	Speedy Cleaning Co					20.00		20.00	
Mar 28	Post Office	2.75						2.75	
		7.45	1.10	2.55	0.80	40.00	24.70	76.60	100.00
						Add Balance in P/Cash Tin		23.40	
								100.00	100.00
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

Note: (a) The aggregate of the totals in columns (1) to (6) inclusive must equal the first total in column (7).

(b) The amount of cash remaining in the petty cash tin is then added to the first total in column (7) and the balance must equal column (8).

Last reviewed: 26 September 2013

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[¶74-485] Form B150: Statement of account

Click to open document in a browser

Ocean View community titles scheme 1234

STATEMENT OF INCOME

AND EXPENDITURE FOR THE YEAR

ENDED 30 JUNE 2013

ADMINISTRATIVE FUND

		Period 1.7.12 to 30.6.13			**Period 1.7.11 to 30.6.12**	
Balance in bank at start of period			$1,080.00			$560.00
PLUS INCOME						
Contribution received		$37,449.00			$28,625.00	
Special levy received		$4,563.00			$2,150.00	
Interest on arrears		$2.00	$42,014.00		$86.00	$30,861.00
			$43,094.00			$31,421.00
LESS EXPENSES						
Cleaning		$5,889.00			$5,624.00	
Caretaker		$8,017.00			$7,762.00	
Electricity		$1,703.00			$1,989.00	
Light globes		$555.00			$124.00	
Garden supplies		$712.00			$820.00	
Insurance		$3,818.00			$4,120.00	
Management fees		$1,820			$1,670.00	
Bank charges		$10.00			$8.00	
Stationery, postage, copies, etc.		$649.00			$534.00	
Telephone		$231.00			$188.00	
Sundry expenses		$447.00			$231.00	
Intercom repairs		$417.00			$121.00	
Lift maintenance		$4,928.00			$4671.00	
Repairs and maintenance:						
Common areas	$2,015.00			$1,312.00		
Residential	$5,224.00			$1,167.00		

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	$7,239.00			$2,479.00		
Less paid by insurer	$5,070.00	$2,169.00		$0.00	$2,479.00	
Roof treatment		$4,509.00	$35,874.00		$0.00	$30,341.00
						$1,080.00
Balance in bank at period end			$7,220.00			
ACCRUALS:						
Add –						
Contributions in arrears	$823.00			$0.00		
Outstanding penalties	$38.00			$0.00		
Outstanding insurance claim	$1,434.00	$2,295.00		$0.00	$0.00	
Deduct –						
Contributions in advance	$320.00			$0.00		
Trade creditors	$1,212.00	$1,532.00		$0.00	$0.00	
Sub-total		$763.00	$763.00		$0.00	$0.00
TOTAL AVAILABLE FUNDS			$7,983.00			$1,080.00

SINKING FUND

	Period 1.7.12 to 30.6.13		Period 1.7.11 to 30.6.12	
Balance at start of period		$860.00		$410.00
PLUS INCOME				
Contributions received	$18,214.00		$1,806.00	
Interest on arrears	$3.00		$9.00	
Interest on investments	$107.00	$18,324.00	$32.00	$1,847.00
		$19,184.00		$2,257.00
LESS EXPENSES				
Washing machine replacements	$18,212.00		$0.00	
Guttering	$817.00		$310.00	
Rear fence	$1,642.00		$0.00	
Transfer to Building Society Investment Account	$14,000.00	$18,645.00	$ 1,087.00	$ 1,397.00

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Balance in bank at period end			$539.00			$860.00
ACCRUALS:						
Add –						
Contributions in arrears	$120.00			$0.00		
Outstanding penalties	$8.00	$128.00		$0.00	$0.00	
Deduct –						
Contributions in advance	$83.00			$0.00		
Trade creditors	$0.00	$83.00		$0.00	$0.00	
Sub-total		$211.00	$211.00		$0.00	$0.00
Total available funds			$750.00			$860.00

STATEMENT OF INVESTMENTS

AND FINANCIAL INSTITUTION ACCOUNTS

AS AT PERIOD END

ADMINISTRATIVE FUND

Period 1.7.12 to 30.6.13	Period 1.7.11 to 30.6.12
$0.00	$0.00

SINKING FUND

Account 123456 with XYZ Building Society Limited

		Period 1.7.12 to 30.6.13		Period 1.7.11 to 30.6.12
Balance at start of period		$1,087.00		$0.00
PLUS CREDITS				
Interest	$20.00		$0.00	
Transfer from sinking fund bank account	$14,000.00	$14,020.00	$1,087.00	$1,087.00
Sub-total		$15,107.00		$1,087.00
LESS DEBITS		$0.00		$0.00
BALANCE at end of period		$15,107.00		$1,087.00

REMUNERATION, ALLOWANCES OR EXPENSES PAID TO COMMITTEE MEMBERS

Period 1.7.12 to 30.6.13	Nil	Period 1.7.11 to 30.6.13	Nil

Last reviewed: 26 September 2013

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[¶74-490] Form B151: Motion for resolution dispensing with audit

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MOTION FOR SPECIAL RESOLUTION

THAT the body corporate's statement of accounts for the financial year ended 30 June 2013 not be audited.

> **Note:** If you want the accounts to be audited, vote "**no**". If you do not want the accounts to be audited, vote "**yes**".

Last reviewed: 26 September 2013

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[¶74-495] Form B152: Motion for resolution appointing an auditor

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THAT the body corporate appoint Mr William Smith as its auditor for the financial year ended 30 June 2013 in accordance with his proposal dated 2 March 2012.

Last reviewed: 26 September 2013

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[¶74-500] Form B153: Resolution authorising contribution for insurance premium

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RESOLVED that a levy is made to the Administration Fund in the sum of $[amount], being the premium for insuring the common property and body corporate assets under section 182 of the Body Corporate and Community Management (Standard Module) Regulation 2008, to be payable on [date] by lot owners in proportion to their interest schedule lot entitlements and that the treasurer is authorised to impose that levy by notice in writing to the respective lot owners.

Last reviewed: 26 September 2013

[¶74-505] Form B154: Resolution establishing a voluntary insurance scheme

Click to open document in a browser

RESOLVED that, in accordance with section 189 of the *Body Corporate and Community Management Act 1997*, the body corporate establish a voluntary insurance scheme for lots [here insert the lot numbers], the owners of those lots having agreed to participate, the conditions of the scheme being:

1 Participating lot owners ("Owners") must promptly notify the body corporate in writing of any:

(a) improvements made to the building on their lot, including the value of those improvements, that requires the sum insured to be increased; and
(b) activities carried on, or proposed to be carried on, on their lot which may affect the premium payable by the body corporate.

2 The body corporate, acting reasonably and with the advice of the insurer, will determine the proportion of the premium payable by Owners.
3 The premium applying to an Owner must be paid by the Owner to the body corporate within 14 days of receipt by the Owner of an invoice from the body corporate.
4 Any unpaid premium shall bear simple interest calculated on a daily basis at the rate of 10% from the date on which it was payable until the date on which it is paid and such interest may be recovered by the body corporate from the Owner as a debt.
5 Owners must notify the body corporate in writing of the name and address of any registered mortgagee of their lot.
6 If an Owner sells their lot during the period of insurance they:

(a) must arrange for the new owner of their lot to participate in the scheme until the end of that period; and
(b) must not require refund of any portion of the premium paid in respect of their lot.

7 Owners must comply with any conditions of the policy.

Last reviewed: 26 September 2013

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[¶74-510] Form B155: By-law establishing a voluntary insurance scheme

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PLEASE NOTE: This by-law is relevant to a basic scheme and one created by use of a standard format plan. It is intended to cover those buildings which do not share common walls.

By-law No. [insert number]

If 2 or more lot owners ("Owners") agree to participate in a voluntary insurance scheme under section 185 of the Standard Module ("Scheme") then the body corporate must establish a Scheme for those owners who agree to participate. The following conditions will apply to the Scheme:

1 The sum insured in respect of each lot shall be determined by insurance valuation to be obtained by the body corporate every 2 years.
2 Owners must promptly notify the body corporate in writing of any:

(a) improvements made to the building on their lot since the date of the last insurance valuation, including the value of those improvements, that require the sum insured to be increased; and
(b) activities carried on, or proposed to be carried on, on their lot which may affect the premium payable by the body corporate.

3 The body corporate, acting reasonably and with the advice of the insurer, will determine the proportion of the premium and last valuation fee payable by Owners. In making that determination the body corporate will have regard to the value of improvements on the lots and the use of the lots and improvements.
4 The premium and valuation fee applying to an Owner must be paid by the Owner to the body corporate within 14 days of receipt by the Owner of an invoice from the body corporate.
5 Any unpaid premium and valuation fee shall bear simple interest calculated on a daily basis at the rate of 10% from the date on which it was payable until the date on which is it paid and such interest may be recovered by the body corporate from the Owner as a debt.
6 Owners must notify the body corporate in writing of the name and address of any registered mortgagee of their lot.
7 If an Owner sells their lot during the period of insurance they:

(a) must arrange for the new owner of their lot to participate in the scheme until the end of that period; and
(b) must not require refund of any portion of the premium paid in respect of their lot.

8 Owners must comply with any conditions of the policy.

Last reviewed: 26 September 2013

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[¶74-515] Form B156: Notification of improvements to a lot

Click to open document in a browser

[date]

The Secretary
[name] community titles scheme [number]
[address]

Dear [Sir/Madam]

Notification of improvements to lot [number]

In accordance with section 164 of the *Body Corporate and Community Management (Standard) Module 1997* I give notice that the following notifiable improvement has been made to the above lot.

Nature of the improvement:

[describe the nature of the improvement]

Value of the improvement:

$[state the value of the improvement]

Yours faithfully

Lot Owner

Last reviewed: 26 September 2013

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[¶74-520] Form B157: Resolution deciding on additional insurance

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RESOLVED that the body corporate effect the following insurances, which are additional to those required under the *Body Corporate and Community Management Act 1997* and the *Body Corporate and Community Management (Standard) Module 1997*:

[list and describe the additional insurance covers]

Last reviewed: 26 September 2013

[¶74-527] Form B158A — Consent to act as a mandatory specialist adjudicator

Click to open document in a browser

[Date]

Commissioner for Body Corporate
and Community Management
Level 8 AXA Centre
144 Edward Street
Brisbane Qld 4000

[Parties to the application]
[Brief description of the application]

I consent to being appointed as a specialist adjudicator under Chapter 6, Part 8 of the *Body Corporate and Community Management Act 1997* to determine the above matter. I confirm that I have had no prior association with the subject community titles scheme or the parties to the dispute and I am not aware of anything else that would result in a conflict of interest in the event that I am appointed to act in that capacity.

In the event of my appointment I propose to charge fees at the rate of [here set out details of either a lump sum or hourly/daily rate and include how disbursements will be treated].

I attach my curriculum vitae in support of my suitability for this appointment.

Yours faithfully

[Signature]

Last reviewed: 26 September 2013

[¶74-530] Form B159: Submission in response to application

Click to open document in a browser

PLEASE NOTE: The Commissioner's office will require a particular form to be attached to the front of submissions as part of those being transmitted to their office. This form is normally attached to the correspondence sent by the Commissioner to the Body Corporate inviting a written response to the Applicant's material.

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Body Corporate and Community Management Act 1997
(Section 243)

Submission in Response to Application

Office of the Commissioner for Body Corporate and Community Management
Number: [Quote Commissioner's Reference]

Applicant: [Name of Applicant]

Submission by: [Name of person making submission]

Capacity: [e.g. owner or occupier]

Lot No. [Lot number]

Scheme No. [Scheme number]

I/We make the following submission in response to the above application:

1. [Set out the terms of the submission]

………………………... ………………………….... **Dated:** 2013

Signature Signature

Last reviewed: 26 September 2013

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[¶74-535] Form B160: Resolution determining differential levy

Click to open document in a browser

RESOLVED that:

(a) in accordance with an order of the [name] Court dated [date], contributions are determined in the sum of $[amount];

(b) the treasurer is authorised to levy those contributions by notice in writing;

(c) the contributions are to be due and payable on [date];

(d) no discount is to be applied; and

(e) the contributions are to be levied on owners of the following lots in the proportions designated –

Lot	Proportion	Lot	Proportion

[Here set out the various lot numbers and the proportion that applies to each of them.]

Last reviewed: 26 September 2013

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[¶74-540] Form B161: Exclusive use by-law allocating area

Click to open document in a browser

By-law 15 – Exclusive use and enjoyment of common property

15.1 The parts of the common property designated CP 1 to CP 6, inclusive, and EU 1 to EU 6, inclusive, on the plan attached and marked "A" are subject to rights of exclusive use and enjoyment by the occupiers of certain lots.

15.2 An area of common property identified in Schedule E attaches to the corresponding lot identified in that Schedule and the occupier for the time being of that lot is entitled to the exclusive use and enjoyment of that area, subject to the conditions imposed by this by-law.

15.3 Where an area of common property identified in Schedule E has no corresponding lot identified in that Schedule, then the original owner may within 1 year from the date of recording of the First Community Management Statement for the scheme, or such extended period allowed by an order of an adjudicator, by notice in writing to the body corporate, allocate the area to a specific lot. Upon such an allocation being made the area attaches to that lot and the occupier for the time being of that lot is entitled to the exclusive use and enjoyment of that area, subject to the conditions imposed by this by-law.

15.4 The following conditions apply to the use and enjoyment of common property areas CP 1 to CP 6, inclusive:

(a) they must be kept in a clean and tidy condition;

(b) they may only be used for the parking of a registered motor vehicle; and

(c) they must not be used so as to create a nuisance or disturbance to other occupiers of lots.

15.5 The following conditions apply to the use and enjoyment of common property areas EU 1 to EU 6, inclusive:

(a) they must be kept in a clean and tidy condition;

(b) they may only be used as a courtyard for residential purposes;

(c) any gardens and lawns within the area must be maintained to a high standard and plantings must be appropriate to the size of the area and nature of the scheme; and

(c) they must not be used so as to create a nuisance or disturbance to other occupiers of lots.

Form B161 continued

SCHEDULE E ALLOCATION OF EXCLUSIVE USE AREAS

Area	Allocated to Lot	Area	Allocated to Lot
CP1	1	CP4	4
CP2	2	CP5	5
CP3	3	CP6	6
EU1	1	EU4	4
EU2	2	EU5	5
EU3	3	EU6	6

Last reviewed: 26 September 2013

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[¶74-545] Form B162: Exclusive use by-law authorising allocation of area

Click to open document in a browser

By-law 15 – Exclusive use and enjoyment of common property

15.1 The parts of the common property designated CP 1 to CP 6, inclusive, and EU 1 to EU 6, inclusive, on the plan attached and marked "A" are to be subject to rights of exclusive use and enjoyment by the occupiers of certain lots.

15.2 The original owner may within 1 year from the date of recording of the First Community Management Statement for the scheme, or such extended period allowed by an order of an adjudicator, by notice in writing to the body corporate allocate common property areas CP1 to CP6, inclusive, and common property areas EU1 to EU6, inclusive, to specific lots. Upon such an allocation being made the areas attach to the lots specified and the occupiers for the time being of those lots are entitled to the exclusive use and enjoyment of their respective areas, subject to the conditions imposed by this by-law.

15.3 The following conditions apply to the use and enjoyment of common property areas CP 1 to CP 6, inclusive:

(a) they must be kept in a clean and tidy condition;

(b) they may only be used for the parking of a registered motor vehicle; and

(c) they must not be used so as to create a nuisance or disturbance to other occupiers of lots.

15.5 The following conditions apply to the use and enjoyment of common property areas EU 1 to EU 6, inclusive:

(a) they must be kept in a clean and tidy condition;

(b) they may only be used as a courtyard for residential purposes;

(c) any gardens and lawns within the area must be maintained to a high standard and plantings must be appropriate to the size of the area and nature of the scheme; and

(c) they must not be used so as to create a nuisance or disturbance to other occupiers of lots.

Last reviewed: 26 September 2013

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[¶74-550] Form B163: Appointment of owner's agent

Click to open document in a browser

To:

[Name of Agent]

ABC PTY LTD, the Original Owner in community titles scheme 1234, authorises you, in accordance with section 171(1)(b)(i) of the *Body Corporate and Community Management Act 1997*, to make allocations of common property areas [body corporate assets] pursuant to by-law No [#] of the scheme's by-laws.

Dated: 2013

THE COMMON SEAL of ABC PTY LTD)
was affixed in accordance with its)
Constitution in the presence of:)

……………………………………..
Director

……………………………………………….
Secretary

Last reviewed: 26 September 2013

[¶74-555] Form B164: Reallocation Agreement

Click to open document in a browser

REALLOCATION AGREEMENT made 2013

BETWEEN John Smith, Unit 5, 23 Jones Street, Brisbane ("**Smith**")

AND Peter Green, Unit 8, 23 Jones Street, Brisbane ("**Green**")

WHEREAS:

(A) Smith is the owner of lot 5 in community titles scheme 1234 to which common property area A5 attaches by virtue of exclusive use by-law 34.

(B) Green is the owner of lot 8 in community titles scheme 1234 to which common property area A8 attaches by virtue of exclusive use by-law 34.

(C) Green and Smith have agreed to exchange the areas over which they have exclusive use and enjoyment under by-law 34 by means of a reallocation agreement under section 171 of the *Body Corporate and Community Management Act 1997* ("**Act**").

AND THE PARTIES AGREE AS FOLLOWS:

1. Smith by this agreement reallocates common property area A5 identified in by-law 34 from lot 5 to lot 8.
2. Brown by this agreement reallocates common property area A8 identified in by-law 34 from lot 8 to lot 5.
3. Details of these reallocations must be given immediately by both Smith and Brown to the body corporate in accordance with section 174(1) of the Act.
4. Both parties shall share any costs involved in ensuring that these reallocations take effect and remain effective.

SIGNATURES

....
John Smith

....
Peter Green

Last reviewed: 26 September 2013

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[¶74-560] Form B165: Checklist for taking instructions

Click to open document in a browser

This checklist should be used by legal practitioners to take instructions from developer clients.

Has development approval been obtained? If so, please provide a copy.
Has building approval been obtained? If so, please provide a copy.
What are the title particulars for the development site?
Have you taken steps to reserve a name for your development? If so, please provide a copy. Do you require us to reserve a name for the development? If so, please provide details of the name (eg The Apartments on Chalmers Street).
Is the development site to be subdivided to create the community title parcel? If so, please provide details and a draft plan.
Who currently owns the development site? (Name, ACN or ABN, address.)
Who is the development manager or our contact person with the developer? (Name, address, contact person, telephone number, facsimile number and email address.)
How is the project to be financed? How many units do you need to sell to secure your funding? Will the financier have any special requirements (eg qualifying contracts, deposit bonds, buyer guarantor requirements, pre-commitments, etc)? Please provide the name and contact details of your personal banker/project banker.
Provide details of the marketing agent to be shown on the contract. (Name, ACN or ABN, real estate agent licence number, address, contact person, telephone number, facsimile number and email address.)
Who is to be the stakeholder? (Name, ACN or ABN, address, contact person, telephone number, facsimile number and email address.)
Who is to be proposed as the body corporate manager? (Name, ACN or ABN, address, contact person, telephone number, facsimile number and email address.) Please provide the terms of their engagement. (NB: if the developer client is referred to the practitioner by a body corporate manager, it is likely the client will want to use that manager and this question may not be relevant for your client.)
Is there to be a building manager (also known as a “caretaker”)? If known at this stage, please provide the terms of their engagement, including name, ACN or ABN, address, contact person, telephone number, facsimile number and email address.
Are there plans to provide the building manager with an occupation authority to use certain areas of the common property (common examples are an office off the reception area and a storage shed for tools/cleaning equipment)? If so, please have the developer’s surveyor provide a plan with relevant details.
Is there to be a letting agent? If known at this stage please provide name, ACN or ABN, real estate license number, address, contact person, telephone number, facsimile number and email address. Also, provide terms of their engagement.
Are there to be any other service contractors? If so, please provide a copy of the terms of their engagement, including name, ACN or ABN, address, contact person, telephone number, facsimile number and email address. (Example: lift maintenance contractor — check disclosure requirements.)
Will deposit bonds and bank guarantees be accepted in lieu of cash deposits? Are any deposit bond companies or banks unacceptable?
Are cash deposits to be invested? If so, how is the interest to be dealt with (eg 50/50 split with the buyer)? (The practitioner should check whether the developer client will want the agent to use deposit interest as part of the marketing campaign.)
Are corporate buyers to be supported by personal guarantees? What are the guarantor requirements (eg all directors, parent companies, etc.)? (Ensure that the conveyancing department is aware of the requirement to obtain a company search as part of the sale process.)

Are finance clauses to be offered to buyers? If so, on what terms? (Be aware — an agent may want the ability to add finance into the package after it has been finalised with “no finance” in order to attract buyers.)
What regulation module is to apply to the community titles scheme? (This will depend on the size and type of the development, and the body corporate manager is normally in a better position to advise the client on this point.)
Are any special rights to be included in the power of attorney reserved in favour of the developer?
Is a furniture package to be included as part of the sale? If so, may we please have a copy of it for inclusion in the contract?
Please provide the following:

copy of concept drawings (ie development approval standard drawings) (often provided by the surveyor)
copy of draft building format (standard format) plan (often provided by the surveyor)
schedule of finishes (provided by the builder or architect)
schedule of contribution schedule lot entitlements and schedule of interest schedule lot entitlements (often provided by the body corporate manager)
the amount of maintenance contributions reasonably expected to be payable to the body corporate by the various lot owners (often provided by the body corporate manager)
the estimated cost (if any) to the body corporate of the engagement of:

a body corporate manager
a building manager (caretaker)
any other service contractor

as well as the estimated cost to the various lot owners for each of those engagements
a list of body corporate assets proposed to be acquired by the body corporate
proposed services location diagram (often provided by the surveyor but may not be finalised until the building is built. If provided, the services location diagram will need to be attached to the community management statement (CMS) as part of disclosure).
What is the final date for the developer to elect to buyers whether or not to proceed with the development (eg because finance is not available or any pre-commitment target is not reached)?
What is the final date (ie sunset date) for completion of the building, registrations and settlements?
Have you obtained or are you planning to obtain FIRB approval to sell up to 50% of the units to foreign persons? If obtained, please provide a copy of the approval.
Do you propose to adopt the margin scheme for GST purposes?
Are any special by-laws required to regulate use of lots or common property? (This will be in the development approval.)
Are there to be any rights of exclusive use over the common property? If so, please provide plans of the areas and details of how they are to be allocated. (A surveyor will provide plans detailing exclusive use, eg car parks or courtyards. That plan will need to be attached to the CMS as part of disclosure.)

Last reviewed: 26 September 2013

[¶74-565] Form B166: Resolution changing lot entitlements

Click to open document in a browser

RESOLVED by resolution without dissent pursuant to section 62 of the *Body Corporate and Community Management Act 1997* that the interest schedule lot entitlements be changed as shown in the table below **AND** that the body corporate endorse its consent on a new community management statement giving effect to the change:

TABLE

Lot	Entitlement	Lot	Entitlement
1	26	7	32
2	26	8	32
3	28	9	34
4	28	10	34
5	30	11	40
6	30	12	40
		Total	380

Last reviewed: 26 September 2013

[¶74-570] Form B167: Power of Attorney (Queensland)

Click to open document in a browser

Appointment of attorney

1. **I**, [*insert name*]

   ________________________________ ,

   of [*insert address*]

   ________________________________ ,

   appoint the following person as my attorney:

   [*insert name and address of attorney who is to represent you on the body corporate committee*]

   ____

2. **Are you appointing more than one attorney?** No.
4. **The attorney's power is subject to the following terms:**

   The Attorney's powers are restricted to all matters relevant to or incidental to the attorney representing me as a voting member of the committee of "Body corporate for [*insert name*] community titles scheme [*insert number*]" and is given by me for the purposes of section 10(1) of the *Body Corporate and Community Management (Standard Module) Regulation 1997*.
5. **The power given to my attorney/s begins immediately.**
6. **This power of attorney gives my attorney/s power to do, on my behalf, anything that I could lawfully do by an attorney (other than a personal/health matter), subject to the above terms.**

[Sign your name here]

[Your witness signs here]

[Designation of witness]

[Write the date here]

Last reviewed: 26 September 2013

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[¶74-580] Form B168: Interview questions from the body corporate committee

Click to open document in a browser

• How do you plan to keep yourself up to date with changes in workplace health and safety?
• What systems will you keep in place to ensure tradesmen are monitored on site;
• How do you plan to manage consistent noise from occupiers?
• How do you plan to deal with occupiers parking on common property or in designated visitor parking bays?
• What management experience do you have?
• Will you employ anyone to assist you – do we get to meet this person?
• Would you look at meeting the committee informally on an as needed basis?
• Will you send out newsletters?
• Do you plan to do any "handyman" work yourself? If so – do you have a trade?
• Are you willing to undertake further training to learn new skills?
• Have you read the list of caretaking duties – are there any duties you consider you will have difficulties providing?
• How many hours per day has the seller told you that you need to put into the complex to keep it neat and tidy?
• Will you create a grounds-keeping plan to ensure the gardens and grounds are kept watered, fertilized and mulched?
• How do you intend to comply with Council requirements for the pool?
• Will you keep a written log of pool testing results for occupiers to inspect as needed?
• Have you inspected the complex? Do you see any areas that need work done?
• Will all of your family members be involved in providing services on site?
• Do you plan to live on site?
• What office hours will you keep?
• Will you provide your mobile number and be available after hours?
• Do you have any questions for the committee?
• Will you obtain funding to purchase the management rights and if so, what percentage is the loan to the value of the management rights (this is to test the financial soundness, ie leveraging of the assignee).

Last reviewed: 15 April 2013

[¶74-590] Form B169: List of documents to obtain from the seller or obtain by way of search

Click to open document in a browser

- Original caretaking agreement – check its expiry and advise the seller on whether it should seek a “top up” of the agreement;
- Original letting authorisation – check its expiry and advise the seller on whether it should seek a “top up” of the agreement;
- If the original caretaking and letting agreements have expired – obtain a copy of the deeds extending those and check any new terms or tasks added to the original caretaking agreement;
- Check whether or not a transfer fee is payable under s 124 of the Accommodation Module, s 126 of the Standard Module with reference to the dates of the agreement and all previous assignments;
- Original utility agreement (if one applies to the transaction – normally it will cover the use of a PABX telephone system or similar service connected to each lot);
- All original assignment deeds showing the chain of ownership of the management rights;
- Copy of the current community management statement;
- Rates notice for the lot forming part of the sale;
- List of plant and equipment which is being transferred as part of the sale;
- Details of software licenses, website, email to be transferred as part of the sale;
- Copy of current resident letting agent licence or copy of full real estate agent licence;
- Copy of all breach notices (if any) issued by the body corporate together with details necessary to establish whether the seller is still in breach;
- Copy of the sale/marketing details about the management rights so that the sale contract can be compared to the business marketed and any misrepresentation excluded or explained;
- A copy of each completed letting agreement with each lot owner – to be checked to ensure these have not lapsed;
- If the caretaking agreement does not contain it – a list of daily, monthly and yearly tasks;

Last reviewed: 26 September 2013

[¶74-595] Form B170: Precedent Motion for a Body Corporate (Accommodation Module) to enter into a lease over common property with a third party

Click to open document in a browser

Motion X — Lease 1 between .... and .... Limited

Resolution required — Special Resolution

The body corporate resolves by **special resolution** to enter into a lease with .... Limited for a period of ten (10) years commencing on a date to be agreed between the body corporate and............................ in accordance with the terms of the lease circulated with this motion and the Body Corporate authorises:

(a) any two committee members to affix the body corporate seal to the lease and to execute the lease
(b) any two committee members to affix the body corporate seal to and to execute, a certificate under s159(6) of the Body Corporate and Community Management (Accommodation Module) Regulation 2008, and
(c) any two members of the body corporate committee to sign lease plans and any other document required to effect registration of the lease.

Certificate under 159 (6) of Body Corporate and Community Management (Accommodate Module) Regulation 2008

The body corporate for ______________________________ (the Body Corporate) hereby certifies that the transaction described in the schedule was authorised by Special Resolution passed at a properly convened meeting of the Body Corporate on ________________________

day of ________________________ 2013.

Schedule

(Description of transaction requiring Body Corporate authorisation)

The grant of a lease by Body Corporate to ______________________________ over part of the common property for the period of ten (10) years commencing on ________________________.

The Common Seal of the Body Corporate for ______________________ was hereunto affixed in the presence of	)))
	______________________
Committee Member ______________________ Name:	))))
	______________________
Committee Member ______________________ Name:	)))
	______________________
on the ______________________ day of ______________________ 2013	

Last reviewed: 7 November 2013

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[¶75-050] Example forms

Click to open document in a browser

The forms reproduced are designed to be used for the purposes of the *Body Corporate and Community Management Act 1997*.

Please note: Queensland Land Registry forms, relevant to dealings with community titles, represent a small selection of the forms provided by the Department of Natural Resources and Mines for use in property transactions in Queensland.

The forms are available for completion online at www.nrm.qld.gov.au/property/.

The website also includes a guide containing information to assist in the completion of the forms at www.nrm.qld.gov.au/property/titles/completingforms.html.

Last reviewed: 19 April 2013

[¶75-100] Community management statement

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QUEENSLAND LAND REGISTRY
Body Corporate and Community Management Act 1997

COMMUNITY MANAGEMENT STATEMENT

CMS Version 3
Page 1 of 12

THIS STATEMENT MUST BE LODGED TOGETHER WITH A FORM 14 GENERAL REQUEST AND IN THE CASE OF A NEW STATEMENT MUST BE LODGED WITHIN THREE (3) MONTHS OF THE DATE OF CONSENT BY THE BODY CORPORATE

Office use only
CMS LABEL NUMBER

This statement incorporates and must include the following:

Schedule A - Schedule of lot entitlements
Schedule B - Explanation of development of scheme land
Schedule C - By-laws
Schedule D - Any other details
Schedule E - Allocation of exclusive use areas

1. **Name of community titles scheme**
   XXXXXXX Apartments CTS XXXXXX

2. **Regulation module**
   Accommodation

3. **Name of body corporate**
   Body Corporate for XXXXXX Apartments CTS XXXXXXXXX

4. **Scheme land**

Lot on Plan Description	County	Parish	Title Reference
Refer to attached Schedule			

5. **#Name and address of original owner**
   Not Applicable

6. **Reference to plan lodged with this statement**
   Not Applicable

\# first community management statement only

7. **Local Government community management statement notation**
   Not applicable – Section 60(6)(a) of the Body Corporate and Community Management Act 1997 applies.

   .... signed

   .... name and designation

   .... name of Local Government

8. **Execution by original owner/Consent of body corporate**

XXXXXXX Apartments CTS XXXXXXXXX

/ /
Execution Date

....
Chairperson/Secretary

/ /
Execution Date

....
Committee Member

*Original owner to execute for a first community management statement
*Body corporate to execute for a new community management statement

Privacy Statement
Collection of this information is authorised by the Body Corporate and Community Management Act 1997 and is used to maintain the publicly searchable registers in the land registry. For more information about privacy in DNRM see the department's website.

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QUEENSLAND LAND REGISTRY
Body Corporate and Community Management Act 1997

SCHEDULE

Title Reference (Common Property)

XXXXXXX Apartments CTS XXXXXX

4.

Scheme Land	County	Parish	Title Reference
Common Property for XX Apartments CTS XXXXX	Ward	Nerang	(add details)
Lot 1 on SP XXXXX	Ward	Nerang	
Lot 2 on SP XXXXX	Ward	Nerang	
Lot 3 on SP XXXXX	Ward	Nerang	
Lot 4 on SP XXXXX	Ward	Nerang	
Lot 5 on SP XXXXX	Ward	Nerang	
Lot 6 on SP XXXXX	Ward	Nerang	
Lot 7 on SP XXXXX	Ward	Nerang	
Lot 8 on SP XXXXX	Ward	Nerang	
Lot 9 on SP XXXXX	Ward	Nerang	
Lot 10 on SP XXXXX	Ward	Nerang	
Lot 11 on SP XXXXX	Ward	Nerang	
Lot 12 on SP XXXXX	Ward	Nerang	
Lot 13 on SP XXXXX	Ward	Nerang	
Lot 14 on SP XXXXX	Ward	Nerang	
Lot 15 on SP XXXXX	Ward	Nerang	
Lot 16 on SP XXXXX	Ward	Nerang	
Lot 17 on SP XXXXX	Ward	Nerang	
Lot 18 on SP XXXXX	Ward	Nerang	
Lot 19 on SP XXXXX	Ward	Nerang	
Lot 20 on SP XXXXX	Ward	Nerang	
Lot 21 on SP XXXXX	Ward	Nerang	
Lot 22 on SP XXXXX	Ward	Nerang	
Lot 23 on SP XXXXX	Ward	Nerang	
Lot 24 on SP XXXXX	Ward	Nerang	
Lot 25 on SP XXXXX	Ward	Nerang	
Lot 26 on SP XXXXX	Ward	Nerang	
Lot 27 on SP XXXXX	Ward	Nerang	
Lot 28 on SP XXXXX	Ward	Nerang	
Lot 29 on SP XXXXX	Ward	Nerang	
Lot 30 on SP XXXXX	Ward	Nerang	
Lot 31 on SP XXXXX	Ward	Nerang	
Lot 32 on SP XXXXX	Ward	Nerang	
Lot 33 on SP XXXXX	Ward	Nerang	
Lot 34 on SP XXXXX	Ward	Nerang	
Lot 35 on SP XXXXX	Ward	Nerang	
Lot 36 on SP XXXXX	Ward	Nerang	
Lot 37 on SP XXXXX	Ward	Nerang	
Lot 38 on SP XXXXX	Ward	Nerang	
Lot 39 on SP XXXXX	Ward	Nerang	
Lot 40 on SP XXXXX	Ward	Nerang	
Lot 41 on SP XXXXX	Ward	Nerang	
Lot 42 on SP XXXXX	Ward	Nerang	
Lot 43 on SP XXXXX	Ward	Nerang	

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SCHEDULE

Title Reference (Common Property)

XXXXXXX Apartments CTS XXXXXX

SCHEDULE A SCHEDULE OF LOT ENTITLEMENTS

Lot on Plan	Contribution	Interest
Lot 1 on SP XXXXX	5	5
Lot 2 on SP XXXXX	4	4
Lot 3 on SP XXXXX	4	4
Lot 4 on SP XXXXX	4	4
Lot 5 on SP XXXXX	5	5
Lot 6 on SP XXXXX	5	5
Lot 7 on SP XXXXX	5	5
Lot 8 on SP XXXXX	5	5
Lot 9 on SP XXXXX	6	6
Lot 10 on SP XXXXX	5	5
Lot 11 on SP XXXXX	5	5
Lot 12 on SP XXXXX	4	4
Lot 13 on SP XXXXX	4	4
Lot 14 on SP XXXXX	4	4
Lot 15 on SP XXXXX	5	5
Lot 16 on SP XXXXX	5	5
Lot 17 on SP XXXXX	4	4
Lot 18 on SP XXXXX	4	4
Lot 19 on SP XXXXX	4	4
Lot 20 on SP XXXXX	5	5
Lot 21 on SP XXXXX	5	5
Lot 22 on SP XXXXX	5	5
Lot 23 on SP XXXXX	5	5
Lot 24 on SP XXXXX	5	5
Lot 25 on SP XXXXX	5	5
Lot 26 on SP XXXXX	5	5
Lot 27 on SP XXXXX	4	4
Lot 28 on SP XXXXX	4	4
Lot 29 on SP XXXXX	5	5
Lot 30 on SP XXXXX	5	5
Lot 31 on SP XXXXX	4	4
Lot 32 on SP XXXXX	4	4
Lot 33 on SP XXXXX	4	4
Lot 34 on SP XXXXX	5	5
Lot 35 on SP XXXXX	5	5
Lot 36 on SP XXXXX	5	5

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Title Reference (Common Property)

XXXXXXX Apartments CTS XXXXXX

Lot 37 on SP XXXXX	5	5
Lot 38 on SP XXXXX	5	5
Lot 39 on SP XXXXX	5	5
Lot 40 on SP XXXXX	4	4
Lot 41 on SP XXXXX	4	4
Lot 42 on SP XXXXX	4	4
Lot 43 on SP XXXXX	5	5
TOTALS	199	199

SCHEDULE B EXPLANATION OF THE DEVELOPMENT OF SCHEME LAND

There is to be no further development of the Scheme Land – Sections 66 (1)(d), (f) and (g) of the Body Corporate and Community Management Act 1997 do not apply.

SCHEDULE C BY-LAWS

1. DEFINITIONS

1.1 Dictionary

Act	means the Body Corporate and Community Management Act 1997.
Body Corporate	has the same meaning as in the Act.
Body Corporate Committee	has the same meaning as in the Act.
Commissioner	has the same meaning as in the Act.
Common Property	has the same meaning as in the Act.
Invitee	any person on the Scheme Land with the permission of an Occupier.
Lot	has the same meaning as in the Act.
Occupier	an Owner of a Lot, a tenant of a Lot, a licensee of a Lot, or any person resident in a Lot.
Owner	has the same meaning as in the Act.
Scheme Land	has the same meaning as in the Act.
Window Coverings	curtain, blind, venetian or roller shade.

1.2 Rules for interpretation

In these by-laws unless the context indicates a contrary intention:

(a) words denoting any gender include all genders

(b) the singular number includes the plural and vice versa

(c) a person includes their executors, administrators, successors, substitutes (for example, persons talking by novation) and assignees

(d) words importing persons will include all bodies, associations, trusts, partnerships, instrumentalities and entities corporate or unincorporated, and vice versa

(e) any obligation on the part of or for the benefit of two or more persons will be deemed to bind or benefit as the case may be, any two or more of them jointly and each of them severally

(f) references to any legislation includes any legislation which amends or replaces that legislation

(g) headings are included for convenience only and will not affect the interpretation of these by-laws.

(h) a reference to anything includes the whole or each part of it, and

(i) in interpreting these by-laws, no rules of construction will apply to the disadvantage of a party because that party was responsible for the drafting of these by-laws or any part of them.

2. NOISE

(a) An Occupier must not create any noise likely to interfere with the peaceful enjoyment of a person lawfully on another Lot or the Common Property.

(b) Occupiers leaving or returning to Lots late at night or early in the morning must do so with minimum noise.

(c) The Occupier must request Invitees leaving after 11pm to leave quietly.

3. VEHICLES

(a) An Occupier must not park any vehicle upon Common Property except -

(i) with the consent in writing of the Body Corporate Committee, or

(ii) where authorised by an exclusive use by-law.

(b) An approval under 3.(a)(i) must state the period for which it is given.

(c) The Body Corporate Committee may cancel the approval by giving seven (7) days written notice to the Occupier.

(d) An Occupier must not exceed the speed limit of 10kph on the Common Property driveway and car park.

(e) To the greatest practical extent, an Occupier must ensure his Invitees do not exceed the speed limit of 10 kph on the Common Property driveway and car park.

4. OBSTRUCTION/NUISANCE

(a) An Occupier must not obstruct lawful use of Common Property by any other person.

(b) An Occupier must not cause a nuisance or act in such a way as to interfere with the peaceful enjoyment of a person lawfully on another Lot or the Common Property.

5. DAMAGE TO LAWNS

(a) The Occupier of a Lot must not, without the body corporate's written approval –

(i) damage a lawn, garden, tree, shrub, plant or flower on the common property;

(ii) use part of the common property as a garden.

(b) An approval under subsection 5(a)(ii) must state the period for which it is given.

(c) However, the Body Corporate Committee may cancel the approval by giving seven (7) days written notice to the Occupier.

6. DAMAGE TO COMMON PROPERTY

(a) An Occupier must not mark, paint, or drive nails or screws or the like into, or otherwise damage or deface a structure that forms part of the Common Property, except with the consent in writing of the Body Corporate Committee.

(b) An Occupier must not erect any structure on the Common Property for his own benefit, unless consent has been obtained in accordance with the Act.

(c) However, an Occupier may install a locking or safety device to protect the lot against intruders, or a screen to prevent entry of animals or insects, if the device is soundly built and is consistent with the colour, style and materials of the building.

(d) The Owner of a lot must keep a device installed under subsection (c) in good order and repair.

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7. STRUCTURAL ALTERATIONS

(a) An Occupier must not, without the prior written consent (which consent may be given on conditions) of the Body Corporate Committee, undertake any structural alterations to a Lot.

(b) An Occupier shall submit plans and specifications for any proposed structural alteration to the Body Corporate Committee in order to seek its consent.

(c) Without limitation to the conditions attaching to any approval, any approval granted by the Body Corporate Committee shall be conditional on the Occupier having first obtained the necessary approvals (if any) for the proposed structural alteration from the Local Authority.

8. FOR SALE OR FOR LEASE SIGNS

(a) An Occupier, must not, without the prior written consent (which consent may be given on conditions) of the Body Corporate Committee, erect a "for sale" or "for lease" sign on the Common Property.

(b) Where the Body Corporate Committee provides consent, then that consent shall expire sixty (60) days after it is given.

9. BEHAVIOUR OF INVITEES

(a) Occupiers must take all reasonable steps to ensure that their Invitees abide by the by-laws and do not behave in a manner likely to interfere with the peaceful enjoyment of a person lawfully on another Lot or the Common Property.

(b) Owners will be liable to compensate the Body Corporate for all damage to the Common Property caused by their Occupiers and Invitees.

(c) The Owner of a Lot which is subject to a lease or licence shall, at his own cost, take all steps available to him under the lease, licence or at law to ensure that any tenant or licensee or other Occupier or their Invitee complies with the provisions of the by-laws.

10. DEPOSITING RUBBISH, ETC ON COMMON PROPERTY

An Occupier must not deposit or throw upon the Common Property any rubbish, dirt, dust or other material likely to interfere with the peaceful enjoyment of a person lawfully on another Lot or using the Common Property.

11. APPEARANCE OF LOTS

(a) The Occupier of a lot must not, without the Body Corporate Committee's written approval, make a change to the external appearance of the lot unless the change is minor and does not detract from the amenity of the lot and its surrounds.

(b) An Occupier must not display any sign, advertisement, placard, banner, pamphlet or like matter on any part of his Lot in such a way as to be visible from another Lot, the Common Property or outside the Scheme Land, except with the consent in writing of the Body Corporate Committee.

(c) An Occupier must not hang any washing, towel, bedding, clothing or other article on any part of his Lot in such a way as to be visible from another Lot, the Common Property or outside the Scheme Land, except with the consent in writing of the Body Corporate Committee.

12. REPLACEMENT, MAINTNANCE OR UPGRADE OF FLOORING IN A LOT

(a) An Occupier of a Lot must not, without the prior written approval of the Body Corporate Committee install any Hard Floor Surface in the Lots.

(b) In granting its consent, the Committee may impose conditions in order to ensure the transference of noise between Lots is minimised.

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(c) In addition to any conditions imposed by the Committee under by-law 12 (b), the owner/occupier must comply with the following conditions:

(i) Any Hard Floor Surface must have at least a 3 Star Rating.

(ii) Following the installation of the Hard Floor Surface, the Occupier must as soon as is reasonably practical and in any event within thirty (30) days provide to the Body Corporate Committee a written report from an Expert certifying the Hard Floor Surface achieves a 3 Star Rating. The Occupier will be responsible for the cost of the Expert.

(iii) Where the Hard Floor Surface is less than a 3 Star Rating, the Occupier must at their sole cost and within thirty (30) days of being advised in writing that the Hard Floor Surface does not achieve a 3 Star Rating, remove, or cause to be removed, the Hard Floor Surface and/or have any necessary procedures or modification works undertaken in order for the Hard Floor Surface to achieve a 3 Star Rating.

(iv) This paragraph (c) shall not apply to original existing tiled areas of bathrooms, ensuites, kitchens and entry/foyer areas in a Lot.

(d) In this by-law 12, the following terms shall have the following meaning:

(i) "3 Star Rating " means the 3 Star Rating provided for in the Association of Australian Acoustical Consultants Guideline for Apartment and Townhouse Acoustic Rating namely:

(ii) Airborne Sound Insulation For Walls and Floors (between separate tenancies) of $D_{nT,w}+C_{tr} \geq 40$; and

(iii) Impact Isolation of Floors (between tenancies) of $L_{nT,w} \leq 55$.

(iv) "Expert" means a member of at least 3 years standing of the Association of Australian Acoustical Consultants.

(v) "Hard Floor Surface" means any floor covering material that is not carpet or other soft covering including but not limited to tiles, timber, marble or concrete.

13. STORAGE OF FLAMMABLE LIQUIDS

(a) The Occupier of a Lot must not, without the Body Corporate Committee's written approval, store a flammable substance on the Common Property.

(b) The Occupier of a Lot must not, without the Body Corporate Committee's written approval, store a flammable substance on the Lot unless the substance is used or intended for use for domestic purposes.

(c) However, this section does not apply to the storage of fuel in –

(i) The fuel tank of a vehicle, boat or internal combustion engine; or

(ii) A tank kept on a vehicle or boat in which the fuel is stored under the requirements of the law regulating the storage of flammable liquid.

14. GARBAGE DISPOSAL

(a) The Occupier must keep a receptacle for garbage in a clean and dry condition and adequately covered on the Lot, or on a part of the Common Property designated by the Body Corporate Committee for that purpose, unless the Body Corporate Committee provides for some other way of garbage disposal.

(b) The Occupier must -

(i) ensure any bin is lined with a suitable bin liner;

(ii) comply with all local government local laws about disposal of garbage, and

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(iii) ensure that in disposing garbage, the hygiene health and comfort of other Occupiers or of any contractor retained by the Body Corporate is not adversely affected.

15. WINDOW COVERINGS

(a) An Occupier must ensure that Window Coverings are of colours sympathetic to the overall appearance of the Scheme Land and that when viewed from outside the Lot present an aesthetic appearance.

(b) An Occupier is permitted to install curtains with white block-out backing to a Lot without seeking the written approval of the Body Corporate Committee.

(c) An Occupier must not, except with the written consent of the Body Corporate Committee, affix window tinting to the window surfaces of a Lot.

16. MAINTENANCE OF LOTS

(a) Each Occupier must ensure his Lot is kept and maintained so as not to allow infestation by vermin or insects or be offensive in appearance to other Occupiers.

17. USE OF THE SWIMMING POOL

(a) In relation to the swimming pool area, an Occupier must ensure that -

(i) children under 13 years are not allowed in or around the area, unless accompanied by an adult;

(ii) Invitees are not allowed in or around the area, unless accompanied by the Occupier;

(iii) alcoholic beverages and glassware are not taken in or around the area;

(iv) food and drink are not consumed in the pool;

(v) caution is exercised around the area at all times,

(vi) the gate to the pool area is securely closed at all times (other than when open for the purpose of ingress or egress from the pool area); and

(vii) no person causes a nuisance to any other person lawfully using the swimming pool.

(viii) The swimming pool is not used between the hours of 10pm and 7am.

18. USE OF LOTS

Each Lot must be used for residential purposes only and not for any illegal, unlawful or immoral purpose, save for Lot 9 which may also be used for the purposes of conducting the management rights for the scheme.

19. RECOVERY BY BODY CORPORATE

Where the Body Corporate spends money to repair damage caused by a breach of the Act or of these by-laws by any Occupier or Invitee then the Body Corporate is entitled to recover the amount spent as a debt in any court action from the Owner of the Lot from which that Occupier or Invitee came.

20. RECOVERY OF COSTS

(a) An Owner must pay on demand the whole of the Body Corporate's costs and expenses (including solicitor and own client costs), such amount to be deemed a liquidated debt, incurred in:

(i) recovering levies or any other money that the Body Corporate is entitled to receive from the Owner; and

(ii) all proceedings, including legal proceedings, taken against the Owner concluded in favour of the Body Corporate including, but not limited to, applications for an order by the Commissioner.

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(b) In the event that the Owner fails to attend to the payment of such costs and expenses after demand is made for the payment of same, the Body Corporate may:-

(i) treat such costs and expenses as a liquidated debt and take action for the recovery of same in any Court of competent jurisdiction; and

(ii) may enter such costs and expenses against the levy account of such Owner in which case the amount of same shall be paid to the Body Corporate upon a subsequent sale or disposal of the Owner's lot failing which the purchase of such lot shall be liable to the Body Corporate for the payment of same.

21 KEEPING OF ANIMALS

Subject to Section 169 of the Act, an Owner or Occupier must not bring or keep an animal or bird on the Lot or the Common Property, or permit an Invitee to bring or keep an animal or bird on the Lot or Common Property. For the purposes of this By-Law, animal shall refer to dogs, cats and reptiles.

22 EXCLUSIVE USE

Car spaces – The proprietor for the time being of the Lot referred to in the first column of Schedule E hereto shall be entitled to the exclusive use and enjoyment of that part of the Common Property marked with the letter referred to in the fourth column of Schedule E as shown on the plan annexed hereto and marked "Plan 7766-10" for identification.

SCHEDULE D OTHER DETAILS REQUIRED/PERMITTED TO BE INCLUDED

Nil

SCHEDULE E DESCRIPTION OF LOTS ALLOCATED EXCLUSIVE USE AREAS OF COMMON PROPERTY

Lot Description	County	Parish	Area allocated
Lot 1 on SP XXXXX	Ward	Nerang	Q on Plan marked 'A'
Lot 2 on SP XXXXX	Ward	Nerang	D on Plan marked 'A'
Lot 3 on SP XXXXX	Ward	Nerang	A on Plan marked 'A'
Lot 4 on SP XXXXX	Ward	Nerang	AW on Plan marked 'A'
Lot 5 on SP XXXXX	Ward	Nerang	B on Plan marked 'A'
Lot 6 on SP XXXXX	Ward	Nerang	C on Plan marked 'A'
Lot 7 on SP XXXXX	Ward	Nerang	K on Plan marked 'A'
Lot 8 on SP XXXXX	Ward	Nerang	L on Plan marked 'A'
Lot 9 on SP XXXXX	Ward	Nerang	V, W, X on Plan marked 'A'
Lot 10 on SP XXXXX	Ward	Nerang	S on Plan marked 'A'
Lot 11 on SP XXXXX	Ward	Nerang	P on Plan marked 'A'
Lot 12 on SP XXXXX	Ward	Nerang	AN on Plan marked 'A'
Lot 13 on SP XXXXX	Ward	Nerang	AM on Plan marked 'A'
Lot 14 on SP XXXXX	Ward	Nerang	AL on Plan marked 'A'
Lot 15 on SP XXXXX	Ward	Nerang	AH on Plan marked 'A'
Lot 16 on SP XXXXX	Ward	Nerang	I on Plan marked 'A'
Lot 17 on SP XXXXX	Ward	Nerang	H on Plan marked 'A'
Lot 18 on SP XXXXX	Ward	Nerang	M on Plan marked 'A'
Lot 19 on SP XXXXX	Ward	Nerang	O on Plan marked 'A'
Lot 20 on SP XXXXX	Ward	Nerang	F on Plan marked 'A'
Lot 21 on SP XXXXX	Ward	Nerang	E on Plan marked 'A'

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QUEENSLAND LAND REGISTRY
Body Corporate and Community
Management Act 1997

SCHEDULE

Title Reference (Common Property)

XXXXXXX Apartments CTS XXXXXX

Lot 22 on SP XXXXX	Ward	Nerang	AR on Plan marked 'A'
Lot 23 on SP XXXXX	Ward	Nerang	AQ on Plan marked 'A'
Lot 24 on SP XXXXX	Ward	Nerang	U on Plan marked 'A'
Lot 25 on SP XXXXX	Ward	Nerang	T on Plan marked 'A'
Lot 26 on SP XXXXX	Ward	Nerang	Y on Plan marked 'A'
Lot 27 on SP XXXXX	Ward	Nerang	Z on Plan marked 'A'
Lot 28 on SP XXXXX	Ward	Nerang	AE on Plan marked 'A'
Lot 29 on SP XXXXX	Ward	Nerang	AA on Plan marked 'A'
Lot 30 on SP XXXXX	Ward	Nerang	AX on Plan marked 'A'
Lot 31 on SP XXXXX	Ward	Nerang	AV on Plan marked 'A'
Lot 32 on SP XXXXX	Ward	Nerang	AT on Plan marked 'A'
Lot 33 on SP XXXXX	Ward	Nerang	AS on Plan marked 'A'
Lot 34 on SP XXXXX	Ward	Nerang	AZ on Plan marked 'A'
Lot 35 on SP XXXXX	Ward	Nerang	AY on Plan marked 'A'
Lot 36 on SP XXXXX	Ward	Nerang	AP on Plan marked 'A'
Lot 37 on SP XXXXX	Ward	Nerang	AO on Plan marked 'A'
Lot 38 on SP XXXXX	Ward	Nerang	AD on Plan marked 'A'
Lot 39 on SP XXXXX	Ward	Nerang	AC on Plan marked 'A'
Lot 40 on SP XXXXX	Ward	Nerang	AF on Plan marked 'A'
Lot 41 on SP XXXXX	Ward	Nerang	AK on Plan marked 'A'
Lot 42 on SP XXXXX	Ward	Nerang	AI on Plan marked 'A'
Lot 43 on SP XXXXX	Ward	Nerang	AB on Plan marked 'A'

Last reviewed: 10 March 2014

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[¶75-160] Form C4: Community Title Off-the-plan Contract

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Please see ¶23-690 for an example of a recommended special condition dealing with natural disasters. Please also see ¶23-690 for conditions of use of this contract. Please note that this example contract is under review as a result of recent legislative amendments.

Form C4: Community Title Off-the-plan Contract — Parts A, B and C

Form C4: Community Title Off-the-plan Contract — Parts D, E and F

Terms for Use of Community Title Off-the-Plan Contract

Last reviewed: 5 February 2014

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[¶75-165] Form C5: Pro-forma Off-the-plan Disclosure Statement

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Body Corporate and Community Management Act 1997 (Section 213) ***Land Sales Act 1984*** (Section 21)

Disclosure Statement
For Proposed Community Title Lot in
[*Development Name*]
(This Disclosure Statement forms part of the Contract for Sale to which it relates.)
SCHEDULE

Item No	Description	Information Provided
1	Current land description	**Description of Lots** / **Title Reference** Lot(s) # — # (County of #, Parish of # and City of #)
2	Lot proposed to be purchased	Lot # on the proposed Building Plan (including car space #), being part only of the current land description and subject to the Seller's right to make changes as set out in the Contract.
3	Name of Seller *(prospective vendor)*	#
4	Address of Seller	#
5	Name of Buyer *(prospective purchaser)*	#
6	Name of Seller's Agent	#
7	Address of Seller's Agent	#
8	Whether the Seller or the Seller's Agent (personally or by an employee) made or offered to the Buyer or to an agent of the Buyer (prospective purchaser's agent) any representation, promise or term with respect to the provision to the Buyer of a certificate of title that relates to the lot in question only	Yes, but only in the terms and to the extent that appears in the Contract.
9	Particulars of such representation, promise or term	That a certificate of title for the Property will be provided on settlement of the contract, but only if one issues (bearing in mind that a certificate of title will not always issue). Settlement itself is conditional upon registration of the Building Plan to enable creation of a separate title and, if applicable, issue of a certificate of title.
10	Buyer's selections	Colour scheme: Finishes: Furniture Package: (not often relevant)

Dated 200

Signed by the Seller (us) or the Seller's (our) authorised agent on the above date

……………………………………………….
Seller or Seller's Agent
Signed by the Buyer (you) as acknowledgment of having received a copy of this statement

……………………………………………..
Buyer

Body Corporate and Community Management Act 1997 ***Land Sales Act 1984***

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(Section 213) (Section 21)

Disclosure Statement

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Item	Subject Matter	Page
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B	Building Plan
C	Caretaking Agreement
D	Community Management Statement
E	Cost Allocation Table
F	Letting Authority
G	Plans and Drawings
H	Schedule of Finishes
I	Body Corporate Assets
J	Furniture Package

Body Corporate and Community Management Act 1997 ***Land Sales Act 1984***

(Section 213) (Section 21)

Disclosure Statement

1. Interpretation

In this Disclosure Statement and the Power of Attorney Disclosure Statement that forms part of this Disclosure Statement, unless the context otherwise requires:

"**Act**" means the *Body Corporate and Community Management Act 1997*.

"**Administration Agreement**" means the draft agreement in annexure A.

"**Body Corporate**" means the body corporate that will be constituted upon registration of the Building Plan.

"**Building Plan**" means the proposed building format plan in respect of the Development, a rough draft of which is in annexure B.

"**Caretaking Agreement**" means the draft agreement in annexure C.

"**Common Property**" means the common property that will come into existence upon registration of the Building Plan.

"**Community Management Statement**" means the community management statement proposed to be registered with the Building Plan, a preliminary draft of which is annexure D.

"**Community Titles Scheme**" means the community titles scheme to be established under the Act upon registration of the Building Plan.

"**Contract**" means the contract for sale between us and you in respect of the Lot.

"**Cost Allocation Table**" means the table(s) in annexure E.

"**Development**" means the proposed development approximately illustrated in the Plans, to be undertaken by us on the land described in Item 1 of the Schedule and to be known as [insert name of the development].

"**Furniture Package**" means the furniture set out in annexure J.

"**Letting Authority**" means the document in annexure F.

"**Lot**" means the proposed lot described in item 2 of the Schedule.

"**Plans**" means the plans and drawings in annexure G.

"**Schedule**" means the schedule at the front of this Disclosure Statement.

"**Schedule of Finishes**" means the schedule of finishes in annexure H.

"**we**", "**us**" and "**our**" means the person named in item 3 of the Schedule.

"**you**" and "**your**" means the person named in item 5 of the Schedule.

2. About the Development

2.1 The Development is [describe the Development — e.g. "*a low-rise all residential complex comprising 4 buildings surrounding an internal courtyard containing a tennis court and swimming pool*"] as

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approximately illustrated in the Plans and to be finished substantially in accordance with the Schedule of Finishes.

2.2 The Building Plan is the only plan to be registered in respect of the Development. Therefore, there will be only one body corporate for the Development to which the Community Management Statement will apply.

2.3 After it is constituted and before its first annual general meeting we will procure the Body Corporate to enter into:

(a) the Caretaking Agreement;
(b) the Letting Authority; and
(c) the Administration Agreement.

2.4 We will determine, in our discretion, the other parties to the Caretaking Agreement and Letting Authority and you may not subject if such other parties are related to us. In addition, we may, in our discretion, change the body corporate manager party to the Administration Agreement.

3. Statement under section 213 of the Act

The following information is given in accordance with section 213 of the Act:

Section 213(2)(a)

(a) the amount of annual contributions reasonably expected to be payable to the Body Corporate by you as the owner of the Lot is set out in the Cost Allocation Table;

Section 213(2)(b)

(b) in relation to the Caretaking Agreement:

(i) the terms of the engagement of the service contractor under that agreement, other than the provisions of the code of conduct taken to be included in those terms by section 118 of the Act, are as set out in the Caretaking Agreement;
(ii) the estimated cost of the engagement of that service contractor to the Body corporate during the first year is set out in the Cost Allocation Table; and
(iii) the proportion of that cost to be borne by you as the owner of the Lot is set out in the Cost Allocation Table;

(c) in relation to the Administration Agreement:

(i) the terms of the engagement of the body corporate manager, other than the provisions of the code of conduct taken to be included in those terms by section 118 of the Act, are as set out in the Administration Agreement;
(ii) the estimated cost of the engagement to the Body Corporate during the first year is set out in the Cost Allocation Table; and
(iii) the proportion of that cost to be borne by you as the owner of the Lot is set out in the Cost Allocation Table;

Section 213(2)(c)

(d) in relation to the Letting Authority, the terms of the authority to the letting agent are as set out in the Letting Authority;

Section 213(2)(d)

(e) the Body Corporate assets (if any) proposed to be acquired by the Body Corporate after the establishment of the Community Titles Schemes are set out in annexure I:

Section 213(2)(e)

(f) the Community Titles Scheme is not proposed to be established as a subsidiary scheme;
(g) the Community Management Statement is disclosed in this Disclosure Statement;

Section 213(2)(f)

(h) the regulation module proposed to apply to the Community Titles Scheme is the [state the relevant module — e.g. “*Body Corporate and Community Management (Standard Module) Regulation 1997*”].

Body Corporate and Community Management Act 1997	***Land Sales Act 1984***
(Section 213)	(Section 21)

Disclosure Statement

Power of Attorney Disclosure Statement

(Section 219, *Body Corporate and Community Management Act 1997*)

If we use, or cause to be used, the power of attorney in the Contract then we will:

(1) do so either as a corporate entity, or by means of one of our directors; and
(2) only do so for one or more of the following purposes:

(a) to authorise, ratify or give effect to anything that is disclosed to you in the Contract;

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(b) to procure the Body Corporate to authorise or ratify a transfer, lease, easement, licence, release of easement, variation of easement or other dealing involving the Common Property;

(c) to procure the Body Corporate to consent to an amendment to the Community Management Statement if we find it necessary to amend that document to more effectively regulate the Development;

(d) to procure the grant of exclusive use or special privilege by-laws by the Body Corporate to enable us to effectively market and undertake the Development;

(e) to prevent the Body Corporate from interfering with any building work we need to undertake after registration of the Building Plan to complete the Development;

(f) to obtain authority from the Body Corporate to work on the Common Property to fix any building defects;

(g) to obtain any necessary consents from the Body Corporate to enable us to fix any building defect; and

(h) to appoint a representative, proxy or company nominee so that we may exercise your vote at meeting of the Body Corporate for any of the above purposes.

Body Corporate and Community Management Act 1997	***Land Sales Act 1984***
(Section 213)	(Section 21)

Disclosure Statement

ANNEXURE A
(Administration Agreement)

[*A complete copy of the Administration Agreement should comprise this annexure. The name of the body corporate manager would normally be included because the body corporate manager usually provides this agreement.*]

Body Corporate and Community Management Act 1997	***Land Sales Act 1984***
(Section 213)	(Section 21)

Disclosure Statement

ANNEXURE B
(Building Plan)

[*A draft of the complete building format plan should comprise this annexure. The surveyor can prepare that draft from the building construction plan. Modified floor plans should be avoided because they do not normally allow identification of common property for the exact location of the lot being purchased.*]

Body Corporate and Community Management Act 1997	***Land Sales Act 1984***
(Section 213)	(Section 21)

Disclosure Statement

ANNEXURE C
(Caretaking Agreement)

[*A complete copy of the Caretaking Agreement should comprise this annexure. The name of the caretaker need not be included as it may not be finalised at the time the first contract is signed.*]

Body Corporate and Community Management Act 1997	***Land Sales Act 1984***
(Section 213)	(Section 21)

Disclosure Statement

ANNEXURE D
(Community Management Statement)

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[*A complete copy of the proposed community management statement should comprise this annexure. be careful to include in it the services location diagrams and statutory easement particulars or the developer's "best guess" of these.*]

ANNEXURE E
(Cost Allocation Table)

Estimated Annual Costs to the Body Corporate		
Year	Administration Agreement	Caretaking Agreement
1	$	$
2	$	$
3	$	$

Estimated Annual Costs to Lot Owners — Contributions									
	First Year			Second Year			Third Year		
Lot	Administrative Fund	Sinking Fund	Total Contributions	Administrative Fund	Sinking Fund	Total Contributions	Administrative Fund	Sinking Fund	Total Contributions
1	$	$	$	$	$	$	$	$	$
2	$	$	$	$	$	$	$	$	$
3	$	$	$	$	$	$	$	$	$
4	$	$	$	$	$	$	$	$	$
5	$	$	$	$	$	$	$	$	$
6	$	$	$	$	$	$	$	$	$
7	$	$	$	$	$	$	$	$	$
8	$	$	$	$	$	$	$	$	$

Body Corporate and Community Management Act 1997 (Section 213)

Land Sales Act 1984 (Section 21)

Disclosure Statement

Estimated Annual Costs to Lot Owners — Agreements						
	First Year		Second Year		Third Year	
Lot	Administration Agreement	Caretaking Agreement	Administration Agreement	Caretaking Agreement	Administration Agreement	Caretaking Agreement
1	$	$	$	$	$	$
2	$	$	$	$	$	$
3	$	$	$	$	$	$
4	$	$	$	$	$	$
5	$	$	$	$	$	$
6	$	$	$	$	$	$
7	$	$	$	$	$	$
8	$	$	$	$	$	$

The following assumptions were made when preparing the above estimates:

1.………. [Here set out any relevant assumptions.]
2.……….
3.……….

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[*It is strongly recommended that all cost estimates be given over at least a 3 year period. This is because section 213(2)(b) of the Act does not sanction a one year estimate and the amount payable by a lot owner in the second year is always much higher than in the first year (when equipment and services are covered by warranty agreements). Also, the third year tends to see a further increase as the true cost of administering the scheme becomes apparent. Care should also be taken to ensure that the first year estimates are accurate and defensible rather than being "tailored to what the market will bear".*]

Body Corporate and Community Management Act 1997 — ***Land Sales Act 1984***

(Section 213) — (Section 21)

Disclosure Statement

ANNEXURE F
(Letting Authority)

[*A complete copy of the Letting Authority should comprise this annexure. The name of the letting agent need not be included as it may not be finalized at the time the first contract is signed.*]

Body Corporate and Community Management Act 1997 — ***Land Sales Act 1984***

(Section 213) — (Section 21)

Disclosure Statement

ANNEXURE G
(Plans and Drawings)

[*These comprise a site plan, relevant floor plans, sections and perspectives. They should not include dimensions or areas. They are normally taken from the materials used by the marketing agents. They are included in the disclosure statement to give the buyer comfort about what they are buying. They assist "closure" of the deal.*]

Body Corporate and Community Management Act 1997 — ***Land Sales Act 1984***

(Section 213) — (Section 21)

Disclosure Statement

ANNEXURE H
(Schedule of Finishes)

[*The schedule of finishes used for marketing purposes comprises this annexure. It should be as detailed as possible because it is also intended to give the buyer comfort about what is being purchased. It also has a relationship to some terms of the contract of sale.*]

Body Corporate and Community Management Act 1997 — ***Land Sales Act 1984***

(Section 213) — (Section 21)

Disclosure Statement

ANNEXURE I
(Body Corporate Assets)

[*Any personal property to be acquired by the Body Corporate, either by "gift" from the developer or from its own funds, should be described in this annexure. This includes such things as outdoor furniture, barbeque equipment , gym equipment, pool equipment, furnishings, artwork, security installations and wall hangings, etc. Ensure that the client's instructions are obtained at the start of the project and check them again prior to issuing material for execution. The timing and budget of the development may mean certain items initially budgeted for may no longer be provided. Check that any items removed from the Disclosure Statement part way through the development do not trigger a Further Statement under s 214 of the Body Corporate and*

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Community Management Act 1997 (Qld). The case of Wilson v Mirvac Queensland Pty Ltd (2010) LQCS ¶90-157; [2010] QSC 87 should be considered in the event of even a minor change to the Body Corporate Assets.]

ANNEXURE J
(Furniture Package)

[*If the furniture package is included — ensure that the contract refers to the unencumbered furniture package being handed over at settlement.*
As a matter of housekeeping — always ensure that any changes required to the Disclosure Statement created at the start of a development do not trigger a "material prejudice" argument on behalf of an intending purchaser.]

Last reviewed: 18 October 2013

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Introduction to Index

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This Index covers the editorial writings in the Reporter. References are to paragraph numbers of the text.

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A

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