Body Corporate and Community Management and Other Legislation Amendment Bill 2023

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Office of the President

4 September 2023

Our ref: [WD:PD]

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: LASC@parliament.qld.gov.au

Dear Committee Secretary,

Body Corporate and Community Management and Other Legislation Amendment Bill 2023

Thank you for the opportunity to provide a submission on the Body Corporate and Community Management and Other Legislation Amendment Bill 2023 (the **Bill**).

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law and help protect the rights of individuals and the community. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Property and Development Law Committee, whose members have substantial expertise in this area.

Our high level comments follow.

1. **Body corporate reforms:**

    a. QLS appreciates having had the opportunity to participate in the Community Titles Legislation Working Group and broadly supports the reforms to the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**), including the amendments to allow for the termination of an uneconomic community titles scheme. We believe the proposed termination regime provides an appropriate balance between facilitating termination of "uneconomic" schemes and protecting the rights of "minority" owners.

    b. However, we have significant concerns with the drafting of some of the provisions which we believe will result in termination actions being open to challenge. This may, in turn, deter bodies corporate and potential developers from utilising the process.

    c. We also have concerns about unintended consequences as a result of the proposed amendment to section 59(3) of the BCCM Act. The proposed

amendment appears to have misconceived the reference to "seal" in the existing section.

2. **Early release of deposits from trust accounts -** QLS considers the amendments proposed to section 218C of the BCCM Act (and similar provisions in other legislation) are inadequate to address the current uncertainty in the interpretation of the section. As a result buyers will remain at risk of losing deposits.
3. **Sunset dates:**
    a. QLS does not support deferring the introduction of the sunset date reforms to "off the plan" apartment contracts (and contracts for other community title lots) until a later date. In our members' experience sunset dates are also being misused by apartment developers and buyers of apartments should be extended the same protection as buyers of land.
    b. QLS is concerned that the proposed new section 19F(3) of the *Land Sales Act 1984* (Qld) (**LSA**) (which requires the Supreme Court to consider the viability of the seller's business when deciding whether it is just and equitable to make an order to terminate contracts) will provide sellers with termination rights which presently do not exist. This is open to abuse and is contrary to the consumer protection objects of the legislation.
    c. We also query the requirement to give a notice of intention to terminate 28 days prior to the sunset date. If a project is nearing completion and a survey plan has (for example) been lodged with Council for plan sealing or with the land registry for registration, the seller will not know whether the sunset clause can be satisfied by the sunset date.
4. **Timeframe for a response:** QLS is concerned at the short timeframe allowed for responses to the Bill. Having adequate time to consider the specific drafting of a bill is critical to ensuring the legislation as introduced will achieve its intended objectives. Although the substance of some of these reforms have been the subject of public consultation, and other topics have been discussed at the Community Titles Legislation Working Group, the truncated public submission period may mean that there are drafting issues and other unintended consequences which have not been identified. QLS highlights the risks of errors in legislation which is passed without adequate time for public scrutiny.
5. Given the short timeframes, QLS has identified the key issues with the Bill. If we have not commented on a particular issue, this should not be taken as assent or support.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Chloé Kopilović
President

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Office of the President

6 September 2023

Our ref: [WD:PD]

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: LASC@parliament.qld.gov.au

Dear Committee Secretary

Body Corporate and Community Management and Other Legislation Amendment Bill 2023 – supplementary submission

Further to our submission of 4 September 2023, the attached sets out further detailed comments in relation to the issues raised.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Chloé Kopilović
President

SUPPLEMENTARY SUBMISSION

Body Corporate and Community Management and Other Legislation Amendment Bill 2023

1. Termination of community titles schemes – new Part 9 of the *Body Corporate and Community Management Act 1997*

Clause 7 of the Body Corporate and Community Management and Other Legislation Amendment Bill 2023 (**Bill**) inserts a new Part 9 in the *Body Corporate and Community Management Act 1997* (**BCCM Act**).

These reforms are intended to 'provide a balanced approach to termination of community titles schemes, which recognise the need to facilitate renewal and redevelopment in appropriate cases, while also appropriately respective individual lot owners' property rights.'[1]

QLS agrees that, whilst a majority of lot owners may be in favour of selling their lots to a developer for redevelopment of the scheme land, it is important that the views of the "minority" owners are taken into account and, if they are ultimately forced to sell, they are not financially disadvantaged as a result of their opposition to the proposal. QLS broadly supports the approach and processes proposed in the new Part 9 including measures to ensure that all owners are fully informed of how sale proceeds will be distributed and that there are safeguards in place.

However there are number of issues with the drafting of Part 9 which we believe:

- create considerable uncertainty;
- will likely lead to litigation about technical issues rather than the merits of proposed terminations; and
- as a result, will likely result in the measures not having the desired effect in terms of enabling redevelopment of old schemes and creating additional housing.

1.1 Application of Division 4

Division 4 contains provisions which allow for termination of schemes where economic reasons for termination exist.

Section 80(1) provides that "*this division [that is, Division 4] applies only if … the body corporate prepares a termination plan and passes a motion for an economic reasons resolution*". However, Division 4 deals with a number of steps which must be taken prior to preparation of a termination plan and the passing of the resolution and provides rights to aggrieved parties if an economic reasons resolution is not passed.

On a strict reading, Division 4 would never apply. QLS suggests section 80(1)(b) should be amended to read:

"*(b) if the body corporate proposes to pass a motion for a termination resolution*"

[1] Explanatory Notes to the Body Corporate and Community Management and Other Legislation Amendment Bill 2023 (p.3)

1.2 Application of Subdivision 5

Similarly, section 81I states that "*This subdivision [that is, subdivision 5] applies if a body corporate … passes a termination plan resolution*". However, subdivision 5 deals with matters which must be dealt with before a termination plan resolution is passed (sections 81J and 81K) and imposes obligations on the body corporate if the termination plan resolution is not passed (section 81L).

QLS suggests section 81I should be amended to read:

"*This subdivision applies if a body corporate proposes to pass a termination plan resolution.*"

1.3 Test for determining economic reasons for termination

The threshold test for determining whether the new provisions are available is that there are ***economic reasons for termination*** of the scheme.

The Queensland University of Technology in its "*Options paper recommendations: Body corporate governance issues: By-laws, debt recovery and scheme termination*"[2] (**QUT Recommendations**) proposed that the regime should apply where it was ***uneconomic to maintain*** the scheme building. In our view this requires an economic cost benefit analysis of the reasonableness of continuing to maintain the building rather than replace it. In other words, would a reasonable person who owned the building, in exercising sound financial judgement, consider it more appropriate to demolish the building and rebuild it rather than incur the expenditure necessary to maintain it?

QLS believes this is the appropriate test and is concerned that the test in proposed new section 81A of the BCCM Act requires something higher than this or, at the very least, is open to challenge. This will diminish the effectiveness of the new provision.

Section 81A(b) provides that economic reasons for termination exist where "*it is not … economically viable for the body corporate … to carry out repairs and maintenance to [the scheme buildings]*".

QLS believes this arguably requires the body corporate to consider whether the lot owners in the scheme are able to afford the continued maintenance of the scheme buildings, regardless of whether this would be a rational economic decision. QLS submits this is not an appropriate test.

Section 81A(a) proposes a slightly different test "*where all of the lots included in the scheme are used for a commercial purpose*". In this case, economic reasons for termination exist where "*it is not economically viable for the scheme to continue*". It is difficult to see any practical difference between these two tests as presumably it will be economically viable for

[2] Queensland University of Technology, *Options paper recommendations: Body corporate governance issues: By-laws, debt recovery and scheme termination* (2017) available at https://www.justice.qld.gov.au/community-engagement/community-consultation/past/review-of-property-law-in-queensland

the scheme to continue as long as the owners are able to pay the levies.[3] Again, this seems to apply regardless of the economic sense in doing so.

Further if (a) and (b) do have different meanings, it is not clear whether they are intended to be cumulative or alternatives (that is, whether a scheme with only commercial lots is required to satisfy (a) or both (a) and (b)).

QLS's view is that the test for whether economic reasons for termination exist should be redrafted to reflect the QUT Recommendation (so that it is based on a sound economic evaluation not the particular circumstances of the body corporate) and remove the existing uncertainty. We do not see the rationale for applying different tests for commercial schemes and others (if that is the intention).

1.4 Implementation of Termination Plans

QLS questions whether proposed Subdivision 5 provides an effective mechanism to enable a termination plan to be implemented.

A body corporate does not own the scheme land or buildings and, absent an appropriate legislative provision, has no power to compel a lot owner to transfer its lot to a third party.

The intention appears to be that the facilitator appointed under proposed new section 81M should apply to the court for orders under section 81N(6) (noting that sections 81N(3) and (4) prevent the body corporate or another lot owner from making an application to the court for appropriate orders).

However proposed new section 81N (6) only permits a facilitator to apply to the court for an order that "*each lot in the scheme be sold under the termination plan*". Given this express limitation it is not clear that the facilitator could apply for the appointment of a statutory trustee for sale as contemplated by section 81R(2). This would be the usual course of action for compelling a sale.

We also note that if a facilitator makes an application to the court for an order under proposed new section 81(6) (for example because a single owner refused to comply with the plan and sign a transfer of its lot) under section 81Q(2):

- the body corporate is required to pay the cost of the proceedings
- the body corporate is required to prove that the implementation of the plan is just and equitable, notwithstanding the period for an owner to challenge the termination the plan under section 81N(2) may have expired.

This seems inequitable.

We would also suggest that the time limit in proposed section 81N(2) should only apply to an application to challenge a termination resolution, not an application to vary a termination plan or to compel compliance with a termination plan. We think it is likely in practice that bodies corporate will not implement termination plans (or conversely that developers/buyers will not

[3] Although it is noted in this case, the pre-termination report is required to include a report on whether the lots can be used for an economically viable purpose which seems to introduce a third possibility – see s 81C(2)(d)

settle apartment purchasers) until this "challenge period" has expired. There will potentially be a need long after this period for parties to seek orders necessary for the implementation of the plan.

Proposed section 81N also appears to prevent anyone seeking orders against a lessee or management rights holder if they fail to act in accordance with the termination plan.

Apart from these drafting anomalies, QLS believes the Bill should contain a clear statement to the effect that, if passed, the termination plan is binding on the body corporate, owners, lessees and contractors.[4] This will provide greater clarity to Division 4, not just in its legal interpretation but for the benefit of lay people such as owners, lessees and body corporate managers who are required to understand it.

1.5 Effect of change of ownership on termination resolution

A related issue, not clearly addressed by the Bill, is whether the subsequent owner of a lot is bound by a termination resolution.

It is also noted that whilst the body corporate is required to notify the Registrar of Titles when a termination resolution is passed, there is no obligation on the Registrar to make that information available to prospective purchasers of a lot.[5] QLS believes it is important that this information be publicly available.

1.6 Potential for Premature Termination of Scheme

The Bill appears to allow a body corporate to register the termination of a scheme as soon as a termination resolution is passed. Proposed section 81T simply provides that the termination takes effect under section 115V of the *Land Title Act 1994* (Qld) (**LTA**). That section, in turn, merely requires that a plan amalgamating all lots in the scheme and a copy of the termination resolution be lodged in the land registry.

The definition of ***termination plan*** in section 81B contemplates that the plan may be prepared prior to the scheme being sold by public auction or tender.

It is therefore conceivable that the body corporate could terminate the scheme under the proposed new Part 9 prior to a buyer for the scheme being found or prior to an owner objecting to the termination resolution or plan under section 81N.

Further, the effect of termination of the scheme, if there are multiple lot owners, is that:

- the body corporate ceases to exist;

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[4] Whilst the NSW scheme differs from what is proposed in the Bill, see section 184 of the *Strata Schemes Development Act 2015* (NSW), in particular:
"(2) The owner of each lot in the strata scheme must sell the owner's lot in accordance with the strata renewal plan and the order."
"(6) A lease of a lot in the strata scheme is terminated on the day stated in the strata renewal plan for giving vacant possession of the lot to the purchaser or on such later day as may be specified in the order."

[5] By way of contrast, see ss176(3) and 187 of the *Strata Development Act 2015* (NSW)

- all lot owners become the joint owners of the whole of the scheme land (that is, all of the former lots and common property); and
- the assets and liabilities of the body corporate vest in the owners.

Needless to say, this would create a minefield of complexity and potential liability for owners.

Section 184(3) of the *Strata Schemes Development Act 2015* (NSW) sensibly provides that scheme termination takes effect when all of the lots have been sold unless otherwise determined by the Court. We would submit that the Bill needs to include a provision preventing the body corporate from taking the steps contemplated by section 115V of the LTA prior to the transfer of lots to the developer/proposed buyer unless otherwise ordered by the court.

1.7 Liability for outstanding rates and taxes

Whilst each owner's minimum entitlement is stated to be exclusive of any debts owed to the body corporate, section 81B(4) does not take into account arrears of statutory charges (eg, rates and land tax) which would need to be discharged prior to the transfer of the lot. The practical effect is, if an owner owes rates and land taxes for its lot, all owners will bear those outstanding charges proportionately. This is unreasonable. A lot owner's minimum compensation should be net of all debts owing on the lot.

2. Unintended consequences of amendment to section 59 of the BCCM Act

Section 59(3)(b) of the BCCM Act presently provides that a community management statement (**CMS**) is binding on the body corporate and each member of the body corporate "as if each person had signed the community management statement under seal".

The effect of clause 6 of the Bill is to omit the words "as if each person had signed the community management statement under seal".

We expect this is a consequential amendment to clause 4 which removes the requirement for a body corporate to have a seal. However we are concerned that the amendment may have significant unanticipated consequences.

The reference to signing "under seal" is intended to convey that the provisions in the CMS take effect as a deed and are therefore enforceable notwithstanding the absence of consideration. Historically a deed was required to be signed by each party "under seal" but this requirement has been dispensed with by statute.[6]

The proposed amendment may raise doubts about whether owners are bound by the CMS and clause 6 should be removed from the Bill or proposed section 59(3) should be amended to make it clear that the covenants take effect as if contained in a deed signed by the body corporate and each owner.

[6] See section 46C(2)(c) of the *Property Law Act 1974*

3. Early release of deposits from trust accounts

Section 218C of the BCCM Act (and equivalent provisions in other legislation[7]) are intended to provide protection for "off the plan" buyers against loss of deposits. The intention is to require that deposits for off the plan contracts be held in a solicitor's or real estate agent's trust account until settlement occurs, or the contract is otherwise terminated (for example, because the buyer defaults or the seller exercises a right not to proceed with the development). This prevents developers from using deposits as a means of funding the development, with the resultant risk to buyers if the developer becomes insolvent.

However there is anecdotal evidence (from media reports[8] and from our members' experience) that there are instances where deposits are being paid to developers prior to settlement occurring.

QLS believes this is as a result of ambiguity in the drafting of these provisions, in particular the requirement that the deposit be held in a trust account "*until a party to the contract or instrument becomes entitled, under this part or otherwise according to law.*"

The phrase 'otherwise according to law' is being interpreted by some as allowing parties to expressly agree in the contract that the deposit can be released to the seller earlier than settlement. This accords with the common law position that if a buyer and seller agree, a deposit holder may be directed to release the deposit in accordance with their instructions. Further a contractual term to this effect is arguably a direction by the buyer and seller to disburse the money to the seller for the purpose of section 249(1) of the *Legal Profession Act 2007* (Qld) (**LPA**).

According to this argument, the release of the deposit is made "*according to law*" and it is therefore permissible to release the deposit to the developer or seller prior to settlement if the contract so provides or if the buyer otherwise agrees.

The Bill proposes addressing the issue by the addition of a note to the effect that the relevant sections cannot be contracted out of[9] and the inclusion of a paragraph in the Explanatory Note explaining the legislative intent of the amendments.

QLS does not believe that the changes adequately address the issue. This is because:

1. If the above interpretation is correct, the section itself allows a deposit holder to release a deposit if the contract provides for it. Therefore, the contractual clause cannot be regarded as contracting out of the Act.
2. The use of extrinsic legislative material (such as Explanatory Notes) in interpretation is permitted in the circumstances in section 14B of the *Acts Interpretation Act 1954* (Qld). This will only occur if the provision is ambiguous or obscure; or if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable; or in any

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[7] Section 49F of the *Building Units and Group Titles Act 1980*; section 18 of the *Land Sales Act 1984*; section 97N of the *South Bank Corporation Act 1989* (Qld)

[8] For example, Brisbane Times (4 Dec 2019) "Fair Trading drops Brookwater resort probe after two years"

[9] Clause 26 of the Bill, amending section 218C of the BCCM Act; Clause 47 of the Bill, amending section 49F of the *Building Units and Group Titles Act 1980* (Qld); Clause 49 of the Bill, amending section 18 of the *Land Sales Act 1984* (Qld); Clause 55 of the bill, amending section 97N of the *South Bank Corporation Act 1989* (Qld).

other case, to confirm the interpretation conveyed by the ordinary meaning of the provision. If a court is satisfied that the words of section 218C of the BCCM Act permit the release of a deposit in accordance with a contractual direction, then there is no justification for referring to the extrinsic material in the relevant Explanatory Notes.

This is an unacceptable outcome when there are clear examples of this provision being abused and a simple legislative change could clarify the obligations of those holding deposits in trust accounts.

The relevant sections need to be amended to specify that deposits must be retained in the trust account until settlement or earlier termination of the contract.

We provide the following drafting for consideration:

> *"(1) A recognised entity that is paid an amount under section 218B(1) must hold the amount in the entity's prescribed trust account until:*
>
> *(a) a party to the contract or instrument becomes entitled upon settlement or earlier termination of the contract or instrument to a repayment or payment of the amount; or*
>
> *(b) the amount is paid to another recognised entity, to be held under this subdivision, in accordance with subsection (1)(a).*
>
> *Maximum penalty—200 penalty units or 1 year's imprisonment."*

4. Sunset clauses

Whilst QLS agrees with introduction on limits of the use of sunset clauses by developers, we have concerns with certain aspects of the Bill.

4.1 Essential nature of sunset clauses and inappropriate reasons for terminating a contract

The Bill proposes reforms which are intended to ensure that a developer may only terminate a contract using a sunset clause if the buyer consents to the termination or there is a Supreme Court order. Proposed new section 19F of the LSA (inserted by clause 50 of the Bill) sets out the process for obtaining a Supreme Court order to terminate under a sunset clause and also prescribes the matters the Supreme Court must consider when deciding whether it is just and equitable to make the order.

At present, sunset clauses generally do not allow a developer to terminate an off the plan contract where it believes the project is no longer viable as a result of cost escalations. Once preliminary conditions precedent (eg planning approvals, sufficient pre-sales) are satisfied, the seller is bound to carry out the development and:

- the seller takes the risk of construction cost escalations;
- the buyer takes the risk of reductions in the value between the contract date and the settlement date.

The case law clearly establishes that a developer cannot rely on a sunset clause where the failure to complete the development by the sunset date is caused by its own default or delay (even if caused by external circumstances, such as cost increases).

Similarly, a buyer cannot avoid its obligations simply because the market value of apartments has fallen and the buyer is unable to obtain the amount of finance it had expected to.

Proposed section 19F(3) requires the Supreme Court to consider whether the seller's performance was affected by matters beyond its control or which affected the viability of the seller's business when deciding whether it is just and equitable to make an order to terminate the contract.

This appears to create a statutory modification of the seller's usual contractual provision and risk allocation.

We expect that if an off the plan contract contained a clause to the effect that the seller had the ability to get out of the contract if the cost of construction increased but the buyer had to settle even if the purchase price was more than the market value, most buyers would not sign the contract. This is also likely to be an unfair term under Commonwealth legislation. However this appears to be the potential effect of proposed new section 19F(3) of the LSA.

We are also concerned this will encourage the practice of developers demanding additional payments in order to proceed with contracts under the threat of making an application to court for termination under the sunset clause. For most buyers the cost of resisting a court order will be prohibitive and practically it will be easier for them to either pay the additional money or agree to termination and seek to purchase elsewhere.

We believe this is contrary to the consumer protection objects of the legislation and QLS believes proposed subsections 19F(3)(c) and (f) of the LSA should be deleted.

4.2 Staged approach to reforms – reforms should include proposed 'off the plan' community titles sales

QLS believes, as is the case in the legislation enacted in New South Wales, these reforms should apply to all off the plan contracts (that is, land and community title scheme lots).

In our members' experience, the reliance on sunset clauses by developers is equally (if not more) prevalent in apartment sales. We see no logical justification in not applying these reforms to all off the plan sales.

4.3 Timing of sunset clause notices

We query the logic of requiring a sunset clause notice to be given before the sunset date.

The seller may not know, 28 days before the sunset date, whether the survey plan will register before the sunset date or not. If the development works have been completed and the survey plans lodged for sealing or registration, it is possible that the titles will issue prior to the sunset date.

We suggest it would be preferable to permit sellers to only give a sunset clause notice after the sunset date but to only permit an application to court 28 days after the notice is given.

4.4 Delete the regulation-making power in proposed new section 19D(1)(c) and (2) (clause 50 of the Bill)

QLS considers the regulation-making power in proposed new subsections 19D(1)(c) and (2) of the Bill is too wide.

Such a regulation would have insufficient regard to the institution of Parliament. As it is inconsistent with sections 4(4) and (5) of the *Legislative Standards Act 1992* (Qld), QLS recommends this subsection be removed.