



ACSL
Australian College of Strata Lawyers

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11 July 2022

Legal Affairs and Safety Committee
Parliament House George Street BRISBANE QLD 4000
Email: lasc@parliament.qld.gov.au

RE: Building Units and Group Titles and Other Legislation Amendment Bill 2022

On behalf of the Australian College of Strata Lawyers (ACSL) we submit the **attached** submission in relation to the Building Units and Group Titles and other Legislation Amendment Bill 2022.

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Building Units and Group Titles and Other Legislation Amendment Bill 2022

THE PROBLEM

1. If you live on [REDACTED] [REDACTED] in Queensland, then your Body Corporate can make by-laws that prohibit:
 - a. you from using your unit for the housing of physically or mentally disabled persons, or for social housing, because only 'normal' residential use is permissible; or
 - b. your tenant from using the swimming pool, because only 'owners' can use it.
2. This is possible because bodies corporate governed by the *Mixed Use Development Act 1993 (MUDA)* or the *Building Units and Group Titles Act 1980 (BUGTA)* can make by-laws that impose those prohibitions. Bodies corporate regulated by the *Body Corporate and Community Management Act 1997 (BCCMA)* cannot make such by-laws and have not been able to since introduction of the BCCMA in 1997 – that is, for the last **25 years**.
3. If MUDA and BUGTA are to be retained, then the time has come for bodies corporate regulated by those Acts, to be regulated in the same way as the overwhelming majority of bodies corporate in Queensland are; by the same restrictions which are contained within the BCCMA.

'TWO SPEED' BY-LAW REGULATION

4. If the proposed amendments within the Bill are made, in the Bill's current form, bodies corporate governed by MUDA or BUGTA will be required to act reasonably when carrying out their functions. That new restriction will not however, fix the problem of inappropriate or unreasonable by-laws.
5. The overwhelming majority of strata schemes² in Queensland are regulated by the BCCMA. Since 1997 the bodies corporate for those strata schemes have been subject to restrictions with respect to the by-laws which they may adopt. See particularly sections 180 and 181 of the BCCMA. Those restrictions include, for example, that a by-law must not be oppressive or unreasonable, having regard to the interests of all owners and occupiers in lots included in the scheme, and the use of the common property for the scheme.

¹ [REDACTED] is an **example** only – it's use as an example is not based on any factor, other than strata schemes on the Island being governed by the law in question. No offence is intended to the residents or bodies corporate of those strata schemes.

² 'strata schemes' is used as a common term instead of the more correct 'community title scheme', 'mixed used development', 'building units plan or 'group titles plan'



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6. The specific restrictions in section 180 of the BCCMA have the practical effect of ensuring that inappropriate or unreasonable by-laws are not adopted. That is, by-laws which don't meet certain minimum standards will be invalid. Those minimum standards are reflective of the community's minimum standards and have been since 1997.
7. Only two of the minimum standards referred to in the BCCMA have analogues under the equivalent section of BUGTA, being section 30. In particular:
 - a. restriction on dealings with a lot - section 30(6) of BUGTA loosely correlates with the protection in section 180(4) of the BCCMA; and
 - b. guide dogs - section 30(12) of BUGTA has a similar effect to section 181 of the BCCMA.
8. While there are similarities in these restrictions, the differences provide uncertainty and unnecessary complication. For example, in relation to restrictions on dealings with a lot, section 180(4) of the BCCMA provides:

(4) A by-law can not prevent or restrict a transmission, transfer, mortgage or other dealing with a lot.

Examples—

 - 1 A by-law can not prevent the owner of a lot from leasing or mortgaging a lot.
 - 2 A by-law can not prevent the sale of a lot to a person under or over a particular age.
9. The analogous BUGTA provision, section 30(6) provides:

(6) No by-law or any amendment of or addition to a by-law shall be capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement, service right or service obligation implied or created by this Act.
10. The purpose of by-laws under MUDA / BUGTA on the one hand and BCCMA on the other, are effectively the same. This is reflected in the by-law making powers granted to bodies corporate within the Acts. Section 169 of the BCCMA sets out a framework for the 'content and extent of by-laws' which is largely reflected in s30(2) of the BUGTA.
11. BCCMA Section 169(1)(a) allows bodies corporate to make by-laws for '*the administration, management and control of common property and body corporate assets*'. Section 30(2) of the BUGTA provides by-laws may be made '*... for the purpose of control and management, administration, use or enjoyment of the lots and common property the subject of the plan*'.
12. By-laws are private laws which take effect between the lot owners and occupiers bound by them. The minimum standards prescribed in the BCCMA are current and predominate in



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Queensland. If BUGTA and MUDA are to be retained, they must be modernised. That requires they be amended to incorporate the minimum standards adopted in the BCCMA.

13. Why? So that the owner or occupier of a lot in any type of strata scheme in Queensland can expect the same limitations upon by-laws to apply, in their scheme. A 'two speed system' is undesirable, unfair and counterproductive to the aim of community education and acceptance of strata living³.
14. Under the proposed new s132A of BUGTA a new education and information service will be provided. The logical provider of that service will be the Office of the Commissioner for Body Corporate and Community Management. By-law disputes are commonly in the top 5 causes of all disputes brought to the Commissioner's Office for resolution.
15. If the Bill does not amend BUGTA and MUDA to reflect the restrictions upon by-laws in the BCCMA, then the task confronting the Commissioner's Office, with respect to education and information relating to by-laws, will be made needlessly more difficult. There will be, in effect, one service for BCCMA schemes and another for BUGTA and MUDA schemes. To cope, the Commissioner's Office will have to be funded for, effectively, two services.

BCCMA 'LIMITATIONS FOR BY-LAWS'

16. Section 180 of the BCCMA contains 'Limitations for by-laws' which reflect contemporary community standards as to limitations on the by-law making power. Despite that, the following BCCMA sections have no analogous provision in BUGTA.

No Restrictions on Residential Use – s 180(3)

17. BCCMA s 180(3) - If a lot may lawfully be used for residential purposes, the by-laws can not restrict the type of residential use.
18. There is no such restriction in the BUGTA, and the result of the omission is that bodies corporate may 'pick and choose' the residential uses to which their neighbor's lots can be put. For example, under the Sunshine Coast Council Planning Scheme, one residential use is:

'community residence' - Any dwelling used for accommodation for a maximum of six persons who require assistance or support with daily living needs, share communal spaces and who may be unrelated.

19. Social housing models can rely heavily on co-housing and the use of shared facilities to render housing affordable for at risk populations, including the physically or mentally disabled, or those requiring income or other supports.

³ which is essential to any residential growth management strategy in Queensland



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20. Bodies corporate are not qualified, capable or desirable as arbiters of residential use – that function has traditionally been reserved to, and should remain with, local government as the progenitors, administrators and enforcers of local planning schemes.
21. Under the BCCMA a body corporate cannot ban use of a lot for social housing. The same should be the case for bodies corporate in BUGTA and MUDA schemes.

No Discrimination between occupiers – s 180(5)

22. BCCMA s 180(5) – A by-law must not discriminate between types of occupiers. The example given for this restriction is '*A by-law can not prevent a tenant from using a pool on the common property*'.
23. While cast in broad terms, this BCCMA provision has been interpreted narrowly. Irrespective it provides an obvious and essential protection, which tenants within BUGTA / MUDA schemes do not have.

No Monetary Liability (except exclusive use by-law) – s 180(6)

24. BCCMA s 180(6) - A by-law (other than an exclusive use by-law) must not impose a monetary liability on the owner or occupier of a lot included in a community titles scheme.
25. Monetary liabilities may also be imposed with respect to exclusive use by-laws under BUGTA, section 30(7). There is however no express prohibition on monetary liabilities being imposed under any other form of by-law.
26. Adoption of a by-law under BUGTA requires a special resolution (section 30(2)) except in the case of exclusive use by-laws which require a resolution without dissent.
27. There is no reason lot owners within BUGTA schemes should not enjoy the same clear and concise protection against monetary liabilities imposed under by-laws, which is afforded to lot owners within BCCMA schemes.

Not Oppressive or Unreasonable – s 180(7)

28. BCCMA s 180(7) - 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.
29. Section 180(7) effectively provides an avenue for proprietors to challenge the reasonableness of by-laws having regard to the interests of all lot owners and occupiers. This restriction on by-law making power acts as an important check on power, including by opening up by-laws to review by Adjudicators under Chapter 6 of the BCCMA.



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Sustainable Housing – s180(8)

30. BCCMA s 180(8) - A by-law must not include a provision that has no force or effect under the Building Act 1975, chapter 8A, part 2.
31. The relevant part of the *Building Act 1975* concerns 'sustainable housing' (in the environmental sense) and limits prohibitions upon particular sustainable housing measures. For example, section 246O(d) provides that a prohibition contained within a by-law, on the installation of a solar hot water system or photovoltaic cells on the roof or other external surface of a building in a strata scheme, has no force or effect.
32. The sustainable housing provisions were introduced in 2009 by the *Building and Other Legislation Act 2009*. While by-laws for a BUGTA scheme are a 'relevant instrument' for the *Building Act*, and the sustainable housing provisions apply to them, it is not clear, to bodies corporate of schemes regulated by BUGTA, that by-laws which breach the sustainable housing provisions should not be made in the first place.
33. The practical effect of BUGTA not having an equivalent restriction to s180(8) of the BCCMA, is by-laws which do not comply with the sustainable housing provisions, being accepted as valid by lot owners within affected schemes. Lot owners routinely accept that by-laws made by their body corporate are valid, and abide them accordingly; indeed, that is arguably a desirable public policy outcome. If that outcome is to be sought, then the limits of by-law making power should be clear, in BUGTA / MUDA schemes, as they are in BCCMA schemes.

WHAT CHANGES SHOULD BE MADE TO THE BUGTA AND MUDA?

34. BUGTA and MUDA should be brought into alignment with the BCCMA, with respect to the limitations for by-laws. The 'missing' limitations, from section 180 of the BCCMA, should be introduced into BUGTA and MUDA. There is no reason for this process to be delayed.
35. While the minimum standards in section 180 of the BCCMA should, by now (25 years after promulgation) be universal amongst all strata schemes, it is acknowledged that for a limited number of schemes, there may be issues associated with transition.
36. Accordingly, an appropriate transitional provision, would limit the operation of the new limitations on by-laws in BUGTA and MUDA, to by-laws adopted after the commencement of the amendments. In other words, existing by-laws contrary to the 'new' limitations would remain valid, until the earlier of their repeal or amendment by the body corporate.

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