

HISTORY OF COMMUNITY TITLES LEGISLATION IN QUEENSLAND

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POSITION PRIOR TO LEGISLATION

Queensland, particularly Brisbane, was historically characterised by low density living and outward growth.¹ This was heavily influenced by the *Undue Subdivision of Land Prevention Act 1885*, which was passed to 'prevent overcrowding and urban degradation in cities and towns'.² That Act imposed a minimum lot size of 16 perches, or about 400 square metres.³ The growth of the tram and train network in the early 1900s further contributed to Brisbane's low density urban sprawl.⁴ However, flats became more common in Brisbane during the 1930s as a result of a housing shortage at the time.⁵

As the density of cities across Australia grew in the 1900s the demand for apartments subsequently increased.⁶ The two common legal arrangements to facilitate community living in Australia (in addition to leases) were 'tenancies in common, supplemented by agreements allowing for occupation of a particular apartment or company title'.⁷ Of the two, company title was more widely used.⁸ This was likely due to the inflexibility of tenancies in common, where the owners hold fixed, undivided shares in the same property. Additionally, the requirement for unanimity in making decisions about the property was also seen as a major drawback.⁹

Company title, which had its origins in New York City in the 1880s,¹⁰ enabled a person to live in a unit by acquiring shares in an incorporated company or association that owned the building.¹¹ The shareholder was given a licence or lease from the company to have exclusive use and occupation of a unit and the right to use common property.¹² The management of the building was governed by the company's constitution, which also established the company's governing body.¹³

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¹ The Brisbane Institute, 'The 200 km City: From Noosa to the Tweed' (2004), 1.

² Sigrid Sanderson, 'The 30 minute city' (Paper presented at 2010 PIA Queensland Conference, Coolool, 12 November 2010).

³ Ibid.

⁴ Ibid; The Brisbane Institute above n 1, 1.

⁵ 'Homes Better than Flats', *The Courier Mail* (Brisbane), 16 February 1937.

⁶ Consumer Affairs Victoria, *Company Titles (Home Units) Bill exposure draft consultation explanatory statement* (14 August 2012) <<http://www.consumer.vic.gov.au/resources-and-education/legislation/public-consultations-and-reviews/company-titles-home-units-bill/explanatory-statement>>.

⁷ Cathy Sherry, 'The fundamentals of high rise buildings and master planned estates: Ownership, governance and living in multi-owned housing with a case study on children's play' (2008) 16 *Australian Property Law Journal* 1, 5.

⁸ Ibid, 5.

⁹ Consumer Affairs Victoria, above n 6.

¹⁰ Consumer Affairs Victoria, above n 6.

¹¹ New South Wales Law Reform Commission, *Disputes in company title home units*, Report No 115 (2007), [2.1].

¹² Ibid, [2.1].

¹³ Ibid, [2.2].

There were a number of problems with company title and one of the most significant problems was that it did not give freehold ownership over a unit. Another problem was that there were often restrictions on the sale and lease of units such as requiring the approval of the board of directors.¹⁴ Dispute resolution, when compared to modern community titles legislation, is also more rigid as disputes are handled in the Supreme Court.¹⁵ However, the New South Wales Law Reform Commission has recommended that the New South Wales Consumer, Trader and Tenancy Tribunal be vested with jurisdiction to hear company title disputes, except those relating to the sale, transfer or lease of shares or units, and other corporate law matters.¹⁶ Additionally, Victoria has released an exposure draft Bill seeking to give the Victorian Civil and Administrative Tribunal jurisdiction to hear matters as recommended by the New South Wales Law Reform Commission.¹⁷

In addition to the legal problems associated with company title, there are also a number of recognised commercial problems. Primarily, it is recognised that it may be more difficult to obtain finance to purchase a company title unit.¹⁸ This is because historically, banks 'have been hesitant to lend without title' or those that do, lend at a lower loan to value ratio.¹⁹

The use of company title declined with the introduction of community titles legislation across Australia from the 1960s, with Victoria being the first jurisdiction to introduce such legislation in the form of the *Transfer of Lands (Stratum Estates) Act 1960*. Queensland soon followed with the *Building Units Titles Act 1965*, although this legislation was based more on the New South Wales *Conveyancing (Strata Titles) Act 1961*. Currently in Queensland, 'company title units are now rarely utilised'²⁰ although company title does still exist in Australia, particularly in Sydney.²¹

THE NEED FOR COMMUNITY TITLES LEGISLATION— *BUILDING UNITS TITLES ACT 1965*

Australia was experiencing a housing shortage after World War II and the Commonwealth Housing Commission estimated that at least 700,000 dwellings would be needed over the next 10 years.²² Importantly, it was recognised that multi-storey dwellings would need to make up part of the shortfall.²³ Indeed, by the 1950s, there was growing demand for flats in Brisbane and despite the difficulties in obtaining finance at the time, 'many big firms [of architects] were ready to go ahead with new buildings as soon as financial credit eased.'²⁴ It may be speculated that the difficulties in obtaining finance were due to the company title arrangements in place.

¹⁴ Ibid, [2.4].

¹⁵ Ibid [2.9].

¹⁶ Ibid, [10].

¹⁷ Company Titles (Home Units) Bill 2012.

¹⁸ Cathy Sherry, above n 7, 5.

¹⁹ Susan Wellings, 'Blast from the Past', *The Sydney Morning Herald* (online), 21 April 2007 <<http://www.smh.com.au/news/property/blast-from-the-past/2007/04/20/1176697053761.html>>.

²⁰ Queensland Office of State Revenue, *Practice Direction: Duties Act – 18.1 Application of land rich provisions to company title units* (1 March 2002) <<http://www.osr.qld.gov.au/historical-information/superseded-pd/duties/pdda018-1.pdf>>.

²¹ Susan Wellings, above n 19.

²² 'Home Needs', *Cairns Post* (Cairns), 10 November 1945.

²³ Ibid.

²⁴ 'Flats need urgent, but finance delay', *The Courier Mail* (Brisbane), 20 August 1952.

Nevertheless, the first multi-storey apartment building in Brisbane, the now iconic 'Torbreck' at Highgate Hill, was completed in 1960 under a company title scheme.²⁵

On 9 December 1964, the Building Units Titles Bill was introduced into the Queensland Legislative Assembly in response to the growth of Brisbane, 'demand for increased domestic and professional accommodation in the city and inner suburbs', and to overcome the difficulties in the previous schemes.²⁶ Importantly, the Bill also sought to assist in the 'post-war trend towards ownership, rather than rental, of defined parts of multi-storey premises.'²⁷ The Bill was enacted and assented to on 31 March 1965.

The *Building Units Titles Act 1965* permitted, for the first time in Queensland, land to be subdivided into units by registering a building units plan.²⁸ Additionally, the Act provided for separate title to be created for each unit.²⁹ The Act however only permitted subdivision of units in a single building of at least two storeys.³⁰ This allowed a 'multi-storied building to be subdivided floor by floor and further subdivided within those floors.'³¹

Upon registration of the building units plan, a body corporate was created.³² The duties and powers of the body corporate included insuring the building, maintaining common property, and establishing and maintaining a fund for administrative purposes.³³ The Act also provided for owners' rights in respect to their unit such as the provision of services (e.g. water, sewerage, electricity and telephone)³⁴ and ownership of common property.³⁵

The concept of unit entitlements was introduced in the Act, with the building units plan required to include a schedule specifying in whole numbers the unit entitlement of each unit.³⁶ However, the Act did not provide how unit entitlements were to be determined. The body corporate had the power to levy contributions on lot owners in proportion to the unit entitlement of their respective units.³⁷ The Act did not contain provisions regarding the adjustment of unit entitlements or the amendment of the building units plan (with the exception of changing the name of the building units or the address for service of documents).³⁸ However, such adjustments and amendments may have been envisaged as evidenced in section 3(3) of the Act, which provided that 'a proprietor shall hold his unit and his share in common property...subject to any amendments to units or common property shown on the [building units plan].'

²⁵ Australian Institute of Architecture, 'Nationally Significant 20th-Century Architecture: Torbreck' (16 April 2010) <http://www.architecture.com.au/emailnews/national/Heritage/07_QLD-Torbreck-citation-FINAL.pdf>.

²⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 December 1964, 2245–46 (Peter Delamothe, Minister for Justice).

²⁷ *Ibid*, 2245.

²⁸ *Building Units Titles Act 1965* s 3(1).

²⁹ *Ibid* s 3(4).

³⁰ *Ibid* s 2 (definition of 'building units plan').

³¹ Department of Natural Resources and Mines (Qld), *Land Title Practice Manual (Queensland)* (2009), 13.

³² *Building Units Titles Act 1965* s 14.

³³ *Ibid* s 15.

³⁴ *Ibid* s 7.

³⁵ *Ibid* ss 9–10.

³⁶ *Ibid* s 18.

³⁷ *Ibid* s 15(2)(c).

³⁸ *Ibid* ss 4(3) and 4(4).

Although Parliament at the time could not have foreseen the present day disputes over lot entitlements, the Minister for Justice, in his introductory speech, stated that 'it is not within human power to make neighbours live together in harmony.'³⁹ The Leader of the Opposition also raised the issue of how unit entitlements would be determined:

Although several units may have the same floor space, one may command a higher premium because of a river view or something of that kind and the actual costs would be greater than for another unit of similar floor space. Similar remarks may apply to advantages associated with a unit at ground level or in the basement as compared with one on the 13th floor, which might enjoy more breeze.⁴⁰

Section 23 of the Act allowed the body corporate or any person having an interest in a unit to apply to the Supreme Court for the appointment of an administrator. This provision was intended to 'safeguard against malfeasance or neglect on the part of the body corporate.'⁴¹

The by-laws were contained in the first and second schedules of the Act. The first schedule detailed the duties of a proprietor and the body corporate, constituted the council of the body corporate, and dealt with administrative matters regarding meetings and resolutions. The second schedule contained only two by-laws, which dealt with the use of units and the keeping of animals. The lack of additional by-laws was due to the Government's position that the owners should decide the by-laws and the two by-laws in the second schedule were there 'purely as a starting point'.⁴²

GROUP TITLES ACT 1973

The Building Units Titles Act only dealt with the subdivision of land in strata (i.e. multi-storey buildings) and as such, the horizontal subdivision of land with common areas for the use of lot owners was still governed largely by company title. This type of group title (i.e. townhouse or cluster housing) development was becoming more common and was seen as an alternative way to provide higher density living to multi-storey apartment buildings.⁴³

The Group Titles Bill was introduced into the Queensland Legislative Assembly on 12 October 1973 to facilitate development of group title housing and, similar to the Building Units Titles Act, overcome the difficulties in company title.⁴⁴ The Bill was enacted and assented to on 15 November 1973.

The *Group Titles Act 1973* allowed land to be subdivided into lots by registering a group titles plan,⁴⁵ with separate legal title for each lot.⁴⁶ The group titles plan was required to delineate the external surface boundaries of the parcel of land and the location of each lot and the common areas.⁴⁷ The Act placed particular emphasis on

³⁹ Queensland, above n 26, 2246.

⁴⁰ Ibid, 2251 (John Duggan, Leader of the Opposition).

⁴¹ Ibid, 2249 (Peter Delamothe, Minister for Justice).

⁴² Queensland, *Parliamentary Debates*, Legislative Assembly, 9 March 1965, 2473 (Peter Delamothe, Minister for Justice).

⁴³ Queensland, *Parliamentary Debates*, Legislative Assembly, 19 October 1973, 1135 (Charles Porter).

⁴⁴ Ibid, 1132 (William Knox, Minister for Justice).

⁴⁵ *Group Titles Act 1973* s 3(1).

⁴⁶ Ibid s 3(4).

⁴⁷ Ibid s 4(1).

the role of local government in approving proposed subdivisions⁴⁸ and the transfer or lease of a common area.⁴⁹ This was due to Parliament's intent that local authorities have greater control over town planning and that group title developments strictly adhere to local authority requirements to prevent 'slums' being created under the new legislation.⁵⁰

The concept of lot entitlements in the Group Titles Act was similar to unit entitlements in the Building Units Titles Act. However, the Group Titles Act provided a method for determining lot entitlements. Section 15(2) provided that

[t]he lot entitlement of each lot shall (as nearly as is practicable) bear in relation to the aggregate lot entitlement of all lots contained in such plan the same proportion as the unimproved value of such lot bears to the sum of the unimproved values of all lots contained in the plan.

This meant that the lot entitlement for each lot was determined in proportion to the unimproved value of the lot. Additionally, section 15(3) required a group titles plan lodged for registration to be accompanied by a registered valuer's 'opinion as to the unimproved value, and the lot entitlement, of each lot contained in the plan.'

The remaining provisions of the Group Titles Act were similar to those in the Building Units Titles Act.

COMBINING THE BUILDING UNITS TITLES ACT AND THE GROUP TITLES ACT— *BUILDING UNITS AND GROUP TITLES ACT 1980*

The Building Units Titles Act and the Group Titles Act resulted in a 'very substantial increase in people living in community title and like schemes' in Queensland.⁵¹ However, it was recognised that under those Acts people suffered 'a great deal of unnecessary and undesirable financial hardship.'⁵² This led to the introduction of the Building Units and Group Titles Bill into the Queensland Legislative Assembly on 25 March 1980. The purpose of the Bill was to 'modernise the law relating to community living and to protect the rights of purchasers of lots in their dealings with developers, bodies corporate and other proprietors of lots.'⁵³ The Bill also combined the provisions of the Building Units Titles Act and the Group Titles Act due to their provisions being similar.

While it is common today for proposed legislation to be widely consulted on, the extensive public consultation on the Building Units and Group Titles Bill was a rarity at the time. Such consultation involved Members of Parliament travelling to Sydney and Melbourne to examine the relevant New South Wales and Victorian legislation, release of a discussion paper, public seminars and consultation with peak bodies such as the Queensland Home Units Association, Real Estate Institute of Queensland and the Master Builders Association.⁵⁴ Indeed, it was acknowledged during the debate of the Bill that '[t]he Bill has been a major exercise in open

⁴⁸ Ibid ss 4(5) and 18.

⁴⁹ Ibid s 9(4).

⁵⁰ Queensland, above n 43, 1132 (William Knox, Minister for Justice); 1134 (Edmund Casey); 1135 (Charles Porter).

⁵¹ *C v A* [2005] QADT 14, [45] (Member Savage SC).

⁵² Queensland, *Parliamentary Debates*, Legislative Assembly, 17 April 1980, 3358 (Robert Gibbs).

⁵³ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 1980, 2937 (William Lickiss, Minister for Justice and Attorney-General).

⁵⁴ Ibid, 2937 (William Lickiss, Minister for Justice and Attorney-General); Queensland, above n 52, 3362 (Donald Lane).

government and public involvement, which should stand as a model for future Governments of Queensland.⁵⁵

The Bill received bipartisan support from the Opposition and was subsequently enacted and assented to on 6 June 1980.

The *Building Units and Group Titles Act 1980* repealed the Building Units Titles Act and the Group Titles Act.⁵⁶ Savings and transitional provisions continued the registration of plans and bodies corporate established under the former legislation.⁵⁷ The Act still provided for separate registration of a building units plan and a group titles plan.⁵⁸ However, the Act imposed a new requirement for the lodgement of a building units plan for registration in that a certificate of an architect, building surveyor, local authority or building inspector was required to be lodged to certify that the building had been substantially completed in accordance with the plans and specifications approved by the local authority.⁵⁹ The requirement, which applied retrospectively to buildings which commenced construction after 1 February 1973, was likely a response to concerns of 'jerry-builders' marketing 'second-class home units'.⁶⁰

Similar to the Group Titles Act, lot entitlements under the Building Units and Group Titles Act were determined in proportion to the unimproved values of all the lots contained in the plan.⁶¹ Additionally, there was no express method of adjusting lot entitlements.

New types of resolutions were introduced in the Act, being a 'unanimous resolution', 'resolution without dissent' and 'special resolution'. This allowed for flexibility as it was recognised that in a block of units, there may be one person who may 'hold out against the interest of the majority'.⁶²

The Act introduced new disclosure requirements for the purchase of a lot or proposed lot. The original proprietor (the person who held the land in fee-simple when the plan was registered)⁶³ was required to give the purchaser a written statement detailing information about the lot or proposed lot, the parties, lot entitlements, any management or service agreements and by-laws.⁶⁴ If, after giving the disclosure statement, the original proprietor entered into a management or service agreement, altered the by-laws, or changed the lot entitlements, the original proprietor was required to give the purchaser a written notice disclosing particulars of the changes.⁶⁵ The purchaser had a right to void the contract within 30 days of receipt of the notice if the purchaser's rights were materially affected.⁶⁶ The purchaser also had the right to void the contract if the other disclosure requirements were not complied with.⁶⁷

⁵⁵ Queensland, above n 52, 3360 (Donald Lane).

⁵⁶ *Building Units and Group Titles Act* s 4.

⁵⁷ *Ibid* s 5.

⁵⁸ *Ibid* s 9.

⁵⁹ *Ibid* s 9(8)(b).

⁶⁰ Queensland, above n 52, 3358–9 (Robert Gibbs).

⁶¹ *Building Units and Group Titles Act 1980* s 19(1).

⁶² Queensland, above n 52, 3361 (Donald Lane).

⁶³ *Building Units and Group Titles Act 1980* s 7 (definition of 'original proprietor')

⁶⁴ *Ibid* s 49(2).

⁶⁵ *Ibid* s 49(4).

⁶⁶ *Ibid* s 49(4).

⁶⁷ *Ibid* s 49(5).

The Act also made provision for the appointment of a managing agent by a body corporate to perform the body corporate's functions.⁶⁸ This was seen as a significant innovation, particularly for the Gold Coast where there was a high percentage of absent owners and units were being used for short-term letting.⁶⁹ To complement the emerging short-term letting industry, the Act also amended the *Auctioneers and Agents Act 1971* (the predecessor of the *Property Agents and Motor Dealers Act 2000*) to introduce a restricted real estate agent's licence which allowed managing agents to also let lots in the building for which they were appointed as a managing agent.⁷⁰

Another significant innovation in the Act was the dispute resolution process. An application could be made to a referee (appointed by the Governor in Council)⁷¹ for an order on virtually any matter under the Act as the grounds for making an application were not specified.⁷² Similarly, a referee had wide powers to make orders and interim orders.⁷³ A person who was dissatisfied could then appeal to the tribunal against the order of a referee.⁷⁴ The tribunal was not a separate entity, similar to the current Queensland Civil and Administrative Tribunal. Rather, every stipendiary magistrate and acting stipendiary magistrate, by virtue of their appointment to that office, constituted a tribunal.⁷⁵ A further right of appeal was available to the Supreme Court on a question of law.⁷⁶

Finally, the Act provided more comprehensive by-laws than its predecessors. The by-laws were expanded to regulate matters such as damage to common property, parking of vehicles, behaviour of invitees and garbage disposal.⁷⁷

AMENDMENTS TO THE BUILDING UNITS AND GROUP TITLES ACT

The Building Units and Group Titles Act it seems, may have been too complex for some stakeholders, with the Attorney-General stating in Parliament about a year and a half since the Act commenced that 'there appears to be a good deal of misunderstanding about its provisions and the feeling that it is overcomplicated.'⁷⁸ The Attorney-General stated further that '[w]e have to concentrate a great deal more than we have on education and publicity, together with simplification of certain provisions that are causing trouble for lay secretaries in bodies corporate.'⁷⁹

The Building Units and Group Titles Act was amended in 1983 to limit a purchaser's right to avoid a contract for the purchase of a lot or proposed lot under section 49 of the Act, which dealt with the original proprietor's duties of disclosure.⁸⁰ This was in response to a High Court decision which gave a wide interpretation to section 49⁸¹

⁶⁸ Ibid s 50.

⁶⁹ Queensland, above n 52, 3361 (Donald Lane).

⁷⁰ *Building Units and Group Titles Act 1980* sch 1 pt 2.

⁷¹ Ibid s 69.

⁷² Ibid s 72.

⁷³ Ibid pt V div 3.

⁷⁴ Ibid s 106.

⁷⁵ Ibid s 96.

⁷⁶ Ibid s 108.

⁷⁷ Ibid sch 3.

⁷⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 2 December 1981, 4241 (Sam Doumany, Minister for Justice and Attorney-General).

⁷⁹ Ibid.

⁸⁰ *Building Units and Group Titles Act Amendment Act 1983*.

⁸¹ *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* [1983] HCA 44.

and concerns that purchasers were misusing the provision to avoid 'their contractual obligations on the basis of a technical defect.'⁸²

The Act was substantially amended in 1988 in response to a wide range of stakeholder concerns.⁸³ A significant amendment was the provision of licensing of body corporate managers and abolishing the term 'managing agent' as the term was often 'confused with real estate agents or letting agents when in fact the managing agents carried out the role of the secretary/treasurer.'⁸⁴ The actual licensing provisions for body corporate managers were inserted into the *Auctioneers and Agents Act 1971* to provide bodies corporate with the protection afforded by the Auctioneers and Agents Act Fidelity Guarantee Fund.⁸⁵ However, the licensing amendments were never proclaimed into force and were subsequently repealed in 1994.⁸⁶ There do not appear to be any reasons given for this in *Hansard* or the Explanatory Notes. Other significant amendments included requiring greater disclosure of third party service agreements entered into by a body corporate, auditing of body corporate funds and lowering the required number of votes for a special resolution.

The Act was again amended in 1990 after ongoing consultation with stakeholders and to address 'anomalies that were created by the 1988 amendments'.⁸⁷ In response to a High Court decision,⁸⁸ section 30, which dealt with the making of by-laws, was amended to clarify that a by-law granting exclusive use of common property need not identify the common property and allowed the transposition of common property from one lot owner to another.⁸⁹ Other amendments included increasing penalties and removing Ministerial consent for group title plans of more than 50 lots. In recognising that the Act required further amendments, the Minister for Land Management stated in his reply speech that a Green Paper would be presented in 1991 to 'delve a bit deeper into the complexities' of the Act.⁹⁰

A NEW BUILDING UNITS AND GROUP TITLES ACT?

The Green Paper was subsequently released in June 1991 'with the objective of reviewing and, where necessary, rectifying concerns.'⁹¹ The Green Paper identified a number of issues with the Building Units and Group Titles Act including the lack of a statutory restriction on the term of service contracts,⁹² the use of proxy votes by managers and dominant voters to influence body corporate decisions,⁹³ building

⁸² Queensland, *Parliamentary Debates*, Legislative Assembly, 14 December 1983, 604 (Neville Harper, Minister for Justice and Attorney-General).

⁸³ *Building Units and Group Titles Act Amendment Act 1988*; Queensland, *Parliamentary Debates*, Legislative Assembly, 10 November 1987, 3959–60 (Paul Clauson, Minister for Justice and Attorney-General).

⁸⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 10 November 1987, 3960 (Paul Clauson, Minister for Justice and Attorney-General).

⁸⁵ *Ibid*; *Auctioneers and Agents Act Amendment Act 1988*.

⁸⁶ *Statute Law (Miscellaneous Provisions) Act (No. 2) 1994* s 4(1).

⁸⁷ *Building Units and Group Titles Act Amendment Act 1990*; Queensland, *Parliamentary Debates*, Legislative Assembly, 8 November 1990, 4734 (Andrew Eaton, Minister for Land Management).

⁸⁸ *Dainford Ltd v Smith* [1985] HCA 23.

⁸⁹ *Building Units and Group Titles Act Amendment Act 1990* s 12.

⁹⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 23 November 1990, 5222 (Andrew Eaton, Minister for Land Management).

⁹¹ Department of Lands (Qld), *Management Issues and Staged Developments Green Paper*, 1991, v.

⁹² *Ibid*, 14.

⁹³ *Ibid*, 16.

managers securing exclusive use by-laws over common property,⁹⁴ and the lack of provisions dealing with staged developments.⁹⁵

The Green Paper generated a great deal of interest from stakeholders and more than 300 submissions were received.⁹⁶ A draft Building Units and Group Titles (Administration) Bill 1992 was subsequently tabled in Parliament on 26 November 1992 for public exposure. Details of this draft Bill are scant and, for whatever reason, the Bill did not proceed. However, a new Building Units and Group Titles Bill was introduced into the Legislative Assembly on 27 October 1994.

The Building Units and Group Titles Bill 1994 was essentially a rewrite of the existing Building Units and Group Titles Act and responded to the issues raised in the 1991 Green Paper.⁹⁷ Specifically, the Bill introduced a number of improvements including imposing a maximum term of 10 years for letting and service contracts, allowing bodies corporate to enter into agreements with other bodies corporate for the sharing of facilities, restricting the use of proxy votes by letting agents, body corporate managers or service contractors, increasing disclosure requirements, and making provision for staged developments.⁹⁸

The imposition of a 10 year maximum term for letting and service contracts was to operate retrospectively from 24 October 1994. It was recognised that retrospective legislation was necessary in this instance to provide relief to bodies corporate that were locked into long term contracts.⁹⁹ In order to provide further relief, the Bill provided a statutory right of termination of existing service contracts. Service contracts entered into within the first three years after registration of a plan were required to be reviewed by a body corporate after three years and the body corporate could terminate the contract by ordinary resolution.

The Bill also reversed a High Court decision where it was held that a body corporate did not have the power to enter into a contract with a letting agent in the absence of a specific by-law authorising such an agreement.¹⁰⁰ The Bill provided that any contract entered into between a body corporate and letting agent from 4 May 1994 (the date of the High Court decision) would be validated.

During debate of the Bill, it was widely acknowledged by both Government and Opposition members that the Bill dealt with complex issues and it would not be possible to satisfy all stakeholders. The Bill was subsequently enacted and assented to on 1 December 1994.

The *Building Units and Group Titles Act 1994* never commenced (i.e. its provisions were not proclaimed into force) and was 'abandoned' on the grounds that it was 'widely recognised that there are a number of deficiencies' with the Act.¹⁰¹ Instead, the Government proposed a new approach whereby provisions dealing with building units and group titles would be split between three Acts. Management and dispute

⁹⁴ Ibid, 18.

⁹⁵ Ibid, 27.

⁹⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 1991, 2246 (Andrew Eaton, Minister for Land Management).

⁹⁷ Explanatory Notes, Building Units and Group Titles Bill 1994, 2–3.

⁹⁸ Ibid, 1–2.

⁹⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 18 November 1994, 10550 (John Szczerbanik).

¹⁰⁰ *Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1955* [1994] HCA 21.

¹⁰¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 19 October 1995, 475 (Kenneth McElligott, Minister for Lands).

resolution aspects would be provided in a proposed Community Land Management Act, titling aspects would be provided in the *Land Title Act 1994* and planning aspects would be dealt with under the relevant planning legislation.¹⁰² The proposed approach was 'met with unanimous support from all sections of the industry, which found previous legislation to be complex and difficult to understand.'¹⁰³

BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997

A change of Government in February 1996 resulted in a different approach to the replacement of the Building Units and Group Titles Act. In particular, the Government wanted to address the lack of flexibility in the Building Units and Group Titles Act in light of the varying types of developments which had come to exist.¹⁰⁴ This led to the introduction of the Body Corporate and Community Management Bill into the Legislative Assembly on 30 April 1997. At this stage, the community titles sector in Queensland had grown significantly and it was estimated there were more than 220,000 unit owners in Queensland.¹⁰⁵

The primary objective of the Bill was to provide flexibility so that it could apply to varying types of developments such as residential units, resorts, hotels, duplex apartments, business parks and commercial offices.¹⁰⁶ This was achieved through an 'umbrella Act supported by separate regulatory modules that [were] tailor made for specific types of development.'¹⁰⁷ These modules were the Standard Module (for predominantly residential schemes), Accommodation Module (for holiday letting or serviced apartment schemes), Commercial Module (for commercial schemes) and the Small Schemes Module (for schemes which have six or less lots).¹⁰⁸ The management processes provided in each module decreased successively in that the Standard Module had the highest level of regulation while the Small Schemes Module had the lowest level of regulation.

Similar to the abandoned *Building Units and Group Titles Act 1994*, the Bill contained retrospective provisions imposing a 10 year maximum term for management, letting and service contracts entered into from 24 October 1994, and validating letting agreements entered into from 4 May 1994.

The Bill was subsequently enacted and assented to on 22 May 1997.

The *Body Corporate and Community Management Act 1997* (BCCM Act), in addition to the flexible operation and retrospective application described above, introduced a number of new concepts to the regulation of bodies corporate. The basic concept of the Act was the 'community titles scheme' which comprised a community management statement and the scheme land.¹⁰⁹ Each community titles scheme required at least two lots, common property, a single body corporate and a single community management statement.¹¹⁰ A community titles scheme was established

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 24 September 1996, 313 (Howard Hobbs, Minister for Natural Resources).

¹⁰⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 30 April 1997, 1136 (Howard Hobbs, Minister for Natural Resources).

¹⁰⁶ Ibid; Explanatory Notes, Body Corporate and Community Management Bill 1997, 2.

¹⁰⁷ Queensland, above n 105.

¹⁰⁸ Ibid.

¹⁰⁹ *Body Corporate and Community Management Act 1997* (as passed) s 11(1).

¹¹⁰ Ibid s 11(4).

by registering a plan of subdivision under the *Land Title Act 1994* and the recording by the registrar of titles of the first community management statement for the scheme.¹¹¹

The Act facilitated development of complex, staged and mixed use schemes through 'layered arrangements'. This involved the creation of a principal community titles scheme with subsidiary community titles schemes.¹¹² The subsidiary schemes could then be governed by differing modules, allowing for mixed use schemes.

While the previous legislation made provision for lot entitlements and the payment of levies, the Act introduced new concepts of a contribution schedule lot entitlement and an interest schedule lot entitlement.¹¹³ The contribution schedule lot entitlement determined a lot owner's levy contributions and the value of the lot owner's vote in the conduct of a poll.¹¹⁴ The interest schedule lot entitlement determined a lot owner's share of common property, their interest on the termination of the scheme, and the unimproved value of the lot for the purposes of a charge, levy, rate or tax paid to a local government or the Commissioner of Land Tax.¹¹⁵

Contribution schedule lot entitlements were not required to be equal for each lot included in the scheme and interest schedule lot entitlements were not required to be directly proportional to the market values of respective lots.¹¹⁶ However, a lot owner could apply to the District Court for an order to adjust a lot entitlement schedule.¹¹⁷ If the application to the District Court was about the contribution schedule, the order of the court was required to be consistent with the principle that the 'respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.'¹¹⁸ If the application was about the interest schedule, the court order was required to be consistent with the principle that the 'respective lot entitlements should reflect the respective market values of the lots included in the scheme when the court makes the order, except to the extent to which it is just and equitable in the circumstances for the individual lot entitlements to reflect other than the respective market values of the lots.'¹¹⁹

Lot entitlements could also be adjusted in limited circumstances by agreement of two or more lot owners.¹²⁰ An important limitation was that lots could only be adjusted if the total lot entitlements of the lots subject to the change were not affected.¹²¹ For instance, two lot owners could agree to adjust their respective lot entitlements between them as long as their combined lot entitlements did not change, thus ensuring the lot entitlements of other owners would not be affected.

The Act also dealt with body corporate managers, service contractors and letting agents in greater detail than the Building Units and Group Titles Act and contained provisions to protect the interests of lot owners. Specifically, a body corporate was prevented from seeking or obtaining a benefit for engaging a service contractor or

¹¹¹ Ibid s 26.

¹¹² Ibid s 19.

¹¹³ Ibid ch 2 pt 6.

¹¹⁴ Ibid s 45(2).

¹¹⁵ Ibid s 45(3).

¹¹⁶ Ibid s 46(1).

¹¹⁷ Ibid s 46(2).

¹¹⁸ Ibid s 46(4).

¹¹⁹ Ibid s 46(5).

¹²⁰ Ibid s 47.

¹²¹ Ibid s 47(1)(b).

letting agent.¹²² Additionally, the remuneration of a service contractor could be reviewed by the body corporate making an application to the adjudicator.¹²³

New provisions dealing with by-law contraventions were introduced in the Act. A body corporate could now serve a 'continuing contravention notice' or a 'future contravention notice' to a lot owner who was believed to be contravening the by-laws.¹²⁴ The body corporate could then commence proceedings in the Magistrates Court if the lot owner did not comply with the notice.¹²⁵

Consumer protection for the sale and purchase of existing lots and proposed lots was provided in the Act through disclosure requirements and termination rights. Unlike the Building Units and Group Titles Act which required the original owner to provide disclosure, the requirements in the BCCM Act applied to any seller of a lot.¹²⁶ In addition to the disclosure statement, the seller was now required to attach an 'information sheet' (which provided information about community titles schemes) as the first or top sheet of the contract.¹²⁷ The buyer could terminate the contract prior to settlement if the seller did not give the buyer the disclosure statement or if the information sheet was not attached as the first sheet or top sheet of the contract.¹²⁸ For an existing lot, a buyer could also terminate the contract if the disclosure statement was inaccurate and the buyer would be materially prejudiced or if the buyer had not been able to verify the information contained in the statement.¹²⁹ For a proposed lot, a buyer could terminate the contract if there was a variation between the initial disclosure statement and a subsequent statement and the buyer would be materially prejudiced.¹³⁰ Additionally, the buyer of a proposed lot could terminate the contract if the buyer would be materially prejudiced by an inaccuracy of the disclosure statement or if the community management statement recorded on the scheme was different to the one originally disclosed.¹³¹

Consumer protection was also provided through implied warranties. The implied warranties dealt with matters such as latent and patent defects in the common property or body corporate assets, and liabilities of the body corporate.¹³² The buyer could then cancel the contract for a breach of an implied warranty.¹³³

The dispute resolution process under the Act was expanded, with the creation of the commissioner for body corporate and community management and the appointment of adjudicators. The commissioner served a dual purpose of providing a dispute resolution service and an education and information service.¹³⁴ Applications made to the commissioner would go through a case management process whereby the commissioner could recommend the application be subject to mediation, specialist mediation, department adjudication, or specialist adjudication.¹³⁵ Orders of

¹²² Ibid ss 102–104.

¹²³ Ibid s 112.

¹²⁴ Ibid ss 144–145.

¹²⁵ Ibid s 146.

¹²⁶ Ibid ss 163 and 170.

¹²⁷ Ibid ss 163(5) and 170(5).

¹²⁸ Ibid ss 163(6) and 170(6)

¹²⁹ Ibid s 166.

¹³⁰ Ibid s 171.

¹³¹ Ibid s 174.

¹³² Ibid s 180.

¹³³ Ibid s 181.

¹³⁴ Ibid s 187.

¹³⁵ Ibid s 198.

adjudicators could be enforced through the Magistrates Court while appeals could be made to the District Court against the order of an adjudicator on a question of law.¹³⁶

Overall, the BCCM Act was a revolutionary piece of legislation in terms of how it provided flexibility through its regulatory modules and in terms of its improved subdivision, management, consumer protection and dispute resolution provisions. In the second reading of the Body Corporate and Community Management Bill, the Minister for Natural Resources spoke about the groundbreaking nature of the Bill:

It is also recognised nationally and internationally as a “first”. Other Governments are keenly interested in Queensland’s response to those issues that they have simply been unable to tackle with their incumbent laws.¹³⁷

CURRENT APPLICATION OF THE BUILDING UNITS AND GROUP TITLES ACT TO THE ‘SPECIFIED ACTS’

While schemes established under the Building Units and Group Titles Act were transitioned to the BCCM Act, the Building Units and Group Titles Act was amended so that it now only has limited application to schemes regulated by the ‘specified Acts’. These Acts are the *Integrated Resort Development Act 1987*, *Sanctuary Cove Resort Act 1985*, *Mixed Use Development Act 1993*, *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 specified Acts were created to accommodate both planning elements and body corporate management elements of large scale developments for which the Building Units and Group Titles Act framework was insufficient.

AMENDMENTS TO THE BCCM ACT

While there have been numerous amendments to the BCCM Act since it was enacted in 1997, only the most significant amendments will be looked at.

2000—Delegation of adjudicator’s investigative powers

The *Natural Resources and Other Legislation Amendment Act 2000* amended the BCCM Act to retrospectively validate orders made by adjudicators where the evidence of a community titles inspector who did not have a proper delegation was relied upon. While an adjudicator had investigative powers under section 221 of the BCCM Act as passed, there was no provision which allowed an adjudicator to delegate their powers. A District Court decision in 1998 invalidated an adjudicator’s decision as the adjudicator relied on a report of a departmental community titles inspector who did not have a proper delegation under the BCCM Act to conduct the investigation.¹³⁸ The *Natural Resources and Other Legislation Amendment Act* inserted a new section 221A into the BCCM Act to provide for the delegation of power. A transitional provision validated adjudicator’s decisions made before commencement of the amendments, thus giving retrospective application. At the time, there were approximately 50 adjudicator’s decisions which relied on reports from departmental community titles inspectors.¹³⁹

¹³⁶ Ibid ss 232–242.

¹³⁷ Queensland, above n 105.

¹³⁸ *Westlake Villas Body Corporate v Meek & Ors* (Unreported, District Court of Queensland, D 2138/98).

¹³⁹ Explanatory Notes, *Natural Resources and Other Legislation Amendment Bill 1999*, 2.

2002—Conflict with the PAMD Act

The *Tourism, Racing and Fair Trading (Miscellaneous Provisions) Act 2002* amended the BCCM Act in relation to the order in which the information sheet was required to be attached to the contract. The *Property Agents and Motor Dealers Act 2000* (PAMD Act) introduced a new requirement for the sale of residential dwellings in that a 'warning statement' had to be attached as the first or top sheet of the contract.¹⁴⁰ This requirement conflicted with the BCCM Act requirement for the information sheet and there was potential for contracts to be terminated by the failure of a seller to comply with the conflicting requirements. An amendment to the BCCM Act allowed the information sheet to be placed immediately beneath the warning statement where the PAMD Act applied.¹⁴¹ The amendment was given retrospective application and buyers were prohibited from terminating contracts entered into on or after 1 July 2001 (the commencement of the PAMD Act) on the grounds that the information statement was placed beneath the warning statement.

2003—Review of BCCM Act and substantial amendments

Significant amendments to the BCCM Act were made by the *Body Corporate and Community Management and Other Legislation Amendment Act 2003* following a review of the BCCM Act commenced in 1998. As indicated in the Explanatory Notes to the Body Corporate and Community Management and Other Legislation Amendment Bill, the amendments to the BCCM Act generally provided for:

- greater efficiency in processes involving progressive development of schemes
- allowing a body corporate to own a lot in the scheme for the purpose of allowing a letting agent to reside in the scheme
- more guidance in the establishment and adjustment of lot entitlements
- resolution of matters associated with the compulsory acquisition of part of a scheme
- the creation of a layered scheme from a number of existing schemes
- changes in the voting requirements for a special resolution
- increased obligations on the original owners (developer) of the scheme
- the sale of management rights
- clarification that service contracts with letting agents and body corporate managers include a prescribed code of conduct and performance standards
- expanding the ways in which the body corporate may authorise a body corporate manager to carry out the duties of the committee and the executive members of the committee
- clarification of the rights of financiers of financed service contracts/letting authorisations
- increased flexibility to review the terms of an agreement with a service contractor, generally within three years of the agreement being entered into by the developer on behalf of the body corporate
- the power of the body corporate to require the resident manager to transfer the management rights to another person
- increased protection of body corporate funds in financial institution accounts
- voiding exclusive use by-laws purporting to grant exclusive rights about common property for carrying on the business of a letting agent or service contractor
- clarification of the enforcement of by-laws provisions of the Act

¹⁴⁰ *Property Agents and Motor Dealers Act 2000* (as passed) s 366.

¹⁴¹ *Tourism, Racing and Fair Trading (Miscellaneous Provisions) Act 2002* s 12.

- more detailed and flexible provisions regarding arrangements with a body corporate about the supply of utility services and the recovery of the costs of the supply of the services
- enhanced consumer protection in the buying and selling of lots in a community titles scheme
- enhanced dispute resolution service
- limitations on the use of enduring powers of attorney in community titles schemes
- clarification of the option rights in the body corporate contracts under the transitional section (section 290 of the BCCM Act)
- the transfer of the “titling” provisions of the BCCM Act to the *Land Title Act 1994*.¹⁴²

As can be seen, letting agents, resident managers, body corporate managers and service contracts were a particular focus of the 2003 amendments. A duty was imposed on the original owner to ‘exercise reasonable skill, care and diligence and act in the best interests of the body corporate’ (being the body corporate formed after the original owner control period ended) in engaging or authorising a body corporate manager, service contractor or letting agent.¹⁴³ A code of conduct was provided in a new schedule 1A which applied to a body corporate manager and a caretaking service contractor.¹⁴⁴ Importantly, the provisions of the code of conduct were implied into the contract and the provisions of the code of conduct would prevail over an inconsistent term in the contract.¹⁴⁵ Additionally, new provisions were inserted dealing with the review of service contracts, contraventions of the code of conduct, and transfer of management rights.¹⁴⁶

The BCCM Act as passed did not require contribution schedule lot entitlements to be equal. However, section 44 of the BCCM Act was amended to provide that the contribution schedule lot entitlements for future developments should be ‘equal, except to the extent to which it is just and equitable in circumstances for them not to be equal.’¹⁴⁷ Guidance was provided in deciding lot entitlements in that regard must be had to how the scheme was structured; the nature, features and characteristics of the lots; and the purposes for which the lots were used.¹⁴⁸

Amendments were also made to allow applications to be made to a specialist adjudicator to adjust lot entitlements.¹⁴⁹ Guidance was provided to the District Court and specialist adjudicator for deciding just and equitable circumstances in which contribution schedule lot entitlements should not be equal and for interest schedule lot entitlements should not reflect market values. The court or specialist adjudicator was required to have regard to how the scheme was structured; the nature, features and characteristics of the lots; and the purposes for which the lots were used.¹⁵⁰ However, the court or adjudicator could 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—

¹⁴² Explanatory Notes, Body Corporate and Community Management and Other Legislation Amendment Bill 2002, 1–2.

¹⁴³ *Body Corporate and Community Management and Other Legislation Amendment Act 2003* s 38.

¹⁴⁴ *Ibid* s 43.

¹⁴⁵ *Ibid* s 43.

¹⁴⁶ *Ibid* s 49.

¹⁴⁷ *Ibid* s 10.

¹⁴⁸ *Ibid* s 10.

¹⁴⁹ *Ibid* s 11.

¹⁵⁰ *Ibid* s 12.

- (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.¹⁵¹

The lot entitlement amendments were later examined in a Court of Appeal decision (known as the Fischer or Centrepont case) which provided further clarity regarding the adjustment of lot entitlements.¹⁵² This will be discussed in more detail later in relation to the 2011 lot entitlement amendments.

2005—Attaching the information sheet to the contract

There were two court decisions which highlighted the deficiencies in the PAMD Act (and consequently the BCCM Act) in relation to the requirement to attach a warning statement (and information sheet) as the first or top sheet of a contract for the sale of residential property. In both these decisions, the buyer attempted to terminate the contract on the grounds the seller did not attach the PAMD Act warning statement to the contract. In *MP Management (Aust) Pty Ltd v Churven*¹⁵³ Muir J examined the definition of ‘attach’ and preferred a restrictive meaning requiring ‘some form of physical joinder or incorporation.’¹⁵⁴ In *MNM Developments Pty Ltd v Gerrard*¹⁵⁵ the Court of Appeal raised concerns about attaching warning statements to contracts sent by facsimile.

The uncertainty raised by the court decisions resulted in amendments being made to both the PAMD Act and BCCM Act by the *Liquor and Other Acts Amendment Act 2005*. A definition of ‘attach’ was inserted into the BCCM Act to mean ‘attach in a secure way so that the information sheet and the contract appear to be a single document.’¹⁵⁶ It was also clarified that the use of electronic communications in the sale of lots was subject to the *Electronic Transactions (Queensland) Act 2001* and a procedure for transmitting documents by fax was provided¹⁵⁷

2007—Review of BCCM Act and substantial amendments

A review of the BCCM Act was commenced in 2004 and a discussion paper titled *Body Corporate and Community Management: into the 21st Century* was released for public consultation. The discussion paper looked at a wide range of issues and 177 submissions were received.¹⁵⁸ The *Body Corporate and Community Management and Other Legislation Amendment Act 2007* subsequently made a number of amendments to the BCCM as a result of the review.

The amendments largely focused on improving the dispute resolution processes and expanding the jurisdiction of the Commercial and Consumer Tribunal (CCT). A new requirement for self-resolution of disputes was inserted to give the applicant the opportunity to resolve the dispute with the body corporate prior to making an application to the commissioner for body corporate and community management.¹⁵⁹ As a further measure to handle disputes more promptly and informally, a

¹⁵¹ Ibid s 12.

¹⁵² *Fischer & Ors v Body Corporate for Centrepont Community Title Scheme 7779* [2004] QCA 214.

¹⁵³ [2002] QSC 320.

¹⁵⁴ Ibid, [22].

¹⁵⁵ [2005] QCA 230.

¹⁵⁶ *Liquor and Other Acts Amendment Act 2005* s 40.

¹⁵⁷ Ibid ss 40, 42 and 47.

¹⁵⁸ Explanatory Notes, *Body Corporate and Community Management and Other Legislation Amendment Bill 2006*, 6.

¹⁵⁹ *Body Corporate and Community Management and Other Legislation Amendment Act 2007* s 24.

departmental conciliation process was added.¹⁶⁰ An application for conciliation could be made in the first instance or the commissioner could refer an adjudication application for department conciliation. The jurisdiction of the District Court to hear and determine complex disputes and adjustments of lot entitlements was replaced by the CCT as a result of stakeholder concerns regarding the 'costs and formality of District Court proceedings.'¹⁶¹

A new code of conduct for committee voting members was inserted in schedule 1A of the BCCM Act.¹⁶² Additionally, the code of conduct for body corporate managers and caretaking service contractors was amended to provide that a 'body corporate manager must not attempt to unfairly influence the outcome of an election for the body corporate committee.'¹⁶³

The importance of community titles schemes to the tourism industry in Queensland was recognised as a new secondary object was inserted into the section 4 of the BCCM Act. The new secondary object of the BCCM Act was to 'encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of owners, and intending buyers, of lots in community titles schemes.'¹⁶⁴ As outlined in the Explanatory Notes, this amendment was not intended to have an overriding or limiting effect:

The acknowledgement of tourism issues is not intended to override or fetter existing rights of unit owners (for example, the right to object to, or vote against body corporate proposals that may have tourism benefits). The recognition of tourism is also not intended to limit the operation of existing consumer protection provisions for intending purchasers (for example, provisions requiring disclosure of letting arrangements in the course of the sale of lots).¹⁶⁵

2009—The *Bossichix* decision

Section 212 of the BCCM Act, prior to amendment, allowed a buyer of a proposed lot to cancel the contract prior to settlement if the contract did not 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. In *Bossichix Pty Ltd v Martinek Holdings Pty Ltd*¹⁶⁶ the Queensland Court of Appeal dismissed an appeal where, in the first instance, the buyer was held to have validly terminated the contract on a technical breach of section 212 by the seller.

The Government recognised that the Court of Appeal decision potentially affected up to 14,000 off-the-plan contracts and acted quickly to prevent more buyers from terminating contracts on the grounds of a technical breach by the seller.¹⁶⁷ The *Body Corporate and Community Management Amendment Act 2009* replaced section 212 with a new section which deemed contracts for proposed lots to include a term that

¹⁶⁰ Ibid s 37.

¹⁶¹ Explanatory Notes, Body Corporate and Community Management and Other Legislation Amendment Bill 2006, 3.

¹⁶² *Body Corporate and Community Management and Other Legislation Amendment Act 2007* s 10.

¹⁶³ Ibid s 69.

¹⁶⁴ Ibid s 4.

¹⁶⁵ Explanatory Notes, Body Corporate and Community Management and Other Legislation Amendment Bill 2006, 7.

¹⁶⁶ [2009] QCA 154.

¹⁶⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 18 June 2009, 1062 (Peter Lawlor, Minister for Tourism and Fair Trading); Peter Lawlor, 'Response to the appeal outcome of *Bossichix Pty Ltd v Martinek Holdings Pty Ltd*' (Media Statement, 11 June 2009).

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.¹⁶⁸ As outlined in the Explanatory Notes, the amendment would

ensure contracts cannot be cancelled based on a mere omission of reference (a technical breach) to the establishment of the community titles scheme on the condition that the building plan and community management statement has been lodged with the Registrar of Titles and settlement does not take place earlier than 14 days after the seller notifies the buyer that this process has been completed.

This meant that the buyer could only cancel a contract prior to settlement if a proposed community management statement for the scheme as established or changed was not provided when the contract was entered into.¹⁶⁹

The new section 212 was given retrospective application to contracts entered into, whether before or after 5 June 2009 (the date of the *Bossichix* decision). However, the new section 212 did not apply to contracts already settled or cancelled prior to 5 June 2009 and to legal proceedings decided prior to the commencement of the amendments.¹⁷⁰

2009—Replacing the CCT with QCAT

The Queensland Civil and Administrative Tribunal (QCAT) was established to replace the jurisdiction of a number of existing tribunals, the administrative review jurisdiction of the courts and the minor debt claims jurisdiction of the Magistrates Court.¹⁷¹ The BCCM Act was amended by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* in order to replace the jurisdiction of the CCT with QCAT.¹⁷²

2009—Sustainability

The Government sought to implement its 'ban the banners' election commitment in order to 'stop bodies corporate and developers from restricting the use of sustainable building elements and features.'¹⁷³ The *Building and Other Legislation Amendment Act 2009* firstly amended the *Building Act 1975* to insert a new chapter 8A part 2 which dealt with provisions to support sustainable housing. These provisions effectively invalidated prohibitions in community management statements or body corporate by-laws regarding the use of sustainable building elements and features such as lighter roof colours, photovoltaic cells and energy efficient window treatments.¹⁷⁴

The BCCM Act was then amended to prevent a community management statement from adopting an architectural and landscape code (or provisions thereof) which have no force or effect under the new chapter 8A part 2 of the Building Act.¹⁷⁵ Additionally, new subsections (7) and (8) were inserted into section 180 of the BCCM Act which dealt with limitations for by-laws. The new subsection (7) provided that a 'by-law must

¹⁶⁸ *Body Corporate and Community Management Amendment Act 2009* s 3.

¹⁶⁹ *Ibid* s 3.

¹⁷⁰ *Ibid* s 4.

¹⁷¹ Explanatory Notes, Queensland Civil and Administrative Tribunal Bill 2009, 3.

¹⁷² *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* ch 5 pt 8.

¹⁷³ Explanatory Notes, Building and Other Legislation Amendment Bill 2009, 2.

¹⁷⁴ *Building and Other Legislation Amendment Act 2009* s 29.

¹⁷⁵ *Ibid* s 49.

not be oppressive or unreasonable, having regard to the interest of all owners and occupiers of lots included in the scheme and the use of the common property for the scheme.¹⁷⁶ The new subsection (8) prohibited a by-law from including a provision which had no force or effect under the new chapter 8A part 2 of the Building Act.

2010—Streamlining the contractual process

Chapter 11 of the PAMD Act deals with the presentation and delivery of contracts for the sale of residential property. Additional requirements under the BCCM Act (i.e. giving a disclosure statement and information sheet) apply for lots or proposed lots under a community titles scheme. After a number of court decisions considering buyers' termination rights under chapter 11 of the PAMD Act,¹⁷⁷ and a review by the former Service Delivery and Performance Commission, the Government decided to streamline the contractual process. The *Property Agents and Motor Dealers and Other Legislation Amendment Act 2010* removed the prescriptive, technical requirements in chapter 11 of the PAMD Act and made parallel amendments to the BCCM Act. This further limited the potential for buyers to terminate contracts on the grounds of technical breaches by sellers.

2011—Lot entitlements and two-lot schemes

Lot entitlements

As explained earlier, the 2003 amendments to the BCCM Act clarified the position regarding the setting and adjustment of lot entitlements. The 2004 'Centrepont case'¹⁷⁸ provided further clarity regarding the adjustment of lot entitlements and the question of whether it would be just and equitable for respective lot entitlements not to be equal:

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 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.¹⁷⁹

The Centrepont case in effect created a precedent for future challenges to lot entitlements which often resulted in owners of larger apartments and penthouses paying lower levies at the expense of owners of smaller apartments. By 2008, the Gold Coast in particular was experiencing a large number of adjustment applications¹⁸⁰ and there was growing public concern.¹⁸¹ A review was initiated by the Government and a discussion paper titled *Sharing Expenses in Community Titles Schemes* was released in December 2008.

The *Body Corporate and Community Management and Other Legislation Amendment Act 2011* was enacted in response to the review and the Centrepont case. Amendments were made to the BCCM Act to introduce a new lot entitlements system and allowed for the reversion of lot entitlements for community titles schemes

¹⁷⁶ Ibid s 50.

¹⁷⁷ For example, *Blackman v Milne* [2006] QSC 350; *Juniper v Roberts* [2007] QSC 379; *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* [2008] QSC 261.

¹⁷⁸ *Fischer & Ors v Body Corporate for Centrepont Community Title Scheme 7779* [2004] QCA 214.

¹⁷⁹ Ibid, [26] (Chesterman J).

¹⁸⁰ Peter Gleeson, 'System a spent unit' *Gold Coast Bulletin* (online), 8 April 2008 <http://www.goldcoast.com.au/article/2008/04/08/9835_peter-gleeson-opinion.html>.

¹⁸¹ 'Public rally over high-rise law' *Gold Coast Bulletin* (online), 7 June 2008 <http://www.goldcoast.com.au/article/2008/06/07/12183_gold-coast-top-story.html>.

which had had their lot entitlements adjusted prior to the commencement of the amendments.

In relation to setting the contribution schedule lot entitlements, the lot entitlements were required to be consistent with either the 'equality principle' or the 'relativity principle'.¹⁸² A new section 46A was inserted into the BCCM Act which defined 'equality principle' and 'relativity principle'.¹⁸³ The equality principle required that 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. The relativity principle required that lot entitlements must clearly demonstrate the relationship between the lots by reference to one or more relevant factors, which were:

- (a) how the community titles scheme is structured;
- (b) the nature, features and characteristics of the lots;
- (c) the purposes for which the lots are used;
- (d) the impact the lots may have on the costs of maintaining the common property; and
- (e) the market values of the lots.

The relativity principle was intended to 'provide a transparent rationale for calculation of contribution schedule lot entitlements that can be tailored to relevant characteristics of the scheme and its lots.'¹⁸⁴

Interest schedule lot entitlements on the other hand, were to be decided using the 'market value principle'. This required lot entitlements to 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.¹⁸⁵

A new section 47A was inserted into the BCCM Act which allowed a body corporate to adjust the contribution schedule lot entitlements by a resolution without dissent.¹⁸⁶ A new section 47B was also inserted which allowed a specialist adjudicator or QCAT to adjust the contribution schedule lot entitlements if a community titles scheme was affected by a material change that happened since the last time the contribution schedule lot entitlements were decided.¹⁸⁷ A 'material change' was a change which had, or may have had, a significant effect on the contribution schedule lot entitlements such as the addition or removal of lots in the scheme.¹⁸⁸

Section 66 of the BCCM Act, which dealt with the requirements for community management statements, was amended so that community management statements were required to detail whether lot entitlements were decided using the relevant principles.¹⁸⁹

New termination rights were also inserted into the BCCM Act. The new section 206B required a seller of a lot give the buyer a copy of a new community management

¹⁸² *Body Corporate and Community Management and Other Legislation Amendment Act 2011* s 4.

¹⁸³ *Ibid* s 5.

¹⁸⁴ Explanatory Notes, *Body Corporate and Community Management and Other Legislation Amendment Bill 2010*, 9.

¹⁸⁵ *Body Corporate and Community Management and Other Legislation Amendment Act 2011* s 5.

¹⁸⁶ *Ibid* s 7.

¹⁸⁷ *Ibid* s 7.

¹⁸⁸ *Ibid* s 43.

¹⁸⁹ *Ibid* s 15.

statement if a new community management statement was recorded after the contract was entered into but before it settled.¹⁹⁰ The buyer could terminate the contract prior to settlement if the buyer would be materially prejudiced.¹⁹¹ Section 209 was amended to allow a buyer to terminate the contract if the copy of the community management statement that was attached to the contract when entered into was different from that most recently advised to the buyer and the buyer would be materially prejudiced.¹⁹² A new section 209A allowed a buyer to terminate the contract if the original owner was the seller and the buyer believed that the contribution schedule lot entitlements were inconsistent with the relevant principle on which the lot entitlements were decided and the buyer would be materially prejudiced.¹⁹³ Similar amendments were made to the corresponding provisions regarding the sale of proposed lots.

Transitional provisions were inserted which provided a reversion process whereby a previous adjustment order of a court, tribunal or specialist adjudicator could be overturned by one lot owner submitting a motion requesting the contribution schedule lot entitlements be reverted to their original setting prior to the adjustment orders.¹⁹⁴

Two-lot schemes

The 2011 amendments also provided simpler processes for the management of specified two-lot residential schemes. For instance, such schemes were no longer required to have a body corporate committee and conduct meetings or polls.¹⁹⁵ Instead, decisions would be made by 'lot owner agreements' to be regulated under the proposed new regulation module for specified two-lot schemes.¹⁹⁶

2012—Reversing the reversion

The reversion process brought about by the 2011 amendments was a particularly contentious issue. The Minister for Tourism and Fair Trading recognised this during his second reading speech of the Body Corporate and Community Management and Other Legislation Amendment Bill 2010:

At the outset, I acknowledge some of the proposed amendments will not receive universal acclaim. There are many who will decry the rationale and policy intent behind this bill. I am not entirely unsympathetic to those views, but difficult problems sometimes require difficult solutions. If we do nothing, then the community titles sector will become increasingly unstable.¹⁹⁷

The March 2012 Queensland general election resulted in a change in Government and the new Government decided to remove the reversion process. On 14 September 2012, the Body Corporate and Community Management and Other Legislation Amendment Bill was introduced into the Legislative Assembly. As indicated in the Explanatory Notes, the 2011 reversion process came under

¹⁹⁰ Ibid s 28.

¹⁹¹ Ibid s 28.

¹⁹² Ibid s 29.

¹⁹³ Ibid s 30.

¹⁹⁴ Ibid s 41.

¹⁹⁵ Ibid s 17.

¹⁹⁶ Ibid s 17.

¹⁹⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 23 November 2010, 4130 (Peter Lawlor, Minister for Tourism and Fair Trading).

significant criticism by some lot owners and peak legal and stakeholder bodies for allowing a single lot owner the ability to effectively over-turn a lawful order of an independent court, tribunal or specialist adjudicator.

The Bill seeks to remove the reversion process and, where a reversion has already taken place, provide a process enabling lot entitlements to be changed back to what was set by the last adjustment order of a court, tribunal or specialist adjudicator.¹⁹⁸ The Bill also seeks to remove the disclosure requirements imposed by the 2011 amendments and to 'provide jurisdictional consistency for the resolution of disputes about contribution schedule lot entitlement adjustments.'¹⁹⁹

At the time of writing, the Bill was currently before the Legal Affairs and Community Safety Committee, which is a Parliamentary portfolio committee tasked with examining Bills introduced into the Legislative Assembly.

CONCLUSION

Community titles legislation in Queensland has evolved over time to meet the demands for greater housing supply and density, and to realise the tourism potential of community titles scheme developments. While early Queensland legislation took its cues from interstate, the introduction of the BCCM Act was recognised as a national and international first. Throughout the course of this legislative history, Ministers and Members of Parliament have recognised the complex nature of community living and the fact that not every stakeholder can be satisfied by the legislation. Additionally, the legislative history has been marked by reactive amendments to court decisions and retrospectivity. Given the complex issues surrounding community living and the ever-changing nature of the marketplace, community titles legislation in Queensland will no doubt continue to evolve in the future.

¹⁹⁸ Explanatory Notes, Body Corporate and Community Management and Other Legislation Amendment Bill 2012, 3.

¹⁹⁹ Ibid, 1.