

# Building Units and Group Titles and Other Legislation Amendment Bill 2022

## Explanatory Notes

### Short title

The short title of the Bill is the Building Units and Group Titles and Other Legislation Amendment Bill 2022 (the Bill).

### Policy objectives and the reasons for them

The policy objectives of the Bill are to:

1. improve the operation of the *Building Units and Group Titles Act 1980* (BUGT Act) and the *Mixed Use Development Act 1993* (MUD Act) with a focus on making body corporate governance arrangements fairer for proprietors; and
2. provide for effective and consistent enforcement options for gift card requirements under the Australian Consumer Law (ACL) in Queensland.

#### ***Improving the operation of the BUGT Act and MUD Act***

Prior to the commencement of the *Body Corporate and Community Management Act 1997* (BCCM Act), most multi-owner developments in Queensland were established and regulated under the BUGT Act.

The majority of these developments were simple subdivisions of land or buildings, with a single body corporate. However, a number of more complex developments were also created in reliance on special planning legislation (known as ‘specified Acts’) to provide for the establishment and governance of an overarching hierarchical structure for development subdivisions and associated bodies corporate, combined with the BUGT Act to provide for the establishment and governance of individual subsidiary layer subdivisions and their associated bodies corporate.

The specified Acts are the:

- MUD Act;
- *Integrated Resort Development Act 1987*;
- *Registration of Plans (H.S.P. (Nominees) Pty. Limited) Enabling Act 1980*;
- *Registration of Plans (Stage 2) (H.S.P. (Nominees) Pty. Limited) Enabling Act 1984*; and
- *Sanctuary Cove Resort Act 1985*.

*BUGT Act and MUD Act have not benefitted from incremental reforms*

Developments established solely under the BUGT Act were transitioned to the BCCM Act upon commencement. However, while the BCCM Act does provide for ‘layered scheme’ arrangements comparable to the developments established under the MUD Act (or other specified Acts) and the BUGT Act in combination, existing MUD Act (or other specified Act) developments were not transitioned to the BCCM Act. This was largely due to the complex nature of those developments creating a risk that transition to the BCCM Act would negatively impact ongoing and planned development stages that were reliant on contractual, planning and titling arrangements made in accordance with requirements of a specified Act and the BUGT Act.

As a result, the MUD Act (and other specified Acts) remain in effect for complex developments established prior to the commencement of the BCCM Act, where staged development may continue, but no new developments may be registered. The BUGT Act remains in effect for existing and planned subdivisions within those developments comprising a building unit plan (subdivision of a building into lots and common property based on structural elements – such as a ‘unit block’) or a group titles plan (subdivision of land into lots and common property – such as ‘townhouses’ or ‘freestanding homes’, with common property).

The MUD Act (and other specified Acts) also rely on the BUGT Act, Part 5, dispute resolution provisions in regard to the resolution of particular disputes, including orders that may be made by a referee appointed under the BUGT Act, and appeals that may be conducted by way of a tribunal (a magistrate acting under rules and with powers provided by the BUGT Act). The MUD Act (and other specified Acts) rely on terms defined in the BUGT Act, and also explicitly apply sections of the BUGT Act (for example, schedule 2, parts 1 and 2), to provide rules and requirements for meetings, voting and other administrative and procedural matters.

The BCCM Act and its regulation modules provide a substantially enhanced framework of governance for bodies corporate relative to that of the BUGT Act and MUD Act, primarily due to the focus on broader and more effective protections for lot owners (proprietors) and measures intended to ensure governance probity, but also through legislative support for a Government provided information and education service for owners, occupiers and service providers in BCCM Act schemes.

Over time, incremental reforms to the BCCM Act and its regulation modules, in contrast to more limited reforms to the BUGT Act and MUD Act, have seen the framework disparities increase. While ‘simple’ or ‘single layer’ BUGT Act developments that automatically transitioned to the BCCM Act have benefitted from the base enhancements to the BCCM Act and its regulation modules, as well as incremental reforms introduced since the BCCM Act’s commencement, counterpart schemes in complex developments that remain regulated under a mix of the BUGT Act and MUD Act have not.

*Deficiencies of the BUGT Act and MUD Act are increasingly apparent*

The legislative deficiencies of the pre-BCCM Act legislation for multi-owner developments, the effects of which are particularly evident in developments under the MUD Act and BUGT Act, centre on a lack of requirements to ensure acceptable levels of probity in governance processes, and a lack of protections for proprietors.

The outcomes experienced by proprietors that are associated with these deficiencies include (but are not limited to) numerous lengthy and costly disputes including disputes focussed on non-payment of contributions, disruptions in the provision of utility services, decision-making tainted by conflicts of interests, and an inability for subsidiary bodies corporate and their proprietors to contribute to scheme governance.

The detriment experienced by proprietors has likely been compounded by the lack of access to information and education services that would assist them understand their rights and responsibilities under the legislation, as well as in how to go about resolving disputes in their developments.

The Bill includes significant enhancements to the MUD Act and BUGT Act that are largely based on existing provisions of the BCCM Act and its regulation modules. These enhancements are intended to deliver the policy objective of improving the operation of the BUGT Act and MUD Act with a focus on making body corporate governance arrangements fairer for proprietors.

### ***Gift card infringement notices***

The ACL is a national law providing a set of generic consumer protections and applied as a Commonwealth law through the *Competition and Consumer Act 2010* (Commonwealth), referred to as the ACL (Commonwealth), and as a law of Queensland through the *Fair Trading Act 1989* (Fair Trading Act), referred to as the ACL (Queensland).

In Queensland, the ACL is jointly administered and enforced by the Queensland Office of Fair Trading (OFT) and the Australian Competition and Consumer Commission (ACCC).

The Fair Trading Act mirrors the Commonwealth's ACL infringement notice regime, in order to provide a nationally consistent infringement notice regime for the ACL in Queensland. The Commonwealth infringement notice regime applies and operates outside of the Queensland penalty infringement notice regime under the *State Penalties Enforcement Act 1999*.

The ACL gift card provisions prohibit post-purchase fees on gift cards; require a minimum three-year expiry date for gift cards; and require the expiry date of the gift card to be prominently displayed.

The ACL gift card provisions apply in Queensland via the ACL (Queensland). However, further consequential amendments are required to the infringement notice regime under the Fair Trading Act to ensure that OFT has the power to issue infringement notices for breaches of the gift card requirements, consistent with the ability already afforded to the ACCC under the ACL (Commonwealth).

## **Achievement of policy objectives**

### ***Improving the operation of the BUGT Act and MUD Act***

To achieve its objectives, the Bill will amend the BUGT Act and MUD Act.

The amendments achieve the policy objective of improving the operation of the BUGT Act and MUD Act, with a focus on making body corporate governance arrangements fairer for proprietors, by providing for the following improvements to key areas of the legislation relevant to governance and proprietor protections.

*Supporting information and education services*

The Bill includes amendments to the BUGT Act (based on provisions of the BCCM Act) to support provision of an information and education service to assist proprietors understand rights, responsibilities and dispute resolution options under the BUGT Act, including provisions of the BUGT Act applied in the MUD Act and other specified Acts, and to assist referees to increase their proficiency at resolving disputes.

This is a reasonable and appropriate means of improving the operation of the BUGT Act as it establishes legislative authority for providing such a service with clear guidance regarding the intent and scope of the service, while allowing the implementation of the service to be provided consistent with Government objectives and available resources. This approach has been found to be an appropriate and beneficial legislative means of supporting the comparable BCCM Act information and education service.

An education and information service, comparable to that already provided for stakeholders in community titles schemes under the BCCM Act, is intended as an effective means of addressing identified shortfalls in the ready availability of information to assist proprietors in dealing with governance issues in their developments, and understanding rights and remedies available to them, including the process for dispute resolution.

*Enhancing dispute resolution*

The Bill's amendments will improve provision of dispute resolution services under the BUGT Act (as well as under the MUD Act and other specified Acts, where the BUGT Act is applied). Referees will be provided greater flexibility when dealing with dispute resolution applications and the amendments clarify that referees must observe natural justice, act with as little formality and technicality as possible, and not be bound by the rules of evidence.

The amendments will also allow bodies corporate under the BUGT Act to make applications for an order of a referee to deal with a dispute with a party who is not a proprietor without requiring a special resolution authorising the application. This will substantially reduce the cost and time burden currently experienced by BUGT Act bodies corporate wishing to resolve particular disputes.

The amendments facilitate access to a more flexible and informal dispute resolution process, which is a reasonable and appropriate means of ensuring proprietors (the majority of whom are laypeople) can act effectively to protect their rights and ensure governance of their developments is fair and conducted in compliance with legislative requirements.

The amendments will also more closely align requirements for referees considering dispute resolution applications, as well as thresholds for body corporate decisions about making such applications, with those already in place for the BCCM Act, thus making dispute resolution less burdensome on proprietors and bodies corporate.

### *Obligations of bodies corporate*

The Bill includes amendments that more clearly state the obligations and duties of relevant bodies corporate.

Amendments to the MUD Act and BUGT Act will require bodies corporate established under these Acts (including a community body corporate and a precinct body corporate under the MUD Act, and a body corporate under the BUGT Act) to act reasonably when carrying out their functions. The requirement to act reasonably will also apply to executive committees in making decisions on behalf of MUD Act bodies corporate, and committees in making decisions on behalf of BUGT Act bodies corporate.

The requirement for a body corporate to act reasonably has been a beneficial feature of the BCCM Act since its commencement, providing scope for resolution of disputes involving the decision-making processes of bodies corporate that might otherwise not be covered by specific requirements or prohibitions under the BCCM Act. The requirement is intended to be similarly effective in making body corporate governance arrangements fairer for proprietors in bodies corporate under the MUD and BUGT Acts.

Amendments to the MUD Act will ensure that where a community body corporate or precinct body corporate has undertaken to provide an essential utility service (including to subsidiary bodies corporate), whether directly or through another party, it will be obliged to take all reasonable steps to ensure continuity of that utility service.

The amendments are intended to ensure provision of essential utility services must be managed by the responsible body corporate in a manner commensurate with the importance of the services provided, and the degree to which proprietors rely upon them. It is reasonable and appropriate that where a body corporate has the power to enter into arrangements for the provision of essential utility services that may otherwise fall under other regulatory frameworks providing protections for consumers, that the body corporate be clearly and specifically obliged to take all reasonable steps to ensure continuity of that service.

### *Committee eligibility*

The Bill includes amendments to improve the operation of the MUD Act and BUGT Act in regard to the eligibility requirements established for executive committees and committees to ensure the probity and quality of governance provided by those committees.

Amendments will make persons owing a debt to any body corporate within a development (whether to a body corporate under the MUD Act or the BUGT Act, in the same development) ineligible for election to an executive committee or committee. In addition, a person who is an associate of a person who owes a body corporate debt will also be ineligible for election as a member of an executive committee or committee. The types of associate relationships that are relevant for the restriction are defined in the Bill, and are mainly of a commercial or business nature. Personal or family relationships with a person owing a debt will not of themselves make a person ineligible for election to an executive committee or committee.

It is a fundamental responsibility of proprietors to fulfil their financial obligations to a body corporate. The amendments making a person owing a debt to a body corporate, and their associates, ineligible for election to a committee or executive committee of a body corporate (within the same development) ensure that committee members, who are entrusted with administering a body corporate on behalf of other proprietors, are model proprietors in terms of meeting their financial obligations. Further, it avoids the increased risks of conflicts of interests tainting decisions (about debt recovery proceedings in particular) that follow from allowing persons owing debts, or their associates, to be elected to committee positions.

Amendments will also make persons who are service contractors, body corporate managers, or letting agents (under the MUD Act), or parties to 'prescribed arrangements' that are the effective equivalents of those roles (under the BUGT Act), and their associates, ineligible to be elected as a member of an executive committee or committee.

Caretaking service contractors (who provide a combination of letting agency and caretaking services, also known as 'resident managers'), and body corporate managers, and their equivalents in terms of parties to 'prescribed arrangements' will however be deemed to be non-voting members of committees. This will provide them with access to committee processes and decisions commensurate with their role in assisting with body corporate administration.

The tightening of eligibility criteria, largely in line with the approach taken under the BCCM Act, acknowledges that it is not appropriate for persons engaged by the body corporate, and with a vested interest in significant decisions that may be made by committees in regard to dealings with authorisations and engagements (relevant to letting agents, service contractors and body corporate managers) to be voting members of a committee.

This is intended as an effective means of avoiding substantial conflicts of interest that may otherwise impact on body corporate governance to the detriment of proprietors. Comparable restrictions have been effective for this purpose in schemes under the BCCM Act (including former BUGT Act developments that transitioned to the BCCM Act) since its commencement.

The restriction extends to persons performing such roles within other bodies corporate in the development, and their associates, acknowledging that unlike the great majority of community titles schemes under the BCCM Act that have a single body corporate, MUD Act and other specified Act developments are complex with multiple interrelated bodies corporate. Persons engaged as service contractors, letting agents or body corporate managers for one body corporate, may have a direct or indirect interest in, or stand to benefit from, decisions made by other bodies corporate in the relevant development.

#### *Subsidiary body corporate representation and voting*

The Bill includes amendments to improve the operation of the MUD Act regarding requirements for nominees representing subsidiary bodies corporate on 'higher-level' bodies corporate.

A body corporate regulated by the MUD Act (a community body corporate or precinct body corporate), can be comprised of members directly owning lots that are not further subdivided, as well as subsidiary bodies corporate created by the subdivision of a lot within the community or precinct body corporate. A subsidiary body corporate requires a nominated representative that is an individual to represent it in the governance processes of the higher-level body corporate of which it is a member.

Amendments to the MUD Act will help ensure the appropriateness of nominees of subsidiary bodies corporate by requiring that they first be a member of the committee or executive committee of the subsidiary. Continuity of representation will be assisted by deeming the subsidiary chairperson to be the nominee if one has not been appointed.

Requiring that a nominated representative be a member of the committee (for a BUGT Act subsidiary) or executive committee (for a MUD Act subsidiary) means that members of the subsidiary have already determined, by electing the person to the committee, that they are suitable to contribute to governance processes. The requirement also ensures that the person meets the new eligibility criteria for committee members that are designed to minimise conflicts of interest and enhance probity and governance. This will also increase consistency with the BCCM legislation, which includes a comparable requirement for subsidiary scheme representatives in layered community titles schemes.

The Bill also contains amendments to improve the operation of the MUD Act by preserving the entitlement to vote of subsidiary bodies corporate in specific circumstances where the subsidiary would otherwise not be entitled to vote.

The amendments recognise that contribution debts owed by owners of undeveloped lots within a development have the potential to impact multiple subsidiary bodies corporate in terms of an entitlement to vote on higher-level bodies corporate (as a member of a body corporate is not entitled to vote if they owe a debt at the time of a meeting). However, interests associated with the undeveloped lots may retain input into the decisions of higher-level bodies corporate, through associated entities, or due to the diversity of holdings across the development.

To address this potential for disenfranchising proprietors of developed lots, amendments will allow, in certain circumstances, a subsidiary body corporate that owes a debt to a higher-level body corporate to retain its voting entitlement as a member of that higher-level body corporate. A voting entitlement may be retained if the subsidiary is owed overdue amounts by owners of undeveloped lots that are at least 50% of the debt the subsidiary owes to the higher-level body corporate. Retention of the subsidiary's voting entitlement will only apply where at least one lot in the subsidiary is not owned by the owner of undeveloped lots or their associates. Further, the owners of undeveloped lots owing debts will not be able to represent the subsidiary body corporate in any capacity in regard to membership of the higher-level body corporate.

The measure is a proportionate, reasonable and appropriate means of preventing systemic debt issues associated with debts owing on undeveloped lots within a scheme leaving other proprietors disenfranchised. The measure only applies in relation to debts associated with undeveloped lots, ensuring that incentives remain for subsidiary bodies corporate to meet their financial obligations in other circumstances, and that as lots are developed and deliver financial returns, that bodies corporate are incentivised to recover overdue amounts.

### *Committee decision making*

The Bill improves the operation of the BUGT Act and MUD Act through measures designed to ensure executive committee and committee decision making is in the best interests of the body corporate and its proprietors.

Conflict of interest provisions are included for committees under the BUGT Act, that will require a voting committee member to disclose a conflict of interest in relation to a matter being considered by the committee, and to refrain from voting on the matter. This will ensure bodies corporate regulated under the BUGT Act will benefit from protections against conflict of interest that have long been a feature of the MUD Act, some other specified Acts, and the BCCM legislation.

Requiring a person entrusted with the responsibility of committee decision making on behalf of the body corporate and its proprietors to disclose and avoid conflicts of interest with the potential to influence that decision making, is a reasonable and appropriate means of enhancing transparency and probity of body corporate governance. This does not prevent a person with an interest in a matter from seeking to have the matter considered by the body corporate at a general meeting, at which time they would not be restricted from voting in their capacity as a proprietor representing their own interests.

Amendments also make a member of a committee (BUGT Act) or executive committee (MUD Act) who owes a debt to the body corporate ineligible to vote on motions considered by the relevant committee. It is a fundamental responsibility of proprietors to fulfil their financial obligations to a body corporate, and it is critical that committee members be model members of the bodies corporate for which they perform their governance role. These amendments support the new criteria making persons who owe a debt ineligible to be elected to the committee, and help to avoid conflicts of interest when committee decisions are made about debt collection.

### *Financial management*

The Bill improves the operation of the BUGT Act and MUD Act to support the financial viability of developments through amendments designed to ensure the financial obligations of proprietors to their body corporate are satisfied in an appropriate manner and debts recovered in a reasonable time frame.

The Bill amends the BUGT Act and MUD Act to require that contributions and other amounts owed by a proprietor to the body corporate must ordinarily be paid as a monetary amount. However other forms of payment through non-monetary exchanges of fair value will be permitted in certain limited circumstances, in recognition of the flexibility and convenience this can provide to bodies corporate and proprietors in some cases.

It is reasonable and appropriate to require, in most circumstances, that contributions be paid to the body corporate as a monetary amount. Other types of value exchange may risk the immediate liquidity of the body corporate; impose the burden and delay of conversion into monetary form; raise issues about transparency, the true value of the exchange involved and fairness for other proprietors; and may limit the capacity of the body corporate to prioritise where its financial resources are directed.

To ensure that bodies corporate that have in the past benefited from offset arrangements retain sufficient flexibility to continue to do so, while also ensuring that such arrangements provide sufficient protection for the body corporate and its proprietors, the amendments allow for offset arrangements to be entered into, provided several important safeguards are complied with.

Given the level of risk associated with offset arrangements, they will only be permitted if authorised by decision of the body corporate at a general meeting. In addition, the person benefitting from the offset arrangement, and any associates of the person, will not be permitted to vote on the motion seeking approval of the offset, in order to remove the potential for a majority owner to put in place offset arrangements that do not benefit the body corporate or its other proprietors. Also, the fair value of the offset must be equal to the value of the contribution being sought to be discharged by the offset arrangement. Further, the amendments require completion of the offset prior to the offset being considered to discharge all or part of a contribution.

The Bill also includes amendments to the BUGT Act consistent with the BCCM legislation that will require bodies corporate under the BUGT Act to commence debt recovery proceedings within 2 years and 2 months of an amount owed to the body corporate by a proprietor becoming outstanding (a debt becomes outstanding if not paid within 30 days of being due).

Failure to ensure that contributions and other amounts payable to the body corporate are paid or recovered in a timely fashion poses a substantial risk to the financial viability of a body corporate. It is also unfair to proprietors who are meeting their financial obligations, who may be required to address financial shortfalls through the striking of additional or increased levies, or who may be directly affected by the capacity of the body corporate to adequately administer and maintain scheme property and facilities.

The amendments will clarify and reinforce a body corporate's obligation to ensure amounts owing to it are ultimately collected, while also allowing sufficient scope to allow arrangements such as longer-term payment plans to be put in place to assist debtor proprietors experiencing hardship, should that be appropriate in the circumstances. The amendments do not prevent bodies corporate from commencing proceedings to recover debts when amounts become overdue before the 2 years and 2 months period elapses.

#### *Information disclosure*

The Bill improves the operation of the BUGT Act and MUD Act to ensure disclosure and transparency of body corporate and committee decision making.

Both the BUGT Act and MUD Act require minutes of committee meetings and body corporate meetings to be kept as body corporate records and allow members of the body corporate to access and inspect such records. However, neither the BUGT Act nor MUD Act include a positive obligation for minutes of meetings to be provided to members of the body corporate within specific timeframes, or a specific requirement that minutes of general meetings be 'full and accurate'. In contrast, the BCCM legislation obliges bodies corporate to keep full and accurate minutes of committee meetings and general meetings, and to provide lot owners with minutes of these meetings within 21 days.

Ensuring access to full and accurate information about body corporate governance is important. Difficulty accessing such information has been a clear concern for members of bodies corporate under the BUGT Act and MUD Act.

Accordingly, the Bill amends the MUD Act and BUGT Act to require committee meeting and general meeting minutes to be given to body corporate members (and their mortgagees) within 21 days of the meeting. The amendments also require the minutes of general meetings that must be kept to be 'full and accurate'. This is a reasonable and appropriate means of ensuring transparency of body corporate governance processes by way of disclosing to persons benefitting from, and impacted by, decisions of the committee and the body corporate, full and accurate information about those decisions.

The Bill includes amendments to the BUGT Act and MUD Act requiring that notice of committee meetings be provided to body corporate members, at least 7 days prior to the holding of the meeting (or 2 days if agreed by members of the committee), which is consistent with requirements of the BCCM legislation. This will assist members to be aware of the matters their committee intends to consider, and to more easily dispute committee decisions, if that is desired.

### ***Gift card infringement notices***

The relevant clauses in the Bill achieve the policy objectives by making consequential amendments to the infringement notice provisions in the Fair Trading Act, to specify that the Commissioner for Fair Trading (Commissioner) can issue an infringement notice if the Commissioner has reasonable grounds to believe that a person has contravened a gift card provision in the ACL.

To ensure the ACL remains nationally consistent, the Bill ensures the penalties associated with the Fair Trading Act infringement notices align with the amounts prescribed for these offences in the *Competition and Consumer Act 2010* (Cth).

## **Alternative ways of achieving policy objectives**

### ***Improving the operation of the BUGT Act and MUD Act***

The relevant clauses in the Bill are the most effective and appropriate way of achieving the objective to improve the operation of the BUGT Act and the MUD Act with a focus on making body corporate governance arrangements fairer for proprietors. There are no suitable non-legislative ways of achieving the policy objectives.

Alternative legislative options considered for achieving the policy objective are a complete process of harmonisation of the BUGT Act and MUD Act (and other specified Acts) and the BCCM legislation while retaining separate coverage of these legislative instruments, or the complete transition of existing developments under the BUGT Act/MUD Act (and other specified Acts) to the BCCM legislation, and the repeal of those Acts.

Harmonisation of the BUGT Act and MUD Act with the BCCM legislation (whether through amendment or transition) would be expected to achieve the policy objective. As part of a review of property law in Queensland, the Queensland University of Technology (QUT) considered the issue of harmonising the BUGT Act with the BCCM Act, producing an options paper and recommendations paper, both released for consultation.

Following investigation of the merits, requirements and practicalities of harmonisation, QUT ultimately limited their conclusions to relatively high-level recommendations for increasing consistency of the BUGT Act and BCCM Act, with consequential considerations for the specified Acts. The implementation of reforms based on those recommendations would be a significant legislative undertaking, requiring a substantial period of further analysis, consultation and development.

Consultation on an exposure draft of the Bill revealed stakeholders do see a need to harmonise the BUGT Act and MUD Act with the BCCM Act in broad terms, including in relation to a number of issues not addressed by the Bill. However, that was combined with a practical recognition that deficiencies that will be directly addressed by the Bill are currently resulting in notable detriment to proprietors, and that relatively urgent amendments to the BUGT Act and MUD Act are warranted.

The improvements provided in the Bill are targeted at deficiencies of the BUGT Act and MUD Act that must be addressed urgently to address the factors that are at this time resulting in detriment to proprietors in relevant developments, and to prevent that detriment compounding for those and other proprietors. In the event that Government pursues further reforms to harmonise the BUGT Act and MUD Act with the BCCM Act in future, it will do so with the benefit of a substantial degree of harmonisation of critical governance processes and requirements already established through this Bill.

### ***Gift card infringement notices***

There are no alternative ways of achieving the policy objectives and maintaining the nationally consistent infringement notice regime for the ACL in Queensland.

## **Estimated cost for government implementation**

### ***Improving the operation of the BUGT Act and MUD Act***

Costs to Government of implementing the majority of measures included in clauses of the Bill amending the BUGT Act and MUD Act are insubstantial. This includes the measures to enhance governance probity and transparency, and reduce the potential for conflicts of interest, for bodies corporate under the MUD Act or BUGT Act by way of improving requirements for committee eligibility, committee decision making, representation of subsidiary bodies corporate, financial management and information disclosure.

Other measures in the Bill will involve costs for Government in terms of staffing, training, and the creation of supporting material. This includes the provision of an information and education service for the benefit of proprietors to understand their rights, responsibilities and dispute resolution options, as well as for referees to increase their proficiency.

The enhancements to dispute resolution services under the BUGT Act (which apply also to the MUD Act and other specified Acts) will require a period of implementation and adjustment by referees appointed to deal with dispute applications.

Costs may also be associated with a likely modest, but not insignificant, rise in dispute resolution applications resulting from the amendments (such as the requirement for bodies corporate and committees to act reasonably) that will increase possible grounds for seeking dispute resolution.

There may also be some increase in applications arising from a general increase in awareness of rights and responsibilities that will result from the new information and education service.

### ***Gift card infringement notices***

Any costs to OFT arising from the implementation of the consequential amendments to the Fair Trading Act will be met from within existing resources.

## **Consistency with fundamental legislative principles**

### ***Improving the operation of the BUGT Act and MUD Act***

Clauses dealing with committee member eligibility raise considerations about whether the Bill has sufficient regard to the rights and liberties of individuals.

The Bill includes amendments that make a person ineligible to be a member of a committee (BUGT Act) or executive committee (MUD Act) if the person, or certain types of associates of the person (excluding familial/personal relationships), owe a debt to their body corporate or another body corporate in the development. In addition, the Bill restricts eligibility of particular service providers (and associates) for committee membership.

These criteria are comparable to those of the BCCM legislation, although the extension of debtor ineligibility to certain associates is a broader application of the criteria, as is the extension to debts owed to, or roles performed within, associated bodies corporate within the development. The broader scope of the criteria for BUGT Act and MUD Act bodies corporate acknowledges that unlike the majority of BCCM schemes, developments under these Acts are complex, multi-layered arrangements where the governance processes and financial circumstances of the multiple bodies corporate comprising the development are interrelated, as can be the interests of commercial entities operating within or across multiple bodies corporate.

These ineligibility criteria could be seen to restrict the rights and liberties of individuals. However, it should be noted that committee membership itself is not a right but a statutorily created role to which a person may be elected, and on which a person serves, not in any personal capacity to further their own interests, but to serve the interest of the body corporate and its proprietors.

In regard to the ineligibility based on owing a debt to a body corporate, a person's obligation to ensure they are meeting their financial obligations to the body corporate of which they are a member is a fundamental responsibility of membership. Failure to meet financial obligations risks the financial viability of the body corporate, and impacts on the financial circumstances of its other proprietors.

It is therefore critical that committee members, given the responsibility of governance on behalf of other members, not only be model members of any body corporate within their development in terms of meeting their financial responsibilities, but also be free from conflicts of interest (whether personal, or through their associates) that may impact on performance of their governance role when it comes to appropriately setting budgets, commencing debt recovery proceedings, and other related matters.

Further, care has been taken to ensure that debts of familial or personal associates, as opposed to those of associates in business arrangements, do not impact a person's eligibility. This recognises persons involved in business associate relationships are less likely to be individuals, and the associate relationships are more likely to involve more concrete forms of compulsion or obligation to act on a person's directions or in their interests, as well as posing a greater risk in terms of the potential control over governance arrangements that a group of associated business interests may have.

Amendments in the Bill will also make a person ineligible to be a member of the committee or executive committee if the person, or any associate of the person, is a service contractor, letting agent, or body corporate manager for any body corporate in the development. While many of these persons and their associates are businesses, some may be individuals. These roles within the scheme are typically associated with substantial business investments, that are subject to ongoing approval or compliance considerations by the body corporate, including via the committee.

This restriction acknowledges the potential for conflicts of interest specific to engagements and authorisations of service contractors, letting agents and body corporate managers to impact on committee governance. In recognition of the benefits persons engaged as body corporate managers, and persons authorised/engaged both as service contractors and letting agents (resident managers, or caretaking service contractors) can provide to a committee in terms of knowledge of activities and circumstances of the body corporate, the Bill deems such persons to be non-voting members of the relevant committee.

### ***Gift card infringement notices***

The Fair Trading Act gift card infringement notice amendments are consistent with fundamental legislative principles.

## **Consultation**

### ***Improving the operation of the BUGT Act and MUD Act***

In 2021, the Department of Justice and Attorney-General (DJAG) established a Community Titles Legislation Working Group (CTLWG), chaired by the Deputy Director-General – Liquor, Gaming and Fair Trading, to provide advice to DJAG on a broad range of issues relevant to the community titles sector (which, broadly – includes developments under the MUD Act and BUGT Act). The CTLWG includes members representing a broad range of stakeholders in the sector, including:

- Australian College of Strata Lawyers;
- Australian Resident Accommodation Managers Association (Qld);
- Owners Corporation Network (Qld);
- Queensland Law Society;
- Real Estate Institute of Queensland;
- Strata Community Association (Qld); and
- Unit Owners Association of Queensland Inc.

Consultation with members of the CTLWG informed development of most amendments that were subsequently included in the Bill.

An exposure draft of the Bill was released for a three-week period of public consultation on 29 April 2022, with 31 submissions received in response. Submissions highlighted general agreement about the need to improve the BUGT Act and MUD Act.

Amendments to improve governance probity and transparency by way of eligibility for committee membership and voting at committee meetings, representation of subsidiary bodies corporate, and information disclosure improvements were largely supported, although submissions highlighted issues with some measures that were addressed through the drafting process.

Concerns were raised about the broadness of associate provisions when applied to restrictions on committee eligibility, particularly in relation to preventing a person from being eligible for committee membership if they were associated with a person who owed a body corporate debt. As a result, debts owed by a person's familial and personal associates were removed from affecting the person's committee eligibility.

While the requirement for a body corporate to act reasonably was largely supported, concerns were raised about potential uncertainty in determining what acting reasonably entails, and the partially related potential for a rise in dispute resolution applications, include those which may be frivolous, vexatious, misconceived or without substance.

In response, amendments introducing provisions allowing referees to award costs for frivolous and other similar applications, based on existing provisions of the BCCM Act, are included in the Bill. The provision of information and education to assist proprietors with dispute resolution under the BUGT Act, and other matters, is also expected to address stakeholders' needs in regard to understanding the requirement to act reasonably.

While provisions preserving voting rights for subsidiary body corporate members affected by debts owed by their undeveloped lot owners were largely supported, concerns were raised about the complexity of how (originally a proportion of) voting rights would be preserved. In response the provisions were substantially simplified, and protections for minority owners added.

Several submissions did not support provisions allowing for offset arrangements (that is, a proprietor seeking to satisfy a requirement to pay contributions by providing something to the body corporate other than a monetary amount) if approved by the body corporate.

Offset arrangements were seen as potentially impacting on the effective financial management of bodies corporate and having the potential to be misused despite included safeguards. In response, provisions were redrafted to reduce the risk of misuse, and provide clarity around when offset arrangements have effect. Ultimately, the Bill's amendments will impose statutory requirements designed to ensure such arrangements are fair and equitable for bodies corporate and their proprietors, where otherwise such arrangements would likely continue to be used, but without the benefit of any statutory safeguards.

The Office of Best Practice Regulation (OBPR) was consulted on regulatory impact analysis requirements for the proposed improvements to the BUGT Act and MUD Act. OBPR advised that the proposed improvements were not expected to have significant adverse impacts, and that no further regulatory impact analysis was required under the Queensland Government Guide to Better Regulation.

### ***Gift card infringement notices***

In May 2018, Commonwealth Treasury released a Consultation Regulation Impact Statement (RIS) examining gift card expiry dates in Australia. Commonwealth Treasury received 20 formal submissions to the consultation process and 25 informal consumer comments.

Three Queensland stakeholders made submissions – the Queensland Consumers Association, the Queensland Law Society and the Caravan Parks Association of Queensland. The Decision RIS was released by Commonwealth Treasury in July 2018.

The Queensland Office of Best Practice Regulation was consulted and considered these amendments are excluded from further regulatory impact analysis. The Commission noted the treatment of gift cards has already undergone extensive impact assessment and public consultation through a Commonwealth RIS process.

## **Consistency with legislation of other jurisdictions**

### ***Improving the operation of the BUGT Act and MUD Act***

The relevant clauses of the Bill are specific to the State of Queensland, and are not uniform with, or complementary to, legislation of the Commonwealth or another state.

### ***Gift card infringement notices***

The Fair Trading Act amendments are necessary to ensure the ACL (Queensland) is consistent with the ACL (Commonwealth), in terms of enforcement options available to address breaches of the ACL gift card requirements.

## Notes on provisions

### Part 1 - Preliminary

Clause 1 states that, when enacted, the Bill will be cited as the *Building Units and Group Titles and Other Legislation Amendment Act 2022*.

Clause 2 provides that Part 2 (Amendment of BUGT Act), Part 4 (Amendment of MUD Act), Part 5 (Other Amendments) and Schedule 1 (Other Amendments), commence on a day to be fixed by proclamation.

### Part 2 – Amendment of Building Units and Group Titles Act 1980

Clause 3 provides that Part 2 of the Bill amends the BUGT Act.

Clause 4 amends section 7 of the BUGT Act (Interpretation) to include definitions for certain terms and concepts that will be included in the BUGT Act as a result of the Bill, and to amend the existing definition of *body corporate manager* by removing an obsolete transitional element.

Clause 5 inserts into the BUGT Act new Part 4, Division 1AA (Interpretation). The new division includes section 26A (Definition for part) which defines the term *associate* for Part 4. Specifically, section 26A provides that an *associate* of a person is someone else with whom the person is associated under new section 26B (Associates).

Clause 5 also inserts new section 26B (Associates) into the BUGT Act and describes the types of relationships that indicate that a person is associated with someone else. Section 26B is comparable to similar provisions contained in the BCCM Act (refer to section 309) and MUD Act (refer to section 214E). The concept of associate relationships is important for the operation of other provisions in the Bill, including for the determination of whether someone is an 'electable person' for a committee (see clause 10, new section 41B of the BUGT Act).

Section 26B sets out that a person is associated with someone else if a relationship of a listed type exists between them, or if a series of those relationships can be traced between them (through another person or other persons).

Section 26B also clarifies that the proprietor of a lot and a person who is party to a letting arrangement are not associated merely because of services provided to the proprietor by the person, despite the possible existence of specific associate relationships. This will prevent, among other things, a person who is merely receiving letting agency services from a letting agent from being made ineligible for election to the committee.

Section 26B, by reference to new section 41B(a)(iii) (refer to clause 10), provides that a person who is not a proprietor but is nominated for election (to the committee) by an (individual) proprietor, is associated with that proprietor. This provision ensures new committee eligibility criteria apply by association to the relationship between a proprietor and a person they nominate for election to the committee who is not a proprietor. A definition of *executive officer* of a corporation, is also included for the section, making it clear that the term can apply to a person despite the person not being a director, or holding a position named 'executive officer'.

Clause 6 amends section 27 of the BUGT Act (Constitution of bodies corporate). Existing section 27(3) of the BUGT Act broadly describes the powers, authorities, duties and functions of bodies corporate established under the BUGT Act. Clause 5 enhances section 27 by including a new provision to clarify that a body corporate must *act reasonably* in anything it does under section 27(3), including when making (or not making) a decision under the provision. The specific requirement for bodies corporate under the BUGT Act to act reasonably when carrying out their functions is based on a similar requirement for bodies corporate under the BCCM Act (refer to section 94(2) of the BCCM Act).

Clause 7 amends section 32 of the BUGT Act (Levies by bodies corporate on proprietors). Bodies corporate incur a range of operating and capital costs in carrying out duties and functions. Section 32 of the BUGT Act provides for contributions payable by proprietors to the body corporate. Clause 7 of the Bill clarifies that proprietors must pay their contributions to the body corporate as a monetary amount. However, clause 7 allows for an 'offset' arrangement between the body corporate and a proprietor in some limited circumstances.

An offset arrangement may arise, for example, where a proprietor is liable for paying contributions to the body corporate, but separately, the body corporate has a liability to pay an amount to the proprietor for another reason. Clause 7 of the Bill provides that a proprietor's liability to pay all or part of a contribution can be taken to be satisfied in full or part by an offset arrangement between the body corporate and the proprietor. However, to ensure the interests of the body corporate (and other proprietors) are protected, clause 7 also provides that the contribution levied is only taken to be paid in part or full by an offset arrangement if the following requirements are satisfied;

- the terms of the arrangement must be approved by a resolution of the body corporate at a general meeting before the arrangement is completed; and
- the fair value of land, goods or services provided as an offset equals the value of the contribution sought to be satisfied in full or part by the offset arrangement.

Neither the proprietor, nor an associate of the proprietor, is entitled to vote on the motion for the resolution approving the arrangement.

Clause 8 inserts new section 32A into the BUGT Act (Recovery of body corporate debts), to align the point in time at which the body corporate can recover an outstanding contribution as a debt, with the expiry of the 'discount' period (section 32(6)(b)). The 'discount' period refers to the period of 30 days after the contribution amount becomes due and payable, during which the amount to be paid is reduced by any discounting factor set by the body corporate (section 38A(4)). This change will avoid the potential for an amount that is due and payable to be both recoverable as a debt and subject to a payment discount for the 30 days after it becomes due and payable.

Clause 8 will also oblige a body corporate to commence proceedings to recover a contribution amount that has been outstanding for 2 years and 30 days (2 years plus the 'discount' period). The body corporate must do so within the 2 months after the end of the 2 year and 30 day period for which the contribution has been outstanding.

This amendment is intended to give clear direction to the body corporate that it must take steps to recover outstanding amounts within the prescribed period of time. However, it should be noted that the body corporate is not prevented from recovering outstanding

amounts at an earlier time. The introduction of this obligation further aligns the BUGT Act with the approach under the BCCM legislation (see for example, section 166(2) of the *Body Corporate and Community Management (Standard Module) Regulation 2020* (BCCM Standard Module)).

Clause 9 amends section 38D of the BUGT Act (Duty of body corporate as to keeping records, convening meetings etc). Section 38D of the BUGT Act provides a range of governance requirements relating to record keeping, including a requirement to keep and retain minutes of general meetings. In the interests of promoting transparency in body corporate decision-making and governance, clause 9 introduces a new requirement that minutes of general meetings must be ‘full and accurate’. A body corporate will also be required to give a copy of the minutes of each of its meetings to each proprietor and first mortgagee of a lot within 21 days after the meeting is held. This requirement will align the BUGT Act more closely with regulations under the BCCM Act which require bodies corporate to give each lot owner a copy of the minutes of general meetings within 21 days after the meeting (for example, section 117 of the BCCM Standard Module). Clause 9 of the Bill also makes it clear that the new requirement to provide minutes does not apply where the proprietor (or first mortgagee) has given the secretary written notice instructing that the person does not wish to be provided with copies of the minutes.

Clause 10 inserts new subdivision 1 (Interpretation) into the BUGT Act, Part 4, Division 2. The new subdivision includes new section 41A (Definitions for division) that defines a range of entities and concepts for the division, necessary to support the Bill’s changes to committee eligibility rules. Section 41A defines *associated body corporate*, *body corporate manager*, *development site*, *electable person* (by reference to new section 41B), *letting arrangement*, *relevant body corporate debt*, and *service arrangement*.

Clause 10 also inserts a new section 41B (Meaning of *electable person*) that provides the substantive meaning of the term ‘electable person’. The clause provides that a person is an electable person (in relation to committee membership, as established in clause 11) if they are an individual:

- who is a proprietor; or
- who is a company nominee of a corporation that is a proprietor; or
- who is not a proprietor but is nominated for election by an individual who is a proprietor.

In addition, to be an electable person, neither the person nor an associate of the person can, in regard to the body corporate or an associated body corporate:

- owe a relevant body corporate debt; or
- be a body corporate manager; or
- be a party to a service arrangement (including service contractor equivalents under a specified Act); or
- be a party to a letting arrangement (including letting agent equivalents under a specified Act); or
- be a party to another agreement or arrangement under which services or amenities are provided to proprietors (for example a utility service).

However, debts of an associate will not affect whether a person is an electable person if the person is an associate of the debtor on a personal or familial basis.

Clause 11 amends section 42 of the BUGT Act (Constitution of committees) by removing the limited set of prescribed requirements for committee eligibility, and in place setting out that a person is eligible for election to the committee (as chairperson, secretary, treasurer, or member) only if they are an electable person (as defined by clause 10) at the time of the meeting of the body corporate at which the person's election is proposed. In combination with the definition of electable person, this provision reduces the risk that a person who may be elected to the committee is subject to personal or associate conflicts of interest and other influences that may arise from debts owed within the development, or being party to particular agreements or authorisations with bodies corporate within the development, that could affect performance of their duties as a committee member.

Clause 12 inserts new section 42A into the BUGT Act (Non-voting members of committees). New section 42A complements the restriction on committee eligibility of persons who are parties to body corporate management agreements (body corporate managers), service arrangements (service contractors) or letting arrangements (letting agents) with a body corporate. Persons who are body corporate managers, or both service contractors and letting agents (who may be known as resident managers, or caretaking service contractors) are typically well-informed of events and circumstances within the development and have much to offer the committee to assist in its governance role, and in turn can be assisted in the performance of their duties by awareness of committee activities. Consistent with the BCCM legislation, (refer BCCM Standard Module, section 12), the clause makes such persons non-voting members of the committee. A non-voting member of the committee does not affect the maximum size of the committee, or count towards determining a quorum for the committee.

Clause 13 amends section 43 of the BUGT Act (Vacation of office of member of committee) consequential to changes in clause 10 to the determination of committee eligibility elsewhere in the Bill. The clause provides that a person elected to the committee vacates their office if they cease to be an electable person under section 41B(a)(i) or (c)(i), (ii) or (iii). A member's position is also vacated where the person is not a proprietor, and the proprietor that nominated the member ceases to be a proprietor or notifies the body corporate that the member's office is vacated. The clause also ensures that where the body corporate has relied upon section 42(6A) to elect a person as secretary or treasurer that is not a member of the committee (for example, where a person's expertise is desired, but not as a committee member), that the person's position is not vacated if the person that nominated them ceases to be a proprietor, or the person that nominated them notifies the body corporation the position is vacated.

Clause 14 amends section 45 of the BUGT Act (Meetings of committees), which contains provisions relating to committee meetings, including a requirement for committees to keep full and accurate minutes of meetings. In the interests of promoting transparency in body corporate decision-making and governance, clause 14 introduces a new requirement for secretaries to give each proprietor and first mortgagee of a lot copies of decisions of the committee and minutes of committee meetings, within 21 days of the decision or meeting. This requirement will more closely align the BUGT Act with regulations under the BCCM Act which require committee decisions and committee meeting minutes to be provided to lot owners within 21 days (for example, section 71(4) of the BCCM Standard Module).

Clause 14 also makes it clear that the requirement to provide minutes and copies of decisions does not apply where the proprietor (or first mortgagee) has given the secretary a written notice that the person does not wish to be given copies of minutes.

Clause 15 inserts three new sections into the BUGT Act, those being, section 45A (When voting member ineligible to vote at committee meetings), section 45B (Conflict of interest) and section 45C (When committee member may receive particular benefits).

Section 45A sets out that a debtor member of the committee cannot vote at a committee meeting in their own right, or as the representative of another committee member, or by way of being represented by another person at the meeting. Section 45A defines when a committee member is a *debtor member* for the purposes of a meeting of the committee, having regard to the relevant body corporate debts (definition inserted by clause 10) of members that are proprietors, and for nominees of individuals or company proprietors, having regard to the debts of the proprietors that nominated them. A debtor member may be counted for the purpose of deciding if there is a quorum for the meeting.

Section 45B requires disclosure of conflicts of interest and related restrictions on voting consistent with the approach taken to dealing with conflicts of interest affecting committee members in the BCCM legislation (refer BCCM Standard Module section 66) and the MUD Act (refer MUD Act section 188A). A committee member must disclose a direct or indirect interest in an issue being considered if it could conflict with the appropriate performance of the member's duties (about consideration of the issue). A member who discloses an interest is not entitled to vote on in the issue. To ensure that persons acting in the place of committee members are covered by the conflict of interest requirements both personally, and in relation to the committee member they are acting for, the section also provides that a person appointed under section 42(7) must disclose their own interest, or the interest of the member they are acting in place of (if they aware of it).

Section 45C limits when a member of a committee may receive a direct or indirect benefit from a party to a service arrangement or a letting arrangement with the body corporate. Parties to service arrangements (including a section 7, prescribed arrangement subsection (d)) and letting arrangements (including a section 7, prescribed arrangement subsection (g)), may be reliant on actions or decisions of the committee for approval of extensions or renegotiations of those arrangements or agreements, among other things.

The new section does not allow benefits to be provided to committee members that are outside the scope of routine services provided under such arrangements, unless authorised by the body corporate by ordinary resolution, given the risk that such benefits may be offered to committee members as inducements. Benefits that are additional services provided at market price by parties to service arrangements do not require body corporate approval.

Clause 16 amends section 46 of the BUGT Act (Committee's decisions to be decisions of body corporate) to require that a committee must act reasonably in making, or not making, a decision. This requirement for a committee to act reasonably when making a decision is based on a similar requirement for committees established under the BCCM Act (refer to section 100(5) of the BCCM Act).

Clause 17 inserts new section 73A into the BUGT Act (How referee must act). The new section 73A, which is based on section 269(3) of the BCCM Act (Investigation by adjudicator), sets out general principles and requirements that apply when a referee is investigating an application.

Clause 18 inserts new section 94C into the BUGT Act (Order for costs). This provides a power for a referee, when dismissing an application for an order under section 75(4), to order costs against the applicant if it appears that the application is frivolous, vexatious, misconceived or without substance. The costs may be awarded against the applicant to compensate for loss resulting from the application to any or all of: the respondent, the body corporate, or an affected person. The referee may have regard to previous applications made by the applicant and may not order costs of more than \$2,000. This power is consistent with the power of an adjudicator under the BCCM Act to award costs of not greater than \$2,000 and will act to limit any increase in applications that are frivolous, vexatious, misconceived or without substance that might arise from enhancements to grounds for seeking dispute resolution included elsewhere in the Bill.

Clause 19 makes a minor amendment to make section 110 (Refund of prescribed deposit) more consistent with new section 94C (Order for costs).

Clause 20 amends section 121A of the BUGT Act (Limited right of action by body corporate). The amendment removes the requirement for a special resolution of the body corporate to approve instituting proceedings against a person who is not a proprietor, where those proceedings are an application (under the BUGT Act section 72) for an order of a referee (under the BUGT Act, Part 5, Division 3). This more closely aligns the approval requirements for pursuing dispute resolution by order of a referee under the BUGT Act with those for dispute resolution by order of an adjudicator under the BCCM Act, and ensures in particular where a body corporate may need to seek urgent resolution of a dispute, that it can do so without holding a general meeting of the body corporate, and without the high threshold for action of authorisation by special resolution.

Clause 21 inserts new section 132A into the BUGT Act (Education and information service). The new provision (which is broadly based on section 232(3) of the BCCM Act) clarifies that the chief executive may provide an information and education service, including to help proprietors and bodies corporate to become aware of rights and responsibilities under the BUGT Act. As bodies corporate governed by the BUGT Act will be part of a broader development established under one of the 'specified Acts', and a number of the specified Acts apply parts of the BUGT Act, the provision also provides that an information and education service provided by the chief executive may also assist proprietors and bodies corporate become aware of rights and responsibilities about provisions of the BUGT Act applied by those specified Acts.

Clause 22 replaces section 133B of the BUGT Act (Approved forms) with an amended provision. Currently, section 133B authorises the referee, registrar of titles and the chief executive to approve various types of form for use under the Act. Under the new provision, the registrar of titles continues to be empowered to approve forms for use under the BUGT Act in relation to a titles registry function. The chief executive for the BUGT Act may approve any other forms for use under the BUGT Act, while the referee is not specifically authorised to approve forms. This approach is more consistent with the BCCM Act (section 320), which authorises the chief executive, rather than dispute resolution officers, to approve forms for use under that Act.

Clause 23 inserts a new Part 7, Division 5 into the BUGT Act (Transitional provisions for the Building Units and Group Titles and Other Legislation Amendment Act 2022).

New Section 144 provides that the new obligation of the body corporate to commence proceedings within a specified time period only applies to contributions that become due for payment after commencement. New section 145 provides that new requirements to provide minutes of general meetings to proprietors and first mortgagees only apply to meetings held after commencement. New section 146 provides that an elected committee member who is not an electable person upon commencement vacates their office. New section 147 sets out that new requirements to provide minutes of committee meetings or resolutions by votes in writing to proprietors and first mortgagees only apply to committee meetings held or resolutions passed after commencement. New section 148 allows referees to deal with applications made but not decided before commencement as if amendments in the Bill had not commenced. New section 149 preserves any forms approved by a referee that were in force before the commencement, and ensures they are taken to be approved by the chief executive under amended section 133B(2).

Clause 24 amends Schedule 4 (Provisions applying to committees and office bearers), sections 6 and 7 to ensure that notices of committee meetings, or motions proposed for resolution by vote in writing, are provided to committee members, lot owners, and first mortgagees before the meeting or vote in writing. Amendments to section 6 introduce a requirement that 7 days notice (or 2 days notice by agreement of voting members of the committee) of committee meetings be given to committee members, as well as proprietors and first mortgagees, unless the proprietor or mortgagee has advised they do not wish to receive such notice. A copy of the notice must also be placed on the noticeboard.

Section 7 of Schedule 4 (Voting in writing by members of committee) makes provision for committees to make a decision by a majority of members approving a motion in writing, notwithstanding that a meeting has not been held. Clause 24 also amends section 7 of Schedule 4 to set out that a resolution passed by vote in writing is valid if a copy of the motion for a proposed resolution is placed on the noticeboard, served on each member of the committee, given to each proprietor and first mortgagee of a lot, and the resolution is approved by a majority of members of the committee. The requirement to give a copy of the motion to each proprietor and first mortgagee does not apply in an emergency or if the proprietor or mortgagee has advised they do not wish to receive such copies.

Clause 24 also amends section 7 to ensure that new requirements affecting entitlement to vote at committee meetings (specifically, section 45A (When voting member ineligible to vote at committee meetings) and 45B (Conflict of interest)) also apply to voting members of committees when voting in writing.

### **Part 3 – Amendment of Fair Trading Act 1989**

Clause 25 provides that Part 3 amends the *Fair Trading Act 1989*.

Clause 26 amends section 31 (Issuing infringement notice), to insert a new subsection 31(2)(a)(va). New subsection 31(2)(a)(va) provides that sections 99B(1), 99C, 99D(1), 99E and 99F(2) in Part 3-2 of the ACL, which relate to requirements for gift cards, are infringement notice provisions. This will allow the Commissioner to issue an infringement notice to a person if they have reasonable grounds to believe that person has contravened the gift card provisions.

Clause 26 then renumbers subsections 31(2)(a)(va) to (viii) to be subsections 31(2)(a)(vi) to (ix).

Clause 27 amends section 33 (Amount of penalty), by inserting a new subsection 6A into section 33(1). New item 6A provides that, if the infringement notice is for an alleged contravention of section 99B(1), 99C, 99D(1), 99E or 99F(2) in Part 3-2 of the ACL, the penalty that will apply is 55 penalty units for a body corporate (i.e. a corporation) or 11 penalty units if not a body corporate (i.e. an individual).

#### **Part 4 – Amendment of Mixed Use Development Act 1993**

Clause 28 provides that Part 4 of the Bill amends the MUD Act.

Clause 29 inserts a heading for a new subdivision in Part 9 (Bodies corporate) of the MUD Act. The new subdivision will be named ‘Subdivision 1 General’.

Clause 30 amends section 166 of the MUD Act (Definitions) to include a definition for the term ‘electable person’. The definition of ‘electable person’ makes reference to new section 166C (Meaning of *electable person*) which will be inserted into the MUD Act by clause 31.

Clause 31 inserts new section 166A (References to bodies corporate created by the registration of a building units or group titles plan) setting out that references in Part 9 to body corporate manager of the body corporate, committee of the body corporate, and voting member of a committee of the body corporate, have the meaning the terms have under the BUGT Act. This assists the operation of other clauses that reference persons or entities in bodies corporate that are regulated under the BUGT Act.

Clause 31 also inserts a new Subdivision 2 (Electable persons), including section 166B (Definitions for subdivision). Section 166B defines a range of entities and concepts for the subdivision, necessary to support the Bill’s changes to committee eligibility rules. Section 166B defines *associated body corporate*, *letting agent*, and *service provider*. Clause 31 further inserts new section 166C (Meaning of *electable person*) that provides the substantive meaning for the term ‘electable person’. Section 166C provides that a person is an electable person (in relation to committee membership, as established in clause 39) if they are an individual who is:

- a member of the body corporate; or
- a nominee of a corporation that is a member of the body corporate.

In addition, to be an electable person, neither the person (or for a nominee of a corporation - the corporation) nor an associate of the person can, in regard to the body corporate or an associated body corporate:

- owe a relevant body corporate debt; or
- be a body corporate manager; or
- be a service contractor or letting agent (including service contractor or letting agent equivalents under the BUGT Act).

However, debts of an associate will not affect whether a person is an electable person if the person is an associate of the debtor on a personal or familial basis.

Clause 32 amends section 167 of the MUD Act (Community body corporate). Section 167(9) of the MUD Act broadly describes the powers, authorities, duties and functions of

community bodies corporate established under the MUD Act. Clause 32 enhances section 167 by including a new provision to clarify that a community body corporate must *act reasonably* in anything it does under section 167(9), including when making (or not making) a decision under the provision. The specific requirement for community bodies corporate under the MUD Act to act reasonably when carrying out their functions is based on a similar requirement for bodies corporate under the BCCM Act (refer to section 94(2) of the BCCM Act).

Clause 33 amends section 168 of the MUD Act (Precinct body corporate). Section 168(9) of the MUD Act broadly describes the powers, authorities, duties and functions of precinct bodies corporate established under the MUD Act. Clause 33 enhances section 168 by including a new provision to clarify that a precinct body corporate must *act reasonably* in anything it does under section 168(9), including when making (or not making) a decision under the provision. The specific requirement for precinct bodies corporate under the MUD Act to act reasonably when carrying out their functions is based on a similar requirement for bodies corporate under the BCCM Act (refer to section 94(2) of the BCCM Act).

Clause 34 amends section 169 of the MUD Act (Members' nominees). A subsidiary body corporate requires an individual nominee to represent it at meetings of the body corporate of which it is a member. Clause 34 provides that a member of a body corporate that is a subsidiary body corporate must have a nominee to represent it at all times and states that in the absence of a person being appointed as a nominee, the chairperson of the subsidiary body corporate is taken to be the appointed nominee.

To ensure the suitability of the person appointed as nominee, the clause requires that a person must be both a member of the subsidiary body corporate and a voting member of the executive committee (MUD Act subsidiary) or committee (BUGT Act subsidiary). Alternatively, a nominee may be a body corporate manager of the subsidiary body corporate to whom the subsidiary has delegated one or more of its powers. The requirement that the nominee be a member of the committee or executive committee does not apply if there is no committee or executive committee to ensure the subsidiary body corporate is still able to appoint a nominee in these circumstances.

Clause 35 amends section 172 of the MUD Act (Meetings of bodies corporate). Section 172 provides requirements for meetings of bodies corporate, including that Part 2, of schedule 2, to the BUGT Act applies to meetings and voting at meetings (after the first annual general meeting). Part 2, schedule 2 of the BUGT Act (Meetings other than first annual general meeting) includes procedural, quorum, and voting entitlement rules for general meetings of the body corporate. Under section 2(6) of Part 2, schedule 2 of the BUGT Act, a person is not entitled to vote at a meeting unless all contributions due and payable (for at least 30 days before the meeting) and any other moneys recoverable by the body corporate have been paid before commencement of the meeting.

Clause 35 aims to preserve voting rights of subsidiary bodies corporate that are unable to meet their financial obligations to higher-level bodies corporate due to non-payment of contributions payable by undeveloped lot owners to the subsidiary body corporate. Specifically, clause 35 sets out that section 2(6) of Part 2, schedule 2, to the BUGT Act does not apply to a member of a body corporate where:

- the member is a subsidiary body corporate, that at the time of the meeting of the body corporate owes an *overdue amount* to the body corporate; and

- the member that is a subsidiary body corporate is also owed an overdue amount by 1 or more undeveloped lot members equal to at least 50% of the overdue amount it owes to the body corporate; and
- the member that is a subsidiary body corporate has at least 1 member that is not an undeveloped lot member.

Clause 35 also prevents an undeveloped lot member who owes a debt to the subsidiary, and who is a nominee of the subsidiary, from voting on behalf of, or representing, the subsidiary at the meeting of the body corporate. The clause also requires the subsidiary to provide evidence establishing that it meets criteria to retain its voting entitlement (in regard to amounts owing by an undeveloped lot owner and having at least one member who is not an undeveloped lot member), if requested by the body corporate.

Clause 36 amends section 174 of the MUD Act (Levies by bodies corporate on members). Bodies corporate incur a range of operating and capital costs in carrying out duties and functions. Section 174 of the MUD Act provides for contributions payable by members to the body corporate. Clause 36 of the Bill clarifies that members must pay their contributions to the body corporate as a monetary amount. However, clause 36 also allows for an 'offset' arrangement between the body corporate and a member in some limited circumstances.

An offset arrangement may arise, for example, where a member is liable for paying contributions to the body corporate, but separately, the body corporate has a liability to pay an amount to the member for another reason. Clause 36 of the Bill provides that a member's liability to pay all or part of a contribution can be taken to be satisfied in full or part by an offset arrangement between the body corporate and the member. However, to ensure the interests of the body corporate (and other proprietors) are protected, clause 36 also provides that the contribution levied is only taken to be paid in part or full by an offset arrangement if the following requirements are satisfied;

- the terms of the arrangement must be approved by a resolution of the body corporate at a general meeting before the arrangement is completed; and
- the fair value of land, goods or services provided as an offset equals the value of the contribution sought to be satisfied in full or part by the offset arrangement.

Neither the member, nor an associate of the member, is entitled to vote on the motion for the resolution approving the arrangement.

Clause 37 amends section 177 of the MUD Act (Duties of body corporate). Section 177 of the MUD Act contains a range of duties and governance arrangements, including a requirement to keep and retain minutes of meetings of the body corporate. In the interests of promoting transparency in body corporate decision-making and governance, clause 37 introduces a new requirement that the minutes to be kept and retained must be 'full and accurate' minutes. This is consistent with the existing requirement under the MUD Act that committee minutes must be 'full and accurate' (refer MUD Act, section 188), and is also consistent with requirements of the BCCM legislation (for example, section 117 of the BCCM Standard Module).

Clause 37 also includes requirements for a body corporate to give a copy of the minutes of each of meeting to each member of the body corporate and mortgagee within 21 days after the meeting is held. This requirement will align the MUD Act more closely with

regulations under the BCCM Act which require bodies corporate to give each lot owner a copy of the minutes of general meetings within 21 days after the meeting (for example, section 117 of the BCCM Standard Module). Clause 37 of the Bill also makes it clear that the new requirement to provide minutes does not apply where the member of the body corporate (or mortgagee) has given the secretary written notice instructing that the person does not wish to be provided with copies of the minutes.

Clause 37 further amends section 177 of the MUD Act to include a specific obligation for bodies corporate to take all reasonable steps to ensure continuity of an essential utility service (defined as sewerage services, electricity, gas or water), where the body corporate has entered into an agreement under section 176(c) or (d) for the provision (by the body corporate or another person) of a relevant amenity or service.

Clause 38 amends section 183 of the MUD Act (Delegation by corporate members of bodies corporate) to clarify the operation of the provision with respect to requirements of section 169 of the MUD Act (Member's nominees) as they relate to a subsidiary body corporate appointing a nominee to represent the subsidiary, and vote on behalf of the subsidiary, at meetings of a body corporate under the MUD Act, of which it is a member.

Clause 39 amends section 185 of the MUD Act (Constitution of executive committee) to state that a person is eligible for election as chairperson, secretary, treasurer or other member of the executive committee only if they are an electable person for the body corporate at the time of the meeting of the body corporate at which the person's election is proposed. The definition of electable person is added through clause 31 of the Bill (new section 166C of the MUD Act).

Clause 40 inserts new section 185B in the MUD Act (Non-voting members of executive committee). New section 185B complements the restriction on committee eligibility of body corporate managers, service contractors and letting agents. Persons who are body corporate managers, or both service contractors and letting agents (who may be known as resident managers, or caretaking service contractors) are typically well-informed of events and circumstances within the development and have much to offer the committee to assist in its governance role, and in turn can be assisted in the performance of their duties by awareness of committee activities.

Consistent with the BCCM legislation, (refer BCCM Standard Module, section 12), the clause makes such persons non-voting members of the committee. A non-voting member of the committee does not affect the maximum size of the committee or count towards determining a quorum for the committee.

Clause 41 amends section 186 of the MUD Act (Vacation of office of member of executive committee) consequential to changes in clause 31 to the determination of committee eligibility. The clause provides that a person elected to the committee vacates their office if they cease to be an electable person under section 166C(a)(i) or (c)(i) or (ii). A person's committee position is also vacated where the person is the nominee of a corporation that is a member of the body corporate and the corporation notifies the body corporate that the person's office is vacated, or the corporation ceases to be a member of the body corporate.

Clause 41 also ensures that where the body corporate has relied upon section 185(9) to elect a person as secretary or treasurer that is not a member of the executive committee

(for example, where a person's expertise is desired, but not as a committee member), that the person's position is not vacated if the corporation that nominated the member ceases to be a proprietor or notifies the body corporate that the position is vacated.

Clause 42 amends section 188 of the MUD Act (Meetings of executive committee). Section 188 of the MUD Act contains provisions relating to executive committee meetings, including a requirement to keep full and accurate minutes of its meetings. In the interests of promoting transparency in body corporate decision-making and governance, clause 42 of the Bill introduces a new requirement for executive committee secretaries to give a copy of the minutes of executive committee meetings to each member of the body corporate and mortgagee of a lot, within 21 days of the meeting.

This requirement will more closely align the MUD Act with regulations under the BCCM Act which require committee meeting minutes to be provided to lot owners within 21 days (for example, section 71(4) of the BCCM Standard Module). Clause 42 also makes it clear that the requirement to provide executive committee meeting minutes does not apply in relation to a member of the body corporate or first mortgagee who has given the secretary a written notice that the person does not wish to be given copies of the minutes.

Clause 43 inserts new sections 188AA (Notice of executive committee meetings), 188AB (When voting member ineligible to vote at executive committee meetings) and 188AC (When executive committee member may receive particular benefits) into the MUD Act.

New section 188AA requires that notice of committee meetings be provided to executive committee members, members of the body corporate, and mortgagees of lots at least 7 days (or at least 2 days with agreement of the voting members of the executive committee) before the meeting. This requirement does not apply in relation to a person who has instructed the secretary that the person does not wish to be provided with notices of executive committee meetings.

New section 188AB makes a debtor member of the executive committee ineligible to vote at a meeting of the executive committee. New section 188AC sets out the requirements and circumstances in which an executive committee member may receive benefits from a service contractor engaged by the body corporate.

Clause 44 amends section 189 of the MUD Act (Executive committee's decisions to be decisions by body corporate) to require that the executive committee must act reasonably in making, or not making, a decision.

Clause 45 inserts a new Part 15 into the MUD Act (Transitional provisions for Building Units and Group Titles and Other Legislation Amendment Act 2022) to provide transitional arrangements for the Bill.

New section 231 of the MUD Act provides that the appointment of a nominee by a subsidiary body corporate under section 169(1) ends on commencement, if the nominee does not meet the requirements of section 169(4). New section 232 of the MUD Act provides that the requirement under section 177(1)(g) for bodies corporate to provide minutes of general meetings only applies to a meeting of the body corporate held after commencement. New section 233 of the MUD Act provides that that an elected executive committee member who is not an electable person upon commencement vacates their office. New section 234 of the MUD Act provides that the requirement to provide minutes

of executive committee meetings only applies in relation to a meeting of the executive committee held after commencement.

Clause 46 amends section 3(2)(b) of schedule 1 of the MUD Act (Election of executive committee members of bodies corporate), to ensure changes to eligibility requirements for executive committee membership in the Bill are reflected in information provided by the body corporate to members regarding nominations for executive committee elections.

Clause 47 amends schedule 5 (Dictionary) to include either substantive definitions, or section references, for the terms *associated body corporate*, *electable person*, *letting agent*, *relevant body corporate debt*, and *service provider*, to support the operation of other clauses contained in the Bill.

### **Part 5 – Other Amendments**

Clause 48 provides that Schedule 1 of the Bill amends the Acts it mentions.

### **Schedule 1 – Other Amendments**

Schedule 1 contains minor editorial and technical corrections and amendments to the BUGT Act and MUD Act.