

Body Corporate and Community Management and Other Legislation Amendment Bill 2012

Explanatory Notes

Short title

The short title of the Bill is the Body Corporate and Community Management and Other Legislation Amendment Bill 2012.

Objectives of the Bill

The principal policy objectives of the Bill are to amend the *Body Corporate and Community Management Act 1997* (the Act) to:

- remove the requirement for bodies corporate to undertake a process prescribed in Chapter 8, Part 9, Division 4 of the Act (the 2011 reversion process) to adjust contribution schedule lot entitlements to reflect the original entitlements prior to any, and all, relevant orders of a court, tribunal or specialist adjudicator if a lot owner submits a motion requesting such a change (to minimise the number of bodies corporate that may be required to undertake the reversion process, this amendment is proposed to take effect on the date of introduction of the Bill into the Legislative Assembly);
- establish a process for contribution schedule lot entitlements that were adjusted pursuant to the 2011 reversion process to be changed to reflect the lot entitlements that applied to the scheme prior to the application of the reversion process;
- remove unnecessary disclosure requirements imposed on sellers of lots in community titles schemes; and
- provide jurisdictional consistency for the resolution of disputes about contribution schedule lot entitlement adjustments.

Reasons for the Bill

The Act provides the regulatory framework for community titles schemes, which can include small duplexes, townhouse complexes and large multi-storey commercial and residential premises.

A body corporate, comprising all lot owners in a community titles scheme, is responsible for the management of common property for the scheme and the body corporate assets. Most shared costs associated with these responsibilities are divided between lot owners in proportion to the contribution schedule lot entitlements for the scheme. A lot entitlement is a whole number allocated to each lot in a scheme.

As contribution schedule lot entitlements determine the proportion a lot owner contributes towards the body corporate expenses, any adjustment of these lot entitlements inevitably results in financial ‘winners’ and ‘losers’; that is, adjustments will lead to some lot owners contributing more, and others contributing less, to the shared body corporate expenses. It has also been claimed that, because valuers take lot entitlements into account when arriving at a valuation, increases in contribution schedule lot entitlements (and therefore higher body corporate fees) may result in a lower lot value while a reduction in contribution schedule lot entitlements (and therefore lower body corporate fees) may increase the value of a lot.

The reversion process for contribution schedule lot entitlements

The *Body Corporate and Community Management and Other Legislation Amendment Act 2011* (the 2011 amendments) amended the Act to provide that community titles schemes which have been subject to one or more orders of a court, tribunal or specialist adjudicator for the adjustment of the scheme’s contribution schedule lot entitlements before the 2011 amendments commenced, must revert their lot entitlements to the original entitlements prior to any, and all, adjustment orders if a prescribed lot owner submits a motion to the body corporate or committee requesting such a change. This is known as the 2011 reversion process.

The 2011 reversion process has come under 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 addresses this issue by:

- removing the ability of a lot owner to compel the body corporate to undertake the reversion process; and
- where a scheme's contribution schedule lot entitlements have been adjusted under the 2011 reversion process, providing a process enabling the lot entitlements to be changed back to the entitlements as set by the last adjustment order of a court, tribunal, or specialist adjudicator that was made before commencement of the 2011 amendments.

Disclosure provisions for the sale of lots in a community titles scheme

The Act requires a seller of a lot in a community titles scheme to disclose particular information to a buyer. As part of the disclosure regime, the seller must give the buyer a disclosure statement.

The 2011 amendments require a seller to state the following additional information in the disclosure statement:

- the extent to which the annual contributions currently fixed by the body corporate as payable by the owner of the lot are based on the contribution schedule lot entitlements for the lots included in the scheme;
- the extent to which the annual contributions currently fixed by the body corporate as payable by the owner of the lot are based on the interest schedule lot entitlements for the lots included in the scheme; and
- that the contribution schedule lot entitlements, and interest schedule lot entitlements, for the lots included in the scheme are set out in the community management statement (CMS) for the scheme.

Also, for the sale of an existing lot, the 2011 amendments required the disclosure statement to be accompanied by a copy of the scheme's CMS.

The additional requirements relating to disclosure statements introduced by the 2011 amendments are considered unnecessary red tape by sellers and the real estate sector. This is because the requirements to describe the extent to which the annual contributions are based on the different lot entitlement schedules are sometimes difficult to comply with and the requirement to provide a copy of the CMS adds to conveyancing costs. Moreover, an interested buyer of an existing lot may obtain a copy of the CMS for the scheme through a search of Land Registry records and can obtain additional financial information relating to the lot by requesting a

body corporate information certificate and searching the body corporate records.

The Bill reduces the regulatory burden relating to the sale of lots by removing unnecessary additional requirements for disclosure statements introduced by the 2011 amendments.

Jurisdiction for disputes about contribution schedule lot entitlement adjustments

Under the Act, most disputes about contribution schedule lot entitlement adjustments are identified as ‘complex disputes’ that fall within the jurisdiction of a specialist adjudicator under Chapter 6 of the Act or the Queensland Civil and Administrative Tribunal (QCAT).

The 2011 amendments made specific provision for a body corporate to adjust the contribution schedule lot entitlements for the scheme by resolution without dissent. However, the 2011 amendments did not specifically provide for resolution of disputes about these adjustments by a specialist adjudicator or QCAT. It is inappropriate for these disputes to be resolved by a department adjudicator because of the complex nature of these disputes.

To ensure appropriate and consistent dispute resolution about contribution schedule lot entitlement adjustments under the Act, the Bill provides for disputes about adjustments of contribution schedule lot entitlements by resolution without dissent to be resolved by a specialist adjudicator or QCAT.

In contrast, disputes about procedural aspects of a general meeting called to consider a motion to adjust the contribution schedule lot entitlements may continue to be resolved by any dispute resolution process under Chapter 6 of the Act, including department adjudication.

Achievement of the objectives

To achieve the objectives, the Bill contains a range of amendments to the Act, which are summarised below.

1. The Bill provides that the requirement for bodies corporate to undertake the reversion process prescribed in chapter 8, part 9, division 4 of the Act following receipt of a motion from a lot owner proposing that contribution schedule lot entitlements be changed ceases to apply, and if a body corporate has not lodged a request to record a new community management statement incorporating a

change to the lot entitlements made under chapter 8, part 9, division 4 immediately before the commencement, no further action may be taken to change the lot entitlements in accordance with the reversion process.

2. The Bill introduces a new process for schemes that have had a change to the contribution schedule lot entitlements under the 2011 reversion process, whereby:
 - a lot owner may submit a request to the committee proposing an adjustment of the contribution schedule lot entitlements to reflect the contribution schedule lot entitlements as they applied prior to the 2011 reversion process, subject to any adjustments to the lot entitlements that are necessary to reflect any amalgamations or subdivisions of lots included in the scheme, or any boundary or other material changes to the scheme that occurred after the last adjustment order for the scheme that preceded the application of the reversion process; and
 - the committee must undertake a prescribed process to notify and engage the body corporate about the proposal, prior to proceeding to change the contribution schedule lot entitlements to re-instate the entitlements that applied prior to the reversion process, subject to any adjustments necessary to reflect relevant amalgamations, subdivisions, boundary alterations and any other material changes to the scheme.
3. The Bill removes the provisions of the Act which require a seller of an *existing* lot to:
 - provide a copy of the scheme's CMS with the disclosure statement given to prospective buyers;
 - state in the disclosure statement the extent to which the annual contributions currently fixed by the body corporate as payable by the owner of the lot is based on the contribution schedule lot entitlements, and interest schedule lot entitlements, for the lots included the scheme; and
 - state in the disclosure statement that the contribution schedule lot entitlements, and interest schedule lot entitlements, for the lots included in the scheme are set out in the CMS for the scheme.
4. The Bill also removes the provisions of the Act which require a seller of a *proposed* lot to state in the disclosure statement given to proposed buyers:

- the extent to which the annual contributions reasonably expected to be payable by the owner of the proposed lot is based on the contribution schedule lot entitlements, and interest schedule lot entitlements, for the lots in the scheme; and
 - that the contribution schedule lot entitlements, and interest schedule lot entitlements, for the lots included in the scheme are set out in the proposed CMS for the scheme.
5. The Bill clarifies that jurisdiction for disputes about adjustments of contribution schedule lot entitlements by resolution without dissent of the body corporate rests with QCAT or a specialist adjudicator.

Alternative ways of achieving objectives

Legislative amendment is the only way to achieve the objectives. Therefore, no other options were considered.

Estimated cost for government implementation

Any costs associated with the implementation of this Bill will be met within existing resources.

Consistency with fundamental legislative principles

In accordance with *section 4(2)(a)* of the *Legislative Standards Act 1992*, a fundamental legislative principle is that legislation has sufficient regard to the rights and liberties of individuals.

Ending the 2011 ‘reversion process’

The Bill removes the ability of a lot owner to compel a body corporate to undertake the ‘reversion process’ prescribed in chapter 8, part 9, division 4 of the Act, whereby the contribution schedule lot entitlements are changed to reflect the original entitlements prior to any, and all, orders (adjustment orders) of a court, tribunal or specialist adjudicator for the adjustment of the scheme’s contribution schedule lot entitlements.

It is arguable that this amendment adversely affects some individuals by discontinuing an existing statutory right for lot owners in certain community titles scheme to require their body corporate to return to earlier contribution schedule lot entitlements, notwithstanding that the lot entitlements have been lawfully adjusted by a judicial or quasi-judicial process.

However, it is considered the possible breach of fundamental legislative principles in ending the reversion process introduced in 2011 is justified and necessary on the basis that it removes the mechanism whereby independent and lawful decisions of specialist adjudicators, tribunals and courts are effectively over-ridden not by superior judicial bodies, but by simple motions presented to a body corporate by an individual aggrieved lot owner.

Under the Bill, amendments to end the reversion process introduced in 2011 will be deemed to commence upon introduction of the Bill into the Legislative Assembly. Moreover, ‘incomplete adjustment matters’ (as defined in the Bill) will also be deemed to be ineffective as of the date of introduction.

As a result, it is arguable that the amendment fails to have adequate regard to the rights and liberties of individuals by adversely affecting rights retrospectively (*Legislative Standards Act 1992, section 4(g)*).

The limited retrospective operation of the Bill in this respect is considered justified as a means of avoiding unnecessary costs and disruption in community titles schemes which are currently subject to a reversion process, or which otherwise could be subject to a reversion process prior to the passage of the Bill. This is particularly important given that the Bill will facilitate a process (discussed below) to enable bodies corporate to change their contribution schedule lot entitlements back to the lot entitlements that applied to the scheme, prior to the intervention of the reversion process introduced in 2011.

New mechanisms for adjusting lot entitlements affected by the 2011 reversion process

The Bill provides a new process for dealing with contribution schedule lot entitlements that have been affected by the reversion process introduced in 2011. In summary, the Bill provides arrangements whereby:

- a lot owner may submit a request to the committee proposing an adjustment of the contribution schedule lot entitlements to reflect the contribution schedule lot entitlements as they applied prior to the 2011 reversion process, subject to adjustments to the lot entitlements that are necessary to reflect any amalgamations or subdivisions of lots included in the scheme, or any boundary or other material changes to the scheme that occurred after the last adjustment order for the scheme that preceded the application of the reversion process; and

- the committee must undertake a prescribed process to notify and engage the body corporate of the proposal, prior to changing the contribution schedule lot entitlements to re-instate the lot entitlements that applied prior to the reversion process, subject to any adjustments necessary to reflect relevant amalgamations, subdivisions, boundary alterations and any other material changes to the scheme.

It is arguable that the new process for dealing with changes to contribution schedule lot entitlements contravenes fundamental legislative principles by adversely impacting on lot owners who benefited from the reversion process introduced in 2011 (for example, lot owners whose contribution schedule lot entitlements were proportionally lowered as a result of the reversion process resulting in proportionally lower body corporate contributions).

However, the potential breach of fundamental legislative principles is considered justified and necessary as a means of achieving the policy objective of re-instating the effect of independent judicial and quasi-judicial decisions lawfully sought by lot owners, and made, prior to commencement of the 2011 reversion process.

New offences

The Bill includes new offence provisions, which apply if a body corporate fails to lodge a request to record a new community management statement to implement a decision of the body corporate, specialist adjudicator or QCAT under the Act that the contribution schedule lot entitlements be adjusted.

The new offence provisions are considered necessary to ensure lawful decisions to adjust contribution schedule lot entitlements are given effect through a new community management statement.

The new offences and maximum penalties are consistent with offence and maximum penalty provisions applying to other provisions of the Act requiring a body corporate to lodge a request to record a new community management statement.

Consultation

Community

No community consultation has been undertaken on the Bill.

Government

Consultation has occurred with central government agencies.

Notes on Provisions

Part 1 Preliminary

Clause 1 establishes the short title of the Act as the Body Corporate and Community Management and Other Legislation Amendment Act 2012.

Clause 2 provides for commencement of the Act.

Part 2 Amendment of Body Corporate and Community Management Act 1997

Clause 3 provides that Part 2 amends the *Body Corporate and Community Management Act 1997*.

Clause 4 inserts new *sections 47AA, 47AB and 47AC*.

New section 47AA provides jurisdiction to a specialist adjudicator or the Queensland Civil and Administrative Tribunal (QCAT) for resolution of disputes about a change to the contribution schedule lot entitlements for lots included in a community titles scheme where the body corporate for the scheme has, under *section 47A*, agreed to the change by a resolution without dissent.

New section 47AA makes it clear that, except for a dispute about whether the changes to the contribution schedule lot entitlements decided by the body corporate are consistent with the relevant principle used as the basis for the change, an owner of a lot included in the scheme may not make an application under Chapter 6 or to QCAT in relation to a dispute about the

changes to the contribution schedule lot entitlements decided by the body corporate under section 47A; and QCAT or, under Chapter 6, a department adjudicator or specialist adjudicator has no jurisdiction to determine such disputes.

New section 47AA also makes it clear that under Chapter 6 a department adjudicator or specialist adjudicator has no jurisdiction to determine a dispute about whether or not a body corporate acted reasonably under *section 94(2)* in deciding to pass, or not to pass, a resolution for a motion under *section 47A*.

New section 47AA does not prevent a lot owner from making an application for resolution of a dispute under Chapter 6 in relation to a procedural irregularity associated with a general meeting to decide a motion under *section 47A*.

New section 47AB provides for procedural matters for applications made under *new section 47AA*.

New section 47AC provides the obligations for the body corporate if, on an application under *new section 47AA(3)*, the specialist adjudicator or QCAT makes an order that the changed contribution schedule lot entitlements are not consistent with the relevant principle.

Clause 5 amends *section 47B(2)* to clarify the application of *section 47B* where there has been a change to the contribution schedule lot entitlements for the lots included in a scheme under *section 47A*, as a result of an order of a specialist adjudicator or QCAT mentioned in *new section 47AC* or a decision in relation to an appeal from an order of a specialist adjudicator or QCAT mentioned in *new section 47AC*.

Clause 6 reduces the regulatory burden on sellers of existing lots included in a community titles scheme by simplifying the disclosure statement that sellers must give to buyers under *section 206(1)* of the Act. Specifically, *clause 6* removes the requirement for sellers to state in the disclosure statement:

- the extent to which the annual contributions currently fixed by the body corporate as payable by the owner of the lot are based on the contribution schedule of lot entitlements for the scheme (*section 206(2)(b)(ii)*);
- the extent to which annual contributions currently fixed by the body corporate as payable by the owner of the lot are based on the interest

schedule of lot entitlements for the scheme (*section 206(2)(b)(iii)*); and

- that the contribution schedule lot entitlements and interest schedule lot entitlements for lots included in the scheme are set out in the community management statement for the scheme (*section 206(2)(b)(iv)*).

Clause 6 also reduces the regulatory burden by removing the requirement for sellers of existing lots to provide buyers with a community management statement as an accompaniment to the disclosure statement under *section 206(2)(g)*.

Clause 7 omits *section 206B* of the Act. In doing so, *clause 7* reduces the disclosure burden on sellers of existing lots in community titles schemes by removing the requirement for a seller to give a buyer copies of any new community management statements for the scheme that are recorded after the contract is entered into, but before the contract settles.

Clause 8 omits *section 209(1)(b)(ii)*, which provides that a buyer of an existing lot may terminate the contract if the copy of the community management statement that was attached to the contract when it was entered into is different from the community management statement most recently advised to the buyer, and the buyer would be materially prejudiced if compelled to complete the contract, given the difference.

Section 209(1)(b)(ii) is being removed as a consequence of the removal of *section 206(2)(g)* and *section 206B* which require a seller to give a buyer a copy of the community management statement before they enter the contract and copies of any new community managements statements recorded after the contract is entered into, but before the contract settles.

Clause 8 also includes consequential amendments to *sections 209(1)(c)(ii)* and *209(3)* to reflect the renumbering of *section 209(1)(b)*.

Clause 9 reduces the regulatory burden on the seller of a proposed lot intended to come into existence as a lot included in a community titles scheme, when the scheme is established or changed, by simplifying the disclosure statement that the seller must give to a buyer under *section 213(1)* of the Act. Specifically, *clause 9* removes the requirement for sellers to state in the disclosure statement:

- the extent to which annual contributions reasonably expected to be payable to the body corporate by the owner of the lot are based on the

contribution schedule of lot entitlements for the scheme (*section 213(2)(a)(ii)*);

- the extent to which annual contributions reasonably expected to be payable to the body corporate by the owner of the lot are based on the interest schedule of lot entitlements for the scheme (*section 213(2)(a)(iii)*); and
- that the contribution schedule lot entitlements and interest schedule lot entitlements for lots included in the scheme are set out in the proposed community management statement for the scheme (*section 213(2)(a)(iv)*).

Clause 10 amends *section 228* of the Act to expressly state that the role of Chapter 6 in resolving disputes about the adjustment of lot entitlement schedules is subject to new *sections 47AA* and *406*, which prescribes particular arrangements for the resolution of disputes about the adjustment of contribution schedule lot entitlements.

Clause 11 inserts notes into *section 229* of the Act to highlight that new *sections 47AA* and *406* contain particular provisions relating to disputes arising in relation to *section 47A* and new *sections 404* or *405* of the Act.

Clause 12 inserts a note under *section 379* to highlight that, as provided under new *section 398*, *section 379* no longer applies.

Clause 13 inserts a new Chapter 8, Part 10 setting out new provisions establishing transitional arrangements for the amendments contained in the Bill.

New section 397 provides definitions for particular terms used in new Part 10 and new Schedule 5A.

New sections 398 and *399* remove the requirement for bodies corporate to undertake the reversion process prescribed in Chapter 8, Part 9, Division 4 of the Act for adjusting contribution schedule lot entitlements following receipt of a motion from a lot owner proposing that contribution schedule lot entitlements be changed to reflect the original setting prior to any, and all, relevant orders of a court, tribunal or specialist adjudicator.

New section 398 provides that on the commencement, *section 379* ceases to apply.

New section 399 provides that on the commencement, an incomplete adjustment matter relating to the reversion process under Chapter 8, Part 9, Division 4 of the Act ceases to have effect. *New section 399* makes it clear

that an incomplete adjustment matter is taken never to have been made and no further action may be taken in relation to an incomplete adjustment matter. Incomplete adjustment matters are defined in new *section 397* and set out in new Schedule 5A.

New sections 400 to 413 provide a process whereby the contribution schedule lot entitlements for community titles schemes that have been subject to an adjustment under Chapter 8, Part 9, Division 4 may be adjusted to reflect the lot entitlements established by the last adjustment order (as defined in new section 401).

New Section 400 provides for the application of new Chapter 8, Part 10, Division 3.

New section 401 provides definitions for Chapter 8, Part 10, Division 3.

New section 402 provides that unfinalised proceedings in relation to matters under Chapter 8, Part 9, Division 4 cease to have effect if a process for reinstating contribution schedule lot entitlements is undertaken in accordance with new Chapter 8, Part 10, Division 3.

New section 403 enables an owner of a lot included in a scheme to which Chapter 8, Part 10, Division 3 applies to submit a request to the committee proposing that the contribution schedule lot entitlements be adjusted to reflect the last adjustment order entitlements.

New section 403 also specifies the process the committee must follow prior to deciding the request.

New section 404 requires the committee to make a decision in relation to any modifications to the last adjustment order entitlements that should be made and to notify each lot owner of the decision. Subject to new *section 404(5)* the body corporate must lodge a request to record a new community management statement incorporating the changed lot entitlements.

New section 405 establishes a similar process for a body corporate of a specified two-lot scheme to change the scheme's contribution schedule lot entitlements to reflect the last adjustment order entitlements.

New section 406 enables a lot owner who believes that the changed lot entitlements do not accurately reflect the last adjustment order entitlements (as modified in accordance with Chapter 8, Part 10, Division 3, Subdivision 3, as applicable) to make an application for an order of a specialist adjudicator or QCAT for an adjustment of the contribution schedule for lots included in the scheme to reflect the last adjustment order entitlements.

New section 407 sets out the matters a specialist adjudicator or QCAT must have regard to in determining an application under section 406. It also imposes an obligation on bodies corporate to lodge a request to record a new community management statement if a specialist adjudicator or QCAT makes an order for the adjustment of contribution schedule lot entitlements.

New section 408 provides for the recording of the new community management statement incorporating a change to the contribution schedule lot entitlements of the difference between the new statements and existing statement is limited to changes made or ordered under Chapter 8, Part 10, Division 3.

New section 409 provides for responsibility for costs incurred under Chapter 8, Part 10, Division 3.

New sections 410 to 413 state how contribution schedule lot entitlements for lots which have been subject to a subdivision, amalgamation, boundary change or material change are to be dealt with if the contribution schedule lot entitlements are to be changed under *new sections 404, 405 and 407*.

New section 414 provides that if, immediately before the commencement, a buyer may have terminated a contract under *former section 206*, *former section 206* continues to apply to the contract.

New section 415 provides that if, immediately before the commencement, a buyer may have cancelled a contract under *former section 206B*, *former section 206B* continues to apply to the contract.

New section 416 provides that if, immediately before the commencement, a buyer may have terminated a contract under *former section 209* on the grounds stated in *new section 416*, *former section 209* continues to apply to the contract.

New section 417 provides that if, immediately before the commencement, a buyer may have terminated a contract under *former section 213*, *former section 213* continues to apply to the contract.

New section 418 provides that if, immediately before the commencement, a buyer may have terminated the contract under *section 214* because the buyer would, because of an inaccuracy mentioned in *new section 418(1)(a)*, have been materially prejudiced if compelled to complete the contract, the buyer may terminate the contract under *section 214*.

New section 419 provides that if, immediately before the commencement, a buyer may have terminated a contract under *section 217* because the buyer

Part 4 **Amendment of Queensland Civil and Administrative Tribunal Rules 2009**

Clause 19 provides that Part 4 amends the *Queensland Civil and Administrative Tribunal Rules 2009*.

Clause 20 amends rule 44. Rule 44 sets out the general requirements for responding to an application to QCAT. For applications to QCAT that may currently be made under the *Body Corporate and Community Management Act 1997*, a respondent who wishes to respond to the application must make the response within 14 days after the respondent is given a copy of the application. *Clause 20* amends rule 44 to also apply this same timeframe to an application to QCAT under new *sections 47AA, 406 and 408* of the *Body Corporate and Community Management Act 1997*.

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