

Body Corporate and Community Management and Other Legislation Amendment Bill 2023

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (Human Rights Act), I, Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence make this statement of compatibility with respect to the Body Corporate and Community Management and Other Legislation Amendment Bill 2023 (Bill).

In my opinion, the Bill is compatible with the human rights protected by the Human Rights Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The *Body Corporate and Community Management Act 1997* (BCCM Act) provides for the establishment, administration, and termination of community titles schemes. The BCCM Act sets out the legislative framework for community titles schemes, addressing a wide range of matters including governance and decision-making structures, meeting requirements, financial and property management, insurance, and by-laws.

The Bill amends the BCCM Act (with minor, consequential amendments to the *Land Title Act 1994*) to deliver a number of improvements and clarifications to the legislation. Some amendments were informed by relevant recommendations of the Property Law Review, undertaken for the Government by the Queensland University of Technology, and consideration of those recommendations by the Community Titles Legislation Working Group (CTL Working Group). The Bill makes amendments to:

- deliver a key action of the 2022 Queensland Housing Summit by reforming the BCCM Act to allow for termination of uneconomic community titles schemes to facilitate renewal and redevelopment;
- deliver a 2020 election commitment to implement amendments to the BCCM Act to allow an adjudicator the power to approve alternative insurance arrangements, and to make supporting amendments to complement this change; and
- modernise and improve the operation of the BCCM Act in relation to by-laws and other governance issues, including administrative and procedural matters.

The *Land Sales Act 1984* (Land Sales Act) regulates contracts for what are commonly known as 'off the plan' sales of land in Queensland (more technically, the sale of proposed lots). Provisions dealing with 'off the plan' sales of apartments and other lots proposed to be included in community titles-style developments in Queensland are contained in the BCCM Act, the

Building Units and Group Titles Act 1980 (BUGT Act), and the *South Bank Corporation Act 1989* (South Bank Act).

The Bill makes amendments to strengthen buyer protections for ‘off the plan’ residential property contracts as follows:

- amendments to the Land Sales Act to strengthen buyer protections by limiting when sunset clauses can be used to terminate ‘off the plan’ contracts for the sale of land; and
- minor amendments to confirm the policy intent of existing provisions of the Land Sales Act, the BCCM Act, the BUGT Act, and the South Bank Act (collectively referred to as the relevant Acts) about the release of deposits paid by buyers under ‘off the plan’ contracts for the sale of land (Land Sales Act) or lots in community titles-style developments (BCCM Act, BUGT Act, and South Bank Act).

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights engaged by the Bill are:

- Property rights (section 24 of the Human Rights Act);
- Privacy and reputation (section 25 of the Human Rights Act); and
- Cultural rights – generally (section 27 of the Human Rights Act).

Property rights (section 24 of the Human Rights Act)

Clause 7 of the Bill provides for the termination of community titles schemes and includes a new process for the sale and termination of schemes, where there are economic reasons for termination (as defined in the Bill). In summary, amendments contained in the Bill will allow termination of an uneconomic community titles scheme with the approval of 75% of the owners of lots included in the scheme. This new process has the potential to limit property rights of a minority of owners of lots who may be compelled to sell their lots as part of a collective sale, despite not supporting the sale and termination of the community titles scheme.

Clause 9 of the Bill may lead to circumstances where a lot owner or occupier’s vehicle is removed from the common property of a community titles scheme, without a more extensive dispute resolution process that provides an opportunity for the vehicle owner to respond to allegations that they have breached a by-law, before action is taken in relation to their vehicle. This may limit property rights as it may deprive the person of their property (their vehicle) and require them to pay the costs associated with the towing and storage of the vehicle. The person may also have their property rights affected if they experience loss from, or damage to, the vehicle as a result of the towing.

Clauses 10 and 11 of the Bill may limit property rights of lot owners in a community titles scheme by restricting their ability to smoke on their own lot and the common property for the scheme (which is jointly owned by the owners of all lots included in the scheme).

Clause 10 of the Bill requires the occupier of a lot included in a community titles scheme to ensure that their use (or their invitee's use) of a smoking product on their lot or the common property does not regularly expose the occupier of another lot or their invitee, or another person lawfully on the common property, to smoke or emission from the smoking product in the other lot or on the common property.

Clause 11 of the Bill enables a body corporate for a community titles scheme to make a by-law restricting the smoking or inhaling of smoking products on the common property for the scheme or the outdoor area of a lot, such as a balcony or courtyard.

Clause 11 of the Bill also clarifies a body corporate's ability to regulate the keeping or bringing of an animal onto a lot or common property. Property rights may be limited by the body corporate's ability to make a by-law requiring body corporate approval to keep or bring an animal onto a lot or the common property, to impose conditions as part of its approval, and to refuse the keeping of an animal if satisfied on reasonable grounds of a matter set out in the clause.

Clauses 14, 16 and 25 of the Bill may impact on a person's property rights by depriving a person of property by potentially requiring them to pay a penalty for failure to comply with a by-law contravention notice or failing to provide required access to body corporate records.

Clause 50 of the Bill may limit a seller's property rights, by limiting the ability of a seller to use a sunset clause to terminate an 'off the plan' contract for land to the following situations – with the written consent of the buyer; or under a Supreme Court order; or in another way prescribed by regulation. However, the limit on property rights will only apply in instances where the seller is an individual, rather than a corporation.

Privacy and reputation (section 25 of the Human Rights Act)

Clause 7 of the Bill may impact on a person's right to privacy in the context of personal information that may be obtained in relation to a community titles scheme, the value of individual lots, and details of leasehold arrangements, for the purposes of undertaking a process for the termination of the scheme (including development of a termination plan).

Furthermore, Clause 7 may also impact on a person's right to privacy by enabling circumstances in which a person may be required to vacate a home or business premises that they own or lease due to the forced sale of the lot under the new process for economic reasons terminations of community titles schemes.

Clause 25 of the Bill may limit the right to privacy and reputation by allowing body corporate records for a community titles scheme in a layered arrangement of community titles schemes to be accessed by the body corporate for, and owners of lots included in, a subsidiary scheme. The clause may also limit this right by allowing access to body corporate records for a community titles scheme in a layered arrangement of community titles schemes by the body corporate for another community titles scheme (or the owner or occupier of a lot included in another scheme) that is included in the layered arrangement, for the limited purpose of

identifying a person that has breached (or is breaching) body corporate by-laws, to enable enforcement of the by-law.

Cultural rights (section 27 of the Human Rights Act)

Clauses 10 and 11 of the Bill may limit the cultural rights of the owner or occupier of a lot in a community titles scheme, by restricting the ability of the owner or occupier to carry out cultural practices that involve smoking on their own lot and the common property for the scheme (which is jointly owned by the owners of all the lots included in the scheme).

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Property rights (section 24 of the Human Rights Act)

(a) the nature of the right

Section 24 of the Human Rights Act provides that all persons have the right to own property alone or in association with others and that a person must not be arbitrarily deprived of the person's property. The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality, and freedom.

Property includes real and personal property (for example, interests in land, chattels, and money), including contractual rights, leases, shares, patents, and debts. Property can also include statutory rights and non-traditional or informal rights and other economic interests.

The term 'deprived' is not defined by the Human Rights Act. However, deprivation in this sense is considered to include the substantial reduction of a person's use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use their property or part of that property (including enjoying exclusive possession of it, disposing of it, transferring it, or deriving profits from it).

The concept of arbitrariness in the context of the right to property carries a meaning of capriciousness, unpredictability, injustice, and unreasonableness – in the sense of not being proportionate to the legitimate aim sought. Whether a deprivation of property is arbitrary therefore needs to be considered in light of the elements of proportionality, as set out below.

Various provisions of the Bill may limit property rights, as set out below.

1. Termination of community titles schemes (required sale of lots)

Clause 7 of the Bill sets out a new process for termination of uneconomic community titles schemes that has the potential to limit property rights of a minority of owners who do not support sale (and termination) of the scheme. In summary, the new process will permit the owners of 75% or more lots in the scheme to resolve to undertake a collective sale process and terminate the scheme, essentially compelling other lot owners to sell their lot without their agreement. This will require that the body corporate first establish, based on consideration of

prescribed information about the scheme, that there are economic reasons for termination. Economic reasons are either that it is now, or will in five years be, not economically viable to continue to repair or maintain the community titles scheme, or that for a scheme with all lots used for commercial purposes, that it not economically viable for the scheme to continue.

Furthermore, the Bill has the potential to limit property rights of persons leasing lots in community titles schemes, where those leases end early as a result of the sale of the lots and termination of the scheme. This may include residential tenancies as well as leases used for commercial purposes.

2. Towing motor vehicles from common property

Clause 9 of the Bill amends the BCCM Act to clarify that nothing in the BCCM Act prevents a body corporate from towing a motor vehicle from the common property for the scheme under another Act or otherwise according to law.

Clause 9 also amends the BCCM Act to provide that, when a motor vehicle owned or operated by an owner or occupier of a lot in the scheme is parked in contravention of a by-law and the vehicle is towed by the body corporate, the body corporate is not required to comply with a requirement under chapter 3, part 5, division 4 (By-law contraventions), including contravention notice requirements.

These amendments may lead to circumstances where a person's vehicle is removed from the common property of a community titles scheme without a more extensive dispute resolution process that provides an opportunity for the vehicle owner to respond to allegations that they have breached a by-law, before action is taken in relation to their vehicle.

An owner or occupier of a lot included in a community titles scheme may have their property rights limited as the provisions may deprive the person of their property (their vehicle) and require them to pay the costs associated with the towing and storage of the vehicle. A person may also have their property rights affected if they experience loss from, or damage to, the vehicle as a result of the towing.

3. Prohibition or restriction on smoking in community titles schemes

As outlined above, deprivation of property is considered to include the substantial reduction of a person's use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use their property or part of that property.

The Bill may limit a person's use and enjoyment of their property by introducing restrictions on smoking on their lot or common property (owned jointly by all lot owners within a scheme).

Section 167 of the BCCM Act provides that an occupier of a lot must not cause a nuisance, hazard, or unreasonable interference to the use or enjoyment of another lot or the common property. Clause 10 of the Bill provides that an occupier of a lot contravenes section 167 if they regularly use (or permit their invitee to regulatory use) a smoking product on the lot or the common property of the scheme and an occupier of another lot or their invitee, or a person

lawfully on the common property, is regularly exposed to the smoke or emission from the smoking product in the other lot or on the common property.

The extent of the limitation on property rights under clause 10 will vary according to the physical characteristics of the particular scheme (for example, the proximity of the person's lot to other lots) and the occupier's particular smoking habits and behaviours).

Clause 11 of the Bill provides that a body corporate for a community titles scheme may make a by-law prohibiting or restricting occupiers of lots included in the scheme from the smoking or inhaling of all or some smoking products in specified areas. This includes all or part of the common property or body corporate assets (other than common property or body corporate assets that an occupier of a lot may use under an exclusive use by-law), and all or part of an outdoor area of their lot, or common property or a body corporate asset an occupier of a lot may use under an exclusive use by-law (for example, a balcony, patio, courtyard or verandah).

The extent of the limitation on property rights under clause 11 will vary, as not every scheme will implement a smoking by-law, and schemes that implement a smoking by-law might do so in different ways that have different limitations on property rights (for example, by prohibiting smoking only on common property and not balconies; by prohibiting smoking only on balconies and not common property; by prohibiting smoking everywhere except a designated outdoor smoking area).

While smoking in indoor common areas is already restricted by the *Tobacco and Other Smoking Products Act 1998*, smoking on outdoor areas of common property is not currently expressly prohibited. A body corporate may currently make by-laws about smoking in community titles schemes, but there is uncertainty about the extent to which they may prohibit smoking given interpretations of the BCCM Act have found that a by-law currently may only regulate activities, but not prohibit them.

The amendments do not directly affect a person's ability to own or rent a property included in a community titles scheme. However, the presence of a body corporate by-law prohibiting smoking on a property's balcony and/or common property may mean a smoker does not find the property desirable to buy or lease.

4. Keeping or bringing of animals on a lot or on common property

As outlined above, deprivation of property is considered to include the substantial reduction of a person's use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use their property or part of that property.

Clause 11 of the Bill states that a body corporate may make a by-law requiring that an occupier seek the permission of the body corporate before keeping or bringing an animal onto a lot or the common property. The clause also provides a body corporate may attach reasonable conditions to its approval and that the body corporate's approval may be withdrawn if the occupier does not comply with the conditions stated in the written notice given to the occupier.

A body corporate may only refuse to grant approval if satisfied on reasonable grounds of any of the following matters:

- keeping the animal would pose an unacceptable risk to the health and safety of an owner or occupier of a lot because: (i) the owner or occupier is unwilling or unable to keep the animal in accordance with reasonable conditions that address the risk; or (ii) the risk could not reasonably be managed by conditions imposed on the keeping of the animal;
- keeping the animal would contravene a law;
- the animal is a regulated dog under the *Animal Management (Cats and Dogs) Act 2008*;
- keeping the animal would unreasonably interfere with an occupier of another lot's use and enjoyment of the lot or common property and the interference could not reasonably be managed by conditions imposed on the keeping of the animal;
- keeping the animal would unreasonably interfere with native fauna that live on, or visit, the scheme land and the interference could not reasonably be managed by conditions imposed on the keeping of the animal;
- the occupier does not agree to reasonable conditions proposed by the body corporate for keeping the animal;
- another matter prescribed under the regulation module applying to the scheme.

The Queensland Civil and Administrative Tribunal (QCAT) has described the keeping of an animal as an ordinary domestic activity. Clause 11 may limit a person's rights to use and enjoy their property by keeping an animal. It is, however, important to note that the amendment may generally increase the ability for occupiers to keep a pet in a community titles scheme, given it provides more clarity regarding which animal by-laws will be valid, and specifically limits the situations in which a body corporate can refuse approval of a request to keep an animal.

5. Penalties

The Bill also provides for penalties to be imposed for contraventions of the following obligations:

- failure of a person to comply with a continuing contravention notice or future contravention notice given to the person by the body corporate (clauses 14 and 16);
- failure of a body corporate for a community titles scheme in a layered arrangement of community titles schemes to permit an interested person to inspect the body corporate records or give the person a copy of a record kept by the body corporate (clause 25).

Penalty provisions may impact on a person's property rights by depriving a person of property (money) by requiring them to pay a penalty for contraventions of legislation.

6. *Use of sunset clause to terminate an ‘off the plan’ contract for land*

Clause 50 of the Bill provides that a seller of a proposed lot may only terminate an ‘off the plan’ contract for the sale of land under a sunset clause if the seller receives the written consent of the buyer to the termination; or under a Supreme Court order; or in another situation prescribed by regulation. ‘Sunset clauses’ are clauses in ‘off the plan’ contracts that provide a right for the contract to be terminated if a relevant event does not happen by a specified sunset date. The Bill defines relevant events as the registration of the plan of subdivision for the proposed lot the subject of the contract; the creation of a separate indefeasible title for the proposed lot the subject of the contract; settlement of the contract; or another event prescribed by regulation.

Previously, there have been no specific restrictions in the Land Sales Act on the ability of a seller to utilise a sunset clause within an ‘off the plan’ contract for land to terminate the contract. Accordingly, the Bill may limit a seller’s property rights, as it will limit the seller’s ability to execute a clause in a contract pertaining to a property it owns. However, it is noted that, for ‘off the plan’ contracts for the sale of land, the seller will generally be a property developer. In many cases, a property developer will be a corporation and not an individual. Only individuals have human rights (section 11(2) of the Human Rights Act).

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

1. *Termination of community titles schemes (required sale of lots)*

The limitation on property rights to be imposed by the new statutory termination process will enable community titles schemes to be terminated without agreement of all owners in circumstances where there are unsustainable ongoing costs associated with maintaining or repairing the scheme, or for a commercial scheme, where the scheme is no longer economically viable. This will require that economic reasons for termination be evidenced by authoritative information and agreed to by at least 75% of lot owners.

The limitation on human rights is for the purpose of ensuring that the greater majority of owners of lots are not tied to potentially exorbitant and unsustainable costs associated with maintaining or repairing the scheme, or operating a non-viable commercial scheme, because a small number of owners refuse to sell their lots. Given the sharing of ownership that is intrinsic to community titles schemes, decisions of the body corporate do not ordinarily require unanimous agreement, as this is extremely difficult to achieve.

Termination however is one of very few decisions under the BCCM Act that effectively requires unanimity (or alternatively, an order of the District Court). While this is a suitable requirement consistent with the protection of property rights for termination in general, it is not suitable where exigent circumstances require a more democratic basis for decision making in order to avoid compounding economic detriment for the majority of owners (which arguably, seriously and adversely impacts on the property rights of those owners).

Ageing schemes that are becoming rundown also present a safety issue for owners and occupiers and the broader community. The limitation on property rights in the Bill will contribute to community safety by ensuring that ageing schemes in need of demolition can be redeveloped in line with modern building and safety standards. Further, it will in many cases, facilitate higher-density redevelopment creating increased housing opportunities in the community given some older schemes could be perceived as underutilising sites.

The potential limitation will therefore support better-quality and economically viable communally owned buildings and contribute to housing supply. While the reform will limit the property rights of some lot owners in an uneconomic community titles scheme, it will promote the property rights of other owners in the scheme that wish to sell their lots as part of a collective sale. The rights of minority owners will also be protected by minimum compensation requirements and review rights. In these respects, the limitation on property rights is not arbitrary and is consistent with a free and democratic society based on human dignity, equality and freedom.

2. Towing motor vehicles from common property

Parking on common property can be a significant and problematic issue in community titles schemes, particularly in situations where a vehicle is blocking ingress or egress to the scheme or a lot or blocking access to utility infrastructure.

A range of options are available to bodies corporate to manage parking on common property, including body corporate by-laws.

Where a body corporate considers that an owner or occupier of a lot in a community titles scheme has breached the by-laws of the scheme, chapter 3, part 5, division 4 of the BCCM Act sets out a procedure to be followed by a body corporate to enforce the by-laws. The procedure includes issuing a contravention notice and, in the event the notice is not complied with, the body corporate can commence proceedings in the Magistrates Court to enforce the by-laws or make a dispute resolution application under chapter 6 of the BCCM Act.

The BCCM Act does not provide any express authority for a body corporate to tow a motor vehicle. There is the ability for motor vehicles to be towed under legal powers outside the BCCM Act; however, if the motor vehicle is owned or operated by an owner or occupier of a lot included in the scheme and is parked in contravention of a body corporate by-law, the by-law enforcement process must be followed to enforce the by-law.

Stakeholders have raised that there is confusion regarding the ability of bodies corporate to tow vehicles. Additionally, using the by-law enforcement process in the BCCM Act to enforce breaches of parking by-laws can lead to significant delays and stakeholders have raised that there is often a need to respond more rapidly to parking issues in community titles schemes.

The purpose of the provisions clarifying the existing power of bodies corporate to tow outside of the BCCM Act, and removing the requirement for bodies corporate to enforce a contravention of body corporate by-laws via the by-law enforcement process if a motor vehicle is owned or operated by an owner or occupier of a lot, is to ensure a body corporate can reduce

or avoid adverse impacts of parking on common property for other owners and occupiers of lots in the scheme, in a timely manner.

For example, motor vehicles parked on common property in areas not designated for parking may create safety concerns and could materially impede entry and exit of other vehicles (including emergency vehicles) to and from the scheme land. They may also block access to critical infrastructure such as water, electricity, or fire safety plant and equipment, which may have to be accessed or repaired urgently (including blocking egress for fire escapes, which may put the body corporate in breach of fire safety regulations).

As common property is jointly owned by all owners of lots in a community titles scheme, the amendment supports the property rights of other owners and occupiers by ensuring they can access scheme land and their lots.

The amendment also supports the right to life (section 16 of the Human Rights Act) by enabling the body corporate to respond rapidly when vehicles are blocking access to the scheme by emergency vehicles, blocking access to fire safety plant and equipment, or blocking egress for fire escapes, to ensure the health and safety of owners and occupiers in the scheme.

Accordingly, while making it easier for a body corporate to tow a motor vehicle owned or operated by the owner of a lot may impact a person's property rights if their vehicle is towed, the limitation supports the property rights and safety of other owners and occupiers in the scheme and is therefore consistent with a free and democratic society based on human dignity, equality, and freedom.

3. Prohibition or restriction on smoking in community titles schemes

Second-hand smoke is a significant issue of concern for residents in community titles schemes, particularly as smoke from neighbouring lots can penetrate into other lots or the common property, given the typically close proximity of lots in these schemes. The negative health impacts of second-hand smoke are well established.

The purpose of the provisions that prohibit or restrict smoking in community titles schemes is to protect occupiers and visitors in these schemes from the health risks associated with second-hand smoke, by reducing their exposure to second-hand smoke in their lot and on the common property arising from the smoking or inhaling of smoking products by occupiers of other lots (and their invitees) in the scheme.

By reducing the exposure of occupiers and visitors in community titles schemes to the harmful effects of second-hand smoke, the amendments support the right to life (section 16, Human Rights Act).

It is acknowledged there is a view that the amendments do not support the right to life, if co-habitants of smokers may be exposed to increased levels of second-hand smoke due to smokers choosing to smoke indoors, given the restrictions on smoking in outdoor areas of a property. However, it will not always follow that this will occur, given that there may be other easily accessible areas that a person can access to smoke, such as a designated smoking area on

scheme land or the street outside the scheme, and smokers may deliberately choose not to expose their co-habitants to smoke, by ceasing smoking or smoking in an alternative place.

It is clear from stakeholder concerns that non-smoking owners of lots in community titles schemes often have their property rights impacted as they are unable to utilise outdoor areas of their lots without being exposed to second-hand smoke or have to close all doors and windows in their lot to limit smoke ingress. The amendments will therefore also support the property rights of these owners to use and enjoy their lots without interference from second-hand smoke.

In seeking to protect the human rights of non-smoking occupiers and visitors in community titles schemes, the purpose of the amendments is consistent with a free and democratic society based on human dignity, equality and freedom.

4. Keeping or bringing of animals on a lot or on common property

Australia has a high level of pet ownership and the keeping of animals in community titles schemes is an increasingly important issue as more people choose to live in these schemes. There is evidence that many bodies corporate have invalid by-laws that prohibit pets, and that some bodies corporate unreasonably refuse requests to keep an animal.

Clause 11 of the Bill allows a body corporate to make a by-law requiring body corporate approval to keep a pet; to impose conditions on the keeping of an animal as part of its approval under a by-law and withdraw its approval if the conditions are not complied with; and to refuse approval for the keeping of an animal on particular grounds.

While, on the face of it, the amendments in the Bill may seek to place limitations on the ability for owners and occupiers to keep and bring pets into their lot or the common property, the amendments actually seek to reduce the barriers to lot owners and occupiers keeping animals in community titles schemes. The Bill does this by including specific provisions in the BCCM Act about how a body corporate may regulate the keeping of animals, broadly based on existing interpretations of the BCCM Act.

Clause 11 supports the property rights of owners and occupiers of lots in community titles schemes by providing that body corporate by-laws cannot prohibit the keeping or bringing of an animal onto a lot or the common property of the community titles scheme, or restrict the number, type, or size of an animal that an occupier of the lot may keep or bring onto the lot or common property for the scheme. Clause 11 also limits the ability to refuse an application to keep an animal, except based on a specific list of reasons.

The amendments are intended to ensure an appropriate balance between allowing animals to be kept in community titles schemes, while also ensuring that the keeping of an animal will not significantly adversely impact the occupiers of other lots in the scheme.

Many of the reasons that a body corporate may refuse a request to keep an animal under clause 11 support the right to life (section 16, Human Rights Act) by protecting other occupiers of the scheme against risks to health and safety (for instance, where an occupier has a severe allergy) and against regulated dogs under the *Animal Management (Cats and Dogs) Act 2008*.

The amendments relating to the imposition of conditions, and providing that a request may be refused if keeping the animal would unreasonably interfere with an occupier of another lot's use and enjoyment of the lot or common property and the interference could not reasonably be managed by conditions imposed on the keeping of the animal, support the property rights of other occupiers by ensuring they are able to use their lot and the common property without unreasonable disturbance from animals.

The amendments providing that a request may be refused if keeping the animal would unreasonably interfere with native fauna that live on, or visit, the scheme land and the interference could not reasonably be managed by conditions imposed on the keeping of the animal, supports the property rights of other occupiers to enjoy the benefits of native wildlife on the common property. It also generally balances the competing interest of allowing people to keep and bring pets onto a community titles scheme against environmental considerations.

The reasons that a body corporate may refuse the keeping of an animal are broadly based on decisions by adjudicators, QCAT, and the courts, about when it is reasonable for a body corporate to refuse the keeping of an animal. Therefore, the reasons are considered to appropriately balance the rights and liberties of owners and residents who wish to keep pets against those owners who want to live without disturbance that may be caused by pets.

Importantly, the abilities of the body corporate to impose conditions and refuse a request for approval to keep an animal are not arbitrary. Conditions imposed on the keeping of an animal must be reasonable and appropriate in the circumstances. Before refusing a request for approval to keep an animal, the body corporate is required in most cases to consider whether the potential negative impacts of an animal may be adequately managed by appropriate conditions.

While the amendments that permit the body corporate to refuse an animal may limit a person's property rights, they are consistent with a free and democratic society based on human dignity, equality, and freedom because they seek to protect the human rights of other owners and occupiers of lots in a community titles scheme.

5. Penalties

Penalties are provided in the Bill to encourage compliance with obligations under the BCCM Act (specifically, the obligation to comply with notices given in relation to by-law contraventions, and the obligation to give body corporate records for the purpose of enabling the enforcement of by-law contraventions or to enable subsidiary schemes in a layered arrangement of community titles schemes to access information from higher-level schemes).

These penalties are important in ensuring efficient enforcement of by-laws in community titles schemes and for ensuring lot owners in subsidiary schemes in a layered arrangement can access information about how their financial contributions to higher-level bodies corporate are used.

The offence provisions and their associated penalties are consistent with existing offences and penalties within the BCCM Act in relation to similar requirements.

As any penalties will be issued for failure to comply with, or breach of, particular provisions, the penalties are not arbitrary, and are therefore consistent with a free and democratic society based on human dignity, equality, and freedom.

6. Use of sunset clause to terminate an 'off the plan' contract for land

Placing restrictions on the ability of a seller to utilise sunset clauses to terminate an 'off the plan' contract for land may limit the ability for a seller to directly deal with their property in a manner they choose (that is, by directly terminating a contract to deal with the property in another way, such as re-listing it for sale).

However, a power imbalance between buyers and sellers may leave buyers with little ability to negotiate changes to a contract to avoid the insertion of a seller's sunset clause, particularly when there is a high level of demand (and therefore competition from other buyers) in the market. Further, many buyers may not have the financial resources to pursue legal action against a seller in the event they believe the seller has used the sunset clause inappropriately.

The purpose of the restriction in the Bill is to strengthen protections for buyers that would be adversely impacted by the termination of an 'off the plan' contract for land. It does this by limiting when sunset clauses can be used to terminate 'off the plan' contracts for the sale of land to the following situations – with the written consent of the buyer; under an order of the Supreme Court; or another situation prescribed by regulation.

The Bill does not prevent sellers from utilising sunset clauses entirely – rather, it provides a new process that sellers have to undertake in order to utilise the clause. Should a buyer not agree to the seller terminating the contract via the sunset clause, the seller can make an application to the Supreme Court for an order permitting the seller to terminate the contract. The Supreme Court can only make the order if satisfied it is just and equitable to do so.

Arguably, the amendments also support the property rights of buyers, as the amendments will ensure their 'off the plan' contracts for the sale of land are not arbitrarily terminated via a sunset clause, which is likely to lead to more contracts being settled (and buyers therefore obtaining the land they were seeking to buy). Termination of an 'off the plan' contract via a sunset clause typically results in loss for a buyer as, although the buyer will receive their deposit back, in many cases the time that has elapsed will mean that the deposit may no longer be enough to secure purchase of another property, particularly in a property market where prices have significantly increased.

Balancing the rights and interests of parties to these contracts in this way is consistent with a free and democratic society based on human dignity, equality, and freedom.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

1. Termination of community titles schemes (required sale of lots)

The limitations on property rights represented by the potential for lot owners to be compelled to sell their property, and potential early ending of tenancies and other contractual

arrangements, are directly related to the purpose of ensuring that the greater majority of owners of units are not tied to exorbitant and unsustainable costs associated with maintaining or repairing the scheme, or operating a non-viable commercial scheme, because a small number of owners refuse to sell their lots.

It is not possible to terminate a community titles scheme by agreement if even just one owner does not wish to terminate the scheme. While there is the option to seek an order of the District Court that it is just and equitable to terminate the scheme, due to the potential costs and uncertainty of that process it has been seldom used.

The limitation on property rights of up to 25% of lot owners, in favour of the rights of the remaining 75% to terminate the scheme supports the purpose of providing a viable means of terminating community titles schemes for economic reasons where there is agreement of most, but not necessarily all, lot owners.

It is necessary to provide the capacity to compel the sale of a lot as part of the new termination process to ensure that the process cannot be frustrated by an owner's non-compliance with the body corporate's agreed plans for termination. Similarly, it is necessary for termination to cause ongoing tenancies and leases to end as otherwise the process could be frustrated by lot owners not in favour of termination simply leasing out their lot.

2. Towing motor vehicles from common property

Removing impediments to a body corporate towing a motor vehicle owned and operated by a lot owner or occupier in the community titles scheme from the common property is directly and rationally linked to the purpose of the restriction, which is to ensure a body corporate can reduce or avoid adverse impacts of parking on common property for other owners and occupiers of the scheme in a timely manner.

3. Prohibition or restriction on smoking in community titles schemes

The requirement that an occupier of a lot must not cause a nuisance, hazard or unreasonable interference with the use or enjoyment of another lot or the common property by ensuring they do not regularly expose the occupier of another lot, their invitee or another relevant person to smoke or emission from their use of a smoking product in the other lot or on common property is directly and rationally linked with the purpose of reducing the exposure of occupiers in community titles schemes to the harmful effects of second-hand smoke.

Through this amendment, occupiers of lots and other relevant persons can expect to have protection from the harmful effects of second-hand smoke emanating from other lots and common property. A body corporate or owner or occupier of a lot can enforce a contravention of the nuisance provisions by making a dispute resolution application under the BCCM Act.

The amendment to permit a body corporate to make a by-law prohibiting smoking on the common property and the outdoor area of a lot (for example, a balcony) is directly and rationally linked to the purpose of the limitation, which is to reduce the exposure of occupiers of lots in community titles schemes to the harmful effects of second-hand smoke.

The power of the body corporate to adopt a by-law banning smoking is limited to the common property, body corporate assets, and outdoor areas of lots and exclusive use areas (for example, balconies and courtyards), as these are the areas where smoking is most likely to have an impact on the occupiers of other lots in the scheme. When the occupier of a lot smokes or inhales smoking products on their balcony, the occupiers of other nearby lots can be exposed to second-hand smoke on their balcony and second-hand smoke may also travel to indoor areas of nearby lots through open doors and windows. Therefore, in schemes where a body corporate makes a by-law prohibiting smoking in common areas and outside areas of lots, occupiers of lots can expect to have protection from the harmful effects of second-hand smoke emanating from other lots and common property.

The amendment enables a tailored response by each body corporate that considers the wishes of owners in each scheme and the physical environment of each scheme.

Where an occupier contravenes a body corporate by-law, the by-law can be enforced using a procedure provided under the BCCM Act. The procedure includes issuing a contravention notice and, in the event the notice is not complied with, the body corporate can commence proceedings in the Magistrates Court to enforce the by-laws or make a dispute resolution application under the BCCM Act.

4. Keeping or bringing of animals on a lot or on common property

Allowing a body corporate to make a by-law requiring body corporate approval to keep an animal; to impose conditions on the keeping of an animal as part of its approval under a by-law and withdraw its approval if the conditions are not complied with; and to refuse an application for the keeping of an animal on particular grounds, is directly and rationally related to the purpose of ensuring an appropriate balance between allowing animals to be kept in community titles schemes, while also ensuring the keeping of an animal will not significantly adversely impact the occupiers of other lots in the scheme.

The requirements that conditions be reasonable and appropriate in the circumstances, and that the body corporate is required to consider whether conditions could deal with the adverse impact before refusing a request to keep an animal, will ensure that the limitation is well-targeted to achieving the purpose.

5. Penalties

The penalties are directly and rationally related to the purpose of encouraging compliance with particular obligations under the Act, as any penalties will be issued for failure to comply with, or breach of, the obligations.

6. Use of sunset clause to terminate an 'off the plan' contract for land

This limitation on property rights has a direct and rational link to the purpose of the restriction, which is to protect buyers that would be adversely impacted by the termination of an 'off the plan' contract for the sale of land. Limiting the ability of sellers to utilise sunset clauses to terminate these contracts to three situations – with the written consent of the buyer; under an

order of the Supreme Court; or another situation prescribed by regulation – is expected to deter a seller from terminating a contract without making a bona fide attempt to finalise the contract. This approach is also expected to address the power imbalance between buyers and sellers.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

1. Termination of community titles schemes (required sale of lots)

There are no viable alternatives to the economic reasons termination process that are significantly less restrictive in terms of property right limitations, while also providing for the desired facilitation of termination of uneconomic schemes with agreement of most, but not necessarily all, lot owners.

Approaches taken in other jurisdictions have not limited the capacity for termination without agreement of all lot owners to particular economic circumstances, but instead have provided a more general capacity for the majority of lot owners to sell or terminate a scheme, which can result in the forced sale of the lots of owners opposed to the sale or termination and the early ending of leases and tenancies.

The Bill's restriction of the capacity for termination without the agreement of all lot owners to circumstances where there are defined economic reasons to do so is designed to minimise unnecessary limitations on property rights while still achieving the purpose of facilitating termination of uneconomic schemes. The approach ensures property rights are not limited generally, but only in specific circumstances where the limitation is reasonably justified.

In terms of other less restrictive approaches that could be considered, the required threshold of agreement for economic reasons termination could be increased from 75% of lot owners to some higher amount. This would limit the number of schemes in which lot owners may be exposed to potential forced sale of their lot, or lessees and tenants subject to the ending of their lease. However, the same property rights limitations for minority owners would remain. In addition, a higher-threshold would consequentially limit the availability of the process for smaller schemes – a scheme with four lots for example (of which there are a substantial number) would not be able to achieve agreement under the new process if a higher threshold was in place, with any level of dissent. This effect of further limiting application of the process would increase along with the threshold.

2. Towing motor vehicles from common property

The purpose of the provisions clarifying the existing power of bodies corporate to tow outside of the BCCM Act, and removing the requirement for bodies corporate to enforce a contravention of body corporate by-laws via the by-law enforcement process if a motor vehicle is owned or operated by an owner or occupier of a lot, is to ensure a body corporate can reduce or avoid adverse impacts of parking on common property for other owners and occupiers of the scheme in a timely manner.

There are no less restrictive or reasonably available ways to achieve the purpose.

As part of the Property Law Review, QUT recommended bodies corporate be able to tow vehicles after making an authorising by-law and erecting signage. However, following consideration of the views of the CTL Working Group and further examination of existing options available to bodies corporate to tow, the Property Law Review recommendation was not adopted. The Property Law Review recommended approach would not have achieved the purpose as effectively as the option adopted, given it would potentially have risked reducing the general ability of a body corporate to tow motor vehicles compared to the option adopted.

Providing an explicit legislative stand-alone right to tow vehicles in the BCCM Act was also considered. However, again, this approach would not have achieved the purpose as effectively as the option adopted, given it would have potentially risked reducing the general ability of a body corporate to tow under common law.

While bodies corporate already have rights to tow vehicles, it is clear that reforms are needed to achieve the purpose, given there is currently no clarity regarding the ability for a body corporate to tow an owner or occupier's vehicle that is in breach of a parking by-law *in a timely manner*.

It is considered the least restrictive available approach is to allow bodies corporate to use existing legal rights to tow motor vehicles and, in the case of vehicles owned or operated by lot owners and occupiers, to remove the requirement for a body corporate to deal with a motor vehicle parked in contravention of a by-law through the by-law enforcement process.

There are a number of safeguards that mitigate the impact of the limitation on property rights.

The *Tow Truck Act 1973* and *Tow Truck Regulation 2009* provide a legislative framework for fair private property towing practices by regulating and controlling towing of vehicles parked on private property; subsequent handling and storage of those vehicles; holding of property found in the vehicle, in safe custody, until it can be returned to the vehicle owner; and maximum fees that may be charged.

If a body corporate decides to tow a vehicle, there are rights available to an owner or occupier to dispute the body corporate's actions. A body corporate is still required to make reasonable decisions under section 94 of the BCCM Act, and the body corporate may be liable if the decision to tow is found to be unreasonable or unlawful.

3. Prohibition or restriction on smoking in community titles schemes

There are no less restrictive or reasonably available ways to achieve the purpose of reducing the harmful exposure of residents in community titles schemes to second-hand smoke.

To make a body corporate by-law, a body corporate must pass a motion to change the by-laws. A motion agreeing to change the by-laws (other than exclusive-use by-laws) must be agreed to by a special resolution at a general meeting. A special resolution requires that at least two-thirds of the votes cast are in favour of the motion; and the number of votes counted against the motion are not more than 25% of the number of lots included in the scheme; and the total of the contribution schedule lot entitlements for the lots for which votes are counted against

the motion is not more than 25% of the total of the contribution schedule lot entitlements for all lots included in the scheme.

The option of requiring a motion regarding changes to by-laws prohibiting or restricting smoking to be passed by resolution without dissent was considered. A motion is passed by resolution without dissent only if no vote is counted against the motion. Resolutions without dissent are used for very limited significant matters under the BCCM Act, such as amalgamation of two community titles schemes into a single scheme.

Requiring a resolution without dissent for a by-law prohibiting smoking would be very difficult to achieve in practice and would therefore not achieve the purpose of reducing second-smoke exposure in community titles schemes.

Safeguards that have been included to ameliorate the impact of the limitation on property rights, include limiting the body corporate's ability to prohibit or restrict smoking to the common property, body corporate assets, and outdoor areas of a lot (or exclusive-use areas). A body corporate cannot ban smoking on the indoor area of a lot by way of a by-law.

4. Keeping or bringing of animals on a lot or on common property

There are no less restrictive or reasonably available ways to achieve the purpose of ensuring an appropriate balance between allowing animals to be kept in community titles schemes, while also ensuring the keeping of an animal will not significantly adversely impact the occupiers of other lots in the scheme.

As part of the Property Law Review, QUT recommended bodies corporate be able to make and enforce a 'no pets' by-law, if the by-law was adopted by a resolution without dissent, or if it was in place when the scheme was created. However, this is not a less restrictive way of achieving the purpose, as it does not support the keeping of animals in community titles schemes.

Adjudicators, QCAT, and the courts have found that keeping a pet is an ordinary domestic activity; that by-laws banning pets are unreasonable and oppressive; and that pets should be permitted to be kept in a community titles schemes if they would not affect other occupiers in the scheme in a meaningful way. While a body corporate making a by-law banning pets by resolution without dissent suggests that no lot owner at the time of the decision wished to keep a pet, by-laws are binding on future lot owners in the scheme, who would have their property rights affected in terms of their ability to use and enjoy their lot by keeping an animal, as would tenants of lots in the scheme.

A number of safeguards have been included in the provisions to ameliorate the impact of the limitation on property rights.

The reasons a body corporate may refuse an animal are limited to those stated in the relevant clause. The permitted reasons for refusal are directly related to a matter where the keeping of the animal would have a significant adverse impact on the occupiers of other lots.

Before refusing approval, the body corporate must be satisfied on reasonable grounds that one of the permitted reasons for refusing the keeping of an animal exists and must also have considered whether the potential negative impacts of the animal could be adequately managed by appropriate conditions.

An owner or occupier of a lot can seek review of a body corporate's decision to approve or refuse a request to keep an animal, to impose conditions on the keeping of an animal, or to withdraw approval, by way of an application for dispute resolution under chapter 6 the BCCM Act.

5. Penalties

There are no less restrictive or reasonably available ways to achieve the purpose of encouraging compliance with particular obligations under the Act.

While there would be the option not to provide a penalty for contravention of the relevant provisions, this may mean it is unlikely that the provisions will be complied with.

As noted above, compliance with the provisions is important as they relate to enforcement of by-laws and provide access to body corporate records of a community titles scheme by owners in subsidiary schemes who contribute funds to the operation of the higher-level scheme.

6. Use of sunset clause to terminate an 'off the plan' contract for land

There are no less restrictive or reasonably available ways to achieve the purpose to strengthen protections for buyers that would be adversely impacted by the termination of an 'off the plan' contract for land via a sunset clause.

'Off the plan' contracts for the sale of land are private contracts entered into between two parties. As noted above, a power imbalance between buyers and sellers may leave buyers with little ability to negotiate changes to a contract to avoid the insertion of a seller's sunset clause, and many buyers will not be in a financial position to pursue legal action against a seller in the event they believe the seller has used the sunset clause inappropriately. This means that non-legislative interventions, such as raising buyer awareness around the risks of sunset clauses, or approaches that do not directly intervene in the ability for sellers to exercise these sunset clauses, are unlikely to be successful in addressing the problem.

The only readily available mechanism is legislative intervention to place appropriate controls on the ability of sellers to utilise sunset clauses. However, the impact of the limitation on property rights is ameliorated as seller sunset clauses are not completely prohibited and can still be utilised if the buyer agrees or under a Supreme Court order based on the use being just and equitable.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

1. Termination of community titles schemes (required sale of lots)

On balance, and noting safeguards in the Bill, I consider the limitations on the property rights of lot owners not in favour of terminating a community titles scheme, or a tenant or lessee whose tenancy is ended early by termination of the scheme, are outweighed by the important objective of facilitating the termination of schemes where it is established that there are defined economic reasons to terminate the scheme, and where a significant majority of lot owners (75% or more) wish to exercise their property rights by selling their lot as part of a collective sale and terminating the scheme.

2. Towing motor vehicles from common property

On balance, I consider that the limitations on property rights for owners and occupiers of lots in a community titles scheme arising from enabling bodies corporate to tow motor vehicles owned or operated by an owner or occupier of a lot is outweighed by the protections and benefits offered to other owners and occupiers of lots in the scheme, including safety considerations. The amendments will provide greater clarity for bodies corporate and owners and occupiers and include relevant safeguards.

3. Prohibition or restriction on smoking in community titles schemes

On balance, I consider that the limitations on property rights arising from the restriction on the ability of an occupier in a community titles scheme to smoke or inhale a smoking product either on an outdoor area of their lot or common property under a body corporate by-law, or their lot and the common property under the ‘nuisance’ provision, are outweighed by the important objective of reducing the harmful effects of second-hand smoke on occupiers of other lots in a scheme, which supports the human right to life.

4. Keeping or bringing of animals on a lot or on common property

On balance, I consider that the limitations on property rights arising from the changes in respect of keeping or bringing of animals on a lot or common property are outweighed by the importance of ensuring an appropriate balance between allowing animals to be kept in community titles schemes, while also ensuring that the keeping of an animal will not significantly adversely impact the occupiers of other lots in the scheme through risks to health and safety or unreasonable interference.

5. Penalties

On balance, I consider that the limitations on property rights arising from the new penalties are outweighed by the importance of ensuring compliance with the relevant provisions of the BCCM Act.

6. *Use of sunset clause to terminate an ‘off the plan’ contract for land*

On balance, I consider that the limitations on property rights for a seller from the ‘sunset clause’ amendments are outweighed by the importance of providing appropriate protections for buyers who have entered into ‘off the plan’ contracts for the sale of land. The amendments will provide certainty for buyers and sellers to ‘off the plan’ contracts for land and thereby give buyers greater confidence in entering into these contracts.

Privacy and reputation (section 25 of the Human Rights Act)

(a) *the nature of the right*

The ‘privacy and reputation’ right (section 25 of the Human Rights Act) protects a person’s right not to have the person’s privacy, family, home, or correspondence unlawfully or arbitrarily interfered with and not to have the person’s reputation unlawfully attacked. Arbitrariness can be defined in a human rights context as meaning capricious, unpredictable, unjust, or unreasonable. This right includes protection of privacy in the sense of personal information, data collection and correspondence.

Various provisions of the Bill may place limitations on privacy and reputation rights:

1. *Termination of community titles schemes (information regarding a person’s property)*

Clause 7 may limit a person’s right to privacy, as information about a person’s property is required to be obtained by the body corporate and distributed to all lot owners as part of the new process for termination of uneconomic community titles schemes.

2. *Access to body corporate records in layered arrangements of community titles schemes*

The ‘privacy and reputation’ right includes protection of privacy in the sense of personal information, data collection, and correspondence.

Body corporate records may include a range of person information, including details of the name and address of owners and occupiers of lots included in the scheme and correspondence received or sent by the body corporate.

Clause 25 may limit the right to privacy and reputation by allowing the body corporate records for a community titles scheme in a layered arrangement of community titles schemes to be accessed by the body corporate for, and owners of lots included in, a subsidiary scheme. The clause may also limit this right by allowing access to body corporate records for a community titles scheme in a layered arrangement by the body corporate for another community titles scheme (or the owner or occupier of a lot included in another scheme that is included in the layered arrangement), for the limited purpose of identifying a person that has been, or is, breaching body corporate by-laws, for the purpose of enforcement of the by-law.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

1. Termination of community titles schemes (information regarding a person's property)

The limitation on a person's right to privacy through the collection and distribution of information about a person's property is for the purpose of ensuring lot owners, lessees, and other potentially affected parties have sufficient information to understand what they will be entitled to, and liable for, if the scheme were to be terminated, and to be confident that they are being compensated fairly and in accordance with the legislative requirements.

This will enable lot owners to make informed decisions at various points in the new process for scheme termination – for example, in regard to whether to approve preparation of a termination plan and whether to approve implementation of the termination plan.

The extent that personal information is included in the termination plan is appropriately confined and relates to persons who have chosen to purchase the scheme, those who currently own a lot in the scheme, and persons leasing lots or land in the scheme or with a contractual arrangement with the body corporate, who may be eligible for compensation if their lease or contractual arrangement is affected by the termination. Therefore, the sharing of person information is not arbitrary and is consistent with a free and democratic society based on human dignity, equality and freedom.

2. Access to body corporate records in layered arrangements of community titles schemes

Clause 25 empowers the body corporate for a subsidiary scheme, and owners of lots included in a subsidiary scheme, to request to inspect or obtain the records of the body corporate of a higher scheme. The purpose of the amendment is to ensure that bodies corporate and lot owners for subsidiary schemes may access information about how their contributions have been used by higher-level bodies corporate.

A layered arrangement includes a principal community titles scheme, which is made up of the scheme land for all other community titles schemes in the group and its own common property (and any other lot included in the scheme where that lot does not constitute a community titles scheme). Other community titles schemes within the grouping are called subsidiary schemes. In simple layered arrangements of community titles schemes, subsidiary schemes are lots included in the principal scheme, and the subsidiary scheme bodies corporate are members of the principal body corporate and directly involved in the management and operation of the principal scheme.

However, in a more complex layered arrangement of community titles schemes, there may be multiple layers of community titles schemes and subsidiary schemes may not be directly involved in the management and operation of higher-level schemes.

The expenses of the body corporate for a higher scheme in a layered arrangement are paid for via contributions made by subsidiary schemes. This means that lot owners in subsidiary schemes ultimately contribute towards to the expenses of higher schemes.

It is considered that the body corporate for, and owners and occupiers of lots included in, a subsidiary scheme should be able to access records of higher schemes so there is transparency about how their contributions have been used.

Under the BCCM Act, owners and occupiers of lots are bound by body corporate by-laws. The Bill inserts provisions into the BCCM Act to allow a body corporate, or an owner or occupier of a lot included in a scheme in a layered arrangement of community titles schemes, to enforce by-laws against another body corporate or an owner or occupier of a lot in another scheme in the layered arrangement.

To make a dispute resolution application, issue notices relating to the enforcement of by-laws, or for owners and occupiers to try to directly resolve disputes about by-law contraventions, it is necessary for bodies corporate, owners, and occupiers in a community titles scheme to have access to details such as the name of the person that is alleged to be contravening the by-law.

The purpose of the amendment is to provide limited access by bodies corporate and owners and occupiers of lots in subsidiary schemes to the records of the body corporate in another scheme for the layered arrangement of community titles schemes, for the purpose of identifying a person, to enable the issuing of a contravention notice for a breach of a body corporate by-law.

These provisions do not arbitrarily interfere with a person's right to privacy and reputation and are consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

1. Termination of community titles schemes (information regarding a person's property)

The limitation on a person's right to privacy through the collection and distribution of information about a person's property is directly related to the purpose of ensuring lot owners, lessees, and other potentially affected parties have sufficient information to understand what they will be entitled to, and liable for, if the scheme were to be terminated, and to be confident that they are being compensated fairly and in accordance with the legislative requirements.

The limitation will directly enable lot owners to make informed decisions at various points in the new process for scheme termination – for example, in regard to whether to approve preparation and implementation of a termination plan.

2. Access to body corporate records in layered arrangements of community titles schemes

The limitations imposed by clause 25 are directly and rationally linked to achieving the purposes of ensuring that bodies corporate and lot owners for subsidiary schemes may access

information about how their contributions have been used by higher-level bodies corporate; and ensuring bodies corporate and owners and occupiers of lots in subsidiary schemes can utilise records of the body corporate in another scheme for the layered arrangement of community titles schemes to identify a person to enable the issuing of a contravention notice for a breach of a body corporate by-law.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

1. Termination of community titles schemes (information regarding a person's property)

There are no less restrictive or reasonably available ways of achieving the purposes of the Bill in regard to a new process for scheme termination. If clear and comparatively meaningful information about the value of a relevant persons' interests in the scheme is not included in the termination plan, it will substantially and unnecessarily increase the risk that compensation arrangements for those persons may not be put in place, or not be appropriately determined.

Further, if sufficient information about the value of a relevant person's interest in the scheme is not included in the termination plan, it may result in unnecessary disputes about, and potential frustration of, the termination process.

2. Access to body corporate records in layered arrangements of community titles schemes

There are no less restrictive or reasonably available ways achieving the purposes of the amendments in the Bill that limit the right to privacy.

Safeguards are included in the amendments to mitigate the limitation of privacy and reputation. As discussed above, a body corporate for a scheme in a layered arrangement may generally only provide access to records to the body corporate for another scheme in the layered arrangement, or an owner or occupier of a lot in another scheme in the layered arrangement, for limited by-law enforcement purposes (note however, bodies corporate and lot owners for subsidiaries will be able to access records of higher-level bodies corporate for wider purposes, given the direct interest of these parties in how financial contributions are utilised by higher-level bodies corporate).

Also, a body corporate is not required to allow a person to inspect or obtain a copy of a part of a record if the body corporate reasonably believes the part contains defamatory material.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

1. Termination of community titles schemes (information regarding a person's property)

On balance, I consider the limitation on the right to privacy and reputation of owners and occupiers is outweighed by the importance of informed decision-making and ensuring compensation arrangements for persons affected by termination of a community titles scheme under the Bill's new process for termination of schemes for economic reasons.

2. *Access to body corporate records in layered arrangements of community titles schemes*

On balance, I consider that the limitations on an owner or occupier's right to privacy and reputation are outweighed by the importance of the amendments to allow access to body corporate records for the purpose of enabling body corporate by-laws to be enforced. Owners and occupiers of lots are bound by body corporate by-laws and it is appropriate that if they do not comply with a by-law, that access to information that allows them to be identified for the purpose of enforcing the by-law be permitted. The limitation is also outweighed by the importance of supporting transparency between subsidiary and higher-level community titles schemes in respect of contributed funds.

Cultural rights – generally (section 27 of the Human Rights Act)

(a) *the nature of the right*

'Cultural rights' under section 27 of the Human Rights Act Human Rights include that all persons with a particular cultural, religious, racial, or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion, and to use their language. This provision promotes the right to practise and maintain shared traditions and activities. It is also aimed at the survival and continued development of cultural heritage.

As noted in the discussion of property rights above, Clause 10 of the Bill provides that an occupier of a lot contravenes section 167 of the BCCM Act if they regularly use (or permit their invitee to regulatory use) a smoking product on the lot or the common property of the scheme, and an occupier of another lot or their invitee, or a person lawfully on the common property, is regularly exposed to the smoke or emission from the smoking product in the other lot or on the common property.

As also noted above, Clause 11 of the Bill provides that a body corporate for a community titles scheme may make a by-law prohibiting or restricting occupiers of lots included in the scheme from the smoking or inhaling of all or some smoking products in specified areas, including the common property and body corporate assets and the outdoor area of lots (including balconies).

Clauses 10 and 11 of the Bill may limit the cultural rights of the occupier of a lot in a community titles scheme, by restricting the ability of the occupier to carry out cultural practices that involve smoking on their own lot and the common property for the scheme.

(b) *the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom*

The purpose of the provisions that prohibit or restrict smoking in community titles schemes is to protect occupiers and visitors in these schemes from the health risks associated with second-hand smoke, by reducing their exposure to second-hand smoke in their lot and on the common

property arising from the smoking or inhaling of smoking products by occupiers of other lots (and their invitees) in the scheme.

By reducing the exposure of occupiers and visitors in community titles schemes to the harmful effects of second-hand smoke, the amendments support the right to life (section 16 of the Human Rights Act).

The amendments will also support the property rights of these owners to use and enjoy their lots without interference from second-hand smoke (section 24 of the Human Rights Act).

In seeking to protect the human rights of non-smoking occupiers and visitors in community titles schemes, the purpose of the amendments is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

As noted in the discussion of property rights above, the amendments restricting smoking in community titles schemes are directly and rationally linked with the purpose of reducing the exposure of occupiers in community titles schemes to the harmful effects of second-hand smoke.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive or reasonably available ways to achieve the purpose of reducing the harmful exposure of residents in community titles schemes to second-hand smoke.

To make a body corporate by-law, a body corporate must pass a motion to change the by-laws. A motion agreeing to change the by-laws (other than exclusive-use by-laws) must be agreed to by a special resolution at a general meeting.

The option of requiring a motion that includes changes to by-laws prohibiting or restricting smoking to be passed by a resolution without dissent was considered.

However, requiring a resolution without dissent for a by-law prohibiting smoking would be very difficult to achieve in practice, and would therefore not achieve the purpose of reducing second-smoke exposure in community titles schemes.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, I consider that the limitations on cultural rights arising from the restriction on the ability of an occupier in a community titles scheme to smoke or inhale a smoking product either on the outdoor area of their lot or common property under a body corporate by-law, or their lot and the common property under the ‘nuisance’ provision, are outweighed by the important objective of reducing the harmful effects of second-hand smoke on occupiers of other lots in a scheme, which supports the human right to life.

Conclusion

In my opinion, the Body Corporate and Community Management and Other Legislation Amendment Bill 2023 is compatible with human rights under the *Human Rights Act 2019* because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality, and freedom.

YVETTE D'ATH MP
ATTORNEY-GENERAL AND MINISTER FOR JUSTICE
MINISTER FOR THE PREVENTION OF DOMESTIC AND FAMILY VIOLENCE

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