

Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020

Human Rights Certificate

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

In accordance with section 41 of the *Human Rights Act 2019* (HR Act), I, Yvette D’Ath MP, Attorney-General and Minister for Justice and Leader of the House, provide this human rights certificate with respect to the *Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020* (the Regulation) made under the *Body Corporate and Community Management Act 1997* (BCCM Act) and *Building Units and Group Titles Act 1980* (BUGT Act) in reliance on sections 8 and 9 of the *COVID-19 Emergency Response Act 2020* (COVID-19 Response Act); the *Collections Act 1966* (Collections Act) in reliance on section 13 of the COVID-19 Response Act; section 322 of the BCCM Act; section 134 of the BUGT Act; sections 202 and 235 of the *Liquor Act 1992* (Liquor Act); section 30B of the *Statutory Instruments Act 1992*; and section 22 of the *Tourism Services Act 2003* (Tourism Services Act).

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

The policy objectives of the Regulation are to:

- protect the health, safety and welfare of persons in the community titles sector during the COVID-19 emergency;
- legislatively validate past actions that body corporate committees may have taken in relation to general meetings and committee meetings to protect the safety and welfare of persons in the community titles sector during the COVID-19 emergency;
- ensure continued access to dispute resolution provided under the BCCM Act and BUGT Act during the COVID-19 emergency;
- legislatively validate the waiver of fees associated with certain liquor licensing applications made between 1 February 2020 and 31 July 2020 inclusive;
- provide financial relief for inbound tour operators by waiving registration renewal fees for 12 months; and
- provide the chief executive with the ability to extend the timeframes for the preparation and lodgement of financial statements and returns under the Collections Act during the COVID-19 emergency.

Parts of the regulation are made under the COVID-19 Response Act, which commenced on 23 April 2020. Under section 2 of the COVID-19 Response Act, the main purposes of the Act include protecting the health, safety and welfare of persons affected by the COVID-19 emergency.

The COVID-19 Response Act includes additional regulation-making provisions to make extraordinary regulations under affected Acts. Under section 5, a Minister administering an affected Act may recommend to the Governor in Council the making of an extraordinary regulation only if satisfied it is necessary for a purpose of the COVID-19 Response Act. The COVID-19 Response Act provides for regulations to be made under Part 3 relating to attendance at places or meetings and for particular matters relating to documents, and Part 4 to modify statutory time limits.

Community titles schemes

The BCCM Act provides administrative, governance, dispute resolution and other arrangements for community titles schemes, their bodies corporate, and lot owners, in Queensland. To provide the required flexibility of governance arrangements for this range of schemes, uses, and ownership types, the BCCM Act is constructed so that management processes and procedures are provided in regulation modules designed for different types of schemes, and certain fees are prescribed in a separate regulation. Six regulations currently support the operation of the BCCM Act:

- the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Accommodation Module);
- the *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Commercial Module);
- the *Body Corporate and Community Management Regulation 2008* (Fees Regulation);
- the *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Small Schemes Module);
- the *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (Specified Two-lot Schemes Module); and
- the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Standard Module).

The BUGT Act provides for administration, governance, dispute resolution and other arrangements for a relatively small number of subsidiary schemes within developments under ‘specified Acts’ (for example, the *Integrated Resort Development Act 1987*, *Mixed Use Development Act 1993* and *Sanctuary Cove Resort Act 1985*) that were not transitioned to the BCCM Act upon its introduction. The BUGT Act is supported by the *Building Units and Group Titles Regulation 2008* (BUGT Regulation).

The Regulation protects the health, safety and welfare of persons in the community titles sector during the COVID-19 emergency by temporarily modifying particular arrangements under the BCCM Act and its regulation modules (other than the Specified Two-lot Schemes Module), as well as the BUGT Act and BUGT Regulation. The Regulation allows bodies corporate to decrease risks of transmission of COVID-19 and facilitate compliance with public health directions by:

- providing that if the committee believes that a public health direction would be contravened if a requirement or entitlement related to holding a body corporate general meeting or committee meeting is complied with, the requirement or entitlement is suspended and the committee must modify the way the meeting is to be held to the extent reasonably necessary to ensure the meeting is held in a way that does not contravene the direction;
- allowing the committee to make arrangements to enable each person who is entitled to attend the meeting to do so remotely and to allow a person who is entitled to vote at the meeting to cast an electronic vote;
- providing that the requirement for the body corporate to comply with a request from an interested person to inspect the body corporate's records during the COVID-19 emergency is taken to be satisfied if the body corporate provides the person electronic access to the records to inspect them, or gives the interested person a copy of the records (subject to the person paying the relevant fee for inspecting the records, or being given the copy of the records);
- providing that the requirement for the Commissioner for Body Corporate and Community Management to comply with a request from an interested person to inspect a document under section 246 of the BCCM Act is taken to be satisfied if the Commissioner gives the interested person a copy of the document (subject to the person paying the fee payable for being given a copy); and
- for community titles schemes under the BCCM Act, setting out that despite a decision changing rights, privileges or obligations of lot owners being a restricted issue for the committee, such a decision is not a decision on a restricted issue in specified circumstances (those circumstances are that the decision is in relation to changing arrangements for access to, or use of, common property and body corporate assets, and the committee considers the change is reasonably necessary to ensure compliance with a public health direction, and the decision states that it stops having effect on the earlier of the day the public health direction stops having effect, or 31 December 2020).

The Regulation legislatively validates past actions that body corporate committees may have taken in relation to general meetings and committee meetings to protect the safety and welfare of persons in the community titles sector during the COVID-19 emergency. The Regulation achieves this by retrospectively applying, with necessary modifications, the provisions in the Regulation relating to the holding of meetings, including provisions providing for the suspension of requirements and entitlements relating to meetings and the modification of the way a meeting is held, as well as provisions allowing the committee to make arrangements for remote attendance and electronic voting.

Like other parts of the community, the COVID-19 emergency has had financial impacts on the community titles sector, including for both bodies corporate and individual unit owners. The Regulation temporarily expands fee waiver provisions under the BCCM Act and BUGT Act to avoid compounding financial hardship that may be experienced during the COVID-19 emergency and to ensure access to justice for persons experiencing financial hardship by:

- amending the BCCM Regulation to allow the Commissioner for Body Corporate and Community Management to waive all or part of the fee payable for inspecting or obtaining copies of particular documents relating to a dispute resolution application, including submissions made about an application, if satisfied payment of the fee would cause the applicant financial hardship; and
- allowing referees under the BUGT Act to waive fees payable to the referee, if satisfied a person is suffering financial hardship.

Modification of Collections Act 1966

The Regulation provides the chief executive with the ability to extend the timeframes for the preparation and lodgement of financial statements and returns under the *Collections Act 1966* during the COVID-19 health emergency.

Amendment of Liquor Regulation 2002

The Regulation also gives legislative effect to the waiver of liquor licensing application fees announced on 18 February 2020 as part of the Palaszczuk Government’s \$27.25 million immediate industry recovery package. Specifically, the Regulation amends the *Liquor Regulation 2002* to exempt applications to change liquor trading hours or to vary a licensed area of the premises made between 1 February 2020 and 31 July 2020 inclusive, from payment of the prescribed fee. The amendments also provide for the refund of fees paid by an applicant for any application subject to the exemption.

Amendment of Tourism Services Regulation 2003

The Regulation amends the *Tourism Services Regulation 2003* by allowing a fee exemption for registrants applying to renew their registration if the registration expires between 1 February and 31 January 2021. The amendments also provide for the refund of registration renewal fees already paid for registrations that expire during the exemption period.

Human Rights Issues

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

In my opinion, the Regulation engages the following human rights:

- right to life (section 16 of the HR Act); and
- property rights (section 24 of the HR Act).

Right to life

The right to life in section 16 of the HR Act protects the lives of all persons and includes the right not to be arbitrarily deprived of life. Provisions of the Regulation promote this right by modifying processes to ensure health requirements associated with the COVID-19 emergency are able to be met.

The Regulation temporarily modifies arrangements relevant to the conduct of body corporate general meetings and committee meetings under the BCCM Act and BUGT Act; temporarily allows committees for bodies corporate under the BCCM Act to make decisions to change the rights, privileges or obligations of owners of lots in relation to access to, or the use of, common property and body corporate assets; and temporarily provides for an obligation to allow inspection of information under the BCCM Act or the BUGT Act to be met in an alternative way that does not require the presence of a person.

These measures decrease risks of transmission of COVID-19 by enabling body corporate meetings to be held, and documents to be accessed, without the need for people to be in physical attendance for these purposes, and to ensure compliance with public health directions made by the Chief Health Officer under the *Public Health Act 2005* (Public Health Act), for example, in relation to social distancing requirements associated with the COVID-19 emergency.

The Regulation also provides the chief executive with the ability to extend timeframes for the preparation and lodgement of financial statements and returns under the Collections Act. This is intended to allow registered charities, community purpose associations and promoters of appeals for support more flexibility to meet their financial reporting obligations if they have been unable to meet with those preparing the statements or members of the charity etc for inspection. The extension of timeframes supports public health responses to the COVID-19 emergency (particularly through the implementation of social distancing measures) and therefore are compatible with the right to life, which is protected by section 16 of the HR Act.

Property rights

The Regulation may limit property rights of owners and occupiers of lots in community titles schemes under the BCCM Act, as it includes provisions that temporarily permit a body corporate committee to make a decision to change the rights, privileges or obligations of the owners of lots in a community titles scheme, if:

- the change is in relation to access to, or the use of, common property or body corporate assets; and
- the committee considers the change is reasonably necessary to ensure compliance with a public health direction given under the Public Health Act; and
- the decision states it stops having effect on the earlier of the following: (i) the day the public health direction stops having effect; or (ii) 31 December 2020.

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*) – property rights

(a) the nature of the right

Section 24 of the HR 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. The right includes the protection from the deprivation of property. The term 'deprived' is not defined by the HR Act, however, deprivation in this sense is considered to include the substantial restriction on a person's use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use his or her property or part of that property (including enjoying exclusive possession of it, disposing of it, transferring it or deriving profits from it).

Property is likely to include all real and personal property interests recognised under general law (for example, interests in land, contractual rights and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude). The right does not provide a right to compensation. The concept of arbitrariness in the context of the right to property carries a human rights meaning of capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought.¹ Whether a deprivation of property is arbitrary therefore needs to be considered in light of the elements of proportionality, as set out below.

Relevantly, in the context of the Regulation and the temporary amendments it makes to regulation modules under the BCCM Act, property has been held as the right to use common property equally with other lot owners. However, it is said to be a 'lesser right' than that of the right to property.²

Under the BCCM Act, owners of lots in a community titles scheme own the common property for the scheme as tenants in common and have a right to use and enjoy the common property for the scheme. If the occupier of a lot is not the lot's owner, a right the owner has under the BCCM Act to the occupation or use of common property is enjoyed by the occupier. In relation to body corporate assets, the body corporate for a community titles scheme holds the body corporate assets beneficially. Owners and occupiers of lots in a community titles scheme are permitted under the BCCM Act to use and enjoy body corporate assets.

The Regulation may limit the property rights of owners and occupiers of lots included in a community titles scheme under the BCCM Act, as it includes provisions that temporarily permit a body corporate committee to make decisions to change the rights, privileges or obligations of lot owners about access to, or the use of, common property or body corporate assets, if the committee considers the change is reasonably necessary to ensure compliance with a public health direction made under the Public Health Act.

¹ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing)

² *Owners Corporation No. 1 SP37133 v J and Investments Pty Ltd & Ors (Owners Corporation)* [2012] VCAT 1164

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of any limitation on property rights that may be imposed by the Regulation is to ensure body corporate committees are able to make decisions to change the rights, privileges or obligations of owners of lots relating to the access or use of common property or body corporate assets for a community titles scheme, if the committee considers the change is reasonably necessary to ensure compliance with relevant public health directions. For example, a committee may decide to prevent owners and occupiers of lots in the community titles scheme from accessing or using a common property indoor swimming pool to ensure owners and occupiers comply with a relevant public health direction.

The temporary capacity for committees to make decisions about access to, or the use of, common property and body corporate assets is also aimed at ensuring bodies corporate (via their committees) may make decisions that promote the right to life by supporting the public health response to COVID-19, by ensuring compliance with public health directions.

As the purpose of the limitation on property rights imposed by the Regulation promotes the right to life by ensuring compliance with public health directions, the purpose of the limitation is considered to be consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The limitation on property rights imposed by the Regulation achieves its purpose by ensuring body corporate committees have capacity to make decisions to change the rights, privileges or obligations of owners of lots about access to, or the use of, common property and body corporate assets to support the public health response to COVID-19, by ensuring compliance with public health directions.

The limitation imposed by the Regulation also achieves its purpose by ensuring committees may make decisions that are aimed at protecting the health and safety of owners and occupiers of lots in a community titles scheme, by changing rights, privileges or obligations of owners of lots in relation to access to, or use of, common property and body corporate assets if the committee considers the change is reasonably necessary to ensure compliance with public health directions. Overall, the limitation imposed on the property rights of owners and occupiers of lots by the Regulation is intended to promote the right to life, by ensuring body corporate committees are able to make decisions to support the public health response to COVID-19.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

A less restrictive way to achieve the purpose of the Regulation would be to maintain the current approach prescribed by the regulation modules under the BCCM Act, which requires decisions to change rights, privileges or obligations of owners of lots about access to, or the use of, common property and body corporate assets to be made at a body corporate general meeting.

However, this is not considered to be an optimal option, given body corporate general meetings are subject to particular procedural requirements that may limit the capacity of bodies corporate to respond rapidly to support the public health response to COVID-19 and ensure compliance with public health directions (e.g. owners must be given at least 21 days' notice of a general meeting).

Decisions to change the rights, privileges or obligations of owners of lots about access to, and the use of, common property and body corporate assets to ensure compliance with public health directions may require bodies corporate to respond rapidly, particularly in light of the urgent nature of some public health directions made under the Public Health Act.

Allowing decisions to change the rights, obligations or privileges of owners of lots to be made by the committee ensures bodies corporate may make timely decisions about access to, and use of, common property and body corporate assets if the committee considers it reasonably necessary to ensure compliance with public health directions.

Also, it should be noted that the allowance provided to committees to make decisions to change the rights, privileges or obligations of lot owners in relation to access to, or the use of, common property and body corporate assets is a temporary measure that expires on 31 December 2020. A decision made by the committee under the Regulation to change the rights, privileges or obligations of lot owners about access to, or the use of, common property or body corporate assets must state that the decision stops having effect on the earlier of the day the relevant public health direction stops having effect, or 31 December 2020.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The Regulation may limit property rights by allowing committees to make decisions to change the rights, privileges or obligations of owners of lots about access to, or the use of, common property and body corporate assets.

However, the Regulation limits the capacity of committees to make decisions to change the rights, privileges or obligations of owners of lots about access to, or the use of, common property and body corporate assets to decisions about changes that the committee considers are reasonably necessary to ensure compliance with public health directions.

It is important for owners and occupiers of lots in community titles schemes to enjoy their property rights by using and enjoying common property and body corporate assets for the scheme. While the Regulation permits committees to make decisions to change the rights, privileges or obligations of lot owners about access to, or the use of, common property or body corporate assets, it is not considered the Regulation imposes an arbitrary or unreasonable limitation on the property rights of lot owners and occupiers.

In this respect, while the provisions temporarily allow committees to make decisions that may limit the property rights of owners and occupiers of lots, such decisions are only permitted to be made where the committee considers it reasonably necessary to change rights, privileges or obligations about access to, or the use of, common property. It is important for committees to have the ability to make these decisions urgently to support the public health response to COVID-19.

The purpose of the Regulation also supports bodies corporate, via their committee, making decisions that promote the right to life by changing rights, privileges or obligations of lot owners about access to, or the use of, common property and body corporate assets to support the public health response to COVID-19.

Any limitation of the property rights of lot owners or occupiers may also be mitigated by the ability of a lot owner or occupier to apply under the dispute resolution provisions of the BCCM Act if the owner or occupier considers the committee has acted unreasonably in making a decision under the Regulation.

Given the above, it is considered the purpose of the limitation on the property rights of owners and occupiers of lots imposed by the Regulation appropriately balances the importance of preserving owners' and occupiers' property rights, in this instance.

Conclusion

I consider that the *Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020* is compatible with the *Human Rights Act 2019* because while it does limit, restrict or interfere with a human right, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

THE HONOURABLE YVETTE D'ATH MP
ATTORNEY-GENERAL AND MINISTER FOR JUSTICE
LEADER OF THE HOUSE

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