

Body Corporate and Community Management Legislation Amendment Regulation 2024

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* (Human Rights Act), I, Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, provide this human rights certificate with respect to the *Body Corporate and Community Management Legislation Amendment Regulation 2024* (Amendment Regulation) made under the *Body Corporate and Community Management Act 1997* (BCCM Act).

In my opinion, the Amendment Regulation, as tabled in the Legislative Assembly, 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 Subordinate Legislation

The primary object of the BCCM Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land in Queensland. To achieve this object, the BCCM Act provides for the establishment, operation and management of community titles schemes.

To provide the required flexibility of governance arrangements for the wide range of community titles schemes, management processes and procedures are provided through regulation modules designed for different types of schemes. Five regulation modules have been made under the BCCM Act:

- *Body Corporate and Community Management (Accommodation Module) Regulation 2020* (Accommodation Module)
- *Body Corporate and Community Management (Commercial Module) Regulation 2020* (Commercial Module)
- *Body Corporate and Community Management (Small Schemes Module) Regulation 2020* (Small Schemes Module)
- *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (Specified Two-lot Schemes Module)
- *Body Corporate and Community Management (Standard Module) Regulation 2020* (Standard Module).

The *Body Corporate and Community Management and Other Legislation Amendment Act 2023* (BCCMOLA Act) amended the BCCM Act to:

- allow for termination of uneconomic community titles schemes to facilitate renewal and redevelopment;

- provide adjudicators from the Office of the Commissioner for Body Corporate and Community Management with the power to approve alternative insurance arrangements, rather than the Commissioner, where the body corporate is not able to comply with insurance requirements under the regulation modules; and
- modernise and improve the operation of the BCCM Act in relation to by-laws and other governance issues, including administrative and procedural matters.

These amendments commence on 1 May 2024.

The BCCMOLA Act included heads of power in the BCCM Act to prescribe matters in the regulation modules to support implementation of the amendments to the BCCM Act. The Amendment Regulation will amend the regulation modules to prescribe the following matters for the BCCM Act:

- the period within which a body corporate or its committee must decide whether to grant written approval to keep or bring an animal on a lot or the common property, or to permit an invitee to keep or bring an animal on a lot or the common property;
- fees payable for inspecting or obtaining the body corporate records of other community titles schemes in a layered arrangement of community titles schemes;
- the way in which a body corporate must give documents or other information it is required to give under the BCCM Act to an owner or other person whose address for service is required to be given to the body corporate; and
- the way in which a body corporate must give a person a copy of a body corporate record if the body corporate and the person who has requested the copy do not agree on how the copy will be given.

The Amendment Regulation will also make consequential amendments to the regulation modules needed because of amendments in the BCCMOLA Act to introduce arrangements for adjudicators to make alternative insurance orders, and to remove the requirement for a body corporate to have a seal.

Finally, the Amendment Regulation will enable a body corporate to give a notice to the original owner (usually the developer) for a community titles scheme requesting that certain documents be given if they have not been provided by the original owner at the time the original owner was required to give the documents.

Human Rights Issues

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

I have considered each of the rights protected by Part 2 of the Human Rights Act. In my opinion, I consider the following human rights to be relevant to the Amendment Regulation:

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

Property rights (section 24 of the Human Rights Act)

1. Fees for inspecting and obtaining a copy of body corporate records

Under section 205AAB of the BCCM Act, a body corporate for a community titles scheme in a layered arrangement, and an owner or occupier of a lot included in a scheme in a layered arrangement, may make a written request to inspect or obtain copies of the records of a body corporate for another scheme in the layered arrangement of community titles schemes. The written request must be accompanied by the prescribed fee under the regulation module applying to the other scheme.

The Amendment Regulation may engage and potentially limit property rights by depriving a person of property (money) by prescribing fees for inspecting and obtaining a copy of the body corporate records of another scheme in a layered arrangement of schemes.

The prescribed fee for inspecting the records is 18.25 fee units if the person inspecting the records is the owner of a lot in another scheme in the layered arrangement or a body corporate for another scheme, and 35.10 fee units if the person is another person (for example, the occupier of a lot). The prescribed fee for obtaining a copy of record is 0.65 fee units for each page supplied.

2. Original owner obligation to give documents to body corporate

The original owner for a community titles scheme (usually the developer) is required to give the body corporate specific documents and material at the first annual general meeting (AGM) under the Accommodation Module, Commercial Module, Small Schemes Module or Standard Module. Also, if these documents come into the original owner's possession after the body corporate's first AGM, the original owner must give the documents to the secretary at the earliest practicable opportunity.

In a community titles scheme to which the Specified Two-lot Schemes Module applies, the original owner must give specific documents and material to the body corporate within two months of no longer being the owner of one or both of the lots in the scheme. Also, if these documents come into the original owner's possession after two months of no longer being the owner of one or both of the lots in the scheme, the original owner must give them to the body corporate at the earliest practicable opportunity.

The Amendment Regulation will amend the Accommodation, Commercial, Small Schemes and Standard Modules to enable the body corporate to give a notice to the original owner requiring the original owner to, within 14 days after the person is served with the notice, give any documents or other material required to be given to the body corporate under the regulation module but that the original owner has not given.

The Amendment Regulation will amend the Specified Two-lot Schemes Module to enable the giving of a notice to the original owner by the owners of both lots in the scheme (or the owner of the other lot if the original owner is the owner of one of the lots) requiring the original owner to, within 14 days after the person is served with the notice, give any documents or other material required to be given to the body corporate under the regulation module but that the original owner has not given.

The Amendment Regulation may engage and potentially limit property rights by depriving a person of property (money) by requiring the original owner to pay a maximum penalty of 20 penalty fee units for failing to comply with a notice.

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

The Amendment Regulation may engage a person's right to privacy and reputation by requiring particular information about a committee decision regarding a request for written approval to keep a pet to be included in the minutes of a committee meeting.

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.

The provisions require the following information relevant to a decision on a person's request to keep a pet to be detailed in the minutes of a committee meeting, or in a record of motions:

- the date of the request was made to the committee;
- if known - the animal's name, breed and sex; and
- any conditions imposed on a pet approval.

The minutes of a committee meeting and records or motions are distributed to owners of lots in the scheme and may also be inspected or copied by interested persons upon written request and payment of an associated fee.

It is not considered that the disclosure of information about a request to keep an animal is arbitrary. The disclosure of this information is intended to ensure transparency and appropriate record-keeping in relation to committee decisions by ensuring owners of lots in a community titles scheme are provided with relevant details in relation to a decision on a request for approval to keep a pet.

For these reasons, it is my opinion that the inclusion of information about a committee decision on a person's request to keep a pet is compatible with the right to privacy and reputation, which is protected by section 25 of the Human Rights Act.

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

Property rights (section 24 of the Human Rights Act)

(a) the nature of the right

Property rights under the Human Rights Act protects the right of all people to own property either alone or with other people. The right also protects a person from being arbitrarily deprived of their property. Property in relation to human rights includes real and personal property such as land, chattels and money, and includes contractual rights, leases and debts. Property rights can include statutory rights and other economic interests.

The term 'deprived' is not defined by the Human Rights Act but is considered to include the significant restriction on a person's use or enjoyment of their property, to the extent that a person is significantly deprived of the ability to use their property or part of that property.

Enjoyment of property could include exclusive possession of it, disposing of it, or obtaining profits from it.

A limitation of property rights includes that a person has the right not to be ‘arbitrarily’ deprived of their property. The term arbitrarily has been defined in a human rights context as conduct that is capricious, unpredictable or unjust and as interferences with rights that are unreasonable, in the sense of not being proportionate to the aim.

(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

1. Fees for inspecting and obtaining a copy of body corporate records

The purpose of prescribing a fee for a person to inspect or obtain a copy of records of a body corporate is to ensure that the body corporate which is required to facilitate an inspection or provide the copy of the records is reimbursed for the associated costs.

In many cases, a body corporate engages a body corporate manager to provide administration services for the body corporate. These administration services typically include management of body corporate records, including facilitating inspections of records and providing copies of body corporate records as required under the body corporate legislation.

The fees paid by the person requesting to inspect records or obtain a copy of records can be used by the body corporate to recoup, either wholly or in part, the fees a body corporate manager may charge under the terms of its engagement with the body corporate.

The fees prescribed in the Amendment Regulation are consistent with existing prescribed fees required to be paid by an interested person for inspecting or obtaining copies of body corporate records under section 205 of the Act.

A body corporate is funded by contributions from the owners of lots included in the scheme. If a fee was not prescribed for access to the records, then the owners of the lots included the scheme would have to fund the associated costs through increased levies.

It is appropriate that the person seeking to access the body corporate records bear the associated costs rather than the relevant body corporate, which receives no direct benefit from providing access.

The fee arrangements therefore protect the property rights of the owners of lots included in a community titles scheme by ensuring a body corporate, which is funded by the owners of all lots in the scheme, is not negatively impacted financially by requests for information. It is important the body corporate is sustainable economically to ensure that the body corporate can meet its obligations in relation to the scheme, including the requirement to maintain common property in good condition.

The potential impact of the fees is consistent with a free and democratic society based on human dignity, equality and freedom because it contributes to the sustainable operation of community titles schemes.

2. Original owner obligation to give documents to body corporate

The documents to be given by the original owner include a register of body corporate assets, plans of buildings forming part of scheme land, all policies of insurance, and other documents relevant to the ongoing administration and management of the scheme.

The purpose of prescribing a penalty for an original owner's failure to comply with a notice requesting the giving of information is to encourage the original owner to comply with the notice, to ensure that the body corporate has in its possession information and other materials required for the administration and management of the scheme.

The penalty is consistent with the penalties under existing provisions of the regulation modules that apply to a member of the body corporate or committee, a body corporate manager or a service contractor who fails to comply with a body corporate notice requiring the relevant person to return a body corporate asset, a body corporate record or other document of a body corporate.

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

By incentivising the original owner to provide documents to the body corporate required for the administration of the scheme, the penalty will support the property rights of members of the body corporate (the owners of the lots included in the community titles scheme). For example, the body corporate may use the information provided to manage the scheme to the benefit of all the owners in the scheme. For this reason, the purpose of the limitation is considered 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

1. Fees for inspecting and obtaining a copy of body corporate records

The fees for inspecting and obtaining a copy of body corporate records are intended to reimburse the body corporate for the costs it may incur in providing access to records.

The extent to which the prescribed fee reimburses the body corporate for the costs associated with providing access to records will vary between bodies corporate due to a number of factors:

- Bodies corporate may have different management arrangements in place (for example, some bodies corporate may engage a body corporate manager to provide administrative services, including facilitating access to records, while some bodies corporate may rely on volunteer committee members providing the access to records).
- Body corporate managers may charge bodies corporate in different ways for administrative services, including the provision of access to body corporate records.
- There may be different costs associated with providing the access which may vary according to different factors, for example, whether the records are inspected or provided in electronic or in hard copy form.

The fees are consistent with the existing fees for accessing body corporate records under section 205 of the BCCM Act, which relates to access to body corporate records by the owner, or a mortgagee, of a lot included in the scheme; the buyer of a lot included in the scheme; another person who satisfies the body corporate of a proper interest in the information sought; or the agent of one of the aforementioned persons.

2. Original owner obligation to give documents to body corporate

The penalty for failure to comply with the notice to the original owner to hand over documents to the body corporate is rationally connected to encouraging compliance with the notice to provide documents, and the broader purpose of ensuring a body corporate has information about the community titles scheme that is necessary for the administration and management of the scheme.

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

1. Fees for inspecting and obtaining a copy of body corporate records

Imposing a reduced fee for accessing or obtaining copies of body corporate records may be a less restrictive option to achieve the purpose of the provision. However, a reduced fee is unlikely to enable a body corporate to recoup the fees it may incur in providing an interested person with access to the body corporate records. For this reason, imposing a reduced fee would not be reasonable, particularly given the nature of the existing fees already in place for inspecting and obtaining records.

The prescribed fee for inspecting records varies depending on the person's relationship to the scheme. The prescribed fee for inspecting records is reduced if the person is the owner of a lot included in another scheme that is included in the layered arrangement, or the person is a body corporate for another scheme that is included in the layered arrangement. This is considered appropriate because the lot owner has an interest in the management of the scheme, and again it is consistent with the nature of existing fees already in place for inspecting and obtaining records.

2. Original owner obligation to give documents to body corporate

Prescribing a reduced penalty for an original owner's failure to comply with a notice to give documents or materials to the body corporate is not considered reasonable, as a reduced penalty is unlikely to promote compliance with the obligation to give information or materials to the body corporate.

As noted above, an original owner's compliance with a notice is essential, as it is important for the body corporate to have access to information and materials necessary for the administration and management of the community titles scheme.

The penalty would need to be prosecuted by a body corporate or another party through a court, meaning that natural justice would apply to the application of the penalty.

(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

1. Fees for inspecting and obtaining a copy of body corporate records

On balance, I consider the limitations on the property rights arising from the prescribed fees for inspecting or obtaining a copy of body corporate records are outweighed by the importance of ensuring the body corporate is reimbursed for the costs associated with providing the access to records and is not negatively impacted by the requests to access records. Ensuring appropriate reimbursement of the body corporate for these costs will in turn protect the property rights of the owners of lots included in the community titles scheme.

2. Original owner obligation to give documents to body corporate

On balance, I consider the limitations on property rights arising from the penalty for failure to comply with the notice to give documents to the body corporate are outweighed by the importance of the body corporate having important information necessary for the administration of the community titles schemes.

Conclusion

I consider that the *Body Corporate and Community Management Legislation Amendment Regulation 2024* is compatible with the Human Rights Act because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

YVETTE D'ATH MP

Attorney-General and Minister for Justice
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