

2014

Queensland Government Property  
Law Review  
Options Paper

*Body corporate governance issues:  
By-laws, debt recovery and scheme  
termination*

Commercial and Property Law  
Research Centre  
QUT Law

# By-laws, debt recovery and scheme termination

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## Attorney-General's foreword



The Queensland Government knows that property and construction are critical to Queensland's future economic growth and prosperity.

On 15 August 2013, I announced that the Government had engaged the Queensland University of Technology (QUT) to conduct a broad ranging, independent review of Queensland's property laws, including community titles legislation.

The Government is proud to partner with QUT in this exciting opportunity to identify ways of ensuring Queensland legislation provides the foundation for strong, sustainable and socially responsible growth in Queensland's property and construction sectors.

The property law review is being conducted through the Commercial and Property Law Research Centre, QUT Law, and is headed by highly-respected property law experts, Professor Bill Duncan, Professor Sharon Christensen and Dr Bill Dixon.

A critical part of the property law review process will be meaningful consultation and engagement with Queensland property professionals, industry stakeholders and the broader community.

In this respect, I am very pleased to be releasing a further consultation paper for the property law review. This consultation paper is the first of two papers that will present options for improving a range of body corporate governance matters. This Options Paper deals particularly with issues relating to by-laws, recovery of body corporate debts and termination of community titles schemes.

The second body corporate governance paper will examine administrative and procedural matters including, for example, issues relating to body corporate committees and meeting and voting arrangements. A further paper will also consider the possibility of a transition to the *Body Corporate and Community Management Act 1997* for schemes regulated under the *Building Units and Group Titles Act 1980*.

The release of this first body corporate governance options paper follows the earlier release of two issues papers in February 2014 as part of the property law review. Issues Paper 1 considered the current seller disclosure regime in Queensland including its effectiveness for the purposes of the sale and conveyancing process and whether there is a need for reform. Issues Paper 2 dealt with the complex and difficult issues concerning the setting and adjustment of contribution schedule lot entitlements under the *Body Corporate and Community Management Act 1997*.

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The property law review will also include an examination of issues concerning the *Property Law Act 1974* and consultation papers will be released in due course to seek industry and community feedback on the legislation.

Due to the complexity of the review, QUT will provide the Government with reports outlining the findings of the review in stages. The Government will make announcements about the outcomes of the property law review after considering the findings and recommendations of the QUT review team.

I sincerely thank the QUT review team for preparing this Options Paper and I strongly encourage all Queenslanders with an interest in community titles law to have their say by making a submission in response to the paper.

**The Honourable Jarrod Bleijie MP**  
**Attorney-General and Minister for Justice**  
15 December 2014

## How to make a submission

Written submissions are invited in response to some or all of the issues raised in this Options Paper.

The issues raised are not intended to be exhaustive. If you think there are other opportunities for improving the body corporate governance matters under the *Body Corporate and Community Management Act 1997*, please include these in your response.

The closing date for submissions is **30 January 2015**.

Copies of the *Body Corporate and Community Management Act 1997* can be obtained at:  
[www.legislation.qld.gov.au](http://www.legislation.qld.gov.au)

### ***Where to send your submission***

You may lodge your submission by email or post.

The email address for submissions is: [QUTReview-BCCM@justice.qld.gov.au](mailto:QUTReview-BCCM@justice.qld.gov.au)

Alternatively, you can post your submission to:

QUT Review - BCCM  
C/- Office of Regulatory Policy  
Department of Justice and Attorney-General  
GPO Box 3111  
BRISBANE QLD 4001

These submissions will be provided to the Commercial and Property Law Research Centre at the Queensland University of Technology which is conducting the review.

### ***Privacy Statement***

Any personal information you include in your submission will be collected by the Department of Justice and Attorney-General (the Department) and the Queensland University of Technology for the purpose of undertaking the review of Queensland's property laws. The Department or the Queensland University of Technology may contact you for further consultation regarding the review. Your submission may also be released to other government agencies as part of the consultation process.

Submissions provided to the Department and the Queensland University of Technology in relation to this paper will be treated as public documents. This means that they may be published on the Department's website, together with the name and suburb of each person or entity making a submission. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly in the submission. However, please note that all submissions may be subject to disclosure under the *Right to Information Act 2009*, and access applications for submissions, including those marked confidential, will be determined in accordance with that Act.

Submissions (or information about their content) may also be provided in due course to a parliamentary committee that considers any legislation resulting from this review.

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# 1. Background

## 1.1. Review of Queensland Property Laws

In August 2013, the Queensland Government engaged the Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) to conduct an independent and broad-ranging review of Queensland's property laws. This review is paving the way for a more streamlined approach to how Queenslanders buy, sell and manage property by reducing red tape, unnecessary regulation and property law duplication.

A core element of the review includes the options for the modernisation, simplification, clarification and reform of the *Property Law Act 1974* (Qld) in light of case law, the operation of other related legislation and changes in practice. The review also includes a range of issues involving community titles schemes arising under the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**). In February 2014, *Issues Paper 1: Seller Disclosure in Queensland* and *Issues Paper 2: Lot entitlements under the Body Corporate and Community Management Act 1997* were released by the Department of Justice and Attorney-General.

Following the release of *Issues Paper 2*, which addressed setting and adjustment of lot entitlements in community titles schemes, the Centre has focused on a number of governance issues relevant to body corporate committees and lot owners. The Centre engaged in direct, face-to-face meetings with a broad range of strata industry groups and other relevant stakeholders to identify problems or concerns with the current BCCM Act and to consider practical ways of addressing these areas.

Stakeholder meetings identified a large number of concerns with the current legislation relating to body corporate governance. Broadly, these concerns can be grouped in to the following categories:

- issues relating to the introduction of and validation of by-laws relating to the towing of vehicles parked in contravention of parking by-laws and to regulate smoking in lots and on common property;
- issues relating to the process of recovering unpaid contributions as a debt from lot owners who are unable or unwilling to pay;
- concerns relating to the current provisions for termination of and redevelopment of a strata scheme;
- procedural issues such the body corporate seal, meeting notice periods, electronic voting and committee membership; and
- miscellaneous issues.

There was a substantial amount of support among industry groups relating to the issues of by-laws, debt recovery and scheme termination. Given the general consensus, the Centre has structured this paper as an Options Paper setting out a range of potential options. Subsequent papers will address the procedural issues relating to body corporate committees, electronic voting and other miscellaneous issues and consider the issues associated with a possible transition to the BCCM Act for schemes under the *Building Units and Group Titles Act 1980* (Qld).

## 1.2. Balancing the rights of the individual and the community

The owners of the lots in a community titles scheme are automatically members of the body corporate.<sup>1</sup> Bodies corporate create and enforce rules, levy charges to administer, maintain and improve the common property and carry out other functions as required by the BCCM Act and the relevant **Regulation Module**.<sup>2</sup> The body corporate makes decisions at general meetings and through a committee of volunteer members, elected to represent the body corporate. Many day to day decisions of the body corporate are made by the committee.

Bodies corporate are often referred to as the ‘fourth tier of government’.<sup>3</sup> Like a government, bodies corporate collect money (in the form of contributions) for the provision of services and facilities and create laws (in the form of by-laws). Unlike a government, however, bodies corporate are made up of private individuals who voluntarily enter into agreement with other private individuals to share the costs of owning and maintaining property. The mixture of individual ownership of lots and collective ownership of common property creates unique challenges for balancing individual and collective rights. Where one individual fails to follow the rules or fails to pay their share of the expenses, this can have dramatic consequences for the other individuals in the community.

In Queensland, bodies corporate have a number of enforcement mechanisms available to deal with lot owners or occupiers that do not comply with the by-laws or lot owners who fail to pay their share of the contributions on time. These include issuing a notice to comply with a by-law; charging interest on any unpaid contributions; and even seeking an order of a court or an adjudicator requiring a lot owner or occupier to do or refrain from doing a particular thing.

Despite this range of enforcement mechanisms, there is a widespread perception among strata industry groups, body corporate managers and lot owners that the body corporate is a ‘toothless tiger’ when it comes to enforcing its own rules. There are legislative limits on enforcing by-laws restricting certain behaviours, such as keeping pets or smoking on balconies, even if all the owners agree to the by-law. A body corporate cannot enforce its own rules through direct action, but must ultimately rely on another entity (a court, tribunal or adjudicator) to enforce the rules. The process of enforcing by-laws may require a notice, self-resolution, conciliation, adjudication and an order from the Magistrates Court. These limitations mean that quick response to particular types of by-law breach may be difficult, if not impossible.

The purpose of the BCCM Act is to provide for flexible and contemporary communally based arrangements by a number of means including by balancing the rights of individuals with the responsibility for self-management as an inherent aspect of community titles schemes.<sup>4</sup>

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<sup>1</sup> *Body Corporate and Community Management Act 1997 (Qld) (BCCM Act)* s 31.

<sup>2</sup> A community titles scheme has a Regulation Module applying to it: BCCM Act s 21. The current Regulation Modules are: *Body Corporate and Community Management (Standard Module) Regulation 2008 (Qld) (Standard Module)*; *Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld) (Accommodation Module)*; *Body Corporate and Community Management (Commercial Module) Regulation 2008 (Qld) (Commercial Module)*; *Body Corporate and Community Management (Small Schemes Module) Regulation 2008 (Qld) (Small Schemes Module)*; *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011 (Qld) (Two-lot Module)*.

<sup>3</sup> Hazel Easthope and Bill Randolph, ‘Governing the Compact City: The Challenges of Apartment Living in Sydney, Australia’ (2009) *Housing Studies* 24(2), 243-259 at 248.

<sup>4</sup> BCCM Act ss 2, 4(a).

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It is argued by some that the balance favours individual rights over the rights of the body corporate and the common benefit. Some owners and occupiers flagrantly ignore the body corporate by-laws. Some lot owners steadfastly refuse to pay their contributions which can force the body corporate to incur significant costs.<sup>5</sup> Where the cost of repairing the common property of a scheme is so high as to be prohibitive, a single owner may hold out against termination of the scheme potentially forcing other lot owners to pay large contributions to maintain a building that is diminishing in value.

The body corporate has little power to do anything in the face of these situations. Enforcing by-laws against owners and occupiers or collecting unpaid contributions from a recalcitrant owner may involve a huge investment of time and money. If one lot owner votes against scheme termination, a valuable redevelopment opportunity may be lost to the other lot owners who may have to pay tens of thousands of dollars to restore a building to a habitable standard. Those that support this argument feel there is a need to re-balance individual and collective rights with a stronger emphasis on collective rights.

Others argue that the current balance between individual rights and collective rights protects lot owners from the intrusion of unreasonable, uninformed or intractable committees that seek unnecessary control over the activities within a lot. Some bodies corporate or body corporate committees may be overly vigorous in their attempts to control what lot owners and occupiers may do on common property and even in the confines of their own lot. Those that support this argument feel that any increase in the power of the body corporate brings with it a potential for abuse by particular individuals.

### 1.3. Scope of Options Paper

This Options Paper deals with options for improving the ability of the body corporate to self-regulate by enforcing by-laws and recovering unpaid contributions from lot owners. Additionally it deals with the contentious issue of scheme termination, which is required to occur before the scheme land can be redeveloped, for example by knocking down and rebuilding existing structures.

This Options Paper deals with particular issues where one lot owner may have a dramatic impact on body corporate resources by breaching particular by-laws, failing to pay contributions to the common expenses or voting against a scheme termination when the building is uneconomic to repair.

The options are intended to give bodies corporate quick, effective enforcement mechanisms to address disputes relating to parking, pets, smoking and overcrowding so as to protect the rights of other lot owners in the scheme. Effectively addressing these issues may require changes to the ability of the body corporate to enforce particular types of by-laws and follow up with direct action. Further, bodies corporate may require robust mechanisms to recover unpaid contributions without incurring significant additional expenditure on debt recovery procedures and legal fees. Bodies corporate may also need the ability to make decisions by majority even where these decisions may have a negative impact on a small number of lot owners.

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<sup>5</sup> For example, see *Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme* 36237 [2014] QCA 73 (*Westpac v Wave*).

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If implemented, many of the options in this Options Paper will result in an increase in the powers of the body corporate (the community) and require individual lot owners and occupiers to take the first step to challenge a notice from the body corporate about an alleged breach of a by-law.

In all cases, the body corporate will continue to have the obligation to act reasonably in anything it does.<sup>6</sup> However, the issues of bias, interpersonal conflict and malice cannot be entirely removed from the equation in a community titles scheme. For these reasons, the options presented in this Options Paper are balanced by strong mechanisms to protect important individual rights, where appropriate.

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<sup>6</sup> BCCM Act s 94(2).

## 2. By-laws

The **by-laws**<sup>7</sup> for a strata or community titles scheme are a set of rules that provide for:

- the administration, management and control of common property and body corporate assets; and
- the use and enjoyment of lots, common property and body corporate assets.<sup>8</sup>

An **exclusive use by-law** may give exclusive use of a part of the common property or a body corporate asset to a particular lot in the scheme.<sup>9</sup> For example, a courtyard attached to a lot may actually be common property, but subject to an exclusive use by-law which allows the owner of the lot to have exclusive use of that courtyard. An exclusive use by-law may also provide that the lot owner is required to pay for the maintenance associated with the relevant common property or body corporate asset either directly or by reimbursing the body corporate.

Generally, the by-laws are included in the original documents or plans that create the scheme and which are registered with the relevant state titles office. Alternatively, or sometimes in addition, model by-laws in the legislation may apply by default. By-laws cover issues such as noise, parking, keeping of pets and the appearance of a lot. By-laws are binding on owners, occupiers and visitors of community titles schemes.

The following sections of this chapter suggest a number of options to improve the enforcement of by-laws in Queensland. Section 2.1 addresses the existing by-law enforcement. Sections 2.2 to 2.5 consider the specific issues of parking, pets, smoke drift and overcrowding to highlight difficulties that bodies corporate face in relation to these issues. A number of options are suggested to improve the ability of the body corporate to deal with these specific issues. Section 2.6 suggests a number of options to improve the general ability of the body corporate to enforce by-laws through direct action.

### 2.1. Current by-law process in Queensland

#### 2.1.1. Applicable by-laws

In Queensland, the by-laws are usually included as a schedule to the community management statement (**CMS**) registered when the community titles scheme is created.<sup>10</sup> If no by-laws are included in the CMS, the by-laws in Schedule 4 of the BCCM Act may apply.<sup>11</sup>

#### 2.1.2. Changing by-laws

By-laws may be adopted, amended, removed or replaced during the life of a scheme by a **special resolution**<sup>12</sup> of the body corporate in a general meeting. Exclusive use by-laws (other than an exclusive use by-law included in the first CMS) may only be changed with the prior written consent of

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<sup>7</sup> Some jurisdictions use the term 'rules' or 'articles' to refer to by-laws.

<sup>8</sup> See for example, BCCM Act s 169.

<sup>9</sup> BCCM Act s 170.

<sup>10</sup> BCCM Act s 66(1)(e).

<sup>11</sup> BCCM Act s 168. Schemes created prior to 1997 may have the by-laws from schedule 3 of the *Building Units and Group Titles Act 1980* (Qld) (**BUGTA**): BCCM Act s 337(2)(g).

<sup>12</sup> BCCM Act s 62(3)(a). The requirements for a special resolution are set out in BCCM Act s 106.

the relevant lot owner and a **resolution without dissent**.<sup>13</sup> New or modified by-laws do not take effect until a new CMS has been registered with the Titles Registry.<sup>14</sup>

### 2.1.3. Enforcing by-laws through a contravention notice

The body corporate is given the authority to enforce the CMS<sup>15</sup> (which usually includes the by-laws). If the body corporate reasonably believes that an owner or occupier is contravening a by-law and it is likely the contravention will *continue*<sup>16</sup> then the body corporate may issue<sup>17</sup> a **continuing contravention notice**. If the body corporate reasonably believes that an owner or occupier has contravened a by-law and it is likely the contravention will be *repeated*,<sup>18</sup> the body corporate may issue a **future contravention notice**. The owner or occupier must comply with the continuing contravention notice or future contravention notice (each, a **contravention notice**).

An owner or occupier in a scheme (the **complainant**) who reasonably believes that another owner or occupier (the **accused person**) in the scheme has contravened a by-law for the scheme may ask the body corporate to issue a contravention notice to the accused person if the circumstances of the breach make it likely the contravention will continue or be repeated.<sup>19</sup>

### 2.1.4. Failure to comply with contravention notice

If an accused person has been issued a contravention notice and does not comply with that notice, the body corporate may bring an action in the Magistrates Court<sup>20</sup> seeking that the accused person be forced to pay a civil penalty of up to \$2,200.<sup>21</sup> However, this rarely occurs in practice as non-compliance with a contravention notice is dealt with as a **dispute**<sup>22</sup> under the BCCM Act. The body corporate or the complainant (in specific circumstances discussed below) may seek to resolve the dispute using the **dispute resolution process**<sup>23</sup> administered by the office of the Commissioner for Body Corporate and Community Management (**BCCM Commissioner**).

### 2.1.5. Commencing dispute resolution

Unless special circumstances<sup>24</sup> apply, the body corporate may not commence the dispute resolution process without first giving the accused person a contravention notice. A complainant may not commence dispute resolution without following the preliminary procedure.

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<sup>13</sup> A motion is passed by a resolution without dissent if no vote is counted against the motion: BCCM Act s 105.

<sup>14</sup> BCCM Act s 59(1); *Land Title Act 1994* (Qld) s 115L(3).

<sup>15</sup> BCCM Act s 94(1)(b). The CMS is deemed to be an agreement signed under seal by the body corporate, registered proprietors and occupiers of lots and common property: BCCM Act s 59(3).

<sup>16</sup> BCCM Act s 182.

<sup>17</sup> The decision to issue a notice may be made by the committee: BCCM Act 100(1).

<sup>18</sup> BCCM Act s 183.

<sup>19</sup> BCCM Act s 185.

<sup>20</sup> *Justice Act 1886* (Qld) s 19.

<sup>21</sup> BCCM Act s 182(5) and 183(6) provide that a person who does not comply with a contravention notice is liable for a fine of up to 20 penalty units. One penalty unit is \$110: *Penalties and Sentencing Act 1992* (Qld), s 5(1)(d). The penalty is paid to the state government, not to the body corporate.

<sup>22</sup> BCCM Act ss 184, 227(1)(a)-(b) and schedule 6 (definition of 'dispute').

<sup>23</sup> See BCCM Act Chapter 6 generally and schedule 6 (definition of 'dispute resolution process').

<sup>24</sup> BCCM Act s 186.

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The preliminary procedure requires the complainant to make a written complaint to the body corporate requesting that a contravention notice be issued to the accused person. The body corporate may decide:

- to issue a contravention notice to the accused person, in which case the body corporate will be responsible for taking action if there is non-compliance;<sup>25</sup> or
- not to issue a contravention notice to the accused person.

In either case, the body corporate must notify the complainant of the action it has taken.<sup>26</sup> If the body corporate does not notify the complainant within 14 days after receiving the written complaint, or if the body corporate notifies the complainant that it has decided not to issue a contravention notice, then the complainant may commence the dispute resolution process.<sup>27</sup> This means that a complainant cannot seek to enforce the by-laws against an accused person unless the body corporate declines to seek enforcement.

### 2.1.6. Dispute resolution process

The dispute resolution process in the BCCM Act consists of several stages. In the first instance, the body corporate or the complainant must attempt to resolve the dispute by **internal dispute resolution** using the process adopted by the body corporate for **self-resolution**, or if no process has been adopted, by informal processes such as communicating with the accused person.<sup>28</sup>

If this does not resolve the dispute, the body corporate or the complainant after following the preliminary procedure (each, an **applicant**) may apply to the BCCM Commissioner's office for **conciliation**.<sup>29</sup> This involves a face-to-face or telephone meeting between the applicant, the accused person and other relevant parties to the dispute facilitated by an independent conciliator who will help the parties achieve their own resolution.<sup>30</sup>

If conciliation does not resolve the dispute the applicant may apply for **adjudication**. Adjudicators may make orders that are binding on the parties<sup>31</sup> to the dispute and which may be enforced in the Magistrates Court.<sup>32</sup> Adjudicators are not bound by the rules of evidence and seek to make orders

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<sup>25</sup> A complainant may commence dispute resolution to require the body corporate to issue a contravention notice. See Queensland Government, Department of Justice and Attorney-General, Office of the Commissioner for Body Corporate and Community Management, *Practice Direction 6: By-Law Enforcement Applications*, [http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0017/12905/practice-direction-6.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0017/12905/practice-direction-6.pdf).

<sup>26</sup> BCCM Act s 182(3) and 183(3).

<sup>27</sup> BCCM Act s 185(2).

<sup>28</sup> BCCM Act s 238(1)(b) and Schedule 6 (definition of 'internal dispute resolution').

<sup>29</sup> BCCM Act schedule 6 (definition of 'department conciliation' and 'dispute resolution process'). Where appropriate, the BCCM Commissioner may progress some applications straight to adjudication.

<sup>30</sup> See Queensland Government, Department of Justice and Attorney-General, Office of Body Corporate and Community Management, *Conciliation* (Fact sheet, May 2010), [http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0007/12859/conciliation.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/12859/conciliation.pdf).

<sup>31</sup> BCCM Act s 276(2).

<sup>32</sup> BCCM Act ss 286-287.

quickly and with as little formality and technicality as possible while still observing natural justice.<sup>33</sup> If a party fails to comply with an adjudicator's order, that party may be liable for a fine of up to \$44,000.<sup>34</sup>

The BCCM Commissioner may reject an application for conciliation or adjudication if the applicant has not tried to resolve the issue through an earlier stage (i.e. conciliation prior to applying for adjudication or self-resolution prior to applying for conciliation).<sup>35</sup> An adjudicator's decision may be appealed to the Queensland Civil and Administrative Tribunal (QCAT) on a question of law.<sup>36</sup>

## **2.2. Issue: Unlawful parking in breach of the by-laws and towing**

Car parking is becoming a more contentious issue in community living. Parking spaces in densely populated urban areas are becoming scarcer and increasingly are subject to local authority parking restrictions and, in some cases, heavy parking fees. This makes the issue of protecting access to car parking in community titles schemes all the more necessary.

There are two aspects to the car parking issue in community titles schemes. The first is where someone (an owner, occupier or a third party) parks a vehicle in a space belonging to another lot, thus preventing the rightful user from accessing the space. The parking space may be a part of the lot or it may have been allocated to the lot by an exclusive use by-law. In either case, the offending vehicle is trespassing on private property.

The second, and more problematic, concern is vehicles parked on common property at the scheme either in the visitor car parking spaces or in areas not designated for parking. Lot owners and occupiers sometimes use the visitor car parking spaces for their personal vehicles, perhaps because they are using their allocated car park for storage or for another vehicle. Third parties not connected with the scheme (who are not visitors or guests and who are trespassing upon common property) also sometimes use the visitor car parking spaces as more convenient than paid street parking or where street parking is limited, unavailable or expensive. This may particularly affect schemes located close to rail stations, large shopping complexes or hospitals.

Parking concerns raise a number of issues for bodies corporate. The use of visitor parking by owners /occupiers and trespassers may mean there are few, or no, parking spaces available for bona fide visitors to the scheme. It may also be that the relevant development approval requires the scheme to have visitor car parking spaces. If the body corporate allows all the visitor spaces to be used by owners and occupiers, the body corporate will be in breach of the development approval. Vehicles parked on common property in areas not designated for parking may create safety concerns and could restrict or limit access to the scheme.

### **2.2.1. Existing approach and problems**

Some bodies corporate have attempted to address these issues by putting up signs limiting the amount of time a vehicle may be parked and stating that vehicles parked over time may be towed at the vehicle owner's expense. Some schemes give owners and occupiers a time limited 'visitor permit' to be used for guest's vehicles parked in a visitor car park. The by-laws may provide that the body

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<sup>33</sup> BCCM Act s 269(3).

<sup>34</sup> 400 penalty units: BCCM Act s 288. The penalty is paid to the state government, not to the body corporate and must be ordered by a Magistrate.

<sup>35</sup> BCCM Act s 241.

<sup>36</sup> BCCM Act s 289(2).



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corporate can tow away vehicles which do not have the permit displayed or which have been parked over the time limit. Some schemes may tow vehicles as a means of regulating parking on the common property or out of necessity, if the vehicle is blocking ingress, egress or otherwise creates a danger to people or property.

Some argue that a power to tow vehicles is implicit in the body corporate's power to regulate the use of common property. Despite this, and regardless of what is stated in the by-laws with respect to towing or the type of notice that is displayed in the visitor's parking area, there is no clear legislative authority for a body corporate to tow, or arrange for the towing of a vehicle. The body corporate will not be able to recover any towing costs<sup>37</sup> and may be liable for damage to the vehicle should the vehicle be damaged during the towing process (the body corporate insurance will not generally cover damage to a towed vehicle).

The body corporate is subject to legislation which makes it illegal to wilfully interfere with any mechanism or other part of a vehicle.<sup>38</sup> The body corporate may have common law rights to tow a vehicle<sup>39</sup> parked on the common property but potential liability still remains even if there are signs, regardless of whether the car belongs to an owner or occupier, a visitor or to a third party. However, if the offending vehicle belongs to an owner or occupier, the body corporate must follow the by-law contravention process in the BCCM Act (outlined at section 2.1 above) and seek an order of an adjudicator authorising the body corporate to tow the vehicle away. If the body corporate does not take these steps, removal of the vehicle may be unlawful.<sup>40</sup> This applies to a single offence and to repeat offenders.

Some bodies corporate take a robust view of this and tow vehicles regardless of the risk and the lack of an express legislative authority. Other bodies corporate are not willing to bear the risk. The time, effort and risk involved often means that bodies corporate will not pursue an owner or occupier for parking in the visitor car parking spaces and that person is free to flagrantly breach the relevant by-law.

Industry groups involved in body corporate management, especially resident managers, strongly support a change to the law to enable proper administration of the parking by-laws and to allow removal of vehicles in emergency circumstances. It is suggested that the legislation should clarify the obligations on the body corporate when dealing with vehicles parked on common property.

### 2.2.2. Considerations relevant to reform

Any option to address the concern of parking and towing must consider a number of relevant issues. These include:

- Who owns the vehicle (owner or occupier, visitor or trespasser)?

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<sup>37</sup> By-laws cannot impose a monetary liability on an owner or occupier: BCCM Act s 180(6).

<sup>38</sup> *Transport Operations (Road Use Management) Act 1995* (Qld) s 135. The section also prohibits immobilising a vehicle.

<sup>39</sup> These rights would be outside the scope of the BCCM Act and bodies corporate should seek legal advice before relying on common law to remove a vehicle: *Aztec on Joyce* [2013] QBCCMCmr 28 (29 January 2013).

<sup>40</sup> See, for example, *City Connection II* [2013] QBCCMCmr 487 (6 December 2013) (vehicles towed without notice to the occupier of the lot were unlawfully towed).

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- How should each party be warned if it is not possible to contact them after the infraction becomes known?
- How much notice (and in what form) should any warning be given? How soon can action be taken to remove the vehicle?
- Who makes the decision to tow the vehicle: the body corporate, the committee or a resident manager? What liability will attach to the decision maker if the vehicle is inappropriately towed?
- Should the same process apply to vehicles parked in a space belonging to or allocated to another lot in the scheme (i.e. parked on private property, not common property)?
- Would this process be different in the case of an emergency where the vehicle is blocking ingress and egress to the common property (and potentially emergency vehicles), rubbish collection areas, fire doors or access to other common essential plant and equipment which must be accessible for maintenance and repair at all times?

A number of options have been suggested. The options below consider the relevant issues to varying degrees.

### **2.2.3. Option 1 – Express legislative authority to tow vehicles**

The first option is for the BCCM Act to provide an express legislative authority to tow vehicles. This authority could be given to:

- lot occupiers (in this case, including owner occupiers) to remove vehicles parked on their lot without permission; and
- bodies corporate:
  - in particular limited circumstances of urgency, to remove vehicles without prior notice when the vehicle is parked on common property in an area not designated for parking in such a way that materially affects the functioning or safety of the scheme; and
  - in non-urgent circumstances, after appropriate notice has been given, to remove vehicles parked on common property in contravention of the by-laws.

In all cases, the authority would have to be explicit in a suitable by-law so that owners and occupying tenants will have knowledge of the body corporate's power in this respect.

#### **2.2.3.1. Lot occupier's authority to tow**

If a vehicle is parked in the space belonging to another lot without the permission of the lot occupier, that occupier may already have common law rights to have the vehicle towed away based on trespass. This option could provide an express authority for the lot occupier to directly engage a licenced tow truck<sup>41</sup> to remove a vehicle. This would not be done by the body corporate but the vehicle will be towed over common property.

#### **2.2.3.2. Body corporate authority to tow in special circumstances requiring urgent action**

There are occasions where a vehicle is parked on common property in such a way that it creates a hazard to lot owners and occupiers and seriously impedes the functioning of the scheme or part of

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<sup>41</sup> Licenced under the *Tow Truck Act 1973* (Qld).

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the scheme. These circumstances generally arise when vehicles are parked in areas on common property that have not been designated for parking. The necessity to remove these vehicles is a matter of urgency to ensure that in the event of a medical emergency, a fire or a breakdown in essential plant and equipment, there is clear access to the common property. Such circumstances (each, a **special circumstance**) include where vehicles:

- materially impede ingress and egress of other vehicles (including emergency vehicles) at the scheme;
- 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);
- deny access to other vehicles delivering goods or services; or
- block or seriously restrict the access of customers to commercial occupiers in schemes.

Where special circumstances exist, it is impractical for the body corporate to engage the dispute resolution processes to obtain the authorisation of an adjudicator to remove the vehicle (particularly if the infringement occurs on a weekend or public holiday). The risk created to people and property is immediate and the dispute resolution process cannot respond to this type of immediate concern.

Where special circumstances exist, after a reasonable attempt has been made to locate the driver of the vehicle, the body corporate could have the ability to remove a vehicle without prior notice to the vehicle owner provided conspicuous signage (as set out in 2.2.3.3) reflects this possibility by warning drivers that they park unlawfully at their risk. It is likely that such a power would not be often used as the vast majority of these types of parking infringements are resolved when the driver moves the vehicle after being asked.

It should be noted that removal of vehicles in these circumstances already occurs by necessity and without authority. In many cases, the body corporate determines that the risk to persons or property is too great to await adjudication. It is proper that legislation addresses these special circumstances by giving the body corporate the authority to engage towing services to remove the vehicle where they are unable to find the driver within the short time required. The legislation could allow the body corporate to delegate the authority to deal with these limited special circumstances to a resident committee member or to the resident manager. The legislation could also exempt the body corporate from liability where loss or damage occurs to a vehicle which is towed under these special circumstances.

### **2.2.3.3. Body corporate authority to tow for breach of a by-law in non-urgent circumstances**

In many schemes, parking on lots and common property is regulated to maintain the orderly use of designated vehicle spaces, such as visitor parking spaces. Parking in designated vehicle spaces does not have the same urgency and potential risk to people and property as vehicles parked in special circumstances, and should be dealt with in a different manner.

The body corporate has an obligation to enforce the by-laws in a way provided under the BCCM Act,<sup>42</sup> including by-laws that regulate parking on common property. Stakeholders have indicated that the

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<sup>42</sup> BCCM Act s 94(1)(b).

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body corporate should be given an express authority to tow vehicles parked in contravention of the by-laws.

This option will provide an express authority for the body corporate to tow away vehicles parked on common property in contravention of the by-laws by following a specific legislative process. Under this option, the BCCM Act should provide an express exclusion from liability for damage to a vehicle for bodies corporate that arrange for vehicles to be towed in strict compliance with the legislative process. The stages should be as follows:

1. *Adopt a by-law authorising towing and post clear signage.*

The body corporate will be required to adopt an adequately worded by-law setting out the parking restrictions and stating that a vehicle may be towed at the owner's risk and expense. The body corporate will be required to post clear signage in a place conspicuous to any person parking a vehicle on common property. The signage will be required to state the parking restrictions and give notice that vehicles may be towed at the owner's expense and the owner's risk.

2. *For vehicles parked in contravention of the by-law, give a first notice.*

If the body corporate has a reasonable basis to believe the vehicle has been parked in contravention of the by-law and the posted signage, then the body corporate (or its delegate) will issue a written warning (**first notice**) to the owner or occupier in control of the vehicle, either directly by service or by attachment to the vehicle, giving a reasonable amount of time to move the vehicle (or to obtain or demonstrate an authorisation to use the space). The first notice will be required to state the time and date it is issued and to clearly set out that failure to comply may result in the vehicle being towed.

Where it is not known if the vehicle belongs to an owner or occupier, a visitor or a third party, the first notice may be left on the vehicle in a conspicuous place, such as on the windshield for a period of time which would be specified in the by-law.

3. *For continued breach, give a second notice.*

After the time limit stated in the first notice has elapsed, if the body corporate has a reasonable basis to believe the vehicle has continued to be parked in breach of the by-laws and the body corporate has reasonable evidence that there has been no compliance with the first notice, then the body corporate will be authorised to take steps to have the vehicle towed away.

The first step in arranging to tow the vehicle will be to require the body corporate to make reasonable attempts to identify and give a second written notice (**second notice**) to the vehicle owner, whether that is an owner or occupier or third party visitor. The second notice will be given to the owner or occupier or where it is not known who controls the vehicle, attached directly to the vehicle.

The second notice will be required to state that the vehicle is believed to be parked in contravention of the by-law and state that after a reasonable amount of time, the body corporate may tow the vehicle without further notice.

4. *Committee resolution authorising removal of the vehicle.*

After a reasonable amount of time specified in the second notice, the body corporate may decide, by a resolution of the body corporate committee, to engage a licenced tow truck operator to remove the vehicle. This decision may be made by a vote outside of a committee meeting.<sup>43</sup>

#### **2.2.3.4. Comments**

This option inserts an additional step in the dispute resolution process for the body corporate when enforcing by-laws related to parking. After a first and second notice, the body corporate may directly take steps to enforce the breach by authorising that the offending vehicle be towed. This would be direct action because the body corporate would not be required to seek authorisation from a magistrate or the BCCM Commissioner's office. This would put the enforcement of the by-law directly in the hands of the body corporate. After the vehicle has been towed, the dispute resolution process could be activated, if the vehicle owner decided to challenge the basis on which the vehicle was towed. This would function as a check on the power of the body corporate and allow the decision to be reviewed by the BCCM Commissioner's office or a magistrate.

The implementation of this option may create several problems. Firstly, it may lead to a small increase in the number of dispute resolution applications lodged with the BCCM Commissioner. Special circumstance towing already occurs and there is unlikely to be much increase in disputes over this issue. However, owners and occupiers who experience the inconvenience and expense of having their vehicle towed away may be very upset, particularly if they believe they have a right to park in the space. Secondly, the onus is on the vehicle owner to challenge the action of the body corporate through dispute resolution if the vehicle owner believes the vehicle was towed inappropriately. This might leave the vehicle owner with the cost and inconvenience of the towing and the burden of taking action to challenge the towing. Finally, neither a bona fide visitor nor a third party trespasser currently have standing to challenge the body corporate for towing a vehicle through the dispute resolution process in the BCCM Act. The action would have to be pursued as a minor civil dispute.

An infringement notice issued by a local council (option 2 below) may be easily reversed if incorrectly issued. A towed vehicle cannot be easily returned. The exercise of this ability by a body corporate for vehicles parked in special circumstances and those parked in contravention of the by-laws must be subject to strict requirements to safeguard important individual rights.

#### **2.2.3.5. Safeguarding individual rights**

A number of safeguards already exist in the legislation. The first is that a body corporate is required to act reasonably in anything it does.<sup>44</sup> Secondly, a towing by-law would have to be adopted by the body corporate at a general meeting. This would mean the owners would (or should) be aware of the by-law and should consider the implication of giving the committee the authority to decide to tow a vehicle. Finally, under the BCCM Act, a by-law may not be oppressive or unreasonable, having regard to the interests of all owners and occupiers and the use of the common property for the scheme.<sup>45</sup>

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<sup>43</sup> Standard Module s 54; Accommodation Module s 54; Commercial Module s 28. Vote outside a committee meeting is not available under the Small Schemes Module or the Two-Lot Module.

<sup>44</sup> BCCM Act s 94(2).

<sup>45</sup> BCCM Act s 180(7).

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Other mechanisms to safeguard the rights of vehicle owners may include amendments to the BCCM Act to give non-residents the standing to lodge an application for dispute resolution when their vehicle has been towed by a body corporate. This would allow bona fide visitors and others who had their vehicle towed by a body corporate to seek dispute resolution for the towing in the BCCM Commissioner's office.

A second safeguard is to specify that in a dispute over a towed vehicle, the burden of proof that the vehicle was parked in special circumstances or contravention of a by-law falls on the body corporate. This would mean that if a vehicle were towed away and the vehicle owner lodged a dispute with the BCCM Commissioner's office, the body corporate would be required to prove that the correct procedure had been followed and that there was reasonable evidence that the vehicle was parked illegally or that there were special circumstances. The BCCM Act could provide that failure to meet this burden of proof will make the body corporate liable for the vehicle owner's costs to recover the vehicle and the cost of the application for dispute resolution. Such a provision would go a long way to stop bodies corporate from maliciously or negligently towing a vehicle.

Taken together, these additional safeguards will ensure that people who can establish a bona fide right to park in the visitor parking will be able to claim the costs of recovering the vehicle from the body corporate if the vehicle had been improperly towed.

### **2.2.4. Option 2 – Local council to police parking on private property**

A second option is for the body corporate to enter into an agreement with the local council to patrol the car park and issue fines to offenders. This idea has been suggested in New South Wales<sup>46</sup> and is available in Victoria.<sup>47</sup> Anecdotal evidence indicates that the cost to a local council to police parking in community titles schemes may outweigh the benefit.

At present, given the variety of local authorities affected, this option would appear to be unworkable in the short term (and even the longer term as it would involve costs to the local authority in employing more parking inspectors which would ultimately be borne by the body corporate). However, the Brisbane City Council has recently initiated a taskforce to review parking policies and practices<sup>48</sup> which may consider parking in community titles schemes. Other local authorities in Queensland must also consider this issue. Even if workable from a process point of view, it may be too costly to implement and maintain for both the local authority and the body corporate given the relatively few infractions it would need to address.

This option may be suited to address parking on common property and in visitor car parking spaces but not parking on a lot. A council parking inspector can determine that a vehicle parked on common property is illegally parked if there is clear signage and an agreement in place between the body corporate and the local council. A parking inspector will not be able to determine that a vehicle parked in a space for a lot does not belong to that lot.

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<sup>46</sup> See New South Wales Government, Office of Fair Trading, *Strata Title Law Reform: Strata & Community Title Law Reform Position Paper (Position Paper)*, (2013), 36, [http://www.fairtrading.nsw.gov.au/biz\\_res/ftweb/pdfs/About\\_us/Have\\_your\\_say/Strata\\_title\\_law\\_reform\\_position\\_paper.pdf](http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Have_your_say/Strata_title_law_reform_position_paper.pdf).

<sup>47</sup> *Road Safety Act 1986* (Vic) s 90D.

<sup>48</sup> <http://www.brisbane.qld.gov.au/traffic-transport/parking-permits/brisbane-parking-taskforce>.

### Questions

1. Should bodies corporate have the express ability to tow a vehicle that has been parked in a visitor car park in contravention of the by-laws?
2. Who should be authorised to initiate towing a vehicle in special circumstances (e.g. a resident manager (where one has been appointed) or a designated member of the committee who lives on-site)?
3. What right should a lot owner have to deal with a vehicle parked in their space without permission?
4. Should the body corporate be liable to pay for the costs of recovering the vehicle and the cost of dispute resolution in the BCCM Commissioner's office if a vehicle is towed away improperly (either in special circumstances or non-urgent circumstances)? What other safeguards should be placed on the body corporate's ability to tow vehicles?

## 2.3. Issue: Pets

Another issue that has generated considerable discussion in community titles schemes is the keeping of pets in a lot or on common property. Some schemes have by-laws that prohibit all pets. However, following a recent decision of the QCAT appeals tribunal it may not be possible for a scheme to enforce such a prohibition.

The BCCM Act empowers a body corporate to make by-laws for a number of purposes, including the regulation of the use and enjoyment of lots and common property.<sup>49</sup> The BCCM Act also provides that a by-law must not be oppressive and unreasonable having regard to the interests of all owners and occupiers and the use of the common property.<sup>50</sup>

### 2.3.1. The River City decision

The recent decision of *Body Corporate for River City Apartments CTS 31622 v MacGarvey*<sup>51</sup> (**River City decision**) considered the issue of pets at an apartment block in Brisbane's central business district. The by-law prohibited owners and occupiers of a lot from keeping an animal upon their lot or on the common property. It had been in effect from the time the scheme was registered. A lot owner, who was keeping a dog in her lot in contravention of the by-law, lodged an application for dispute resolution with the BCCM Commissioner. The adjudicator found the by-law was unreasonable<sup>52</sup> and ordered that it be replaced with the standard by-law from schedule 4 of the BCCM Act. The standard by-law allows the committee to decide on a case by case basis whether to permit a lot owner or occupier to have a pet and what (if any) conditions to impose. The approval of the body corporate may not be unreasonably withheld.

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<sup>49</sup> BCCM Act s 169.

<sup>50</sup> BCCM Act s 180(7).

<sup>51</sup> [2012] QCATA 47.

<sup>52</sup> *River City Apartments* [2001] QBCCMCmr 184 (3 May 2011) at 4.

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On appeal by the body corporate, QCAT<sup>53</sup> found the by-law to be invalid but for a different reason. The BCCM Act gives the body corporate the authority to regulate the use of lots.<sup>54</sup> The power to *regulate* an activity is distinct from a power to *prohibit* the activity all together. A by-law prohibiting pets is a blanket prohibition on an activity that an owner or occupier would normally be entitled to carry out which goes beyond regulation and is *prima facie* invalid.<sup>55</sup>

A by-law prohibiting an activity without the written consent of the body corporate, which sets out an objective standard by which to judge the request and which provides (directly or indirectly) that consent cannot be unreasonably withheld would not necessarily go beyond regulation.<sup>56</sup> For this reason, a by-law allowing pets subject to written approval of the body corporate and conditions (such as limits on the height or weight of the animal) is likely to be enforceable.

The River City decision noted that by-laws prohibiting pets would not automatically be unreasonable or oppressive.<sup>57</sup> The validity of the by-law would have to be decided having regard to the facts before the adjudicator, the context of those facts and the interest of all owners and occupiers in the scheme.

Despite this, the River City decision has generally been taken to mean that a body corporate does not have the authority under the BCCM Act to enforce a by-law that entirely prohibits an ordinary domestic activity such as keeping a pet. This has caused conflict in some schemes.

### **2.3.2. Option 1 – No change**

The first option to address the issue of keeping pets is to maintain the status quo. This means that by-laws about pets will be determined on a case by case basis. By-laws prohibiting pets would continue to be *prima facie* invalid but this will be subject to a determination by an adjudicator based on the facts at the scheme.

Schemes would be encouraged to adopt the standard pet by-law from schedule 4 of the BCCM Act or to adopt reasonable conditions on keeping pets, based on the circumstances at the scheme. These conditions will have to be reasonable and not arbitrary limitations.

Proponents of this approach argue there is little reason for the body corporate to prohibit a lot owner or occupier from keeping a pet, for example a house cat, that remains in the lot and makes no noise.

One drawback with this approach is that it does not provide certainty for lot owners or bodies corporate. The lot owners in a scheme may prefer to live in a scheme where pets are not allowed. A new owner or occupier might come in and bring a pet. Under this option, it is very likely that the pet would be allowed to stay.

Another drawback of this approach relates to the conditions placed on keeping pets. A consent allowing, for example, a lot owner to keep a dog that weighs less than 10 kilograms or under a particular size may be breached if, for example, as the dog ages it puts on extra weight or grows larger than was expected for the breed. Would the lot owner have to get rid of the animal? Additionally, it

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<sup>53</sup> *Body Corporate for River City Apartments CTS 31622 v McGarvey* [2012] QCATA 47 (**River City decision**).

<sup>54</sup> BCCM Act s 169(1)(b)(i).

<sup>55</sup> River City decision, above n 53, at [38] citing *Mineralogy Pty Ltd v The Body Corporate for “The Lakes Coolum”* [2003] 2 Qd R 381.

<sup>56</sup> *Mineralogy Pty Ltd v The Body Corporate for “The Lakes Coolum”* [2003] 2 Qd R 381.

<sup>57</sup> River City decision, above n 53 at [62].



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may be difficult to measure the size of an animal. Is the measurement from the shoulder bones to the ground or from the top of the head? Is the length of the animal measured from tip of the nose to the tip of the tail or just the length of the body?

### **2.3.3. Option 2 – ‘No pets’ by-law**

A second option for dealing with pets is to give bodies corporate the ability to pass and enforce a ‘no pets’ by-law which completely prohibits keeping pets in a lot or on common property.

In the River City decision the by-law was held to be invalid because the body corporate has the ability to regulate behaviour, not to prohibit it. The BCCM Act could be amended to expressly give the body corporate the ability to prohibit the keeping of pets in a lot.

It is proposed that a ‘no pets’ by-law should require a resolution without dissent to be adopted, amended or removed. As such, a ‘no pets’ by-law would be unlikely to pass in a scheme where lot owners or occupiers already have pets. The legislation should provide that a ‘no pets’ by-law may not cancel or remove any existing permission given by the body corporate to lot owners or occupiers to keep a pet.

### **Questions**

- 5. Should bodies corporate have the right to decide by resolution without dissent, to prohibit pets in the scheme? Why or why not?**
- 6. Do you support the existing rules relating to keeping of pets? How should the BCCM Act deal with the issue of pets?**

## **2.4. Issue: Smoke drift**

In many schemes, the lots are located close to each other and the doors, windows and balconies of a lot are in close proximity to other lots. The sounds and smells created in one lot can often be heard and smelled in adjacent lots. Where one person smokes on the balcony of the lot, the smoke may drift into the windows and doors of another lot where a non-smoker lives. This is particularly an issue in residential building format plans<sup>58</sup> where the living quarters of each lot are in close proximity. A similar issue arises where townhouses on standard format plans<sup>59</sup> are closely constructed or contiguous.

Public tolerance of smoking has been steadily declining for years.<sup>60</sup> In Queensland in 2005, smoking was banned anywhere within four metres of an entrance to a non-residential building, at sporting stadiums, outdoor eating and drinking areas and near outdoor children’s playground equipment.<sup>61</sup> In

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<sup>58</sup> Building format plan defines lots using the structural elements of a building: *Land Title Act 1994* (Qld) s 48C. A typical example is a high-rise tower.

<sup>59</sup> Standard format plan defines lots using a horizontal plane and references to marks on the ground: *Land Title Act 1994* (Qld) ss 48B -48C. A typical example is town houses sharing a common wall.

<sup>60</sup> See MM Scollo and MH Winstanley, *Tobacco in Australia: Facts and issues*, 4th edn. Melbourne: Cancer Council Victoria; 2012. Available from [www.TobaccoInAustralia.org.au](http://www.TobaccoInAustralia.org.au).

<sup>61</sup> *Tobacco and Other Smoking Products Amendment Act 2004* (Qld).

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2010, smoking was banned in cars carrying children under 16 years old.<sup>62</sup> In 2011, the Brisbane City Council banned smoking in the Queen Street Mall in Brisbane's central business district.<sup>63</sup> The Minister for Health has recently announced further restrictions relating to smoking around hospitals and at schools.<sup>64</sup>

While society's tolerance to smoking and exposure to second hand smoke has been declining, lot owners and occupiers in a community titles scheme find themselves with very little that can be done if the smoke from a neighbouring lot or balcony drifts into their windows and doors.

### 2.4.1. Existing approach and problems

The non-smoker may try to resolve the issue by talking to the smoker and trying to come to an understanding. If this fails, the non-smoker may try to get the body corporate to pass a by-law to prohibit smoking on balconies. If the body corporate were to pass such a by-law, however, given the River City decision, it would likely be unenforceable.

Smoking and pets are very different issues but the power of the body corporate to regulate both comes from the same section of the BCCM Act.<sup>65</sup> A no smoking by-law, like a 'no pets' by-law is very likely to be unenforceable.

The non-smoker may seek to address the issue through the dispute resolution process. The BCCM Act does not specifically prohibit smoke drift from one lot to another but it does provide that the occupier of a lot must not cause a nuisance or hazard, or unreasonably interfere with the use or enjoyment of another lot in the scheme.<sup>66</sup>

However, QCAT have determined that 'ordinary and accustomed' use of the lot will not amount to nuisance.<sup>67</sup> Public acceptance of smoking is steadily declining, but smoking within one's own home, even where that smoke causes inconvenience to a person in another home has not been enough to establish a nuisance at law.<sup>68</sup> In *Norbury v Hogan*<sup>69</sup> it was held that to amount to a nuisance, the cigarette smoke emanating from the adjacent lot must be 'of such volume or frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity.'<sup>70</sup>

In practice, it may be difficult to draw the line between reasonable and unreasonable interference or between an inconvenience and a nuisance. The person alleging the nuisance bears the onus of proving that the smoke causes unreasonable interference and under the current legislation, this may be difficult if not impossible. It is difficult to objectively demonstrate the volume and frequency of smoke

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<sup>62</sup> *Tobacco and Other Smoking Products Act 1998* (Qld) s 26VC.

<sup>63</sup> *Smoke Free Places Local Law 2011*. See <http://www.brisbane.qld.gov.au/laws-permits/laws-permits-businesses/malls-management-markets/queen-street-mall-smoking-ban>.

<sup>64</sup> Laura Chalmers, 'Queensland smoking ban to extend to school gates and within 5m of hospitals', *The Courier-Mail* (Queensland), 17 May 2014.

<sup>65</sup> BCCM Act s 169(1)(b)(i).

<sup>66</sup> BCCM Act s 167.

<sup>67</sup> *Norbury v Hogan* [2010] QCATA 27 at [17].

<sup>68</sup> *Admiralty Towers* [2011] QBCCMCmr 264 at [45]. This decision was appealed to QCAT but the appeal was dismissed because the applicant no longer resided in the lot: *Karykowski v Andree McDonald for C Weller Investment Trust* [2014] QCATA 023.

<sup>69</sup> [2010] QCATA 27.

<sup>70</sup> *Norbury v Hogan* [2010] QCATA 27 at [28].

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entering into a lot<sup>71</sup> and to determine that it is originating from a single source. Logs or notes of the date, time and source of the offending smoke may offer some evidence, but such evidence is subjective and unlikely to satisfy the relevant test.

This may mean that the only option left is for the non-smoker to keep their doors and windows shut to avoid being exposed to second hand smoke.

### **2.4.2. Considerations relevant to reform**

Smoking is a very contentious issue. Prohibiting a person from smoking on part of a lot (i.e. a balcony, exclusive use area or in the case of a standard format plan, in close proximity to a neighbour) is literally prohibiting what that person can do on their own property. However, in community titles schemes, the actions of one person may have a greater impact on another person's use and enjoyment of their lot than would be the case in standalone housing. There are existing prohibitions on the use of lots for certain purposes which interfere with the use and enjoyment of other lots.<sup>72</sup> Given society's increasing intolerance of smoking, there is a strong argument in favour of restricting the rights of people to smoke on their premises when the smoke drifts and impacts on other people in the scheme.

The law has increasingly recognised a need to protect non-smokers from the harmful effects of second hand smoke in public areas and workplaces. There is little reason not to extend this protection to people in a community titles scheme. Residential bodies corporate are one of the only places of concentrated occupation to which no power is given to restrict (or prohibit) smoking except on common property. Smoke emanating from lots can be more hazardous and a greater nuisance than that emanating from common property.

### **2.4.3. Option 1 – Appropriate by-law**

One option to deal with smoking is to encourage schemes where smoke drift is a problem to draft a by-law that regulates, rather than prohibits, smoking. In situations where smoke is likely to drift from one lot to another, a by-law could provide that a lot owner may not, without the written consent of the body corporate, smoke in a lot or on a balcony. The by-law would have to spell out objective factors that could be used to determine whether or not the body corporate will grant consent. The consent could be subject to conditions, such as no smoking during particular hours or requiring the smoker to take steps to minimise the smoke drift to other lots.

It is arguable whether this type of by-law is currently enforceable. It may be considered unreasonable or oppressive. However, if appropriately worded and administered, and any decisions relating to the consent to smoking were consistently and objectively applied, there is no obvious reason under the current legislation why this type of by-law should not be enforceable.

### **2.4.4. Option 2 – No smoking by-law**

Another option to deal with the issue of smoke drift is to give a body corporate the ability to adopt and enforce a no smoking by-law that prohibits smoking on a balcony in a building format plan or where a structure is within four metres of a structure on an adjacent lot in a standard format plan.

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<sup>71</sup> See for example, *Admiralty Towers*, above n 68; *Carson Place* [2012] QBCCMCMr 503 where the applicants have submitted to adjudicators that there is no commercially available machine to measure cigarette smoke entering into a lot.

<sup>72</sup> BCCM Act s 167.

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It is suggested that a no smoking by-law would only be available for lots used for residential purposes. If the lots are commercial lots then there are other regulations (such as workplace health and safety and other health regulations) that would regulate or prohibit smoking in defined areas.

Bodies corporate could be authorised to adopt a no smoking by-law where there is a reasonable possibility that the smoke will drift from a lot and interfere with the use and enjoyment of another lot in the scheme. The restriction could apply to smoking on a balcony that is part of a lot, in a courtyard or other outside area where the smoke drifts into another lot. It would be the smoker's responsibility to ensure the smoke does not drift to other lots. In other words, the lot owner may only be free to smoke inside their own lot with the windows and doors shut. Bodies corporate that adopt this by-law could be encouraged to provide designated outdoor smoking areas, if practicable.

As with a 'no pets' by-law, a no smoking by-law would likely be unenforceable under the current legislation. The BCCM Act would have to be amended to give the body corporate an express ability to adopt a no smoking by-law and make the by-law enforceable. A no smoking by-law would require a resolution without dissent to be adopted, amended or removed.

### Questions

- 7. Should bodies corporate have an ability to prohibit smoking on a balcony or where a structure is within four metres of another structure on an adjacent lot?**
- 8. If not, how should bodies corporate deal with this issue?**

## 2.5. Issue: Overcrowding

Another issue raised in discussions with stakeholder groups relates to overcrowding of lots. This is particularly an issue during events like Schoolies on the Gold Coast but is also an issue affecting schemes in tourist areas that attract backpackers, around universities and inner city areas where housing is increasingly expensive.

Overcrowded lots have serious ramifications for schemes. The most obvious issues are fire safety, occupant health and overuse of common services not meant to accommodate greater numbers than those approved by the local authority in the Certificate of Classification.<sup>73</sup> If lots are overcrowded, it may be difficult, if not impossible, for the lot to be evacuated in the event of a fire. Sometimes lots may have had modifications<sup>74</sup> such as additional locks on internal doors or in some cases added bedrooms or lofts,<sup>75</sup> which could make evacuation difficult in an emergency.

Tenants in overcrowded lots may be less likely to report leaky taps, blocked drains and overloaded electrical services as this might draw unwanted attention to the overcrowding. Overburdened

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<sup>73</sup> Issued under the *Building Act 1975* (Qld).

<sup>74</sup> Jimmy Thomson, 'Packed to the rafters with strife', *Sydney Morning Herald* (New South Wales), 1 February 2014.

<sup>75</sup> Jimmy Thomson, "'Lofting" raised bar on overcrowded flats', *Sydney Morning Herald* (New South Wales), 28 January 2014.

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plumbing and electrical infrastructure creates an additional risk of property damage at the scheme. Overcrowded lots may result in increased rubbish which can cause a health issue.<sup>76</sup>

Bodies corporate may attempt to deal with the issue of overcrowding through by-laws. However, it may not be appropriate to use by-laws to enforce a planning or fire safety issue. Even if such a by-law were enforceable, if the overcrowding is for a short term such as Schoolies, by the time a by-law contravention process is commenced, the tenants have already left. At other times, the problem may be that when overcrowding is suspected, by the time the lot is inspected following an entry notice,<sup>77</sup> the evidence of overcrowding may have been removed.

The local council may have an ability to investigate suspected overcrowding as a breach of the relevant development approval<sup>78</sup> or to refer the matter for an investigation as a fire safety risk. However, fire safety investigations require the consent of an occupier<sup>79</sup> or a warrant. There is a risk that using fire safety investigations to investigate overcrowding may result in occupiers being less likely to agree to fire safety investigations in the future.

Where the body corporate believes, on reasonable grounds, that a lot is overcrowded, the body corporate should have an ability to take action to protect the interest of the scheme. Enforcement of overcrowded lots is a complex issue. It may be inappropriate to use by-laws to enforce what is essentially a town planning and fire safety concern. However, overcrowded lots present a serious risk for particular schemes.

### **2.5.1. Option 1 – Right of entry for suspected overcrowding**

The BCCM Act could be amended to provide that if the body corporate has a reasonable suspicion of overcrowding in a lot, the body corporate has a right to authorise a particular person to enter the lot to conduct an inspection. The point of this entry, apart from advising the occupants that the lot is being unlawfully occupied, is to obtain evidence of the overcrowding which may be later used to report the matter to the local authority health department for prosecution.

Bodies corporate have a power of entry into a lot or exclusive use common property with seven days written notice (or at any time in an emergency) to inspect whether work the body corporate is authorised or required to carry out is necessary.<sup>80</sup> However, this power of entry does not cover situations where there is suspected overcrowding.

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<sup>76</sup> Jim Alouat, 'Crowding causes a stink', *News Mail* (Queensland), 13 September 2013.

<sup>77</sup> Except in an emergency, the body corporate must give 7 days written notice prior to entry into a lot: BCCM Act s 163.

<sup>78</sup> An authorised person has the ability to enter property in particular circumstances, such as to find out whether the conditions of an approval have been complied with: *Local Government Act 2009* (Qld) s 132(1)(c). BCCM Act s 316 – a local government authorised under an Act to enter a lot may also enter the common property.

<sup>79</sup> *Fire and Emergency Services Act 1990* (Qld) s 60J.

<sup>80</sup> BCCM Act s 163.

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In Tasmania, the relevant legislation provides that if an ‘authorised person’<sup>81</sup> believes on reasonable grounds that a breach of a by-law has been or is being committed, then that person may at a reasonable time after giving reasonable notice, enter the site.<sup>82</sup>

This option will amend the power of entry in Queensland following the Tasmanian provisions and allow a person authorised by the body corporate to enter a lot to investigate suspected overcrowding. The timeframe for entry into a lot for cases of suspected overcrowding would have to be quite short so that the evidence of overcrowding could not be removed before the inspection is allowed.

This option would have to be implemented in a way that does not infringe on important individual privacy and property rights. It would also be important to ensure that lot occupiers are not unfairly targeted due to their age (i.e. during Schoolies) or the fact that they are renting the lot.

### **2.5.2. Option 2 – Consent on behalf of occupier**

A further option to deal with overcrowding is to allow a body corporate, via a committee decision, to give consent on behalf of the lot occupier (in this case, including owner occupiers) to allow the fire service or the local government to enter a lot to investigate overcrowding. Currently the fire service may enter a lot only with the consent of the occupier.<sup>83</sup> The local government also has a right to enter private property, either with the occupier’s consent or under a warrant.<sup>84</sup> The BCCM Act could provide that in cases where overcrowding is suspected on reasonable grounds, the body corporate has the ability to give consent, on behalf of the occupier of a lot, for an inspection by either the fire service or the local council where the purpose is to gather evidence for a prosecution of the owner under the health regulations.

Such a right could have a dramatic impact on individual privacy and property rights, including the right to quiet enjoyment of a lot. It may disproportionately affect the rights of vulnerable groups of people such as students, backpackers and lower socio-economic groups. However, it may be justifiable on the grounds that overcrowded lots represent a serious risk to the health, safety and wellbeing of the lot occupiers themselves and owners and occupiers in other lots in the scheme.

This option requires important safeguards to ensure the rights of tenants are not unfairly diminished or removed, such as requiring that the right is only exercisable where there is a reasonable evidence of overcrowding. Where a lot is leased, it may be necessary to require the body corporate to raise the issue with the lot owner or the lot owner’s agent. Overcrowding of a lot is a breach of the standard terms of a lease agreement.<sup>85</sup>

This option will provide that if the body corporate committee forms the view, based on reasonable evidence, that there is overcrowding in a lot, the body corporate committee may resolve to invite the fire service or the local council to investigate the matter, and if necessary, give consent on behalf of

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<sup>81</sup> Being the Recorder of Titles, or a person authorised by the Recorder of Titles: *Strata Titles Act 1988* (Tas) s 3 (definition of ‘authorised person’).

<sup>82</sup> *Strata Titles Act 1988* (Tas) s 167 and s 3 (definition of ‘site,’ which includes lots and common property for the scheme).

<sup>83</sup> Under the *Fire and Emergency Services Act 1990* (Qld) s 60I, an investigation officer may enter a place if the occupier consents to the entry.

<sup>84</sup> *Local Government Act 2009* (Qld) s 130.

<sup>85</sup> *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 55; *Residential Tenancies and Rooming Accommodation Regulation 2009* (Qld) s 6, schedule 1 part 2 clause 23.

the occupier for the inspector to enter the lot. This option may also require amendment to the relevant provisions of the *Fire and Emergency Services Act 1990* (Qld) and the *Local Government Act 2009* (Qld) to enable investigators to enter the lot with the consent of the body corporate.

### Questions

9. If there are reasonable grounds to believe that a lot is overcrowded, should the body corporate have the authority to give consent, on behalf of the lot occupier, for the local council or fire services to investigate the suspected overcrowding?
10. Which option do you support and why? If you do not support any of the options, how would you deal with this issue?

## 2.6. Improving by-law enforcement

Other jurisdictions, both in Australia and overseas, have a system of by-laws that is generally similar to Queensland. By-laws are created by the body corporate,<sup>86</sup> they are binding on owners and occupiers and there are consequences for breaches. However, some jurisdictions give bodies corporate a greater ability to directly enforce the by-laws. The options considered below, if adopted in Queensland, will improve the ability of the body corporate to enforce by-laws.

### 2.6.1. Option – Update schedule of model by-laws

In relation to the applicable by-laws, legislation in both Victoria and Tasmania provides that if the by-laws of a scheme do not cover a topic, the model by-law covering that topic in the legislation is deemed to be applied to the scheme by default.<sup>87</sup> This means, for example, that if a scheme does not have a by-law about dispute resolution, the model by-law about dispute resolution is deemed to be an applicable by-law for the scheme.

In Queensland, the by-laws in schedule 4 of the BCCM Act only apply to a scheme that does not have by-laws in the CMS.<sup>88</sup> Schedule 4 is not a list of default by-laws which means that, unlike Victoria and Tasmania, the by-laws in schedule 4 do not apply to a scheme unless they have been adopted by that scheme. If schedule 4 were to apply to schemes as default by-laws, this could result in some confusion over what by-laws apply. It could mean, for example, that the applicable by-laws are partially recorded in the CMS and partially recorded in the legislation which would require looking in two places instead of one to determine the applicable by-laws. Arguably, such a provision may conflict with the principle of self-management reflected in the secondary objects of the BCCM Act.<sup>89</sup>

Schedule 4 by-laws deal with issues like noise, damage to common property, parking (but not towing) and pets. There is no model by-law relating to internal dispute resolution despite the fact that internal dispute resolution is required before commencing conciliation or adjudication under the BCCM Act.

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<sup>86</sup> In some jurisdictions a body corporate is known as the owners corporation, a community corporation, strata corporation, strata company or a homeowners association.

<sup>87</sup> *Owners Corporation Act 2006* (Vic) s 139(3); *Strata Titles Act 1998* (Tas) s 90(5).

<sup>88</sup> BCCM Act s 168 and schedule 4.

<sup>89</sup> BCCM Act s 4(a).

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This means there is little guidance in the legislation for complainants when seeking to resolve a dispute in the first instance.

If the body corporate is given the ability to make by-laws authorising vehicles to be towed and prohibiting pets and smoking, it is desirable to update schedule 4 to reflect examples of well written by-laws that can achieve these purposes and which are valid and enforceable if adopted.

### Questions

**11. What issues should be covered by the by-laws in schedule 4 of the BCCM Act?**

**12. If the by-laws for a scheme are silent about an issue that is covered by the by-laws in schedule 4 of the BCCM Act, should the relevant schedule 4 by-law apply by default?**

### 2.6.2. Option – Positive obligation to comply with by-laws

Under the BCCM Act, the obligation on lot owners to comply with the by-laws may be characterized as indirect. The CMS is binding on the body corporate, lot owners and occupiers as if the CMS had been signed under seal.<sup>90</sup> The by-laws, as part of the CMS, are then binding. The by-laws are usually, but not always, included in the CMS. Where no by-laws are included in the CMS, there may be a statement that the by-laws in the BCCM Act apply.

Other states and territories, including New South Wales (**NSW**), the Australian Capital Territory (**ACT**), Victoria, Western Australia (**WA**), South Australia (**SA**) and Tasmania, take a more direct approach by placing in the legislation a positive obligation on owners, occupiers and invitees to comply with the by-laws.<sup>91</sup> In the ACT<sup>92</sup> and WA<sup>93</sup> the by-laws are treated as if they are an agreement signed and sealed between the body corporate, the owners and mortgagees.

The *Building Units and Group Titles Act 1980* (Qld) (**BUGTA**), which preceded the BCCM Act (and still applies in relation to specified Acts<sup>94</sup>) also uses the direct approach. BUGTA provides that by-laws are binding as if they had been signed and sealed by the body corporate, each owner, lessee and occupier and as if they contained mutual covenants to observe and perform all the provisions of the by-laws.<sup>95</sup> There appears to be little reason not to include this direct approach in the BCCM Act.

The BCCM Act could contain a provision similar to the BUGTA provision that deems the by-laws for a scheme to be an agreement signed by the body corporate, all lot owners, occupiers and mortgagees. This will clarify and put beyond doubt the obligation on all parties to comply with the relevant by-laws for the scheme. If bodies corporate are to be given more direct enforcement mechanisms for by-laws

<sup>90</sup> BCCM Act s 59(3).

<sup>91</sup> See for example, *Strata Schemes Management Act 1996* (NSW) s 44; *Owners Corporations Act 2006* (Vic) s 141; *Community Titles Act 1996* (SA) s 43; *Strata Titles Act 1988* (SA) s 20; *Strata Titles Act 1998* (Tas) s 93.

<sup>92</sup> *Unit Titles (Management) Act 2011* (ACT) s 107(1).

<sup>93</sup> *Strata Titles Act 1985* (WA) s 42(6).

<sup>94</sup> BCCM Act s 326 – specified Acts are: *Integrated Resort Development Act 1987* (Qld); *Mixed Use Development Act 1993* (Qld); *Registration of Plans (H.S.P (Nominees) Pty. Limited) Enabling Act 1980* (Qld); *Registration of Plans (Stage 2) (H.S.P (Nominees) Pty. Limited) Enabling Act 1984* (Qld); *Sanctuary Cove Resort Act 1985* (Qld).

<sup>95</sup> BUGTA s 30(5).



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such as parking, pets and smoking, it will be helpful and avoid disputes to clearly state the obligation to comply with the by-laws.

This option would likely require increased disclosure of by-laws in the sales contracts for new and existing lots. Additionally, there will need to be greater compliance with the existing requirement that a copy of the by-laws be included in tenancy agreements<sup>96</sup> and a copy of the by-laws for the scheme given to tenants and occupiers. There is anecdotal evidence that compliance with this provision is low despite the fact that failure to comply could result in a penalty of up to \$2,200.<sup>97</sup>

### Question

**13. Should the by-laws for a community titles scheme be deemed to be an agreement signed and sealed by each of the body corporate, owners, occupiers and mortgagees from time to time?**

### **2.6.3. Option – Fine for contravention of by-laws**

In NSW and Victoria the body corporate may apply to the tribunal or relevant authority to impose a penalty on a resident for breach of the by-laws.<sup>98</sup> WA legislation allows the by-laws of the scheme to provide for a penalty (up to a prescribed amount) but the penalty may only be imposed by the state tribunal.<sup>99</sup> In WA, the penalty is paid to the body corporate. There is also a proposal in NSW that the penalty would be paid to the body corporate.<sup>100</sup>

In South Australia, the body corporate may impose a fine on owners or occupiers for breach of a by-law.<sup>101</sup> The Northern Territory (NT) has recently proposed allowing bodies corporate to issue infringement notices for a breach of the by-laws.<sup>102</sup> The NT proposal is modelled on the South Australian provisions and referred to as the **South Australian Model**.

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<sup>96</sup> By-laws are taken to be terms of the rental agreement and a copy must be given to the tenant when signing the lease: *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 52(2) and s 69.

<sup>97</sup> 20 penalty units @ \$110 each: *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 69.

<sup>98</sup> *Strata Schemes Management Act 1996* (NSW) s 203; *Owners Corporation Act 2006* (Vic) ss 157(2), 166.

<sup>99</sup> *Strata Titles Act 1985* (WA) ss 42A and 103I.

<sup>100</sup> Position paper, above n 46, 35.

<sup>101</sup> *Community Titles Act 1996* (SA) s 34(3)(e); *Strata Titles Act 1988* (SA) s 19(3a).

<sup>102</sup> Northern Territory, Department of the Attorney-General and Justice, *Report 2 – Unit titles Issues: Unit Titles Act and the Unit Title Schemes Act (Enforcement of Articles and By-laws and related issues and combining of the Acts: Consultation Outcomes*, September 2013, 11-15, [http://www.nt.gov.au/justice/policycoord/documents/lawmake/2014/report2\\_unit\\_titles\\_issues.pdf](http://www.nt.gov.au/justice/policycoord/documents/lawmake/2014/report2_unit_titles_issues.pdf).

### **2.6.3.1. The South Australian Model**

Under the South Australian Model, a body corporate may adopt a by-law which imposes a monetary penalty up to a prescribed amount, for contravention or failure to comply with a by-law.<sup>103</sup> Where a scheme has adopted such a by-law, the scheme is able to issue a monetary fine to lot owners and occupiers who breach the other by-laws for the scheme. The accused person is given a warning, requiring compliance with the by-law and notice that a penalty will be incurred if the contravention or failure to comply continues.<sup>104</sup> If, after the warning, the person does not comply with the by-law, then a fine may be issued. The fine is payable to the body corporate and may be recovered as a debt against tenants or, if served on the owner of the lot, may be recovered as if it were an unpaid contribution.<sup>105</sup>

The person who receives the fine may apply to the Magistrates Court to have it revoked<sup>106</sup> and the body corporate bears the onus of establishing on the balance of probabilities that the person committed the contravention or failure to comply.<sup>107</sup> The Magistrates Court must dismiss the notice if satisfied that the person did not commit the offence or that the contravention or failure to comply was trifling in the circumstances.<sup>108</sup>

### **2.6.3.2. A Queensland version of the South Australian Model**

One reason to consider adopting the South Australian Model in Queensland is that the current dispute resolution process of self-resolution, conciliation and adjudication is not well suited to dealing with owners and occupiers who continue to flagrantly ignore contravention notices. Neither the BCCM Commissioner nor adjudicators have the authority to enforce compliance with an order of an adjudicator. If a lot owner ignores contravention notices and ignores the order of an adjudicator, the body corporate has to take costly and time consuming steps to enforce the judgment in the Magistrates Court.

A Queensland version of the South Australian Model could give the body corporate an ability to issue a monetary fine to owners or occupiers who disregard a contravention notice. This option could provide that the fine will be issued by the body corporate as an alternative to commencing dispute resolution, if after a contravention notice has been issued, the body corporate reasonably believes that there has been a further or continued contravention. This will insert an extra step in the dispute resolution process to give the body corporate the ability to enforce the by-laws directly without requiring the order of an adjudicator or magistrate.

After a fine has been issued, the accused person will decide whether to pay the fine or to dispute it. If the accused person disputes the fine, the body corporate will bear the onus of proving that the breach has occurred. As with the South Australian Model, the fine should be dismissed if the breach is trivial or trifling in the circumstances. As added protection for lot owners and occupiers, there

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<sup>103</sup> *Community Titles Act 1996* (SA) s 34(3)(e); *Strata Titles Act 1988* (SA) s 19(3a).

<sup>104</sup> Government of South Australia, Attorney-General's Office, *Factsheet – Changes to community and strata titles legislation*, 3, <http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/Changes%20to%20community%20and%20strata%20legis/OwnersV4.pdf>.

<sup>105</sup> *Community Titles Act 1996* (SA) s 34(6)(d); *Strata Titles Act 1988* (SA) s 19(3b)(d).

<sup>106</sup> *Community Titles Act 1996* (SA) s 34(6)(e); *Strata Titles Act 1988* (SA) s 19(3b)(e).

<sup>107</sup> *Community Titles Act 1996* (SA) s 34(6)(f); *Strata Titles Act 1988* (SA) s 19(3b)(f).

<sup>108</sup> *Community Titles Act 1996* (SA) s 34(6)(e); *Strata Titles Act 1988* (SA) s 19(3b)(e). Examples of trifling contravention are set out in *Community Titles Act 1996* (SA) s 34(7); *Strata Titles Act 1988* (SA) s 19(3c).

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should be a mechanism to allow a lot owner to recover the cost of an application for dispute resolution to contest a fine if the fine was found to have been issued incorrectly.

### 2.6.3.3. Considerations relevant to reform

This option will require a number of changes to the existing legislation. Firstly, the provision prohibiting a by-law from imposing a monetary obligation on the owner or occupier of a lot<sup>109</sup> will require amendment. Other issues to consider include:

- whether the fine should be subject to a statutory cap;
- who would have the authority to issue the fine;
- the form of the notice;
- the ability to dispute the fine;
- how the fine will be collected; and
- whether the fine should escalate for repeat offenders.

Importantly, this option may have a number of consequences. If a lot owner fails to pay the fine, it could become a debt owing to the body corporate and cause the lot owner to lose discounts for contribution payments, incur penalty interest and lose the right to nominate for a committee position and to vote on particular matters. These consequences can be mitigated. The BCCM Act can provide that while a fine is being disputed, it does not accrue as an unpaid contribution until after a determination is made as to whether the fine will be revoked.

Another issue with this option is that it may lead to an increase in the number of disputes and even exacerbate an existing dispute. Disputes within community titles schemes may take on a personal dimension, and adding a monetary fine to the mix may amount to pouring fuel on the fire. This could lead to an increase in dispute resolution applications to the BCCM Commissioner's office.

The South Australian model gives the Magistrates Court the authority to decide whether the notice should be revoked. This responsibility in Queensland could be handled by the BCCM Commissioner's office using the existing dispute resolution mechanisms. This may impact on the resources of the BCCM Commissioner. However, because the fine would not be issued until after a contravention notice had been given and breached, the increase in dispute resolution applications is likely to be minimal.

### Question

**14. Should Queensland adopt a version of the South Australian Model and allow bodies corporate to fine lot owners and occupiers who, after receiving a contravention notice, continue to breach or fail to comply with the by-laws?**

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<sup>109</sup> BCCM Act s 180(6).

#### **2.6.4. Option – Delegation of by-law enforcement authority**

NSW legislation allows the body corporate to delegate to the managing agent the ability to issue contravention notices.<sup>110</sup> In Queensland, a contravention notice requires a decision of the body corporate committee (or the body corporate in a general meeting)<sup>111</sup> to issue the contravention notice. While the contractual agreement between a body corporate and the resident manager may require the manager to ‘police’ or ‘monitor compliance’ with the by-laws, it is arguable that delegating the power to the resident manager to issue contravention notices would be a breach of the provisions restricting a body corporate from delegating its power.<sup>112</sup> The implementation of this option would require an express exception to the prohibition on a delegation of power.

This option could give the body corporate an express authority to delegate the power to issue contravention notices to a resident manager, a body corporate manager or to an individual committee member. In this way, a contravention notice could be issued on the spot, shortening the time between breach and a notice of the breach. This would serve as a warning and put the accused person on notice that there may be additional consequences from further contravention. This would allow the contravention to be dealt with in a more immediate manner.

##### **2.6.4.1. Considerations relevant to reform**

This option has a number of drawbacks, however, including a perception of bias. Delegating the authority to issue contravention notices to a particular committee member may result in a situation where, in the course of a dispute between neighbours, one owner has the power to issue notices against another owner. This could exacerbate the dispute.

Allegations of bias may also be directed at a resident manager by resident owners or tenants serviced by an off-site letting agency. This could add a personal dimension to disputes about compliance with by-laws, if for instance, there is a perception they are not being evenly enforced.

As there is a potential that this power could be abused, it is important to provide adequate safeguards for lot owners and occupiers. One mechanism to achieve this is to provide that the body corporate committee must ratify or otherwise approve the contravention notice at the next committee meeting.<sup>113</sup> If the contravention notice is not ratified, it will be withdrawn.

A further issue is that disputes between a lot owner or occupier on the one hand and a resident manager on the other do not fall into the category of a ‘dispute’ under the BCCM Act.<sup>114</sup> Under this option, the resident manager will have the power to issue contravention notices but no responsibility. Any action to challenge the contravention notice will be against the body corporate (as the resident manager will issue the contravention notice as an agent of the body corporate). This could leave the resident manager with the power to issue contravention notices, but little accountability for its

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<sup>110</sup> *Strata Schemes Management Act 1996* (NSW) ss 45(3) and 28.

<sup>111</sup> See for example BCCM Forms 10 and 11, <http://www.justice.qld.gov.au/justice-services/body-corporate-and-community-management/forms-and-publications#Forms>.

<sup>112</sup> BCCM Act s 97.

<sup>113</sup> However, there are no timelines for committee meetings under the BCCM Act or Regulation Modules.

<sup>114</sup> Under section 227, a dispute for the purposes of the BCCM Act includes a dispute between the body corporate and a resident manager or a body corporate manager, but not between an owner or occupier of a lot and a resident manager or a body corporate manager.

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actions. However, the body corporate committee or a general meeting could revoke the delegation at any time.

The relevant individual receiving the delegated authority would have to be willing to accept it. For resident managers and body corporate managers, this may involve an amendment to an existing agreement to allow compensation for the additional duty. This may create problems if the delegation were later to be revoked, as the agreement could require further amendment.

### Question

**15. Should bodies corporate have the ability to authorise a resident manager, body corporate manager or a single executive committee member to issue on-the-spot contravention notices to owners and occupiers who contravene or fail to comply with the by-laws?**

### 3. Debt recovery

Community living involves individual ownership of lots and joint ownership of common property which may include areas such as lawns, driveways, swimming pools, lifts and stairwells. Bodies corporate levy each lot owner a **contribution** to cover the costs of maintaining the common property and lot owners have a statutory obligation to pay. If lot owners do not pay their contributions, then the body corporate may be unable to fund important services such as essential or routine maintenance (e.g. to keep a swimming pool safe or a lift property serviced). Unpaid contributions may also affect the ability of the body corporate to maintain a sinking fund that can cope with expected future capital expenditure. The burden of unpaid contributions falls on the other lot owners who must either make up the shortfall or go without particular services. This is the reality notwithstanding that the body corporate may have the right to charge interest on the arrears.

Bodies corporate have robust mechanisms to collect unpaid contributions. In all states and territories in Australia, unpaid contributions may be recovered against owners as a debt. Unpaid contributions are subject to penalty interest and usually result in an owner losing the right to vote on particular issues. In many cases, the unpaid contributions may be recoverable jointly and severally against the owner at the time the debt is incurred as well as against subsequent owners who take possession before the debt is paid.

#### 3.1. Current system in Queensland

In Queensland, unpaid contributions, penalty interest and recovery costs are recoverable as a debt owing to the body corporate.<sup>115</sup> Penalty interest may be up to 30% per annum.<sup>116</sup> The body corporate must take action to recover unpaid contributions within two years and two months from the date the contribution was due<sup>117</sup> but it is not required to wait that long.

**Body corporate debts**, which may include unpaid contributions, penalty interest and other amounts associated with the ownership of a lot,<sup>118</sup> are recoverable jointly and severally against persons (including co-owners and a mortgagee in possession) who owned the lot when the debt became payable or who become the owner of the lot before the debt is paid.<sup>119</sup>

The debt recovery process for unpaid contributions to a body corporate is the same as debt recovery for any other type of debt. For small amounts (up to \$25,000) proceedings may be started in QCAT. Larger amounts are recovered in the Magistrates Courts (up to \$150,000) or a higher court as

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<sup>115</sup> Standard Module s 145; Accommodation Module s 143; Commercial Module s 104; Small Schemes Module s 79; Two-lot Module s 48(4).

<sup>116</sup> 2.5% per month: Standard Module s 144; Accommodation Module s 142; Commercial Module s 103; Small Schemes Module s 78. Specified two-lot schemes cannot recover interest but may recover any penalties such as late fees: Two-lot Module s 27(7).

<sup>117</sup> Standard Module s 145(2); Accommodation Module s 143(2); Commercial Module s 104(2); Small Schemes Module s 79(2). This time period does not apply to specified two-lot schemes - see Two-lot Module s 27.

<sup>118</sup> The same definition is in the schedule of each of the Standard Module, Accommodation Module, Commercial Module and Small Schemes Module (definition of 'body corporate debt').

<sup>119</sup> Standard Module ss 145(3)-(4); Accommodation Module ss 143(3)-(4); Commercial Module ss 104(3)-(4); Small Schemes Module s 79(3)-(4); Two-lot Module s 27(5)-(6).

necessary, following the procedures of the relevant court. The BCCM Commissioner does not have jurisdiction to hear debt disputes.<sup>120</sup>

### 3.2. Examples from other jurisdictions

In California, the legislation allows a home owners association (**HOA**)<sup>121</sup> to use the lot as security for any unpaid contributions. The HOA may place an encumbrance<sup>122</sup> on the title of the lot when a debt is past due. This encumbrance secures the right of the HOA to recover the unpaid debt. The legislation prescribes mandatory steps that must be taken prior to the encumbrance being recorded.<sup>123</sup> If the debt remains unpaid, the HOA may seek a judicial foreclosure (using a process similar to the enforcement warrant discussed at section 3.3.5 below) or it may seek a non-judicial foreclosure by following the process set out in the relevant legislation.<sup>124</sup> Non-judicial foreclosure allows the HOA to forcibly sell the lot to collect unpaid contributions. There is a mandatory procedure that must be followed,<sup>125</sup> such as offering the owner dispute resolution<sup>126</sup> before the sale can commence. After the lot is sold, the sale is subject to a right of redemption<sup>127</sup> for 90 days after the sale.

In Florida, if a lot owner has unpaid contributions but the lot is rented to a tenant, the HOA may require the tenant to pay rent money directly to the HOA to cover the unpaid contributions by the delinquent landlord.<sup>128</sup> The tenant must pay the HOA if the tenant has been served with proper notice. The HOA may evict the tenant if he or she continues to pay rent to the landlord. The tenant is protected from any action by the landlord for non-payment of rent in these circumstances.

### 3.3. Issues with debt recovery in Queensland

The failure by even a small percentage of lot owners to pay their contributions either at all or in full can have a dramatic impact on the budget of a body corporate. In large schemes it has been known for over \$1 million dollars to be outstanding. This severely limits the body corporate in maintaining and operating services. It should also be noted that contributions are a recurring debt so that an owner in arrears not only has an obligation to pay up arrears and interest (if any) but also to continue paying contributions that fall due in the future.

Stakeholder groups have advised the Centre that unpaid contributions may mean that the body corporate cannot fund regular maintenance expenses or in extreme cases, capital improvement such as painting or replacing the roof. Evidence suggests that some bodies corporate have been unable to

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<sup>120</sup> BCCM Act s 229A(3).

<sup>121</sup> A homeowners association or HOA is the equivalent of a body corporate.

<sup>122</sup> California Civil Code § 5675.

<sup>123</sup> California Civil Code § 5660-5673.

<sup>124</sup> California Civil Code § 5700-5740.

<sup>125</sup> *Diamond v. Superior Court (Casa Del Valle Homeowners Association)* -217 Cal.App.4th 1172 (June 2013) held the homeowners association must strictly comply with the legislation for the lien and foreclosure to be valid.

<sup>126</sup> California Civil Code § 5705(b).

<sup>127</sup> California Civil Code § 5715(b).

<sup>128</sup> XL Fla Stat § 718.116(11)( for condominiums); XL Fla Stat § 719.108(10) (for cooperatives) and XL Fla Stat § 720.3085(8) (for home owners associations).

pay an insurance premium because of outstanding contributions. The schemes have ended up uninsured for a time (thus in breach of the Regulation Module).<sup>129</sup>

Interest charges are insufficient to overcome the damage to body corporate finances, and in some cases, their operations that may be caused by unpaid contributions. Defaulting owners are often paying arrears whilst new levies are being made such that these owners are perpetually in arrears (including unpaid interest).

There are a number of issues around debt recovery for unpaid contributions within community titles schemes. The following sections discuss three aspects of this issue: the uncertainty about recovery costs; that body corporate debts are unsecured; and difficulty commencing legal proceedings to recover debts.

### 3.3.1. Recovery Costs

**Recovery costs** are the costs of collecting unpaid contributions and penalty interest. This may include the cost of reminder letters, debt collectors, solicitor's fees and court costs. The Regulation Modules allow the body corporate to recover unpaid contributions, penalty interest and reasonably incurred recovery costs as a debt.<sup>130</sup> Recovery costs can quickly add up and in some cases, may even exceed the amount of the original unpaid contribution.

A recent line of decisions<sup>131</sup> has confirmed that reasonably incurred recovery costs are a 'body corporate debt' for the purposes of the relevant Regulation Module. However, it is not clear what 'reasonably incurred' means. Some guidance may be expected following Westpac's unsuccessful appeal against an order to pay approximately \$335,000 in recovery costs spent by a body corporate to collect a debt of \$12,475 in contributions and interest. The reasonableness of the recovery costs in this case is still to be determined.<sup>132</sup>

#### 3.3.1.1. Option 1 – Scale for recovery costs

One option to create certainty in relation to reasonable recovery costs is to provide a scale of recovery costs. A scale will set out amounts to be charged for particular actions taken by or on behalf of the body corporate to recover unpaid contributions from defaulting lot owners. Examples of the types of expenses that should be included in a scale are reminder letters, letters of demand, actions taken by a body corporate manager to brief a debt collector or attending to settling of the debt and other action. The scale will also include legal costs should it be necessary seek a judgment against the defaulting lot owner to collect the unpaid amounts. The scale could be implemented similarly to the scale of costs contained in schedules 1 to 3 of the *Uniform Civil Procedure Rules 1999 (UCPR)*.

A scale of recovery costs will provide certainty for bodies corporate, debt collectors, solicitors and defaulting owners in terms of what recovery costs are reasonable. The scale will limit the amount that the body corporate can charge a defaulting lot owner and ideally limit what a person or company

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<sup>129</sup> The Regulation Modules require the body corporate to insure the common property and body corporate assets: Standard Module s 178; Accommodation Module s 176; Commercial Module s 134; Small Schemes Modules s 112; Two-lot Module s 48.

<sup>130</sup> See, for example, Standard Module s 145(1); Accommodation Module s 143, Commercial Module s 104.

<sup>131</sup> See *The Body Corporate for 399 Woolcock Street CTS 34700 v Sexton* [2013] QCATA 55 and *Westpac v Wave*, above n 5.

<sup>132</sup> See *Westpac v Wave*, above n 5 at [64].



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employed by the body corporate to collect the unpaid contributions will charge the body corporate. Recovery costs in accordance with the scale will be added directly to the amount of unpaid contributions and penalty interest billed to the lot owner without the need for a court to determine whether the costs are reasonable. If the defaulting owner feels the recovery costs are unreasonable, the defaulting owner will be able to ask the body corporate to demonstrate that the costs are in accordance with the schedule.

This option will recognise that while the scale of costs will apply to most situations, there could be extraordinary circumstances where a body corporate may incur costs above the scale, for example if the conduct of the defaulting lot owner significantly increases the recovery costs. In these circumstances the body corporate could recover these costs if they were determined to be reasonable by a court or tribunal.

### **3.3.1.2. Option 2 – Clarify the meaning of body corporate debt**

A further option (and one that will work in conjunction with the scale of costs option above) is to clarify the definition of a ‘body corporate debt’ to specifically include recovery costs and judgment debts.

In the Regulation Modules, a ‘body corporate debt’ includes unpaid contributions, penalty interest and other amounts associated with the ownership of a lot.<sup>133</sup> The recent decision of *Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme 36237*<sup>134</sup> (***Westpac v Wave***) confirmed that ‘other amounts’ include recovery costs reasonably incurred by the body corporate in recovering an amount.<sup>135</sup>

Similarly, the definition of body corporate debt does not expressly include judgment debts. *399 Woolcock Street*<sup>136</sup> involved a situation where the body corporate had sought, and been granted a judgment for approximately \$30,000 in unpaid contributions, interest and recovery costs against a company that owned four lots in the scheme. The lot owner did not pay. The mortgagee of the lots took possession and sold the lots to new owners. The body corporate then sought to collect the unpaid amount from the new owners. On adjudication, it was determined that once a judgment for unpaid contributions is entered, the original cause of action merges with the judgment and the requirement to pay the contribution is discharged by the operation of law.<sup>137</sup> As such, the judgment was not found to be a body corporate debt within the meaning of the Regulation Module.

On appeal, QCAT overturned this reasoning. It was held that the judgment debt against the previous owners did not destroy an independent cause of action by the body corporate against the new lot

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<sup>133</sup> See the schedule in each of the Standard Module, Accommodation Module, Commercial Module, Small Schemes Module (definition of ‘body corporate debt’).

<sup>134</sup> [2014] QCA 73.

<sup>135</sup> Accommodation Module s 143(1). *Westpac v Wave* concerned the Accommodation Module, but an equivalent provision is contained in the Standard Module s 145(1); Commercial Module s 104(1); Small Schemes Module s 79(1); Two-Lot Module s 27(2)(b).

<sup>136</sup> *399 Woolcock Street* [2012] QBCCMCmr 134.

<sup>137</sup> *399 Woolcock Street* [2012] QBCCMCmr 134 at [22], citing *Pacific Breeze Apartments* [2009] QBCCMCmr 316.

owners.<sup>138</sup> The recovery costs are a body corporate debt and the new owners of the lots are liable to pay the outstanding amounts.<sup>139</sup>

Despite these recent decisions, there is still uncertainty in regard to the exact scope of 'body corporate debts'. It is important that there be clarity on this issue as any lot owner that owes a body corporate debt is ineligible to be a voting member of the committee<sup>140</sup> and excluded from voting for particular matters.<sup>141</sup>

### Questions

- 16. Should the BCCM Act specify a scale of costs for debt recovery actions taken by the body corporate to collect unpaid contributions and penalty interest?**
- 17. Aside from legal costs allowable under the UCPR, what items should be included in a scale of costs for debt recovery? Should there be fixed charges for certain items or monetary limits imposed depending upon the size of the debt?**
- 18. Should the definition of 'body corporate debt' in the Regulation Modules be amended to specifically include recovery costs and judgments?**

### **3.3.2. Unpaid contributions are an unsecured debt**

Unpaid contributions are an unsecured debt. Owners who have financial difficulty paying their contributions may also have difficulty paying other obligations, such as the mortgage or credit card bills. In some cases, this means that the body corporate will have to line up with other creditors to receive any repayment. Body corporate debts are enforceable jointly and severally against subsequent owners (including a mortgagee in possession) if the lot is sold,<sup>142</sup> however, there is no priority for the body corporate if the lot is not sold. Even if the lot is sold, the body corporate is not automatically entitled to recover the body corporate debt.

#### **3.3.2.1. Part IX debt agreements**

The unsecured nature of body corporate debt is highlighted by the use of Part IX debt agreements<sup>143</sup> which are available to eligible people as an alternative to bankruptcy. Part IX debt agreements may limit the ability of bodies corporate to recover the unpaid contributions and other costs, even if there is a judgment and costs have been awarded against the defaulting lot owner. Bodies corporate may be forced to accept less than the full amount of the outstanding debt, which puts a burden on the other lot owners to make up the shortfall.

<sup>138</sup> *The Body Corporate for 399 Woolcock Street CTS 34700 v Sexton* [2013] QCATA 55 at [10] and [13].

<sup>139</sup> *The Body Corporate for 399 Woolcock Street CTS 34700 v Sexton* [2013] QCATA 55 at [16].

<sup>140</sup> See for example, Standard Module s 10(2)(d), 16(2)(b), 17(4) and 40.

<sup>141</sup> Standard Module s 145(3); Accommodation Module s 143(3); Commercial Module s 104(3); Small Schemes Module s 79(3); Two-lot Module s 27(5) (The Two-lot Module does not use the term 'body corporate debt' but the relevant provision has the same function).

<sup>142</sup> See the relevant Regulation Module, for example, Standard Module s 145(3).

<sup>143</sup> A Part IX debt agreement is an alternative to bankruptcy under the *Bankruptcy Act 1966* (Cth). For further information, see <https://www.afsa.gov.au/debtors/debt-agreement>.

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If the outstanding contributions, penalty interest and recovery costs are not paid, the other (non-defaulting) lot owners are effectively making a loan to the defaulting lot owner. There is no security for this loan and no priority when recovering the unpaid amounts. In reality, the only way a body corporate can be paid is if the lot is sold and adjustment is made on settlement.

### **3.3.2.2. Adjustment on settlement is not required**

The liability to pay a body corporate debt is enforceable jointly and severally against the lot owner at the time the debt became payable and any other person, including a mortgagee in possession, who becomes the lot owner before the debt is paid.<sup>144</sup> This gives the body corporate some security that the debt will eventually be satisfied if the lot is sold. There is no express statutory requirement to pay an outstanding body corporate debt on settlement of a sale of the lot. If the debt is not satisfied at settlement, the body corporate may have to take legal action to recover the debt.

If the lot owner has defaulted on a mortgage, the mortgagee may sell the lot. The Centre understands that some mortgagees avoid becoming a 'mortgagee in possession' for the purposes of the BCCM Act by deliberately failing to notify the body corporate of an intention to enforce the mortgage.<sup>145</sup> If the mortgagee sells the lot without becoming a mortgagee in possession, there is no liability on the mortgagee to pay the debt.

The mortgagee could sell the lot to a third party thus making that third party liable for the debt while avoiding any liability itself by not becoming a mortgagee in possession. In the normal course of events, the existence of a body corporate debt on a lot may not be discovered until after the sales contract has been entered into. In such cases, if the mortgagee refused to make an adjustment at or before settlement to account for the body corporate debt, the third party purchaser may not, depending on the terms of the contract of sale, have a right to terminate and may be liable for the body corporate debt.

### **3.3.2.3. Option 1 – Non-judicial power of sale**

A mortgagee can exercise a power of sale on any unremedied default regardless of the amount owing which means the mortgagee has priority in a defaulting owner's hierarchy of debt reduction. A body corporate does not have any such priority when seeking to recover unpaid contributions. Until the unpaid contributions can be recovered, the non-defaulting lot owners must make up the shortfall of unpaid contributions or face potentially being unable to fund repair, maintenance and upgrades of common property.

One option to address this is to give bodies corporate a non-judicial power of sale, similar to the provisions in California (discussed at 3.2 above). This could be in addition to the existing ability of a body corporate to seek an enforcement warrant after a judgment has been granted against a defaulting lot owner.

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<sup>144</sup> Standard Module s 145(3); Accommodation Module s 143(3); Commercial Module s 104(3); Small Schemes Module s 79(3); Two-lot Module s 27(5) (The Two-lot Module does not use the term 'body corporate debt' but the relevant provision has the same function).

<sup>145</sup> BCCM Act schedule 6 (definition of 'mortgagee in possession') provides that a mortgagee in possession is a mortgagee who has taken steps to enforce a mortgage of a lot and has notified the body corporate of the intention.

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Such an option, however, could create a legion of problems. Unlike banks, bodies corporate are effectively unregulated. An annual audit is not required if the lot owners vote against it<sup>146</sup> and the amount of unpaid contributions owed by the defaulting lot owner may be incorrectly calculated. Further issues could include a conflict if the mortgagee and the body corporate attempt to exercise a power of sale at the same time.

This option will have far ranging impacts and the potential to lead to expensive litigation. It would require further consideration and consultation with a wide range of stakeholders before it could be implemented.

### **3.3.2.4. Option 2 – Body corporate debt is a charge on the lot**

A second option to give bodies corporate increased security in relation to unpaid body corporate debt is to amend the BCCM Act and Regulation Modules to provide that a body corporate debt is a charge on the lot. Statutory charges currently exist for unpaid rates<sup>147</sup> and unpaid land tax.<sup>148</sup>

If body corporate debts are deemed to be a charge on the lot, this will give the body corporate a greater security that the body corporate debt will be satisfied when the lot is sold. This is because the charge must be disclosed under the sales contract and if not disclosed, may give the purchaser a right to terminate the contract for failure to release the charge.<sup>149</sup>

When selling the lot, mortgagees, whether mortgagees in possession or not, will be more likely to make adjustment on or before settlement of the sale to account for unpaid body corporate debt if the amount is required to be discharged at settlement. Purchasers will be more likely to ask for an adjustment or to decide that an adjustment is not necessary and thus voluntarily take on the obligation to pay the body corporate debt at settlement.

This option may impact on the existing rights of registered mortgage holders where they seek to sell a lot without becoming a mortgagee in possession. However, selling the lot without becoming a mortgagee in possession allows the mortgagee to avoid any liability for unpaid body corporate debts and this defeats the spirit, if not the letter, of the BCCM Act.

It has been suggested that if body corporate debts are deemed to be a charge, this may give rise to an interest in a lot<sup>150</sup> which could result in a caveat being lodged that prevents a lot owner from selling the lot to get out of financial difficulty. This risk can be mitigated if the BCCM Act provides that a charge on a lot for body corporate debt does not give rise to an interest in the lot for the purpose of a caveat under the *Land Title Act 1994* (Qld).

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<sup>146</sup> See for example, Standard Module s 155.

<sup>147</sup> *Local Government Act 2009* (Qld) s 95(2).

<sup>148</sup> *Land Tax Act 2010* (Qld) s 60.

<sup>149</sup> The Real Estate Institute Queensland (REIQ) Residential Lots in a Community Titles Scheme Contract (5<sup>th</sup> ed) requires that the property is sold free of encumbrances. Failure to disclose an encumbrance may amount to a material breach and give the purchaser a right to rescind the contract.

<sup>150</sup> *Land Title Act 1994* (Qld) s 122.

### 3.3.2.5. Option 3 – Reduce debt recovery time

Currently, a body corporate must commence debt recovery within two years and two months of a debt becoming due.<sup>151</sup> The body corporate is not required to wait that long. Some bodies corporate see the penalty interest as an additional revenue stream. A 30% annual return (2.5% per month)<sup>152</sup> on unpaid contributions (if recovered) is much higher than could be achieved by investing those funds in an ordinary savings account.

To ensure that the amount of unpaid contributions remains as low as possible, it may be desirable to shorten this time to one year. Unpaid contributions are likely to be lower after one year than would be the case if they had been outstanding for two years (particularly given the high interest rate).

#### Questions

19. Should the body corporate have a non-judicial power of sale over a lot when the lot owner has outstanding body corporate debt?
20. Should the body corporate debt of a lot owner be a charge on the lot?
21. How long should bodies corporate allow unpaid contributions to accrue before taking steps to recover the amounts?

### 3.3.3. Address for service

Under the BCCM Act, lot owners must notify the body corporate of their residential or business address and an **address for service** (if different from the residential or business address).<sup>153</sup> If no address is given the BCCM Act provides that the lot owner's address for service is the address of the lot.<sup>154</sup> The address for service is used for ordinary notices of the body corporate relating to meetings, minutes and contributions.

The Standard Module requires that the address for service be an Australian address.<sup>155</sup> However, if an Australian address is not given, the address for service may be an overseas residential or business address last notified to the body corporate.<sup>156</sup> The other Regulation Modules do not require lot owners to provide an Australian address for service.<sup>157</sup> It is unclear why the other Regulation Modules do not require this.

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<sup>151</sup> See for example, Standard Module s 145(2).

<sup>152</sup> See for example, Standard Module s 144(1).

<sup>153</sup> Standard Module s 193(3)(a)(iii); Accommodation Module s 191(3)(a)(iii); Commercial Module s 149(3)(a)(iii); Small Schemes Module s 127(3)(iii); Two-Lot Module s 64(3)(a)(iii).

<sup>154</sup> BCCM Act s 315(4).

<sup>155</sup> Standard Module s 194(1).

<sup>156</sup> Standard Module s 194(2).

<sup>157</sup> See Accommodation Module s 192; Commercial Module s 150; Small Schemes Module s 128; Two-Lot Module s 65.

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The Regulation Modules also provide that if the lot owner appoints a person to act for the owner in letting or leasing the lot, the lot owner must notify the body corporate of the name and residential or business address of the person appointed.<sup>158</sup> However, this information is not always provided.

There is no penalty or sanction against a lot owner that fails to provide or update an address for service or the address of a person acting as an agent for leasing the lot.

Many residential lots in community titles schemes are being purchased by persons living abroad. Many stakeholders argue that it is essential that overseas owners give the name and address of an Australian resident for the service of notices required by the legislation. This address must be kept up to date and preferably, should include an email address for the lot owner and the nominated person.

### **3.3.3.1. Option – Australian address for service of notices**

One option is to make the Regulation Modules consistent in terms of a lot owner's address for service. This means that all Regulation Modules, not just the Standard Module, will require lot owners to provide an Australian address for service. The address could be the lot owner's residential or business address in Australia or the residential or business address of a person in Australia acting for the lot owner in the letting or leasing of the lot. If neither is provided, the address for service will be the address of the lot itself.

While this may impact on lot owners who live overseas, it can be justified on a number of grounds. First, some lot owners are corporations. Under the *Corporations Act 2001*,<sup>159</sup> corporations are required to have a registered business address in Australia. The address for service can be the registered business address. This option places an equivalent requirement on individuals.

Secondly, where the lot owner is an overseas owner or investor, in many cases there is a real estate agent, a family member or another person in Australia that is looking after or managing the lot on behalf of the lot owner. This person acts as an agent, with either actual or ostensible authority on behalf of the lot owner. The overseas lot owner could nominate the Australian address of the person acting on their behalf as the Australian address.

Thirdly, overseas lot owners who would like to receive body corporate notices relating to minutes, meetings and contributions could provide the body corporate with an email address. Under the *Electronic Transactions (Queensland) Act 2001* (Qld) the requirement to give written notice for either a general meeting or a committee meeting may be satisfied if the person receiving the information consents to receiving it electronically.<sup>160</sup> This means that notices of general meetings and committee meetings can be sent electronically if the lot owner agrees.

Finally, as discussed under the next option, an Australian address for service may assist bodies corporate if it becomes necessary to take debt recovery action against an overseas lot owner.

### **Question**

<sup>158</sup> Standard Module s 193(3)(c); Accommodation Module s 191(3)(c); Commercial Module s 149(3)(c); Small Schemes Module s 127(3)(c); Two-Lot Module s 64(3)(c).

<sup>159</sup> *Corporations Act 2001* (Cth) s 142(1).

<sup>160</sup> *Electronic Transactions (Queensland) Act 2001* s 11.

**22. Are there any reasons why the Regulation Modules should not require lot owners to provide an Australian address for service and maintain the accuracy of the address?**

### 3.3.4. Service of legal process on individual lot owners

To commence legal action to recover a debt, the body corporate must serve legal documents, known as **originating process** on the defaulting lot owner. Generally, originating process requires personal service.<sup>161</sup> However, proceedings in the Magistrates Court (with jurisdiction to hear debts disputes up to \$150,000) may be served either personally or by leaving originating process documents with someone who is apparently an adult living at the **relevant address**.<sup>162</sup> The relevant address for the purposes of the UCPR is not the same as the address for service under the BCCM Act.

A large number of lots in Queensland community titles schemes are owned by overseas investors. In some cases, the owners have never physically visited the lot and view it simply as a commodity to produce an income through rental return. In some cases, the owner continues to receive rental income from the lot while the contributions relating to the lot remain unpaid.

The body corporate may need to issue legal process to recover unpaid contributions by obtaining a judgment and through the issue of an enforcement warrant but these steps can be costly, time-consuming and may not result in complete satisfaction of the outstanding debt.

Beginning legal proceedings can be particularly time consuming and expensive if the lot owner's address for service is outside Australia. If the only address for the lot owner is an overseas address then the body corporate must seek to serve the originating process on the defaulting owner in the overseas jurisdiction. In some jurisdictions, this may be very difficult, if not impossible. Where it is not possible, the body corporate must make an application to the court for substituted service to allow the originating process to be served on a person hopefully in Australia other than the lot owner, where this will bring the matter to the attention of the lot owner. It is the obligation of the body corporate to institute inquiries as to the identity of a suitable person upon whom to substitute service of process.

An example of a suitable person for substituted service may be the person notified to the body corporate as acting for the owner in letting or leasing of the lot (if such a person has been notified to the body corporate). A person acting as an agent for a lot owner for the leasing or letting of the lot does not have to help the body corporate locate the lot owner. Without an order for substituted service, the person is under no legal obligation to accept or to pass on originating process to the lot owner.

Although in a successful proceeding the cost of substituted service would be added to the judgment debt, the body corporate must still bear the costs in the early stages for the preparation, issue and service (substituted or otherwise). As mentioned at 3.3.1.2 above, the judgment debt should be expressly included in the definition of a 'body corporate debt'.

#### 3.3.4.1. *Option – Service of originating process*

<sup>161</sup> *Uniform Civil Procedure Rules 1991* (Qld) (UCPR) rule 105.

<sup>162</sup> UCPR rules 111-112. The relevant address is a person's residential or business address or the person's last known place of residence or business. See also UCPR rule 17(6) and 140.

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The BCCM Act could provide that the Australian address for service is deemed to be the relevant address to serve the lot owner with originating process only when commencing debt recovery actions. In many instances, this would be the only address the body corporate might have if proceedings for substituted service were necessary. Problems arise where that address is not a street address or is simply a post office box. The address provided would have to be care of an individual at a street address within Australia and should be provided to the body corporate secretary.

If the lot owner has not provided an Australian address for service, the relevant address should be the Australian address of a rental agent or other person acting on behalf of the lot owner for the leasing of the lot, whether or not the lot owner has provided those details to the body corporate. If there is no rental agent or other person acting for the lot owner for the leasing of the lot, the relevant address should be the address of the lot.

Under this option, if an overseas lot owner is using a rental agent or other person to act on their behalf for leasing the property, the body corporate will be able to serve the rental agent or person, whether or not that person's details had been provided to the body corporate. In effect, this option would give the body corporate a statutory method of substituted service.

This option will require amendments not only to the BCCM Act and Regulation Modules but also to the UCPR. The UCPR will require special provisions to recognise that in cases of service of originating process for debt recovery matters against a lot owner in a body corporate, where an Australian address for service has not been provided, the Australian address of a person acting as an agent of the lot owner for leasing the lot, or the lot itself is deemed to be the relevant address of the lot owner.

As with the previous option, this may have particular relevance for lot owners who are physically resident overseas. However, it is justifiable as a protection for non-defaulting lot owners. The body corporate should have an easier and less expensive mechanism to serve legal proceedings against lot owners, including overseas lot owners, if those lot owners fail to comply with their obligations under the BCCM Act and the Regulation Modules in regard to providing an address for service.

This option would reduce the cost and the time involved in recovering the debt which would in turn limit the burden on the non-defaulting lot owners.

### Question

**23. Are there any reasons why the BCCM Act and the UCPR should not provide special provisions to assist a body corporate to recover unpaid contributions from lot owners that have not provided an Australian address for service?**

### **3.3.5. Collecting after a judgment**

Even if the difficulty of the address for service is overcome and a judgment is made against the defaulting lot owner, it may be very difficult to actually collect money from the lot owner without further curial processes.

The body corporate may have obtained a judgment from a court requiring a lot owner to pay the outstanding debt but the lot owner may not pay. The body corporate is then forced to take further



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court action and seek an enforcement warrant to recover the amount of the judgment through a seizure of the lot owner's property, income or assets.

Obtaining an enforcement warrant involves additional legal action. Even if granted, the enforcement warrant does not guarantee the body corporate any priority, for example if there is an unpaid mortgage or other creditors seeking to recover amounts from the lot owner's assets.

If the defaulting lot owner is employed, a court might issue an enforcement warrant to redirect a portion of the lot owner's earnings to the body corporate to satisfy the judgment.<sup>163</sup> If the defaulting lot owner is owed a debt, the court may order that the debt is redirected to the body corporate.<sup>164</sup> If the defaulting lot owner has property or other assets, the court may give the body corporate the right to seize and sell the property or assets.<sup>165</sup> This could result in the forcible sale of the lot to recover the unpaid amount.

If the body corporate has a judgment against the lot owner and the lot is producing a rental income, the body corporate may seek to garnishee the rental income. This may be achieved by a court order redirecting a debt owed to the lot owner from a third person<sup>166</sup> (the tenant).

### **3.3.5.1. Option – Ability to directly garnishee rental income**

In some cases, the owner may have unpaid contributions but continue to receive rental income from the lot. Sometimes, an owner may be in arrears notwithstanding that the lot has been tenanted for the entire period of default. Payments of body corporate contributions may be the last in the lot owner's priority as they are more difficult to collect.

In situations where the lot is tenanted and the body corporate has obtained a judgment against the lot owner for unpaid contributions, penalty interest and recovery costs, an option may be for the body corporate to have a specific ability to garnishee the rental returns directly from the tenant or person collecting rent money (i.e. the rental agent of the lot) to satisfy the judgment against the lot owner. This special power would apply only in circumstances where there is a judgment against the lot owner and the lot is tenanted or occupied by a person other than the lot owner who is paying rent to the lot owner through the medium of a real estate agent.

As mentioned above, the UCPR has general provisions that allow any person (an **enforcement creditor**) with a judgment for money against another person (the **enforcement debtor**) to have debts owed to the enforcement debtor by a third party redirected to the enforcement creditor. These provisions would allow a body corporate to redirect the rent from a tenant.

This option proposes a specific remedy to allow a body corporate to enforce a judgment for unpaid contributions directly against the rental income generated by the lot. This could take the form of a special type of enforcement warrant that can be served against a tenant or a real estate agent where a lot the subject of a judgment is producing rental income. The body corporate could be treated as a

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<sup>163</sup> UCPR Chapter 19, Part 6.

<sup>164</sup> UCPR Chapter 19, Part 5.

<sup>165</sup> UCPR Chapter 19 Part 4.

<sup>166</sup> UCPR r 840.

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special type of enforcement creditor and rental income generated from the lot could be treated as a special type of income of the defaulting lot owner available for redirection.

This option involves expanding the power of the court to issue an enforcement warrant in specific circumstances and will require amendment to the UCPR.

This power could be exercised prior to or as an alternative to seeking an enforcement warrant for a redirection of earnings, debt or seizure and sale of property. The provisions in Florida (discussed at section 3.2 above), which protect the tenant from being evicted by the lot owner for paying rent to the body corporate, may provide a model for this approach.

This option will provide the body corporate with a powerful means of ensuring that the failure of a single lot owner to pay its fair share of the common expenses would not dramatically impact on the ability of the body corporate to carry out its statutory obligations. Further, this option will make it easier for a body corporate to collect arrears where the lot owner ignores a judgment of the court to pay the debt, particularly where the owner is overseas. This option would provide protection to the lot owners who do the right thing and pay their contributions on time.

This option will impact on tenants and rental agents. Tenants may be inconvenienced by having to change their rent payment arrangements to deposit money into a different account. Rental agents, who generally deduct their fee from the rental returns before providing the money to the lot owner may also find it difficult to ensure they are paid. In the usual instances, however, not all the rental income would be redirected to the creditor body corporate and some would be left to pay the real estate agent rates and taxes.

### Question

**24. In circumstances where a body corporate has obtained a judgment against a lot owner for unpaid body corporate debt, should the body corporate have a mechanism to garnishee the rental income from the lot to satisfy the judgment by serving the tenant or real estate agent for the lot? Why or why not?**

## 4. Scheme termination

The first strata titles legislation was introduced in NSW in 1961.<sup>167</sup> Since that time, strata buildings have become common place throughout Australia and indeed, throughout the world. Queensland alone has nearly 43,000 strata schemes.<sup>168</sup> As these schemes and their buildings age, more and more buildings will reach the end of their economic life. This means that the expense of maintaining and repairing the common property increases but the property value decreases. The end of the economic life of a building is the point at which it makes more sense, financially speaking, to knock the building down and redevelop the site than it does to continue paying high maintenance and repair costs for the existing building which is diminishing in value. The decision to redevelop the site requires that the current lot owners vote to terminate the scheme.

Where the building has reached the end of its economic life the owners may enter into a collective sales arrangement with a developer who agrees to purchase all the lots, terminate the scheme and redevelop the site. Sometimes the existing owners enter into a joint venture agreement with the developer which provides that, in exchange for an investment in the project, the lot owner will receive a new lot in the redeveloped scheme. However, all lot owners must agree for this to happen voluntarily. This means that, effectively, one dissenting owner can stop a scheme from being redeveloped.

The BCCM Act allows a scheme to be terminated without unanimous support of lot owners by an order of the District Court. However, there have been very few cases where a court has ordered a scheme to be terminated.<sup>169</sup>

### 4.1. Current system in Queensland

In Queensland, a community titles scheme may be terminated in two ways. The first is by a resolution without dissent<sup>170</sup> where all registered proprietors and lessees of scheme land have entered into an agreement about termination issues.<sup>171</sup> Alternatively a scheme may be terminated by order of the District Court.<sup>172</sup> The District Court will make an order to terminate a scheme only if it is satisfied that it is just and equitable in the circumstances to do so.

When the scheme is terminated, the title to all individual lots is cancelled and replaced with a single title<sup>173</sup> held by the (now former) owners as tenants in common.<sup>174</sup> The body corporate is dissolved

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<sup>167</sup> *Conveyancing (Strata Titles) Act 1961* (NSW).

<sup>168</sup> Queensland Government, Department of Justice and Attorney-General, Office of Body Corporate and Community Management Commissioner, *Common Ground*, Issue 13, 4, [http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/293143/common-ground-issue-13.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0004/293143/common-ground-issue-13.pdf).

<sup>169</sup> Only five schemes in New South Wales: Position Paper, above n 46 at 20. In Queensland, there has been only one – see *Body Corporate for Nobby's Outlook CTS 14822 v Lawes* [2013] QDC 301. However the dissenting owner ultimately agreed to the termination order and the scheme was terminated by consent.

<sup>170</sup> BCCM Act s 78(1).

<sup>171</sup> Termination issues include disposal of scheme land, custody, management and distribution of body corporate assets and the sharing of liabilities of the body corporate: BCCM Act schedule 6 (definition of 'termination issues').

<sup>172</sup> BCCM Act s 78(2).

<sup>173</sup> *Land Title Act 1994* (Qld) s 115V(3). More than one title may be created, however the registered owners of the title will be all the owners of the lots prior to termination.

<sup>174</sup> *Land Title Act 1994* (Qld) s 115V(4)(b).

and the assets and liabilities of the scheme are vested in the former owners<sup>175</sup> as tenants in common in shares proportionate to their respective interest schedule lot entitlements (as immediately before the termination).

## 4.2. Examples from other jurisdictions

### 4.2.1. NSW proposal

NSW is currently considering implementing a model that allows schemes to be terminated with just 75% of the owners in the scheme agreeing to termination.<sup>176</sup> However, the legislation to implement this proposal has not yet been released.

### 4.2.2. Northern Territory proposal

The Northern Territory has recently considered the issue of scheme terminations. Following a discussion paper released in 2012,<sup>177</sup> a final report (**Cancellation Report**) was completed in September 2013.<sup>178</sup> The Cancellation Report contains a proposal to amend the relevant legislation to create a sliding scale of support for termination. For schemes comprising 10 or more lots, the level of support to terminate the scheme will vary depending on the age of the building. Schemes from 15 to 20 years old will require a 95% majority, schemes 20-30 years old will require 90%, and buildings over 30 years old will require 80%.<sup>179</sup>

The NT proposal will allow any owner in the minority to challenge the termination in a tribunal or the Supreme Court and would set specific criteria when considering such an application. It is proposed that the main criterion would be the economic necessity for the redevelopment.<sup>180</sup>

In October 2014, the Northern Territory released a consultation paper<sup>181</sup> and draft legislation to implement these recommendations.

### 4.2.3. Singapore model

In Singapore, schemes can be terminated voluntarily by unanimous agreement of the management corporation<sup>182</sup> or by an order of the court.<sup>183</sup> In addition, the relevant legislation contains provisions to allow a majority of owners (90% for buildings less than 10 years old,<sup>184</sup> or 80% for buildings more

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<sup>175</sup> BCCM Act s 81(1).

<sup>176</sup> Position Paper, above n 46, at 20-2.

<sup>177</sup> Northern Territory, Department the Attorney-General and Justice, *Cancellation of unit plans and schemes under the Unit Titles Act and the Unit Title Schemes Act: Discussion Paper*, November 2012, [http://www.nt.gov.au/justice/policycoord/documents/lawmake/Discussion\\_Paper\\_on\\_%20Dissolution\\_of\\_Schemes\\_under\\_the\\_NT\\_Unit\\_Titles\\_Act\\_and\\_Unit\\_Title\\_Schemes\\_%20Act.pdf](http://www.nt.gov.au/justice/policycoord/documents/lawmake/Discussion_Paper_on_%20Dissolution_of_Schemes_under_the_NT_Unit_Titles_Act_and_Unit_Title_Schemes_%20Act.pdf).

<sup>178</sup> Northern Territory, Department of the Attorney-General and Justice, *Report: Cancellation provisions under the Unit Titles Act and Unit Title Schemes Act (Cancellation Report)*, September 2013, 17-18, [http://www.nt.gov.au/justice/policycoord/documents/lawmake/2013/final\\_report\\_unit\\_titles\\_cancellation.pdf](http://www.nt.gov.au/justice/policycoord/documents/lawmake/2013/final_report_unit_titles_cancellation.pdf).

<sup>179</sup> Cancellation Report, above n 178, 18 at [3].

<sup>180</sup> Cancellation Report, above n 178, 20 at [8(a)].

<sup>181</sup> Northern Territory, Department of the Attorney-General and Justice, *Consultation Paper – Termination of Units Plans and Unit Titles Schemes Bill 2014 – Unit Titles’ Reform: Termination of units Plans and Schemes*, <http://www.nt.gov.au/justice/policycoord/lawmake/reports.shtml>.

<sup>182</sup> *Building Maintenance and Strata Management Act* s 84 Cap 30C, 2008 rev ed and *Land Titles (Strata) Act* s 81 Cap 158, 2009 rev ed.

<sup>183</sup> *Land Titles (Strata) Act* s 78 Cap 158, 2009 rev ed.

<sup>184</sup> *Land Titles (Strata) Act* s 84A(a) Cap 158, 2009 rev ed.

than 10 years old<sup>185</sup>) to force the minority to sell their lots in accordance with a collective sales agreement that has been entered into by the majority. Once all the lots are sold, the scheme is terminated and the land is redeveloped.

The Northern Territory proposal and the NSW proposal each draw to some extent on the provisions in Singapore.<sup>186</sup> However, there is some concern that the provisions from Singapore, with a population of over 5 million people in an area of land only about a third of the size of the Australian Capital Territory,<sup>187</sup> would be inappropriate in the Australian context.<sup>188</sup>

### 4.3. Issues with scheme termination in Queensland

There are a number of issues related to scheme termination, including the large number of schemes which are likely to require redevelopment in the next 10-20 years, inadequate maintenance (which may reduce the economic life of a building), the difficulty obtaining a unanimous vote and the uncertainty of court orders for termination. Other concerns have been raised about the inability to terminate layers in a layered scheme.

#### 4.3.1. Ageing buildings and schemes

A primary concern for Queensland is that many existing schemes are ageing. In the next 10 to 20 years it is likely that there will be an increase in the number of schemes where the buildings have reached the end of their economic life. This will be particularly true in coastal areas such as the Gold Coast and the Sunshine Coast as older buildings begin to deteriorate from age and exposure to the elements. These schemes will either require increasingly expensive maintenance and repairs or redevelopment.

#### 4.3.2. Inadequate maintenance

Bodies corporate are run by a committee of volunteer owners, who often have little or no experience managing property and who may be unlikely to fully appreciate the ongoing maintenance needs of a building. The committee members try to keep the costs of running the scheme as low as possible. This may involve putting off routine maintenance of common property in order to save on costs in the short term. In some situations, however, this may be a short term gain (lower contributions for lot owners) but a long term loss in terms of increased repair costs down the track.

Generally, buildings that have been inadequately maintained will reach the end of their economic life sooner than buildings that have been well maintained. Buildings that are nearing the end of their economic life require increasingly frequent maintenance and repairs which can add up to large costs for lot owners. As these costs increase, the value of the common property decreases. Some owners may be unable to afford the increase in contributions caused by skyrocketing maintenance costs or special levies for urgent repairs. It is at this point that some owners may consider that it makes more economic sense to redevelop the scheme rather than continue maintaining the existing scheme.

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<sup>185</sup> *Land Titles (Strata) Act* s 84A(b) Cap 158, 2009 rev ed.

<sup>186</sup> See Position Paper above n 46 at 23 and First, Second and Third Schedule of *Land Titles (Strata) Act* Cap 158, 2009 rev ed.

<sup>187</sup> Singapore has a land area of 716.1 km<sup>2</sup>: Department of Statistics, Singapore, [http://www.singstat.gov.sg/statistics/latest\\_data.html#14](http://www.singstat.gov.sg/statistics/latest_data.html#14). The ACT is 2358 km<sup>2</sup>: Geoscience Australia, <http://www.ga.gov.au/education/geoscience-basics/dimensions/area-of-australia-states-and-territories.html>.

<sup>188</sup> See for example, Cathy Sherry, Termination of strata schemes in New South Wales – Proposals for reform, (2006) 13 *Australian Property Law Journal* 227.

One of the main problems is determining when this point has been reached. The majority of lot owners in a scheme may decide that it is time to terminate the scheme and redevelop the land for economic reasons. The BCCM Act requires a resolution without dissent for the voluntary termination of a scheme.

#### **4.3.3. Difficulty obtaining unanimous consent**

Termination of a scheme often involves all of the lot owners selling their individual lots to a developer who will terminate the scheme and redevelop the site. However, this can give rise to what has been termed the 'holdout problem'.<sup>189</sup> This is when one or a small number of owners in a community titles scheme hold out against the redevelopment and effectively veto the termination of the scheme. This may occur because the owners are seeking to improve their bargaining position (to secure a larger price for their lot) or when an owner, for whatever reason, just does not want to sell.

The legislation allows the scheme to be terminated if the lot owners agree, by passing a resolution without dissent. A resolution without dissent is not a unanimous vote – but it will not pass if even one lot owner votes against it. One holdout may stop the scheme from being redeveloped. The question then is whether a majority should be able to compel the dissenting owner or owners to sell their lot so the redevelopment can go forward.

##### **4.3.3.1. Option 1 – No change to threshold for scheme termination**

Despite widespread criticism of the effective requirement for unanimity, it is unclear if there is in fact a problem with this requirement. If a body corporate is unable to pass a resolution without dissent to terminate the scheme, the body corporate or any owner of a lot in the scheme<sup>190</sup> may apply to the District Court for a termination order. The current provisions have not been effectively tested but that does not mean that the process of court ordered termination does not work.<sup>191</sup> As schemes age, there may be more court ordered terminations. While some commentators might predict an avalanche of such applications in the next 10-20 years, the first few court ordered terminations will create precedent to be followed in other schemes.

##### **4.3.3.2. Option 2 – Reduce the threshold for scheme termination**

The alternative option is to reduce the percentage threshold for scheme termination. As schemes and buildings age, the number of schemes that reach the end of their economic life will increase and, it is argued, there should be a mechanism to stop one owner from 'holding out' against a redevelopment when the rest of the owners support it because of the increasing maintenance costs within the scheme.

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<sup>189</sup> Melissa Pocock, Overcoming the holdout problem when redeveloping strata schemes: research findings. *Strata and Community Title in Australia for the 21<sup>st</sup> Century 2013 Conference*, Gold Coast, Australia, September 2013.

<sup>190</sup> BCCM Act s 78(4). An administrator appointed under the dispute resolution provisions of the BCCM Act may also make an application to the court for a termination order.

<sup>191</sup> See Sherry, above n 188, at 236.

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However, lot owners may want to terminate a scheme and redevelop the site if the characteristics of the neighbourhood or the planning aspects change. It may make economic sense to terminate a scheme, if for example a relatively new 5 story building can be replaced by higher density 10 story high-rise.

Any reduction in the threshold for termination must distinguish between the situations where the building is uneconomic to repair and maintain as the building reaches the end of its economic life as opposed to a situation where the redevelopment potential of the scheme land makes it desirable (and profitable) to replace a sound structure with new, higher density scheme. There must be robust mechanisms to protect the fundamental property rights of individual lot owners.

One option to reduce the relevant threshold is to introduce a new category of resolution, for example a super resolution, which would require a threshold of at least 75% of votes cast, provided no more than 15% of lot owners, or lot owners who hold at least 15% of the lot entitlements vote against the proposal. This would be an effective 85% threshold, which is higher than a special resolution but less than a resolution without dissent.

There will need to be robust safeguards to protect the rights of lot owners in the minority who do not want to sell their lot. A court should be given wide powers to determine such a dispute and be directed to consider the economic necessity for the redevelopment, the arguments of the minority against termination and the consequences to the majority if the termination is not allowed.

### Questions

**25. Should a body corporate be able to voluntary terminate the scheme with less than 100% agreement of lot owners? What percentage should be required?**

**26. What safeguards should be in place for lot owners that do not support the voluntary termination?**

#### **4.3.4. Uncertainty of court ordered termination**

If a resolution without dissent cannot be achieved, the body corporate may, by special resolution authorising legal action,<sup>192</sup> apply to the District Court for a termination order. The District Court has the power to terminate a scheme if satisfied that it is just and equitable to do so.<sup>193</sup> However, in Queensland (to date) there has only been one scheme terminated by an order of the District Court.<sup>194</sup>

Nobby's Outlook on the Gold Coast was facing a cost of \$3.8 Million (or about \$100,000 per lot)<sup>195</sup> to repair and upgrade the existing buildings. The scheme failed to achieve a resolution without dissent to terminate the scheme. The body corporate then applied to the District Court for a termination order. The dissenting owner eventually agreed to a consent order providing for the conditional termination of the scheme pending a number of conditions precedent. Thus, in Queensland there is

<sup>192</sup> BCCM Act s 312(1)(b).

<sup>193</sup> BCCM Act s 78(2).

<sup>194</sup> *Body Corporate for Nobby's Outlook CTS 14822 v Lawes* [2013] QDC 301.

<sup>195</sup> *Body Corporate for Nobby's Outlook CTS 14822 v Lawes* [2013] QDC 301 at [1].

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not yet any judicial guidance as to what a court may consider when determining whether it is just and equitable to terminate a scheme.

Some argue that a single person should not be able to effectively veto the will of the majority to terminate the scheme. They argue that the threshold to terminate a scheme should be reduced to a lower percentage.

Others have argued that the District Court order provides a way around the unanimous consent requirement. They say that before the threshold is lowered, the existing mechanism to apply to the District Court should be used. Just because the legislation is effectively untested does not mean that it does not work.

### **4.3.4.1. Option – Legislative guidance to determine ‘just and equitable’**

The BCCM Act provides that the District Court may make an order for termination of a scheme if it decides that it is just and equitable to do so.<sup>196</sup> There have not yet been any decisions as to what is just and equitable in this context. To address the predicted avalanche of scheme terminations likely to occur in the next decade, it may be desirable to provide legislative guidance for the District Court when determining if it is just and equitable to terminate a scheme.

The legislation could enumerate factors that the District Court may consider. These factors could include many of the same factors that a court should consider if the reduced threshold option discussed above were to be adopted such as: the economic need for the proposal (whether the building is uneconomic to maintain or whether the redevelopment potential of the land is high but the building is otherwise sound); the consequences to the lot owners if the scheme is terminated; the consequences if the scheme is not terminated; the age of the building; sinking fund forecasts and current balance; expected capital expenditure, etc.

### **Question**

**27. What factors should the District Court consider when deciding whether it is just and equitable to order the termination of a scheme?**

### **4.3.5. Inability to terminate layered schemes**

The BCCM Act provides that only a basic scheme may be terminated.<sup>197</sup> A basic scheme is a scheme where none of the lots in the scheme is another community titles scheme.<sup>198</sup> Essentially, this means the scheme must not be a layered scheme.<sup>199</sup> Before a layered scheme can be terminated, it must become a basic scheme.<sup>200</sup> This could be problematic.

For example, a scheme may have two high-rise towers and be structured so that the principal body corporate is made up of two lots, each of which is a community titles scheme over one of the towers.

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<sup>196</sup> BCCM Act s 78(2).

<sup>197</sup> BCCM Act s 76(2).

<sup>198</sup> A basic scheme is where all the lots are lots under the *Land Title Act 1994*: BCCM Act s 10(5).

<sup>199</sup> The BCCM Act has diagrams in Schedule 1 showing examples of a basic scheme.

<sup>200</sup> BCCM Act s 76(3).



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After the scheme has been developed, there may be little reason to keep the principal body corporate. In fact, the costs and time involved in running three bodies corporate may mean it is desirable to have only two. However, under the current legislation, the principal body corporate cannot be terminated unless each subsidiary scheme is terminated.

As outlined above, when a scheme is terminated, all individual lots and common property are owned by all lot owners as tenants in common of one lot. This single lot would then have to be re-subdivided to create an individual title for each lot and a new scheme registered. The legal consequences of this are unlikely to be supported by banks and other financiers that hold an interest in the title of the existing individual lots.

### **4.3.5.1. Option – Termination of layers in a layered scheme**

The more bodies corporate involved in running a scheme, the larger the expenses in the scheme will be. A number of layered schemes were initially set up for purposes that have largely been fulfilled. However, the restriction on termination of a scheme that is not a basic scheme means that it is effectively impossible to re-arrange a scheme structure to remove redundant layers.

The legislation could provide a simplified way to unbundle a layered scheme, allowing a subsidiary scheme to be removed but leaving the lots in that scheme to continue as a stand-alone scheme or be recorded as a new scheme, with identical lot boundaries and common property held by the identical owners.

#### **Question**

- 28. Should it be possible to terminate schemes that are part of a layered scheme without terminating all layers? What is the best way to achieve this?**
- 29. What safeguards would need to be put in place if the threshold for scheme termination is reduced?**

## Resources

### A. Articles/Books/Reports

Alouat, Jim 'Crowding causes a stink', *News Mail* (Queensland), 13 September 2013.

Chalmers, Laura 'Queensland smoking ban to extend to school gates and within 5m of hospitals', *The Courier-Mail* (Queensland), 17 May 2014.

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Pocock, Melissa 'Overcoming the holdout problem when redeveloping strata schemes: research findings'. *Strata and Community Title in Australia for the 21<sup>st</sup> Century 2013 Conference*, Gold Coast, Australia, September 2013.

Scollo, MM and MH Winstanley, *Tobacco in Australia: Facts and issues*, 4th edn. Melbourne: Cancer Council Victoria; 2012. Available from [www.TobaccoInAustralia.org.au](http://www.TobaccoInAustralia.org.au).

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Thomson, Jimmy 'Packed to the rafters with strife', *Sydney Morning Herald* (New South Wales), 1 February 2014.

Thomson, Jimmy "'Lofting" raised bar on overcrowded flats', *Sydney Morning Herald* (New South Wales), 28 January 2014.

### B. Cases

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## Glossary

TERM	MEANING
<b>Accommodation Module</b>	<i>Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld)</i>
<b>Accused person</b>	An owner or occupier accused of contravening a by-law in a scheme
<b>ACT</b>	Australian Capital Territory
<b>Address for service</b>	A person's residential or business address for service of notices from the body corporate, as advised to the body corporate under the applicable Regulation Module
<b>Adjudication</b>	A stage of the dispute resolution process with the BCCM Commissioner that involves a binding decision being made by a departmental adjudicator
<b>Applicant</b>	Person applying for conciliation or adjudication under chapter 6 of the BCCM Act
<b>BCCM Act</b>	<i>Body Corporate and Community Management Act 1997 (Qld)</i>
<b>BCCM Commissioner</b>	Office of the Commissioner for Body Corporate and Community Management
<b>Body corporate debt</b>	Contributions, penalty interest and other amounts associated with the ownership of a lot that must be paid by a lot owner to the body corporate
<b>BUGTA</b>	<i>Building Units and Group Titles Act 1980 (Qld)</i>
<b>By-laws</b>	a set of rules that provide for the administration, management and control of common property and body corporate assets and the use and enjoyment of lots, common property and body corporate assets
<b>Cancellation Report</b>	<i>Report: Cancellation provisions under the Unit Titles Act and Unit Title Schemes Act, released by the Northern Territory, Department of the Attorney-General and Justice</i>
<b>Centre</b>	Commercial and Property Law Research Centre
<b>CMS</b>	Community management statement
<b>Commercial Module</b>	<i>Body Corporate and Community Management (Commercial Module) Regulation 2008 (Qld)</i>
<b>Complainant</b>	An owner or occupier claiming that an accused person has contravened a by-law in a scheme
<b>Conciliation</b>	A stage of the dispute resolution process with the BCCM Commissioner that involves a meeting between the parties to the dispute and an independent conciliator who will help the parties reach their own agreement
<b>Continuing contravention notice</b>	Notice issued by the body corporate to an owner or occupier believed to have contravened a by-law in circumstances where the contravention is likely to continue
<b>Contravention notice</b>	A future contravention notice or a continuing contravention notice
<b>Contribution</b>	An amount levied by the body corporate on the owner of each lot to fund the budgets for the financial year for the scheme
<b>Dispute</b>	Under the BCCM Act, a dispute between any of the parties listed in section 227(1) of the BCCM Act

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<b>TERM</b>	<b>MEANING</b>
<b>Dispute resolution process</b>	The process under Chapter 6 of the BCCM Act by which the BCCM Commissioner will deal with disputes. This includes conciliation and adjudication
<b>Exclusive use by-law</b>	A by-law that attaches to a lot and gives the lot owner exclusive use of common property or a body corporate asset
<b>Future contravention notice</b>	Notice issued by the body corporate to an owner or occupier believed to have contravened a by-law in circumstances where the contravention is likely to be repeated
<b>Internal dispute resolution</b>	The resolution of a dispute by the parties to the dispute using informal processes or the community titles scheme's body corporate processes
<b>NSW</b>	New South Wales
<b>NT</b>	Northern Territory
<b>Originating process</b>	Documents issued by a court and served on a person to commence legal proceedings under the UCPR
<b>Position Paper</b>	<i>Strata Title Law Reform: Strata &amp; Community Title Law Reform Position Paper</i> , released by the New South Wales Government, Office of Fair Trading
<b>QCAT</b>	Queensland Civil and Administrative Tribunal
<b>QUT</b>	Queensland University of Technology
<b>Recovery costs</b>	The costs of recovering unpaid contributions from a lot owner
<b>Regulation Modules</b>	The Standard Module, the Accommodation Module, the Commercial Module, the Small Schemes Module and the Two-lot Module
<b>Relevant address</b>	The address of a person to be served for legal proceedings under the <i>Uniform Civil Procedure Rules 1999 (Qld)</i> . See rule 112.
<b>Resolution without dissent</b>	A resolution of the body corporate in a general meeting in which no vote is counted against the motion
<b>River City decision</b>	<i>Body Corporate for River City Apartments CTS 31622 v McGarvey [2012] QCATA 47</i>
<b>SA</b>	South Australia
<b>Self-resolution</b>	The resolution of a dispute by the parties to the dispute
<b>Small Schemes Module</b>	<i>Body Corporate and Community Management (Small Schemes Module) Regulation 2008 (Qld)</i>
<b>South Australian Model</b>	The provisions under the South Australian legislation that allow a body corporate to impose a fine on residents of the scheme that contravene or fail to comply with a by-law
<b>Special resolution</b>	A resolution of the body corporate at a general meeting where at least two thirds of votes cast are in favour of the resolution; no more than 25% of the lots in the scheme vote against the resolution; and the lots voting against the resolution do not have more than 25% of the total contribution schedule lot entitlements for the scheme
<b>Standard Module</b>	<i>Body Corporate and Community Management (Standard Module) Regulation 2008 (Qld)</i>
<b>Two-lot Module</b>	<i>Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011 (Qld)</i>
<b>UCPR</b>	<i>Uniform Civil Procedure Rules 1999 (Qld)</i>
<b>WA</b>	Western Australia



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<b>TERM</b>	<b>MEANING</b>
<i>Westpac v Wave</i>	<i>Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme 36237 [2014] QCA 73</i>