

2017

Government Property Law Review

Final Recommendations *Procedural issues under the Body Corporate and Community Management Act 1997*

Preface

The Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) was established in 2013. The Centre is a specialist network of researchers with a vision of reforming legal and regulatory frameworks in the commercial and property law sector through high impact applied research.

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1. Body corporate procedural issues – Recommendations

1.1. Introduction

The primary object of the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**) is to provide for flexible and contemporary communally based arrangements for the use of freehold land having regard to the secondary objects which include (among others):

- to balance the rights of individuals with the responsibility for self-management as an inherent aspect of community titles schemes;
- to promote economic development by establishing sufficiently flexible administrative and management arrangements for community titles schemes;
- to ensure bodies corporate for community titles schemes have control of the common property and body corporate assets they are responsible for managing on behalf of owners of lots included in the scheme; and
- to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes.¹

The primary and secondary objects are achieved through legislative provisions that cover a diverse range of areas from governing the basic operation and management of community titles schemes through to administrative matters, the sale of lots and dispute resolution.

The BCCM Act applies to more than 46,630 community titles schemes Queensland.²

1.2. The Issues Paper

In August 2013, the Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) commenced a review of Queensland's property law³ including issues arising under the BCCM Act.

In December 2015, a paper entitled *Property Law Review Issues Paper: Procedural issues under the Body Corporate and Community Management Act 1997* (**Issues Paper**)⁴ was released for public consultation by the Department of Justice and Attorney-General.

The Issues Paper contained 89 questions covering a range of procedural issues arising under the BCCM Act. These issues included: procedures for general and committee meetings; electronic distribution of notices; electronic voting; and a range of miscellaneous issues that had been raised by body corporate stakeholders and industry groups.

¹ *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**) ss 2, 4.

² Queensland Registrar of Titles: Information provided by the Office of the Registrar of Titles, Department of Natural Resources and Mines, Queensland as at 31 March 2017.

³ See Ministerial Media Release, *Review modernises Queensland Property Law*, then Attorney-General and Minister for Justice the Honourable Jarrod Bleijie, 15 August 2013.

⁴ Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Procedural Issues under the Body Corporate and Community Management Act 1997*, released by Department of Justice and Attorney-General, available at <https://publications.qld.gov.au/dataset/dac949f9-911f-4527-bb90-24f5954f8279/resource/72d4b93b-8e94-490d-a544-5ff7bf2620c0/download/propertylawreviewissuespaperproceduralissuesunderthebccmact1997.pdf>.

1.3. The submissions

In total, 203 submissions were received during the public consultation period in response to the Issues Paper. Despite this, few submissions addressed all of the questions. The most responses were received in relation to the questions about electronic service of documents (questions 58-59, with just over half of all submissions addressing these questions). The fewest responses were received in relation to the question about whether bodies corporate for commercial schemes should have a spending limit (question 55, with only 42 responses).

Submissions were received from bodies corporate, individual lot owners (including both owner-occupiers and investors), body corporate solicitors and other interested parties. Submissions were received from several key stakeholder groups in the strata industry, including:

- the Strata Community Australia (Queensland) (**SCA**) which represents body corporate managers;
- the Australian Resident Accommodation Managers Association (**ARAMA**) which represents resident unit managers (also referred to as caretakers);
- the Owners Corporation Network (Qld) (**OCN**) which represents lot owners; and
- the Unit Owners Association of Queensland (**UOAQ**) which also represents lot owners.

In addition, the SCA, ARAMA and the OCN made a joint submission expressing in principle agreement in relation to a large number of the questions raised in the Issues Paper. Other bodies that made submissions to the Issues Paper include:

- the Urban Development Institute of Australia (Queensland) (**UDIA**);
- the Property Council of Australia (Queensland) (**PCA**);
- the Real Estate Institute of Queensland (**REIQ**); and
- the Queensland Law Society (**QLS**).

While some submissions addressed the specific questions in the Issues Paper, other submissions commented on a range of issues. These included: problems specific to a particular body corporate; ongoing conflict with management rights holders or with difficult and abusive owners or occupiers; scheme termination; and, in some cases, situations where the best course of action would be to seek legal advice. Some of these issues, (for example management rights and dispute resolution) are specifically outside the scope of the Centre's review. Other issues, such as scheme termination, were addressed in an earlier paper. Despite the variety of comments and issues raised in the submissions, each submission was reviewed by the Centre in the course of drafting these recommendations.

1.4. Rationale for the Recommendations

The Recommendations contained in this paper are intended to harmonise with the objects of the BCCM Act, particularly the objects cited in section 1.1 above. The Recommendations seek to: address common concerns of lot owners; streamline and modernise administrative processes; reduce red tape; improve transparency in decision making; facilitate legislative compliance and increase consumer protection.

Under the BCCM legislation community titles schemes are registered under one of five **Regulation Modules**.⁵ These modules provide for the day to day procedural aspects of body corporate management such as: holding meetings; voting; selecting committee members; giving notices; and other administrative processes. In these Recommendations, the phrase ‘BCCM legislation’ may be used to refer to either the BCCM Act, the Regulation Modules or to both the BCCM Act and the Regulation Modules as together they form the legislative framework that regulates the function of bodies corporate. The *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (Qld) (**Two-lot Module**) is much less prescriptive than the other Regulation Modules and provides for decisions to be made by lot owner agreement. Where a Recommendation calls for the amendment to a process that does not currently exist under the Two-Lot Module, the Recommendation does not apply to that module.

The following sections discuss each of the questions raised in the Issues Paper and give a brief overview of the submissions received. This is generally followed with some background discussion on the relevant issue before the Centre’s recommendation is given.

The Centre is committed to making recommendations that are practical, which create certainty and which are balanced. The Recommendations have been formulated based on the submissions to the Issues Paper, discussions with relevant stakeholders and consideration of changing administrative practices. The Centre’s Recommendations are strongly influenced, but not determined, by the submissions to the Issues Paper. Some Recommendations call for no change to the existing provisions while other Recommendations will require legislative change.

1.5. The Recommendations

In consideration of the more than two hundred submissions received and in response to the 89 questions raised in the Issues Paper the Centre makes the following 64 recommendations.

⁵ *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**); and *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (Qld) (**Two-lot Module**).

<p style="text-align: center;">Recommendation 1</p> <p>It is recommended that no more than once every 5 years, a body corporate should be able to pass an ordinary resolution to change the financial year for the scheme without the need to make an application for an adjudicator's order from the Office of the Body Corporate and Community Management Commissioner (BCCM Commissioner).</p>
<p style="text-align: center;">Recommendation 2</p> <p>It is recommended that the annual general meeting for a scheme continue to be held within 3 months after the end of the financial year for that scheme.</p>
<p style="text-align: center;">Recommendation 3</p> <p>It is recommended that the Regulation Modules continue to provide that a general meeting must be held at least 21 days after notice of the meeting is given to lot owners.</p>
<p style="text-align: center;">Recommendation 4</p> <p>It is recommended that the Regulation Modules deem notices sent to a lot owner's address for service to have been received by the lot owner four business days after being sent by post and the next business day after being sent electronically.</p>
<p style="text-align: center;">Recommendation 5</p> <p>It is recommended that the agenda for an AGM include a statutory motion authorising the body corporate committee to:</p> <ul style="list-style-type: none"> • renew a policy of insurance that comes up for renewal before the next AGM provided that policy is on similar terms to the policy approved at the last AGM; or • enter into a new policy on such other terms as the body corporate decides.
<p style="text-align: center;">Recommendation 6</p> <p>It is recommended that at the next AGM held after that insurance policy is renewed or entered into the body corporate may ratify the policy. If the policy is not ratified, the body corporate must organise new quotes and may require an EGM to consider and vote on those quotes before cancelling the existing insurance.</p>
<p style="text-align: center;">Recommendation 7</p> <p>It is recommended that the BCCM legislation should be clarified so that for the purposes of determining a quorum:</p> <ul style="list-style-type: none"> • a lot owner who owns multiple lots is counted as a voter for each lot they own; • a lot owner who holds the proxy of another lot owner is counted once for each lot they own and once for each proxy that they hold (subject to any limits in the legislation); and • a lot owner present at a meeting personally, by proxy or by written or electronic ballot is counted for the quorum even if that lot owner has an outstanding body corporate debt.
<p style="text-align: center;">Recommendation 8</p> <p>It is recommended that at least 30 minutes after the scheduled start time of a general meeting if there are not enough voters present in person or by written or electronic voting paper to establish a quorum that the general meeting should proceed, chaired by the chairperson, an authorised body corporate manager or another person as decided by those present.</p>

<p>Recommendation 9</p> <p>It is recommended that if a general meeting proceeds without a quorum, any resolutions passed at that meeting be treated as provisional for at least 28 days, which is up to 21 days for the body corporate to circulate the minutes to all lot owners, and at least 7 days after that for any lot owner who did not attend the general meeting or submit a voting paper to cast a vote on the motions. To the extent additional valid voting papers are received by the body corporate, the votes will be re-tallied and the results declared.</p>
<p>Recommendation 10</p> <p>It is recommended that the requirement for voters to be present personally should be removed so that a general meeting may proceed if a sufficient number of written and electronic voting papers have been received to constitute a quorum of lot owners, provided an authorised body corporate manager is present or able to receive and tally the votes. If there are no lot owners present personally and the voting papers that have been received are insufficient to form a quorum then the deemed quorum procedure in Recommendation 9 should apply.</p>
<p>Recommendation 11</p> <p>It is recommended that the default relevant limit for major spending should be the lesser of \$1,100 per lot or \$20,000. The body corporate will retain the flexibility to set a different limit. Motions to approve spending over the relevant limit for major spending will continue to require two quotes.</p>
<p>Recommendation 12</p> <p>It is recommended that any motion to be considered by the body corporate or the body corporate committee to approve spending of an amount below the major spending limit should require at least one quote or a maximum price.</p>
<p>Recommendation 13</p> <p>It is recommended that there should be no change to the use of a resolution without dissent or the existing dispute resolution mechanisms in relation to such resolutions at this time.</p>
<p>Recommendation 14</p> <p>It is recommended that the majority resolution should continue to be available as a threshold for decision making by the body corporate under the BCCM Act.</p>
<p>Recommendation 15</p> <p>It is recommended that there should be no change to the provisions relating to the use of polls at this time.</p>
<p>Recommendation 16</p> <p>It is recommended that there should be no change to the information to be included in the minutes at this time. However, it is recommended that the Regulation Modules be amended so that the definition of 'full and accurate' minutes clearly identifies the other sections in the relevant Regulation Module that require information to be included in the minutes.</p>
<p>Recommendation 17</p> <p>It is recommended that the maximum number of committee voting members for a scheme should remain at seven except to the extent that the scheme is a principal body corporate for a layered scheme in which case there should be at least one representative for each subsidiary scheme.</p>

<p style="text-align: center;">Recommendation 18</p> <p>It is recommended that there be no change to the requirement that the engagement of a body corporate manager under part 5 can only take place at a general meeting where the agenda for that general meeting circulated to lot owners included the terms of the engagement and an explanation of the nature of the engagement.</p>
<p style="text-align: center;">Recommendation 19</p> <p>It is recommended that the resolution to engage a body corporate manager under part 5 should continue to require a secret ballot unless the body corporate decides by ordinary resolution to use an open ballot to decide the engagement.</p>
<p style="text-align: center;">Recommendation 20</p> <p>It is recommended that the engagement of a body corporate manager under part 5 continue to be available only where there is no committee for the body corporate.</p>
<p style="text-align: center;">Recommendation 21</p> <p>It is recommended that resident managers should not be eligible to be voting members of the committee for the body corporate at this time.</p>
<p style="text-align: center;">Recommendation 22</p> <p>It is recommended that there are no changes to the definition of associate under the BCCM Act at this time.</p>
<p style="text-align: center;">Recommendation 23</p> <p>It is recommended that the Accommodation Module should be amended to require the use of secret ballot as the method of determining membership of the committee for the body corporate unless the body corporate decides by ordinary resolution to use an open ballot.</p>
<p style="text-align: center;">Recommendation 24</p> <p>It is recommended that the Regulation Modules be amended to mimic section 42(3) of the <i>Building Units and Group Titles Act 1980</i> to provide that where there are three or more lots in a scheme but only three owners of those lots:</p> <ul style="list-style-type: none"> • the committee will consist of those owners or their nominees unless the lot owner opts out of being a committee member; • the lot owners must decide between themselves which of the positions of secretary, treasurer and chair each is to hold (and, if they cannot agree, each of the positions are to be held jointly by all three of them).
<p style="text-align: center;">Recommendation 25</p> <p>It is recommended that the BCCM Act should provide only one method for removal of committee voting members. This method should be by an ordinary resolution of the body corporate at a general meeting. The removed committee voting member will have the right:</p> <ul style="list-style-type: none"> • to circulate a statement to the lot owners after the agenda is set but before the meeting deciding the member's removal is held; • to speak at the general meeting prior to the vote to remove the member; and • if removed by a resolution of the body corporate, to lodge an application with the BCCM Commissioner's office to dispute the body corporate's decision.

<p style="text-align: center;">Recommendation 26</p> <p>It is recommended that where a committee voting member has been removed from office by a vote of the body corporate, that committee voting member should be prohibited from re-nominating for a committee voting position for a period of up to two years as decided by the body corporate when the member is removed from the committee.</p>
<p style="text-align: center;">Recommendation 27</p> <p>It is recommended that the code of conduct for committee voting members should be updated to:</p> <ul style="list-style-type: none"> • include an obligation on committee voting members to remain financial with respect to body corporate contributions during the term of office; and • expressly prohibit a committee voting member from receiving a benefit from any service contractor engaged by the body corporate under a service contract unless that benefit has been disclosed to the body corporate and the body corporate has decided that it is in the body corporate's best interest to proceed or continue with the service contract. <p>If a committee voting member does not remain financial with respect to body corporate contributions, the BCCM legislation should provide that the committee voting member is unable to vote on committee motions while their body corporate debt is outstanding.</p>
<p style="text-align: center;">Recommendation 28</p> <p>It is recommended that there be no changes to the BCCM Act and the Regulation Modules in relation to the body corporate's ability to remove the entire committee from office.</p>
<p style="text-align: center;">Recommendation 29</p> <p>It is recommended that the obligation in paragraph 2(2) of the code of conduct for body corporate managers and caretaking service contractors, which presently only applies to body corporate managers, should be amended to include caretaking service contractors. It is further recommended that the obligation in paragraph 2(2) of the code, which presently prohibits an attempt to unfairly influence the outcome of an election for the body corporate committee, should be expanded to prohibit attempts to unfairly influence the outcome of a motion to be decided by the body corporate.</p>
<p style="text-align: center;">Recommendation 30</p> <p>It is recommended that there be no change in relation to the remedies available to the body corporate for a breach of the code of conduct for body corporate managers and caretaking service contractors.</p>
<p style="text-align: center;">Recommendation 31</p> <p>It is recommended that committees be required to reasonably consider motions submitted by lot owners at the next committee meeting or vote outside of a committee where it is reasonably practical to consider that motion.</p>
<p style="text-align: center;">Recommendation 32</p> <p>It is recommended that there should be no change to the notice period for committee meetings or the rules in relation to calling committee meetings.</p>

<p>Recommendation 33</p> <p>It is recommended that a motion to be decided by a vote outside of a committee meeting should lapse if 21 days after the notice of the motion is given to all committee members, the majority of all voting members of the committee entitled to vote on the motion have not agreed to the motion or voted against it.</p>
<p>Recommendation 34</p> <p>It is recommended that the notice of opposition in the Standard Module (section 56) should be made available under all Regulation Modules.</p>
<p>Recommendation 35</p> <p>It is recommended that the default relevant limit for committee spending under the Standard Module, the Accommodation Module and the Small Schemes Module should be set to \$500 per lot in the scheme up to a maximum of \$20,000.</p>
<p>Recommendation 36</p> <p>It is recommended that bodies corporate retain the flexibility to set a different relevant limit for committee spending. Motions to approve spending over the relevant limit for committee spending will continue to require body corporate approval on the basis of two quotes.</p>
<p>Recommendation 37</p> <p>It is recommended that there be no changes with respect to the appointment of ad hoc specialist advisers by the body corporate.</p>
<p>Recommendation 38</p> <p>It is recommended that the definition of address for service in the BCCM legislation be updated to include an email address nominated by a lot owner (in addition to a physical address) as the address for service of notices, minutes and other documents required to be given to lot owners by the body corporate under the BCCM legislation.</p>
<p>Recommendation 39</p> <p>It is recommended that lot owners be under an obligation to give the body corporate notice of changes to the lot owner's address for service.</p>
<p>Recommendation 40</p> <p>It is recommended that service of documents for the purposes of the BCCM legislation should be at either the physical address for service of the lot owner, or if the lot owner has provided an email address for service (as notified by the lot owner on the body corporate roll) and the lot owner has agreed to receive notices electronically, service of documents for the purposes of the BCCM legislation may be effected electronically at the email address for service notified by the lot owner.</p>
<p>Recommendation 41</p> <p>It is recommended that to the extent that lot owners have agreed to receive documents electronically at the email address for service as notified by the lot owner on the body corporate roll, the body corporate may use alternative methods to provide those lot owners with access to documents and supporting material that are voluminous in the sense of being too large for typical email servers.</p>

<p>Recommendation 42</p> <p>It is recommended that lot owners should not be required to pay extra to receive hard copies of documents that the body corporate is required to give to the lot owner.</p>
<p>Recommendation 43</p> <p>It is recommended that electronic voting continue to be available as one of a range of options for voting at general meetings in bodies corporate that decide by ordinary resolution to allow electronic voting.</p>
<p>Recommendation 44</p> <p>It is recommended that there not be any change to the Small Schemes Module in regard to the use of voting methods.</p>
<p>Recommendation 45</p> <p>It is recommended that body corporate committees should continue to decide whether to allow committee members to attend committee meetings by telephone or video conference facilities.</p>
<p>Recommendation 46</p> <p>It is recommended that the Regulation Modules be amended so that under all Regulation Modules:</p> <ul style="list-style-type: none"> • if there are 20 or more lots in the scheme, no person may hold proxies greater in number than 5% of the lots; • if there are fewer than 20 lots in the scheme, a person may hold one proxy; and • all schemes have an express ability to restrict the use of proxies for particular things or all together by a special resolution of the body corporate in a general meeting.
<p>Recommendation 47</p> <p>It is recommended that there should be no change to the existing provisions relating to the use of proxies at committee meetings.</p>
<p>Recommendation 48</p> <p>It is recommended that the agenda for the first AGM should include motions submitted by lot owners if it is reasonably practical to include those motions on the agenda.</p>
<p>Recommendation 49</p> <p>It is recommended that the BCCM Act and Regulation Modules be amended to require that the agenda for the second AGM must include a motion for the body corporate to decide whether or not to obtain an independent building defects assessment.</p>
<p>Recommendation 50</p> <p>It is recommended that at the first AGM, the body corporate consider:</p> <ul style="list-style-type: none"> • updating the contact details of the body corporate including the body corporate's address for service as recorded with the Titles Registry; and • whether or not to establish an email address for the scheme and, if so, the responsible party for accessing such email and the arrangements for such access.

Recommendation 51

It is recommended that the list of documents and materials in the Regulation Modules that are required to be given to the body corporate by the original owner at the first AGM should be amended to expressly include the following documents:

- the final development approval for the site;
- a fire safety plan;
- building and maintenance contracts;
- supply contracts (hot water, gas, electricity, etc.);
- copies of any warranties;
- any authorisation (e.g. a proxy or a power of attorney) held by the original owner;
- any documents relating to a claim made against the body corporate's policy of insurance prior to the first AGM;
- an electronic, editable copy of the community management statement (**CMS**) including an electronic version of exclusive use plans and service location diagrams in the CMS;
- a facilities management plan; and
- a 5 year administrative fund forecast.

Recommendation 52

It is recommended that the BCCM Act and the Regulation Modules be amended to provide that the body corporate has an express ability to request the original owner to:

- hand over any documents or other material required to be handed over to the body corporate at the first AGM if, after the first AGM, those documents or other material have not been handed over; and
- call the first AGM in accordance with the relevant Regulation Module.

To the extent the original owner fails to comply with either request, the original owner should be a party to a dispute for the purposes of the BCCM Act for failure to comply with the request.

Recommendation 53

It is recommended that the BCCM legislation impose an obligation on the original owner of a scheme to prepare, and hand over to the body corporate at the first AGM:

- a facilities management plan that includes a maintenance schedule for facilities on common property and body corporate assets; and
- a detailed and comprehensive estimate of the body corporate's administrative fund expenditure for the scheme's first 5 years that includes an estimate of the cost of implementing the facilities management plan.

Recommendation 54

It is recommended that the dispute resolution provisions of the BCCM Act be expanded to recognise a dispute between a principal body corporate (**PBC**) and a lot owner in a subsidiary body corporate to the extent that the dispute relates to access to the PBC's records or enforcement of the by-laws of the PBC.

It is recommended that disputes between a lot owner in a subsidiary scheme and the PBC that fall outside these areas should continue to be dealt with through the subsidiary scheme and the PBC.

<p>Recommendation 55</p> <p>It is recommended that the BCCM Act expressly allow a body corporate to satisfy the requirement to ‘give’ a copy of an adjudication application to lot owners if the application is made available electronically and the body corporate gives each lot owner instructions on how to access the application, provided that the body corporate also provides a physical copy to any lot owners who request one or who do not currently receive other notices under the BCCM legislation electronically.</p>
<p>Recommendation 56</p> <p>It is recommended that there be no change to the existing provisions relating to the length of applications for adjudication or submissions in response to an application for adjudication.</p>
<p>Recommendation 57</p> <p>It is recommended that the BCCM Act should provide adjudicators with an increased ability to order costs if an adjudication application is found to be frivolous or vexatious.</p>
<p>Recommendation 58</p> <p>It is recommended that the requirement to execute a document under the body corporate’s seal should be replaced with a requirement for the document to be executed by either:</p> <ul style="list-style-type: none"> • the signature of at least two committee members, one of whom is the chairperson or secretary (for schemes under the Small Schemes Modules, one committee member and one other person); or • if a body corporate manager is acting under a chapter 3 part 5 engagement, the body corporate manager and one other person; or • as directed by the body corporate in the resolution authorising the transaction the subject of the document being executed.
<p>Recommendation 59</p> <p>It is recommended that the requirement to maintain and use a body corporate seal should be removed from the BCCM legislation.</p>
<p>Recommendation 60</p> <p>It is recommended that the BCCM Act place an obligation on bodies corporate to ensure that the address for service of the body corporate as notified to the registrar is promptly updated in the event that the address changes. If the body corporate has engaged a body corporate manager, that manager should be jointly liable with the body corporate for ensuring the compliance with this obligation.</p>
<p>Recommendation 61</p> <p>It is recommended that if the body corporate has not advised the registrar of its address for service, or the address for service is out of date, the address for service of the body corporate will be the address of the scheme itself.</p>
<p>Recommendation 62</p> <p>It is recommended that there should be no change to the provisions relating to authority to settle legal proceedings. However, it is recommended that bodies corporate be encouraged to authorise the committee to settle legal proceedings within specified parameters in the resolution authorising the commencement of those legal proceedings.</p>

Recommendation 63

It is recommended that there is no change to the provision in the Regulation Modules which allows a committee to set interim contributions to be levied on the owner of each lot before the owner is levied contributions fixed on the basis of the body corporate's budgets for a financial year.

Recommendation 64

It is recommended that support for the educational and training function of the BCCM Commissioner should continue, and to the extent needed to respond to the growth of community titles schemes in Queensland, be increased. This is necessary to ensure that lot owners and bodies corporate benefit from the continued availability of high quality informational material in relation to the nature of community living, the rights and obligations of lot owners and the nature of legislative changes (if any) that are introduced.

2. General meeting procedures

2.1. Date of the AGM

The financial year of each community titles scheme is different and does not necessarily align with the traditional financial year of 1 July to 30 June.⁶ The body corporate must hold the annual general meeting (**AGM**) each year within three months after the end of that scheme's financial year.⁷ A body corporate may bring an application to the Office of the Body Corporate and Community Management Commissioner (**BCCM Commissioner**) for an adjudicator to order a change to the financial year for the scheme.⁸ Such an application may be decided as a declaratory order.⁹ The main effect of changing the financial year for the scheme is that it changes when the AGM must be held.

The Issues Paper asked two questions about this, seeking ways to give a body corporate more flexibility when it comes to setting the date of the AGM and asking whether it should continue to be necessary to obtain an adjudicator's order to make such a change.

Questions

- 1. Should the body corporate be able to pass a motion to change the financial year of the scheme? What type of resolution should be required to pass a motion changing the financial year for the scheme?**
- 2. Should bodies corporate have the ability to set the date of the AGM, regardless of the end of the financial year for the scheme, without requiring an adjudicator's order changing the financial year for the scheme?**

Generally speaking, the submissions to the Issues Paper that responded to these questions agreed that a body corporate should be able to change the financial year for the scheme without an adjudicator's order. Some submissions were concerned that, if allowed, this ability could be abused by bodies corporate frequently changing the financial year for the scheme. This could make it difficult for interstate and overseas owners to make plans to attend the AGM in person. It could also be problematic if the timing of the AGM is changed to coincide with a time period where a particular lot owner would be unlikely to attend. To lessen the risk of abuse, it was suggested that there should be a limit on the frequency of change allowed.

The Centre recommends that bodies corporate should have the ability to change the financial year for the scheme, which will change when the AGM must be held. The changed financial year will apply going forward only so that the body corporate will be required to approve a budget for the period from the end of the current financial year to the start of the new financial year and a budget for that new financial year.

⁶ BCCM Act schedule 6 (definition of 'financial year').

⁷ Standard Module s 66; Accommodation Module s 64; Commercial Module s 33; Small Schemes Module s 31.

⁸ BCCM Act s 283.

⁹ BCCM Act s 227(2).

To address concerns about this power being used improperly, the Centre recommends that the body corporate should be able to exercise this power only once every 5 years. In the event that the body corporate requires a change to the financial year sooner than 5 years after the last change, that body corporate will be required to bring an application to the BCCM Commissioner's office.

The existing dispute resolution provisions will apply for any lot owner who seeks to challenge the decision of the body corporate to change the financial year for the scheme.

The Issues Paper also asked whether the AGM should be decoupled from the end of the financial year of the scheme. This would allow the body corporate to set the date of the AGM at a time of year most suitable to the members of the body corporate. However, the submissions did not support this option. The AGM deals with budgets and other issues that run for the financial year and it would be very difficult to separate the AGM from the end of financial year by too great a time.

The Centre recommends that the current rules, which require the AGM to be held within 3 months of the end of the financial year of the scheme, remain unchanged.

Recommendation 1

It is recommended that no more than once every 5 years, a body corporate should be able to pass an ordinary resolution to change the financial year for the scheme without the need to make an application for an adjudicator's order from the Office of the Body Corporate and Community Management Commissioner (**BCCM Commissioner**).

Recommendation 2

It is recommended that the annual general meeting for a scheme continue to be held within 3 months after the end of the financial year for that scheme.

2.2. General meeting notice periods

Questions

- 3. Should the timeframes for calling general meetings be changed?**
- 4. If yes, should there be a shorter time when calling an EGM as opposed to calling an AGM? What should the timeframes be?**

The submissions to questions 3 and 4 of the Issues Paper did not support shorter notice periods for general meetings, except to the extent that an extraordinary general meeting (**EGM**) is required for a genuine emergency. A large number of submissions noted recent changes to Australia Post's delivery times and pricing as a reason for retaining the long notice period.

Some submissions gave support for shorter notice periods if the BCCM legislation allows electronic delivery of notices. However, even if electronic delivery (discussed at section 4 below) is allowed, there is still good reason to retain a notice period that is sufficiently long to allow for delivery of the documents and time for the documents and supporting material to be adequately considered by lot owners. The issues considered at a general meeting are likely to be complex. The motions may require significant consideration and a choice between several alternative courses of action.

The Regulation Modules provide that a general meeting must be held at least 21 days after notice of the meeting is given to lot owners¹⁰ and the Centre does not recommend any change to this timeframe. However, to avoid any confusion as to when notice has been *given*, the Centre recommends that the Regulation Modules clarify how long after posting or sending the notice to lot owners before the notice will be deemed to have been received for the purposes of the BCCM legislation. The intention of this recommendation is to allow the body corporate to fix the date of the general meeting as closely as possible after the notice period has ended to minimise any delay.

The Centre recommends that notices (and other documents required to be sent by the body corporate) to lot owners should be deemed to have been received, and thus satisfy the requirement of being given, on the next business day if sent electronically and after four business days¹¹ if sent via post. If a notice is sent to lot owners by a combination of means (i.e. to some lot owners electronically and to others via post) the notice will be deemed to have been received after the longer timeframe of four business days. The purpose of this recommendation is to allow the body corporate to set the date of a general meeting with as little unnecessary delay as possible.

Some submissions argued that there may be situations which require a general meeting to be held on very short notice (such as responding to an imminent maintenance issue or a genuine emergency). It was argued that it would be desirable that there be a mechanism to allow the body corporate to hold a meeting with a shorter notice period when these situations arise. It should be noted however that if the general meeting is simply to authorise spending in the case of an emergency, a body corporate committee already has the ability to apply to an adjudicator for authorisation to spend above the relevant limit for committee spending (even where that amount has not been approved by the body corporate by ordinary resolution at a general meeting).¹²

The ability to seek an emergency spending order in a very short timeframe through the BCCM Commissioner's office makes it unlikely that the body corporate would need to call a general meeting on short notice. However, providing a deemed time of receipt for material that has been sent to lot owners will allow the body corporate to have certainty about when the notice period has been met and hold an EGM as soon as possible, particularly if the Recommendations regarding electronic delivery of notices are accepted (see section 4.2 below).

¹⁰ Standard Module s 74; Accommodation Module s 72; Commercial Module s 41; Small Schemes Module s 36 (NB under the Small Schemes Module, the body corporate may decide on a different notice period).

¹¹ This is consistent with the position in NSW. See *Evidence Act 1995* (NSW) s 160.

¹² Standard Module s 151(1)(c); Accommodation Module s 149(1)(c); Small Schemes Module s 85(1)(c). See also Office of the Commissioner for Body Corporate and Community Management, *Practice Direction 18 – Emergency Expenditure Applications*, Department of Justice and Attorney General, June 2016, available at <https://publications.qld.gov.au/dataset/093b4b03-9ea8-4704-ad2c-cf6f76a06198/resource/5075cdce-0165-4d96-b2e6-ad62f5b952e2/download/pd18---emergency-expenditure-applications.pdf>.

Recommendation 3

It is recommended that the Regulation Modules continue to provide that a general meeting must be held at least 21 days after notice of the meeting is given to lot owners.

Recommendation 4

It is recommended that the Regulation Modules deem notices sent to a lot owner's address for service to have been received by the lot owner four business days after being sent by post and the next business day after being sent electronically.

2.3. Deciding insurance policies

Questions

5. **Should the decision to renew an insurance policy for the scheme be a restricted issue that cannot be decided by the committee? If so, how should provision be made for insurance policies that must be renewed prior to the AGM?**
6. **Should the statutory motion to review insurance policies be amended to refer to approving or confirming the insurance?**

The insurance questions prompted significant discussion in the submissions. Of those that addressed the questions, the majority:

- did not support making insurance renewal into a restricted issue; and
- supported amending the statutory motion to refer to approving or confirming insurance.

Some submissions argued that insurance should be exempt from the spending limit requirements so that the decision to enter into or renew insurance could be decided by the committee. Other submissions argued that it would be unwise to completely remove lot owners from the decisions about insurance.

It is understood that in many schemes, the general meeting will pass a resolution that authorises the committee to renew the insurance when it comes due. In this way, the committee has specific authorisation to spend the money to renew the insurance and spending limits are not an issue. In practice, it is understood that not all schemes pass such a resolution. This means that in some cases, the committee makes the decision to renew insurance without specific authorisation from the body corporate and may technically be in breach of the BCCM Act.¹³

¹³ If the cost of insurance renewal is less than the committee spending limit for the scheme then the committee could authorise the expenditure without exceeding the limit and not be in breach of the BCCM legislation.

Insurance is a mandatory requirement under the Regulation Modules¹⁴ and a body corporate must not allow the insurance to lapse. The Centre recommends that the Regulation Modules should be amended to require a statutory motion at each AGM (after the first AGM) authorising the committee to renew a contract of insurance when it comes due provided the policy is on terms similar to the policy approved at the last AGM or, if the body corporate has decided to significantly change the insurance (e.g. changes to the insured amounts, excess, policy exclusions, etc.) on such other terms as the body corporate decides. Terms refer to details of the policy such as the amount insured, the excess, the annual premium, the inclusions, or the exclusions in the policy. If the body corporate is authorising the committee to enter into a new policy or a policy on different terms, this may require that two or more quotes are considered at the AGM, with the committee authorised to enter into the new policy from the expiration of the existing policy.

This mechanism is intended to streamline the renewals process and provide a basic protection measure to ensure continuity of insurance, and to ensure that bodies corporate retain (and should consider) the capacity to enter into new insurance policies at the AGM. If the body corporate does not authorise the committee to renew the insurance when it comes due or to enter into a policy on different terms then an extraordinary general meeting may be required (prior to the end of the existing insurance policy) to decide whether to renew the insurance or go with a different policy.

If the statutory motion is approved, the committee will have authorisation from the body corporate and may renew the insurance, or enter into different insurance when the current policy expires. At the next AGM following the renewal or entry into the new policy, the body corporate may vote to ratify the insurance policy. If the body corporate does not ratify the insurance policy entered into by the committee, the body corporate will be required to organise new quotes for insurance and may be required to hold an EGM to approve entering into a different policy. The agenda for that EGM will have to include all the details of the proposed policy so that lot owners can make an informed decision.¹⁵ If a different policy is approved the body corporate may only terminate the existing policy (subject to the terms of that policy) when the new policy commences, setting up the insured periods to ensure that at no time will the body corporate be uninsured.

Recommendation 5

It is recommended that the agenda for an AGM include a statutory motion authorising the body corporate committee to:

- renew a policy of insurance that comes up for renewal before the next AGM provided that policy is on similar terms to the policy approved at the last AGM; or
- enter into a new policy on such other terms as the body corporate decides.

Recommendation 6

It is recommended that at the next AGM held after that insurance policy is renewed or entered into the body corporate may ratify the policy. If the policy is not ratified, the body corporate must organise new quotes and may require an EGM to consider and vote on those quotes before cancelling the existing insurance.

¹⁴ Standard Module s 178(1); Accommodation Module s 176(1); Commercial Module s 134(1); Small Schemes Module s 112; Two lot Module s 48(1).

¹⁵ This will be the same information that is required to make a decision about insurance at the annual general meeting.

2.4. Determining a quorum

Questions

7. When determining whether a quorum is present, if a person owns several lots in a scheme, should that person be counted as a voter for each lot owned?
8. Should a lot owner (who is present personally) who holds the proxy of another lot owner (who is not present) be counted as one voter or as two?
9. When determining whether a quorum is present, should a lot owner who owes a body corporate debt be counted as a voter?

As discussed in the Issues Paper,¹⁶ there is some confusion as to the exact meaning of ‘voter’ in the context of determining a quorum for a general meeting. Generally, the submissions supported the position that a lot owner should be counted once for each lot they own and that a lot owner who holds the proxy of another lot owner should be counted as two voters.

However, most submissions that answered question 9 said that a voter who owes a body corporate debt should not be counted as a voter for the purposes of determining a quorum. The Centre submits that this position is incorrect. A voter who owes a body corporate debt is prohibited from voting on most issues but may still vote on a motion requiring a resolution without dissent. As such, a voter who owes a body corporate debt must be counted as a voter for the purposes of a quorum whether present personally, by proxy or by either a written or electronic voting paper.

The lot owner will not be able to vote in person, and any vote cast by that lot owner on a written or electronic ballot will not count unless the motion is to be decided by a resolution without dissent. Similarly, a person who holds the proxy of a lot owner that owes a body corporate debt will not be able to cast a vote on behalf of that person unless voting on a motion that requires a resolution without dissent.

The Centre recommends that the BCCM legislation should be clarified to remove any confusion that may exist in relation to the meaning of a voter when determining a quorum.

Recommendation 7

It is recommended that the BCCM legislation should be clarified so that for the purposes of determining a quorum:

- a lot owner who owns multiple lots is counted as a voter for each lot they own;
- a lot owner who holds the proxy of another lot owner is counted once for each lot they own and once for each proxy that they hold (subject to any limits in the legislation); and
- a lot owner present at a meeting personally, by proxy or by written or electronic ballot is counted for the quorum even if that lot owner has an outstanding body corporate debt.

¹⁶ See Issues Paper at 3.4.1.

2.5. If a quorum is not present

Questions

- 10. If a quorum is not present after 30 minutes, should the meeting go ahead anyway (chaired by the body corporate manager or the chairperson) thus eliminating the need to hold a second meeting one week later (and saving the expense of the second meeting)?**
- 11. Should the body corporate have the ability to hold the general meeting 'on the papers' (that is, decided by the voters present by written and electronic voting papers even if no voters are present personally)?**
- 12. Should the legislation safeguard the interest of lot owners by giving them an opportunity to object to motions carried at an AGM with a deemed quorum? If so, how should this be done?**

Questions 10 to 12 of the Issues Paper asked whether a general meeting of the body corporate should be able to proceed without a quorum and if so, how to safeguard the interests of lot owners. Additionally, it was asked if the requirement that some voters be 'personally' present should be relaxed when determining a quorum.

Generally the submissions that responded to this question supported allowing a general meeting to proceed even if there is no quorum after 30 minutes. If the BCCM legislation is amended to allow this to happen, some submissions argued that the existing dispute resolution provisions are sufficient to protect lot owners who may be dissatisfied with a decision made by the body corporate at that general meeting. However, the submissions also supported a mechanism that would treat any resolutions carried at a general meeting without a quorum as provisional until lot owners who were unable to attend that general meeting or send a ballot paper have had a further opportunity to vote.

It should be noted that such a mechanism may create significant delay. Until the provisional resolutions can be treated as final, there will be uncertainty as to whether a motion has passed or failed. The body corporate has up to 21 days to circulate the minutes of a general meeting to lot owners.¹⁷ The addition of 7 days to allow those lot owners who missed the first opportunity to vote to have a second chance to vote for or against any resolutions passed at the meeting with a deemed quorum means the body corporate cannot take action to implement the resolutions until the time has passed. Despite the risk of delay, safeguarding the interest of lot owners by treating any resolutions passed at a general meeting with a deemed quorum as provisional is worthwhile.

The submissions supported allowing a general meeting to proceed on the papers even if no owners are physically present, provided the number of voters present by written and electronic voting papers is sufficient to establish a quorum. Obviously, this would require a body corporate manager to be present to tally the votes.

¹⁷ Standard Module s 96(2); Accommodation Module s 94(2); Commercial Module s 63(2); Small Schemes Module s 51(2).

The Centre recommends that the requirement to adjourn an AGM if a quorum is not present should be replaced with a system that allows the AGM to go ahead but treats any motions passed as provisional for a set period of time.

The Centre recommends that where a general meeting proceeds with a deemed quorum, any resolutions passed should be treated as provisional until at least 28 days after the meeting. This means that lot owners who missed the first opportunity to vote will have at least 7 days (and very likely more if the minutes are sent quickly) to cast a vote on the motions provisionally decided at the AGM. After the 28 days, to the extent additional votes have been submitted, the votes on a motion will be re-tallied and the final result declared.¹⁸

Implementing this recommendation will require a new provision preventing a body corporate from implementing a decision until the relevant time has expired. Further, the provision will require some exceptions to ensure that the body corporate does not breach the BCCM legislation. For example, an exception may be needed to allow the body corporate to implement an adjudicator's order or ensure that the body corporate insurance is current.

The Centre recommends that a general meeting should be able to proceed without any owners physically attending the meeting, provided there are sufficient number of voters present by written and electronic voting papers to establish a quorum of voters and that there is an authorised body corporate manager¹⁹ present to the exercise executive powers of the body corporate, including acting as chair of a general meeting.

Recommendation 8

It is recommended that at least 30 minutes after the scheduled start time of a general meeting if there are not enough voters present in person or by written or electronic voting paper to establish a quorum that the general meeting should proceed, chaired by the chairperson, an authorised body corporate manager or another person as decided by those present.

Recommendation 9

It is recommended that if a general meeting proceeds without a quorum, any resolutions passed at that meeting be treated as provisional for at least 28 days, which is up to 21 days for the body corporate to circulate the minutes to all lot owners, and at least 7 days after that for any lot owner who did not attend the general meeting or submit a voting paper to cast a vote on the motions. To the extent additional valid voting papers are received by the body corporate, the votes will be re-tallied and the results declared.

Recommendation 10

It is recommended that the requirement for voters to be present personally should be removed so that a general meeting may proceed if a sufficient number of written and electronic voting papers have been received to constitute a quorum of lot owners, provided an authorised body corporate manager is present or able to receive and tally the votes. If there are no lot owners present personally and the voting papers that have been received are insufficient to form a quorum then the deemed quorum procedure in Recommendation 9 should apply.

¹⁸ The existing dispute resolution provisions will apply if a lot owner is dissatisfied with a decision of the body corporate.

¹⁹ BCCM Act s 119.

2.6. Relevant limit for major spending

Questions

13. Is the current relevant limit for major spending appropriate for matters considered at general meetings of the body corporate?
14. Should two quotes continue to be required for motions involving expenditure above the relevant limit for major spending?
15. Should the default relevant limit for major spending be increased or removed altogether?
16. Should the relevant limit for major spending be different for small schemes (e.g. 10 or fewer lots) and large schemes (e.g. 100 or more lots)?
17. Should one quote be required for any motion being considered by the body corporate at a general meeting that involves expenditure?
18. Should a motion to appoint or reappoint a body corporate manager be exempt from the requirement to provide two quotes? Why or why not?

Under the Standard Module, Accommodation Module and Small Schemes Module, unless the body corporate by ordinary resolution at a general meeting sets a different limit, the **relevant limit for major spending** is the lesser of either \$1,100 multiplied by the number of lots in the scheme²⁰ or \$10,000.²¹

The general consensus of the submissions that responded to these questions is that the relevant limit for major spending is appropriate because the body corporate has the ability to set a different limit. The submissions supported retaining a relevant limit for major spending and the requirement for two quotes for expenditure over the relevant limit.

Many of the submissions that responded to question 17 supported a requirement that at least one quote should be submitted for a motion that involves any spending of body corporate funds.

The majority of submissions that responded to question 18 were in favour of retaining the two quote requirement when appointing a body corporate manager. Some submissions supported removing the two quote requirement only where the body corporate manager is being re-appointed. However, it was noted that when an engagement or authorisation to act as the body corporate manager expires, it is technically a new engagement that is entered into, not a re-appointment. Generally however, the

²⁰ Or for layered schemes, the number of layered lots (defined as the number of lots that are not a community titles scheme plus, for each lot that is a community titles scheme, the number of lots in that scheme): Standard Module and Accommodation Module, schedule (definition of 'number of layered lots').

²¹ See the schedule (definition of 'relevant limit for major spending') in each of the Standard Module, Accommodation Module and Small Schemes Module (NB under the Small Schemes Module the maximum can only be \$6,600 (\$1,100 @ six lots)). There is no relevant limit under the Commercial Module.

submissions supported the position that there is little reason why expenditure on a body corporate manager should be treated differently to other types of expenditure.

The Centre is of the view that decisions about major spending at a scheme should always be decided by the body corporate on the basis of at least two quotes. However, the BCCM legislation must also have flexibility for regular and routine spending without onerous red tape requirements.

Given this, the Centre recommends that the default relevant limit for major spending be the lesser of \$1,100 per lot or \$20,000. Bodies corporate will retain the ability to set a different limit. Expenditure of amounts greater than the relevant limit for major spending will continue to require at least two quotes. Further, the Centre recommends that any motion to spend body corporate funds below the major spending limit should require at least one quote or a maximum price. This requirement will apply to any spending below the relevant limit.

Additionally, as discussed further below, a similar change is recommended in relation to the default committee spending limit (increased to \$500 per lot to a maximum of \$20,000 - see section 3.14 below). The effect of these recommendations is that any spending by the body corporate below the relevant limit for major spending or by the committee below the default committee spending limit will require at least one quote (or a maximum price). Body corporate spending over the relevant limit for major spending will require at least two quotes and approval by the body corporate in a general meeting.

Recommendation 11

It is recommended that the default relevant limit for major spending should be the lesser of \$1,100 per lot or \$20,000. The body corporate will retain the flexibility to set a different limit. Motions to approve spending over the relevant limit for major spending will continue to require two quotes.

Recommendation 12

It is recommended that any motion to be considered by the body corporate or the body corporate committee to approve spending of an amount below the major spending limit should require at least one quote or a maximum price.

2.7. Resolution without dissent

Questions

- 19. Is there any reason to keep the requirement for a resolution without dissent? Would it make more sense to replace it, where it is required, with a special resolution (or some higher threshold that is lower than unanimous)?**
- 20. If the resolution without dissent is removed, what additional safeguards should be put in place to protect minority interest? For example, should the BCCM Act provide a right for lot owners in the minority to challenge a decision of the body corporate to an adjudicator on grounds other than the reasonableness of the decision?**

The question about whether to keep the resolution without dissent as a threshold for deciding motions received one of the highest response rate of any of the questions in the Issues Paper, with half of all submissions addressing this question. Some of the submissions, however, misconstrued the question as being about scheme termination. The issue of whether the BCCM Act should provide a lower decision threshold for scheme termination was considered in an earlier paper prepared by the Centre and released by the Queensland Government in December 2014.²²

The majority of the submissions that responded to question 19 answered that there are no reasons to keep the resolution without dissent. However, it is important to understand that question 19 was much broader than just scheme termination. The question was intended to determine whether there are any reasons for keeping the resolution without dissent as a relevant threshold for deciding motions under the BCCM Act.

A resolution without dissent is required in a number of situations under the BCCM Act. A full listing of those situations is as follows:

- to acquire and incorporate into common property:
 - land in fee simple contiguous to scheme land; or
 - a lot in a scheme;²³
- to acquire a lot in the scheme to become common property for use by a letting agent or a service contractor;²⁴

²² Commercial and Property Law Research Centre, *Queensland Government Property Law Review Options Paper: Body corporate governance issues: By-laws, debt recovery and scheme termination*, released by Department of Justice and Attorney-General, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0003/334758/Property-law-review-Body-Corporate-Governance-Options-Paper-1.pdf. For the Centre's recommendation in relation to scheme termination, see Commercial and Property Law Research Centre, *Government Property Law Review: Options Paper Recommendations – Body Corporate Governance Issues: By-laws, debt recovery and scheme termination*, released by Department of Justice and Attorney-General, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/508714/qut-recommendations-by-laws-debt-recovery-and-scheme-termination.pdf.

²³ BCCM Act s 37.

²⁴ BCCM Act s 40.

- to adjust the contribution schedule lot entitlement for the lots in the scheme;²⁵
- to consent to recording a new community management statement;²⁶
- to approve a process for reinstating a building in whole or part under BCCM Act Part 8;²⁷
- terminating a scheme;²⁸
- amalgamating a scheme;²⁹
- creating a layered arrangement of two or more basic schemes;³⁰
- changing, amending or removing an exclusive use by-law;³¹
- to be in debt for a borrowed amount greater than \$250 multiplied by the number of lots in the scheme³² (or more than \$3000 under the Small Schemes Module);³³
- disposal of an interest in common property that involves the sale of freehold land;³⁴
- granting or amending a lease for more than 3 years over part of the common property;³⁵
- leasing of the whole of the common property for more than 3 years;³⁶
- granting or surrendering an easement over the common property or accepting the grant or surrender of an easement for the benefit of the common property;³⁷
- granting or amending a lease over a body corporate asset of more than 3 years;³⁸
- acquisition of amenities for the benefit of owners of lots to the extent the amenity is freehold land;³⁹
- disposal of a body corporate asset to the extent the asset is freehold land;⁴⁰ and
- to apply the amount of insurance money for damage to property for a purpose other than the repair, reinstatement or replacement of the damaged property.⁴¹

In each of these situations, the resolution without dissent is required to protect important individual property rights. These rights may be a lot owner's interest in the common property, a body corporate asset or the use of money held or being spent by the body corporate.

²⁵ BCCM Act s 47A.

²⁶ BCCM Act s 62 (subject to exceptions in BCCM Act s 62(3)-(7)).

²⁷ BCCM Act s 74.

²⁸ BCCM Act s 78. But note the Centre's view as expressed in Commercial and Property Law Research Centre, *Government Property Law Review: Options Paper Recommendations – Body Corporate Governance Issues: By-laws, debt recovery and scheme termination*, released by Department of Justice and Attorney-General, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/508714/qut-recommendations-by-laws-debt-recovery-and-scheme-termination.pdf.

²⁹ BCCM Act s 85.

³⁰ BCCM Act s 91.

³¹ BCCM Act s 171.

³² Standard Module s 150 (There is no equivalent under the Accommodation or Commercial Module).

³³ Small Schemes Module s 84.

³⁴ Standard Module s 161.

³⁵ Standard Module s 161(2).

³⁶ Standard Module s 161.

³⁷ Standard Module s 162.

³⁸ Standard Module s 167.

³⁹ Standard Module s 166.

⁴⁰ Standard Module s 167.

⁴¹ Standard Module s 189.

A resolution without dissent is a high threshold to achieve, but it is not completely impossible. Additionally, if the body corporate does not approve a motion by a resolution without dissent, the body corporate or a lot owner may bring an application for adjudication with the BCCM Commissioner's office. The adjudicator may make an order that will have effect as a resolution without dissent.⁴² A lot owner may also challenge the body corporate's decision to pass a resolution without dissent as unreasonable.⁴³

The Centre is of the view that there are good reasons for keeping the resolution without dissent as a relevant threshold for decision making. Further, the Centre does not recommend any changes to the situations where a resolution without dissent is required or to the dispute resolution provisions for dealing with the passage of, or failure to pass, a resolution without dissent.

Recommendation 13

It is recommended that there should be no change to the use of a resolution without dissent or the existing dispute resolution mechanisms in relation to such resolutions at this time⁴⁴.

2.8. Majority Resolution

Questions

- 21. Is there any reason to keep the requirement for a majority resolution? Should it be replaced with a special resolution, a resolution without dissent or some other threshold that is based on the number of votes cast rather than the number of lots in the scheme?**
- 22. If the majority resolution is removed, what safeguard should be put in place for the letting agent?**

Two-thirds of the submissions that addressed question 21 said that there is no reason to keep the majority resolution. Most submissions interpreted this question as asking whether the majority resolution should continue to be used for forced transfer of a management rights business (which is not an unreasonable interpretation, given that at present, this is the only use of a majority resolution in the BCCM Act). However, the question was about whether the majority resolution should be retained as a relevant threshold for deciding motions under the BCCM Act. Whether the majority

⁴² BCCM Act s 284(4). Note however that an adjudicator has no jurisdiction to determine a dispute about whether a body corporate acted reasonably when deciding to pass, or not pass, a resolution without dissent to adjust the contribution schedule: BCCM Act s 47AA(5).

⁴³ The body corporate must act reasonably in anything it does: BCCM Act s 94(2).

⁴⁴ However, note the Centre's view in relation to the use of resolution without dissent for terminating a scheme as expressed in Commercial and Property Law Research Centre, *Government Property Law Review: Options Paper Recommendations – Body Corporate Governance Issues: By-laws, debt recovery and scheme termination*, released by Department of Justice and Attorney-General, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/508714/qut-recommendations-by-laws-debt-recovery-and-scheme-termination.pdf.

resolution should continue to be used for forced transfers of management rights businesses is a different question.

Some submissions noted that only an ordinary resolution is required to approve,⁴⁵ amend⁴⁶ or terminate⁴⁷ an authorisation as a letting agent, so it is inconsistent for a higher threshold to apply to the forced transfer of a letting agent's management rights business.

2.8.1. Background – the introduction of the majority resolution

The forced transfer provisions in the BCCM Act⁴⁸ were introduced in 2002⁴⁹ to emulate⁵⁰ provisions in the *Corporations Act 2001* (Cth)⁵¹ that allowed the majority of owners in the letting pool to force the resident manager to transfer the business to another party.⁵² It was intended that the provisions in the BCCM Act would only operate for a scheme that is not a managed investment scheme under the *Corporations Act 2001* (Cth).⁵³

The Australian Securities and Investment Commission (**ASIC**) considers that most management rights businesses in Queensland will fall into the definition of managed investment schemes⁵⁴ under the *Corporations Act 2001* (Cth). However, ASIC will exempt management rights schemes from the requirements that apply to managed investment schemes in the *Corporations Act 2001* (Cth) if the management rights scheme complies with particular requirements set out in relevant class orders. One such requirement is that the agreement between the letting agent and the lot owner must include forced sale provisions that allow a majority of the lot owners with lots in the letting pool to force the letting agent to transfer the management rights to another person.⁵⁵

The Queensland provisions were designed to emulate the forced transfer provisions but instead of just owners with lots in the letting pool the BCCM Act requires a majority of the owners of all lots in the scheme to require a forced transfer.

2.8.2. Retaining the majority resolution

Some submissions supported retaining the majority resolution because there should not be a different standard for forced transfer of a management rights business under federal and state legislation. However, there are already differences between the state and federal requirements as to which lot owners may cast a vote on a forced transfer. Further, under the federal legislation, forced transfer is a term of the agreement between the letting agent and the lot owner, not a requirement in the

⁴⁵ Standard Module s 114(1)(b); Accommodation Module s 112(1)(b); Commercial Module s 79(1)(b).

⁴⁶ Standard Module s 114(1)(c); Accommodation Module s 112(1)(c); Commercial Module s 79(1)(c).

⁴⁷ Standard Module s 129(2); Accommodation Module s 127(2); Commercial Module s 88(2).

⁴⁸ BCCM Act s 140 (which was originally section 112K before the BCCM Act was renumbered).

⁴⁹ *Body Corporate and Community Management and Other Legislation Amendment Act 2003* (Qld).

⁵⁰ See Explanatory Notes, *Body Corporate and Community Management and Other Legislation Amendment Bill 2002* at 9.

⁵¹ *Managed Investments Act 1999* (Cth) which was enacted as Chapter 5C in the *Corporations Act 2001* (Cth).

⁵² ASIC Class Order [CO 02/305] amended in 2014.

⁵³ Explanatory Notes, *Body Corporate and Community Management and Other Legislation Amendment Bill 2002* at 39 (discussing section 112G which was later renumbered as BCCM Act s 136).

⁵⁴ See Australian Securities & Investment Commission, *Regulatory Guide 140: Serviced strata schemes*, November 2000 at 21, RG 140.42.

⁵⁵ ASIC Class Order [CO 02/305].

legislation. Additionally, under the BCCM Act, the letting agent must have failed to comply with a code contravention notice before the body corporate can require the transfer of the business. There is no such threshold required under the ASIC class order.

Presently, the majority resolution is only required for the forced transfer of a management rights business. The issue as to whether this threshold should continue to be used for deciding forced transfers of management rights businesses is a different question and outside the scope of this review. However, the Centre is of the view that a majority resolution, as a decision making threshold requiring the support of at least half of the lots in the scheme, continues to be relevant under the BCCM legislation and should remain.⁵⁶

Recommendation 14

It is recommended that the majority resolution should continue to be available as a threshold for decision making by the body corporate under the BCCM Act.

2.9. Polls

Questions

23. What types of ordinary resolutions are commonly decided by a poll?

24. Are there any reasons to retain the ability to call for a poll on a motion to be decided by an ordinary resolution at a general meeting?

Only 30% of the submissions received in response to the Issues Paper addressed the question as to whether a poll should continue to be available under the BCCM Act. The responses were about evenly split as to whether there are reasons to retain the ability to call for a poll on a motion to be decided by an ordinary resolution.

Many submissions commented that they had never seen a poll used at a general meeting. Others said they are generally only used for motions that are contentious, divisive or that relate to significant expenditure.

One of the most compelling arguments for retaining polls is that polls allow those lot owners that bear a greater proportion of the costs to have a greater say in the decision making. This facilitates a secondary purpose of the BCCM Act which is to balance individual rights with the responsibility for self-management.

⁵⁶ Note that the Centre recommends the use of a majority resolution to determine if there are economic reasons for scheme termination: Commercial and Property Law Research Centre, *Government Property Law Review: Options Paper Recommendations – Body Corporate Governance Issues: By-laws, debt recovery and scheme termination*, released by Department of Justice and Attorney-General, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/508714/qut-recommendations-by-laws-debt-recovery-and-scheme-termination.pdf at 69.

Given the useful function of polls, the Centre recommends that there should be no changes to the BCCM Act in this regard.⁵⁷

Recommendation 15

It is recommended that there should be no change to the provisions relating to the use of polls at this time.

2.10. Minutes of general meeting

Question

25. Is there any other information that should be included in the minutes to ensure they are full and accurate?

Some submissions that addressed this question argued the minutes should record things such as:

- the details of what was said;
- who said it; and
- why a lot owner voted a particular way.

It was argued that the minutes should provide enough information for a lot owner who was not present at the meeting to understand what transpired.

The majority of submissions that addressed this question did not believe that additional information should be included in the minutes. It was noted that the minutes of the meeting are not, and are not intended to be, a verbatim transcript of what was said. A lot owner's reasons for voting a particular way may not be apparent and much of the discussion for and against a motion may be irrelevant once the motion is decided.

One submission commented that there is sometimes confusion as to whether the meeting is chaired by the chairperson (assisted by the body corporate manager) or actually chaired by the body corporate manager. It was suggested that the minutes should clearly state who chairs the meeting.

It is noted that the provisions relating to the information required to be included in the minutes is scattered through a number of places in the Regulation Modules. For example, the provisions relating to ruling a motion out of order require that the minutes must include the reason or reasons a

⁵⁷ Note however that if the Centre's recommendations in relation to lot entitlements are accepted then polls would be based on the interest schedule lot entitlement, not the contribution schedule lot entitlement. See Commercial and Property Law Research Centre, *Property Law Review: Lot Entitlements under the Body Corporate and Community Management Act 1997*, released by Department of Justice and Attorney-General, available at <https://publications.qld.gov.au/dataset/400d0899-3ce7-4eb0-a242-6db01521e8db/resource/d0803718-372e-41ce-a918-344bdafcf5f6/download/property-law-review-lot-entitlements-report.pdf> at 29.

chairperson rules a motion out of order and the results of any vote taken to overturn the chairperson's ruling.⁵⁸ Other parts of the Regulation Modules⁵⁹ contain provisions as to what must be in the minutes.

The Regulation Modules require that the minutes must be full and accurate, by including specified information,⁶⁰ including 'anything else required under this regulation'. It was noted that it is not always easy to find the other things in the relevant Regulation Module which are required to be included in the minutes to satisfy the 'full and accurate' requirement.

The Centre recommends that the relevant provision in the Regulation Modules should be amended to include a note that identifies the other sections that impose a requirement to record particular information in the minutes of the meeting.

Recommendation 16

It is recommended that there should be no change to the information to be included in the minutes at this time. However, it is recommended that the Regulation Modules be amended so that the definition of 'full and accurate' minutes clearly identifies the other sections in the relevant Regulation Module that require information to be included in the minutes.

⁵⁸ See for example, Standard Module s 81(4).

⁵⁹ See for example, Standard Module s 25(3).

⁶⁰ Standard Module s 96; Accommodation Module s 94; Commercial Module s 63; Small Schemes Module s 51.

3. The committee of the body corporate

3.1. Maximum number of committee members

Questions

- 26. Should the maximum number of voting members of the committee be increased above seven? If so, in what circumstances?**
- 27. If the body corporate is a principal body corporate for a layered scheme that has more than seven subsidiary schemes, should there be one committee representative for each subsidiary scheme?**

Some submissions supported the idea of allowing each body corporate to decide by special resolution how many voting members should be allowed on the committee for the scheme, with no maximum number. The UOAQ proposed having up to nine voting members with a requirement that the two longest serving committee members be ineligible for renomination unless no other lot owners were willing to take the position.

However, the majority of the submissions that responded to question 26 argued that seven is a sufficient number of committee voting members. Many submissions noted that it is often difficult to get seven people willing to act as committee members so if the number is increased, it may be even more difficult to fill the positions.

However, the submissions overwhelmingly supported allowing one representative for each subsidiary scheme to be appointed to represent that scheme at the principal body corporate level. In most cases, it was felt that this should be a clear exception to the maximum of seven committee voting members and should only be available when there are more than seven subsidiary schemes.

This would mean that if a layered scheme consisted of nine schemes, each being a lot in a principal body corporate, that there would be nine voting members on the principal body corporate committee for that scheme – one representative for each lot that is a community titles scheme.

Recommendation 17

It is recommended that the maximum number of committee voting members for a scheme should remain at seven except to the extent that the scheme is a principal body corporate for a layered scheme in which case there should be at least one representative for each subsidiary scheme.

3.2. Part 5 Engagement

Questions

28. Should a body corporate be able to engage a body corporate manager under a part 5 appointment without the need to hold an EGM?

29. Should the vote to appoint a body corporate manager under a part 5 appointment require a secret ballot?

If a body corporate is unable to fill the committee executive positions or fewer than 3 committee voting member positions are filled,⁶¹ the body corporate may appoint a body corporate manager under a part 5 engagement⁶² to carry out the functions that would be carried out by the committee.⁶³ If a committee cannot be elected, a part 5 engagement is required.

The procedure for a part 5 engagement requires that all lot owners be given the terms of the engagement and an explanation of the nature of the engagement together with the material for the general meeting.⁶⁴ The legislation also requires a special resolution decided by secret ballot to make a part 5 engagement.⁶⁵

Unless it is anticipated that the body corporate will be unable to fill the committee voting positions, the material required for the part 5 engagement is not likely to be included with the agenda for an AGM. In practical terms this means that if the body corporate is unable to elect enough members to form a committee at an AGM, the body corporate must hold an EGM to either appoint eligible lot owners to be committee members or to approve a part 5 engagement.⁶⁶

Calling an EGM can lead to significant delay and expense for a body corporate. As a part 5 engagement may be required, the issue of a simpler method of achieving a part 5 engagement was raised. The Issues Paper asked whether it should be possible to engage a body corporate manager under part 5 without the need to call an EGM. This would mean allowing the part 5 engagement to take place at the same AGM that fails to elect a body corporate committee.

⁶¹ Standard Module s 58(3); Accommodation Module s 56(3). This is not required to make a part 5 engagement under the Small Schemes Module: see s 23.

⁶² BCCM Act ss 98, 120. Standard Module s 7(2); Accommodation Module s 8(2); Small Schemes Module s 8(2). The Commercial Module does not contain provisions for a part 5 engagement.

⁶³ Standard Module s 58; Accommodation Module s 56; Small Schemes Module s 23.

⁶⁴ Standard Module s 58(2)(d); Accommodation Module s 56(2)(d). This does not apply under the Small Schemes Module.

⁶⁵ Standard Module s 58(2)(c); Accommodation Module s 56(2)(c). A secret ballot is not required under the Small Schemes Module.

⁶⁶ The agenda for the EGM must include a motion to appoint a person under a part 5 engagement: Standard Module s 32; Accommodation Module s 32. This does not apply under the Small Schemes Module.

By a small margin, the submissions that responded to this question supported allowing a part 5 engagement to occur at the same AGM that fails to elect a committee. The submissions that did not support this argued that lot owners who were reluctant to nominate for a position at the AGM would be more likely to nominate for a position at the subsequent EGM.

Under the current procedures, a body corporate could make a part 5 engagement at the same AGM that fails to elect a committee⁶⁷ if the required information⁶⁸ has been given to lot owners with the material for the general meeting and the other procedural requirements of the engagement have been followed. However, this information is usually not provided. One option to overcome this would be to provide for body corporate managers to give quotes for both a standard engagement and a part 5 engagement. In this way, the terms of the engagement and an explanation of the nature of the engagement would be included with the agenda for the general meeting, likely as a motion with alternatives,⁶⁹ in the event a committee is not formed.

If the part 5 quote is required 'just in case' this will significantly increase the obligation on body corporate committees and body corporate managers when preparing the agenda for a meeting. Additionally, not all body corporate managers will be willing to provide services under part 5. This may mean that bodies corporate are required to source quotes for part 5 engagements from other body corporate managers who will spend time and effort preparing quotes that may never be used or needed.

Given this, the Centre recommends the continued use of a voluntary approach in relation to whether the AGM agenda includes an item for a part 5 engagement where a committee cannot be formed. This maintains the status quo in that if a committee cannot be formed at the AGM and the material given to lot owners for that AGM did not include an explanation of the nature of a part 5 engagement and the terms on which the part 5 engagement would be given then the body corporate would be required to call an EGM and provide lot owners with the terms of the part 5 engagement and the explanation.

This approach is only useful for committees or bodies corporate that anticipate a part 5 engagement and obtain quotes or for schemes that have already engaged a body corporate manager under part 5 and that are likely to make another engagement for the next financial year.⁷⁰ As such, it is of limited use. While there are good reasons to simplify the process, the Centre is of the view that the requirement that lot owners be given the terms of the part 5 engagement and an explanation of the nature of the engagement prior to voting on the part 5 engagement should remain.

In regard to the use of the secret ballot, several submissions pointed out that if the owners are unable to elect 3 members to form a valid committee then there is little reason to require secrecy when

⁶⁷ Standard Module s 58(3)(a); Accommodation Module s 56(3)(a); Small Schemes Module s 23(2)(c).

⁶⁸ The terms of the engagement and an explanatory note in the approved for explaining the nature of the engagement: Standard Module s 58(2)(d)(i); Accommodation Module s 56(2)(d)(i); Small Schemes Module s 23(2)(c)(i).

⁶⁹ Standard Module s 72; Accommodation Module s 70; Commercial Module s 39; The Small Schemes Module does not provide requirements for a motion with alternatives.

⁷⁰ A part 5 engagement cannot last beyond the next AGM or 12 months from the date the engagement begins: Standard Module s 60; Accommodation Module s 58; Small Schemes Module s 25.

engaging a body corporate manager under part 5. Despite this, the engagement of a body corporate manager under part 5 is akin to the election of a committee. At Recommendation 23, the Centre has recommended consistency in the default method of electing committee members under the Standard Module and the Accommodation Module. In keeping with this approach, the Centre is of the view that a secret ballot should continue to be required when voting on a part 5 engagement. However, the Centre also recommends that the body corporate should have the flexibility to make the part 5 engagement by open ballot, if the body corporate decides by ordinary resolution to conduct an open ballot.⁷¹ Such a provision could be modelled on the way that elections under the Standard Module are required to be conducted by secret ballot unless the body corporate decides by ordinary resolution to conduct the election by open ballot.⁷²

Recommendation 18

It is recommended that there be no change to the requirement that the engagement of a body corporate manager under part 5 can only take place at a general meeting where the agenda for that general meeting circulated to lot owners included the terms of the engagement and an explanation of the nature of the engagement.

Recommendation 19

It is recommended that the resolution to engage a body corporate manager under part 5 should continue to require a secret ballot unless the body corporate decides by ordinary resolution to use an open ballot to decide the engagement.

3.3. Delegation to the body corporate manager

Questions

30. Should a body corporate be able to engage a body corporate manager to perform all of the functions of the committee and still retain a committee?

31. If so, should this be limited to bodies corporate with less than a particular number of lots? If yes, how many?

Questions 30 and 31 were raised due to an impression that in practice, some schemes operate with a disinterested committee and a body corporate manager who makes most decisions. The body corporate manager may have the decisions ratified by the executive members of the committee, or advise the committee prior to making the decision (e.g. using a phrase such as ‘unless I am instructed otherwise’). It is understood that this happens in practice but it is a situation which is technically in breach of the legislation.⁷³

The submissions were evenly divided on this question, with slightly more submissions opposed than in favour. Notably however, the SCA, ARAMA and the UOAQ did not support this.

⁷¹ The requirement to approve the part 5 engagement by a special resolution for which no votes are exercised by proxy (e.g. Standard Module s 58(2)(b)) will remain in place.

⁷² Standard Module s 15(3).

⁷³ A body corporate may not delegate its powers: BCCM Act s 97.

Given the lack of support by strata industry groups, the Centre does not recommend any changes in this regard at the current time.

Recommendation 20

It is recommended that the engagement of a body corporate manager under part 5 continue to be available only where there is no committee for the body corporate.

3.4. Committee voting status for resident manager

Question

32. Should a resident manager be eligible to be a voting member of the committee for the body corporate (but excluded from voting on motions relating to the renewal or performance of the caretaking service contract)?

The issue of whether a resident manager for a community titles scheme (referred to in the BCCM Act as a caretaking service contractor) should be eligible to be a voting member of the committee generated some controversy. Many submissions responded with a resounding 'no'. It was argued that a resident manager has a vested interest in every decision of the body corporate and should not be allowed to vote on committee decisions even if conflicts are declared. Some submissions detailed ongoing and aggravated conflicts between the lot owners and the resident manager, citing extreme difficulty in removing resident managers that were perceived to be underperforming in their role.

Other submissions argued in favour of allowing a resident manager to become a voting member of the committee if that person is also a lot owner in the scheme. It was argued that other lot owners with a vested commercial interest in the scheme, such as the owner of a commercial lot or an off-site letting agent, are not prohibited from being voting members of the committee.

A resident manager (caretaking service contractor)⁷⁴ is a service contractor⁷⁵ to the body corporate (usually for maintenance services at the scheme) who is also the letting agent⁷⁶ authorised by the body corporate to run a letting agent business. The Centre is of the view that resident managers, even to the extent they are lot owners in the scheme are more akin to employees of the body corporate than not. If not for the caretaking service contract (and the requirement to own a lot as part of the management rights) it is not clear that the resident manager would own a lot in the scheme.

Given the lack of public support, the Centre does not recommend any change to the voting status of resident managers on the body corporate committee at this time.

Recommendation 21

It is recommended that resident managers should not be eligible to be voting members of the committee for the body corporate at this time.

⁷⁴ BCCM Act schedule 6 (definition of 'caretaking service contractor').

⁷⁵ BCCM Act s 15 (definition of 'service contractor').

⁷⁶ BCCM Act s 16(1) (definition of 'letting agent').

3.5. Definition of ‘associates’

Question

33. Is the definition of ‘associate’ too broad, given that deemed association may stop an otherwise eligible lot owner from being able to act as a voting member of the committee?

More than 60% of the submissions that responded to this question said the definition of associate is not too broad. A number of those even said it is not broad enough. Some submissions wanted to strengthen the conflict of interest provisions in the code of conduct to force committee voting members to refrain from voting on issues where there is a conflict of interest. It should be noted however, that the Regulation Modules already prohibit committee voting members from voting if there is a conflict of interest.⁷⁷

Given the general sentiment that the definition of ‘associate’ is not too broad, the Centre does not recommend any changes to the definition at this time.

Recommendation 22

It is recommended that there are no changes to the definition of associate under the BCCM Act at this time.

3.6. Choosing committee members

Questions

34. Should there be consistency across the Standard Module, Accommodation Module and Commercial Module regarding the method of electing committee members?

35. If yes, what method should be used?

The vast majority of submissions that responded to question 34 agreed that there should be consistent voting methods across the Standard Module, Accommodation Module and the Commercial Module.

By and large, there already is a degree of consistency. The Regulation Modules allow the body corporate to decide by special resolution that elections are to be held in a way that is fair and

⁷⁷ Standard Module s 53; Accommodation Module s 53; Commercial Module s 27; The Small Schemes Module allows the committee member to vote with the specific authorisation of the body corporate after disclosing the interest: see Small Schemes Module s 21.

reasonable in the circumstances of the scheme.⁷⁸ The difference emerges in the default method that is used in the absence of a decision by the body corporate.

Under the Standard Module, the default method⁷⁹ requires the use of secret ballot unless the body corporate decides by ordinary resolution to have an open ballot.⁸⁰ Under the Accommodation Module the default method⁸¹ does not require a secret ballot. Under the Commercial Module, the committee must be chosen by election, but a detailed default method is not provided.⁸²

The real issue, then, is whether a secret ballot should be the default method of selecting committee members under the Accommodation Module and whether the Commercial Module should provide a more prescriptive method of electing committee members.

In response to question 35, the submissions varied as to the method that should be the default but there was a clear preference for the use of a secret ballot. A number of submissions suggested an open ballot with a secret ballot required if there are more nominations than there are positions available. Some submissions argued that there should be no change.

The Centre is of the view that both the Standard Module and the Accommodation Module should use a secret ballot as the default method of electing committee voting members. This may create additional red tape because of the more onerous procedural requirements of a secret ballot but it will create consistency across the two modules that together cover the vast majority of residential schemes. The same default method under both modules will function as a consumer protection mechanism so that lot owners who move from a Standard Module scheme to an Accommodation Module scheme will know what to expect. Of course, bodies corporate will retain the ability to agree by special resolution to conduct the election in another way that is fair and reasonable in the circumstances of the scheme. This means that to the extent a secret ballot for electing committee voting members is not appropriate at a particular scheme, the body corporate will have the ability to introduce a different method.

There does not appear to be any strong justification for including a prescriptive election process in the Commercial Module. Lot owners in Commercial Module schemes are generally experienced businesses or business owners who have less need for prescriptive regulations.

Recommendation 23

It is recommended that the Accommodation Module should be amended to require the use of secret ballot as the method of determining membership of the committee for the body corporate unless the body corporate decides by ordinary resolution to use an open ballot.

⁷⁸ Standard Module s 15; Accommodation Module s 14; Commercial Module s 14; Small Schemes Module s 14.

⁷⁹ Standard Module ss 16-28.

⁸⁰ Standard Module s 15(3).

⁸¹ Accommodation Module ss 17-28.

⁸² Commercial Module s 14.

3.7. Only three lot owners

Question

36. If there are three or more lots in a scheme but only three different lot owners, should the lot owners (or their nominees) automatically be the executive members of the committee without the need to hold an election?

Over 85% of the submissions that responded to this question responded positively. It was submitted that if there are only three owners they could decide among themselves who will take the executive positions. If they are unable to agree, they can share all three of the positions. A similar type of sharing occurs under the Small Schemes Module⁸³ if there are only two owners (as there are only two positions on the committee for schemes under the Small Schemes Module).

The *Building Units and Group Titles Act 1980* (Qld)⁸⁴ provides that if there are three or more lots but only three owners, those three owners make up the committee and may decide among themselves which of the executive positions each lot owner is to have.

Some submissions phrased their opposition to this question around a perception that a lot owner would be forced to be on the committee. An owner would of course be free to opt out of being on the committee and should communicate this position to the other two lot owners. If a sufficient number of lot owners are not prepared to be on the committee, a part 5 engagement is required.

The Centre recommends that the Regulation Modules⁸⁵ be amended so that if there are three or more lots in a scheme but only three lot owners that those owners make up the committee and may decide among themselves who will take each executive role. In the absence of agreement, the position under the Small Schemes Module should apply, in that the executive functions could be held jointly.

Recommendation 24

It is recommended that the Regulation Modules be amended to mimic section 42(3) of the *Building Units and Group Titles Act 1980* to provide that where there are three or more lots in a scheme but only three owners of those lots:

- the committee will consist of those owners or their nominees unless the lot owner opts out of being a committee member;
- the lot owners must decide between themselves which of the positions of secretary, treasurer and chair each is to hold (and, if they cannot agree, each of the positions are to be held jointly by all three of them).

⁸³ Small Schemes Module s 12(4).

⁸⁴ *Building Units and Group Titles Act 1980* (Qld) s 42(3).

⁸⁵ This recommendation would not apply under the Small Schemes Module as there are only two committee positions.

3.8. Removing committee voting members

Questions

- 37. Should the legislation clarify the two removal options and enumerate the situations in which each may be used to remove a committee member?**
- 38. Should the procedure for removing committee voting members for a breach of the code of conduct be made shorter so that it can be done without the need to hold two general meetings (for example, by allowing the committee to decide to issue a written notice detailing the breach, without the need for a general meeting)?**
- 39. Does the code of conduct for committee voting members address relevant issues? Are there any additional issues that should be addressed in the code of conduct?**
- 40. Should lot owners who have been removed from the committee be prohibited from renominating for a committee position?**

Under the BCCM legislation, there are two methods to remove committee voting members. The first is removal for a breach of the code of conduct.⁸⁶ Removal via this method requires two general meetings – the first to give written notice to the committee voting member detailing the alleged breach of the code of conduct⁸⁷ and the second, after the committee voting member has had a chance to give a written response to the notice, to decide, by ordinary resolution to remove the committee voting member from office. The second method is removal of the committee voting member using a general power of the body corporate. The removal in this situation may be for a particular reason or for no reason at all. This method only requires that the body corporate decide, by an ordinary resolution in a general meeting, to remove the committee voting member from office.⁸⁸ Under this second method, the body corporate is not required to allow the removed committee voting member a right of reply.

Generally, the submissions supported clarifying the removal options and shortening the removal process when a committee voting member has breached the code of conduct. Most submissions argued for a simpler process provided the person being removed is afforded natural justice (in the form of an opportunity to refute any allegations or to challenge the reason for their removal). The submissions also supported prohibiting removed committee voting members from re-nominating for a committee position for a time and amending the relevant code of conduct to include additional issues.

⁸⁶ BCCM Act s 101B(3); Standard Module s 35; Accommodation Module s 35; Commercial Module s 17; Small Schemes Module s 17.

⁸⁷ Standard Module s 34; Accommodation Module s 34; Commercial Module s 16; Small Schemes Module s 16.

⁸⁸ Standard Module s 33(2)(f); Accommodation Module s 33(2)(f); Commercial Module s 15(2)(f); Small Schemes Module s 15(2)(e).

In regards to removal of committee members, the submissions were generally in agreement that there should be a single, simple process. Some submissions commented that the two removal options are sufficiently clear but the problem is that bodies corporate are confused as to which to use.

Many submissions suggested that there should be just one process for removing a committee member, based on a vote of the body corporate at a general meeting so that the person is dismissed immediately and a second general meeting is not required. It was argued that this single process should be used regardless of whether the person is being removed under the general power or for a breach of the code of conduct. The main issue with such an approach is that it might not afford the committee member natural justice, in the form of a right to challenge any allegations against them or to speak against their removal from the committee voting position.

The Centre recommends simplifying the options for removal of committee voting members so that a member may be removed by an ordinary resolution of the body corporate in a general meeting. However, the Centre also recommends several measures be put in place to ensure the person is provided with natural justice.

Under the recommended process, the removal of a committee voting member will be by an ordinary resolution of the body corporate in a general meeting. The usual rules will apply to calling this meeting which means that the body corporate will be required to give notice of the meeting to lot owners and to include an agenda which contains the motion for removal of the committee voting member.

The Centre recommends that the committee voting member who is the subject of the removal should have a right to circulate a statement to the lot owners after the agenda of the general meeting is given but before that meeting is held. The member should have the right to request the body corporate to pay postage and photocopy expenses reasonably incurred in giving this statement to other lot owners, as this right is currently given to committee members facing removal for a breach of the code of conduct.⁸⁹ Secondly, the committee member must also have a right to speak at the general meeting prior to the vote on the motion. These measures will ensure the committee voting member has the opportunity to state the case as to why they should not be removed and to address the reasons (if any) that have been given for their removal. Thirdly, a committee voting member who has been removed from the committee will have a right to dispute the decision of the body corporate to the BCCM Commissioner's office.

Taken together, these measures will ensure that a committee voting member who is faced with being removed will have the opportunity to respond to any allegations and to state the case why they should not be removed. There will also be protection in the event a committee member is unreasonably removed.

⁸⁹ Such rights are currently given to voting committee members facing removal from the committee for a breach of the code of conduct: Standard Module s 34(1)(c)-(d); Accommodation Module s 34(1)(c)-(d); Commercial Module s 16(1)(c)-(d); Small Schemes Module s 16(1)(c)-(d).

In regards to prohibiting renomination of a committee voting member who has been removed by the body corporate, most of the submissions that responded supported such a ban but there was no consistent timeframe proposed. Some submissions supported lifetime bans; others argued for bans of several years; and still others just said for the prohibition to extend to the next AGM.

The Centre is of the view that a committee voting member who is removed by the body corporate should be prohibited from renominating for a committee voting position for a period of up to two years as decided by the body corporate at the time the committee voting member is removed. The existing dispute resolution provisions will apply to the body corporate's decision about the renomination period.

In regards to code of conduct issues, there was a perception in the submissions that the code of conduct does not adequately address some issues. Some submissions argued that the all of the codes of conduct in the BCCM Act are futile and meaningless. Other submissions said that the code of conduct should not be too onerous as this will discourage lot owners from volunteering to participate in committee voting positions.

A number of issues were raised as possible inclusions in a revised code of conduct for committee voting members. Of these, the Centre is of the view that the following issues should be added to the code of conduct for committee voting members:

- an obligation to remain financial (by paying all contributions and other amounts levied by the body corporate on the lot) during the member's term of office; and
- an express prohibition on receiving a benefit from any service contractor engaged by the body corporate under a service contract.

A lot owner is not eligible to be a committee voting member if the lot owner owes a body corporate debt at the time the committee voting members are chosen.⁹⁰ Under the Standard Module⁹¹ and the Accommodation Module,⁹² any nomination for the election of a person as a committee voting member is taken not to comply if it is received at a time when the lot owner making the nomination owes a body corporate debt. However, the BCCM Act and the Regulation Modules are silent as to whether lot owners who are already on the committee will lose the right to vote on committee motions if they owe a body corporate debt when that motion is decided by the committee. The Centre recommends that the legislation should clearly state that committee voting members who owe a body corporate debt are unable to vote on committee motions while their body corporate debt is outstanding. While it is recommended that this obligation be included in the code of conduct, it is likely to require substantive provisions located in the Regulation Module itself.

⁹⁰ Standard Module s 10(2)(d); Accommodation Module s 11(2)(d); Commercial Module s 11(2)(c); Small Schemes Module s 11(2)(c).

⁹¹ Standard Module s 17(4).

⁹² Accommodation Module s 18(4).

In regards to an express prohibition on receiving a benefit from a service contractor, it is arguable that this is already implicit in the code of conduct (as receiving a benefit is likely to breach the obligation to act with honesty and fairness).⁹³ The Regulation Modules also prohibit a committee voting member from voting on a matter when there is a conflict of interest.⁹⁴ However, there can be little harm in making the obligation express. The Centre recommends that the code of conduct for committee voting members expressly include an obligation on committee voting members not to receive a benefit from a service contractor unless the benefit is disclosed and the body corporate decides that it is in the best interest of the body corporate to proceed or continue with the service contract, despite the benefit.

Recommendation 25

It is recommended that the BCCM Act should provide only one method for removal of committee voting members. This method should be by an ordinary resolution of the body corporate at a general meeting. The removed committee voting member will have the right:

- to circulate a statement to the lot owners after the agenda is set but before the meeting deciding the member's removal is held;
- to speak at the general meeting prior to the vote to remove the member; and
- if removed by a resolution of the body corporate, to lodge an application with the BCCM Commissioner's office to dispute the body corporate's decision.

Recommendation 26

It is recommended that where a committee voting member has been removed from office by a vote of the body corporate, that committee voting member should be prohibited from re-nominating for a committee voting position for a period of up to two years as decided by the body corporate when the member is removed from the committee.

Recommendation 27

It is recommended that the code of conduct for committee voting members should be updated to:

- include an obligation on committee voting members to remain financial with respect to body corporate contributions during the term of office; and
- expressly prohibit a committee voting member from receiving a benefit from any service contractor engaged by the body corporate under a service contract unless that benefit has been disclosed to the body corporate and the body corporate has decided that it is in the body corporate's best interest to proceed or continue with the service contract.

If a committee voting member does not remain financial with respect to body corporate contributions, the BCCM legislation should provide that the committee voting member is unable to vote on committee motions while their body corporate debt is outstanding.

⁹³ BCCM Act schedule 1A s (2)(1).

⁹⁴ Accommodation Module s 53; Standard Module s 53; Commercial Module s 27; Small Schemes Module s 21 (the office holder must have specific authorisation of the body corporate to make a decision on an issue if there is a conflict).

3.9. Removing the entire committee

Question

41. Should the BCCM Act and the Regulation Modules specify whether the body corporate can remove the entire committee with a single motion or should a separate motion be required to remove each committee member?

Most of the submissions that addressed this question said that the best practice is to use a separate motion for each committee voting member to be removed. If a single motion is used to seek removal of all committee voting members, a lot owner who may want to remove only one or a few of the members of the committee must either vote against the motion, or abstain. If there are separate motions submitted for the removal of each committee voting member, a lot owner can vote to remove just the members they believe should be removed.

Other submissions argued that the current position is sufficient. Currently, the BCCM Act is silent which means it is up to the person submitting the motion to decide whether to use a single motion for all committee voting members or an individual motion for each committee voting member. The Centre sees little reason to change this position. Regardless of whether a separate motion is used to remove each committee voting member or a single motion is used for removal of all committee members, the process and the safeguards discussed above (at section 3.8 and Recommendation 25) in relation to the removal of a committee voting member will apply.

Recommendation 28

It is recommended that there be no changes to the BCCM Act and the Regulation Modules in relation to the body corporate's ability to remove the entire committee from office.

3.10. Breach of code of conduct for non-voting members

Questions

42. Should the non-voting members of the committee also be subject to the code of conduct in schedule 1A (for committee voting members)?

43. What should happen if a body corporate manager or a caretaking service contractor breaches the code of conduct in schedule 2 or schedule 3 of the BCCM Act?

44. Do the codes of conduct for non-voting members and letting agents address relevant issues? Are there any additional issues that should be addressed in the codes?

Generally, the submissions that addressed these questions strongly supported making the code of conduct for committee voting members apply to non-voting members. A minority of submissions argued that the codes of conduct for body corporate managers and caretaking service contractors⁹⁵ and letting agents⁹⁶ already replicate the obligations in the code that apply to committee voting members.⁹⁷

The Centre notes that the obligations in the code of conduct for committee voting members and the other codes of conduct are deliberately different based on the nature of the party that is governed by the code. There seems to be little justification to apply the code of conduct for committee voting members to non-voting committee members. The only non-voting members are the body corporate manager and the caretaking service contractor.⁹⁸

The Centre notes that the code of conduct for body corporate managers and caretaking service contractors places an obligation on body corporate managers to refrain from attempting to unfairly influence the outcome of an election for the body corporate committee.⁹⁹ This obligation does not expressly extend to prohibit an attempt to unfairly influence the outcome of a vote on a motion relating to some other matter. Further, the obligation does not expressly apply to caretaking service contractors.

The Centre recommends that the obligation in the code of conduct for body corporate managers and caretaking service contractors to refrain from attempting to unfairly influence the outcome of an election for the body corporate committee should be expanded so as:

- to apply to body corporate managers and to caretaking service contractors; and
- to prohibit attempts to unfairly influence the outcome of a motion to be decided by the body corporate or the outcome of an election for the body corporate.

In regards to the consequences of a breach of the code of conduct, some submissions argued that the existing remedies – a remedial action notice¹⁰⁰ or a code contravention notice for breach of the letting agent code of conduct¹⁰¹ – are sufficient. Other submissions stated that these remedies are useless due to the prohibitive legal costs of enforcing body corporate decisions over the objections of a caretaking service contractor or body corporate manager. Several submissions noted that the remedies for breaches by caretaking service contractors / letting agents are difficult (if not impossible) to achieve in practice.

⁹⁵ BCCM Act schedule 2.

⁹⁶ BCCM Act schedule 3.

⁹⁷ BCCM Act schedule 1A.

⁹⁸ Standard Module s 12; Accommodation Module s 13; Commercial Module ss 11(3) and 11(5); There are no non-voting members under the Small Schemes Modules, but neither a body corporate manager nor a service contractor are eligible to be a secretary or treasurer: Small Schemes Module s 11(2).

⁹⁹ BCCM Act schedule 2 s 2(2).

¹⁰⁰ Standard Module s 131; Accommodation Module s 129; Commercial Module s 90; Small Schemes Module s 68.

¹⁰¹ BCCM Act s 139.

The Regulation Modules provide that a breach of the code of conduct may give rise to a right to terminate the contract if the requirements for a remedial action notice have been fulfilled and the relevant party has not complied with the notice.¹⁰² In addition, the BCCM Act provides that the provisions of the code of conduct in schedule 2 are taken to be terms of the contract between the body corporate and the body corporate manager or caretaking service contractor.¹⁰³

This means that a breach of the code of conduct is a breach of the contract. Depending on the terms of the contract and the nature of the breach, the body corporate may have a remedy at law outside of the BCCM Act. Any remedy available to the body corporate may revolve around whether the breach in question is a breach of an essential term of the contract. The breach of an essential term will give the innocent party a right to terminate the contract.¹⁰⁴ However, wrongful termination by an innocent party may result in a repudiation of the contract, leaving the innocent party in breach. On review of the terms in the code of conduct in Schedule 2, it is likely that many of the code's provisions could be construed as essential terms.

The Centre is of the view that the existing remedies in the BCCM Act and Regulation Modules for a breach of the code of conduct for body corporate managers and caretaking service contractors are sufficient. The question as to whether a breach of the code of conduct is a breach of an essential term of the contract that gives the innocent party the right to terminate is a matter best left for determination by the courts.

Recommendation 29

It is recommended that the obligation in paragraph 2(2) of the code of conduct for body corporate managers and caretaking service contractors, which presently only applies to body corporate managers, should be amended to include caretaking service contractors. It is further recommended that the obligation in paragraph 2(2) of the code, which presently prohibits an attempt to unfairly influence the outcome of an election for the body corporate committee, should be expanded to prohibit attempts to unfairly influence the outcome of a motion to be decided by the body corporate.

Recommendation 30

It is recommended that there be no change in relation to the remedies available to the body corporate for a breach of the code of conduct for body corporate managers and caretaking service contractors.

¹⁰² Standard Module s 131(4); Accommodation Module s 129(4); Commercial Module s 90(4); Small Schemes Module s 68(3).

¹⁰³ BCCM Act s 118(2). The parties cannot override the terms: BCCM Act s 118(3).

¹⁰⁴ Christensen, S A and WD Duncan, *The Construction and Performance of Commercial Contracts*, (2014) Federation Press, Sydney, at 85.

3.11. Committee meetings

Questions

- 45. Should greater notice of the committee meetings be given to lot owners who are not members of the committee?**
- 46. Should there be a greater ability for lot owners, who are not on the committee, to have items of interest added to the agenda for a committee meeting?**
- 47. Should lot owners be able to compel the committee to hold a meeting?**

The submissions that responded to questions 45 and 47 were very evenly split. Slightly more submissions argued against giving lot owners greater notice of committee meetings than argued for it. Slightly more submissions argued in favour of allowing lot owners to compel a committee meeting than argued against it.

However, the submissions clearly agreed that lot owners who are not on the committee should have a greater ability to put items on the agenda for a committee meeting. Nearly 70% of those that responded to question 46 supported this position.

Some submissions did not support giving lot owners greater notice of, or the right to compel, committee meetings but felt that lot owners should have a right to have a motion placed on the agenda for the next committee meeting and to speak at the meeting in favour of that motion. It was argued that the committee should be required to consider a motion submitted by a lot owner at the next committee meeting or vote outside of a committee meeting where it is practical to consider that motion.

If this right is given to lot owners and such an obligation placed on the committee, there is little need to give lot owners additional notice or the ability to compel a committee meeting. It was noted that the ability to compel the committee to meet, without a right to speak at that committee meeting, would be virtually meaningless.

The Centre recommends that lot owners who are not on the committee should have the right to put a motion to the committee and the committee should be required to reasonably consider that motion at the next committee meeting or vote outside of a committee meeting where it is reasonably practical to do so.

The Centre recognises that not all issues raised by lot owners will be appropriate for committee consideration. In some cases, the motion may be outside the scope of the committee's authority. In other cases, the motion may be frivolous or vexatious. To the extent that any of these circumstances arise, the committee voting members will have the ability to vote against the motion. Once the committee has made a decision, a lot owner who did not agree with that decision will have rights under the existing dispute resolution provisions in the BCCM Act.

Recommendation 31

It is recommended that committees be required to reasonably consider motions submitted by lot owners at the next committee meeting or vote outside of a committee where it is reasonably practical to consider that motion.

Recommendation 32

It is recommended that there should be no change to the notice period for committee meetings or the rules in relation to calling committee meetings.

3.12. Voting outside of committee meetings

Questions

- 48. Should the legislation specify a maximum amount of time after a notice and advice of a motion to be decided outside of a committee meeting have been given by which a vote must be returned?**
- 49. Should the legislation specify a minimum amount of time after a notice and advice of a motion to be decided outside of a committee meeting have been given before the result can be declared?**

The majority of submissions that responded to these questions were in favour of both a minimum time before the result is declared and a maximum time after which the motion should lapse. Generally, it was argued that once enough votes have come in to decide the matter the result should be declared.

It was noted that the lack of a response from committee voting members to a vote outside of a committee meeting could leave a matter outstanding and uncertain. Failure to make a decision may delay any dispute resolution applications with the BCCM Commissioner's office.

Some body corporate managers commented that they provide a discretionary timeframe for responses to be returned. Given this, there is good reason to provide a statutory timeframe.

It was noted that a vote outside a committee meeting may require a higher threshold of agreement to pass than a vote at a committee meeting. This is because at the committee meeting, a motion is decided by a majority of committee voting members present rather than by a majority of the total number of committee voting members. With a vote outside a committee meeting, a resolution will require a majority of all committee voting members to pass.

The Centre recommends that the Regulation Modules should provide that where a vote outside a committee meeting has not received enough responses to decide the issue after 21 days, the motion should lapse and the matter should be deemed to be decided in the negative. However, if enough votes are cast on the vote outside the committee meeting motion to decide the matter, the committee should be able to declare the result, even if all committee voting members are yet to cast a vote.

Recommendation 33

It is recommended that a motion to be decided by a vote outside of a committee meeting should lapse if 21 days after the notice of the motion is given to all committee members, the majority of all voting members of the committee entitled to vote on the motion have not agreed to the motion or voted against it.

3.13. Minutes and record**Question**

50. Should the notice of opposition be available under the other Regulation Modules?

The majority of submissions that addressed this question agreed that the notice of opposition should be available under the other Regulation Modules. The strongest argument in favour of this position is that if the notice of opposition is considered an appropriate safeguard for lot owners in some schemes, it should be available for all lot owners in all schemes.

The notice of opposition requires a very high level of support. It can be used to oppose the giving effect of a resolution of the committee but it must be signed by at least half of all lot owners and given to the secretary within 7 days¹⁰⁵ after the secretary gives each lot owner a copy of the minutes of the committee meeting containing the motion or for a vote outside of a committee meeting, a copy of the resolution.¹⁰⁶ However, it cannot be used to oppose a resolution:

- that is of a routine, administrative nature; and
- that involves spending less than:
 - \$200 or
 - \$5 multiplied by the number of lots in the scheme.

As such, the use of a notice of opposition is limited to specific circumstances and requires a high threshold of owner agreement. By contrast, it takes only 25% of lot owners to request an extraordinary general meeting.¹⁰⁷ This means, at least by one measurement, that it is easier for lot owners to call a requested EGM than to give a notice of opposition. Despite this, if half of the lot owners in a scheme are against taking a particular action, the body corporate should respond to that. The Centre is of the view that the notice of opposition in the Standard Module should be available under all of the Regulation Modules.

Recommendation 34

It is recommended that the notice of opposition in the Standard Module (section 56) should be made available under all Regulation Modules.

¹⁰⁵ Standard Module s 56.

¹⁰⁶ As required under Standard Module s 55.

¹⁰⁷ Standard Module s 67; Accommodation Module s 65; Commercial Module s 34; Small Schemes Module s 32.

3.14. Relevant limit for committee spending

Questions

- 51. Is the current relevant limit for committee spending appropriate?**
- 52. Should the default relevant limit for committee spending be different for small schemes (e.g. 10 or fewer lots) and large schemes (e.g. 100 or more lots)?**
- 53. Is the current approach to situations where the relevant limit for committee spending is higher than the relevant limit for major spending for a scheme appropriate? If not, how should the legislation deal with this situation?**
- 54. Should the body corporate be required to consider and set the relevant limit for committee spending at each AGM?**
- 55. Should the Commercial Module have a relevant limit for committee spending?**

As with the relevant limit for major spending (discussed at section 2.6 above), the submissions that responded to these questions agreed that the relevant limit for committee spending is appropriate. The default relevant limit for committee spending is \$200 multiplied by the number of lots in the scheme.¹⁰⁸ It was noted that the body corporate has the ability to set a different relevant limit.¹⁰⁹

The submissions that responded to question 52 did not support a different spending limit for large and small schemes. It was noted that the expenses in a scheme are based on the facilities at the scheme (the pool, gym, gardens, etc.) not the number of lots.

Where the relevant limit for committee spending is higher than the relevant limit for major spending, the submissions generally supported the current process (which requires the committee to obtain two quotes). It was noted that the body corporate has the ability to lower the relevant limit for committee spending so that it is lower or the same as, the relevant limit for major spending. The submissions did not support requiring the relevant limit for committee spending to be set or reviewed each year at the AGM.

The Centre recommends that, unless the body corporate by an ordinary resolution approves a different amount, the relevant limit for committee spending should be \$500 per lot up to a maximum of \$20,000. Any expenditure over \$20,000 at the committee level must be specifically authorised by the body corporate. Combined with the recommendation for the relevant limit for major spending (see section 2.6 above), this recommendation will ensure that:

¹⁰⁸ This includes layered lots for schemes under the Standard Module and Accommodation Module. See schedule (definition of 'number of layered lots') in each of the Standard Module and Accommodation Module.

¹⁰⁹ See schedule in each of the Standard Module, Accommodation Module and Small Schemes Module (definition of 'relevant limit for committee spending'). There is no limit under the Commercial Module.

- expenditure of body corporate funds of \$20,000¹¹⁰ or more will require approval by the body corporate on the basis of at least two quotes; and
- the default relevant limit for committee spending will not be higher than the default relevant limit for major spending.

The submissions strongly supported a spending limit for schemes under the Commercial Module. However, few submissions indicated any experience with Commercial Module schemes. Unlike schemes under the other Regulation Modules, commercial schemes may have three budgets – an administrative fund, a sinking fund and a promotion fund.¹¹¹ Generally, lot owners in commercial schemes are more sophisticated in terms of their business experience and awareness of legal issues.

It is noted that there is no relevant limit for major spending under the Commercial Module. Presumably, this is because lot owners in commercial schemes are less likely to need to recourse to the consumer protection aspect of such a mechanism, owing to their greater sophistication. Given this, the Centre does not recommend the inclusion of a relevant limit for committee spending for schemes under the Commercial Module. Such schemes, will of course, retain the ability to set a committee spending limit if the body corporate so decides.

Recommendation 35

It is recommended that the default relevant limit for committee spending under the Standard Module, the Accommodation Module and the Small Schemes Module should be set to \$500 per lot in the scheme up to a maximum of \$20,000.

Recommendation 36

It is recommended that bodies corporate retain the flexibility to set a different relevant limit for committee spending. Motions to approve spending over the relevant limit for committee spending will continue to require body corporate approval on the basis of two quotes.

3.15. Professional committee member

Questions

**56. Should the BCCM Act permit schemes to appoint a professional committee member?
Should particular schemes be required to appoint a professional committee member?**

57. What minimum qualifications should a professional committee member have?

Generally, the submissions that responded to these questions were in favour of allowing the body corporate to appoint a professional to assist with body corporate functions. Few submissions, though, felt that it should be required under the legislation.

¹¹⁰ Or other limit as set by the body corporate.

¹¹¹ Commercial Module s 98(4).

A number of submissions argued that the existing legislation is already sufficient to allow bodies corporate to hire specialist ad hoc advisers to undertake particular tasks. These specialists may be engaged as service contractors to provide advice and information to the body corporate.

The body corporate is then responsible for making decisions as it cannot delegate decision making power to the specialist.¹¹² It is up to the body corporate to decide whether to accept or ignore the advice given by the specialist and the consequences of the decision, if any, are for the body corporate to accept.

Generally speaking, such a specialist adviser will not have an interest in the body corporate and will not be a committee member or a lot owner in the scheme. However, the Regulation Modules allow a committee member to be paid by the body corporate.¹¹³ It is understood that this is more likely to occur in a very large scheme, for example a layered scheme, where the role of chairperson of the principal body corporate may require a significant amount of time and effort to manage.

The Centre is of the view that the existing legislation is sufficient to allow the body corporate to engage experts to provide advice for particular issues as required by the body corporate based on the circumstances of the scheme.

Recommendation 37

It is recommended that there be no changes with respect to the appointment of ad hoc specialist advisers by the body corporate.

¹¹² BCCM Act s 97.

¹¹³ See for example, Standard Module s 18(2)(e); Accommodation Module s 19(2)(e).

4. Electronic notices, minutes and voting

4.1. Email address for service

Questions

- 58. Should a lot owner's address for service include an email address in addition to a physical address?**
- 59. Should the BCCM Act allow the body corporate to send notices of general meetings and minutes of general meetings to lot owners via email?**
- 60. Should the BCCM Act allow the body corporate to send notices of committee meetings and minutes and record of motion voted on outside of committee to lot owners via email?**

The submissions strongly supported amending the definition of a lot owner's address for service to include email (in addition to a physical address). The submissions also strongly supported allowing the body corporate to give notices and minutes of general meetings and committee meetings to lot owners via email, where those lot owners have agreed to receive material in this way.

There was very little opposition to the use of email for delivery of notices of meetings and minutes. However, some submissions commented that not all lot owners have an email address or use it regularly. It should be noted that the use of email is not intended to replace the requirement for a lot owner to provide a physical address for service. Even if the BCCM Act expressly provides for the delivery of material via email, a lot owner must consent to receive material electronically.

A further issue with using email delivery is to ensure that the email address provided by a lot owner is regularly checked and the body corporate is notified of changes. A number of submissions suggested that the BCCM Form 8¹¹⁴ could be amended to include a lot owner's email address and to record the lot owner's consent to receiving electronic communication. The form could also be used to notify the body corporate of changes to the lot owner's address for service, including a new email address.

The Centre recommends that the BCCM Act place an obligation on lot owners to notify the body corporate of changes to their address for service, including the email contact details where they have been provided. This could occur in much the same way that lot owners are required to notify the body corporate of particular information on the occurrence of particular events, such as becoming a lot owner or appointing an agent to manage the lot.¹¹⁵

Lot owners will not be required to receive documents and notices electronically. The introduction of email delivery of notices and minutes must ensure that lot owners have agreed to receive information this way by specifically opting in to email receipt of notices and minutes, where the body corporate offers this as an option. Lot owners who wish to continue to receive meeting notices and minutes via post will not be required to take any steps to continue to receive material this way. Lot owners must

¹¹⁴ This form is generally used by lot owners to give notice to the body corporate on the occurrence of particular events (becoming a lot owner, engaging a letting agent, etc.): for example see Standard Module s 193.

¹¹⁵ See for example, Standard Module s 193(1).

be able to elect whether to receive notices and minutes at their physical mailing address or via email. In this way, lot owners must specifically opt-in to email receipt of notices and minutes, where the body corporate offers this as an option.

For completeness, it must be noted that if a lot owner provides an email address as part of that lot owner's address for service, the email address will be recorded on the body corporate roll.¹¹⁶ Certain parties, including lot owners and the buyer of a lot in a scheme must be given access to the body corporate records upon request¹¹⁷ It is understood that there have been cases where a body corporate has denied lot owners access to the email addresses of lot owners, citing privacy legislation. If the definition of address for service in the BCCM Act is amended to include a lot owner's email address then that email address will be available to interested persons¹¹⁸ on an inspection of the body corporate records.

Recommendation 38

It is recommended that the definition of address for service in the BCCM legislation be updated to include an email address nominated by a lot owner (in addition to a physical address) as the address for service of notices, minutes and other documents required to be given to lot owners by the body corporate under the BCCM legislation.

Recommendation 39

It is recommended that lot owners be under an obligation to give the body corporate notice of changes to the lot owner's address for service.

4.2. Delivery of documents electronically

Questions

- 61. Should making documents available on a website, and providing lot owners with instructions to access the website satisfy the requirement to give notices of meetings and minutes under the BCCM Act?**
- 62. Should lot owners be able to 'opt-in' to receive all meeting notices, agendas and minutes (or record of motion voted on outside of a committee) via e-mail or by accessing a website? If yes, what form should the opt-in take?**
- 63. Should lot owners who do not opt-in be required to pay the printing and postage costs associated with delivering the notices and minutes (so that this cost is not borne by the other lot owners)?**

¹¹⁶ Standard Module s 196(2)(d); Accommodation Module s 194(2)(d); Commercial Module s 152(2); Small Schemes Module s 130(2)(d).

¹¹⁷ BCCM Act s 205.

¹¹⁸ BCCM Act s 205(6) (definition of 'interested person').

The submissions supported allowing bodies corporate to give notices of meetings and minutes by making those documents available on a website and giving each lot owner the means to access the documents. However, it was noted that not all bodies corporate will have the ability to provide this type of service and it should be up to a body corporate to decide how to make the documents available.

This may become particularly important if email delivery is allowed. Emails with large attachments may be rejected by an email server. Typically, free email services such as Hotmail or Gmail limit the amount of storage space given to each account. If the inbox is full or the email attachments are too large, the email may be rejected by the server and the recipient may never even know the email was sent or that delivery was attempted. In some cases, the sender may receive a message from their email server giving notice that delivery has failed, but this may not always occur.

It may be necessary to allow documents to be made available on-line as an alternative to giving them electronically. The main problem with making documents available online is that this does not satisfy a requirement to 'give' the document¹¹⁹ as the recipient is not actually being given anything other than a means to get the document.

The Centre is of the view that for electronic delivery of documents, the BCCM legislation should provide an exception for giving notices and meeting minutes via email if the material in question is voluminous. Such an exception is already allowed under the Regulation Modules when the body corporate must send voluminous quotations via post. Under the current provisions, the quotations for a motion must be included with the notice of the meeting where the motion is to be decided unless the quotations are voluminous, in which case a summary and advice of how to access the full document is sufficient.¹²⁰

A similar exception could be applied where electronic delivery is used and the files to be attached to the email are so large as to make it likely that the delivery will not be successful due to the email server rejecting the delivery. The Centre recommends where the documents to be delivered to a lot owner electronically are voluminous, in terms of the file size, the body corporate be able to give the lot owner a summary of the documents and provide the lot owner with the means to access the full documents. The lot owner should be required to agree to this as a condition of electronic delivery of meeting notices and minutes. The exception would allow the body corporate to satisfy the obligation to 'give' documents that are voluminous by sending or giving the lot owner an email containing a summary of the voluminous document in the body of the email and including a URL link to the document.

For the avoidance of doubt the Centre recommends that this exception should only be available to the body corporate when the information to be given electronically is so large that it may be rejected by a typical email server. The body corporate would send the main document or notice being given (e.g. the minutes or agenda) but provide a link to access the additional voluminous material. It is recommended that this only be available where electronic delivery of large documents creates a risk that the email is too large for typical email servers. It is not recommended that this exception be

¹¹⁹ *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30 at [28] and [37].

¹²⁰ Standard Module s 152(5); Accommodation Module s 150(5); Small Schemes Module s 86(5).

available for notices or other material that are currently required to be sent via post to a lot owner's physical address for service, except to the extent it is already available.¹²¹

Email delivery of documents will not be required. Bodies corporate will not be required to send documents electronically and lot owners will not be required to receive documents electronically. Those without email or who prefer not to use email for body corporate communication will be able to continue to receive hard copy documents delivered to their physical address for service as is currently required. Where a body corporate is able to offer email delivery, lot owners will be able to notify the body corporate of their consent to receive documents electronically, provide an email address and agree to the terms of delivery.

In regards to whether lot owners who continue to receive hard copies of notices and minutes should pay for the postage and printing, only about a third of the submissions that responded to this question supported that position. Most submissions argued that this could disadvantage vulnerable lot owners such as the elderly and people on fixed income. The Centre does not support charging lot owners for receiving hard copies of documents.¹²² The cost to the body corporate of sending notices are shared by all lot owners. If a body corporate provides both electronic delivery and standard postal delivery, it may be very difficult to charge lot owners differently depending on which delivery method they have selected. While email delivery may be more convenient and not require printing and postage costs, it is not free. There will be costs associated with uploading and emailing documents (including online storage costs) that may be significant.

As stated in Recommendation 38, the Centre recommends that a lot owner's address for service should include an email address if the lot owner is willing to provide it and willing to agree to accept notices from the body corporate electronically. The Centre also recommends that lot owners who agree to email delivery of documents should also be required to agree that if the documents are voluminous (that is, too large to send via email) the body corporate may provide a summary of the documents and make the full version of the documents available in another way, such as on a secure website.

Recommendation 40

It is recommended that service of documents for the purposes of the BCCM legislation should be at either the physical address for service of the lot owner, or if the lot owner has provided an email address for service (as notified by the lot owner on the body corporate roll) and the lot owner has agreed to receive notices electronically, service of documents for the purposes of the BCCM legislation may be effected electronically at the email address for service notified by the lot owner.

Recommendation 41

It is recommended that to the extent that lot owners have agreed to receive documents electronically at the email address for service as notified by the lot owner on the body corporate roll, the body corporate may use alternative methods to provide those lot owners with access to documents and supporting material that are voluminous in the sense of being too large for typical email servers.

¹²¹ For voluminous quotations: Standard Module s 152(5); Accommodation Module s 150(5); Small Schemes Module s 86(5).

¹²² It should be noted that the costs are allocated among all lot owners. Where a body corporate provides both electronic delivery and standard postal delivery, it may be too cumbersome to charge lot owners.

Recommendation 42

It is recommended that lot owners should not be required to pay extra to receive hard copies of documents that the body corporate is required to give to the lot owner.

4.3. Electronic voting

Questions

64. Should the BCCM Act and the Regulation Modules allow electronic voting as the default option so that owners who do not wish to vote electronically must opt-out of electronic voting (or vote in writing or in person at a general meeting)?

65. Should the same rules that apply to electronic voting under the Standard Module, Accommodation Module and Commercial Module also apply under the Small Schemes Module?

About half of the submissions that addressed these questions were in favour of allowing electronic voting as a default option. Other submissions opposed this, arguing that electronic voting should be just one of a range of options and that the default option should be voting in person at the general meeting (followed by a written ballot).

Others argued that electronic voting should be available on an opt-in basis, rather than an opt-out basis. One submission noted that the day may come where everybody will vote electronically but that day is not yet here. Other submissions argued that not all schemes will have the capacity to provide electronic voting (especially self-managed schemes).

The Centre does not recommend any changes to the existing rules for electronic voting. This means bodies corporate under the Standard Module, Accommodation Module and Commercial Module will continue to be required to approve electronic voting by an ordinary resolution for open¹²³ and secret ballots.¹²⁴

As noted in the Issues Paper, electronic voting is not specifically provided for in the Small Schemes Module although the body corporate may decide on a way of conducting voting at general meetings (that includes electronic mail).¹²⁵

¹²³ Standard Module ss 71(4)(f), 86(1)(d) and 86(3); Accommodation Module ss 69(4)(f), 84(1)(d) and 84(3); Commercial Module ss 38(4)(f), 53(1)(d) and 53(3).

¹²⁴ Standard Module ss 71(4)(g), 89(1)(b) and 90(2); Accommodation Module ss 69(4)(g), 87(1)(b) and 88(2); Commercial Module ss 38(4)(g), 56(1)(b) and 57(2).

¹²⁵ Small Schemes Module s 47(2).

Question 65 asked whether the rules that apply under the Standard, Accommodation and Commercial Modules should also apply under the Small Schemes Module. The submissions supported consistency across the Regulation Modules. If, at some time in the future, electronic voting is made available as a standard option (i.e. without requiring a specific resolution of the body corporate) then at that point there should be consistency across the Regulation Modules. However, at this point, the Centre is of the view that there is no reason to amend the provisions of the Small Schemes Module.

Recommendation 43

It is recommended that electronic voting continue to be available as one of a range of options for voting at general meetings in bodies corporate that decide by ordinary resolution to allow electronic voting.

Recommendation 44

It is recommended that there not be any change to the Small Schemes Module in regard to the use of voting methods.

4.4. Electronic attendance at meetings

Questions

66. Should committee members be able to attend committee meetings by telephone or video conference?

67. Should the body corporate be required to authorise electronic attendance at committee meetings by an ordinary resolution in a general meeting?

The Centre understands that some committees will allow members to attend committee meetings via telephone or video conferencing. The BCCM Act does not prohibit this but it is not expressly allowed either.

The majority of submissions that addressed these questions supported allowing committee members to attend committee meetings by telephone or video conference if the committee decides to allow this. The submissions did not, however, support the position that the body corporate should be required to authorise electronic attendance by resolution at a general meeting. It was argued that the committee should decide on its own whether (and when) to allow such virtual attendance to occur.

The Centre does not recommend any changes to the BCCM Act or the Regulation Modules in regard to electronic attendance at committee meetings at this time.

Recommendation 45

It is recommended that body corporate committees should continue to decide whether to allow committee members to attend committee meetings by telephone or video conference facilities.

4.5. Proxies for general meetings

Question

68. If the BCCM Act facilitates electronic distribution of meeting notices and electronic voting, is there any reason to continue to allow the use of proxies for general meetings?

Of the submissions that addressed this question 52% argued that there are reasons to keep proxies, even if the BCCM Act permits electronic voting while 46% responded that proxies should not be kept (the remainder argued for conditional use). The strongest argument in favour of retaining proxies is that a lot owner may want someone else to represent their interest at a general meeting and to make decisions for them, for example if the lot owner is in ill health, lives far away or cannot access the other methods of voting that may be available. In addition, proxies can be used to overturn a decision of a chairperson to rule a motion out of order.¹²⁶

The strongest argument against retaining proxies is the potential for abuse through ‘proxy farming,’ which is a practice whereby an individual or small group of lot owners gather as many proxies as they can in order to control enough votes to get a motion passed at a general meeting, effectively controlling the body corporate. A number of submissions argued in favour of keeping proxies but also argued for tighter restrictions on their use. It was noted that where investor owners assign a proxy to the caretaking service contractor this could create a conflict of interest allowing the caretaking service contractor to effectively control major decisions of the body corporate.

Under the Standard Module, for schemes with 20 or more lots, a person may hold proxies for no more than 5% of the lots.¹²⁷ If the scheme has less than 20 lots, a person may hold a proxy for only one lot. Under the Accommodation Module, the same restrictions apply except that if there are more than 20 lots a person can hold proxies for up to 10% of the lots.¹²⁸ These restrictions do not apply under the Commercial Module or the Small Schemes Module.

Under the Standard and Accommodation Modules, a body corporate may, by special resolution, prohibit the use of proxies for particular things or altogether.¹²⁹ This is not expressly provided for under the Commercial or Small Schemes Module.

The Centre recommends that the use of proxies should be retained but is of the view that the existing restrictions on proxies should be standardised across all Regulation Modules. This will create consistent expectations for lot owners in different types of schemes and may reduce conflict created by perceived conflicts of interest. The Centre is of the view that the position under the Standard Module should apply. This would mean that a person may hold proxies for no more than 5% of the

¹²⁶ Persons present and entitled to vote may overturn the decision of a person chairing a general meeting to rule a motion out of order: Standard Module s 81(3); Accommodation Module s 79(3); Commercial Module s 48(3); Small Schemes Module s 42(3). Obviously, this can only apply to persons present personally or by proxy as those voters present by voting paper would not be able to cast a vote on an issue raised from the floor at the general meeting.

¹²⁷ Standard Module s 107(4).

¹²⁸ Accommodation Module s 105(4).

¹²⁹ Standard Module s 107(2); Accommodation Module s 105(2).

lots if there are 20 or more lots and no more than one proxy if there are fewer than 20 lots in the scheme.¹³⁰

The Centre recommends that all schemes should have an express ability to exclude the use of proxies for particular things or altogether by a special resolution of the body corporate.

Recommendation 46

It is recommended that the Regulation Modules be amended so that under all Regulation Modules:

- if there are 20 or more lots in the scheme, no person may hold proxies greater in number than 5% of the lots;
- if there are fewer than 20 lots in the scheme, a person may hold one proxy; and
- all schemes have an express ability to restrict the use of proxies for particular things or all together by a special resolution of the body corporate in a general meeting.

4.6. Proxies for committee meetings

Question

69. If the use of proxies is prohibited for general meetings, should the use of proxies also be prohibited for committee meetings?

70. If telephone or video conference attendance is allowed for committee meetings, is there any need to keep proxies?

The submissions that responded to these questions supported retaining proxies for committee meetings. It was noted that committee meeting agendas are more fluid than general meetings as motions and issues are much more likely to be raised from the floor or tabled for discussion without any advance notice. However it was also noted that committee meetings require a strong element of personal involvement, and that elected members should not regularly defer their decision making power to another.

Despite this, there are still good reasons to keep proxies for committee meetings. Even if telephone or video conference attendance is available, committee meetings may be infrequent¹³¹ and a committee member may not have the ability to attend for any number of reasons. Further, if a committee voting member is absent from two consecutive meetings without the committee's leave, that member's position becomes vacant. A committee voting member can avoid this by giving a proxy to another person.¹³²

¹³⁰ There can be no more than 6 lots under the Small Schemes Module so a person should be limited to holding a proxy for no more than 1 lot.

¹³¹ There is no requirement to hold committee meetings under the Regulation Modules.

¹³² Standard Module s 33(2)(d); Accommodation Module s 33(2)(d); Commercial Module s 15(2)(d). This does not apply under the Small Schemes Module as the committee is made up of just the treasurer and secretary. If one is not present, there can be no committee meeting.

Recommendation 47

It is recommended that there should be no change to the existing provisions relating to the use of proxies at committee meetings.

5. First AGM

5.1. Compulsory agenda items

Question

71. Are there other items that should be included on the agenda for the first AGM?

Theoretically, the first AGM is when the original owner hands control of the body corporate over to the lot owners. In practice, this does not always occur as the original owner may still own a significant number of lots in the scheme. However, at this point a committee is elected and other lot owners begin to have a greater say in the running of the scheme.

It was noted in some submissions that lot owners should have the opportunity to submit items for inclusion on the agenda for the first AGM. Generally, motions submitted by lot owners must be received by the body corporate prior to the end of the financial year to be included on the agenda for the next AGM.¹³³ However, for the first AGM there is no preceding financial year. The Centre recommends that motions submitted by lot owners for consideration at the first AGM should be included on the agenda if it is practicable to include the motion.

The majority of submissions that responded to this question said that there are additional issues to be included on the agenda for the first AGM. While there was little consensus on what additional items should be included, one issue that was raised repeatedly was an independent assessment of building defects in the scheme. It was suggested in the submissions that this should be a compulsory item on the agenda for the first AGM.

Such an assessment, prepared by a qualified expert to the relevant standard could serve a myriad of purposes. Firstly, it could provide a baseline level of the quality of the construction which could be useful in any future disputes that may arise during the statutory building defect period. Secondly, the assessment could identify areas of the built environment or body corporate assets that may require regular maintenance, putting the body corporate on notice that the maintenance obligations should be complied with for optimal longevity. Thirdly, the assessment could identify major defects that may not be readily apparent but which could, with early rectification, reduce any additional damage or avoid other issues that may arise. Fourthly, such an assessment could reduce or eliminate disputes about defects that arise in the statutory defects period.

At the first AGM, it is likely that the original owner may still own a majority of lots in the scheme or at least control a majority of the voting power. The BCCM Act recognises that the original owner may control the body corporate for a particular time by reference to a concept called the 'original owner control period' which is defined as the period in which:

¹³³ For example, Standard Module s 69(3).

- the body corporate is constituted solely by the original owner (i.e. after registration but before the first AGM has been held); or
- the original owner owns, or has an interest in, the majority of lots in the scheme or, in any other way, controls the voting of the body corporate.¹³⁴

There is a potential that during the original owner control period a motion to obtain an independent defects assessment may be unlikely to pass in a general meeting of the body corporate. However, failure to obtain an independent defects report may be viewed unfavourably by potential purchasers upon review of the body corporate records.

Further, provided the cost is below the committee spending limit, the committee elected at the first AGM would be able to obtain a defects assessment by an ordinary resolution of the committee at a committee meeting or vote outside committee meeting. If the original owner is a committee member, it is very likely that they would be required to refrain from voting on a resolution to obtain the defects assessment due to the conflict of interest provisions in the code of conduct for committee voting members.¹³⁵

The Centre recommends that the BCCM Act and the Regulation Modules should provide that the agenda for the second AGM for a scheme is required to include a statutory motion for the body corporate to decide whether to obtain an independent building defects assessment. Making this a statutory agenda item at the second AGM may reduce the risk of the motion being defeated by the original owner. Further, as it may take some time for any building defects to become apparent, obtaining the report in the first two to three years of the scheme may be beneficial. Currently, the BCCM legislation does not specifically prescribe any particular items for the second AGM (aside from motions required to be on the agenda of any general meeting).¹³⁶ This means that a new provision will need to be added to the legislation to set out the statutory agenda item for the second AGM. A body corporate would be free to obtain a defects assessment at any time, and if such an independent assessment has already been obtained, there would be no need to approve the motion at the second AGM.

Another issue that was raised for consideration at the first AGM is the body corporate's address for service as notified to the Titles Registry.¹³⁷ The Centre recommends that at the first AGM, the body corporate should consider whether it is necessary to update the address for service of the body corporate. Question 86 of the Issues Paper (discussed at section 7.2 and Recommendation 60 below) asked whether the address for service of the body corporate should include an email address. As discussed at section 7.2, there are a number of concerns that are relevant to including an email address with the physical address for service notified to the Titles Registry. The issue of creating an

¹³⁴ BCCM Act Schedule 6 (definition of 'original owner control period').

¹³⁵ BCCM Act Schedule 1A s 6; Standard Module s 53(2); Accommodation Module s 53(2); Commercial Module s 27(2); Small Schemes Module s 21 (note that the office holder may vote even if there is a conflict of interest if the office holder has the specific authorisation of the body corporate).

¹³⁶ For example, question of whether to audit the statement of accounts: Standard Module s 155; Accommodation Module s 153; Commercial Module s 111; Small Schemes Module s 89 (note that the Small Schemes does not require the body corporate to conduct an audit).

¹³⁷ BCCM Act s 315(2).

email address (if the body corporate decides to create one) for the scheme and designating a party responsible for accessing it should be addressed at the first AGM.

Recommendation 48

It is recommended that the agenda for the first AGM should include motions submitted by lot owners if it is reasonably practical to include those motions on the agenda.

Recommendation 49

It is recommended that the BCCM Act and Regulation Modules be amended to require that the agenda for the second AGM must include a motion for the body corporate to decide whether or not to obtain an independent building defects assessment.

Recommendation 50

It is recommended that at the first AGM, the body corporate consider:

- updating the contact details of the body corporate including the body corporate's address for service as recorded with the Titles Registry; and
- whether or not to establish an email address for the scheme and, if so, the responsible party for accessing such email and the arrangements for such access.

5.2. Specific documents to be handed over

Question

72. Should the documents and materials required to be handed over by the original owner at the first AGM expressly include the development approval for the site?

73. What other documents should be expressly listed for hand over by the original owner at the first AGM?

All but two of the submissions that responded to question 72 argued that the development approval for a scheme should be expressly listed as a document to be handed over by the original owner to the body corporate at the first AGM. It was noted that this document is likely already required under a plain language interpretation of the relevant provision¹³⁸ despite anecdotal evidence that it is not often included.

If the body corporate does not have the final development approval for the scheme it may inadvertently approve changes at the scheme that conflict with the development approval. This has the potential to create compliance issues for the body corporate and the local council.

The UDIA argued against requiring the development approval to be handed over. The UDIA noted in its submission that the development approval is highly technical and unlikely to be accessible by the typical lot owner. Further, it was argued, the development application can change frequently in the early stages and an earlier version of the development application may cause confusion for the body corporate. The UDIA argued that the development approval is available from the council and a body

¹³⁸ Standard Module s 79; Accommodation Module s 77; Commercial Module s 46; Small Schemes Module s 40.

corporate that requires the development approval should obtain the final version directly from the council.

Despite this, there are strong arguments in favour of expressly listing the development approval as one of the documents to be handed over at the first AGM. The first is that the body corporate must comply with the development approval. The second is that, as it is arguably already required to be handed over, expressly listing it will avoid future disputes by dispelling the uncertainty. This may help to avoid prolonged arguments and legal wrangling between the body corporate and the original owner.

A number of documents and materials are required to be handed over under the existing legislation. The issue is that the description of the types of documents and material is very broad and there may be leeway to argue as to whether specific documents are required or not. The Centre recommends retaining the current broad requirements but also, for the avoidance of doubt, expressly enumerating a list of documents and material to be handed over.

The submissions suggested a number of documents that should be expressly included for handover at the first AGM. The Centre recommends that in addition to the final development approval for the site, the following documents should be expressly listed for handover at the first AGM:

- a fire safety plan (a fire safety certificate is already expressly required);
- building and maintenance contracts (contracts for building work or other work of a developmental nature carried out on scheme land are already required);
- supply contracts (hot water, gas, electricity, etc.);
- copies of any warranties;
- any authorisation such as a proxy or a power of attorney held by the original owner¹³⁹ to vote at the first AGM on behalf of a lot owner;
- any documents relating to a claim made against the body corporate's policy of insurance prior to the first AGM;
- an electronic, editable copy of the most recent community management statement (**CMS**) registered with the Titles Registry, including an electronic version of exclusive use plans and service location diagrams¹⁴⁰ in the CMS;¹⁴¹
- a facilities management plan (see section 5.4 below); and
- a 5-year administrative fund forecast (see section 5.4.2 below).

¹³⁹ Both a power of attorney and a proxy are required to be given to the secretary: Standard Module ss 83(2)-(3), 107(5); Accommodation Module ss 81(2)-(3), 105(5); Commercial Module ss 50(2)-(3), 74(2); Small Schemes Module ss 44(2)-(3). However there is no secretary prior to the first AGM. It is prudent, therefore, to require these documents to be handed over at the first AGM.

¹⁴⁰ BCCM Act s 66(d).

¹⁴¹ This is particularly important given that amending the by-laws or other changes to the CMS require registering a new CMS: BCCM Act s 54(1). Often this means that new CMSs are photocopies of the previous version, with the relevant pages changed. Over time, the plans contained in the CMS become unreadable and the body corporate may be forced to undertake a new survey to create a readable diagram when making an unrelated change to the CMS.

Recommendation 51

It is recommended that the list of documents and materials in the Regulation Modules that are required to be given to the body corporate by the original owner at the first AGM should be amended to expressly include the following documents:

- the final development approval for the site;
- a fire safety plan;
- building and maintenance contracts;
- supply contracts (hot water, gas, electricity, etc.);
- copies of any warranties;
- any authorisation (e.g. a proxy or a power of attorney) held by the original owner;
- any documents relating to a claim made against the body corporate's policy of insurance prior to the first AGM;
- an electronic, editable copy of the community management statement (**CMS**) including an electronic version of exclusive use plans and service location diagrams in the CMS;
- a facilities management plan; and
- a 5 year administrative fund forecast.

5.3. Disputes with the original owner

Question

74. Should disputes about contraventions of the BCCM Act between the body corporate and the original owner be added to the definition of dispute under chapter 6 of the BCCM Act so that the body corporate can take action against the original owner through the BCCM Commissioner's office?

Of the submissions that responded to this question, 91% supported this change. However implementing this is not as simple as just adding the original owner as a party to a dispute under the BCCM Act.¹⁴² As mentioned in the Issues Paper, the jurisdiction of the BCCM Commissioner is limited to issues of compliance with the BCCM Act. A dispute between the original owner and the body corporate relating to issues such as, for example, building defects or the assignment of management rights is outside the scope of the BCCM Act.

If this change is made, an application for adjudication between the body corporate and the original owner will have to be dismissed if the adjudicator does not have jurisdiction to deal with the dispute (i.e. it is outside the scope of the BCCM Act) or the dispute should be dealt with in a different court or tribunal.¹⁴³ This may create an increased burden on the resources of the BCCM Commissioner's office. Given this, if the definition of a dispute under the BCCM Act is amended to include the original owner, the scope of the action and the remedy sought would have to be very narrowly defined.

The Centre recommends that the original owner should be a party to a dispute under the BCCM Act for two specific causes of action. They are:

¹⁴² BCCM Act s 227.

¹⁴³ BCCM Act s 270.

- an action by the body corporate seeking hand over of documents required by the BCCM Act to be provided by the original owner to the body corporate; or
- an action by a lot owner against the original owner for failure to call the first AGM as required under the relevant Regulation Module.¹⁴⁴

It is recommended that the BCCM legislation be amended to allow the body corporate to request documents from the original owner and to allow a lot owner to request the original owner hold the first AGM in accordance with the relevant Regulation Module. If the original owner fails to comply with the request, the body corporate or lot owner should have recourse to dispute resolution under the BCCM Act.

Recommendation 52

It is recommended that the BCCM Act and the Regulation Modules be amended to provide that the body corporate has an express ability to request the original owner to:

- hand over any documents or other material required to be handed over to the body corporate at the first AGM if, after the first AGM, those documents or other material have not been handed over; and
- call the first AGM in accordance with the relevant Regulation Module.

To the extent the original owner fails to comply with either request, the original owner should be a party to a dispute for the purposes of the BCCM Act for failure to comply with the request.

5.4. Facilities management plan

Question

75. Should the original owner produce a management plan for the scheme, setting out the lifecycle and maintenance requirements for body corporate assets and significant infrastructure?

The vast majority of submissions that responded to this question supported the idea of a management plan, including the submissions of strata industry groups such as the UOAQ, SCA, OCN and ARAMA. Many submissions also supported a requirement that the plan be included as an item to be handed over by the original owner at the first AGM.

A management plan for body corporate facilities (**facilities management plan**) may be comprised of a series of maintenance schedules for facilities on common property and body corporate assets. This will provide the body corporate with a benchmark of minimum maintenance requirements to be undertaken at regular intervals. It is not suggested that there be sanction for failure to adhere to this plan but its primary purpose is to assist the body corporate in understanding its maintenance

¹⁴⁴ For example, Standard Module s 77(1); Accommodation Module s 75(1); Commercial Module s 44; Small Schemes Module s 38(1).

obligations in relation to the common property particularly during the initial years of the building but also beyond.

The body corporate is under an obligation to maintain common property in good condition, including maintaining structures in structurally sound condition.¹⁴⁵ Volunteer committee members may not have a background in property management and they may not be fully aware of the maintenance requirements of particular common property and body corporate assets. A facilities management plan could provide the body corporate with guidance as to how best to undertake the requisite maintenance for each item included in the plan.

It is suggested below that compliance with the facilities management plan by the body corporate could be viewed as prima facie evidence of compliance with the obligation to maintain the common property. However, if the body corporate has knowledge of a matter that is not included in the facilities management plan or where the plan is inadequate, failure to act to address the issue will not be excused just because it is not in the facilities management plan. This means that if a maintenance issue arises that is not included in the facilities management plan, or arises earlier than anticipated in the plan, the body corporate's obligation to maintain common property will continue to apply.

5.4.1. Recent reforms in NSW

Recent changes to the strata title legislation in New South Wales (**NSW**) now require something akin to a facilities management plan. The strata titles legislation in that state requires developers to produce an initial maintenance schedule¹⁴⁶ to provide the body corporate¹⁴⁷ with information about obligations and costs relating to the maintenance of common property. According to the regulations¹⁴⁸ the initial maintenance schedule must contain a schedule for maintaining a number of items including, but not limited to: exterior walls, guttering, downpipes and roofs; pools and surrounds (including fencing and gates); air conditioning, heating and ventilation systems; fire protection equipment; and security access systems. In NSW, the body corporate will not be required to adopt the initial maintenance schedule¹⁴⁹ but it may be considered in a proceeding for building defects.

In NSW, this is particularly relevant given the introduction of a 2% bond payable by the developer of a scheme which will be held until the building defects period has expired. The bond will be held as security to fix any defective building work.¹⁵⁰ The initial maintenance schedule will inform owners of their maintenance obligations and may be used as evidence in a proceeding about building defects.¹⁵¹

¹⁴⁵ BCCM Act s 152; Standard Module s 159; Accommodation Module s 157; Commercial Module s 115; Small Schemes Module s 93.

¹⁴⁶ *Strata Schemes Management Act 2015* (NSW) s 115.

¹⁴⁷ In NSW, the body corporate is referred to as an 'owners corporation'.

¹⁴⁸ *Strata Scheme Management Regulation 2016* (NSW) s 29.

¹⁴⁹ But the plan may be used to determine whether a defect or damage to a building could have been avoided by the taking of specific action: *Strata Scheme Management Act 2015* (NSW) s 115(3)-(4).

¹⁵⁰ The building defect bonds scheme will not start until 1 July 2017: http://www.fairtrading.nsw.gov.au/ftw/About_us/Legislation/Changes_to_legislation/Major_changes_to_strata_laws.page.

¹⁵¹ *Strata Scheme Management Act 2015* (NSW) s 115(4).

NSW legislation also places an obligation on developers to set realistic levies during the original owner control period.¹⁵² If the levies are inadequate to meet the actual or expected expenditures of the body corporate, the developer may be liable to pay compensation to the body corporate.¹⁵³ This issue was included in the legislation to address a perception that developers would underfund the obligations of the body corporate to keep levies low and encourage people to purchase units. Purchasers would buy a lot in the scheme, partly based on the low levies. However, due to the underfunding in the initial period, sometimes levies would increase significantly, even doubling or more, in subsequent years.¹⁵⁴

With the introduction of the 2% developer bond in NSW, it is useful to consider whether there is merit in the introduction of a similar provision in Queensland. Such a measure could go a long way to improving the public perception of building developers and could potentially save lot owners significant time and money. However, the Centre is of the view that the operation of the system in NSW should be monitored and the introduction of a similar provision in Queensland should be considered in the future.

5.4.2. Recommendation for Queensland

The Centre recommends that the BCCM Act should impose an obligation on the original owner of a scheme to create and hand over at the first AGM a facilities management plan detailing a maintenance schedule for common property and body corporate assets. The specific items included in a facilities management plan will vary from scheme to scheme but the items required to be included could be listed in each relevant Regulation Module.

The Centre recommends that bodies corporate be encouraged, but not required, to adopt the facilities management plan. 'Adoption' in this sense means budgeting for and performing maintenance in accordance with the plan at the scheduled intervals and may be achieved with or without a formal resolution adopting the plan.

It is recommended that compliance with a facilities management plan should be prima facie evidence of compliance with the obligation to maintain common property in good condition. However, compliance with the facilities management plan alone may not be sufficient to discharge the obligation if the common property is damaged in some way, fails earlier than anticipated in the plan or is not covered in the plan.

¹⁵² In NSW, this is called the 'initial period': *Strata Schemes Management Act 2015* (NSW) s 4 (definition of 'initial period'). It covers the period from when the strata plan is registered to when the developer has sold at least 1/3 of the lots (or 1/3 of the lot entitlements (called unit entitlements in NSW)).

¹⁵³ *Strata Schemes Management Act 2015* (NSW) s 89.

¹⁵⁴ NSW Government, Fair Trading (November 2013) *Strata Title Law Reform: Strata & Community Title Law Reform* Position Paper, p 29 at 3.2. Available at http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Have_your_say/Strata_title_law_reform_position_paper.pdf.

To ensure that lot owners understand the maintenance obligations that will arise at a scheme, the Centre recommends that there be a mechanism to fund the facilities management plan for a set period of time. This can be similar to the way sinking fund budgets are forecast. Under the existing regulations, the original owner must create a 10-year estimate of the body corporate's sinking fund expenditure.¹⁵⁵ It is up to the body corporate to approve a budget that funds the sinking fund during each of those years.

The Centre recommends that in a manner similar to the sinking fund forecast, the original owner should be required to produce a detailed and comprehensive estimate of the body corporate's administrative fund expenditure¹⁵⁶ for the scheme's first 5 years that includes the costs of implementing the facilities management plan. At the first AGM, the original owner should put forward a budget that funds the sinking fund forecast and the administrative fund forecast. At the first AGM and each AGM after that, it will be a matter for the body corporate to approve budgets that adequately fund the estimated costs to both the administrative fund forecast and the sinking fund forecast.

This recommendation serves a dual purpose. The first is that it will ensure that the levies set by the original owner in the budgets for the first AGM will be sufficient to fund the maintenance obligations of the body corporate as embodied in the facilities management plan. Secondly, the administrative fund forecast will allow prospective lot owners to understand the financial commitment that will be required to fund the maintenance obligations for the first 5 years of the scheme. This will function as a consumer protection mechanism that will reduce the incidence of developers underfunding the body corporate in order to keep levies unsustainably low.

Recommendation 53

It is recommended that the BCCM legislation impose an obligation on the original owner of a scheme to prepare, and hand over to the body corporate at the first AGM:

- a facilities management plan that includes a maintenance schedule for facilities on common property and body corporate assets; and
- a detailed and comprehensive estimate of the body corporate's administrative fund expenditure for the scheme's first 5 years that includes an estimate of the cost of implementing the facilities management plan.

¹⁵⁵ Standard Module s 79(1)(i); Accommodation Module s 77(1)(i); Commercial Module s 46(1)(i); Small Schemes Module s 40(1)(i).

¹⁵⁶ Under the Regulation Modules, maintenance obligations must be funded from the administrative fund, as only prescribed items are funded through the sinking fund: Standard Module s 146(2); Accommodation Module s 144(2); Commercial Module s 105(2); Small Schemes Module s 80(2).

6. Dispute resolution

6.1. Standing in layered schemes

Question

76. Should the definition of dispute in the BCCM Act include disputes between a principal body corporate and a lot owner in a subsidiary scheme?

While this question had a relatively low response rate (only about 1/3 of the submissions addressed this question), the submissions that did respond overwhelmingly supported amending the definition of disputes to encompass a dispute between a principal body corporate (**PBC**) and a lot owner in a subsidiary scheme.

A lot owner in a subsidiary scheme who wants to take action against the PBC must currently do so through the subsidiary scheme body corporate. It is only through membership of the subsidiary scheme that the lot owner has an interest in the PBC. If the lot owner cannot get the subsidiary scheme body corporate to take action, that lot owner could always seek to challenge the subsidiary scheme body corporate's decision with the BCCM Commissioner's office.

However, there are some situations where there is a direct link between the owner in a subsidiary scheme and the principal body corporate. The main example of this is a principal body corporate by-law that applies to owners in the subsidiary scheme.

The Centre recommends a narrowly drawn expansion of the dispute resolution provisions to recognise a dispute between a lot owner in a subsidiary scheme and the principal body corporate in two specific circumstances. These are:

- access to body corporate records; and
- enforcement of the by-laws of the PBC.

The Centre recommends that disputes that fall outside of these specific areas should continue to be dealt with through the subsidiary scheme and the PBC.

Recommendation 54

It is recommended that the dispute resolution provisions of the BCCM Act be expanded to recognise a dispute between a principal body corporate (**PBC**) and a lot owner in a subsidiary body corporate to the extent that the dispute relates to access to the PBC's records or enforcement of the by-laws of the PBC.

It is recommended that disputes between a lot owner in a subsidiary scheme and the PBC that fall outside these areas should continue to be dealt with through the subsidiary scheme and the PBC.

6.2. Applications and submissions

Questions

- 77. Should the BCCM Act allow notices of applications for adjudication to be given electronically to lot owners?**
- 78. Should the body corporate be able to satisfy the requirement to ‘give’ a copy of an adjudication application to lot owners if the application is made available electronically and the body corporate gives each lot owner instructions on how to access the application?**
- 79. Should the legislation limit the length of an application for adjudication to a statutory maximum number of pages?**
- 80. Should the applicant be required to pay for the cost of printing and distributing the application to lot owners in the scheme?**
- 81. Should the legislation limit the length of a submission in response to an application for adjudication to a statutory maximum number of pages?**

Similar to the questions about electronic distribution of documents (discussed at section 4.2 above) the submissions strongly supported electronic distribution of notices of applications for adjudication and for copies of adjudication applications. The submissions strongly supported allowing the body corporate to make an adjudication application available on-line and provide lot owners with instructions to access the full document.

The Centre understands that the BCCM Commissioner’s office now expressly allows bodies corporate to email notices of applications and extensions to lot owners who have provided the body corporate with a current email address.¹⁵⁷ It is likely that the body corporate is still required to attach the document to an email in order to satisfy the obligation to ‘give’ it to lot owners. As discussed in the Issues Paper, making a document available on a website and providing a link to access the document is unlikely to satisfy the requirement of ‘giving’ at law.¹⁵⁸

The Centre recommends that bodies corporate should be able to satisfy the obligation to give notice of an adjudication application¹⁵⁹ by email or by making the application available to each lot owner in another way, provided the body corporate also gives a physical copy to any lot owners who request one or who do not currently receive other notices under the BCCM legislation electronically.

¹⁵⁷ Office of the Commissioner for Body Corporate and Community Management, *Practice Direction 33 – Electronic Communication*, Department of Justice and Attorney General, June 2016, available at <https://publications.qld.gov.au/dataset/093b4b03-9ea8-4704-ad2c-cf6f76a06198/resource/fb30e2ac-52d2-4615-aaef-6cdaa815d639/download/pd33---electronic-communication.pdf>.

¹⁵⁸ A link to information is a communication of the means by which the information can be found, it is not a delivery of the information itself: *Conveyor & general Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30 at [28] and [37].

¹⁵⁹ BCCM Act s 243(4).

In regards to the length of the applications and submissions there were slightly more submissions favouring limits than there were against limits. However, in applications for dispute resolution, the onus is on the applicant to make their case and ensure that the adjudicator is provided with the appropriate information. The adjudicator is not required to request further information from the applicant but must assess the material provided and decide what is relevant. A limit on the length on the application could unfairly prejudice an applicant's ability to make a case.

It is prudent that the onus remain on the applicant to ensure that all the material that the applicant wants the adjudicator to consider is provided with the application. Arbitrary limits on the length of an application may prejudice the applicant's ability to put forward the best case. The Centre does not recommend limits be imposed on the length of an application at this time.

The same argument can be applied in relation to limits on the length of a submission in response to an application (question 81 in the Issues Paper). The respondent or other interested party making the submission must bear the responsibility for ensuring that the relevant information to support their claims in response to the application is put before the adjudicator. The Centre does not support limits on the length of an application or a submission in response to an application.

While the costs of distributing applications and submissions may be high, these costs can be better reduced by using electronic distribution than by limiting the length of applications and submissions.

The submissions to the Issues Paper did not support requiring applicants to pay the costs of distributing the application. It was noted that this may create access to justice issues which could leave vulnerable lot owners without a means to address their grievance unless they have a capacity to pay. It would be particularly hard on lot owners in large schemes. The Centre does not support requiring lot owners to bear the costs of distributing adjudication applications.

It is noted that if the concern to be addressed relates to frivolous or vexatious applications, this could be better addressed by increasing the ability of adjudicators to order costs when dismissing an application. Currently an adjudicator may award costs of up to \$2,000.¹⁶⁰ The Centre recommends that this should be increased to up to \$5000 if the adjudicator finds the application to be frivolous or vexatious.

Recommendation 55

It is recommended that the BCCM Act expressly allow a body corporate to satisfy the requirement to 'give' a copy of an adjudication application to lot owners if the application is made available electronically and the body corporate gives each lot owner instructions on how to access the application, provided that the body corporate also provides a physical copy to any lot owners who request one or who do not currently receive other notices under the BCCM legislation electronically.

Recommendation 56

It is recommended that there be no change to the existing provisions relating to the length of applications for adjudication or submissions in response to an application for adjudication.

¹⁶⁰ BCCM Act s 270(3).

Recommendation 57

It is recommended that the BCCM Act should provide adjudicators with an increased ability to order costs if an adjudication application is found to be frivolous or vexatious.

7. Miscellaneous issues

7.1. Body corporate seal

Questions

- 82. Is there any reason to retain the requirement to use a body corporate seal?**
- 83. If the requirement to use the body corporate seal is removed, who should be able to execute documents on behalf of the body corporate? Two executive committee members, one executive member and one ordinary member or two ordinary members?**
- 84. If the requirement to use the body corporate seal is removed, what safeguards should be placed in the legislation for third parties dealing with bodies corporate?**

Two thirds of the submissions that responded to question 82 argued that there is no reason to retain the body corporate seal. It was submitted that where a document currently requires the seal, the body corporate resolution authorising that action should set out who is authorised to execute the document on behalf of the body corporate. Alternatively, it was argued, the default provisions in the Regulation Modules could apply.

The Regulation Modules¹⁶¹ provide that if the body corporate has not decided how the seal is to be used, then the seal may be applied if witnessed by the chairperson or treasurer and one other committee member¹⁶² or by the body corporate manager and another person if there is a part 5 engagement.

The Centre recommends that the existing provisions be modified to remove the requirement for the use of the seal. It is recommended that the BCCM Act provide that the body corporate resolution authorising the action (that previously required the use of the seal) may direct who is authorised to execute the document or take the action on behalf of the body corporate. If the resolution does not provide for this, a chairperson or secretary and one other committee member (or person in the case of the Small Schemes Module) will be authorised to execute a document on behalf of the body corporate. If a part 5 engagement is in place, the body corporate manager and one other person will be required to execute the document.

A number of the submissions argued that the existing protections in the BCCM Act¹⁶³ are sufficient to protect third parties dealing with the body corporate if the use of the seal is no longer required. Given this, the Centre does not recommend any change to the existing protections.

¹⁶¹ Standard Module s 192(3); Accommodation Module s 190(3); Commercial Module s 148(3); Small Schemes Module s 126(3).

¹⁶² Or in the case of the Small Schemes Module, one other person.

¹⁶³ BCCM Act s 310.

Recommendation 58

It is recommended that the requirement to execute a document under the body corporate's seal should be replaced with a requirement for the document to be executed by either:

- the signature of at least two committee members, one of whom is the chairperson or secretary (for schemes under the Small Schemes Modules, one committee member and one other person); or
- if a body corporate manager is acting under a chapter 3 part 5 engagement, the body corporate manager and one other person; or
- as directed by the body corporate in the resolution authorising the transaction the subject of the document being executed.

Recommendation 59

It is recommended that the requirement to maintain and use a body corporate seal should be removed from the BCCM legislation.

7.2. Body corporate address for service

Questions

85. Should bodies corporate be required to update the address for service? If the address has not been given or is out of date, what should be the default address?

86. Should the address for service of the body corporate include an email address?

The address for service of the body corporate is notified to the Registrar of Titles and is recorded on the indefeasible title for the common property.¹⁶⁴ Nearly all of the submissions that responded to question 85 agreed that the body corporate should be required to update¹⁶⁵ its address for service regularly. In the event that the body corporate has not notified the Registrar of Titles of an address for service (i.e. the address is out of date) the BCCM Act provides that the address for service of the original owner as shown on the first CMS for the scheme will be the address for service.¹⁶⁶ The issue is that in some cases, the original owner may no longer exist, or the address as shown on the first CMS is well and truly out of date. It was suggested in the submissions that the default address should be: firstly, the address of the body corporate manager (if one is appointed); secondly, the address of the scheme itself; and finally, the address of the secretary for the scheme.

In regards to whether the address for service of the body corporate should include an email address, again, nearly all submissions that responded to this question believed that it should. It was noted that this may be difficult to implement in practice. The email address for the body corporate would have to be a dedicated email for the scheme and not the personal address of the original owner or a committee member.

¹⁶⁴ BCCM Act s 315(2).

¹⁶⁵ This is done by submitting a general request to the Titles Registry.

¹⁶⁶ BCCM Act s 315(3).

However, the creation of an email address and the access to that address can be treated similarly to the creation and access of a financial account. The email address should be established specifically for the scheme and the body corporate should decide who is responsible for accessing the account (e.g. the secretary or the body corporate manager). As discussed at section 5.1 above, if a body corporate decides to create an email address for the scheme, this should be addressed at the first AGM.¹⁶⁷

It was noted that such an email address, if provided, should not replace the need for a physical mailing address (similarly to the way that the address for service of a lot owner must include a physical address and may include an email address: see section 4.1 above).

To further ensure the currency of the body corporate's address for service, the Centre recommends that where a body corporate manager is appointed by a scheme, the BCCM Act should impose an obligation on the body corporate manager to ensure that the address for service of the scheme is up to date. When the body corporate appoints a new body corporate manager, if the address for service of the body corporate needs to be updated, the body corporate manager is well placed to inform the body corporate of this fact, and to ensure that the motion appointing the body corporate manager contains an authorisation to lodge an updated address for service with the Titles Registry.¹⁶⁸

Recommendation 60

It is recommended that the BCCM Act place an obligation on bodies corporate to ensure that the address for service of the body corporate as notified to the registrar is promptly updated in the event that the address changes. If the body corporate has engaged a body corporate manager, that manager should be jointly liable with the body corporate for ensuring the compliance with this obligation.

Recommendation 61

It is recommended that if the body corporate has not advised the registrar of its address for service, or the address for service is out of date, the address for service of the body corporate will be the address of the scheme itself.

7.3. Authority to settle legal proceedings

Question

87. How should the BCCM Act deal with the issue of settling legal proceedings? Should a special resolution be required or should the BCCM Act authorise the chairperson or the committee to decide to settle or discontinue legal proceedings, if that decision is supported by written advice from a solicitor?

¹⁶⁷ See Recommendation 50.

¹⁶⁸ Registration of the updated address for service with the Titles Registry is likely to require evidence of the body corporate's consent to the change in the form of a body corporate resolution.

The submissions were evenly divided as to whether to continue to require a special resolution to settle legal proceedings or to allow the chair or committee to settle based on written legal advice. A high number of submissions gave qualified responses. Some of these did not support authorising a single person (chair) to make the decision. Others noted that the terms of the settlement (i.e. what the body corporate is required to do to settle the proceedings) may mandate a special resolution or even a resolution without dissent to achieve.

A body corporate legal specialist commented that lawyers will not always be able to give a clear 'settle for this' type of legal advice as there may be risks with any type of settlement. Ultimately, it will be for the body corporate to decide what risks or consequences it is willing to accept.

Some submissions argued that the motion authorising legal proceedings should set the terms on which the committee could settle the matter and authorise a committee to do so. It was noted, however, that the protracted nature of some legal proceedings means that several years (and various committees) may have come and gone between commencement and settlement.

Several submissions said that there should be no change in the law in relation to this issue. It was noted that the committee can settle a dispute if the quantum is within the committee spending limit. If above the relevant limit for committee spending, a resolution of the body corporate is required. The type of resolution will depend on the terms of the settlement.

The Centre recommends that there should be no change to the provisions at this time. However, the Centre also recommends that bodies corporate should be encouraged to decide on the scope for settlement at the time they commence legal proceedings. This encouragement could come in the form of advice from a legal practitioner prior to the body corporate entering into legal proceedings or could be in the form of information from the BCCM Commissioner's office, such as a checklist of things to think about when the body corporate is involved in litigation.¹⁶⁹ A prudent body corporate should specify the terms of an acceptable settlement at the time they commence legal proceedings.

Recommendation 62

It is recommended that there should be no change to the provisions relating to authority to settle legal proceedings. However, it is recommended that bodies corporate be encouraged to authorise the committee to settle legal proceedings within specified parameters in the resolution authorising the commencement of those legal proceedings.

7.4. Continuation of contributions

Question

88. If the body corporate is unable to pass a budget at a general meeting, should the contributions from the previous year continue to apply until such time as a new budget and new contributions are passed? Why or why not?

¹⁶⁹ It should be noted that the BCCM Commissioner does not provide legal advice.

Nearly every submission that responded to this question supported this. Some submissions noted that the Regulation Modules already allow a committee to fix interim levies.¹⁷⁰ These levies must be based on the previous financial year and cover the period from the end of the previous financial year to two months after the proposed date of the general meeting. The interim levy must be subsequently set off against liability for levies decided by the body corporate.

The Centre recommends that there be no change to the current provisions.

Recommendation 63

It is recommended that there is no change to the provision in the Regulation Modules which allows a committee to set interim contributions to be levied on the owner of each lot before the owner is levied contributions fixed on the basis of the body corporate's budgets for a financial year.

7.5. Continuation of committee members

Question

89. What is the best way to educate committee members about their responsibilities beyond the AGM after they are elected?

The intent of this question was to solicit responses as to how to educate committee members generally. Many of the submissions understood this and made suggestions accordingly. Some of the suggestions included the following:

- mandatory online training for committee members followed by an assessment;
- additional resources for the BCCM Commissioner to provide education to lot owners and committee members;
- provisions that require nominations for committee voting positions to include details about the professional qualifications of the person nominated for the position (so lot owners will know a bit about the person and their experience);
- mandating that body corporate managers provide an induction package to new lot owners and;
- requiring committee voting members to sign a statutory declaration that they have read the BCCM Act and are familiar with their obligations as a committee voting member.

Some of these measures are more practical than others. The BCCM Commissioner's office is tasked with providing both a dispute resolution service¹⁷¹ and an education and information service for lot owners and the general public.¹⁷² The Centre is of the view that any new induction procedures or additional training for lot owners and committee members should be provided through the BCCM

¹⁷⁰ Standard Module s 141(3)-(4); Accommodation Module s 139(3)-(4); Commercial Module s 100(3)-(4); No equivalent provision is available under the Small Schemes Module.

¹⁷¹ BCCM Act s 232(2).

¹⁷² BCCM Act s 232(3).

Commissioner's office as an addition to the existing educational services.¹⁷³ The information and education services provided by the BCCM Commissioner contribute to effective governance of community titles schemes.

The role of the BCCM Commission becomes even more important given the increase in community titles schemes registered in Queensland. In March 2014 there were 42,948 community titles schemes in Queensland.¹⁷⁴ By March 2017, that number had increased to 46,630,¹⁷⁵ an increase of about 100 new schemes per month. To the extent that these Recommendations, and other recommendations arising from the Property Law Review are implemented in legislation, there will be changes that will affect every lot owner. The BCCM Commissioner will play a vital role in developing new informational and training material so that lot owners will be aware of the changes and will be able to comply with the legislation.

As the number of lots and lot owners in community titles schemes increase, the chances for dispute and conflict also increase. This makes it vitally important that committee members have a strong understanding of their role, as committee members and lot owners. The community titles sector relies on lot owner involvement at the body corporate and committee level and the need to ensure that lot owners understand their rights, obligations and responsibilities becomes paramount to ensure that conflict within a scheme is minimised.

The Centre recommends that the role of the BCCM Commissioner should continue to be supported and, to the extent necessary, given additional support, to adequately deal with the growth in community titles schemes. The increasing number of lot owners and the changing legislative context mean that the BCCM Commissioner may need to update and renew its existing training materials so that the information service remains relevant for new and existing lot owners in community titles schemes.

Recommendation 64

It is recommended that support for the educational and training function of the BCCM Commissioner should continue, and to the extent needed to respond to the growth of community titles schemes in Queensland, be increased. This is necessary to ensure that lot owners and bodies corporate benefit from the continued availability of high quality informational material in relation to the nature of community living, the rights and obligations of lot owners and the nature of legislative changes (if any) that are introduced.

¹⁷³ The BCCM Commissioner's office provides a comprehensive free online training program for body corporate members: <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/roles-and-responsibility/training-and-seminars/training/>.

¹⁷⁴ Queensland Government, Department of Justice and Attorney-General, Office of Body Corporate and Community Management Commissioner, *Common Ground*, Issue 12, 2, available at <https://publications.qld.gov.au/dataset/5530e3a9-a16f-4ad2-b1c7-7f5ed9bce762/resource/567442cb-eb98-4035-9bf6-31a82f91e33c/download/commongroundissue12.pdf>.

¹⁷⁵ Queensland Registrar of Titles: Information provided by the Office of the Registrar of Titles, Department of Natural Resources and Mines, Queensland as at 31 March 2017

8. Conclusion

It is clear from the submissions to the Issues Paper that there is room for improvement and modernisation in the BCCM Act. The Centre has made the preceding Recommendations based on the submissions to the Issues Paper and consultation with industry groups. In conjunction with the final recommendations to earlier issues papers¹⁷⁶ it is anticipated that these recommendations will assist with the implementation of a more streamlined and modern approach to dealing with property under the BCCM Act.

¹⁷⁶ Commercial and Property Law Research Centre, *Property Law Review: Lot entitlements under the Body Corporate and Community Management Act 1997 – Final Recommendations*; Commercial and Property Law Research Centre, *Government Property Law Review: Options Paper Recommendations – Body Corporate Governance Issues: By-laws, debt recovery and scheme termination*, each released by Department of Justice and Attorney-General, available at <https://publications.qld.gov.au/dataset/400d0899-3ce7-4eb0-a242-6db01521e8db/resource/d0803718-372e-41ce-a918-344bdafcf5f6/download/property-law-review-lot-entitlements-report.pdf> and http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/508714/qut-recommendations-by-laws-debt-recovery-and-scheme-termination.pdf respectively.