

2017

Property Law Review  
Issues Paper  
*Consistency between the Body  
Corporate and Community  
Management Act 1997 and the  
Building Units and Group Titles Act  
1980*

Commercial and Property Law  
Research Centre

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## Preface

The Commercial and Property Law Research 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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## How to make a submission

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

The issues raised are not intended to be exhaustive. If you think there are other opportunities for achieving consistency between the *Body Corporate and Community Management Act 1997* and the *Building Units and Group Titles Act 1980* please include these in your response.

As this Issues Paper considers issues that affect a number of different resort developments and mixed use developments, if applicable, it would be useful if you could identify what development you are involved in or that your comments relate to (for example, Hope Island, Sanctuary Cove, Cathedral Place). This information will assist in the analysis of submissions.

The closing date for submissions is **Friday, 22 September 2017**.

Copies of Queensland legislation can be obtained at [www.legislation.qld.gov.au](http://www.legislation.qld.gov.au).

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

You may lodge your submission by email or post.

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

Alternatively, you can post your submission to:

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

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

### ***Privacy Statement***

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

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

disclosure under the *Right to Information Act 2009*, and access applications for submissions, including those marked confidential, will be determined in accordance with that Act.

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

## Disclaimer

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# 1. Background

## 1.1. Review of Queensland Property Laws

In August 2013, the former Queensland Government engaged the Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) to conduct an independent and broad-ranging review of Queensland's property laws. The purpose of this review is to identify options for reducing red tape, unnecessary regulation and property law duplication.

A core element of the review includes the options for the modernisation, simplification, clarification and reform of the *Property Law Act 1974* (Qld) in light of case law, the operation of other related legislation and changes in practice. The review also includes a range of issues involving community titles schemes arising under the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**). The Centre has previously prepared a number of Issues Papers and Final Reports which have been released by the Department of Justice and Attorney-General.<sup>1</sup>

This Issues Paper, which is the final consultation paper to consider body corporate issues, addresses the continuing operation of the *Building Units and Group Titles Act 1980* (Qld) (**BUGTA**) with respect to a number of mixed use and resort developments throughout the State. These developments are facilitated by specific legislation referred to as the **specified Acts**.<sup>2</sup> In particular, this Issues Paper considers options for harmonising the BUGTA and the BCCM Act, including the option of replacing the BUGTA with the BCCM Act to bring the developments under the specified Acts under a more contemporary body corporate legislative framework.<sup>3</sup>

Feedback is being sought from stakeholders and other interested parties to the specific questions in this Issues Paper.

## 1.2. Scope of this Issues Paper

It may be possible to replace the BUGTA with the BCCM Act thereby bringing the specified Acts under a more contemporary body corporate management framework. Such a change, should it be determined a desirable outcome, would likely require a staged transition. This process could commence with amendments to the BUGTA to more closely resemble the BCCM Act, thereby producing consistency in the provisions of the two Acts. The process could end with the full repeal of the BUGTA.

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<sup>1</sup> For a full list, see <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland>.

<sup>2</sup> *Body Corporate and Community Management Act 1997* (Qld) s 326 (definition of specified Act), which includes the following Acts: *Integrated Resort Development Act 1987* (Qld); *Mixed Use Development Act 1993* (Qld); *Sanctuary Cover Resort Act 1985* (Qld); *Registration of Plans (HSP (Nominees) Pty Limited) Enabling Act 1980* (Qld); and *Registration of Plans (Stage 2) (HSP (Nominees) Pty Limited) Enabling Act 1984* (Qld).

<sup>3</sup> This topic was flagged in Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Procedural Issues under the Body Corporate and Community Management Act 1997*, 10, [1.3].

This may result in a reduction of red tape, improved consumer protection for lot owners in schemes currently regulated by the BUGTA and a more streamlined and consistent legislative approach to community living in Queensland.

However, amendments to or the repeal of the BUGTA may have dramatic consequences in terms of the specified Acts. Any legislative changes would require careful consideration to avoid unintended consequences. Lot owners, bodies corporate, developers and other commercial operators and stakeholders in the developments under the specified Acts would have to be widely consulted. The financial and administrative burdens imposed by such a transition would have to be evaluated in terms of the costs versus the benefits.

Further, planning and titling issues are not within the scope of the BCCM Act and are therefore outside of the scope of the Property Law Review being undertaken by the Centre. The specified Acts, which are also outside of the scope of the Property Law Review, are likely to require significant consideration, and possibly amendment, to accommodate the more modern legal concepts and framework under the BCCM Act as well as the different titling and planning provisions under the *Land Title Act 1994* (Qld) and the *Planning Act 2016* (Qld)<sup>4</sup>. If the BUGTA is repealed, parts of it may need to be re-enacted in the specified Acts.

To the extent that a complete transition is determined to be a desirable outcome, it must be recognised at the outset that this will be a difficult and time consuming task. The technical, legal and practical aspects of such a transition are complex and must be given adequate consideration, review and consultation. The differences between the BCCM Act and the BUGTA must be worked out and where differences exist, it must be determined whether the BCCM Act approach is feasible given the nature and structure of plans under the BUGTA and the operation of the specified Acts. It will require a sustained, coordinated effort across a broad range of stakeholder groups including the State Government and local councils.

Given this, it is not possible, within the scope of this Issues Paper, or indeed in the scope of the current Property Law Review, to adequately consider all issues that are necessary to achieve a complete transition from the BUGTA to the BCCM Act. However, it is possible to discuss steps towards harmonisation that may be part of a complete transition, should there be a demonstrated need and supporting economic rationale. This Issues Paper addresses a number of issues that could be utilised as a first step along a path to transition.

This Issues Paper will focus on several areas. The first is to provide a brief overview of the history of body corporate legislation in Queensland to situate the specified Acts, the BUGTA and the BCCM Act in a historical context. Following this, the Issues Paper will give a brief outline of several differences between the two Acts. From there, the Issues Paper asks whether there is a need for reform in this area, and assuming there is, provides options for achieving such reform.

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<sup>4</sup> The *Planning Act 2016* (Qld) replaced the *Sustainable Planning Act 2009* (Qld) on 3 July 2017.



## 2. Brief overview of body corporate legislation in Queensland

Body corporate legislation in Queensland has a history going back to the mid-1960s. The following paragraphs discuss the major pieces of legislation that comprise this history and set the background to the current state of affairs. For the purposes of this Issues Paper, it is useful to note that prior to 1997, the body corporate legislation in Queensland contained a mixture of body corporate regulations, town planning considerations and land titling provisions. As discussed below, this approach was abandoned in 1997 with the introduction of the BCCM Act, in favour of an approach that put body corporate provisions, planning and titling issues each in separate Acts.

### 2.1. *Building Units Titles Act 1965 (Qld)*

The *Building Units Titles Act 1965 (Qld)* (**1965 Act**) introduced the concept of individual freehold title for units within a building units plan by providing for individual title to lots and common property administered by a body corporate. This replaced the previous system of company title,<sup>5</sup> which has a number of drawbacks, including that it does not give freehold ownership over a unit. This could make it difficult to obtain finance to purchase the shares in the company.<sup>6</sup> The 1965 Act allowed a building to be subdivided into floors and for each floor to be further subdivided into units with a separate title for each unit.<sup>7</sup>

### 2.2. *Group Titles Act 1973 (Qld)*

The *Group Titles Act 1973 (Qld)* (**1973 Act**) introduced a framework for community title within a larger flat land development for groups of townhouses or stand-alone units. Like the 1965 Act, the 1973 Act provided for individual title to lots with common property managed by a body corporate. However, the 1973 Act focused on the horizontal subdivision of land rather than the vertical subdivision of a building under the 1965 Act.<sup>8</sup>

### 2.3. *Building Units and Group Titles Act 1980 (Qld)*

As the number of unit developments increased, the need to create a more sophisticated regime for the governance of building units plans and group titles plans emerged. In 1980, the *Building Units and Group Titles Act 1980 (Qld)* (**BUGTA**) was passed which combined and replaced the 1965 and 1973 Acts. The BUGTA retained concepts from the earlier Acts, including group titles plans and building

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<sup>5</sup> Company title allowed a person to live in a unit by acquiring shares in a company that owned the building. See Anthony Lim, Office of Regulatory Policy, Department of Justice and Attorney-General, *History of Community Titles Legislation in Queensland*, (2012), 1

<sup>6</sup> Anthony Lim, Office of Regulatory Policy, Department of Justice and Attorney-General, *History of Community Titles Legislation in Queensland*, (2012), 3.

<sup>7</sup> Anthony Lim, Office of Regulatory Policy, Department of Justice and Attorney-General, *History of Community Titles Legislation in Queensland*, (2012), 3.

<sup>8</sup> Anthony Lim, Office of Regulatory Policy, Department of Justice and Attorney-General, *History of Community Titles Legislation in Queensland*, (2012), 4-5.

units plans (each, a **plan**), providing for the vertical and horizontal subdivisions of land into lots with individual titles.<sup>9</sup>

The BUGTA was designed to overcome a number of problems that had been identified with the existing legislation, such as: allowing the body corporate to acquire additional common property; allowing a body corporate to appoint a managing agent for the scheme; giving the local authority the ability to recover unpaid rates directly from lot owners; and making provision for dispute resolution.<sup>10</sup> One issue that was deliberately left out of the BUGTA relates to staged developments. It was noted at the time that there was little demand for such development in Queensland.<sup>11</sup>

In 1988, the BUGTA was significantly modified as the realities of ‘legislation in an area involving so many persons with diverse views and needs’ became apparent.<sup>12</sup> As discussed below, there was a further attempt to update the BUGTA in the early 1990s, but this effort ultimately resulted in the BCCM Act.

#### ***2.4. Registration of Plans (HSP (Nominees) Pty Limited) Enabling Act 1980 (Qld) and Registration of Plans (Stage 2) (HSP (Nominees) Pty Limited) Enabling Act 1984 (Qld)***

The *Registration of Plans (HSP (Nominees) Pty Limited) Enabling Act 1980 (Qld) (HSP Nominees)* was introduced around the same time as the BUGTA but focused on the creation of a specific project, the Paradise Centre at Surfers Paradise on the Gold Coast. The Act was designed to enable the development by allowing the creation of a combined residential and commercial development. The residential area would be run by a body corporate made up of the owners of residential lots and the commercial area run by a body corporate made up of the owners of the commercial lots. There was no mechanism under the legislation at that time to achieve this outcome.

At the time, the development was described as ‘novel and unique’ in Australia. The Government of the day viewed the scheme as a pilot project, to ‘test the need or desirability’ of such legislation for a more general application.<sup>13</sup> For this reason, it was not thought appropriate to include the provisions in the Building Units and Group Titles Bill as they would then have general application. Instead, the purpose of HSP Nominees is to function as enabling legislation to allow the development of Paradise Centre only.

Paradise Centre is at the heart of Surfers Paradise. It comprises two residential towers, a hotel and several levels of commercial premises. The *Registration of Plans (Stage 2) (HSP (Nominees) Pty*

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<sup>9</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Building Units and Group Titles Bill: Second Reading Speech’ (Lickiss, WD, 25 March 1980), 2937.

<sup>10</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Building Units and Group Titles Bill: Second Reading Speech’ (Lickiss, WD, 25 March 1980), 2937-2939.

<sup>11</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Building Units and Group Titles Bill: Second Reading Speech’ (Lickiss, WD, 25 March 1980), 2939.

<sup>12</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Building Units and Group Titles Act Amendment Bill: Second Reading Speech’ (Clauson, PJ, 10 November 1987), 3959-3960.

<sup>13</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Registration of Plans (HSP Nominees Pty Limited) Enabling Bill: Second Reading Speech’ (Lickiss, WD, 15 April 1980), 3217.

*Limited) Enabling Act 1984 (Qld) (HSP Nominees Stage 2)* was introduced in 1983 to facilitate a second stage to the development, allowing for the construction of the hotel. At the time, it was noted that HSP Nominees was working well but it was still too soon to extend the provisions in the Act to other developments.<sup>14</sup>

## 2.5. *Sanctuary Cove Resort Act 1985 (Qld)*

The *Sanctuary Cove Resort Act 1985 (Qld) (SCRA)* was introduced to facilitate the staged development of a world class resort at Hope Island on the Gold Coast to include a golf course, an international hotel, a marina, a harbour and up to 900 residences. The SCRA was landmark legislation for its time. It was envisaged that Sanctuary Cove would be the first of ‘a new generation of resort communities, which are true, integrated, mixed land-use resorts, which can be ... complete resort destinations in the true sense of the term.’<sup>15</sup> Although the SCRA is specific to the Sanctuary Cove development, it was intended to provide a general precedent for similar development in the future.<sup>16</sup>

The SCRA was unique at the time for mixing residential, commercial and recreational activities to target the growing tourism industry on the Gold Coast with the creation of an integrated resort development. The SCRA creates a principal body corporate (**PBC**), a primary thoroughfare body corporate (**PTBC**), commercial zones and a number of residential bodies corporate (**RBCs**). The PBC and the PTBC are regulated under the SCRA. The RBCs, as group titles plans or building unit plans, are constituted under and regulated by the BUGTA. The SCRA applies parts of the BUGTA to the operation of the PBC and PTBC. For example, the SCRA provides for PBC and PTBC meetings to be run in accordance with the BUGTA<sup>17</sup> and for disputes about the operation of the SCRA (save for some exceptions) to be dealt with under the dispute resolution provisions of the BUGTA.<sup>18</sup>

## 2.6. *Integrated Resort Development Act 1987 (Qld)*

Following the success of Sanctuary Cove, the *Integrated Resort Development Act 1987 (Qld) (IRDA)* was introduced to facilitate the development and ongoing management of ‘a new generation of complete resort destinations’ including private roads and a mixture of land tenure types.<sup>19</sup>

The IRDA was described as:

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<sup>14</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Registration of Plans (Stage 2) (HSP Nominees Pty Limited) Enabling Bill: Second Reading Speech’ (Harper, NJ, 30 November 1983), 416.

<sup>15</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Sanctuary Cove Resort Bill: Second Reading Speech’ (Hinze, RJ, 17 October 1985), 2190.

<sup>16</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Sanctuary Cove Resort Bill: Second Reading Speech’ (Hinze, RJ, 17 October 1985), 2190.

<sup>17</sup> *Sanctuary Cove Act 1985 (Qld)* ss 27(5) and 70(5).

<sup>18</sup> *Sanctuary Cove Act 1985 (Qld)* s 104A.

<sup>19</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Integrated Resort Development Bill: Second Reading Speech’ (Hinze, RJ, 31 March 1987), 1063.

*a new code for the subdivision of land which recognises a mix of different forms of freehold title, including group titles and building unit titles, together with a management structure which properly provides for the ongoing maintenance of a private road system and other common areas for the benefit of all who reside within the development.*<sup>20</sup>

A number of developments were created across the State, including on the Gold Coast, Fraser Island, the Whitsundays and at Port Douglas. The IRDA in many ways draws on, and expands, the model of resort development enacted under the SCRA.<sup>21</sup> Similarly to the SCRA, the IRDA allows the creation of PBCs and PTBCs which are governed by the IRDA, and RBCs which are group titles plans and building units plans that are registered under, and continue to be governed by, the BUGTA. The IRDA applies parts of the BUGTA to the operation of the PBC and PTBC for meeting procedures<sup>22</sup> and dispute resolution.<sup>23</sup>

The IRDA provides that the operation of town planning schemes would cease to apply as land use issues would be the subject of a proposal made in an application to the Government. The local authority would still be charged with the administration of the scheme and with granting approval of particular issues.<sup>24</sup>

## 2.7. *Mixed Use Development Act 1993 (Qld)*

The *Mixed Use Development Act 1993 (Qld)* (**MUDA**) was designed as a 'code of practice' to facilitate the development of buildings for residential, commercial and office space.<sup>25</sup> Similarly to the SCRA and the IRDA, the MUDA allows for a layered arrangement of bodies corporate. However, conceptually, the MUDA is different from the SCRA and the IRDA. The MUDA is not targeted at resort style development but at mixed commercial, residential or industrial uses. The principal body corporate layers created under the Act are the community body corporate and precinct body corporate. The RBCs, comprised of the individual lot owners, are the subsidiary layers that are created by the registration of group titles plans and building units plans registered under the BUGTA.

In the Parliamentary debates surrounding the Mixed Use Development Bill, the legislation was described as pioneering, permitting the development of different types of titles beside or on top of

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<sup>20</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Integrated Resort Development Bill: Second Reading Speech' (Hinze, RJ, 31 March 1987), 1064.

<sup>21</sup> Although, when the *Mixed Use Development Act 1993 (Qld)* was introduced, the IRDA was amended by the *Integrated Resort Development Amendment Act 1993 (Qld)* to include additional subdivision options similar to the *Mixed Use Development Act 1993 (Qld)*: Queensland, Legislative Assembly, *Parliamentary Debates*, 'Integrated Resort Development Amendment Bill: Second Reading Speech' (Mackenroth, TM, 11 May 1993), 2599.

<sup>22</sup> *Integrated Resort Development Act 1987 (Qld)* ss 106(6) and 143(6).

<sup>23</sup> *Integrated Resort Development Act 1987 (Qld)* s 179A.

<sup>24</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Integrated Resort Development Bill: Second Reading Speech' (Hinze, RJ, 31 March 1987), 1063-4.

<sup>25</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Mixed Use Development Bill: Second Reading Speech' (Mackenroth, TM, 18 March 1993), 2421.

one another within one fully planned development.<sup>26</sup> As a concept at least, this is in some ways similar to the HSP Nominees legislation introduced in 1980. Unlike the HSP Nominees legislation which applied only to a specific project, the MUDA applied to approved projects across the State.

As noted in the Second Reading Speech, the Mixed Use Development Bill replaced the existing complex web of company title that was being used to produce mixed use developments in order to allow purchasers to have individual title to lots.<sup>27</sup> Specifically, the Bill provided for staged implementation of large, mixed use projects incorporating more than one type of use in a single site or within a building.<sup>28</sup> It was intended that the local government would be involved at all stages of the approval and development process.<sup>29</sup> The Bill was described as the ‘culmination of five years of hard work’ by the government, the private sector and specialist legal advisors.<sup>30</sup>

The MUDA governs nine developments across Queensland. The developments are located around Brisbane and right across the State from the Sunshine Coast to Far North Queensland. The structure of developments created under the MUDA is generally similar to the types of body corporate structure that would come to be available under the BCCM Act.

## 2.8. *Building Units and Group Titles Act 1994 (Qld)*

Despite significant amendment to the BUGTA in 1988,<sup>31</sup> there were still a number of issues with the Act, including the limitations in regards to mixed use and layered schemes developed in stages (which is the reason the various specified Acts discussed above were required). While the IRDA and the MUDA allowed more of these types of developments to occur, it was recognised that a new approach was needed. In 1994, after significant community consultation,<sup>32</sup> the *Building Units and Group Titles Act 1994 (Qld)* (**BUGTA 1994**) was passed to replace the BUGTA. Despite being passed and assented to, the BUGTA 1994 never commenced and was later abandoned.

The BUGTA 1994 was designed to allow staged development<sup>33</sup> and layered body corporate schemes,<sup>34</sup> thus eliminating the need for separate legislation for these types of developments. The BUGTA 1994 also included a number of other provisions such as restrictions on the use of proxies, limits on the maximum term of a letting and service contract and a requirement for unanimous agreement of all

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<sup>26</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Mixed Use Development Bill’ (Woodgate, MR, 13 May 1993), 2759-2761.

<sup>27</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Mixed Use Development Bill: Second Reading Speech’ (Mackenroth, TM, 18 March 1993), 2421.

<sup>28</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Mixed Use Development Bill: Second Reading Speech’ (Mackenroth, TM, 18 March 1993), 2421.

<sup>29</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Mixed Use Development Bill: Second Reading Speech’ (Mackenroth, TM, 18 March 1993), 2421.

<sup>30</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Mixed Use Development Bill: Second Reading Speech’ (Mackenroth, TM, 18 March 1993), 2422.

<sup>31</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Building Units and Group Titles Act Amendment Bill: Second Reading Speech’ (Clauson, PJ, 10 November 1987), 3959-3960.

<sup>32</sup> For a history of the *Building Units and Group Titles Act 1980 (Qld)* see Anthony Lim, Office of Regulatory Policy, Department of Justice and Attorney-General, *History of Community Titles Legislation in Queensland*, (2012).

<sup>33</sup> Explanatory Notes, Building Units and Group Titles Bill 1994 (Qld), 2.

<sup>34</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Building Units and Group Titles Bill 1994: Second Reading Speech’ (Smith, GN, 27 October 1994), 10022.

owners in a scheme to allow a variation from the master plan when implemented as a staged development.

By 1995, the BUGTA 1994 had been abandoned in favour of an approach that separated planning, titling and body corporate issues into different Acts.<sup>35</sup> The then Minister for Lands criticised the BUGTA 1994 for being a generic piece of legislation which the industry found to be complex and difficult to understand.<sup>36</sup> The BUGTA 1994 was also criticised as being unable to differentiate between a six pack or duplex and a 500 lot resort.<sup>37</sup>

## 2.9. *Body Corporate and Community Management Act 1997 (Qld)*

In 1997, the *Body Corporate and Community Management Act 1997 (Qld)* (**BCCM Act**) was introduced as a 'new and improved framework for community developments throughout Queensland'.<sup>38</sup> The legislation drew on much of the ground work that had been laid when preparing the BUGTA 1994. The BCCM Act was designed to provide a flexible framework to deal with different types of development which have differing requirements<sup>39</sup> and provides for the creation of mixed use and layered schemes. The flexible approach is supported by the use of the **Regulation Modules**<sup>40</sup> which provide different operating requirements for different types of schemes. This legislative structure allows amendments to the BCCM Act to be kept to a minimum as much of the content that is likely to be changed is contained in the Regulation Modules, which are easier to amend.

The BCCM Act introduced the concept of community titles schemes as the basic concept of the Act.<sup>41</sup> A community titles scheme is established by registration of a plan subdividing land into lots and common property and recording of the first community management statement for the scheme.<sup>42</sup> When the BCCM Act came into operation, the transitional provisions provided that building units plans and group titles plans under the BUGTA, except for those registered for one of the specified Acts, were deemed to be community titles schemes under the BCCM Act.<sup>43</sup>

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<sup>35</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Ministerial Statement: Building Units and Group Titles Act' (McElligott, KV (19 October 1995), 475.

<sup>36</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Ministerial Statement: Building Units and Group Titles Act' (McElligott, KV, 19 October 1995), 475.

<sup>37</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Body Corporate and Community Management Bill: Second Reading Speech', (Hobbs, HWT, 30 April 1997), 1136.

<sup>38</sup> Explanatory Notes, *Body Corporate and Community Management Bill 1997 (Qld)*, 2.

<sup>39</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Body Corporate and Community Management Bill: Second Reading Speech', (Hobbs, HWT, 30 April 1997), 1136.

<sup>40</sup> *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**).

<sup>41</sup> *Body Corporate and Community Management Act 1997 (Qld)* s 9.

<sup>42</sup> *Body Corporate and Community Management Act 1997 (Qld)* s 42; *Land Title Act 1994 (Qld)* s 115B.

<sup>43</sup> *Body Corporate and Community Management Act 1997 (Qld)* s 325(1)(a).



The BCCM Act allows for the creation of mixed use, layered schemes and staged developments.<sup>44</sup> When considering the preceding legislation, a clear trajectory can be observed from 1980, with the HSP Nominees legislation allowing mixed used schemes, through to the SCRA, IRDA and the MUDA allowing layered schemes and staged developments.

The BCCM Act is a departure from previous legislation in that town planning and titling considerations are contained in other legislation. The BCCM Act largely deals with body corporate processes and procedures and with dispute resolution. Titling provisions are contained in the *Land Title Act 1994* (Qld) and town planning is handled through the *Planning Act 2016* (Qld).

## 2.10. The specified Acts

The BCCM Act deemed most building units plans and group titles plans under the BUGTA to be community titles schemes<sup>45</sup> under the BCCM Act. However, the BUGTA continues in force for group titles plans and building units plans (each, a **plan**) registered under the BUGTA for the purpose of each of the specified Acts:<sup>46</sup> HSP Nominees; HSP Nominees Stage 2; the SCRA; the IRDA; and the MUDA.

The BUGTA was amended to operate only in respect of the specified Acts.<sup>47</sup> As discussed above, the specified Acts were designed to facilitate developments that could not be enacted under the planning, titling and body corporate legislation at the time.<sup>48</sup> As such, the specified Acts contain provisions for titling, planning and body corporate management and rely on provisions in the BUGTA.

The specified Acts include developments that together comprise thousands of lots, lot owners, a number of bodies corporate and other interested parties. There are at least 580 plans that are still registered under the BUGTA for the purposes of the specified Acts.<sup>49</sup> These include:

- The Paradise Centre, Surfers Paradise;
- Sanctuary Cove Resort, Hope Island;
- Hope Island Resort, Hope Island;
- Royal Pines Resort, Benowa;
- Laguna Quays Resort, Laguna Quays;
- Sheraton Grand Mirage Port Douglas Resort, Port Douglas;
- Kingfisher Bay Resort, Fraser Island;
- Cathedral Place, Fortitude Valley;
- Central Brunswick, Fortitude Valley;
- Cypress Gardens Retirement Community, Clear Island Waters;

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<sup>44</sup> Explanatory Notes, Body Corporate and Community Management Bill 1997 (Qld), 2.

<sup>45</sup> *Body Corporate and Community Management Act 1997* (Qld) s 325 (1).

<sup>46</sup> *Body Corporate and Community Management Act 1997* (Qld) s 326 (definition of 'specified Acts'). The specified Acts rely on the BUGTA to varying degrees and in some cases, modify the provisions in BUGTA as necessary for the type of plans and subdivisions available under the specific Act.

<sup>47</sup> *Building Units and Group Titles Act 1980* (Qld) s 5A

<sup>48</sup> Queensland Government, Department of Local Government, Planning, Sport and Recreation, *Resort Development and Management in the Twenty-First Century*, Discussion Paper, March 2007, 6 [2.1].

<sup>49</sup> Information provided by Queensland Government, Department of Justice and Attorney-General, Office of Regulatory Policy, January 2017.

- Royal Harbour, Cairns;
- Noosa Springs, Noosa Heads;
- Couran Cove Island Resort, South Stradbroke Island;
- Bretts Wharf, Hamilton;
- Osprey, Mackay; and
- Island Shores Resort, North Queensland.

However, the BUGTA is no longer considered to be contemporary legislation. It does not reflect best practice standards for body corporate management and it provides a lesser standard of protection for lot owners than what is available under the BCCM Act. The specified Acts, to the extent that they rely on the BUGTA, may also be considered out-of-date.

Given this, it has been suggested that the plans remaining under the BUGTA could be brought under more modern legislative frameworks. Previous governments have signalled this as a policy objective.<sup>50</sup> As discussed further below, some legislative reform<sup>51</sup> has been made towards achieving the goal of bringing the specified Acts under more modern body corporate frameworks.

## 2.11. Reform of the specified Acts

As outlined above the specified Acts were designed to enable developments that could not be established under the existing legislative framework. In terms of body corporate procedures, generally, the specified Acts regulate the principal bodies corporate responsible for the common property.<sup>52</sup> The residential bodies corporate (which are comprised of the owners of the individual lots) are building units plans and group titles plans incorporated under, and governed by, the BUGTA. However, during the time since the passage of the first specified Act (in 1980) planning law in Queensland has undergone a radical transformation.<sup>53</sup> The body corporate legislation has also developed substantially with the introduction of the BCCM Act, which, as noted above, is a radical departure from the BUGTA.

In 2009 and 2011, amendments were made to the SCRA, the IRDA and the MUDA to reflect changes in planning and body corporate laws and to account for the operational realities of developing large resorts and mixed use developments. In some places, the amendments imported provisions from the BCCM Act and the Standard Module.<sup>54</sup> While it was intended that the amendments would be the first

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<sup>50</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Resorts and Other Acts Amendment Bill: Second Reading Speech' (Hinchliffe, SJ, 19 May 2009), 303; Queensland, Legislative Assembly, *Parliamentary Debates*, 'Local Government Electoral Bill 2011: Second Reading Speech' (Lucas, PT, 16 June 2011), 1968.

<sup>51</sup> *Resorts and Other Acts Amendment Act 2009* (Qld); *Local Government Electoral Act 2011* (Qld), Part 12 Division 11.

<sup>52</sup> For examples, see *Sanctuary Cove Resort Act 1985* (Qld) part 3 and part 5; *Integrated Resort Development Act 1987* (Qld) part 8; *Mixed Use Development Act 1993* (Qld) part 9.

<sup>53</sup> Philippa England, 'From revolution to evolution: Two decades of planning in Queensland', *Environment and Planning Law Journal*, 27 (2010) 53.

<sup>54</sup> For example, see *Sanctuary Cove Resort Act 1985* (Qld) s 47C-47G.



phase of a broader transition to bring the legislation under contemporary planning and body corporate legislation and frameworks,<sup>55</sup> the remainder of the transition never commenced.

### 2.11.1. Amendments to the SCRA, the IRDA and the MUDA

The SCRA and the IRDA facilitated development that was unique for its time. When the Acts were passed, it was assumed that the resorts would be approved and fully developed by a single developer in 10 years.<sup>56</sup> But 30 years on, the original plans have been modified to meet conditions on the ground. The developments have changed owners and there is still land to be developed at Sanctuary Cove. The MUDA was intended to allow large, mixed use, staged development of projects. While a number of projects have been developed under the MUDA prior to the commencement of the BCCM Act, further projects under the MUDA are no longer needed as these types of projects can be achieved under the BCCM Act.

The SCRA and the IRDA were amended in 2009<sup>57</sup> following a discussion paper and community consultation.<sup>58</sup> Similar amendments were made to the MUDA in 2011.<sup>59</sup> The amendments were designed to address what were seen as pressing procedural and equity issues<sup>60</sup> relating to improved transparency in the conduct of bodies corporate at the PBC and the PTBC level<sup>61</sup> and to make better provision for land use amendments. The amendments mirrored provisions in the BCCM Act so as to better align the regulation of the PBCs and PTBCs under the legislation with the regulation of bodies corporate under the Standard Module. In addition to other legislative changes, the amendments included: changes to the methods of electing committee members at the PBC and PTBC level; increased restrictions on the use of proxies and improved financial disclosure. While these changes applied to the principal layers, they were not included in the BUGTA and thus did not apply at the RBC level.

The amendments were described as 'interim measures'<sup>62</sup> to introduce mixed use development communities to the concepts of more contemporary body corporate management while a broader reform program of modernisation was developed.<sup>63</sup> It was said in relation to the MUDA that it

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<sup>55</sup> Minister for Infrastructure and Planning, the Honourable Stirling Hinchliffe, Media Release 'Outdated resort laws simplified and modernised' August 4, 2009.

<sup>56</sup> Queensland Government, Department of Local Government, Planning, Sport and Recreation, *Resort Development and Management in the Twenty-First Century*, Discussion Paper, March 2007, 6 [2.1].

<sup>57</sup> *Resorts and Other Acts Amendment Act 2009* (Qld).

<sup>58</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Resorts and Other Acts Amendment Bill: Second Reading Speech' (Hinchliffe, SJ, 19 May 2009), 303.

<sup>59</sup> *Local Government Electoral Act 2011* (Qld), Part 12 Division 11.

<sup>60</sup> Explanatory Notes, Resorts and Other Acts Amendment Bill 2009 (Qld), 1; Explanatory Notes, Local Government Electoral Bill 2011 (Qld).

<sup>61</sup> For ease of reference, the use of the terms 'PTBC' and 'PBC' below include reference to the equivalent layers under the *Mixed Use Development Act 1993* (Qld) which are the community body corporate and the precinct body corporate.

<sup>62</sup> Explanatory Notes, Resorts and Other Acts Amendment Bill 2009 (Qld); Queensland, Legislative Assembly, *Parliamentary Debates*, 'Local Government Electoral Bill 2011: Second Reading Speech' (Lucas, PT, 16 June 2011), 1968.

<sup>63</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Local Government Electoral Bill 2011: Second Reading Speech' (Lucas, PT, 16 June 2011), 1968.

predated the contemporary body corporate management framework in the BCCM Act, 'resulting in an outdated structure and a range of inequities for residents.'<sup>64</sup>

It was signalled at the time that a larger reform process would be undertaken to transition the developments 'into contemporary frameworks and [to] achieve a clear separation between planning and body corporate issues'.<sup>65</sup> Minister Hinchliffe, in introducing the Bill that would amend the SCRA and the IRDA, said:

*The second phase will involve significant consultation and engagement with the resort communities and substantial legal and operational analysis to satisfactorily address complex rights, interests, obligations and other detailed transitional issues.*<sup>66</sup>

In 2011 when the MUDA was amended, the government expressed a goal 'to transition these communities to more contemporary frameworks for planning, development and body corporate management'<sup>67</sup> that would involve consultation with the communities involved.

Despite the announced intention for further amendment, the SCRA, the IRDA and the MUDA have not had further substantial amendments. The requirement for significant consultation to address the complex issues in regards to a transition as identified in 2009 and confirmed in 2011 has not diminished with time. In fact, the passage of time may actually make such a transition more complex as additional lots are developed and the list of potential stakeholders grows larger.

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<sup>64</sup> Explanatory Notes, Local Government Electoral Bill 2011 (Qld), 3.

<sup>65</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Resorts and Other Acts Amendment Bill: Second Reading Speech' (Hinchliffe, SJ, 19 May 2009), 304.

<sup>66</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Resorts and Other Acts Amendment Bill: Second Reading Speech' (Hinchliffe, SJ, 19 May 2009), 304.

<sup>67</sup> Queensland, Legislative Assembly, *Parliamentary Debates*, 'Local Government Electoral Bill: Second Reading Speech' (Lucas, PT, 16 June 2011), 1968.

### 3. The BUGTA and the BCCM Act – highlighting key differences

A full explanation of all the differences between the BCCM Act and the BUGTA is beyond the scope of this Issues Paper. Despite this, there are areas where differences between the Acts are readily apparent. Two of these areas are:

- dispute resolution; and
- the procedural requirements for running a body corporate.

If a transition from the BUGTA to the BCCM Act is determined to be a desirable objective, relatively simple amendments in respect of these two areas could be one way to bring about an initial form of consistency between the two Acts. Amendments in these areas could be made with very simple legislative changes. When compared to the planning and titling changes that would be necessary for a complete transition for the specified Acts, these amendments appear ‘easy’. However, the effect of any such amendments could be significant.

#### 3.1. Dispute resolution

Significant differences between the BCCM Act and the BUGTA can be observed in relation to dispute resolution. The BCCM Act<sup>68</sup> sets up the Office of the Commissioner for Body Corporate and Community Management (**BCCM Commissioner’s Office**) to provide a dispute resolution service and an educational and informational service for lot owners and members of the public.<sup>69</sup>

By contrast, dispute resolution under the BUGTA is more limited, as discussed below. There is no provision for informal dispute resolution or for non-binding dispute resolution. Any appeal of a decision made by a referee is heard in the Magistrates Court and then may be appealed to the Supreme Court. A further explanation of the dispute resolution provisions under each Act is given below.

##### 3.1.1. Dispute resolution under the BCCM Act

A dispute will exist for the purposes of the BCCM Act if the dispute is between specified parties – e.g. a dispute between two or more owners or occupiers, a dispute between the body corporate and a lot owner or occupier. Other parties to a dispute may include body corporate managers, service contractors, letting agents and committee members. A party may apply to the BCCM Commissioner’s Office for dispute resolution only if the dispute falls into the definition of a ‘dispute’<sup>70</sup> for the purposes of the BCCM Act.

The dispute resolution process commences with self-resolution – where the parties to the dispute attempt to resolve the issue themselves.<sup>71</sup> If this fails, a party to the dispute may then apply for

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<sup>68</sup> See chapter 6 of the *Body Corporate and Community Management Act 1997* (Qld).

<sup>69</sup> *Body Corporate and Community Management Act 1997* (Qld) s 231-231.

<sup>70</sup> *Body Corporate and Community Management Act 1997* (Qld) s 227.

<sup>71</sup> *Body Corporate and Community Management Act 1997* (Qld) schedule 6 (definition of ‘dispute resolution’).

conciliation<sup>72</sup> which is non-binding and informal. It involves the parties meeting with an independent conciliator who will assist the parties to reach their own resolution.<sup>73</sup> If the dispute is not resolved by conciliation, a party may apply for adjudication<sup>74</sup> (although it may be possible, in specific circumstances, to by-pass conciliation and proceed immediately to adjudication).<sup>75</sup> Adjudication is a more formal process where an adjudicator will decide the dispute on the basis of submissions by the parties.<sup>76</sup>

If necessary, an adjudicator's decision may be enforced by an order of the Magistrates Court.<sup>77</sup>

An aggrieved person<sup>78</sup> may appeal the decision of an adjudicator to the Queensland Civil and Administrative Tribunal (QCAT) on a question of law,<sup>79</sup> or with leave, on a question of fact or mixed fact and law.<sup>80</sup> Further appeals may be made to the Queensland Court of Appeal and ultimately, to the High Court of Australia.<sup>81</sup> Complex disputes under the BCCM Act are resolved by QCAT or a specialist adjudicator.<sup>82</sup>

### 3.1.2. Dispute resolution under the BUGTA

Under the BUGTA, dispute resolution applications are made to a referee.<sup>83</sup> A referee has power, on application, to make particular orders.<sup>84</sup> Depending on the type of order sought, only particular people may bring an application for that order. For example, any person may apply for an order that the body corporate make available documents.<sup>85</sup> However, only a proprietor may apply for an order to force a body corporate to make an insurance claim or vary certain contributions.<sup>86</sup> Only a person entitled to vote at a meeting of the body corporate may bring an application for an order to: revoke an amendment of a by-law; repeal a by-law; or reinstate a previously repealed by-law.<sup>87</sup>

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<sup>72</sup> *Body Corporate and Community Management Act 1997* (Qld) s 239A.

<sup>73</sup> For details on the conciliation process, see <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/body-corporate-disputes/types-of-dispute-resolution/conciliation-for-body-corporate-disputes/>.

<sup>74</sup> *Body Corporate and Community Management Act 1997* (Qld) s 239B.

<sup>75</sup> For example, *Body Corporate and Community Management Act 1997* (Qld) s 241(3).

<sup>76</sup> For details of the adjudication process, see <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/body-corporate-disputes/types-of-dispute-resolution/adjudication-for-body-corporate-disputes/>.

<sup>77</sup> *Body Corporate and Community Management Act 1997* (Qld) ss 286-288. An adjudicator's order may also be enforceable by seeking an order to appoint an administrator for the scheme, either under the BCCM Act or in the Magistrates Court.

<sup>78</sup> *Body Corporate and Community Management Act 1997* (Qld) s 289(1)(c) (definition of 'aggrieved person').

<sup>79</sup> *Body Corporate and Community Management Act 1997* (Qld) s 289(2).

<sup>80</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 142(3)(b).

<sup>81</sup> For a case that was recently appealed all the way to the High Court, see *Ainsworth v Albrecht* [2016] HCA 40.

<sup>82</sup> *Body Corporate and Community Management Act 1997* (Qld) schedule 6 (definition of 'complex dispute').

<sup>83</sup> *Building Units and Group Titles Act 1980* (Qld) s 72.

<sup>84</sup> *Building Units and Group Titles Act 1980* (Qld) ss 75-95.

<sup>85</sup> *Building Units and Group Titles Act 1980* (Qld) s 84.

<sup>86</sup> *Building Units and Group Titles Act 1980* (Qld) ss 82-83.

<sup>87</sup> *Building Units and Group Titles Act 1980* (Qld) s 88.

On receipt of an application, the referee is given powers to notify parties of the application, including the body corporate to which the application relates and any other parties the referee believes would be affected by the order sought, and to invite them to make submissions.<sup>88</sup> The referee may requisition further information from the applicant<sup>89</sup> and make such investigations as the referee thinks fit, including entering the parcel of land to which the dispute relates.<sup>90</sup>

After the referee makes an order in response to an application, the applicant, a person who made a submission on the application or a person required to do or refrain from doing something under the order<sup>91</sup> may appeal to the Magistrates Court. Under the BUGTA, the only grounds on which an appeal may be made is that the referee acted unreasonably by making the order.<sup>92</sup>

After the Magistrates Court has made a determination of an appeal, the appellant, the original applicant, the body corporate or a person required to do or refrain from doing something under the determination may appeal to the Supreme Court on a question of law.<sup>93</sup>

### 3.1.3. Considering the differences

In a general sense, referees and adjudicators have similar powers in terms of the types of orders that can be made<sup>94</sup> and the types of powers that can be exercised.<sup>95</sup> The BCCM Act is more detailed and nuanced, and while this may arguably give adjudicators wider powers, in actual fact any differences are unlikely to have a significant impact on decisions that can be made. However, the process of dispute resolution under the two Acts is quite different.

The BCCM Act has a more formalised and specialised dispute resolution process than the BUGTA. Under the BCCM Act, self-resolution and conciliation require the parties to a dispute to attempt to resolve the dispute among themselves first. It is only if this fails that an adjudicator may be asked to step in and determine the dispute.<sup>96</sup> Even after the adjudicator's decision has been made, an appeal may be made to QCAT, a low-cost jurisdiction. QCAT is more readily accessible than the court system and has members that are familiar with body corporate issues. Appeals may go to the Court of Appeal and then to the High Court.

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<sup>88</sup> *Building Units and Group Titles Act 1980* (Qld) s 73(1)(c)-(d).

<sup>89</sup> *Building Units and Group Titles Act 1980* (Qld) s 73(1)(a).

<sup>90</sup> *Building Units and Group Titles Act 1980* (Qld) s 73(1)(f)-(g).

<sup>91</sup> *Building Units and Group Titles Act 1980* (Qld) s 106(1).

<sup>92</sup> *Building Units and Group Titles Act 1980* (Qld) s 106(2).

<sup>93</sup> *Building Units and Group Titles Act 1980* (Qld) s 108(1). See also s 7 (definition of 'Court').

<sup>94</sup> *Building Units and Group Titles Act 1980* (Qld) ss 75-95; *Body Corporate and Community Management Act 1997* (Qld) s 276 and schedule 5.

<sup>95</sup> *Building Units and Group Titles Act 1980* (Qld) s 75(2)-(4); *Body Corporate and Community Management Act 1997* (Qld) ss 269-272.

<sup>96</sup> Provided, of course, that the dispute is within the jurisdiction of the BCCM Commissioner's Office. See BCCM Act s 241(1)(a).

Under the BUGTA there is no requirement for self-resolution or conciliation prior to making an application to the referee.<sup>97</sup> There is no equivalent of the BCCM Commissioner's Office<sup>98</sup> to assist lot owners and other interested parties through the dispute resolution process. The BUGTA is more restrictive in terms of who can make a dispute application.

If a lot owner seeks to appeal the decision of the referee, the matter is heard in the Magistrates Court, which is a court of law. The costs of court action may be significant (as compared to QCAT) and may leave a party exposed to a costs order. In addition, an appeal of a Magistrates Court decision is to the Supreme Court which may also be expensive and may leave a party exposed to a costs order.<sup>99</sup>

The BCCM Commissioner's Office, in the role of information provider, has a telephone service that can assist applicants and interested parties to navigate the legislation and understand the dispute resolution process. While the BCCM Commissioner's Office does not give legal advice, it performs a vital information and educational service to assist lot owners and members of the public to understand the rights and obligations under the BCCM Act.<sup>100</sup> There is no equivalent information and education service available for lot owners in plans registered under the BUGTA.

### 3.1.4. Options

In 2007, the *Resort Development and Management in the Twenty-First Century* discussion paper stated<sup>101</sup> that the structures of the BCCM Act and the SCRA and the IRDA are so different that it would be impossible to apply the BCCM Act rules to a dispute involving a PTBC or a PBC.

Despite this, with careful planning, the dispute resolution procedures in the BCCM Act could be made to apply to disputes between lot owners or between a lot owner and the body corporate within the same group title plan or building unit plan. This could be achieved by amending the BUGTA to contain equivalent provisions to the BCCM Act or even by removing Part 5 of the BUGTA and providing that Chapter 6 of the BCCM Act will apply to BUGTA plans in relation to disputes, with such changes as needed.

One issue that may require further consideration relates to disputes between a lot owner in a subsidiary scheme and a body corporate in a principal layer. Under some layered arrangements, a dispute, for example, relating to the enforcement of a by-law or access to body corporate records, may arise between a lot owner in the subsidiary layer and the body corporate at the principal layer. This may create a problem because the lot owner in the subsidiary body corporate is not a member of

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<sup>97</sup> It should be noted that the *Integrated Resort Development Act 1987* (Qld) s 179C, the *Sanctuary Cove Resort Act 1985* (Qld) s 104(c) and the *Mixed Use Development Act 1993* (Qld) s 214D all require that using internal dispute resolution has been attempted before a decision can be made under the *Building Units and Group Titles Act 1980* (Qld) part 5 to resolve a dispute about the operation of the relevant Act, or the rights and obligations of a party under that Act. This requirement was added in the 2009 and 2011 amendments discussed at section 2.11.1 above.

<sup>98</sup> Although the referee under the BUGTA is effectively managed through the BCCM Commissioner's Office.

<sup>99</sup> See for example, *The Proprietors – Rosebank GTP 3033 v Locke* [2016] QCA 192 where the body corporate was ordered to pay the lot owner's costs in a matter that was appealed to the Supreme Court.

<sup>100</sup> *Body Corporate and Community Management Act 1997* (Qld) 232(3).

<sup>101</sup> Queensland Government, Department of Local Government, Planning, Sport and Recreation, *Resort Development and Management in the Twenty-First Century*, Discussion Paper, March 2007, 24-25.

the principal body corporate. The members of the principal body corporate are the subsidiary bodies corporate. It is only as a member of the subsidiary body corporate that the lot owner has a membership in the principal body corporate. This may create issues for standing in the case of a dispute.

Under the BCCM Act, a lot owner in a subsidiary layer of a layered scheme does not have standing to pursue dispute resolution directly against the principal body corporate.<sup>102</sup> Any action by a lot owner against a principal body corporate must be taken up by the body corporate in the subsidiary layer, not by the lot owner directly against the principal layer (as this does not fall within the definition of a dispute under the BCCM Act).<sup>103</sup>

The SCRA,<sup>104</sup> the IRDA<sup>105</sup> and the MUDA<sup>106</sup> all provide that disputes<sup>107</sup> about the operation of the specified Act or the rights of a person under the Act are to be resolved in accordance with the BUGTA, with some limited exceptions. While the BUGTA does not contain provisions about disputes between lot owners in a subsidiary layer and the body corporate at the principal layer, some of the specified Acts contain a limited right for a proprietor or occupier of a lot in a subsidiary body corporate to apply to QCAT to deal with a matter relating to the application, contravention, or alleged contravention, of the development control by-laws, if the proprietor or occupier is directly and materially affected by the matter.<sup>108</sup>

Additionally, the role of the BCCM Commissioner's Office as an information and education provider would have to be considered. Information and education in relation to the BUGTA plans is not currently available. If the role of the BCCM Commissioner's Office is expanded to provide these services for plans under the BUGTA, the capacity of the BCCM Commissioner's Office to provide these services would have to be considered.

Any legislative changes will also need to account for the differences in the structure of schemes and plans and consider issues (for example the notification provisions) that could be burdensome on bodies corporate in very large resort developments. For example, under the BCCM Act, the body corporate must give a copy of the notice of dispute to each person whose name appears on the body corporate roll as the owner of a lot in the scheme.<sup>109</sup> In some integrated resorts or mixed use developments, the number of lot owners required to be notified may be very large.

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<sup>102</sup> This issue was discussed in Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Procedural Issues under the Body Corporate and Community Management Act 1997*, 54-55, [7.2].

<sup>103</sup> But note that the Centre has recommended that under the BCCM Act, lot owners in subsidiary schemes should have standing for dispute resolution for particular disputes with the principal body corporate: Commercial and Property Law Research Centre, *Property Law Review: Final Recommendations: Procedural Issues Under the Body Corporate and Community Management Act 1997*, 70, [6.1].

<sup>104</sup> *Sanctuary Cove Resort Act 1985* (Qld) s 104A.

<sup>105</sup> *Integrated Resort Development Act 1987* (Qld) s 179A.

<sup>106</sup> *Mixed Use Development Act 1993* (Qld) s 214A.

<sup>107</sup> Excluding disputes about particular matters such as transfer of management rights and development control by-laws.

<sup>108</sup> See *Sanctuary Cove Resort Act 1985* (Qld) s 104B; *Integrated Resort Development Act 1987* (Qld) s 179B. *Mixed Use Development Act 1993* (Qld) ss 214B, 214C.

<sup>109</sup> *Body Corporate and Community Management Act 1997* (Qld) s 243(4).

The key advantage of replicating or applying the BCCM Act dispute resolution provisions in the BUGTA is that lot owners under the BUGTA will have a clearer process to resolve disputes due to the more formalised dispute resolution structure under the BCCM Act. This may make it easier for department adjudicators under the BCCM Act, who are also appointed as referees under the BUGTA, to make decisions about breaches of either Act by following a consistent procedure. Further, lot owners will be able to benefit from the information service provided by the BCCM Commissioner's Office, if the role of information and education provider for lot owners and members of the public in relation to BUGTA plans is granted to the BCCM Commissioner's Office.

However a major disadvantage could be that this increases the burden on the services provided by the BCCM Commissioner's Office. Presently, the BCCM Commissioner's Office provides referee services for BUGTA plans so there may not be an additional financial impact in terms of dispute resolution, except perhaps for an increased utilisation of the conciliation service (as disputes under the BUGTA would be able to take advantage of conciliation as part of the dispute resolution process). However, there may be an increase in relation to information services if the BCCM Commissioner's Office is to provide the education and information services for BUGTA plans as are currently provided for schemes under the BCCM Act.

### **Questions**

- 1. Should the dispute resolution provisions in the BCCM Act replace the dispute resolution provisions in the BUGTA?**
- 2. If so, should the same dispute resolution provisions apply to plans under the BUGTA for all issues, or are there some issues where, due to the nature of the plan itself, different provisions should apply? What are these issues and what is the best way to deal with the difference?**
- 3. What is the best way to deal with a dispute between a lot owner in a subsidiary layer and a body corporate in a principal layer?**

## **3.2. Procedural issues**

A second area where consistency could be achieved between the BUGTA and the BCCM Act relates to body corporate meeting procedures.<sup>110</sup> Generally, the procedures are very similar. Under both Acts, the lot owners make up the body corporate and pay levies to fund the maintenance of the common property. The body corporate holds an annual general meeting to decide on budgets and elect a committee to handle the day to day operations. The notice of the meeting must be given to lot owners and only specified parties are eligible to nominate for a committee position, to vote or to put forward a motion for consideration. Any meeting of the body corporate other than the annual general meeting is an extraordinary general meeting.

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<sup>110</sup> It should be noted that the procedures for the principal body corporate layers under the SCRA, IRDA and MUDA are contained in those Acts and are not considered here. They were adjusted in 2009 and 2011 to more closely resemble the provisions of the Standard Module.



Under the BUGTA, meeting procedures are set out in Schedule 2. Part 1 of Schedule 2 deals with the first annual general meeting of the body corporate and Part 2 of Schedule 2 deals with general meetings other than the first annual general meeting. The schedule applies regardless of the size of the development.

Under the BCCM Act, body corporate meetings and committee meetings must be held and conducted in accordance with the Act itself<sup>111</sup> and the relevant Regulation Module.<sup>112</sup> There are five Regulation Modules, each designed to provide for different types of schemes. The Regulation Modules are:

- the Standard Module, which is the default module that applies at most schemes;
- the Commercial Module, designed for schemes that are, or are intended to be, predominately composed of commercial lots;
- the Accommodation Module, designed for schemes that are, or are intended to be predominately accommodation lots;
- the Small-Schemes Module, designed for schemes with six or fewer lots; and
- the Two-Lot module, designed for specified two-lot schemes where decisions are made by lot owners agreements.

Consistency could be achieved by amending the BUGTA to contain equivalent provisions to the BCCM Act and the Standard Module. Alternatively, in the scenario of a full transition from the BUGTA to the BCCM Act, it may be that one or more new Regulation Modules are required under the BCCM Act to deal with plans under the specified Acts, depending on their characteristics. This could offer opportunities to achieve procedural consistency with the BCCM Act generally while still allowing specific rules for the mixed use and resort developments under the specified Acts. A new Regulation Module could vary from the Standard Module as necessary to account for the operational realities of administering these types of developments.

It is sufficient for present purposes to note that despite the general similarity discussed above, there are differences in the procedures. Below is a brief list of several differences between the BCCM Act and the BUGTA in terms of procedural issues. The list is by no means complete. Some of these issues were addressed in the SCRA,<sup>113</sup> the IRDA<sup>114</sup> and the MUDA<sup>115</sup> when those Acts were amended in 2009 and 2011.

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<sup>111</sup> *Body Corporate and Community Management Act 1997* (Qld) s 101 (committee meetings) and s 104(1) (body corporate meetings).

<sup>112</sup> *Body Corporate and Community Management Act 1997* (Qld) s 21.

<sup>113</sup> To apply to the primary thoroughfare body corporate or the principal body corporate: *Sanctuary Cove Resort Act 1985* (Qld) schedule 3.

<sup>114</sup> To apply to the primary thoroughfare body corporate or the principal body corporate: *Integrated Resort Development Act 1987* (Qld) schedule 3.

<sup>115</sup> To apply to the community body corporate or the precinct body corporate: *Mixed Use Development Act 1993* (Qld) schedule 1.

### 3.2.1. Notice of annual general meetings

One difference between the BCCM Act and the BUGTA relates to the notice period before an annual general meeting is held. Under the BCCM Act, the annual general meeting must be held at least 21 days after notice of the meeting has been given to lot owners.<sup>116</sup> Under the BUGTA, notice of a general meeting is to be served on each proprietor and first mortgagee at least seven days before the meeting. The reason for the significant difference is unclear. The longer timeframe under the BCCM Act probably reflects a fairer amount of time as the notice may contain quotes or other material that will require time to read and understand before the general meeting.

### 3.2.2. Use of proxies

The BCCM Act<sup>117</sup> restricts the use of proxies in a number of ways. First, the body corporate may, by special resolution, decide to prohibit the use of proxies for particular things or altogether.<sup>118</sup> For schemes with 20 or more lots, a person may hold proxies for no more than 5%<sup>119</sup> of the lots. If the scheme has less than 20 lots, a person may hold a proxy for only one lot.<sup>120</sup>

To be valid, a proxy:

- must be given to the secretary prior to the meeting;<sup>121</sup>
- must be in the approved form;
- cannot be irrevocable;
- must last for no more than the financial year (or a shorter period as stated in the proxy itself);<sup>122</sup>
- must appoint a named individual; and
- cannot be transferred.<sup>123</sup>

Under some regulation modules, a proxy may not be used for the following:

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<sup>116</sup> Standard Module s 74; Accommodation Module s 72; Commercial Module s 41. Under the Small Schemes Module s 36 the body corporate may decide on a different period.

<sup>117</sup> Through the relevant Regulation Module: *Body Corporate and Community Management Act 1997* (Qld) s 103.

<sup>118</sup> Standard Module s 107(2); Accommodation Module s 105(2). This option is not available under the Commercial Module or the Small Schemes Module.

<sup>119</sup> Or 10% under the Accommodation Module s 105(4)(a).

<sup>120</sup> Standard Module s 107(4); Accommodation Module s 105(4). This restriction does not apply under the Commercial Module or the Small Schemes Module.

<sup>121</sup> Standard Module s 107(5); Accommodation Module s 105(5); Commercial Module s 74(2); Small Schemes Module s 54(2).

<sup>122</sup> This restriction does not apply under the Accommodation Module or the Commercial Module.

<sup>123</sup> Standard Module s 108; Accommodation Module s 106; Commercial Module s 75; Small Schemes Module s 55.

- electing committee members;
- voting on a special resolution to prohibit or restrict the use of proxies;
- voting on a special resolution to change the applicable Regulation Module;
- voting on a majority resolution;
- a motion engaging, or amending or terminating the engagement of, a service contractor; or
- a motion decided by secret ballot.<sup>124</sup>

Under the BUGTA, there are few limits on proxies.<sup>125</sup> The instrument appointing the proxy must be in writing under the hand of the person making the appointment (or their agent) and may be either general or particular.<sup>126</sup>

The BUGTA also provides that a person who has a financial interest in a prescribed arrangement<sup>127</sup> may not vote on that arrangement as a proxy for another person. This is the only restriction on the use of proxies in the BUGTA. A person who has an interest in a prescribed arrangement (for example, a body corporate manager) can still act as a proxy provided they do not vote on the prescribed arrangement.

This means that under the BUGTA, for a meeting of a residential body corporate, a proxy can be given that is irrevocable, perpetual (in that it does not lapse) and that does not name a specified individual. This lack of restriction has a high potential for abuse. For this reason amendments to the SCRA<sup>128</sup> and the IRDA<sup>129</sup> in 2009 and to the MUDA<sup>130</sup> in 2011 included additional restrictions on the use of proxies at the PBC and PTBC level. Given this, it is sensible to introduce restrictions on the use of proxies at the RBC level in these developments.

### 3.2.3. Conflict of interest – committee members

Under the BCCM Act, a voting member of the committee must disclose direct or indirect conflicts of interest in a matter being considered by the committee and refrain from voting on the matter.<sup>131</sup>

Under the BUGTA there are no provisions about a conflict of interest. This means that a voting member of the committee could vote on a matter where a conflict of interest exists without disclosing the conflict.

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<sup>124</sup> Standard Module s 109(3); Accommodation Module s 107(3); Commercial Module s 76(3); Small Schemes Module s 56(3).

<sup>125</sup> This is despite the amendments to the SCRA, the IRDA and the MUDA in 2009 and 2011 to restrict the use of proxies at the PBC and PTBC levels.

<sup>126</sup> *Building Units and Group Titles Act 1980* (Qld) schedule 2 part 2 s 17. See also section 50A.

<sup>127</sup> Generally, being any arrangement between the original owner and the body corporate relating to carrying out duties of the body corporate or conducting a business on body corporate property: *Building Units and Group Titles Act 1980* (Qld) s 7 (definition of 'prescribed arrangement').

<sup>128</sup> *Sanctuary Cove Resort Act 1985* (Qld) ss 47B-47G.

<sup>129</sup> *Integrated Resort Development Act 1987* (Qld) ss 168A -168F.

<sup>130</sup> *Mixed Use Development Act 1993* (Qld) ss 201A-201L.

<sup>131</sup> Standard Module s 53; Accommodation Module s 53; Commercial Module s 27; Under the Small Schemes Module, the office holder must disclose the conflict but can be authorised to vote: Small Schemes Module s 21.

The only limitation (as described above) is that a person must not vote as a proxy for a lot owner if the person acting as the proxy has an interest in a prescribed arrangement.<sup>132</sup> The person may still vote as a proxy for other arrangements even if a conflict of interest exists.

### 3.2.4. Delegation of decision making

Under the BCCM Act, the body corporate cannot delegate its powers<sup>133</sup> (for example, to a body corporate manager) unless specific circumstances exist.<sup>134</sup> The BCCM Act does allow for what is known as a part 5 engagement where the body corporate in a general meeting has failed to elect a committee. Where a part 5 engagement has taken place, there is no committee. The engagement will last only until the next annual general meeting (although if the body corporate fails to elect a committee, a new engagement could be made). The part 5 engagement must be decided by secret ballot and a proxy cannot vote on the resolution.<sup>135</sup>

Under the BUGTA, the body corporate may delegate all of its powers to a body corporate manager.<sup>136</sup> Notwithstanding any such appointment, the body corporate under the BUGTA may continue to exercise those delegated powers.<sup>137</sup> The only restrictions are that the body corporate may not delegate the power to make a delegation of power<sup>138</sup> or to decide certain restricted matters.<sup>139</sup>

The reason for the difference is not clear.

### 3.2.5. By-laws

The BUGTA provides that the by-laws<sup>140</sup> contained in Schedule 3 of the BUGTA will be the by-laws for a plan, except where the by-laws in the Schedule are amended, added to or repealed by the body corporate.<sup>141</sup> In some cases this may create confusion as to what by-laws are in effect in a scheme as the by-laws may be those recorded in the BUGTA as amended by the body corporate from time to time.<sup>142</sup>

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<sup>132</sup> *Building Units and Group Titles Act 1980* (Qld) s 7 (definition of 'prescribed arrangement').

<sup>133</sup> *Body Corporate and Community Management Act 1997* (Qld) s 97.

<sup>134</sup> *Body Corporate and Community Management Act 1997* (Qld) ss 98, 120; See also for example Standard Module s 7(2); Accommodation Module s 8(2); Small Schemes Module s 8(2).

<sup>135</sup> Standard Module s 58(2); Accommodation Module s 56(2). The Small Schemes Module does not require a secret ballot or that no vote is exercised by proxy: Small Schemes Module s 23(2).

<sup>136</sup> *Building Units and Group Titles Act 1980* (Qld) s 50(1)(a).

<sup>137</sup> *Building Units and Group Titles Act 1980* (Qld) s 50(5).

<sup>138</sup> *Building Units and Group Titles Act 1980* (Qld) s 50(2)(a).

<sup>139</sup> *Building Units and Group Titles Act 1980* (Qld) ss 50(2)(b), 46.

<sup>140</sup> It is noted that under the specified Acts there are different types of by-laws, (e.g. development control by-laws; primary and secondary thoroughfare by-laws; precinct by-laws; community property and activities by-laws) however the focus here is on the difference between the BUGTA and the BCCM Act in relation to the schedule of by-laws in each Act.

<sup>141</sup> *Building Units and Group Titles Act 1980* (Qld) s 30.

<sup>142</sup> It is noted that changes to the standard by-laws must be lodged within 3 months of the change and do not come into force until recorded on the registered plan: *Building Units and Group Titles Plan 1980* (Qld) s 30(3)-(3A).

Generally for a scheme under the BCCM Act the by-laws are included as a schedule to the community management statement (**CMS**) registered when the community titles scheme is created.<sup>143</sup> If the CMS does not contain by-laws the schedule of by-laws in the BCCM Act may apply.<sup>144</sup> It is noted that when the BCCM Act was enacted, existing plans under the BUGTA were deemed to be community titles schemes and the CMS for these schemes were deemed to include by-laws identical to the by-laws that were in force for the plan before the BCCM Act commenced. If the CMS for these schemes has never been updated, the by-laws for the scheme will be the by-laws in the BUGTA as amended by the body corporate from time to time before the BCCM Act commenced.

Under the BCCM Act, there are a number of restrictions that apply to by-laws. These include that a by-law may not:

- restrict the type of residential use of the lot if the lot may be used for residential purposes;
- prevent or restrict a transmission, transfer, mortgage or other dealing with a lot;
- discriminate between types of occupier (i.e. owners versus tenants);
- impose a monetary liability (unless it is an exclusive use by-law); or
- be oppressive or unreasonable having regard to the interests of all owners and occupiers and the use of the common property.

Under the BUGTA, there are less restrictions. A by-law may not restrict the transfer or other dealing with a lot, or destroy or modify any easement, service right or service obligation implied or created by the BUGTA.<sup>145</sup> By-laws may impose a monetary liability on a lot owner and where a person becomes the proprietor of a lot at a time when another person is under an obligation in a by-law to pay money to the body corporate, the new proprietor is jointly and severally liable with the other person to pay the money.<sup>146</sup>

### Questions

- 4. Should the body corporate procedures that apply to community titles schemes under the BCCM Act be made to apply to plans under the BUGTA? If so, what is the best way to achieve this?**
- 5. If BUGTA plans are transitioned to the BCCM Act, is a new Regulation Module for mixed use and integrated resorts under the specified Acts required? If so, how would it differ from the existing Regulation Modules?**
- 6. In addition to the dispute resolution and the procedural matters discussed above (and leaving aside titling and town planning considerations) what other areas or differences between the BUGTA and the BCCM Act should be considered for amendment?**

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<sup>143</sup> *Body Corporate and Community Management Act 1997* (Qld) s 66(1)(e).

<sup>144</sup> *Body Corporate and Community Management Act 1997* (Qld) s 168.

<sup>145</sup> *Building Units and Group Titles Act 1980* (Qld) s 30(6).

<sup>146</sup> *Building Units and Group Titles Act 1980* (Qld) s 9A.

## 4. The BCCM Act and the BUGTA

When the BCCM Act came into operation, the transitional provisions provided that building units plans and group titles plans under the BUGTA, except for those registered for one of the specified Acts, were deemed to be community titles schemes under the BCCM Act.<sup>147</sup>

Many thousands of schemes were transitioned across to the BCCM Act with minimal disruption. However, the developments created under the specified Acts involved layered and staged arrangements that were more difficult to translate into the BCCM Act. It may be for this reason that the BUGTA was left in effect for the specified Acts.

A transition to the BCCM Act from the BUGTA is easier to describe than to achieve. Any transition will require consultation and coordination between State and local government, the bodies corporate that manage the plans and a vast range of interested stakeholders. Assuming such a transition is a desirable goal, it will be very complex to actually bring it about in practice.

As discussed above, there are some significant differences between the BCCM Act and the BUGTA. While there are differences, there are some obvious similarities between the BUGTA and the BCCM Act which could be drawn out and maximised as a part of any transition. The amendments to the SCRA, the IRDA and the MUDA in 2009 and 2011 were designed to address a number of pressing concerns that had arisen in relation to the developments under those Acts. The amendments were directed towards modernising the body corporate framework of the specified Acts in relation to procedural requirements for the PBCs and PTBCs so as to more closely resemble the BCCM Act.

If the BUGTA is to be replaced with the BCCM Act, the differences may require that the specified Acts are modified or amended to be self-referential (i.e. to contain provisions that cannot be accommodated in the BCCM Act). Taken together, this means that replacing the BUGTA with the BCCM Act will have a significant impact on the resorts and other developments under the specified Acts.

### 4.1. Is there a need for reform?

At this point, the question to consider is whether the effort of a transition is worth the result. In other words, it is necessary to determine whether the benefits of a transition outweigh the costs associated with achieving the transition and whether there will be net benefit to the community.

A critical issue to consider is whether there is a level of detriment that is being experienced by lot owners under the BUGTA, either as a result of the current legislation or as compared to lot owners under the BCCM Act. Further, it is important to understand whether owners of lots under the BUGTA support a transition to BCCM Act.

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<sup>147</sup> *Body Corporate and Community Management Act 1997* (Qld) s 325(1)(a).

Bearing in mind the investment of money, time and effort that will be required by Government, by industry groups and bodies corporate, and the disruption to owners in moving from one legislative regime to another, the first question to ask is whether the goal of transition is worthwhile. While there are compelling arguments in favour of administrative consistency, it will not be quick or easy, given the diverse range of interest groups to be consulted and the potential legal and administrative hurdles.

## **4.2. Arguments in favour of a transition**

A compelling argument in favour of replacing the BUGTA with the more modern legislation in the BCCM Act is efficiency. From a practical perspective it is desirable if the same rules that apply to schemes governed by the BCCM Act also apply to residential and commercial bodies corporate in the resorts and developments which are still regulated by the BUGTA. A single legislative framework would reduce red tape and bring about administrative consistency for lot owners, bodies corporate, body corporate managers, government officials and other interested stakeholders involved with both BCCM Act schemes and BUGTA plans.

A consistent set of rules for all bodies corporate in Queensland could be valuable for a number of reasons. The first is that body corporate managers and relevant government officials who deal with bodies corporate under both Acts currently have to understand and navigate the BCCM Act, the BUGTA and the specified Acts. It could be easier to administer the relevant legislation if there is only one set of rules. Secondly, some people own lots in both community titles schemes under the BCCM Act and plans under the BUGTA. In some cases, these lot owners may not understand why a different set of rules apply to different lots.

Another reason that supports bringing plans under the BUGTA in line with the BCCM Act relates to the structure of the BCCM Act itself. The BUGTA takes a generic approach to body corporate management and was never designed to deal with the range of developments that currently operate under the specified Acts. This is one reason why the specified Acts were needed – the BUGTA did not provide for mixed use, staged developments. By contrast, the BCCM Act contains a more contemporary body corporate management framework. The Act itself supports staged and layered development. Further, the BCCM Act is supported by the Regulation Modules which provide different operating requirements for different types of schemes. This facilitates a more flexible approach to development by creating different rules for two lot schemes, small schemes, commercial schemes and other residential schemes.

## **4.3. The challenge of transitioning from the BUGTA to the BCCM Act**

In 2009 and 2011, the Queensland Government of the time signalled an intention to move the specified Acts to contemporary body corporate, planning and titling arrangements. To date, this has not occurred. While some of the delay in this regard may be attributed to changes of government and shifting government priorities, some of it may also be due to the fact that such a transition is complex, time consuming and difficult.

The BUGTA and the specified Acts deal with titling and planning issues that are outside the scope of the BCCM Act. This means that a full transition from the BUGTA to the BCCM Act will require detailed and careful consideration of these planning and titling issues, such as the operation of town planning instruments and the registration of group titles plans and building units plans.

The planning and titling changes must be identified and discussed with local governments, the state government and interested parties. Any potential solutions that are identified to bring the plans within modern body corporate frameworks should be widely consulted before being implemented. The Centre is of the view that the planning and titling issues are the most difficult part of the transition from BUGTA to the BCCM Act. Provisions in the BUGTA may need to be moved into each of the specified Acts or into the *Land Title Act 1994* (Qld) or the *Planning Act 2016* (Qld).

#### 4.3.1. Other factors

There are a number of other factors to consider in any transition. While it is not possible to list them all here, a few important factors to consider are discussed below. One of the most significant will be the cost imposed on developments under the specified Acts to comply with legislative changes. Where the costs of achieving the transition are high, the benefit to lot owners and the community as a whole must justify the costs.

If plans under the BUGTA are to become community titles schemes under the BCCM Act, a number of issues arise. For example, when the BCCM Act commenced, existing building units plans and group titles plans were deemed to be community titles schemes under the BCCM Act<sup>148</sup> and were taken to have an interim CMS.<sup>149</sup> The single schedule of existing lot entitlements were deemed to be both the interest schedule lot entitlement and the contribution schedule lot entitlement.<sup>150</sup> The by-laws in force for the plan at the time of transition were taken to be the by-laws of the scheme on transition.<sup>151</sup> After the transition, schemes were given three years to record a new CMS,<sup>152</sup> after which the interim CMS would be taken to be the CMS for the scheme, regardless of whether it complied with the requirements for a CMS under the Act.

If a transition is to occur for plans under the BUGTA, these types of issues will have to be addressed. In particular, there may need to be extraordinary general meetings of the body corporate at all levels to come to agreement on controversial issues. This may cost time and money.

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<sup>148</sup> *Body Corporate and Community Management Act 1997* (Qld) s 325(1).

<sup>149</sup> *Body Corporate and Community Management Act 1997* (Qld) s 337.

<sup>150</sup> *Body Corporate and Community Management Act 1997* (Qld) s 337(2)(e)-(f).

<sup>151</sup> *Body Corporate and Community Management Act 1997* (Qld) s 337(2)(g).

<sup>152</sup> *Body Corporate and Community Management Act 1997* (Qld) s 337(3).



The cost of holding extraordinary general meetings may be significant, particularly in large schemes. Further, the issues that arise may not have easy solutions. For example, lot entitlements may be a potential source of conflict in the development,<sup>153</sup> as may the by-laws, particularly if the Centre's recommendations in relation to the enforcement of by-laws are accepted by the Government.<sup>154</sup>

**Question**

- 7. Is there a detriment being experienced by lot owners in bodies corporate that continue to be regulated by the BUGTA? Some areas to consider include dispute resolution, proxy votes, delegation of executive committee powers, conflict of interest, and contractual terms for body corporate managers.**

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<sup>153</sup> See Commercial and Property Law Research Centre, *Queensland Government Property Law Review Issues Paper 2: Lot Entitlements under the Body Corporate and Community Management Act 1997*, available at [http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0010/224875/property-law-review-ip2-lot-entitlements-bccm.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0010/224875/property-law-review-ip2-lot-entitlements-bccm.pdf).

<sup>154</sup> 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*, available at [http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0007/508714/qut-recommendations-by-laws-debt-recovery-and-scheme-termination.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/508714/qut-recommendations-by-laws-debt-recovery-and-scheme-termination.pdf).

## 5. The BCCM Act and the BUGTA – Towards consistency

### 5.1. Options without a transition to the BCCM Act

If it is determined that a transition from the BUGTA to the BCCM Act is not, or is unlikely to be, of benefit to lot owners and the community, there are several options to proceed. The first is the status quo option – that is, leaving the BUGTA as it is. A second option is to follow the approach taken in 2009 and 2011 with amendments to the SCRA, the IRDA and the MUDA. This approach is to amend the BUGTA to more closely resemble the BCCM Act in particular respects. This option could involve making changes to the areas discussed above (i.e. procedural requirements and dispute resolution) but without going further towards replacing the BUGTA with the BCCM Act. A third option is to repeal the BUGTA but to re-enact those parts of the BUGTA that are used by each of the specified Acts as a part of the specified Act itself. This could be achieved similarly to the way the *Southbank Corporation Act 1989* (Qld) relies on a modified version of the BUGTA enacted in a regulation.<sup>155</sup>

### 5.2. Options with a transition to the BCCM Act

If it is determined that a transition to the BCCM Act will be of benefit to lot owners and the community, there are two ways of achieving it as discussed below. While a consideration of the feasibility of a full transition from the BUGTA to the BCCM Act is beyond the scope of the Property Law Review, it is possible to consider how such a transition may be achieved. The discussion in this section assumes that a complete transition from the BUGTA to the BCCM Act is a desirable outcome.

The first method is a radical approach, which is to repeal the BUGTA, amend the specified Acts and insert transitional provisions in the BCCM Act, effectively deeming plans registered under the BUGTA to be community titles schemes under the BCCM Act. This option may require a new Regulation Module to address particular issues at large and mixed use developments under the specified Acts. Additionally, amendments to the specified Acts may be needed where there are significantly different requirements than under the BCCM Act.

Under this radical approach, all the details of a complete transition would have to be worked out before any legislative changes are implemented. This is the only way to facilitate the repeal of the BUGTA and to minimise the transaction costs of implementation. This approach will have to be planned very carefully to minimise unintended consequences and avoid unnecessary impact on existing rights and property values.

Alternatively, a more moderate approach is to amend the BUGTA (and to the extent necessary, the specified Acts) to include provisions equivalent to those in the BCCM Act or to provide that specific parts of the BCCM Act apply to the specified Acts.<sup>156</sup> Over time, the provisions could be progressively harmonised so that ultimately there would be little difference between the BUGTA and BCCM Act. At

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<sup>155</sup> *South Bank Corporation (Modified Building Units and Group Titles) Regulation 2014* (Qld).

<sup>156</sup> For example, as discussed above at paragraph 3.1, the BUGTA could be amended to provide that chapter 6 of the *Body Corporate and Community Management Act 1997* (Qld) (dispute resolution) apply to disputes for plans registered under the BUGTA.

the point where the BUGTA was harmonised with the BCCM Act, planning and titling provisions could be moved to the *Planning Act 2016* (Qld) and the *Land Title Act 1994* (Qld) and the BUGTA could be repealed.

A moderate approach would also require extensive consultation but under this approach, the first minor changes agreed by stakeholders could be implemented in legislation while the details are worked out for further changes. This means that there could be some legislative changes sooner than would be seen under the radical approach. A moderate approach could be implemented in stages so that changes that are phased in over time with incremental changes. A number of the amendments discussed above could be among the first changes implemented as these changes are relatively minor when compared to the major planning and titling changes that would be required.

### **5.3. A staged approach to transition**

If a transition is desirable, it will be necessary to ensure that in transition there is no diminution of existing value, amenity or interests for stakeholders in plans under BUGTA as a result of the transition. Further, the impact on existing rights should be as minimal as possible. This will require consultation with residents in the schemes, developers, local governments and the Queensland Government as well as any other interest holders. There are a number of complex issues to be considered before any major changes could be implemented.

Despite this, under a moderate, staged approach, there are minor changes that could be implemented with relatively little legislative amendments. These include changes to areas such as dispute resolution and body corporate procedural requirements as discussed above.

It is likely that a staged approach will have at least three stages. Below is an outline of what the stages may involve.

#### **5.3.1. Stage one**

The first stage of a moderate staged approach would likely involve information gathering and developing proposals for reform. Stage one would seek to transition over a reasonable length of time. This stage may require determining if a full transition from the BUGTA to the BCCM Act is even practicable from a planning and titling perspective. Assuming it is, the compliance costs must be evaluated against the benefit of the change. If a full transition to the BCCM Act is not practicable, it must be determined what, if any, changes should be made to achieve consistency between the BUGTA and the BCCM Act. In this respect, the first stage is useful regardless of what approach to transition is taken.

The focus of stage one will be to identify, and consult upon, concrete proposals for reform that are both practical and achievable. These reforms, once agreed, could be implemented while further consultation takes place in relation to other, more difficult topics.

This Issues Paper can be viewed as part of the first stage. The intent is to gather information, determine whether a transition is needed, and if so, what a transition should look like. The responses

to the questions in this Issues Paper will help to target efforts of reform and to identify other areas where reform could be made with relatively little impact on existing rights.

### 5.3.2. Stage two

A second stage could utilise the information gathered during the first stage as a starting point for developing further proposals for reform. The second stage may begin with consultation between residents, developers, the Queensland Government and local government and other interest holders. The consultation could focus on the proposals developed in the first stage as responses to this Issue Paper as well as on identifying additional areas where consistency could be achieved.

The Centre anticipates that a second stage could involve the implementation of some of the ‘easier’ changes<sup>157</sup> such as body corporate procedural issues for residential bodies corporate and dispute resolution provisions. The second stage may also involve considering how changes to the BUGTA for residential bodies corporate of group titles plans and building units titles plans may impact on the operation of the PBCs and PTBCs established under the specified Acts.

The second stage may involve considering the way each of the specified Acts interact with the BUGTA. For example, it may be that some specified Acts rely on the BUGTA to a greater extent than others, or that the structure of developments created under a specified Act could more readily be translated to a BCCM Act framework than others. It may be, for example, that developments under the MUDA more resemble schemes under the BCCM Act than developments under the IRDA or the SCRA. This may mean that the specified Acts could be treated differently for the purposes of a transition to the BCCM Act. It may be that parts of the BUGTA could be retained for some specified Acts (either as amendments to the specified Act itself, or in regulations) while other specified Acts could be fully transitioned to the BCCM legislation.

### 5.3.3. Stage three

A third stage could involve detailed consideration of the planning and titling changes that will be needed under the specified Acts or to the *Land Title Act 1994* (Qld) and the *Planning Act 2016* (Qld) to facilitate a full transition to the BCCM Act and to allow the repeal of the BUGTA.

It is understood from the BCCM Commissioner’s Office<sup>158</sup> that the planning and titling aspects are not a common concern or cause for dispute in the developments that continue to operate under the BUGTA. This means that transitioning the planning and titling aspects of the BUGTA to the *Land Title Act 1994* (Qld) or the *Planning Act 2016* (Qld) is not a high priority. Further stakeholder input and specialist legal advice may be needed to develop workable proposals for reform.

The third stage is likely to be the most difficult and time consuming as it is the hardest to achieve from a legislative standpoint. This stage may include changes that deem the plans remaining under the

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<sup>157</sup> Which are only easy in comparison to the planning and titling changes that will be required.

<sup>158</sup> The BCCM Commissioner’s Office, in addition to providing the dispute resolution service under the *Body Corporate and Community Management Act 1997* (Qld) also provides the referee for determining disputes under the *Building Units and Group Titles Act 1980* (Qld).

BUGTA to be community titles schemes with such changes as necessary to achieve the outcome under the specified Acts. Alternatively, or even at the same time, this stage may require cancellation and re-registration of plans, easements, mortgages, caveats and other registerable interests. The titling issue has the potential to include the highest compliance costs and the greatest margin for error of any other stage in the transition. As such, these issues are the most in need of consultation, consideration and precise legislative intervention.

### **Questions**

- 8. Of the following options, which do you support and why?**
  - The status quo approach (i.e. no change to the current system);
  - Amending the BUGTA to resemble the BCCM Act in particular respects;
  - A full transition from the BUGTA to the BCCM Act; or
  - Some other option (please provide details).
- 9. In your opinion, what are the advantages or disadvantages of transitioning from the BUGTA to the BCCM Act for those plans that continue to be regulated by the BUGTA?**
- 10. In your opinion, are there sufficient reasons to justify a transition to the BCCM Act for bodies corporate that continue to be regulated by the BUGTA?**
- 11. Should the specified Acts be treated differently for the purposes of a transition to the BCCM Act? That is, would it be appropriate to transition from the BUGTA differently, depending on the specified Act concerned?**
- 12. If a transition is desirable, do you support a moderate approach involving staged implementation of amendments or do you prefer a radical approach involving a complete change? Why?**

## 6. Conclusion

The Centre anticipates that any legislative amendments designed to bring the BUGTA in line with more modern frameworks in the BCCM Act will be a lengthy and time-consuming process, requiring significant commitment of resources over a long period of time. Such a transition will require targeted consultation between local government, state government and the lot owners and bodies corporate in the plans themselves. It will require detailed and expert consideration of the planning, titling and body corporate aspects of the existing legislation.

The changes to dispute resolution and body corporate procedures discussed above offer an excellent starting point for further discussion in this area. If there is a demonstrated need, and sufficient benefit for lot owners and the community at large to justify amending the BUGTA to more closely resemble the BCCM Act, then improvements to the dispute resolution provisions and the procedural requirements may be an easy starting point. However, these changes are only easy when compared to the difficult task of completely transitioning plans under BUGTA to the BCCM Act.

Despite the difficulty of this task, the goal of improved consumer protection, simplified legislation, administrative consistency and streamlined practices across the body corporate sector may make the challenge worth the effort.

## Resources

### A. Articles/Books/Reports

Commercial and Property Law Research Centre, *Government Property Law Review: Options Paper Recommendations: Body Corporate Governance Issues: By-laws, Debt Recovery and Scheme Termination*

Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Procedural Issues under the Body Corporate and Community Management Act 1997*

Commercial and Property Law Research Centre, *Property Law Review: Final Recommendations: Procedural Issues Under the Body Corporate and Community Management Act 1997*

Commercial and Property Law Research Centre, *Queensland Government Property Law Review Issues Paper 2: Lot Entitlements under the Body Corporate and Community Management Act 1997*

England, Philippa, 'From revolution to evolution: Two decades of planning in Queensland', *Environment and Planning Law Journal*, 27 (2010) 53

Explanatory Notes, Body Corporate and Community Management Bill 1997 (Qld)

Explanatory Notes, Building Units and Group Titles Bill 1994 (Qld)

Explanatory Notes, Local Government Electoral Bill 2011 (Qld)

Explanatory Notes, Resorts and Other Acts Amendment Bill 2009 (Qld)

Lim, Anthony, Office of Regulatory Policy, Department of Justice and Attorney-General, *History of Community Titles Legislation in Queensland*, (2012)

Minister for Infrastructure and Planning, the Honourable Stirling Hinchliffe, Media Release 'Outdated resort laws simplified and modernised' August 4, 2009

Queensland Government, Department of Local Government, Planning, Sport and Recreation, *Resort Development and Management in the Twenty-First Century*, Discussion Paper, March 2007.

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Body Corporate and Community Management Bill: Second Reading Speech', (Hobbs, HWT, 30 April 1997), 1136

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Building Units and Group Titles Bill 1994: Second Reading Speech' (Smith, GN, 27 October 1994), 10022

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Building Units and Group Titles Act Amendment Bill: Second Reading Speech' (Clauson, PJ, 10 November 1987), 3959-3960

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Building Units and Group Titles Bill: Second Reading Speech' (Lickiss, WD, 25 March 1980), 2937

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Integrated Resort Development Amendment Bill: Second Reading Speech' (Mackenroth, TM, 11 May 1993), 2599

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Integrated Resort Development Bill: Second Reading Speech' (Hinze, RJ, 31 March 1987), 1063

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Local Government Electoral Bill: Second Reading Speech' (Lucas, PT, 16 June 2011), 1968.

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Ministerial Statement: Building Units and Group Titles Act' (McElligott, KV, 19 October 1995), 475.

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Mixed Use Development Bill: Second Reading Speech' (Mackenroth, TM, 18 March 1993), 2421

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Mixed Use Development Bill' (Woodgate, MR, 13 May 1993), 2759-2761

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Registration of Plans (HSP Nominees Pty Limited) Enabling Bill: Second Reading Speech' (Lickiss, WD, 15 April 1980), 3217

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Registration of Plans (Stage 2) (HSP Nominees Pty Limited) Enabling Bill: Second Reading Speech' (Harper, NJ, 30 November 1983), 416

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Resorts and Other Acts Amendment Bill: Second Reading Speech' (Hinchliffe, SJ, 19 May 2009), 303

Queensland, Legislative Assembly, *Parliamentary Debates*, 'Sanctuary Cove Resort Bill: Second Reading Speech' (Hinze, RJ, 17 October 1985), 2190

## **B. Legislation**

*Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld)

*Body Corporate and Community Management Act 1997* (Qld)

*Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld)

*Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld)

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

*Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld)

*Building Units and Group Titles Act 1980* (Qld)

*Integrated Resort Development Act 1987* (Qld)

*Integrated Resort Development Amendment Act 1993* (Qld)

*Local Government Electoral Act 2011* (Qld)

*Planning Act 2016* (Qld)



*Queensland Civil and Administrative Tribunal Act 2009* (Qld)

*Resorts and Other Acts Amendment Act 2009* (Qld)

*Sanctuary Cove Resort Act 1985* (Qld)

*South Bank Corporation (Modified Building Units and Group Titles) Regulation 2014* (Qld)

*Sustainable Planning Act 2009* (Qld)

**C. Cases**

*Ainsworth v Albrecht* [2016] HCA 40

*The Proprietors – Rosebank GTP 3033 v Locke* [2016] QCA 192

**D. Miscellaneous**

<http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland>

<https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/body-corporate-disputes/types-of-dispute-resolution/adjudication-for-body-corporate-disputes/>

<https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/body-corporate-disputes/types-of-dispute-resolution/conciliation-for-body-corporate-disputes/>