strata community association QLD

Strata Community Association (Qld)
Level 9, 410 Queen Street
Brisbane QLD 4000
T: (07) 3839 3011
E: admin.qld@strata.community

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Secretariat,

Re: Building Units and Group Titles and Other Legislation Amendment Bill 2022 ("the Bill")

Introduction

Currently, there are over 500,000 body corporate lots in more than 50,000 community title schemes across Queensland. SCA (Qld) is the peak association supporting Queensland's strata sector, with more than 1,200 individual and corporate members who help oversee, advise and manage assets worth tens of billions of dollars. SCA (Qld) members manage approximately 400,000 of the lots in the state of Queensland. As the peak body for the strata industry, SCA (Qld) is in the unique position to understand the sector from all angles.

SCA (Qld) is in an enviable position to understand the sector from a broad array of viewpoints owing to its diverse membership. SCA (Qld) represents strata managers, community titles schemes with committee members acting as nominees, lot owners as individuals and service providers to the strata industry including specialist insurers, painting suppliers, energy suppliers, solicitors, accountants, water and plumbing providers, banks, elevator maintenance professionals, cleaning providers, surveyors, valuers, glaziers, IT providers and pool servicing and maintenance providers.

SCA (Qld) is pleased to contribute to discussion around reform of the Building Units and Group Titles Act 1980 ("BUGTA") and the Mixed-Use Development Act 1993 ("MUDA") (collectively the "Acts"). BUGTA and MUDA regulate a significant albeit niche part of the strata titled properties in Queensland.

The Proposed Bill

SCA (Qld) is largely supportive of the Bill as drafted. For the most part, we believe it strikes an appropriate balance in most areas between ensuring appropriate governance and protecting harmonious community living. By ensuring that genuine conflicts of interest, frivolous and vexatious disputes and appropriate definitions of associates have been accounted for, this Bill makes a vast improvement to the Acts.

Recovery Costs

SCA (Qld) believes that one important change that ought be inserted alongside the new S32A of the BUGTA by this Bill is to allow a body corporate constituted under the BUGTA to recover all costs reasonably incurred in the recovery of unpaid contributions. At present in the strata title sector , including the BUGTA, the recovery of costs is a significant issue when it comes to levy recovery. It is important to have a pragmatic understanding of this from a public policy perspective.

There are a few salient considerations at the outset of this discussion:

- A body corporate cannot turn a profit;
- Bodies corporate are unable to set aside a "rainy day fund" or similar;
- The mechanism for cost recovery is litigious, litigation is obviously a large expense and theoretically unexpected by a body corporate.

Strata Community Association (Qld)
Level 9, 410 Queen Street
Brisbane QLD 4000
T: (07) 3839 3011
E: admin.qld@strata.community

Given this, one recalcitrant owner can be a significant disruption to the finances of a given body corporate. If bodies corporate under the BUGTA are to be obliged to pursue debtors as this Bill seeks to legislate, then it is only fair given the abovementioned factors that they are not out of pocket on a net basis for pursuing them.

Consider the following public policy discussions around commensurate provisions in the *Body Corporate and Community Management Act* (1997) (Qld) ("BCCMA"). These comments and considerations are equally valid in discussions around the BUGTA.

Prior to an amendment made by the *Body Corporate and Community Management Legislation Amendment Regulation (No 1) 2003*, there was no provision for a body corporate to claim as a debt its recovery costs. The Explanatory Note for the amendment regulation dealt with the replacement of section 97 (as it then was) in these terms:

"The recovery of contributions owed to the body corporate by lot owners is a significant issue for some bodies corporate, to the extent that in some instances contributions can be in arrears for a number of years. The problem of arrears can be such that it can cause severe financial hardship for the body corporate."

In considering the inclusion of the amendment, Her Honour Justice Mullins held in the decision of *Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme 36237* [2014] QCA 73, at paragraph 59:

"The policy that prevailed when s 97 was introduced to the 1997 Regulation by the 2003 amendment is evident from the Explanatory Note. The severe financial hardship for the body corporate caused by arrears in contributions was intended to be addressed by the amendment. The body corporate depends on each lot owner making its payment of the contributions.

As His Honour Judge Robin QC held in *Prins v The Body Corporate for the Wave* [2013] QDC 066 at page 2:
"It is clearly vital in modern social conditions to have rather draconian measures in place to ensure prompt payment of body corporate levies for the efficient operation of body corporates and indeed, the peace of mind of lot owners in them whose lives will be a misery if they cannot rely on their fellow owners to get the body corporate in funds to enable it to attend to its responsibilities."

As stated above, these public policy considerations are not unique to BCCMA body corporate schemes and therefore these measures should be at the forefront of the minds of legislators in re-drafting the BUGTA.

Voting at Committee Meetings

We note proposed new section 45A of the BUGTA.

SCA (Qld) believes that the clauses as drafted to alter requirements around voting at committee meetings will have significant unintended consequences. Specifically, the section recognises that a debtor member of the committee cannot vote at the meeting.

However, when read in context with another amendment Clause 24 new Schedule 4, section 7 which is proposed to be introduced into the BUGTA there appears to be a drafting oversight which ought to be rectified.

Upon examination, these provisions allow an unfinancial committee to make decisions outside of meeting. This is a significant loophole which will allow for continued mischief. Ostensibly, unfinancial committees will be able to use votes outside committee meetings to continue to make decisions whilst failing to pay their contributions.

strata community association QLD
Strata Community Association (Qld)
Level 9, 410 Queen Street
Brisbane QLD 4000
T: (07) 3839 3011
E: admin.qld@strata.community

Specifically, the new s45A(1) sets out a definition for a debtor member for "a meeting" then rules them ineligible to vote "at a meeting" under subsection (2). An appropriate remedy for this would be to re-draft subsection (2) to say they must not vote on a committee motion, whether considered at a meeting or outside of committee. This ought to be corrected to ensure governance of BUGTA schemes is not compromised by this loophole. The simplest method of correcting this deficiency is to insert a section similarly drafted to the *Body Corporate and Community Management (Standard Module)* Regulation 2020 ("Standard Module") s67 which reads:

"A voting member of the committee who is a debtor member is ineligible to vote on a motion before the committee."

This would address the deficiency in the current provisions of the Bill.

Conflicts of Interest

Proposed S45B is an important clause and will help enhance governance under the BUGTA. SCA (Qld) feel that whilst the strengthening of the conflicts of interest provisions in the Bill as drafted is a positive, we believe that the copying of the BCCMA provisions around these matters falls short of best practice. Given there are changes being made to the BUGTA, all changes should be best practice.

It would often seem simply inappropriate for a conflicted member to remain a participant in discussion, we would encourage that this deficiency be rectified. There is no reason deficiencies be carried from one piece of legislation to the other. S61-63 of the Standard Module deal with when someone should not be in a committee meeting when certain issues are being considered. S61 does not require a voting committee member to leave when there is a matter of conflict for them that arises. Allowing people to silently "eyeball" others whilst making a delicate body corporate decision isn't appropriate.

Allowing people who have a conflict of interest to remain in the decision-making space is not best practice. We believe this change should not clone what is ostensibly a deficiency in the BCCMA, but rather require conflicted persons to remove themselves from the room. This is sensible and done as best practice in other similar contexts.

Committee Eligibility

SCA (Qld) note the drafting on new section 41B will be inserted to prevent associates of certain classes of people being able to nominate for or elected to a voting committee position. These classes of person are:

- someone who owes a body corporate debt, other than a family member; or
- the body corporate manager of the body corporate or an associated body corporate (i.e. the PBC or PTBC or another subsidiary);
- someone who provides services to the body corporate or an associated body corporate, or services or amenities to proprietors under an agreement or arrangement with the body corporate or an associated body corporate.

Whilst these provisions are drawn from commensurate provisions of the BCCMA, there is an important distinction to be made given the drafting of the BUGTA which should be examined. Specifically, the definition of "provides services" draws on s7 of BUGTA which states:

> ***prescribed arrangement*** *means any agreement or arrangement (including an arrangement set out in the by-laws in respect of the plan) between—*
> *(a) in the case of a registered lot—the body corporate or the original proprietor and any other person; or*
> *(b) in the case of a proposed lot—the original proprietor and any other person;*

Strata Community Association (Qld)
Level 9, 410 Queen Street
Brisbane QLD 4000
T: (07) 3839 3011
E: admin.qld@strata.community

being an agreement or arrangement—
(c) by instrument in writing appointing, pursuant to section 50, a body corporate manager; or
(d) for the carrying out of any of the duties of the body corporate under section 37(1)(a), (b) or (c); or
(e) entered into pursuant to section 37(2)(a), (b), (c), (d) or
(e) or section 38C; or
(f) for the protection of the parcel or any part thereof or of the security of the occupants of the lots; or
(g) for the conduct of a business upon the parcel (whether upon a lot or the common property) of letting of lots on behalf of any proprietors of lots; or
(h) under which the rights of the proprietor of a lot are or are likely to be affected to a material extent.

Section 37 allows proprietors of lots to enter into service contracts with a body corporate under specific circumstances, including for the provision of services and or amenities. It is important to note no reference to the length of such an arrangement is made in contrast with similar provisions of the BCCMA.

Consider the following example as to the unintended consequences of this section as drafted:

Hypothetically, if Joe Smith owns a lot in a subsidiary plan of an Integrated Resort, but in his trade as a painter he is engaged by the body corporate of another subsidiary plan in the same Integrated Resort to paint its common property BBQ gazebo, Joe and his wife will not be electable persons for their committee.

If this is the intent of the Bill, it goes far beyond the commensurate provisions of the BCCMA, which refers to a minimum term of such an agreement of a year. If the intent is to mirror the BCCMA , we would encourage amendment to reflect this and eliminate the potential for the hypothetical example given above to occur.

Information and education services

SCA (Qld) notes that the Bill provides for an information and education service to be provided to parties with involvement with BUGTA-related schemes. Currently, those parties cannot access the information and education service provided by the Office of the Commissioner for Body Corporate and Community Management ("Commissioner's Office"). This means the Commissioner's Office will be providing information in relation to BUGTA, which includes, presumably, information by telephone, in writing and online. The information and education services provided by the Commissioner's Office are held in high regard across the sector, as a way of clarifying issues and preventing disputes. BUGTA-related information and education is relatively specialized and will likely require considerable resources to develop. This in turn places pressure on service delivery by the Commissioner's Office, which is already under considerable pressure from demand from BCCMA-related parties.

SCA (Qld) notes an allocation in the 2022-23 State Budget to address the above, although that allocation has not been clarified and there is no information about how that allocation will be utilized. SCA (Qld) would welcome this clarification and puts on record its willingness to collaborate with the Commissioner's Office around information and education initiatives.

Other, BUGTA-analogous schemes

While the Bill's amendments are welcomed, SCA (Qld) notes that there are other, BUGTA-analogous schemes in Queensland which will not benefit from these amendments. For example, the *Integrated Resort Development Act 1987*, ("IRDA") which regulates properties such as Royal Pines on the Gold Coast, utilizes the referee services under BUGTA, although there are no amendments proposed to the operation of IRDA despite its age. SCA (Qld) submits that it is imperative that IRDA and other, related

strata community association QLD

Strata Community Association (Qld)
Level 9, 410 Queen Street
Brisbane QLD 4000
T: (07) 3839 3011
E: admin.qld@strata.community

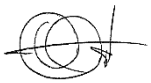
pieces of legislation, which are aligned with BUGTA, should also be reviewed and brought into line with contemporary approaches to strata.

Conclusion

SCA (Qld) supports the Bill and believe it will have a positive impact on governance in BUGTA regulated schemes. We believe there are some discreet amendments (as outlined above) that should be made in order to more perfectly correct deficiencies in the legislation. We are pleased to see significant funding for the transition and support of those affected by changes to these pieces of legislation announced in the budget.

We believe these changes represent a vast improvement on the current framework and will make a tangible difference to the lives of people in affected schemes.

Kristi Kinast



President SCA (Qld)