

New Body Corporate Lot Entitlement & Disclosure Changes under the BCCM Amendment Act – Seller Beware!

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The Queensland Government recently passed amendments to the *Body Corporate and Community Management Act 1997* (BCCM Act) which has serious implications for sellers (and developers and agents) in the event of non-compliance with the new provisions.

The amendments include the following:

- New disclosure obligations for sellers of existing and proposed lots in a Community Title Scheme (CTS);
- New body corporate lot entitlements system;
- New termination rights for the buyer;
- New process for lot owner reverting to previous Contribution Schedule Lot Entitlements.

This article will focus predominantly on the new disclosure obligations and termination rights.

Some comments will also be made in relation to the implications of the new lot entitlement regime for developers and lot owners.

New Disclosure Obligations

Section 206 of the BCCM Act now provides that a seller must state (in the disclosure statement):

- *The amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot;*
- *The extent to which the amount fixed by the body corporate as payable by the owner of the lot is based on the contribution schedule lot entitlements for the lots included in the scheme;*
- *The extent to which the amount fixed by the body corporate as payable by the owner of the lot is based on the interest schedule lot entitlements for the lots included in the scheme; and*
- That the contribution schedule lot entitlements, and interest schedule lot entitlements, for the lots included in the scheme are set out in the community management statement for the scheme.

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The Disclosure Statement must also be accompanied by a copy of the Community Management Statement (CMS) for the scheme.

Community Management Statement – New Requirements

New section 66 (1)(db) requires the CMS to state the deciding principle used for the contribution schedule, that is, whether the ‘*equality principle*’ or the ‘*relativity principle*’ was applied to determine the contribution schedule for the CTS.

If the ‘*equality principle*’ or ‘*market value principle*’ are stated as being used but the entitlements are not equal or according to market values (as the case may be) there must be an explanation as to why the entitlements are not equal or according to market value.

If the ‘*relativity principle*’ is stated as being used then the CSM must explain how the principle was actually applied.

These ‘new’ principles will be discussed further in this article.

Disclosure of new Community Management Statement

New Section 206B provides that:

- a new community management statement must be given to the buyer if, after the contract is entered into but before its settles, a new community management statement for the community titles scheme is recorded.
- the seller must provide the buyer with the new community management statement within 14 days of the new

community management statement being recorded.

Disclosure Statement for Proposed Lots

For “proposed lots”, that is, lots in a CTS which has not yet been established, section 213 now provides that a disclosure statement must state:

- *The amount of* annual contributions reasonably expected to be payable to the body corporate by the owner of the lot;
- *The extent to which* the amount fixed by the body corporate as payable by the owner of the lot is based on the contribution schedule lot entitlements for the lots included in the scheme
- *The extent to which* the amount fixed by the body corporate as payable by the owner of the lot is based on the interest schedule lot entitlements for the lots included in the scheme; and
- That the contribution schedule lot entitlements, and interest schedule lot entitlements, for the lots included in the scheme are set out in the community management statement for the scheme.

Practical issues – meaning of “*the extent to which*”?

The new requirement to specify the “*extent to which*” the levies are based upon the different kinds of lot entitlements has caused considerable confusion within the property industry.

According to the various *Regulation Modules*, the general rule is that levies should be proportionate to the contribution schedule lot

entitlements and body corporate insurance premiums should be proportionate to the interest schedule lot entitlements.

The Queensland Law Society (QLS) suggests that legal practitioners should include in the disclosure statement the actual amount or proportion (as a percentage) of the levies.

For example:

“Administrative Fund: \$X

Sinking Fund: \$X

Building Insurance Levy: \$X

“The administrative and sinking levies are determined in proportion to the respective contribution schedule lot entitlements of the lots.

The building insurance levies are determined in proportion to the respective interest schedule lot entitlements of the lots.”

Of course, if the administrative fund, sinking fund and building insurance levies have not been determined in accordance with contribution schedule and interest schedule lot entitlements respectively, then the disclosure statement must state the extent to which they are proportionate as an amount or a percentage.

New Principles for Lot Entitlements

It is worth briefly summarising the new ‘principles’ for deciding contribution schedule and interest schedule lot entitlements for new community titles schemes (that is established after 14 April 2011) as non-compliance with, or non-disclosure of, the relevant principle may give rise to a right for the buyer to terminate a contract.

For new schemes, the developer will be required to set lot entitlements in accordance with a *contribution schedule principle* and an *interest schedule principle*:

Contribution Schedule Principle

Contribution schedule lot entitlements are used to calculate a lot owner’s share of most body corporate expenses (levies etc.) and the value of a lot owner’s vote on a resolution.

Equality Principle

The equality principle provides that the lot entitlements *must be equal*, except to the extent that it is just and equitable for them not to be equal.

An example of where it may be ‘just and equitable’ for the lots not to be equal is where the use of a particular lot, in a commercial CTS, the owner uses a larger volume of water or conducts a more dangerous or higher risk activity than the owners of the other lots.

In a residential CTS, it may be ‘just and equitable’ where one particular lot disproportionately gives rise to body corporate expenses, such as a lift or a swimming pool.

Relativity Principle

The relativity principle provides that lot entitlements must reflect the relationship between the lots by reference to one or more relevant factors. The relevant factors are:

- how the scheme is structured
- the nature, features and characteristics of the lots
- the purposes for which the lots are used

- the impact the lots may have on costs maintaining the common property
- the market values of the lots.

Generally, it would be inadvisable to base contribution schedule lot entitlements solely on the market values of the lots as previous case law in Queensland has established that *“the focus of the inquiry is the extent to which an apartment unequally causes costs to the body corporate...rather than factors which go to an apartment’s value or amenity”ⁱ*.

Interest Schedule Principle

Interest Schedule lot entitlements are used to calculate the lot owner’s share of common property and for the purposes of calculating a lot owner’s contribution to body corporate insurance premiums (as required under the various *Regulation Modules*).

Market Value Principle

The market principle provides that the interest schedule lot entitlements must reflect the market value of the lots to the extent that it is just and equitable not to reflect the market value.

New Termination Rights for Existing Lots

Failure to disclose new CMS

New section 206B provides that a buyer may cancel the contract if the buyer would be “materially prejudiced” if compelled to complete the contract, given the extent to which the new community management statement is different from the community management statement last advised by the buyer.

Different CMS – buyer materially prejudiced

New subsection 209 (ii) provides that a buyer may terminate a contract if the copy of the CMS that was attached to the contract when it was entered into is different from the CMS most recently advised to the buyer, and the buyer would be materially prejudiced if compelled to complete the contract, given the difference.

Contribution Schedule Lot Entitlements Inconsistent with Contribution Schedule Principle

New section 209A provides that a buyer may terminate the contract if the seller is the original owner of the scheme and the buyer reasonably believes the contribution schedule lot entitlements are inconsistent with the contribution schedule principle on which they were decided and the buyer would be materially prejudiced if compelled to complete the contract.

The buyer may only terminate the contract under this section within 30 days after the buyer’s copy of the contract is received by the buyer.

New Termination Rights for Proposed Lots

Failure to disclose deciding principle in CMS

New sections 217 (b)(iv)(v)(v) & (vii) provide that a buyer may terminate the contract if the CMS does not include the statements required under s 66(1)(db) and (dc) concerning the deciding principle used to determine the contribution schedule lot entitlements and interest schedule lot entitlements and any explanation as to why the lot entitlements do not reflect the principle stated as being used.

Proposed Contribution Schedule Lot Entitlements Inconsistent with Contribution Schedule Principle

New section 217A provides that a buyer may terminate the contract if the seller is intended to be the original owner for the scheme when it is established and the buyer reasonably believes that the proposed contribution schedule lot entitlements for the lots proposed to be included in the scheme are inconsistent with the contribution schedule principle on which they are proposed to be decided and the buyer would be materially prejudiced if compelled to complete the contract.

The buyer may only terminate the contract under this section within 30 days after the buyer's copy of the contract is received by the buyer.

Process for reverting to previous Contribution Schedule Lot Entitlements

New Part 9, Division 4 provides that a lot owner may submit a motion to the body corporate proposing the adjustment of the contribution schedule for the scheme to reflect the contribution schedule before any adjustment orders were made, that is, the pre-adjustment order lot entitlements.

Such a motion may only be made by a lot owner who was the owner of the lot before the adjustment order was made and the adjustment order increased the proportion of the total contribution schedule lot entitlements for all the lots in the scheme.

This allows a lot owner who was adversely affected by an adjustment order made by a court, tribunal or specialist adjudicator to effectively undo that order by submitting a motion to the body corporate.

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Obligation of Body Corporate Committee - New Section 385

If a lot owner submits a motion to the committee proposing to revert the contribution schedule lot entitlements to their pre-adjustment order status, the committee must within 2 months after receiving the motion:

- identify the pre-adjustment order entitlements
- give each lot owner a notice stating that a motion has been made
- state the committee's proposed adjustment of the contribution schedule; and
- invite the lot owners to make submissions in relation to what (if any) changes to the pre-adjustment order entitlements for the scheme should be made within 28 days of receiving the notice

The committee must have regard to the submissions and decide what (if any) changes are to be made to the pre-adjustment order entitlements and must communicate that decision by written notice to the lot owners within 7 days of the decision being made.

A lot owner may dispute the decision of the committee within 28 days of receiving written notification of the decision by the committee and apply, at his or her own cost, for an order of a specialist adjudicator or for an order of QCAT.

If no challenge is made to the decision, then the body corporate must within 3 months after the committee makes its decision lodge a request to record a new CMS incorporating

the change to the contribution schedule lot entitlements.

Conclusion

The new provisions place a considerable onus on the seller to ensure that proper disclosure is made at the outset and during the course of the conveyancing transaction. The new provisions give the buyer additional termination rights if disclosure is not made.

It is not clear whether the amendments will achieve the stated objectives, namely, to “ensure that there is as much certainty around body corporate costs as possible, as well as providing appropriate and flexible principles for setting contribution schedule lot entitlements”.

In particular, there may be little or no certainty in relation to body corporate levies if disgruntled lot owners avail themselves of the right to submit a motion to revert to the previous contribution schedule lot entitlements. If the making of such an adjustment has the effect of increasing levies

for some buyers in the scheme, then there is little or no benefit to be obtained from the enhanced disclosure requirements which were intended to increase consumer protection.

As there is a 3 year time limit on making an application to adjust the contribution schedule we expect that there will be a flurry of activity some of which may end up in the court system.

Watch this space.

For more information on this topic please do not hesitate to contact Paul Watkins, Senior Associate at Kelly Legal on **(07) 3182 1212** or by email: paul.watkins@kellylegal.com.au



ⁱ Fischer v Body Corporate for Centrepont Community Title Scheme 7779 [2004] QCA 214