

# **Community Titles Reforms in Queensland: a regulatory panacea for commercial, residential, and tourism stakeholders.**

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## **ABSTRACT**

The economic, environmental, social and political significance of community titles schemes is on the rise culminating in important changes to the laws governing community titles schemes in Queensland. Recent amendments to the *Body Corporate and Community Management Act 1997* (Qld) were designed to maintain the flexibility and balance of rights between stakeholders with an interest in community titles. This paper outlines the community titles legislation following the recent changes. The paper will also examine some of the new measures designed to balance the interests of the original developer and subsequent lot owners, those of different types of lot-owners, and those between the body corporate and service contractors. The paper also briefly considers the need for the development of a new *Regulation Module* to specifically enhance tourism.

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# INTRODUCTION

Prior to the 1990s most Australians chose houses as their “Castle.” That trend is rapidly shifting to unit accommodation.<sup>2</sup> Similarly, the resort or condominium has replaced the motel or hotel sector as the preferred form of tourism accommodation.<sup>3</sup> At the same time compulsory superannuation funds, and investors seeking independence for their retirement, have poured billions of dollars into the supply side of unit accommodation (see Table 1). Consequently, the economic, environmental, social and political significance of community titles schemes is on the rise culminating in important changes to the laws governing community titles schemes in both New South Wales and Queensland.<sup>4</sup>

Recent amendments to the *Body Corporate and Community Management Act 1997* (Qld) were designed to maintain the flexibility and balance of rights between stakeholders with an interest in community titles.<sup>5</sup> This paper outlines the community titles legislation following the recent changes. The paper will also examine some of the new measures designed to balance the interests of the original developer and subsequent lot owners, those of different types of lot-owners, and those between the

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<sup>2</sup> ABS, Time Series Spreadsheets 8750.0 and 8750.3 Building Activity (Australia and Queensland respectively), December 2002.

<sup>3</sup> ABS, Time Series Spreadsheet 8635.0 Tourist Accommodation (Australia), December 2002.

<sup>4</sup> For an example of the controversy see “Strata Title Difficulties” broadcasted on Radio National’s *Life Matters* on 10 February 2003. The program summary is available at <http://www.abc.net.au/rn/talks/lm/stories/s779285.htm> (accessed on 1 May 2003). The original broadcast featured an interview with Sydney solicitor Stephen Goddard, who was formerly the chair for the Regis Towers body corporate.

<sup>5</sup> *Body Corporate and Community Management and Other Legislation Amendment Bill 2002*.

body corporate and service contractors. The paper also briefly considers the need for the development of a new *Regulation Module* to specifically enhance tourism.

## COMMUNITY TITLE LEGISLATION

### COMMUNITY TITLES SCHEMES

Collective ownership of buildings or complexes is legally possible using a wide variety of legal arrangements, for example, covenants, home unit corporations and tenancy in common. On the whole, these arrangements have not survived the test of time<sup>6</sup> and today the preferred arrangement is by way of a community titles scheme (elsewhere known as “strata title”).<sup>7</sup> Community titles schemes are the creation of statutes and have evolved from the first strata titles legislation enacted by Victoria in the *Transfer of Lands (Stratum Estates) Act 1960 (Vic)*. In Queensland, the *Body Corporate and Community Management Act 1997 (Qld)*, (*BCCM*), provides for the ownership of a single “unit” (called “lot” in the *BCCM*) in a building or complex, together with a legal arrangement providing for the governance of relations between

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<sup>6</sup> Over time there have been shifts in accommodation preferences from units to town houses, single story to multi-story complexes, and shifts from single use to multi-use complexes. The range of possible uses of lots can vary in one building from residential, to leased residential, to tourism and holiday letting, through to commercial. Complexity of physical design and variation in use has driven the shift to community title statutory regimes.

<sup>7</sup> “Strata title” does not adequately reflect the potential range of physical structures that may comprise a building or complex. “Strata” tends to suggest that the building or complex will be defined according to vertical levels.

lot-owners and granting them a corporate interest in the management of common property.

A “community titles scheme” is defined under section 10 of the *BCCM* as freehold land subject to a single “community management statement” recorded by the Registrar of Titles where the land comprises of two or more lots and contains common property not part of those lots.<sup>8</sup>

The “community management statement” (CMS) is the constitution for the body corporate and it must comply with the requirements of section 66 of the *BCCM* and the appropriate Regulation Module for that scheme.

Under s.66 of the *BCCM* the CMS must:

- Contain the identifying name for the scheme;
- Identify the name of the body corporate;
- State the unique identifying number for the scheme;
- Identify the regulation module applying to the scheme;
- Include a contribution schedule and an interest schedule;
- Identify the lots included in the scheme;
- Specify the common property for the scheme;
- Identify the lots affected, or proposed to be affected, by a statutory easement, and state the type of statutory easement;
- Specify by-laws unless the default by-laws in Schedule 4 are nominated;
- Specify any future stages to be developed whereby a lot is made into a subsidiary scheme (viz: a layered scheme in accord with s. 18 *BCCM*); and
- Include anything that the regulation module applying to the scheme says it must include, and may include anything that the regulation module applying to the scheme says it may include.

The CMS is critically important because it distributes power and requires responsibility on the part of individual lot-owners to contribute toward the costs associated with the complex. It also presumes lot-owners will participate in the governance of the scheme through the body corporate. In practice, few lot-owners

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<sup>8</sup> “Community Management Statement” is defined in section 12 of the *BCCM*.

actually participate and their motivation or views may not be representative of the majority of lot-owners.<sup>9</sup>

The original owner (developer)<sup>10</sup> is responsible for devising and registering a community management statement (s. 53 *BCCM*). Otherwise, in the case of pre-1997 complexes, the body corporate is empowered under the *BCCM* to adopt a new community management statement.<sup>11</sup> A CMS may only be registered under the *Land Title Act 1994* (Qld) (s. 115L) if it has the consent of the relevant local authority (Local Government Council).<sup>12</sup>

## **CONTRIBUTION SCHEDULES**

The *BCCM* presumes that individual lot-owners will contribute to outgoings on an equal basis and where this is not the case the CMS must declare why the contributions are unequal along with the applicable contribution number: sections 66(1)(c) & 66(1)(d)(i) of the *BCCM*. The *Act* draws a distinction between an interest schedule and the contribution schedule: sections 46 & 47 of the *BCCM*. The contribution schedule provides the basis for calculating: (a) the lot owner's share of amounts levied by the body corporate unless otherwise specified by the *Act*, and (b) the value of the lot owner's vote for voting on an ordinary resolution (s. 47 *BCCM*). While the interest schedule specifies: (a) the lot owner's share of common property; and (b) the lot owner's interest in the scheme upon termination; and (c) the basis for the

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<sup>9</sup> Based on interviews with stakeholders, in particular the service contractors' association (Q.R.A.M.A).

<sup>10</sup> The person who owns the lot(s) immediately prior to the creation of a community titles scheme is called the "original owner". This person is typically the developer. See section 13 of the *BCCM*.

<sup>11</sup> See generally Part 6 and sections 24,25 & 27 of the *BCCM*.

<sup>12</sup> See sections 59,60 & 61 *BCCM*.

calculation of land tax, rates or levies payable directly by the lot-owner. The *Act* expressly prohibits the inclusion of any charges or contributions that are capable of being billed or charged directly to individual lot-owners or occupiers (e.g. lot specific energy charges): section 47(4) of the *BCCM*.

## **STATUTORY CORPORATIONS**

Section 32 of the *BCCM* confers body corporate status on community titles schemes while expressly precluding the operation of the *Corporations Law*. This means that a body corporate established under the *BCCM* is not subject to the *Corporations Law*, and instead, is only empowered to the extent of the *BCCM* and the relevant Regulation Module.<sup>13</sup> However, the following similarities exist:

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<sup>13</sup> *Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1995* (1993-94) 179 CLR 597. In *Humphries* the High Court held that a management agreement between a body corporate, constituted under the *Building Units and Group Titles Act 1980* (NSW), and its manager whereby the corporate assumed an obligation to pay its manager out of corporate funds in return, amongst other things, for the manager's undertaking to provide a letting service for individual proprietors, was invalid in the absence of an authorising by-law. The High Court found that there was nothing in the *Building Units and Group Titles Act 1980* that should be regarded as permitting expenditure from a body corporate's fund on services to benefit individual proprietors, and instead, the only source of authority for such action would be through a body corporate's by-laws. Similarly in *Birstar v Ocean Breeze* [1996] QCA 110, the Court held that the powers of a body corporate, as a statutory entity constituted according to statute, will by definition have powers "limited in accordance with the indications given by the statute itself" per Pincus JA and Thomas J. However, see ASIC Policy Statement 140 stating that "promoters" and "operators" of "serviced strata units" will have obligations under the *Corporations Law* in certain situations.

- A Body Corporate under the *BCCM* has a separate legal identity and can sue and be sued.<sup>14</sup>
- The owners of lots, like shareholders, are members of the body corporate, and this extends to the members rights according to the relevant Regulation Module.<sup>15</sup>
- The original owner or developer, like the promoter of a company, owes various duties to the body corporate.<sup>16</sup>
- Like corporations, a body corporate can engage agents or employees to provide it with services.<sup>17</sup>

Bodies corporate established under the *BCCM* are statutory corporations for the purposes of legal doctrine and principle.<sup>18</sup> Therefore ordinary principles of statutory interpretation will be used to determine the scope and distribution of power.

## **REGULATION MODULES**

“Regulation Modules” are clusters of *Regulations* that apply to particular types of community titles schemes depending on the nature of the building and its occupants. Section 21 of the *BCCM* currently provides for Regulation Modules that specify in

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<sup>14</sup> Section 33(2), but see also s. 36 of the *BCCM*, which gives the body corporate the power to sue and be sued in relation to common property.

<sup>15</sup> Section 31 of the *BCCM*.

<sup>16</sup> For example, s. 112 of the *BCCM* imposes a duty on the original owner to contract “in the best interests” of the body corporate.

<sup>17</sup> See section 95 and generally ss 112 to 135 of the *BCCM*.

<sup>18</sup> *Humphries v The Proprietors “Surfers Palms North” Group Titles Plan 1995* (1993-94) 179 CLR 597.

considerable detail the corporate governance rules policies and procedures.<sup>19</sup> There are currently four modules:

- **Standard Regulation Module** (A generic module suitable for most situations which acts as the default module where none is expressly stipulated in the Community Management Statement or the scheme predated the current legislative regime).
- **Accommodation Module** (This module is appropriate where the majority of the lots are used for residential, letting or leasing purposes: s3 *BCCM (Accommodation Module) Regulation 1997*).
- **Commercial Module Regulation** (This module is used where the lots are for mainly commercial purposes. A commercial lot is a lot used for commercial or industrial purposes and is not an accommodation lot: s. 3 *BCCM (Commercial Module) Regulation 1997*.)
- **Small Schemes Module Regulation** (This module is restricted to buildings where (a) the scheme is a basic scheme; (b) there is no letting agent for the scheme; and (c) there are no more than 6 lots included in the scheme: s. 3 *BCCM (Small Schemes Module) Regulation 1997*.)

A particular Regulation Module will apply because (1) it is a module stated to apply to that scheme, and (2) no other module applies, and regardless of the community

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<sup>19</sup> However, the type of Regulation Module that applies to a building will normally be a decision for the original owner (or developer) who lodges the *community management statement* with the local authority and the Registrar of Titles. For pre-1997 buildings, unless the body corporate decides otherwise, they will assume the Standard Regulation Module. Anecdotal evidence – based on a series of interviews and meetings with industry stakeholders - suggests that many buildings are subject to an inappropriate Regulation Module often based on the self-interest of active body corporate constituents.

management statement (s. 21 *BCCM*). Still, considerable flexibility applies in practice as to which particular Regulation Module will apply to a scheme. It is possible for a single building or complex to have more than one Regulation Module applying to it because the *Act* provides scope for the inclusion of layers of schemes (each with its own Regulation Module) within one overall physical complex (s. 21(6) *BCCM*). However, each individual scheme can only have one type of Module applying to it at any point in time (s. 21(5) *BCCM*).

## **MANAGEMENT STRUCTURES**

Chapter 3 of the *BCCM* sets out the rules for the management structures of community titles schemes. Even though s. 97 expressly prohibits a body corporate from delegating its powers, the corporate governance of community titles schemes can occur through three organs, namely: (1) The **body corporate** itself through decisions of general meetings; (2) **Committees** of the body corporate; and (3) if appointed, through a body corporate **manager**.

### **Body Corporate**

Division 1 of Chapter 3 deals with the general powers and responsibilities of a body corporate. Under section 94 of the *BCCM* it is the responsibility of the body corporate to:

- administer common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and
- enforce the CMS and by-laws together with any other function necessary under the Act.

In performing these functions, the *Act* requires the body corporate to act reasonably (s. 94(2) *BCCM*). The body corporate has “all the powers necessary for carrying out its functions”: section 95 of the *BCCM*.<sup>20</sup> However, the body corporate cannot carry on a business other than to the extent necessary to satisfy its responsibilities under section 96. The *Act* gives examples of business activities prohibited by section 96 which include business as a letting agent, tour operator, restaurant, real estate agent or land trader.

Decision-making of the body corporate can occur through general meetings, provided the meetings are convened and conducted in accord with the relevant Regulation Module: s. 104 *BCCM*.

### **Committees**

All four Regulation Modules require the creation of a “committee” in accord with section 98 of the *Act* which states that *Division 2* of the *BCCM* will apply to any committee for the body corporate if such a committee is required under a regulation module. *Division 2* of the *BCCM* provides for the composition, election, powers and procedures of committees by empowering the provisions contained in the relevant Regulation Module.<sup>21</sup> This effectively means that a decision of a duly elected and constituted committee acting *intra vires* will be treated as a decision of the body, provided the decision was not a decision on a “restricted issue.”<sup>22</sup> Each Regulation Module stipulates what will be regarded as a “restricted issue” for the purposes of

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<sup>20</sup> Section 95 of the *BCCM* provides “examples” of this broad power including: (a) the capacity to contract; (b) the power to own and deal with property; and (c) the capacity to employ.

<sup>21</sup> See sections 99 – 101 of the *BCCM*.

<sup>22</sup> Per section 100 of the *BCCM*, read in conjunction with the relevant Regulation Module.

committees.<sup>23</sup> In general, restricted issues are matters where the general meeting is deemed to be the appropriate decision-making body typically on matters that vary rights and financial responsibilities, and where an ordinary or special resolution would be needed to effect that change.

### **Managers**

Under section 119 the a committee of a body corporate may authorize a body corporate manager to “exercise some or all of the powers (**‘authorised powers’**) of an executive member of the committee. This delegation must be authorized by a special resolution<sup>24</sup> without the use of proxies and must be for a term of less than 12 months. Once duly authorized, the body corporate cannot prevent or interfere with the performance or exercise of the authorized powers unless the powers are revoked in writing by the body corporate.<sup>25</sup> The specific details of the authorization will vary according to the regulation Module involved and the terms of the authorization.<sup>26</sup> Basically, the *Act* authorizes a manager to undertake the tasks of individual committee members rather than to undertake the powers and functions of the committee as a whole thereby ensuring that the manager does not replace or supercede the committee. The *Act* also provides scope for the original owner and committees to authorize service contractors and letting agents to provide services. Sections 112 to 135 apply

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<sup>23</sup> E.g. section 15 Small Schemes Regulation Module; section 26 Standard Regulation Module; section 24 Accommodation Regulation Module; and section 15 Commercial Regulation Module.

<sup>24</sup> A special resolution requires two thirds of those actually voting to vote in favour of the resolution: s. 106(3)(a)(ii) of the *BCCM*.

<sup>25</sup> Section 119 (3) & (4) of the *BCCM*.

<sup>26</sup> Section 122 of the *BCCM*.

generally to govern the authorization, review, renewal or removal of body corporate managers, service contractors and letting agents.<sup>27</sup>

## GOVERNANCE AMENDMENTS

### Background to the amendments

The *BCCM* is meant to strike a balance between the developer and future owners of individual lots. The *Act* is designed to be flexible and was introduced on the premise that because it was an innovative regime it would require future legislative revisions.<sup>28</sup> The first such revision was completed in 2002 and resulted in amendments that took effect from 4 March 2003.<sup>29</sup>

The government department with responsibility for the *BCCM* – the Department of Natural Resources and Mines - undertook an extensive process of consultation.

According to the Minister the consultation process revealed:

The issues that have generated most discussion relate to management rights – where a resident manager provides caretaking services for a scheme and acts as a letting agent for owners who wish to use that service. A scheme's success, and the success of related investments,

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<sup>27</sup> They will be numbered from 112 to 149 when the remaining provisions of the *Body Corporate and Community Management and Other Legislation Amendment Act 2003* are proclaimed.

<sup>28</sup> The minister responsible for the recent amendments made this clear during his second reading speech: 'The *BCCM Act* was passed in 1997, establishing a more flexible framework than had previously existed for community titles schemes. Because of the legislation's complexity, the government of the day committed to review the act to ensure its objectives were being achieved.' Per S. Robertson, *Hansard (Qld)*, 3 December 2002, 12:45 p.m., page 5225.

<sup>29</sup> The *Act* has been reprinted so that many section numbers have also been changed.

relies on a strong working relationship between the resident manager, the body corporate and individual owners. Unfortunately this does not always happen. With two distinct owner types – those who live in their properties, and those who use them as investments – tensions can arise because of their different priorities, especially if one group feels the resident manager is concentrating on the needs of the other. Investor owners can feel disillusioned if their returns do not meet their expectations, especially if they are paying an increasing amount for resident management services. Bodies corporate can feel trapped in long-term agreements that fail to meet their needs. This bill seeks to bring balance to the management rights issue, proposing new codes of conduct to govern the activities of letting agents and service contractors like resident managers.<sup>30</sup>

Each of the issues raised in this passage will be considered below as will the specific legislative amendments aimed at alleviating the problems.

## **Balancing the interests of the original developer and subsequent lot owners?**

Consultation revealed a perception among unit-owners and other stake-holders that the balance was tilted in favour of original owners (developers). The reason for this is that previously the *Act* was silent on the duty owed by the developer to the body corporate while empowering the developer to enter into contracts on the body corporate's behalf. Typically, a developer could sell service rights and thereby encumber the future owners with a long-term management rights or other service contract. The Minister commented:

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<sup>30</sup> S. Robertson, *Hansard (Qld)*, 3 December 2002, 12:45 p.m., page 5225.

Bodies corporate can feel trapped in long-term agreements that fail to meet their needs. This bill seeks to bring balance to the management rights issue, proposing new codes of conduct to govern the activities of letting agents and service contractors like resident managers.<sup>31</sup>

The Bill amended the *Act* in three important ways to balance the relationship between developer and the body corporate by:

- (1) requiring the developer to act in the best interests of the body corporate when contracting with service providers,<sup>32</sup>
- (2) introducing new codes of conduct for service providers,<sup>33</sup> and
- (3) empowering the body corporate to review and terminate service contracts.<sup>34</sup>

Of these changes, the second and third will be considered in the next section on the relationship between service providers and lot owners, and the first will be discussed here.

The *Act* allows for management and service contracts to run for 25 years under the Accommodation Module and for a maximum of 10 years under the Standard Module thereby binding future owners of lots. Any contracts that were perpetually renewable will be terminated on the 13 July 2022 irrespective of the governing Regulation Module.<sup>35</sup> Before the changes, there was very little to compel the developer to

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<sup>31</sup> S. Robertson, *Hansard (Qld)*, 3 December 2002, 12:45 p.m., page 5225.

<sup>32</sup> Section 112(2) of the *BCCM*.

<sup>33</sup> Section 118 and Schedules 2 & 3 of the *BCCM*.

<sup>34</sup> See Schedule 6 of the *BCCM*. The relevant provisions have not yet been proclaimed into force and consequently were not included in the reprint of 4 March 2003. Instead they are contained in Schedule 6, and once proclaimed they will appear as ss 136 to 144 of the *BCCM*.

<sup>35</sup> Section 344(4)(d) of the *BCCM* limits the operation of original contracts to 25 years from 13 July 1997 (e.g. until 13 July 2022).

consider the long-term impact of management and service contracts. The 2002 amendments changed this by requiring in section 112(2) that:

The original owner must exercise reasonable skill, care and diligence and act in the best interests of the body corporate, as constituted after the original owner control period ends, in ensuring each of the following—

- (a) the terms of the engagement or authorisation achieve a fair and reasonable balance between the interests of—
  - (i) the contracted party; and
  - (ii) the body corporate as constituted after the original owner control period ends;
- (b) the terms are appropriate for the scheme;
- (c) the powers able to be exercised, and functions required to be performed, by the contracted party under the engagement or authorisation—
  - (i) are appropriate for the scheme; and
  - (ii) do not adversely affect the body corporate's ability to carry out its functions.

Maximum penalty—300 penalty units (currently \$22,500).

Significantly, the developer is still able to profit from the initial sale of management rights or other service arrangements: s. 113(2) *BCCM*. This may be contrasted with the fiduciary duty owed by a promoter to a corporation. Notwithstanding the analogous relationship between the promoter of a corporation who establishes its legal structure and who may contract on its behalf, and the developer of a community titles scheme, it is unclear whether the latter will owe any duty in equity (a fiduciary duty) to the body corporate. In part this is because the High Court has made it clear that a fiduciary duty attaches to a particular relationship based on the nature of that

relationship rather than whether it falls into a particular category.<sup>36</sup> It is also partly because the courts will be reluctant to impose a fiduciary duty where the parties are perceived to have entered a commercial arrangement at arm's length (eg, developer selling to potential lot-owners).<sup>37</sup> Two further matters may militate away from the prospect of any fiduciary duty. First, the developer of a community titles scheme may risk considerably more personal capital than the promoter of an ordinary corporation, and the relationship therefore is fundamentally different to the relationship that a promoter has to potential investors of a corporation,<sup>38</sup> though, this is by no means clear. Second, the relationship between a developer and future lot-owners is regulated by statute, which may determine the scope of their relationship.<sup>39</sup>

On the other hand, in *Breen v Williams*, Gaudron and McHugh JJ held:

In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorized benefit from the relationship and not to be in a position of conflict.<sup>40</sup>

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<sup>36</sup> Even then, where the relationship is fundamentally fiduciary, a court may not find that the specific grievance necessarily involved a breach of any fiduciary duty because fiduciary duties may only attach to certain parts of the relationship. See, e.g. *Breen v Williams* (1996) 186 CLR 71, per Brennan CJ at 82.

<sup>37</sup> See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, especially at 99-100 per Mason J.

<sup>38</sup> In other words, the original owner (or developer) is not a recognised category of fiduciary.

<sup>39</sup> Per Dodds DCJ at paragraph 15 in *Body Corporate for Noosa on the Beach CTS 6417 v Hollis Partners Pty Ltd* [2002] QDC 86 (9 May 2002); and *Humphries v Proprietors 'Surfers Palms North' Group Titles Plan 1955* (1994) 179 CLR 597.

<sup>40</sup> *Breen v Williams* (1996) 186 CLR 71, at 113.

Given that the original owner is required under s. 112 to “exercise reasonable skill, care and diligence and act in the best interests of the body corporate” this may fit within the ambit of “an obligation to act in another’s interests”. But whether or not this creates sufficient ascendancy (or lot-owner dependency) or a duty of loyalty on the part of the original owner would need to be determined according to the specific circumstances of a particular case and the nature of any alleged breach.<sup>41</sup>

A factor that should influence the legal characterisation of the relationship between original owner and subsequent owners is the fact that many unit-owners are not investor owners, but are, people purchasing their primary residence. To this extent it is arguable that the original owner is in a position of ascendancy with respect to resident owners and is less likely to be in a position of ascendancy in relation to an investor-owner, although this distinction becomes hazy where the unit concerned is the secondary residence or “holiday home.”

### **A balance between service providers and lot owners?**

Regardless of whether the body corporate received contracts governing services, problems could arise because the body corporate was “stuck” with a long-term arrangement for the provision of services that it was dissatisfied with. According to the Minister:

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<sup>41</sup> *Pilmer v The Dukes Group Ltd (in liquidation)* [2001] HCA 31, per McHugh, Gummow, Hayne & Callinan JJ at paragraphs 75 – 79.

Under the legislation, bodies corporate will have the power to terminate resident managers and letting agents who breach their code of conduct and make them sell or transfer their management rights.<sup>42</sup>

The amendments addressing this problem included:

- (1) requiring the developer to act in the best interests of the body corporate when contracting with service providers,<sup>43</sup>
- (2) introducing new codes of conduct for service providers,<sup>44</sup> and
- (3) empowering the body corporate to terminate such contracts.<sup>45</sup>

The first measure was considered above and now it is necessary to examine the second and third measures. Section 118 of the *Act* states that the Code of Conduct in Schedule 2 of the *BCCM* applies to body corporate managers and to caretaking service contractors in the performance of their functions. Letting agents are dealt with separately in a code contained in Schedule 3 of the *BCCM* and are subject to the *Property Agents and Motor Dealers Act 2000*, which inter alia, governs the relationship a letting agent has with owners using that agent's services.

Under the Code in Schedule 2, managers and service providers are required to have an understanding ("good working knowledge") of both the *Act* and the Code as they

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<sup>42</sup> S. Robertson MP, "Government Reforms Queensland's Body Corporate Laws," *Ministerial Media Statements*, 3 December 2002, accessed at [www.http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?id=9979&db=media](http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?id=9979&db=media) on 17 February 2003.

<sup>43</sup> Section 112(2) of the *BCCM*.

<sup>44</sup> Section 118 and Schedules 2 & 3 of the *BCCM*.

<sup>45</sup> See Schedule 6 of the *BCCM*. The relevant provisions have not yet been proclaimed into force and consequently were not included in the reprint of 4 March 2003. Instead they are contained in Schedule 6, and once proclaimed they will appear as ss 136 to 149 of the *BCCM*.

concern their functions. In addition, managers and service providers must act with the following in the performance of their functions:

- Honesty, fairness and professionalism
- Skill, care and diligence
- Act in the body corporate's best interests
- Keep the body corporate informed of developments
- Ensure employees comply with the *Act* and code
- Goods and services must be supplied at competitive prices
- The body corporate manager must keep records

Importantly, the body corporate is empowered under the Code to require the manager to produce evidence that they have kept records in accordance with the Act and its regulations. However, whether or not this will allow access to these records remains to be seen. It may be possible to compel a manager to disclose information under the general law of agency, provided an agency relationship can be established in the circumstances. It may be that the amendments should have gone further in the interests of openness and accountability to provide access while at the same time restricting access where it may constitute a nuisance.

The Code in Schedule 2 also places the following restrictions on managers and service providers. A manager or service contractor must not:

- engage in fraudulent or misleading conduct in performing their duties.
- engage in unconscionable conduct in performing the person's functions.
- accept an engagement for another community titles scheme if doing so places their duty or interests for the first scheme in conflict with their duty or interests for the other scheme.

The Code will apply to all managers and service contractors regardless of the specific terms of their contracts.<sup>46</sup> Also, the *Act* was amended to allow the terms of contracts to be reviewed. Prior to these amendments the *Act* only provided for a review of the

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<sup>46</sup> Section 118 of the *BCCM*, subsections (2),(3) & (4).

remuneration under a service contract.<sup>47</sup> Now sections 130 to 135 allow for the revision of the duties contained in service contracts.<sup>48</sup>

A separate Code of Conduct applies to letting agents, along with the introduction of new measures contained in Chapter 3, Part 2, Division 8.<sup>49</sup> Under the Code in Schedule 3, letting agents are required to avoid:

- any unconscionable conduct,
- causing any nuisances, and
- fraudulent and misleading conduct.

Letting agents have the following positive obligations under the Code:

- They must act honestly, fairly and professionally in conducting their agency.
- They must exercise reasonable skill, care and diligence in conducting their agency.
- They must, as far as practicable, act in the best interests of the body corporate and individual lot owners.
- They must take reasonable steps to ensure any of their employees comply with the *Act* and Code.
- They must take reasonable steps to ensure goods and services are obtained or supplied at competitive prices.

In addition to the Code, the recent amendments to the *Act* included a new Division 8, which among other things, provides for the compulsory transfer of a letting agent's management rights. According to the Explanatory Notes these measures were considered necessary because of the crucial position a letting agent occupies, particularly in a holiday oriented complex, and because lot-owners had little or no capacity to review or alter the terms of such long-term arrangements where they were

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<sup>47</sup> See section 129 of the *BCCM*.

<sup>48</sup> See Division 7 of Chapter 3, Part 2 of the *BCCM*.

<sup>49</sup> The new measures are presently annexed to the *Act* in Schedule 6.

dissatisfied with the service.<sup>50</sup> Often the roles of letting agent, management, and services will be combined so s. 137 deems any other provisions purporting to deal with a combined role void to the extent they are inconsistent with the provisions in Division 8.

There are two possible grounds for the transfer of management rights. Under section 138 a transfer can be forced where: (1) the letting agent failed to comply with a code contravention notice; or (2) the body corporate reasonably believes the letting agent, after being given the notice, contravened a provision of the code of conduct for either letting agents or body corporate managers and caretaking service contractors. The body corporate must issue a contravention notice before it can vote on a transfer resolution.<sup>51</sup> It need only issue one such contravention notice and it can then resolve to transfer the rights under s. 138 whether or not a subsequent alleged contravention involves the same matter referred to in the contravention notice. A resolution forcing the transfer of management rights must be by majority resolution decided by secret ballot and conducted according to the relevant regulation module.<sup>52</sup>

Once such a resolution has been passed, a letting agent must transfer their management rights to a person or entity of their choice, other than to an associate, subject to the approval of the body corporate.<sup>53</sup> In exercising their approval, the body corporate must act reasonably and may only consider the character, financial standing,

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<sup>50</sup> Explanatory Notes to the *Body Corporate and Community Management and Other Legislation Amendment Bill 2002*, pages 8 – 11.

<sup>51</sup> Section 139 of the *BCCM*.

<sup>52</sup> Section 140 of the *BCCM*. A “majority motion” means that more than 50% of those entitled to vote actually vote in favour of the resolution: s. 107.

<sup>53</sup> Section 141 of the *BCCM*.

competence, qualifications and experience of the candidate.<sup>54</sup> The rights must be transferred within 11 months where the body corporate chooses to vary the existing contract but any changes must be completed within the defined time frame or otherwise within 9 months if the terms are not varied.<sup>55</sup> The variation in time allows the body corporate the opportunity to vary the nature of the contract to be transferred.<sup>56</sup>

### **A balance between different types of lot-owners (be they residents or investors)?**

Queensland has over 250,000 unit owners.<sup>57</sup> Unfortunately there are no accurate figures available to differentiate between the various types of unit-owners (whether they are investors or residents or something in between). Recall that according to the Minister, the consultation process leading up to the *Bill*<sup>58</sup> revealed that:

With two distinct owner types – those who live in their properties, and those who use them as investments – tensions can arise because of their different priorities, especially if one group feels the resident manager is concentrating on the needs of the other. Investor owners can feel

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<sup>54</sup> Section 141(2) of the *BCCM*.

<sup>55</sup> See the joint operation of ss. 141 and 147. Section 143 provides a set of procedures should the transfer fail to take place within the time-frame required by s 141.

<sup>56</sup> The selling process cannot commence until the contract conditions that will be offered to the incoming contractor are finalized – hence the time variation.

<sup>57</sup> S. Robertson MP, “Government Reforms Queensland’s Body Corporate Laws,” *Ministerial Media Statements*, 3 December 2002, accessed at [www.http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?id=9979&db=media](http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?id=9979&db=media) on 17 February 2003.

<sup>58</sup> *Body Corporate and Community Management and Other Legislation Amendment Bill 2002*.

disillusioned if their returns do not meet their expectations, especially if they are paying an increasing amount for resident management services.<sup>59</sup>

To the extent that the problem is a consequence of “different priorities” in relation to management services, the amendments described above do have the capacity to maintain a balance between the two types of unit-owners. Whether or not they do in fact reconcile interests remains to be seen. However, the relationship between the two groups raises a very important governance issue that remains to be addressed – that is the question of whether there should be a “Tourism Regulation Module.”

## **TOURISM**

At present there are four regulation modules none of which was specifically designed with the tourism industry in mind.<sup>60</sup> Instead the Accommodation Regulation Module is thought to provide a suitable generic framework for tourism, and both short and long-term residential leasing. There are indications that the government would be prepared to pursue the development of a Tourism Module, however time constraints rendered it impractical to include one in the recent round of amendments. It is also unclear whether financial institutions and developers would respond to the new opportunities that might be presented by a regulation module of this kind. What is clear is that many of the buildings in Queensland, built during the building booms

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<sup>59</sup> S. Robertson, *Hansard (Qld)*, 3 December 2002, 12:45 p.m., page 5225.

<sup>60</sup> In other words none of the modules was specifically designed to cater for the use of units for short-term tourist letting.

from the 1960s to the 1980s, are in what may be described as a “stagnation phase” of their life cycles.<sup>61</sup> This raises the question of what should follow?

Section 4 of the *BCCM* states the secondary objectives of the *Act*. Among these secondary objectives are:

- to promote economic development by establishing sufficiently flexible administrative and management arrangements for community titles schemes; and
- to provide a legislative framework accommodating future trends in community titling.

Indeed the Minister noted the importance of the relationship between tourism and the Community Titles legislation during his second reading speech.<sup>62</sup> The minister said:

The unit and apartment sector of the real estate market is becoming increasingly important to Queensland. More and more Queenslanders are choosing unit living to suit their lifestyles. Many people both from within Australia and overseas, are choosing commercial or accommodation units as investment properties. And **the continued growth of tourism in our state relies on the accommodation being available – much of it in community titles schemes. To meet these needs, Queensland needs an effective legislative framework** for the successful operation of community titles schemes and bodies corporate.<sup>63</sup>

Therefore it would be prudent for the relevant stakeholders to seize the initiative and firstly demonstrate the desirability of a tourism specific module, and secondly, to set out the content of such a regulation module.<sup>64</sup> Without preempting the outcome of

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<sup>61</sup> G. Priestley and L. Mundet, “The Post-Stagnation Phase of the Resort Cycle” (1998) 25 *Annals of Tourism Research* 85.

<sup>62</sup> S. Robertson, *Hansard (Qld)*, 3 December 2002, 12:45 p.m., page 5225.

<sup>63</sup> S. Robertson, *Hansard (Qld)*, 3 December 2002, 12:45 p.m., page 5225 (emphasis added).

<sup>64</sup> QRAMA has indicated support for this initiative since the existing Regulation Modules define committee procedures but do not address objectives.

such deliberations it would seem appropriate that a suitable governance structure for a tourist module would:

- Privilege investment ownership over residential ownership
- Promote tourism or holiday letting over other forms of letting
- Provide for greater management autonomy
- Require shorter depreciation schedules, and for regular infrastructure upgrades
- Require stricter maintenance standards
- Provide for the imposition of tourism industry quality standards
- Enable local councils to influence the development of tourism precincts

The list above is not exhaustive but a starting point for research and discussion.

Clearly, there is a need for considerable research in this area given the importance of community titles schemes to the Queensland economy and way of life.

## CONCLUSIONS

The recent reforms to Queensland community titles legislation should go a long way to resolving some of the concerns of unit-owners, and were welcomed by unit-owners associations and by the association of service contractors (QRAMA).<sup>65</sup> They shift the balance between the original owner and subsequent owners so that owners have a greater capacity to review, manage and terminate contracts that would have otherwise been little more than over-priced encumbrances. At the same time, the *Act* ensures that service providers and managers are still protected by a requirement that body

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<sup>65</sup> S. Lappeman, "Unit Wrongs Righted: New laws give owners power to sack bad managers," *Gold Coast Bulletin*, 4 December 2002, 8.

corporates act reasonably in conducting reviews and terminations. The actual success of the reforms can only be determined over time.

Given the reported comments of the Minister and the stated objectives of the *Act*, it would seem that there is a need to explore the desirability and scope for a new regulation module to enhance tourism in Queensland. Such a regulation module may also present a novel opportunity to relieve some of the incompatibility that exists as a consequence of the different priorities between the different types of groups owning units.

Table 1: Value of commenced or completed residential buildings (\$m).<sup>66</sup>

Year	Australia			Queensland		
	Houses	Other <sup>67</sup>	% Other	Houses	Other <sup>68</sup>	% Other
83-84				1079	242	22.4
84-85				1088	230	21.1
85-86				1099	207	18.8
86-87	4559	1070	23.5	934	204	21.8
87-88	5553	1342	24.2	1456	523	35.9
88-89	6968	2030	29.1	2203	1093	49.6
89-90	8378	2632	31.4	1950	718	36.8
90-91	7461	2215	29.7	2018	571	28.3
91-92	8951	2619	29.3	2431	577	23.7
92-93	9605	3346	34.8	2924	904	30.9
93-94	10607	4061	38.3	3189	1228	38.5
94-95	9958	4948	49.7	2938	1252	42.6
95-96	8767	3708	42.3	2331	787	33.8
96-97	9263	3749	40.5	2365	792	33.5
97-98	11190	4550	40.7	2675	985	36.8
98-99	11927	4625	38.8	2322	927	39.9

<sup>66</sup> Data taken from ABS, Time Series Spreadsheets 8750.0 and 8750.3 Building Activity (Australia and Queensland respectively), December 2002.

<sup>67</sup> "Other" = flats, home units, townhouses, villa units, terrace houses, semi-detached houses, and maisonettes. NOTE: not all of them would be subject to strata title, but most could be.

<sup>68</sup> "Other" = flats, home units, townhouses, villa units, terrace houses, semi-detached houses, and maisonettes. NOTE: not all of them would be subject to strata title, but most could be.

99-00	15116	6322	41.8	3034	967	31.9
00-01	10520	5100	48.5	1877	914	48.7
01-02	15003	6726	44.8	3282	1163	35.4