

# Body Corporate and Community Management and Other Legislation Amendment Bill 2010

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April 2011

The [Body Corporate and Community Management and Other Legislation Amendment Bill 2010](#) was passed in Queensland Parliament on 6 April 2011 and will receive Royal Assent shortly. Please find below the major aspects of changes to the legislation.

### Disclosure Obligations – Sales of Existing Lots

The Bill amends section 206 of the Body Corporate and Community Management Act 1997 (BCCM) on its commencement to require

- disclosure within the disclosure statement of:
  - i. the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot; and
  - ii. the extent to which the amount mentioned in subparagraph (i) is based on the contribution schedule lot entitlements for the lots included in the scheme; and
  - iii. the extent to which the amount mentioned in subparagraph (i) is based on the interest schedule lot entitlements for the lots included in the scheme; and
  - iv. 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; and
- the disclosure statement to be accompanied by a copy of the community management statement for the scheme

The Bill also inserts a new section 206B which creates an obligation for a seller to disclose to a buyer a new version of the community management statement within 14 days if one is recorded after a contract is entered into but before it settles. A buyer may terminate a contract within 14 days after receiving the new community management statement if they 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 to the buyer.

#### *New termination rights*

The Bill also inserts new rights of termination of a contract for a buyer under

- section 209 if the copy of the community management statement that was attached to the contract when it was entered into is different from the community management statement most recently advised to the buyer, and the buyer would be materially prejudiced if compelled to complete the contract, given the difference; and
- section 209A where the seller is the original owner for the community titles scheme and the buyer reasonably believes—
  - a. the contribution schedule lot entitlements for the lots included in the scheme are inconsistent with the contribution schedule principle on which they were decided; and
  - b. the buyer would be materially prejudiced if compelled to complete the contract.

The new contribution schedule principles are outlined below.

*Transitional arrangements- Contract given to a buyer but not signed by both parties*

The Bill includes new section 394 which states:

### 394 Application of s 206

- (1) This section applies in relation to the sale of a lot included in a community titles scheme—
  - (a) if a contract for the sale of the lot to the person who proposes to buy the lot (the buyer) has not been entered into before the commencement; and
  - (b) whether or not the person who proposes to sell the lot (the seller) to the buyer has complied with previous section 206 in relation to the sale.
- (2) The seller must give the buyer a disclosure statement complying with current section 206 before the buyer enters into a contract to buy the lot.
- (3) If the seller has, before the commencement, given the buyer a disclosure statement under previous section 206, the seller complies with current section 206 in relation to the buyer if—
  - (a) the seller gives the buyer a new disclosure statement that complies with current section 206; or
  - (b) the seller gives the buyer a written notice that—
    - (i) states the matters mentioned in current section 206(2)(b); and
    - (ii) is accompanied by a copy of the community management statement for the community titles scheme.
- (4) In this section—

*current* section 206 means section 206 as in force immediately after the commencement.

*previous* section 206 means section 206 as in force from time to time before the commencement.

The transitional provisions apply to contracts given to a buyer prior to commencement but not signed by both parties at the time of commencement. To comply with this section a seller after commencement is required to:

1. give a new disclosure statement in compliance with new s 206; or
2. if a disclosure statement was already given to the buyer a written notice stating the information in new s 206(2)(b), which includes the statements outlined above and a copy of the CMS.

The transitional provisions require the new disclosure statement to be given before the buyer enters a contract to buy the lot. While it is not clear from s 206, the conservative view is that a buyer enters a contract to buy when the buyer signs a contract. Therefore, where a seller has not signed but a buyer has signed a contract prior to commencement, it will be prudent to reissue the contract for signing, together with the disclosure statement in compliance with the new provisions. It should be noted that a failure to provide a disclosure statement to a buyer prior to signing will allow the buyer to terminate the contract at any time prior to settlement under s 206(7).

### Disclosure Obligations – Sales of Proposed Lots

The Bill amends section 213 of the BCCM to require the disclosure statement to include:

- i. the amount of annual contributions reasonably expected to be payable to the body corporate by the owner of the proposed lot; and
- ii. the extent to which the amount mentioned in subparagraph (i) is based on the contribution schedule lot entitlements for the lots included in the scheme; and
- iii. the extent to which the amount mentioned in subparagraph (i) is based on the interest schedule lot entitlements for the lots included in the scheme; and
- iv. that the contribution schedule lot entitlements, and interest schedule lot entitlements, for the lots included in the scheme are set out in the proposed community management statement for the scheme

#### *New Termination Rights*

The Bill also creates new rights of termination of contracts in section 217 where:

- the community management statement most recently advised to the buyer is required under new section 66(1)(db)(i) of the BCCM to state the contribution schedule principle on which the contribution schedule lot entitlements have been decided and does not include the statement;
- the community management statement most recently advised to the buyer is required under new section 66(1)(db)(ii) of the BCCM to explain why the contribution schedule lot entitlements are not equal and does not contain the explanation;
- the community management statement most recently advised to the buyer is required under new section 66(1)(db)(iii) of the BCCM to include sufficient details about the relativity principle to show how individual contribution schedule lot entitlements were decided by using it (the details) and does not include the details;
- the community management statement most recently advised to the buyer is required under new section 66(1)(dc)(ii) of the BCCM to explain why the interest schedule lot entitlements do not reflect the respective market values of the lots included in the scheme and does not contain the explanation

The buyer may terminate only if materially prejudiced by the omission.

A new right of termination of a contract for sale of a proposed lot is inserted in section 217A where the seller is the original owner for the community titles scheme and the buyer reasonably believes—

- either
  - i. 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; or
  - ii. the proposed interest schedule lot entitlements for the lots proposed to be included in the scheme are inconsistent with the market value principle; and
- the buyer would be materially prejudiced if compelled to complete the contract

Transitional arrangements - Contracts given to a buyer but not signed by both parties

The Bill includes new section 395 which states:

### 395 Application of s 213

- (1) This section applies in relation to the sale of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established—
  - (a) if a contract for the sale of the lot to the person who proposes to buy the lot (the buyer) has not been entered into before the commencement; and
  - (b) whether or not the person who proposes to sell the lot (the seller) to the buyer has complied with previous section 213 in relation to the sale.
- (2) The seller must give the buyer a disclosure statement complying with current section 213 before the buyer enters into a contract to buy the lot.
- (3) If the seller has, before the commencement, given the buyer a disclosure statement under previous section 213, the seller complies with current section 213 in relation to the buyer if—
  - (a) the seller gives the buyer a new disclosure statement that complies with current section 213; or
  - (b) the seller gives the buyer a written notice that states the matters mentioned in current section 213(2)(a).

(4) In this section—

*current* section 213 means section 213 as in force immediately after the commencement.

*previous* section 213 means section 213 as in force from time to time before the commencement.

Section 395 operates in the same way as section 394. The section applies to contracts given to a buyer prior to commencement, but not signed by both parties at the time of commencement. To comply with this section after commencement the seller is required to give a new disclosure statement in compliance with new section 213 or if a disclosure statement was already given to the buyer a written notice stating the information in new section 213.

#### *Further disclosure statements after commencement*

There is no change to the requirements of section 214 but any further disclosure statement given under section 214 after commencement should contain the new information about lot entitlements in compliance with new section 213. If the further disclosure statement fails to include this information a buyer may seek to rely upon section 217, if material prejudiced can be proven, to terminate the contract.

There is also an argument that because of the new requirements the disclosure statement “if given now would not be accurate” triggering an obligation to give a further disclosure statement under section 214. It is unclear whether the absence of the new information about lot entitlements makes the disclosure statement inaccurate. If the lot entitlements have not changed, the failure to give a further disclosure statement, merely to update the statement in accordance with new section 213 is unlikely to materially prejudice the buyer. If however a further disclosure statement is required after commencement for some other reason, the new statements in section 213 should be included.

## Contribution and Interest Schedule Principles

The Bill amends section 46 to require:

- For the contribution schedule for a community titles scheme established after the commencement of this subsection, the respective lot entitlements must be consistent with either—
  - a) the equality principle; or
  - b) the relativity principle.
- For the interest schedule for a community titles scheme established after the commencement of this subsection, the respective lot entitlements must be consistent with the market value principle

The Bill sets out in new section 46A the equality principle and the relativity principle for deciding contribution schedule lot entitlements. The Bill sets out in new section 46B the market value principle for deciding interest schedule lot entitlements.

Section 66 of the BCCM is amended to require certain disclosures about contribution and interest schedules principles in community management statements, these include:

- for existing schemes which are not adjusted after commencement of the Bill, if the contribution schedule lot entitlements for each lot included in the scheme are not equal, explanation of why they are not equal;
- for schemes created or adjusted after the commencement of the Bill:
  - o stating the contribution schedule principle on which the contribution schedule lot entitlements have been decided;
  - o if the contribution schedule lot entitlements have been decided in accordance with the equality principle and are not equal, explanation of why they are not equal;
  - o if the contribution schedule lot entitlements have been decided in accordance with the relativity principle including sufficient details about the principle to show how individual contribution schedule lot entitlements for the lots were decided by using it;
  - o if the interest schedule lot entitlements reflect the respective market values of the lots stating that the interest schedule lot entitlements reflect the respective market values of the lots;
  - o if the interest schedule lot entitlements do not reflect the respective market values of the lots explanation of why the interest schedule lot entitlements do not reflect the respective market values of the lots.

#### *Transitional Arrangements*

The Bill includes new section 375 which provides a concession for the setting of the interest schedule lot entitlements for a scheme which has not come into existence at the time of commencement, but where a contract for the sale of a proposed lot has been formed prior to commencement. In that case the interest schedule lot entitlements are not required to be calculated on the basis of market value but may be calculated with regard to the structure of the scheme, the nature, features and characteristics of the scheme and the purpose for which the lots are used.

## Adjustments of existing schemes

The Bill sets out new processes for adjustment of contribution schedules through either:

- a resolution of the body corporate without dissent (new section 47A); or
- by order of specialist adjudicator or QCAT (s 47B Body Corporate and Community Management Act 1997 ) if:
  - o there was a material change to the scheme necessitating a change to the contribution schedule lot entitlements
  - o the scheme was established after commencement and an owner considers that the contribution schedule lot entitlements are not consistent with the deciding principle for the scheme (ie equality principle or relativity principle). New section 48A sets out the criteria a specialist adjudicator or QCAT must use for deciding whether contribution schedule lot entitlements are consistent with a deciding principle.

The interest schedule lot entitlements may be adjusted by an order of an adjudicator or QCAT (s 48 Body Corporate and Community Management Act 1997), but must be consistent with the market value principle (as defined in s 46B Body Corporate and Community Management Act 1997).

### *Transitional Arrangements*

The Bill includes:

- new sections 376 and 377 which deem that a 'pre-commencement adjustment action' ceases to have effect and is deemed never to have existed on commencement. These actions include:
  - o motions and resolutions of bodies corporate for adjustment of contribution schedules which has either not been made or put into effect as at commencement;
  - o an application to a specialist adjudicator or QCAT for an adjustment of a contribution schedule which has either not been decided or put into effect as at commencement; or
  - o an appeal against a decision of a specialist adjudicator or QCAT about adjustment of a contribution schedule which has either not been decided or put into effect as at commencement.
- new sections 378 to 390 which set a process by which an owner in an existing scheme where an adjustment order has previously been made to have the scheme's contribution schedule lot entitlements reverted back to the pre-adjustment order figures. This process will only be available for 3 years after commencement.