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A "New and More Flexible" System for Deciding Shared Costs in Community Titles Schemes: the Body Corporate and Community Management and Other Legislation Amendment Bill 2010 (Qld)

Renee Gastaldon

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Ms Karen Sampford
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BACKGROUND

COMMUNITY TITLES LIVING IN QUEENSLAND

Community titles schemes can exist in various forms including, for example, as duplexes, townhouse complexes, residential unit blocks, high rise apartments, shopping complexes, commercial premises or business parks.

All such schemes are comprised of at least two individually owned lots and collectively owned and managed common property such as shared driveways or letterbox areas, communal lifts or stairwells, gardens, swimming pools, tennis courts, roadways and golf courses.[1]

A recent statement suggests there are over 39,000 community titles schemes in Queensland, with more than 364,000 individual lots.[2] In terms of outlook for the sector, it has been said:

> As Queensland's population continues to grow at a rapid pace, many people are embracing the opportunities offered by community living. … The community titles sector is a significant and growing contributor to Queensland's economy.
>
> Community living can be an affordable and convenient lifestyle choice. It can benefit singles or retirees looking to downsize yet continue independent living. People with common interests can meet socially or simply develop a closer relationship with their neighbours. Members can share facilities, such as pools and gardens, that may be too costly or difficult for them to build or maintain on their own.[3]

RELEVANT LEGISLATION

The *Body Corporate and Community Management Act 1997* (Qld) ('**BCCM Act**') governs the establishment and administration of community titles schemes in Queensland.

Four separate 'regulation modules'[4] provide detailed rules for the administration and operation of the different types of schemes.

Further information on community titles schemes in Queensland is available from the following publication:

- Queensland Government. Department of Justice and Attorney-General, Body Corporate: A quick guide to community living in Queensland, 2009.

Relevant fact sheets are also available from the Department of Justice and Attorney-General website.

LOT ENTITLEMENTS

The Department of Justice and Attorney-General fact sheet, 'Lot entitlements', provides the following overview of lot entitlements under the BCCM Act:

> The community management statement … for each community titles scheme in Queensland contains two schedules of lot entitlements. These schedules are the 'contribution schedule' and the 'interest schedule'. …
>
> Lot entitlements are used for a number of purposes, but they are mostly used to divide body corporate expenses among lot owners. The following is a more specific outline of the purposes of lot entitlements.
>
> The **contribution schedule lot entitlements** are used to calculate:
>
> - a lot owner's share of most body corporate expenses … ; and
> - the value of a lot owner's vote when voting on an ordinary resolution if a 'poll' is called for … .
>
> The **interest schedule lot entitlements** are used to calculate:
>
> - each lot owner's share of the common property and body corporate assets if the scheme is terminated (a scheme could be terminated if all the owners of lots in a scheme agreed to dispose of the scheme for the purposes of redevelopment);
> - each owner's share of the unimproved value of scheme land, for the purpose of calculating local government rates and charges, and other costs that are calculated on the basis of unimproved value.[5]

The existing system of lot entitlements under the BCCM Act is more comprehensively discussed below, in the section entitled '**The Existing Lot Entitlements System in Queensland**'.

A PROPOSED NEW SYSTEM OF LOT ENTITLEMENTS

On 23 November 2010, the then Minister for Tourism and Fair Trading, the Hon P Lawlor MP ('**former Minister**'),[6] introduced the Body Corporate and Community Management and Other Legislation Amendment Bill 2010 (Qld) ('**Bill**') into the Queensland Legislative Assembly.

This *e-Research Brief* considers one of the key objectives of the Bill,[7] namely the provision of a new system of lot entitlements for community titles schemes in Queensland.[8]

In summary, the relevant key proposals under the Bill include:

- for new community titles schemes,[9] lot entitlements will have to be set so that they are consistent with certain principles:
  - for contribution schedule lot entitlements – the 'equality principle' or the 'relativity principle'; and
  - for interest schedule lot entitlements – the 'market value principle';
- the ability for contribution schedule lot entitlements to be adjusted will be limited, for both existing community titles schemes[10] and new community titles scheme;
- lot owners in existing community titles schemes, who have been adversely affected by one or more adjustments to their contribution schedule lot entitlements, will have an opportunity to revert the entitlements for all the lots in their scheme to their original settings (that is, prior to any, and all, adjustment orders); and
- disclosure requirements for buyers of lots in community titles schemes will be enhanced.

BACKGROUND TO THE INTRODUCTION OF THE BILL

In December 2008, the Queensland Government released the following discussion paper seeking public comment on the existing system of lot entitlements, predominantly concerning the setting and adjusting of contribution schedule lot entitlements:

- Queensland Government. Department of Justice and Attorney-General, 'Sharing Expenses in Community Titles Schemes: A Discussion Paper on Lot Entitlements under *the Body Corporate and Community Management Act 1997*', *Discussion Paper*, December 2008 ('**2008 Discussion Paper**').

Submissions to the 2008 Discussion Paper closed in late February 2009.[11]

On 12 August 2010, the former Minister released public consultation drafts of:

- the Body Corporate and Community Management Amendment Bill 2010 (Qld) ('**Draft Bill**'); and
- the accompanying Explanatory Notes ('**Draft Explanatory Notes**').[12]

Submissions to the Draft Bill closed on 23 September 2010.[13]

SCOPE OF E-RESEARCH BRIEF

This *e-Research Brief* comprehensively discusses the proposal under the Bill for a new lot entitlements system for community titles schemes in Queensland by:

- providing an overview of the existing system of lot entitlements under the BCCM Act;
- outlining the key stages in the development of the law relating to lot entitlements, specifically:
  - the *Building Units and Group Titles Act 1980* (Qld);
  - the *Body Corporate and Community Management Act 1997* (Qld);
  - the *Body Corporate and Community Management and Other Legislation Amendment Act 2003* (Qld);
  - the Queensland Court of Appeal's decision, in 2004, in the '*Centrepoint case*', and associated discussion of the implications of the decision; and
  - the *Body Corporate and Community Management and Other Legislation Amendment Act 2007* (Qld);
- identifying the issues raised for public comment in the 2008 Discussion Paper concerning the setting and adjusting of contribution schedule lot entitlements, including the different options for reform;
- mentioning the release for public consultation of the Draft Bill; and

- detailing the key provisions of the Bill directed at providing a new lot entitlements system, together with a selection of commentary discussing some of the implications of the proposed changes under the Bill.

THE EXISTING LOT ENTITLEMENTS SYSTEM IN QUEENSLAND

'CONTRIBUTION SCHEDULE LOT ENTITLEMENTS' AND 'INTEREST SCHEDULE LOT ENTITLEMENTS'

Each community titles scheme must have:

- at least two lots;
- common property;
- a single body corporate; and
- a single community management statement (BCCM Act, s 10(4)).

When a community titles scheme is established, a body corporate is created (BCCM Act, s 30). The members of the body corporate are the owners of all the lots included in the scheme (BCCM Act, s 31).

One of the functions of a body corporate is to administer, manage and control the common property and body corporate assets for the benefit of the lot owners (BCCM Act, ss 94 and 152(1)(a)).

A body corporate must hold an annual general meeting each year (e.g. Standard Module, s 66). A body corporate must also adopt two budgets for each financial year – an 'administrative fund budget' (to cover expenditure of a recurrent nature such as the cost of maintaining common property and body corporate assets, and insurance) and a 'sinking fund budget' (for anticipated major expenditure of a capital or non-recurrent nature, or for the purchase or replacement of major assets) (e.g. Standard Module, s 139).

Based on these budgets, a body corporate must fix the contributions to be levied on each lot owner for the financial year (e.g. Standard Module, s 141(1)).

The contribution levied for a particular lot must be proportionate to the 'contribution schedule lot entitlement' of the lot (e.g. Standard Module, s 141(5)). (Note that an exception to this is for the costs of insuring common property and body corporate assets, where the levied contribution must be proportionate to the 'interest schedule lot entitlement' of the lot (e.g. Standard Module, s 178(4))).

The community management statement for each community titles scheme sets out two schedules of lot entitlements – the 'contribution schedule' and the 'interest schedule' (BCCM Act, Chapter 2, Part 5).

For both schedules, each lot in the scheme is allocated a whole number:

- for the contribution schedule, this number is known as the 'contribution schedule lot entitlement' for the lot; and
- for the interest schedule, this number is known as the 'interest schedule lot entitlement' for the lot (BCCM Act, ss 46(1)-(6)).

The aggregate of all the lot entitlements is also shown in each schedule.

More specifically, contribution schedule lot entitlements determine:

- a lot owner's share of most of the body corporate's expenses; and
- the value of a lot owner's vote when voting on an ordinary resolution if a poll is called for (BCCM Act, s 47(2)).

Interest schedule lot entitlements determine a lot owner's share of the:

- common property and body corporate assets if the scheme is terminated;
- value of the scheme land, for the purpose of calculating such things as local government rates and charges; and
- insurance premiums for common property and body corporate assets (BCCM Act, ss 47(2)(a) and (3)).

In terms of contribution schedule lot entitlements, the respective lot entitlements for a scheme must be "equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal" (BCCM Act, s 46(7)).

The following are examples of circumstances in which it may be just and equitable for there to be an inequality:

- a layered arrangement of community titles schemes, the lots of which have different uses (including, for example, car parking, commercial, hotel and residential uses) and different requirements for public access, maintenance or insurance;
- a commercial community titles scheme in which the owner of one lot uses a larger volume of water or conducts a more dangerous or a higher risk industry than the owners of the other lots (BCCM Act, s 46(7)).

The original developer of a scheme determines the respective lot entitlements when the first community management statement for the scheme is prepared. When a developer sets the contribution schedule and interest schedule lot entitlements, regard must be had to:

- how the scheme is structured;
- the nature, features and characteristics of the lots in the scheme; and
- the purposes for which the lots are used (BCCM Act, s 46(8)).

For further general information on the existing lot entitlements system, see:

- Queensland Government. Department of Justice and Attorney-General, 'Lot entitlements', *Fact Sheet*, May 2010.

ADJUSTING LOT ENTITLEMENTS

A lot entitlements schedule for a community titles scheme may be adjusted in any of the following ways:

- lot owners in the scheme agreeing in writing to redistribute, between themselves, the lot entitlements for their particular lots (BCCM Act, s 50);
- the body corporate for the scheme recording a new community management statement which accounts for a change in lot entitlements. This requires a resolution consenting to the new statement having been passed without dissent (BCCM Act, ss 55 and 62);
- a lot owner in the scheme applying for an order of a 'specialist adjudicator'[14] for the adjustment of the schedule (BCCM Act, s 48(1)(a)); or
- a lot owner in the scheme applying for an order of the Queensland Civil and Administrative Tribunal ('**QCAT**') for the adjustment of the schedule (BCCM Act, s 48(1)(b)).

Adjustments by a specialist adjudicator or QCAT are considered in the following section.

ADJUSTMENTS BY A SPECIALIST ADJUDICATOR OR QCAT

The respondent to an application to a specialist adjudicator or QCAT for the adjustment of a lot entitlements schedule is the body corporate for the scheme (BCCM Act, s 48(2)).

For applications to specialist adjudicators:

- other lot owners in the scheme may elect to be joined as respondents to the application; and
- each party to the application is responsible for their own costs (BCCM Act, s 48(3)).

The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sets out the associated provisions concerning applications made to QCAT.

Principle for the adjustment of contribution schedules

In relation to a contribution schedule, any adjustment order must be consistent with the principle that the respective lot entitlements should be "equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal" (BCCM Act, ss 48(1), (5)(a) and (6)).

Principle for the adjustment of interest schedules

For an interest schedule, any adjustment order must be consistent with the principle that the respective lot entitlements should reflect the respective market values of the lots included in the scheme when the adjustment order is made, except to the extent to which it is "just and equitable in the circumstances" for the individual lot entitlements to reflect other than the respective market values of the lots (BCCM Act, ss 48(1), (5)(b) and (7)).

Relevant criteria for deciding 'just and equitable' circumstances

In both instances, in deciding whether 'just and equitable' circumstances apply, the matters to which regard may be had include, but are not limited to:

- how the particular community titles scheme is structured;
- the nature, features and characteristics of the lots included in the scheme; and
- the purposes for which the lots are used (BCCM Act, ss 49(1)-(4)).

Regard may not be had to any knowledge or understanding the lot owner had, or any lack of knowledge or misunderstanding on the part of the lot owner, when they entered into a contract to buy their lot, about:

- the lot entitlement for their lot or other lots in the scheme; or
- the purpose for which a lot entitlement is used (BCCM Act, s 49(5)).

ADJUSTING CONTRIBUTION SCHEDULES – COURT OF APPEAL'S INTERPRETATION IN '*CENTREPOINT CASE*'

In June 2004, the Queensland Court of Appeal, in the *Centrepoint case* ('**Court of Appeal's decision**'),[15] authoritatively interpreted the above provisions of the BCCM Act concerning applications for the adjustment of contribution schedule lot entitlements.

The effect of the decision is that a contribution schedule should provide for equal contributions by lot owners, except to the extent that it can be shown that some lots give rise to particular costs to a body corporate which other lots do not.

Whether a contribution schedule should be adjusted requires a consideration of the demand respective lots in a scheme make on the services and the amenities provided by a body corporate, or their contribution to the costs incurred by the body corporate. More general considerations of amenity, value or history are irrelevant.

The *Centrepoint case*, and some of the implications of the Court of Appeal's decision, are more comprehensively discussed below, in the section entitled '**The *Centrepoint Case***'.

DEVELOPMENT OF THE LAW RELATING TO LOT ENTITLEMENTS

The following key stages in the development of the law relating to lot entitlements in community titles schemes in Queensland are outlined below:

- the *Building Units and Group Titles Act 1980* (Qld);
- the *Body Corporate and Community Management Act 1997* (Qld);
- the *Body Corporate and Community Management and Other Legislation Amendment Act 2003* (Qld);
- the Queensland Court of Appeal's decision, in 2004, in the '*Centrepoint case*', and associated discussion of the implications of the decision; and
- the *Body Corporate and Community Management and Other Legislation Amendment Act 2007* (Qld).

BUILDING UNITS AND GROUP TITLES ACT 1980 (QLD)

Under the *Building Units and Group Titles Act 1980* (Qld) ('**1980 Act**'), a single schedule of lot entitlements existed for 'building units plans' and 'group titles plans' which determined:

- the voting rights of owners;
- each owner's share in the common property; and
- the proportion of body corporate levies payable by each owner (s 19(1)).[16]

For group titles plans, lot entitlements were set in proportion to the unimproved values of the lots (s 19(2)).

Every group titles plan lodged for registration had to be accompanied by a valuer's certificate setting out the valuer's opinion as to the unimproved value, and the lot entitlement, of each lot in the plan (s 19(3)).

No guidance was provided for the setting of lot entitlements in building units plans. The 2008 Discussion Paper (p 6) explained:

> Lot entitlements were often set to reflect the expected market value of the lots. Sometimes, lot entitlements were based on the respective size of the lots or on the level of body corporate levies that might be generated by a particular lot. In some instances, the entitlements set were quite arbitrary.
>
> In this environment, it was possible for developers to give less attractive lots lower lot entitlements in order to make them more marketable on the basis of low body corporate fees. It was also possible for developers to set low lot entitlements for lots they intended to keep for themselves, thus reducing their contributions to body corporate expenses.
>
> Many owners had expressed concern to Government that they were required to pay a disproportionate share of body corporate expenses under these arrangements. These problems were compounded by the fact that … there was no provision to adjust the lot entitlements set by the developer for the scheme … .

BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997 (QLD)

The *Body Corporate and Community Management Act 1997* (Qld) ('**BCCM Act as passed**') commenced in July 1997 and introduced "significant reforms to community titles legislation".[17]

Specifically in terms of lot entitlements, the 2008 Discussion Paper (p 7) noted:

> In response to continued calls for a change to the method of distributing shared body corporate expenses under the 1980 Act, the BCCM Act introduced fundamental reforms to the concept of lot entitlements when it commenced in 1997.

The key reforms were:

- the introduction of a 'dual system'[18] of lot entitlements, with each lot having a 'contribution schedule lot entitlement' and an 'interest schedule lot entitlement'; and
- the introduction of a means by which lot entitlements could be adjusted.

Bodies corporate created under the 1980 Act were taken to be community titles schemes under the BCCM Act as passed, with the previous single schedule of lot entitlements mentioned above being taken to be both the contribution schedule and the interest schedule.

The key reforms, which were set out in Chapter 2, Part 6 of the BCCM Act as passed, are discussed in greater detail below.

The following publications also discussed the reforms:

- Queensland Parliamentary Library (Peter Bartholomew), 'Community Titles in Queensland: The Body Corporate and Community Management Bill 1997', *Legislation Bulletin*, No. 6/97, May 1997;
- Sharon Christensen, 'Adjustment of lot entitlements: Is the court approach just and equitable?', *Queensland Lawyer*, 20(6), 2000, pp 226-229; and
- Ryan Heffernan, 'Noosa ruling to impact on body corporate fees', *Courier Mail*, 16 February 2000, p 37.

Contribution schedule lot entitlements

The 'contribution schedule lot entitlement' for a lot was defined as the number allocated to the lot in the 'contribution schedule' in the community management statement for the relevant scheme (ss 44(1), (2) and (4)).

The contribution schedule lot entitlement was stated to be the basis for calculating:

- the lot owner's required contribution to most body corporate expenses (an exception being insurance premiums for common property and body corporate assets);[19] and
- the value of the lot owner's vote on a poll for an ordinary resolution (s 45(2)).

Interest schedule lot entitlements

The 'interest schedule lot entitlement' for a lot was defined as the number allocated to the lot in the 'interest schedule' in the community management statement for the relevant scheme (ss 44(1), (3) and (5)).

The interest schedule lot entitlement was stated to be the basis for calculating:

- the lot owner's share of common property;
- the lot owner's interest on termination of the scheme, including their share in body corporate assets; and

- the unimproved value of the lot, for the purpose of a charge, levy, rate or tax calculated and imposed on the basis of unimproved value (s 45(3)).

As mentioned above (and in endnote 19), interest schedule lot entitlements were also identified as the basis for determining a lot owner's required contribution to certain insurance premiums.

Adjusting lot entitlements

Under the reforms, lot entitlements could, for the first time, be adjusted, in one of the following ways:

- the owners of two or more lots in a scheme could agree in writing to change the lot entitlements of their own lots, without affecting the overall lot entitlements of the lots subject to the change, and advise the body corporate of the change (s 47);
- the body corporate for the scheme could consent to the recording of a new community management statement for the scheme, incorporating a new interest schedule or contribution schedule, by passing a resolution without dissent (s 55); or
- the owner of a lot could apply to the District Court for an order for the adjustment of a lot entitlement schedule (s 46). This method of adjustment is discussed in greater detail below.

Adjustment of lot entitlements schedules by District Court

The following provision was included in the BCCM Act as passed:

> It is not a requirement for a community management statement for a community titles scheme that the contribution schedule lot entitlements be equal for each lot included in the scheme, or that the interest schedule lot entitlements be directly proportional to the market values of the respective lots (s 46(1)).

The BCCM Act as passed also stated that:

> Nevertheless, the owner of a lot may apply to a District Court for an order for the adjustment of a lot entitlement schedule (s 46(2)).

Any consequential order of the District Court had to be consistent with:

- for a contribution schedule, the following principle - the respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal (ss 46(3) and (4)); and
- for an interest schedule, the following principle - the respective lot entitlements should reflect the respective market values of the lots in the scheme when the Court makes the order, except to the extent to which it is just and equitable in the circumstances for the individual lot entitlements to reflect other than the respective market values of the lots. For schemes created under a standard format plan, it is the unimproved value of the lot that is relevant (ss 46(3), (5) and (7)).

BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT ACT 2003 (QLD)

The *Body Corporate and Community Management and Other Legislation Amendment Act 2003* (Qld) ('**2003 Act**') "introduced changes … to clarify and extend the arrangements for setting and adjusting lot entitlements".[20]

The relevant changes, which commenced in March 2003, included:

- guidance for developers in setting contribution schedule lot entitlements;
- mandating certain matters for developers to have regard to in setting lot entitlements;
- requiring community management statements and disclosure statements given by developers to prospective buyers to explain any inequality in contribution schedule lot entitlements;
- providing an additional process for the adjustment of lot entitlements, by 'specialist adjudicators';
- guidance on the matters the District Court or a specialist adjudicator could, or could not, consider in deciding applications for the adjustment of lot entitlements; and
- requiring parties to bear their own costs in applications for the adjustment of lot entitlements.

The 2008 Discussion Paper (p 8) provided the following explanations about the background to these changes.

In terms of the requirements on developers in setting contribution schedule lot entitlements:

> These amendments were in response to concerns that some developers were still arbitrarily setting contribution schedule lot entitlements with little regard to the principle that would be applied by the District Court if a dispute arose in the future.

In terms of the new process for adjustment of lot entitlements by specialist adjudicators:

> This amendment responded to concerns that the District Court was inaccessible to many owners.

In terms of the guidance provided to the District Court and specialist adjudicators when ordering that lot entitlements be adjusted:

> This addressed criticisms that the legislation was not sufficiently clear on this issue.

These changes are discussed in greater detail below.

The 2003 Act was also discussed in the following publications:

- Sharon Christensen and Anne Wallace, 'Body Corporate & Community Management Act amendments: a snapshot', *Proctor*, April 2003, pp 20-22; and
- 'New Act to hit developers', *Gold Coast Bulletin*, 19 April 2003, p 26.

Guidance for developers in setting contribution schedule lot entitlements

The following provision was inserted to guide developers in the setting of contribution schedule lot entitlements:

> For the contribution schedule for a scheme for which development approval is given after the commencement of this subsection, the respective lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.
>
> *Examples … of circumstances in which it may be just and equitable for lot entitlements not to be equal-*
>
> 1. A layered arrangement of community titles schemes, the lots of which have different uses (including, for example, car parking, commercial, hotel and residential uses) and different requirements for public access, maintenance or insurance.
> 2. A commercial community titles scheme in which the owner of 1 lot uses a larger volume of water or conducts a more dangerous or a higher risk industry than the owners of the other lots (s 10 of the 2003 Act - s 44(7) of the BCCM Act as amended by the 2003 Act).

This provision reflected the principle the District Court already had to consider in applications for the adjustment of contribution schedule lot entitlements (discussed above under '**Adjustment of lot entitlements schedules by District Court**').

The 2003 Act (s 11(1)) also removed the below provision, which had been s 46(1) of the BCCM Act as passed:

> It is not a requirement for a community management statement for a community titles scheme that the contribution schedule lot entitlements be equal for each lot included in the scheme, or that the interest schedule lot entitlements be directly proportional to the market values of the respective lots.

Extrinsic material referred to in the interpretation of this provision

Relevant excerpts of certain extrinsic material associated with this provision are reproduced below. This material was referred to by the Queensland Court of Appeal in the *Centrepoint case* (discussed below) in interpreting this provision.

Explanatory Notes

The Explanatory Notes to the relevant Bill[21] (pp 18-19) stated (emphasis added):

> The change is intended to *reinforce the concept that usually all lot owners are equally responsible for the cost of upkeep of common property and for the running costs of the community titles scheme*. However, it is recognised that there are many valid instances where the contribution schedules do not have to be equal. The amendment provides that usually the numbers in this schedule are equal, unless it can be demonstrated that it is just and equitable for there to be inequality.
>
> The need for difference is best shown by examples.
>
> Example 1 Where a basic community titles scheme contains lots having different uses, for example a combination of residential and business lots (restaurants, small shops and the like) the contribution schedule can be different to reflect the higher maintenance and utilities use of the shops in comparison to lower requirements for the residential lots.
>
> Example 2 In a layered scheme there may be a difference in the contribution schedule of each basic scheme in the layered arrangement depending on the nature of each of the basic schemes. If the layered scheme was a building that comprised a number of basic schemes including a car park, shopping centre,

> hotel and residential schemes, the contribution schedule would be different between, for example, the car park and the shopping centre to reflect the different service needs, the different levels of consumption of utilities and the different maintenance and refurbishment costs. A similar difference would exist between the hotel and the residential schemes.
>
> *Example 3 In a basic scheme, if all the lots are residential lots ranging in size from a small lot to a penthouse, the contribution schedule lot entitlements generally would be equal. However, the contribution schedule may be different if the penthouse has its own swimming pool and private lift. The contribution schedule should recognise this type of difference. The other lots in the scheme despite being of differing size or aspect would be expected to have equal contribution schedule lot entitlements.*
>
> The clause also includes basic principles to be applied by the developer when first determining the lot entitlements for the community titles scheme.
>
> *For example it is not uncommon for a developer to assign a higher contribution schedule lot entitlement to a small lot in comparison to that for a larger lot in the scheme. The contribution should not be based on lot size or value. The developer must consider all the factors included in section 44(8).*

(Note that the referred to factors in section 44(8) of the BCCM Act as amended by the 2003 Act are discussed in further detail below.)

Second Reading Reply

In the Second Reading Reply to the relevant Bill (pp 310-312, at p 311), the then Minister for Natural Resources and Minister for Mines, the Hon S Robertson MP, said (emphasis added):

> The issue of the nature of the contributions schedule for a body corporate scheme has created some discussion. The guiding principle for both setting and adjusting the contributions schedule is that it involves the equitable sharing of the costs of operating and maintaining the common property. *These costs should be borne in proportion to the benefit, not in proportion to the unit's value. It is not a contribution linked to an ability to pay, but as a payment for services.* However, if there are reasons why an equal contribution schedule would not be fair or equitable, it can be changed through application to the courts or to a specialist adjudicator. There is not an argument here today against the fact that, in terms of costs related to a property's value – costs such as rates and insurance – owners whose properties are worth more should pay more. *But when we are talking about those parts of a property where the benefits are shared more or less equally, we cannot apply the same formula.*

Matters to which developers must have regard in setting lot entitlements

The following provision was inserted to mandate certain matters to which developers had to have regard in setting both contribution schedule lot entitlements and interest schedule lot entitlements.

> In deciding the contribution schedule lot entitlements and interest schedule lot entitlements for a scheme [for which development approval is given after the commencement of this subsection], regard must be had to:
>
> - how the scheme is structured;
> - the nature, features and characteristics of the lots included in the scheme; and
> - the purposes for which the lots were used (s 10 of the 2003 Act – s 44(8) of the BCCM Act as amended by the 2003 Act).

In this regard, as already noted above, the Explanatory Notes to the relevant Bill stated (pp 18-19):

> …[I]t is not uncommon for a developer to assign a high contribution schedule lot entitlement to a small lot in comparison to that for a larger lot in the scheme. The contribution should not be based on lot size or value. The developer must consider all the factors included in section 44(8).

Information for prospective buyers about any inequality in contribution schedule lot entitlements

The new provisions directed at assisting prospective buyers to understand any inequality in contribution schedule lot entitlements for new community titles schemes were as follows:

- a requirement that developers include in the community management statements for new schemes an explanation of why contribution schedule lot entitlements were not equal (s 24 of the 2003 Act - s 57(1)(d)(i) of the BCCM Act as amended by the 2003 Act);
- a requirement that the information a developer provided to prospective buyers include the reason stated in a community management statement for any inequality in the contribution schedule lot entitlements (s 65 of the 2003 Act - s 163(2)(c) of the BCCM Act as amended by the 2003 Act); and

- the provision of power to buyers to cancel a contract prior to settlement if the community management statement most recently advised to them did not contain the required explanation as to any inequality in contribution schedule lot entitlements (s 68 of the 2003 Act - s 174(b)(iii) of the BCCM Act as amended by the 2003 Act).

Adjustment of lot entitlements by specialist adjudicators

Lot owners were provided with an additional process by which they could apply to have lot entitlements adjusted, namely by applying to a 'specialist adjudicator' (s 11(2) of the 2003 Act - s 46(1) of the BCCM Act as amended by the 2003 Act).[22]

Guidance in deciding applications for the adjustment of lot entitlements

A provision was inserted to provide guidance on the matters the District Court or a specialist adjudicator could, and could not, have regard to in determining applications for the adjustment of lot entitlements (s 12 of the 2003 Act - s 46A of the BCCM Act as amended by the 2003 Act).

In particular, the new criteria were inserted for deciding:

- in relation to a contribution schedule – if it was 'just and equitable in the circumstances' for the respective lot entitlements not to be equal; and
- in relation to an interest schedule – if it was 'just and equitable in the circumstances' for the individual lot entitlements to reflect other than the respective market values of the lots.

The matters to which regard could be had included, but were not limited to:

- how the community titles scheme was structured;
- the nature, features and characteristics of the lots included in the scheme; and
- the purposes for which the lots were used.

Regard could not be had to any knowledge or understanding the applicant had, or any lack of knowledge or misunderstanding on the part of the applicant, at the time the applicant entered into a contract to buy the particular lot, about:

- the lot entitlement for the subject lot or other lots included in the community titles scheme; or
- the purpose for which a lot entitlement was used.

The Explanatory Notes to the relevant Bill (pp 4-5) provided the following context for the new provision:

> …[F]urther guidance is provided regarding matters to be considered in the adjustment of lot entitlements. It has been suggested that in previous decisions, the Court has been hamstrung by the lack of statutory direction for matters the Court could take into account in reaching a decision. The Bill specifies matters that the court or specialist adjudicator may and need not have regard to in deciding just and equitable circumstances.

The Explanatory Notes to the relevant Bill also stated (pp 19-20):

> The criteria are indicative for the Court and the specialist adjudicator, as it is considered more appropriate that the decision maker consider the matter on its merits while understanding the purpose and impact of lot entitlements.
>
> The purpose of the provision is explained more clearly with an understanding of the background to lot entitlements.
>
> Lot entitlements are regarded by some as a property right of which the buyer had knowledge at the time of purchase. This view arose in part from the *Building Units and Group Titles Act 1980* which used a single value based entitlement number for contributions to body corporate funds and interest in the common property of the scheme. The *Body Corporate and Community Management Act 1997* altered this concept for schemes translated from the *Building Units and Group Titles Act 1980* and for new schemes under *Body Corporate and Community Management Act 1997* to require a separate number each for the contribution and interest schedules. The bodies corporate that had been created under *Building Units and Group Titles Act 1980* were taken to be schemes under *Body Corporate and Community Management Act 1997* when the latter Act commenced in 1997.
>
> The reality is that most buyers have no real concept of the operation of the different schedules, despite the mandatory warning statement on the contract of sale and any advice the buyer may receive prior to signing a purchase contract for a lot in a scheme.
>
> Lot entitlements do not have to remain fixed for the life of a scheme. If the scheme changes, for example through compulsory acquisition … or from an all-residential scheme to a mix of residential and commercial,

> the lot entitlements must change to justly and equitably reflect the changed structure of the scheme, the nature and characteristics of the lots and the purpose for which they are used.
>
> Allowing the Court or specialist adjudicator to also disregard the applicant's knowledge or lack of knowledge is intended to allow a determination to be made which will provide the best possible lot entitlement arrangement for the scheme that is just and equitable at the time, without the Court or specialist adjudicator trying to find out or understand what may or may not have been in the mind or the understanding of the owner at the time of buying the lot in the scheme.

Parties bear own costs in adjustment applications

In relation to applications to the District Court or a specialist adjudicator for an order for the adjustment of a lot entitlement schedule, a provision was inserted stating that each party to the application was responsible for their own costs of the application (s 11(2) of the 2003 Act - s 46(2)(c) of the BCCM Act as amended by the 2003 Act).

In this regard, the Explanatory Notes to the relevant Bill (p 4) stated:

> … [P]arties must bear their own costs in regard to applications for adjustment of lot entitlements, to avoid situations where threats are being made that if people oppose an application, the applicant will seek costs against them.

In addition, the 2003 Act also stated that:

- the respondent to such an application was the body corporate; and
- another lot owner in the scheme could elect to be joined as a respondent to the application (s 11(2) of the 2003 Act - ss 46(2)(a)-(b) of the BCCM Act as amended by the 2003 Act).

The Explanatory Notes to the relevant Bill (p 19) explained:

> The amendment makes the body corporate the respondent for the purposes of the section. It is considered that as the body corporate as a whole would be directly affected by changes to the lot entitlement schedules, the body corporate is the most appropriate respondent. The intention is also to simplify the number of respondents to the action, to remove the prospect of the costs incurred in responding to an application being borne by one person and to give an owner the right to be not directly involved in the legal process. Notwithstanding the making of the body corporate as the primary respondent, an owner may still elect to be directly involved in the determination process by requesting to be made a respondent.

THE '*CENTREPOINT CASE*'

Facts[23]

The applicants (ten in number) were the owners of lots in a community titles scheme (known as '*Centrepoint*'), located at Leichhardt Street, Spring Hill.

Centrepoint was comprised of 51 residential lots in two towers (20 apartments in one tower and 31 apartments in the other). Six of the apartments had one bedroom, 28 had two bedrooms and 17 had three bedrooms. The apartments ranged in size from 81 square metres to 241 square metres. There were three levels of underground car parks.

Each tower had one lift shaft. The common areas included a sauna, swimming pools, a games room, reception and gardens. The apartments were centrally air-conditioned.

The body corporate for *Centrepoint*, having been incorporated under the 1980 Act, had only one schedule of lot entitlements, which was taken to be both the contribution schedule lot entitlements and the interest schedule lot entitlements under the BCCM Act as passed.

Prior to the commencement of the relevant proceedings, the first applicant, Mr Fischer, commissioned an expert report which concluded that, although it was just and equitable for the contributions not to be equal, the existing contributions schedule was not just and equitable. The report recommended a fair and equitable contribution schedule of lot entitlements.

At an extraordinary general meeting of the body corporate for *Centrepoint* in June 2002, Mr Fischer moved that the body corporate adopt the recommendation. The motion was defeated, with lot owners voting as follows: nine in favour, twenty-one against and four abstaining.

Mr Fischer resubmitted the motion at a meeting in November 2002. The motion was again defeated, with lot owners voting as follows: ten in favour, fifteen against and five abstaining.

In February 2003, the applicants applied to the District Court for an order that the contribution schedule lot entitlements be adjusted.

The application was dismissed by the District Court (per Judge Samios) in February 2004 (see District Court's decision).

In June 2004, the Court of Appeal (per Justices McPherson, Chesterman and Atkinson) allowed the applicants' appeal, ordering that the contribution schedule lot entitlements be adjusted (see Court of Appeal's decision).

Both decisions are discussed in greater detail below.

The relevant law in effect at the time of both the decisions was that under the 2003 Act.

Expert reports

Report commissioned by Mr Fischer

The expert report commissioned by Mr Fischer was essentially a 'cost allocation exercise' which was premised upon attributing to each lot a contribution schedule lot entitlement which equated to the cost that that lot was either causing or benefiting from. That is, the report sought to establish a 'user-pay system' (District Court's decision, para 16).

The report stated (Court of Appeal's decision, para 16):

> Certain administrative and sinking fund items should not be shared on an equal basis amongst all lots … Certain lots within the scheme place a greater demand for the underlying service [than] other lots …

The cost allocation exercise involved the following steps:

- calculating the body corporate's actual costs, by analysing the administrative fund of the body corporate to assess the money collected and spent in the operations of the body corporate;
- calculating the money required for the sinking fund, by analysing the replacement costs for items of a long-term capital nature;
- considering each item of expenditure and deciding how that was benefiting or being caused by each of the lots; and
- allocating the expenditure according to that determination (District Court's decision, paras 16-17).

For some items of the body corporate's expenditure (e.g. payment of a tax return each year), it was considered that this was not impacted upon by the size of a lot or whether it, for example, had a pool or access to a lift. Accordingly, such an expenditure was considered to be a cost which should be shared equally by the lot owners, and each lot was attributed an equal share of that cost (District Court's decision, para 17).

However, other items of expenditure (e.g. painting) were considered to bear some relationship to the size of a particular lot, and such expenditure was consequently distributed according to the size of a particular lot (District Court's decision, para 17).

The report identified the following five methods by which it was considered appropriate to share the body corporate's costs (District Court's decision, paras 18-23, and Court of Appeal's decision, para 16):

1. Equal sharing of costs – for expenses that were either directly proportional to the number of lots in the scheme (e.g. body corporate administration contract) or fixed without reference to the number of lots (e.g. fee for preparation of a tax return). No particular lot placed any greater or lesser demand on the service. It was considered that these expenses should be shared amongst all the lots on an equal basis.
2. 'Support and shelter costs' – for expenses such as painting and roof repairs. It was considered that these costs should be shared based on the area of a particular lot in proportion to the total area of all the lots.
3. 'The potential accommodation factor (bedrooms)' – for expenses directly related to use of the common property. These expenses depended on the number of people who were resident. It was said that the "most logical determinant" of the number of residents was the number of bedrooms and, accordingly, it was considered that these costs should be shared based on the number of bedrooms in a particular lot.
4. Lift costs – the costs of a working lift. It was considered that these costs should be shared equally between the two towers, and then equally between the lots in those towers.
5. 'Lattice costs' – the costs associated with the lattice on 24 of the lots. It was considered that these costs should be allocated only to those particular lots with lattice.

As mentioned above, the report concluded that the contribution schedule for the *Centrepoint* body corporate should not be equal because it was just and equitable for the contributions not to be equal (District Court's decision, para 26).

However, the existing schedule was not considered by the report to be just and equitable (District Court's decision, para 26).

Accordingly, the report recommended that the existing schedule be replaced with a new schedule, as set out in the report, the effect of which would be a decrease in the monetary contribution of some of the lot owners (20 lot owners) and an increase in the monetary contribution of other lot owners (31 lot owners) (District Court's decision, paras 27 and 31).

Report commissioned by lot owners opposed to the application

Lot owners opposed to the application also commissioned an expert report.

The resulting report largely used the same methodology as the report commissioned by Mr Fischer (District Court's decision, para 28, Court of Appeal's decision, para 18).

The report also similarly concluded that the existing contribution lot entitlement schedule for the *Centrepoint* body corporate was not just and equitable to all lot owners, and recommended that the body corporate adopt a proposed schedule of contribution lot entitlements, set out in the report, which was considered to be just and equitable in the circumstances (District Court's decision, para 28).

The recommended schedule was not significantly different to the schedule proposed in the report commissioned by Mr Fischer (District Court's decision, para 28).

The point of difference related to allocating the costs of operating and maintaining the lifts separately between the apartments in each tower, though equally between the apartments in each (Court of Appeal's decision, para 18).

Evidence of effect of change in contributions on lot values

Evidence was given by a valuer, at the hearing of the application in the District Court, of the effect of a change in contribution schedule lot entitlements on the value of lots in *Centrepoint*.

Individual lots were not valued, but the evidence showed that for an investor-owner of a lot subject to an increase in contributions, the effect would be a reduction in cash flow from the rental income, which would negatively affect the return on investment. An increase in contributions for an owner-occupier would negatively affect the marketability of the particular lot (District Court's decision, para 31).

In terms of the five lot owners who gave evidence at the hearing of the application in the District Court, the valuer gave evidence that the market value of their particular lots would fall by a factor of 18.18 times the annual increase in the amount of their contributions (District Court's decision, para 32).

The following table of this impact was provided (District Court's decision, para 32):

Lot owner	Annual increase in contributions	Decrease in value of lot
A	$342.13	$6,219.92
B	$1,104.54	$21,898.54
C	$1,779.69	$32,354.75
D	$801.98	$14,580.00
E	$313.22	$5,694.25

District Court's decision

(See District Court's decision)

Judge Samios quoted the following earlier judicial consideration of lot entitlements under the 1980 Act (District Court's decision, para 36):

> Usually a lot entitlement reflected the expected market value of the lot. Sometimes the entitlements reflected the self interest of the developer, or were based on the level of body corporate levies that might be generated

by a particular lot, or were based on the area of the building which the lot occupied. Occasionally, there was no apparent explanation at all for the allocation.

His Honour noted that:

- the applicants had submitted that "it would only be by an amazing coincidence" if the contribution lot entitlements schedule applying to the *Centrepoint* scheme complied with the criteria set out in the 2003 Act (District Court's decision, para 37); and
- the respondent body corporate had submitted that the contribution schedule lot entitlements were the "product of a consideration of differences in the size and location of the lots" and were "weighted accordingly". As such, the body corporate submitted that the existing contribution schedule provided a "just, equitable and appropriate means of differentiating between the lot owners" and was not inconsistent with the legislation (District Court's decision, para 38).

By way of summary, Judge Samios:

- refused to adjust the lot entitlements;
- rejected both expert reports on the basis they did not sufficiently consider a lot's size, number of bedrooms and location (position in the building and aspect);
- stated that the basis upon which the lot owners had purchased their particular lots could not be ignored, including the existing lot entitlement contributions;
- stated that the potential for a reduction in the value of those lots for which contributions would increase under any adjustment could not be ignored; and
- acknowledged that a majority of lot owners did not support the application for an adjustment.

More particularly, His Honour stated (emphasis added) (District Court's decision, paras 48-55):

> … *I am satisfied the existing lot entitlements reflect a differentiation between the lots based on the size of the lot, number of bedrooms in the lot and location of the lot in the building.* Further, this differentiation has been in existence since the Scheme's inception.
>
> Further, *I am satisfied owners of lots … purchased their lot on the basis of the existing lot entitlement contributions and paid for their lots a price based amongst other things upon the existing lot entitlement contributions.* It is correct to say the Act allows for an application to be made to this Court for an order for the adjustment of a lot entitlement schedule. Further, a purchaser of a lot is presumed to know the law which would include in this instance that the Act permits an application to be made for an adjustment of a lot entitlement schedule. However, *I do not accept the Court can ignore the basis upon which lot owners opposed to the application did purchase their lot*.
>
> Further, even though [the experts] used the size of a lot and the number of bedrooms in the lot, no weight appears to have been given … to the *location of a particular lot*. In my opinion the nature, features and characteristics of a lot which is one of the matters the Court may have regard to when deciding just and equitable circumstances is wide enough to include the location of a lot*. In my opinion there are two aspects to the location of a lot. These two aspects are the position of the lot in the building as in what level the lot is on and secondly the aspect that might be enjoyed by that particular lot.* I accept location in the sense I am considering location in this application is something that would be difficult to quantify. Further [the experts] have approached their task by considering the money required to fund the body corporate's expenses and have sought to determine the costs incurred because of a particular lot. However, the application of their approach to an item of expenditure that can be clearly seen is generated because of a particular lot does not cause the difficulty. The difficulty arises when the expense being examined is said to be caused equally by all the lots and yet not all the lots are equal in size, number of bedrooms and location in the building. I accept the lots in this building are very different. I accept this building has a particular composition, is unique and is very diverse. I do not accept the Act demands the application of the user pays approach particularly when the application of size of the lot and number of bedrooms in the lot produces little by way of differentiation between the lots. *That is I do not accept the approach taken [by the experts] gives any weight to the location of a particular lot in the building having regard to both aspects of location of a lot in the building let alone giving sufficient weight to the size of a lot and the number of bedrooms in a lot*.
>
> …
>
> … *Even though the quantification of expenditure because of location is difficult, in my opinion, that does not mean no weight should be given to that matter when considering what is just and equitable.* Take by way of another example expenditure relating to the lifts. According to [one expert] that expenditure should be divided equally between the two towers and then equally between the lots in each tower. In my opinion it could be argued a one bedroom lot on level E does not generate an equal cost of maintaining and servicing the lift to a three bedroom lot on K level. Further, the use of a ratio of floor area between the two lots in that example may not be just and equitable. That is, the ratio of lot size say between lot 33 on E level and lot 51 on K level is about 1:1.5. However, the three bedroom lot on K level it could be argued generates six times the cost of maintaining and servicing the lift in that tower because there are six levels between the two lots.

> *In my opinion the size of a lot or the number of bedrooms in a lot does not numerically produce a ratio creating such a differentiation between lots of different size or bedrooms located in different parts of the building that can be balanced justly and equitably against the weight to be given to the location of the lot in the building. That is so, in my opinion, even if location of the lot is limited to its level in the building rather than considering what aspect is enjoyed by that lot. In my opinion some lot owners would argue the aspect enjoyed by a lot is also a relevant matter to what is just and equitable*.
>
> Further, I am satisfied *there is potential for a reduction in the value of the lots for which the contributions will be increased if an adjustment is ordered as proposed. Again, I do not accept the Court can ignore this potential on this application*.
>
> Finally, in this instance a majority of the lot owners in the Body corporate do not support the application.
>
> I accept there are some expenses of the Body corporate that should not be shared equally. An example … is the expenses relating to the lattice. Therefore, I am satisfied it is just and equitable that the contribution not be equal. However, *I am not satisfied the approach of [the experts] gives sufficient weight to the size of the lot, the number of bedrooms in the lot and the location of the lot*.

Court of Appeal's decision

(See Court of Appeal's decision)

The applicants appealed the District Court's decision.

The Court of Appeal allowed the appeal and ordered that the contribution schedule lot entitlements be adjusted.

Justices McPherson and Atkinson concurred with Justice Chesterman, who delivered the leading judgment.

The question for the Court of Appeal was said to be a "narrow one" (Court of Appeal's decision, para 24). That is, whether, in determining an application for the adjustment of a contribution lot entitlements schedule and, in particular, the extent to which it is just and equitable that respective lot entitlements not be equal, the enquiry is at large, or whether it is limited to matters which show how lots differently affect the cost of running and maintaining a community titles scheme.[24]

By way of summary, Justice Chesterman accepted the applicants' submission that, in making an adjustment of a lot entitlements schedule, the Court must pay regard only to the origin and allocation of body corporate expenditure.

His Honour acknowledged that there was "a degree of arbitrariness between the allocation of lot entitlements" to the various lots in the *Centrepoint* scheme, and that both experts had agreed that the existing schedule was not 'just and equitable' (Court of Appeal's decision, para 15).

His Honour noted (Court of Appeal's decision, para 19):

> … [B]oth experts had regard only to the expenses incurred by the respondent in operating and maintaining its buildings and the extent to which the apartments 'consume' those expenses differentially. The exercise undertaken, and the basis for the opinions as to the proper allocation of lot entitlements, did not go beyond identifying and classifying the extent to which different apartments placed greater financial burden on the body corporate than other apartments.

In terms of Judge Samios' conclusion that the original lot entitlements seemed to reflect a differentiation between the lots based on size, number of bedrooms and location in the building, Justice Chesterman stated (Court of Appeal's decision, para 22):

> [This] observation is not entirely accurate. The evidence showed that there was a degree of arbitrariness in the original allocation of lot entitlements. There was no distinct pattern though it could be said that, generally speaking, the higher an apartment was in the buildings the greater its entitlement. This probably reflects a connection between the value of the units and their lot entitlements.

His Honour went on to state (Court of Appeal's decision, para 26):

> Although the Act gives no clear indication one way or the other, the preferable view is that a contribution schedule should provide for equal contributions by apartment owners, except insofar as some apartments can be shown to give rise to particular costs to the body corporate which other apartments do not. That question, whether a schedule should be adjusted, is to be answered with regard to the demand made on the services and amenities provided by a body corporate to the respective apartments, or their contribution to the costs incurred by the body corporate. More general considerations of amenity, value or history are to be disregarded. What is at issue is the 'equitable' distribution of the costs.

His Honour pointed to the following reasons for this conclusion (Court of Appeal's decision, paras 27-29):

- the Explanatory Notes to the relevant Bill for section 10 of the 2003 Act, which inserted the provision[25] requiring contribution schedule lot entitlements to be "equal, except to the extent to

which it is just and equitable in the circumstances for them not to be equal", particularly example 3 of the relevant extract; and

- comments made by the then Minister for Natural Resources and Minister for Mines in the Second Reading Reply to the relevant Bill (pp 310-312, at p 311).

(The relevant extracts are reproduced above, in the section entitled '**Extrinsic material referred to in the interpretation of this provision**'.)

Justice Chesterman stated (emphasis added) (Court of Appeal's decision, paras 30-32):

> These materials make it tolerably plain that the Act is intended to produce a contribution lot entitlement schedule which divides body corporate expenses *equally except to the extent that the apartments disproportionately give rise to those expenses, or disproportionately consume services. That determination can only be made by reference to factors which have a financial impact or consequence on the body corporate. It cannot be affected by factors which go to an apartment's value or amenity.*
>
> Secondly, the nature of a contribution lot entitlement schedule itself suggests that the allocation of lot entitlements is to be made on the basis of the impact that individual apartments make upon the costs of operating and running a community titles scheme. Contribution lot entitlements determine the apartment's share of the outgoings. The starting point is that the entitlements should be equal. A departure from that principle is allowable only where it is just, or fair, to recognise inequality. The departure must take as its reference point the proposition, from which it departs, that apartment owners should contribute equally to the costs of the building. *The focus of the inquiry is the extent to which an apartment unequally causes costs to the body corporate.*
>
> The third consideration is that if this principle not be the applicable one then there is no basis on which applications for adjustment of contribution lot entitlement schedules can consistently be made. As the evidence in this application shows, *if the inquiry is limited to the extent to which an apartment creates costs, or consumes services, above or below the average, one can readily determine what the contribution lot entitlement should be.* The high degree of similarity in the reports of [the experts] demonstrates this. *If the inquiry be wider and include such nebulous criteria as the structure of the scheme, or the nature, features and characteristics of the apartments in the scheme, and the purposes for which they are used, there is no intelligible basis on which there could be a consistent and coherent determination of applications for adjustment of lot entitlements.* Each case would be determined idiosyncratically and a vast variety of circumstances might be relied upon to depart from, and therefore erode, the principle said to be paramount, that there should be an equality of entitlements.

His Honour concluded by stating (Court of Appeal's decision, para 33):

> Accordingly I would construe [the Act] as meaning that those identified matters to which a court may have regard are to be regarded only to the extent, if any, that they affect the cost of operating a community titles scheme.

Justice Chesterman ordered an adjustment to the lot entitlements in accordance with the respondent body corporate's expert report stating that, compared to the applicant's expert report, the "differences are small" but that the approach "adjusted for the cost of the lifts with greater precision" (Court of Appeal's decision, para 35).

Discussion on the implications of the Court of Appeal's decision

The practical consequence of the Court of Appeal's decision has been that the contribution schedules of some community titles schemes have been adjusted, with the effect that the lot entitlements of some owners, and accordingly their share of a body corporate's expenses, have reduced, while the lot entitlements of other owners have increased.

Typically, reductions have occurred for the owners of larger, better located and more expensive lots in a community titles scheme, such as penthouses.

As the total costs or expenses of a body corporate are unaffected by, and unrelated to, any adjustment order, such reductions for some lot owners have necessarily been accompanied by increases to the lot entitlements of other owners, generally those of smaller, less desirably located and less expensive lots in a community titles scheme.

While the Court of Appeal's decision has understandably been welcomed by those lot owners who have seen a reduction (or potential for reduction) to their contribution schedule lot entitlements, it has been met with some disquiet by those who have had (or potentially could have) their lot entitlements increased, particularly in circumstances where:

- lot owners may have bought into a community titles scheme at a time when lot entitlements could not be adjusted (pre-1997);

- lot owners feel the purchase price for their lots reflected the body corporate fees attaching to those lots at the time of purchase; and
- lot owners feel they relied on the quantum of those body corporate fees in assessing the future affordability of the property to them.

General community discussion

The *Centrepoint case* was seen as a 'test case' for unit owners in Queensland.[26]

The body corporate chairman for the *Centrepoint* complex was quoted as saying:

> It's like buying a car that costs $40,000. You don't expect 10 years later for the motor company to come along and say, 'Look, the price of cars has gone up. You've got to pay another $10,000'.
>
> Why should you all of a sudden expect a dramatic change? I could imagine an adjustment of a few per cent for inflation, but think how this could affect a little old lady who suddenly finds her levies go up by several thousand dollars. It's a fortune to a lot of people.[27]

Media on the Gold Coast, where there are reportedly "more body corporates … than anywhere else in Australia" and where more than one-third of Queensland's units are apparently located,[28] have reported the consequences of the decision as follows:

> The latest legal loophole to be exploited by some wealthy unit owners is breathtaking in its unfairness and rationale.
>
> In most cases, certainly until late last year, unit owners paid their body corporate rates based on the size of their apartment and its views.
>
> For example, the bloke with the 160sq m one-level penthouse on the 28th floor paid more for body corporate fees than the fellow on the second floor, one of two 80sq m units on that floor, despite both owners having access to the same in-house facilities.
>
> Since what has become known as the Centrepoint case, lawyers are now successfully challenging the methodology behind the setting of body corporate fees.
>
> …
>
> But while the penthouse and one-level unit owners have had their annual body corporate fees reduced, it has meant the levy for the smaller unit owners has gone up.
>
> …
>
> Fred, not his real name, bought a property in a luxury Surfers Paradise unit complex, securing a private unit with great facilities and agreeing to an annual body corporate fee of about $5000 a year.
>
> His neighbours above him were paying about double that, but they had double his space and much superior views, as you would expect for the price difference.
>
> One of the penthouse owners decided it wasn't fair and took the matter to court, using the Centrepoint legal precedent.
>
> …
>
> As a result [of the Centrepoint case], Fred's annual body corporate fees have been jacked up to $9000 a year.
>
> He believes it has affected the value of his property because annual body corporate fees are a major consideration when someone buys a unit.
>
> … Fred has been told he doesn't have a leg to stand on.
>
> [A lawyer] said these types of body corporate challenges are not uncommon and it exposes a wider problem of just how unwieldy and inconsistent the laws have become.
>
> It appears there's increasingly more confusion over where unit owners stand with their body corporate fees.[29]

A unit owner opposed to the Court of Appeal's decision has also described the situation as follows:

> It's the equivalent of someone parking a huge Winnebago campervan across four tent sites for the price of one tent site and expecting other people in the camp ground to foot the extra charges.[30]

However, on the other hand, others have welcomed the Court of Appeal's decision:

> The Unit Owners Association of Queensland past president … yesterday supported the Court of Appeal's decision, saying valuations had nothing to do with wear and tear on a building.
>
> "Often in penthouses you only have one or two people living in them, while the smaller apartments lower down are rented out and fully occupied.

> "Rented apartments have a much higher turnover and there is more wear and tear from people moving furniture in and out".[31]

Another unit owner has described the impact of the decision on the relations between the different lot owners in apartment complexes as follows:

> [We] all have to live in buildings together – I agree something needs to be done to make the system more equitable but this attitude against penthouse owners is unjustified.[32]

More recently, in early 2009, reports emerged, in relation to *The Pinnacle* apartment complex at Surfers Paradise, of a bullet having been fired at a penthouse "amid a bitter body corporate fee feud that is dividing apartment communities across Queensland".[33]

> Tensions are rising among many of the state's 340,000 apartment dwellers, with one warning yesterday: "It's getting to the stage where someone is going to get hurt". The shooting incident, that shattered a penthouse window, followed a bid by wealthy apartment owners in riverside Surfers Paradise highrise The Pinnacle to have their body corporate levies halved and the fees of residents on lower floors doubled.
>
> Trouble erupted in December when penthouse owners applied to the Commercial and Consumer Tribunal to change the lot entitlements in The Pinnacle.
>
> Unit owners in almost 30 other buildings in Brisbane and the Gold and Sunshine coasts have filed similar applications.[34]
>
> …
>
> The [*Centrepoint case*] has since sparked civil war in many apartment buildings, which are attracting growing numbers of residents.
>
> …
>
> [The owner of a one-bedroom unit in *The Pinnacle*] slammed the move by penthouse owners as "greedy and completely immoral".
>
> "These guys are worth millions and they are trying to screw everyone else in the building", he said.
>
> …
>
> [But a penthouse owner in *The Pinnacle*] said the current body corporate fee structure was "inequitable and ridiculous".
>
> He said he was paying 10 times more in body corporate fees than lower-floor residents to use the same facilities.
>
> [A sub-penthouse owner in *The Pinnacle*] said too many unit owners had been "getting away with low body corporate fees for years".[35]

Queensland Government discussion paper on body corporate and community management issues

In the days following the Court of Appeal's decision, the Queensland Government released a discussion paper on various body corporate and community management issues:

- Queensland Government. Department of Tourism, Fair Trading and Wine Industry Development, 'Body Corporate and Community Management: into the 21st Century – A Discussion Paper on Community Living Issues in Queensland', *Discussion Paper*, July 2004 ('**2004 Discussion Paper**').

The 2004 Discussion Paper made the following reference to the Court of Appeal's decision (p 35):

> In recent months there has been some disparity in the approach taken by some specialist adjudicators and District Court judges in the interpretation of the lot entitlement provisions, and particularly in what circumstances it is just and equitable for lot entitlements to be other than equal. One of these decisions has recently been the subject of a decision of the Court of Appeal. This decision has clarified the intent of the BCCM Act concerning lot entitlements. It is anticipated that this decision will now provide clarity to decision makers when determining applications for lot entitlement adjustments. However, there is scope to consider if, and how, more consistent decisions on lot entitlement adjustments could be made. On the latter point, this may incorporate moves to have all lot entitlement disputes determined by one decision-making body.

The associated *Ministerial Media Statement*[36] included the following:

> Mrs Keech said an issue of recent interest was that of lot entitlements, which helped establish what each owner paid in body corporate levies.
>
> "Lot entitlements are a significant issue as an adjustment can result in considerable extra costs for owners and can have an impact on property values", she said.

> "Friday's Supreme Court of Appeal decision reinforces my commitment to consider the views of stakeholders on the lot entitlement issue.
>
> "Legislation has attempted to strike a balance between stakeholder interests. The discussion paper seeks the views of stakeholders on what changes, if any, might be needed on this issue. …"

Comments by the former Minister for Tourism and Fair Trading

Mr Lawlor MP, initially in his capacity as Member for Southport, and more recently during his term as Minister for Tourism and Fair Trading,[37] has advocated the need to close what has been described as the "legal loophole" identified in the *Centrepoint case*.[38]

> The Southport MP said he and the other Gold Coast MPs had been inundated by complaints about the unfair system, with many constituents in tears at being unable to pay fees which were suddenly doubled.
>
> In one case, a first-year teacher had to sell her one-bedroom unit when the wealthy, high-profile owner of the penthouse applied to have his levy halved, leaving the other unit owners to pay for the shortfall.
>
> "I have had numerous calls, letters, emails, people in tears having to move out of their homes", he said.
>
> Pensioners and those with fixed incomes were the worst affected because they could not come up with the extra money they suddenly had to pay.
>
> "To argue that body corporate lot entitlements should be equal is the same as arguing that council rates should be equal for a house on Hedges Avenue as one at Nerang", he said.
>
> "The Act has had a loophole which unfairly allowed some unit owners to get away with paying less than their fair share of body corporate fees at the expense of others".[39]

In March 2007, in his capacity as Member for Southport, and in the context of the Second Reading Debate (pp 719-732, at pp 719-720) of the Body Corporate and Community Management and Other Legislation Amendment Bill 2006 (Qld), Mr Lawlor MP referred to the Court of Appeal's decision as the "unintended consequences" of the BCCM Act:

> Anyone who says that the legislation must be working okay because there has been only one court case is completely missing the point.
>
> It is a complete non sequitur of a comment.
>
> This case did not go the further step to the High Court because the judgement correctly interpreted the provisions of the [BCCM Act].
>
> Anyone who took a further case to court would be a complete madman or madwoman or a multimillionaire with a sense of humour.
>
> The fault is not with the judgement in the Centrepoint case; it is with the legislation, which gives rise to the present unfair situation which is set out in the Centrepoint case.
>
> …
>
> One of the criticisms I get [about lot entitlement adjustments] is that most unit lot entitlements do not change significantly.
>
> That is just a trite comment because of course most units in any building will be around the mean lot entitlement and they will not change greatly.
>
> …
>
> It is only at the extremes that it becomes significant and, in the case of, say, a one-bedroom ground floor unit, unfair.
>
> The penthouse or large unit comes down and the one-bedroom ground floor unit goes up.
>
> Under previous legislation lot entitlements were set by the developer and essentially fixed in concrete when the plan was registered.
>
> Yes, they may have set the levies of the penthouse artificially high and cheaper units artificially low.
>
> But so what?
>
> A purchaser of either unit, when entering into a contract, gets details of the lot entitlements et cetera.
>
> Those details form part of the contract.
>
> The purchaser is fully informed and aware of the liability to pay an extent of the levies.
>
> What could be fairer?
>
> On the other hand, what could be more unfair than entering into a contract and thereby being informed what your liability for the body corporate levies were on completing the purchase only to find that six months, six

> years or 20 years down the track an application is made to vary the lot entitlements and your levies might double.
>
> It could be enough to force you to sell your unit and move out … .
>
> …
>
> I have heard an argument that lot entitlements 'should not be used as a marketing tool'.
>
> Why not?
>
> By that I presume it is meant that you should not use the higher entitlements of, say, a penthouse to subsidise the ground floor units lot entitlement and therefore make them more attractive to a purchaser.
>
> What is wrong with that?
>
> The entitlements differential cannot be too ridiculous as the developer still has to sell the penthouse.
>
> But if the developer's objectives – that is, to sell his units – coincide with the objectives and policies of various groups, including this government, to provide more affordable housing, what is wrong with that?
>
> …
>
> The proper use of lot entitlements and the certainty provided under the old Building Units and Group Titles Act could contribute greatly to the provision of affordable housing, which is in greater demand than it ever was.
>
> Another comment I got was that 'in many cases lot entitlement adjustments result in lower costs for unit holders and result in more affordable housing not less'.
>
> That is rubbish.
>
> It may result in more affordable housing for millionaires.
>
> I would be happy to be proved wrong on this point, and I could be proved wrong and would admit that I was wrong if I could be given just one example of the lot entitlements of a penthouse going up as a result of an application [for an adjustment order].
>
> …

Academic consideration

For an example of academic consideration of the Court of Appeal's decision, see:

- Bill Dixon, 'The impact of location on contribution schedule lot entitlements', *Queensland Lawyer*, 25 (2), October 2004, pp 65-66.

BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT ACT 2007 (QLD)

As a result of the *Body Corporate and Community Management and Other Legislation Amendment Act 2007* (Qld) ('**2007 Act**'),[40] applications for the adjustment of lot entitlements could be made to QCAT rather than to the District Court (s 5 of the 2007 Act - s 48(1)(b) of the BCCM Act as amended by the 2007 Act).

This change commenced in July 2007.

Applications could also continue to be made to a specialist adjudicator.

The 2008 Discussion Paper (p 10) provided the following context for the change:

> In a review of body corporate and community management issues in 2004, stakeholders expressed concern that the costs of specialist adjudication and the costs and formality of District Court proceedings inhibit parties' ability to seek an adjustment to lot entitlements. In response, the *Body Corporate and Community Management and Other Legislation Amendment Act 2007* provided that applications for the adjustment of lot entitlements could be made to the Commercial and Consumer Tribunal, a low-cost, informal jurisdiction, instead of the District Court. Applications can continue to be made to a specialist adjudicator … .

The relevant *Ministerial Media Statement* was:

- Hon M Keech MP, Minister for Tourism, Fair Trading, Wine Industry Development and Women, 'Legislative amendments to improve community living', *Ministerial Media Statement*, 29 June 2007.

As mentioned above, and by way of background to the 2007 Act, the Queensland Government commenced a review of body corporate and community management issues in 2004. The 2004 Discussion Paper was released in July 2004:

Concerns with the particular process involved in obtaining adjustment orders via specialist adjudication or the District Court were not directly raised for consideration in the 2004 Discussion Paper.[41] However, it appears that such issues were expressed by stakeholders as part of the broader review.[42]

177 submissions to the 2004 Discussion Paper were received.[43]

DECEMBER 2008 DISCUSSION PAPER – 'SHARING EXPENSES IN COMMUNITY TITLES SCHEMES'

In December 2008, the Queensland Government released a discussion paper specifically directed at the lot entitlements system in Queensland, and in particular the setting and adjusting of contribution schedule lot entitlements:

- Queensland Government (Department of Justice and Attorney-General), 'Sharing Expenses in Community Titles Schemes – A Discussion Paper on Lot Entitlements under the *Body Corporate and Community Management Act 1997*', December 2008 ('**2008 Discussion Paper**').

The relevant *Ministerial Media Statement* was:

- Hon K Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, 'Community urged to have its say on community titles schemes', *Ministerial Media Statement*, 16 December 2008.

The 2008 Discussion Paper was released "to encourage public discussion and comment about how the system for sharing expenses between owners is operating" under the BCCM Act.[44]

Submissions closed on 28 February 2009.

CONTEXT OF DISCUSSION PAPER

The foreword to the 2008 Discussion Paper (p 1) provided the following context:

> The setting and adjusting of lot entitlements are … extremely significant to the 338,000 owners in community titles schemes. As the trend towards living and working in community titles schemes continues, these issues will become relevant to more and more Queenslanders.
>
> Sharing costs and interests fairly and appropriately is a challenge for community titles legislation. Not surprisingly, there are divergent views about what approach to setting and adjusting lot entitlements should be adopted. Regardless of the methodology used, there is unlikely to be an outcome that wins universal acceptance. The challenge is to determine the fairest method of sharing costs and interests in Queensland's diverse community titles schemes. Such a legislative basis will both encourage the growth of a strong and diverse community titles sector and ensure a harmonious environment for owners.
>
> Most community interest in lot entitlements has focused on contribution schedule lot entitlements, which have the most immediate impact on owners as they determine how body corporate costs are shared. In light of the ongoing interest in lot entitlement issues, this discussion paper has been released to inform the community about the current system of lot entitlements and why it was introduced, and to facilitate public comment and feedback on the appropriateness and operation of the current system.

FORMAT OF DISCUSSION PAPER

The 2008 Discussion Paper provided:

- background information on lot entitlements under the BCCM Act (pp 4-5);
- a historical review of lot entitlements legislation in Queensland (pp 6-10);
- discussion of whether the current system for setting and adjusting contribution schedule lot entitlements is appropriate (pp 11-20), namely:
  - how the current principle for setting and adjusting contribution schedule lot entitlements works in practice (pp 11-13);
  - the impacts of adjustment orders (p 13);
  - lot entitlements legislation in other jurisdictions (pp 13-14, 25-27);
  - differing views in the community for and against the current system (pp 14-16); and
  - various options for reform, including some arguments for and against each option (pp 16-20); and

- consideration of other issues with the current system for setting and adjusting contribution schedule lot entitlements (pp 21-23), namely:
  - adjustments following the amalgamation of lots (p 21);
  - information and education about lot entitlements (p 22); and
  - orders for adjustments of lot entitlements by QCAT and specialist adjudicators (pp 22-23).

APPROPRIATENESS OF CURRENT SYSTEM FOR SETTING AND ADJUSTING CONTRIBUTION SCHEDULE LOT ENTITLEMENTS

The 2008 Discussion Paper (p 11) noted that, under the BCCM Act, the principle for setting and adjusting contribution schedule lot entitlements is that the respective lot entitlements should be equal, except to the extent it is just and equitable in the circumstances for them not to be equal.

The 2008 Discussion Paper (p 12) stated:

> The principle is clearly based on the concept that usually all lots equally cause and benefit from most body corporate expenses and therefore it is reasonable for each owner to equally contribute to these expenses. However, the principle recognises that the individual features of a lot give rise to particular or additional costs to the body corporate that are not caused by other lots. In such cases, unequal lot entitlements may be set to allow a more equitable distribution of expenses amongst owners.

The 2008 Discussion Paper:

- considered how the principle has been applied by developers in the setting of contribution schedule lot entitlements, and by QCAT and specialist adjudicators in orders for the adjustment of lot entitlements (pp 12-13);
- noted that the financial impact of an adjustment order on a lot owner, in terms of consequential effects on a lot's valuation, is currently not a relevant consideration in determining whether to adjust lot entitlements because it is not a factor relevant to the extent to which a lot impacts on body corporate expenses (p 13);
- stated that there is no consistent approach to lot entitlements across the Australian jurisdictions, in relation to the number of lot entitlement types provided for, how lot entitlements are set and whether and how lot entitlements can be adjusted (pp 13-14) (for further detail regarding the position in the various jurisdictions, as at December 2009, see Appendix 2 pp 25-27); and
- set out a summary of community views for and against the current system (pp 14-16).

Views for and against the current system

Views in the 2008 Discussion Paper (pp 14-16) for the current system included the following (note: this is a summary of the views only, rather than a complete listing):

- it is not reasonable to expect some owners to 'subsidise' other lot owners simply because their lot may be worth more, given that all the lot owners benefit from most body corporate services equally;
- lot value does not necessarily reflect an owner's ability to pay;
- owners of small lots have already had the benefit of having their levies subsidised for many years, and the 'wealthy penthouse owner' versus the 'struggling pensioner' example is an unhelpful generalisation;
- many cheaper or smaller lots are frequently used as rental properties and, with the changing of tenants, these lots actually contribute more wear and tear to the overall complex;
- owners are only being asked to pay what their lot costs the body corporate;
- if someone is subject to an unfair arrangement, in terms of paying more than their fair share, a remedy should be possible;
- owners have been aware, since 1997, that lot entitlements can be adjusted;
- most lot owners are not aware of lot entitlements and what they mean when purchasing their lot;
- the costs of using lot entitlements to facilitate more affordable accommodation are not met by developers or by government but by other lot owners, and it is unreasonable to expect private citizens to pay a higher proportion of shared expenses in order to make housing more affordable

for others, particularly where owners derive an equal benefit from the expenses and where there is no certainty that the value of a lot reflects an owner's capacity to pay for the expenses; and

- lot entitlements are not about marketing, but rather the fair sharing of expenses.

Views set out in the 2008 Discussion Paper (pp 14-16) against the current system included the following (note: this is a summary of the views only, rather than a complete listing):

- the 'Australian' view of fairness is that wealthier people in the community should carry a greater amount of community expenses and, as such, lot entitlements should be set according to the value of the various lots in a scheme, which usually reflects capacity to pay;
- the adjustment provisions benefit 'wealthy penthouse owners' at the expense of 'struggling pensioners' occupying smaller units;
- adjustments should not be allowed, so that owners can have certainty about their future liability for body corporate expenses;
- adjustments disadvantage those who purchased their lot on the basis of a set of lot entitlements they budgeted for;
- purchasers receive pre-purchase disclosure about lot entitlements, so there should be no means to later seek adjustment;
- if someone purchases a lot knowing its lot entitlements then they should not have the right to later seek that those lot entitlements be adjusted;
- the provisions assume that each lot burdens the body corporate equally, which is incorrect;
- developers should have discretion to set lot entitlements so they can include affordable housing in community titles schemes by setting low lot entitlements for certain lots;
- linking lot entitlements to the value of the various lots in a scheme will facilitate the provision of affordable housing; and
- the current system is a barrier to developers being able to market a community titles scheme.

Options for reform

The 2008 Discussion Paper canvassed the following possible options for reform, with arguments for and against each option:

- retaining the current system for setting and adjusting contribution schedule lot entitlements (pp 16-17);
- adopting a different basis for contribution schedule lot entitlements, for example related to:
  - lot value (pp 17-18);
  - lot size (p 18);
  - no criteria (i.e. arbitrary allocation by developers) (p 18); or
  - what is just and equitable (i.e. according to the body corporate expenses generated by a lot) (pp 18-19);
- removing or limiting the ability to adjust contribution schedule lot entitlements (p 19); and
- removing or limiting the ability to adjust contribution schedule lot entitlements in schemes established prior to 1997 (pp 19-20).

DRAFT BODY CORPORATE AND COMMUNITY MANAGEMENT BILL 2010 (QLD)

On 12 August 2010, the former Minister released public consultation drafts of:

- the Body Corporate and Community Management Amendment Bill 2010 (Qld) ('**Draft Bill**'); and
- the accompanying Explanatory Notes ('**Draft Explanatory Notes**').[45]

The Draft Bill proposed various amendments to the BCCM Act which, in summary, were directed at providing a new lot entitlements system, and a greater degree of certainty for lot owners.

In releasing the Draft Bill, the former Minister provided the following context for, and explanation of, the proposed changes, and the anticipated associated benefits:

> Mr Lawlor said proposed amendments would offer certainty for lot owners in community titles schemes.
>
> "The proposed amendments provide certainty around the proportion of total body corporate fees a unit owner must pay and will increase the affordability of unit living as an accommodation and lifestyle choice for the majority of Queensland unit owners", Mr Lawlor said.
>
> Mr Lawlor said the Bill also provided new and expanded principles for deciding the contribution schedule lot entitlements for owners of lots in new community title schemes. "The Bill also provides lot owners adversely affected by adjustment orders the right to have their contribution schedules revert to the original settings as they were prior to any adjustment orders".
>
> "In the future, the ability to adjust contribution schedule lot entitlements will be limited to all lot owners in a scheme unanimously agreeing to make an adjustment through a resolution without dissent or by unanimous agreement between two or more lot owners to redistribute the lot entitlements for their lots amongst themselves.
>
> "Only under special circumstances will an adjustment order be allowed".
>
> Mr Lawlor said since the Act was introduced in 1997, lot owners could apply to have their lot entitlements – and thus body corporate fees – reduced at any time.
>
> "Owners of larger units for example, can effectively slash their own body corporate fees, but these costs are merely passed on to others in the complex instead", he said.
>
> "So a ground floor studio owned by a retiree or pensioner would be left paying much more than they had budgeted for when buying the unit – in some cases double and this has forced many unit owners out of their homes.
>
> "This situation needs to be fixed if affordable housing options are to continue to be available to a wide range of Queenslanders", he said.
>
> "The amendments would also enhance disclosure requirements for new buyers and protects the interests of the many Queenslanders who own one of the 358,000 units across the States", he said.[46]

Submissions in response to the Draft Bill closed on 23 September 2010.[47]

The media reported:

> A poor response to changes to the body corporate laws in Queensland could see penthouse owners retain their right to a 50 per cent discount in fees.
>
> Queensland Association of Body Corporates chairman Zeke Kotcharian said it had been unable to get a consensus among members about the [draft Bill] … .
>
> "I would say that about two-thirds of our members were in favour of the law, but about one-third were not", said Mr Kotcharian.
>
> "So I had to write to the Minister and inform him that we could not put a joint submission in".
>
> …
>
> Mr Lawlor's office confirmed only about 150 submissions had been received, a large number of which were from individual lot owners, rather than body corporate committees.
>
> …
>
> Mr Kotcharian said there was a threat the system might not be changed because of the 'polarised opinion' on the new law and apathy among some high rise residents.[48]

For additional media reporting, see, for example:

- Peter Cameron, 'One size doesn't fit all', *Gold Coast Bulletin*, 13 November 2010, p 34.

The relevant *Ministerial Media Statements* were:

- Hon P Lawlor MP, Minister for Tourism and Fair Trading, 'Public to have their say on amendments to body corporate lot entitlements', *Ministerial Media Statement*, 12 August 2010; and
- Hon P Lawlor MP, Minister for Tourism and Fair Trading, 'Bligh Government to make body corporate fees fairer', *Ministerial Media Statement*, 19 February 2010.

BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2010 (QLD)

On 23 November 2010, the Body Corporate and Community Management and Other Legislation Amendment Bill 2010 (Qld) ('**Bill**') was introduced into the Queensland Legislative Assembly by the former Minister for Tourism and Fair Trading, the Hon P Lawlor MP ('**former Minister**').[49]

CONTEXT FOR INTRODUCTION OF BILL

In introducing (pp 4129-4130) the Bill, the former Minister provided the following context:

> Most community interest has been about contribution schedules, as most costs associated with living in a community titles scheme are proportioned by a lot owner's allocated contribution schedule lot entitlement.
>
> To date, there have been about 120 applications to the Queensland Civil and Administrative Tribunal and its predecessors seeking contribution schedule adjustment orders for schemes right across Queensland. These decisions have affected thousands of lot owners and many more applications are pending. There are thousands of schemes potentially subject to contribution schedule adjustment orders which could impact upon tens of thousands of lot owners.
>
> We have a problem in the marketplace. It needs to be fixed. That is what this bill is about. The problem is that a lot owner can make an application to QCAT or a specialist adjudicator to seek adjustment of a scheme's contribution schedule. If successful, an adjustment order can significantly change the relativities between the contribution schedule lot entitlements and drastically increase the amount a lot owner must pay for their annual body corporate fees. This can then have a negative flow-on effect, reducing the capital value of a lot.
>
> A lot owner can then find himself or herself locked into an untenable situation. They cannot afford the increased fees but cannot afford to sell at fire sale rates. Regrettably and typically, contribution schedule adjustment orders tend to have the most adverse consequences for the many lot owners on low and fixed incomes. There has been no single cause of the problem. A chain of events and decisions over time, including a failure in 1997 to fully appreciate the transitional implications arising from the enactment of the BCCM Act, have combined to give rise to the current problem.
>
> …
>
> The [Centrepoint decision] has subsequently led to cases of contribution schedule adjustment orders being towards equal which, while equitable, has sometimes had devastating consequences for lot owners who may have had the same contribution schedule lot entitlements for up to or exceeding 20 years and did not expect their contribution schedule lot entitlements to change. The bill will address this inequity.[50]

OVERVIEW OF KEY PROPOSALS

As mentioned above, in the sections entitled '**A Proposed New System of Lot Entitlements**' and '**Scope of E-Research Brief**', this *e-Research Brief* comprehensively discusses one of the key objectives of the Bill, namely the provision of a new lot entitlements system for community titles schemes in Queensland.

In this regard, the Bill impacts on both:

- existing community titles schemes (i.e. those already established prior to the relevant provisions in the Bill commencing); and
- new community titles schemes (i.e. those established after the relevant provisions in the Bill commence).

In summary, the key changes proposed by the Bill in achieving this objective are as follows:[51]

- for new community titles scheme, lot entitlements will have to be set so that they are consistent with certain principles:
  - for contribution schedule lot entitlements - the 'equality principle' or the 'relativity principle'; and
  - for interest schedule lot entitlements - the 'market value principle';
- the ability for contribution schedule lot entitlements to be adjusted will be limited, for both existing community titles schemes and new community titles schemes;
- lot owners in existing community titles schemes, who have been adversely affected by one or more adjustments to their contribution schedule lot entitlements, will have an opportunity to revert the entitlements for all the lots in their scheme to their original settings (i.e. prior to any, and all, adjustment orders); and

- disclosure requirements for buyers of lots in community titles schemes will be enhanced.

Each proposal is discussed in greater detail below.

A selection of relevant commentary regarding some of the implications of the proposed changes is also provided.

PRINCIPLES FOR SETTING LOT ENTITLEMENTS IN NEW COMMUNITY TITLES SCHEMES

Clause 4 proposes amendments to section 46 of the BCCM Act to govern the setting of contribution schedule lot entitlements and interest schedule lot entitlements for new community titles schemes.

In summary:

- contribution schedule lot entitlements will have to be consistent with either the 'equality principle' or the 'relativity principle'; and
- interest schedule lot entitlements will have to be consistent with the 'market value principle' (**proposed new ss 46(7)-(8)**).

Clause 5 establishes each of these principles (**proposed new ss 46A and 46B**), which are discussed in greater detail below.

Setting contribution schedule lot entitlements

It will be at the developer's discretion whether to apply the equality principle or the relativity principle in the setting of contribution schedule lot entitlements (Explanatory Notes, p 9).

At the outset, it should be noted that under **clause 30**, it is proposed that a consequence of a developer setting contribution schedule lot entitlements for a scheme in a manner inconsistent with the particular principle on which they were decided will be that a buyer may, in appropriate circumstances, terminate a contract for the purchase of a lot in the scheme. Those circumstances are as follows:

- the buyer must reasonably believe that:
  - the contribution schedule lot entitlements are inconsistent with the particular principle on which they were decided; and
  - the buyer would be materially prejudiced if compelled to complete the contract; and
- the termination may occur any time before settlement, provided it is not later than 30 days, or a longer agreed period, after the buyer receives a copy of the contract (**proposed new s 209A**).

The 'equality principle'

The 'equality principle' for deciding contribution schedule lot entitlements requires the lot entitlements to be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal (**proposed new s 46A(1)**).

The following examples are provided of circumstances in which it may be just and equitable for lot entitlements not to be equal:

- a layered arrangement of community titles schemes, the lots of which have different uses (including, for example, car parking, commercial, hotel and residential uses) and different requirements for public access or maintenance;
- a commercial community titles scheme in which the owner of one lot uses a larger volume of water or conducts a more dangerous or higher risk activity than the owners of the other lots.

The 'relativity principle'

The 'relativity principle' for deciding contribution schedule lot entitlements requires the lot entitlements to clearly demonstrate the relationship between the lots by reference to one or more particular relevant factors (**proposed new s 46A(2)**).

A relevant factor may, and may only, be any of the following:

- how the community titles 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 the costs of maintaining the common property;
- the market values of the lots (**proposed new s 46A(3)**).

The Explanatory Notes (pp 9-10) provide the following explanation of, and context for, the relativity principle:

> The intention of the relativity principle is to provide a transparent rationale for calculation of contribution schedule lot entitlements that can be tailored to relevant characteristics of the scheme and its lots. This will give developers a structured, customisable framework within which to set contribution schedule lot entitlements.
>
> … The developer may choose, at their discretion, which factor or factors … of the Bill will be used to calculate the contribution schedule lot entitlements.
>
> The explanation of how contribution schedule lot entitlements are calculated forms part of the community management statement. If the relativity principle is used, the explanation should sufficiently demonstrate how it has been applied to determine individual contribution schedule lot entitlements for lots included in the scheme.
>
> The relationship can be demonstrated using a formula if applicable, or by an explanation, including the chosen relevant factors and how they relate to the setting of individual contribution schedule lot entitlements based on the relevant characteristics of the scheme or lots.
>
> Under the relativity principle, it is acceptable to have an unequal contribution schedule (or a purposefully weighted schedule) provided that the inequality demonstrates a relationship between lots, and that the relationship is based on relevant factors provided for in the Bill.
>
> Non-compliance with the requirements relating to deciding principles may provide grounds for the termination of a contract (section 209A). It is therefore necessary that the rationale (or formula) must have an independent and transparent logic.

Setting interest schedule lot entitlements

As mentioned above, **clause 5** proposes a definition for the 'market value principle' by which interest schedule lot entitlements must be set.

The 'market value principle' requires the interest schedule lot entitlements to reflect the respective market values of the lots, except to the extent to which it is just and equitable in the circumstances for the individual lot entitlements not to do so (**proposed new s 46B**).

Relevant factors for 'equality principle' and 'market value principle'

Similar to the existing section 46(8) of the BCCM Act, **clauses 4(2)-(3)** (**proposed new s 46(9)**) state that, in deciding the contribution schedule lot entitlements under the equality principle, or the interest schedule lot entitlements under the market value principle, regard must be had to:

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

LIMITING THE ABILITY TO ADJUST CONTRIBUTION SCHEDULE LOT ENTITLEMENTS

The Bill proposes limiting the ability for contribution schedule lot entitlements to be adjusted, for both existing community titles schemes and new community titles schemes.[52]

The relevant proposed changes (**clause 7, proposed new ss 47A and 47B**) are as follows:

- contribution schedule lot entitlements may be adjusted if such a change is unanimously agreed to through a resolution without dissent of the body corporate, and the change is consistent with certain requirements; and
- the circumstances in which a specialist adjudicator or QCAT may order contribution schedule lot entitlements be adjusted will be restricted.

(Note that for interest schedule lot entitlements, the existing process for adjustment by specialist adjudicators or QCAT under section 48 of the BCCM Act will continue to apply - **clause 8, proposed amended s 48**.)

Resolution without dissent of body corporate

The body corporate for either a new or an existing community titles scheme, by resolution without dissent, may change the contribution schedule lot entitlements for lots included in the scheme (**proposed new s 47A**).

The notice of the meeting at which the resolution is proposed to be passed must state, or be accompanied by a written notice stating:

- the proposed changes; and
- the reasons for the proposed changes (**proposed new s 47A(2)**).

The changed contribution schedule lot entitlements must be consistent with:

- the 'deciding principle' for the existing contribution schedule lot entitlements; or
- another principle, if it is a 'contribution schedule principle' (**proposed new s 47A(3)**).

The 'deciding principle', for lot entitlements, is defined to mean the principle on which the lot entitlements were decided, whether or not the principle is or has been identified as an applicable principle for deciding the lot entitlements under the BCCM Act as in force from time to time (**clause 43(2), proposed new definition for schedule 6 Dictionary**).

'Contribution schedule principle' is defined to mean a principle under the proposed amended section 46 applicable to deciding the contribution schedule lot entitlements for the lots included in a community titles scheme (**clause 43(2), proposed new definition for schedule 6 Dictionary**).

If, for the above provision, the deciding principle for the existing contribution schedule lot entitlements is the relativity principle based on one or more particular relevant factors ('original factors'), the changed contribution schedule lot entitlements may be consistent with:

- the relativity principle based on the same particular relevant factors;
- the relativity principle based on one or more particular relevant factors that, when considered as a whole, are different to the original factors considered as a whole; or
- another contribution schedule principle (**proposed new s 47A(4)**).

If a contribution schedule is changed in this manner, the body corporate must, as quickly as practicable, lodge a request to record a new community management statement incorporating the change. A maximum penalty of 100 penalty units ($10,000)[53] will apply if this requirement is not complied with (**proposed new s 47A(5)**).

The cost of preparing and recording the new community management statement must be borne by the body corporate (**proposed new s 47A(6)**).

Restricting the circumstances for adjustment by specialist adjudicator or QCAT

The ability for adjustments to contribution schedule lot entitlements to be ordered by specialist adjudicators or QCAT will be restricted (**proposed new s 47B**).

Applications for adjustment orders may be made only if:

- in the case of both existing and new community titles schemes:
  - the scheme is affected by a 'material change' that has happened since the last time the contribution schedule lot entitlements were decided; and
  - the owner of a lot believes an adjustment is necessary because of the change; or
- in the case of new community titles schemes, the owner of a lot believes the contribution schedule lot entitlements are not consistent with the deciding principle (defined above) for the lot entitlements (**proposed new ss 47B(1)-(3)**).

'Material change' is defined (**clause 43(2), proposed new definition for schedule 6 Dictionary** to mean a change that has, or may have, a significant effect on the contribution schedule lot entitlements for the lots included in the scheme, including, for example:

- the addition of one or more lots, other than by a subdivision not involving the addition of a subsidiary scheme; or
- the removal of one or more lots, other than by an amalgamation.

However, the proposed definition states that if a community titles scheme is intended to be developed progressively, a change arising from development proposed in the community management statement for the scheme will not be a 'material change' for the scheme.

If a specialist adjudicator or QCAT orders an adjustment, the adjustment must:

- be consistent with the deciding principle for the existing contribution schedule lot entitlements, and be just and equitable to the extent the deciding principle allows;[54] or
- if there is no apparent deciding principle, be just and equitable (**proposed new s 47B(7)**).

It is reiterated that if there is a deciding principle for the existing contribution schedule lot entitlements, a specialist adjudicator or QCAT cannot change that principle (**proposed new s 47B(9)**).

If an adjustment is ordered, the body corporate must, as quickly as practicable, lodge a request to record a new community management statement incorporating the adjustment ordered. A maximum penalty of 100 penalty units ($10,000)[55] will apply if this requirement is not complied with (**proposed new s 47B(8)**).

Criteria for determining consistency with deciding principle

Clause 9 proposes setting out the only matters to which a specialist adjudicator or QCAT may have regard in deciding whether contribution schedule lot entitlements are consistent with their deciding principle (**proposed new s 48A**).

Regard may be had only to:

- the deciding principle for the contribution schedule lot entitlements;
- the information about the application of the deciding principle to the lots included in the scheme that is included in the community management statement;
- if the contribution schedule lot entitlements were decided on the equality principle, the matters a specialist adjudicator or QCAT may have regard to under the existing section 49 of the BCCM Act for deciding just and equitable circumstances;
- the matters raised by the applicant to support the assertion that the lot entitlements are not consistent with the deciding principle for the lot entitlements; and
- the matters (if any) raised by each respondent to support the assertion that the contribution schedule lot entitlements are consistent with the deciding principle for the lot entitlements (**proposed new s 48A(3)**).

ABILITY TO REVERT TO PREVIOUS CONTRIBUTION SCHEDULE LOT ENTITLEMENTS

Clause 41 proposes a **new Part 9, Division 4** (**proposed new ss 378-390**) which allows the body corporate of an existing community titles scheme which has been subject to one or more orders to adjust contribution schedule lot entitlements to, in certain circumstances, revert those lot entitlements to their original settings, prior to any and all such adjustments.

Application

The proposed new provisions will only apply:

- in the case of an existing community titles scheme; and
- in relation to an order of a court, tribunal or specialist adjudicator, made before the commencement of the relevant proposed provisions, which provided for an adjustment of the contribution schedule for the scheme (**proposed new s 378, definition of 'adjustment order' and 'existing scheme'**).

Motion proposing adjustment of contribution schedule

A lot owner adversely affected by an adjustment order[56] (i.e. whose proportion of the total contribution schedule lot entitlements for all the lots included in the particular scheme increased as a result of the adjustment order), may submit a motion to the body corporate (or body corporate committee, if applicable)[57] proposing the adjustment of the contribution schedule for the scheme to reflect the contribution schedule before any, and all, adjustment orders (**proposed new s 379(1)-(2); proposed new s 378, definition of 'pre-adjustment order entitlements'**).

Limitations on ability to propose such a motion

The ability to submit such a motion will not be available to a person who:

- became the owner of a lot after an adjustment order was made; or
- becomes the owner of a lot after the relevant provisions commence (**proposed new s 379(3)**).

The ability to submit such a motion will also cease three years after the relevant provisions commence (**proposed new s 379(4)**).

Dealing with such a motion

Guidance for particular circumstances

Specific provision is made for how such a motion should be dealt with in the following particular circumstances:

- if a lot in the scheme has been subdivided (**proposed new s 381**);
- if two or more lots in the scheme have been amalgamated (**proposed new s 382**);
- if the boundary for a lot included in the scheme has changed (**proposed new s 383**); and
- if the scheme has been affected by a material change (**proposed new s 384**).

(Note that a reference, in the paragraphs below, to '**particular circumstances**', is a reference to the circumstances listed above.)

Body corporate committee dealing with such a motion

The **proposed new section 385** sets out how a body corporate committee must deal with any such motion submitted to it.

In summary, a body corporate committee must:

- within two months after receiving a motion:
  - identify the original contribution schedule lot entitlements for the scheme prior to any and all adjustment orders; and
  - appropriately notify each lot owner in the scheme of the motion and the committee's proposed adjustment of the contribution schedule, and invite owners to make submissions in relation to what, if any changes, should be made to accommodate any of the particular circumstances;
- have regard to any appropriately made submissions by lot owners in relation to deciding whether to make any changes to the original contribution schedule lot entitlements to accommodate any of the particular circumstances;
- appropriately notify each lot owner of its decision within seven days after the decision is made; and
- within three months after making its decision, lodge a request to record a new community management statement incorporating the appropriate change to the contribution schedule lot entitlements (a maximum penalty of 100 penalty units, or $10,000,[58] will apply for a contravention of this requirement) (**proposed new ss 385(1)-(7)**).

A lot owner will have the ability, within 28 days after receiving notice of the committee's decision, to apply to a specialist adjudicator or QCAT for an adjustment of the contribution schedule lot entitlements to reflect their original setting, subject to any necessary changes to reflect any applicable particular circumstances (**proposed new s 385(8)**).

Body corporate dealing with such a motion

The **proposed new sections 386 and 387** set out how a body corporate must deal with any such motion submitted to it.

In summary, a body corporate must:

- within two months after receiving a motion:
    - identify the original contribution schedule lot entitlements for the scheme prior to any and all adjustment orders; and
    - call a general meeting of the lot owners to decide what, if any, changes to the original contribution schedule lot entitlements should be made to accommodate any of the applicable particular circumstances; and
- hold the general meeting within 28 days after it is called (**proposed new ss 386**).

The **proposed new section 387** then sets certain requirements on the body corporate in relation to the general meeting, including deciding what (if any) changes need to be made to the original contribution schedule lot entitlements to take account of any applicable particular circumstances. Lot owners must also be appropriately notified of the body corporate's decision, and the body corporate must, within three months after the general meeting, lodge a request to record a new community management statement incorporating the required change to the contribution schedule lot entitlements (a maximum penalty of 100 penalty units, or $10,000,[59] will apply for a contravention of this requirement) (**proposed new s 387(1)-(5)**).

A lot owner will have the ability, within 28 days after receiving notice of the body corporate's decision, to apply to a specialist adjudicator or QCAT for an adjustment of the contribution schedule lot entitlements to reflect their original setting, subject to any necessary changes to reflect any applicable particular circumstances (**proposed new s 387(6)**).

ENHANCED DISCLOSURE REQUIREMENTS

The Bill proposes certain enhanced disclosure requirements for buyers of lots in community titles schemes, including the following:

- new requirements for community management statements, to provide explanations or details in relation to the principles governing lot entitlements;
- additional information will have to be provided in the disclosure statement given by a seller to a buyer;
- if, after a contract is entered into but before it settles, a new community management statement for the scheme is recorded, the seller must give the buyer a copy of the new community management statement and, in certain circumstances, the buyer will be able to cancel the contract; and
- a buyer will be able to, in certain circumstances, terminate a contract if the copy of the community management statement attached to the contract when it was entered into differs from the community management statement most recently advised to the buyer.

Each of these proposals is discussed in greater detail below.

New requirements for community management statements

Clause 15 proposes **amendments to section 66** to insert certain new requirements for community management statements.

A community management statement must, for a new scheme or an 'adjusted scheme', in relation to contribution schedule lot entitlements for the lots included in the scheme:

- state the contribution schedule principle (namely, the equality principle or the relativity principle) on which the contribution schedule lot entitlements have been decided; and
- if the equality principle was used and the contribution schedule lot entitlements are not equal – explain why they are not equal; and
- if the relativity principle was used – include sufficient details about the principle to show how individual contribution schedule lot entitlements for the lots were decided by using it (**proposed new s 66(1)(db)**).

(In this context, an 'adjusted scheme' means an existing scheme for which the contribution schedule for the scheme is adjusted after the relevant provisions commence and, after the adjustment, the deciding principle for the contribution schedule lot entitlements for the lots included in the scheme is a contribution schedule principle (namely, the equality principle or the relativity principle) (**proposed new s 66(6)(a)**).)

Similarly, a community management statement must, for a new scheme or an 'adjusted scheme', in relation to interest schedule lot entitlements for the lots included in the scheme:

- if the interest schedule lot entitlements reflect the respective market values of the lots - state this fact; or
- if the interest schedule lot entitlements do not reflect the respective market values of the lots – explain why they do not (**proposed new s 66(1)(dc)**).

(In this context, an 'adjusted scheme' means an existing scheme for which the interest schedule for the scheme is adjusted after the relevant provisions commence (proposed new s 66(6)(b)).)

There will also be a requirement that such explanations or details be:

- written in plain English; and
- simple enough, and only as detailed as is necessary, for the understanding of an ordinary person (**proposed new s 66(1A)**).

Additional information to be provided in disclosure statements

Clause 27 proposes **amendments to section 206** in relation to the information that must be contained in the disclosure statement the seller of a lot in a community titles scheme must provide to a person who proposes to buy the lot, before the buyer enters into a contract.

At present, the required information includes, amongst other things, the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot (s 206(2)(b)).

Under the proposed amendments, the following additional information will also have to be provided in the disclosure statement:

- the extent to which the stated amount of annual contributions currently 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; and
  - interest schedule lot entitlements for the lots included in the scheme; and
- that the contribution schedule lot entitlements, and the interest schedule lot entitlements, for the lots included in the scheme are set out in the community management statement for the scheme (**proposed new s 206(2)(b)**).

Further, it is proposed to delete the current requirement in section 206(2)(c) that, if a seller is the developer of a community titles scheme and the contribution schedule lot entitlements for lots included in the scheme are not equal, the disclosure statement must state the reason stated in the community management statement for the inequality.

Instead, it will be required that a disclosure statement be accompanied by a copy of the community management statement for the particular scheme (**proposed new s 206(2)(g)**).

Providing buyer with copy of a new community management statement and allowing buyer to cancel contract in certain circumstances

Clause 28 proposes a **new section 206B** which will apply if, after a contract for the purchase of a lot in a community titles scheme is entered into but before it settles, a new community management statement for the scheme is recorded.

The seller will be required, within 14 days (or a longer agreed period) after the new community management statement is recorded, to give the buyer a copy of the new community management statement (**proposed new s 206B(2)**).

The buyer will be entitled to cancel[60] the contract if:

- it has not already settled;
- the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the new community management statement differs from the community management statement last advised to the buyer; and
- the cancellation occurs by written notice to the seller within 14 days (or a longer agreed period) after the seller gives the buyer the further statement (**proposed new s 206B(3)**).

Terminating a contract for inaccuracy of disclosure statement

Clause 29 proposes providing an additional circumstance, under a **new section 209(1)(b)(ii)**, in which a buyer of a lot in a community titles scheme may terminate a contract.

A buyer may elect to terminate a contract that has not already settled 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.

COMMENTARY REGARDING IMPLICATIONS OF THE PROPOSED CHANGES

The following extracts are a selection of some of the commentary regarding possible implications of the proposed changes under the Bill.

In introducing the Bill, the former Minister acknowledged the likely competing outcomes of the proposed changes:

> At the outset, I acknowledge some of the proposed amendments will not receive universal acclaim. There are many who will decry the rationale and policy intent behind this bill. I am not entirely unsympathetic to those views, but difficult problems sometimes require difficult solutions. If we do nothing, then the community titles sector will become increasingly unstable. This bill provides certainty for the marketplace which will ensure that medium- and high-density living remains an attractive and affordable option for many Queenslanders.[61]

In earlier providing some context for the changes proposed by the Bill, and the Government's intention for a "fairer" system of lot entitlements overall, the former Minister had said:

> This is a much needed change. The [BCCM Act] has had a loophole which unfairly allowed some unit owners to get away with paying less than their fair share of body corporate fees at the expense of others.
>
> … We're putting a stop to [the current situation] and changing the law so it's fairer for everyone all round.[62]

However, the former Minister has also acknowledged the likely adverse impact of some of the proposed changes on certain lot owners, such as penthouse owners:

> Every penthouse owner will scream blue murder.[63]

In a similar vein, a newspaper editorial has said:

> While it may be unfair for residents of lower levels to subsidise those on higher floors, it seems equally unfair for those on higher floors to pay more than those on lower floors for the same amenities.[64]

The former Minister has said the following of the balancing exercise that is involved:

> Now, there are many people who are unhappy about the government's decision, but there may be 'winners' and 'losers' regardless of the approach taken towards seeking the most appropriate lot entitlements system. The government's approach is about looking after the most vulnerable people in our society and about the ideas of certainty and fairness. There will be some lot owners who say that removing the right to seek adjustment of contribution schedule lot entitlements will entrench inequities and remove flexibility.
>
> However, people purchase and purchased property in community titles schemes knowing what their portion of body corporate expenses are or were.[65]

The Explanatory Notes (pp 5-7) provide the following discussion regarding consistency of the Bill with the fundamental legislative principles,[66] which highlights some potential implications of the proposed changes:

> Section 4(2)(a) of the *Legislative Standard[s] Act 1992* requires legislation to have sufficient regard to the rights and liberties of individuals. Notwithstanding, the proposed amendments … will potentially breach the fundamental legislative principle by adversely affecting the rights and liberties of individuals retrospectively.
>
> The Bill proposes to remove the ability to apply to a specialist adjudicator or QCAT for an adjustment of contribution schedule lot entitlements for lots in community titles schemes established prior to the commencement of the Bill. However, schemes established after the commencement of the Bill will be able to seek a specialist adjudicator or QCAT order to adjust contribution schedule lot entitlements, but the order must only be in accordance with the contribution schedule principle that already applies to the scheme.
>
> This proposal does present a possible breach of fundamental legislative principles in that lot owners in schemes established prior to the commencement of the Bill will have a different set of rights to lot owners

in schemes established after the commencement of the Bill. Some schemes established prior to the commencement of the Bill will have had their contribution schedule lot entitlements set according to the equality principle as currently provided by the BCCM Act and, on commencement of the Bill, will have the ability to seek a contribution schedule lot entitlement adjustment order of a specialist adjudicator or QCAT removed. However, some schemes established after the commencement of the Bill may have their contribution schedule lot entitlements set according to the equality principle and they will have a right to seek an order of a specialist adjudicator or QCAT to adjust the contribution schedule lot entitlements if they are not set according to the said principle.

The distinction between the community titles schemes established pre- and post-commencement of the Bill is considered necessary.

For the sale of a lot in a scheme, a seller must disclose certain requirements to a buyer, including the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot, but not a lot's lot entitlements. Whilst a buyer has a right to view a scheme's community management statement, which details prescribed information about the scheme such as the scheme's lot entitlement schedules, there is anecdotal evidence suggesting that buyers do not view this information prior to making a purchase and therefore do not make fully informed decisions when purchasing a lot in a scheme. Furthermore, there is also anecdotal evidence to suggest that buyers purchase a lot in a scheme unaware that lot entitlements may be adjusted. Consequently, many lot owners have unexpectedly been required to pay higher levies after a contribution schedule lot entitlement adjustment order and, in some cases, lot owners are not able to afford their proportion of the body corporate expenses.

To correct this issue in the marketplace, the ability to seek a specialist adjudicator or QCAT order to adjust contribution schedule lot entitlements will be removed for schemes established prior to the commencement of the Bill. In going forward, disclosure requirements will be enhanced for the sale of a lot after the commencement of the Bill to include relevant information, such as the community management statement for the scheme and information about the ability to adjust contribution schedule lot entitlements for schemes established after the commencement of the Bill. These enhanced disclosure requirements will enable lot owners to make an informed decision when purchasing a lot in a scheme and will aim to reduce the need for adjustments of contribution schedule lot entitlements.

The proposed amendments … also potentially breach the fundamental legislative principle that legislation have sufficient regard to the rights and liberties of individuals as the proposed amendments will have retrospective impact on some community titles schemes with the ability to revert contribution schedule lot entitlements to their settings prior to any, and all, adjustment orders. Reverting contribution schedule lot entitlement adjustment orders may also be seen as a breach of fundamental legislative principles as orders from a specialist adjudicator, tribunal and court will be overturned even though they were made in accordance with the law at that time. It is also acknowledged that the rights of lot owners will be removed as they will not be permitted to oppose the reversion and that some lot owners who purchased a lot in a scheme after an adjustment order was made may be adversely affected by a reversion of contribution schedule lot entitlements.

Furthermore, lot owners who have purchased a lot after the commencement of the BCCM Act have had the ability to adjust the contribution schedule for the scheme if the developer had not set the contribution schedule lot entitlements in accordance with the current principle provided by the BCCM Act. This right will be removed, except in circumstances where there is a unanimous agreement to adjust the contribution schedule lot entitlements, which will affect the rights and liberties of lot owners who bought into a scheme knowing they could adjust the contribution schedule lot entitlements.

Whilst prima facie, this proposed amendment does not have sufficient regard to rights and liberties of individuals, the objective of the Bill is to provide as much certainty around body corporate costs as possible whilst recognising that administrative and sinking fund budgets will vary from year to year depending upon the circumstances of each individual scheme.

The Scrutiny of Legislation Committee, in its Legislation Alert No. 1 of 2011 (pp 13-18), tabled in the Queensland Parliament on 16 February 2011, also considered the application of the fundamental legislative principles to the Bill. The Committee received submissions about the Bill from the Queensland Law Society and the Unit Owners Association of Queensland.

LINKS TO FURTHER READING

BILL AND ACCOMPANYING DOCUMENTS

- Body Corporate and Community Management and Other Legislation Amendment Bill 2010 (Qld)
- Explanatory Notes
- Second Reading Speech, 23 November 2010, pp 4129-4130

KEY ACT AMENDED

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

DRAFT BILL AND ACCOMPANYING DOCUMENT

- Draft Body Corporate and Community Management Amendment Bill 2010 (Qld)
- Draft Explanatory Notes

DECEMBER 2008 DISCUSSION PAPER

- Queensland Government. Department of Justice and Attorney-General, 'Sharing Expenses in Community Titles Schemes: A Discussion Paper on Lot Entitlements under the *Body Corporate and Community Management Act 1997*', *Discussion Paper*, December 2008

MINISTERIAL MEDIA STATEMENTS

- Hon P Lawlor MP, Minister for Tourism and Fair Trading, 'Public to have their say on amendments to body corporate lot entitlements', *Ministerial Media Statement*, 12 August 2010
- Hon P Lawlor MP, Minister for Tourism and Fair Trading, 'Bligh Government to make body corporate fees fairer', *Ministerial Media Statement*, 19 February 2010
- Hon K Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, 'Community urged to have its say on community titles schemes', *Ministerial Media Statement*, 16 December 2008

MINISTERIAL STATEMENTS

- Hon P Lawlor MP, Minister for Tourism and Fair Trading, 'Body Corporate Fees', Ministerial Statement, *Queensland Parliamentary Debates (Hansard)*, 23 February 2010, p 338
- Hon P Lawlor MP, Minister for Tourism and Fair Trading, Answer to Question on Notice No. 323 and Answer to Question on Notice No. 324, both asked on 9 March 2010 (by Ms G Grace MP and Ms C Male MP respectively) and answers tabled on 8 April 2010

QUEENSLAND GOVERNMENT INFORMATION

- Queensland Government. Department of Justice and Attorney-General, Body corporate and community management webpage, including a range of forms and publications
- Queensland Government. Department of Justice and Attorney-General, Body Corporate: A quick guide to community living in Queensland, 2009
- Queensland Government. Department of Justice and Attorney-General, 'Lot entitlements', *Fact Sheet*, May 2010

QUEENSLAND PARLIAMENTARY LIBRARY PUBLICATIONS

- Queensland Parliamentary Library (Peter Bartholomew), 'Community Titles in Queensland: The Body Corporate and Community Management Bill 1997', *Legislation Bulletin*, No. 6/97, May

1997

NEWSPAPER ARTICLES

- Peter Cameron, 'One size doesn't fit all', *Gold Coast Bulletin*, 13 November 2010, p 34
- Lucy Ardern, 'Rich may keep fees cut', *Gold Coast Bulletin*, 27 September 2010, p 9
- Martin Rasini, 'New body corporate laws alter group-title dynamic', *Townsville Bulletin*, 22 September 2010, p 24
- 'Queensland ends body corporate loophole', *Brisbane Times*, 19 February 2010
- Sue Lappeman, 'Law cracks down on penthouse fees farce', *Gold Coast Bulletin*, 19 February 2010
- 'Editorial: Body corporate minefield', *Gold Coast Bulletin*, 19 February 2010
- Steven Wardill, 'Penthouse fees ruse closed off', *Courier Mail*, 19 February 2010, p 3
- Peter Cameron, 'Find body corporate fee fairness', *Gold Coast Bulletin*, 19 January 2010
- Tanya Westthorpe, 'Minister to act on unit laws', *Gold Coast Bulletin*, 17 April 2009
- Greg Stolz, 'Body blow – shot fired in highrise fee revolt', *Courier Mail*, 19 February 2009, p 1
- 'Anger grows as body corporate costs favour rich: Fees set to price owners off coast', *Gold Coast Bulletin*, 2 July 2008
- Peter Gleeson, 'Body corporate fees under review', *Gold Coast Bulletin*, 19 May 2008
- Peter Gleeson, 'High-rise magistrate in fees row', *Gold Coast Bulletin*, 10 May 2008, p 3
- Peter Gleeson, 'MP tipped strata title fees chaos', *Gold Coast Bulletin*, 24 April 2008, p 25
- Peter Gleeson, 'System a spent unit', *Gold Coast Bulletin*, 8 April 2008, p 16
- Troy R Williams (chief executive officer, Community Titles Institute Queensland Ltd), 'Letter: Don't delay levy reform', *Courier Mail*, 3 July 2004
- Brendan O'Malley, 'Unit owners face higher fees after court ruling', *Courier Mail*, 26 June 2004, p 3
- Brian Thomas, 'Battle rages over what's a fair share', *Sunday Mail*, 21 March 2004, p 102
- Ryan Heffernan, 'Noosa ruling to impact on body corporate fees', *Courier Mail*, 16 February 2000, p 37

AUDIO VISUAL FILES

- 612 ABC Radio, Morning Show, 19 February 2009
- Channel 7 News, 19 February 2009
- Stateline Queensland, 'Body Corporate Fees', 28 May 2004

ENDNOTES

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1 Queensland Government. Department of Justice and Attorney-General, Body Corporate: A quick guide to community living in Queensland, 2009, p 4.

2 Hon P Lawlor MP, Minister for Tourism and Fair Trading, Body Corporate and Community Management and Other Legislation Amendment Bill 2010 (Qld), Second Reading Speech, *Queensland Parliamentary Debates (Hansard)*, 23 November 2010, pp 4129-4130, at p 4129.

3 Body Corporate: A quick guide to community living in Queensland, 2009, p 1.

4 Body Corporate and Community Management (Standard Module) Regulation 2008 (Qld) ('**Standard Module**'), Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld) ('**Accommodation Module**'), Body Corporate and Community Management (Commercial Module) Regulation 2008 (Qld) ('**Commercial Module**') and Body Corporate and Community Management (Small Schemes Module) Regulation 2008 (Qld) ('**Small Schemes Module**').

5 Queensland Government. Department of Justice and Attorney-General, 'Lot entitlements', *Fact Sheet*, May 2010, pp 1-2.

6 The Hon P Lawlor MP was Minister for Tourism and Fair Trading from 26 March 2009 until his resignation from the Ministry on 21 February 2011.

7 The other key objective of the Bill – to establish simplified management arrangements for residential community titles schemes consisting of only two lots, and to facilitate a new regulation module directed at making the day-to-day management of such schemes less onerous and complex for lot owners (Body Corporate and Community Management and Other Legislation Amendment Bill 2010 (Qld), Explanatory Notes, p 1) - is not considered in this *e-Research Brief*.

8 Specifically in terms of contribution schedule lot entitlements, the former Minister made the following statement when introducing the Bill: "The bill will introduce a new and more flexible system of contribution schedule lot entitlements" (Second Reading Speech, p 4130). Note that the title to this *e-Research Brief* includes a quote from this statement.

9 That is, community titles schemes established after the relevant provisions in the Bill commence.

10 That is, community titles schemes already in existence when the relevant provisions in the Bill commence.

11 Queensland Government. Department of Justice and Attorney-General, 'Sharing Expenses in Community Titles Schemes: A Discussion Paper on Lot Entitlements under the *Body Corporate and Community Management Act 1997*', *Discussion Paper*, December 2008, p 3 ('**2008 Discussion Paper**').

12 Hon P Lawlor MP, Minister for Tourism and Fair Trading, 'Public to have their say on amendments to body corporate lot entitlements', *Ministerial Media Statement*, 12 August 2010.

13 'Public to have their say on amendments to body corporate lot entitlements', Ministerial Media Statement.

14 For further information on specialist adjudication, see the BCCM Act, Chapter 6.

15 *Fischer v Body Corporate for Centrepoint Community Title Scheme 7779* [2004] QCA 214 ('**Court of Appeal's decision**').

16 'Building units plans' are now known as 'building format plans', which are typically used for duplexes or multi-storey blocks of residential units. 'Group titles plans' are now known as 'standard format plans', which are typically used for, for example, townhouse complexes.

17 2008 Discussion Paper, p 6.

18 This terminology is taken from the 2008 Discussion Paper, p 7.

19 A lot owner's required contribution to the cost of such insurance premiums is determined according to the interest schedule lot entitlement of their lot, rather than the contribution schedule lot entitlement. See, for example, the Standard Module, s 178.

20 2008 Discussion Paper, p 8. For the consultation process that took place prior to the introduction of the Body Corporate and Community Management and Other Legislation Amendment Bill 2002 (Qld) ('relevant Bill'), see the Explanatory Notes to the relevant Bill (pp 13-14).

21 The relevant Bill was the Body Corporate and Community Management and Other Legislation Amendment Bill 2002 (Qld).

22 Specialist adjudication was provided for in Chapter 6 of the appropriate reprint of the BCCM Act.

23 The facts are taken from *Fischer v Body Corporate for Centre Point Community Title Scheme 7779* [2004] QDC 017 ('**District Court's decision**') (paras 1-9 and 12) and the Court of Appeal's decision (paras 3-10).

24 Bill Dixon, 'The impact of location on contribution schedule lot entitlements', *Queensland Lawyer*, 25(2), October 2004, pp 65-66, at p 65.

25 s 44(7) of the BCCM Act as amended by the 2003 Act, which has subsequently been renumbered to the existing s 46(7) of the BCCM Act.

26 Brian Thomas, 'Battle rages over what's a fair share', *Sunday Mail*, 21 March 2004, p 102.

27 'Battle rages over what's a fair share', Sunday Mail.

28 Peter Gleeson, 'System a spent unit', *Gold Coast Bulletin*, 8 April 2008, p 16.

29 'System a spent unit', Gold Coast Bulletin.

30 'Anger grows as body corporate costs favour rich: Fees set to price owners off coast', *Gold Coast Bulletin*, 2 July 2008.

31 Brendan O'Malley, 'Unit owners face higher fees after court ruling', *Courier Mail*, 26 June 2004, p 3.

32 'Anger grows as body corporate costs favour rich: Fees set to price owners off coast', Gold Coast Bulletin.

33 Greg Stolz, 'Body blow – shot fired in highrise fee revolt', *Courier Mail*, 19 February 2009, p 1.

34 Note that in Sue Lappeman, 'Law cracks down on penthouse fees farce', *Gold Coast Bulletin*, 19 February 2010, it was instead reported that there were about 80 Gold Coast buildings in which owners of larger units had successfully applied to have their lot entitlements adjusted.

35 'Body blow – shot fired in highrise fee revolt', Courier Mail. See also 'Law cracks down on penthouse fees farce', Gold Coast Bulletin.

36 Hon P Beattie MP, Premier and Minister for Trade, 'Changes aimed at making Qld's unit living nation's best', *Ministerial Media Statement*, 28 June 2004.

[37] Refer to endnote 6.

[38] See, for example, Peter Gleeson, 'Body corporate fees under review', *Gold Coast Bulletin*, 19 May 2008; Peter Gleeson, 'High-rise magistrate in fees row', *Gold Coast Bulletin*, 10 May 2008, p 3; 'System a spent unit', Gold Coast Bulletin. See also Hon P Lawlor MP, Minister for Tourism and Fair Trading, 'Bligh Government to make body corporate fees fairer', *Ministerial Media Statement*, 19 February 2010, and Hon P Lawlor MP, Minister for Tourism and Fair Trading, 'Body Corporate Fees', Ministerial Statement, *Queensland Parliamentary Debates (Hansard)*, 23 February 2010, p 338.

[39] 'Law cracks down on penthouse fees farce', Gold Coast Bulletin.

[40] For historical purposes, note that an identical provision to section 5 of the Body Corporate and Community Management and Other Legislation Amendment Bill 2006 (Qld), which later became the 2007 Act, appeared in the identically titled Body Corporate and Community Management and Other Legislation Amendment Bill 2006 (Qld) which was introduced into the Queensland Parliament on 10 August 2006 but lapsed on 15 August 2006 with the prorogation of the 51st Parliament.

[41] Note, however, that the 2004 Discussion Paper (pp 4-5) did discuss specialist adjudication more generally.

[42] 2008 Discussion Paper, p 10.

[43] Body Corporate and Community Management and Other Legislation Amendment Bill 2006 (Qld), Explanatory Notes, p 2.

[44] Hon K Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, 'Community urged to have its say on community titles schemes', *Ministerial Media Statement*, 16 December 2008.

[45] 'Public to have their say on amendments to body corporate lot entitlements', Ministerial Media Statement.

[46] 'Public to have their say on amendments to body corporate lot entitlements', Ministerial Media Statement.

[47] 'Public to have their say on amendments to body corporate lot entitlements', Ministerial Media Statement.

[48] Lucy Ardern, 'Rich may keep fees cut', *Gold Coast Bulletin*, 27 September 2010, p 9.

[49] Refer to endnote 6.

[50] Second Reading Speech, pp 4129-4130.

[51] Note that this is a non-exhaustive listing of the changes proposed by the Bill to the lot entitlements system in Queensland. The listed changes are those that have been identified as 'key changes' for the purposes of this publication.

[52] **Clause 41** inserts a **proposed new section 391** which confirms, for the sake of clarity, that the proposed new sections 47A to 48 also apply in relation to community titles schemes established before the commencement of the relevant provisions.

[53] The value of one penalty unit is currently $100 (*Penalties and Sentences Act 1992* (Qld), s 5. Note that under section 181B, the maximum fine for a corporation, if not expressly prescribed, is five times the maximum fine for an individual.

[54] Proposed new criteria (**clause 9, proposed new s 48A**) for deciding whether contribution schedule lot entitlements are consistent with the applicable deciding principle are discussed in greater detail under the heading '**Criteria for determining consistency with deciding principle**'.

[55] For an explanation of the monetary value of a penalty unit, refer to endnote 53.

[56] Note that a new community management statement reflecting the increase must have been recorded before the relevant provisions commence (**proposed new s 379(1)(b)**).

[57] A regulation module applying to a particular community titles scheme may require there to be a committee for the body corporate (BCCM Act, s 98). See, for example, section 7 of the Standard Module.

[58] For an explanation of the monetary value of a penalty unit, refer to endnote 53.

[59] For an explanation of the monetary value of a penalty unit, refer to endnote 53.

[60] Note that the terminology in the **proposed new section 206B** is that a contract may be 'cancelled', whereas other provisions in the BCCM Act refer to a contract being 'terminated' (see, for example, section 209 of the BCCM Act). Relevant terminology in the BCCM Act was recently changed from 'cancelling' a contract to 'terminating' a contract as a result of amendments under the *Property Agents and Motor Dealers and Other Legislation Amendment Act 2010* (Qld), Part 3, which commenced on 1 October 2010.

[61] Second Reading Speech, p 4130.

[62] 'Bligh Government to make body corporate fees fairer', Ministerial Media Statement.

[63] Steven Wardill, 'Penthouse fees ruse closed off', *Courier Mail*, 19 February 2010, p 3.

[64] 'Editorial: Body corporate minefield', *Gold Coast Bulletin*, 19 February 2010.

[65] Hon P Lawlor MP, Minister for Tourism and Fair Trading, Body Corporate Speech, *Transcript*, 10 June 2010.

[66] Section 4 of the *Legislative Standards Act 1992* (Qld) states that 'fundamental legislative principles' are "the principles relating to legislation that underlie a parliamentary democracy based on the rule of law". The principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament. The Scrutiny of Legislation Committee is presently conducting an inquiry into the meaning of 'fundamental legislative principles'. A 'Call for Public Submissions' to the inquiry was tabled on 25 November 2010.