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Queensland Government Property  
Law Review  
Issues Paper 2  
*Lot entitlements under the Body  
Corporate and Community  
Management Act 1997*



Commercial and Property Law  
Research Centre  
QUT Law

# Lot Entitlements

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## Attorney-General's foreword



The Queensland Government knows that property and construction are critical to Queensland's future economic growth and prosperity.

On 15 August 2013, I announced that the Government had engaged the Queensland University of Technology (QUT) to conduct a broad ranging, independent review of Queensland's property laws, including community titles legislation.

The Government is proud to partner QUT in this exciting opportunity to identify ways of ensuring Queensland legislation provides the foundation for strong, sustainable and socially responsible growth in Queensland's property and construction sectors.

The property law review is being conducted through the Commercial and Property Law Research Centre, QUT Law, and is headed by highly-respected property law experts, Professor Bill Duncan, Professor Sharon Christensen and Dr Bill Dixon.

A critical part of the property law review process will be meaningful consultation and engagement with Queensland property professionals, industry stakeholders and the broader community.

Accordingly, I am very pleased to be releasing the first two issues papers for the property law review. Issues Paper 1 considers the current seller disclosure regime in Queensland including its effectiveness for the purposes of the sale and conveyancing process and whether there is a need for reform. Issues Paper 2 (this Issues Paper) deals with the complex and difficult issues concerning the setting and adjustment of contribution schedule lot entitlements under the *Body Corporate and Community Management Act 1997*.

Two further Issues Papers will be released for consultation in the second half of 2014. Issues Paper 3 will seek industry and community feedback on issues concerning the *Property Law Act 1974*, while Issues Paper 4 will be about body corporate governance issues arising under

the *Body Corporate and Community Management Act 1997* and other community titles legislation.

Due to the complexity of the review, QUT will provide the Government with reports outlining the findings of the review in stages, commencing with reports about seller disclosure and body corporate lot entitlements in mid-2014. The Government will make announcements about the outcomes of the property law review after considering the findings and recommendations of the QUT review team.

I sincerely thank the QUT review team for preparing the first two Issues Papers for the property law review. I am confident that these papers provide an excellent starting point for engaging with property professionals, industry and the community about the critical issues that need to be addressed if Queensland is to have a contemporary, world-class property law framework for the future.

I strongly encourage all Queenslanders with an interest in property and community titles law to have their say by making a submission in response to the Issues Papers.

**The Honourable Jarrod Bleijie MP**  
**Attorney-General and Minister for Justice**  
12 February 2014

**Not Government Policy**

## How to make a submission

Written submissions are invited in response to some or all of the issues raised in this Issues Paper.

The issues raised are not intended to be exhaustive. If you think there are other opportunities for improving the lot entitlement regime under the *Body Corporate and Community Management Act 1997*, please include these in your response.

The closing date for submissions is 14 March 2014.

Copies of the *Body Corporate and Community Management Act 1997* can be obtained at:

[www.legislation.qld.gov.au](http://www.legislation.qld.gov.au)

### **Where to send your submission**

You may lodge your submission by email or post.

The email address for submissions is: QUTreview-BCCM@justice.qld.gov.au

Alternatively, you can post your submission to:

QUT Review - BCCM

C/- Office of Regulatory Policy

Department of Justice and Attorney-General

GPO Box 3111

BRISBANE QLD 4001

These submissions will be provided to the Commercial and Property Law Research Centre at the Queensland University of Technology which is conducting the review.

### **Privacy Statement**

Any personal information you include in your submission will be collected by the Department of Justice and Attorney-General (the Department) and the Queensland University of Technology for the purpose of undertaking the review of Queensland's property laws. The Department or the Queensland University of Technology may contact you for further consultation regarding the review. Your submission may also be released to other government agencies as part of the consultation process.

Submissions provided to the Department and the Queensland University of Technology in relation to this paper will be treated as public documents. This means that they may be published on the Department's website, together with the name and suburb of each person or entity making a submission. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly in the submission. However, please note that all submissions may be subject to disclosure under the *Right to Information Act 2009*, and access applications for submissions, including those marked confidential, will be determined in accordance with that Act.

Submissions (or information about their content) may also be provided in due course to a parliamentary committee that considers any legislation resulting from this review.

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## Executive Summary

This Issues Paper addresses the contentious issue of setting and adjusting lot entitlements for community titles schemes in Queensland and considers options for dealing with the controversial issue of adjusting lot entitlements of existing community titles schemes.

This Issues Paper outlines the advantages and disadvantages of different options identified from existing literature and submissions from previous reviews. Approaches used in other jurisdictions are highlighted to provide a comprehensive picture of how lot entitlements are set and adjusted in other Australian and international jurisdictions.

This Issues Paper poses specific questions and seeks feedback from lot owners, bodies corporate, strata managers and other interested parties to develop a new system that will apply to setting and adjusting lot entitlements in future community titles schemes and to identify transitional issues for existing schemes where new principles apply to new schemes.

The purpose of approaching the review in this way is to gather evidence of experiences in Queensland and other places about the concerns and challenges for bodies corporate arising from the way in which lot entitlements have been allocated in the past and the current approaches to setting and adjustment of lot entitlements.

The Issues Paper proposes a number of options for the setting of lot entitlements and adjustments into the future and seeks feedback from all stakeholders about the appropriateness of those proposals.

All feedback and submissions will be taken into account as part of the reform recommendations to be made to the Attorney-General in 2014.



## 1. Background

### 1.1. Review of Queensland Property Laws

The Queensland Government has engaged the Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) to conduct an independent and broad-ranging review of Queensland's property laws. This review will pave the way for a more streamlined approach to how Queenslanders buy, sell and manage property by reducing red tape, unnecessary regulation and property law duplication. A core element of the review will be the options for the modernisation, simplification, clarification or reform of the *Property Law Act 1974* (Qld) in light of case law, the operation of other related legislation and changes in practice. The review will also consider options for simplification, streamlining and reform of the current common and statutory laws regulating the disclosure of matters by a seller upon a sale of property with particular emphasis upon unifying existing disclosure obligations within a coordinated framework.

As part of the objective of streamlining the sale, purchase and management of property in Queensland various options for improving the framework regulating the governance of community titles schemes under the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**) will be considered. This will include:

1. The options for the principles governing the setting and review of contribution schedule lot entitlements in the BCCM Act and related matters;
2. Assessment of the efficacy of the BCCM Act with respect to the establishment and governance of contemporary community titles schemes, including consideration of the effectiveness of the existing regulation module structure under the Act;
3. Options for maximising existing synergies and minimising inconsistencies between BCCM Act and the *Building Units and Group Titles Act 1980* (Qld) in relation to management of schemes and dealings with lots and common property with a view to, where appropriate, transitioning schemes to the same legislative framework.
4. Identification and analysis of issues concerning body corporate committee governance, and consideration of options for improved education and information resources for committee members.

This Issues Paper addresses the options for the regulation of the setting, adjustment and review of lot entitlements under the BCCM Act.

### 1.2. Review of Lot Entitlements

Appropriate lot entitlements are critical to the efficient and harmonious operation of a community titles scheme (**CTS**). Lot entitlements are used to allocate expenses and liabilities to each lot owner within a CTS and govern voting rights of owners. Unpredictable changes to lot entitlements over the life of a CTS can have a detrimental impact on the ability of a lot owner to continue to pay levies and on the value of the lot. Since the first building units plan was created in 1965, the methods of allocation of lot entitlements, and therefore the allocation of expenses, have changed significantly.

Prior to 2003 the methods used by developers to set lot entitlements were not regulated by legislation. Lot entitlements in most schemes, particularly prior to 1997, were decided on the basis of market value. After 1997, the practice of aligning lot entitlements with market value continued with some movement toward contribution schedule lot entitlements being based upon a user pays equality method. From 2003 the BCCM Act required developers to make contribution schedule lot entitlements equal unless it was just and equitable that they not be equal, thereby enshrining the user pays model. In 2011, the BCCM Act was amended adding a new method called the relativity principle which allowed developers to set contribution schedule lot entitlements on a number of different bases including market value, provided the calculation used was explained. The amendments to the method for setting lot entitlements applied in each case only to schemes established after commencement of the new provisions.

More controversial in nature are the amendments to the BCCM Act introducing the ability for lot entitlements to be adjusted by an order of a court or specialist adjudicator (**adjustment order**), often by the application of a minority of owners within the CTS. The right to apply for an adjustment or review of lot entitlements was introduced in 1997 by the BCCM Act. Since that time, a significant number of schemes, primarily those established prior to 2003, have applied for adjustment of the contribution schedule lot entitlements for the scheme. Following the Court of Appeal decision in *Fischer v Body Corporate for Centrepont Community Titles Scheme* [2004] QCA 214 these adjustments were made solely on the basis of the impact of particular lots on the expenses of the body corporate, without regard to the knowledge of lot owners at the time of purchase, financial impact of the adjustment on lot owners or impact on capital value of lots. In some cases these adjustments have had a dramatic impact on the allocation of costs within the CTS.

Following a review of the statutory framework for lot entitlements and various submissions to the Government in 2008,<sup>1</sup> the *Body Corporate and Other Legislation Amendment Act 2011* (Qld) (**2011 Amendment**) was passed. Controversially, the 2011 Amendment introduced a process (the **2011 reversion process**) where a single lot owner who had been adversely affected by an adjustment order could restore the lot entitlements for the CTS back to what they had been prior to the adjustment order. No regard was had at that time to whether the previous allocation of lot entitlements was in fact a just and equitable distribution and no right was given to disaffected parties to apply to a court or tribunal to appeal the result. Following a change of government and further submissions by affected owners, the BCCM Act was again amended in 2013 to repeal the 2011 reversion process so that lot entitlements could be reverted to the previous allocation decided by a court, tribunal or specialist adjudicator under an adjustment order. Many of the other aspects of the 2011 Amendment were left in place pending a more extensive review of the body corporate legislation.

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<sup>1</sup> 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**) <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0014/21614/discussion-paper-sharing-expenses-in-community-titles-schemes.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0014/21614/discussion-paper-sharing-expenses-in-community-titles-schemes.pdf)>.

### 1.3. Scope of Issues Paper

This Issues Paper examines the problems and challenges arising under the current regime in relation to the setting, use and adjustment of contribution schedule lot entitlements in Queensland and proposes options to reform the BCCM Act to deal with these issues. The paper seeks the responses of stakeholders and other interested parties to the questions posed throughout and contained in [Resources](#).

This Issues Paper does not specifically propose:

- changes to the system for setting or adjusting interest schedule lot entitlements, which are currently set on market value; or
- changes to the specified Acts<sup>2</sup> governed by the *Building Units and Group Titles Act 1980* (Qld) (**BUGTA**), except to request feedback about whether the lot entitlement provisions of the BCCM Act should also apply to BUGTA schemes and what difficulties stakeholders can envisage if this were to occur.<sup>3</sup>

This Issues Paper is the initial step in a complete review of body corporate laws in Queensland. In 2014 further discussion papers will be released proposing options for improving governance of schemes, including a review of body corporate committee governance, by-laws and the potential for transitioning all schemes from BUGTA to the BCCM Act.

By way of background to the current review, this Issues Paper will briefly outline the history of lot entitlements in Queensland since 1965. This will be followed by a detailed review of the issues associated with the setting and adjusting of contribution schedule lot entitlements, highlighting areas of controversy and options for reform. A number of questions are posed throughout to seek stakeholder feedback on the issues and options discussed.

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<sup>2</sup> *Integrated Resort Development Act 1987* (Qld); *Mixed Use Development Act 1993* (Qld); *Registration of Plans (HSP (Nominees) Pty Limited) Enabling Act 1980* (Qld); *Registration of Plans (Stage 2) (HSP (Nominees) Pty Limited) Enabling Act 1984* (Qld); *Sanctuary Cove Resort Act 1985* (Qld). See *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**) s 326.

<sup>3</sup> The *South Bank Corporations Act 1989* (Qld) is not included as a specified Act under the BCCM Act as it is governed by relevant provisions as provided in the *South Bank Corporation (Modified Building Units and Group Titles) Regulation 2003* (Qld).

## 2. History of lot entitlements in Queensland

Contribution schedule lot entitlements determine each owner's contribution to the operating costs of the body corporate. There are divergent views as to the best method to set and adjust contribution schedule lot entitlements.<sup>4</sup> Below is a brief discussion of the history of lot entitlements in Queensland highlighting the rationale for changes under each statute.<sup>5</sup>

### 2.1. *Building Units Titles Act 1965*

The *Building Units Titles Act 1965* (Qld) (**1965 Act**) introduced the concept of individual freehold title for units within a building units plan, replacing the previous system of company title. As part of this framework unit entitlements were introduced and specified in a schedule to the building units plan. The body corporate was empowered to charge lot owners a fee to cover the cost of body corporate expenses based on the proportion of the unit entitlement for their lot compared to the unit entitlements for the plan. There were no requirements within the 1965 Act for unit entitlements to be allocated on any particular basis or an ability to adjust the unit entitlements.

### 2.2. *Group Titles Act 1973*

The *Group Titles Act 1973* (Qld) (**1973 Act**) introduced a framework for community title within a larger flat land development or townhouse development. Like the 1965 Act it provided for lot entitlements for each lot. Lot entitlements were set by the ratio of the unimproved value (based on a registered valuer's opinion) of the lot in relation to the unimproved value of all lots in the group titles plan.<sup>6</sup> Like the 1965 Act, each lot owner's contribution to the common expenses of the body corporate was based on the lot entitlement for the relevant lot.<sup>7</sup>

### 2.3. *Building Units and Group Titles Act 1980*

As the number of unit developments increased, the need to create a more sophisticated regime for the governance of units and group titles emerged. This resulted in the *Building Units and Group Titles Act 1980* (Qld) (**BUGTA**) which combined and replaced the 1965 and 1973 Acts. BUGTA retained concepts from the earlier Acts, including group titles plans and building units plans.<sup>8</sup> Under

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<sup>4</sup> See 2008 Discussion Paper, above n 1.

<sup>5</sup> For a fuller history of community titles in Queensland, see Anthony Lim, Office of Regulatory Policy, Department of Justice and Attorney-General, *History of Community Titles Legislation in Queensland*, (2012) <<http://www.parliament.qld.gov.au/documents/committees/LACSC/2012/BCCMOLAB/121026-ltr-DJAG2.pdf>>; Renee Gastaldon, '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)' (e-Research Brief 2011/03, Queensland Parliamentary Library, March 2011) (**2011 Research Brief**) <<http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/ResearchBriefs/2011/eRBR201103.PDF>>.

<sup>6</sup> *Group Titles Act 1973* (Qld) (**1973 Act**) ss 15(2)-(3). See also Lim, *History of Community Titles Legislation*, above n 5, 3, 5.

<sup>7</sup> 1973 Act s 13(2)(c).

<sup>8</sup> Group titles plans are now called standard format plans and building unit plans are called building format plans. See BCCM Act ss 331, 335.

BUGTA, a single schedule of lot entitlements was used to determine each owner's interest in the common property, voting rights and the proportion of body corporate contributions payable by each owner.<sup>9</sup>

Under BUGTA, lot entitlements for group titles plans were required to represent unimproved values (as was the case under the 1973 Act),<sup>10</sup> but there were no requirements for lot entitlements under building units plans. There was no legislative method or process for adjustment of lot entitlements after the establishment of the scheme.<sup>11</sup>

## 2.4. *Body Corporate and Community Management Act 1997*

The *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**) largely replaced BUGTA as the statutory framework for community titles schemes.<sup>12</sup> Together with a new governance model for community titles schemes, a dual system of lot entitlements was introduced:

- i. **contribution schedule lot entitlements** to determine each owner's share of most costs for common areas; and
- ii. **interest schedule lot entitlements** to determine each owner's share of the common property.<sup>13</sup>

Lot entitlements are contained in the two schedules of a community management statement (**CMS**) for a CTS. The CMS is recorded with the Registrar of Titles<sup>14</sup> and when information, including lot entitlements within the CMS, is changed, a new CMS is recorded. Schemes existing at the time of commencement were transitioned to the BCCM Act by using the existing lot entitlements as both the contribution and interest schedule lot entitlements.<sup>15</sup> The result was that the contribution schedule lot entitlements for existing schemes usually represented the different market values of the lots.

From 1997 until 2003, at the time of establishment of a new scheme, the contribution schedule lot entitlements were not required by the BCCM Act to be equal and interest schedule lot entitlements were not required to be based directly on or proportional to market value.<sup>16</sup> Developers, as the original owners,<sup>17</sup> were not required to provide a rationale for allocation of contribution or interest schedule lot entitlements. As a result, lot entitlements may have been set on value, area or some other criteria.

The BCCM Act also introduced in 1997 a mechanism for lot entitlements to be adjusted by agreement among owners or by an adjustment order of the District Court. An adjustment order for

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<sup>9</sup> *Building Units and Group Titles Act 1980* (Qld) (**BUGTA**) s 19(1).

<sup>10</sup> *Ibid* ss 19(2)-(3). Note the section was amended in 2010 to remove the reference to 'unimproved' value. Value is now determined in accordance with the *Land Valuation Act 2010* (Qld).

<sup>11</sup> See Lim, *History of Community Titles Legislation*, above n 5, 6; 2008 Discussion Paper, above n 1, 6.

<sup>12</sup> BUGTA governs schemes registered under a number of specified Acts. See BCCM Act s 326.

<sup>13</sup> BCCM Act ss 46 -47.

<sup>14</sup> *Ibid* s 52.

<sup>15</sup> For schemes under BUGTA, the existing schedule of lot entitlements was deemed to be both the contribution schedule and the interest schedule: BCCM Act s 337(e)-(f).

<sup>16</sup> See BCCM Act reprint 1, section 46 (as passed).

<sup>17</sup> BCCM Act ss 13, 53.

the contribution schedule lot entitlement was required to be consistent with the principle that the respective lot entitlements should be equal, except to the extent to which it was just and equitable in the circumstances for them not to be equal.<sup>18</sup> This principle later became known as the **equality principle**.

An adjustment order for the interest schedule lot entitlement was required to be consistent with the principle that the respective lot entitlements should reflect the respective market values of the lots included in the CTS, except to the extent to which it was just and equitable in the circumstances to reflect other than market value.<sup>19</sup> This principle later became known as the **market value principle**.

Contribution schedule lot entitlements for schemes established between 1997 and 2003 were not allocated on a consistent basis by developers, but owners within these schemes were entitled to apply to the District Court for an order adjusting the lot entitlements consistent with the equality principle. Where contribution schedule lot entitlements were allocated by a developer on a basis other than equality, the change to lot entitlements consequent upon an adjustment order was often dramatic.

## ***2.5. Body Corporate and Community Management and Other Legislation Amendment Act 2003***

After a review of the BCCM Act in 2000, significant amendments were made to the Act. The *Body Corporate and Community Management and Other Legislation Amendment Act 2003* (Qld) (**2003 Amendment**) required that for new schemes, the contribution schedule lot entitlements were required to be equal except to the extent it was just and equitable for the entitlements to not be equal. When setting lot entitlements, developers were required to have regard to:

- how the scheme was structured;
- the nature, features and characteristics of the lots included in the scheme; and
- the purposes for which the lots were used.<sup>20</sup>

The 2003 Amendment also gave lot owners the option to apply to a specialist adjudicator for an adjustment order. Adjustment orders were still required to be consistent with the relevant principle but the courts and adjudicators were given guidance to determine '*just and equitable*' circumstances through new provisions setting out what a court or adjudicator may, and may not, have regard to. Relevantly, the court or adjudicator could not consider what the applicant for the adjustment order knew or did not know at the time they acquired the lot.<sup>21</sup> This meant it was irrelevant if the person bought the lot knowing the lot entitlements were unequal.<sup>22</sup>

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<sup>18</sup> BCCM Act reprint 1, section 46(4) (as passed).

<sup>19</sup> Ibid, section 46(5).

<sup>20</sup> *Body Corporate and Community Management and Other Legislation Amendment Act 2003* (Qld) (**2003 Amendment**) s 10 (amending BCCM Act section 44 (later renumbered as section 46)).

<sup>21</sup> Ibid s 12, inserting new section 46A into BCCM Act (this was later renumbered as section 49).

<sup>22</sup> See 2008 Discussion Paper, above n 1, 8-9; Lim, *History of Community Titles Legislation*, above n 5, 15-16.

## 2.6. Impact of Centrepoint decision

In *Fischer v Body Corporate for Centrepoint Community Titles Scheme 7779* [2004] QCA 214 (the **Centrepoint decision**)<sup>23</sup> the Court of Appeal held that considerations of amenity, value or history are to be disregarded when determining just and equitable distribution of lot entitlements and it is only how a lot creates cost for, or consumes services of, a body corporate that is relevant when making an adjustment order for contribution schedule lot entitlements.<sup>24</sup> This meant that the financial impact of the change or the original basis for the allocation of entitlements was also irrelevant.

The Centrepoint decision created a precedent which allowed owners paying a higher percentage of the body corporate fees (because lot entitlements had been allocated unequally based on area, value or some other criteria) to have their lot entitlements, and thus their contributions, reduced. This meant that those owners paying lower contributions would then suddenly have their contributions increased.

As more owners sought adjustment orders a larger number of owners were affected. Some lot owners had their body corporate contributions doubled while others may have had their body corporate contributions cut in half.<sup>25</sup> It was recognised that this type of increase in required contributions could have a drastic impact on the capital value of a lot. Some owners found themselves in a situation where they could not afford the new contributions but could not afford to sell the lot at a drastically decreased value. Ultimately, after numerous submissions this situation resulted in amendments to the BCCM Act in 2011.

## 2.7. 2007 and 2009 amendments to BCCM Act

In 2007 the BCCM Act was amended, largely focusing on dispute resolution procedures. Relevantly, jurisdiction was given to the Commercial and Consumer Tribunal (which, in 2009 was amalgamated into the Queensland Civil and Administrative Tribunal (**QCAT**)) to hear applications for adjustment orders.

## 2.8. *Body Corporate and Community Management and Other Legislation Amendment Act 2011*

The *Body Corporate and Community Management and Other Legislation Amendment Act 2011* (Qld) (**2011 Amendment**) introduced a significant change to both the setting and adjustment of lot entitlements.

First, the 2011 Amendment introduced the **relativity principle** (as an alternative to the equality principle) which allows contribution schedule lot entitlements to be set in a way that clearly demonstrates the relationship between the lots in the scheme by reference to one or more relevant

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<sup>23</sup> For a detailed discussion of the Centrepoint decision, see 2011 Research Brief, above n 5, 11-20; Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland*, (Thompson Reuters, 3<sup>rd</sup> ed, 2010) at 13.240-13.270.

<sup>24</sup> *Fischer v Body Corporate for Centrepoint Community Titles Scheme 7779* [2004] QCA 214 [32].

<sup>25</sup> For background discussion, see Trent Dalton, 'Space wars', *Q-Weekend, The Courier Mail* (Brisbane Queensland), 4 August 2012.

factors.<sup>26</sup> Interest schedule lot entitlements were required to be set in accordance with the market value principle.<sup>27</sup> For new schemes, the CMS was required to contain a statement, using plain English and simple terms, stating the relevant principle (for contributions schedules either equality or relativity and for interest schedules, market value) and how the lot entitlements were determined based on those principles.<sup>28</sup>

No rationale for introduction of the relativity principle is provided in the Explanatory Note to the Bill.<sup>29</sup> The assumed purpose of introducing the new principle was to allow flexibility for the setting of lot entitlements having regard to the fact that the right to seek an adjustment order was removed.

The second significant change was to restrict the situations in which a lot owner could seek an adjustment order. For schemes established prior to 14 April 2011,<sup>30</sup> the 2011 Amendment removed the right of owners to seek an adjustment order from a Court, tribunal or specialist adjudicator except in specific circumstances.

The final significant change was the introduction of a new process whereby existing schemes, which had been subject to an adjustment order, could be reverted back to the original lot entitlements prior to any adjustment (the **2011 reversion process**). The 2011 reversion process allowed an individual owner to make a motion at a general meeting which would require the lot entitlements to 'revert' back to what they had been prior to any adjustment, effectively overturning an adjustment order made by a court, a tribunal or a specialist adjudicator. The alleged rationale for the reversion process was to introduce certainty for lot owners in relation to liability for body corporate expenses.<sup>31</sup>

The 2011 Amendment and the 2011 reversion process in particular attracted widespread criticism for allowing a single owner to overturn a decision of a court, specialist adjudicator or tribunal.

## ***2.9. Body Corporate and Community Management and Other Legislation Amendment Act 2013***

Following a change of government in 2012, the *Body Corporate and Community Management and Other Legislation Amendment Act 2013* (Qld) (**2013 Amendment**) was passed. The 2013 Amendment removed the 2011 reversion process, stopped reversions that were then underway and provided a mechanism for those schemes which had been subject to a reversion to revert back to the last adjustment order made by a specialist adjudicator, tribunal or court.

Similar to the 2011 Amendment, the 2013 Amendment allowed a single owner to submit a motion requiring a body corporate to reverse the reversion, and because of this, the 2013 Amendment

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<sup>26</sup> BCCM Act ss 46(7)(b) and 46A(2)-(3).

<sup>27</sup> Ibid ss 46(8) and 46B.

<sup>28</sup> Ibid ss 66(1)(da)-(dc) and 66(1A).

<sup>29</sup> Explanatory Notes, Body Corporate and Community Management and Other Legislation Amendment Bill 2010.

<sup>30</sup> The commencement date of the *Body Corporate and Community Management and Other Legislation Amendment Act 2011* (Qld) (**2011 Amendment**).

<sup>31</sup> Explanatory Notes, Body Corporate and Community Management and Other Legislation Amendment Bill 2010, 7.



attracted similar criticism to the 2011 Amendment. At the time of introducing the amendments, the Attorney-General noted that the 2013 Amendment was limited in focus and announced a review of the system of setting and adjusting lot entitlements to look at getting the balance right.<sup>32</sup> This Issues Paper is the first step in that review.

## 2.10. Conclusions

As can be seen by the foregoing discussion, lot entitlements in Queensland have a unique history. There are several key points about the history of lot entitlements in Queensland that are relevant to the issues of setting and adjusting lot entitlements which are highlighted in the next section of this paper.

- a. From 1965 to 2003, lot entitlements in Queensland were set at the discretion of developers, usually on the basis of unimproved or market value. Although the equality principle was introduced for adjustment orders in 1997 it was not until 2003 that a requirement for developers to use the equality principle was introduced. This created a significant disparity between the principles for setting lot entitlements and the principles for an adjustment.
- b. From 2003 to 2011, contribution schedule lot entitlements were required to be set based on the equality principle and in 2011, the relativity principle was added for new schemes. Until 2011 the equality principle was used as the guiding principle for determining any adjustment of the contribution schedule lot entitlements irrespective of the original method for setting of the lot entitlements. The availability of the adjustment process for schemes established prior to 2003 under either BUGTA or the BCCM Act where a market value allocation or similar was used for lot entitlements has been a significant contributing factor to the current controversy.
- c. Interest schedule lot entitlements have not created the same issues despite there being no requirement for developers to use the market value principle when setting interest schedule lot entitlements until 2011. From 1997, an adjustment order for interest schedule lot entitlements was required to be consistent with the market value for the lot at the time of the order. This did not create significant hardship because the methodology used under BUGTA and the BCCM Act was consistent with the market value principle and any changes to interest schedule lot entitlements did not result in financial imposts on owners.
- d. The introduction of a mechanism for the adjustment of lot entitlements on the basis of criteria inconsistent with the methodologies used for existing and new schemes has created significant financial and social issues for community titles schemes. These issues were exacerbated by giving the right to one lot owner to overturn an adjustment order under the 2011 Amendment thereby significantly altering the relative contributions of lot owners.

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<sup>32</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 2012, 2076 (Jarrod Bleijie).

### 3. Issue – Use and setting of lot entitlements

A key factor in the choice of an appropriate principle for the setting of lot entitlements is the way in which lot entitlements will be used within a scheme. Lot entitlements in Queensland are used for a number of purposes<sup>33</sup> however the main purpose is to allocate shared expenses and liabilities.

#### 3.1. Uses of lot entitlements in Queensland

In Queensland a CTS is required under the BCCM Act to have two lot entitlement schedules: the contribution schedule and the interest schedule. These two schedules set out the lot entitlements<sup>34</sup> for each lot in the scheme, as set by the developer or original owner.<sup>35</sup>

The contribution schedule lot entitlement is used to calculate:

- a lot owner's share of most amounts levied by the body corporate;<sup>36</sup> and
- if a poll is conducted for an ordinary resolution, the value of a lot owner's vote for that resolution.<sup>37</sup>

The interest schedule lot entitlement is used to calculate:

- a lot owner's share of the common property and interest in the body corporate assets on termination of the scheme;<sup>38</sup>
- the value of the lot, for the purposes of local government rates or charges, or other costs calculated on the basis of value;<sup>39</sup> and
- a lot owner's proportion of the insurance premium.<sup>40</sup>

#### 3.2. How are costs to be allocated?

Lot entitlements are used primarily to allocate costs. As such, there is a clear link between the methodology to be adopted for the allocation of lot entitlements and the basis upon which body corporate expenses are shared. If body corporate expenses are to be shared equally, lot

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<sup>33</sup> For further discussion of lot entitlements, see Queensland Government, Department of Justice and Attorney-General, *Lot entitlements – the basics* (Fact sheet, 2012), 1 <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0010/162595/Lot-entitlements-the-basics.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0010/162595/Lot-entitlements-the-basics.pdf)>.

<sup>34</sup> BCCM Act s 46.

<sup>35</sup> *Ibid* s 13.

<sup>36</sup> *Ibid* s 47(2)(a). However, particular expenses (such as insurance) may be calculated differently. See Queensland Government, Department of Justice and Attorney-General, *Insurance* (Fact sheet, 2010) <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0008/12878/Insurance.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0008/12878/Insurance.pdf)>.

<sup>37</sup> BCCM Act s 47(2)(b).

<sup>38</sup> *Ibid* s 47(3)(a)-(b).

<sup>39</sup> *Ibid* s 47(3)(c).

<sup>40</sup> *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 176(4); *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 178(4); *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) s 134(4); *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) s 112(4); *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (Qld) s 48(4).

entitlements should be allocated equally. If body corporate expenses are to be shared in a relative way, based on one or more factors, lot entitlements should not be allocated equally.

Prior to 1997, lot entitlements were often allocated on a relative basis, based at best on the value of the lot and at worst arbitrarily allocated. With the introduction of the BCCM Act in 1997, there was a move away from allocating contribution lot entitlements on the basis of value or other relativity towards the principle of equality.

### 3.3. Guiding principle – equality

Unlike some other jurisdictions, Queensland uses two schedules of lot entitlements, the contribution schedule and the interest schedule. The rationale underlying the creation of two types of lot entitlements under the BCCM Act is that operating expenses should be fairly and equitably allocated between lot owners and not on the basis of market value. This policy approach continued with the 2003 Amendment, as explained in the second reading speech:

*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 ... There is not an argument ... 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.*<sup>41</sup>

On this basis the guiding principle was that the contribution schedule lot entitlements should be equal unless it was just and equitable for them to be unequal. The examples of when it was just and equitable for the contribution schedule lot entitlements to be other than equal include situations where differences in use resulted in a greater consumption of services and greater impact on the maintenance and repair of common areas and facilities, such as a retail compared to residential or a larger lot placing a larger impact on maintenance services.<sup>42</sup>

In practice the application of the guiding principle can be opaque to a lot owner. Developers engage quantity surveyors or equivalent experts to create reports calculating lot entitlements through analysis of the past and prospective administrative fund and sinking fund expenditure. Each item of expenditure is then examined to determine how it should be allocated amongst the respective lots, based on the extent each lot draws on the particular expense item. These reports start with the premise that lot entitlements are equal and aim to calculate the differing impacts of the different lots on the expenses of the body corporate. As a result of these reports, the difference in contribution schedule lot entitlements is usually small with the differential between the lower level lot and penthouse often being less than 20%.<sup>43</sup>

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<sup>41</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2003, 311 (Steven Robertson).

<sup>42</sup> Explanatory Notes, Body Corporate and Community Management and Other Legislation Amendment Bill 2002, 18.

<sup>43</sup> Centrepoint decision, above n 24.

### 3.4. Guiding principle - relativity

Following the review of lot entitlements in 2008,<sup>44</sup> the 2011 Amendment altered the guiding principle for setting contribution schedule lot entitlements by introducing an alternative to the equality principle. The relativity principle requires that lot entitlements must clearly demonstrate the relationship between the lots by reference to relevant factors, being *only* 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.<sup>45</sup>

The relativity principle requires consideration of a number of factors to be taken into account by a developer when making the contribution schedule lot entitlements unequal. The first three relevant factors are the same as the factors required to be taken into account for the equality principle.<sup>46</sup> Therefore, the extent to which the relativity principle results in a different allocation than the equality principle in some schemes is debateable.

Irrespective of whether the equality or relativity principle is used, contribution schedule lot entitlements remain the method of calculating a lot owner's contribution to the expenses of the body corporate (both administrative fund and sinking fund).<sup>47</sup> The expenses within the administrative fund can be characterised as expenses of a recurrent nature (administration, maintenance, insurance) and the expenses within the sinking fund can be characterised as expenditure of a capital nature.

### 3.5. Criticisms of current regime for allocation of expenses

Significant criticisms of the current regime have been voiced in relation to the financial and emotional impact of allowing lot entitlements to be adjusted. These are examined in Part 4 below.

Other criticism has focused on the guiding principle for allocating expenses as inappropriate. One view has been expressed that a different approach should be taken to the sharing of expenses within the administrative and sinking funds.

The administrative fund contains an estimate for the financial year of the body corporate to meet expenses in relation to the cost of maintaining common property and body corporate assets and other expenditure of a recurrent nature. Expenditure from the administrative fund includes maintenance, cleaning, administrative expenses such as audit fees, bank charges, secretarial fees, postage and stationery. It has been suggested that these items should be shared equally as the nature and type of the lot, the size of the lot or the location of the lot in the scheme has no bearing on these types of expenses.

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<sup>44</sup> See 2008 Discussion Paper, above n 1.

<sup>45</sup> BCCM Act s 46A(2)-(3).

<sup>46</sup> Ibid s 46(9)(a)-(c), s 46A(3)(a)-(e). Section 46(9) was inserted by the 2003 Amendment (as section 44(8)).

<sup>47</sup> The only exception is in relation to insurance which may be apportioned on the basis of interest schedule lot entitlements. See above n 40.

The sinking fund contains an estimate for the financial year of the contributions required by the body corporate to meet capital expenses. It also reserves an appropriate proportionate share to meet anticipated major expenditure over the next nine years in relation to costs of a capital (or non-recurrent) nature and periodic replacement of items of a major capital nature. This non-recurrent expenditure includes painting, replacing windows and doors, replacing the roof, upgrading facilities and refurbishing common property. The argument is that these costs are, in essence, expenses of a capital nature and therefore have a direct relationship to the value of each lot and the value of each owner’s underlying interest in the scheme. As such, these costs should be tied to each lot’s interest schedule lot entitlement.

### 3.6. Options for allocating costs in a community titles scheme

As the primary role of lot entitlements is to provide a method for the sharing of expenses and liabilities within a scheme, a key issue impacting on the setting of lot entitlements is how body corporate expenses should be shared. All Australian jurisdictions use a form of lot entitlements<sup>48</sup> as the basis of sharing body corporate expenses.<sup>49</sup> **Annexure 2** provides a comparison of Australian jurisdictions. Generally, expenses may be shared in the following ways:

- equally – all lot owners pay the same regardless of the size of their lot or any other factor. Equal allocation may allow for minor variations, such as when it would not be just and equitable to charge equally;
- differentially – lot owners pay different amounts. This could be based on the value or area (floor space) of the lot;
- combined - lot owners pay for some costs equally and some costs differentially.

#### 3.6.1. Equal allocation of costs

One option is to allocate all costs equally. On this basis the contribution schedule lot entitlements would be equal except where it is just and equitable for them to be unequal. The rationale for this type of allocation is that a user pays approach is an appropriate mechanism for lot owners to pay for certain common expenses, irrespective of the value of the lot. Past experience demonstrates that under this principle most expenses are shared more or less equally, with little difference between ground floor and penthouse lots. In addition to Queensland, the Northern Territory<sup>50</sup> and Tasmania<sup>51</sup> also provide for equal sharing of expenses unless it is just and equitable for them to be unequal. Common themes from previous responses to reviews are:

Arguments in favour	Arguments against
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<sup>48</sup> Different jurisdictions use different terminology. For the purposes of this Issues Paper, we have considered only entitlements that are equivalent to the contribution schedule lot entitlement.

<sup>49</sup> In Western Australia, South Australia and the ACT, expenses are generally allocated on the basis of lot entitlements but the owners may agree on an alternative method of allocating those expenses: *Strata Titles Act 1985* (WA) s 42B; *Community Titles Act 1996* (SA) s 114(3); *Unit Titles (Management) Act 2011* (ACT) s 78(2)(b).

<sup>50</sup> *Unit Titles Schemes Act 2009* (NT) s 39(5)(a).

<sup>51</sup> *Strata Titles Act 1988* (Tas) s 16(6). Note that the wording in Tasmanian legislation refers to a ‘fair and equitable basis’.

Arguments in favour	Arguments against
Owners benefit from most body corporate services equally and those costs should be shared equally.	Equal allocation of costs assumes that each lot consumes services of the body corporate equally, which is not correct.
Owners should be expected to pay what their lot costs the body corporate. Some lot owners should not be subsidised at the expense of other lot owners.	Owners should pay for the maintenance of the common property in the same proportion as they own an undivided share in that common property. Where common property is not owned equally, the costs of maintaining that common property should not be shared equally.

### 3.6.2. Differential allocation of costs

A second option is to allocate costs to each lot differently based on a particular factor. Differential allocation of costs is the method favoured by most Australian jurisdictions and several international jurisdictions. Lot entitlements are set using the value (either site value or capital value) of the lot in New South Wales,<sup>52</sup> South Australia,<sup>53</sup> West Australia,<sup>54</sup> and the ACT.<sup>55</sup> In overseas jurisdictions such as California,<sup>56</sup> Florida<sup>57</sup> and British Columbia<sup>58</sup> lot entitlements are generally based on the floor space of a lot. The relativity principle, introduced by the 2011 Amendment, is also an example of differential allocation based on factors determined by the developer from a list of factors. The differential allocation in each jurisdiction, except Queensland, is based upon one factor, primarily either market value or area of the lot.

Where differentially allocated lot entitlements are used to determine an owner's contributions to the operating costs of the body corporate,<sup>59</sup> usually the more expensive or larger lots will pay a higher percentage of the body corporate operating and capital costs. Arguably one of the limitations of this approach is that all expenses are payable by an owner on the basis of the particular factor irrespective of the contribution of the lot to the expenditure. Common themes from previous responses to reviews are:

Arguments in favour	Arguments against
Differential allocation on the basis of value will align Queensland with the majority of other jurisdictions in Australia.	Many operating expenses are utilised equally by all lots in the scheme irrespective of the value of the lot.
Differential allocation on the basis of area would	A penthouse lot that is three times the size of a

<sup>52</sup> *Strata Schemes Management Act 1996* (NSW) s 183(3), 183(6). Although developers are not directly required to set entitlements in accordance with value for regular strata schemes (as opposed to progressively developed schemes), they may be liable for costs and overpayments if owners seek an adjustment.

<sup>53</sup> *Community Titles Act 1996* (SA) s 20 (site value); *Strata Titles Act 1988* (SA) s 6 (capital value).

<sup>54</sup> *Strata Titles Act 1985* (WA) s 14 (capital value for strata schemes and site value for survey strata schemes).

<sup>55</sup> *Unit Titles Act 2001* (ACT) s 8.

<sup>56</sup> In California, the procedure for calculating each owner's contribution of the common expenses is contained in the governing documents for the home owners association: Cal Admin Code tit. 10, § 2792.8(a)(4).

<sup>57</sup> In Florida, owner's contributions to the expenses of the body corporate are based on the floor area of the lot: XL Fla Stat § 718.104(4)(f), 718.115(2).

<sup>58</sup> *Strata Property Act*, SBC 1998, c 43, s 246.

<sup>59</sup> See above note 49. ACT, SA and WA provide that a basis other than lot entitlements may be used to allocate costs.

Arguments in favour	Arguments against
generally mean that more expensive lots pay a larger share of the common expenses.	ground floor lot does not use three times the services of the body corporate.
Differential allocation on the basis of relativity provides flexibility for developers to decide on a basis for allocation of expenses that suits the particular development, including in relation to market value.	Explanation of the factors <sup>60</sup> used under the relativity principle may be inadequate to explain how those factors were used to calculate lot entitlements.  Applying different combinations of factors to determine lots entitlements leads to confusion, lacks certainty and adds to red tape.
The 'Australian' view of fairness, entrenched in Australia's taxation system, is that wealthier people in the community carry a greater amount of community expenses. Applying this principle, lot entitlements should be set on lot value, which usually reflects an ability to pay.	Body corporate expenses are not in the nature of taxes for community services but are shared expenses entered into by private citizens.  Lot value is not necessarily reflective of an owner's ability to pay.  Owner-occupiers often purchase slightly larger lots to live in and may undertake significant borrowing to do so, whereas smaller lots are often purchased by investors for use as rental properties.

### 3.6.3. Combined (equal and differential) allocation of costs

The third option is to allocate costs on the basis of a hybrid model using a combination of equal and differential allocation depending on the nature of the expense. Particular costs, such as the cost of running the swimming pool or maintaining the common gardens would be difficult, if not impossible, to allocate differentially. The different impact of individual lots on expenditure for these items is usually negligible and the application of complicated formulas to create differential lot entitlements is arguably not cost effective. Usually these expenses are found in the administrative budget and are in the nature of operational or day to day expenses of the body corporate. This may be contrasted with expenses such as painting the building, replacing lifts and improvements to the common property all of which are capital in nature and paid from the sinking fund. Arguably there is a connection between this type of expenditure and an improvement in or enhancement to the value of a lot in the building. As a lot owner benefits from this expenditure relative to the current value of their lot there is a reasonable argument that expenditure from the sinking fund or expenditure of a capital nature should be paid by owners relative to value.

A simple method for allocating costs using this methodology would be for lot owners to contribute to the administrative fund on the basis of contribution schedule lot entitlements, which are equal and to the sinking fund on the basis of interest schedule lot entitlements (based on market value).

<sup>60</sup> A CMS that uses the relativity principle to allocate contribution schedule lot entitlements must contain a simple statement, in plain English, giving sufficient details about the principle to show how the lot entitlements for the lots were decided by using it: BCCM Act ss 66(1)(db)(iii), 66(1A).

On the basis that expenses within the administrative fund are largely recurrent expenditure, not directly impacted by the use or size of a lot, the contribution schedule lot entitlements could be equal except for adjustments required to the lot entitlement where the use of the lot creates additional expense for the body corporate (such as window cleaning where the lot has more windows than other lots). Expenses from the sinking fund are generally of a capital nature. Requiring contribution to those expenses on the basis of the market value of the lot is justifiable on the basis that the interest schedule lot entitlement represents the proportion of the value of the assets attributed to a lot upon a termination of the scheme. A lot owner therefore benefits from improvement or replacement of those items in the same proportion. Under this type of allocation, lot owners would pay for most maintenance costs equally but would pay for improvements or renewals of the common property in the same proportion as their interest in the common property. However this may have the unintended effect of making the adjustment of interest schedule lot entitlements more controversial than is currently the case.

Common themes from previous responses to reviews are:

Arguments in favour	Arguments against
Owners should pay for improvements to common property in the same proportion as they own an undivided share in that common property. Where common property is not owned equally, the costs of improving or renewing that common property should not be shared equally.	All owners benefit from improvements to the common property regardless of how that common property is owned.
Allocating some costs equally and some costs differentially better reflects the benefits received by owners of lots for different types of expenditure.	Lot owners should pay for all expenditure on the basis of value as maintenance and improvements benefit more expensive lots more than cheaper lots.
Having equal contribution to the administrative fund and differential contribution for the sinking fund makes it easier to administer scheme expenses.	Allocating some costs equally and some costs differentially could lead to errors in calculating expenses and levying contributions.

### Questions

1. **Should lot entitlements continue to be used to determine a lot owner’s contribution to body corporate expenses and liabilities? If no, what other method should be used to allocate expenses within a body corporate?**
  
2. **What is the most appropriate method for the sharing of expenses within a scheme and why?**
  - a. **Equal contribution to all expenses;**
  - b. **Differential contribution (e.g. value or area of the lot);**



- c. A combination of equal and differential contribution depending upon the nature of the expense; or
  - d. Another method?
- 3. If body corporate expenses are shared equally should there be an ability for a developer to set lot entitlements having regard to just and equitable factors? If yes, what factors should be taken into account when deciding on the contribution schedule lot entitlements?
- 4. If expenses are shared on a differential basis according to contribution schedule lot entitlements, should the Act: (indicate preference)
  - a. Specify the factors that *must* be used to determine lot entitlements (e.g. area of the lot, level in the building, use of the lot, market value or some other factor)? Should there only be one factor?
  - b. Specify the factors that *may* be used to determine lot entitlements? (This would be an exhaustive list).
  - c. Allow a developer to choose any factor provided the basis for calculation is specified in the community management statement? Should the developer be required to explain the basis using a clear formula/example (e.g. Base lot entitlement of 100 and adjusted for water front + 20; park frontage +10; main road -10)?
- 5. If a differential basis using market value is used, is there a need to retain two types of lot entitlements (i.e. contribution and interest) for each lot?
- 6. If expenses are shared on a differential basis is there a need to retain the equality principle as an option for setting contribution schedule lot entitlements?
- 7. Do you support a model where lot owners contribute differently to recurrent expenditure and capital expenditure?
  - a. Option 1 – equal contribution to administrative fund and market value to sinking fund ;
  - b. Option 2 – specified factor (e.g. area, use of lot, level in building) for administrative fund and market value for sinking fund.

**c. If you do not agree, do you have a different suggestion?**

**8. Are there any models of best practice for setting lot entitlements, not identified above, which this review should consider?**

**9. What is the best way to educate prospective purchasers and lot owners about lot entitlements and the circumstances under which lot entitlements may change?**

### **3.7. Mixed use schemes**

Any change to the method of setting lot entitlements must also consider schemes that contain a combination of residential, commercial or retail lots, known as mixed use schemes. Cost sharing in mixed used schemes may be controversial as, for example, residential and commercial lots create costs and utilise services of the body corporate in different ways. The equality principle may treat all lots the same, even if commercial or retail lot owners do not make use of the shared facilities (such as lifts, pools, etc) to the same extent as residential lots. It has been suggested that using value to set lot entitlements for mixed use schemes is inappropriate as commercial and residential lots are valued in different ways.

Clearly, the BCCM Act was designed to have the flexibility to apply to mixed use schemes. The Explanatory Notes for the Bill that would become the 2003 Amendment provided that it may be just and equitable for contribution schedule lot entitlements not to be equal where residential and business lots exist in the one scheme.<sup>61</sup> Prior to the 2011 Amendment, the BCCM Act itself had a similar example, referring to a layered scheme where the lots have different uses (including for example car parking, commercial, hotel and residential uses).<sup>62</sup>

It is becoming common for developers to by-pass the BCCM Act when allocating common expenses among different lots in a mixed used scheme. For example, developers often use volumetric subdivisions and a building management statement (**BMS**)<sup>63</sup> to share costs. In this way, the retail, residential and commercial sections of a building may each be a separate scheme or lot and common costs and responsibility for shared facilities between the schemes will be regulated through the mechanism set out in the BMS. This type of arrangement may solve some problems in relation to allocation of costs but it may also create a range of other problems that cannot be easily solved within the current legal framework.<sup>64</sup>

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<sup>61</sup> Explanatory Notes, Body Corporate and Community Management and Other Legislation Amendment Bill 2002, 18.

<sup>62</sup> See BCCM Act s 46 (reprint no 2). This example was inserted by the 2003 Amendment and removed by the 2011 Amendment.

<sup>63</sup> See *Land Title Act 1994* (Qld), part 4 division 4.

<sup>64</sup> For discussion of the issues associated with using a BMS to regulate mixed used developments, see Cathy Sherry, 'Building Management Statements and Strata Management Statements: Unholy Mixing of Contract and Property' (2013) 87 *Australian Law Journal* 393.

For older schemes where a BMS structure has not been used problems remain in relation to contributions between residential and retail lots within the one scheme.

### **Questions**

- 10. Should different principles to those discussed above, apply to different types of schemes (e.g. single scheme, layered scheme, mixed use schemes, two lot schemes, hotel style schemes) in relation to the setting and use of lot entitlements?**
- 11. Is there more justification for allowing greater flexibility in the setting of lot entitlements or the allocation of expenses in a mixed use or progressively developed scheme?**
- 12. What, in your view, is the most appropriate method for the allocation of expenses within a mixed use scheme where residential, retail or commercial lots are within the same scheme? Are there any examples of best practice?**
- 13. What in your view is the most appropriate method for the allocation of expenses within a mixed use scheme where residential, retail or commercial lots are within different schemes or volumetric lots within a layered or other type of scheme? Are there any examples of best practice?**
- 14. In your experience, what are the benefits of using building management statements to allocate costs between residential and commercial or retail lots in a mixed use development?**
- 15. Is there a need for a different method of allocation of expenses within complex mixed use schemes other than via a community management or building management statement?**

### **3.8. Who should set lot entitlements?**

In Queensland, as in most jurisdictions, lot entitlements are initially set by the developer or original owner of the scheme when the CTS is created or registered. Lot owners do not have input into the process of setting lot entitlements. Currently lot owners for post April 2011 schemes can challenge whether lot entitlements are determined in accordance with the deciding principle stated in the CMS, but there is no ability to challenge the deciding principle itself and obtain an allocation on a different basis. Even before the 2011 Amendment any adjustment of lot entitlements was required to be in accordance with the equality principle.

### 3.8.1. Direct approach – approval by government body

In some international jurisdictions, developers set lot entitlements, but these must be approved by a government body as appropriate or consistent with certain principles. In Singapore, this is done by the Commissioner for Buildings.<sup>65</sup> In British Columbia, Canada, this may be done by the Superintendent of Real Estate<sup>66</sup> in some situations. In the ACT, the planning and land authority has discretion to reject an application to register a scheme on a number of grounds, including if the lot entitlements are unreasonable.<sup>67</sup>

### 3.8.2. Independent certification

It should be noted that if a government body was required to approve lot entitlements prior to registration of a CTS, this could result in significant delay to registration of schemes and may create other difficulties. An alternative approach is to use independent certification by a qualified specialist. In Western Australia, for example, where lot entitlements are based on value, a certificate of a licensed valuer is required to be submitted with the documents to register a scheme certifying that the allocation of lot entitlements to each lot reflects the value of the lots.<sup>68</sup>

A similar approach could be implemented in Queensland using accredited specialists to set lot entitlements using a report drafted in a prescribed form. Developers could engage these specialists to produce the report, which would be submitted with the other material required for registration of the CTS.

### 3.8.3. Indirect approach – liability if principles are not followed

NSW uses an indirect approach to ensure compliance with relevant principles when lot entitlements are set. In NSW, there is no requirement for setting lot entitlements for standard schemes<sup>69</sup> but developers who allocate lot entitlements unreasonably and not in accordance with the valuation of a qualified valuer may become liable to pay the costs of owners seeking an adjustment and may also be liable for any amounts overpaid by a body corporate or owners of a lot.<sup>70</sup> Thus, indirectly, developers are encouraged to allocate lot entitlements on the basis of a valuation by a qualified

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<sup>65</sup> *Building Maintenance and Strata Management Act* (Singapore, cap 30C, 2008 rev ed) s 11. Singapore uses a 'just and equitable' test but has guidelines that interpret this to mean an allocation based on perceived usage of common facilities as reflected by floor area. See Building and Construction Authority, Singapore, *Strata Living in Singapore: A General Guide* (2005), 4, <[http://www.bca.gov.sg/bmsm/others/strata\\_living.pdf](http://www.bca.gov.sg/bmsm/others/strata_living.pdf)>.

<sup>66</sup> Developers may set the lot entitlements by area, equally or using a number that is approved by the Superintendent: *Strata Property Act*, SBC 1998, c 43, s 246. See also Province of British Columbia, *Guide 19: How to Alter Unit Entitlement*, Office of Housing and Construction Standards, 1, <<http://www.housing.gov.bc.ca/pub/stratapdf/Guide19.pdf>>.

<sup>67</sup> *Unit Titles Act 2001* (ACT), s 20(1)(c).

<sup>68</sup> *Strata Titles Act 1985* (WA) s 14(2).

<sup>69</sup> *Strata Schemes (Freehold Development) Act 1973* (NSW) s 8(4); *Strata Schemes (Leasehold Development) 1986* (NSW) s 7(2C). However, see New South Wales Government, Office of Fair Trading, *Strata Title Law Reform: Strata & Community Title Law Reform Position Paper*, (2013), 29, (**Position Paper**) <[http://www.fairtrading.nsw.gov.au/biz\\_res/ftweb/pdfs/About\\_us/Have\\_your\\_say/Strata\\_title\\_law\\_reform\\_position\\_paper.pdf](http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Have_your_say/Strata_title_law_reform_position_paper.pdf)>.

<sup>70</sup> *Strata Schemes Management Act 1996* (NSW) s 183(6).

valuer in order to avoid being liable to lot owners and the body corporate at some date after the scheme is registered. The relevant provisions in NSW are set out in Annexure 2.

### **Questions**

- 16. Do you think that developers should be responsible for setting lot entitlements when establishing new schemes? Why or why not?**
  
- 17. What supporting information should be required when registering a scheme (e.g. if lot entitlements are based on value, should the developer be required to include a valuation by a qualified valuer)?**
  
- 18. What input should lot owners have to the setting of lot entitlements? Should there be a right for a majority of owners to challenge the basis upon which lot entitlements are allocated? If yes, on what basis should they be challenged (e.g. unreasonable, inequitable, special resolution / without dissent / unanimous)? What principles or criteria could a court use to determine the new allocation?**
  
- 19. Should the government or another body approve lot entitlements when registering schemes? Should there be discretion to reject an application for a scheme if the lot entitlements have not been set appropriately or they are unreasonable?**
  
- 20. Is there some other suitably qualified specialist that could be accredited by the government to evaluate lot entitlements and be required to certify that lot entitlements for new developments have been set in accordance with the required legislative principles?**
  
- 21. Should there be penalties or sanctions for developers who allocate lot entitlements unreasonably and in ways that do not accord with legislative principles?**

## 4. Issue - Adjustment of lot entitlements

The circumstances in which adjustment of lot entitlements can occur and the principles governing adjustment have caused significant controversy over the last 10 years. Comments and feedback provided in response to the 2008 review and the 2011 and 2013 Amendments highlight a number of significant problems arising from the ability of a minority of lot owners to force a review of lot entitlements for the scheme. Common themes from previous responses are:

Arguments in favour of adjustment	Arguments against adjustment
Adjustments allow owners to correct abuses of the past caused by developers when setting lot entitlements.	Adjustments allow wealthy penthouse owners to decrease their contributions to common expenses of the body corporate while struggling pensioners occupying smaller lots have seen an increase.
. Owners who have sought an adjustment order have done nothing more than exercise a legal right.	Adjustments result in some owners contributing significantly more and other owners contributing significantly less, to the common expenses than prior to the adjustment
Where a situation is unfair, a remedy should be possible.	If someone purchases a lot knowing its lot entitlements, then they should not have a right to seek an adjustment after the fact.

This part of the Issues Paper addresses issues related to the adjustment of lot entitlements in three sections.

Section **4.1** considers new schemes, being those schemes established after commencement of any new statutory requirements for the setting of contribution schedule lot entitlements recommended by this review (**new schemes**). Section **4.1** considers issues which may arise if the Government decides to adopt new statutory requirements for setting lot entitlements for new schemes and how those new statutory requirements may deal with the issue of adjustment of lot entitlements for new schemes.

Section **4.2** considers existing schemes, being those schemes currently in operation or which are established prior to the commencement of any new statutory principles (**existing schemes**). Section **4.2** examines the complex issue of whether, and if so, upon what basis, existing schemes should be able to adjust lot entitlements if the Government decides to adopt new statutory requirements for setting lot entitlements for new schemes.

Section **4.3** considers the adjustment of lot entitlements for existing schemes if the Government does not decide to adopt new statutory requirements for setting lot entitlements following this review.

## 4.1. Adjustment of new schemes (created after commencement of new provisions)

The 2011 Amendment to the BCCM Act reduced the ways in which lot entitlements within a scheme may be adjusted. The issues for consideration in this part are:

- a. If new principles for setting contribution schedule lot entitlements are supported by this review, is there a need to provide a right for lot owners to obtain an adjustment of lot entitlements for a new scheme from a tribunal or court;
- b. If the right to a review or adjustment by a court is provided by the Act, what process should be recommended; and
- c. Whether there are other appropriate mechanisms for adjustment or review of lot entitlements that should be maintained or introduced.

### 4.1.1. Are adjustments necessary for new schemes?

If new principles for setting contribution schedule lot entitlements are supported by this review, is there a need to provide a right for lot owners to obtain an adjustment of lot entitlements for a new scheme from a tribunal or court? Assuming that lot entitlements for new schemes continue to be set by developers according to clear and equitable principles and the lot entitlements and the basis for their allocation are made clear to a purchaser at the time of contract, is there a need for a lot owner or body corporate to have a right to apply to a court or tribunal for an adjustment? Many jurisdictions both in Australia and overseas allow adjustment of lot entitlements only in very limited circumstances.

One alternative to an open right to review is to limit the right to apply to a court or tribunal to where the lot entitlements are manifestly unfair, unreasonable or if circumstances substantially change. NSW legislation provides that lot entitlements may be adjusted if they have been set unreasonably or become unreasonable due to other changes.<sup>71</sup> Legislation in California has a similar restriction.<sup>72</sup> In Tasmania, lot entitlements may be adjusted if they have been fixed on a basis that is not fair and equitable.<sup>73</sup> In Singapore, once set, the schedule of lot entitlements cannot change except in very limited circumstances (to correct an error, or with the consent of the owner).<sup>74</sup> The table below sets out the adjustment mechanisms in selected jurisdictions.

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<sup>71</sup> Ibid s 183(2).

<sup>72</sup> California Civil Code § 1354 provides that the governing documents (which create the scheme and provide for the allocation of costs) are enforceable 'unless unreasonable'. Note, from 1 January 2014, the California body corporate law will be replaced with updated and re-organised provisions. § 1354 will be contained in California AB 805 Common Interest Developments (**AB 805**) at § 5975. For an example of what may be reasonable, see *Cebular v Cooper Arms Homeowners Association* 142 Cal App 4<sup>th</sup> 106 (a stock company building was converted to units and each assigned 1 vote per share in the stock company. Levies were assessed on the number of votes a unit had (more votes = higher percentage of the common expenses). The court held this was not unreasonable and did not reallocate each unit's votes).

<sup>73</sup> *Strata Titles Act 1998* (Tas) s 16(6). However, see *CR and CG Cooper Strata Title Act [2005] TASRMPAT 250* (8 November 2005) for a description of fair and equitable (adjustment of unit entitlements to maintain proportional relationship between lot 2 on the one hand, and whatever combination of lots ensued from lot 1 on the other is not other than fair and equitable).

<sup>74</sup> *Building Maintenance and Strata Management Act* (Singapore, cap 30C, 2008 rev ed) ss 11 and 62.

## ADJUSTMENT MECHANISMS IN SELECT JURISDICTIONS

Jurisdiction	Unit of assessment	Setting	Adjustment
<b>New South Wales</b>	<b>Unit entitlement</b> determines payment of contributions. <sup>75</sup>	For staged schemes, unit entitlements must be based on valuation by a qualified valuer.  No guidance for usual schemes, but developer may be liable for costs and overpayments if allocations are unreasonable and not based on a valuation. <sup>76</sup>	Application to Tribunal where lot entitlements were <b><i>unreasonable</i></b> when set, or became unreasonable at the end of a development scheme or from a change in permitted land use. Tribunal must have regard to respective value of the lots. <sup>77</sup>
<b>Victoria</b>	<b>Lot liability</b> determines payment of contributions. <sup>78</sup>	No guidance is provided for setting lot entitlements in the legislation.	On application to a tribunal supported by a unanimous resolution of the owners corporation, having regard to the lot value. <sup>79</sup>
<b>Singapore</b>	<b>Share value</b> determines amount of contributions that may be levied against the lot. <sup>80</sup>	Share value must be approved by the Commissioner of Buildings and is set based on floor area of the lot.	Adjustment is not allowed, except: to correct an error; if the value has been fraudulently assigned; for subdivision or amalgamation of lots; or with the consent of the owner.
<b>British Columbia</b>	<b>Unit entitlement</b> determines share of expenses. <sup>81</sup>	Unit entitlement is set: on habitable area; equally for all lots; or by approval of the superintendent.	Owner can seek adjustment only if unit entitlements are set based on habitable area and do not reflect the actual habitable area. <sup>82</sup>

It has been argued that there should not be a right to adjust lot entitlements in Queensland unless there are material changes to the scheme. According to this view, prospective purchasers should investigate lot entitlements and the allocation of costs as part of their due diligence before purchasing a lot in a scheme. Those who purchase a lot with knowledge that costs are not equally divided in the scheme cannot complain after purchasing. An adjustment may negatively impact an owner who purchased a lot based on carefully budgeted contribution levels and may affect a lot's capital value.

<sup>75</sup> *Strata Schemes Management Act 1996* (NSW) s 78. Unit entitlements also determine beneficial interest in the common property and the value of a vote for a poll.

<sup>76</sup> *Ibid* s 183(6). But see Position Paper, above n 69.

<sup>77</sup> *Strata Schemes Management Act 1996* (NSW) s 183.

<sup>78</sup> *Subdivision Act 1988* (Vic) section 3 (definition of 'lot liability').

<sup>79</sup> *Ibid* section 33.

<sup>80</sup> *Building Maintenance and Strata Management Act* (Singapore, cap 30C, 2008 rev ed) s 62. Share value also determines voting rights and undivided share of the common property.

<sup>81</sup> *Strata Property Act*, SBC 1998, c 43, s 1. Unit entitlement also determines share of the common property, assets and liabilities.

<sup>82</sup> *Ibid* s 246(7).



## Questions

**22. Should bodies corporate of new schemes have the right to adjust contribution schedule lot entitlements after establishment of the scheme?**

**23. If yes, should there be any limits on when adjustments may be made (e.g. only to correct errors, or when there is a substantial change to the scheme)?**

### 4.1.2. Should existing mechanisms be retained for new schemes?

The ability to adjust lot entitlements is one way that the BCCM Act facilitates its primary objective, which is to provide for flexible and contemporary communally based living arrangements.<sup>83</sup> Under the current legislation, lot entitlements can be adjusted in a number of ways.

#### 4.1.2.1. Resolution without dissent

Contribution schedule lot entitlements may currently be adjusted by a resolution without dissent.<sup>84</sup> The notice of the meeting where the resolution is to be voted on must comply with procedural requirements<sup>85</sup> and the changed contribution schedule must be consistent with the equality principle, the relativity principle or the deciding principle for the existing contribution schedule.<sup>86</sup>

It has been suggested that achieving a resolution without dissent to adjust lot entitlements is virtually impossible. Lot owners are unlikely to support a motion which will increase their costs, even if the resolution would achieve a fairer allocation of costs. It has been suggested that the threshold be lowered so that a special resolution<sup>87</sup> would be sufficient to pass a motion adjusting contribution schedule lot entitlements.

#### 4.1.2.2. Written agreement

Two or more lot owners may agree in writing<sup>88</sup> to redistribute their lot entitlements amongst themselves, provided the total lot entitlements of the two (or more) lots are not affected.

## Questions

**24. Do you agree that for new schemes the power to adjust contribution schedule lot**

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<sup>83</sup> BCCM Act s 2.

<sup>84</sup> Ibid s 47A. A motion is passed by a resolution without dissent if no vote is counted against the motion: BCCM Act s 105.

<sup>85</sup> Ibid s 47A(2).

<sup>86</sup> Ibid s 47A(3) to (4).

<sup>87</sup> Ibid s 106. A special resolution requires: 1) at least 2/3rds of votes cast are in favour of the resolution; 2) no more than 25% of the lots in the scheme vote against the resolution; and 3) the lots voting against the resolution do not have more than 25% of the total contribution schedule lot entitlements for the scheme.

<sup>88</sup> Ibid s 50.

**entitlements by resolution and by written agreement between lot owners should be retained?**

**25. Should the voting threshold for a resolution to adjust contribution schedule lot entitlements require a resolution without dissent, a special resolution or some other percentage in order to be passed by a body corporate?**

#### **4.1.2.3. Adjustment by tribunal or specialist adjudicator**

Currently, a lot owner may seek an adjustment order for the contribution schedule lot entitlements from a specialist adjudicator or QCAT only in specific situations, such as after a resolution without dissent,<sup>89</sup> a material change<sup>90</sup> or a formal acquisition.<sup>91</sup> For schemes established after 14 April 2011 (which have not had an adjustment order following a resolution without dissent), the owner may apply for an adjustment order if the owner believes the contribution schedule lot entitlements do not comply with the relevant deciding principle as explained in the CMS.<sup>92</sup> Schemes established before 14 April 2011 are currently unable to apply for a review and adjustment of their contribution schedule lot entitlements. Application of the current provision to those schemes is difficult because there is no overt deciding principle stated in the CMS.

<b>Arguments in favour of tribunal or specialist adjudicator adjustment</b>	<b>Arguments against tribunal or specialist adjudicator adjustment</b>
The ability to seek adjustment allows the BCCM Act to achieve its primary objective which is to provide for flexible and contemporary communally based arrangements for the use of freehold land.	An owner who bought a lot knowing the allocation of costs in the scheme was not equal should not be able to change the allocation after the fact.
Where lot entitlements are unfair, a remedy should be possible.	Adjustment creates uncertainty for owners who purchased a lot on the basis of a budget for the amount of contributions.

#### **Questions**

**26. Do you think that the current limited rights of a lot owner to seek an adjustment order by a specialist adjudicator or QCAT should be retained?**

**27. If the right to seek an adjustment order is retained, on what basis should a lot owner or the body corporate be able to seek an order? Should the order be limited to whether the**

<sup>89</sup> Ibid s 47AA.

<sup>90</sup> Ibid s 47B(1); Schedule 6 (definition of 'material change').

<sup>91</sup> Ibid s 47B(2A); Schedule 6 (definition of 'formal acquisition').

<sup>92</sup> Ibid s 47B(2).

**deciding principle was correctly applied or the allocation of lot entitlements is manifestly unreasonable?**

### 4.1.3. Material change or resumption

The owner of a lot may apply to a specialist adjudicator or QCAT for an adjustment order if:

- the scheme is affected by a material change<sup>93</sup> since the last time the contribution schedule lot entitlements were decided; and
- the owner believes an adjustment to the contribution schedule is necessary because of the material change;

or

- the contribution schedule lot entitlement is affected because of a formal acquisition or resumption<sup>94</sup> affecting the scheme; and
- the owner does not believe the changed contribution schedule is consistent with the relevant principles.

‘Material change’ is defined as a change that has or may have a significant effect on the contribution schedule lot entitlements such as the addition or removal of one or more lots. However, the definition excludes addition or removal as a result of subdivision, amalgamation or a progressively developed scheme. Decisions by QCAT have found that a material change must be in the nature of a physical change to the scheme such as irreversible damage to a seaside lot by marine erosion or storm damage not economically or readily remediable.<sup>95</sup>

‘Formal acquisition’ means an acquisition made under the *Acquisition of Land Act 1967* (Qld). BCCM Act section 51 details the process that must be taken before lot entitlements can change as the result of a formal acquisition.

Arguments in favour	Arguments against
Adjustments for material changes and resumptions protect important individual property rights.	Adjustment creates uncertainty for owners who purchased a lot on the basis of a budget for the amount of contributions.

### Questions

**28. Do you agree that for new schemes a tribunal or court should be able to adjust lot entitlements where there is a material change or resumption?**

<sup>93</sup> Ibid s 47B(1).

<sup>94</sup> Ibid s 47B(2A).

<sup>95</sup> See *Heaton v Body Corporate for ‘Windsong Apartments’ CTS 31804* [2012] QCAT 45, [9]. Although this decision related to the term in the context of BCCM Act section 384, the decision was followed in *Moses v Body Corporate for Rhode Island Community Titles Scheme 20573* [2012] QCAT 322, [31].

**29. If yes, should one lot owner be able to instigate such a review? Should an ordinary resolution be required to support the application for a review?**

**30. Should the definition of material change be limited to physical changes to the scheme? Should the definition provide examples of material changes? What should those examples be?**

#### **4.1.4. Adjustment of lot entitlements for subdivisions and amalgamations**

Prior to 2011, the BCCM Act was silent as to how subdivisions and amalgamations were treated. With the 2011 Amendment, the legislation changed to require that the total lot entitlements for a scheme are not affected by subdivision or amalgamation.

##### **4.1.4.1. Amalgamation**

For amalgamated lots, the new lot entitlement is the total of the lot entitlements of the pre-amalgamation lots.<sup>96</sup> It has been suggested that prior to 2011, lot owners would amalgamate two or more lots in a scheme and then seek an adjustment order. The adjustment order would then re-allocate lot entitlements on the basis of the equality principle with costs now divided among fewer lots, meaning an overall increase in lot entitlements (and thus contributions) for most lot owners. In some cases, these newly amalgamated lots would continue to be used as separate premises and it was perceived that some owners were gaining a financial windfall at the expense of other owners in the scheme.

##### **4.1.4.2. Subdivision**

Currently, the BCCM Act provides that subdivided lots must split the lot entitlements of the pre-subdivision lot amongst the new lots (**post-subdivision lots**).<sup>97</sup> The owners of the post-subdivision lots must allocate lot entitlements among the post-subdivision lots consistently with the deciding principle for the scheme, or where there is no deciding principle, on the basis of market value.<sup>98</sup>

This may create an imbalance between the allocation of lot entitlements for the post-subdivision lots as compared to the other lots in the scheme. For example, if the deciding principle is equality the lot entitlements for the post-subdivision lots will be allocated by equally dividing the existing lot entitlement for the pre-subdivision lot. As compared to other lots in the scheme, however, the lot entitlements will not be equal.

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<sup>96</sup> BCCM Act s 51C(2).

<sup>97</sup> Ibid s 51B.

<sup>98</sup> Ibid s 51B(3).

## Questions

- 31. Do you agree that new schemes should retain the current provisions relating to lot entitlements for amalgamated and subdivided lots? If not, how should lot amalgamations and subdivisions be treated if lot entitlements are to be adjusted?**
- 32. If the current provisions are not retained for new schemes,**
- a. **Should the lot entitlements for all lots in the scheme be adjusted following an amalgamation or a subdivision?**
  - b. **Should the owner of an amalgamated lot be able to equalise their lot entitlements with other lots in the scheme by way of an adjustment order?**
  - c. **Should sub-divided lots be allocated lot entitlements equally to other lots in the scheme on an adjustment order?**
- 33. Is there a better way for lot entitlements to be allocated to post-subdivision lots?**
- 34. Should a specialist adjudicator or QCAT be required to consider whether a lot has been amalgamated or subdivided when making an adjustment order for new schemes?**
- 35. Should adjustment orders consider whether amalgamated lots are being used as separate residences?**

### **4.1.5. Additional mechanisms that may be appropriate**

The comparative survey of relevant legislation in Australian states and territories (see **Annexure 2**) demonstrates that there are a number of mechanisms which currently exist in other jurisdictions that may be appropriate to introduce in Queensland. These mechanisms include:

- Limiting the financial impact of increases in body corporate fees;
- Considering a lot owner's knowledge in relation to the allocation of expenses in a scheme;
- Providing for alternative methods of allocating expenses; and
- Requiring registered interest holders to consent to adjustment of lot entitlements.

### Question

**36. In addition to the mechanisms discussed, are there any additional mechanisms that may be appropriate or desirable in relation to setting and adjusting lot entitlements?**

#### 4.1.5.1. Financial impact

Adjustment orders are often criticised because some lot owners can see their contributions double while others may see their costs cut in half. Courts, specialist adjudicators and QCAT do not consider the financial impact an adjustment order may have on a particular lot owner when reallocating lot entitlements. It has been suggested that the financial impact should be a relevant consideration and the legislation should limit any increase in lot entitlements to a capped percentage. This would mean that lot owners would be unlikely to see large increases in their contribution levels as the result of an adjustment order.

In California, for example, the law provides that a body corporate cannot, without the consent of the owners, increase levies by more than 20% over the previous year.<sup>99</sup> An analogous provision in Queensland could provide that following an adjustment order by a tribunal or specialist adjudicator, an individual lot's contribution schedule lot entitlement could not increase by more than a set percentage.

### Question

**37. If adjustment orders are allowed, should the legislation limit the impact that an adjustment order would have on particular lot owner's lot entitlement, for example by stipulating that a lot owner's contribution schedule lot entitlements cannot increase by more than a certain percentage as the result of an adjustment order?**

#### 4.1.5.2. Knowledge of lot entitlements at time of purchase

It has been suggested that a person's knowledge at the time they purchased the lot should be a relevant factor when making an adjustment order. The current amount of annual contributions payable by the owner of a lot is disclosed at the time of purchase of a lot in the disclosure statement required by the BCCM Act.<sup>100</sup> The CMS, which contains the information about lot entitlements, is available to prospective purchasers of existing lots through a search of the Land Registry and is required to be included in the disclosure statement for the purchase of a proposed lot.<sup>101</sup> A buyer

<sup>99</sup> California Civil Code § 1366(b). See above note 72. AB 805 contains an equivalent provision at § 5605(b).

<sup>100</sup> BCCM Act s 206(2)(b).

<sup>101</sup> Following the 2011 Amendment, the seller of a lot in a scheme was required to provide the purchaser with a copy of the CMS for the scheme. This requirement was removed by the 2013 Amendment, although a CMS must still be provided for a proposed lot: BCCM Act s 213(2)(e)(i).

should be assumed to have made an informed decision to purchase on the basis of the existing entitlements. Under the Centrepont decision, specialist adjudicators and QCAT are prevented from considering what an owner knew about the lot entitlements for a scheme at the time that owner purchased the lot.<sup>102</sup>

### **Question**

**38. Should specialist adjudicators and QCAT be able to consider what a person knew about the lot entitlements in a scheme at the time that person purchased the lot (i.e. if the person purchased the lot with actual or deemed knowledge that the lot entitlements were not equal, should that person have a right to seek an adjustment order)?**

#### **4.1.5.3. Voting for alternative method of allocating expenses**

In Western Australia,<sup>103</sup> South Australia<sup>104</sup> and the ACT,<sup>105</sup> expenses are generally allocated on the basis of lot entitlements. However, owners in those schemes may agree on an alternative method of allocating the body corporate expenses by a resolution or a by-law.

### **Question**

**39. Should new schemes be able to decide a different method of allocating all or some costs by passing a resolution or a by-law? If no agreement can be reached, should there be a right to apply to a court or tribunal to resolve the allocation of lot entitlements?**

#### **4.1.5.4. Consent of registered mortgagees**

It has been suggested that changes to lot entitlements can have an impact on the market value of a lot. In some jurisdictions,<sup>106</sup> a motion by the body corporate to adjust lot entitlements requires the consent of registered mortgagees and other parties that may have an interest in the lot. In Queensland, a registered mortgagee's consent is required only where lot entitlements are adjusted by an agreement in writing between two or more lot owners.<sup>107</sup>

### **Questions**

**40. Should a motion of the body corporate to adjust contribution schedule lot entitlements require the consent of registered mortgagees and other parties that have a registered**

<sup>102</sup> BCCM Act s 49(5).

<sup>103</sup> *Strata Titles Act 1985* (WA) s 42B.

<sup>104</sup> *Community Titles Act 1996* (SA) s 114(3).

<sup>105</sup> *Unit Titles (Management) Act 2011* (ACT) s 78(2)(b).

<sup>106</sup> See, for example, *Strata Titles Act 1985* (WA) s 15(2)(b); *Community Titles Act 1996* (SA) s 21(4)(c); *Strata Titles Act 1988* (SA) s 12(3)(e).

<sup>107</sup> BCCM Act s 50(1)(c).

interest in the lot?

**41. Should registered mortgagees and other parties that have a registered interest in the lot have any rights at all in relation to adjustments of lot entitlements?**

#### 4.1.5.5. Progressively developed schemes

The number of lots in a scheme may be increased through progressive subdivision of an existing lot.<sup>108</sup> The CMS for a progressively developed scheme must include an explanation of the proposed development including illustrative drawings and details of any future allocation of common property or body corporate assets under an exclusive use by-law.<sup>109</sup>

When the plan of subdivision for a further stage is lodged, it must be accompanied by a request to record a new CMS.<sup>110</sup> The new CMS may re-allocate contribution schedule lot entitlements among the existing lots and the proposed lots. The body corporate must consent to the recording of the new CMS,<sup>111</sup> and existing lot owners have little recourse to object to the re-allocation even if the new CMS significantly changes the existing allocation.

While progressively developed schemes may strive to achieve an allocation of contribution schedule lot entitlements that complies with the relevant contribution schedule upon completion of the final stage, it may be that the allocation at various stages prior to final completion does not comply with the relevant principle. The legislation provides little guidance as to how lot entitlements are to be re-allocated within an existing scheme at the completion of each stage of the development. There may be a need for greater legislative certainty in relation to such re-allocation when the new CMS is recorded.

In NSW, for example, for a progressively developed scheme, the developer must set lot entitlements in accordance with market value.<sup>112</sup> The lot entitlements can be adjusted by a tribunal if they become unreasonable as the result of a completion of a staged development.<sup>113</sup> Developers may be liable for costs if lot entitlements are set unreasonably and without reference a valuation of a qualified valuer.<sup>114</sup>

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<sup>108</sup> Ibid s 28. See also *Land Title Act 1994* (Qld) part 6A.

<sup>109</sup> BCCM Act s 66(1)(f).

<sup>110</sup> Ibid s 56.

<sup>111</sup> Ibid s 57(6).

<sup>112</sup> *Strata Schemes (Freehold Development) Act 1973* (NSW) s 8(4A); *Strata Schemes (Leasehold Development) 1986* (NSW) s 7(2CA).

<sup>113</sup> *Strata Schemes Management Act 1996* (NSW) s 183(2).

<sup>114</sup> Ibid s 183(6).



## Questions

**42. Should the legislation provide specific provisions in relation to the re-allocation of lot entitlements on the completion of a stage of development in progressively developed schemes? What are the problems in practice?**

**43. Should developers be liable for costs if lot entitlements become unreasonable as the result of the completion of a staged development?**

**44. Are there any other mechanisms that should be introduced in Queensland relating to adjustments of lot entitlements in the context of a progressively developed scheme?**

### 4.2. Existing Schemes

The circumstances in which the contribution schedule lot entitlements for an existing scheme should be capable of adjustment is a difficult and complex issue. One of the significant difficulties in reaching a proposed solution to the question of adjustment for existing schemes is that every scheme is different. The difficulty in identifying every circumstance that should be addressed is highlighted by the following timeline and example of legislative changes to the right to adjust and relevant factors since BUGTA. The example below is useful to illustrate the ways that changes in the legislation governing schemes over time may have impacted on existing schemes.

#### 4.2.1. Example Imaginary Scheme

For illustrative purposes, consider the imaginary scheme described below created under BUGTA. The relevant provisions of BUGTA are summarised in the table.

YEAR	LEGISLATION	ENTITLEMENT	PRINCIPLE	ADJUSTMENT
1980-1997	BUGTA	One lot entitlement	Unimproved value for group title plans. No principle for other plans, usually market value or area.	No right to adjust.

*Imaginary Scheme* is a six story building created in 1990. There are two lots on each of the first four floors and a penthouse lot on each of floor 5 and 6. The single schedule of lot entitlements as registered by the developer (based on the value of the lots) is as follows.

<b>SCHEDULE OF LOT ENTITLEMENTS FOR <i>IMAGINARY SCHEME</i></b>			
<b>LOT</b>		<b>ENTITLEMENT</b>	
<b>1 in BUP12345</b>	<b>8</b>	<b>6 in BUP12345</b>	<b>8</b>
<b>2 in BUP12345</b>	<b>8</b>	<b>7 in BUP12345</b>	<b>8</b>
<b>3 in BUP12345</b>	<b>8</b>	<b>8 in BUP12345</b>	<b>8</b>
<b>4 in BUP12345</b>	<b>8</b>	<b>9 in BUP12345</b>	<b>18</b>
<b>5 in BUP12345</b>	<b>8</b>	<b>10 in BUP12345</b>	<b>18</b>
<b>TOTAL LOTS: 10</b>	<b>AGGREGATE: 100</b>		

In 1997, the BCCM Act is introduced. The relevant provisions of the BCCM Act are summarised in the table.

<b>YEAR</b>	<b>LEGISLATION</b>	<b>ENTITLEMENT</b>	<b>PRINCIPLE</b>	<b>ADJUSTMENT</b>
<b>1997 - 2003</b>	BCCM Act	Two lot entitlements: Contribution schedule lot entitlement and interest schedule lot entitlement	Contribution – any basis Interest – any basis, usually market value	Adjustment available by resolution without dissent, by agreement or on application by an owner to District Court (eg for subdivision, amalgamation).  On adjustment by District Court <ul style="list-style-type: none"> <li>• Contribution schedule must be equal unless just and equitable to not be equal; and</li> <li>• Interest schedule must be market value, unless just and equitable not to be market value.</li> </ul>

For the *Imaginary Scheme*, the existing lot entitlements under BUGTA were taken to be both the interest schedule lot entitlements and the contribution schedule lot entitlements under the BCCM Act.<sup>115</sup> Thus the lot entitlements for the *Imaginary Scheme* are as follows:

<b>TABLE OF LOT ENTITLEMENTS FOR <i>IMAGINARY SCHEME</i></b>							
<b>LOT</b>		<b>INTEREST</b>	<b>CONTRIBUTION</b>	<b>LOT</b>		<b>INTEREST</b>	<b>CONTRIBUTION</b>
<b>1 in BUP12345</b>	<b>8</b>	<b>8</b>	<b>8</b>	<b>6 in BUP12345</b>	<b>8</b>	<b>8</b>	<b>8</b>
<b>2 in BUP12345</b>	<b>8</b>	<b>8</b>	<b>8</b>	<b>7 in BUP12345</b>	<b>8</b>	<b>8</b>	<b>8</b>
<b>3 in BUP12345</b>	<b>8</b>	<b>8</b>	<b>8</b>	<b>8 in BUP12345</b>	<b>8</b>	<b>8</b>	<b>8</b>
<b>4 in BUP12345</b>	<b>8</b>	<b>8</b>	<b>8</b>	<b>9 in BUP12345</b>	<b>18</b>	<b>18</b>	<b>18</b>
<b>5 in BUP12345</b>	<b>8</b>	<b>8</b>	<b>8</b>	<b>10 in BUP12345</b>	<b>18</b>	<b>18</b>	<b>18</b>
<b>TOTAL LOTS:</b>	<b>10</b>	<b>AGGREGATE INTEREST:</b>		<b>AGGREGATE CONTRIBUTION:</b>			
		<b>100</b>		<b>100</b>			

In 2003 lots 1 and 2 were amalgamated into one lot on one title. The following year, lots 5 and 6 were also amalgamated by a different owner. The lot entitlement for the newly amalgamated lots is the sum of the lot entitlements of the pre-amalgamation lots.

<sup>115</sup> BCCM Act s 337(e) - (f).

<b>CONTRIBUTION SCHEDULE LOT ENTITLEMENTS FOR <i>IMAGINARY SCHEME</i></b>			
<b>LOT</b>	<b>ENTITLEMENT</b>	<b>LOT</b>	<b>ENTITLEMENT</b>
<b>1 in SP3746</b>	16	<b>7 in BUP12345</b>	8
<b>3 in BUP12345</b>	8	<b>8 in BUP12345</b>	8
<b>4 in BUP12345</b>	8	<b>9 in BUP12345</b>	18
<b>5 in SP5987</b>	16	<b>10 in BUP12345</b>	18
<b>TOTAL LOTS: 8</b>	<b>AGGREGATE: 100</b>		

In 2003, the BCCM Act is amended to require that developers set contribution schedule lot entitlements in accordance with the equality principle and to allow an owner to make an application for an adjustment order to a specialist adjudicator. The right to apply for an adjustment order was available to all schemes irrespective of when the scheme was established.

<b>YEAR</b>	<b>LEGISLATION</b>	<b>ENTITLEMENT</b>	<b>PRINCIPLE</b>	<b>ADJUSTMENT</b>
<b>2003 - 2011</b>	BCCM Act	Two lot entitlements	Contribution – equal unless just and equitable Interest – any basis, usually market value	Adjustment available by resolution without dissent, by agreement or on application by an owner to District Court/ specialist adjudicator (eg for subdivision, amalgamation)  On adjustment by District Court <ul style="list-style-type: none"> <li>• Contribution schedule must be equal unless just and equitable to not be equal; and</li> <li>• Interest schedule must be market value, unless just and equitable not to be market value.</li> </ul>

In 2006, the owner of lot 10 makes an application to a specialist adjudicator seeking an adjustment order to allocate the contribution schedule lot entitlements equally, except as necessary for minor differences. The adjustment order replaces the old contribution schedule with the new schedule.

<b>ADJUSTMENT OF LOT ENTITLEMENTS FOR <i>IMAGINARY SCHEME</i></b>					
<b>LOT</b>	<b>OLD ENTITLEMENT</b>	<b>NEW ENTITLEMENT</b>	<b>LOT</b>	<b>OLD ENTITLEMENT</b>	<b>NEW ENTITLEMENT</b>
<b>1 in SP3746</b>	16	<b>13</b>	<b>7 in BUP12345</b>	8	<b>12</b>
<b>3 in BUP12345</b>	8	<b>12</b>	<b>8 in BUP12345</b>	8	<b>12</b>
<b>4 in BUP12345</b>	8	<b>12</b>	<b>9 in BUP12345</b>	18	<b>13</b>
<b>5 in SP5987</b>	16	<b>13</b>	<b>10 in BUP12345</b>	18	<b>13</b>
<b>TOTAL LOTS:</b>	<b>OLD AGGREGATE:</b>	<b>NEW AGGREGATE:</b>			
<b>8</b>	<b>100</b>	<b>100</b>			

As can be seen above, lot entitlements increased for some lots and decreased for others. Notably, the amalgamated lots and the two penthouses are now nearly equal to the smaller lots and thus are paying a similar amount of contributions. The owners of lots 3, 4, 7 and 8 are very upset with the increase in their respective level of contributions.

The 2011 Amendment is passed in April 2011 and introduces the 2011 reversion process. The owner of lot 3 submits a motion to the body corporate in accordance with the new process and the contribution schedule is reverted to the old schedule.

YEAR	LEGISLATION	ENTITLEMENT	PRINCIPLE	ADJUSTMENT
2011-2013	BCCM Act	Two lot entitlements	Contribution – equal unless just and equitable or relativity Interest – market value	General right to review by tribunal or specialist adjudicator for contribution schedule removed.  One owner allowed to force a reversion to pre-adjustment lot entitlements.

Unsurprisingly, the owners of lots 1, 5, 9 and 10 are very upset with the increase in contributions for their lots. In 2013, the new government amends the BCCM Act. The 2013 Amendment removes the 2011 reversion process and provides a mechanism for schemes that had been reverted to go back to the last adjustment order. The owner of lot 10 submits a motion to the body corporate in accordance with the new process and the contribution schedule is changed back to the last adjustment order as reflected in the new contribution schedule above.

YEAR	LEGISLATION	ENTITLEMENT	PRINCIPLE	ADJUSTMENT
2013-present	BCCM Act	Two lot entitlements	Contribution – equal unless just and equitable or relativity Interest – market value	No general right to review by tribunal or specialist adjudicator for contribution schedule  One owner allowed to force lot entitlements to revert to last adjustment order lot entitlements

The owners of lots 3, 4, 7 and 8 are again very upset with the increase in contributions. Needless to say, there has been a significant amount of tension in the *Imaginary Scheme* since the first adjustment order back in 2006.

As the *Imaginary Scheme* example shows, in situations where lot entitlements are allocated on one set of principles and later adjusted according to a different set of principles, a number of problems may arise.

#### 4.2.2. Adjustment of lot entitlements for existing schemes

The adjustment of contribution schedule lot entitlements of existing schemes has been a source of great controversy in the last 10 years. On one view existing schemes should be entitled to all of the same adjustment rights as new schemes. Past experiences indicate however that significant difficulties arise in the application of new lot entitlement principles to schemes created under vastly different regimes and which may or may not have been adjusted since establishment.

This part of the Issues Paper considers what rights lot owners in existing schemes should have to adjust lot entitlements. The issues for consideration are:

- a. whether the same rights to adjust lot entitlements as apply to new schemes should apply to lot owners in an existing scheme; and
- b. whether general provision should be made, similar to the previous adjustment process, to allow an existing scheme to apply for a review of lot entitlements in the scheme and if so on what basis they should be reviewed.

### 4.2.3. Retain the right to seek adjustment orders?

The first issue for consideration is whether lot owners in existing schemes should retain the right to seek adjustment orders for contribution schedule lot entitlements. Lot owners in existing schemes currently have the right to seek adjustment orders from an adjudicator or QCAT only in limited situations. The broad right to seek an adjustment of contribution schedule lot entitlements to make the entitlements consistent with the equality principle was removed by the 2011 Amendment.

### 4.2.4. What should the right be?

If lot owners in existing schemes are to retain the right to seek adjustment orders, the next issue for consideration is what that right should be and how it should be exercised. There are several options in this regard.

#### 4.2.4.1. Same right as new schemes

The first option is to allow lot owners within existing schemes to seek an adjustment order on the same basis as lot owners in a new scheme. This approach was followed with the introduction of the BCCM Act in 1997. The adjustment mechanism introduced by the BCCM Act applied to schemes created from 1997 onwards and to earlier schemes registered under the 1965 Act, the 1973 Act and BUGTA. Lot owners in these earlier schemes (which may have had lot entitlements set by reference to the market value of the lot) were given a new right to seek an adjustment order on the basis of the equality principle.

This retrospective application of the adjustment provisions in the BCCM Act has been a significant factor in the current problems surrounding lot entitlements. It has been suggested that the adjustment provisions in the BCCM Act should not have applied to pre-1997 schemes, except in limited circumstances to correct obvious abuses by developers.<sup>116</sup> Alternatively, if any new adjustment provisions are not applied to existing schemes, many of the issues which have caused the current controversy over lot entitlements may remain unresolved.

The issue of whether specific provision should be made to transition existing schemes to any proposed new lot entitlement principles is considered under the transitional issues discussed in **Part 5**.

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<sup>116</sup> See Gary Budgen, *Reform of Lot Entitlements in Queensland*, (March 2010), 3, <<http://www.garybugden.com/assets/seminar/065-2010%20Reform%20of%20Lot%20Entitlements%20in%20Queensland.pdf>>.

#### 4.2.4.2. Retain current right

A second option is for lot owners in existing schemes to retain their current rights in relation to seeking adjustment orders. Notably this would mean retaining the current situation where lot owners in schemes created prior to 14 April 2011 would be unable to approach a specialist adjudicator or QCAT for an adjustment order unless one of the specific situations exists. Schemes created after 14 April 2011 would maintain the right to seek an adjustment order if the lot entitlements are not determined in accordance with the deciding principle stated in the CMS.

Arguments in favour	Arguments against
Retaining existing rights maintains the status quo and provides minimal disruption to existing schemes.	The current distinction between pre and post 14 April 2011 schemes in relation to adjustment orders creates two classes of schemes and is unfair.

#### 4.2.4.3. Re-introduce broad right to seek adjustment orders

Prior to the 2011 Amendment, a lot owner had a broad right to seek an adjustment order for adjustment of contribution schedule lot entitlements under the BCCM Act. After 2011, this right was restricted to specific situations following an adjustment of the contribution schedule lot entitlements by a resolution without dissent, a material change or a formal acquisition. Schemes established after 14 April 2011 have the additional right to seek an adjustment order where the owner does not believe the contribution schedule lot entitlements are consistent with the deciding principle in the CMS.

The third option for lot owners in existing schemes (both post and pre April 2011) is to reinstate the broad right to seek an adjustment order for all existing schemes. This would mean all existing schemes would have the same rights with respect to adjustment orders and would remove the distinction between pre and post 14 April 2011 schemes.

Arguments in favour	Arguments against
The 2011 Amendment arbitrarily stripped lot owners in existing schemes of a legal right.	Re-introducing this right is a backwards step and will not fix the problems with the current system.
The current distinction between pre and post 14 April 2011 schemes in relation to adjustment orders creates two classes of schemes and is unfair.	The broad right to seek adjustment orders for all schemes has been a significant factor in the current controversy surrounding lot entitlements.

#### 4.2.4.4. Limited right

A fourth option is to allow lot owners within all existing schemes to seek adjustment orders but to limit the circumstances in which this may occur or limit the way in which the adjustment must be decided. Limits may include:

- a. Requiring a body corporate resolution before an application for an adjustment order can be made;
- b. Limiting adjustment orders to situations where lot entitlement are, or have become, unreasonable;<sup>117</sup>
- c. Requiring the adjustment order to be as far as reasonably practical consistent with the principle for allocation at the time of establishment of the scheme but having regard to other relevant circumstances, such as history of the scheme, financial impact, knowledge of lot owners at time of purchase; and
- d. Limiting the extent of any adjustment to a maximum percentage change.

Arguments in favour	Arguments against
Requiring at least an ordinary resolution of the body corporate in support of an application for an adjustment order will prevent a minority of lot owners from seeking an adjustment that is not in the best interest of the scheme as a whole.	Unfair allocation of lot entitlements may only affect a minority of lot owners and the majority may be unwilling to support a change that would increase their costs.
Adjustment orders should take account of the principle for allocation of lot entitlements at the time the scheme was created as this will limit the impact of any changes.	Lot entitlements may have reflected an unfair allocation at the time the schemes was created.
If lot entitlements are set on the basis of a guiding principle, an adjustment order should not change the guiding principle when re-allocating lot entitlements.	If different principles are to apply to adjustment orders of existing schemes and new schemes, this will create (at least) two classes of schemes and will be administratively more complex.
Purchasers should consider the allocation of costs in the scheme and the potential for that allocation to change prior to purchasing a lot.	Where different principles apply to existing schemes as opposed to new schemes, this may affect the saleability of lots in existing schemes.

### Questions

**45. Should lot owners in existing schemes retain the right to seek adjustment orders for contribution schedule lot entitlements?**

**46. If so, what should these rights be?**

- a. **Should these rights be the same as the rights given to lot owners in new schemes?**
- b. **Should the current rights be retained?**
- c. **Should lot owners in all existing schemes have the right to seek an adjustment order, as existed in the BCCM Act prior to 14 April 2011, reinstated?**

<sup>117</sup> This would be similar to the position in NSW: *Strata Schemes Management Act 1996* (NSW) s 183(2).

**47. Should the distinction between pre and post 14 April 2011 schemes be removed?**

**48. If existing schemes have the right to seek adjustment orders, on what basis should these schemes be adjusted?**

- a. **What type of body corporate resolution should be required to support an application for an adjustment order?**
- b. **Should adjustment be limited to situations where lot entitlements are unreasonable or have become unreasonable?**
- c. **Should what is fair and equitable be decided on the basis of any new/current principles or on the basis of the deciding principle at the time the scheme was created?**
- d. **If the deciding principle for setting lot entitlements in a pre April 2011 scheme is not expressed in the community management statement should the adjudicator or QCAT or the lot owners determine the deciding principle for the scheme?**

**49. Should specialist adjudicators and QCAT be required to use the same principles to adjust a contribution schedule as were used to set it (e.g. if lot entitlements for a scheme registered under BUGTA were based on value, should a specialist adjudicator or QCAT be required to make any adjustments to the lot entitlements using value as the basis)?**

### **4.3. Changes to adjustment provisions only**

Following this review and consideration of the responses received to this Issues Paper, the Government may decide not to make any changes to the legislative provisions relating to setting and adjustment of lot entitlements for new schemes. Should this occur, the question for consideration becomes whether there should be any changes to the current legislative provisions for adjusting lot entitlements for existing schemes.

The issues addressed above in sections 4.1.2 to 4.1.4 and sections 4.2.4.2 to 4.2.4.4 are relevant for consideration in this regard to determine what the content of the right to adjust lot entitlements should include.

#### **4.3.1. Deciding principle for pre April 2011 schemes**

As discussed above, a lot owner in a scheme created after the 2011 Amendment has a right to seek an adjustment order if that owner believes the contribution schedule lot entitlement is not



consistent with the deciding principle for the scheme.<sup>118</sup> New schemes created, and existing schemes that have had their contribution schedule lot entitlements adjusted after, the commencement of the 2011 Amendment are required to have a statement in the CMS setting out in plain English and simple language<sup>119</sup> whether the equality principle or the relativity principle was used to allocate lot entitlements.<sup>120</sup> This principle becomes the deciding principle for that scheme.<sup>121</sup>

Generally, schemes created prior to April 2011 will not have a deciding principle expressly stated in the CMS. Therefore, extending to lot owners in pre April 2011 schemes the same right to seek an adjustment order as is currently given to lot owners in post April 2011 schemes would be difficult.

One option to address this for existing schemes is to allow existing schemes to determine a deciding principle through a resolution of the body corporate and to then seek an adjustment order on that basis.

This could be achieved by allowing a three year period during which the body corporate of an existing scheme that did not already have a deciding principle could pass an appropriate resolution adopting a deciding principle for their contribution schedule. The resolution could be an ordinary resolution, a special resolution or a resolution without dissent. If the required level of agreement was not obtained, lot owners may be given the right to seek a decision of a specialist adjudicator to break a deadlock and determine the deciding principle for the scheme. Once adopted by the body corporate, the deciding principle could be the basis of allocating, or reallocating as the case may be, contribution schedule lot entitlements for the scheme. The deciding principle would also be binding on subsequent adjustments in the event of material changes to, or formal acquisition of, scheme land.

### **Questions**

**50. If no changes are made to the law for setting or adjustment of lot entitlements for new schemes, should there be changes to the right of adjustment for existing schemes?**

**51. Should the right to seek an adjustment order as existed prior to 14 April 2011 be reinstated or should some other right apply? What should that right be?**

**52. Should schemes created prior to April 2011 be given the right to adopt a deciding principle?**

**a. If yes, should the decision be made by an ordinary resolution of the body corporate, a special resolution or a resolution without dissent?**

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<sup>118</sup> BCCM Act s 47B(2).

<sup>119</sup> Ibid s 66(1A).

<sup>120</sup> Ibid s 66(1)(db).

<sup>121</sup> Ibid Schedule 6 (definition of 'deciding principle').

- b. **What should happen if an agreement cannot be reached?**
- c. **How long should schemes have to adopt a deciding principle?**

**53. Should the deciding principle be binding on specialist adjudicators and the tribunal in the event of an adjustment order?**

## 5. Issue - Transitional arrangements

A new system for setting and adjusting lot entitlements for new schemes may be implemented with the commencement of new legislation. New principles adopted would apply to all schemes created after the commencement of the new legislation. However, it is equally important to consider how, and when, new principles would apply to existing schemes. As clearly demonstrated by the preceding discussion about the adjustment of contribution schedule lot entitlements for existing schemes, the way in which new principles come to apply to existing schemes can be controversial.

### 5.1. Application to new schemes only

Whether an existing scheme should be able to take advantage of any new system for adjustment of lot entitlements was discussed in section **4.2.4.1**.

The first option is that there be no transition for existing schemes to the new principles. This would mean the principles for the setting of lot entitlements only apply to new schemes established after commencement. Lot owners in existing schemes may retain their current rights to adjust lot entitlements in the event of changes to the scheme or where the lot entitlements do not reflect the deciding principle.

Under this option, existing schemes would not be required to move to the new regime and adjust lot entitlements consistently with the new principles. This option also results in existing schemes being unable to voluntarily move to the new methodology through a court or tribunal review process.

### 5.2. Retrospective operation

The second option is to apply both the methodology for allocation of lot entitlements and the new rights to adjust retrospectively to existing schemes. Retrospective alteration of lot entitlements by a statutory provision would be unusual and has not occurred in the past. It is not recommended that lot entitlements for existing schemes be adjusted in accordance with new principles automatically by statute. Whether new rights to adjust lot entitlements for existing schemes by court order should be available was discussed at **4.2.4**.

#### **Question**

**54. Do you agree that, subject to any transitional arrangements, there should be no retrospective operation of new provisions relating to setting and adjusting lot entitlements for existing schemes?**

### 5.3. 'Opt-in' procedure

The third option is for no automatic transition to the new principles but for existing schemes to be given an opportunity to voluntarily transition. Such an approach would need to have a transitional

period subject to a time limit (e.g. three years), similar to the time limit applied in the transition to the BCCM Act. Unlike the transition of schemes to the BCCM Act in 1997, for this transition a scheme that did not take advantage of the opt-in provisions would be deemed to have 'opted out'. The effect of opting out would be that the lot entitlements for the scheme remain the same and no right to review and adjust, unless a general right was given, would be available. Other limits may be required such as:

- a. A process for the scheme to 'opt in' on the basis of a majority decision or similar, not the decision of one lot owner;
- b. A limit on the percentage by which lot entitlement may change if the scheme opted in;
- c. A right for the lot owners to approach a court to approve or adjust the lot entitlements on the basis of a set of principles prescribed by the legislation. This may occur as part of the transitional process or as a necessary mechanism to break any deadlock.

Existing schemes that did not opt-in during the transition period could either maintain the current rights to seek adjustment orders or forfeit the right to seek adjustment orders, except in particular cases such as following a formal acquisition or material change.

### Questions

**55. Should existing schemes be able to vote to opt-in to new provisions for setting and adjustment of lot entitlements or should existing schemes only be allowed to transition to the new provisions with a court order on the basis of minimum considerations?**

**56. Would your decision to opt in depend on what the new provisions for setting or adjustment of lot entitlements are? If yes which option would you chose to opt in:**

- a. **Option 1 - equal contribution to all expenses;**
- b. **Option 2 - Differential contribution on basis of**
  - (i) Value**
  - (ii) Area**
  - (iii) Level in building**
  - (iv) Other**
- c. **Option 3 – combination of equal for administration fund and market for sinking fund.**

**57. How much time should existing schemes have to opt-in or seek a court order?**

**58. What should happen to existing schemes that do not opt in to the new provisions within the required timeframe? Should they retain the current right to adjust lot entitlements or should they forfeit that right altogether (so that only new schemes would have a right to seek adjustment orders)?**

## 5.4. BUGTA schemes

A final area of consideration relates to existing group titles plans and building units plans which continued after commencement of the BCCM Act to be governed by BUGTA. These are schemes established under defined 'Specified Acts,' being the *Integrated Resort Development Act 1987* (Qld), *Mixed Use Development Act 1993* (Qld) and other specified Acts.<sup>122</sup>

### 5.4.1. Transition of BUGTA schemes to BCCM Act

As highlighted in section 1.3 of this Issues Paper, further review of the body corporate legislation in 2014 will consider the extent to which schemes currently governed by the provisions of BUGTA might be transitioned to the BCCM Act. As a preliminary issue, this Issues Paper raises whether the lot entitlement provisions of the BCCM Act may be applied to those schemes.

### 5.4.2. Lot entitlements under BUGTA schemes

As already highlighted schemes established under BUGTA and the specified Acts have only one schedule of lot entitlements.<sup>123</sup> In the case of group titles plans, lot entitlements are required to be set based on the value of the lot as defined in the *Land Valuation Act 2010* (Qld).<sup>124</sup> No guidance is provided for setting lot entitlements for building units plans but these have generally been set based on value.

Owners in these schemes do not have the ability to seek adjustment of lot entitlements and because of this, the schemes have not had the same issues with lot entitlements as has been seen by BCCM Act schemes. If any new principles are adopted to address the adjustment of lot entitlements for new and existing schemes under the BCCM Act, it may be administratively desirable to allow BUGTA schemes to have the same rights to seek adjustments.

This could be achieved by amending BUGTA and the specified Acts to contain equivalent provisions to any new provisions adopted in the BCCM Act. Alternatively, it could be achieved through an automatic transition of BUGTA schemes to the BCCM Act or through an 'opt in' process.

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<sup>122</sup> BCCM Act s 326. The other 'specified Acts' include *Registration of Plans (HSP (Nominees) Pty Limited) Enabling Act 1980* (Qld), *Registration of Plans (Stage 2) (HSP (Nominees) Pty Limited) Enabling Act 1984* (Qld) and *Sanctuary Cove Resort Act 1985* (Qld).

<sup>123</sup> BUGTA s 19(1).

<sup>124</sup> *Ibid* s 19(2).

## **Questions**

- 59. Should BUGTA schemes be subject to the same lot entitlement adjustment principles as existing schemes under BCCM Act?**
- 60. If yes, how should the principles be applied to BUGTA schemes? Should BUGTA and the specified Acts be amended with provisions equivalent to any new provisions under the BCCM Act or should some other method apply (e.g. automatic migration to the BCCM Act or an 'opt in' procedure)?**

## Resources

### A. Articles/Books/Reports

Budgen, Gary, *Reform of Lot Entitlements in Queensland*, (March 2010), 3, <<http://www.garybugden.com/assets/seminar/065-2010%20Reform%20of%20Lot%20Entitlements%20in%20Queensland.pdf>>

Dalton, Trent, 'Space wars', *Q-Weekend, The Courier Mail* (Brisbane Queensland), 4 August 2012

Gastaldon, Renee, '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)' (e-Research Brief 2011/03, Queensland Parliamentary Library, March 2011) <<http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/ResearchBriefs/2011/eRBR201103.PDF>>

Lim, Anthony, Office of Regulatory Policy, Department of Justice and Attorney-General *History of Community Titles Legislation in Queensland*, (2012) <<http://www.parliament.qld.gov.au/documents/committees/LACSC/2012/BCCMOLAB/121026-ltr-DJAG2.pdf>>

MacDonald, Carmel, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland*, (Thompson Reuters, 3<sup>rd</sup> ed, 2010)

Sherry, Cathy, 'Building management statements and strata management statements: Unholy mixing of contract and property' (2013) 87 *Australian Law Journal*, 393

### B. Cases

*Cebular v Cooper Arms Homeowners Association* 142 Cal App 4<sup>th</sup> 106

*CR and CG Cooper Strata Title Act [2005] TASRMPAT 250* (8 November 2005)

*Fischer v Body Corporate for Centrepont Community Titles Scheme 7779* [2004] QCA 214

*Heaton v Body Corporate for 'Windsong Apartments' CTS 31804* [2012] QCAT 45

*Moses v Body Corporate for Rhode Island Community Titles Scheme 20573* [2012] QCAT 322

## **C. Legislation**

### Australian Capital Territory

*Unit Titles (Management) Act 2011 (ACT)*

*Unit Titles Act 2001 (ACT)*

### New South Wales

*Strata Schemes Management Act 1996 (NSW)*

*Strata Schemes (Freehold Development) Act 1973*

*Strata Schemes (Leasehold Development) 1986*

### Northern Territory

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*Unit Titles Act*

### Queensland

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*Body Corporate and Community Management and Other Legislation Amendment Act 2003 (Qld)*

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*Western Australia*

*Strata Titles Act 1985 (WA)*

*Tasmania*

*Strata Titles Act 1988 (Tas)*

*Victoria*

*Owners Corporations Act 2006 (Vic)*

*Subdivision Act 1988 (Vic)*

*South Australia*

*Community Titles Act 1996 (SA)*

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The Oracle at Broadbeach, – January 2013  
<[http://commons.wikimedia.org/wiki/File:The\\_Oracle.jpg](http://commons.wikimedia.org/wiki/File:The_Oracle.jpg)>

## Annexure 1

### Questions

1. Should lot entitlements continue to be used to determine a lot owner's contribution to body corporate expenses and liabilities? If no, what other method should be used to allocate expenses within a body corporate?
2. What is the most appropriate method for the sharing of expenses within a scheme and why?
  - a. Equal contribution to all expenses;
  - b. Differential contribution (e.g. value or area of the lot);
  - c. A combination of equal and differential contribution depending upon the nature of the expense; or
  - d. Another method?
3. If body corporate expenses are shared equally should there be an ability for a developer to set lot entitlements having regard to just and equitable factors? If yes, what factors should be taken into account when deciding on the contribution schedule lot entitlements?
4. If expenses are shared on a differential basis according to contribution schedule lot entitlements, should the Act: (indicate preference)
  - a. Specify the factors that *must* be used to determine lot entitlements (e.g. area of the lot, level in the building, use of the lot, market value or some other factor)? Should there only be one factor?
  - b. Specify the factors that *may* be used to determine lot entitlements? (This would be an exhaustive list).
  - c. Allow a developer to choose any factor provided the basis for calculation is specified in the community management statement? Should the developer be required to explain the basis using a clear formula/example (e.g. Base lot entitlement of 100 and adjusted for water front + 20; park frontage +10; main road -10)?
5. If a differential basis using market value is used, is there a need to retain two types of lot entitlements (i.e. contribution and interest) for each lot?
6. If expenses are shared on a differential basis is there a need to retain the equality principle as an option for setting contribution schedule lot entitlements?
7. Do you support a model where lot owners contribute differently to recurrent expenditure and capital expenditure?

- a. **Option 1 – equal contribution to administrative fund and market value to sinking fund ;**
  - b. **Option 2 – specified factor (e.g. area, use of lot, level in building) for administrative fund and market value for sinking fund.**
  - c. **If you do not agree, do you have a different suggestion?**
8. **Are there any models of best practice for setting lot entitlements, not identified above, which this review should consider?**
9. **What is the best way to educate prospective purchasers and lot owners about lot entitlements and the circumstances under which lot entitlements may change?**
10. **Should different principles to those discussed above, apply to different types of schemes (e.g. single scheme, layered scheme, mixed use schemes, two lot schemes, hotel style schemes) in relation to the setting and use of lot entitlements?**
11. **Is there more justification for allowing greater flexibility in the setting of lot entitlements or the allocation of expenses in a mixed use or progressively developed scheme?**
12. **What, in your view, is the most appropriate method for the allocation of expenses within a mixed use scheme where residential, retail or commercial lots are within the same scheme? Are there any examples of best practice?**
13. **What in your view is the most appropriate method for the allocation of expenses within a mixed use scheme where residential, retail or commercial lots are within different schemes or volumetric lots within a layered or other type of scheme? Are there any examples of best practice?**
14. **In your experience, what are the benefits of using building management statements to allocate costs between residential and commercial or retail lots in a mixed use development?**
15. **Is there a need for a different method of allocation of expenses within complex mixed use schemes other than via a community management or building management statement?**
16. **Do you think that developers should be responsible for setting lot entitlements when establishing new schemes? Why or why not?**
17. **What supporting information should be required when registering a scheme (e.g. if lot entitlements are based on value, should the developer be required to include a valuation by a qualified valuer)?**
18. **What input should lot owners have to the setting of lot entitlements? Should there be a right for a majority of owners to challenge the basis upon which lot entitlements are allocated? If yes, on what basis should they be challenged (e.g. unreasonable, inequitable,**

special resolution / without dissent / unanimous)? What principles or criteria could a court use to determine the new allocation?

19. Should the government or another body approve lot entitlements when registering schemes? Should there be discretion to reject an application for a scheme if the lot entitlements have not been set appropriately or they are unreasonable?
20. Is there some other suitably qualified specialist that could be accredited by the government to evaluate lot entitlements and be required to certify that lot entitlements for new developments have been set in accordance with the required legislative principles?
21. Should there be penalties or sanctions for developers who allocate lot entitlements unreasonably and in ways that do not accord with legislative principles?
22. Should bodies corporate of new schemes have the right to adjust contribution schedule lot entitlements after establishment of the scheme?
23. If yes, should there be any limits on when adjustments may be made (e.g. only to correct errors, or when there is a substantial change to the scheme)?
24. Do you agree that for new schemes the power to adjust contribution schedule lot entitlements by resolution and by written agreement between lot owners should be retained?
25. Should the voting threshold for a resolution to adjust contribution schedule lot entitlements require a resolution without dissent, a special resolution or some other percentage in order to be passed by a body corporate?
26. Do you think that the current limited rights of a lot owner to seek an adjustment order by a specialist adjudicator or QCAT should be retained?
27. If the right to seek an adjustment order is retained, on what basis should a lot owner or the body corporate be able to seek an order? Should the order be limited to whether the deciding principle was correctly applied or the allocation of lot entitlements is manifestly unreasonable?
28. Do you agree that for new schemes a tribunal or court should be able to adjust lot entitlements where there is a material change or resumption?
29. If yes, should one lot owner be able to instigate such a review? Should an ordinary resolution be required to support the application for a review?

30. Should the definition of material change be limited to physical changes to the scheme? Should the definition provide examples of material changes? What should those examples be?
31. Do you agree that new schemes should retain the current provisions relating to lot entitlements for amalgamated and subdivided lots? If not, how should lot amalgamations and subdivisions be treated if lot entitlements are to be adjusted?
32. If the current provisions are not retained for new schemes,
- Should the lot entitlements for all lots in the scheme be adjusted following an amalgamation or a subdivision?
  - Should the owner of an amalgamated lot be able to equalise their lot entitlements with other lots in the scheme by way of an adjustment order?
  - Should sub-divided lots be allocated lot entitlements equally to other lots in the scheme on an adjustment order?
33. Is there a better way for lot entitlements to be allocated to post-subdivision lots?
34. Should a specialist adjudicator or QCAT be required to consider whether a lot has been amalgamated or subdivided when making an adjustment order for new schemes?
35. Should adjustment orders consider whether amalgamated lots are being used as separate residences?
36. In addition to the mechanisms discussed, are there any additional mechanisms that may be appropriate or desirable in relation to setting and adjusting lot entitlements?
37. If adjustment orders are allowed, should the legislation limit the impact that an adjustment order would have on particular lot owner's lot entitlement, for example by stipulating that a lot owner's contribution schedule lot entitlements cannot increase by more than a certain percentage as the result of an adjustment order?
38. Should specialist adjudicators and QCAT be able to consider what a person knew about the lot entitlements in a scheme at the time that person purchased the lot (i.e. if the person purchased the lot with actual or deemed knowledge that the lot entitlements were not equal, should that person have a right to seek an adjustment order)?
39. Should new schemes be able to decide a different method of allocating all or some costs by passing a resolution or a by-law? If no agreement can be reached, should there be a right to apply to a court or tribunal to resolve the allocation of lot entitlements?
40. Should a motion of the body corporate to adjust contribution schedule lot entitlements require the consent of registered mortgagees and other parties that have a registered interest in the lot?

41. Should registered mortgagees and other parties that have a registered interest in the lot have any rights at all in relation to adjustments of lot entitlements?
42. Should the legislation provide specific provisions in relation to the re-allocation of lot entitlements on the completion of a stage of development in progressively developed schemes? What are the problems in practice?
43. Should developers be liable for costs if lot entitlements become unreasonable as the result of the completion of a staged development?
44. Are there any other mechanisms that should be introduced in Queensland relating to adjustments of lot entitlements in the context of a progressively developed scheme?
45. Should lot owners in existing schemes retain the right to seek adjustment orders for contribution schedule lot entitlements?
46. If so, what should these rights be?
  - a. Should these rights be the same as the rights given to lot owners in new schemes?
  - b. Should the current rights be retained?
  - c. Should lot owners in all existing schemes have the right to seek an adjustment order, as existed in the BCCM Act prior to 14 April 2011, reinstated?
47. Should the distinction between pre and post 14 April 2011 schemes be removed?
48. If existing schemes have the right to seek adjustment orders, on what basis should these schemes be adjusted?
  - a. What type of body corporate resolution should be required to support an application for an adjustment order?
  - b. Should adjustment be limited to situations where lot entitlements are unreasonable or have become unreasonable?
  - c. Should what is fair and equitable be decided on the basis of any new/current principles or on the basis of the deciding principle at the time the scheme was created?
  - d. If the deciding principle for setting lot entitlements in a pre April 2011 scheme is not expressed in the community management statement should the adjudicator or QCAT or the lot owners determine the deciding principle for the scheme?
49. Should specialist adjudicators and QCAT be required to use the same principles to adjust a contribution schedule as were used to set it (e.g. if lot entitlements for a scheme registered under BUGTA were based on value, should a specialist adjudicator or QCAT be required to make any adjustments to the lot entitlements using value as the basis)?
50. If no changes are made to the law for setting or adjustment of lot entitlements for new schemes, should there be changes to the right of adjustment for existing schemes?



51. Should the right to seek an adjustment order as existed prior to 14 April 2011 be reinstated or should some other right apply? What should that right be?
52. Should schemes created prior to April 2011 be given the right to adopt a deciding principle?
- If yes, should the decision be made by an ordinary resolution of the body corporate, a special resolution or a resolution without dissent?
  - What should happen if an agreement cannot be reached?
  - How long should schemes have to adopt a deciding principle?
53. Should the deciding principle be binding on specialist adjudicators and the tribunal in the event of an adjustment order?
54. Do you agree that, subject to any transitional arrangements, there should be no retrospective operation of new provisions relating to setting and adjusting lot entitlements for existing schemes?
55. Should existing schemes be able to vote to opt-in to new provisions for setting and adjustment of lot entitlements or should existing schemes only be allowed to transition to the new provisions with a court order on the basis of minimum considerations?
56. Would your decision to opt in depend on what the new provisions for setting or adjustment of lot entitlements are? If yes which option would you chose to opt in:
- Option 1 - equal contribution to all expenses;
  - Option 2 - Differential contribution on basis of
    - Value
    - Area
    - Level in building
    - Other
  - Option 3 – combination of equal for administration fund and market for sinking fund.
57. How much time should existing schemes have to opt-in or seek a court order?
58. What should happen to existing schemes that do not opt in to the new provisions within the required timeframe? Should they retain the current right to adjust lot entitlements or should they forfeit that right altogether (so that only new schemes would have a right to seek adjustment orders)?
59. Should BUGTA schemes be subject to the same lot entitlement adjustment principles as existing schemes under BCCM Act?
60. If yes, how should the principles be applied to BUGTA schemes? Should BUGTA and the specified Acts be amended with provisions equivalent to any new provisions under the

**BCCM Act or should some other method apply (e.g. automatic migration to the BCCM Act or an 'opt in' procedure)?**

APPENDIX 2 – LOT ENTITLEMENTS IN AUSTRALIAN JURISDICTIONS

STATE	TERM	USES	METHOD FOR SETTING	METHOD OF ADJUSTMENT
Queensland <i>Body Corporate and Community Management Act 1997</i>	Contribution schedule lot entitlement	<ul style="list-style-type: none"> <li>• Owner’s share of most amounts levied by body corporate</li> <li>• If a poll is called for an ordinary resolution, the value of the lot owner’s vote<sup>125</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Equality principle (equal except to the extent just and equitable in the circumstance not to be equal) or</li> <li>• Relativity principle – relative based one of 5 factors<sup>126</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Resolution without dissent<sup>127</sup></li> <li>• Agreement between two or more owners provided no overall change to total entitlements for scheme<sup>128</sup></li> <li>• Order of specialist adjudicator or QCAT following                             <ul style="list-style-type: none"> <li>○ resolution w/o dissent<sup>129</sup> or</li> <li>○ material change<sup>130</sup> or</li> <li>○ adjustment for formal acquisition, where adjusted schedule does not comply with relevant principle<sup>131</sup> and</li> <li>○ For schemes post 14/4/11 only, where owner thinks lot entitlement does not comply with relevant principle<sup>132</sup></li> </ul> </li> </ul>
	Interest schedule lot entitlement	<ul style="list-style-type: none"> <li>• Owner’s share of common property,</li> <li>• Interest on termination of the scheme; and</li> <li>• Value of the lot for a charge, levy, rate or tax imposed on basis of value<sup>133</sup></li> <li>• Owner’s share of insurance premium (in relevant</li> </ul>	Market value principle (relative market value, except where just and equitable in the circumstances not to be) <sup>134</sup>	<ul style="list-style-type: none"> <li>• Owner can seek adjustment order by specialist adjudicator or by QCAT<sup>135</sup></li> <li>• Agreement between two or more owners provided no overall change to total entitlements for scheme<sup>136</sup></li> </ul>

<sup>125</sup> BCCM Act s 47(2).

<sup>126</sup> Ibid ss 46(7), 46A.

<sup>127</sup> Ibid s47A.

<sup>128</sup> Ibid s 50.

<sup>129</sup> Ibid s 47AA).

<sup>130</sup> Ibid s 47B(1).

<sup>131</sup> Ibid s47B(2A).

<sup>132</sup> Ibid s 47B(2).

<sup>133</sup> Ibid s 47(3).

<sup>134</sup> Ibid s 46(8).

<sup>135</sup> Ibid s 48.

<sup>136</sup> Ibid s 50.

STATE	TERM	USES	METHOD FOR SETTING	METHOD OF ADJUSTMENT
NSW <sup>137</sup> <i>Strata Schemes (Freehold Development) Act 1973</i>  <i>Strata Schemes (Leasehold Development) 1986</i>  <i>Strata Schemes Management Act 1996</i>	Unit entitlement	<p>regulation)</p> <ul style="list-style-type: none"> <li>• Payment of contributions<sup>138</sup></li> <li>• Beneficial interest in common property<sup>139</sup> (held on trust)</li> <li>• Value of vote for a poll or special resolution<sup>140</sup></li> </ul>	<p>For staged schemes: Land value based on valuation by a qualified valuer<sup>141</sup></p> <p>While no guidance for usual schemes,<sup>142</sup> developer can be liable for costs and overpayments if an adjustment order sought because unit entitlements were not allocated with respect to a valuation by a qualified valuer and are unreasonable<sup>143</sup></p>	<p>Application to Tribunal<sup>144</sup> where lot entitlements were unreasonable when set, or became unreasonable at the end of a development scheme or from a change in permitted land use<sup>145</sup></p> <p>Tribunal must have regard to respective value of the lots<sup>146</sup>.</p> <p>Application must be accompanied by a valuation by a qualified valuer (as at the time of registration or immediately after the change)<sup>147</sup></p> <p>At the end of a development scheme, by special resolution, based on valuation by a qualified valuer<sup>148</sup></p> <p>By Supreme Court following resumption<sup>149</sup></p> <p>Registrar General may adjust<sup>150</sup></p>

<sup>137</sup> See Position Paper, above n 69.

<sup>138</sup> *Strata Schemes Management Act 1996* (NSW) (**SSMA**) s 78.

<sup>139</sup> *Strata Schemes (Freehold Development) Act 1973* (NSW) (**SSFD**) s 20; *Strata Schemes (Leasehold Development) 1986* (NSW) (**SSLD**) s 23.

<sup>140</sup> SSMA schedule 2, ss17-18.

<sup>141</sup> SSFD s 8(4A); SSLD s 7(2CA).

<sup>142</sup> SSFD s 8(4); SSLD s 7(2C). However, see the see Position Paper, above n 69, at 29.

<sup>143</sup> SSMA s 183(6).

<sup>144</sup> *Ibid* s 183.

<sup>145</sup> *Ibid* s 183(2).

<sup>146</sup> *Ibid* s 183(3).

<sup>147</sup> *Ibid* s 183(4).

<sup>148</sup> SSFD s 28QAA; SSLD s 57AAA.

<sup>149</sup> SSFD s 32; SSLD s61.

<sup>150</sup> SSFD s 43; SSLD s 72.

STATE	TERM	USES	METHOD FOR SETTING	METHOD OF ADJUSTMENT
Victoria  <i>Owners Corporation Act 2006</i>	Lot liability (equivalent of QLD contribution schedule)	Payment of administrative and general expenses <sup>151</sup> (definition in s3 OC, s 3 SA)	No guidance NB – basis for setting, if available, must be kept on the owners corporation register <sup>152</sup> and plan creating the owners corporation must have a document attached specifying the basis of allocation <sup>153</sup>	Application to the Registrar by unanimous resolution. <sup>154</sup> For lot liability, on adjustment, owners corporation must consider amount that would be just and equitable for the owners of each lot to contribute. <sup>155</sup>
	<i>Subdivision Act 1988</i> Lot entitlement (equivalent of QLD interest schedule)	Interest in the common property <sup>156</sup>		Application to the Registrar by unanimous resolution. <sup>157</sup> For lot entitlement, on adjustment owners corporation must have regard to proportion of the lot value to total value of all lots. <sup>158</sup>  For both lot liability and lot entitlements, allocation can be challenged in VCAT as disputes arising under the legislation. <sup>159</sup>
West Australia  <i>Strata Titles Act 1985</i>	Unit entitlement	<ul style="list-style-type: none"> <li>• Voting rights</li> <li>• Share of common property and</li> <li>• Payment of contributions<sup>160</sup> (scheme can also pass a by-law to provide another basis<sup>161</sup>).</li> </ul>	<p>For strata scheme - Capital value.<sup>162</sup> For survey-strata scheme – site value.<sup>163</sup></p> <p>NB strata schemes are defined by reference to a building and include boundary on height.</p> <p>Survey-strata schemes do not require a building, height limit or common property.</p>	<p>By resolution without dissent accompanied by consent from any person with a registered interest in a lot affected, and certificate of a licensed valuer stating unit entitlement to total unit entitlements is +/- 5% of unit value to total value of all units.<sup>164</sup></p> <p>By application to Tribunal accompanied by special resolution and a certificate of licensed valuer stating that value of a unit has varied more than 5% re another lot since registration of plan or amended plan.<sup>165</sup></p> <p>Where a by-law under section 42B has change the basis of assessment to something other than unit entitlements, party aggrieved can challenge the bylaw in the Tribunal.<sup>166</sup></p>

<sup>151</sup> *Owners Corporation Act 2006* (Vic)s 3 (definition of lot liability); *Subdivision Act 1988* (Vic) s 3(definition of lot liability).

<sup>152</sup> *Owners Corporation Act 2006* (Vic)s 148(f).

<sup>153</sup> *Subdivision Act 1988* (Vic) s 27F(2)(a).

<sup>154</sup> *Ibid* s 33(1).

<sup>155</sup> *Ibid* s 33(3).

<sup>156</sup> *Owners Corporation Act 2006* (Vic)s 3 (definition of lot entitlement); *Subdivision Act 1988* (Vic) s 3(definition of lot entitlement).

<sup>157</sup> *Subdivision Act 1988* (Vic) s 33(1).

<sup>158</sup> *Ibid* s 33(2).

<sup>159</sup> *Owners Corporation Act 2006* (Vic)s 162; *Subdivision Act 1988* (Vic) s 34A.

<sup>160</sup> *Strata Titles Act 1985* (WA) s 14(1).

<sup>161</sup> *Ibid* ss 36(1)(c), 42B.

<sup>162</sup> *Ibid* s 14(2a(a)).

<sup>163</sup> *Ibid* s 14(2a)(b)).

STATE	TERM	USES	METHOD FOR SETTING	METHOD OF ADJUSTMENT
Tasmania <i>Strata Titles Act 1998</i>	Unit entitlement (may be general or special <sup>167</sup> )	General unit entitlement -All purposes; or Special unit entitlement may be fixed for specific purposes ie share of contributions, common property, voting, apportioning of income. <sup>168</sup> For a strata scheme - contributions based on unit entitlement; for a community scheme, basis is in mgmt statement	Fair and equitable basis <sup>169</sup> NB s 16(5) unit entitlement may be the same for each lot or vary from lot to lot).	<ul style="list-style-type: none"> <li>• Unanimous resolution of the body corporate;</li> <li>• Application for relief under Part 9 of the Act. Recorder of Titles can redetermine the unit entitlements on a basis that it considers fair and equitable;<sup>170</sup></li> <li>• Agreement between two or more owners provided no overall change to total entitlements for scheme, with consent of mortgagee or lessees.<sup>171</sup></li> </ul>

<sup>164</sup> Ibid s 15.

<sup>165</sup> Ibid s 16.

<sup>166</sup> Ibid s 99A.

<sup>167</sup> *Strata Titles Act 1998* (TAS) s 16.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid s 16(6)

<sup>170</sup> Ibid s 124.

<sup>171</sup> Ibid s 17(1).

STATE	TERM	USES	METHOD FOR SETTING	METHOD OF ADJUSTMENT
South Australia  <i>Community Titles Act 1996</i>	Community schemes Lot entitlements	<ul style="list-style-type: none"> <li>Share of monetary contributions unless other method by unanimous resolution;<sup>172</sup></li> <li>assets and liabilities on termination;<sup>173</sup></li> </ul> Common property (as tenants in common) <sup>174</sup>	Unimproved value <sup>175</sup>	Application to Registrar General in pursuance of a unanimous resolution, accompanied by a new schedule certified correct by a land valuer and consent of particular people, inc encumbrances. <sup>176</sup> <ul style="list-style-type: none"> <li>Amendment by District Court on application by particular parties.<sup>177</sup></li> </ul>
<i>Strata Titles Act 1988</i> (NB no new strata schemes since 1/7/2009)	Strata schemes Unit entitlements	<ul style="list-style-type: none"> <li>common property (held on trust);<sup>178</sup></li> <li>Share of contributions<sup>179</sup> (unless another basis is approved by unanimous resolution<sup>180</sup>);</li> </ul> Interests and liabilities. <sup>181</sup>	Capital value <sup>182</sup>	Application by strata corporation to Registrar General in pursuance of a unanimous resolution, accompanied by a new schedule certified correct by a land valuer and consent of particular people, inc encumbrances. <sup>183</sup> <ul style="list-style-type: none"> <li>Amendment by Supreme Court on application by particular parties.<sup>184</sup> Court can amend plan and make further orders necessary to achieve justice.<sup>185</sup></li> </ul>

<sup>172</sup> *Community Titles Act 1996 (SA)* ss 20, 114(3).

<sup>173</sup> *Ibid* s 20.

<sup>174</sup> *Ibid* s 29.

<sup>175</sup> *Ibid* s 20(4).

<sup>176</sup> *Ibid* s 21.

<sup>177</sup> *Ibid* s 59.

<sup>178</sup> *Strata Titles Act 1988 (SA)* ss 10, 17(7).

<sup>179</sup> *Ibid* s 27(2).

<sup>180</sup> *Ibid* s 27(3).

<sup>181</sup> *Ibid* ss 21, 26(6).

<sup>182</sup> *Ibid* s 6.

<sup>183</sup> *Ibid* s 12.

<sup>184</sup> *Ibid* s 13.

<sup>185</sup> *Ibid* s 13(4)(b).

STATE	TERM	USES	METHOD FOR SETTING	METHOD OF ADJUSTMENT
NT	Contribution entitlement	<ul style="list-style-type: none"> <li>Owner's share of contributions<sup>186</sup></li> </ul>	Equal to the extent it is just and equitable <sup>187</sup>	<ul style="list-style-type: none"> <li>Owner may make application to Local Court;<sup>188</sup></li> <li>Agreement between two or more owners provided no overall change to total entitlements for scheme;<sup>189</sup></li> </ul>
<i>Unit Title Schemes Act 2009</i>	Interest entitlement	Owner's share of scheme land and interest in body corporate assets <sup>191</sup>	Market value to the extent it is just and equitable. <sup>192</sup>  <i>Just and equitable</i> must consider: scheme and units characteristics; whether layered, higher or subsidiary; and market value of units. <sup>193</sup>	Due to land acquisition. <sup>190</sup>
<i>Unit Titles Act (for previous schemes)</i>	Unit entitlement	<ul style="list-style-type: none"> <li>Voting<sup>194</sup></li> <li>Beneficial ownership of common property<sup>195</sup></li> <li>Contributions<sup>196</sup> except specified contributions that are unanimously decided on a different basis<sup>197</sup></li> <li>Liabilities<sup>198</sup></li> </ul>	Improved capital value as certified by a valuer at date of registration <sup>199</sup>	Once registered, there is no adjustment except in limited circumstances such as subdivision, consolidation, conversion (requires unanimous resolution <sup>200</sup> ), following completion of staged development <sup>201</sup> or a Court order under dispute resolution procedures. <sup>202</sup>

<sup>186</sup> *Unit Title Schemes Act 2009* (NT) s39(3).

<sup>187</sup> *Ibid* s 39(5)(a).

<sup>188</sup> *Ibid* s 40.

<sup>189</sup> *Ibid* s 41

<sup>190</sup> *Ibid* s 42.

<sup>191</sup> *Ibid* s 39(4).

<sup>192</sup> *Ibid* s 39(5)(b).

<sup>193</sup> *Ibid* s 39(5).

<sup>194</sup> *Unit Titles Act* (NT) s 7(7).

<sup>195</sup> *Ibid* s 24.

<sup>196</sup> *Ibid* s 36(3).

<sup>197</sup> *Ibid* s 36(4).

<sup>198</sup> *Ibid* s 45(2).

<sup>199</sup> *Ibid* ss 4 (definition of unit entitlement), 11(1)(b).

<sup>200</sup> *Ibid* s 21A.

<sup>201</sup> *Ibid* ss 26U, 26W, 26X.

<sup>202</sup> *Ibid* s 26.



STATE	TERM	USES	METHOD FOR SETTING	METHOD OF ADJUSTMENT
ACT <i>Unit Titles Act 2001</i>  <i>Unit Titles (Management) Act 2011</i>	Unit entitlement	<ul style="list-style-type: none"> <li>Beneficial interest of common property (held on trust as tenants in common);<sup>203</sup></li> <li><i>Proportional share</i> of contributions to general fund<sup>204</sup> and sinking fund;<sup>205</sup></li> <li>Voting rights for a poll.<sup>206</sup></li> </ul> <p><i>Proportional share is defined as the ratio of the unit entitlement for the lot compared to the total unit entitlement for the scheme</i></p>	<p>Improved value of each unit relative to each other unit.<sup>207</sup></p> <p>Planning and land authority can reject a unit title application (the document that becomes a units plan after approval<sup>208</sup> on a number of grounds, including if the schedule of unit entitlements is not reasonable having regard to the prospective relative improved values of the units<sup>209</sup>.</p> <p>Can also be amended by the planning and land authority if, for a staged development, the development statement is amended prior to the units plan being registered and the planning and land authority is satisfied on reasonable grounds that the amendment is necessary to reflect a change in improved valued of the units.<sup>210</sup></p>	<ul style="list-style-type: none"> <li>Planning and land authority can authorised an amendment to the schedule of unit entitlements after registration of a units plan for a staged development where a change to the development statement requires a change of boundaries and the authority is satisfied on reasonable grounds that the amendment is necessary to reflect change in relative improved value of the units;<sup>211</sup></li> <li>Owners' corporation can apply for a unit entitlement authority to amend the unit entitlement schedule if authorised by a special resolution and the change is necessary to reflect the current relative improved value of the units or expected improved value after an event occurs;<sup>212</sup></li> <li>On application by an owners' corporation, on a unanimous resolution if there is a minor boundary change and the amendment is necessary reflect changes to relative improved values of units.<sup>213</sup></li> </ul>

<sup>203</sup> *Unit Titles (Management) Act 2011* (ACT) s 19(1)(b).

<sup>204</sup> Ibid s 78.

<sup>205</sup> Ibid s 89.

<sup>206</sup> Ibid schedule 3, 3.28.

<sup>207</sup> *Unit Titles Act 2001* (ACT) s 8.

<sup>208</sup> Ibid s 7.

<sup>209</sup> Ibid s 20(1)(c).

<sup>210</sup> Ibid s 29(5).

<sup>211</sup> Ibid s 30(7).

<sup>212</sup> Ibid s 146(2).

<sup>213</sup> Ibid s 149.

## Annexure 3

### Glossary

<b>TERM</b>	<b>MEANING</b>
<b>1965 Act</b>	<i>Building Units Titles Act 1965 (Qld)</i>
<b>1973 Act</b>	<i>Group Titles Act 1973 (Qld)</i>
<b>2003 Amendment</b>	<i>Body Corporate and Community Management and Other Legislation Amendment Act 2003 (Qld)</i>
<b>2011 Amendment</b>	<i>Body Corporate and Community Management and Other Legislation Amendment Act 2011 (Qld)</i>
<b>2011 reversion process</b>	Process introduced by the 2011 Amendment that allowed a single lot owner who had been adversely affected by an adjustment order to restore the lot entitlements for the CTS back to what they had been prior to the adjustment order.
<b>2013 Amendment</b>	<i>Body Corporate and Community Management and Other Legislation Amendment Act 2013 (Qld)</i>
<b>Adjustment order</b>	Order of a court, tribunal or specialist adjudicator adjusting the lot entitlements for a CTS
<b>BCCM Act</b>	<i>Body Corporate and Community Management Act 1997 (Qld)</i>
<b>BMS</b>	Building management statement
<b>BUGTA</b>	<i>Building Units and Group Titles Act 1980 (Qld)</i>
<b>Centre</b>	Commercial and Property Law Research Centre
<b>Centrepont decision</b>	<i>Fischer v Body Corporate for Centrepont Community Titles Scheme 7779 [2004] QCA 214</i>
<b>CMS</b>	Community management statement
<b>Contribution schedule lot entitlement</b>	For a lot, a number allocated to the lot in the contribution schedule attached to the CMS. Used to determine an owner's share of most costs for common expenses.
<b>CTS</b>	Community titles schemes
<b>Equality principle</b>	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.
<b>Existing scheme</b>	Those schemes currently in operation or which are established prior to the commencement of any new statutory principles that may be recommended by this review.
<b>Interest schedule lot entitlement</b>	For a lot, the number allocated to the lot in the interest schedule. Used to determine an owner's share of the common property.
<b>Market value principle</b>	The principle that the respective lot entitlements should reflect the respective market values of the lots included in the CTS, except to the extent to which it is just and equitable in the circumstances to reflect other than market value.
<b>New scheme</b>	Those schemes established after commencement of any new statutory requirements for the setting of contribution schedule lot entitlements that may be recommended by this review.
<b>Post-subdivision lot</b>	A new lot created when an existing lot in a CTS is subdivided into 2 or more lots.
<b>QCAT</b>	Queensland Civil and Administrative Tribunal
<b>QUT</b>	Queensland University of Technology

TERM	MEANING
<b>Relativity principle</b>	The principle that lot entitlements must be set in a way that clearly demonstrates the relationship between the lots in the scheme by reference to one or more relevant factors.
<b>Specified Acts</b>	<i>Integrated Resort Development Act 1987 (Qld); Mixed Use Development Act 1993 (Qld); Registration of Plans (HSP (Nominees) Pty Limited) Enabling Act 1980 (Qld); Registration of Plans (Stage 2) (HSP (Nominees) Pty Limited) Enabling Act 1984 (Qld); Sanctuary Cove Resort Act 1985 (Qld).</i>