

BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2002

EXPLANATORY NOTES

AMENDMENT TO BE MOVED IN COMMITTEE BY THE HONOURABLE STEPHEN ROBERTSON MP

TITLE OF THE BILL

*The Body Corporate and Community Management and Other
Legislation Amendment Bill 2002.*

OBJECTIVES OF THE AMENDMENTS

The amendments to the Bill provide for:

- recognition of unintended consequences of proposed section 104A on the business arrangements that are often put in place as part of the management rights business;
- correction of typographical and descriptive errors which would lead to incorrect provisions, and
- clarification of wording in relation to application of a provision to existing agreements.

Ongoing consultation with the key industry stakeholder groups in the community titles industry, subsequent to the introduction of the Bill into the Parliament, revealed deficiencies in two particular clauses that impacted on their practical application and reduced the efficacy of the policy objectives of the proposed sections. Departmental review of the Bill also revealed minor editorial and descriptive errors.

ACHIEVEMENT OF THE OBJECTIVES

The Bill provides the body corporate with the power to require the transfer of the letting agent's management rights where there is a breach of the codes of conduct (also included in the Bill). Those provisions require the letting agent to sell the management rights in the scheme together with the lot from which the agent letting business is conducted. To ensure that the sale of the complete management business package occurs, Clause 42 (the proposed section 104A) requires that the letting agent must hold the lot in the letting agent's name.

The provision did not however cover the situation where those people buying management rights structure their business arrangements, for various financial reasons, in such a way that the legal entity that is the registered proprietor of the lot from which the letting business is conducted is different from the entity that obtains the authorisation from the body corporate to conduct the letting business in the community titles scheme.

To ensure the policy objective of the transfer of management rights is still properly supported, the amendment to clause 42 will, in addition to the present provision, require both the letting agent and the owner of the lot from which the letting business is run, if different people, to be bound by the transfer provisions. The mechanism to achieve this will be a deed between the body corporate and the owner or lessee of the lot, under which the owner acknowledges and agrees to be bound by the transfer of management rights provisions of the Act.

The other proposed amendments require only minor wording changes or definition to maintain their policy objectives.

ESTIMATED COST FOR GOVERNMENT IMPLEMENTATION

There are no financial implications arising from the amendments.

CONSISTENCY WITH FUNDAMENTAL LEGISLATIVE PRINCIPLES

The amendments are consistent with the Fundamental Legislative Principles.

CONSULTATION

Representatives from the letting agent's industry body, QRAMA, raised the issue relating to ownership of the letting agent's lot. The Minister for Natural Resources and Minister for Mines has advised QRAMA that the issue will be addressed. The Urban Development Institute of Australia and legal advisors to the finance industry also raised the issue. Discussions have been held to determine appropriate methods to resolve the issue.

NOTES ON PROVISIONS

Clause 42 Insertion of new s 104A

The existing Clause 42 has been replaced, in recognition that business arrangements, different from that envisaged by the existing Clause, exist for the holding of the complete management rights package.

An example of those different arrangements might be that the people buying management rights structure their business arrangements, for various financial reasons, in such a way that the legal entity that is the registered proprietor of the lot from which the letting business is conducted is different from the entity that obtains the authorisation from the body corporate to conduct the letting business in the community titles scheme. The other entity could be a company under the Corporations Act or a trust. The natural persons would most likely have some form of control over the other entity.

The purpose of the section still remains. That purpose is to ensure that, where the body corporate exercises the transfer provisions of Chapter 3 Part 2 Division 8, the lot from which the letting business is operated is also transferred along with the rest of the letting rights business and the letting agent leaves the scheme completely.

To address the situation where the owner of the lot and the person who has been granted the authorisation to conduct a letting business in the community titles scheme are different people, the section requires a deed to be entered into under which the owner of the lot agrees and is bound to transfer the person's interest in the lot. It must be noted that if the deed is not entered into the authorisation has no effect.

While the content of the deed is a matter for the body corporate, the deed may include arrangements to ensure the transfer of the lot occurs as contemporaneously as possible with the transfer of the management rights. It is recognised that the sale of the lot and the rest of the business may not occur at the same time for various reasons, however the time frames imposed by Division 8 must be recognised and accommodated.

The deed might also include a power of attorney. However the power of attorney would, it is envisaged, be exercisable only if the obligations in the deed were not complied with or perhaps where there was an attempt to frustrate the sale of the lot.

Clause 44 Replacement of ch 2, pt 2, div 2 (Delegations)

Clause 44 of the Bill contains two typographical errors. Firstly, on page 46, lines 17 and 18, the references to Chapter 2, part 2, division 2 should be a references to Chapter 3, part 2, division 2. Secondly, in proposed section 106A(2), page 47 line 9, the words “some or all of” should not be included.

The purpose of 106A is to provide for schemes where the body corporate has determined there is to be no committee, and a body corporate manager is authorised to act as the committee. Consequently, the provision should apply to the exercising of all of the powers of the committee.

Clause 47 Replacement of s 110 (Limitation on termination of financed contract)

Clause 47 of the Bill contains a new Section 110A that prohibits agreements between the financier of a contract (e.g. a management rights contract) and the body corporate. This prohibition is not intended to apply to existing agreements, as is stated in the explanatory note to the Clause. To avoid the wording of section 110A being read as applying to existing agreements, the words “or be a party to” are to be omitted from the proposed subsection (1), and the words “entered into, or to which a financier is a party,” from subsection (2).

Clause 49 Insertion of new ch 3, pt 2, divs 7 and 8

Section 112G is to be replaced to clarify the community titles schemes to which these provisions apply. On-going discussion with stakeholder groups, particularly the Urban Development Institute of Australia,

identified the need for the amendment particularly in view of the jurisdiction of the *Corporations Act* about managed investment schemes. The clarification has been achieved through the use of different terms such as “serviced strata arrangement” and “serviced strata scheme” to better accord with the *Corporations Act* and its jurisdiction.

Clause 103 Amendment of s 246 (False or misleading documents)

Clause 103(2) incorrectly describes the amendment that is to be made to section 246(2)(a) and (b), where it was intended to replace the word “adjudicator” with the newly defined term “receiver”.

Clause 117 Amendment of sch 4 (Dictionary)

The use of electronic means to exercise or confirm voting under the various regulation modules will become commonplace in future years. To ensure that the Act, and more particularly the regulation modules, can support that form of voting, a new inclusive definition “writing” has been inserted into the Dictionary.

Schedule Minor and Consequential Amendments

Item 38 of the Bill Schedule incorrectly describes the amendment that is to be made to section 185(2), where it was intended to replace the word “adjudicators” with the term “dispute resolution officers”.

Item 52 of the Bill Schedule does not provide sufficient information about the amendment that is to be made to the heading of Chapter 6, part 9.