

Body Corporate and Community Management (Specified Two-lot Schemes Module) Amendment Regulation 2020

Explanatory notes for SL 2020 No. 232

made under the

Body Corporate and Community Management Act 1997

General Outline

Short title

*Body Corporate and Community Management (Specified Two-lot Schemes Module)
Amendment Regulation 2020.*

Authorising law

Section 322 of the *Body Corporate and Community Management Act 1997*.

Policy objectives and the reasons for them

The *Body Corporate and Community Management Act 1997* (the BCCM Act) provides for the establishment, operation and management of community titles schemes. To accommodate the diverse management needs of community titles schemes, the BCCM Act is constructed so that management processes and procedures are provided in regulation modules designed for different types of schemes.

The *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (the Specified Two-lot Schemes Module) provides simplified management arrangements designed for residential two-lot schemes that are not part of a layered arrangement of schemes and do not have a letting agent. The Specified Two-lot Schemes Module applies if a scheme is a specified two-lot scheme (within the meaning of section 111C of the BCCM Act) and the community management statement for the scheme states that the Specified Two-lot Schemes Module applies to the scheme.

The policy objective of the *Body Corporate and Community Management (Specified Two-lot Schemes Module) Amendment Regulation 2020* (the Amendment Regulation) is to improve the day-to-day management and administration of specified two-lot community titles schemes through a number of specific measures, achieved through amendments to the Specified Two-lot Schemes Module.

Specifically, and as detailed below, the Amendment Regulation contains provisions to:

- increase obligations on body corporate managers to disclose commissions, payments or other benefits;
- clarify a lot owner's responsibility to maintain utility infrastructure on common property that relates only to the supply of utility services to the owner's lot;
- increase flexibility to use email and other electronic means of communication for the giving of, or serving of, documents and information to lot owners;
- change the time for giving of particular notices to the body corporate;
- clarify the original owner's obligation to provide particular information to the body corporate when the original owner sells one or both lots included in a specified two-lot scheme, and change how the information must be provided;
- require a body corporate to consider the preparation of a defect assessment report for particular property it is required to insure; and
- at the same time a body corporate considers obtaining a defect assessment report for particular property it must insure, enable a body corporate to establish a voluntary defect assessment plan for lots established by standard format plan that do not share a common wall with another lot in the scheme.

The Amendment Regulation also contains editorial amendments to improve the clarity of the Specified Two-lot Schemes Module.

Increased disclosure obligations for body corporate managers

A body corporate may engage a body corporate manager to provide it with administrative services, which may include organising quotes from contractors for the provision of goods and services to the body corporate. Comprehensive disclosure of commissions, payments and other benefits a body corporate manager is entitled to receive in relation to contracts the body corporate is considering entering into is important as such benefits may impact the sourcing of competitive quotes.

Section 21 of the Specified Two-lot Schemes Module requires that, before a body corporate enters into a contract, the body corporate manager must disclose any commissions, payments or other benefits the manager is entitled to receive in relation to the contract the body corporate is considering entering into. However, in some cases body corporate managers have not disclosed the exact monetary amount of the benefit that the manager is entitled to receive. For example, disclosure has been made only by inclusion of a relatively general statement in the terms of a body corporate manager's engagement that the manager may receive a commission in relation to the acquisition of certain types of goods and services by the body corporate.

The Amendment Regulation will improve transparency about benefits received by body corporate managers by requiring the disclosure of monetary amounts the body corporate manager is entitled to receive as a commission, payment or other benefit in relation to a contract the body corporate is considering entering into.

Clarification of lot owner's responsibility to maintain utility infrastructure

Section 31 of the Specified Two-lot Schemes Module sets out a body corporate's responsibility for maintenance of common property (including utility infrastructure) for the community titles scheme. Section 31 makes clear that a lot owner is responsible for the maintenance of an item of utility infrastructure, including utility infrastructure situated on common property, in good order and condition, to the extent that the utility infrastructure relates only to supplying utility services to the owner's lot. Section 31 lists common examples of utility infrastructure that may relate only to supplying utility services to an owner's lot. However, the examples listed do not include some common types of utility infrastructure that are typically installed in this context, for example, solar panels or air conditioning systems. This can potentially result in uncertainty and disputes about maintenance obligations for these items of utility infrastructure.

The Amendment Regulation will clarify a lot owner's responsibility to maintain utility infrastructure that relates only to supplying utility services to the owner's lot by providing contemporary examples of types of utility infrastructure typically installed in this context.

Increased flexibility to use email and other electronic means of communication

The use of electronic communication is now accepted in a wide range of situations. The Specified Two-lot Schemes Module does not reflect current community expectations around the use of email and other forms of electronic communication for routine communications. The Specified Two-lot Scheme contains few provisions dealing with giving documents to lot owners by email or other forms of electronic communication. While a body corporate may provide some documents electronically by relying on provisions of the *Electronic Transactions Act (Queensland) 2001*, the Specified Two-lot Schemes Module also contains provisions that require particular documents or information to be provided to the lot owner's address for service, which does not include an email address.

The Amendment Regulation amends the Two-lot Schemes Module to provide the body corporate and lot owners with increased flexibility to use email and other electronic means of communication for the giving, or serving, of documents and information.

Changing the time for giving of particular notices to the body corporate

To effectively manage a community titles scheme, the body corporate and lot owners require up-to-date information about the identity and contact details of owners and occupiers of lots included in the scheme. Section 64 of the Specified Two-lot Schemes Module requires that if certain events happen relating to a lot, such as a change of ownership or some leasing arrangements, the owner of the lot must provide the body corporate (and the owner of the other lot included in the scheme) with particular information, including for example, contact details for the new owner or lessee. Also, if a lot, or an interest in a lot, is the subject of a registered mortgage, the mortgagee must give particular contact details to the body corporate (and the owner of the other lot included in the scheme), if the mortgagee enters into possession of the lot.

Section 64 of the Specified Two-lot Schemes Module requires this information to be provided by the relevant person within two months of the event happening. To improve the timeliness of the provision of this important information to bodies corporate, the Amendment Regulation reduces the time for providing the required information to within one month of the specified event occurring.

Body corporate duty to consider preparing a defect assessment report

It is important that the body corporate is aware of, and monitors, the condition of property it is required to maintain and insure under the Specified Two-lot Schemes Module.

Preparation of an independent building defect assessment by a qualified expert in the early years after a community titles scheme's establishment is a key way to identify the condition of property included in the community titles scheme. If a body corporate decides to obtain a defect assessment report, the report may identify major defects that may not be readily apparent to the body corporate. Early identification of major defects could, with early rectification, reduce any further damage or avoid other issues arising. A defect assessment report may also identify areas of the scheme that require regular maintenance to ensure the longevity of the scheme.

It is a matter for the body corporate to decide, based on the particular circumstances of the community titles scheme, whether it is necessary to obtain a defect assessment report. However, it is important that the body corporate consider the matter of whether an independent defect assessment should be obtained.

The Amendment Regulation amends the Two-lot Schemes Module to require a body corporate to consider, on or before the second anniversary of the scheme's establishment, the engagement of an appropriately qualified expert to conduct an independent assessment of property (other than body corporate assets) that the body corporate is required to insure for full replacement value.

A body corporate's obligation to insure a building included in the community titles scheme can depend on the format of the plan (or plans) of subdivision creating the scheme. While a body corporate is required to insure any buildings containing lots created under a building format plan of subdivision, the body corporate's insurance responsibilities for buildings on lots created under a standard format plan of subdivision depends on whether a building on one lot shares a common wall with a building on another lot.

While bodies corporate are not required to insure buildings on lots that do not share a common wall with a building on another lot, there may be benefits in the body corporate arranging for a defect assessment of those types of buildings included in a scheme.

In this respect, the Amendment Regulation also amends the Two-lot Schemes Module to enable a body corporate to establish a voluntary defect assessment plan for lots established by standard format plan that do not share a common wall with another lot in the scheme, at the same time it considers obtaining a defect assessment report about property it must insure for full replacement value.

Clarification of original owner's obligation to provide information to the body corporate

Section 67 of the Specified Two-lot Scheme Module requires that, within two months after the original owner of a specified two-lot scheme sells one or both lots included in the scheme, the original owner must give particular documents and material to the body corporate. This requirement is designed to ensure the body corporate has information it needs to effectively administer and manage the scheme, including documents with which the body corporate may be required to comply, when the original owner is no longer the sole member of the body corporate or no longer owns a lot in the scheme.

The description in section 67 of the documents that must be given by the original owner is broad and has resulted in uncertainty about whether particular documents are required to be provided. Feedback from the community titles sector indicates some documents that are considered relevant to the scheme, including important documents relevant to the ongoing administration and management the scheme, such as the development approval and community management statement, are not always supplied by the original owner.

To avoid uncertainty and potential dispute about the documents that the original owner must provide to the body corporate, the Amendment Regulation expressly lists particular documents that must be provided by the original owner to the body corporate.

Section 67 of the Specified Two-lot Schemes Module does not require that the documents and material be provided in any particular form. It can be complicated for bodies corporate to keep records relating to the scheme when an original owner gives documents in a combination of electronic and hard copy formats. To provide bodies corporate with the flexibility to keep documents in the format that best meets their need, the Amendment Regulation requires the original owner to give the documents and material under section 67 to the body corporate in both hard copy and electronic form.

A key document for a community titles scheme is the community management statement (CMS) for the scheme. The CMS is a document recorded under the *Land Title Act 1994*, that identifies the scheme land (comprising all lots and the common property for the scheme) and contains a range of other important particulars relevant to the scheme, such as the by-laws (including exclusive use by-laws) for the scheme, the schedule of contribution schedule and interest schedule lot entitlements for the scheme, and the regulation module that applies to the scheme. The body corporate may need to lodge a new CMS when particular events occur, for example, when the body corporate seeks to make a new by-law.

Some bodies corporate experience difficulties preparing a new CMS for recording because the original CMS for the scheme provided to the body corporate by the original owner cannot be edited. Where the CMS cannot be edited, to prepare a new CSM the body corporate may need to manually replicate information included in the existing CMS, including reproducing details of relevant plans and service location diagrams. The Amendment Regulation provides that the electronic form of the CMS provided to the body corporate must be readily capable of being edited.

Achievement of policy objectives

As detailed below, the policy objective will be achieved through specific amendments to the Specified Two-lot schemes Modules, as contained in the Amendment Regulation.

Increased disclosure obligations for body corporate managers

The Amendment Regulation amends section 21 of the Specified Two-lot Schemes Module to require that the body corporate manager's written notice to the body corporate disclosing a commission, payment or other benefit the manager is entitled to receive in relation to a contract the body corporate is considering entering into must, to the extent the commission, payment or other benefit is monetary, disclose the monetary amount.

This approach is reasonable and appropriate, as it ensures the body corporate receives clear information about the monetary amount a body corporate manager will receive if the body corporate enters into a contract with a person to provide goods or services to the body corporate.

Clarification of lot owner's responsibility to maintain utility infrastructure

The Amendment Regulation will amend section 31 of the Specified Two-lot Schemes Module to include additional examples of utility infrastructure that must be maintained by the owner of a lot if the utility infrastructure relates only to the supply of utility services to the owner's lot. The new examples are solar panels, air conditioning systems, and television antennae.

This approach is reasonable and appropriate because it reflects contemporary types of utility infrastructure included in community titles schemes that commonly only relate to providing utility services to individual lots included in the scheme.

Body corporate duty to consider preparation of a defect assessment report

The Amendment Regulation inserts new section 31A in the Two-lot Schemes Module to require bodies corporate to consider, on or before the second anniversary of the scheme's establishment, engaging an appropriately qualified person to prepare a defect assessment report for property (other than body corporate assets) that the body corporate is required to insure for full replacement value.

The approach is reasonable and appropriate because it prompts the body corporate to consider the need to obtain a defect assessment report for particular property in the scheme, but does not require the body corporate to obtain a defect assessment report. It remains a matter for the body corporate to decide on whether to engage a person to prepare a report, depending on the circumstances of the scheme. Before or on the second anniversary is an appropriate time for the body corporate to consider obtaining an independent assessment of the quality of the building work in the scheme so that the body corporate is aware of defects in the early years after establishment of the scheme and can take rectification action to prevent defects becoming more significant.

The Amendment Regulation also inserts new section 31B that allows the body corporate, at the same time it considers obtaining a defect assessment report under new section 31A, to organise a voluntary defect assessment plan for standalone buildings that are on a lot created under a standard format plan of subdivision and do not share a common wall with a building on another lot included in the scheme.

Under new section 31B, lot owners may voluntarily opt-in to the defect assessment plan arranged by their body corporate. The owner of a lot who takes part in the defect assessment plan is liable to pay a contribution that is a proportionate amount of the total cost of the plan, relative to the defect assessment report undertaken on the owner's lot.

This approach is reasonable and appropriate because there may be benefits in having the same appropriately qualified person conduct an assessment of all property in the scheme, including buildings the body corporate is not required to insure, at the same time.

Increased flexibility to use email and other electronic means of communication

The Amendment Regulation amends the Specified Two-lot Schemes Module to provide increased flexibility to use email by replacing the existing provisions about address for service (sections 65 and 66) with new sections 61, 61A and 61B. New section 61A changes the existing requirements for address for service to allow the owner of a lot, or a relevant person, to also nominate an email address to be part of their address for service, and that if the owner of a lot nominates an email address to be part of their address for service, the owner is taken to have consented to being given or served with, by email, any document or information that may be given to, or served on, the owner under the BCCM Act (including the Specified Two-lot Schemes Module).

This approach is also considered reasonable and appropriate because the act of providing an email address as part of their address for service will indicate the owner of a lot has consented to receive documents and information electronically. If an owner does not wish to receive documents and information electronically, then the owner may choose to not provide an email address to the body corporate as part of their address for service. Lot owners who choose not to receive documents and information electronically may continue to receive them in hard copy. If an owner of a lot has provided an email address as their address for service, the body corporate is not prevented from providing documents and information in hard copy form to an owner in person or to the owner's address for service.

The Amendment Regulation also inserts new section 61C in the Specified Two-lot Schemes Module to provide increased flexibility to use other electronic means of communication. New section 61C provides that documents and information that may be given, served or notified under the Specified Two-lot Schemes Module may be given by:

- delivering it to the owner, or relevant person, personally;
- sending it to the owner's, or relevant person's, address for service; or
- if a lot owner agreement provides for the owner, or other person, to nominate another way for the document or information to be given, served or notified—in accordance the way nominated. For example, an owner may nominate that a body corporate may give the owner a document by sending the owner written instructions on how the owner may access and download a document from an online file-sharing website.

This amendment is considered reasonable and appropriate as consent of the owners of both lots included in the scheme is required to the nominated way of receiving the documents through the lot owner agreement, and it gives bodies corporate flexibility to adopt modern forms of technology, such as file-sharing websites or software for giving information that are convenient for the lot owners. Also, the body corporate and other lot owner may continue to give, serve or notify information under the Specified Two-lot Schemes Module in the other ways permitted under the Module, that is, personally or to a lot owner's address for service.

Changing the time for giving of particular notices to the body corporate

The Amendment Regulation amends section 64 to shorten the time for giving specified information relating to certain events from within two months of the event happening to within one month of the event happening. Shortening the time for giving this information to within one month of the event happening is reasonable and appropriate because it

ensures up-to-date contact information about owners, lessees and mortgagees in possession is available to the body corporate.

Clarification of original owner's obligation to provide information to the body corporate

The Amendment Regulation amends section 67 of the Specified Two-lot Schemes Module to clarify the documents that an original owner must provide to the body corporate when it sells one or both lots in the scheme. In addition to the documents already listed in the Specified Two-lot Schemes Module, the amendment provides that the original owner must also provide the following documents:

- the development approval for the scheme (if development approval was required for development on scheme land);
- a copy of the community management statement currently recorded for the scheme;
- a copy of any fire and evacuation plan for a building on scheme land (if a plan is required under the *Fire and Emergency Services Act 1990*);
- copies of documents relating to any claims made against a policy of insurance taken out by the original owner for the body corporate;
- copies of any contracts or agreements relating to the supply of utility services to the body corporate;
- copies of documents relating to warranties for buildings on scheme land;
- copies of warranties for plant and equipment on common property; and
- a copy of any document under which the original owner derives representative capacity for a lot owner.

This approach is reasonable and appropriate because it ensures the Specified Two-lot Schemes Module clearly specifies the documents that are relevant to the ongoing administration and management of the scheme and will reduce uncertainty about what documents the original owner must give to the body corporate.

The Amendment Regulation also amends section 67 of the Specified Two-lot Schemes Module to require that the original owner provide the documents and materials to the body corporate in both hard copy and electronic form. This approach is reasonable and appropriate as it ensures the body corporate is able to maintain important records relevant to the scheme in hard copy and electronic form, or in the form that meets the needs of the scheme.

The Amendment Regulation also makes amendments to section 67 of the Specified Two-lot Schemes Module to require that the electronic form of the CMS that is provided by the original owner to the body corporate be readily capable of being edited. This approach is reasonable and appropriate because it ensures that the body corporate may maintain in its records an electronic copy of the CMS that is readily capable of being edited, if necessary, as a result of future decisions of the body corporate (for example, to record a new CMS to include new by-laws).

The Amendment Regulation inserts new section 85 which provides transitional arrangements for when the original owner stops being the owner of one or both of the lots before the commencement of these provisions.

Consistency with policy objectives of authorising law

The primary object of the BCCM Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land. To achieve this object, the BCCM Act provides for the establishment, operation and management of community titles schemes.

The Amendment Regulation is consistent with the primary object of the BCCM Act as it enhances management arrangements for specified two-lot community titles schemes.

Inconsistency with policy objectives of other legislation

The Amendment Regulation is not inconsistent with the policy objectives of other legislation.

Alternative ways of achieving policy objectives

The Amendment Regulation is the only effective way of achieving the policy objectives.

Benefits and costs of implementation

Increased disclosure obligations for body corporate managers

Requiring a body corporate manager to disclose any monetary amount the manager is entitled to receive in relation to a contract the body corporate is considering entering into will enhance transparency about potential conflicts of interests relating to these contracts and enable the body corporate to make an informed decision that is in the body corporate's best interests. The costs for body corporate managers in complying with this new requirement will be minimal as body corporate managers will be aware of any commission, payment or other benefit they are entitled to receive in relation to a contract the body corporate is considering entering into.

Clarification of lot owner's responsibility to maintain utility infrastructure

Providing clarity about the types of utility infrastructure the owner of a lot is responsible for maintaining, to the extent that the infrastructure only relates to supplying utility services to the owners' lot, may prevent potential disputes about maintenance responsibilities. The amendment does not impose any additional maintenance requirements on the owner of a lot, and only clarifies the existing requirements to include additional examples of utility infrastructure that commonly only relates to supplying utility services to an individual lot.

Body corporate duty to consider preparation of defect assessment report

To comply with this provision, the body corporate must make a decision about whether to engage an appropriately qualified expert to conduct a defect assessment report. The Specified Two-lot Schemes Module provides for body corporate decisions to be made through a lot owner agreement, which is a written document signed by the owners of the lots included in the scheme that states details of the body corporate matters the owners are in agreement about. Only minimal costs are involved in making a lot owner agreement.

The amendment does not require the body corporate to engage an appropriately qualified expert to prepare a defect assessment report; this is a matter for the body corporate to decide. If a body corporate decides to obtain a defect assessment report, the report may identify major defects that may not be readily apparent to the body corporate. Early identification of major defects could, with early rectification, reduce any further damage or avoid other issues arising. A defect assessment report may also identify areas of the scheme that require regular maintenance to ensure the longevity of the scheme.

Increased flexibility to use email and other electronic means of communication

If lot owners opt-in to receiving their documents and information by email or another form of electronic communication, the costs of distributing documents and information to owners of lots will be reduced, as sending documents and information by electronic communication is less expensive than printing and posting documents and information. Sending documents and information electronically also involves less time and administrative burden.

As documents and information sent by email and other electronic means of communication can reach lot owners in a very short period of time, this amendment will potentially allow the body corporate to deal with matters more quickly.

While lot owners may change their physical address regularly, lot owners may be less likely to change their email address. If this is the case, amending the address for service of lot owners to include an email address may lead to more lot owners receiving body corporate documents and information than is currently the case.

Changing the time for giving of particular notices to the body corporate

Reducing the time for giving particular notices to the body corporate will ensure that the body corporate's records are updated more quickly, and that the body corporate is able to administer the scheme effectively by providing documents and information to the correct person at the correct address.

Clarification of original owner's obligation to provide information to the body corporate

Clarifying the information that the original owner must provide to the body corporate will ensure that the body corporate has information relevant to the administration and management of the scheme, and that the body corporate is aware of its compliance responsibilities contained in key documents, such as development approvals and community management statements. Requiring the original owner to provide information to the body corporate in both hard copy and electronic form will ensure the body corporate has information available to it in a form that is convenient and easily accessible. Requiring the electronic copy of the CMS to be readily editable has the potential to reduce costs for bodies corporate in lodging a request for the recording of a new CMS, which a body corporate may need to lodge from time to time.

The obligation on the original owner to provide documentation relevant to the scheme is expected to involve only minimal costs as these are documents that the original owner typically has in their possession. The costs associated with providing documents in hard copy and electronic copy are expected to be minimal.

Benefits and costs to government

The Department of Justice and Attorney-General (DJAG) will incur implementation costs, including costs associated with developing information and training resources for lot owners, committees, body corporate managers, departmental staff, and other stakeholders about the amendments to the Specified Two-lot Schemes Module.

Impact on demand for dispute resolution services provided by the Office of the Commissioner for Body Corporate and Community Management, or through the Queensland Civil and Administrative Tribunal, is expected to be minimal. While there may be some disputes about new requirements and processes included in the Specified Two-lot Schemes Module there is also likely to be fewer disputes involving other elements of the regulation where reforms to clarify and improve provisions have been implemented.

Consistency with fundamental legislative principles

The Amendment Regulation is consistent with fundamental legislative principles.

Consultation

The reforms in the Amendment Regulation are the result of a review of body corporate administrative and procedural issues conducted by the Department of Justice and Attorney-General (DJAG).

The review considered the body corporate administrative and procedural recommendations of a review of Queensland's property laws conducted for the Government by the Commercial and Property Law Research Centre within the Queensland University of Technology (QUT).

QUT's report titled *Final Recommendations - Procedural Issues under the Body Corporate and Community Management Act 1997* made 64 recommendations aimed at providing more efficient and effective procedural arrangements for bodies corporate and was informed by extensive consultation, including meetings with stakeholder groups and release of a public consultation paper titled *Property Law Review Issues Paper: Procedural Issues under the Body Corporate and Community Management Act 1997* between 1 December 2015 and 22 February 2016, which attracted 198 submissions.

DJAG released QUT's recommendations report on procedural issues for public consultation from 10 July 2017 to 6 October 2017. Sixty-seven submissions were received.

During consultation on QUT's recommendations report, DJAG also identified other beneficial procedural reforms.

DJAG conducted targeted consultation sessions about proposed procedural reforms to the five regulation modules under the BCCM Act with:

- Australian College of Strata Lawyers;
- Australian Resident Accommodation Managers Association;
- Owners Corporation Network;

- Strata Community Association;
- Unit Owners Association of Queensland; and
- Urban Development Institute of Australia.

DJAG released a draft of the Amendment Regulation for public consultation from 4 October 2019 to 1 December 2019. DJAG also released drafts of new regulation modules under the BCCM Act for public consultation. One hundred and three individuals and organisations provided submissions to the combined consultation process for the reforms to the regulation modules. Most submissions provided feedback about the whole reform package rather than on individual modules. Submissions were generally supportive of the majority of reforms included in the Amendment Regulation. While there are a small number of issues that individual stakeholders have different views about, the Amendment Regulation is considered to appropriately balance the competing interests of stakeholders.

In accordance with the *Queensland Government Guide to Better Regulation*, the Queensland Productivity Commission (QPC) was consulted on the Amendment Regulation. The QPC advised that as the reforms included in the Amendment Regulation were unlikely to result in significant adverse impacts, no further regulatory impact analysis was required.